UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATEMENT

Subject to certain conditions, 2 U.S.C. § 1534(b) provides that the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, does not apply to advisory committees consisting of "Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf)." The two questions that this case presents are whether § 1534(b) applies to the Joint Federal-Tribal Class II Game Classification Standards Advisory Committee (Standards Committee) and, if it does not apply, whether plaintiffs, the Confederated Salish and Kootenai Tribes (Confederated Tribes) and the Santa Rosa Rancheria Indian Community, are entitled to the injunctive and declaratory relief they seek.[1]

Defendants, the National Indian Gaming Commission (NIGC) and its three commissioners, have moved to dismiss this action or, in the alternative for summary judgment. In doing so, they have shown that § 1534(b) applies to the Standards Committee because

[1]Plaintiffs refer to the Standards Committee as the "Tribal Advisory Committee" and object to the unwillingness of defendants to do the same. Pls.' Opp'n Defs.' Mot. Dis. or, in Alt., Summ. J. (Pl. Mem.) at 9. However, the Standards Committee is a joint federal-tribal committee. *See id.* at 3, 4. Referring to the committee as the Tribal Advisory Committee obscures this fact.

"authority" for purposes of § 1534(b) includes apparent authority and because every individual appointed to the committee as the representative of a tribal government had apparent authority to act on behalf of that government. Mem. Supp't Defs.' Mot. Dis. or, in Alt., Summ. J. at 12-16. In addition, defendants have shown that plaintiffs would not be entitled to the relief they seek even assuming, *arguendo*, that § 1534(b) did not apply to the Standards Committee. *Id.* at 16-22.

Asking that defendants' motion be denied, plaintiffs allege that "authority" does not include apparent authority for purposes § 1534(b) because "[t]he doctrine of apparent authority does not apply to tribal governments"; because ambiguous statutes should be construed in a manner that benefits Indian tribes; and because the interpretation of § 1534(b) that the Office of Management and Budget (OMB) has provided is invalid. Pls.' Mem. at 13, 22, 23. Plaintiffs also allege that no inference of apparent authority may be drawn from the nomination forms for the individuals appointed to the Standards Committee because the forms contained too little information, were incomplete, and were submitted by the wrong people. *Id.* at 16-20.

As a further matter, plaintiffs allege that they are entitled to the relief they seek. They thus allege that they are entitled to an order restraining defendants from continuing to operate the Standards Committee because a federal agency hypothetically could take certain action to evade the requirements of § 1534(b); that they are entitled to an order restricting the discretion of defendants to make appointments to any committee organized in lieu of the Standards Committee because of the broad remedial authority that courts possess in cases involving Indians; that they are entitled to an order restraining defendants from making use of the work product of the Standards Committee because such an order would send an important message to defendants and would not be precluded by considerations of delay or waste; and that they are entitled to a

declaratory judgment because such a judgment would assist them in challenging certain regulations that the Standards Committee has helped to develop and because the lack of such a judgment would render FACA "a nullity." Pl. Mem. at 24, 25, 26-32, 34-35.

None of these allegations has merit. First, plaintiffs have not shown that § 1534(b) is inapplicable to the Standards Committee. As is shown below, the doctrine of apparent authority applies to tribal governments in appropriate contexts, including § 1534(b); construing "authority" to include apparent authority for purposes § 1534(b) does not work to the detriment of Indian tribes; and the interpretation of § 1534(b) provided by OMB is valid for all purposes. In addition, the forms used to nominate individuals for appointment to the Standards Committee were, and are, fully sufficient to create an inference of apparent authority.

Second, plaintiffs have not shown that they would be entitled to the relief they seek even assuming, *arguendo*, that § 1534(b) was inapplicable to the Standards Committee. The removal from the committee of everyone who, in the judgment of plaintiffs, was ineligible to serve renders inappropriate the issuance of an order restraining defendants from operating the committee; the alleged special authority that courts possess in cases involving Indians does not permit this Court to issue an order restricting the discretion of defendants to make appointments to advisory committees; no justification exists for an order restraining defendants from making use of the work product of the Standards Committee; and no justification exists for the issuance of the declaratory judgment that plaintiffs seek. Defendants' motion to dismiss or, in the alternative, for summary judgment, should therefore be granted.

## ARGUMENT

### I. PLAINTIFFS HAVE NOT SHOWN THAT § 1534(b) IS INAPPLICABLE TO THE STANDARDS COMMITTEE.

#### A. THE DOCTRINE OF APPARENT AUTHORITY APPLIES TO TRIBAL GOVERNMENTS IN APPROPRIATE CONTEXTS, INCLUDING § 1534(b).

Citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), *United States v. District of Columbia*, 669 F.2d 738 (D.C. Cir. 1981), and *Restatement (Third) of Agency*, § 2.03, comment g (Tentative Draft No. 2, 2001), plaintiffs allege that "authority" for purposes of § 1534(b) does not include apparent authority because the doctrine of apparent authority does not apply to tribal governments. Pl. Mem. at 13. Plaintiffs' reliance on these authorities is misplaced. In *Merrill*, a federal employee made certain inaccurate representations to the plaintiff about the scope of a federally-issued insurance policy. The Supreme Court held that the United States was not bound by the representations because "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." 332 U.S. at 384. In *District of Columbia*, the court held on the strength of *Merrill* that the United States was not bound by certain representations that a federal employee had made to a hotel hosting a federally-sponsored conference because the employee "lacked actual authority to contract on behalf of the United States" and because "the doctrine of apparent authority generally does not apply to dealings with the Government." 669 F.2d at 747-48 n.13. In both cases, the courts dealt exclusively with extent to which the United States could be bound by representations of its employees in the context of commercial agreements. Neither case concerned Indians, Indian tribes, tribal governments, or advisory committees. Neither case, accordingly, is apposite to this one.

*Restatement (Third) of Agency*, § 2.03, comment g (Tentative Draft No. 2, 2001), states that "[t]he doctrine of apparent authority generally does not apply to sovereigns and entities that have been created by sovereigns to achieve governmental ends." Whether Indian tribes are "sovereigns" for purposes of this comment is not clear. Nothing in the comment addresses this issue, and the Supreme Court has described Indian tribes as "quasi-sovereign nations," i.e., "separate sovereigns pre-existing the Constitution" that are "no longer 'possessed of the full attributes of sovereignty.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 56, 71 (1978) (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)).

Even assuming, *arguendo*, that Indian tribes *are* "sovereigns" for purposes of the above comment, the comment does not say that the doctrine of apparent authority is never applicable to sovereigns or entities within its purview. To the contrary, the comment says that the doctrine of apparent authority "generally" does not apply to such sovereigns and entities. As the case law makes clear, the doctrine of apparent authority *does* apply to Indian tribes in appropriate cases. In *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), the doctrine of apparent authority was held to apply to applications for federal funding executed by a tribal official on behalf of his tribe. 243 F.3d at 1288. In *Navajo Tribe of Indians v. Hanosh Chevrolet-Buick*, 749 P.2d 90 (N.M. 1988), the doctrine of apparent authority was held to apply to, and to preclude, the attempt of a tribe to disavow a settlement agreement entered into by the tribe's attorney. 749 P.2d at 92-93. In *World Touch Gaming v. Massena Management, LLC*, 117 F. Supp. 2d 271 (N.D.N.Y. 2000), the doctrine was held *not* to apply to the purported waiver of the immunity of an Indian tribe from suit. 117 F. Supp. 2d at 276. However, this holding was required by the principle that "a waiver of sovereign immunity 'cannot be implied but must be

unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)) (internal quotation marks omitted). Accordingly, plaintiffs are mistaken when they allege that "courts have universally recognized that agents or employees of Indian tribes must possess actual authority to bind Indian tribes to governmental acts." Pl. Mem. at 14.

In *Crull v. Sunderman*, 384 F.3d 453 (7th Cir. 2004), the court held that the doctrine of apparent authority "must be applied with great circumspection when a state entity is the principal" because "'it is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision.'" 384 F.3d at 466 (quoting *Canizzio v. Berwyn Township*, 741 N.E.2d 1067, 1071 (Ill. App. Ct. 2000)). However, the rationale of *Crull* is inapposite to this case. Section § 1534(b) deals with advisory committees. Advisory committees do not make decisions that "tie the hands" of state, local, or tribal governments. Instead, they merely provide "advice or recommendations" to the bodies that create them. *See* FACA § 3(2). Accordingly, the notion that "authority" includes apparent authority for the purpose of § 1534(b) is fully appropriate.

B. CONSTRUING "AUTHORITY" TO INCLUDE APPARENT AUTHORITY FOR PURPOSES OF § 1534(b) DOES NOT WORK TO THE DETRIMENT OF INDIAN TRIBES.

In *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001), the court held that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" 240 F.3d at 1101 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). In this case, plaintiffs allege on the strength of *Cobell* that apparent authority cannot be

construed as "authority" for purposes of § 1534(b) because such a construction would permit the federal government to "determine unilaterally" who speaks on behalf of tribal governments. Pl. Mem. at 23. Plaintiffs are mistaken. Construing "authority" to include apparent authority for purposes of § 1534(b) would not restrict the absolute right of a tribal government to nominate anyone whom it wanted – or no one – for appointment to an advisory committee. To the contrary, it would merely permit the federal government to infer from the nomination of a particular individual that he or she had authority to serve where, as here, the words or action of the tribal government, "'reasonably interpreted,'" permitted such an inference to be drawn. *See Makins v. District of Columbia*, 277 F.3d 544, 549 (D.C. Cir. 2002) (quoting *Restatement (Second) of Agency* § 27 (1958)). The standard of reasonableness that governs any inference of apparent authority means that any "evisceration of tribal self government" would be extremely unlikely. *See* Pl. Mem. at 23.

Rather than working to the detriment of tribal governments, construing "authority" to include apparent authority for purposes of § 1534(b) works to their benefit. The purpose of § 1534(b) is to "facilitate the consultation process" between the federal government and state, local, and tribal governments by "provid[ing] an exemption from [FACA] for the exchange of official views regarding the implementation of public laws requiring shared responsibilities or administration.'" *Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4*, § II, 60 Fed. Reg. 50653 (1995) (quoting H.R. Conf. Rep. No. 104-76, at 40 (1995)). "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character." *Kagama,* 118

U.S. at 381. In view of this fact, anything that facilitates the "exchange of official views" between the federal government and tribal governments benefits both. A construction of § 1534(b) that excluded apparent authority from "authority" for purposes of § 1534(b) would discourage federal officials from meeting with representatives of tribal governments until formal assurances could be obtained of their actual authority to represent those governments. An agency might hesitate, for example, before doing what NIGC has done here: "conduct[] over 200 separate government-to-government consultation meetings with individual tribes and their leaders or representatives regarding the pre-rulemaking development and formulation of the NIGC's proposed Class II game classification and technical standards regulations." Westrin Decl. ¶ 8.

In view of the foregoing, a construction of § 1534(b) that recognizes apparent authority as a component of "authority" for purposes of § 1534(b) is a "'liberal[]'" construction of § 1534(b) that benefits Indians and their tribes. *See Cobell*, 240 F.3d at 1101 (quoting *Blackfeet Tribe*, 471 U.S. at 766). Such a construction is therefore appropriate.

C. THE INTERPRETATION OF § 1534(b) PROVIDED BY OMB IS VALID FOR ALL PURPOSES.

The same legislation that enacted § 1534(b) directed the President to "issue guidelines and instructions to Federal agencies for appropriate implementation of [§ 1534(b)] consistent with applicable law and regulations." Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, tit. II, § 204(c), 109 Stat. 48, 66 (codified at 2 U.S.C. § 1534(c)). By memorandum dated August 25, 1995, the President delegated the authority given to him by § 1534(c) to the Director of OMB. 60 Fed. Reg. 45039 (1995). On September 29, 1995, the Director of OMB issued the

guidelines and instructions that § 1534(c) required. *Id.* at 50651. Section II of the guidelines and instructions states that the exemption from FACA created by § 1534(b) "should be read broadly to facilitate intergovernmental communications on responsibilities or administration." *Id.* at 50653.

In cases where a statute is "'silent or ambiguous with respect to [a] specific issue,'" an interpretation of the statute by the agency responsible for its implementation will be upheld if "'the agency's answer is based on a permissible construction of the statute.'" *PBGC v. LTV Corp.*, 496 U.S. 633, 648 (1990) (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)). In this case, plaintiffs allege that the interpretation of § 1534(b) that OMB has provided may not be relied upon because the interpretation conflicts with "applicable precedents," i.e., 3A Norman Singer, *Statutes and Statutory Construction* § 72.1 (2003). Pl. Mem. at 22. Section 72.1 states: "Statutes requiring government agencies to conduct their business in open meetings are liberally construed and exceptions to them are strictly construed."

The reliance that plaintiffs place on § 72.1 is misplaced. No federal authority, let alone authority dealing with FACA, is cited in support of § 72.1. *See* Singer, *op. cit.* § 72.1 n. 17. In addition, FACA is not a statute that courts construe liberally. To the contrary, the Court construed FACA narrowly in *Public Citizen v. U.S. Department of Justice*, 491 U.S. 438 (1989), to avoid its extension "to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice." 491 U.S. at 452. In the same way the court construed FACA narrowly in *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (en banc), to avoid "severe separation of powers problems." 406 F.3d at 728.

Accordingly, plaintiffs are wrong to suggest that the interpretation of § 1534(b) provided by OMB is invalid because the interpretation conflicts with "applicable precedents." That interpretation is valid for all purposes, including the purpose of showing that "authority" includes apparent authority for purposes of § 1534(b).

D. THE FORMS USED TO NOMINATE INDIVIDUALS FOR APPOINTMENT TO THE STANDARDS COMMITTEE WERE, AND ARE, FULLY SUFFICIENT TO CREATE AN INFERENCE OF APPARENT AUTHORITY.

Seven individuals were appointed to the Standards Committee as ostensible representatives of Indian tribes: Joseph W. Carlini, Norman H. DesRosiers, Kenneth J. Ermatinger Sr., Jamie Hummingbird, Mark Garrow, Melvin J. Daniels, and Charles Lombardo. Pl. Mem. at 3. The nomination form for each of the seven set forth his tribal affiliation and contained a clause stating: "Note: Submission of this form is verification that the nominee is a designated employee or representative of the tribe." Def. Ex. I at 1, 3; Ex. J at 4; Ex. K at 3; Ex. L at 3; Ex. M at 3; Ex. N at 2; Ex. O at 1, 3.[2] By letters dated March 17, 2005, the leaders of the tribes that had nominated the seven were asked by the Chairman of NIGC, Philip N. Hogen, to confirm that each was a "designated employee [of the tribe] with the authority to act on its behalf." Pl. Mem. at 5-6. Only in the case of Mr. Carlini was the answer "no."[3] Defs.' Exs. X-CC.

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

[3]According to plaintiffs, the "initial written response[]" of the St. Regis Mohawk Tribe to the letter of Mr. Hogen confirmed that Mr. Garrow "did not have authority to act in an official capacity on [the tribe's] behalf." Pl. Mem. at 7. However, the response of the tribe stated that Mr. Garrow had authority to represent the tribe "to the extent necessary for his participation on your committee," i.e., that he was authorized to serve on the committee. Def. Ex. CC. Plaintiffs do not respond to this point, much less refute it.

Despite the foregoing, plaintiffs make a series of allegations to try to show that defendants were not entitled to draw any inference of apparent authority from the nomination forms for the seven appointees. None of these allegations is persuasive. First, plaintiffs allege that defendants were not entitled to draw an inference of apparent authority from the nomination forms because the forms did not ask the tribes submitting them to submit "a tribal resolution or any other proof that nominees to the advisory committee possessed authority to act in an official capacity on behalf of the tribes with which they were associated." Pl. Mem. at 16. In making this allegation, plaintiffs rely on 25 C.F.R. §§ 533.3(b) and (c). *Id.* at 18. Sections 533.3(b) and (c) require a tribe seeking administrative approval of a contract for the management of a Class II or Class III gaming activity to submit "[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" and "[c]opies of documents evidencing that authority."

Plaintiffs are mistaken to analogize a contract for the management of a Class II or Class III gaming activity to an appointment to an advisory committee. A contract for the management of a Class II or Class III gaming activity is a document that "'ties the hands'" of subsequent officials of a tribe "'with respect to decisions regarding the welfare of the [tribe].'" *See Crull*, 384 F.3d at 466 (quoting *Canizzio*, 741 N.E.2d at 1071). A nomination to an advisory committee "ties the hands" of nobody because nobody is bound by the advice or recommendations that the committee makes. Accordingly, no need existed for tribes nominating individuals for appointment to the Standards Committee to do more than verify, as they did, that the individuals nominated were "designated employee[s] or representative[s] of the tribes."

Second, plaintiffs allege that defendants were not entitled to draw an inference of apparent authority from the nomination forms because the forms did not ask the persons submitting them to sign them. Pl. Mem. at 17. However, inferences are frequently drawn from the submission, without signature, of documents. Fed. R. Civ. P. 11(b) permits certain inferences to be drawn from the presentation to a court of "a pleading, written motion, or other paper" regardless of whether the presentation is by "signing, filing, submitting, or later advocating." LCvR 5.4(b)(5) permits certain inferences to be drawn about the originals of documents from the filing with the court of electronic images of those documents.

Third, plaintiffs allege that defendants were not entitled to draw an inference of apparent authority from the nomination form for Mr. Lombardo because the form did not did not indicate who was submitting it. Pl. Mem. at 20. However, this allegation ignores the fact that the form was transmitted to defendants by letter dated February 9, 2004, from Mitchell Cypress, Chairman of the Tribal Council, Seminole Tribe of Florida, to Mr. Hogen. Def. Ex. O at 4. In this letter, Mr. Cypress said:

> The Tribe is pleased to nominate Charles Lombardo, Senior Vice President of Tribal Gaming Operations, as one of the possible tribal candidates to serve on the new Joint Federal-Tribal Class II Game Classifications Standards Advisory Committee. I have enclosed a completed nomination form on behalf of Mr Lombardo for your review.

*Id.*

Fourth, plaintiffs allege that defendants were not entitled to draw an inference of apparent authority from the nomination form for Mr. DesRosiers because the form allegedly "indicate[d] that Mr. DesRosiers nominated himself." Pl. Mem. at 20 (emphasis deleted). However, this allegation ignores the fact that the form contained the following statement: "Authorization to

submit this nominee obtained from Council on 1-27-04. Vice Chairman Barrett presiding – approval in the Council meeting minutes of 1-27-04 meeting." Def. Ex. I at 3.

Finally, plaintiffs allege that defendants were not entitled to draw an inference of apparent authority from the nomination forms for Messrs. Garrow, Ermatinger, or Hummingbird because the persons who nominated those individuals were "officials of subordinate regulatory entities," not "elected officers of tribal governments." Pl. Mem. at 19. However, § 1534(b) creates an exemption from FACA for advisory committees consisting of "Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf)." It does not limit that exemption to "Federal officials and elected officers of State, local, and tribal governments (or individuals nominated by such officials)." Accordingly, no need existed for Messrs. Garrow, Ermatinger, or Hummingbird to be nominated to the Standards Committee by "elected officers of tribal governments."

## II. PLAINTIFFS HAVE NOT SHOWN THAT THEY WOULD BE ENTITLED TO THE RELIEF THEY SEEK EVEN ASSUMING, *ARGUENDO*, THAT § 1534(b) DID NOT APPLY TO THE STANDARDS COMMITTEE.

### A. THE REMOVAL FROM THE STANDARDS COMMITTEE OF EVERYONE WHO, IN THE JUDGMENT OF PLAINTIFFS, WAS INELIGIBLE TO SERVE RENDERS INAPPROPRIATE THE ISSUANCE OF AN ORDER RESTRAINING DEFENDANTS FROM OPERATING THE COMMITTEE.

Plaintiffs seek an order restraining defendants from "holding meetings, promulgating or revising draft regulations or otherwise conducting [Standards Committee] business of any kind." Am. Compl. prayer ¶ d. However, "[a] request for injunctive relief remains live only so long as there is some present harm left to enjoin." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1502 (D.C. Cir.), *amended*, 66 F.3d 1226 (D.C. Cir. 1995). In this case, the four individuals whose

appointment to the Standards Committee allegedly made § 1534(b) inapplicable – Messrs. Carlini, Garrow, Ermatinger, and Daniels – have been removed from the committee or become the subject of tribal resolutions confirming their authority to serve. Pl. Mem. at 7-9. Accordingly, § 1534(b) applies to the committee at the present time even assuming, *arguendo*, that it did not apply previously. No ground thus exists for the order that plaintiffs seek.

Plaintiffs allege that such an order is appropriate because a hypothetical federal agency could "establish an advisory committee with no affiliation with an Indian tribe"; "conduct months' or even years' worth of advisory committee meetings on matters that [would] directly impact Indian tribes while willfully disregarding FACA"; replace the membership of the committee with a new member "with actual authority to act on an Indian tribe's behalf"; and "deliver[]" the "final work product" of the agency immediately after doing so. Pl. Mem. at 24. Whether an agency would act improperly under such a scenario is far from clear. Even assuming, *arguendo*, that it would, the scenario does not justify the order that plaintiffs seek. "[T]o obtain prospective injunctive relief, a party must convince the court that there is some 'cognizable danger' of recurrent violations, more that the 'mere possibility' that suffices to keep the case alive for constitutional purposes." *S-1 v. Spangler*, 832 F.2d 294, 297 (4th Cir. 1987) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). In this case, plaintiffs do not allege, let alone show, that a "cognizable danger" exists that defendants will appoint anyone to the Standards Committee who will not have the authority to serve that § 1534(b) requires. Accordingly, plaintiffs are not entitled to an order restraining defendants, on a prospective basis, from "holding meetings, promulgating or revising draft regulations or otherwise conducting [Standards Committee] business of any kind."

B. THE ALLEGED SPECIAL AUTHORITY THAT COURTS POSSESS IN CASES INVOLVING INDIANS DOES NOT PERMIT THIS COURT TO ISSUE AN ORDER RESTRICTING THE DISCRETION OF DEFENDANTS TO MAKE APPOINTMENTS TO ADVISORY COMMITTEES.

Speculating that defendants may "move forward in the development of regulations relating to the classification and treatment of gaming devices * * * by forming a new advisory committee," plaintiffs ask that an order be issued directing defendants to limit the membership of any such committee to "members with actual authority to act in an official capacity on their respective tribes' behalf." Am. Compl. prayer ¶ e. However, any such order would exceed the authority of this Court. The powers of nomination and appointment "are political powers, to be exercised by the President according to his 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 (D.C. Cir. 1914). Accordingly, "[i]t is clear that there can be no review of this power so long as it is exercised within the limitations of the law." *Frizzell*, 42 U.S. App. D.C. at 78.

Citing *Cobell v. Norton*, 391 F.3d 251 (D.C. Cir. 2004), plaintiffs allege that this Court possesses authority to issue the order that they seek. Pl. Mem. at 25. In *Cobell*, the court of appeals held that the district court "retain[ed] substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." 391 F.3d at 257-58. However, *Cobell* is very different from this case. Though an "Indian case," this case is not "a trust case," let alone one in which "the trustees have egregiously breached their fiduciary duties." In addition, *Cobell* does not hold that a district court is free to issue an order specifying whom an agency may appoint to an advisory committee. Suggesting

otherwise, *Cobell* reminds a district court "to be mindful of the limits of its jurisdiction." *Cobell v. Norton*, 240 F.3d 1081, 1110 (D.C. Cir. 2001). In this case, the "limits of [this Court's] jurisdiction" preclude the issuance of the order that plaintiffs seek.

C. NO JUSTIFICATION EXISTS FOR AN ORDER RESTRAINING DEFENDANTS FROM MAKING USE OF THE WORK PRODUCT OF THE STANDARDS COMMITTEE.

As a further matter, plaintiffs seek an order 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 further NIGC notice and comment rulemaking." Am Compl. prayer ¶ f. According to plaintiffs, such a "use injunction" would send a "strong and appropriate signal to Defendants that they cannot disregard." Pl. Mem. at 32. This allegation adds nothing. The "punitive effect" of use injunctions is one reason why the D.C. Circuit has held them to be "the remedy of last resort" in FACA cases. *NRDC v. Pena*, 147 F.3d 1012, 1025 (D.C. Cir. 1998). Accordingly, "sending a strong and appropriate signal to Defendants" is not an appropriate justification for the order that plaintiffs seek.

As further justification for the order that they seek, plaintiffs allege that they have "prosecuted their claims properly and promptly" because "at least one [Standards Committee] meeting" has taken place since the commencement of this action and because two drafts of the Class II game classification and technical standards regulations have been issued since that date. Pl. Mem. at 27. However, these allegations do not stand up to scrutiny. The sole meeting of the Standards Committee to take place since the commencement of this action took place on March 11, 2005, the day after the lawsuit was commenced. *Id.* at 6. The Standards Committee has not had any input into the current draft of the regulations. Westrin Decl. ¶ 19. Accordingly, no basis

exists for the allegation that the "work [of the Standards Committee] continues, and may well continue through the end of this year, or perhaps longer." Pl. Mem. at 27; *see also id.* at 29, 34 (similarly).

Alternatively, plaintiffs allege that defendants are "solely responsible" for any delay that has taken place in the commencement of this action. Pl. Mem. at 28. In so alleging, plaintiffs refer to the alleged failure of defendants to respond to a letter, dated February 7, 2005, in which the Confederated Tribes "requested that NIGC comply with FACA and set aside its current work product because of its past and ongoing noncompliance with FACA." *Id.* This allegation is unpersuasive. The Standards Committee was established in March 2004. Pl. Mem. at 3. By February 7, 2005, it had conducted five of the six meetings that it has conducted to date. *Id.* at 4. Accordingly, the alleged failure of defendants to respond to the letter of the Confederated Tribes dated February 7, 2005, provides no justification for plaintiffs' having waited until March 10, 2005, to commence this action. In addition, plaintiffs are mistaken when they allege that defendants failed to respond to the aforementioned letter. On February 10, 2005, a meeting took place between representatives of NIGC, including Mr. Hogen, and representatives of the Confederated Tribes, including Daniel F. Decker, one of the tribes' attorneys. Def. Ex. GG; Ex. HH at 1. According to notes of the meeting taken by an individual in attendance, the Standards Committee and FACA were topics that were discussed. *See* Def. Ex. HH at 2.

Plaintiffs also allege that considerations of waste do not preclude the issuance of the order that they seek. Pl. Mem. at 29. This allegation is baseless. An order 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 further NIGC notice and comment rulemaking,"

would require defendants to start over from scratch with the proposed Class II gaming standards regulations upon which they have been working for more than 18 months. *See* Def. Ex. A at 1. The multiple drafts that the regulations have gone through would have to be discarded, and the "over 200 separate government-to-government consultation meetings" that NIGC has conducted with "individual tribes and their leaders or representatives regarding the pre-rulemaking development and formulation of the [regulations]" would be for naught. *See* Westrin Decl. ¶ 8. The waste of time and effort would be immense. Worse, the public would be no closer than it ever was to having a set of "definitive, technical standards for distinguishing whether electronic games are Class II or Class III games." Def. Ex. A at 1. Plaintiffs do not allege that Mr. Hogen was mistaken when he said that "[a]dvancements in gaming technology and methods" have created a need for such standards. *See id.*

### D. NO JUSTIFICATION EXISTS FOR THE ISSUANCE OF THE DECLARATORY JUDGMENT THAT PLAINTIFFS SEEK.

As a final matter, plaintiffs seek a declaratory judgment providing that the Standards Committee "is fully subject to FACA"; that its composition "did not and does not satisfy any exception to FACA," including § 1534(b); and that "Defendants' conduct of the committee * * * violates FACA." Am. Compl. prayer ¶¶ a-c. According to plaintiffs, such a judgment would assist them in "publicly challeng[ing] the underpinnings and conclusions of the [Standards Committee] when Defendants ultimately publish regulations in the Federal Register." *See* Pl. Mem. at 34-35. This allegation is unpersuasive. Defendants have made "[s]ubstantial efforts to include members of the interested public" in the process of developing those regulations. *See Pena*, 147 F.3d at 1026. Notice of every meeting of the Standards Committee, except the first,

has been posted on the NIGC website; each meeting has been open to the public; and persons attending each meeting, except the first, have been permitted to present their views orally.[4] Westrin Decl. ¶¶ 4-5. In addition, everyone with an interest in Indian gaming has been given numerous opportunities, exclusive of the existence of the Standards Committee, to participate in the development of the regulations. NIGC has sent two working drafts of the regulations, 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 regulations 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 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. In view of the foregoing, any violations of FACA that may have taken place in this case have had, at most, a negligible effect on the development of the regulations. Accordingly, the declaratory judgment that plaintiffs seek would give them scant ground for challenging any version of the regulations that defendants might publish for adoption.

Plaintiffs also allege that they are entitled to the declaratory judgment that they seek because the absence of such a judgment would invite the entire Executive Branch to violate FACA, thereby rendering the statute "a nullity." Pl. Mem. at 33. This allegation is unpersuasive.

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[4]Plaintiffs allege that persons attending the meetings have been given too little time "to provide their views orally." Pl. Mem. at 9-10. This allegation is unwarranted. FACA does not require that persons attending meetings of advisory committees be given *any* opportunity to address those meetings. *See* FACA § 10(a)(3). Accordingly, the amount of time that persons attending the meetings of the Standards Committee have been given to "provide their views" exceeds the amount of time to which they would be entitled if FACA applied to the committee.

The government's nonobservance of the law, without more, is merely an "'abstract injury.'" *See Valley Forge Christian College v. Am. United for Sep. of Church & State*, 454 U.S. 464, 482 (1982) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974)). In this case, FACA will remain a strong and important statute, applicable in appropriate cases, without the declaratory judgment that plaintiffs seek.

## CONCLUSION

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

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Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
KENNETH L. WAINSTEIN
United States Attorney

ARTHUR R. GOLDBERG, DC Bar 180661
DAVID M. GLASS, DC Bar 544549
Attorneys, Department of Justice
20 Mass. Ave., N.W., Room 7140
Washington, D.C. 20530
Tel: (202) 514-4469
Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendants