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

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN	)	
Plaintiff,	)	
v.	)	**Civ. No. 1:07-cv--02210-RJL**
DIRK KEMPTHORNE, et al.	)	**Next Scheduled Court Deadline: Oral Argument at 2:00 P.M. on January 15, 2008**
Defendants.	)	

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN'S MEMORANDUM IN REPLY TO THE FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The St. Croix Chippewa Indians of Wisconsin (the "St. Croix Tribe" or the "Plaintiff"), by and through counsel, hereby submits its Reply Memorandum to the Federal Defendants' Memorandum of Points and Authorities in support of their Motion to Dismiss and in response to the Plaintiff's Motion for Preliminary Injunction ("Defendants' Memorandum").

I. THE DEFENDANTS' MOTION TO DISMISS SHOULD PROPERLY BE DENIED

The Federal Defendants have moved for dismissal of the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants' Memorandum at 6-7. The Federal Defendants assert three grounds as the basis for their Motion: (1) the Plaintiff has not met its burden of establishing the requisite waiver of sovereign immunity; (2) the Plaintiff lacks standing to pursue its claims; and (3) the Plaintiff's claims are not ripe for review. The Federal Defendants' positions are without merit.

A. The Plaintiff has Established the Requisite Waiver of Sovereign Immunity.

The Federal Defendants make two arguments in support of their position that sovereign immunity has not been waived: (1) none of the statutory provisions relied on by the Plaintiff provide for a waiver of sovereign immunity; and (2) the August 21, 2007 letter from George Skibine ("Skibine letter") does not constitute final agency action. Defendants' Memorandum at 8-9.

The Federal Defendants tacitly acknowledge, as they must, that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides for a waiver of sovereign immunity if the statutory requirements within the APA itself are met. Defendants' Memorandum at 9. As the Federal Defendants then proceed to correctly assert, that issue turns on whether or not the Skibine letter constitutes "final agency action" pursuant to 5 U.S.C. § 704. Defendants' Memorandum at 10-11. As the Federal Defendants acknowledge, the APA includes within the definition of "agency action" an "agency rule." Defendants' Memorandum at 10 and 5 U.S.C. § 551(13). The Federal Defendants do not take issue with the Plaintiff's position that the Skibine letter constitutes an "agency rule" under 5 U.S.C. § 551(4) in that it is an ". . .agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the. . .procedure or practice requirements of an agency. . . ." 5 U.S.C. § 551(4). See Plaintiff's Memorandum in Support of its Motions for Temporary Restraining Order and a Preliminary Injunction ("Plaintiff's Memorandum") at 15, n.1.

Importantly, the Federal Defendants do not argue that the Skibine letter was some type of tentative or inconclusive statement of Interior's position.[1] The Declaration of Mr. Skibine filed

[1] At the hearing held before this Court on December 12, 2007, counsel for the Government staked out the position that the Skibine letter did not constitute final agency action, suggesting as (…Continued)

by the Federal Defendants fails to even mention the Skibine letter, or for that matter, the issue raised herein relating to Interior's decision to make the Part 151 determination prior to the two-part IGRA determination. The Skibine letter clearly meets the "consummation" of the agency decision making process standard set out by the Supreme Court in Bennett v. Spear, 520 U.S. 154, 177-178 (1997). It was sent by Mr. Skibine, in his capacity as Acting Deputy Assistant Secretary-Policy and Economic Development, in response to a letter sent by Mr. Adler to Assistant Secretary Artman. The statements made by Mr. Skibine, acting in his official capacity, were a finality. There was no speculation or prediction involved. It met the requirements of Bennett v. Spear, supra, as well as those set out by this District Court in Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. John Ashcroft, et al., 360 F. Supp.2d 64, 68 (D.D.C. 2004). Moreover, in Tarbell v. Department of Interior, 307 F. Supp.2d 409, 427 (N.D.N.Y. 2004), letters from Philip N. Hogen, Assistant Solicitor of the Division of Indian Affairs within the Interior Department ". . .articulating an official agency position" were found by the District Court to be a sufficient basis for review under the APA.

The Federal Defendants' position that the Skibine letter does not constitute final agency action is apparently based on the fact that the Interior Department has not yet issued a final decision regarding Plaintiff's application. Defendants' Memorandum at 11. Quite clearly, the Plaintiff's Complaint is based on Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) and the Interior Department's failure to comply with it and the subsequent case law following it. Indeed,

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(Continued…)
a basis for this assertion, that the Interior Department was rethinking its position. See Transcript for the Hearing of December 12, 2007 at 14, lines 4-12, appended hereto as Exhibit A.

the Federal Defendants failed, in articulating their reasons that this action should be dismissed under Rule 12(b), to discuss, much less reconcile, State Farm (and circuit cases following it) with their arguments seeking dismissal of this action.[2]

The Second Circuit's decision in Yale-New Haven Hospital, et al. v. Michael O. Leavitt, 470 F.3d 71 (2nd Cir. 2006) vividly demonstrates why the Skibine letter is actionable under the APA as final agency action. In Yale-New Haven, a 1986 Manual position marked an evident change in course and "altered historical practice." Yale-New Haven, supra at 79-80. The 1986 Manual denied on a *per se* basis coverage for investigational medical devices whereas previously a 1977 letter provided some discretion in reimbursement. Yale-New Haven, supra at 74-75 and 80. Just as the Skibine letter did on its face, the Government contended in Yale-New Haven that the 1986 Manual "marked no change of position," but instead merely expressed the historical *de facto* practice. Yale-New Haven, supra at 81. However, the Second Circuit disagreed, finding that the 1986 Manual provision did in fact reverse historical practice and there was no contemporaneous explanation provided as to the reasons for the change in that practice. Yale-New Haven, supra at 79. This led the Second Circuit to conclude that the 1986 Manual provision was "invalid and unenforceable." Yale-New Haven, supra at 86.

In American Federation of Labor, et al. v. Michel Chertoff, et al., 2007 U.S. Dist. Lexis 75233 (N.D. Cal. Oct. 10, 2007), the issue presented was whether proposed 2007 no-match letters, which the Social Security Administration planned to send to thousands of employers, were actionable under the APA as arbitrary and capricious in that they neither stated that they represented a change in policy of the Department of Homeland Security nor articulated reasons

[2] The Federal Defendants only deal with State Farm and other cases following it in arguing that the Plaintiff has failed to meet the required standards for a Preliminary Injunction. See Defendants' Memorandum at 23 et seq.

for the policy change. As held by the Court, the policy change set forth in the proposed no-match letters was that an employer who received a no-match letter must follow the safe harbor procedures or expose itself to criminal civil liability; whereas, previously, guidance from Homeland Security and the INS recognized that the receipt of a no-match letter could not impact criminal liability by itself. American Federation of Labor, supra at *15. This led the District Court to issue a preliminary injunction prohibiting the dissemination of the proposed no-match letters. Following State Farm, the Court held that the agency had changed course and had failed to set forth a reasoned analysis as to why it had changed course. American Federation of Labor, supra at 26-28.[3]

The D.C. Circuit's decision in James V. Hurson Associates v. Dan Glickman, Secretary of the United States Department of Agriculture, et al., 229 F.3d 277 (D.C. Cir. 2000) is directly on point and is indeed controlling with respect to the issues raised by the Federal Defendants in their Motion to Dismiss as well as with respect to their position, in opposition to the requested injunctive relief, that the Plaintiff has not demonstrated that it is likely to succeed on the merits. In Hurson, the Food Safety Inspection Service ("FSIS") of the United States Department of Agriculture ("USDA") had responsibility with reviewing the labels affixed to certain commercial food products to insure that they were truthful, not misleading and otherwise were in compliance with relevant regulations. Hurson, supra at 279. Historically, a commercial food producer could seek approval of a proposed label in several ways: by mailing in an application, by personally visiting the FSIS, or by hiring couriers/expediting firms whose employees would meet with FSIS

[3] The Defendants' Memorandum fails to even mention this decision even though it is obviously significant in that the Court issued a preliminary injunction on the same theory which the Plaintiff herein is asserting. The decision was discussed in the Plaintiff's Memorandum at 21 as having "real significance."

representatives during office hours. These meetings were called "face-to-face." Id. However, in 1998, the USDA announced its intention to eliminate the practice of allowing face-to-face meetings with courier/expediting firms. Hurson, supra at 279-280. The USDA cited at the time four separate reasons for its elimination of this particular face-to-face review process. Hurson, supra at 280. Hurson, a courier/expediting firm, whose livelihood was threatened by the USDA's new rule prohibiting face-to-face appointments, filed a lawsuit and also sought a temporary restraining order against the USDA. Hurson, supra at 280. Hurson alleged that the USDA had violated the APA by abolishing face-to-face appointments for courier/expediting firms without engaging in notice-and-comment rulemaking. Id. After the parties had fully briefed the notice-and-comment issue, but before the Court ruled on cross-motions for summary judgment, Hurson submitted an amended complaint (or, in the alternative, a motion seeking leave to amend its complaint). Hurson proposed to add new allegations that the USDA's elimination of face-to-face appointments was "arbitrary and capricious" in violation of the APA. The District Court denied Hurson's motion to amend as untimely. The Court further held that the agency's new rule was a procedural one and therefore exempt from the APA's notice-and-comment requirement. Id. On appeal, the D.C. Circuit found that the agency's abolition of face-to-face appointments did not alter the substantive criteria by which it would approve or deny proposed labels. Instead, it simply changed the procedures it would follow in applying those substantive standards. Hurson, supra at 281. Given that the substantive rules were not changed, the Court held that the APA's notice-and-comment requirement was not triggered. Id. However, with respect to Hurson's arbitrary and capricious claim, the Court held that it ". . .would survive a 12(b)(6) motion to dismiss." Hurson, supra at 284. The Court relied

on State Farm and the D.C. Circuit's later decision in AT&T v. FCC, 974 F.2d 1351, 1355 (D.C. Cir. 1992). Id.[4]

The Plaintiff submits that Hurson is controlling with respect to the disposition of the Federal Defendants' Motion to Dismiss. The Court explicitly recognized that Hurson could properly assert an arbitrary and capricious claim under the APA even though Hurson itself was not a commercial food producer and, therefore, had no direct interest in whether or not a proposed label was approved. Further, Hurson confirmed that an arbitrary and capricious claim can properly be asserted even though it is limited to a challenge to the agency's change in internal procedures by which it makes decisions -- as the Federal Defendants herein characterize it, a "departure from an internal process for review." Defendants' Memorandum at 25.

Just as in Hurson, the Complaint herein properly alleges the necessary elements to survive a motion to dismiss. For purposes of a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, it is well-established that the complaint is to be construed liberally in the Plaintiff's favor and that the Plaintiff is to be granted the benefit of all inferences that can be derived from the alleged facts. U.S. ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1259-1260 (D.C. Cir. 2004). Dismissal is inappropriate unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of its claim which would entitle it to relief. U.S. v. Martin-Baker Aircraft, supra at 1260.

[4] While the USDA provided four separate reasons why it changed its procedure, Hurson argued that the stated reasons were pretextual, implausible and counter to the attendant facts. Hurson, supra at 284. Apparently dubious as to whether this challenge to the preferred reasons would succeed, the Court noted that it believed that Hurson's arbitrary and capricious claim was exceptionally weak and that it harbored grave doubts that it would be able to prevail on the merits on remand. Hurson, supra at 284.

The Plaintiff's Complaint alleges in its ¶¶ 8-9 that for more than a six-year period, continuing until the summer of 2007, Bureau of Indian Affairs ("BIA") officials represented to the Plaintiff and the Bad River Band that the two-part (IGRA) decision would be made first by the Central Office of the BIA and (if the Governor thereafter concurred) the BIA would then proceed to make the fee-to-trust determination under Part 151. This was consistent with the historical practice of the BIA. Complaint, ¶¶ 31-32. The Complaint further alleges that in August 2007 the Tribes were first notified by virtue of the Skibine letter that this process would be reversed and that the Part 151 decision would be made before the two-part determination required under IGRA. Complaint, ¶¶ 9 and 29. The Complaint further alleges that this represented a 100% reversal of the decision-making process during both the Clinton Administration and, thereafter, the Bush Administration. Complaint, ¶ 9. See also Complaint, ¶ 30. The Interior Department failed to offer an explanation supporting its change in procedure and practice. Complaint, ¶ 37.

The Federal Defendants, in their Memorandum and in the attached Declaration of George Skibine, do not take issue with the following facts in seeking a dismissal of the Complaint (nor could they) or in opposing the requested injunction: (1) prior to the summer of 2007, the Interior Department had an historical practice of making the two-part determination prior to the Part 151 determination with respect to off-reservation casino applications; (2) a decision was made during the summer of 2007 to reverse this decision making process; (3) no notification was sent to either the Plaintiff or other Indian tribes of this change in practice and procedure other than the Skibine letter itself (which claimed that this did not represent a policy change); and (4) no explanation was provided by the Interior Department to the Plaintiff or other Indian tribes for the reasons behind this change.

The Plaintiff has properly asserted a cause of action under the APA.

B. **The Plaintiff Has Proper Standing.**

In their Memorandum at 12-14, the Federal Defendants assert that the Plaintiff lacks standing to pursue its claims. The Federal Defendants assert, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) contend that the Plaintiff lacks standing because its allegations of injuries are based upon speculation and conjecture "rather than a certainty" that a decision would be detrimental to the Plaintiff if the Part 151 determination were made prior to the two-part determination. Defendants' Memorandum at 12. This argument is misplaced in that the Plaintiff's arbitrary and capricious APA challenge is to the Interior Department's recent decision to make the Part 151 determination prior to the two-part determination.

In their discussion of Lujan (Defendants' Memorandum at 12), the Federal Defendants ignore the treatment of standing within Lujan itself where a plaintiff asserts procedural harm. As Lujan held, 504 U.S. at 572, n.7:

> The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

Lujan provided an example whereby one living adjacent to a site for the proposed construction of a federally-licensed dam had standing to challenge the agency's failure to prepare an environmental impact statement ("EIS") even though he cannot establish with a certainty that the EIS would cause the license to be withheld or altered or even though the dam will not be completed for many years. Id. Under the standards established by Lujan, a plaintiff, such as the Plaintiff herein, asserting procedural harm, need only show that the statutes in question were designed to protect some threatened concrete interests which are personal to the plaintiff.

Herein, the APA grants the Plaintiff a procedural right to protect its interest by challenging the Interior's final agency action.

The Defendants' Memorandum ignores the Supreme Court's decision during the past term in Massachusetts v. EPA, 127 S. Ct. 1438, 1453 (2007). The Supreme Court changed Lujan's redressability requirement in a manner which has direct applicability herein. Under Lujan, the standard was "likely" as opposed to merely "speculative." The new standard enunciated by the Supreme Court is that in cases of procedural injury, all that is required is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Such a possibility certainly exists herein. Indeed, Government counsel stated at the Hearing held before this Court on December 12, 2007, that agency officials were already reconsidering their decision to make the Part 151 determination prior to the two-part decision. See Transcript of Hearing, page 14 (Exhibit A hereto).

Massachusetts v. EPA was followed by the D.C. Circuit in Wisconsin Public Power Inc. v. Federal Energy Regulatory Commission, 493 F.3d 239, 269 (D.C. Cir. 2007). Quoting from the Supreme Court's decision, the Court stated:

> [A petitioner] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.

The First Circuit also applied the modified standing requirements of Massachusetts in holding that individual tribal members had standing to bring an action for declaratory and injunctive relief alleging that the BIA failed to follow procedures required by law before approving a lease to construct a liquefied natural gas terminal on Indian lands. Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18 (1st Cir. 2007).

These decisions effectively dispose of the Federal Defendants' argument that the Plaintiff does not have standing because it cannot demonstrate that if the Federal Defendants made the two-part determination prior to the Part 151 determination, ". . .it would lead to a favorable decision on the Tribe's application." Defendants' Memorandum at 14.

C. The Plaintiff's Claims are Ripe for Judicial Review.

The Federal Defendants argue that the Plaintiff's suit is ". . .not ripe for review because the existence of the dispute itself hangs on future contingencies that may or may not occur." Defendants' Memorandum at 15. Essentially, the Federal Defendants' position is that since the Plaintiff's application is still under review, this lawsuit is premature.

In making this argument, the Federal Defendants ignore the body of law dealing with ripeness with respect to a claim of procedural injury. As held by the Supreme Court in Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 737 (1998):

> [A] person with standing who is injured by a failure to comply with [statutory] procedure may complain of that failure at the time the failure takes place, for the claim can never get riper.

In Nulankeyutmonen Nkihtaqmikon, supra, the BIA made an argument similar to that made herein -- that the plaintiffs' claims were not ripe because it rested on future contingencies that had not yet occurred. Nulankeyutmonen Nkihtaqmikon, supra at 32-33. However, the First Circuit rejected that argument holding that it ". . .misses the mark." Id. According to the Court: "Plaintiffs' alleged injury is the BIA's failure to follow federal law before approving [a] lease."

II. THE PLAINTIFF HAS SATISFACTORILY MET THE STANDARDS FOR A PRELIMINARY INJUNCTION.

A. The Plaintiff is Likely to Succeed on the Merits of Its Claims.

The Federal Defendants contend that the Plaintiff is unlikely to succeed on the merits in that there is "no law to apply" and that, due to the administrative discretion imparted to the agency, any decision made by the Interior Department to make the Part 151 determination prior to the two-part determination is not reviewable by this Court. Defendants' Memorandum at 16-23.

The Federal Defendants' assertions are without merit. In the first place, even if, hypothetically, the Federal Defendants are correct that there is "no law to apply" and it has absolute discretion whether the Part 151 or the two-part determination should be made first, its change in historical practice is subject to the requirements of State Farm and the cases following it. The Federal Defendants place reliance on American Farm Lives v. Black Ball Freight Service, et al., 397 U.S. 532, 539 (1970). Defendants' Memorandum at 18. That decision, decided well before State Farm, did not purport to deal with any State Farm type arbitrary and capricious issue and the corollary issue presented herein as to whether the changed procedure was consistent with Congressional intent. Second, the Plaintiff firmly believes that there is "law to apply" and that the Interior Department does not have discretion to make the Part 151 determination prior to the two-part (IGRA) determination. As the Plaintiff originally set forth in its Memorandum at 22-23, n.3 filed in support of the requested Preliminary Injunction, even if the two relevant statutes (25 U.S.C. § 465 and 25 U.S.C. § 2719) are in conflict with each other, the later enacted statute (25 U.S.C. § 2719) prevails and trumps any conflict with the earlier statute. See State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 704-05 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994).

The Interior Department itself has on at least two separate occasions confirmed to separate courts that its own view of the statutory scheme that the § 2719(b)(1)(A) two-part determination must be made in order for the Department to then exercise its authority under 25 U.S.C. § 465. The earliest such statement presently known to the Plaintiff is the Government's brief (pages 2-3 and 22) filed in Sokaogon Chippewa Community, et al. v. Bruce C. Babbitt in the United States District Court for the Western District of Wisconsin (No. 95-659).[5] In the Federal Defendants' discussion of this brief, they assert that the quote from page 22 ". . .says nothing about sequence. . . ." Defendants' Memorandum at 21. However, the Government's brief in Sokaogon at 22 does speak to sequence in that it clearly states that the Interior Department cannot exercise its authority under 25 U.S.C. § 465 to acquire land in trust unless an applicant can show that it will be in its best interest and that the proposed casino will not be detrimental to the surrounding community. Those showings cannot possibly be made unless the two-part determination is made prior to the Part 151 determination. Be that as it may, if there is any doubt about the Government's stated position as to the sequence of the determinations, the same brief succinctly stated at pages 2-3 that the "initial determination" is the two-part determination.

The second such statement by the Government was one made in March 2007 in its brief filed in the D.C. Circuit in Citizens Exposing Truth About Casinos v. Dirk Kempthorne, et al. (No. 06-5354). A copy is appended hereto as Exhibit B.[6] That appeal challenged the Interior

[5] A copy of this brief was appended to the Affidavit of Robert M. Adler (filed in support of the Plaintiff's Motion for a Preliminary Injunction) as Exhibit F.

[6] An attorney for the Solicitor's Office in the BIA appears on this brief together with Department of Justice attorneys.

Department's decision to acquire the so-called "Sackrider property" in trust for gaming purposes. Interior first concluded that the Sackrider property qualified under the "initial reservation exception in IGRA."[7] Citizens Exposing Truth About Casinos v. Dirk Kempthorne, 492 F.3d 460, 463-464 (D.C. Cir. 2007). In its brief on page 29, the Government stated: "What is more, Interior had to determine whether the Sackrider properly would qualify for gaming under 25 U.S.C. § 2719 in order to comply with the IRA [the Indian Reorganization Act, 25 U.S.C. § 465] and its implementing regulations."

The Government's statements in the Sokaogon and Citizens Exposing Truth About Casinos briefs are significant in that they not only document Interior's historical practice but they also articulate the Interior Department's interpretation of the statutory scheme. The Plaintiff submits that Interior's acknowledgements at the time correctly reflected Congressional intent. As the Second Circuit held in Yale-New Haven at 79, quoting from State Farm: "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. . . ." The Court in Yale-New Haven, supra at 79 also found instructive the Second Circuit's earlier decision in Huntington Hospital v. Thompson, 319 F.3d 74, 79 (2nd Cir. 2002) which held: "While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting some reasoned analysis." That is precisely what the Interior Department has not done herein. Although reversing the order of its decision making process, a position clearly inconsistent with its earlier-stated interpretations of the statutory construction, it has done so without even attempting to present a reasoned analysis of why it did so and making a

[7] The "initial reservation" exception is one of several exceptions to the statutory prohibition of gaming, in addition to a favorable finding under the two-part determination,.

presentation as to why its new procedure is nonetheless consistent with Congressional intent. That is unlawful and actionable.

Interior cannot now be allowed to ignore the proper statutory scheme for making these decisions by creating some artifice to deny pending off-reservation casino applications. The sequencing of the Part 151 and two-part determinations was not, and is not, a procedure which the Interior Department can decide to willy nilly change as it has done here. Instead, as the Interior Department clearly recognized in the statements made to two federal courts and in letters to the Governors of two states (Exhibits D and E to the Affidavit of Robert M. Adler ("Adler Aff.")) that Congress intended that the gaming related issues (other than for NEPA considerations) be determined under the two-part determination. That is, whether the proposed casino was in the best interest of the applicant tribe(s) and whether it would cause detriment to the surrounding casino. If those issues were decided favorably to the tribal applicant, then the tax and jurisdictional issues would later be decided under Part 151 if the Governor concurred in the favorable two-part determination. This construction of the regulatory scheme was detailed in the Adler Aff., ¶ 4. Notably, this has not been countered by Mr. Skibine in his Declaration.

The Plaintiff submits that even had the Interior Department provided reasons for its change in procedure in making the Part 151 determination first, or should it attempt to do so in the future, any such proffered explanation remains subject to legitimate challenge under the APA. State Farm made it abundantly clear that if an agency changes course, its new policy or procedure must nonetheless be based on factors which Congress has intended it to consider. Motor Vehicle Manufacturers Association in the United States, Inc. v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29, 43 (1983). As the Second Circuit stated in

Yale-New Haven, supra at 80 quoting from its earlier decision in N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Authority 757 F.2d 502, 508 (2nd Cir. 1985):

> When an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. . . .
>
> * * *
>
> Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation why the new rule effectuates the statute as well as or better than the old rule.

B. The Federal Defendants' Efforts to Limit State Farm and Cases Following It Effort Are Without Merit.

The Federal Defendants' analysis of State Farm and cases following that decision appears for the first time in their Memorandum at 23-26. They assert that the applicability of State Farm in the present dispute is "limited." Defendants' Memorandum at 24. Essentially, their argument is that State Farm and cases following it establish a pattern where in the State Farm doctrine is only applied ". . .at regulation or enforcement of an outside party." Defendants' Memorandum at 25. The Federal Defendants proceed to contend that State Farm and its progeny do not apply to ". . .an alleged departure from an internal process for review. Id." They further argue that any decision to make the Part 151 determinations prior to the two-part determinations ". . .does not impact the rights or obligations of any outside party. The decision would merely involve internal, ministerial management fully within the agency's discretionary powers to decide how to best manage the programs Congress has asked it to implement." Defendants' Memorandum at 26.

These arguments are without merit. In the first place, the issues presented herein squarely deal with Interior's regulatory procedures and how and when they are applied. They accordingly fall within the zone of "regulation" which the Federal Defendants acknowledge is covered by State Farm. Second, the priority of the determinations (Part 151 versus the two-part) does effect the Plaintiff's rights. Congress, in passing IGRA in 1988, clearly intended to provide Indian tribes with the ability to establish that one or more of the exceptions to the prohibition of gaming properly applied to the casino proposal under consideration. Accordingly, Interior's decision to make the Part 151 determination first is not simply an "internal, ministerial management. . ." decision.

Further, filed in support of the Plaintiff's Motion for a Preliminary Injunction is the Declaration of the St. Croix Tribe's Chairperson, Hazel Hindsley. Chairperson Hindsley stated, in pertinent part in ¶ 10: ". . .[A]s I view it, there is an apparent effort to find some pretext by which to deny the Tribes' pending fee-to-trust application for gaming in Beloit, Wisconsin. The Department of the Interior put this into place by deciding to make the Part 151 determination before the two-part determination under IGRA." This sworn statement has not been contradicted by the Federal Defendants in any affidavit filed with this Court. Accordingly, the record, for purposes of the requested injunctive relief, is that the Interior Department's decision to make the Part 151 determination prior to the two-part determination was not simply an internal administrative decision but one aimed to provide a pretextual basis upon which to deny the Beloit and similar off-reservation gaming applications.

The Federal Defendants state that they have ". . .not found or been made aware of any Court decision requiring a reasoned explanation for an alleged departure from an internal process for review." Defendants' Memorandum at 25. The D.C. Circuit's decision in Hurson, supra is

just such a case. It dealt with a change in an internal review process whereby the face to-face procedure was eliminated for courier services. There was no change in any regulation. Moreover, State Farm and cases following it do not limit their holdings to only situations involving "regulation or enforcement of an outside third party." Defendants' Memorandum at 25. Instead, the State Farm doctrine generally applies whenever an agency has changed its policy or historical practice. That was the case in American Federation of Labor, supra with respect to the proposed no-match letters. And, that was also the case in Yale-New Haven, supra with respect to the policy statements made in the 1986 Manual provision.

Other case law supports the Plaintiff's position. In Owner-Operator Independent Drivers Associations Inc. v. Federal Motor Carrier Safety Administration, 494 F.3d 188, 206 (D.C. Cir. 2007, rehearing *en banc* denied September 28, 2007), the Court held that the agency failed to satisfy the arbitrary and capricious standard under State Farm in that it failed to provide an explanation for critical elements of methodology adopted by it for a crash-risk model which changed models previously used by the agency. In Fox TV Stations, Inc., et al. v. Federal Communications Commission, et al., 2007 U.S. App. Lexis 12868 (2nd Cir. 2007), petition for cert. filed (U.S. Nov. 1, 2007) (No. 07-582), the FCC changed its standards relating to whether isolated and fleeting expletives ran afoul of its indecency regime. The Court held that there was no question but that the FCC had changed its policy and that its action was arbitrary and capricious in that it failed to provide a reasoned explanation for the change. Fox TV, supra at *31-32, *40-41.

III. THE INTERIOR DEPARTMENT'S PRONOUNCEMENT IN THE SKIBINE LETTER OF MAKING THE TWO-PART DETERMINATION FIRST, AND ITS DECISION TO DO SO IN CONFLICT WITH CONGRESSIONAL INTENT, AND CONSTITUTE VIOLATIONS OF 5 U.S.C.(2)(A), (C) AND (D).

For reasons previously stated in this Reply Memorandum and in Plaintiff's Memorandum, the Interior Department's decision to make the Part 151 determination prior to the two-part determination is in conflict with Congressional intent in its passage of IGRA. Accordingly, it is "not in accordance with law" (5 U.S.C. § 706(2)(A) (Count I)). Further, for reasons previously set forth by the Plaintiff, the Interior Department's decision to make the Part 151 determination first is "in excess of its statutory authority or limitations and similarly "short of statutory right." (5 U.S.C. § 706(2)(Count III)). Finally, Interior's failure to comply with State Farm and in cases following it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). (Count IV).

The Federal Defendants argue in their Memorandum that any Interior decision to make the Part 151 determination first would not violate due process and that no trust obligation exists in these circumstances and none was violated. Defendants' Memorandum at 27-30. The Plaintiff believes that these issues are best reserved for a full briefing and determination on the merits. It will therefore not rely on its due process or trust obligation claims for purposes of establishing that there is a substantial likelihood of success on the merits.

IV. THE PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF THE REQUESTED INJUNCTION IS NOT GRANTED.

Unless this Court issues a Preliminary Injunction, the present record is clear that the Interior Department will, in all likelihood, immediately proceed to send denial letters to the Plaintiff, the Bad River Band and other tribes having similar applications pending before the

Central Office of the BIA.[8] In fact, a denial letter, relying on Part 151, was sent today by Interior to the St. Regis Mohawk Tribe. A copy is appended hereto as Exhibit C. On information and belief, similar denial letters have also been sent today to other Indian tribes.

The Affidavit of Robert M. Adler detailed a meeting held with Assistant Secretary Artman on November 29, 2007. Adler Aff., ¶ 15. 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. Assistant Secretary Artman made it quite clear that decisions would be made within several weeks of that meeting on not only the Beloit application but other similar applications. From that meeting with Assistant Secretary Artman, and Mr. Adler's earlier meetings with him, no doubt was left in Mr. Adler's 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 application.

In their response to the Plaintiff's Motion for a Preliminary Injunction, the Federal Defendants do not take issue with Mr. Adler's statements that a denial letter (absent an injunction) will be almost immediately sent to the St. Croix Tribe and the Bad River Band. Indeed, the Declaration of George Skibine fails to deal with this issue. Accordingly, the record in this case is that absent injunctive relief, a denial letter based upon Part 151 will be sent in the immediate future (perhaps within days) to the St. Croix Tribe and the Bad River Band. That denial letter under Part 151 would be legally flawed, and invalid, for the very reasons asserted by the Plaintiff in this lawsuit. While the Federal Defendants assert in their Memorandum at 31 that the Plaintiff has failed to demonstrate that irreparable injury will occur without an injunction,

[8] A strong indication of this is Interior's steadfast refusal at the December 12, 2007 hearing to include in the Stipulation the pending applications submitted by other tribes.

they have failed to proffer any evidence to this Court that absent an injunction they will not issue a denial letter to the St. Croix Tribe and the Bad River Band based upon Part 151. The Plaintiff has satisfied its burden.

The Federal Defendants place considerable weight on their argument that the Plaintiff has unjustifiably delayed in the filing of its request for injunctive relief. Defendants' Memorandum at 30-31. However, the lawsuit itself was filed on December 7, 2007 -- 11 days after the November 29, 2007 meeting with Assistant Secretary Artman. The Motions for a Temporary Restraining Order and Preliminary Injunction Relief were filed the next business day, December 10, 2007. The Plaintiff submits that this period of time was reasonable and not an unnecessary delay. The eleven-day interval provided time for extensive consultations with the Tribal Council in Wisconsin, further research, and the preparation and drafting of the Complaint, the Motions for a Temporary Restraining Order and a Preliminary Injunctions, the supporting Memorandum and sworn statements submitted in support of the requested injunctive relief. There was no lack of diligence.

The Federal Defendants refer this Court to two fairly recent decisions from this District Court dealing with the issue of delay. Defendants' Memorandum at 31. In Sandoz, Inc. v. Food and Drug Administration, 439 F. Supp.2d 26, 31 (D.D.C. 2006), aff'd., mot. dismissed, 2006 U.S. App. Lexis 22343 (D.C. Cir. Aug. 30, 2006), the Court found that Sandoz delayed pursuing the action until the last minute. It placed primary reliance on the Supreme Court's decision in Hill v. McDonough, 547 U.S. 573, 126 S. Ct. 2096, 2104 (2006) for the proposition that there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay. Id. In the case at bar, even had a lawsuit and a request for injunctive relief been filed on the date of the

Skibine letter, there is no practical way that the complicated legal issues raised by the Plaintiff's lawsuit could be resolved prior to the time that a denial letter would predictably be issued by the Interior Department to the Plaintiff and the Bad River Band.

In the second case, City of Tempe AZ v. F.A.A., 239 F. Supp.2d 55, 65, n.13 (D.D.C. 2003), the plaintiffs filed their complaint on October 16, 2002, but did not apply for a preliminary injunction until December 16, 2002, three weeks before the scheduled start of the runway closure. The Court's stated reason for its conclusion that there was unnecessary delay was the 44-day time period between the filing of the lawsuit and the application for a preliminary injunction. (". . .[plaintiffs] offer little excuse for the two-month lapse between the filing of the complaint and the filing of the application for extraordinary relief."). These cases do not suggest that there was unreasonable delay herein.

Finally, the Federal Defendants assert that the Plaintiff has not demonstrated irreparable injury because it has not demonstrated that it will actually suffer any economic harm. Defendants' Memorandum at 32. The Federal Defendants misperceive the requisite irreparable injury which is claimed for purposes of the Preliminary Injunction. As set forth in the Plaintiff's Memorandum at 25, the D.C. Circuit in National Wildlife Federation v. Burford, et al., 835 F.2d 305, 325 (D.C. Cir. 1987) made it imminently clear that when there is procedural harm claimed, as there is herein, then that is the irreparable injury which an injunction is designed to stay:

> A preliminary injunction is designed to prevent irreparable injury; its value would be totally eviscerated if the plaintiff had to show that the harm had already occurred before the court could issue the injunction." (emphasis in original).

V. AN INJUNCTION WILL SERVE THE PUBLIC INTEREST

In arguing that an injunction would not serve the public interest, the Federal Defendants incorrectly assert that the Plaintiff has failed to identify any final agency action taken by Defendant. Defendants' Memorandum at 33. For that reason, argue the Federal Defendants, an injunction would lead to pointless litigation and disrupt the processes established by the Defendant for review of applications to take land into trust for gaming. To the contrary, the Plaintiff submits that unless and until the issues raised by the Plaintiff herein are resolved by this Court, it would make little sense for the Interior Department to proceed to make Part 151 decisions for the Beloit or other similar applications since by doing so it would be forced to rescind those decisions if the Federal Defendants do not prevail in this litigation. In fact, at the Court's hearing on December 12, 2007, this point was raised by the Court with Government counsel. See Hearing Transcript (Exhibit A hereto) at 13-14. This colloquy led Government counsel to state that he understood Interior was reconsidering its position. Transcript at 14.

Finally, the Federal Defendants assert that if a Preliminary Injunction is issued, it will negatively impact Indian tribes who are not party to this litigation. Defendants' Memorandum at 33. The Federal Defendants do not provide any explanation or support for this statement. To the contrary, the Plaintiff believes that other Indian tribes, having similar applications pending before the Interior Department, will demonstrably benefit from the issuance of a Preliminary Injunction so that the issues raised by the Complaint can be resolved on the merits.

CONCLUSION

For the reasons set forth herein and in the Plaintiff's Memorandum previously submitted to this Court, the Plaintiff submits that the Federal Defendants' Motion to Dismiss should be

denied and that a preliminary Injunction should be issued pending a decision by this Court on the merits.

Respectfully submitted,

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