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MENOMINEE INDIAN TRIBE OF WISCONSIN

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN, GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF WISCONSIN, Plaintiff, vs. THE UNITED STATES DEPARTMENT OF THE INTERIOR and DIRK KEMPTHORNE, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR Defendants.	Case No. **PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE**

Pursuant to Rule 201 of the Federal Rules of Evidence ("FRE 201"), the Menominee Indian Tribe of Wisconsin requests that the Court take judicial notice of the following documentary evidence:

1. Ryan Baumtrog et al., The Unmet Needs of the Menominee Nation: Challenges and Opportunities ("Baumtrog Report"), attached hereto as Exhibit A. The Baumtrog Report is judicially noticeable under FRE 201; it is in the public record and

available online.[1] *See, e.g.*, *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008) (courts may take judicial notice of documents in the public record); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of ... documents contained in the public record ... is proper."). *Cf. Greeson v. Imperial Irr. Dist.*, 59 F.2d 529, 531 (9th Cir. 1932) (a court "is bound to take notice of ... public documents").

2. The Checklist for Gaming Acquisitions, Gaming-Related Acquisitions, and IGRA Section 20 Determinations issued by the Department of the Interior in September 2007, a true and correct copy of which is attached as Exhibit B. The Checklist is subject to judicial notice under FRE 201. *See, e.g.*, *Northgate Motors, Inc. v. General Motors Corp.*, 111 F.Supp.2d 1071, 1077 (E.D. Wis. 2000) ("[A]gency files ... are properly the subject of judicial notice."); *Allbrecht v. Metro. Pier & Exposition Auth.*, 338 F.Supp.2d 914, 917 n.1 (N.D. Ill. 2004) (taking judicial notice of publicly available agency policies).

3. The January 3, 2008 Guidance Memorandum on taking off-reservation land into trust for gaming purposes ("Guidance Memo"), a true and correct copy of which is attached as Exhibit C. The Guidance Memo is judicially noticeable under FRE 201. *See, e.g.*, *Bowers v. Remington Rand, Inc.*, 64 F.Supp. 620, 625 (S.D. Ill. 1946) (taking judicial notice of Department of Labor, Wage and Hour Division interpretive bulletin).

4. The October 22, 2008 Letter from Lisa Waukau, Menominee Tribal Chairman, to George Skibine, a true and correct copy of which is attached hereto as Exhibit D. The letter is an agency file and is part of the public record and is judicially

[1] *See* http://www.lafollette.wisc.edu/publicservice/tribal/menominee.pdf.

noticeable under FRE 201. *See, e.g.*, *Northgate Motors*, 111 F.Supp.2d at 1077; *Pugh*, 521 F.3d at 691 n.2; *Menominee*, 161 F.3d at 456.

5. The October 31 Letter George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Department of the Interior, to Lisa Waukau, a true and correct copy of which is attached hereto as Exhibit E. The letter is subject to judicial notice under FRE 201 for the same reasons set forth in paragraph 4 above with respect to the October 22, 2008 Letter from Lisa Waukau to George Skibine.

6. The Testimony on the Department of the Interior's New Policy on Off-Reservation Acquisitions of Land in Trust for Indian Gaming, before the United States House of Natural Resources Committee, 110th Cong., 2d Sess. (Feb. 27, 2008), attached hereto as Exhibit F. This testimony, which is part of the public record, is subject to judicial notice under FRE 201. *See, e.g.*, *Pugh*, 521 F.3d at 691 n.2; *Menominee*, 161 F.3d at 456.

7. The January 4, 2008 Department of Interior press release titled "Department of the Interior Issues Off-Reservation Gaming Guidance and Sends Letters to Tribes," a true and correct copy of which is attached hereto as Exhibit G. The press release is subject to judicial notice under FRE 201 as a public record of a government agency. *See, e.g.*, *Pugh*, 521 F.3d at 691 n.2; *Menominee*, 161 F.3d at 456; *Fletcher v. Jones*, 105 F.2d 58, 61 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 555.

8. The Memorandum of Agreement between the National Indian Gaming Commission and the Department of the Interior, executed in 2007, a true and correct copy of which is attached hereto as Exhibit H. The Memorandum of Agreement, which is

available on the website of the National Indian Gaming Commission,[2] is subject to notice under Federal Rule of Evidence 201. *See, e.g.*, *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice of information on agency website); *Shepherd Investments Int'l, Ltd. v. Verizon Communications, Inc.*, 373 F.Supp.2d 853, 858 n.2 (E.D. Wis. 2005) (taking judicial notice of documents on agency website). *See also Pugh*, 521 F.3d at 691 n.2; *Menominee*, 161 F.3d at 456; *Greeson v. Imperial Irr. Dist.*, 59 F.2d at 531.

9. The December 21, 2006 letter from James E. Cason, Associate Deputy Secretary of the Interior, to George E. Pataki, Governor of New York ("Pataki Letter"), a true and correct copy of which is attached hereto as Exhibit I. Agency determinations like the Pataki Letter are judicially noticeable under FRE 201. *See, e.g.*, *Fornilak v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) ("[I]t is well established that ... agency determinations are subject to judicial notice ....") (citations omitted); *Opoka v. Immigration & Naturalization Service*, 94 F.3d 392, 394 (7th Cir. 1996) (noting that courts have the "power, in fact the obligation, to take judicial notice of ... relevant decisions of ... agencies") The Pataki Letter is also in the public record. *Cf. Pugh*, 521 F.3d at 691 n.2.

10. The February 20, 2001 letter from James E. McDivitt, Deputy Assistant Secretary – Indian Affairs, to Scott McCallum, Governor of Wisconsin ("McCallum Letter"), a true and correct copy of which is attached as Exhibit J. The McCallum Letter

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[2] *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/indianlands/mou/DOIMOU022607.pdf .

is judicially noticeable under FRE 201 for the same reasons noted in paragraph 9 above with respect to the Pataki Letter.

11. Defendant's Brief in Opposition to Plaintiff's Appeal of July 15, 1995, Decision of Michael J. Anderson, Sokaogon Chippewa Community et al. v. Babbitt, No. 95-C-659 (W.D. Wis. Aug. 23, 1996), a true and correct copy of which is attached as Exhibit K. The brief is judicially noticeable under FRE 201, as federal courts may take notice of documents from other court cases. *See, e.g.*, *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994) (citations omitted) (finding it proper to judicially notice public court documents).

Dated: November 6, 2008

Respectfully submitted,

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PROOF OF SERVICE

State of California)
) ss.
County of Los Angeles)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West Fifth Street, 21st Floor, Los Angeles, California 90071.

On November 6, 2008, I served the document described as **REQUEST FOR JUDICIAL NOTICE** on the interested parties in this action, enclosed in a sealed envelope, addressed as follows:

[X] **(BY CERTIFIED MAIL)** Following ordinary business practices, I placed the document for collection and mailing at the offices of Holland & Knight LLP, 633 West Fifth Street, 21st Floor, Los Angeles, California 90071, in a sealed envelope, to the addressee below. I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service, and, in the ordinary course of business, such correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-00001

[X] **(BY PERSONAL SERVICE)** I caused to be delivered such document by hand to the offices of the addressee stated below.

Steven M. Biskupic
United States Attorney
Eastern District of Wisconsin
205 Doty Street, 3rd Floor
Green Bay, WI 54301

X I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 6, 2008, Los Angeles, California.

Angelica Rivera

EXHIBIT A

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit A to Plaintiff's Request for Judicial Notice

The Unmet Needs of the Menominee Nation: Challenges and Opportunities

Presented by
Ryan Baumtrog
Steven Cook
Dennis Dresang

Prepared for the
Menominee Kenosha Gaming Authority
July 2008

Robert M. La Follette School of Public Affairs

THE UNIVERSITY of WISCONSIN MADISON

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Executive Summary

Prior to the enactment of the federal Termination Act in 1954, the Menominee Nation was economically self-sufficient and enjoyed the reputation of being a model of responsible, effective tribal governance. The immediate and lingering effects of Termination were poverty and the health and social ills that typically accompany poverty. Menominee County, which is coterminous with the Reservation, is Wisconsin's poorest county and has the lowest levels of health in the state. The Tribe is one of the poorest in the country. Indeed, the federal government recognized the problems with Termination, repealed the law in 1973, and abandoned plans to terminate other Indian nations. The damages to the Menominee, however, have not been reversed.

The government of the Menominee Nation continues to be thoughtful and responsible as it addresses the Tribe's challenges. In this report, we review the budget and the array of programs and services for tribal members, and we identify a partial list of needed projects and programs. Available funds are not only very limited, but, importantly, the Tribe is heavily dependent on the federal and state governments. In the 2006-07 fiscal year, the tribal budget depended on the federal government for 56.6 percent of expenditures. The Tribe itself was only able to fund 21.5 percent. The Tribe is very vulnerable to cuts in funding it cannot control.

One potential source of revenue to improve conditions on the Reservation and the quality of life for tribal members is an off-reservation casino and convention center. Because of the location of the Reservation in a rural, sparsely populated region of Wisconsin, improvements and expansion to the existing casino and hotel on the Reservation would not significantly increase revenues. Pending approvals from federal and state authorities, agreements between the Tribe and the local community are in place to build a casino and convention center in Kenosha. Implementation of these agreements would bring with them the establishment of training programs and business arrangements that explicitly would drive economic development and growth on the Reservation. A Kenosha casino also could enhance tribal ties with Menominee communities in Milwaukee and Chicago. These proposals build on existing strengths like the College of Menominee Nation and take advantage of the tendency of tribal members to move off the Reservation for work or education and then to return after a few years.

We conclude this report with specific recommendations for projects that could be funded with revenue from a new casino. Many of these are priorities that the Tribe cannot afford to meet.

Acknowledgments

We would like to thank officials from several University of Wisconsin–Madison and State of Wisconsin departments for their assistance. Jim Weber, State of Wisconsin Department of Health and Family Services' Office of Tribal Affairs, and Rachelle Ashley, Native American liaison with the State of Wisconsin Department of Workforce Development, provided important information about the relationship between the Menominee Indian Tribe and the State of Wisconsin. Thanks to the University of Wisconsin–Madison's Applied Population Lab and Department of Population Health Sciences for its resources relevant to the Tribe's demographics. Professor Nicholas C. Peroff of the University of Missouri-Kansas City, who authored the seminal study of the federal Termination and restoration of the Menominee Tribe and who continues to follow events and developments of the Menominee Nation, kindly offered his thoughts and suggestions at an early stage of this project. Thanks, too, to Karen Faster, La Follette School publications director, for editing and formatting the report. We would like to express our profound appreciation for the information, insights, and responsiveness provided by members and employees of the Menominee Indian Tribe.

We close in expressing our respect and admiration for the Menominee Nation and its people's determination to overcome the adverse effects of Termination. Given the opportunity, the Menominee Nation will resume its place as a model of positive identity, self-reliance, and partnership.

Introduction

The Menominee Indian Tribe of Wisconsin and the Menominee Kenosha Gaming Authority asked the La Follette School of Public Affairs, University of Wisconsin–Madison, to study unmet needs of the Nation, with particular attention to how revenues from a casino and convention center in Kenosha, Wisconsin, might benefit the Nation.

This report incorporates findings from studies that tribal agencies completed, including:

Proposed Use of Income Generated from Off-Reservation Gaming

Unmet Needs and Projected Benefits to the Tribe and its Members from Increased Tribal Income

Damages from Termination Accrue into Unmet Needs — Land into Trust Application Supplemental Report

Organizational Unmet Needs

Each of these studies addresses the events and circumstances that led to the Tribe's current economical, social, cultural, and governing conditions. The studies, individually and collectively, followed sound methods of analysis and used verifiable data. Together these studies make a compelling case for the need for increased revenue to address critical tribal needs.

Our independent analysis consists of the following major parts:

1. the legacies of the history of the Menominee Nation and especially the effects of the federal Termination policy
2. the current sources of revenue available to the Tribe
3. the needs of the Tribe to maintain current levels of operations and service, to address existing concerns and issues, and to meet challenges and opportunities
4. the difference between current revenue streams and the costs of the Nation's needs
5. the likely effects of an expanded casino and hotel on the Reservation
6. the probable impacts on the Reservation if the Nation operates a casino and convention center in Kenosha
7. a summary of findings and conclusions, as well as recommendations for the Tribe

History

The Menominee Indian Tribe has resided in what is now the state of Wisconsin for more than 10,000 years. Menominee tribal lands once encompassed nearly 10 million acres within Wisconsin and Upper Michigan.[1] The treaties of 1831, 1832, 1836, 1848, 1854, and 1856 all resulted in the cession of Menominee land that left the Tribe with 235,000 acres in northern Wisconsin, close to the mouth of the Menominee River where the Menominee origin story places the creation of the Tribe.[2]

Confined to such a limited amount of land, the Menominee could no longer live by their preferred methods of hunting, fishing, and gathering of rice. While the sandy soil in the Reservation was not conducive to growing crops, the land did include prime timber. In 1908, the La Follette Act authorized the construction of a sawmill on the Reservation, and the Tribe began to practice sustained-yield management of its forest. The sawmill was and continues to be a major source of income and employment for the Menominee people. The forest is valued culturally and economically.

By the 1950s the Tribe was among the most self-sufficient tribes in the United States. The Tribe owned a 220,000-acre forest and a sawmill representing a capital investment of $1.5 million. Furthermore, the Tribe had more than $10 million on deposit in the U.S. Treasury and had a successful, fully functioning government.[3] The Tribe also had established a law enforcement agency, telephone services, electric companies, a hospital and clinic, and schools. By virtue of its great successes, the Menominee Nation was one of the few tribes initially targeted for a new federal policy that unilaterally ended rights and protections based on the treaties.

This policy—widely recognized as a mistake—caused significant harm to the Tribe. Analyses by the Menominee Tribe detail the damages. Despite the repeal of this policy, the adverse effects of Termination continue. The harm this policy caused distinguishes the Menominee Nation from other tribes in the United States.

With very limited resources, the Menominee have made impressive strides over the past years to return their Tribe to the prospering nation it was before Termination. The Menominee have used the modest revenues from the gaming operation on the Reservation in several ways to benefit the Tribe. The Nation operates and maintains a health-care clinic for tribal members. Since 1993 the College of Menominee Nation has served the community by offering associate of arts and sciences degrees and providing opportunities for students to complete baccalaureate degrees through agreements with four-year universities. The Tribe continues to sustain and nurture its forest and to run and maintain the sawmill, which provides the Nation with jobs and income. These ventures are strong indicators of the Menominee determination to use resources carefully and with a commitment to the collective benefit of the Tribe. These ventures also provide a sound foundation on which to build. Additional resources are necessary for the Menominee to expand upon its successes and to return its Reservation and its Tribe to the status as one of the best in the country.

Termination and Its Effects

The Menominee Termination Act was signed into law on June 17, 1954, but it was not implemented until May 1, 1961, because of many problems with the large number of questions and concerns raised by the implications of ending federal recognition. The Tribe and the State of Wisconsin also sought to block Termination and then to restore recognition of the Tribe. Indeed, the policy was so problematic that the federal government gave up plans to terminate other tribes. The act transformed the reservation into a county subject to state and federal laws.[4] Tribal rolls were closed. Children born after 1954 were not recognized as tribal members. The Menominee were no longer viewed as Indian, and tribal government structures were relegated to history.

Prior to Termination, tribal members were considerably poorer than the white population in surrounding counties, and the reservation had a limited and fragile revenue base, despite the Tribe's relatively successful sawmill, sustainable forest, viable hospital, functioning power plant, and sound government. The federal government considered these accomplishments an indication the Menominee should be "rewarded" with Termination, even though all factors showed that residents of the new county would not be able to fund the services the State of Wisconsin mandated.[5] The narrow base for property taxes was insufficient to support the public schools, law enforcement, human services, and emergency services the State required.

After years of lobbying by the Menominee and the State of Wisconsin, the federal government restored recognition to the Menominee on December 22, 1973. However, restoration did not end or remedy the negative effects of Termination. A 2005 study by the Tribe demonstrates that individuals and the Nation as a whole faced increased costs for governance and public services at the same time income dropped.[6] We highlight some of the major findings:

- Individuals and families left the former reservation in record numbers for jobs and for services. The population on the former reservation consisted primarily of the very young and the elderly. Poverty increased markedly.
- The hospital and clinic had to be abandoned because of the inability to fund compliance with state standards. Most tribal members had to forgo health care because of the higher costs and the lack of transportation to services in Shawano and Antigo.
- The Tribe sold its telephone and electric companies, and utility services had to be purchased.
- Tribal courts and police were dismantled, and Menominee County relied heavily on neighboring Shawano County for law enforcement.

- The former reservation became part of the Shawano School District, and Menominee youth pursued their education with the challenges that accompany ethnic minority status.
- Menominee young people no longer qualified for funding for Indians to attend boarding schools or colleges.
- Land, critical to the economy and the cultural identity of the Menominee, had to be sold by Tribal Enterprises (the entity that runs tribal businesses) to individuals outside the Tribe to generate needed revenues.
- Individuals also had to sell land to buyers outside the Tribe because they could not afford property taxes levied as a result of Termination.
- Menominee had to acquire hunting and fishing licenses for activities critical for cultural identity and, for some, sustenance.
- As with other communities in social and economic distress, the Tribe has experienced increases in alcohol and other drug abuse, gang-related violence, and domestic abuse since Termination.

While it might be argued that some of the economic difficulties and relocation of Menominee to urban areas were due in part to factors other than the Termination policy, it cannot be argued that Termination helped the Menominee Nation or its people. Indeed, the federal Bureau of Indian Affairs has acknowledged that Termination was a mistake and caused the Menominee harm:

> In 1965, the Bureau stated: "A review of developments in Menominee County since termination of the Federal trust in 1961 makes clear how ill-advised were the terms on which the Menominee were deprived of Federal services and supervision."[7]
>
> In 1972: "Upon termination the reservation became a county which today is the most poverty-stricken in the State of Wisconsin. Public expenditures which were to decrease over time soared from an annual figure of $160,000 before termination to almost $2,000,000 thereafter. Yet despite the cost the county ranks at the bottom of Wisconsin counties in employment, income, education, health, housing, property values, and other areas.[8]

Continued Costs of Termination

More than 50 years after Termination, the Tribe's economic and cultural integrity is still recovering. Menominee County, coterminous with the Reservation, regularly ranks as the poorest county in Wisconsin and the fourth poorest tribe in the United States.[9] Ongoing issues include:

- The diversion of revenues from the sawmill to replace federal revenues lost with Termination and to pay for costs required of county governments by the State of Wisconsin meant that the mill could not reinvest in the modernization of its operation.
- The loss of the hospital was only partially offset with the establishment of the Menominee Tribal Clinic in 1977. Anyone needing care and treatment in a hospital must still bear the extra costs of traveling to and staying in a facility off the Reservation. Partly due to the high poverty rate, the Menominee have considerably more expensive health-care needs than other Wisconsin communities.
- Tribal ownership of utilities has not been restored, and services must be purchased from off-Reservation sources.
- The State of Wisconsin created the Menominee Indian School District in 1976 so children could learn in an atmosphere free of some of the racial hostility encountered in Shawano, but this added a significant expenditure for the Tribe.
- The coterminous existence of Menominee County and the Reservation continues to oblige the Tribe to meet the mandates and responsibilities of a county without adequate revenues from property taxes.
- The Menominee's status as a tribe and as a county means higher expenses for governance—two bodies are more expensive to operate than one.
- The Menominee Nation is the only tribe in Wisconsin not covered under federal Public Law 280 that gives states jurisdiction over Indians accused of crimes. Law enforcement costs for the Menominee are higher than for other tribes and for other counties with similar populations but without the complexities of handling cases in accordance with whether the accused are Indian.
- The disruption to the economy of the Menominee continues to disadvantage the Tribe and its members and to drive an exodus of individuals seeking employment in areas and occupations not related to the Tribe or Tribal Enterprises.

Descriptive Overview

The unmet needs of the Menominee Nation at the beginning of the 21st century can in part be understood through an examination of the characteristics of the Nation's people and Reservation. The Tribe has a larger percentage of younger people than is the norm in the United States. Tribal members experience unusually high levels of poverty and are not as healthy as other groups in society. The Reservation has considerable natural beauty, but aging infrastructure. In short, the needs are many and serious. Figure 1 outlines characteristics of the Menominee Tribe.

Figure 1: Characteristics of the Menominee Tribe, 2000

These indicators are absolute measures that demonstrate high levels of poverty among the Menominee.

- Total population was 8,691.
- The median age was 25.9, with 38.6 percent younger than 18 and 6.3 percent older than 55.
- 79.4 percent of those who are at least 25 years old have a high school education.
- 9 percent have a bachelor's degree or higher.
- 65.2 percent of those who are at least 16 years old are in the labor force.
- The unemployment rate was 16 percent.
- The median income per household was $28,906.
- The median income for men was $25,661.
- The median income for women was $21,274.
- The per-capita income was $10,499.
- 25.7 percent of families were below the federal poverty line.
- 50.9 percent of the families with children were headed by a female with no husband present.
- The median year for when housing was built is 1975.
- 9.9 percent of the housing units had no telephone service

Source: U.S. Census Bureau, *Characteristics of America Indians and Alaska Natives by Tribe and Language: 2000* (December 2003), www.census.gov/prod/cen2000/phc-5-pt.1.pdf.

Demography

The Menominee Indian Tribe has resided in what is now Wisconsin from before the earliest European contacts in the 1600s. Disease and conflicts introduced by other migrating tribes reduced the Menominee population to as low as 400 at the time of the French arrival in Wisconsin in 1667. The Menominee population grew slowly during the next 200 years, with an 1854 census reporting 1,900. At the same time the treaties with the United States federal government reduced the lands available to the Menominee.

For the next 100 years, the Menominee population had a low of 1,400 and then experienced gradual growth until tribal rolls were closed in 1954 under the federal Termination policy. At Termination in 1961 the enrolled membership was 3,700, which does not include children born after the closing of the rolls in 1954. Approximately three-fourths of the Tribe lived in Menominee County.[10]

The enrolled Menominee population has more than doubled over the years since Termination: The U.S. Census Bureau reported the population of the Menominee Tribe at 8,691 in the 2000 census. The distribution of the population since 1954 has changed dramatically. Before Termination, the great majority of the Tribe lived on the Reservation. In the decades after, the reservation population declined 12 percent in the 1950s and 29 percent in the 1960s. Population decreases were even greater for the Menominee population since the county figures reflect an influx of non-Menominee. Non-Indians were 2 percent of the population on the Reservation in 1956; by 1970 they were 12 percent.

Since federal recognition of the Tribe was restored in 1973, overall tribal population growth has continued, but the shift out of Menominee County has not abated. As of September 2004, the Menominee Tribe had 8,181 enrollees. Less than half of the enrollment (4,021 people, or 49.1 percent) live on the Reservation, another 2,856 (35 percent) live off-reservation in Wisconsin, with the largest populations in communities adjacent to the Reservation (749), in Green Bay (612), and Milwaukee (341). The remaining 1,304 members live out of state, with the largest concentration in Chicago (126).[11]

The movement of population off the Reservation, and the County's high birth rate, has led to a dramatic skewing of the age distribution of the tribal population on the reservation. Those tribal members living off the Reservation are more likely to be of working age, and those living on the Reservation are more likely to be children. Of the total enrollment, 27.8 percent are younger than 20, but among those people living in Menominee County, 42.1 percent are younger than 20. In Wisconsin, 25.5 percent of the population is younger than 18, compared to 38.9 percent of Menominee County's residents. No other county in Wisconsin exceeds 30 percent.[12] This

skew dates to Termination when the county population saw increases among the very young and very old, and substantial decreases in working age people. These trends suggest that people were leaving the Reservation to pursue work or education that may have not been available on the Reservation, leaving behind their children to be raised by single parents or by grandparents.

These shifts in the county population have many consequences for individuals, families, and for the governmental institutions responsible for service provision. One result is that single women head many more Reservation households than is generally true in the state. Data from the 2000 Census show nearly one-third of Menominee householders are single women compared to 9.6 percent of all Wisconsin households. Female-headed households are much more likely to experience poverty, utilize government assistance, and have negative consequences for children's educational attainment and other outcomes.[13]

Income and Poverty

Especially since Termination, the Reservation has experienced levels of poverty and income far worse than any other county in Wisconsin. Table 1 compares median income (adjusted for inflation) in Menominee County with state levels.

Table 1: Median Household Income (2005 dollars)[14]

	2005	1999	1989	1979	1969
Menominee County	30,839	34,512	22,242	35,239	28,902
Wisconsin	47,141	51,335	46,371	38,786	44,516

Median income in Menominee County has been consistently about two-thirds of that statewide, with the exception of 1979, the peak year for federal spending on Indian programs, before cuts instigated during the Reagan/Bush years.[15] In an environment such as Menominee County where a large proportion of the labor force is employed by the local government, the availability of funding for such programs did appear to have a strong, if transitory, effect on raising relative income levels.

Table 2 compares the poverty level in Menominee County with state rates and other nearby counties during the last three decades.

Table 2: State and County Poverty Rates[16]				
	Percentage of Population in Poverty			
	2005	1999	1989	1979
Menominee County	26.3	28.8	48.7	18.0
Langlade County	11.8	10.1	14.6	n/a
Oconto County	8.7	7.1	12.1	n/a
Shawano County	9.6	7.9	11.3	n/a
Wisconsin	10.2	8.7	10.7	7.1

Poverty rates for Menominee County are anywhere from two to four times higher than the state rates or even than the relatively high rates of a poor, neighboring rural county such as Langlade. The higher poverty rates in Menominee have several sources. The larger proportion of children and older adults on the Reservation means that families are more likely to have non-earning members. The greater number of single-parent households mean that more families have only a single source of income. And, the incomes that those families earn are lower than in other Wisconsin counties.

External factors such as the general condition of the economy and levels of federal spending affect poverty rates in all counties, but Menominee County appears to react more strongly to these factors. Poverty rates in other counties and on the statewide level move within a fairly narrow band, but poverty rates in Menominee County more than double between 1979 and 1989, and then drop by half between 1989 and 1999. This sensitivity to external factors no doubt reflects the limited diversity of employment opportunities in the county. In the late 1970s government and the forestry/lumber industry accounted for almost all on-reservation employment. Government funding cuts or slowdowns in the lumber industry can have enormous impacts on the overall economic condition of the tribal population.

Employment

Since the 1970s the Tribe's employment opportunities have diversified, primarily from the opening of the tribal casino and hotel in 1987 and the chartering of the College of the Menominee Nation in 1993. Along with the forestry industry and some small retail, these employers provide jobs not only for the residents of Menominee County, but also draw in employees from other counties, primarily Shawano, some of whom are tribal members living off-reservation. The county labor force faces an annual unemployment rate that generally hovered between 8 percent and 10 percent through the 1990s, with an increase to 12.3 percent during the recession of the early 2000s, remaining around 10 percent since then. The unemployment rate is at least twice as high as that in the state overall and is the highest of any county in the state.

Social Services

Given high unemployment and poverty rates and low income levels on the Reservation, tribal social services are an important safety net. The Tribe offers many programs; the State manages some, others are run independently. Funding comes from tribal funds, the federal Bureau of Indian Affairs, the U.S. Department of Health and Human Services' Administration for Children and Families, and a few Wisconsin agencies.[17] General Assistance provided grants for food, shelter, and clothing for adults without children before it was terminated in 2007 due to insufficient funding.

Since 2004, the Tribe has managed its own Temporary Assistance for Needy Families (TANF) program; before that, tribal members applied to the State's program, Wisconsin Works (W-2), which is managed through county offices. The Tribal TANF program serves many more Menominee than had received grants or services through W-2. In the seven years from the start of W-2 to the start of the Menominee program, 296 families identifying as American Indian received W-2 grants or services in Menominee or Shawano counties. For federal fiscal year 2006 (October 2006 to September 2007) alone, the Tribal TANF program served 794 families and distributed $475,000 in voucher payments. In addition, the Tribe's grant-supported employment and training program annually provides job-search and training services to 200 youth and 100 adults.

Two tribal programs supply basic support or emergency assistance to individuals ineligible for TANF. The Emergency/Catastrophic program serves as a last resort assistance fund for those needing one-time emergency support. The Tribe's Aging Division provides heating assistance and home repair aid to older adults.

Health

Menominee County consistently ranks as the worst in Wisconsin for health outcomes and risk factors. The only exception to this pattern is when air pollution, water pollution, and lead paint are considered. The environmental quality of the county is consistently among the best in the state. Menominee County has the highest mortality rate and the highest incident rate of almost every major chronic illness. Despite the impressive outpatient services at the Menominee Tribal Clinic, Menominee County has the fifth worst health-care services of the 72 counties in Wisconsin. Menominee County placed 69 out of 72 on the incidence of type 2 diabetes, itself an indicator of poor health habits and conditions.[18] In a 2007 University of Wisconsin–Madison Population Health Institute study, Menominee County ranks as worst in Wisconsin when considering:

- mortality (death rate for those younger than 75)
- general health
- mammogram screening

- smoking during pregnancy
- teen birth rate
- sexually transmitted diseases
- motor vehicle crashes requiring emergency room visits
- violent crime
- high school drop-out rate
- proportion of adults lacking high school degrees
- unemployment rate
- children in poverty
- divorce rate
- single parent households

Infrastructure

The Menominee Reservation is a forested area along one of the most pristine and picturesque segments of the Wolf River. The natural resources of the Reservation are of considerable cultural and aesthetic value. Infrastructure for community living and economic activities is, however, quite limited and aging.

Transportation

According to the Indian Reservation Road inventory, the Menominee Reservation has approximately 295 miles of Bureau of Indian Affairs roads, 8 miles of tribal roads, 41 miles of state roads and 122 miles of county and township roads. The Tribe's Community Development Department maintains and repairs tribal and Bureau of Indian Affairs roads while Menominee County is in charge of county and town roads.

The Menominee Nation's Department of Transportation provides services to the Tribal School, Head Start, and Tribal Clinic and operates round-trip bus services from Keshena to Neopit, Zoar, Middle Village, Shawano, and other locations. The department works with the Department of Community Development to improve walkways and crosswalks to make Reservation towns more pedestrian friendly. The Department of Transportation's development plan addresses current services as well as needs and gaps in service.

Utilities

Keshena has community wells, a new pump house, two water towers, water and wastewater distribution systems, and a wastewater treatment plant. Neopit's systems are similar to Keshena, while Zoar has a new well and pump house. The Tribe is beginning a $5 million project to update utility systems, with partial funding from the U.S. Department of Agriculture, U.S. Environmental Protection Agency, and the Indian Health Service.

Water and Sewer

The Menominee Tribal Utility Department provides the water, wastewater, and septic services to everyone within the Reservation without their own well and septic systems. They also provide Middle Village with electrical services. The Utility Department provided the following services in 2006:

Middle Village
Residential sewer/water/electrical: 72 customers
Commercial sewer/water/electrical: 210 customers
Commercial electrical: 9 customers

Neopit
Residential sewer and water: 210 customers
Commercial sewer and water: 19 customers

Keshena
Residential sewer and water: 312 customers
Commercial sewer and water: 60 customers

Zoar
Residential water: 23 customers
Commercial water: 4 customers

Trailer Court
Residential water: 17 customers

Redwing
Residential water: 21 customers

Summary

For decades Menominee County has had the lowest median income, the highest unemployment rate, and the highest poverty rate in Wisconsin. During Termination, including the seven years between passage and implementation, the Reservation population declined, leaving a disproportionately large population of children with female-headed households. Menominee County is not only the poorest county in the state, it ranks among the least healthy every year.

The large increase in use of the Tribal TANF program (compared to area usage of Wisconsin Works) speaks to a demand for services unmet by the state program. In addition, reliance on outside funding for employment of a large percentage of the county's population exacerbates the difficulties of addressing hardships the Menominee face. The tribal government uses federal and state funds to finance jobs and to assist many tribal members. This funding may erode. Increases in income and reductions in poverty occurred in the 1970s when funding of Indian programs was healthy. These gains could not be sustained when that support was cut.

The Tribe has attempted to diversify its employment opportunities and funding streams by starting new businesses: the casino and the college. While poverty is still severe, this diversification is a logical way to further address these tribal needs.

Operating Costs

The following analysis and presentation of revenue sources and expenditure patterns of the Menominee Nation is based on program categories the Tribe developed for its financial reporting.[19] Data are for 2007. This section itemizes and explains 2007 programs and costs. It also highlights the Tribe's dependency on external sources of funding, especially the federal government, even for basic services.[20] These costs and the services *do not* portray adequate levels; cuts in federal and state support have taken a serious toll on tribal services. Given the very basic level of services and the interdependence of the agencies, a cut in one program or agency has serious negative effects on others. Note that the Tribe is a major employer on the Reservation and, like other employers, faces the challenges of rising costs of health care for employees and their dependents. In fiscal year 2006-07, employee and dependent health care cost $11,273,764 (19.5 percent of the total budget presented below). Given the importance of government as an employer on the Reservation, decreases in federal funding require staff layoffs, which reduces tribal income and affects health care, and simultaneously increases the workload of other employees.

Revenue sources and expenditure patterns do not highlight critical needs on the Reservation. These include:

- a domestic violence shelter
- a new school
- a new jail
- replacements for Dam #3 and the Neopit Millpond Dam
- natural resource protection
    - against invasive species that have harmed other parts of Wisconsin, e.g., zebra mussels, gar fish, purple loosestrife, lamprey eels, and garlic mustard
    - against plant and animal diseases that have harmed other parts of Wisconsin, e.g., gypsy moth, oak wilt, and chronic wasting disease
    - for species of cultural and natural importance, e.g., wild rice and Karner-Blue butterfly habitat
- housing
- aged and inadequate infrastructure

In short, the descriptions of programs below should not be interpreted as a plethora of adequately funded programs and services. Instead, the reader is invited to note the extraordinary dependence of the Tribe on federal and state funding. In addition, current budgets do not cover important needs like schools and dams that are essential to maintain an already declining quality of life. For example, the 45-bed jail is

always filled to capacity, so some individuals who should be incarcerated are on probation or parole. The Tribe has three probation officers for the almost 300 individuals on probation or parole, meaning some offenders are not receiving enough supervision, which puts the community at risk for additional crime.

Health and Family

The programs and departments under the health and family category describe the Tribe's services that relate to the spiritual, physical, and mental well-being of the Tribe. These programs and departments include: Aging Division, Chicago Community Center, Tribal Clinic, Youth Development and Outreach, Food Distribution Supplement Program, Maehnowesekiyah, Neopit Community Center, Recreation, South Branch Community Center, Social Services, Veterans Service Office, and Zoar Ceremonial Building, Neopit Boxing Club, Woodland Boys and Girls Club, Community Funding Requests, Veterans Pow Wow, Child Support Agency. General Assistance was eliminated in 2007.

1) Aging Division

The Aging Division's mission is to respect and honor the traditions of tribal elders by providing services that promote independent living and enhance their quality of life. The Senior Nutrition Program supplies meals to approximately 100 elders each day. The Native American Caregiver program offers temporary respite for family caregivers. The Senior Companion Program provides visits and companionship to elders while the Maintenance Department assists elders by cutting firewood, mowing grass, plowing snow, and performing other services. The division administers programs that give direct monetary assistance through Community Service Block Grant funds, the Federal Emergency Management Agency, and tribal dollars. The division runs the Wolf River Community Based Residential Facility for elders.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$176,476	$40,107	$861,676	$9,801	$1,088,060

2) Chicago Community Center

This center allows tribal members in the Chicago area to maintain ties with one another and the Tribe. The tribal government holds semi-annual meetings with tribal members at this community center.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$8,001	$ –	$8,001

3) Tribal Clinic

The Tribal Clinic provides quality, accessible, and comprehensive medical, dental, optical, mental, and community health services. It also has a pharmacy and optical center. It serves approximately 4,000 eligible Indians each year and has about 8,500 active medical charts.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$8,498,832	$83,014	$231,282	$7,402,630	$16,215,758

4) Youth Development and Outreach

Youth Development and Outreach serves youth and families of the Menominee community through culturally appropriate resources. The office promotes family reunification and support for youth ages 11-17.[21] Youth Development and Outreach has three program areas to promote healthy lifestyles, strengthen families, and develop community outreach and partnerships. Programs include alcohol education, balanced and restorative justice, truancy education, drug-free communities, and family reunification and youth advocacy.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$305,269	$123,969	$150,430	$44,015	$623,683

5) Food Distribution Supplement Program

The Food Distribution Supplement Program supplies food, recipes, and nutrition information to help eligible people maintain balanced diets. The program serves 390-420 households with about 1,100 individual participants. The program serves 90 to 95 food items, including meats, fresh produce, and seeds.[22] This program works with the U.S. Department of Agriculture ordering system and served 11,030 participants in 2006.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$221,911	$348	$161,304	$11,788	$395,351

6) General Assistance

General Assistance helped clients meet basic needs for food, shelter, and clothing. They received monthly grants and medical cards, and were required to seek employment. General Assistance served 111 tribal members in 2006. This program was eliminated in 2007 because of a lack of funding.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$41,988	$ –	$24,906	$ –	$66,894

7) Maehnowesekiyah

Maehnowesekiyah provides culturally specific treatment, education, and support services for tribal members with alcohol, drug, mental health, adolescent, and domestic abuse problems. [23] Treatment services for alcohol and other drug abuse includes residential treatment, aftercare services, assessment, drug testing services, intensive day treatment, education group, and adolescent treatment. The wellness drug court gives first-time offenders a chance to become free of substance abuse and clear their record of the criminal charges that brought them to the program.

Domestic violence services include assessment and a support group for batterers. Before the domestic violence shelter was closed in 2007 because of inadequate funding, it provided 24-hour coverage, seven days a week for victims of domestic violence. The assistance ranged from one-time information or referral to long-term aid. In 2006, the program served 207 adults and 133 children. The shelter housed 50 adults and 55 children for 1,152 bed nights.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$1,387,665	$220,513	$413,011	$6,839	$2,028,028

8) Neopit Community Center

The Neopit Community Center is a gathering place for Neopit community members. Tribal programs use the center for activities, special events, community service projects, and family learning activities.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$8,000	$ –	$8,000

9) Recreation Department

The Tribal Recreation Department improves the quality of life among all residents of the Reservation. The department provides and promotes parks, public areas, recreational programs, and special events. In fiscal year 2006-07, the department served 11,595 youth and 4,198 adults. The department operates the Youth Center. Program activities include: Culture Camp, Family Fun Day, Tribal School and Hoop Dancers, Neopit and Keshena Little League, and nightly open gym at the Menominee High School.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$235,430	$ –	$235,430

10) South Branch Community Center

The South Branch Community Center primarily is a gathering place for South Branch community members. Tribal programs use the center for activities, special events, community service projects, and family learning activities. The Johnson O'Malley Program's tutoring and library services at the center were discontinued in 2007 due to inadequate funding.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$8,000	$ –	$8,000

11) Social Services

Social Services oversees the Child Support Department, Indian Child Welfare Act requirements, counseling services to children and families, enrollment assistance to adult adoptees, adult paternity, kinship care services, respite day care, adoption recruitment, coordination of the community child protection team, administration of the individual Indian money accounts program, and administration of the emergency/catastrophic program.[24]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$312,440	$288,984	$355,668	$324	$957,416

12) Veterans Service Office

Menominee County operates and sponsors this program to provide technical and limited financial assistance to veterans who reside in Menominee County. Since the majority, if not all, of the veterans are members of the Tribe, the Tribe helps the County by subsidizing a portion of its costs. The County receives a small grant from the State to operate the program, with the remaining balance being picked up by county tax dollars and tribal contributions.[25]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$28,995	$ –	$28,995

13) Zoar Ceremonial Building

The Tribe contributes annual funds to Zoar for the operation and maintenance of the Zoar Ceremonial Building. The facility is used for gatherings that include social and religious events.[26]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$4,710	$ –	$4,710

14) Neopit Boxing Club

The Neopit Boxing Club teaches Menominee youth of all ages boxing techniques and other athletic instruction in a safe and healthy environment. Youth participate in tournaments in the state and throughout the Midwest.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$11,231	$ –	$11,231

15) Woodland Boys and Girls Club

The Woodland Boys and Girls Club, non-profit organization, provides structured after-school and summer programming to Menominee youth. Programming include tutoring, field trips, anti-drug and anti-alcohol activities, Menominee crafts, and cultural events. The club collaborates with a number of tribal departments to support and enhance its programming.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$44,200	$ –	$44,200

16) Community Funding Requests

Community Funding Requests are funds that provide cash assistance for special community events and aid in emergency situations for tribal members who are not eligible for supportive services from other agencies or for medical assistance. A panel of tribal members screens, reviews, and approves Community Funding Requests.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$15,000	$ –	$15,000

17) Veterans Pow Wow

The Veterans Pow Wow is an annual community event that serves to honor and recognize all Native American veterans and active duty military personnel through traditional drumming, singing, and dancing. The pow wow is organized by the Veterans of the Menominee Nation and is open to the public.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$4,000	$ –	$4,000

18) Child Support Agency

The Child Support Agency promotes parental responsibility and financial security for children by providing services to families who need assistance to establish paternity or to establish and enforce child, family, and medical support. The primary functions of the agency include intake, paternity establishment, child support establishment and enforcement, income withholding, and interstate child support enforcement and case management.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$593,901	$ –	$125,525	$22,950	$742,376

Labor, Education, and Training

The Tribe's labor, education, and training programs and departments develop and foster tribal human capital—the membership's education and work skills. These programs and departments include College of Menominee Nation, Department of Early Child Care Services, Education Department, Head Start, Tribal Historic Preservation Office, Community Resources Center, Johnson O'Malley Program, Language and Culture Commission, Library, Tribal School, Department of Trust Resources, and University of Wisconsin–Extension. East-West University's Keshena campus closed in June 2008.

1) College of Menominee Nation

The College of Menominee Nation serves as a center for lifelong learning by offering exemplary academic preparation and research. Chartered by the Menominee Tribe, the two-year community college infuses higher education with American Indian culture to prepare students for careers and graduate studies in a multicultural world. The college serves 500 students a year and awards associate of arts and sciences degrees. Students can complete their baccalaureate degrees through agreements the college has with four-year universities around Wisconsin. The college is committed to researching, promoting, perpetuating, and nurturing American Indian culture in the classroom and through outreach workshops and community services. The Higher Learning Commission of North Central Association accredited the college in 1998.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$252,092	$ –	$252,092

2) Department of Early Child Care Services

The Department of Early Child Care Services, formerly known as the Menominee Tribal Day Care Center, has been serving children and families of the Tribe since 1988. The facility is open year round and is licensed for 156 children age 6 weeks through 12 years. During 2006, the center provided educational child care services for 155 children. The center provides a safe, stable environment where children can learn, explore, create, and play under the supervision of qualified staff. In collaboration with the College of Menominee Nation, Head Start, Maehnowesekiyah, and Tribal Social Services, the Department of Early Child Care Services offers training programs for the community and program clients.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$281,582	$107,193	$282,951	$88,140	$759,866

3) East-West University

Closed in June 2008, the East-West University Keshena Campus offered an academic program leading to a bachelor of arts degree. The campus meant students could remain on the Reservation while they pursued their four-year programs. The Higher Learning Commission of the North Central Association of Colleges and Schools accredited all courses.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$29,223	$ –	$29,223

4) Education Department

The Education Department helps tribal members who want to advance in the work force pursue higher education.[27] Based on financial need, the higher education program provides Bureau of Indian Affairs and tribal grants to eligible Menominee students seeking bachelor's degrees at colleges or universities. The program gives financial aid application assistance, education counseling, and financial aid workshops, and aids student advocacy regarding financial aid eligibility. As of May 2006, this program served 199 students.

The department also assists Menominee students enrolled in one- to two-year vocational/technical associate degree, diploma, or certificate programs. These grants are based on financial need, and the services are the same as the

higher education program. As of May 2006, this program served 114 people. The adult education program provides full-time general educational development or high school equivalency diploma instruction and training, courses, and job-related workshops.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$520,706	$ –	$200,454		$721,160

5) Head Start

The Menominee Nation Head Start programs offer services for children from birth to 5 years old who are enrolled members of the Menominee Tribe. As of 2006, enrollment was near its capacity of 210 3- to 4-year-olds, 32 children young than 3, and 13 pregnant mothers. The age group of birth to 3 years old had a waiting list of 81 children. More than 50 percent of the families enrolled were at or below the income poverty line.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$1,770,973	$271,990	$530,977	$5,624	$2,579,564

6) Tribal Historic Preservation Office

The Tribal Historic Preservation Office revitalizes and preserves Menominee history, language, and culture. The office functions under a special designation the Tribe gained from the National Park Service in 1999. It manages repatriation of bones and artifacts and aids language revitalization by helping tribal members become Menominee language and culture teachers. The office supports the Menominee language immersion camp and assists yearly events such as the Menominee Youth Culture Camp, Sturgeon Feast, and Celebration Pow Wow.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$84,033	$ –	$140,592	$ –	$224,625

7) Community Resources Center

The Community Resources Center provides quality job training, employment, labor market information, and income maintenance services. All funding comes from state and federal sources. The Tribal Temporary Assistance for Needy Families (TANF) served 794 families with $471,418.71 in monthly vouchers in 2006. Tribal TANF served 1,484 children in 2004-06. The TANF plan has agreements with Maehnowesekiyah and Tribal Housing for services such as drug testing and emergency shelter. TANF assisted participants with child care, unsubsidized employment, subsidized private-sector employment, subsidized public-sector employment, work experience, on-the-job training, job searching and job readiness, community service, vocational education, job skills education, and general educational development tests or attainment of high school equivalency diplomas. In 2006 the Tribe's job training program served 111 clients, including youth. The program provided outlets to Menominee young adults to learn about interviewing, résumé-building, and job orientation. Finally, the Menominee Tribe's Bright Futures Job Training and Adolescent Self Sufficiency Program encouraged high school graduation, vocational preparedness, improved social and other interpersonal skills, and responsible decision-making through tribal apprenticeships and mentoring.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$2,182,671	$ –	$16,094	$ –	$2,198,765

8) Johnson O'Malley Program

The Menominee Johnson O'Malley Program meets the specialized educational needs of Indian students attending public schools. The program raises the median educational level of participants by supplementing regular public educational programs and by providing financial assistance to students unable to pay fees and other educational expenses. The career exploration center exposes Menominee high school students to opportunities and expectations in the world of careers and work programs. Through Johnson O'Malley, the community resource center serves Menominee youth through the Keshena Public Library and the Keshena Youth Center. Positive Youth Development and Outreach works with schools and other community programs to sponsor student trips throughout the school year.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$112,638	$ –	$ –	$1,493	$114,131

9) Language and Culture Commission

The Menominee Language and Culture Commission promotes the revitalization and preservation of the Menominee language, history, traditions, and culture for Menominee children and families. The commission sponsors language class, language teacher's sessions, language tribal jail class, winter round house, community talking circles, language curriculum, elder's pow wow, language teacher certification, minute radio broadcast, and science curriculum.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$93,432	$ –	$93,432

10) Library

The Tribal/County Library in Keshena offers the full range of library services to the Menominee community. Local programs provide continual, lifelong learning through free access to library materials. The summer reading program helps keep children engaged in reading. The library is the only agency that provides free computer and high-speed internet access to the public. It has 1,027 library card holders. From January 1, 2006, to September 30, 2006, patrons checked out 1,438 items.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$5,000	$ –	$128,347	$ –	$133,347

11) Tribal School

The Tribal School educates students in kindergarten through eighth grade. It helps individuals develop awareness of their gifts as Native Americans; nurture self-respect and pride in family and community; integrate culture and knowledge; value quality education; be motivated to set high, attainable goals; and recognize their responsibilities to Native American nations and beyond.[28]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$3,744,176	$84,558	$100,000	$109,643	$4,038,377

12) Department of Trust Resources

The Department of Trust Resources monitors forest management and development practices, addresses communication regarding forest management and forest development issues, and promotes involvement of tribal members in the management of the Tribe's natural resources.[29] In 2006 the department offered its first internship for a student to study natural resource management on the Reservation. In 2006 the department developed a timeline for ensuring proper review and approval of silvicultural treatments; organized monthly meetings for forestry staff of the Menominee Tribal Enterprises, Bureau of Indian Affairs trust foresters, and the Tribe; and reviewed and approved costs that Menominee Tribal Enterprises submitted to the Tribe for reimbursement. Staff attended forest management meetings.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$2,300,076	$ –	$ –	$ –	$2,300,076

13) University of Wisconsin–Extension

The University of Wisconsin–Extension offers educational programs tailored to local needs and based on academic knowledge and research. Programs are typically in agriculture and agribusiness, community and economic development, natural resources, family living, and youth development.[30]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$11,400	$ –	$11,400

Housing

The Tribe's housing programs and departments deliver essential services and resources to improve housing and develop affordable housing. These include Home Improvement Program, Tribal Housing Department, and Wolf River Development Corporation.

1) Home Improvement Program

The Home Improvement Program provides grants to low-income tribal members who live in substandard housing, are without housing, or have no other recourse for assistance. Depending on eligibility, a client may receive $2,500 in repairs to a home that will remain sub-standard, up to $35,000 in repairs that will make the housing standard as defined by statute, or a new modest home if an applicant is homeless or her or his home is considered to be beyond repair.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$49,027	$ –	$49,027

2) Tribal Housing Department

The Tribal Housing Department develops, operates, and maintains affordable housing. The unit provides services to the community through 18 programs, including help for elders and people with disabilities and weatherization assistance.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$2,791,656	$47,156	$538,830	$67,962	$3,445,604

3) Wolf River Development Corporation

The Wolf River Development Corporation is a tribal entity created by a charter adopted by the Wisconsin Legislature. The corporation uses tax credits to help secure investment dollars that are then used to renovate, rehabilitate, or construct homes on the Reservation. Projects and costs vary.[31]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$43,537	$ –	$ –	$506,427	$549,964

Enforcement and Resource Protection

The enforcement units deliver safety and justice, while the resource protection agencies develop the Tribe's abundant natural resources. These include: Conservation Department, Election Commission, Environmental Services Department, Tribal Gaming Commission, Tribal Court, Tribal Police Department, Tribal Probation and Parole Department, Prosecutor's Office, and the Tax Commissioner.

1) Conservation Department

The Conservation Department manages conservation law enforcement, fish and wildlife management, and environment quality services. The department conducts patrols, investigates complaints, issues citations, provides in-service training, conducts annual fish and game surveys, stocks fish, and prescribes wildlife management methods.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$483,559	$ –	$321,992	$63,875	$869,426

2) Election Commission

The Election Commission executes tribal elections for positions such as police chief and tribal legislator.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$55,231	$ –	$55,231

3) Environmental Services Department

The Environmental Services Department promotes the environmental integrity of the land, air, and water of tribal land. The department organizes and executes work relating to environmental management, clean and safe water, clear air, brownfields, emergency management, solid and hazardous waste, and environmental health.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$634,339	$ –	$116,027	$1,035	$751,401

4) Tribal Gaming Commission

The Menominee Tribal Gaming Commission promotes and ensures integrity, security, honesty, and fairness of the operation and administration of gaming and the ancillary activities of the gaming operation. The commission issues employee gaming licenses, gaming facility licenses, and oversees the gaming operation to ensure compliance with the tribal/state compact through which tribal gambling is authorized. The commission investigates possible violations, establishes minimum internal control standards for the gaming operation, and interacts with other regulatory and law enforcement agencies.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$521,420	$ –	$521,420

5) Tribal Court

The Menominee Tribal Court provides judicial services on the Reservation through the adjudication of criminal, civil, juvenile, family, probate, and all other matters within its jurisdiction. The Peacemaker Court utilizes mediation methods and traditional peacemaking teachings to handle legal disputes.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$534,788	$ –	$253,741	$ –	$788,529

6) Tribal Police Department

The Tribal Police Department provides law enforcement services throughout the Reservation and enforces tribal, federal, and state laws. The department promotes education and awareness. The department generated 11,195 incident reports in 2006. Of these, 1,689 cases were referred to the tribal prosecutor and Tribal Court. These cases led to 1,148 arrests.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$1,619,576	$62,849	$1,603,030	$8,208	$3,293,663

7) Tribal Probation and Parole Department

The Tribal Probation and Parole Department supervises an average of 234 clients who are sentenced each year to probation in lieu of a jail sentence. Staff meet with each individual client twice a month to monitor her or his progress and ensure completion of her or his court-ordered obligations. The department collaborates with agencies that offer services such as domestic violence counseling, assessments for alcohol and other drug abuse, anger management training, and educational and employment opportunities.[32] The department is a member of the wellness drug court, coordinated community response team for domestic violence, sex offender registration and notification program, and teen court.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$92,936	$ –	$115,079	$ –	$208,015

8) Prosecutor's Office

The Prosecutor's Office acts on civil and criminal violations of Menominee Tribal Law pursuant to Menominee Tribal Ordinance 79-14, Interim Law and Order Code. The office prosecuted 2,981 matters in Tribal Court in 2006, including 371 criminal complaints and 80 juvenile delinquency petitions.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$198,173	$ –	$162,014	$ –	$360,187

9) Tax Commissioner

The Tax Commissioner monitors and enforces the tribal regulatory permits, ordinances, licenses, and payment of tribal taxes. The department ensures payment of refunds due the Menominee Indian Tribe from the U.S. Department of Revenue and the U.S. Department of Treasury. The department handles issues related to excise fuel taxes, hotel room taxes, and tobacco taxes. The office also monitors and enforces payment of tribal taxes.[33]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$71,979	$ –	$71,979

Governmental Affairs

The governmental affairs units operate the Tribe's daily functions. These programs and departments include Operations of Tribal Government, Tribal Administration, *Menominee Nation News,* and the Enrollment, Finance, Insurance, Internal Audit, Maintenance, Information Technology, Property Management and Acquisition, Legal Services, Human Resources, and License and Permit departments.

1) Operations of Tribal Government

Operations of Tribal Government provides the tribal chairperson with the administrative support services to develop the meeting agendas for the Menominee Tribal Legislature, record meeting minutes and manage other tribal records, facilitate meetings of the Menominee Tribal Legislature, serve as the official spokesperson for the Tribe, and perform other duties as the Menominee Constitution and bylaws of the Tribe require.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$596,844	$256,483	$853,327

2) Enrollment Department

The Enrollment Department keeps accurate and up-to-date membership rolls of the Menominee Indian Tribe. The department assists the enrollment committee in processing membership applications.[34] The department also processes certification of Indian blood documents. In 2006 the department approved 146 applicants for tribal membership and 107 applicants for the ancillary roll, a list of people who do not meet the blood-level threshold to be considered Menominee, but whose parents or grandparents do. Some people on the ancillary roll have some tribal privileges, such as the ability to get hunting and fishing permits.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$45,364	$ –	$69,670	$1,639,618	$1,754,652

3) Finance Department

The Finance Department provides accountability for the Tribe to the federal and state governments as well as to tribal members. The department's accounting functions support program directors by recording, tracking, and reporting financial transactions involving tribal and contracted funds.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$81,215	$1,271,173	$1,352,388

4) Insurance Department

The Insurance Department protects the Tribe's physical and employee assets from direct physical loss through a variety of insurance programs. The department oversees workers compensation, property and liability insurance, employee benefit programs that include health, dental, prescription drugs, and vision. The department administers employee life insurance, short-term disability, the 401K retirement savings plan, the burial benefit for enrolled tribal members, and the medical relief block grant program.[35] The department provides the occupational wellness program that promotes and educates the employees of the Tribe, College of Menominee Nation, and casino about health living, disease awareness, and injury prevention.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Indirect Costs	Total
$70,429	$193,496	$195,201	$54,250	$395,589	$908,965

5) Internal Audit Department

The Internal Audit Department ensures that tribal departments fulfill their obligations to the Menominee. The department conducts these audits: financial, operational, compliance, management information systems, investigative and internal consulting. The internal audit assists the tribal administrator in the effective discharge of responsibilities. The department provides management with analyses, appraisals, recommendations, counsel, and information concerning the activities reviews.[36]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$ –	$248,455	$248,455

6) Maintenance Department

The Maintenance Department supports all tribal programs by cleaning and maintaining the Tribe's physical plant and assets.[37] The buildings the department preserves and maintains include tribal headquarters, the Legal Services Department, the Law Enforcement Center, the health clinic, Neopit Head Start, the library, and the recreation center. The department provides maintenance and housekeeping staffs for each facility, except for the health clinic.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$189,899	$68,449	$152,825	$383,183	$794,356

7) Information Technology Department

The Information Technology Department assists and consults with tribal employees on training, programming, and technical services related to information technology. In 2006 the department set up these systems and services: tribal intranet web site, voice-over internet protocol telephone technology, live vault backup system, security camera, and computer imaging.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$ –	$972,651	$972,651

8) Property Management and Acquisition Department

The Property Management and Acquisition Department reviews and approves tribal purchases, equipment inventories, transfers and disposals of equipment, contract processing and procurement, and equipment policy modifications. This department also provides internal services that include centralized supply ordering, competitive bid evaluation coordination, and purchasing assistance.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$ –	$157,544	$157,544

9) Tribal Administration

Tribal Administration provides administrative services to tribal departments and programs, including grant writing and management, budget development, project development, contract negotiation, and planning. The department implements, enforces, and monitors the effectiveness of the Tribal Legislature's policies and initiatives, and it carries out projects the Legislature mandates.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Indirect Costs	Total
$126,608	$ –	$4,613	$34,515	$690,573	$856,309

10) Legal Services Department

The Legal Services Department serves the Tribe's staff attorney and provides legal assistance to tribal programs, the tribal chairperson, and the Legislature. The department offers legal opinions; drafts contracts; advises on personnel matters; negotiates with federal, state, and local governments; and represents the Tribe in court. The Legal Services Department houses the tribal and program attorneys.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$106,827	$227,289	$334,116

11) Human Resources Department

Human Resources assists all departments in the recruitment, selection, and retention of quality employees. The department also handles issues such as unemployment hearings and drug testing. The department provides services related to personnel management, compensation and benefits, development, and job training programs.[38]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Indirect Costs	Total
$ –	$ –	$ –	$475,994	$475,994

12) Menominee Nation News

The *Menominee Nation News* covers reservation news, including events involving youth and elders, and economic, environmental, and social information that may affect tribal members.[39]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$198,334	$ –	$198,334

13) License and Permit Department

The License and Permit Department ensures that residents comply with the licenses and permits required by tribal ordinance, including those for hunting, fishing, dogs, construction, food-handling, rafting, tobacco sales, fireworks, and bingo. In cooperation with the Wisconsin Department of Transportation's Division of Motor Vehicles, the licensing department issues Menominee Nation license plates and handles their renewal, transfer, and cancellation. It also manages vehicle titles and registration.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$112,302	$ –	$112,302

Community Development

Several tribal units provide the tools and resources needed to develop, expand, and improve tribal entities. These include Community Development, Fire Protection, Department of Transportation, and Utility Department.

1) Community Development

Community Development oversees tribal economic development, small business development, solid waste disposal and recycling, land-use planning and design, and maintenance and construction of facilities and roads.[40]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$3,076,369	$65,658	$434,378	$19,549	$3,595,954

2) Fire Protection

The Town of Menominee provides fire protection to the entire County. The Town operates four fire stations in Neopit, Keshena, South Branch, and Middle Village. The Tribe provides 50 percent of the overall operating expense for Neopit, Keshena, and South Branch since they are all located on the Menominee Indian Reservation. The Tribe pays 100 percent of the operating costs associated with the Middle Village fire department since it is in the Town of Red Springs in Shawano County. The Town of Red Springs agreed in 2000 to transfer that service area to the Town of Menominee.[41]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$13,802	$ –	$71,250	$ –	$85,052

3) Department of Transportation

The Department of Transportation provides services to the Tribal School, Head Start, and Tribal Clinic, and it operates round-trip bus services from Keshena to Neopit, Zoar, Middle Village, Shawano, and other locations. The department assists other tribal departments with transportation services and maintenance of vehicles.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$775,350	$ –	$733,615	$151,607	$1,660,572

4) Utility Department

The Menominee Tribal Utility Department provides water, wastewater, and septic services to all people within the Reservation. The department provides Middle Village area with electrical services. It manages, operates, and maintains tribal utility systems.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$866,865	$ –	$392,184	$ –	$1,259,049

Budget and Finance

This service area includes two programs, the Pow Wow and the Loan Department.

1) Pow Wow

The three-day, annual Menominee Nation Contest Pow Wow showcases some of the best dancers and drum groups in the United States. The pow wow facilitates family reunions because many tribal members come home to the Reservation to attend. Expenses include cash prizes for the dance and drum groups, security, sanitation, electrical hookups, and honorariums to volunteers. The value of this event as a social gathering for cultural preservation is immeasurable.[42]

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$ –	$ –	$13,198	$109,945	$123,143

2) Loan Department

The Loan Department manages four programs: the Menominee loan fund, the Community Development Block Grant/U.S. Department of Housing and Urban Development revolving loan fund, the Menominee revolving loan fund, and the housing down payment loan fund.

Operating Costs and Source of Funds

Federal	Wisconsin	Tribal	Other	Total
$64,344	$ –	$ –	$192,133	$256,477

Summary

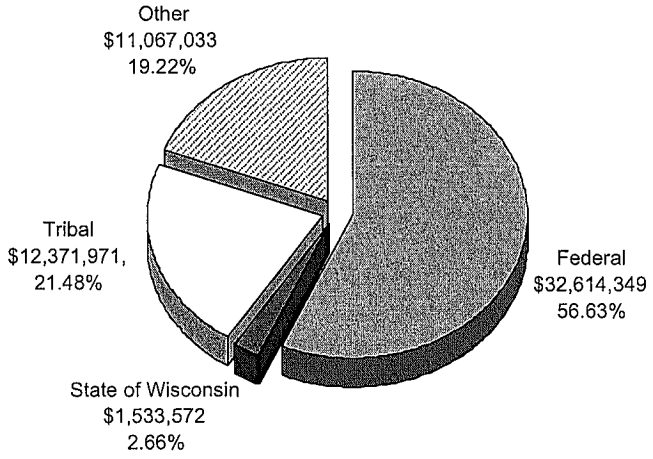
Despite the far-reaching nature of these programs, current services do not meet the needs of the Menominee people. Almost every department has a list of clients who cannot be served because of insufficient funding. Indeed, the domestic abuse shelter was closed in 2007 because the Tribe could not afford to sustain it. The severe poverty and the serious health risks of the Menominee are dramatic indicators of the need for more stable funding. In addition to the shelter, the Reservation needs a new school, jail, two dams, enhanced natural resource protection, better and more housing, and improvements for its aging and inadequate infrastructure. The Tribe's current budget cannot meet these needs, and the federal and state governments are facing shortfalls of their own, which may further reduce already precarious tribal services. An additional, sustainable source of reliable revenue must be developed to meet the Tribe's minimal needs.

Revenues

The Menominee Nation is financially very vulnerable, able to contribute only 12 percent of the funds it needs for basic services. The Tribe is highly dependent on revenues from forces over which it has little control and influence. State and federal grants fluctuate and expire; federal funding was cut significantly during the Reagan presidency. State and federal budget difficulties may prompt additional reductions. The budget proposal the president sent to Congress in February 2008 does not include any funding for some of the programs in the Menominee Nation's current budget.

As Figure 2 shows, in fiscal year 2006-07, a typical financial year for the Tribe, tribal revenues contributed $12,371,971 toward total expenses of $57,586,924. Federal funds contributed $32,614,349, or 56.63 percent of the total, and the State of Wisconsin paid $1,533,572, or 2.66 percent of the total. The remaining $11,067,033 came from other sources. These include expenses billed to third parties, such as an insurance provider; donations from private donors or corporations; and funds from Menominee County and the Town of Menominee for health, recycling, transportation, and older adult services.

Figure 2:
Sources of Menominee Nation Revenues,
Fiscal Year 2006-07



The Tribe relies especially heavily on external funding for many important programs, all of which budget cuts could jeopardize. Fluctuations in funding and services make long-range planning difficult and reduce people's confidence that they will receive quality assistance. Federal and state funding makes up a large part of these programs' budgets:

- Clinic: $3.82 million from the federal government and $290,000 from Wisconsin
- Head Start: $1.77 million federal and $27,000 Wisconsin
- Job Training: $2.06 million federal and $13,000 Wisconsin
- Community Development: $3.82 million federal
- Housing: $2.53 million federal
- Transportation: $72,000 Wisconsin

Any declines in funding in harm individuals and families who are already among the very poorest. Table 3 further illustrates the reliance of the Tribe on outside revenue.

Table 3: Fiscal Year 2006-07 Revenues by Services and Funding Sources

Service	Federal	Wisconsin	Tribal	Other	Total
Budget and Finance	$62,111	0	0	0	$62,111
Community Development	$3,992,160	$11,213	$9,660,000	$378,913	$14,042,287
Enforcement and Resource Protection	$5,960,724	$58,767	$222,603	$9,794	$6,251,889
Governmental Affairs	$308,350	$202,607	$1,973,985	0	$2,484,942
Health and Family Services	$11,391,576	$830,829	$465,359	$9,338,352	$22,026,117
Housing	$2,769,162	$67,338	0	$1,244,097	$4,080,598
Labor, Education and Training	$8,130,265	$362,817	$50,023	$95,876	$8,638,982
Total	$32,614,349	$1,533,572	$12,371,971	$11,067,033	$57,586,924*

Source: Fiscal Year 2007 Single Audit *Amounts do not total due to rounding.

In choosing to spend limited resources on a health clinic, college, governance, housing, and transportation, the Tribe demonstrates its commitment to the Reservation. The decision to spend money—however limited—on the Reservation rather than on per-capita payments to tribal members illustrates how much the Menominee value services that reinforce the sense of community and people's tribal identification. That the Tribe can do relatively so little is disheartening and speaks to how much more could be done with additional revenues from a casino in Kenosha.

Potential Effects of Expansion of Menominee Casino Resort

The Menominee Casino Resort on the Reservation competes for customers with two nearby casinos (Mohican North Star and Northern Lights Casino) and will face even more competition from the planned Ho-Chunk mini-casino in Wittenberg. The Menominee Casino Resort needs to update its facilities. The Menominee Nation is considering an expansion of the casino and hotel as part of this project. The estimated cost of repair, renovation, and expansion is $65 million. The resort would be closed during the renovations, temporarily cutting the Tribe's annual revenue and causing a number of people to lose their jobs.

Improvements to the Menominee Casino Resort are essential as a response to competition and to the usual needs of an aging facility. While this is important to prevent declines in employment and economic activity on the Reservation, improvements and expansion alone would not generate the revenue to meet the Tribe's needs. A feasibility study by an independent consultant shows that revenue gains from work on the resort are likely to be modest. It would, in fact, take five years after completion of the construction for the expanded casino to produce the revenue for the Tribe that it generated when construction began. Debt service, payments to the State of Wisconsin, and increased operating expenses would keep the Tribe from seeing even a modest gain in revenue for almost 10 years after construction would be completed. While improvements and expansion of the Menominee Casino Resort would keep it a viable enterprise and employer, the benefits beyond status quo would be modest and would not generate the revenue the Tribe needs to reduce poverty and improve health.

Potential Effects of a Casino and Convention Center in Kenosha

Various research studies describe the social and economic effects of casinos on American Indian tribes. A 2002 study compares economic outcomes before and after tribes opened casinos to outcomes in the same period for tribes that did not adopt or were prohibited from adopting gaming. The study shows that four years after tribes opened casinos, employment increased by 26 percent, while the employment-to-population ratio increased five percentage points or about 12 percent. The authors found that the fraction of adults who worked but were poor declined by 14 percent.[43] Other studies found similar results. For example, Dean Gerstein and his co-authors reported in 1999 that unemployment rates decreased by 12 percent, and that income maintenance and unemployment insurance payments and other welfare benefits all declined.[44]

Research on the negative social effects of casinos is often contradictory and inconclusive. Gerstein and his co-authors found no statistically significant effect of casinos on crime. However, another study found that communities with Indian casinos experienced a net decline in auto theft and robbery.[45] The 2002 study found that benefits such as lower unemployment come with some costs: auto thefts, larceny, violent crime, and bankruptcies increased by about 10 percent four or more years after a casino opened in a county.[46]

While most articles on the effects of casinos "focus exclusively on the positive impact of casino gambling and completely ignore or minimize the negative impacts that are also associated with casino gambling,"[47] Ricardo Gazel takes a different and more theoretical approach. He argues that "with a few exceptions, many state and local economies in the United States have, most likely, experienced net monetary losses due to casino gambling in their jurisdiction."[48] Gerstein and co-authors echo this sentiment but frame the losses as social and not economic. They argue that costs begin with the gambler and spill over to the household, relatives, friends, employers, creditors, and the community as a whole.[49] They explore the financial consequences of gambling attributed to casinos, including bankruptcy, dissipation of assets, debt, and theft. Other negative effects of casinos can be missed work or lateness to work, lost employment, stress and impaired physical and mental health, suicidal ideation, and alcohol- and drug-related disorders. Families and personal relationships usually are adversely affected, with associated conflict and strife, with divorce frequently the result.[50]

The report by Gerstein and his coauthors concedes some negative impacts of Indian gambling. For example, the number of compulsive gamblers on and off reservations has grown with Indian gaming. However, their "detailed examination of off-reservation economic activity and crime levels before and after the opening of five case-study Indian casinos provides no evidence of deleterious off-reservation impacts."[51] The report finds that actual social impact on tribes is uneven, though positive.

A 1998 investigation "inescapably yields the conclusion that the positive social and economic impacts of gaming, both on and off reservations, far outweigh the negative."[52] This report focuses on economic impacts, not because the authors believe that the social consequences of casino gaming are unimportant, but rather "because the available evidence indicates that the dramatic improvements in economic welfare for many tribes characterized by abject poverty have had positive side effects in the social sphere."[53] The study found that casino gaming drove economic growth and enabled some tribes to improve employment and income. For instance, in 1995, gaming tribes enjoyed 13 percent lower unemployment rates than their non-gaming counterparts.[54] Tribal governments, obligated by law and driven by concern for the well-being of tribal members, invested gaming profits to improve tribal welfare. "The fruits of these investments are reflected in, among other things, higher graduation rates and lower rates of participation in social assistance programs among members of gaming tribes."[55] The study explains that "tribal gaming is an important source of jobs for tribal members and that casinos also represent an opportunity for tribes to gain managerial experience that is desperately needed on reservations across the country."[56] Gaming tribes tend to make up for federal funding shortfalls, invest in tribal culture, rebuild tribal assets, and strengthen tribal government.[57]

Given the extent of poverty, health risks and outcomes, and social challenges the Menominee face, we expect the Tribe gains more than it sacrifices from casino operations. As a place of cultural significance and of natural beauty, the Menominee Reservation is a major asset that distinguishes the Tribe from tribes harmed by gambling's ill effects. Revenues from a second casino in Kenosha could be invested to make the Reservation a more attractive place for tribal members to live by creating well-paying jobs, expanding educational opportunities, improving social services, and reducing poverty.

Employment for the Menominee Nation

Wisconsin residents generally follow a pattern in which people who leave the state after high school and college graduation tend to return after five to 15 years, a 2007 study by the University of Wisconsin–Madison Applied Demographic Laboratory found. Although all communities—Indian and non-Indian—face the prospect of brain drain as young people relocate to work and to change their lifestyles, indicators suggest this phenomenon is not a major threat to the Menominee Nation. Cultural ties are an additional force to draw Menominee back to the Reservation, and many do return to live on the Reservation. Others who spend part of their lives in Milwaukee and Chicago maintain their identification with the Menominee Nation and their ties to the Reservation.

Employment in Kenosha and on the Reservation

On the surface, employment opportunities for Menominee at a tribal casino in Kenosha might seem to be a trigger for an exodus of the most employment-ready individuals from the Reservation. However, we believe this is unlikely because impoverished reservation residents lack the resources necessary to effect a move and because revenue from the new casino could enhance the College of the Menominee Nation, the health clinic, and the sawmill. These improvements would create jobs on the reservation and lessen the draw of jobs at the Kenosha casino.

According to a PriceWaterhouseCoopers study, the proposed complex in Kenosha would create 1,500 construction jobs and then 2,500-3,000 positions to operate the casino, hotel, and convention center. In 2004, the estimated average salary for these positions was $47,234. The range of positions includes dealers, food service personnel, information technology specialists, graphic designers, marketing specialists, accountants, and maintenance workers. The jobs in Kenosha would be open to tribal members and to non-Indians.

The casino construction would be an opportunity to develop a skilled and experienced Menominee workforce that then could be hired for projects on the Reservation. The Tribe could collaborate with unions and the College of the Menominee Nation to develop apprentice training programs on the Reservation. With revenue from the Kenosha casino, the Tribe could then employ these workers to address immediate construction needs on the Reservation, including housing, roads, schools, and clinics. We conservatively estimate that 300-500 construction and craft workers could be trained through this arrangement and then be available for projects on the Reservation.

The positions needed to operate the casino, hotel, and convention center likewise present an opportunity not to create jobs in Kenosha but also to develop a skilled tribal workforce for the Reservation. The preservation of cultural integrity and identity and the promotion of economic development on the Reservation require program and project managers, accountants, information technology specialists, and support staff. Revenue from a casino in Kenosha could be used to enhance the curriculum and resources at the College of Menominee Nation to provide the training for these positions. The operations in Kenosha could provide not only jobs but internship and apprenticeship experiences that tribal members could bring back to the Reservation.

The following analyses break out the number of tribal members who would benefit from training and experience linked to jobs in Kenosha and then be ready to contribute to reservation programs and services. We conservatively estimate that the use of casino revenues to improve Reservation facilities would create 275 to 465 temporary construction jobs. In addition, we conservatively estimate the creation of 210 to 300 permanent jobs in a variety of fields for programs that casino funds could expand.

College of Menominee Nation

One of the most visible success stories of the Menominee is the College of Menominee Nation. Since its tribal charter in 1993, it has established a record of excellence and is a central resource on the Reservation. This community college offers remedial education and technical and university programs to more than 500 students. The College allows students to stay on the Reservation to further their education. Another attraction is the quality of instruction. Accredited by the Higher Learning Commission of North Central Association in 1998, the college confers associate of arts and sciences degrees. In 2007, arrangements were made so students could complete baccalaureate degrees at University of Wisconsin System campuses.

The curricula of the College of Menominee Nation include accounting, early childhood, alcohol and other drug abuse counseling, computer technology, police science and carpentry. The Tribe could use revenue from a casino in Kenosha to build on the college's successes and expand course offerings to include forest management, nursing, and health care. The corresponding increases of faculty and support staff would add 45 to 75 jobs. Tribal members fill slightly more than 40 percent of the college's positions, a share that could increase when more tribal members gain the needed skills. In addition to these permanent positions, construction on the campus would generate 75 to 125 project jobs.

Menominee Tribal Clinic

While the Tribal Clinic operates at capacity and employs more than 120 people, Menominee County has the fifth worst health-care services in the state, the highest mortality rate, and the highest incidence of almost every major chronic illness. Additional funds could address these dire health problems. Kenosha casino revenue could finance a new, state-of-the-art health clinic and expanded services, including better emergency medical services and wellness and prevention programs that address nutrition, family planning, and diabetes. Better medical services would enhance the attractiveness of the Reservation as a place to which tribal members return.

A new clinic would improve the health outcomes on the Reservation and create jobs. Building a clinic would create construction jobs, while the new facility and updated equipment would require more skilled health-care workers. New clinic employees would be needed to work with electronic claim filing systems, nerve fiber analyzers, laboratory information systems, and radiology equipment. Radiology technicians, nurses, administrative specialists, physical therapists, health educators, optometrists, dental hygienists, psychiatrists, and dietitians would be hired. With the addition of health care as an academic concentration, the College of Menominee Nation could train many of these health-care professionals and support staff.

The clinic estimates it needs nearly $26.9 million for a new facility; an additional $3.3 million per year to properly fund it; and at least 25 to 45 new employees.

Forestry

The Reservation forest is a major economic resource central to the culture and identity of the Menominee Nation. More than 95 percent of the Menominee Reservation is required by law to be a sustained-yield forest, and the Tribe cannot use it for other development and economic purposes. The Tribe's operation of the sawmill, through Menominee Tribal Enterprises, has 300 tribal members as employees and generates tribal revenue.

Menominee Tribal Enterprises has estimated that an update and expansion of the mill would cost approximately $14.2 million and require 150-200 construction employees. The mill would then add 55 to 70 permanent jobs.

In addition, the Reservation needs employees to handle forest management and maintenance and road maintenance. The responsibilities of the Tribe's Conservation and Environmental Services departments for wildlife management and pollution control are integrally related to the preservation and enhancement of the quality of the forest. These departments, especially the Department of Conservation, are underfunded and understaffed. Some needs can be met with temporary project employees, but 10 to 15 more positions in wildlife management and forest maintenance and two to four more employees in pollution control are needed. These positions cannot be funded without the additional revenue that a casino in Kenosha could provide.

Ecotourism

Given the beauty of the forests, the lakes, and the Wolf River on the Reservation, the development of tourism is an opportunity for economic diversification. However, recreational and tourist activities must be conducted while respecting the cultural and spiritual aspects of natural resources on the Reservation. Ecotourism has become an approach that is increasingly understood, respected, and, indeed, attractive. Countries like Costa Rica and New Zealand have thriving ecotourism that preserves natural settings and environmental resources and increases protection. Bhutan is an example of a country that has developed a successful, high-end tourism that respects and builds on a spiritual mandate for preserving natural environments. Limiting tourists to certain areas and activities does not mean limiting the industry to meager revenues.

The operation of an entertainment and recreation facility in Kenosha and the development of tourism on the Reservation are related. The identical nature of the skills and jobs needed for both can form the basis of curricular development at the College of Menominee Nation and of the creation of formal and informal job partnerships that link enterprises in Kenosha and on the Reservation. The transferrable nature of these skills would increase job options for tribal members who want to live on the Reservation.

Tourism development means construction projects and operational employment. The number of jobs would depend on decisions about how to balance business opportunities and natural resource preservation. Conservative estimates are that construction jobs would number 50 to 90, and permanent positions 75 to 100.

Improving Quality of Life on and off the Reservation

All communities—Indian and non-Indian—experience an out-migration of some people, many of them young. We also note that a common pattern is for many of these people to move back to their communities after five to 15 years away. A casino in Kenosha could become a gathering place for tribal members living in southeastern Wisconsin and northern Illinois, including the Kenosha, Milwaukee, and Chicago metropolitan areas. By housing services, programs, tribal events, and administrative facilities, the casino complex could enhance ties to the Menominee Nation and bonds among tribal members. These ties would serve as a magnet for tribal members considering returning to the Reservation as jobs and quality of life there improve due to expanded opportunities and conditions.

According to a number of studies, decisions to move out of a community are based on employment, lifestyle, education, health care, safety, and housing. The U.S. Census Bureau in the 1995 report *Housing of American Indians on Reservations* indicated that young adult American Indians left reservations because of poor employment prospects, educational opportunities, and housing. A 2005 study sponsored by the Harvard University Project on American Indian Economic Development found that the general quality of life on reservations, after suffering a decline in previous decades, improved between 1990 and 2000 largely in large part to gaming revenues.[58] Tribes with gaming revenues generated a variety of jobs and, on average, lowered their unemployment rates by 5 percent. The population on these reservations increased by one-fourth, and average incomes increased by one-third. The evidence supports the expectation that gaming revenues from the Kenosha project could be used to improve the quality of life and opportunities on the Menominee Reservation and that this would lead to an increase in the number of tribal members on the Reservation.

As requested, we have reviewed the Tribe's study entitled *Unmet Needs and Projected Benefits To the Tribe and its Members from Increased Tribal Income.* This analysis focused on how increased tribal revenues from a Kenosha casino might be used to improve the quality of life on the Menominee Reservation. The report identified 170 specific new jobs that would contribute to needed improvements in policing, community development, education, social services, housing, and the like. The analyses and projections presented in *Unmet Needs* are sound and quite reasonable. In fact, they are somewhat conservative, since the report only considers expansion of current services and permanent jobs. We see the need and possibility for even more jobs at the clinic and

the College of Menominee Nation and in forestry. We see favorable prospects for the development of ecotourism. In addition, those 170 new jobs do not include the workers who could be hired for the construction and renovation projects that Kenosha casino revenues could fund.

If we focus on the program and operational positions included in *Unmet Needs*, one can calculate a ratio of jobs to revenue. The average salary, with benefits, of current tribal government jobs is $48,072. Like most other governments in the United States, personnel costs for the Menominee Tribal Government are 80 percent of total costs. In other words, for every $1 million spent, $800,000 is for salary and benefits of the employees providing services. If one projects a similar pattern, for every additional $1 million in tribal revenues, the Tribe can hire 16.64 new full-time employees.

Summary

The revenues and activities of the proposed Kenosha casino, hotel, and convention center are likely to have a net effect of improving the quality of life for tribal membets and of increasing the number of tribal members living and working on the Reservation. Inevitably, tribal members already living in the Kenosha area would fill many of the jobs the project would generate. With new resources, the Tribe would be able to improve the quality of life and to create jobs on the Reservation. This would present new, attractive options for people living on the Reservation and encourage tribal members who leave the Reservation to return. Conscious efforts and explicit programs could be developed between the Kenosha project and resources on the Reservation, such as the College of Menominee Nation, to build partnerships and links that further bind the Tribe.

Recommendations

Our most fundamental recommendation is that the Tribe and federal, state, and local governments collaborate to establish a casino and convention center complex in Kenosha. The history, the effects of federal Termination policy, demographics, resources, challenges, and opportunities of the Menominee Nation all lead to this conclusion. The Tribe and the Kenosha community encourage the state and federal government to join them in establishing this enterprise.

In addition, we recommend the following as sound investments of casino revenue to enhance the collective well-being of the Menominee and the quality of life of tribal members and families on and off the Reservation:

1) Expand and improve educational opportunities for Menominee children.
2) Link programs at the College of the Menominee Nation to employment opportunities at the Kenosha casino and convention center, with an emphasis on apprenticeships that prepare individuals for jobs on the Reservation.
3) Develop curriculum at the College of the Menominee Nation to educate tribal members to work in health care and forest management. This would meet the demand for employees that expansion of the sawmill and health-care services would engender.
4) Use jobs at the casino to improve skills and experiences needed for work on the Reservation.
5) Include facilities and activities at the complex in Kenosha to serve the needs of Menominee living in southeast Wisconsin and northern Illinois and would continue to link tribal members to the Reservation.
6) Expand the Tribal Clinic so it might serve more individuals and provide more emergency services and wellness and prevention programs.
7) Establish a fund and set of services to encourage and assist tribal members to start and expand businesses and provide special incentives for businesses that meet tribal development needs and priorities.
8) Modernize the sawmill operation.
9) Enhance forest and wildlife protection and management.
10) Design and promote ecotourism that is sensitive to Menominee culture and traditions.
11) Improve the quality of life on the Reservation through investments in housing, social services, and education.
12) Preserve the language, culture, and traditions of the Menominee Nation, using research and education as well as sponsoring cultural events and celebrations.

Endnotes

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EXHIBIT B

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit B to Plaintiff's Request for Judicial Notice

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

SEP 2 1 2007

Memorandum

To: All Regional Directors

From: Assistant Secretary - Indian Affairs

Subject: September 2007 Checklist for Gaming Acquisitions, Gaming-related Acquisitions, and Two-Part Determinations Under Section 20(b)(1)(A) of the Indian Gaming Regulatory Act.

Please find attached a September 2007 revision of the Checklist for Gaming Acquisitions. This revision replaces the March 2005 Checklist. All pending and future acquisitions for gaming, gaming-related purposes, and Section 20 two-part determinations should be processed in accordance with the requirements of the September 2007 Checklist. The authority to approve or disapprove requests for the acquisition of land into trust for gaming and gaming-related purposes remains with the Assistant Secretary for Indian Affairs in accordance with Secretarial policy issued on July 19, 1990, and our memorandum of November 9, 2001.

The September 2007 Checklist differs from the previous checklist in only two respects. First, Section D on the first page is modified to clarify that an application for a two-part Secretarial determination pursuant to Section 20(b)(1)(A) of IGRA should not be processed unless the land is already in trust or, if not yet in trust, until after the publication of a notice to take the land in trust has been published pursuant to 25 CFR 151.12. Second, Section III of Part 2 is amended to clarify that the preparation of NEPA documentation should not be undertaken before either a request has been submitted to take land in trust under 25 CFR 151.9, or, if the land is already in trust, not before the submission of an application for a two-part determination under Section 20(b)(1)(A) of IGRA. The changes are redlined in the text of the Checklist for your convenience.

Attachment

CHECKLIST
FOR GAMING ACQUISITIONS
GAMING-RELATED ACQUISITIONS and IGRA SECTION 20 DETERMINATIONS

Office of Indian Gaming
1849 C Street NW, MS-3657 MIB
Washington, DC 20240
(202) 219-4066
(202) 273-3153 fax

September 2007

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PART 1 - LAND ACQUISITION - 25 CFR PART 151

PART 2 - INDIAN GAMING REGULATORY ACT - 25 U.S.C. § 2719, SECTION 20

CHECKLIST FOR GAMING and GAMING-RELATED ACQUISITIONS

The Office of Indian Gaming (OIG) is responsible for Indian gaming functions and activities remaining with, or delegated to, the Secretary under the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. §§ 2701-2721. The OIG is also responsible for the review of recommendations from Regional Offices regarding requests for the acquisition of land into trust for gaming and gaming-related purposes. This function includes acquisitions either for a new gaming facility, for the expansion of a present gaming facility, or for projects that are essential to the operation of a gaming facility, such as parking lots or the construction of a waste water treatment facility serving the gaming establishment. The following criteria should be used to determine whether the acquisition is gaming-related: (1) If the land and the improvements on the land are going to be used exclusively to support the gaming facility, the acquisition is gaming-related; (2) if the land and the improvements on the land are not used exclusively to support the gaming facility but the gaming facility cannot operate without it, the acquisition is gaming-related; and (3) if the land and the improvements are not used exclusively for the gaming facility and are not essential to its operation, but the gaming facility is merely sharing in infrastructure improvements, the acquisition is not gaming-related.

In order to assist you in preparing a complete land acquisition package for review and final action, the OIG has prepared this checklist for your use. The checklist is designed to address the factors found in Title 25, Code of Federal Regulations (CFR), Part 151, the requirements of Section 20 of IGRA, and the environmental laws which most likely would be applicable. We also have included information on certain procedural steps that should be followed to assure that a complete file of the tribe's application, information, and supporting documentation is properly submitted to the Central Office. These procedural steps are:

A. All requests for the acquisition of land for gaming must be transmitted to OIG regardless of whether the land is located on, contiguous to, or off the applicant's reservation. This directive applies to trust-to-trust, restricted-to- restricted/trust, and fee-to-trust land acquisitions. The authority to approve or disapprove land acquisitions for gaming and gaming-related purposes is vested with the Assistant Secretary - Indian Affairs (AS-IA); however, the authority to accept title in trust for BIA is vested with the Regional Director.

B. The acquisition package submitted to OIG must contain a complete file of information and documents which clearly indicates compliance with 25 CFR Part 151, IGRA, the National Environmental Policy Act (NEPA) and other applicable Federal laws, regulations, and Executive Orders. The Regional Office's transmittal memorandum must contain Proposed Findings of Fact and Conclusions relative to 25 CFR Part 151, Section 20 of IGRA, and NEPA, and any other information deemed appropriate by the Regional Director. Further, it must contain the Regional Director's recommendations for approval or disapproval of the acquisition. For ease in cross-referencing to specific findings or conclusions, the acquisition package should be organized with an index, and all exhibits should be tabbed and numbered. The initial request or application received from the tribe should be kept intact and tabbed as one exhibit. For example, responses to the BIA's request for input/comments should be kept intact and tabbed as a single exhibit, e.g. the 30-day notices to states, county, city, etc. All of these documents can be under one tab with each full document manually numbered for ease in citation and location. No additions or deletions should be made to the tribe's application package. Any additional information obtained by BIA offices to supplement or clarify the tribe's application should be maintained separately and should be identified in a manner that will enable the reader to readily make a determination as to which office obtained or prepared the additional information.

C. The Regional Director must independently analyze the factors, and make independent findings and recommendations even when the Tribe submitting the application has contracted the realty services program under Title I of the Indian Self-Determination and Education Assistance Act (ISDEA), or has entered into a self-governance compact pursuant to Title IV of the ISDEA.

D. When the acquisition is subject to Section 20 (b)(1)(A) of IGRA, 25 U.S.C. Sec. 2719(b)(1)(A), which requires consultation, a two-part Secretarial determination, and the concurrence of the Governor of the State, the Regional Director must first receive notification of the publication in the Federal Register of the notice required under 25 CFR 151.12 before undertaking the preparation of a recommendation on whether a gaming establishment on newly acquired lands is in the best interest of the tribe and its members and is not detrimental to the surrounding community. The specific factors and consideration for the Section 20 analysis are identified in Part 2 of this Checklist.

E. When the Regional Director believes that the acquisition satisfies one of the Section 20 exemptions other than (b)(1)(A), the transmittal memorandum from the Regional Director must so indicate and must include an analysis establishing that such an exemption exists, and include supporting documentation, i.e., an appropriate Solicitor's Office legal opinion, in the acquisition file.

F. The completed acquisition package must be reviewed by the appropriate Regional or Field Solicitor to ensure that all legal requirements have been adequately addressed.

G. The Regional Director's Memorandum must contain a statement certifying that the documents submitted for the acquisition are copies of the original documents.

PART 1 - LAND ACQUISITION - 25 CFR PART 151

I. 151.3 Land acquisition policy

☐ A. The Regional Director's Proposed Findings of Fact and Conclusions must include a statement and statutory citation to the specific act(s) of Congress authorizing the trust acquisition, e.g., Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465.

Additionally, the Regional Director's Proposed Findings of Fact and Conclusions must include a discussion of applicable provisions in the tribe's governing documents authorizing the tribe to take the requested action.

☐ B. The Regional Director must include a statement that indicates which circumstances listed in 25 CFR § 151.3(a) support the request for the trust acquisition.

II. 151.4 Acquisitions in trust of lands owned in fee by an Indian

☐ A. The trust acquisition package must include a discussion of the ownership status of the property, a legal land survey or other document that provides an accurate description of the property to be acquired, and a plat or map to show the distance and/or proximity of the property to the reservation, the reservation boundaries, or to trust lands, whichever is applicable (see also Part 1, Section VII, Paragraph A of this Checklist).

☐ B. The acquisition package must include a copy of the resolution of the appropriate governing body of the tribe authorizing the trust acquisition request and must include a copy or excerpt of the tribe's governing document, if any, which identifies the scope of authority for the tribe's actions. The resolution should include a request to take the land into trust, the exact legal description of the property, the location, the intended purpose, and a citation to the applicable portion of the tribe's governing document which permits the governing body to make the request. The legal description of the property must be identical throughout the acquisition package. Any discrepancies in the legal description should be noted and fully explained.

☐ C. The Regional Director must provide an assurance that the information provided pursuant to 25 CFR § 151.4 was reviewed and found to be sufficient. The Regional Director's assurance must include a brief summary of the tribe's history, organization, and governing practices to illustrate the tribe's operating standards. Legal issues must be reviewed by the appropriate Regional or Field Solicitor. A copy of the Solicitor's opinion or response must be included as part of the package.

III. 151.5 Trust acquisitions in Oklahoma under Section 5 of the Indian Reorganization Act

☐ A. When 25 CFR § 151.5 applies, the acquisition package must include all the information required under Part 1, Section II of this Checklist.

IV. 151.6 Exchanges

☐ A. When 25 CFR § 151.6 applies, the acquisition package must include all the information required under Part 1, Section II of this Checklist, in addition to information required in 25 CFR Part 152, if applicable.

V. 151.7 Acquisitions of fractional interests

☐ A. When 25 CFR § 151.7 applies, the acquisition package must include all the information required under Part 1, Section II of this Checklist.

VI. 151.8 Tribal consent for non-member acquisitions

☐ A. When 25 CFR § 151.8 applies, the acquisition package must include all the information required under Part 1, Section II of this Checklist.

☐ B. A copy of any written documentation, such as a letter or resolution, executed by the tribe proposing to acquire land on a reservation other than its own, to the tribe having jurisdiction over such reservation must be included as part of the package. This documentation should identify the property proposed for trust acquisition and the parties involved in the transaction.

☐ C. The acquisition package must also include a copy of the written consent of the tribe having jurisdiction over such reservation for the proposed acquisition. This documentation should also identify the property and the parties involved in the transaction.

VII. 151.9 Request for approval of acquisitions

☐ A. The information required under 25 CFR Part 151 should be organized to provide a complete picture of the tribe's request. The Tribes should be encouraged to submit their requests in a manner which will facilitate the analysis of the request. At the onset of a request, the tribe should be instructed on the nature of the required submissions which support the request. Documents received from the tribe should be kept intact. NO ADDITIONS OR DELETIONS SHOULD BE MADE TO THE TRIBE'S APPLICATION PACKAGE. ANY ADDITIONAL INFORMATION OBTAINED BY BIA OFFICES TO SUPPLEMENT OR CLARIFY THE TRIBE'S APPLICATION SHOULD BE MAINTAINED SEPARATELY AND IDENTIFIED IN A MANNER THAT WILL ENABLE THE READER TO READILY MAKE A DETERMINATION AS TO WHICH OFFICE OBTAINED OR PREPARED THE ADDITIONAL INFORMATION. Although there is no particular application format required, the organization of information should follow the following logical sequence: (1) The identification of the parties; (2) a citation of the statutory authority which authorizes the acquisition; (3) a statement justifying the need for the additional land [151.10(b)]; (4) a full and complete explanation of the intended purpose for the land [151.10(c)]; (5) a physical description of the location of the land; (6) present and past uses of the land; (7) proof of present ownership, or a description of those circumstances which will lead to tribal ownership; (8) a legal description supported by a survey or other document; (9) an indication of the location and proximity to the tribe's reservation, the reservation boundaries or to trust lands; (10) a plat/map indicating such location and proximity of the land to the reservation; and (11) the tribal resolution. The tribal resolution must include the information listed in Part 1, Section II, Paragraph B of this Checklist.

VIII. 151.10 On-reservation acquisitions

☐ A. The notification process will be conducted by letter inviting the state and local governments having regulatory jurisdiction over the land to be acquired to provide written comments on potential impacts (regulatory jurisdiction, real property taxes, and special assessments). The notification letters should include information on the location of the proposed gaming facility, the scope of gaming proposed, and other pertinent information which will assist the consulted officials should they wish to comment on the proposed acquisition.

☐ B. 151.10(a): The Regional Director must determine that there is statutory authority for the acquisition. A brief summary of the specific statute or act(s) of Congress should be provided along with an independent, factual analysis of the application of such statutory authority to the tribe's request. (See Part 1, Section I of this Checklist).

☐ C. 151.10(b): The Regional Director must conclude that the tribe has sufficiently justified the need for the additional land. The Regional Director's conclusion should be based on a factual finding which may be supported by independent information, or by information and evidence provided by the tribe. The tribe may justify its request by establishing that existing tribal land is inadequate for gaming because of size, location, and market conditions. In support of this contention the tribe may have developed feasibility or market study, or a business plan which the Regional Director should independently review to determine whether it supports the tribe's assertions.

☐ D. 151.10(c): The Regional Director must conclude that the tribe has adequately described the intended purposes for the land.

E. 151.10(d) NOT APPLICABLE

☐ F. 151.10(e): The Regional Director must make a conclusive statement regarding the impact on the State and any political subdivisions expected to result from removing the land from the tax rolls. The Regional Director will come to a conclusion on the basis of information received from the state and local governments having regulatory jurisdiction over the land to be acquired, and other independent information. At the expiration of the required 30-day comment period for State and local governments, the appropriate BIA official will prepare a record that indicates the contacts made and the responses received, and that includes any other additional comments or information. The record will also include any objections made by the contacted governmental entities. The Regional Director must consider any and all objections, and must provide an analysis of the merits of specific objections. The Regional Director will include any information on the outcome of any objection referred to the tribe. Copies of the record on the 30-day notification process shall be included in the submission to the Central Office.

☐ G. 151.10(f): The Regional Director must include, in the same manner as described in Part 1, Section VIII, paragraph F of this Checklist, a conclusion regarding any jurisdictional problems and potential land use conflicts. The Regional Director's conclusion should be based on information received as a result of the BIA notification, on information obtained independently, or on information known about the jurisdictional issues inherent in the status of Indian lands. If jurisdictional problems or conflicts in land use have been identified, existing agreements between the tribe and local jurisdictions resolving these issues should be included in the acquisition package.

☐ H. 151.10(g): The Regional Director must include an independent assessment of the impact on the BIA should the land be acquired in trust. The Regional Director should consider the type of services required for the land, if any; the availability of staff to carry out the additional responsibilities; and such other considerations which may be relevant in making this assessment. In the assessment of the impact, an analysis is required of the intended and future uses of the property, and a statement should be written based on the analysis indicating the extent to which the BIA Agency and Regional offices will be impacted by the proposed trust acquisition. A fully documented assessment is needed to assess how the added responsibilities (i.e. leases, rentals, easements, emergencies, environmental concerns, roads, traffic, etc.) will affect the present BIA staff. To state merely that the BIA's only duty to the property will be routine or administrative is insufficient. If the applicant tribe has contracted the realty services program under Title I of the ISDEA, or has entered into a self-governance compact under Title IV of the ISDEA, the Regional Office should provide an analysis of the tribe's role in the supervision/administration of the land.

☐ I. 151.10(g): The acquisition package must include a pre-acquisition environmental site assessment, no matter whether the proposed acquisition is discretionary or non-discretionary, as required by 602 DM 2. This Department Manual release requires the assessments to be conducted or supervised by qualified individuals, as determined by the Bureau, and provides that assessments will generally be considered adequate for one year prior to the date of acquisition, with documented exceptions for real property located in adverse climatic or geographical areas.

With respect to discretionary acquisitions, the Regional Director must also comply with the requirements of NEPA and its implementing regulations. NEPA is codified at 42 U.S.C. §§ 4321-4347. The NEPA regulations promulgated by the Council on Environmental Quality (CEQ) are published at 40 CFR Parts 1500-1508. In addition, the Regional Director must comply with Departmental NEPA requirements in 516 DM 1-6, as well as the BIA-specific NEPA requirements in 516 DM 6, Appendix 4. The Bureau's NEPA Handbook is published in 30 BIAM Supplement 1. The *Checklist of Environmental Issues for NEPA Review of Proposed Gaming-Related Actions* reproduced in Part 2 of this Checklist must be included with NEPA documents which are being submitted to the AS-IA for review. A more detailed description of the pertinent

NEPA requirements is provided in Part 2, Section III of this Checklist.

IX. 151.11 Off reservation acquisitions

☐ A. When 25 CFR 151.11 applies, the acquisition package must include all the information required under Part I, Section VIII, of this Checklist.

☐ B. The greater the distance the acquired land is from the tribe's reservation will require that the Regional Director's analysis more fully justify the anticipated benefits to the tribe. The information obtained under Part 2, Section II(B) (best interests factors) of this Checklist may be considered, if the application requires submission of this information pursuant to Section 20 of the IGRA, in analyzing the tribe's application to determine if the acquisition sufficiently satisfies the anticipated benefit to the tribe. As the distance from the reservation increases, the greater the justification will have to be to support the additional benefits to the tribe.

☐ C. The Regional Director must review the tribe's comprehensive economic development plan required under 25 CFR § 151.11(c), which specifies the anticipated financial benefits associated with the acquisition.

X. 151.12 Action on requests

☐ A. The AS-IA will use the information provided by the tribe, Superintendent, and Regional Director to make a decision on the request. Therefore, the Regional Director must ensure that the acquisition package is complete in all respects to allow for a timely and informed decision. The package must include all documents, exhibits, and information relied on or provided in support of the proposed acquisition. Should the AS-IA decide to approve the tribe's application to acquire the land in trust for gaming, the Central Office will publish the required *Federal Register* notice.

XI. 151.13 Title Examination

☐ A. The acquisition package must include an *Abstract of Title* or *Commitment for Title Insurance Policy* covering the property to be acquired. The title evidence must be examined by the appropriate Regional or Field Solicitor who must prepare a preliminary title opinion to identify any liens, encumbrances or other legal infirmities which may exist. The accuracy of all legal descriptions must be verified and must match the legal descriptions of the property contained in other documents within the acquisition package prior to submission to the appropriate Regional or Field Solicitor. Copies of correspondence or documented contacts between the Regional Office and the Solicitor's Office must be included as part of the acquisition package. A draft of the instrument of conveyance must be prepared and provided to the Solicitor to ensure compliance with all legal requirements.

After an Abstract of Title has been submitted by the tribe for the title evidence, an appraisal of the property by the BIA is required. The appraisal is used to alert the appropriate Regional or Field Solicitor of the value of the property in the event that office does not have authority to examine title evidence on property exceeding the value of $100,000. The Department of Justice is authorized to examine an Abstract of Title on the property valued at $100,000 or more.

XII. 151.14 Formalization of acceptance

☐ A. The Regional Director will be notified in writing of the AS-IA's approval of the acquisition request and authorized to proceed with the formal acceptance of the land in trust subject to satisfactory completion of all title requirements, and following expiration of the 30-day period after publication of the *Federal Register* notice required under 25 CFR § 151.12. A copy of the final title opinion by the appropriate Regional or Field Solicitor, and a copy of the approved and recorded conveyance instrument must be provided to OIGM for inclusion as part of the file.

☐ B. The appropriate Regional or Field Solicitor's approval of the draft conveyance document must be obtained before a final instrument of conveyance is prepared and signed. A copy of the draft conveyance instrument should be included as part of the acquisition package.

☐ C. The approved instrument of conveyance must be recorded in the appropriate BIA title office. When fee property is approved for trust, the approved instrument of conveyance to trust should also be recorded in the appropriate county office.

PART 2 - INDIAN GAMING REGULATORY ACT - 25 U.S.C. § 2719, SECTION 20

Section 20 of IGRA, 25 U.S.C. § 2719, governs the use of land acquired in trust when the intended use of the land is for gaming. Section 20 of IGRA prohibits gaming on lands acquired in trust after October 17, 1988, with certain exceptions.

The first section of this Part describes the exceptions to the gaming prohibition on lands acquired in trust after October 17, 1988. The second section of this Part describes the instances when the general prohibition on gaming on newly acquired lands will not apply to lands acquired in trust after October 17, 1988. The third section of this Part describes the responsibility of the BIA Regional Office regarding compliance with the requirements of NEPA. The fourth section of this part describes the preparation of the Section 20 documentation by the Regional Office for transmittal to Central Office.

All applications for the trust acquisition of land intended for gaming must be processed with Section 20 considerations in mind. Typically, the acquisition will be for the construction and operation of a gaming facility. There will be projects however, which on first impression may not readily appear to be intended for gaming. For instance, if a tribe intends to expand an existing gaming facility through the addition of a hotel with additional gaming space thereon, the acquisition should be deemed to be for gaming. However, if a tribe intends to expand parking facilities for an existing gaming establishment, the acquisition should not be deemed to be for gaming because there is no gaming conducted in the parking lot. Although an acquisition for the expansion of parking facilities would not be subject to the two-part determination in 25 U.S.C. § 2719(b)(1)(A), the acquisition is still subject to approval by the AS-IA, as stated in PART ONE, above because it is gaming-related. A tribe's contention that gaming on newly acquired lands is not prohibited because one or more exceptions apply will require a conclusive factual and legal finding that the particular exception does apply to the trust acquisition.

I. Section 20(a), 25 U.S.C. § 2719(a)

This section of IGRA prohibits gaming on land acquired by the Secretary in trust for an Indian tribe after October 17, 1988, UNLESS one of the following exceptions apply:

☐ **A. Section 20(a)(1): The land to be acquired qualifies as either:**

- ☐ land that is located within the boundaries of the tribe's reservation as the reservation existed on October 17, 1988, OR
- ☐ land that is contiguous to the boundaries of the tribe's reservation as the reservation existed on October 17, 1988. Include documentation establishing that the land is contiguous and the appropriate Field or Regional Solicitor's concurrence with this determination.

☐ **B. Section 20 (a)(2)(A): The tribe had no reservation on October 17, 1988, AND the land is located in Oklahoma, AND:**

- ☐ the land to be acquired is within the boundaries of the Indian tribe's former reservation as defined by the Secretary, (2)(A)(i). Include an Office of the Solicitor's opinion that the land is within the tribe's former reservation, OR
- ☐ the land to be acquired is contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma, (2)(A)(ii). Include documentation establishing that the land is contiguous and the appropriate Field or Regional Solicitor's concurrence with this determination.

When the application indicates that the proposed acquisition of land in Oklahoma is located in the Indian tribe's "former reservation," the Regional Director must provide a legal opinion from the Office of the Solicitor that the land qualifies as "former reservation lands" and should be treated as such for the purposes of IGRA.

When the application indicates that the proposed acquisition is contiguous to other trust land, or to land held in restricted status by the United States for the Oklahoma tribe, the acquisition package must include documentation of the trust or restricted status of the land which is contiguous to the proposed acquisition. A plat or map showing the contiguous status of the respective parcels of land should be included in the acquisition package. The Regional Director's findings should include all legal descriptions of the lands (lengthy descriptions can be noted as attachments, exhibits, etc.), references to significant dates such as the acquisition date and approval date of trust status. Any and all facts, historical and present, which will establish the finding that the proposed acquisition is contiguous should be discussed and included in the Regional Director's findings. The appropriate Regional or Field Solicitor's concurrence that the land is contiguous must be included.

☐ **C. Section 20 (a)(2)(B): The tribe had no reservation on October 17, 1988, AND the land is located in a State other than Oklahoma AND:**

- ☐ such land is within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

When the application indicates that the proposed acquisition is located within the Indian tribe's "last recognized reservation," the Regional Director must provide documentation that the proposed acquisition is in the tribe's last recognized reservation. The Regional Director's analysis of this issue must include documented information relating the history of the tribe to show that the tribe is presently located in the state in which the land proposed for trust acquisition is located. A legal opinion from the Office of the Solicitor addressing this issue must be included.

II. Section 20(b)(1), 25 U.S.C. § 2719(b)(1)

This section provides that the general prohibition on gaming on newly acquired lands will not apply under several circumstances. Because the circumstances numbered (b)(1)(B) are not frequently presented, they are discussed before (b)(1)(A).

☐ **A. Section 20 (b)(1)(B): Gaming can be conducted on newly acquired land if the land(s) are taken in trust as part of:**

- ☐ a settlement of a land claim, (b)(1)(B)(i); OR
- ☐ the initial reservation of a newly acknowledged Indian tribe given Federal recognition under the Federal acknowledgment process, (b)(1)(B)(ii); OR
- ☐ the restoration of lands for an Indian tribe restored to Federal recognition, (b)(1)(B)(iii).

When the application indicates that the proposed acquisition falls within one of these exceptions, the Regional Director must provide documentation that the particular exception is applicable to the case. Copies of the enabling acts or legislation such as the settlement act, the restoration act, the reservation plan, the final determination of federal recognition and other documentary evidence relating to the tribe's history and existence must be included as part of the acquisition package. A legal opinion from the Office of the Solicitor concluding that the proposed acquisition comes within one of the above exceptions must be included.

☐ **B. Section 20(b)(1)(A): Gaming can be conducted on newly acquired land if the Secretary:**

- ☐ consults with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, **and**
- ☐ issues a two-part determination: that the gaming establishment on newly acquired lands (1) will be in the best interest of the Indian tribe and its members, and, (2) will not be detrimental to the surrounding community, **and**
- ☐ obtains the concurrence of the Governor of the State in which the gaming activity is to be conducted in the Secretary's two-part determination.

The BIA has been delegated responsibility to conduct the consultation on behalf of the Secretary. The consultation process must be completed by the Regional Director at the Regional Office level. Consultation will be conducted by letter inviting the applicant tribe and appropriate state (including the Governor), local and other nearby tribal officials to comment on the proposed acquisition by addressing questions/issues relating to the two-part determination. The consultation letter should include pertinent information regarding the proposed trust acquisition for gaming including information on the location of the proposed gaming facility, the scope of gaming proposed and other information which will assist the consulted officials to comment on the proposed acquisition. A consultation letter should always be sent to the Governor of the State in which the gaming activity is to be located.

- ☐ Appropriate state and local officials include the governor of the state in which the land is located and state and appropriate officials of units of local governments located within ten (10) miles of the site of the proposed gaming establishment.
- ☐ Nearby tribal officials include the tribal governing bodies of all tribes with Indian lands located within 50 miles of the site of the proposed trust acquisition.

The Regional Director may decide that broader consultation is required, or that another method of consultation is necessary in addition to the consultation conducted by letter. When an additional method is used, the Regional Director must fully describe the process and the outcome or results, and provide verification of the use of the process. For example, if

public hearings or meetings were held copies of the hearing transcripts, minutes or videotapes must be provided as part of the file. Newspaper articles or other written verification of the public's response to the proposed acquisition should also be included to illustrate public sentiment. Sample letters are attached for your information. Note that two letters are used - one for the applicant tribe (13 factors); and one for the appropriate State, and local officials, including officials of other nearby Indian tribes (6 factors). It is recommended that the letters be adjusted to reflect the facts of the transaction being processed. Also, it is very important that this process be differentiated from the Part 151 notification process which requires the 30-day notice for determination of taxation, special assessments, services, zoning, etc. (151.10(e)).

The Regional Director should provide a minimum of 30 days for the consulted officials to comment and respond to the consultation letter. In determining the proper length of the consultation period, the Regional Director should take into consideration the number of parties contacted, the scope and magnitude of the proposed gaming project, the preliminary indications of public sentiment, support, opposition, the potential impact on other gaming operations and such other factors which likely will be issues of concern to the consulted parties. Additional time may be granted upon written request; however, the request should provide a good reason for the additional time.

☐ The consultation letters to the applicant tribe and to the appropriate state, local and nearby tribal officials must request specific information useful in making the two-part determination. The responses provided, whether they oppose or support the proposed acquisition, should be supported by factual data and documentary information justifying the position taken. To assist the Secretary in determining whether the gaming establishment on newly acquired land will be in the best interest of the tribe and its members, the applicant tribe should be requested to address items such as the following:

1. Projections of income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe prepared in accordance with Generally Accepted Accounting Principles and National Indian Gaming Commission standards. There should be sufficient detail in expenses and assumptions to allow evaluation of the accuracy and reasonableness of the projections. Projections should cover at least the term of any financing or management agreement, but not less than three years.
2. Projected tribal employment, job training, and career development, including the basis for projecting an increase in tribal employment considering the off-reservation location of the facility, and the impact on the tribe if tribal members leave to take jobs off-reservation.
3. Projected benefits to the tribe from tourism and basis for the projection.
4. Projected benefits to the tribe and its members from the proposed uses of the increased tribal income.
5. Projected benefits to the relationship between the tribe and the surrounding community.
6. Possible adverse impacts on the tribe and plans for dealing with those impacts.
7. Any other information which may provide a basis for a Secretarial determination that the gaming establishment is in the best interest of the tribe and its members, including copies of any consulting agreements, financial agreements, and other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming facility, or the acquisition of the land where the facility will be located.

☐ To assist the Secretary in determining 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 mitigating adverse impacts.
2. Reasonably anticipated impact on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community.
3. Impact on the economic development, income, and employment of the surrounding community.
4. Costs of impacts to the surrounding community and sources of revenue to accommodate them.
5. Proposed programs, if any, for compulsive

gamblers and the source of funding.

6. Any other information which may provide a basis for a Secretarial determination that the gaming establishment is not detrimental to the surrounding community.

Consulted 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 consulted official from addressing the items to the extent possible.

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 consulted officials should not be limited to the listed items.

III. Guidance for preparing NEPA documents for proposed gaming-related actions

The following information provides general guidelines for compliance with NEPA in cases involving gaming-related Federal actions. The Regional Director must comply with the requirements of NEPA when making recommendations pursuant to the two-part determination in Section 20(b)(1)(A) of IGRA, even when this determination is made for lands already held in trust for an Indian tribe. The NEPA process should not be initiated before the tribe has filed with the BIA either a request to take land into trust pursuant to 25 CFR 151.9, or, if the land is already into trust, an application for a two-part determination pursuant to Section 20(b)(1)(A) of IGRA.

NEPA is codified in 42 U.S.C. §§ 4321-4347. Section 102 of NEPA, 42 U.S.C. § 4332, requires all Federal Agencies to include in every recommendation or report on proposals for major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (1) the environmental impact of the proposed action, (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In 1978, the Council on Environmental Quality (CEQ) promulgated regulations implementing NEPA in 40 CFR Parts 1500-1508. These regulations, which are binding on all Federal agencies, address the procedural requirements of NEPA and the proper methods for the administration of the NEPA process. Further guidance on NEPA compliance can be found in Department of the Interior Manual, Part 516. Departmental Manual 516 DM 6, Appendix 4 (augmented by a *Federal Register* Notice of July 7, 1995) addresses BIA's NEPA policy and procedures. The BIA's NEPA Handbook is published in 30 BIAM Supplement 1.

The law and regulations defining the parameters of NEPA are well-defined and explicit. The implementing regulations for NEPA require the use of an interdisciplinary approach, consultation with all interested parties, and a speedy commencement of the process (40 CFR § 1501.2). The NEPA regulations also require that the paperwork be concisely written (40 CFR § 1500.4), that the entire process be completed without delay (40 CFR § 1500.5), and that consideration of NEPA occur early in the planning process (40 CFR §§ 1501.1 and 1501.2). NEPA documents must be supported by evidence which is adequate to show that the agency in question has made sufficient environmental analyses (40 CFR § 1500.2(b)). The lead agency may, if it wishes, set specified page limits and time limits for NEPA documents (40 CFR § 1501.8); the BIA has so far not chosen to set such limits.

Under the NEPA process there are several levels of analysis that may be applied to a particular Federal action. The level which will eventually be chosen for the analysis is generally dependent upon whether or not an undertaking could significantly affect the environment. The basic levels are: a categorical exclusion determination (CX), an environmental assessment (EA), and an environmental impact statement (EIS).

- ☐ A Federal action may be categorically excluded from a detailed environmental analysis if it meets certain criteria, criteria which a Federal agency has previously determined would have no significant environmental impact. A number of agencies, including the BIA, have developed lists of actions which are normally categorically excluded from environmental evaluation under the NEPA regulations. See 516 DM 6 Appendix 4.

- ☐ The next level of analysis, the EA, is used to determine whether or not a Federal action would significantly affect the environment (for the definition of "significantly" see 40 CFR § 1508.27). If it would not, the agency can then issue a Finding of No Significant Impact (FONSI). The EA is described in 40 CFR § 1508.9. An EA usually contains the following information: the need for the proposed action; the alternatives to the proposed

action (always including the no-action alternative); the environmental impacts of the proposed action and the alternatives; and a listing of the agencies and persons consulted.

☐ If the EA determines that the environmental consequences of a proposed Federal undertaking may be significant, an EIS is prepared. The EIS, the most comprehensive level of analysis, is described in 40 CFR § 1502. Proposals for large, and/or potentially controversial gaming establishments should normally require the preparation of an EIS, especially if mitigation measures are required to reduce significant impacts. The EIS should discuss the purpose of, and need for, the action; the alternatives; the affected environment; the environmental consequences of the proposed action; mitigation measures; lists of preparers, agencies, organizations and persons to whom the statement is sent; an index; and an appendix (if any). It is also a good practice to include in a NEPA document a large-scale map with a legend, showing the proposed site in detail. A smaller-scale map with a legend, showing the site in relation to the surrounding features and areas is also a desirable feature of a NEPA document.

Following is a *Checklist of Environmental Issues for NEPA Review of Proposed Gaming-related Actions*. The Regional Director must include this *Checklist* with NEPA documents which are being submitted to the AS-IA for review. Diskette copies of the *Checklist* are available from the OIGM upon request.

OFFICE OF INDIAN GAMING MANAGEMENT

Checklist of Environmental Issues for NEPA Review of Proposed Gaming-related Actions

Title of NEPA Document:_____ Regional Office:_____

NEPA Document Number:_____ Case File Number:_____ Date:_____

Print Name & Title of Lead Area Preparer/Reviewer:_____

Common Environmental Issues	Addressed in Document? Page(s)	No	Significant Impact?♣ Yes	No	Signature of BIA Field Specialist	Date
Air Quality (40 CFR 50-85, 29 CFR 1910.134(d), etc.)♥						
Archaeological, Historical & Cultural (36 CFR 800)♥						
Biota & Threatened & Endangered Species (50 CFR)♥						
Coastal Zone Issues (15 CFR 930) (♥ if applicable)						
Construction, Demolition, Landscaping & Reclamation						
Crime Potential, Protection and Prevention						
Current, Past and Future Cumulative Impacts ♣♥						
Demographic Trends (♥ if alterations will be notable)						
Energy (electrical, fuel, etc.) Resource Use & Changes ♥						
Fire Potential, Protection and Prevention						
Floodplain, River, Lake, Wetland & Riparian Areas ♥						
Forests, Forestry Resources and Logging						
Geology, Seismic and Mining (♥ if a hazard is present)						
Hazardous Substances and Wastes (40 CFR 260-373)♥						
Health and Safety: OSHA (29 CFR 1900-1999), etc.						
Indian Religious Issues (AIRFA: 25 CFR 211.7, etc.)♥						
Land-use Plans (40 CFR 1508.18(b) and 25 CFR 151)						
Noise (29 CFR 1910.95 & 1926.52, 40 CFR 205, etc.)						
Non-hazardous Wastes (solid, liquid or confined gas)♥						
Paleontological Resources						
Prime and Unique Farm Lands (7 CFR 658.3-5)♥						
Protected, Sensitive and Special-management Areas ♥						
Rangelands, Range Resources and Range Activities						
Recreational/Subsistence Hunting, Fishing & Gathering						
Releases (40 CFR 112-117, 40 CFR 300-373, etc.)♥						
Socioeconomic Issues (tribe & other affected parties)♥						
Stormwater Discharges (40 CFR 122.26)♥						
Utilities Issues and Changes						
Vehicular and Pedestrian Traffic Issues and Changes ♥						
Visual Resources (light pollution, views, aesthetics, etc.)						
Wastewater Treatment & Disposal (40 CFR 122-129)♥						
Water Quality (surface, ground and drinking water)♥						
Water Quantities Needed and/or Affected ♥						
Other (specify)						
Other (specify)						

♥ Indicates those issues, at a minimum, which must be addressed in all EAs and EISes. Other issues must be addressed if they would be affected.

♣ "Significance" is defined in 40 CFR 1508.27. An EA or an EIS must show an assessment of the degree of significance of any expected impact -- individual, cumulative, direct, indirect, beneficial, adverse, present, reasonably-foreseeable-future, residual and/or synergistic -- of the proposed action. See 42 USC 7609; 40 CFR 1501.2(a and b), 1502.16, and 1508.8; and 516 DM 5.3(B). "Cumulative impact" is defined in 40 CFR 1508.7.

IV. Preparation of Section 20 documentation by Region

This section describes the duties of the BIA Region Office after completion of the Section 20 requirements for the proposed acquisition:

- ☐ Upon completion of the consultation process, (i.e. receipt of responses, expiration of allowed response time), the Regional Director will review and prepare a summary of the comments and responses received from the consulted officials. When a response raises an issue with actual or potential negative implications which may affect a favorable two-part determination, the Regional Director will analyze the issue and determine what action may be appropriate. The Regional Director should request the applicant tribe to make an effort to resolve the issue. The tribe should be given 30 days to resolve the issue. Additional time may be granted upon written request; however, the requester must justify the need for the additional time. The Regional Director should also advise the tribe that failure or reluctance to respond will result in the Regional Director making conclusive findings on the issue without input from the tribe.

- ☐ Upon completion of all actions or activities relating to the proposed two-part determination, including an independent analysis of all the information and factual evidence provided by the tribe and the parties consulted, the Regional Director must prepare Proposed Findings of Fact addressing the two-part determination and the items of information relating to such a determination. The proposed findings made and conclusions reached must be supported by the facts, supporting exhibits or other documentation.

The Regional Director's Proposed Findings of Fact should include an analysis by program officers (i.e. social services, law enforcement, finance, environmental and tribal operations), to ensure that aspects of those program areas have been adequately addressed by the tribe's application. For example, suppose that the tribe had indicated that in furtherance of its relationship with the surrounding community, the tribe and the local governments will enter into mutual-aid or crossdeputization agreements to facilitate better police services. Clearly, the law enforcement staff would provide a valuable analysis of the agreements and the merits of the proposal.
The Regional Director's Proposed Findings of Fact should also include an analysis of all agreements relied on to arrive at conclusions on the two part determination. For example, if the management agreement is the document used to figure projections of income to the tribe, the Regional Director's Proposed Findings of Fact must include an analysis and conclusion regarding the validity of the finding.

To assure that all important documents and issues are received and adequately reviewed and considered, the acquisition package should be organized in such a manner to allow easy access for review. The information and exhibits should be tabbed and indexed for easy reference. For purposes of organization, the Regional Director's factual findings relative to the two-part determination should be placed under the topical heading identified for each of the two-parts. For example, the "Best Interest of the Tribe" category should serve as a topical heading, and be followed by facts, findings and conclusions on each factor listed under that category.

EXHIBIT C

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit C to Plaintiff's Request for Judicial Notice

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

Memorandum

To: Regional Directors, Bureau of Indian Affairs
George Skibine, Office of Indian Gaming

From: Assistant Secretary Carl Artman

Date: January 3, 2008

Subject: Guidance on taking off-reservation land into trust for gaming purposes

The Department currently has pending 30 applications from Indian tribes to take off-reservation land into trust for gaming purposes as part of the 25 U.S.C. § 2719(b)(1)(A) two-part determination. Many of the applications involve land that is a considerable distance from the reservation of the applicant tribe; for example, one involves land that is 1400 miles from the tribe's reservation. Processing these applications is time-consuming and resource-intensive in an area that is constrained by a large backlog and limited human resources.

The decision whether to take land into trust, either on-reservation or off-reservation, is discretionary with the Secretary. Section 151.11 of 25 C.F.R. Part 151 sets forth the factors the Department will consider when exercising this discretionary authority with respect to "tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation." Section 151.11(b) contains two provisions of particular relevance to applications that involve land that is a considerable distance from the reservation. It states that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

1) greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and

2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

Part 151, however, does not further elaborate on how or why the Department is to give "greater scrutiny" and "greater weight" to these factors as the distance increases. The purpose of this guidance is to clarify how those terms are to be interpreted and applied,

particularly when considering the taking of off-reservation land into trust status for gaming purposes.

Core Principles

As background to the specific guidance that follows, it is important to restate the core principles that underlie the Part 151 regulations and that should inform the Department's interpretation of, and decisions under, those regulations. The Part 151 regulations implement the trust land acquisition authority given to the Secretary by the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465. The IRA was primarily intended to redress the effects of the discredited policy of allotment, which had sought to divide up the tribal land base among individual Indians and non-Indians, and to destroy tribal governments and tribal identity. To assist in restoring the tribal land base, the IRA gives the Secretary the authority to: 1) return "to tribal ownership the remaining surplus lands of any Indian reservation" that had been opened to sale or disposal under the public land laws; 2) consolidate Indian ownership of land holdings within reservations by acquiring and exchanging interests of both Indians and non-Indians; and 3) acquire, in his discretion, interests in lands "within or without existing reservations". The IRA contains also provisions strengthening tribal governments and facilitating their operation. The policy of the IRA, which was just the opposite of allotment, is to provide a tribal land base on which tribal communities, governed by tribal governments, could exist and flourish. Consistent with the policy, the Secretary has typically exercised discretion regarding trust land acquisition authority to take lands into trust that are within, or in close proximity to, existing reservations.

The IRA has nothing directly to do with Indian gaming. The Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701 et seq., adopted more than 50 years after the IRA, sets the parameters of Indian gaming. One requirement is that if gaming is to occur on off-reservation lands those lands must be trust lands "over which an Indian tribe exercises governmental power." The authority to acquire trust lands, however, is derived from the IRA; no trust land acquisition authority is granted to the Secretary by IGRA. The Department has taken the position that although IGRA was intended to promote the economic development of tribes by facilitating Indian gaming operations, it was not intended to encourage the establishment of Indian gaming facilities far from existing reservations. Whether land should be taken into trust far from existing reservations for gaming purposes is a decision that must be made pursuant to the Secretary's IRA authority.

Implementation of Guidance

This guidance should be implemented as follows:

1. All pending applications or those received in the future should be initially reviewed in accordance with this guidance. The initial review should precede any effort (if it is not already underway) to comply with the NEPA requirements of section 151.10(h).

2. If the initial review reveals that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied and the tribe promptly informed. This denial does not preclude the tribe from applying for future off-reservation acquisitions for gaming or other purposes. However, those future applications will be subject to these same guidelines.

3. A greater scrutiny of the justification of the anticipated benefits and the giving greater weight to the local concerns must still be given to all off-reservation land into trust applications, as required in 25 C.F.R. § 151.11(b). This memorandum does not diminish that responsibility, but only provides guidance for those applications that exceed a daily commutable distance from the reservation.

Greater Scrutiny of Anticipated Benefits

The guidance in this section applies to all applications, pending or yet to be received, that involve requests to take land into trust that is off-reservation. Reviewers must, in accordance with the regulations at 25 C.F.R. 151.11(b), "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" as the distance between the acquisition and the tribe's reservation increases. The reviewer should apply this greater scrutiny as long as the requested acquisition is off-reservation regardless of the mileage between the tribe's reservation and proposed acquisition. If the proposed acquisition exceeds a commutable distance from the reservation the reviewer, at a minimum, should answer the questions listed below to help determine the benefits to the tribe. A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation

As noted above, section 151.11(b) requires the Secretary to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" of trust land "as the distance between the tribe's reservation and the land to be acquired increases." The reason for this requirement is that, as a general principle, the farther the economic enterprise - in this case, a gaming facility - is from the reservation, the greater the potential for significant negative consequences on reservation life.

Tribes typically view off-reservation gaming facilities as providing two economic benefits to the tribe. The first is the income stream from the gaming facility, which can be used to fund tribal services, develop tribal infrastructure, and provide per capita payments to tribal members, and thus can have a positive effect on reservation life. Obviously, the income stream from a gaming facility is not likely to decrease as the distance from the reservation increases. In fact, off-reservation sites are often selected for gaming facilities because they provide better markets for gaming and potentially greater income streams than sites on or close to the reservation.

The second benefit of off-reservation gaming facilities is the opportunity for job training and employment of tribal members. With respect to this benefit, the location of the

gaming facility can have significant negative effects on reservation life that potentially worsen as the distance increases. If the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservation will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity.

In either case, the negative impacts on reservation life could be considerable. In the first case, the operation of the gaming facility would not directly improve the employment rate of tribal members living on the reservation. High on-reservation unemployment rates, with their attendant social ills, are already a serious problem on many reservations. A gaming operation on or close to the reservation allows the tribe to alleviate this situation by using their gaming facility as a conduit for job training and employment programs for tribal members. Provision of employment opportunities to reservation residents promotes a strong tribal government and tribal community. Employment of tribal members is an important benefit of tribal economic enterprises.

In the second case, the existence of the off-reservation facility would require or encourage reservation residents to leave the reservation for an extended period to take advantage of the job opportunities created by the tribal gaming facility. The departure of a significant number of reservation residents and their families could have serious and far-reaching implications for the remaining tribal community and its continuity as a community. While the financial benefits of the proposed gaming facility might create revenues for the applicant tribe and may mitigate some potential negative impacts, no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility.

As stated above, some of the issues that need to be addressed in the application if the land is to be taken into trust is off-reservation and for economic development are:

> What is the unemployment rate on the reservation? How will it be affected by the operation of the gaming facility?
>
> How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility? How will their departure affect the quality of reservation life?
>
> How will the relocation of reservation residents affect their long-term identification with the tribe and the eligibility of their children and descendants for tribal membership?
>
> What are the specifically identified on-reservation benefits from the proposed gaming facility? Will any of the revenue be used to create on-reservation job opportunities?

As long as it remains the policy of the Federal government to support and encourage growth of reservations governed by tribal governments, these are important questions that must be addressed before decisions about off-reservation trust land acquisitions are made. The Department should not use its IRA authority to acquire land in trust in such a way as to defeat or hinder the purpose of the IRA. It should be noted that tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department. It is only when the enterprises involve the taking of land into trust, as is required for off-reservation Indian gaming facilities, that the Department must exercise its IRA authority.

Greater Weight

Section 151.11(b) also requires the Secretary to give "greater weight" than he might otherwise to the concerns of state and local governments. Under the regulations, state and local governments are to be immediately notified of a tribe's application to take land into trust, and are to file their comments in writing no later than 30 days after receiving notice. The reviewer must give a greater weight to the concerns of the state and local governments no matter what the distance is between the tribe's reservation and the proposed off-reservation acquisition. This is the second part of the two part review required by section 151.11(b).

The regulations identify two sets of state and local concerns that need to be given "greater weight:" 1) jurisdictional problems and potential conflicts of land use; and 2) the removal of the land from the tax rolls. The reason for this requirement of giving "greater weight" is two-fold. First, the farther from the reservation the proposed trust acquisition is, the more the transfer of Indian jurisdiction to that parcel of land is likely to disrupt established governmental patterns. The Department has considerable experience with the problems posed by checkerboard patterns of jurisdiction. Distant local governments are less likely to have experience dealing with and accommodating tribal governments with their unique governmental and regulatory authorities. Second, the farther from the reservation the land acquisition is, the more difficult it will be for the tribal government to efficiently project and exercise its governmental and regulatory powers.

With respect to jurisdictional issues, the application should include copies of any intergovernmental agreements negotiated between the tribe and the state and local governments, or an explanation as to why no such agreements exist. Failure to achieve such agreements should weigh heavily against the approval of the application.

With respect to land use issues, the application should include a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local governments, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility. Incompatible uses might consist of adjacent or contiguous land zoned or used for: National Parks, National Monuments, Federally designated conservation areas,

National Fish and Wildlife Refuges, day care centers, schools, churches, or residential developments. If the application does not contain such an analysis, it should be denied.

Conclusion

The Office of Indian Gaming will review the current applications. If an application is denied subsequent to this review, the applicant tribe will be notified immediately. Tribes receiving a denial subsequent to this review may resubmit the application with information that will satisfy the regulations. Regional directors shall use this clarification to guide their recommendations or determinations on future applications to take off-reservation land into trust.

EXHIBIT D

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit D to Plaintiff's Request for Judicial Notice

MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE
P.O. Box 910
Keshena, WI 54135-0910

Wednesday, October 22, 2008

George Skibine
Assistant Secretary – Indian Affairs (Acting)
U.S. Department of the Interior
1849 C Street N.W.
Washington D.C. 20840

Re: Request to Suspend Consideration

Dear Mr. Skibine:

It is with a heavy heart that I write, on behalf of the Menominee Indian Tribe of Wisconsin, to request that the Department of the Interior immediately and temporarily suspend all further review and consideration of our Tribe's application for the United States to accept in trust for gaming certain land in Kenosha, Wisconsin.

We are taking this extraordinary step because it has come to our attention that, in what are now the final days of the Bush Administration, Secretary Kempthorne's office is responding to political pressure and is about to issue a hasty, arbitrary, and capricious end-of-term disapproval of our long-pending application. In order to stop this from happening, we ask you to temporarily suspend consideration of our application.

As we have shown you and other non-political Department staff in a series of meetings this year, our Tribe has sincerely and fully documented how our application responds to every standard in the statute, in the regulations, and even in the Guidance issued by the Department in January, 2008. Our off-reservation proposal meets all of the stated requirements, even those with which we disagree.

We want our application to be given fair and impartial consideration, and we are now confident that we cannot receive such consideration from Secretary Kempthorne. Therefore, we would like to wait for consideration by the new Administration early next year. We do not want Secretary Kempthorne to cynically over-ride non-political Department officials who have recommended approval of our application based on the law and a thorough review of our submissions.

Sincerely,

Lisa S. Waukau
Menominee Tribal Chairman

EXHIBIT E

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

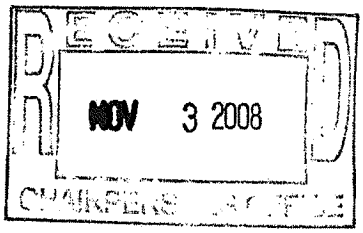
Exhibit E to Plaintiff's Request for Judicial Notice

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 31 2008

TAKE PRIDE IN AMERICA



The Honorable Lisa Waukau
Chairperson
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135-0910

Dear Chairperson Waukau:

Thank you for your letter of October 22, 2008, requesting that the Department of the Interior immediately and temporarily suspend all further review and consideration of the Menominee Indian Tribe's application for the United States to take land into trust in Kenosha, Wisconsin for gaming purposes.

I cannot agree to suspend the Tribe's application for the reasons stated in your letter. Therefore, the Department will continue to assess and review the application.

Sincerely,

George T. Skibine
Acting Deputy Assistant Secretary for
Policy and Economic Development

EXHIBIT F

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit F to Plaintiff's Request for Judicial Notice

Harvard Law School
HARVARD LAW SCHOOL PUBLIC LAW RESEARCH
PAPER NO. 08-07

~ and~

Minnesota Legal Studies
RESEARCH PAPER NO. 08-10

Testimony on the Department of the Interior's New Policy on Off-Reservation Acquisitions of Land in Trust for Indian Gaming, before the United States House of Representatives Natural Resources Committee, 110th Congress, Second Session (February 27, 2008)

Kevin K. Washburn
University of Minnesota Law School
Harvard Law School

February 27, 2008

HARVARD LAW SCHOOL

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Testimony of Professor Kevin K. Washburn

On the Department of the Interior's New Guidance on Off-Reservation Acquisition of Land in Trust for Indian Gaming

Before the Natural Resources Committee, United States House of Representatives

110th Congress, 2d Session

February 27, 2008

Thank you for inviting me to appear before the Committee again to discuss important matters related to Indian gaming. You have asked for my views on a recent Guidance Memorandum issued by the Assistant Secretary of Indian Affairs on the acquisition of off-reservation land in trust for Indian gaming.

Introduction

The policy of the United States, as expressed by Congress, is to assist American Indian tribes in restoring some of the 90 million acres that tribes lost during the allotment era in the late Nineteenth and early Twentieth Centuries. See 25 U.S.C. § 465. It is also the policy of the United States, as expressed by Congress, to encourage Indian gaming as a means of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Although Congress has delegated to the Secretary of the Interior the power to help tribes re-acquire lands, public appropriations for tribal land acquisitions have rarely kept pace with tribal hopes and dreams for land restoration. In recent years, gaming has given tribes financial resources, and access to more financing, that will allow them to acquire more tribal lands. Off-reservation acquisitions of land for Indian gaming can be justified by Congressional policies favoring tribal land restoration as well as policies favoring Indian gaming as a source of tribal economic development and self-sufficiency.

However, off-reservation acquisitions for gaming are controversial. For neighboring tribes and for state and local communities, gaming can have ill effects. First, gaming developments, like any construction projects and commercial activity, can have negative effects on neighboring communities, related to noise, traffic, disruption and environmental degradation. Second, casinos may increase social ills, such as compulsive (or pathological) gambling. Third, the economic well-being of many tribes depends on having a monopoly or a quasi-monopoly in the market they serve.

From an economic standpoint, new casinos often cannibalize the business of existing casinos. While competition is generally a positive value in business because it leads to a higher quality product (or a higher quantity of product at a lower price), competition is not necessarily advantageous in gaming. Indeed, as a matter of public policy, we should not necessarily want casinos to "sell more gaming" at a lower cost, or to offer a better product that is more widely consumed. The product itself comes with some social costs.

Thus, as a matter of public policy, we do not value casinos because of the value of the casino "product." Rather, we *tolerate* casinos for the governmental revenues they produce and in recognition of the inevitability of illegal gaming if we try to prohibit legal gaming activity. If we do not authorize legal gaming from which governments derive revenues, we will nevertheless have illegal gaming from which governments do not. In any event, full free market competition in gaming is not necessarily good. This is why most states now offer state-sponsored lotteries, but they do not allow private vendors to compete for lottery customers.

Because of the controversial nature of Indian gaming, decisions about off-reservation land-into-trust acquisitions often have high political costs. Because of the political costs, federal decision-makers naturally look for ways to avoid facing these difficult questions. Because of the forces of inertia and the power of the status quo, it is often much easier for the Secretary to deny a land-into-trust application than to grant one.

On January 3, 2008, the Assistant Secretary of the Interior for Indian Affairs issued a memorandum providing guidance on taking off-reservation land into trust for gaming purposes (hereinafter "Guidance Memorandum"). The Guidance Memorandum seems designed, first, to make it easier for the Secretary to deny off-reservation land-into-trust applications, and second, to discourage new applications for land-into-trust.

While I understand Interior's cautious approach toward Indian gaming and its desire for a bright-line rule that will mitigate the political controversy surrounding such decisions, the Guidance Memorandum is problematic for several reasons. First, the policy expressed therein is based on a fundamental misconception of the value and purpose of Indian gaming. Second, it is overly broad, reaching non-controversial trust applications, and thereby departing from the values that ought to drive federal decisions involving Indian affairs. Finally, it seems unfair as a matter of process and ill-advised as a matter of policy. In the testimony below, I will explain some of the problems with the Guidance Memorandum and comment more generally on Interior's dysfunctional decision-making process in the land-into-trust context.

I. The Department of the Interior's Guidance Memorandum Misunderstands the Benefits of Indian Gaming; For Tribes, Gaming is about Revenue, Not Jobs.

While the Guidance Memorandum is useful in understanding Interior's position on land-into-trust, Interior's analysis is unsupportable and misguided. The Guidance Memorandum claims that an off-reservation gaming operation that lies beyond a "commutable distance" from the reservation has "considerable" "negative impacts" on reservation life in that such a casino "would not directly improve the employment rate of tribal members living on the reservation." Guidance Memo at p. 4. This conclusion is a non sequitur; it is also flat wrong. It showcases an apparent misconception about the benefits of Indian gaming.

It is likely impossible to find an off-reservation Indian gaming operation that has had negative economic effects on reservation life. The Guidance Memorandum seems to assume that the purpose of Indian gaming is to provide jobs to tribal members. A little perspective is in order. While it is true that an Indian gaming operation can provide some employment advantages to any community, primarily because Indian gaming tends to provide a living wage and reasonably good benefits for low- and medium-skilled workers in the service sector, the vast majority of people who work in Indian casinos nationwide are non-Indians. Indeed, while Indian gaming may have been a "full employment act" for gaming lawyers and for non-Indians in many communities, it has not had the same result for Indian citizens.

This should not, however, be particularly troubling. No serious observer would claim that casino employment for tribal members is the primary benefit of Indian gaming. Rather, gaming has provided a stream of revenue to tribes to improve reservation public safety, healthcare and education, and to pursue other economic development opportunities.

While the Guidance Memorandum misunderstands the importance of gaming jobs, it also misstates the impact of its new policy on reservation jobs. The Guidance Memorandum's central claim about jobs -- that off-reservation casinos fail to provide jobs on the reservation -- is patently ridiculous. Revenues from off-reservation gaming operations pay for tribal jobs on the reservation in a variety of areas, including healthcare, elderly services, social services, education, law enforcement, and numerous other areas of public service, many of which provide direct services to reservation residents. Indeed, such tribal public service jobs – involving tribal members directly helping other tribal members – may be much more personally fulfilling than casino jobs. Indian gaming pays for these jobs in a very direct way.

In presuming that increasing reservation jobs is one of the most important aspects of Indian gaming, the Guidance Memorandum departs from the Indian Gaming Regulatory Act. IGRA describes the benefits of Indian gaming as tribal governmental revenues, not jobs. Indeed, nowhere in IGRA are jobs specifically mentioned, but IGRA specifically refers to "tribal revenues" or "tribal governmental revenues" repeatedly throughout the Act. *See, e.g.*, 25 U.S.C. §§ 2701(1) & (4), 2702, and 2710(b)(2).

The fact that IGRA was not focused primarily on jobs should not surprise anyone. The closest analogues to Indian gaming operations are state lotteries. Like tribal casinos, state lotteries are not valued so much for the jobs they create. Rather, they are valued for the revenues that they provide, which, in turn, serve other governmental functions. In many states, lottery revenues are devoted to education. Thus, lottery revenues pay teachers' salaries and increase jobs in teaching. Tribal gaming operations work in much the same way. Tribal casinos pay for teachers, social workers, doctors and nurses, services for the elderly and myriad other jobs. The Guidance Memorandum is flawed in failing to understand this very basic point.

While it is possible to find policy-makers extolling the job-generating virtues of Indian casinos, this is often used to justify Indian gaming within non-Indian communities and to explain the benefits to non-members. In sum, for Indian tribes, Indian gaming is not primarily a jobs initiative; it is a *revenue* initiative.

II. For Indian Tribes, *Off*-Reservation Gaming Operations Are in Some Ways Better than On-Reservation Gaming Operations and Should Be Encouraged, Especially When They Are Supported by State and Local Governments.

A casino is not an unmitigated good for any community. As any Not-In-My-Back-Yard (NIMBY) community group will tell you, a casino may provide some economic benefits in jobs and tourism, but it also has significant social costs. It can increase traffic and congestion, can create or exacerbate public safety issues, and can lead to an increase in gaming-related social harms, such as pathological (or compulsive) gambling. Thus, one rarely sees wealthy communities clamoring for casinos. Gaming tends to be sought by communities that need economic development and are willing to put up with the inevitable negative externalities. Indeed, much of the planning as to location and siting of gaming facilities is focused on mitigating such harms.

For Indian tribes, casinos can have even more particular side effects in that they bring outsiders onto the reservation, sometimes overwhelming the reservation character of the community and interfering with tribal culture, tribal daily life, and even tribal values. Indeed, to Indian communities, the most positive aspect of casinos is the revenues that they provide. Thus, contrary to the conclusion of the Guidance Memo, in some ways, the ideal Indian gaming operation is one that is outside the reservation. Off-reservation casinos can provide all the revenue benefits of Indian gaming without the corresponding interference with tribal life.

The Guidance Memo claims that taking off-reservation land into trust for a casino can "defeat or hinder" the Indian Reorganization Act purpose to restore the tribal land base. This assertion is just as ridiculous as the claim that off-reservation Indian gaming produces no jobs on the reservation. The chief obstacle to restoration of the tribal land base over the past seven decades has been the Department of the Interior's failure to ask for – and Congress's failure to appropriate – sufficient funds for tribal land acquisition. Off-reservation gaming operations can give tribes the revenues to overcome this obstacle to land restoration. Gaming off the reservation can be used to support land acquisition on the reservation. Indeed, many tribes use their gaming revenues, in part, to fund reservation land acquisition and land consolidation programs.

III. Off-Reservation Casinos That Are Non-Controversial Should be Approved, Without Regard to Party Politics.

Congressional policy, as expressed in the Indian Gaming Regulatory Act, suggests that land acquisitions for Indian gaming should be encouraged, especially if state and local communities concur. In light of the policy values expressed in IGRA, the Secretary's recent denial of Indian land-into-trust acquisitions that were supported by local communities and the governor of a state is difficult to understand. It is unclear what federal interest justifies rejecting a project supported by local, tribal and state officials.

While the Secretary has an important role of serving as a buffer between tribes and states in the context of disagreement, the Secretary should not become an obstacle to joint efforts at economic development when tribes and states agree on the value of an off-reservation Indian gaming operation. The Secretary's denial of land into trust in such circumstances is contrary to tribal self-determination and self-sufficiency. It is also contrary to basic values in a federalist governmental system which suggest that the federal government should intervene in local affairs only when the there is a clear federal interest in doing so. While the federal government has a

responsibility to protect tribes from state interference in some circumstances, no federal interest justifies the Secretary's refusal to take land into trust when tribes, local communities and the state's governor agree. To justify taking such action in the face of wide local agreement, Interior should articulate a clear federal interest. In the absence of such an interest, the action appears to represent a decision made on the basis of crass party politics. Indeed, the tortured reasoning in the Guidance Memorandum may be intended to serve as cover for cynical political considerations.

IV. In Light of the Haphazard Development of Interior Policy on Land-Into-Trust for Gaming, a Clear and Consistent Statement of Policy Is a Good Idea, But It Should Be Developed in a Public Process with Tribal and Public Input.

Partially because of the many externalities of casinos (and large economic development projects in general), taking land into trust for tribes is often controversial, especially outside a reservation. Given the political salience of this important issue, land-into-trust policies should not be developed behind closed doors without public input. Much of the weakness of the Guidance Memorandum is directly attributable to the failure to consult on these important policies with tribal governments and other interested members of the public. If Interior had consulted with affected interests, it likely would not have produced a memorandum with such weak analytical conclusions.

Current law anticipates broad public involvement in Executive Branch policy-making on land-into-trust issues. Department of the Interior regulations on land-into-trust, for example, require consultation with state and local government officials on such decisions. See 25 C.F.R. § 151.11. Likewise, although Section 2719 of IGRA generally prohibits gaming on land taken into trust after October 17, 1988, it gives the Secretary discretion to allow such gaming when the Secretary has consulted with "the Indian tribe and appropriate State and local officials" as to whether gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" and the state governor concurs in such a decision. In other words, the Secretary is given broad discretion, but only in circumstances in which wide public participation occurs (indeed, absent such consultation, the Secretary lacks discretion on these issues and IGRA governs).

Since the New Deal, the notion that the public should have a role in agency decision-making has been a bedrock principle of American government. Given the wide interest and significant local ramifications of decisions about gaming, however, and the very specific responsibilities for consultation with tribes and others in these contexts, decisions about Indian gaming policy should not be made behind closed doors or without significant public participation.

The Clinton administration spent nearly two years attempting to formulate a coherent policy for land-into-trust decisions. Its extensive study of this issue produced a rule that was adopted at the end of President Clinton's second term, on January 16, 2001, to become effective 30 days later. The Bush Administration may have been wise to be suspicious of a rule that was adopted by a lame duck administration so late that it would never apply until after that administration was gone. However, it was unfortunate that the Bush Administration failed to capitalize on the significant sophistication that had developed surrounding this issue. The previous administration had sought significant public involvement on this question.

In light of the current administration's rejection of the previous administration's new rule for off-reservation acquisitions, the problem has festered. In 2004, several high ranking officials produced an "Indian Gaming Paper," ostensibly to answer an inquiry by Secretary Gale Norton on the extent of her discretion to approve off-reservation acquisitions for gaming. Though the Indian Gaming Paper was apparently not developed with public participation, it reached a sensible conclusion. The Indian Gaming Paper concluded that "distance limits should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster." Michael Rosetti, et al., Indian Gaming Paper, at *13 (February 20, 2004).

Though it was never formally enacted as a rule, the 2004 Indian Gaming Paper received widespread public attention. For almost four years, Indian tribes relied on this interpretation in myriad ways. They invested substantial resources into negotiating with communities, as well as state officials, private developers and investors. And they submitted land-into-trust applications believing that they could rely on the Department's guidance. During this time, tribes relied in good faith on the belief that distance from the reservation would not be a significant factor in the decision on land-into-trust applications.

Off-reservation acquisitions have continued to occupy public interest. No less than ten Senate Indian Affairs Committee hearings have been dedicated to the issue of off-reservation land-into-trust acquisitions for gaming. Now, four years after the 2004 Indian Gaming Paper established a policy stance upon which the public largely relied, Interior has abruptly changed course, imposing an arbitrary and indefensible standard on land-into-trust applications. While Executive Branch agencies are entitled to – and indeed have the duty to – change course when a policy change ought to be made or can be justified for good reason, they should not change policy for erroneous reasons. While the decision to take land into trust is a matter committed generally to the discretion of the Department of the Interior, Interior presumably must exercise that discretion in a non-arbitrary manner and should not change policy based on reasons that are patently wrong on the facts and inconsistent with broader Congressional policy.

If the Department wishes to make policy in this area, as perhaps it should in light of the importance of the issue, it would be wise to consult with interested parties in doing so. Such consultation could have prevented the embarrassingly weak analysis set forth in the Guidance Memorandum and the inevitable confusion that bad policy can produce.

V. Because the Guidance Memorandum Effectively Operates as a Rule Promulgated in Violation of the Administrative Procedure Act, Its Immediate Use to Deny Applications Is Inconsistent with Basic Principles of Administrative Due Process.

The Guidance Memorandum advises Interior decision makers that "all pending applications or those received in the future should be initially reviewed in accordance with this guidance" and that if an "application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied." Guidance Memo at p. 2-3. By requiring the decision makers in Interior to deny an application that does not meet the newly imposed standards, the "guidance" is more than a mere clarification of the factors set forth in 25 C.F.R. Part 151. It guides Interior's decisions to take land into trust, effectively having the force of law. Since it is effectively a legislative rule, it is unlawful in the absence of the notice and comment procedures spelled out in Section 553 of the Administrative Procedure Act (APA). It runs afoul of basic administrative law principles in several respects.

First, the APA requires an agency to engage in a notice and comment rulemaking procedure when it either adopts a legislative rule or issues an "interpretative rule" or "statement of policy" that "expresses a change in substantive law or policy" which "the agency intends to make binding, or administers with binding effect." *General Electric v. EPA*, 290 F.3d 377, 382-383 (D.C. 2002) (finding a Guidance Memorandum listing specific requirements applicants must meet to be a legislative rule and vacating because not promulgated in accordance with APA Section 553). The Guidance Memorandum seems to expresses a change in substantive law by rewriting, rather than interpreting, Part 151.

The Guidance Memorandum seems to be a legislative rule, rather than an interpretive one, because it carries the force of law, as reflected in its binding language and immediate effects. A document has binding effect, even before applied, "if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application." *General Electric v. EPA*, 290 F.3d at 383. The Guidance Memorandum explicitly advises tribes that failure to satisfy its requirements will result in denial of their applications. The Guidance Memorandum then goes a step further by binding reviewers to deny applications that do not address the narrow and seemingly arbitrary prescribed factors such as whether the gaming will encourage reservation residents to relocate off-reservation and whether relocation will affect members' identification with the tribe. Thus, the Guidance Memorandum effectively offers more than mere "guidance."

Second, the Guidance Memorandum was put into effect immediately and without any notice, reflecting a lack of due process and an appearance of unfairness. Indeed, on January 4, *only a day after the Guidance was issued*, the Secretary rejected numerous applications to take land into trust for gaming on the basis of the reasoning set forth in the Guidance Memorandum, and without even giving the affected parties an opportunity to address the new standard. Indeed, Secretary Kempthorne explicitly indicated that the applications were rejected because the gaming operations would be too far from the reservations to offer jobs to tribal residents, that residents would be forced to relocate as a result, and that relocation of tribal members would "have serious and far-reaching implications for the remaining tribal community." *See* Anahad O'Connor, *Interior Secretary Rejects Catskill Casino Plans*, N.Y. TIMES (Jan. 5, 2008).

Third, the rule set forth in the Guidance Memorandum operates in an arbitrary and unreasonable manner. While Part 151 advises the Secretary to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" of trust land "as the distance between the tribe's reservation and the land to be acquired increases," it recognizes that each case involves balancing various factors specific to the parties involved. Thus, it instructs the Secretary to "give greater weight to the concerns" of "state and local governments" as the distance increases. 25 C.F.R. § 151.11. However, instead of recognizing the positive as well as the negative impact that state and local governmental views should merit in the "greater scrutiny" review, the Guidance Memorandum identifies two factors that a reviewer should consider: 1) "jurisdictional problems" and "conflicts of land use"; and 2) "removal of the land from the tax rolls." Guidance Memo at p. 5. The Guidance Memorandum ignores the substantial possibility that state and local governments may have negotiated with tribes around these issues – which is almost necessarily how local support and gubernatorial consent is achieved – and does not instruct a reviewer to consider any positive input from state and local governments. This rule is unfair and makes little sense. Disapproval by the affected non-tribal parties may occasionally tip the scale against

taking land into trust for gaming far from a reservation, but likewise, strong support by the affected state and local government should motivate approval.

Given that the Guidance Memorandum is supported by dubious (and even erroneous) assumptions about Indian gaming, that it was adopted without any public or tribal input, and that it was used to deny applications immediately and without notice to affected parties, it should be withdrawn. Although the Secretary has wide discretion as to whether to take land into trust for any legitimate reason, the Secretary should not decline to take land into trust for illegitimate reasons. The Secretary has broad discretion, but good government and basic principles of administrative law suggest that the Secretary's discretion be exercised wisely and fairly.

Conclusion

Interior should be applauded for focusing on this important issue and attempting to provide guidance. Indeed, good government requires clear rules. The only beneficiaries of a mysterious system with vague rules are the lawyers and lobbyists who can navigate the murky and overly political land-into-trust process, and land speculators who can capitalize on the uncertainty in the process to profit from tribal hopes. Clear rules on land into trust would serve tribes and their commercial partners by providing greater predictability.

Acquisition of land into trust is a difficult political issue for the Secretary. Indeed, while Interior has a clear mandate to work to restore the tribal land base, and to create opportunities for tribal self-sufficiency and economic development that comes from Indian gaming, the Secretary bears the brunt of controversial actions in that area. In light of the longstanding Congressional support for the restoration of tribal lands, and the more recent Congressional support for tribal economic development through Indian gaming, however, the Secretary has political cover for taking land into trust. The Secretary should exercise the discretion to accomplish the policy goals that Congress has mandated.

Interior's caution in this area is sometimes well-motivated. Interior has sometimes believed that it must carefully guard its authority to take land into trust by using this power cautiously. Liberal use of the power might cause widespread public opposition that would motivate Congress to withdraw the delegation of this power to the Secretary. Withdrawal of this power would have the effect of placing the power in an even more political body, i.e., Congress, and could well frustrate the land-into-trust process. That kind of result might harm all tribes. In general, it is good that the Secretary have the authority to take land into trust for tribes. However, Congress has given the Secretary reasonably clear direction and the Secretary should follow that direction until it is changed.

In exercising this important discretion, Interior must do a better job of acting in a fairer (and swifter) fashion. Moreover, whatever rules Interior may adopt as to land-into-trust, the Secretary should be willing to waive the rules when an acquisition is non-controversial. While Congress may have believed that the appropriation process would necessarily serve as a practical limit on restoration of tribal land, Congress likely never intended Interior to be an additional *obstacle* to restoration of tribal lands when tribes could afford to bypass the appropriations process. In any event, when local communities and the governor of the state support a land-into-trust application, the Secretary is not facing a controversial decision. Local and state officials, who are closer to their respective communities, should bear the political fallout of those decisions. Such applications should be approved. When the Secretary of the Interior uses his discretion to deny a

land-into-trust application for gaming when there is agreement between tribal, state and local officials, the Secretary invites speculation that the result is not being driven by good government but by partisan politics.

The Secretary should withdraw the Guidance Memorandum and make a serious effort to develop clear rules. Because of the high political salience of these issues, such rules ought to be developed with tribal consultation and public participation in notice and comment. Such rules ought to reflect real concerns, and not half-baked policy considerations unrelated to the purposes of the laws that support tribal land restoration and Indian gaming.

Thank you for considering these views on this important issue.

Disclaimer: The comments expressed herein are solely those of the author as an individual professor and do not represent the views of the Harvard Law School or any other institution with which the author may be affiliated.

* * *

A bibliography of Professor Washburn's work related to Indian gaming is set forth below:

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***The Legacy of Bryan v. Itasca County: How a $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue*, 92 MINNESOTA LAW REVIEW __ (forthcoming 2008).** The Supreme Court's landmark 1976 decision in *Bryan v. Itasca County* is known within Indian law academia its dynamic and pragmatic interpretation of a termination-era statute to limit Congressional termination's harmful legacy during a more enlightened era of tribal self-determination. What is less well-appreciated about the case is that it provided the legal bedrock on which the Indian gaming industry was built. This article explores the genesis of the litigation and traces its path, describing how it came to produce a unanimous Supreme Court opinion of surprising breadth. It also demonstrates that the right to engage in gaming, which ultimately has produced vast tribal economic development and even riches for some tribes, had its roots as much in Indian poverty as in Indian sovereignty. This article can be downloaded electronically at: http://papers.ssrn.com/abstract=1008585.

***The Mechanics of the Indian Gaming Management Contract Approval Process*, 9 GAMING LAW REVIEW 333 (2004).** This article provides a detailed description of the formal and informal policies and procedures of the National Indian Gaming Commission when it reviews Indian gaming management contracts. It discusses various substantive and technical factors that the agency considers in its review.

***Federal Law, State Policy and Indian Gaming*, 4 NEVADA LAW JOURNAL 285 (2004) (Essay in Symposium on Cross-Border Issues in Gaming).** This essay underlines the close link between

Indian gaming and state law. Under the Indian Gaming Regulatory Act, Indian gaming is lawful only if state law allows gaming for at least some purposes. Yet, Indian gaming is likely to be profitable only in those states that have restricted gaming by commercial entities thus preventing substantial competition against tribal casinos. Indian tribes will have profitable operations only as long as they can continue to maintain artificial monopolistic or oligopolistic power through restrictive state laws. In other words, the economically advantageous position that many tribes currently occupy is precarious and subject to the whims of state legislators. Despite its wild success for some tribes, Indian gaming exists largely at the sufferance of state governments. Over the long term, any successful tribal endeavor that depends on the cooperation of a competing sovereign is destined to come to an end.

***Recurring Problems in Indian Gaming*, 1 WYOMING LAW REVIEW 427 (2001).** This article surveys several of the legal problems that have arisen repeatedly in this industry around the country, often in a state-by-state fashion. It has been cited by the Ninth Circuit in *In re: Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003) (majority opinion by Circuit Judge W. Fletcher).

Past Congressional Testimony

***Prepared Statement and Oral Testimony,* Oversight Hearing on the [NIGC] Minimum Internal Control Standards, United States House of Representatives, Committee on Resources (Richard Pombo, Chair), 109th Congress, 2d Session (May 11, 2006).** This testimony addressed the importance of internal control standards in casino gaming operations and the effect of a recent federal court decision on sound gaming regulation. This testimony can be viewed online at http://ssrn.com/abstract=1030926.

***Prepared Statement and Oral Testimony,* Oversight Hearing on the Regulation of Class III Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (September 21, 2005).** This testimony addressed the need for strong federal regulatory oversight of Indian gaming and the pitfalls of failing to provide such oversight. Available online at http://ssrn.com/abstract=1030924.

***Prepared Statement and Oral Testimony,* Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chairman), 109th Congress, 1st Session (April 27, 2005).** This testimony discusses some of the problems in the Indian gaming regulatory structure and suggests that the time for federal economic decision-making for Indian tribes is long past. Available online at http://ssrn.com/abstract=1030922.

* * *

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recent articles: http://ssrn.com/author=334714

EXHIBIT G

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit G to Plaintiff's Request for Judicial Notice

January 4, 2008
Contact: Shane Wolfe (202) 208-6416

Department of the Interior Issues Off-Reservation Gaming Guidance and Sends Letters to Tribes

Department of the Interior Guidance Issued by Assistant Secretary

Assistant Secretary of the Interior for Indian Affairs Carl Artman today issued guidance to Bureau of Indian Affairs (BIA) regional directors and the director of the Office of Indian Gaming to be used in the determination of whether or not to take off-reservation land into trust pursuant to the Indian Reorganization Act of 1934 (IRA) for gaming purposes pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA).

Indian Gaming Regulatory Act of 1988 and Indian Reorganization Act of 1934

• IGRA specifies the criteria that must exist for off-reservation gaming to occur on Indian lands. Indian lands must be trust lands "over which an Indian tribe exercises governmental power." A separate act, the Indian Reorganization Act of 1934 (IRA), enacted to provide a tribal land base on which tribal communities can flourish, gives the Secretary of the Interior discretionary authority to take off-reservation Indian land into trust. Section 151.11 of 25 C.F.R. Part 151 (Part 151) sets forth the factors the Department will consider when exercising the authority.

"Part 151"

• Part 151 contains two provisions of particular relevance to applications that involve land that is a considerable distance from the reservation. It states that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

- o 1) greater scrutiny to the tribes justification of anticipated benefits from the acquisition; and
- o 2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

• Part 151 does not elaborate further on how or why the Department is to give "greater scrutiny" or "greater weight" to the above factors as the distance increases.

Purpose of Guidance

• The guidance clarifies how to interpret and apply the Part 151 terms 'greater scrutiny' and 'greater weight' when considering the taking of off-reservation land into trust status for gaming purposes.

- o The guidance directs that a reviewer ask specific questions for those applications with lands that exceed a "commutable distance" from the reservation because of the impact that such a distant acquisition may or may not have on life on the reservation.

o The guidance emphasizes that as the distance from the reservation increases, greater weight should be given to state and local concerns, including jurisdictional problems and potential conflicts of land use and the removal of the land from the tax rolls.

Letters to 22 Tribes

• Pursuant to the guidance, the Department of the Interior today issued letters to 22 separate tribes with pending applications to take land into trust.

o 11 tribes were informed that the Department of the Interior will not exercise its discretionary authority to take respective properties into trust.

o 11 other tribes were informed that their applications lacked complete information and cannot be acted upon by the Office of Indian Gaming.

Off-Reservation Lands

• 14 of the 22 tribes to receive letters had submitted applications to take land into trust that is situated more than 100 miles from the reservations on which tribal members reside, with some more than 1000 miles from the reservation.

Resubmission

• Any application that is denied pursuant to the guidance may be resubmitted with information that may satisfy Part 151.

EXHIBIT H

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit H to Plaintiff's Request for Judicial Notice

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MEMORANDUM OF AGREEMENT
BETWEEN
THE NATIONAL INDIAN GAMING COMMISSION
AND
THE DEPARTMENT OF THE INTERIOR

WHEREAS, both parties agree that they are in need, from time to time, for legal advice on whether lands may be Indian lands on which a tribe may conduct gaming and that such advice must be provided in a timely fashion;

NOW, THEREFORE, the National Indian Gaming Commission ("NIGC") and Department of the Interior ("DOI") agree to the terms of this MEMORANDUM OF AGREEMENT ("MOA") as follows:

1. The NIGC agrees that whether a tribe meets one of the exceptions in 25 U.S.C. §2719 (i.e. settlement of a land claim, restored lands for a restored tribe, or an initial reservation of a tribe acknowledged through the Part 83 process) is a decision made by the Secretary when he or she decides to take land into trust for gaming.

2. The DOI agrees that deciding whether gaming is being conducted on Indian lands is a basic and essential jurisdictional requirement for the NIGC under the Indian Gaming Regulatory Act ("IGRA").

3. To the extent the Secretary or the Chairman seek legal advice for certain actions requiring action under IGRA dependant upon the determination of Indian lands, the NIGC Office of General Counsel ("OGC") and the DOI Office of the Solicitor ("Solicitor") agree on the following division of responsibilities:

    - If the Secretary is considering a fee-to-trust acquisition, then the DOI's Division of Indian Affairs ("DIA") will draft the legal opinion to the Bureau of Indian Affairs ("BIA") whether it must complete a two-part determination as part of the fee-to-trust acquisition;

    - If a tribe and a state submit a Class III Tribal-State Compact for gaming on existing Indian lands, then the DIA will draft the legal opinion whether the tribe has Indian lands;

- If a tribe requests that the NIGC approve a management contract or ordinance for gaming on existing trust lands, then the OGC will draft the legal opinion to the Chairman on whether the tribe has Indian lands; and

- The OGC will draft the legal opinion to the Chairman whether existing or proposed tribal gaming operations will be on Indian land when the land is already held in trust by the United States.

4. Regardless of whether the DIA or the OGC are drafting the legal opinion, prior to a draft opinion being released to entities other than the DOI and the NIGC, and before any legal opinion is issued, the parties will make every attempt to reach concurrence on all written opinions that provide legal advice that interprets the definition of Indian lands, the exceptions in 25 U.S.C. §2719, a tribe's jurisdiction over proposed Indian lands or the boundaries of a tribe's reservation.

5. A request for concurrence of an Indian lands opinion will include a draft of the opinion and copies of all supporting documents. Within 30 working days of receiving the request, the receiving party will notify the requesting party of his or her intent to either concur or not concur.

6. Notwithstanding the 30 working day requirement in paragraph 5, either party may inform the other of exigent circumstances that require an expedited process. Upon agreement of the parties of the need for expedition, either the Solicitor or the OGC will notify the other party within 5 working days of its intent to concur or not concur.

7. If notified of the intent to not concur, then the parties will meet within 15 working days to discuss ways to resolve the issues of non-concurrence. The notice of the intent not to concur shall include in writing all factual and legal reasons for the non-concurrence.

8. If a legal opinion is re-submitted that addresses the issues of non-concurrence, either the Solicitor or the OGC will notify the parties of its intent to concur or not concur within 10 working days.

9. If the parties are still not able to resolve the issues of non-concurrence, the parties will meet to discuss the next step. The next step may include, with the mutual agreement of both parties, submission of the draft opinion and a summary of the issues of non-concurrence to the Office of Legal Counsel, Department of Justice for resolution.

10. Each party to the MOA will advise the other party within 15 working days of receiving a request to provide Indian lands determinations. The party receiving the request will inform the other party of the individual specifically assigned to work on the legal opinion. In addition, the parties shall periodically coordinate and update pending opinion requests and the OGC shall record and track all Indian lands opinions and decisions in the NIGC Indian lands database and provide periodic updated reports to DIA.

11. If either party has a need for additional information or assistance from the other party in order to render a legal opinion, then the party requiring the information will request such information or assistance in writing to the other party. To the extent either party is able to comply with such a request, it will fully and promptly cooperate with the request. If unable to comply with such request, notice shall be promptly given to the requesting party.

12. The party responsible for the initial draft of the legal opinion shall provide the other party with reasonable time to review the draft and make written comments. The party making the comments will designate the individual responsible and notify the other party. All comments will be provided to the requesting party within 30 working days.

13. The DIA and the OGC will work cooperatively and with collegiality and make every attempt to reach agreement on all Indian lands opinions before submitting a draft legal opinion for concurrence.

14. The Solicitor may request in writing that the OGC draft an Indian lands opinion on pending trust acquisitions that address whether a tribe is a restored tribe and whether the lands are restored lands under IGRA. The OGC, at its discretion, will provide the Solicitor with a draft opinion or decline in writing.

15. It is the position of the Secretary not to approve compacts for gaming on lands that have not been acquired into trust.

16. It is the position of the Chairman not to approve tribal ordinances or management contracts that are site specific when they call for gaming on Indian lands that have not been acquired into trust. The Chairman may continue to approve or disapprove ordinances and management contracts that are otherwise site specific.

17. To meet the demands caused by the need for Indian lands opinions, the NIGC will fund an attorney position (one FTE) within the DIA for 2 years with additional years, if any, in the sole discretion of the NIGC. This attorney position and funding will remain in effect and unaltered by the termination provisions of paragraph 19.

18. This MEMORANDUM OF AGREEMENT supersedes the MEMORANDUM OF UNDERSTANDING previously entered into between the OGC and the Associate Solicitor of the DOI regarding Indian lands opinions.

19. This MEMORANDUM OF AGREEMENT shall be effective upon signatures by both parties and will terminate six (6) months after the date of execution, unless extended by mutual agreement.

Dated this 26 day of Feb., 2007

For the National Indian Gaming Commission:
Chairman

Penny J. Coleman
Penny J. Coleman
Acting General Counsel

Dated this 18 day of January 2007

For the United States Department of the Interior:
Deputy Associate Secretary

David L. Bernhardt
David L. Bernhardt
Solicitor

EXHIBIT I

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit I to Plaintiff's Request for Judicial Notice

THE ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR
WASHINGTON, DC 20240

DEC 2 1 2006

The Honorable George E. Pataki
Governor of New York
Albany, New York 12224

Dear Governor Pataki:

This letter provides you with current information regarding the status of the application of the St. Regis Mohawk Tribe to have land placed in trust for the purpose of gaining approval to conduct off-reservation gaming activities in the State of New York.

While the St. Regis Mohawk Tribe already has an existing reservation of almost 15,000 acres of land in the State of New York, which is held in restricted fee status, the Tribe has proposed that the United States take another 29.31 acres of land into trust for a proposed casino project. The subject property is located in the Village of Monticello over 450 miles from the Tribe's reservation.

Generally, the Indian Gaming Regulatory Act (IGRA) permits Indian Tribes to establish gaming operations on Indian lands upon which the tribe exercised jurisdiction as of October 17, 1988. It is my understanding that the Tribe currently conducts gaming operations on its reservation, but seeks to conduct gaming on the subject property in hopes of achieving greater economic return.

Clearly, the Tribe did not exercise jurisdiction on the subject parcel in 1988, therefore it cannot be used for gaming purposes as a matter of law. However, IGRA also provides several exceptions in Section 20. The application from the Tribe seeks to obtain approval under the "two-part determination" exception referred to in Section 20 of IGRA.

Please recall that former Assistant Secretary Gover, an official of the former Clinton Administration, sent you a letter on April 6, 2000, pursuant to Section 20 (b)(1)(A) of IGRA to provide you with an opportunity to concur in the two-part determination process. A copy of former Assistant Secretary Gover's April 6, 2000, letter, and associated Findings of Fact are enclosed for your reference.

It is our understanding that you had decided not to act on this matter pending the completion of an environmental evaluation. The Tribe has submitted an Environmental Analysis (EA) and we have completed our review of the EA. We have determined that, pursuant to the National Environmental Policy Act, the EA is sufficient, an Environmental Impact Statement (EIS) is not required, and approving the "finding of no significant impact" (FONSI) is appropriate for the proposed project as it is currently defined. I have included a copy of the approved FONSI for your review.

Please be aware that we consider this action to be narrow in scope and should not be regarded as suggesting a commitment to take the subject land into trust or to approve a compact to conduct gaming on that property.

It is our understanding that representatives of the St. Regis Mohawk Tribe will be contacting you to urge you to concur in the April 6, 2000, two-part determination. Please be advised that no further action will be taken on this application, pending receipt of clear, written confirmation that the State of New York concurs with the two-part determination that this off-reservation project meets the requirements of IGRA.

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 CFR Part 151. Please be mindful that your concurrence in the 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 the regulatory requirements contained in 25 CFR Part 151.

Governor, please note that we share the concerns that many have expressed about the implications of off-reservation gaming and so-called "reservation shopping." As you are no doubt aware, within the past year, legislation has been introduced in both the United States Senate and the House of Representatives that would significantly restrict or eliminate the options currently available to Indian tribes under Section 20.

As a result of the public concerns being reflected in the aforementioned proposed legislation and other concerns advanced by local jurisdictions, the Department is reviewing the regulations that govern the processing of fee-into-trust applications (25 CFR Part 151). We anticipate changes to the rules that may result in fewer off-reservation properties being accepted into trust. In particular, we expect to consider a paradigm where the likelihood of accepting off-reservation land into trust decreases with the distance the subject parcel is from the Tribe's established reservation or ancestral lands and the majority of tribal members.

We understand that there are many competing issues and interests to consider before we act to permit gaming to occur in our communities. Please let me know if you need further information to facilitate your evaluation of this matter.

Sincerely,

James E. Cason

James E. Cason

Enclosures

EXHIBIT J

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit J to Plaintiff's Request for Judicial Notice

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 20 2001

Honorable Scott McCallum
Governor
State of Wisconsin
15 E. State Capitol
Madison, Wisconsin 53707

Dear Governor McCallum:

Pursuant to the Settlement Agreement dated October 8, 1999, in the case *Sokaogon Chippewa Community, et al., v. Babbitt, et al.*, Case No. 95-C-659-C (W.D. Wis.), the Assistant Secretary - Indian Affairs agreed to resume consideration of the March 4, 1994, application of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, Sokaogon Chippewa Community of Wisconsin and the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin (Tribes). The Tribes have made application for a trust land acquisition of a 55.82 acre parcel of land located in Hudson, Wisconsin and for a Secretarial two-part determination pursuant to Section 20(b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(A).

Gaming on the Hudson parcel is subject to the Secretarial two-part determination in Section 20(b)(1)(A) of the IGRA, because the land will be acquired in trust after October 17, 1988, is located outside of the Tribes' reservations, nor does it fall within any of the specific exemptions to the prohibition against gaming on trust lands acquired after October 17, 1988. 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.

The Department has completed its review of the Tribes' application for the two-part determination. Based on this application and its supporting documentation, including the comments received from the State and local government officials, and officials of nearby Indian tribes, the Department has made findings of fact supporting the two-part determination.

Based on these findings, I have determined that a gaming establishment on the 55.82 acre parcel of land located in Hudson, Wisconsin would be in the best interests of the Tribes and their members and would not be detrimental to the surrounding community. These findings of fact are enclosed (under separate cover) along with the supporting documentation for your review. The materials we are providing to you contain commercial and financial information which we might not normally release as we believe it may be protected under Exemption 4 of the Freedom of Information Act. We are releasing it to you as we are required by law to seek your concurrence on our two-part determination pursuant to 25 U.S.C. § 2719(b)(1)(A). We believe, therefore, that this information is necessary for you to make an informed decision regarding this matter. If you receive a request for release of this information, we ask that you contact us before making any determination regarding its release.

Pursuant to Section 20 of IGRA, I seek your concurrence in this determination.

Sincerely,

James H. McDivitt
Deputy Assistant Secretary - Indian Affairs
(Management)

Enclosure

EXHIBIT K

Menominee Indian Tribe of Wisconsin v. United States Department of the Interior, et al.

Exhibit K to Plaintiff's Request for Judicial Notice

75

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

Aug 23

SOKAOGON CHIPPEWA COMMUNITY, et al.,

Plaintiffs,

v.

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

Defendants.

00-1137

Case No. 95-C-0659-C

U.S.C.A. - 7th Circuit
FILED
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GINO J. AGNELLO
CLERK

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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPEAL OF JULY 14, 1995, DECISION OF MICHAEL J. ANDERSON

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August 23, 1996

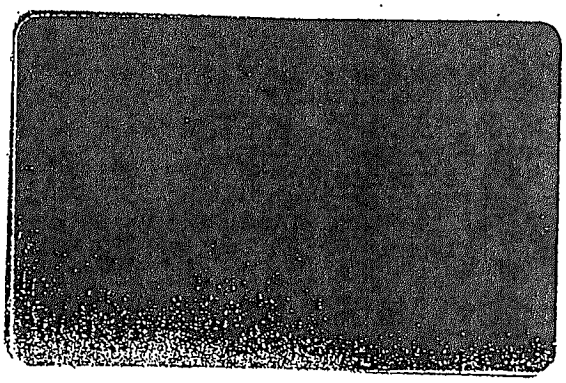

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SOKAOGON CHIPPEWA COMMUNITY, et al., Plaintiffs, v. BRUCE C. BABBITT, Secretary, U.S. DEPARTMENT OF INTERIOR, et al. Defendants.	Case No. 95-C-659-C

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPEAL OF JULY 14, 1995, DECISION OF MICHAEL J. ANDERSON

I. INTRODUCTION

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

II. STATEMENT OF FACTS

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

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

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

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

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

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

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

III. ARGUMENT

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

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

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

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

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

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

A. The Department Did Not Violate Its Duty to Consult

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

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

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

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

> after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [the Department] determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. § 2719(b)(1)(A).

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

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

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

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

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

e. Counselor to the Secretary John Duffy and George

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

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

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

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

R. Binder 10, 2154.

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

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

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

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.

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,

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