IN THE UNITED STATES THE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN	)	
Plaintiff,	)	
v.	)	**Civ. No. 1:07-cv--02210-RJL**
DIRK KEMPTHORNE, et al.	)	**Next Scheduled Court Deadline: Federal Defendants' Response to Plaintiff's Motion to Seal on February 1, 2008**
Defendants.	)	

NOTICE OF FILING

The St. Croix Chippewa Indians of Wisconsin ("Plaintiff"), by and through counsel, hereby files with this Court as Exhibit A hereto the Indian Gaming Paper dated February 20, 2004 ("Indian Gaming Paper"). This document contains redactions on pages 2 and 14 as agreed to by the parties.

As recited in the Indian Gaming Paper (page 1) to then Secretary Norton wanted to be informed as to ". . .what discretion, if any, the law provides her in regard to the approval of off-reservation Indian gaming acquisitions that are great distances from an established reservation, so-called 'far-flung lands'."

The Indian Gaming Paper provided Secretary Norton with an answer -- supported by a detailed analysis. It was authored by senior officials within the Interior Department. Its conclusions were supported by the Chairman of the National Indian Gaming Commission. This document has extraordinary significance to the issues presented herein in that it delineates the Interior Department's own view that the distance of a proposed casino from an established reservation could not, consistent with Congressional intent, be used as a basis to deny

off-reservation casino applications. Ignoring its own analysis, the Plaintiff submits that the Interior Department has and will continue to use distance as a basis for denying off-reservation casino applications, including the Plaintiff's.

To place the Guidance Memorandum into proper context, a brief recitation of the surrounding events is important. On July 9, 2003, Aurene Martin, the Acting Assistant Secretary - Indian Affairs testified before the Senate Committee of Indian Affairs with respect to IGRA. In her written testimony, she informed the Congress that a review was being conducted for the Secretary of the law relating to whether or not IGRA, under its two-part determination, would allow the Secretary to use as a factor the distance between the proposed gaming establishment and the tribe's reservation. On July 13, 2004, Ms. Martin, then holding the position of Principal Deputy Assistant, Secretary -- Indian Affairs testified before the House Committee on Resources, at an oversight hearing on off-reservation, restored and newly-acquired lands. She stated in her written testimony: "We have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development." She went on to state that the two-part IGRA determination, on its face, did ". . .not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation. . . ." Id. She then stated that the Department's review concluded that while the trust acquisition regulations provide broad discretion, IGRA does not authorize the Secretary to consider criteria other than the best interests of the tribe (and its members) and any detriment to the surrounding community. Id. While not identified as such in her testimony, it is clear that the Indian Gaming Paper embodied the substantial examination to which she referred.

The Plaintiff's First Amended Complaint asserts, *inter alia*, that the Guidance Memorandum issued by Assistant Secretary Artman on January 3, 2008 ("Guidance Memorandum"), in describing the negative impact that a distant off-reservation casino would have on reservation life, had no basis by way of evidence, studies or empirical data to support its postulated theories. Amended Complaint, ¶¶ 47-49. Count I (¶ 59) similarly asserted that the Guidance Memorandum was issued without factual support and the Interior Department did not consider all important aspects of the issue and otherwise relied on factors which Congress did not intend for it to consider. For these reasons, the Amended Complaint asserts (¶ 59) that the Guidance Memorandum is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A). Count III of the Amended Complaint asserts in its ¶ 64 that the issuance by the Federal Defendants of the Guidance Memorandum constituted an *ultra vires* action which was in excess of the Interior Department's statutory jurisdiction, authority or limitations, or short of statutory right and was therefore unlawful pursuant to 5 U.S.C. § 706(2)(C). Count V of the Amended Complaint (¶ 69) asserts that the issuance of the Guidance Memorandum was in violation of the trust responsibilities owed by the Federal Defendants to Indian tribes, including the Plaintiff.

Perhaps nothing could more convincingly evidence the substantial merit in Plaintiff's allegations than the Interior Department's own extensive analysis and conclusions as embodied in the Indian Gaming Paper. As briefly described below, the Interior Department itself carefully looked at the issue as to whether Congress, in enacting the Indian Reorganization Act and the Indian Gaming Regulatory Act ("IGRA") intended that distance of a proposed enterprise, including a casino, could be used as a limiting factor. The answer was no.

The Interior Department's own analysis was that Congress well understood that many tribes, because of remote areas in which their established reservations were located, would necessarily need to establish commercial enterprises at some substantial distances away from their established reservations. Despite this conclusion, the entire underlying premise of the Guidance Memorandum was that a distance beyond what was viewed as "commutable" would have a negative impact on reservation life. The Plaintiff submits that there is no legitimate reason for the Interior Department to have ignored its own analysis.

According to the Supreme Court in Motor Vehicle Manufacturers Association of the United States, Inc v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983), an agency's decision such as this is arbitrary and capricious in that it "has relied on factors which Congress has not intended it to consider. . ." and it has ". . .entirely failed to consider an important aspect of the problem. . . ." State Farm, 463 U.S. at 43. The Indian Gaming Paper's recitation of Congressional intent, and the reasons why distance could not be used as a limiting factor, make it overwhelmingly clear that the Guidance Memorandum's reliance on the "commutable" distance notion directly conflicts with Congressional intent.

After thoroughly reviewing the legislative history of IGRA, the Indian Gaming Paper stated at 6:

> In any event, it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It clearly did not. Nor has Congress amended IGRA to add a distance limitation or any other geographic limitation since its passage in 1988.

Turning to an analysis of the Indian Reorganization Act of 1934 (under which the Part 151 regulations were promulgated), the Indian Gaming Paper stated at 8: "By its clear language, the IRA envisions off-reservation acquisitions that are free from state and local

taxation and nowhere in the law does Congress purport to limit the exercise of that authority to lands with-in a fixed distance from an existing reservation." (emphasis supplied). The Indian Gaming Paper continued at 8:

> The major federal policy behind the IRA was to promote economic independence for tribes. Nowhere in the IRA or its legislative history was there ever a discussion of mileage limits to lands that the tribes could acquire to engage in economic enterprises. Hence, when Congress designed and passed IGRA, it must have understood that (at least since 1934) tribes could seek additional Indian lands through the Department upon which they would conduct business enterprises for economic development and exercise full governmental jurisdiction. In short, Congress delegated substantial responsibility to the Secretary within the statutory scheme for gaming on off-reservation lands, but it did so within a clear statutory framework. (emphasis supplied).

The Indian Gaming Paper further stated at 11:

> . . .in may [sic] respects, the two decisions - land acquisition under section 151 and the two-part determination under IGRA - dovetail. In looking at best interest, under section 151 the Department analyzes whether the acquisition is beneficial to the tribe and is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Directly contrary to the Guidance Memorandum, the Indian Gaming Paper did not view distance as being a negative factor for reservation life despite the fact that tribal members might have to travel a substantial distance from the reservation to the casino. In fact, it was just the opposite It stated at 11:

> Another factor considered in the best interest determination is the impact on tribal employment, job training and career development, including impact to the tribe if members leave the reservation for employment at the gaming facility. For a facility that is located a distance from the reservation, the Department may review whether housing is provided for members working at a proposed facility. However, if the tribe is using gaming proceeds at a distant facility to create job opportunities on-reservation, then while tribal members may have to travel a distance to casino employment, overall tribal employment may be

> boosted by the economic gains of the distant facility. In addition, even without substantial job creation, a tribe may demonstrate best interest by projecting the benefits to tribe and tribal members from increased tribal income alone. Increased tribal services, improved education and health care are also benefits from increased tribal income that the Department may consider. (emphasis supplied).

The Indian Gaming Paper went on to analyze Congressional intent when dealing with substantial distances between a proposed casino and a tribe's established reservation. It stated at 13:

> Neither IGRA nor the IRA evince Congressional intent to prohibit off-reservation gaming or to limit it to close proximity to existing reservation lands. If IGRA was intended to bring substantial economic development opportunities to Indian tribes where none could be achieved solely because of the remoteness of reservation lands, Congress provided tribes the potential to prosper on Indian lands a distance from remote reservations. Conversely, if IGRA was intended to spur on-reservation economic development only - or lands that are so close that for all intents and purposes they are on-reservation - the purpose of the law would fail because existing isolated reservation lands would not provide the potential of the law. Accepting the inherent market limitations within some rural states, distance limitations should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster. (emphasis supplied).

The Guidance Memorandum's clear conclusion was that distance could not be used as a basis to deny an off-reservation casino application under IGRA. And, distance to a proposed casino could not therefore be used as a basis to deny an application under Part 151 since the two "dovetail."

The D.C. Circuit has repeatedly held that guidance memoranda are fully ripe for review upon their issuance even though the agency has not taken any administrative action under the Guidance Memorandum in question. See General Electric Company v. Environmental Protection Agency, 290 F.3d 377, 388 (D.C. Cir. 2002) (the Court's consideration would not be

aided by further application of the Guidance Document to particular facts). See also Cement Kiln Recycling Coalition v. Environmental Protection Agency, et al., 493 F.3d 207 (D.C. Cir. 2007) (guidance document); Croplife America, et al. v. Environmental Protection Agency, et al., 329 F.3d 876 (D.C. Cir. 2003) EPA (directive appearing in a press release banning consideration of third-party human studies in evaluating the safety of pesticides); and, John Chiang v. Dirk Kempthorne, 503 F.Supp.2d 343 (D.D.C. 2007) (guidelines issued by the Interior Department). These cases are in conformity with the Supreme Court's holding in Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 737 (1998) that:

> [A] person with standing who is injured by a failure to comply with [statutory] procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

The challenges raised by the Amended Complaint to the Interior Department's decision to make the Part 151 determination first and to the arbitrary and capricious nature of the Guidance Memorandum are fully ripe for review by this Court. The conclusions reached in the Indian Gaming Paper, from which the Interior Department has impermissibly departed, underscore why a

review by this Court of the issues raised by the Amended Complaint at this time could not get any riper.

Respectfully submitted,

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