EXHIBIT F – PART 2

comments from the opposing tribes. In hindsight, the Department should have drafted this letter more carefully to convey precisely its intentions.

Regardless of the interpretation one affixes to this paragraph, the record shows that the applicant Tribes had full notice of opposition comments and had a full opportunity to rebut them. The thrust of plaintiffs' argument is not so much that the letter served as a quasi-regulation binding the agency, see United States v. An Article of Drug, 540 F. Supp. 363, 372 (N.D. Tex. 1982) ("Erroneous letters do not necessarily bind an agency."), but that the applicant Tribes relied to their detriment on their interpretation of the letter and so did not react to opposition comments. The record shows otherwise. As explained above, the Department provided the plaintiff Tribes with the comments submitted by the opposition tribes, and plaintiffs provided rebuttal to these comments. 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). Additionally, plaintiffs knew about the public resolutions by the surrounding communities expressing opposition to the application, and they chose to rebut this opposition through letters (R. Binder 11, pp. 2384-86 (Varda rebuttal letter), R. Binder 12, p. 2946), and through legal process (R. Binder 11, pp. 2398-2402 (notice of claim filed with the City of Hudson by the applicant Tribes)). Thus, the Tribes were not, due to their reading of the Duffy letter, kept in the dark about opposition comments, nor were they foreclosed from responding to opposition comments. Any claim of detrimental reliance, therefore, must ring hollow.

* * *

In sum, plaintiffs have not made the case that they were deprived of their right to consultation. Nor have they tried to show how any alleged procedural defects prejudiced them, for the fact opposition existed was largely uncontrovertible, leaving the policy implications of this opposition solely within the hands of the Department. It is also important to recognize that the government action complained of by the Tribes, the denial of an application, is considered less serious for due process purposes than the revocation of a license or a welfare benefit. Buttrey v. United States, 690 F.2d 1170, 1177-78 (5th Cir. 1982). That is particularly true here, where no res judicata or other preclusive doctrines apply to the Secretary's denial of the Tribes' request. Accordingly, the Tribes are free to resubmit tomorrow a renewed application, which the Department will review based on its independent merit. R. Binder 12, p. 2915 ("Each case is reviewed and decided on the unique or particular circumstances of the applicant tribe."). Considering all these factors, and the substantial opportunities provided the Tribes to present their views during the Central Office's review of their application, the Court should reject the Tribes' claim that they were denied their right to consultation.

B. Secretary Anderson's Decision Under 25 U.S.C. § 2719 Was Not Arbitrary or Capricious

Plaintiffs urge this Court to set aside the Department's decision because it was arbitrary or capricious in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Pls.' Br. at 18-19. "The 'arbitrary or capricious' standard of review is a deferential one which presumes that agency actions are valid as long as the

decision is supported by a 'rational basis.'" Pozzie v. U.S. Dep't of Housing and Urban Development, 48 F.3d 1026, 1029 (7th Cir. 1995). The Court's task, therefore, is to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Foust v. Lujan, 942 F.2d 712, 714 (10th Cir. 1991). If the reviewing court, applying this deferential standard, finds that the agency "considered all relevant factors in reaching [its] decision and made no clear error of judgment, [the agency] action cannot be overturned." Cotton Petroleum Corp. v. United States Dep't of Interior, 870 F.2d 1515, 1525 (10th Cir. 1989). As the following discussion shows, Secretary Anderson's decision letter provided a reasoned explanation of why the Department exercised its discretion to decline the Tribes' application based on the record evidence -- accordingly, plaintiffs' plea to have the decision declared arbitrary or capricious is without merit.

As explained above (p. 5), the Department may not exercise its authority under 25 U.S.C. § 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). In his decision letter, Secretary Anderson concluded that the applicant Tribes failed to show that their gaming operation would not be detrimental to the surrounding community, and so he was obliged to decline their

trust application. R. Binder 12, pp. 2914-15. Secretary Anderson based his decision on a full consideration of the record, and he found compelling the following information:

a. The elected officials of the Town of Troy registered their strong opposition to the acquisition proposed by the applicant Tribes based on their determination that a casino would negatively affect traffic congestion, the social structure in the community, infrastructure, land use patterns, and delivery of services. R. Binder 3, pp. 612-16 & R. Binder 12, pp. 2699-2701 (this resolution incorporated the concerns expressed earlier (R. Binder 3, pp. 612-16) by Troy).

b. The elected officials of the City of Hudson registered their strong objection to the acquisition proposed by the applicant Tribes based on their determination that a casino would negatively affect infrastructure, future residential and commercial development plans, and the availability of labor. R. Binder 12, pp. 2713-14 & R. Binder 11, pp. 2318-19 & 2394-97. Contrary to plaintiffs' assertions (Pls.' Br. at 27), the record does not show that the City of Hudson ever retracted its opposition to this acquisition -- certainly the record contains no communications from the City Council or Mayor issuing a retraction.

c. Lawmakers from the State of Wisconsin, including the State Senator representing the district in which the proposed acquisition was located, registered their strong opposition to the acquisition

proposed by the applicant Tribes based on their concerns about the adequacy of governmental services agreements, the desire of Wisconsin citizens to limit the expansion of gaming, and the effect of a new casino near an urban center on the vitality of current tribal gaming operations in less-populous regions. R. Binder 10, pp. 2156-58.

d. Documentation received by the Department showed that the St. Croix Chippewa would suffer a loss of market share and revenues if the applicant Tribes operated a casino at the St. Croix Meadows site in Hudson, Wisconsin. R. Binder 12, pp. 2791-2864 (redacted comments prepared by St. Croix Chippewa); R. Binder 13, pp. 3198-3201 (staff analysis of economic effects on the St. Croix Chippewa).

e. IGMS staff concluded that the environmental analyses prepared by the applicant Tribes' was inadequate. R. Binder 13, pp. 3083-84, 3134, 3178 and R. Binder 11, pp. 2517-78 (respectively, staff input regarding environmental concerns and letters from the public regarding the St. Croix Riverway).

Thus, Secretary Anderson's decision letter rested on uncontroverted record facts from which it was reasonable to conclude that the Tribes had failed to prove that their casino would not be detrimental to the surrounding community. Based on the record, the degree of discretion afforded the Secretary, and the placement of the burden of persuasion on the applicant Tribes to fit within the § 2719(b)(1)(A)

exception, the Department's decision cannot be described as arbitrary or capricious.

1. Secretary Anderson properly considered the views of local officials.

Plaintiffs attack Secretary Anderson at length for basing his decision in part on the opposition of state and local government officials, claiming that the Checklist for Acquisitions for Gaming Purposes precludes the Department from entertaining such considerations. Pls.' Br. at 20-28. There are two short answers to this criticism: first, as stated above (pp. 15-16), the Checklist applies only to Area Offices and does not bind the review and decision process conducted by the Central Office. Second, the Checklist itself does not forbid consideration of such views, as it encourages Area Offices to forward "[a]ny other information which may provide a basis for a Secretarial determination that the gaming establishment is not detrimental to the surrounding community." Checklist p. 12. In fact, the Checklist goes on to advise as follows:

> Because the impacts of a gaming facility established on newly acquired land will be difficult to quantify in concrete or tangible terms, the officials consulted should also be invited to address such additional concerns or factors which they believe more fully demonstrate the actual or potential impact of the proposed gaming facility. The responding officials should not be limited to the listed items.

Id.

More fundamentally, though, Congress required the Department, through the consultation requirement of § 2719(b)(1)(A), to obtain and consider the views of state and local officials. While plaintiffs dismiss these views as mere "political opposition," the record reveals that the elected officials from the Town of Troy, City of Hudson, and Wisconsin legislature expressed their opposition in terms of the possible impacts

of a new casino on traffic congestion, infrastructure, and future development plans. See supra pp. 23-24. These concerns go to the quality of life and to the future economic and social direction of the surrounding communities -- areas in which politically accountable officials have considerable insight.

That these officials relied on their experience in formulating these concerns without producing exhaustive studies is hardly remarkable given the press of their responsibilities and is consistent with the Checklist, which states that "[r]esponding officials should be advised that the fact that an official does not have extensive information or documented proof on the items listed above should not prevent the responding official from addressing the items to the extent possible." Checklist p. 12. Plaintiffs offer no support beyond the Checklist for their assertion that the Central Office was required to make extensive factual findings to support the objections of the local communities. In this, they have failed to establish that Secretary Anderson's decision was arbitrary or capricious. And to deem reliance on the opposition of local and state officials a "clear error of judgment" is to suggest that the Department act contrary to the statute's requirement that such officials be consulted. Consequently, plaintiffs' assertion that Secretary Anderson abdicated his responsibility and refused to make an independent decision strains logic and credulity.

Furthermore, plaintiffs' attempt to characterize Secretary Anderson's decision as woefully incomplete and worthy of reversal pursuant to the Supreme Court's holding in Burlington Truck Lines v. United States, 371 U.S. 156 (1962), is misguided. Pls.' Br. at 25. Contrary to plaintiffs' contention, the decision at issue in Burlington

was not similar to Secretary Anderson's, as plaintiffs maintain, but rather included "no findings and no analysis," and "no indication of the basis on which the commission exercised its expert discretion." 371 U.S. at 167. Here, Secretary Anderson made findings supported by the record about the opposition raised by local and state officials, about the economic effects of a new casino on the St. Croix Chippewa, and about the inadequacies of the environmental documentation. R. Binder 12, pp. 2914-15. From these findings, Secretary Anderson concluded that the applicant Tribes failed to meet their burden of showing that their casino would not be detrimental to the surrounding community. Id. As such, this reasoned, record-supported decision is in no manner akin to the cryptic, conclusory decisionmaking remanded by the Supreme Court in Burlington.5/

2. Secretary Anderson properly considered the economic impacts on nearby tribes.

Plaintiffs argue that the decision was "[i]mproperly" based on opposition to competition by other nearby Indian tribes. Pls.' Br. at 29. But plaintiffs ignore again the Department's statutory obligation to consult with nearby tribes in determining whether a casino will have a detrimental effect on the surrounding communities, an

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5/ Nor can the decision be deemed arbitrary or capricious because all of the factors on the Checklist were not discussed in the decision letter. The decision meets the test set forth in Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974), requiring that it show consideration of relevant factors, and it substantially exceeds the one-paragraph explanation rejected by the D.C. Circuit in Pennzoil v. FPC, 534 F.2d 627 (D.C. Cir. 1976), where the Federal Power Commission explained its decision to release information over protests by interested parties by stating simply the "public interest" outweighed any potential harm caused by the release.

obligation that is meaningless unless the Department can consider precisely the economic concerns raised by the St. Croix Chippewa and the other nearby tribes. Moreover, the Department has a larger responsibility pursuant to its "fiduciary obligation that is owed to all Indian tribes." Hoopa Valley Tribe v. Joe Christie, et al., 812 F.2d 1097, 1102 (9th Cir. 1987) (citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378-79 (1st Cir. 1975)). In fulfilling his statutory obligation to consult with local officials, "including officials of other nearby Indian tribes," Secretary Anderson had to keep this larger fiduciary duty in mind. His doing so cannot render his decision arbitrary or capricious.

Plaintiffs' contention (Pls.' Br. at 31) that the projected impact of their operation on the St. Croix "would have been minimal" concedes the Department's basic point that the "St. Croix will suffer a loss of market share and revenues." R. Binder 12, p. 2915. According to the IGMS staff analysis quoted by plaintiffs, the St. Croix projected that they would lose 181,000 customers from their projected attendance of 1,225,000 in 1995, a loss of 14.7%. Whether one terms this loss as minimal or substantial, the fact remains that the Secretary correctly found that the St. Croix would suffer some loss as a result of the Tribes' proposed casino. See Defs.' Res. to Conf. Findings of Fact. ¶ 8. Once the Secretary found that a loss would occur, he was not required to balance the loss against possible gains that the applicant Tribes might enjoy, as the two-prong analysis of § 2719(b)(1)(A) precludes a comparative analysis and demands that the Department find that a proposed casino is both in the Tribes' best interest and will not be detrimental to the surrounding community.

Additionally, Secretary Anderson was clearly not concerned that plaintiffs wanted to locate a casino off-reservation, but that their chosen location would give them a substantial competitive advantage over already-existing Indian gaming operations. Plaintiffs believe that the Department should have embraced go-go free enterprise (Pls.' Br. at 32), a legitimate policy choice, yet it cannot be said that the Secretary acted unreasonably by deciding instead to further the Department's trust responsibility owed to all Indian tribes. Also, plaintiffs' varied complaints about distances from the Hudson site and the quality of road access simply go to whether the St. Croix would indeed suffer some loss from the proposed casino, which plaintiffs themselves already concede.

The Tribes' last allegation is that the Secretary should have considered the effect of a revenue sharing agreement on the competitive impacts of the proposed casino, citing the Department's discussion of just such an agreement negotiated by the Sault St. Marie Tribe in Michigan. Pls.' Br. at 35-36. That the Secretary looked approvingly on the revenue sharing agreement negotiated by the Sault St. Marie Tribe demonstrates that the Department has a consistent practice of taking into consideration the economic effects of a proposed trust acquisition on nearby tribes. Thus, had the applicant Tribes negotiated such an agreement with the other tribes, this would have affected the Secretary's analysis of the application. The onus, however, is on the applicant Tribes, not the Secretary, to propose and negotiate a revenue sharing agreement, as the applicant Tribes have the burden of showing that they fit within the exception to the ban on trust acquisitions created by

§ 2719(b)(1)(A).

Unlike the situations discussed in the cases cited by plaintiffs, Pls.' Br. at 36, here an applicant sought an exception to a general statutory prohibition on new trust acquisitions, and neither applicable regulations nor statutes required the Department to engage in any sort of alternatives analysis. In contrast, the Court in Motor Vehicle Manufacturers Association of the United States v. State Farm Automobile Insurance Company, 463 U.S. 29 (1983), chastised the Department of Transportation for failing to discuss in a final rulemaking an alternative that the Department had previously put forward, id. at 46 & n.11; in Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976), the court employed a heightened standard of review and ordered some consideration of alternatives when it reviewed a federal agency order requiring regulated entities to disclose information that they believed was proprietary, id. at 631-32, -- a far different situation from that of the applicant Tribes; and in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), the court found that statutory and regulatory mandates required the agency to give consideration to an alternative posited by a party before the agency, id. at 612, 618-20. Therefore, the cases cited by plaintiffs do not relieve the applicant Tribes of the burden of coming forward with alternatives for fitting within the § 2719 exception, and they cannot now demand that the Department conjure up ways by which the Tribes may satisfy their burden.

3. Secretary Anderson properly considered the inadequacies of the environmental documentation.

Plaintiffs assert that the Secretary's concern over the potential impact of the

proposed casino on the St. Croix National Scenic Riverway was "arbitrary and capricious on its face." Pls.' Br. at 37. Plaintiffs err, however, when they state that the Department had the sole obligation to obtain additional information sufficient to satisfy the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, as the Checklist for Acquisitions for Gaming Purposes, cited by plaintiffs, requires applicants to address environmental issues: "To assist the Secretary determine whether the gaming establishment on newly acquired land will not be detrimental to the surrounding community, the officials consulted and the applicant tribe should be requested to address items such as the following: 1. Evidence of environmental impacts and plans for reducing any adverse impacts." Checklist for Acquisitions for Gaming Purposes p. 12 (attached as Ex. B to Pls.' Complaint). Thus, the applicant Tribes had the responsibility for providing the Department with adequate information on which to judge the environmental consequences of a proposed casino, and the Tribes' failure to provide this information cannot be blamed on the Department.

In this case, the record shows that the plaintiff Tribes did submit the environmental analyses reviewed by the Area Office and found wanting by the Central Office. R. Binder 4, pp. 780-85. Since the proposed federal action was being considered at the behest of an applicant rather than on an agency's own volition (such as when constructing a dam or building a federal highway), plaintiffs had the duty to provide the Department with environmental documentation of sufficient quality to comply with NEPA before the agency could approve the application. The Central

applicants, found that the Tribes failed to perform this duty. R. Binder 13, pp. 2083-86, 3134, 3178 (IGMS staff analysis of the environmental documentation submitted by the Tribes). This failure was especially acute regarding the St. Croix Scenic Riverway: "The fact that the nearby riverway has received a special designation was not revealed in the environmental document which had been submitted [by the Tribes] in connection with the other documents in support of the proposed casino. The potential impact, if any, of the proposed casino on the riverway was also not adequately addressed." R. Binder 13, p. 3134. This staff analysis, coupled with the substantial number of comments regarding the Riverway (R. Binder 11, pp. 2517-78), more than supports the Secretary's ultimate conclusion that "the potential impact of the proposed acquisition on the Riverway was not adequately addressed in environmental documents submitted in connection with the application." R. Binder 12, p. 2915.

4. Secretary Anderson did not violate applicable regulations.

Plaintiffs also contend that the Department's decision was arbitrary or capricious because it "repeatedly violated its own regulations." Pls.' Br. at 40. Plaintiffs fail to offer, however, examples of such regulatory violations other than to state that they are "set forth at length, throughout this brief." Id. at 41. Defendants have set forth throughout this brief their refutation of these allegations, and will leave it at that.

5. Secretary Anderson was not required to suggest alternatives for the applicant Tribes.

In a final catch-all argument, plaintiffs reiterate their previous contentions that the Department did not consider alternatives, did not consider all options, did not analyze all the facts, and did not allow plaintiffs an opportunity to challenge its views. Pls.' Br. at 41-46. In fact, as we have demonstrated above, alternatives and options that were not presented could not have been considered. Nor is the Supreme Court's decision in Motor Vehicle Manufacturers Association of the United States v. State Farm Automobile Insurance Company, 463 U.S. 29 (1983), of any assistance to plaintiffs, as in that case the Court required an agency to consider in a rulemaking an alternative that it had previously put forward. Id. at 46 & n.11.

Likewise, the decision in Asarco, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980), garners plaintiffs little, for there the court was confronted with a highly fact-based agency decision regarding technological alternatives to reduce particulate formation in smoke stacks. The present action, however, presents no such complex questions of fact. Rather, the Department's decision not to acquire property under §§ 465 & 2719 involved making predictive policy judgments: has the tribe shown that a casino will not have a detrimental effect on the community, including nearby tribes; is this a proper case in which to exercise the Department's broad discretion to acquire property. In this type of decisionmaking, "to the extent that factual determinations were involved . . . they were primarily of a judgmental or predictive in nature" and therefore "complete factual support in the record for the [agency's] judgment is not possible or required." FCC v. National Citizens Committee for Broadcasting, 436 U.S.

775, 813-14 (1978).

The Department's decision letter of July 14, 1995, clearly identified the facts relied upon to support its judgments, and those facts are reflected in the record. R. Binder 12, p. 2914. It may not be possible to prove that a new casino will have a detrimental effect, but such proof in the record is not mandated by statute, regulation, or principles of administrative law. Moreover, plaintiffs were aware of the opposition comments submitted to the Department and were afforded every opportunity for rebuttal. Consequently, plaintiffs may disagree with the decision, but they cannot claim that it is unreasonable.

C. Secretary Anderson's Decision Was Not Based On Improper Political Influence

The Court has previously considered and rejected the argument that the Department's decision resulted from improper political influence. Pls.' Br. at 47-53. For the record, the Government incorporates its prior briefs on this issue, which repudiated these allegations, and relies on the Court's June 11, 1996, Opinion and Order. The Government will waste no more time on plaintiffs' unsubstantiated allegations.

D. Secretary Anderson's Decision Did Not Violate Past Policies or Practices of the Department

Plaintiffs next complain that the Department deviated from a laundry list of past practices and policies. Pls.' Br. at 53-54. The case relied on by plaintiffs, Atchinson, Topeka & Sante Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973), did criticize the ICC for failing to explain its departure from past policy, but there the

Court discussed at length the past ICC decisions from which the agency departed. Id. at 808-09. Beyond listing a number of putative policies, however, plaintiffs cite no Department regulations or decisions. Moreover, it is also difficult to imagine how the Department could have built up much in the way of past practices or policies regarding § 2719 trust acquisitions, for the record shows that only three class III applications had been submitted at the time the Tribes' application was before the agency. R. Binder 12, p. 2780. Because the state Governors had not concurred in those three applications, none of them were taken in trust. Id.; see also Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 413 (7th Cir. 1987) ("An inconsistent administrative position means flip-flops by the agency over time, rather than reversals within the bureaucratic pyramid."). Therefore, plaintiffs have not shown that the Department deviated impermissibly from its past practices and policies when it denied the Tribes' request to take St. Croix Meadows into trust.

E. Secretary Anderson's Decision Constituted An Appropriate Exercise of Authority Under 25 U.S.C. § 465

In their last argument, plaintiffs assert that the Department's denial of their application was arbitrary or capricious because Secretary Anderson's decision letter does not show that he considered each of the factors listed at 25 C.F.R. § 151.10 (1995). Pls.' Br. at 55-58.[6/] This argument lacks merit in that the Tribes appear to demand that Secretary Anderson's decision letter, which addressed the relevant

6/ The parties do not dispute that the regulations in force during the review of the Tribes' application were those contained in the 1995 version of the Code of Federal Regulations. These regulations were subsequently amended. See 60 Fed. Reg. 32878.

factors for decision, should have also discussed factors listed in § 151.10 that were of no moment due to the denial of the Tribes' application. Since Secretary Anderson's consideration of relevant factors lead him to decline the Tribes' application, there was no need to discuss superfluous acquisition-specific factors, and accordingly his decision was not arbitrary or capricious. See American Legion v. Derwinski, 54 F.3d 789, 798 (D.C. Cir. 1995) ("[T]he court will uphold agency action that, considered in its entirety, is based on appropriate considerations and otherwise complies with relevant statutes and the Administrative Procedure Act.") (internal quotations omitted).

Secretary Anderson's decision letter of July 14, 1995, began by discussing the record evidence demonstrating opposition by state and local officials and nearby tribes and then found that this evidence prevented the Department from finding under 25 U.S.C. § 2719(b)(1)(A) that the proposed acquisition would not be detrimental to the surrounding community. R. Binder 12, pp. 2914-15. The letter then concluded as follows:

> Finally, even if the factors discussed above were insufficient to support our determination under Section 20(b)(1)(A) of the IGRA, the Secretary would still rely on these factors, including the opposition of the local communities, state elected officials and nearby Indian tribes, to decline to exercise his discretionary authority, pursuant to Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. 465, to acquire title to this property in Hudson, Wisconsin, in trust for the Tribes. This decision is final for the Department.

R. Binder 12, p. 2916.

As the Court is aware, even if a tribe satisfies the requirements of § 2719 and the Department determines 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 land in trust pursuant to the Indian Reorganization Act, 25 U.S.C. § 465." Sokaogon Chippewa Community v. Babbitt, 929 F. Supp. 1165, 1170 (W.D. Wis. 1996); see also Checklist, p. 13 (attached as Ex. B to Pls.' Complaint) ("It should be noted that the Secretary's determination under Section 20 does not constitute a final decision to acquire the land in trust under Part 151."). Thus, Secretary Anderson's decision letter quite properly went on to conclude that despite whether the Tribes had satisfied the two-part test in § 2719(b)(1)(A), the Secretary would not exercise his discretion under § 465 to take the St. Croix Meadows into trust because of the record evidence of opposition from nearby tribes, state lawmakers, and surrounding communities.

Plaintiffs criticize the § 465 portion of the decision letter because Secretary Anderson did not go through each of the factors listed in 25 C.F.R. § 151.10. But to require such obeisance to each of the listed factors, regardless of its relevance in a particular situation, elevates form over substance. The factors in § 151.10 are a means, not an end, by which the Department determines whether taking land into trust would be appropriate under § 465. Thus, the key task for a court is to ascertain if a trust acquisition decision comports with the discretion granted by § 465 as informed by the § 151 factors, not simply to see if the Department put a checkmark next to each factor.

Decisions of the Interior Board of Indian Appeals confirm this understanding. Miami Tribe of Oklahoma v. Muskogee Area Director, 28 I.B.I.A. 52, 56 (Jun. 8, 1995)

("[T]he Board has held that BIA may deny a trust acquisition request on the basis of only some, or even one, of the factors in 25 C.F.R. 151.10 if BIA's analysis shows that factor or factors weighed heavily against the trust acquisition.") (internal quotations omitted); City of Eagle Butte v. Aberdeen Area Director, 17 I.B.I.A. 192, 197 n.3 (July 25, 1989) ("A decision to approve a trust acquisition must show that all of the factors were considered. A decision to disapprove . . . may be based on a more limited analysis of only some of the factors, if BIA's analysis shows that those factors weigh heavily against the trust acquisition."). Decisions of the federal courts agree. United States v. Roberts, 904 F.Supp. 1262, 1268 (E.D. Okl. 1995) (reviewing trust acquisition under § 465 and holding that proper inquiry focuses on whether Department properly exercised its discretion, not on whether Department complied strictly with procedures), aff'd in part, rev'd in part and remanded on other grounds, 1996 WL 379777 (10th Cir. July 8, 1996); see also Florida, Dep't of Business Regulation v. United States Dep't of Interior, 768 F.2d 1248, 1256 (11th Cir. 1985) ("[§ 151.10] does not purport to state how the agency should balance these factors in a particular case, or what weight to assign each factor."), cert. denied, 475 U.S. 1011 (1986); cf. Natural Resources Defense Council, Inc. v. Herrington, 768 F.2d 1355, 1416 (D.C. Cir. 1986) ("[A]gencies rightfully enjoy very broad discretion in determining what aspects of a problem warrant investigation.").7/

7/ See also Hatco Corp. v. W.R. Grace & Co., 849 F. Supp. 931, 964-65 (D.N.J. 1994) (observing that a regulation mandating that a decisionmaker "shall consider" certain enumerated factors does not require that each factor be specifically considered depending on the decisional context); McDonnell Douglas Corp. v. United

(continued...)

This understanding of the § 151 factors was articulated in a recent petition for certiorari, in which the United States explained that "a decision to acquire land in trust under section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706(2), taking into account the factors identified in the Secretary's regulations as relevant in making such decisions." Certiorari Petition in United States Dep't of Interior v. South Dakota p. 7 (attached as Ex. C to Pls.' Motion to Take Judicial Notice).8/ The Secretary's decision to acknowledge judicial review of § 465 determinations is hardly startling given the constitutional threat to the continued viability of § 465, nor, more importantly, does the acknowledgement of judicial review suggest that the Secretary's broad discretion has now been curtailed, as § 465 determinations were already subject to administrative review based on the § 151.10 factors. City of Eagle Butte v. Aberdeen Area Director, 17 I.B.I.A. 192, 197 n.3 (July 25, 1989). In this case, an examination of the factors contained in § 151.10 demonstrates that the Department considered the factors relevant to its decision and that the denial of plaintiffs' application was well within the bounds of the Department's

7/(...continued)
States, 35 Fed. Cl. 358, 369 (Ct. Fed. Cl. 1996) (explaining that review of whether an agency properly exercised its discretion must take into account totality of decisional circumstances).

8/ It must also be noted that the certiorari petition was filed in an action where a party opposed an Interior decision to take property in trust. 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). In situations where the Department is taking land into trust, then review of all the listed factors may be more critical when determining whether the decision comports with § 465. City of Eagle Butte v. Aberdeen Area Director, 17 I.B.I.A. at 197 n.3.

discretion. Diaz v. INS, 648 F. Supp. 638, 648 (E.D. Cal. 1986) ("As a general matter, discretion in the administrative context provides the decision-maker with freedom to exercise his or her best judgment in reaching a decision.").

Section 151.10 lists seven factors to be considered when taking land into trust, one of which, § 151.10(d), applies only to acquisitions for individual Indians. Section 151.10(a) requires that the Department consider any statutory limitations on the exercise of its § 465 authority, which Secretary Anderson's discussion of § 2719(b)(a)(A) satisfied. Indeed, Secretary Anderson's analysis of this first factor weighed heavily against taking the land into trust. Section 151.10(b) provides that the Department consider the need of the applicant for the land, as the Department may only take land that is noncontiguous with a reservation into trust if the land is "necessary to facilitate tribal self-determination, economic development, or Indian housing," 25 C.F.R. § 151.3(a)(3). That the plaintiff Tribes met this threshold criteria was never in question, so Secretary Anderson had no need to discuss § 151.10(b). Section 151.10(c) requires the Department to consider the proposed use of the land, and Secretary Anderson's decision letter went into great detail discussing the problems created by the proposed use of St. Croix Meadows as a casino, which weighed heavily against acquisition. Finally, sections 151.10(e)-(g) were irrelevant to Secretary Anderson's decision to decline the Tribes' trust application, as these provisions require the Department to consider the effect of taking land into trust on tax rolls, on jurisdictional problems, and on the ability of the Bureau of Indian Affairs to discharge its attendant additional responsibilities. See Miami Tribe of Oklahoma v.

Muskogee Area Director, 28 I.B.I.A. at 56.

The cases cited by plaintiffs as supporting their argument are inapposite. In Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), the court remanded a decision by the Department of Energy because the agency failed to consider any of the factors it was required by statute to evaluate. Id. at 801 ("It is clear from the record that at no time prior to promulgating the April 30, 1974 amendment did the DOE even consider the relevant factors or objectives set out in [15 U.S.C.] § 753(b)(1)."). As detailed above, Secretary Anderson's decision letter complied with the relevant factors set forth in § 151.10 by thoroughly evaluating the applicable statute and proposed use of the property. Similarly, in Pennzoil Co. v. FPC, 534 F.2d 627 (5th Cir. 1976), which did not involve the application of statutory or regulatory factors, the court rejected an agency's disposition of a Freedom of Information Act request due to the agency's laconic analysis. Id. at 632 ("The Commission, however, felt that the 'public interest' outweighed such harm. We feel that this brief statement is inadequate as an articulation of a finding that disclosure of this information serves a legitimate regulatory function."). Again, Secretary Anderson discussed in detail the factors he considered in declining to exercise his discretion under § 465, citing substantial record opposition from local governments, state lawmakers, and nearby Indian tribes that was supported by the record.

Plaintiffs also complain that Secretary Anderson considered matters outside the factors listed in § 151.10. Although plaintiffs do not specify what these offensive matters were, it bears repeating that § 151.10 does not straightjacket the Department

from considering other relevant factors; it simply identifies certain factors that will often be relevant in a trust acquisition decision. Moreover, plaintiffs ignore the provision in 25 C.F.R. § 151.11 that empowers the Secretary to consider "any additional information he considers necessary to enable him to reach a decision." This authority extends down to Area Offices, which have been encouraged to provide the Central Office with "any additional findings independently made by the Area Director on issues or matters that will facilitate a decision." Checklist p. 1 (attached as Ex. B to Pls.' Complaint); see also Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir. 1978) (holding that the Secretary did not necessarily exceed his delegated authority when he took into consideration an individual Indian's desire to be relieved from the obligation of paying property taxes when deciding whether to take land into trust), cert. denied, 439 U.S. 965 (1978).

In the end, Secretary Anderson's decision was made with full record support after a thoughtful consideration of the relevant factors enumerated in 25 C.F.R. Part 151. The record shows that this was reasoned decisionmaking on a controversial and significant trust application, and plaintiffs have been unable to demonstrate that the Department engaged in an arbitrary action unbounded by intelligible principles. As such, their complaint seeking a remand of Secretary Anderson's decision should be dismissed.

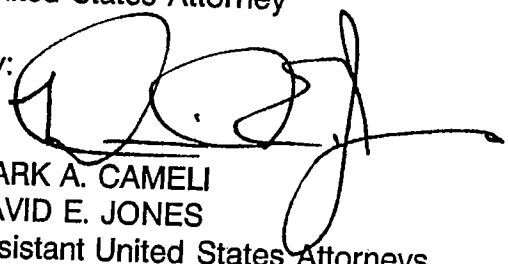
IV. CONCLUSION

For the reasons stated above, defendants ask the Court to deny plaintiffs' appeal of the decision of Deputy Assistant Secretary Michael J. Anderson.

Dated this 23rd day of August, 1996.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
United States Attorney

By: 

MARK A. CAMELI
DAVID E. JONES
Assistant United States Attorneys
660 W. Washington Avenue
Madison, Wisconsin 53701-1585
(608) 264-5158

LOIS J. SCHIFFER
Assistant Attorney General
EDWARD J. PASSARELLI
MICHAEL K. MARTIN
U.S. Department of Justice
Environment and Natural ural Resources Division
P.O. Box 663
601 Pennsylvania Ave., N.W.
Washington, D.C. 20044-0663
(202) 272-6221

Attorneys for Defendant

Of Counsel:
TROY WOODWARD
SCOTT KEEP
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240