

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

THE ST. CROIX CHIPPEWA)
INDIANS OF WISCONSIN)
)
Plaintiff,)
)
v.)
)
DIRK KEMPTHORNE, et al.)
)
Defendants.)
_____)

Civ. No. 1:07-cv--02210-RJL
Next Scheduled Court Deadline:
Federal Defendants' Response to
Plaintiff's Motion to Seal on
February 1, 2008

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 ripener.

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,

/s/ Robert M. Adler

Robert M. Adler, Bar #62950
Gerald H. Yamada, Bar #194092
O'CONNOR & HANNAN, L.L.P.
1666 K Street, N.W., Suite 500
Washington, D.C. 20006-2803
(202) 887-1428
Fax: (202) 785-4047
Radler@oconnorhannan.com
Gyamada@oconnorhannan.com

*Attorneys for the St. Croix Chippewa
Indians of Wisconsin*

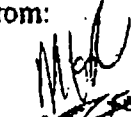
Of Counsel:
Andrew Adams, III
St. Croix Chippewa Indians of Wisconsin
24663 Angeline Avenue
Webster, WI 54893


Dated: January 29, 2008


EXHIBIT A

Indian Gaming Paper

Date: February 20, 2004

From:  Michael Rossetti
Counselor to the Secretary

 Aurene Martin
Principal Deputy Assistant Secretary-Indian Affairs

 Christopher Chaney
Associate Solicitor-Division of Indian Affairs

 Edith Blackwell
Deputy Associate Solicitor-Division of Indian Affairs

I. Purpose of Indian Gaming Paper

Secretary Norton has asked 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 Indian reservation, so-called "far-flung lands."

In addition to discussing this issue with the Secretary, it has been the subject of numerous discussions during the regular Indian gaming meetings which are chaired by the Office of the Assistant Secretary for Indian Affairs and include the Bureau of Indian Affairs' Office of Indian Gaming and the Office of the Solicitor. Given the importance of a thoughtful analysis of the issues raised by off-reservation gaming under existing law, the then Acting Assistant Secretary for Indian Affairs, the Counselor to the Secretary, the then Acting Associate Solicitor for the Division of Indian Affairs, the Chairman of the National Indian Gaming Commission and experienced gaming and trust acquisition staff from the Office of the Assistant Secretary for Indian Affairs, the Bureau of Indian Affairs and the Division of Indian Affairs held a two-day session on the topic. The Chairman of the National Indian Gaming Commission participated in the discussions regarding off-reservation gaming and concurs with the contents of this paper.

As Appendix A shows, pending before the Department are about a dozen proposals for two-part determinations for off-reservation casinos. These proposals are in various stages of development. The range in distance between the existing reservation and the proposed gaming site is from a few miles to over a thousand miles. Many have active community support. Further, some or all of the two-part determination decisions may ripen for review by the Department well before the State and the tribe have entered into a compact.

The statutes at play, the Indian Reorganization Act of 1934¹ (IRA) and the Indian Gaming Regulatory Act² (IGRA) require that the Department make fact-specific determinations for each acquisition. The former provides legal authority for the Secretary to receive lands in trust on behalf of tribes and the latter governs gaming on Indian lands. The purpose of this briefing note is to step back from fact-specific decision-making and analyze the interplay between these federal laws and the policies that they are based upon.

[Intentionally deleted due to the Government's assertion of the deliberative process privilege, 5 U.S.C. § 552(b)(5)]

II. IGRA: The Creation of Federal Indian Gaming Policy by Congress

Generally, Congress has plenary power over Indian affairs.³ In the area of Indian gaming, Congress exercised that power when it enacted IGRA⁴ which embodies federal Indian gaming policy. And, unless Congress enacts amendments to IGRA, the Department must anchor its gaming policy in IGRA as it exists today.

In crafting and passing IGRA, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . [and] Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming

¹25 U.S.C. § 460 *et seq*

²25 U.S.C. § 2701 *et seq*

³ Congress possesses "exclusive and plenary power" to legislate with respect to Tribes and their members. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979); *accord e.g. Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Such power "is drawn both explicitly and implicitly from the Constitution itself" – in particular, from its grants to Congress of the power "[t]o regulate Commerce . . . with the Indian Tribes," Art. II, § 2 Cl. 2. *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (explaining that the Constitution, "by declaring treaties already made . . . to be the supreme law of the land, . . . admits [the Indian nations'] rank among those powers who are capable of making treaties").

⁴25 U.S.C. § 2701 *et seq*

activity."⁵ Congress also declared that the purpose of its Indian gaming policy is "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."⁶

Beyond its broad policy pronouncements, there is scant legislative history regarding the portion of IGRA that envisions gaming on Indian lands that are a distance from established reservations.⁷ Thus, other than relying upon the plain language and structure of the statute, one may review the context of the debate at the time that IGRA was enacted to glean Congressional intent regarding off-reservation Indian gaming policy.

IGRA was enacted in the wake of *California v. Cabazon Band of Mission Indians*⁸ which held that the State of California had no authority under Public Law 280 to enforce its bingo and card-game statutes on Indian reservations because such laws are regulatory and not prohibitory. For three years prior to that decision, Congress entertained bills aimed at regulating gaming on Indian reservations. None of these bills passed because agreement could not be reached between interested states and Indian tribes on the type of games that Indian tribes should be permitted to operate.

In its deliberations, Congress heard testimony as part of its consideration of bills that predated IGRA. Rep. Bereuter of Nebraska, who introduced one of the many gaming bills, testified that it was bad "public policy" to establish Indian gaming on lands that were not contiguous to a reservation against the wishes of the directly affected localities.⁹ Rep. Bereuter considered it inappropriate for the Secretary to put new lands into trust for gaming because, in his view, to do so would circumvent state law enforcement and result in lost revenue to state and local governments.¹⁰

⁵25 U.S.C. § 2701 (4) and (5)

⁶25 U.S.C. § 2702 (1)

⁷25 U.S.C. § 2719

⁸480 U.S. 202 (1987)

⁹*Indian Gambling Control Act, Part II, Hearings before the House Interior and Insular Affairs Committee, 99th Cong., 1st Sess. 20, 21 (1985) (H.R. 3130 Testimony).*

¹⁰ *Id.*

Congress ultimately considered and adopted IGRA within the context of a political debate between states and Indian tribes regarding the limitation of off-reservation gaming without the concurrence of directly affected local governments.¹¹ Simply put, Congress was well aware that states sought to protect their sovereign interest in safeguarding the public health, safety and welfare, as implicated by Indian gaming within their borders while Indian tribes sought to build upon their status as domestic dependent sovereigns through gaming as economic development.

In addressing the tension between states and tribes, Congress struck a balance between tribal sovereignty and states' rights. In IGRA, Congress enacted a prohibition on gaming on parcels acquired into trust after October 17, 1988, unless certain conditions were met. Specifically, IGRA provides that if lands are acquired in trust after October 17, 1988, the lands may not be used for gaming, unless one of the following statutory exceptions applies:

- (1) the lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988;
- (2) the Indian tribe has no reservation on October 17, 1988, and "the lands are located...within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located"¹²;
- (3) the "lands are taken into trust as part of (i) a settlement of a land claim¹³, (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal

¹¹The debate was decidedly not over the legal authority of the Secretary to take lands into trust, wherever located, under the IRA.

¹²The statute contains an additional exception for lands within the State of Oklahoma. See 25 U.S.C. § 2719 (a)(2)(A).

¹³There are multiple land claims pending in the State of New York, two of which (Seneca Nation of Indians (Cuba Lake Claim) and Oneida (of New York and Wisconsin) have settlement discussions underway under the supervision of a court-ordered federal mediator. A third New York land claim (St. Regis Mohawk) has been the subject of settlement discussions between the tribe and the State of New York. The St. Regis Mohawk and the New York Oneida are interested in gaming on lands within Sullivan and Ulster Counties which are located in the Catskills hundreds of miles from their respective New York reservations. The Oneida of Wisconsin and the Stockbridge Munsee, also of Wisconsin, also seek to game in the Catskills. The gaming site was established by state law, authorizing the governor to negotiate the establishment of three casinos within the two counties.

As nothing within IGRA requires a tribal applicant to make a particular election or series of elections if more than one statutory option is available to it, any New York tribe may seek a two-part determination from the Secretary even if it also settles its land claim.

