EXHIBIT F – PART 1

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SOKAOGON CHIPPEWA COMMUNITY, et al.,

Plaintiffs,

v.

BRUCE C. BABBITT, Secretary, U.S. DEPARTMENT OF INTERIOR, et al.

Defendants.

00-1137

Case No. 95-C-0659-C

U.S.C.A. - 7th Circuit
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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPEAL OF JULY 14, 1995, DECISION OF MICHAEL J. ANDERSON

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I. INTRODUCTION

Defendants, by Peggy A. Lautenschlager, United States Attorney for the Western District of Wisconsin, and by undersigned counsel, submit this brief in opposition to plaintiffs' appeal of the July 14, 1995, decision of Michael Anderson, Deputy Assistant Secretary of Interior. Plaintiffs' objections to the Department's decision denying their application center on three areas: (1) the Department did not discharge its duty to consult as required by 25 U.S.C. § 2719; (2) the Department's decision regarding detriment to the local community under 25 U.S.C. § 2719 was arbitrary or capricious; and (3) the Department did not consider factors required by the regulations implementing 25 U.S.C. § 465. We consider each objection below.

II. STATEMENT OF FACTS

On March 4, 1994, the plaintiff Tribes submitted an application asking the Secretary of Interior to take into trust a former greyhound racing track called St. Croix

Meadows in Hudson, Wisconsin. R. Binder 1, p. 0008. The Tribes wanted to establish a gaming casino on the property, which is located just off of U.S. Interstate 94 and is within a thirty-mile radius of the Minneapolis-St. Paul metropolitan area. Complaint ¶ 11; R. Binder 1, p. 0140.

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, confers broad authority on the Secretary of Interior to acquire property in trust for Indian tribes.[1/] Certain conditions on this authority, however, were enacted in section 20 of the Indian Gaming Reform Act of 1988, 25 U.S.C. § 2719, which placed a general prohibition on acquiring property if it were to be used for gaming purposes. Section 2719(b)(1)(A) grants tribes an exception to this prohibition if they can demonstrate that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).[2/]

Pursuant to guidelines issued on September 28, 1994, by the Acting Deputy Commissioner of Indian Affairs, Area Offices of the Bureau of Indian Affairs must make the initial determination of whether an applicant tribe has satisfied the

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1/ The U.S. Court of Appeals for the Eighth Circuit held recently that 25 U.S.C. § 465 violates the delegation doctrine and is therefore unconstitutional. South Dakota v. Department of Interior, 69 F.3d 878, 880 (8th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3823 (Jun. 3, 1996). The validity of § 465 is not at issue in this action.

2/ A U.S. District Court in Oregon found 25 U.S.C. § 2719(b)(1)(A) unconstitutional because it grants state governors veto power over federal agency decisions in violation of the Appointments Clause. Confederated Tribes of Siletz Indians of Oregon v. United States of America, 841 F. Supp. 1479, 1482-86 (D. Ore. 1994). The validity of § 2719(b)(1)(A) is not at issue in this action.

requirements of § 2719(b)(1)(A). Checklist for Acquisitions for Gaming Purposes (attached as Ex. B to Pls.' Complaint). Accordingly, the plaintiff Tribes submitted their request to obtain St. Croix Meadows to the Minneapolis Area Office, which endorsed the application and forwarded it to the Central Office of the Bureau of Indian Affairs in the Department of Interior on November 14, 1994, for final review and action. R. Binder 5, p. 1227.

During the Central Office's review of the application, the Town of Troy, which borders the St. Croix Meadows facility, passed a resolution on December 12, 1994, expressing opposition to the proposed trust acquisition. R. Binder 12, pp. 2699-2701. Shortly thereafter, the City Council of Hudson passed a resolution on February 6, 1995, recording its opposition to casino gambling at the St. Croix Meadows dog track. R. Binder 12, pp. 2713-14. Additionally, members of the Minnesota Congressional Delegation wrote the Department on January 11, 1995, requesting a meeting on the proposed acquisition (R. Binder 12, p. 2672), and on February 8, 1995, Minnesota lawmakers and officials from Indian tribes in Minnesota and Wisconsin expressed their concerns about the effect of a new casino on revenues earned by existing Indian casinos near Hudson, Wisconsin. R. Binder 10, p. 2154 (letter to plaintiff Tribes discussing meeting); R. Binder 13, p. 3132 (meeting notes prepared by George Skibine, head of the Indian Gaming Management Staff ("IGMS")). To ensure that it was fully informed about opposition to the proposed acquisition, the Department of Interior agreed to accept comments on the plaintiff Tribes' application until April 30, 1995. R. Binder 10, p. 2154.

After completing its review process, the Department of Interior declined the plaintiff Tribes' request to acquire the St. Croix Meadows property. In a decision letter executed on July 14, 1995, the Deputy Assistant Secretary of Interior for Indian Affairs, Michael Anderson, explained that the declared opposition of the localities ringing the St. Croix Meadows and of state lawmakers indicated that the Tribes had failed to show that the acquisition would not have a detrimental impact on the surrounding community. R. Binder 12, pp. 2914-16. The Secretary also cited the likely harm that would befall the nearby St. Croix band of Chippewa, as the plaintiff Tribes' casino would be in direct competition with the casino operated by the St. Croix. The last factor affecting the Secretary's analysis under § 2719(b)(1)(A) was his concern that the Tribes had not discussed adequately the proposed casino's effect on the St. Croix Scenic Riverway. R. Binder 12, p. 2915.

Finally, the Secretary stated that even if these considerations did not support his decision under § 2719(b)(1)(A), they were still of sufficient significance to convince the Secretary not to use his discretionary power under § 465 to take the property into trust. Thus, had the Department of Interior found that the Tribes could satisfy the § 2719(b)(1)(A) exception to the ban on new acquisitions for gaming purposes, the concerns raised during the application process convinced the Secretary that he should not exercise his authority to take the St. Croix Meadows in trust. R. Binder 12, p. 2916.

On September 15, 1995, plaintiffs brought suit under the Administrative Procedure Act to overturn this decision. Their complaint alleges principally that the

Department of Interior failed to provide the applicant Tribes with any opportunity to rebut the opposition raised by the surrounding communities and nearby tribes and that the Department's decision was arbitrary or capricious. The case is now set for dispositive motions on the merits.

III. ARGUMENT

Before discussing the specific arguments raised by plaintiffs, it is important to bring into sharp focus the statutory background of this appeal. As noted above (p. 2), although 25 U.S.C. § 465 grants the Secretary of Interior broad discretion to take land into trust for Indians, Congress erected a prohibition in section 20 of the Indian Gaming Regulatory Act of 1988 ("IGRA") against trust acquisitions of noncontiguous land if the land were to be used for gaming purposes. 25 U.S.C. § 2719(a). Congress then carved an exception to this prohibition, and allowed the Secretary to acquire lands for gaming if, after consultation with the applicant tribe, nearby tribes, and state and local officials, the Secretary determines that a new gaming establishment "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A) (emphasis added).

Four important features emerge from this background: first, the statutory framework, with its general prohibition on new trust acquisitions for gaming purposes tempered only by a narrow exception, places the burden on the applicant Tribes to show that they fit within the exception, for "one who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim

comes within the exception." Equal Employment Opportunity Commission v. Chicago Club, 86 F.3d 1423, 1429 (7th Cir. 1996) (internal quotations and alterations omitted). Second, to carry this burden, the plaintiff Tribes must demonstrate that they can satisfy both prongs of the § 2719(b)(1)(A) exception -- the acquisition must be in the Tribes' best interest and the acquisition must not be detrimental to the surrounding community. This statutory test is not fulfilled by balancing the factors developed under the two prongs; rather, the statute commands that if an applicant tribe fails one prong, it will not be granted an exception to the prohibition, regardless of its ability to satisfy the other prong.

Third, much of the argument in this appeal involves whether the Secretary properly construed the terms "consultation" and "detrimental to the surrounding community," which are found in 25 U.S.C. § 2719. In such a challenge, plaintiffs must overcome a strong presumption that the Department has properly construed these terms, as "the agency possesses broad discretion in administering the law so long as its actions are based on a permissible construction of its enabling statute." Nguyen v. INS, 53 F.3d 310, 311 (10th Cir. 1995); see Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."); Homemakers N. Shore v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) ("An agency's construction of its own regulations binds a court in all but extraordinary cases."). Finally, a trust acquisition is only permitted, not mandated, once a tribe demonstrates that it fits within the § 2719(b)(1)(A) exception. Since § 2719 does not itself confer authority to take land into trust, the Secretary

must still decide to exercise the trust acquisition authority granted by 25 U.S.C § 465. The § 2719(b)(1)(A) exception simply allows an applicant tribe to survive the general prohibition against gaming acquisitions, and the exception does not diminish the Secretary's responsibility to then exercise appropriate discretion under § 465. See 25 U.S.C. § 2719(c). With these four features in mind, defendants discuss below the specific contentions raised by the plaintiff Tribes.

One final prefatory note: plaintiffs' brief contains a number of good-faith factual assumptions and allegations that defendants, also in good faith, dispute. Rather than fighting every factual battle in the body of this already-lengthy brief, however, the Court is referred to defendants' response to plaintiffs' proposed statement of findings of fact, where those issues are joined.

A. The Department Did Not Violate Its Duty to Consult

Plaintiffs argue that the Department did not follow proper procedures in its review of their application to obtain the St. Croix Meadows dog track in trust. Specifically, plaintiffs contend that the Department failed to fulfill its obligation to consult with them as required by 25 U.S.C. § 2719, by internal Departmental guidelines, and by a letter from defendant John Duffy to the Tribes. As already noted, an agency's interpretation and administration of its own governing statutes and regulations is afforded great deference, so plaintiffs have a substantial hurdle to overcome in trying to demonstrate that the Department committed reversible error. Cerro Copper Products Co. v. Ruckelshaus, 766 F.2d 1060, 1067 (7th Cir. 1985) (holding that courts "are to accord great deference to an executive department's

construction of a statutory scheme it is entrusted to administer") (internal quotations omitted). As discussed below, plaintiffs have not shown that the Department interpreted impermissibly its consultation obligations, and thus plaintiffs' claim for relief on this ground should be denied.

1. The Department satisfied the requirements of 25 U.S.C. § 2719.

Plaintiffs first contend that the Department did not comply with the consultation requirement set forth in 25 U.S.C. § 2719. As the Court is aware, section 20 of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719, prohibits the Department from using its authority under 25 U.S.C. § 465 to take land that is not adjacent to an Indian reservation into trust for gaming purposes unless,

> after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [the Department] determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and 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.

25 U.S.C. § 2719(b)(1)(A).

Thus, a "consultation" requirement arises from § 2719, and it mandates that the Department consult with the applicant tribe, with officials of nearby tribes, and with state and local officials before deciding whether a proposed trust acquisition would be beneficial to the applicant tribe and would not be detrimental to the surrounding community. The statute does not define "consultation," nor does it provide applicant tribes with a superior procedural status -- the obligation of the Department to consult applies equally to all the listed entities. Indeed, the Department's trust responsibility,

which applies to all Indian tribes, would demand that it take into account equally the views of applicant tribes and nearby tribes. Hoopa Valley Tribe v. Christie, 812 F.2d 1097, 1102 (9th Cir. 1987) ("The Bureau as the agent of the United States does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to all Indian tribes.").

In their brief, the plaintiff Tribes cite a number of cases for the proposition that the Department had an obligation to consult with the Tribes before issuing a decision on their application. Since § 2719 itself requires pre-decisionmaking consultation with the applicant Tribes, as well as with officials from nearby tribes and surrounding communities, citation to caselaw for this proposition is unnecessary. The Department has never contested its obligation to consult, and the Department avers that it met that obligation squarely as follows:

a. The Department accepted for inclusion in the record a December 24, 1993, letter from the leaders of the plaintiff Tribes to Secretary Babbitt expressing their rebuttal to arguments made against the application by nearby tribes. R. Binder 10, pp. 2014-16. The letter places importance on the views of the local community, as it states that the "local unit of Government, The City of Hudson, is supportive of this innovative venture." R. Binder 10, p. 2016. The elected officials from the City of Hudson later clarified their opposition to the proposed casino. See R. Binder 10, pp. 2080-81 (letter from City Attorney of Hudson to Tribal Chairman of Sokaogon explaining City's position on

proposed casino); R. Binder 12, pp. 2713-14 (City of Hudson Resolution 2-95, opposing casino gambling at St. Croix Meadows).

b. The Department accepted for inclusion in the record a June 7, 1995, letter from the leaders of the plaintiff Tribes to Secretary Babbitt expressing their views on economic impact studies submitted during the extended comment period by tribes opposing the acquisition. R. Binder 12, pp. 2897-98.

c. The Department accepted for inclusion in the record an April 8, 1995, letter from the leaders of the plaintiff Tribes to Secretary Babbitt expressing their views in support of their application, including their belief that the Hudson area could "easily accommodate" the planned casino. R. Binder 12, pp. 2946-47. This letter appears to be a rebuttal to an opposition letter sent by Wisconsin lawmakers on March 28, 1995, (R. Binder 12, pp. 2156-58), and to opposition raised by nearby tribes.

d. The Department accepted for inclusion in the record a June 16, 1995, letter from one of the applicant Tribes' representatives, Anthony Varda, which sought to rebut local opposition arguments raised in an earlier letter from Congressman Steve Gunderson to Secretary Babbitt. R. Binder 11, pp. 2329-31 (Gunderson letter) & pp. 2384-86 (Varda rebuttal letter).

e. Counselor to the Secretary John Duffy and George

Skibine, head of the Indian Gaming Management Staff ("IGMS"), met with two representatives of the plaintiff Tribes to discuss the application on May 17, 1995. The meeting with Duffy lasted for forty-five minutes and a follow-on meeting with Skibine and other IGMS officials lasted approximately two hours. Additionally, Skibine met again with representatives of the plaintiff Tribes to discuss the application on or about May 31, 1995. R. Binder 12, pp. 3004-05 (letter responding to a request from U.S. Senate Majority Leader Tom Daschle, R. Binder 12, p. 2888, that Secretary Babbitt meet with two representatives for the plaintiff Tribes).

Save for the Tribes' letter of December 24, 1993, these consultation opportunities all occurred after the Area Office submitted the Tribes' application to the Central Office for final review and action. The plaintiff Tribes were timely informed about opposition raised by nearby tribes (R. Binder 10, p. 2154) and were given copies of the economic analyses prepared by these tribes, which plaintiffs tried to rebut. R. Binder 12, pp. 2897-98. Moreover, plaintiffs were fully aware of local opposition. The Town of Troy had recorded its dissatisfaction with the proposal during and after the Area Office's review of the application. R. Binder 3, pp. 612-16; see also R. Binder 12, pp. 2699-2701 (December 12, 1994, Town of Troy Resolution opposing proposed casino and incorporating earlier comments). Further, the Tribes knew of the opposition expressed by the City of Hudson, as Sokaogon Chippewa Tribal Chairman Arlyn Ackley noted in a February 16, 1995, letter to the County of St.

Croix that it was "unfortunate that the City of Hudson has decided to oppose the project at this time." R. Binder 10, p. 2086 (the County's response to this letter is located at R. Binder 10, p. 2149); see also R. Binder 12, pp. 2706-08 (newspaper articles reporting opposition by City Council of Hudson). The Tribes' response to this opposition was to declare it a breach of the April 18, 1994, Agreement for Government Services and to file a notice of claim against the City of Hudson demanding that the City "cease and desist" its opposition. R. Binder 11, pp. 2398-2402; see also R. Binder 11, pp. 2320-21 (newspaper article reporting that an attorney representing the Tribes, Anthony Varda, addressed the City Council and sought a retraction of its opposition by warning of potential legal liability).

Given these numerous opportunities for predecisional consultation and the public nature of local opposition, it is clear that this case does not fall afoul of the "consultation" cases cited by plaintiffs. Pls.' Br. at 7-10. In Lower Brule Sioux Tribe v. Deer, 911 F. Supp. 395 (D.S.D. 1995), and in Winnebago Tribe of Nebraska v. Babbitt, 915 F. Supp. 157 (D.S.D. 1996), the Department of Interior did not provide any opportunities for predecisional consultations with tribes affected by certain personnel actions taken by the Department. Lower Brule, 911 F. Supp. at 400; Winnebago, 915 F. Supp. at 161. In the same way, Ogalala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979), is distinguishable in that the Department did not advise an affected tribe of a personnel action before reaching a final decision on the action. Id. at 710. Here, the Tribes knew about the opposition to their application and were provided timely opportunities for rebuttal and discussion.

Another distinction that plaintiffs fail to mention is that in each of the cases they cite, the Department tried to implement an internally-generated action, a personnel move, that could not have been known by the affected tribes. In such cases, the courts found that it was especially important for the Department to inform the affected tribe about the proposed move and the reason therefor so that the tribe could provide its views on the proposal. This explains why the court in Lower Brule observed that a proper consultation would consist of a Department official "notifi[ng] the [Tribal] Council of the BIA's proposed action, [and] justifying his reasoning." 911 F. Supp. at 401.

But this does not mean that when a tribe has submitted an application to the Department seeking an exception from the general prohibition on trust acquisitions for gaming, then the tribe has a right to be advised of and to comment on a proposed decision by the Department before it issues its decision. The right to review an agency's proposed decision is a special procedural protection afforded parties in formal adjudications under the Administrative Procedure Act ("APA"), 5 U.S.C. § 557(c), which is only triggered when a governing statute dictates such procedures. See Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1072 (7th Cir. 1982) (holding that formal procedures required by 5 U.S.C. §§ 556 & 557 will not be imposed on an agency unless mandated by a governing statute). The statute at issue here, § 2719, with its bare consultation requirement that applies equally to applicant tribes and to officials of nearby tribes and local communities, cannot be said to convey this right.

In contrast, the governing statute at issue in Koniag, Inc., Village of Uyak v. Andrus, 580 F.2d 601 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978), (cited at Pls.' Br. 10-11), was found to trigger the formal adjudication procedures of the APA because the statute granted the right to "maximum participation by Natives in decisions affecting their rights and property." Id. at 609. No similar language can be found in § 2719, and, as the D.C. Circuit found in Gottlieb v. Pena, 41 F.3d 730 (D.C. Cir. 1994), absent this type of statutory command, due process will be satisfied if a party is given an opportunity to comment on negative submissions provided to an agency decisionmaker. Id. at 737 (construing Koniag and refusing to require an agency to provide its proposed findings to a petitioner). Here, plaintiffs were given this opportunity. See supra pp. 9-11. Accordingly, plaintiffs' claim that they had a right to receive a draft, internal IGMS report (Pls.' Br. at 15-16) has no statutory or due process basis, and indeed smacks of a prohibited attempt to probe the thought processes of agency decisionmakers. United States v. Morgan, 313 U.S. 409, 422 (1941). Consultation means having an opportunity to express views -- it does not mean that an applicant tribe has the right to pass final review on the Department's decision.

If Congress is silent regarding specific procedures, as it was when requiring in § 2719 that the Department consult, courts are not free to impose additional procedures, even when those procedures may provide parties with important protections, such as the right to cross-examination. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, 435 U.S. 519, 523-25 (1978) (refusing

to impose a cross-examination procedure); PBGC v. LTC, Inc., 496 U.S. 633, 653-55 (1990) (refusing to impose procedural rules not required by statue or regulation on an informal adjudication). Plaintiffs ignore this principal of administrative law, as they ask the Court to impose procedures like those required in Koniag, despite the absence of any statutory justification for such procedures. As discussed above, the Department implemented a permissible interpretation of the consultation requirement by providing the applicant Tribes with a substantial opportunity to rebut comments received by the Department. See Gottlieb, 41 F.3d at 737. The record therefore demonstrates that the plaintiff Tribes received the full measure of the process due them.

2. The Department did not violate the Checklist for Acquisitions.

To provide guidance on the consultation requirement, the Central Office of the Department of Interior issued internal guidance on September 28, 1994, to its Area Offices for performing the initial review of an application for a trust acquisition subject to § 2719. See Checklist for Acquisitions for Gaming Purposes (attached as Ex. B to Pls.' Complaint). The cover memorandum from the Central Office to the Area Offices explains that the Checklist "should be used as a tool to assure that the transaction is fully documented prior to its submission to Central Office for review." The Checklist provides extensive advice to Area Offices on initiating the consultations required by § 2719, and it includes this specific guidance regarding comments that oppose an application:

> Upon completion of the consultation process, (i.e. receipt of responses, expiration of allowed response time), the Area Director will review and prepare a summary of the comments and responses received from the officials contacted. When a response raises an issue with actual or

> potential for adverse or negative implications which may affect the potential for a favorable two-part determination [under § 2719], the Area Director will analyze the issue and determine what action may be appropriate. The Area Director should request the applicant tribe to make an effort to resolve the issue. The tribe should be given a reasonable period of time to resolve the issue.

Checklist, p. 12 (attached as Ex. B to Pls.' Complaint).

Plaintiffs, relying on the "Accardi doctrine" (which requires agencies to follow their own regulations in certain circumstances), insist that this passage obligated the Central Office to advise the applicant Tribes about negative comments and to give them an opportunity to resolve those comments. Pls.' Br. at 5-6, 17. Without conceding the applicability of the Accardi doctrine to this internal rule,[3/] a plain reading of the passage shows that the Accardi doctrine cannot forward the Tribes' argument: the Checklist applies by its terms only to Area Offices, not to the Central Office. Thus, the Central Office could not violate the Checklist because the Checklist does not apply to the Central Office's review of trust applications.[4/]

3/ See Von Kahl v. Brennan, 855 F. Supp. 1413, 1421 (M.D. Penn. 1994) (refusing to apply Accardi doctrine to prison regulations and observing that "courts must balance the interests at stake in the context of the rights at issue and proceedings under consideration"); In re Grand Jury Proceedings, 632 F. Supp. 374, 375 (E.D. Tex. 1986) ("The so-called Accardi doctrine is inapplicable . . . [to the] United States Attorney's Manual.").

4/ The Department has not issued regulations binding on the Central Office's final review because, as a practical matter, the Central Office's review will involve a comprehensive consideration of the factors relevant to both authorities, with the broad review envisioned by 25 C.F.R. § 151.11 playing a significant role. See R. Binder 12, p. 2670 (letter from Assistant Secretary Deer explaining that the Department considers an application under both § 465 and § 2719, and advising that the "decision to take land into trust for gaming purposes is made only after an exhaustive deliberative review of all relevant facts and criteria"). This comprehensive

(continued...)

Even if the Checklist were applied to the review conducted by the Central Office, the Checklist guidance highlighted by plaintiffs is not mandatory. The only mandatory requirement placed on Area Office directors is that they "will" analyze issues casting doubt on the two-part determination and that they "will" determine what action may be appropriate. Area Offices are then advised that they "should" give applicant tribes an opportunity to rebut opposition comments, but the Offices are not told that they "shall" provide this opportunity. See Colburn v. Trustees of Indiana University, 739 F. Supp. 1268, 1294-95 (S.D. Ind. 1990) (collecting cases and holding that the term "should" in a guidance handbook confers discretion on a decisionmaker and is not mandatory), aff'd on other grounds, 973 F.2d 581 (7th Cir. 1992). Accordingly, the Central Office acted within the discretion afforded to the Area Offices by the Checklist when it did not specifically ask the applicant Tribes to resolve opposition comments received by the Department.

Nevertheless, the Central Office did provide the applicant Tribes with copies of the economic analyses prepared by the opposition tribes, and the Department accepted the applicant Tribes' attempt to rebut these analyses. R. Binder 12, pp. 2897-98. Additionally, the applicant Tribes were aware that significant local opposition had arisen regarding their proposal, and they had ample opportunity, if

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4/(...continued)
review explains why the Central Office requires the Area Office to discuss the § 465 factors (25 C.F.R. § 151.10) as well as the § 2719 factors in the package submitted to the Central Office for final review and decision. See Checklist, supra, at 1, 13. Deputy Assistant Secretary Anderson's decision in this case, which rested equally on § 2719 and § 465, demonstrates the inclusive nature of the Department's decisionmaking process. R. Binder 12, p. 2914.

not an invitation, to address this opposition before the Department reached its final decision. The doors of the Department did not close on the applicant Tribes.

The plaintiff Tribes now appear to say that, in addition to an open door, they needed the Department to tell them to take the opposition seriously before they would bother to submit rebuttal. Pls.' Br. at 15. Yet, the applicant Tribes needed no invitation to submit three letters addressing the opposition raised by nearby tribes. R. Binder 12, p. 2976 (letter of March 30, 1995); p. 2946 (letter of April 8, 1995); and p. 2897 (letter of June 7, 1995). Moreover, the fact of opposition from the local communities is largely uncontrovertible, which may explain why the applicant Tribes attempted to muzzle this opposition by threatening legal action. R. Binder 11, pp. 2398-2402 (notice of claim filed with the City of Hudson by the applicant Tribes). As Professors Davis and Pierce have observed, "[i]f the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the factfinding process, simply because the agency does not need to resolve any factual controversies." 3 K. Davis & R. Pierce, Administrative Law Treatise § 9.5, at 54 (3d ed. 1994). Simply stated, plaintiffs have no legitimate complaint about the process afforded them, and their real contention is with the policy judgments that the Department employed in evaluating the facts.

3. The Department did not transgress the terms of the Duffy letter.

Finally, plaintiffs contend that a March 27, 1995, letter from John Duffy to leaders of the applicant Tribes lulled them into believing that the Department would

notify them of any "areas of concern" with their application. Pls.' Br. at 3, 14-15. The Department counters that plaintiffs misinterpreted the letter, but that, in any event, plaintiffs were not prejudiced by this misinterpretation.

John Duffy sent the March 27, 1995, letter to advise the applicant Tribes about the meeting he attended with Senator Wellstone and leaders from tribes opposed to the application. R. Binder 10, p. 2154. He explained that the Department would give the opposition tribes until April 30, 1995, to submit their comments on the application. Duffy concluded by stating as follows:

> Please be assured that our commitment regarding the submission of additional information will not delay consideration of other aspects of your application by the BIA's Indian Gaming Management Staff. Should areas of concerns [sic] with the application be identified, you will be so notified.

R. Binder 10, 2154.

Plaintiffs read this paragraph as obligating the Department to keep them notified about areas of concern that might arise regarding their application. Defendants agree that this reading is reasonable, but the Department avers that it intended to convey to the applicant Tribes only that the IGMS would continue to review the "other aspects" of the application; namely, whether the acquisition was in the best interest of the Tribes; and that it would advise the applicant Tribes if any areas of concern regarding this "best interest" aspect arose. The Department did not intend to assume the obligation of advising the applicant Tribes about areas of concern that might arise regarding whether the acquisition would be detrimental to the surrounding community, the aspect of the application that had generated