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

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN Plaintiff, v. DIRK KEMPTHORNE in his official capacity as SECRETARY OF INTERIOR and CARL J. ARTMAN in his official capacity as ASSISTANT SECRETARY – INDIAN AFFAIRS Defendants.	)	Case No. 07-CV-02210 RWR

NOTICE OF THE FILING OF A MOTION
FOR A TEMPORARY RESTRAINING ORDER
AND A MOTION FOR A PRELIMINARY INJUNCTION

Please take notice that the St. Croix Chippewa Indians of Wisconsin, by and through counsel, in connection with the above styled case, have filed with this Court its Motion for a Temporary Restraining Order as well as a Preliminary Injunction. Appended hereto is a copy of the Complaint filed this day in this action together with all other papers filed to date in this matter or otherwise to be presented to the Court at the time of any hearing on the Motion for Temporary Restraining Order.

Respectfully submitted,

/s/ Robert M. Adler

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Dated: December 7, 2007

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

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN Plaintiff, v. DIRK KEMPTHORNE in his official capacity as SECRETARY OF INTERIOR and CARL J. ARTMAN in his official capacity as ASSISTANT SECRETARY – INDIAN AFFAIRS Defendants.	)	Case No. 07-CV-02210 RWR

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

The Plaintiff, the St. Croix Chippewa Indians of Wisconsin ("The St. Croix Tribe"), by and through counsel, hereby move this Court, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and LCvR 65.1(a) for a Temporary Restraining Order.

The Court's attention is respectfully directed to the attached Memorandum of Points and Authorities filed in support hereof together with the Declaration of Tribal Chairperson Hazel Hindsley and the Affidavit of Robert M. Adler with its attached exhibits.

A proposed Order is also appended to this Motion.

WHEREFORE, for the premises considered, the Plaintiff respectfully submits that a Temporary Restraining Order should be entered by this Court.

Respectfully submitted,

/s/ Robert M. Adler

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

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN	)	
Plaintiff,	)	
v.	)	Case No. 07-CV-02210 RWR
DIRK KEMPTHORNE in his official capacity as SECRETARY OF INTERIOR	)	
and	)	
CARL J. ARTMAN in his official capacity as ASSISTANT SECRETARY – INDIAN AFFAIRS	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The Plaintiff, the St. Croix Chippewa Indians of Wisconsin ("The St. Croix Tribe"), by and through counsel, hereby move this Court, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and LCvR 65.1(a) for a Preliminary Injunction.

The Court's attention is respectfully directed to the attached Memorandum of Points and Authorities filed in support hereof together with the Declaration of Tribal Chairperson Hazel Hindsley and the Affidavit of Robert M. Adler with its attached exhibits.

A proposed Order is also appended to this Motion.

WHEREFORE, for the premises considered, the Plaintiff respectfully submits that a Preliminary Injunction should be entered by this Court.

/s/ Robert M. Adler
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IN THE UNITED STATES THE DISTRICT COURT
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THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN Plaintiff, v. DIRK KEMPTHORNE in his official capacity as SECRETARY OF INTERIOR and CARL J. ARTMAN in his official capacity as ASSISTANT SECRETARY – INDIAN AFFAIRS Defendants.	)	Case No. 07-CV-02210 RWR

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN'S MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

The St. Croix Chippewa Indians of Wisconsin ("St. Croix Tribe"), by and through counsel, hereby submits this Memorandum in support of the above-referenced Motions. The Declaration of Tribal Chairperson Hazel Hindsley and the Affidavit of Robert M. Adler and its attached exhibits are submitted in support hereof.

A. Introduction

This is an action brought by the St. Croix Tribe, a Chippewa Tribe whose reservation lands are located in rural Wisconsin. The St. Croix Tribe, together with the Bad River Band of Lake Superior Chippewa Indians (collectively, the "Tribes) have diligently pursued for the past six years the approval by the Bureau of Indian Affairs ("BIA") to establish a casino in Beloit, Wisconsin. The ancestors of the Tribal members resided in the Beloit region and they were parties to peace treaties ceding land in that area to the United States.

The St. Croix Tribe seeks a Temporary Restraining Order and a Preliminary Injunction so that the status quo can be maintained until a hearing on the merits can be held and an adjudication reached in this important matter.

The St. Croix Tribe faces significant challenges to economic development and diversification. The St. Croix Tribe has significant unemployment and a substantial percentage of its employed members earn wages which are below the poverty level. Declaration of Tribal Chairperson Hazel Hindsley, ¶ 3 ("Hindsley Dec.").

The St. Croix Tribe's ability to accumulate the resources to meet its substantial unmet needs, to obtain the capital for further economic development, to increase employment for tribal members, and to decrease its dependence on funding from the federal government, is largely dependant on the approval of the Beloit Casino Project. Hindsley Dec., ¶ 4. This will be a large destination resort expected to attract several million visitors a year, principally from the densely populated greater Chicagoland area. In addition to its casino, the project will include a 500-room hotel, several restaurants, a conference center, a theater and a water park. The general region anticipates that the casino will generate significant revenues for a wide variety of service industries in the area. The Beloit Casino Project will involve construction costs of at least $300 million. Once built, it will provide some 3,000 full-time jobs. This project dominates the local scene in terms of its future economic planning and hopes for its economic revitalization. Local elected officials have repeatedly written BIA officials, as well as attending numerous meetings in Washington, D.C. with BIA representatives, to express their strong and unequivocal support for the project. Hindsley Dec., ¶ 4.

The Beloit Casino Project was originally the idea of the City of Beloit itself as a viable course by which it could restore the local economy which had seriously declined due to the loss of thousands of jobs due to factory closings. The Beloit Casino Project has been supported unanimously for many years by resolutions of the Beloit City Council. It has also received favorable resolutions of support from Rock County (where Beloit is located) as well as from other nearby townships. Hindsley Dec., ¶ 5.

B. Factual Statement

The Tribes jointly filed in July 2001 an application with the BIA Regional Office in St. Paul, Minnesota to take 26 acres of land into trust for gaming purposes in Beloit, Wisconsin. To date, the Tribe has spent in excess of $1 million in pursuit of the approval of this project, including consultant costs, legal fees and option payments made to a local developer for the would-be trust land and adjoining lands necessary for the casino project. Hindsley Dec., ¶ 6. Throughout the process of seeking approval from the BIA, the St. Croix Tribe has incurred these significant expenses without the financial assistance of an outside developer or promoter. Hindsley Dec., ¶ 7.

The Tribes have taken inordinate measures to ensure that they were fully complying with all of the BIA's exacting requirements for the approval of the Beloit Casino Project, including the significant requirements imposed by the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act. This included the substantial expenditure of time and financial resources that went into the preparation of an Environmental Assessment ("EA"). After the completion of the EA, the Tribes were informed by the Department of Justice that it would require an Environmental Impact Statement ("EIS") to be prepared for all off-reservation casino applications. (Otherwise, the Department of Justice indicated it would not defend any lawsuit brought to challenge a Finding of No Significant Impact ("FONSI") issued by the BIA based on an EA.) That, in turn, required the Tribes to start all over again (beginning with the scoping process required for an EIS). That took an additional three years of time, effort and expense. Tribal representatives were informed several weeks ago that the draft filed by the EIS had been approved by the Solicitor's Office of the BIA. Hindsley Dec., ¶ 8, Affidavit of Robert M. Adler, ¶ 3 ("Adler Aff.').

In order to be assured that the Tribes correctly understood the procedures which would be required in order to gain approval for their project, Tribal leaders, staff members and attorneys have had numerous meetings with representatives of the BIA in both its Regional Office located in St. Paul, Minnesota as well as with senior officials of the BIA in its Central Office in Washington, D.C. During these meetings, numerous issues have been addressed and resolved. During the six years of discussions with BIA representatives in the Regional Office, the BIA continuously represented to Tribal representatives that the Section 20 ("IGRA") decision would be made first by the Central Office; and if the Governor concurred, the BIA would then proceed to make the fee-to-trust determination under Part 151. Hindsley Dec., ¶ 9.

On January 8, 2007, Regional Director Terry Virden, wrote the Tribes' Chairmen, informing them that their application had been forwarded to the Central Office in Washington, D.C. with a favorable recommendation. Adler Aff., ¶ 5 and Exhibit A. thereto. Almost immediately thereafter in mid-January 2007, Tribal leaders and representatives, together with elected officials from the Beloit area, met in Washington, D.C. with George Skibine, Director of the BIA's Indian Gaming Management Staff. At that time, Mr. Skibine informed the numerous individuals present that the BIA would complete its staff review of the Tribes' application within sixty days. Adler Aff., ¶ 5. From that date until June 2007, Tribal leaders and their representatives continued to be informed by BIA officials in meetings in the Central Office that the two-part determination would be made before the Part 151 determination. Adler Aff., ¶¶ 2 and 4.

After the January 2007 meeting with Mr. Skibine, it became apparent that the review process (other than for the ongoing review of the draft EIS) had essentially become frozen in that it was clear that this application, and other similar applications, were not going to be favorably approved by virtue of Secretary Kempthorne's strong negative views of off-reservation fee-to-trust gaming applications. Adler Aff., ¶ 6. It was also apparent to the Tribes that Secretary Kempthorne's views found no basis in either IGRA or Part 151 and that he was nonetheless determined not to approve these applications, including Beloit, whether that meant making no decision at all during the remainder of his term as Secretary or crafting some artifice by which to deny the applications. This reality led to a virtual standstill within the BIA of not taking various interim steps in the decision-making process for pending off-reservation casino applications -- such as failing to permit Notices of Availability to be published in the *Federal Register* for draft or final EIS's. This, in fact, was the subject of testimony and critical comments made by Chairman Byron Dorgan at an October 4, 2007 Oversight Committee of the Senate Indian Affairs Committee. Assistant Secretary Artman appeared and testified at that hearing. Senator Dorgan strongly expressed his dissatisfaction with how the BIA had been conducting itself in a number of areas, including the processing of fee-to-trust applications. The Chairman stated that he will hold another Oversight Hearing in six months in order to gauge whether progress had been made by the BIA. See http://indian.senate.gov/public.

After little or no progress was perceived by the Tribes and their representatives in the Central Office's review of the Beloit application, the St. Croix Tribe's outside counsel, Robert M. Adler, wrote to Assistant Secretary Artman by letter dated July 13, 2007. Adler Aff., ¶ 7 and Exhibit B thereto. In that letter, he: (a) requested (in view of the delay by the BIA in reviewing the application) that Assistant Secretary Artman inform him when the staff review of the application would be completed; and, (b) asked Assistant Secretary Artman to inform him whether the rumors were accurate that the Part 151 determination would be made before the two-part IGRA determination. Mr. Adler also expressed serious concerns about the use of Part 151 as the appropriate standards to be applied in making decisions to approve (or deny) off-reservation casino applications, pointing out that to do so would be contrary to Congressional intent. Id.

By letter dated August 21, 2007, a response was sent to Mr. Adler by George Skibine, Acting Deputy Assistant Secretary-Policy and Economic Development. Adler Aff., ¶ 8 and Exhibit C thereto. Mr. Skibine indicated that he had been asked to respond to Mr. Adler's letter of July 13, 2007. This letter proceeded to state, in pertinent part:

> We will make a determination on whether to take land into trust pursuant to Part 151 prior to making the two-part secretarial determination under IGRA. We believe that it is the appropriate and logical sequence for the decision-making process. We do not believe that this represents a policy change since the Department has never before specified a particular sequence from making the two decisions involved in this process. (emphasis supplied).

This was the only written communication from the Department of the Interior to the Tribes that the Part 151 decision would be made prior to the two-part determination. Adler Aff., ¶ 9.

On information and belief, the Department of the Interior has not informed in writing other Indian tribes or the public at large (whether through publication in the *Federal Register* or otherwise) that for fee-to-trust off-reservation gaming applications pending in the Central Office, the Department of the Interior will make the Part 151 determination prior to the two-part determination under IGRA. Adler Aff., ¶ 10.

Despite the representation in Mr. Skibine's letter of August 21, 2007 that "the Department has never before specified a particular sequence from making the two decisions", this has not actually been the case. During the Clinton Administration and later during the Bush Administration, it was made quite clear to the public that the two-part determination would be made first. And, in point of fact, during the past six years, the two-part determination has been made prior to the Part 151 decision in at least two instances.

In a letter dated December 21, 2006 from James E. Cason, the Associate Deputy Secretary of the Department of the Interior, to the then-Governor of New York, George Pataki, Mr. Cason wrote that he was providing him with an opportunity to concur in the two-part determination which had been made on the St. Regis Mohawk application for an off-reservation casino. Adler Aff., ¶ 11 and Exhibit D thereto. Mr. Cason stated, in pertinent part:

> Your affirmative written concurrence is required before the Department will proceed with the consideration of the St. Regis Mohawk Tribe's application to take a portion of the Monticello Raceway in trust pursuant to the Department's land acquisition regulations in 25 U.S.C. Part 151. Please be mindful that your concurrence and its two-part determination under Section 20(b)(1)(A) of IGRA <u>should not be construed as a future commitment from the Department to take the land into trust. That decision has yet to be made and will be made only after consideration of all of the regulatory requirements contained in 25 C.F.R. Part 151</u>. (emphasis supplied).

A similar letter was earlier sent on February 20, 2001 to Wisconsin Governor Scott McCallum by James H. McDivitt, Deputy Assistant Secretary-Indian Affairs (Management). This letter pertained to the pending application of three Wisconsin Tribes to take land into trust in Hudson, Wisconsin for the purpose of operating an off-reservation casino. Adler Aff., ¶ 12 and Exhibit E thereto. As explained in this letter, a favorable two-part determination had been made. Deputy Assistant Secretary McDivitt made it crystal clear that the two-part determination preceded the Part 151 determination which would be made if the Governor concurred in the IGRA decision. Deputy Assistant Secretary McDivitt wrote, in pertinent part:

> Pursuant to Section 20(b)(1)(A) of the IGRA, before the Hudson parcel can be acquired in trust for gaming purposes, I must determine that a gaming facility on the land would be in the best interests of the Tribes and their members and not detrimental to the surrounding community and then you must concur in that determination. If you concur in this determination, the land can be acquired by the United States in trust for the Tribes for gaming purposes, provided all the requirements of the Bureau of Indian Affairs' land acquisition regulations found in 25 CFR Part 151 are met. (emphasis supplied).

An action had been filed several years before by the three Tribal applicants for the Hudson casino against then-Secretary of the Interior Babbitt. Sokaogon Chippewa Community, et al. v. Bruce C. Babbitt, Secretary, in the United States District Court for the Western District of Wisconsin (Civil Action No. 2000-1137). Significantly, in a brief filed in that action on March 9, 2000 by the Department of Justice, on which attorneys in the Solicitor's Office of the Department of the Interior appeared "Of Counsel," the Government stated, in pertinent part at 2-3:

> Pursuant to guidelines issued on September 28, 1994, by the Acting Deputy Commission of the Indian Affairs, area offices of the Bureau of Indian Affairs must make the initial determination of whether an applicant tribe has satisfied their requirements of § 2719(b)(1)(A) (emphasis supplied).

The Government's brief proceeded to articulately set out why the two-part determination was necessary made before the Part 151 decision. It stated at 22:

> As explained above (p. 5), the Department may not exercise its authority under 25 U.S.C. Section 465 to acquire land in trust if it will be used for gaming purposes unless an applicant tribe can show that a proposed gaming operation will be in its best interest

> and that the operation will not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

Adler Aff., ¶ 13 and Exhibit F thereto.

The District Court in the Hudson litigation issued a decision which clearly recognized that the two-part determination was made by the BIA before to the Part 151 decision. Sokaogon Chippewa Community, et al. v. Bruce C. Babbitt, Secretary, et al., 929 F.Supp. 1165, 1169-1170 (USDC for the Western District of Wisconsin, 1996). The Court stated:

> A request to establish an off-reservation gaming facility must be approved by the Secretary of the Interior in accordance with the Indian Gaming Regulatory Act, which provided at 25 U.S.C. § 2719(b)(1)(A) that off-reservation is permitted only if [the two-part determination is favorably decided by the Secretary]. Even if the secretary finds that the proposed off-reservation gaming establishment is in the best interest of the applicant tribes and would not be detrimental to the surrounding community and the governor concurs in that determination, the secretary must decide whether to exercise his discretion to acquire the land in trust pursuant to the Indian Reorganization Act, 25 U.S.C. § 465.

Quite recently, on September 21, 2007, Assistant Secretary Artman issued a memorandum to all of the BIA Regional Directors. Adler Aff., ¶ 14 and Exhibit G thereto. In this memorandum, Assistant Secretary Artman explained an attached September 2007 revision of the "checklist for gaming acquisitions." Assistant Secretary Artman stated that the newly revised checklist differed from the earlier (March 2005) checklist in only two respects. The first, which is pertinent herein, was that the first page of the checklist contained a modification "... to clarify that an application for two-part secretarial determination pursuant to § 20(b)(1)(A) of IGRA should not be processed until the land is already in trust or, if not in trust, until after the publication of a notice to take the land in trust has been published pursuant to 25 C.F.R. 151.12." (emphasis supplied). Despite Assistant Secretary Artman's representation that this was a clarification, this was, in fact, a complete reversal of the practice followed by the BIA for many years. Adler Aff., ¶ 14

C. The Department of the Interior's Artifice By Which It Will Likely Proceed Within the Next Several Weeks to Deny the Beloit Application and Similar Applications Submitted by Other Indian Tribes.

It has recently become apparent that the efforts of the Tribes and elected officials in Beloit (and the surrounding region) to have the BIA approve this project will, in all probability, be a futility. Hindsley Dec., ¶ 10. This is strictly due, the St. Croix Tribe submits, to Secretary Dirk Kempthorne's personal views opposing off-reservation gaming for reasons which do not find a basis in either the standards set out by IGRA or for taking fee land into trust pursuant to Part 151. Secretary Kempthorne's personal animus towards off-reservation gaming fee-to-trust applications is the subject of a recent Complaint filed in this Court. See St. Regis Mohawk Tribe v. Dirk Kempthorne (Civil Action No. 07-CV-01958-RWR).

The St. Croix Tribe submits that the Department of the Interior is improperly attempting to carry this out by making the Part 151 determination prior to the two-part determination. This is because the Department of the Interior is fully aware that if the two-part determination of IGRA were made first, there would be no realistic way to deny the Beloit application (and similar applications) in that the Tribal applications fully meet the requirements of IGRA's two-part determination. Further, the St. Croix Tribe submits that senior officials of the DOI have concluded that once a favorable two-part determination is made (assuming concurrence by the Governor), this would leave little or no room for the BIA to deny the applications under Part 151 and have any realistic belief that this decision would be upheld by a Federal Court. In other words, the IGRA determinations would effectively require the BIA to make favorable findings under Part 151 on a number of the important issues presented under the regulations such as whether the trust land is needed and whether the trust acquisition would promote self-determination and economic development. 25 C.F.R. § 151.3(a)(3) and 151.10(b). For these reasons, the St. Croix Tribe submits that the Department of the Interior decided to make the Part 151 determination first because it will leave it free to deny a fee-to-trust gaming application under the "self-determination," "economic development," "need" and other factors outlined in Part 151 without having prior inconsistent findings made by virtue of its two-part determination. As set forth below, by adopting this new procedure, the Department of the Interior has completely ignored the requirements of the Administrative Procedure Act ("APA") Congressional intent set out in IGRA, and the requirements mandated by case law for an agency, which has changed its policy and procedure, to provide to the public a reasonable explanation as to why it has changed its historical practice.

The St. Croix Tribe seeks Declaratory and Injunctive Relief from this Honorable Court in order to prevent the Department of the Interior from denying the Beloit fee-to-trust application, as well as others, by using its newly adopted procedure to make the Part 151 decision prior to the two-part IGRA determinations. Unless Injunctive relief is entered, the Department of the Interior will likely proceed in the next several weeks to deny the Beloit application as well as a number of other pending off-reservation casino applications submitted by other Tribes. This will cause inordinate damage to the St. Croix Tribe by the loss of not only the more than $1 million paid to date on this project but also for its loss of the future significant anticipated revenues from this project of which the St. Croix Tribe, and its members, are in tremendous need. Hindsley Dec., ¶ 11.

Argument

A. Statutory and Regulatory Requirements

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, enacted in 1934, and its implementing regulations at 25 C.F.R. Part 151 (promulgated in 1980) authorize the Secretary of the Interior to acquire lands for Indian tribes in the name of the United States to hold such lands in trust for Indian tribes and to take action on a tribe's request to acquire such lands. This statute and the Part 151 regulations apply to all tribal requests to take land into trust for any purpose.

In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"). Congress intended IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[,] ... to ensure that the Indian tribe is the primary beneficiary of the gaming operation, . . . and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702. The Senate Committee on Indian Affairs Report, in describing IGRA's exceptions, made it clear that they were meant to set "forth policies with respect to lands acquired in trust after [IGRA's] enactment. S. Rep. No. 100-446, at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090.

Under Section 20 of IGRA, 25 U.S.C. § 2701, tribes are prohibited from engaging in any gaming on land acquired after the date of IGRA's enactment, October 17, 1988, unless certain exceptions are satisfied. The exception, pertinent herein, is § 2719(b)(1)(A), which provides that the prohibition of gaming on post-1988 land does not apply when:

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands [1] would be in the best interest of the Tribe and its members, and [2] would not be detrimental to the surrounding community, but only if the Governor of the State in

> which the gaming activity is to be conducted concurs in the Secretary's determination ...

This exception is commonly referred to as the "two-part determination."

Thus, Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 (and its regulations falling under Part 151) and IGRA, § 2719 (b)(1)(A), both apply to the acquisition of trust lands for gaming purposes. Section 5 of the Indian Reorganization Act is very general in nature in that it, together with the Part 151 regulations, apply to the determination as to whether fee land will be taken into trust for any purpose, whether that be for grazing, Indian housing, a grocery store or a casino. They authorize the Secretary of the Interior to acquire lands that are either "within or without existing reservations," for Indian tribes in the name of the United States to hold those lands in trust for Indian tribes. The criteria governing when land will be taken into trust for an Indian tribe under this statute were promulgated by Interior in regulations at 25 C.F.R. Part 151. The criteria relevant to this case appear at 25 C.F.R., §§ 151.3, 151.10 and 151.11.

25 C.F.R., § 151.3, provides, in pertinent part, that:

> land not held in trust ... may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status ... shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> * * *
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R., § 151.10, provides that for on-reservation trust acquisitions:

> The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when

> the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:
>
> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) *[provision relating to acquisition for individual Indian, not applicable to tribal application]*;
>
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
>
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
>
> (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
>
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R, § 151.11, which governs off-reservation trust acquisitions, provides, in pertinent part, that:

> The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:
>
> (a) The criteria listed in Sect. 151.10(a) through (c) and (e) through (h);
>
> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
>
> (c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed land.

B. The Required Standards For the Court Entering of a Preliminary Injunction

Pursuant to the D.C. Circuit's decision in Mova Pharmaceutical v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998), in order for a party to demonstrate entitlement to Preliminary Injunction, it must show: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the Injunction is not granted; (3) that an Injunction will not substantially injure other interested parties; and (4) that the public interest will be furthered by the Injunction. See also Omar, et al. v. Francis J. Harvey, Secretary of the Army, et al., 479 F.3d 1, 28 (D.C. Cir. 2007), petition for cert. filed (U.S. Sept. 21, 2007)(No. 07-394). The St. Croix Tribe respectfully submits that these requirements are satisfied herein.

(1) **There is a substantial likelihood of success on the merits.**

(a) **The August 21, 2007 letter from George Skibine constitutes final agency action.**

The August 21, 2007 letter from Mr. Skibine constitutes "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 704[1] and is actionable as such under 5 U.S.C. §§ 702 and 706.

In deciding whether a biological opinion issued by the Fish and Wildlife Service was a final agency action, the Supreme Court in Bennett v. Spear, 520 U.S.154 (1997), identified the two conditions that must be met:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the

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[1] Under the APA, a policy statement is a "rule" and actionable as such by an aggrieved party. The term "rule" is defined at 5 U.S.C. § 551(4) as: "...the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.... (emphasis supplied).

> "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U.S. 103, 113, 92 L. Ed. 568, 68 S. Ct. 431 (1948)*--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71, 27 L. Ed. 2d 203, 91 S. Ct. 203 (1970)*.

Bennett at p. 177-178.

In applying these conditions in determining whether BIA letters determining a tribal leadership issue were final agency action, the district court in Tarbell v. Department of Interior, 307 F. Supp. 409 (N.D.N.Y. 2004) found the letters were final agency action because the matter addressed by the letters were on "…a matter entrusted to BIA expertise, and was expected to have concrete legal significance to the [Tribe]." Tarbell at p. 427.

The letter from Mr. Skibine meets the two conditions set forth by the Supreme Court in Bennett. First, the letter states the decision was made to make the Part 151 determination prior to the two-part IGRA determination. It is not of a preliminary nature. The letter communicates an actual agency decision. As held by the Court in Tarbell, supra, the letter addresses a matter within the BIA's expertise and was expected to have concrete legal significance to the Tribes.

(b) **Mr. Skibine's letter fails to meet the requirements set by the Supreme Court in State Farm.**

Mr. Skibine's letter takes the position that there was no change in policy in deciding to make the Part 151 decision prior to the two-part determination. As has been set forth in the Affidavit of Mr. Adler and its attached exhibits, this is not the case. Having denied that a change in policy and procedure took place, the Department of the Interior has hopelessly failed to comply with the requirements set out by 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) the requirements for an agency when it wants to change the direction of a policy embodied in existing policy or procedure.

In State Farm, the Court held that the National Highway Traffic Safety Administration's rescission of a motor vehicle safety standard regulations was arbitrary and capricious because the agency failed to give an adequate basis and explanation for rescinding the regulation. In reaching this conclusion, the Court reasoned that an agency decision would be arbitrary and capricious:

> if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

462 U.S. at 43.

Furthermore, the Court held that when an agency subsequently wants to change settled policies, it has an obligation to supply a reasoned analysis for the change beyond what may have been required when the policy was first issued. 462 U.S. at 44.

The U.S. Court of Appeals for the Second Circuit recently followed State Farm in Yale-New Haven Hospital et al. v. Leavitt, 470 F.3d 71 (2nd Cir. 2006) ("Yale").

In Yale, the Secretary of Health and Human Services ("HHS") denied reimbursement for Medicare coverage filed by the hospital for treatment involving investigational cardiac devices provided to some 48 patients. The Secretary denied reimbursement on the ground that the devices had not received "premarket approval" from the FDA. The District Court reversed the Secretary's denial of the claims. This was affirmed by the Court of Appeals.

Under a 1980 HHS regulation, reimbursement was authorized for the purchase of investigational devices even though they had not obtained premarket approval. However, in 1986, HHS issued a Medicare Reimbursement Manual which provided that only medical devices which had received FDA premarket approval for commercial distribution were covered under Medicare. This was identified in the 1986 Manual as a "New Policy." Yale, supra at 74.

The underlying lawsuit arose out of efforts by the Secretary to recover $1.5 million paid to reimburse Yale for Medicare claims submitted between 1994 and 1995 with respect to devices which had not received premarket approval from the FDA.

The District Court held that the 1986 Manual Provision was "interpretive" and, as a result, was not subject to the procedures governing notice-and-comment rule making. Yale, supra at 77. However, the Court further held that: (1) the 1986 Manual Provision was entitled to little deference because of reliance on FDA premarket approval constituted a shift from historical practice that the Secretary did not adequately explain; (2) there was an inadequate explanation of the reasons for following the premarket approval requirement and therefore the decision was arbitrary and capricious; and (3) the devices in question, although not having received premarket approval, had the requisite level of safety and acceptance in the medical community.

On appeal, Yale challenged the validity of the 1986 Manual Provision on the grounds that: (1) despite the Secretary claiming it was only "interpretative," it was actually a legislative rule that was void because its promulgation did not comply with the notice-and-comment rule making requirements of the APA; (2) it was an impermissible interpretation of the Medicare Act; and (3) in promulgating the 1986 Manual Provision, the Secretary acted arbitrarily and capriciously (relying on State Farm). The Court in Yale assumed for purposes of its decision that it was interpretative. *Yale*, supra at 79, n.7.

The Court of Appeals, following State Farm, held that the 1986 Manual Provision was adopted in a manner which was arbitrary and capricious. Yale, supra at 79. According to the Court:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Yale, supra at 79.

The Court continued that its review was "particularly searching" in that the record indicated that the 1986 Manual Provision "altered historical practice." Id. The Court continued that a settled course of behavior embodied the agency's informed judgment that, by pursuing that course, it was carrying out the policies committed to it by Congress. Id. Accordingly, following State Farm, the Court held that an agency when changing its course by rescinding a rule is ". . .obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Id.

Significantly, in promulgating the 1986 Manual Provision, the Secretary of the Department of Health and Human Services did not provide any contemporaneous explanation as to the reasons or rationale for the changes. The Secretary argued that the 1986 Manual merely expressed Medicare's de facto historical practice, " . .and that therefore nothing required explanation." Yale, supra at 80. However, the Second Circuit rejected this argument and held that the Secretary had acted arbitrarily and capriciously under 5 U.S.C. § 706(2)(A) in promulgating the 1986 Manual Provision and it was therefore invalid and unenforceable. Yale, supra at 86. For this reason, the Court of Appeals remanded the matter to the District Court with instructions to remand it to the Secretary for proceedings consistent with the Court's opinion. The Court further instructed that on remand, Yale's claims were to adjudicated under the rules and procedures in place at the time Yale submitted its claims without reference to the 1986 Manual Provision. Yale, supra at 87.

The pertinent facts presented in Yale are quite similar to those presented herein with respect to the August 21, 2007 letter from George Skibine which proffered no rationale for the change in historical practice, claiming that no change had taken place. A similar result is suggested.

In a more recent decision in the Second Circuit, the Court held (following State Farm and Yale) that an agency's decision to change its policy will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision. Fox TV Stations v. Federal Communications Commission, 489 F.3d 444, 457 (2nd Cir. 2007), petition for cert. filed (U.S. Nov. 1, 2007) (07-582).

The D.C. Circuit Court of Appeals has rendered opinions which are consistent with Yale. In Ramaprakash v. Federal Aviation Administration, et al., 346 F.3d 1121, 1124 (D.C. Cir. 2003) the Court held that:

> Our review under the APA is highly deferential, but agency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (citations omitted). An agency's failure to come to grips with conflicting precedent constitutes "an inexcusable departure from the essential requirement of reasoned decision making." (citation omitted).

Ramaprakash has been followed by the D.C. Circuit in recent decisions. New York Cross Harbor Railroad v. Surface Transportation Board, et al., 374 F.3d 1177, 1183 (D.C. Cir.

2004); Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 203 (D.C. Cir. 2007), reh'g. en banc. denied, 2007 U.S. App. Lexis 23114 (D.C. Cir. Sept. 28, 2007).

Finally, and of some real significance to the Injunctive relief requested herein, the United States District Court for the Northern District of California granted a Preliminary Injunction within the last two months based upon Homeland Security's failure to explain a change in its prior position. American Federation of Labor, et al. v. Michel Chertoff, et al., 2007 U.S. Dist. Lexis 75233 (N.D. Cal. Oct. 10, 2007). In that case, the Court held that Homeland Security had changed course but did not supply reasoned analysis for the change and therefore ran afoul of State Farm. American Federation of Labor, supra at **27-29.

(c) **The D.C. Circuit itself has recognized that the Department of the Interior's established policy is to make the Section 20 determination before deciding whether land should be taken under trust under Part 151.**

The D.C. Circuit in Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460 (D.C. Cir. 2007) addressed a situation which is analogous to the issues presented herein. At issue was the authority of Secretary Kempthorne to designate land for the benefit of an Indian tribe which fell within the "initial reservation" exemption of Section 20. In finding that the Secretary had such authority, the court opined that:

> The Secretary's determination that the "initial reservation" exception applied to the Sackrider property was intended to have the force of law, as it formed the basis for the Secretary's decision under the IRA to acquire the property in trust for the Band.[2]

[2] The IRA refers to the Indian Reorganization Act, 25 U.S.C. § 465, and is the same authority for Department of the Interior to promulgate 25 C.F.R. Part 151.

Exposing Truth About Casinos at pp 466-67.

(d) **The Department of the Interior's Action Is Invalid in That It Is In Conflict With IGRA.**

The Department of Interior has run afoul (or basically ignored) State Farm and the cases following it. An agency's action must be set aside if it is not consistent with the statute adopted by Congress. 5 U.S.C. §§ 706(2)(A) and (C). An agency's interpretation of the governing statute is reviewed under the familiar two-part test set out in Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). The first step requires the Court to determine if Congress' intent is clear. Id. at 842. "[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of congress." Id. at 842-43. In ascertaining Congressional intent, Courts look to the text, to the legislative purpose and history, and to the overall structure of the act. Gonzalez v. Oregon, 546 U.S. 243 (2006). "If the intent of Congress is clear, that is the end of the matter." Chevron, 467 U.S. at 842, and the Courts set aside that an agency action that is not consistent with that intent.

In the case at bar, Congressional intent is clear. The standards set forth in the two-part determination under IGRA are the standards to be used in determining whether or not a Tribal applicant for an off-reservation casino has satisfactorily demonstrated the merits of the proposed casino. The Senate Committee on Indian Affairs Report, in describing IGRA's exceptions, made it clear that they were meant to set "forth policies with respect to lands acquired in trust after [IGRA's] enactment. S. Rep. No. 100-446, at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090. The Part 151 regulations are not to be used for that purpose.[3]

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[3] By way of analogy, when there are two statutes arguably in conflict with each other, the later enacted statute prevails and will trump any conflict with the earlier statute. State of Rhode

Given that the Department of the Interior's decision to make the Part 151 determination prior to the two-part IGRA determination is contrary to IGRA itself, it is not entitled to Chevron deference. Gonzalez v. Oregon, supra.

For similar reasons, the Department of the Interior's decision to make the Part 151 determination first runs afoul of the Supreme Court's decision in State Farm in that ". . .the agency has relied on factors which Congress has not intended to consider. . . ." State Farm, supra at 43. Just as the Government itself so articulately set out in its brief filed in the Sokaogon Chippewa litigation at 22 (Adler Aff., ¶ 13, Exhibit F), the Department of the Interior cannot exercise its authority under 25 U.S.C. § 465 unless and until an applicant tribe has satisfied the standards of the two-part determination in IGRA. It is axiomatic that this cannot take place unless and until the Department of the Interior has actually made the two-part determination.

(e) **Even if there is any arguable ambiguity (which the Plaintiff believes there is not), as to whether the two-part determination should be made before or after the Part 151 decision, any such ambiguity must be interpreted in the light most favorable to the St. Croix Tribe.**

IGRA was enacted by Senate bill S. 555. After S. 555 was passed by the Senate, it was considered by the House of Representatives. The floor manager for this legislation in the House of Representatives was Congressman Morris K. Udall, who was the then Chairman of the House Committee on Interior and Insular Affairs.

In asking the House to pass S.555, Chairman Udall stated in his opening statement his intent as to how the canons of construction would be applied to this legislation:

Island v. Narragansett Indian Tribe, 19 F.3d 685, 704-05 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994).

> Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out this legislation, would apply the Supreme Court's time-honoring rule of construction that any ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

134 Cong. Rec. H8146, H8153 (Sep. 26, 1988).

The Supreme Court's time-honoring rule of construction to which Chairman Udall referred has held that statutes passed for the benefit of Indian tribes are to be liberally construed and ambiguous terms must be interpreted in a light most favorable to the Indian tribes. This canon of construction is set forth in Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 S. Ct. 40, 42 (1918), citing Choate v. Trapp, 224 U.S. 665, 32 Sup. Ct. 565, 569 (1912).

(f) **The Defendants' Actions Constitute a Breach of Its Trust Obligations to the St. Croix Tribe as well as Other Tribes Having Similar Fee-to-Trust Applications Which Are Pending.**

The actions by the Defendants, in unlawfully deciding to make the Part 151 determination prior to the two-part determination and the anticipated denial of the Beloit (and other) pending off-reservation casino applications is in violation of the trust responsibilities owed by it to Indian tribes. United States v. Mitchell, et al., 463 U.S. 206, 226 (1983); Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al., 240 F.3d 1081, 1099 (D.C. Cir. 2001). In substance, Secretary Kempthorne and Assistant Secretary Artman have totally revamped the process by which fee-to-trust applications will be decided so as to have a mechanism by which to carry out, upon information and belief, Secretary Kempthorne's personal bias against off-reservation casinos and their expansion in total disregard of the rights and interests of the effected Indian tribes who are attempting to improve their Tribal self-determination and economic development.

(2) The St. Croix Tribe Would Suffer Irreparable Injury If The Requested Injunction is Not Granted.

Should the St. Croix Tribe's requested Injunction not be granted, the BIA, during the next several weeks will assuredly send letters to it and the Bad River Band denying, under Part 151, the Beloit fee-to-trust application. Adler Aff., ¶ 15. The denial of this application would mean the loss of approximately $1 million which the St. Croix Tribe has spent to date in its efforts to have a Beloit casino.[4] Moreover, the denial of the application would mean that the St. Croix Tribe would be deprived of the anticipated revenues from the Beloit casino, its planned hotel and other related Tribal-owned businesses. Courts have recognized that these circumstances constitute irreparable harm. See Cabo Distrib. Co., Inc. v. Brady, 821 F.Supp. 582, 600 (N.D. Cal. 1992) (issuing preliminary injunction where business would suffer financial losses and have no claim for damages against Government defendant for such losses). In National Wildlife Federation v. Burford, et al., 835 F.2d 305(D.C. Cir. 1987), the Court of Appeals affirmed a Preliminary Injunction against the Department of the Interior. The Court stated at 325:

> . . .Mountain States appears to misunderstand the purpose of the preliminary injunction; it is designed precisely to prevent the Secretary from exercising his discretion in circumstances in which it likely would lead to irreparable injury.

[4] This includes expenses of environmental consultants, lawyers and substantial amounts paid to a local developer as earnest money payments on the land.

(3) <u>The Issuance of a Preliminary Injunction Will Not Cause Substantial Harm to the Department of the Interior</u>.

The issuance of a Preliminary Injunction, until the trial on the merits, should not cause substantial harm to the Department of the Interior. The Department of the Interior, during the Presidency of George W. Bush, has operated for almost seven years using established procedure by which the two-part determination would be made before the Part 151 decision. Moreover, on information and belief, most, if not all, of the pending off-reservation casino applications at the BIA's Central Office have been lodged there for many months. Accordingly, a further delay until this matter is resolved cannot prejudice the Government.

In sum, the preservation of the status quo until this matter can be decided on the merits should not cause any significant harm to the Department of the Interior.

(4) <u>The Public Interest Will Be Served by the Issuance of a Preliminary Injunction</u>.

The public interest weighs strongly in favor of the issuance of a Preliminary Injunction so that time is allowed for a thorough judicial review on the merits of the issues raised herein. <u>National Treasury Employees Union v. U.S. Department of Treasury</u>, 838 F.Supp. 631, 640 (D.D.C. 1993) ("The preservation of. . .the legality of the process by which government agencies function certainly weighs heavily in the public interest.")l <u>Clarke v. Ofc. of Fed. Housing Enterp. Oversight</u>, 355 F.Supp.2d 56, 66 (D.D.C. 2004) ("There is a substantial public interest in ensuring that [the agency] acts within the limits of its authority.")

Conclusion

For the foregoing reasons, the St. Croix Tribe submits that this Court should enter a Temporary Restraining Order and, thereafter, a Preliminary Injunction so that the status quo is preserved until there can be a hearing and adjudication on the merits.

Respectfully submitted,

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