

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.)

**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

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) 887-1400
Fax: 202-887-6186
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: December 7, 2007

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

THE ST. CROIX CHIPPEWA INDIANS
OF WISCONSIN
24663 Angeline Avenue,
Webster, Wisconsin 94893

Plaintiff,

v.

DIRK KEMPTHORNE
in his official capacity as SECRETARY OF
INTERIOR
U.S. Department of the Interior
1849 C Street, NW
Room 6156
Washington, DC 20240

and

CARL J. ARTMAN
in his official capacity as ASSISTANT
SECRETARY – INDIAN AFFAIRS
U.S. Department of the Interior
1849 C Street, N.W., Room 4160
Washington, D.C. 20240

Defendants.

Case No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

COMPLAINT

The Plaintiff, the St. Croix Chippewa Indians of Wisconsin (“The St. Croix Tribe”), files this Complaint against the Defendants, Secretary of the Interior Dirk Kempthorne and Assistant Secretary – Indian Affairs, Carl J. Artman (collectively, the “Defendants”) and state and allege as follows:

INTRODUCTION

1. This is an action brought by The St. Croix Tribe, a federally-recognized Chippewa Tribe, located in remote areas of northern Wisconsin. The St. Croix Tribe, together with the Bad River Band of Lake Superior Chippewa Indians (collectively, the “Tribes”) for the past six years have diligently pursued the approval by the Bureau of Indian Affairs (“BIA”) to establish a casino in Beloit, Wisconsin.

2. The St. Croix Tribe, whose reservation lands are located in remote areas of Wisconsin, faces significant challenges to economic development and diversification. It currently has two casinos (located on Tribal lands). They produce insufficient revenues to fund badly-needed tribal needs. The St. Croix Tribe has significant unemployment and a substantial percentage of its employed members earn wages which are below the poverty level.

3. The St. Croix Tribe’s ability to accumulate the resources to meet their 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. This would 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.

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.

5. The Tribes have ancestral and historical ties to the Beloit region. The Tribes' ancestors resided in the Beloit area and were parties to peace treaties ceding lands in this area to the United States.

6. The Tribes jointly filed in July 2001 an application with the BIA Regional Office to take 26 acres of land into trust for gaming purposes in Beloit, Wisconsin. To date, the Tribes have collectively spent in excess of \$2 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. The St. Croix Tribe itself has, to date, spent well in excess of \$1 million on this project.

7. Throughout the process of seeking approval from the BIA, the Tribes have incurred these significant expenses without the financial assistance of an outside developer/promoter. 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.

8. 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, it was continuously represented by the BIA 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 25 C.F.R. Part 151 (“Part 151”).

9. The Tribes’ application was forwarded (with a favorable recommendation) by the Regional Office to the Central Office in January 2007. From that moment until August 2007, Tribal leaders and their representatives were informed by BIA officials in meetings in the Central

Office that the two-part determination would be made before the Part 151 determination as had been the practice followed by the BIA. However, in August 2007, the Tribes were first notified that this process would be reversed and that the Part 151 decision would be made before the two-part determination required under IGRA. This represented a 100% reversal of the decision-making process during both the Clinton Administration and, thereafter, the Bush Administration.

10. Despite all of this, 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. This is strictly due, on information and belief, 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 is set forth in a recent Complaint filed in this Court. See St. Regis Mohawk Tribe v. Dirk Kempthorne (Civil Action No. 07-CV-01958-RWR).

11. On information and belief, Secretary Kempthorne's negative personal views toward off-reservation gaming have led the BIA to craft an artifice by which it can plausibly proceed to deny a number of pending off-reservation casino applications, including Beloit.

12. The Department of the Interior ("DOI") is unlawfully attempting to carry this out by making the Part 151 determination first. Upon information and belief, it is doing so because it 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 a number of other similar pending applications awaiting decision) in that the Tribal applications fully meet the requirements of IGRA's two-part determination. Further, on information and belief, senior officials of the DOI have concluded

that once a favorable two-part determination is made (assuming concurrence by the Governor), this would leave 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). For these reasons, on information and belief, the DOI has 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. As set forth below, by adopting this new procedure, the DOI has completely ignored the requirements of the Administrative Procedure Act (“APA”) as well as Congressional intent set out in IGRA.

13. The Tribes seek Declaratory and Injunctive Relief from this Honorable Court in order to prevent the DOI from denying the Beloit fee-to-trust and similar applications by using its newly adopted unlawful procedure to make the Part 151 decision prior to the two-part IGRA determinations. Unless Injunctive relief is entered, on information and belief, the DOI will 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.

Jurisdiction and Venue

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1362 and 5 U.S.C. §§ 701-706. This Court has authority to issue Declaratory and Injunctive Relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 555(b) and 701-706.

15. Venue is proper in this District Court pursuant to 28 U.S.C. § 1391(e) because this is an action in which the Defendants are officers and employees of the United States acting in their official capacities, and a substantial part of the events or omissions giving rise to the claims herein have occurred or will occur in this judicial district.

Parties

16. The St. Croix Tribe is a federally recognized Indian tribe whose reservation is located in Burnett, Polk and Barron counties in northwestern Wisconsin. The Tribe qualifies under IGRA, 25 U.S.C. § 2701 *et seq.* to operate class III gaming in the proposed Beloit Casino.

17. Dirk Kempthorne is the Secretary of the Interior and is charged by law with carrying out the duties and responsibilities of the United States as a trustee for the Tribes. In his official capacity, Secretary Kempthorne is authorized to make the required determinations under IGRA, § 2719(b)(1)(A), that the proposed Beloit Casino is in the best interest of the Tribes and is not detrimental to the surrounding community. Thereafter, if the Governor concurs in a favorable determination, Secretary Kempthorne is authorized to acquire the proposed land in trust for the Beloit Casino Project in the name of the United States and to hold such land in trust for the Tribes, and to take all necessary action on the Tribes' request to acquire such lands.

18. Carl J. Artman is the Assistant Secretary – Indian Affairs and is charged by law with carrying out the duties and responsibilities of the United States as a trustee for the Tribes. In his official capacity, Assistant Secretary Artman is authorized to make the required determinations under IGRA, § 2719(b)(1)(A), that the proposed Beloit Casino is in the best interests of the Tribes and is not detrimental to the surrounding community. Thereafter, if the Governor concurs in this determination, Secretary Kempthorne is authorized to acquire the

proposed land in trust for the Beloit Casino Project in the name of the United States and to hold such land in trust for the Tribes, and to take all necessary action on the Tribes' request to acquire such lands.

BACKGROUND

A. Statutory and Regulatory Requirements

19. 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.

20. 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.

21. 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."

22. 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.

23. 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.

24. 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. 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.

(d) Contact with state and local governments pursuant to Sect. 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

B. The Tribes' Application for Land To Be Taken Into Trust for Gaming Purposes in Beloit

26. In July 2001, the Tribes submitted an application to the BIA's Regional Office in St. Paul, Minnesota for the Secretary of the Interior to acquire a 26-acre parcel in trust for gaming purposes in Beloit, Wisconsin.

27. 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. Almost immediately thereafter, 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. However, after that meeting, it became apparent that the review process (other than for the ongoing review of the draft EIS) had

