

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA



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| ST. CROIX CHIPPEWA INDIANS OF | : | Docket No. CV07-2210 |
| WISCONSIN,                    | : | (RJL)                |
|                               | : |                      |
| Plaintiff,                    | : | December 12, 2007    |
|                               | : |                      |
|                               | : | 2:30 p.m.            |
| v.                            | : |                      |
|                               | : |                      |
| DIRK KEMPTHORNE, ET AL.,      | : |                      |
|                               | : |                      |
| Defendants.                   | : |                      |

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TRANSCRIPT OF TEMPORARY RESTRAINING ORDER  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

|                    |   |
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| For the Plaintiff: | GERALD YAMADA, ESQ.<br>ROBERT ADLER, ESQ. (On telephone)<br>O'Connor & Hannan, LLP<br>1666 K Street, NW<br>Washington, DC 20006 |
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| For the Defendants: | KRISTOFOR R. SWANSON, ESQ.<br>SARA ELIZABETH CULLEY, ESQ.<br>U.S. Department of Justice<br>601 D Street, NW<br>Washington, DC 20004 |
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| ALSO PRESENT: | George T. Skibine |
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Court Reporter:

PATTY ARTRIP GELS, RMR

Official Court Reporter

Room 4700-A, U.S. Courthouse

Washington, D.C. 20001

(202) 962-0200

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## P R O C E E D I N G S

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COURTROOM DEPUTY: Your Honor, this is the matter of St. Croix Chippewa Indians of Wisconsin versus Dirk Kempthorne, et al. Civil Action 07-2210. The matter before the Court is a Temporary Restraining Order.

Counsel come forth and state your appearances for the record, please. Mr. Adler.

MR. ADLER: Yes, I am here.

THE COURT: State your appearance for the record.

MR. ADLER: Robert Adler, counsel for the St. Croix Chippewa Indians of Wisconsin.

MR. YAMADA: Gerald Yamada, law firm of O'Connor & Hannan representing the St. Croix Chippewa Indians of Wisconsin.

THE COURT: Welcome.

MR. SWANSON: Christopher Swanson, Department of Justice, Natural Resources Section representing the Defendants.

THE COURT: Welcome.

MS. CULLEY: Sara Culley also of the Department of Justice here on behalf of the Defendants and with us at counsel table is George Skibine, agency counsel.

THE COURT: Welcome. All right, counsel, first of all, I wanted to note for the record, although I do not believe I have a conflict of interest, I wanted to note in an abundance of caution that years ago, and I stress years, long before I was on this bench so back in the 1999, 2000 time frame, I did in

1 private practice have an occasion to represent an individual who  
2 was a lobbyist in the field of Indian gaming; and it was in  
3 connection with the Babbitt independent counsel inquiry.

4 He was one of the witnesses that was called in in his  
5 capacity as a former Chief of Staff to the Indian Gaming  
6 Commission, a Mr. Daisy. I have only the faintest recollection  
7 of what the facts were surrounding his testimony that I prepared  
8 for, reviewed the documents that I received copies of from the  
9 independent counsel's office, and represented him at the time.

10 It did have something, in vague terms, that's all I can  
11 recall, to deal with Wisconsin and Indian gaming in Wisconsin.  
12 I am not even sure if it was this particular matter here today  
13 eight years later, nine years later; but in a hyperabundance of  
14 caution I wanted to put it on the record and let the parties  
15 know that I did have a vague recollection of that.

16 I didn't represent the tribe itself, of course, who is  
17 a party in this case. So I wanted to put that on the record and  
18 give both sides an opportunity, not only to hear it, but to  
19 raise any concern or objection they may have with my going  
20 forward with the case in light of that prior involvement albeit  
21 tangential and removed, but nevertheless, as I said, in an  
22 abundance of caution.

23 So having brought that to your attention and given you  
24 a chance to at least digest it, think about it, Mr. Yamada, does  
25 the Plaintiffs have any issue or concern relating to the Court

1 remaining involved in the case?

2 MR. YAMADA: As I understand it, the controversy  
3 occurred prior to both Mr. Adler and I joining O'Connor &  
4 Hannan. The St. Croix as many Indian tribes were involved in  
5 the controversy as well as O'Connor & Hannan. We do not believe  
6 that that controversy is related at all to the one before this  
7 Court.

8 We have absolutely no objection to you continuing and  
9 having you preside over this case. Thank you, your Honor.

10 THE COURT: All right. Thank you, Mr. Yamada. How  
11 about for the Government, Mr. Swanson?

12 MR. SWANSON: We also have no objection, your Honor.

13 THE COURT: Very good. All right. Well, then based on  
14 that and again my own conclusion independent actually of the  
15 parties, I don't believe it poses any conflict so the Court will  
16 stay with the case under the circumstances.

17 So, now, we are here today really it is kind of a  
18 multi-purpose get-together. First of all, in this District it  
19 is common that the pleadings and TROs and PIs Preliminary  
20 Injunctions are styled sometimes in a way that it is not clear  
21 whether the Plaintiffs actually needs a TRO now or is it the  
22 Preliminary Injunction that they are seeking to achieve under  
23 the circumstances.

24 So I usually hold this type of a hearing to hear from  
25 both sides as to, first of all, as to whether this is a case

1 where a TRO is really apposite and, if not, to set a briefing  
2 schedule so that each side can have a chance to, well,  
3 particularly in the case of the Defendants, the Defendants  
4 usually need an opportunity to respond in writing to the  
5 pleadings that are filed by the Plaintiff under the  
6 circumstances.

7 So I wanted to give each side a chance to be heard on  
8 those issues and to discuss with you any anything relating to a  
9 briefing schedule here so that we could give everyone a chance  
10 to put their thoughts on paper and then I can read it and digest  
11 before we have the oral argument on the Preliminary Injunction  
12 case.

13 So, Mr. Yamada, let me start with you. You are the  
14 moving party after all. Is this a case in your judgment that  
15 really lends itself to the necessity of the extreme remedy of a  
16 Temporary Restraining Order or is this more a PI kind of case  
17 where we can have a briefing schedule, then have a hearing on  
18 the PI.

19 MR. YAMADA: Your Honor, we believe that an Temporary  
20 Restraining Order is needed. The reason for that is we  
21 understand that the Interior Department is on the verge within  
22 the next two weeks of issuing letters based upon the new policy  
23 and that those letters in fact would be denials of the pending  
24 applications.

25 THE COURT: Okay. And if you can say, is your basis

1 for believing that that will happen that imminently in the next  
2 two weeks, is that based on public information; or is that based  
3 on some non public information that you can't even really cite  
4 to authoritatively?

5 MR. YAMADA: The information comes with discussions  
6 with the Interior Department officials. Mr. Adler can speak  
7 perhaps more clearly to those since he was involved in the  
8 meetings, but again it is not published information in terms of  
9 the time frame.

10 THE COURT: So it is not something I could just go on  
11 the web and get it?

12 MR. YAMADA: That's correct.

13 THE COURT: Okay. Now, sometimes in situations of the  
14 kind you are alluding to here, one way to alleviate the  
15 necessity of a Temporary Restraining Order decision and argument  
16 is to just simply inquire as to whether the particular agency is  
17 in a position or not to forestall any decision pending the  
18 arguments for the Preliminary Injunction and the decision on the  
19 Preliminary Injunction.

20 I don't know if, Mr. Swanson, you would be in a  
21 position today to make any representations along those lines,  
22 but why don't we give you -- have a seat, Mr. Yamada, and then  
23 we will see what Mr. Swanson has to say about whether or not the  
24 agency is in a position to hold off on this decision that Mr.  
25 Yamada believes is imminent until we have had a chance to have

1 the argument on the PI and the Court to rule on the PI because  
2 the Court has to obviously rule expeditiously on the PI.

3 MR. SWANSON: Actually I can speak directly to that.  
4 In our discussions with the agency this morning in preparation  
5 for this hearing, they actually assured us that there will not  
6 be, and they would be willing to stipulate to this if necessary,  
7 there will be no decision on St. Croix's part 151 determination  
8 any sooner than January 31st of 2008 if that helps.

9 THE COURT: All right. Well, if that were the case,  
10 then, Mr. Yamada, I mean I would be scheduling a hearing on the  
11 PI in this case, well, certainly within the next few weeks.  
12 That would get us to sometime at the very beginning of January  
13 probably because of the holidays and everything in there and  
14 that would give the Court a matter of certainly weeks to not  
15 only issue a decision but get it out to the public domain.

16 Mr. Swanson, do you know if that could be, in order to  
17 accommodate the Court, that could be pushed back a little more  
18 than that so that I have a little extra time to digest  
19 everything and issue --

20 MR. SWANSON: After that January 31st date the agency  
21 would be willing to agree to give Plaintiffs 21 days' notice of  
22 any imminent decision on their part 151 application.

23 THE COURT: Before they acted?

24 MR. SWANSON: Before they act, correct.

25 THE COURT: So the Court would obviously be privy to

1 that notice as well, right? You would inform the Court  
2 immediately?

3 MR. SWANSON: Correct.

4 THE COURT: Well, certainly I think I can represent  
5 very confidently that if they gave the notice on the first of  
6 the month of February, certainly by the 21st of the month, the  
7 Court would have ruled. I mean that's a total of seven weeks.  
8 There is no doubt in my mind that hearing the argument the  
9 first, say, around the first week of the year that I would be  
10 able to not only hear the arguments, but issue my opinion well  
11 before, I would like to think, well before the earliest possible  
12 date under that scenario which would be roughly the 21st of the  
13 month.

14 MR. YAMADA: Your Honor.

15 THE COURT: Come on up, Mr. Yamada.

16 MR. YAMADA: Your Honor, the stipulation that the  
17 Government offered is specific to the St. Croix tribe. It is  
18 our understanding that there are at least two, perhaps three  
19 other applications pending in the central office that are in the  
20 same position as the St. Croix tribe.

21 I think the stipulation is acceptable if the Government  
22 is willing to stipulate that no decisions on any of the pending  
23 applications will be made using 151 first before the part two  
24 determination.

25 THE COURT: Well, I see your point. In other words,

1 obviously if they limited their decision only to your  
2 application but then granted somebody else's application, that  
3 would effectively be a denial of your application, would it not,  
4 Mr. Yamada?

5 So effectively they would have to agree that all  
6 pending applications for this issue would have to be on hold,  
7 wouldn't they, Mr. Swanson.

8 MR. SWANSON: I would respectfully disagree, your  
9 Honor. My understanding of the process and, if you would like,  
10 I can confer with my agency counsel, is that each of these  
11 applications is reviewed independently. So issuing one  
12 determination on a tribe who is not here today obviously does  
13 not necessarily impact how the determination would come out on  
14 St. Croix's application.

15 Furthermore, this goes a little bit to --

16 THE COURT: So St. Croix, in theory anyway, St. Croix's  
17 application could be granted in their favor even if between now  
18 and the granting in their favor somebody else's application  
19 would also be granted?

20 MR. SWANSON: Correct.

21 THE COURT: Mr. Yamada, is that inconsistent with your  
22 understanding of the regulations and the law?

23 MR. YAMADA: Well, each application, of course, is  
24 judged on its own merits, but what is at issue in this case and  
25 the basis of our request for the TRO and the Preliminary

1 Injunction is the newly issued policy that was issued in August  
2 of this year. That policy is inconsistent or doesn't follow the  
3 Administrative Procedures Act.

4 We think it is arbitrary and capricious so to have the  
5 Interior Department go forward, implement that policy applying  
6 it to other tribes and then at the time when it comes time to  
7 consider our application, to use those as precedence I think  
8 would put us in a very difficult position.

9 THE COURT: All right. Mr. Swanson, would it be  
10 helpful to you to have a chance to take a recess for a few  
11 minutes and talk to your agency counsel about this situation  
12 that Mr. Yamada is concerned about to see if it may be mutually  
13 resolvable I mean this afternoon, the next, say, half hour?

14 MR. SWANSON: Yes, I would be happy to, your Honor.

15 THE COURT: We don't need to reduce it at this point to  
16 writing if there could be agreement in principle between the  
17 parties that would essentially freeze the playing field until  
18 the Court had a chance to rule on the PI, I think that would  
19 essentially accomplish the objective that we are trying to get  
20 here under these circumstances.

21 I mean obviously the Court can and will rule on a TRO  
22 if it has to, but it tries its best to limit rulings of that  
23 kind only when it is absolutely a necessity to do so.

24 So why don't we do this. Why don't we take a brief  
25 recess. Let Mr. Burwell know when you think you are ready for

1 me to come back and have a chat with Mr. Yamada and see if this  
2 is something that may be resolvable.

3 I certainly think I can reach and issue my ruling by  
4 the 21st of the month of February at the earliest and that would  
5 give the agency the time to, if it needed to, to move forward  
6 expeditiously right after the 31st of January. So we will take  
7 a brief recess.

8 (Recess.)

9 THE COURT: All right. Counsel, you have had a chance  
10 to discuss this. Mr. Swanson, why don't you give me a little  
11 update on where things stand at the moment anyway.

12 MR. SWANSON: Yes, your Honor. When we recessed, we  
13 were talking about the potential of stipulating not to make  
14 decisions on 151 applications pending from other tribes outside  
15 of St. Croix, and the agency is uncomfortable with that  
16 stipulation for a few reasons.

17 First of which being simply the fact that that involves  
18 parties that aren't here today and the breadth of it I guess is  
19 the issue which is paralleled in the Plaintiff's proposed --

20 THE COURT: How could it hurt the St. Croix tribe from  
21 your vantage point?

22 MR. SWANSON: How could it hurt the --

23 THE COURT: Yes.

24 MR. SWANSON: We are not sure that it could. I think  
25 the logic gap in there is that, if the tribe is claiming that

1 this change in process is invalid under the APA, that argument  
2 is still in place even if these other decisions have been made.

3 THE COURT: I mean frankly if the Court were to rule in  
4 their favor, wouldn't that put the agency in the unenviable  
5 position of having to redo what it had already done during this  
6 interregna?

7 MR. SWANSON: I am sorry, I couldn't hear you. Redoing  
8 what?

9 THE COURT: Wouldn't this put the burden on the agency  
10 to redo what they had already done as it relates to applications  
11 during this interregna?

12 MR. SWANSON: Yes, it would somewhat restructure the  
13 process. I should say that of the pending applications now, no  
14 determination has been made whether 151 or the two-step is going  
15 to be made first. The guidelines and things out to the region  
16 are prospective and not retrospective.

17 THE COURT: One would think it would be in the agency's  
18 interest to wait as well.

19 MR. SWANSON: The agency's what?

20 THE COURT: It would be in the agency's interest to  
21 wait to act on any application until it got some signal from  
22 this Court as to whether or not the current system does or  
23 doesn't withstand judicial review because, if they go forward  
24 under the current system between now and the ruling on the St.  
25 Croix case and it should come to pass that the system is somehow

1     legally defective, they would have to go and redo consistent  
2     with those defects the applications they acted on between now  
3     and the time of St. Croix, wouldn't they?

4             MR. SWANSON: That is correct, your Honor, but I think  
5     that, again, that assumes there has been some final agency  
6     action in this change of process. We are starting to creep a  
7     little bit into the likelihood of success here, but our position  
8     is that this August 21st letter the Plaintiffs rely on as the  
9     final agency action is not an agency action.

10            And that was very evident this morning in talking on  
11     the phone with the agency that this by to means has been settled  
12     one way or the other.

13            THE COURT: Okay. So at this point it is willing to  
14     suspend on the St. Croix application until the end of January  
15     and give it a three-week notice thereafter --

16            MR. SWANSON: Correct.

17            THE COURT: -- prior to any action on its application?

18            MR. SWANSON: Correct.

19            THE COURT: Okay.

20            MR. SWANSON: Thank you.

21            THE COURT: Very good. Mr. Yamada.

22            MR. YAMADA: Your Honor, in terms of the St. Croix  
23     position, our position is basically -- is that the August 21st  
24     letter is in fact final agency action, and it is fatally flawed  
25     because it is inconsistent with Congressional intent. Now,

1 that's issues for the PI and subsequent hearings.

2 In terms of the current issue before us in terms of the  
3 scope of the stipulation, our primary concern is that the agency  
4 goes forward, denies applications using 151 first, and then  
5 using that as precedence to justify their policy in this  
6 litigation.

7 THE COURT: But they wouldn't be able to do that as a  
8 practical matter because if the Court, in theory, if the Court  
9 were to rule in your favor between now and say February 21st,  
10 then they couldn't use it for any precedential value against you  
11 because what the Court would be doing is ordering them to  
12 reevaluate and restructure their current system.

13 So there would be no precedential value against your  
14 client for any application acted on in the interim. And, of  
15 course, as to your client, of course, there wouldn't be any  
16 action until the Court had ruled anyway.

17 MR. YAMADA: Right. In terms of the scope of the  
18 stipulation, we think it protects our client's interests. We do  
19 not represent the other tribes so --

20 THE COURT: Right.

21 MR. YAMADA: -- under these circumstances the  
22 stipulation is acceptable to us.

23 THE COURT: All right. Very good. So what we will do  
24 is we will just focus on setting a schedule for the briefing and  
25 the hearing on the PI today, and the Court will proceed on the

1 assumption that you will finalize in writing and hand it in to  
2 the Court, Mr. Swanson, with your pleading or sooner. I mean as  
3 soon as you can really that -- but the representation has been  
4 made on the record and the Court accepts it for what it is  
5 worth.

6 So, you know, the Court expects conduct consistent  
7 therewith, and I have no reason to question that that would be  
8 the case. So it is an oral stipulation accepted at this point,  
9 but put it in writing just for the sake of everyone's protection  
10 and make sure Mr. Yamada sees it before it is finalized. That  
11 would be a good thing lest there be any issues of that kind.

12 Now, the Court is mindful it is the holiday season.  
13 How much time would the Government like to respond to the  
14 pleadings of the Plaintiff? Is two weeks sufficient under the  
15 circumstances?

16 MR. SWANSON: Yes, your Honor. It is.

17 THE COURT: Very good. That gets us to -- let's see,  
18 you got these yesterday I assume? Is that a fair statement or  
19 maybe Monday?

20 MR. SWANSON: Yes, I believe the complaint was filed on  
21 the 7th, and we came into the office on Monday and it was there.

22 THE COURT: All right. So we will say you were on  
23 notice as of the 24th and then for your reply there, Mr. Yamada,  
24 again I have to take into consideration the Christmas holiday  
25 season there, but would it be acceptable by the fourth? Would

