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 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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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.) 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
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

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 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. (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