Rory E. Dilweg (Bar No. 1025269)
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Floor
Los Angeles, California 90071-2040
Telephone (213) 896-2400
Mobile (310) 386-7071
Facsimile (213) 896-2450
rory.dilweg@hklaw.com

Attorneys for Plaintiff
MENOMINEE INDIAN TRIBE OF WISCONSIN

IN THE UNITED STATES THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MENOMINEE INDIAN TRIBE OF WISCONSIN Plaintiff, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	Case No. 1:08-CV-00950 **RULE 7.4 EXPEDITED NON-DISPOSITIVE MOTION**

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The Menominee Indian Tribe of Wisconsin hereby submits this Rule 7.4 Expedited Non-Dispositive Motion seeking a Temporary Restraining Order ("TRO"). As set forth more fully in the Complaint, the Tribe for the past 6 years has diligently pursued two approvals required from the Department of the Interior ("DOI") in order to establish a gaming project in Kenosha, Wisconsin. The Tribe prepared and submitted its application for these approvals to DOI in 2004. *See* Affidavit of Rory Dilweg ("Aff.") at ¶ 1. In 2005 the Tribe executed an Intergovernmental Agreement ("IGA") with the City and County of Kenosha that obligates these governments to provide municipal and other services necessary for the Tribe's gaming enterprise and to ensure the enterprise's exclusivity. Aff. ¶¶ 3, 4, Exhb. A. The Tribe also secured options to purchase a site that is uniquely suited for gaming purposes. Aff. ¶ 2. Now, six years after the Tribe submitted its application, DOI has unlawfully adopted two rules that threaten the Tribe's efforts.

The Tribe seeks a TRO to maintain the status quo pending its request for a preliminary injunction. Although the Tribe asked DOI to refrain from processing its application, Aff. ¶ 5, Exhb. B, DOI refused the Tribe's request. The Tribe received notice of this refusal on November 3, 2008. Aff. ¶ 6, Exhb. C. The Tribe filed this lawsuit on Friday, November 7. On Monday, November 10 the Tribe's attorney contacted DOI to obtain the name of the DOJ attorneys who would be handling the case, so that he could discuss with them the possibility of DOI's voluntarily staying action on the Tribe's application pending final adjudication of this lawsuit. Aff. ¶ 8. On information and belief, DOI had agreed to a stay in a case in the D.C. Circuit brought by another Indian tribe challenging the same rules the Tribe challenges here; the Tribe anticipated that such an agreement would be forthcoming here too. Aff. ¶ 9. However, on November 20, following an exchange of voicemails, DOJ attorney Kristopher Swanson informed the Tribe's attorney that DOI refuses to suspend consideration of the Tribe's application. Aff. ¶

12. Unless a TRO is granted, defendants will shortly issue a determination driven by unlawful rules and, in so doing, will cause the Tribe irreparable harm.

All of the criteria for entitlement to a TRO are met. First, there is a reasonable likelihood that the Tribe will succeed on the merits. DOI took final agency actions when it established – and then implemented – rules that affect hundreds of Indian tribes and their members. These actions were arbitrary, capricious, an abuse of discretion, and in violation of the law. Before taking these actions, DOI failed to provide the required notice and opportunity for comment and to provide any explanation or justification for its actions, as required by law. One of these new rules – the Guidance Memorandum – imposes a conclusive presumption against off-reservation gaming projects and directly undermines longstanding federal policy of promoting tribal self-governance and self-sufficiency enacted as law in the Indian Gaming Regulatory Act, 25 U.S.C. § 2702, and the Indian Reorganization Act, 25 U.S.C. § 465. And the Checklist – the other unlawful rule – violates 25 C.F.R. Part 151's requirement that the Interior Secretary consider the purposes for which land will be used, together with other specified factors, before making a decision on fee-to-trust applications. The Checklist also constitutes an abuse of discretion because it allows the Secretary to force upon the Tribe the difficult choice between committing to a land purchase for which it could not recoup its investment if the Secretary later decided that the land is not eligible for gaming and foregoing the possibility of having land taken into trust.

Second, no adequate remedy at law exists. The Tribe lacks recourse to any legal remedy that would adequately compensate it for its irreparable harm, as described below.

Third, the Tribe will suffer imminent irreparable harm if this motion is denied. Action upon the application is imminent, and it is more than likely that DOI will shortly issue a negative determination based upon its unlawful rules as it did for 11 other tribes. A negative

determination will cause the Tribe to lose not only the economic and social benefits of the project – which cannot be quantified in monetary terms – and the goodwill associated with it, but also the benefit of the IGA, under which the City and County are precluded from endorsing the establishment of, licensing, or permitting a competing gaming facility, *see* § 1(D), and required to provide necessary services to the Tribe's future gaming facility – including fire, law enforcement, water, sewer – and to take other actions that would benefit the facility. *See* § 1. These provisions are critical to the Tribe's plans.

The IGA expires on December 31, 2009. An unlawful denial of the Tribe's application would cause the Tribe to lose the benefits of the IGA since – absent temporary and preliminary injunctive relief from this Court – the IGA would expire before the Tribe could fully litigate any unlawful denial. And even if the Tribe were ultimately successful in challenging an unlawful denial of its application, the IGA would no longer be in effect. Moreover, if a denial issues the City and County will lack the requisite incentive to continue to provide the exclusivity that is so important to the Tribe. Without the IGA and the services and exclusivity it provides, the Tribe could not develop or operate the project. That damage is not compensable. The Tribe would be irreparably harmed if DOI were allowed to proceed with the denial it now threatens to issue.

Fourth, the irreparable harm the Tribe will suffer absent injunctive relief is much greater than any harm DOI would suffer if the TRO is granted. DOI will suffer no harm if it is required to suspend action upon the Tribe's application until the present action is adjudicated.

Finally, the TRO will serve the public interest. The public interest will be served if DOI is precluded from taking action based on unlawful rules. Issuance of a TRO will further federal Indian policy by ensuring that DOI's decision on the Tribe's application is made in conformance with federal law.

For these reasons the Tribe respectfully requests that this Court grant its Motion.

Respectfully submitted,

/s/ Rory Dilweg

Rory E. Dilweg (Bar No. 1025269)
HOLLAND & KNIGHT LLP
633 West Fifth Street, 21st Floor
Los Angeles, California 90071-2040
Telephone (213) 896-2400
Facsimile (213) 896-2450
rory.dilweg@hklaw.com

Attorneys for Plaintiff
MENOMINEE INDIAN TRIBE OF WISCONSIN

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