

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, D.C. 20005, and

Civil Action No. 05-____()

PHILIP HOGEN, Chairman
NELSON WESTRIN, Vice-Chairman
CLOYCE CHONEY, Commissioner
National Indian Gaming Commission
1441 L Street NW
Washington, D.C. 20005

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Confederated Salish and Kootenai Tribes and Santa Rosa Rancheria Indian Community (collectively "Plaintiffs"), by counsel, hereby file this Verified Complaint for declaratory and injunctive relief to require Defendants to comply with the

Federal Advisory Committee Act, 5 U.S.C. App. 2 (“FACA”). As grounds therefore, Plaintiffs respectfully allege the following:

PARTIES

1. 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. 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.

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

3. Defendant National Indian Gaming Commission (“NIGC”) is a federal agency and entity of the United States Government, with headquarters of which is located at 1441 L Street NW, Washington, D.C.

4. Defendant Philip Hogen is the Chairman of the NIGC and is sued in his official capacity as Chairman.

5. Defendant Nelson Westrin is a Vice-Chairman of the NIGC and is sued in his official capacity as Vice-Chairman.

6. Defendant Cloyce Choney is a Commissioner of the NIGC and is sued in his official capacity as a Commissioner.

JURISDICTION AND VENUE

7. This Court has personal jurisdiction over each of the Defendants with respect to the claims set forth in this Complaint.

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1346 (United States as defendant) and 5 U.S.C. §§ 551 *et seq.* (“Administrative Procedures Act” or “APA”). This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (actions by Indian tribes), 28 U.S.C. § 2201 (Declaratory Judgment Act), and 28 U.S.C. § 1361 (action to compel officer of the United States to perform official duty).

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because one or more of the Defendants reside in this District and a substantial part of the events or omissions giving rise to the claims occurred in this District. Venue is also proper in this District pursuant to 5 U.S.C. §§ 701, 703, 704.

STATEMENT OF FACTS

10. 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. (*See* Exhibit 1). Upon information and belief, Defendants did not solicit such nominations by contacting Indian tribes directly. Upon information and belief, 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.

11. Upon information and belief, persons or entities other than those authorized by Indian tribes to act on those tribes' behalf (including, but not limited to, non-Indian gaming companies) submitted nominations to the NIGC. Upon information and belief, the nominations from which Defendants selected the members of the Tribal Advisory Committee included nominations from such unauthorized persons or entities.

12. On or about March 8, 2004, Defendants selected seven (7) individuals to serve on the Tribal Advisory Committee. The Tribal Advisory Committee is not chartered pursuant to the FACA.

13. Upon information and belief, one or more of the selected members of the Tribal Advisory Committee are employees of large casino enterprises. Upon information and belief, three (3) of the seven (7) members of the Tribal Advisory Committee are non-tribal members.

14. None of the members of the Tribal Advisory Committee are elected tribal officials.

15. Upon information and belief, one or more of the members of the Tribal Advisory Committee lack actual authority to represent the Indian tribal government(s) that they purport to represent.

16. On or about early October, 2004, Defendants organized and conducted a meeting with the Tribal Advisory Committee in North Carolina. Defendants did not provide public notice of this meeting in the Federal Register. Defendants denied the Tribe and other tribal attendees the right to participate in the meeting. Defendants allowed the Tribe and the other tribal attendees only to observe the meeting. Defendants similarly denied such rights to attorneys representing members of the Tribal Advisory

Committee. No minutes of the meetings were taken. At least one member of the Tribal Advisory Committee offered to take minutes of the meeting, but Defendants refused.

17. On or about October 5, 2004, the Tribe expressed concern to the NIGC about the points of view of the members Defendants selected to be on the Tribal Advisory Committee and requested that the NIGC appoint a person with similar interests of the Tribe to be a part of the Tribal Advisory Committee. Defendants have not responded to that request. (*See Exhibit 5*).

18. On or about December 16, 2004, Defendants participated in a meeting to obtain advice from members of the gaming industry and the Tribal Advisory Committee in Las Vegas, Nevada. Defendants did not provide public notice of this meeting in the Federal Register. Defendants invited only select participants to attend the meeting and comment on the regulations. (*See Exhibits 6-7*).

19. On or about December 1-3, 2004, Defendants organized and conducted a meeting of the Tribal Advisory Committee in Oklahoma City, Oklahoma. 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. 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. No minutes of the meeting were taken. (*See Exhibit 9*).

20. On or about December 1, 2004, Plaintiff caused the hand-delivery of a letter to the NIGC requesting that the NIGC host its next Tribal Advisory Committee meeting in Montana. 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. Defendants have not responded to that request. (*See Exhibit 10*).

21. On or about January 12 and 13, 2005, the NIGC organized and conducted a Tribal Advisory Committee meeting in Palm Springs, California. Defendants did not provide public notice of this meeting in the Federal Register. No minutes of the meeting were taken. (*See Exhibit 3*). At this meeting, copies of draft technical regulations were submitted and reviewed by the Tribal Advisory Committee. Defendants did not provide copies of the draft regulations to the public.

22. 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. Neither the NIGC nor any of the other Defendants have responded to that request. (*See Exhibit 11*).

23. The work-product of the Tribal Advisory Committee has a direct impact on the sovereignty and regulatory responsibility of Plaintiffs and other Indian tribes with and without casinos.

24. Upon information and belief, Defendants assembled the Tribal Advisory Committee to solicit advice from technicians rather than to engage in government-to-government consultation with tribal leaders or individuals with actual authority to act on the tribes' behalf. (*See Exhibits 1-4, 10-12*).

25. Upon information and belief, Defendants intend to use the draft regulations promulgated by Defendants and the Tribal Advisory Committee as the basis for a Proposed Rule that will be published in the Federal Register. Upon information and

belief, Defendants intend to cause such a Proposed Rule to be published in the Federal Register on or about March 14, 2005.

COUNT I

(Violation of the APA and the Federal Advisory Committee Act)

26. Plaintiffs restate and incorporate herein by reference paragraphs 1-25 as though fully set forth here.

27. Tribal Advisory Committee is a federal advisory committee as defined under the FACA. As a federal advisory committee, the Tribal Advisory Committee is required to comply with all provisions of FACA and applicable implementing regulations.

28. To the extent that Defendants establish or utilize the Tribal Advisory Committee, FACA requires Defendants to make affirmative findings that the Tribal Advisory Committee is necessary and to file a charter for the Committee. The Tribal Advisory Committee membership must be fairly balanced in terms of the points of view represented and the functions it performs. The public is entitled to advance notice of Tribal Advisory Committee meetings published in the Federal Register and is generally entitled to inspect advisory committee documents. Detailed minutes must be kept of Tribal Advisory Committee meetings.

29. Defendants have violated and continue to violate FACA by, among other things: (i) failing to open each meeting to the public; (ii) failing to publish timely notice of each meeting in the Federal Register; (iii) failing to allow public attendance or participation during each meeting; (iv) establishing sub-groups without notice in the

Federal Register; (v) failing to keep detailed minutes of each meeting; and (vi) failing to file an advisory committee charter.

30. Defendants' failure to comply with the FACA has harmed Plaintiffs in that, among other things, Plaintiffs have been deprived of their right, granted by the FACA, to participate fully in meetings held by the NIGC's Tribal Advisory Committee process, to have adequate notice of meetings, to obtain in a timely manner documents generated by the NIGC Tribal Advisory Committee, 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 representation during the development of the regulations.

31. Plaintiffs have been and continue to be damaged by the operations of the Tribal Advisory Committee. Public confidence in the integrity of the NIGC has been and continues to be harmed by the appearance that the NIGC is under the influence of a select few members of the gaming industry.

32. Defendants' decision not to comply with FACA in assembling the Tribal Advisory Committee and organizing and conducting Committee meetings constitutes final agency action for purposes of the APA.

33. With respect to the conduct alleged above, Defendants have acted arbitrarily and capriciously, not in accordance with law, and without observation of procedure required by law, in violation of the APA.

34. Plaintiffs have suffered harm and irreparable injury and will continue to suffer irreparable injury, for which there is no adequate remedy at hand, unless Defendants' operation of the Tribal Advisory Committee is brought into compliance with the FACA.

COUNT II

(Declaratory Judgment)

35. Plaintiffs restate and incorporate herein by reference paragraphs 1-34 as though fully set forth here.

36. Defendant Hogen has stated that the FACA does not apply to the Tribal Advisory Committee. Defendant Hogen has not responded to the Tribe's request that the FACA apply to Tribal Advisory Committee meetings. Rather, Defendants have continued to organize and conduct Tribal Advisory Committee meetings without following the requirements of the FACA.

37. An actual controversy exists between the Plaintiffs, on the one hand, and Defendants, on the other, with respect to the application of the FACA to the Tribal Advisory Committee. This controversy is now ripe for resolution by the Court. Without prompt resolution, Plaintiffs are suffering, and will continue to suffer irreparable harm, injury and prejudice as a result of Defendants' refusal to apply the FACA to the activities of the Tribal Advisory Committee.

38. It is now appropriate for the Court to determine and declare the parties' rights and obligations to one another with respect to application of the FACA to the Tribal Advisory Committee and the illegality of Defendants' conduct of the Tribal Advisory Committee under the FACA, and all related aspects of this matter.

39. Plaintiffs are entitled to a declaration, pursuant to 28 U.S.C. § 2201, that the Tribal Advisory Committee is fully subject to the FACA.

40. Plaintiffs are further entitled to a declaration, pursuant to 28 U.S.C. § 2201, that Defendants' conduct of the Tribal Advisory Committee including, but not

limited to, 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.

COUNT III

(Injunctive Relief)

41. Plaintiffs restate and incorporate herein by reference paragraphs 1-40 as though fully set forth here.

42. Defendants' continued operation of the Tribal Advisory Committee violates federal law including, but not limited to, the FACA and the APA.

43. Defendants' failure to comply with the FACA has caused and continues to cause Plaintiffs immediate and irreparable harm, for which there is no adequate remedy at hand, in that Plaintiffs have been and continue to be deprived of their rights under FACA to participate fully in meetings held by the Tribal Advisory Committee, to have adequate notice of meetings, to obtain documents generated by the Tribal Advisory Committee, 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 representation during the development of the regulations.

44. Plaintiffs have also been and continue to be damaged by the operations of the Tribal Advisory Committee in that public confidence in the integrity of the NIGC has

been and continues to be harmed by the appearance that the NIGC is under the influence of a select few members of the gaming industry.

45. There is a reasonable likelihood that Plaintiffs will prevail on the merits of their claims.

46. The public policy favors an award of preliminary and permanent injunctive relief in favor of Plaintiffs.

47. Absent an award of preliminary and permanent injunctive relief, Plaintiffs are likely to suffer further and additional irreparable harm.

48. Plaintiffs are entitled to injunctive relief against Defendants to enjoin these continuing violations of federal law.

WHEREFORE, Plaintiffs respectfully pray that this Court:

- (a) Declare that the Tribal Advisory Committee is fully subject to the FACA;
- (b) Declare that the Defendants' conduct of the Tribal Advisory Committee including, but not limited to, 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;
- (c) Immediately temporarily restrain and enjoin Defendants from holding meetings, promulgating or revising draft regulations or otherwise conducting Tribal Advisory Committee business of any kind;
- (d) Order the Defendants to organize a new Advisory Committee in accordance with FACA that, once composed, shall be fully subject to FACA;
- (e) Preliminarily and permanently restrain and enjoin Defendants from using any draft regulations or other work product created by the Tribal Advisory Committee (as assembled by Defendants on March 4, 2004) in any future notice and comment rulemaking until such time as a new Advisory

Committee has been created and has issued final recommendations to the NIGC;

- (f) Award Plaintiffs reasonable costs and attorneys fees; and
- (g) Order any and all other relief in favor of Plaintiffs as the Court deems to be proper and just.

RESPECTFULLY SUBMITTED



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COUNSEL FOR PLAINTIFFS

VERIFICATION

I declare under penalty of perjury that the foregoing facts set forth in the Verified Complaint for Declaratory and Injunctive Relief are true and correct.

Dated: March 9, 2005



D. Fred Matt, Chairman
Confederated Salish and Kootenai Tribes

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