UNITED STATES 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**

AFFIDAVIT OF ROBERT M. ADLER

ROBERT M. ADLER, being duly sworn, deposes and sayeth that:

1. I am the lead counsel for the St. Croix Chippewa Indians of Wisconsin (the "St. Croix Tribe") in this action. On behalf of the St. Croix Tribe I have served in that capacity since March 2002 for matters relating to the Federal regulatory approval of the fee-to-trust application for gaming in Beloit, Wisconsin submitted to the BIA Regional Office in St. Paul, Minnesota by the St. Croix Tribe and the Bad River Band of Lake Superior Chippewa Indians (hereinafter, the "Tribes").

2. During this time period, I have had a number of meetings relating to this application with George Skibine, Director of the BIA's Indian Gaming Management Staff, several of which have been attended by Tribal officials and elected officials from the Beloit area. As set forth below, until quite recently, the Tribal leaders and I have been informed during these meetings that the process by which the Department of the Interior would make a decision on the Beloit off-reservation casino application would be the same as historically had taken place. That is, the first decision which would be made by the Department of the Interior would be whether or not it would make a favorable decision under IGRA, 25 U.S.C. § 2719 (b)(1)(A). This is the well-known two-part decision. The two factors which must be decided under it are: (1) whether the proposed off-reservation casino would be in the best interests of the applicant Tribes; and (2) whether there was detriment to the surrounding community.

3. Beginning with the first days of the Administration of President George W. Bush, Mr. Skibine and others at the Department of the Interior have emphasized the fact that, as they viewed it, an essential aspect of the "detriment issue" is whether or not there is strong support for the project by the local elected officials. Since this project has had such support for a number of years, we were never led to believe that the "detriment" issue would be a problem in having the application approved. (There has never been an environmental concern raised by anyone at the BIA in connection with this project -- and, in fact, I was informed several weeks ago by Maria Wiseman of the BIA's Solicitor's Office that she had approved the draft final EIS.)

4. However, beginning sometime in June of this year, I began to hear in discussions, on a very informal basis, with Department of Interior officials and lawyers representing other tribes (having similar pending applications) that consideration was being given by the Department of the Interior to reversing the order of the decision making process by having the

Part 151 decision made before the two-part determination under IGRA. This was almost astounding to me. Historically, from my own involvement in these matters for some ten years, if an affirmative determination was made by the Department of the Interior under IGRA, and the Governor thereafter concurred (as required by the statute) then the remaining issues under Part 151 of the regulations were easily satisfied by the Tribal applicants. They primarily dealt with how the given Tribe would restore, if at all, to the local taxing authority its lost revenues by virtue of the property being placed into trust. Other issues were what are generally known as "jurisdictional" questions involving how the given Tribe and the local jurisdiction(s) had agreed that various health and safety matters would be handled. For example, would the Tribe's own plumbing code be used on the trust property as opposed to that of the local jurisdiction? These issues are normally dealt with in what is known as an Intergovernmental Agreement ("IGA") negotiated at some length between a given Tribe and local jurisdictions. In this case, such an IGA had been successfully negotiated between the Tribes and the City of Beloit. Throughout, it was my understanding that this Agreement more than adequately dealt with all of the issues which are raised by Part 151. In fact, no one from the BIA ever informed me (or to my knowledge, either of the two Tribes) that the present IGA was in any way inadequate or otherwise presented a problem for BIA approval under Part 151 of the regulations.

5. 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. A true and accurate copy of that letter is appended hereto as Exhibit A. Almost immediately thereafter (in mid-January), 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. I was present at

that meeting. At that time, Mr. Skibine informed those present that the BIA would complete its staff review of the Tribes' application within sixty days. He also confirmed that the two-part determination would be made by the BIA; and, if favorable, then the BIA would proceed to make the Part 151 determination if the Governor had previously concurred in the BIA's favorable two-part determinations (as required by the statute, 25 U.S.C. § 2719(b)(1)(A)).

6. After this meeting with Mr. Skibine, it became apparent to me that the review process at the BIA (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 negative views towards off-reservation fee-to-trust gaming applications.

7. I perceived little or no progress was being made by the BIA in its review of the Beloit application (other than for the Solicitor's Office review of the draft final EIS); accordingly, I wrote to Assistant Secretary Carl J. Artman by letter dated July 13, 2007. A true and accurate copy of that letter is appended hereto as Exhibit B. In that letter: (a) I requested (in view of the delay by the BIA in reviewing the application) that Assistant Secretary Artman inform me when the staff review of the application would be completed; and, (b) I asked Assistant Secretary Artman to inform me whether rumors were accurate that the Part 151 determination would be made before the two-part IGRA determination. I 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. Finally, I pointed out that to do so would be contrary to Congressional intent.

8. I received a response to my July 13, 2007 letter in a letter dated August 21, 2007 from George Skibine, Acting Deputy Assistant Secretary-Policy and Economic Development. A true and accurate copy is appended hereto as Exhibit C. Mr. Skibine indicated that he had been asked to respond to my 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).

9. To my knowledge, Mr. Skibine's letter dated August 21, 2007 was the only written communication from the Department of the Interior to the Tribes, or either of them, in connection with their fee-to-trust application for gaming in Beloit which stated that the Part 151 decision would be made prior to the two-part determination. At no time was there any written communication from the Department of the Interior to the Tribes, or either of them, explaining why the Department of the Interior had decided to make the Part 151 determination prior to the two-part determination under IGRA. Indeed, this may have been motivated by the Department of the Interior's position, as expressed in Mr. Skibine's letter of August 21, 2007 (Exhibit C hereto), that there was no change in policy at all.

10. To the best of my knowledge, the Department of Interior has not publicly stated, whether by Notice in the *Federal Register* or otherwise, that a decision had been made by it that for off-reservation fee-to-trust gaming applications pending in the BIA's Central Office, the Part 151 determination will be made prior to the two-part determination under IGRA.

11. 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. A true and accurate copy of this letter is appended hereto as Exhibit D. (As explained in the letter, a favorable two-part IGRA determination had previously been made.) 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).

12. A similar letter was sent on February 20, 2001 to Wisconsin Governor Scott McCallum by James H. McDivitt, Deputy Assistant Secretary-Indian Affairs (Management). A true and accurate copy of this letter is appended hereto as Exhibit E. 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. As explained in this letter, the BIA had made a favorable two-part determination. Deputy Assistant Secretary McDivitt made it crystal clear that the two-part determination preceded the Part 151 determination which would thereafter be made if the Governor concurred in the favorable two-part IGRA determination. 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).

13. A lawsuit had been filed several years earlier 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 on March 9, 2000 in that action by the Department of Justice, in 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 further 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).

A true and accurate copy of this brief is appended hereto as Exhibit F.

14. On September 21, 2007, Assistant Secretary Artman, issued a memorandum to all of the BIA Regional Directors. In this memorandum, Assistant Secretary Artman explained that attached to it was a September 2007 revision of the "checklist for gaming acquisitions." A true

and accurate copy of Assistant Secretary Artman's transmittal memorandum, together with the revised Checklist for Gaming Acquisitions, is appended hereto as Exhibit G. Assistant Secretary Artman further stated that the newly revised checklist differed from the earlier (March 2005) checklist in only two respects. The first, which is pertinent to the purposes 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 clarification, it is my view that this was, in fact, a complete reversal of the practice followed by the BIA for many years.

15. On November 29, 2007, Andrew Adams III, General Counsel for the St. Croix Tribe, and I met with Assistant Secretary Artman in his office. The Assistant Secretary's legal advisor, Andrea Lord, and Nancy Pierskalla (an assistant to Mr. Skibine in the Indian Gaming office) were also present. During that meeting, Assistant Secretary Artman confirmed that the Part 151 determination would be made for the Beloit application prior to the two-part IGRA determination. I tried to convince Assistant Secretary Artman, to no avail, that the decision to make the Part 151 determination prior to the two-part determination was legally flawed under the Supreme Court's decision in State Farm and other decisions which followed it. While Assistant Secretary Artman did not say what the decision on the Beloit application would be, he made it quite clear that decisions would be made within the next several weeks on not only the Beloit application but other similar pending applications. From this meeting with Assistant Secretary Artman, and my earlier meetings with him, this left no doubt in my mind that a letter would be

sent by the BIA before Christmas to the St. Croix Tribe and the Bad River Band denying, under Part 151, their fee-to-trust gaming application for Beloit.

FURTHER, AFFIANT SAYETH NOT.

Dated: December 7, 2007

ROBERT M. ADLER

District of Columbia)
) ss:
City of Washington)

Subscribed and sworn to before me this 7th day of December, 2007.

Notary Public

My commission expires:

Joanne K. Comisiak
Notary Public, District of Columbia
My Commission Expires 09-30-2008