ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5430

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

THE ST. CROIX CHIPPEWA INDIANS OF WISCONSIN,
Plaintiff-Appellant,

v.

KENNETH LEE SALAZAR, in his official capacity as Secretary of the Interior, and LARRY ECHO HAWK, in his official capacity as Assistant Secretary for Indian Affairs,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEES

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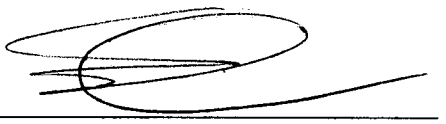
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*: Plaintiff-Appellant is the St. Croix Chippewa Indians of Wisconsin. Defendants-Appellees are Kenneth Lee Salazar, in his official capacity as Secretary of the Interior, and Larry Echo Hawk, in his official capacity as Assistant Secretary for Indian Affairs.[1/] There are no *amici* involved in this matter.

(B) Rulings Under Review: Appellants seek review of a September 30, 2008 Opinion and accompanying Order by the district court, Honorable Richard J. Leon. See St. Croix Chippewa Indians of Wisconsin v. Kempthorne, 2008 WL 4449620 (D. D. C. September 30, 2008). The Opinion and Order are set forth in the Joint Appendix ("JA") at 429-446.

(C) Related Cases: This case has not been before this Court previously. Counsel for the appellees is unaware of any related cases pending in this Court.



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[1/] Public officials currently holding office have been substituted for the original parties pursuant to Fed. R. App. P. 43(c)(2).

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GLOSSARY

APA ..... Administrative Procedure Act, 5 U.S.C. §§ 701-706.

DOJ ..... Department of Justice

EPA ..... Environmental Protection Agency

FOIA ..... Freedom of Information Act

IGRA ..... Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21

IRA ..... Indian Reorganization Act, 25 U.S.C. §§ 465-476

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STATEMENT OF JURISDICTION

Appellant the St. Croix Chippewa Indians of Wisconsin ("St. Croix") invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1362 as well as the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). JA 268. The district court dismissed St. Croix's complaint for failure to state a claim and for lack of jurisdiction in a final judgment entered on September 30, 2008. JA 445-446.

On October 8, 2008, St. Croix filed a notice of appeal, which was within the 60 days provided by Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that the Department of the Interior's ("Interior") decision to make one statutory determination prior to another when processing applications to take land into trust for Indian gaming was not final, and hence was unreviewable?

2. Did the district court correctly conclude that a Guidance Memorandum issued to clarify the applicability of Interior regulations in a particular context was not final agency action?

3. Did St. Croix lack standing because it failed to set forth an injury in fact?

4. Were St. Croix's pre-enforcement claims unripe for review because the challenged policies had no effect on St. Croix?

5. Did Interior's denial of St. Croix's application to take land into trust moot St. Croix's challenges to Interior's process for considering such applications, because no court can grant effectual relief to St. Croix?

STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. The Nature of the Case.

In 2001, the St. Croix Chippewa Indians of Wisconsin, along with another tribe that is not a party to this lawsuit, applied to the Secretary of the Interior to have land in Beloit, Wisconsin, approximately 350 miles from the St. Croix reservation, taken into trust for purposes of establishing a gaming facility. Interior denied that application on January 13, 2009, but this case does not seek review of that final determination. St. Croix filed this suit while Interior was still considering its application, and asked the district court to order Interior to conduct its analysis under the two applicable statutes in a particular order, and to forbid Interior from following an internal guidance memorandum which explained how the relevant regulations should be applied in cases where the land sought to be taken into trust is a great distance from the tribe's reservation. St. Croix alleged that Interior had impermissibly changed the order of its statutory analyses, and that the guidance memorandum amounted to a rule that should have been promulgated pursuant to notice and comment rulemaking.

The district court declined to issue injunctive relief, and on September 30, 2008, the court dismissed St. Croix's complaint, holding that St. Croix had not set forth a challenge to final agency action, St. Croix's claims were not ripe, and St. Croix lacked standing. JA 439-444. St. Croix filed this appeal.

B. Statutory Framework.

In deciding whether to take off-reservation land into trust for gaming purposes, the Secretary of the Interior ("Secretary") makes determinations under two statutes, the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA") and corresponding regulations set forth at 25 C.F.R. Part 151; and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). Applications to take land into trust for gaming purposes are reviewed first by the Regional Office of Interior's Bureau of Indian Affairs. The Regional Director makes a recommendation to the Assistant Secretary for Indian Affairs, who reviews the Region's recommendation and makes a final decision.

1. The Indian Reorganization Act. Under the IRA, the Secretary may acquire lands "for the purpose of providing land for Indians", and such lands acquired by the Secretary "shall be taken in the name of the United States in trust for the Indian tribe . . . ." 25 U.S.C. § 465. Interior's regulations implementing the IRA explain that the Secretary may exercise his discretionary authority to acquire land into trust "when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3).

In reviewing land acquisition requests, the Secretary must consider, *inter alia*, the tribe's need for additional land; the purposes for which the land will be

used; the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and jurisdictional problems and potential conflicts of land use which may arise. *See id.* §§ 151.10(b)-(c), (e)-(f), 151.11. If the land is located "outside of and noncontiguous to the tribe's reservation," then the Secretary must apply these factors with heightened scrutiny: "[a]s the distance between the tribe's reservation and the land to be acquired increases," the Secretary must "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition," and "greater weight" to the impact on the State and its political subdivisions. Id. § 151.11(b). Hereinafter, we will refer to Interior's determination under the IRA and its implementing regulations as the "Part 151 determination."

2. The Indian Gaming Regulatory Act. In 1988, Congress enacted IGRA to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA provides that federally recognized tribes may conduct gaming on "Indian lands" within their jurisdiction. *See* 25 U.S.C. § 2710. The Act defines "Indian lands" as "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is [] held in trust by the United States for the benefit of any Indian tribe . . . ." *Id.* § 2703(4).

Under IGRA, gaming is divided into three classes. Tribes have exclusive authority over Class I social and traditional games with prizes of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain non-banking card games, can occur if the State allows such gaming by other groups. *Id.* §§ 2703(7), 2710(b). The tribes and the National Indian Gaming Commission share regulatory jurisdiction over Class II gaming. *Id.* § 2710(b). Class III gaming, which includes more traditional "casino" games, including slot machines, roulette, poker, and blackjack, can occur lawfully only pursuant to a tribal-State compact. *Id.* §§ 2703(8), 2710(d).

IGRA bars gaming on property taken into trust after October 17, 1988. *See id.* § 2719(a). There are, however, exceptions to that rule. The pertinent exception in this case applies where the Secretary determines, "after consultation with the Indian tribe and appropriate State, and local officials" 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 . . . . " *Id.* § 2719(b)(1)(A). The Secretary's determination under this exception is commonly referred to as the "two-part determination."

C. Statement of the Facts.

1. The Application. On July 30, 2001, the St. Croix Chippewa Tribe and the Bad River Band of Lake Superior Chippewa Indians, which is not a party to this lawsuit, filed an application with the Secretary to take into trust a 26-acre parcel of land in Beloit, Wisconsin, for purposes of establishing a Class III gaming resort (the "Beloit application"). JA 264-265. The parcel of land was located approximately 350 miles from the St. Croix reservation. *See* JA 381. The tribes proposed to construct a facility that would include a casino, a 500-room hotel, several restaurants, a conference center, a theater, and a water park. JA 264. In January 2007, the Midwest Regional Office of the Bureau of Indian Affairs forwarded to the Office of Indian Gaming its recommendation that the application be granted. JA 273.

2. The Skibine Letter. In July of 2007, counsel for St. Croix sent a letter to Carl Artman, Assistant Secretary for Indian Affairs, inquiring when review of the Beloit application would be complete and asking whether the Part 151 determination would be made prior to the two-part determination under IGRA. JA 58. George Skibine, who was the Acting Deputy Assistant Secretary for Policy and Economic Development, responded by letter that the Tribe's application was under review and "a decision will be made only after an exhaustive and deliberative review of all relevant criteria, factual information, and legal

requirements." JA 61 (hereinafter "Skibine Letter"). Mr. Skibine further explained that Interior:

> will make a determination on whether to take the land into trust pursuant to Part 151 prior to making the two-part Secretarial determination under IGRA. We believe that it is the appropriate and logical sequence for the decision-making process. We do not believe that this represents a policy change since the Department [of the Interior] has never before specified a particular sequence for making the two decisions involved in this process.

Id.

3. The Guidance Memorandum. On January 3, 2008, Assistant Secretary Artman issued a memorandum to Bureau of Indian Affairs Regional Directors entitled "Guidance on taking off-reservation land into trust for gaming purposes." JA 213 ("Guidance Memo" or "Memo"). The Guidance Memo focused on the applicability of the Part 151 regulations in situations where the land sought to be acquired is a considerable distance from the reservation. The Memo construed Part 151's requirement that as the distance between the tribe's reservation and the land to be acquired increases, the Secretary must give "greater scrutiny" to the tribe's justification of anticipated benefits and "greater weight to concerns raised" by state and local governments. 25 C.F. R. 151.11(b). As the Guidance Memo explained,

> Part 151 . . . 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.

JA 213-214. The Guidance Memo noted that "[t]he 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." JA 214. The Memo explained that the Part 151 regulations required reviewers to "'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,'" because "as a general principle, the farther the economic enterprise . . . is from the reservation, the greater the potential for significant negative consequences on reservation life." JA 215, *citing* 25 C.F.R. 151.11(b). The Guidance Memo therefore set forth considerations for Regional Directors to take into account, and issues that tribes needed to address in their applications, "[i]f the proposed acquisition exceeds a commutable distance from the reservation." JA 215.

The Guidance Memo explained that the Part 151 regulations require Interior to give greater weight to concerns of state and local governments for two reasons: "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. . ." and "the more difficult it will be for the

tribal government to efficiently project and exercise its governmental and regulatory powers." JA 217. The Guidance Memo stated that applications should analyze whether the proposed gaming facility is compatible with current zoning and land use requirements of the state and local governments, and with uses being made of adjacent or contiguous land, and 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." Id.

4. The District Court proceedings. On December 7, 2007, St. Croix filed a complaint asking that the district court forbid Interior from making the IRA Part 151 determination prior to the two-part determination under IGRA when reviewing pending applications, including St. Croix's. *See* JA 19-20. The complaint also sought a declaration that Interior's decision to make the Part 151 determination prior to the two-part determination under IGRA was invalid and unlawful. St. Croix moved for a preliminary injunction, and the federal defendants moved to dismiss St. Croix's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

On January 3, 2008, Assistant Secretary Artman issued the Guidance Memo, and on January 10, 2008, St. Croix filed an amended complaint, seeking the additional relief of a declaration that the Guidance Memo is invalid, unlawful, and unenforceable, and that any fee-to-trust application denied on the basis of the

guidance in the Memo was unlawful. St. Croix also asked the district court to enjoin Interior from utilizing the Memo when considering St. Croix's fee-to-trust application and any other pending applications. JA 291-292.

The district court held a hearing on St. Croix's motion for a preliminary injunction and Interior's motion to dismiss on January 15, 2008. On February 22, 2008, the district court denied St. Croix's motion for a preliminary injunction. JA 387, 396. St. Croix appealed that ruling to this Court on April 9, 2008; this Court subsequently denied St. Croix's motion for a stay pending appeal. On September 30, 2008, the district court granted the federal defendants' motion to dismiss the suit for lack of jurisdiction and failure to state a claim. JA 429.

5. The District Court's Ruling Dismissing St. Croix's Complaint. The district court concluded that the Skibine Letter did not constitute final agency action under the test of *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). JA 438-439. First, it did not "mark the consummation of the agency's decisionmaking process" because it did not "make any final decision on plaintiff's application, nor was it the culmination of the Department's re-thinking of the application process for off-reservation fee-to-trust gaming applications." *Id.* at 438. Second, the district court concluded, no "rights or obligations have been determined" from which "legal consequences will flow," because the letter "does not make an ultimate determination on the Beloit application, nor does it impose any additional

procedures or obligations on St. Croix." *Id.* at 439, *citing Bennett*, 520 U.S. at 178. Rather, the district court explained, the Skibine letter "is merely a statement by Interior 'about what it plans to do . . . at some point'" and it "'cannot be plucked out of context and made a basis for suit under the APA.'" JA 439, *citing Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13, 22 (D.C. Cir. 2006).

The district court also concluded that the Guidance Memo was not reviewable final agency action, but rather "simply clarifie[d] the applicability of current regulations, and create[d] no additional legal obligations or consequences." JA 440. Applying the two-part test of *Bennett v. Spear*, the court concluded that the Memo did represent the consummation of Interior's decisionmaking process, but that it was not "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.*, *citing Bennett*, 520 U.S. at 178. First, the district court concluded, the Guidance Memo is "merely an internal communication to Interior employees" that "does not amend or change the regulations themselves." JA 441. Second, "the Guidance Memo does not purport to be a "rule" change, and it has never been published in the Code of Regulations or the Federal Register." *Id.* Third, "the Guidance Memo does not have binding effects on the agency or its employees"; it "does not command the reviewer to deny or grant the pending application in a given circumstance"; and it

"leaves the ultimate decision 'to take land into trust, either on-reservation or off-reservation,' (Guidance Memo at 1), in the discretion of the Secretary." *Id.* at 441-442. Finally, the court concluded, the Memo "does not afford any rights to, or impose any obligations on, St. Croix. Simply stated, it does not impose any additional requirements on plaintiff with respect to the pending application process, nor has plaintiff alleged otherwise." *Id.* at 442.

The district court also concluded that St. Croix's claims were not ripe. Applying the factors set forth in *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), and *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 ,733 (1998), the district court concluded that delaying review until Interior ruled on the Beloit application would cause no hardship to St. Croix; that judicial intervention would be inappropriate before the agency had completed review of St. Croix's application, and that the court would benefit from further factual development – that is, the grant or denial of the Beloit application. The court thus concluded that St. Croix's request for judicial intervention was premature. JA 443.

Finally, the district determined that St. Croix lacked standing. St. Croix's only claimed injury was the "increased 'possibility' that the Beloit application [would] be denied, " which, the court determined, constituted "rank speculation[]" and was insufficient to satisfy the requirement to set forth a legally protected interest which is concrete, particularized, and actual or imminent. JA 444-445.

Nor, the court concluded, had St. Croix established that the more lenient standard for violations of procedural rights was applicable, because St. Croix had "failed to identify a specific procedural right that has been violated." *Id.* at 444 n.17, *citing Center. For Law and Education. v. Dep't of Education*, 396 F.3d 1152 ,1159 (D.C. Cir. 2005).

St. Croix appealed from the dismissal order on October 1, 2008. On January 13, 2009, Interior issued a final decision denying the Beloit application, and the federal defendants filed a motion in this Court to dismiss St. Croix's appeals as moot. On March 9, 2009, this Court granted St. Croix' motion to voluntarily dismiss its appeal from the district court's denial of a preliminary injunction, and ordered the parties to address the issue of mootness in briefing on the merits of St. Croix's remaining appeal from the district court's order dismissing the amended complaint.

STANDARD OF REVIEW

This Court reviews *de novo* both a district court's dismissal for failure to state a claim and a dismissal for lack of subject-matter jurisdiction. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006); *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 183 (D.C. Cir. 2006).

SUMMARY OF ARGUMENT

St. Croix's complaint was properly dismissed for a host of threshold deficiencies, all stemming from the fact that St. Croix improperly sought to have the district court interfere in the midst of Interior's decisionmaking process, before any final agency action had been taken and before St. Croix suffered any injury.

St. Croix has not set forth a claim on which relief can be granted under the APA because it has not challenged any final agency action. Interior's decision to make the IRA Part 151 determination before the two-part determination under IGRA is a purely internal, procedural decision that, prior to a ruling on the Beloit application, had no effect on St. Croix whatsoever. It did not create any rights or obligations, and no legal consequences flowed from that decision. Nor did it represent the consummation of any formal decisionmaking process. St. Croix should have waited to challenge that decision until after Interior ruled on St. Croix's fee-to-trust application; indeed, that avenue is now open to St. Croix. Instead St. Croix asked the district court to interfere in the middle of Interior's decisionmaking process, at a point when it was still possible that Interior would grant the Beloit application, making judicial action unnecessary.

The Guidance Memo likewise is not final agency action, because it merely expresses Interior's view of what the Part 151 regulations require in instances where tribes seek to take distant land into trust for gaming purposes. The Memo

has no legal force: it does not determine any rights or obligations, and it has no legal consequences. The Memo effects no change in the scope or applicability of the Part 151 regulations, which continue to provide the framework and the factors to be considered for land-into-trust applications. As the Memo makes clear, discretion continues to rest in the Secretary to grant or deny applications to take land into trust for gaming purposes. The Memo inflicts no injury on St. Croix, and does not force St. Croix to change its behavior. The Guidance Memo therefore is not reviewable final agency action.

St. Croix's claims are not ripe. The decisions St. Croix challenges cause it no injury, and therefore jurisdiction to review them is lacking under Article III. Moreover, as a prudential matter, the pre-enforcement review St. Croix seeks is inappropriate where, as here, there is no statutory authorization for such review, and Interior's policies do not require St. Croix to change its behavior or risk serious penalties for non-compliance. Moreover, the relief St. Croix sought would have interfered with Interior's ongoing administrative process, and could have proven unnecessary had the Beloit application been granted. And St. Croix's claims that Interior's policies would unfairly disadvantage Indian tribes would be better considered in the context of a concrete ruling by Interior on St. Croix's fee-to-trust application, with the facts fully developed and the administrative record available for review.

The district court correctly concluded that St. Croix lacks standing to proceed with this suit. St. Croix had suffered no injury in fact where its only claims of harm were based on its prediction that Interior would deny its application. Because it did not establish injury in fact, St. Croix cannot meet any test of standing.

Finally, now that Interior has issued a ruling denying St. Croix's application to take land into trust for gaming purposes, any justiciable claim St. Croix might have had is moot. Because St. Croix has no application pending before Interior, and the policies it challenges have no adverse effect on St. Croix, a decision issued by this Court could not presently affect St. Croix's rights nor have a more-than-speculative chance of affecting them in the future. Because this Court cannot grant effectual relief to St. Croix, any claims it may have had are moot.

ARGUMENT

I. INTERIOR'S DECISION TO CONDUCT ONE STATUTORY ANALYSIS PRIOR TO ANOTHER WAS NOT FINAL AGENCY ACTION.

The IRA does not provide for judicial review. *See* 25 U.S.C. §§ 461-479. IGRA provides only that Interior decisions regarding tribal gaming ordinances, management contracts, and penalties for noncompliance therewith are final and reviewable under the APA. 25 U.S.C. §§ 2710-2714. Judicial review under the APA is limited to "final agency action." 5 U.S.C. 704; *Center for Auto Safety v.*

Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006). "Whether there has been 'agency action' or 'final agency action' within the meaning of the APA are threshold questions; if these requirements are not met, the action is not reviewable." *Fund for Animals*, 460 F.3d at 18. The APA defines an "agency action" as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13). While this list is expansive, this Court has "long recognized that the term [agency action] is not so all-encompassing as to authorize [the court] to exercise judicial review over everything done by an administrative agency." *Fund for Animals*, 460 F.3d at 19; *see also Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004). "Much of what an agency does is in anticipation of agency action." *Fund for Animals*, 460 F.3d at 19-20. "Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of activities that comprise the common business of managing government programs." *Id.* Indeed, the APA provides that a "preliminary, procedural, or intermediate agency action or ruling" will be subject to judicial review only after there has been final agency action. 5 U.S.C. §704; *see DRG Funding Corp. v. Secretary of Housing and Urban Development,* 76 F.3d 1212, 1214 (D.C. Cir. 1996).

The requirement of final agency action "allows the agency an opportunity to apply its expertise and correct its mistakes, it avoids disrupting the agency's processes," and it prevents courts from engaging in inefficient, "piecemeal review which is at the least inefficient and upon completion of the agency process might prove to have been unnecessary.'" *Id.*, *citing FTC v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980). Requiring a party to wait for the completion of final action "conserves both judicial and administrative resources to allow the required agency deliberative process to take place before judicial review is undertaken." *Reliable Automatic Sprinkler Co, Inc. v. Consumer Product Safety Comm'n*, 324 F.3d 726, 733 (D.C. Cir. 2003).

As this Court has made clear, an "agency action is deemed final if it is definitive and has a direct and immediate . . . effect on the day-to-day business of the party challenging the agency action." *Id.* at 731 (internal quotations omitted), *citing Standard Oil*, 449 U.S. at 239. An agency action is "final" and thus reviewable under the APA when it "'mark[s] the consummation of the agency's decisionmaking process' *and* either determine[s] 'rights or obligations' or 'result[s] in legal consequences.'" *Center For Auto Safety*, 452 F.3d at 800, *quoting Bennett*, 520 U.S. at 178 (emphasis in original). On the other hand, a nonfinal agency order is one that "does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative

action." *DRG Funding Corp.*, 76 F.3d at 1214, *quoting Rochester Tel. Corp. v. United States,* 307 U.S. 125, 130 (1939). Moreover, the long-standing practice of this Court is "to require the complaining party to challenge the specific implementation of the broader agency policy." *Fund for Animals*, 460 F.3d at 22.

Under the standards set forth above, Interior's decision to make the two-part determination under the IRA prior to the Part 151 determination under IGRA when reviewing St. Croix's application does not constitute final agency action. Interior's procedural decision regarding the order of statutory review did not represent the consummation of any decisionmaking process. *See Bennett*, 520 U.S. at 178. Nor was it a decision "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (internal quotations and citation omitted). Interior's decision to conduct the IRA analysis first did not grant any right to St. Croix or impose any obligation upon it, and it had no immediate legal effect on St. Croix. In fact, the decision had no "direct or immediate effect" whatsoever on the "day-to-day business of" St. Croix. *See Reliable Automatic Sprinkler*, 324 F.3d at 731. The only adverse consequence St. Croix alleged from the decision was an increased likelihood that its fee-to-trust application would be denied. JA 39-40. But an agency order that only affects a complainant's rights adversely on the "contingency of future administrative action" is not final agency action. *DRG Funding Corp.*, 76 F.3d at 1214.

In asking the district court to require Interior to make the IGRA two-part determination prior to the IRA Part 151 determination, St. Croix improperly sought to have the district court interrupt Interior's decisionmaking process, and impose a process that St. Croix thought would more likely lead to a favorable outcome on its application. Such judicial interference with an agency's decisionmaking process is inappropriate: it taxes the court's and the agency's resources, and in this case could have proven unnecessary in the event that St. Croix's application had been granted. *See id.*; *Standard Oil Co.*, 449 U.S. at 242.

In *Fund for Animals*, 460 F.3d at 22, this Court found that a Congressional budget request did not constitute final agency action because it did not "adversely affect complainant but only affect[s] his rights adversely on the contingency of future administrative action." (Internal quotations and citation omitted). This Court explained that the budget request was "very unlike a substantive rule that, as a practical matter, requires the parties affected to adjust their conduct as soon as the rule is issued." *Id.* at 20. Rather, the budget request at issue was merely "a statement by [the agency] about what it plans to do . . . . " *Id.* at 21-22 (internal quotations and citation omitted). Similarly, in this case, Interior's decision to conduct the IRA analysis prior to the IGRA analysis is not a final agency action. Instead, it is merely a matter of agency procedure, which does not require St.

Croix to adjust its conduct in any way, and only affects St. Croix upon the conclusion of some future agency action.

In its motion for a preliminary injunction, St. Croix focused its argument on the Skibine Letter, and argued that it was final agency action. JA 44-45. The district court thus focused its ruling on the Skibine Letter as well. JA 438-439. In later briefing in the district court as well as on appeal, St. Croix has insisted that its claim is broader, and that the Skibine Letter is merely documentation of a decision by Interior that occurred prior to issuance of the letter. Regardless, the conclusion is the same: the Skibine Letter does not constitute, nor does it memorialize, any reviewable final agency action.

The Skibine Letter itself is simply a communication by a subordinate official in response to St. Croix's request for information on the status of its application. As the district court pointed out, "a letter that merely advises the recipient of the agency's position does not amount to a 'consummation' of the agency's decision-making process." JA 438. Rather, it is an informal communication that has no direct and immediate effect on St. Croix's day-to-day operations. The Skibine Letter does not impose any obligations on St. Croix. As the district court properly concluded, "the letter does 'not yet [make] any determination or issue[] any order imposing any obligation on [St. Croix], denying

any right of [St. Croix], or fixing any legal relationship.'" JA 439, *citing Reliable Automatic Sprinkler*, 324 F.3d at 732.

St. Croix's reliance on *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) and cases that follow it is misplaced. *See* St. Croix Brief ("Br.") 33-35. Each of the cases cited by St. Croix involved a challenge to what was unquestionably final agency action, and examined whether the challenged action amounted to an arbitrary or capricious change in agency policy or position. *See State Farm*, 463 U.S. 29 (challenge to final agency order rescinding passive restraint requirement for new cars); *James v. Hurson Associates v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (challenge to a final agency rule that had been published in the Federal Register); *Yale-New Haven Hospital v. Leavitt*, 470 F.3d 71 (2d Cir. 2006) (challenge to final decision denying Medicare coverage for experimental medical treatment); *Ramaprakash v. Federal Aviation Administration*, 346 F.3d 1121 (D.C. Cir. 2003) (challenge to suspension of pilot's certificate); *New York Cross Harbor Railroad v. Surface Transportation Board*, 374 F.3d 1177 (D.C. Cir. 2004) (challenge to decision granting application for adverse abandonment of rail operations); *Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007) (challenge to final rule setting hours of service to long-haul truckers); *Blumenthal v. Federal Energy Regulatory Comm'n*, 552 F.3d

875 (D.C. Cir. 2009) (review of final orders rejecting challenges to structure of Connecticut's electricity market); *National Cable & Telecommunications Ass'n v. Federal Communications Comm'n,* 555 F.3d 996 (D.C. Cir. 2009) (petition for review of final order by FCC); *North Carolina v. E.P.A.*, 531 F.3d 896 (D.C. Cir. 2008) (petition for review of final agency order).

A court will only inquire whether an agency has acted arbitrarily or capriciously by changing an earlier policy in the context of a challenge to a reviewable, final agency action. Because St. Croix does not challenge any final agency action, it has not stated a claim upon which relief may be granted, and the analysis in *State Farm* and the cases that follow it is not relevant to this appeal.

St. Croix's reliance on *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971) is likewise misplaced. *See* Br. 39. In *National Automatic Laundry*, this Court found that a letter from the Administrator of the Wage and Hour Division of the Department of Labor concluding that employees of coin-operated laundries were subject to the minimum wage and overtime requirements of the Fair Labor Standards Act was final agency action. *Id.* at 702. This Court explained that the *National Automatic* letter had the consequence of "expected conformity," and distinguished it from communications made while "the process of administrative decisionmaking is still at a stage where the intervention of judicial review will disrupt the orderly process of

adjudication." *Id.* at 700-701 (internal quotation marks and citation omitted). Unlike in *National Automatic Laundry*, Interior's decision to conduct the Part 151 determination prior to the two-part IGRA determination had no consequence of "expected conformity" on the part of St. Croix. Indeed, there was nothing for St. Croix to do as a result of that decision but await the outcome of the application process. St. Croix sought to have the district court "disrupt the orderly process of adjudication" and require the agency to proceed in the manner St. Croix thought would be more advantageous. The APA does not sanction this type of judicial interference with the agency decisionmaking process.

The district court properly analogized the Skibine Letter to the nonfinal actions at issue in *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F.Supp.2d 64 (D. D.C. 2004) (holding that advisory letters from the General Counsel of the National Indian Gaming Commission and a Department of Justice official did not constitute final agency action), and *Sabella v. United States*, 863 F.Supp. 1 (D. D.C. 1994) (holding that an opinion letter regarding the impact of a particular law on the plaintiff's tuna fishing techniques was not a final agency action because it had no direct and immediate impact on the plaintiffs). The letters in those cases did not create any law or bind the agency; similarly here, the Skibine Letter, written by a subordinate official at Interior, did not create any law or demand compliance from St. Croix. Rather, it merely

advised St. Croix of how Interior intended to proceed when considering the Beloit application.

II. THE GUIDANCE MEMO DOES NOT CONSTITUTE FINAL AGENCY ACTION.

The district court was correct to conclude that the Guidance Memo is not final agency action under the test of *Bennett v. Spear*. We do not quibble with the district court's conclusion that the Guidance Memo represented the "consummation of the agency's decisionmaking process." JA 440 n. 16. Nevertheless, as this Court has recognized, "it is possible to view [agency] guidelines as meeting the first part of the *Bennett* test, but not the second." *Center for Auto Safety.*, 452 F.3d at 807.

The Guidance Memo fails to pass muster as final agency action under the second part of the *Bennett* test. The Memo does not determine rights or obligations, nor do legal consequences flow from it. *See Bennett*, 520 U.S. at 178. At the time the Guidance Memo was issued, Interior faced an influx of applications requesting that the Secretary take land into trust that was "a considerable distance" from the applicant-tribes' reservations, in some cases up to 1,400 miles. JA 213. The Memo thus advises Interior staff how to analyze such applications to take distant lands into trust under current IRA regulations. *Id.* at 213-214. The Guidance Memo preserves the Secretary's discretion to grant or

deny applications, and does nothing to disturb the applicable regulatory regime. Nor does the Guidance Memo have any "direct and immediate . . . effect on the day-to-day business of" St. Croix. *See Reliable Automatic Sprinkler Co.*, 324 F.3d at 731. The Memo does not grant or deny St. Croix any rights; it has no legal consequences for St. Croix, and imposes no obligations upon it. The only way the Guidance Memo could have an effect on St. Croix is in the context of a ruling on a particular fee-to-trust application. St. Croix admitted as much in the district court: the only injury it alleged was the increased "possibility" that the Beloit application would be denied. JA 444. Such contingent injury is not sufficient to render the Guidance Memo reviewable agency action. *See DRG Funding Corp.*, 76 F.3d at 1214. In fact, it is the application proceeding, the proceeding St. Croix "s[ought] to short-circuit" that "determine[d] [St. Croix's] rights and obligations." *See id.* at 1215. The Guidance Memo itself is not final, reviewable agency action.

St. Croix is incorrect to contend that the Guidance Memo is not a mere policy statement but rather is a legislative rule. *See* Br. 45. This Court has explained that "the distinction between 'general statements of policy' and 'rules' is critical." *Center for Auto Safety,* 452 F.3d at 807. Guidelines that are "no more than 'general statements of policy,'" that neither determine rights or obligations nor occasion legal consequences," are not final agency action. *Id.* Where "an agency merely expresses its view of what the law requires of a party, even if that

view is adverse to the party," the court lacks authority to review it. *Id.* at 808. "If the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for purposes of judicial review" under the APA. *Id.* at 811, *citing National Ass'n of Homebuilders v Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005).

In *Center for Auto Safety,* this Court examined policy guidelines issued by the National Highway Traffic Safety Administration regarding when manufacturers could limit recalls of cars to specific regions of the country. The guidelines explained how the agency would approach regional recalls in varying circumstances and discussed factors that manufacturers would need to address in arguing for limited recalls. *Center for Auto Safety*, 452 F.3d at 803-804. This Court concluded that the policy guidelines were not final agency action, because while they "reflect NHTSA's views on the legality of regional recalls," they do not "establish new rights and obligations for automakers"; the "agency remains free to exercise discretion in assessing proposed recalls and in enforcing the Act," and any compliance with the guidelines by automakers was voluntary, not legally required. *Id.* at 809-811.

Like the policy guidelines in *Center for Auto Safety*, the Guidance Memo is not final agency action and hence is unreviewable. It does not set forth any new "binding norms," but rather sets forth the agency's view of what the regulations

require in situations where land sought to be acquired for gaming exceeds a certain distance from the reservation. The Guidance Memo makes clear that it does not change or diminish the heightened scrutiny required by the regulations as the distance between the reservation and the proposed acquisition increases:

> 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.

JA 215 (emphasis added). Like the guidelines in *Center for Auto Safety*, the Guidance Memo does not spell a "certain change in the legal obligations" of St. Croix, and it preserves the Secretary's discretion to grant or deny applications to take land into trust for gaming purposes. JA 213; *see Center for Auto Safety,* 452 F.3d at 811.

This Court examined another guidance document in *Cement Kiln Recycling Coalition v. Environmental Protection Agency*, 493 F.3d 207 (D.C. Cir. 2007), that set forth the Environmental Protection Agency's ("EPA") technical recommendations for "conducting multi-pathway, site-specific human health risk assessments on" hazardous waste combusters. This Court concluded that the guidance was not final agency action, because it did not "impose legally binding requirements on EPA, states, or the regulated community," but rather "[i]ts pages are replete with words of suggestion: its provisions are described as

recommendations that permitting authorities are encouraged to consider." *Id.* at 227 (internal quotations and citation omitted). Similarly here, the Guidance Memo imposes no legal requirements, and is not binding on its face, but rather is "replete with words of suggestion." It advises Interior staff how to analyze applications under current regulations, employing terms like "should" and "could," and identifying issues for staff to consider when reviewing applications. *See, e.g.*, JA 215 (stating that reviewers "should answer the questions listed below to help determine the benefits to the tribe"). Also like the *Cement Kiln* document, *see* 493 F.3d at 227, the Guidance Memo points out that the decision whether to take land into trust is within the discretion of the Secretary. *See* JA 213.

St. Croix is wrong to assert that the Guidance Memo is final agency action because Interior's Regional Directors are required to use the Memo to "guide their recommendations." (Br. 43). St. Croix's own language betrays the flaw in its argument: the Memo is only a guide, and does not require any particular legal outcome. St. Croix is also mistaken in asserting that the Guidance Memo establishes a presumption that casinos located more than a commutable distance from a reservation have a negative impact on tribes. *See* Br. 43. The Memo contains no threshold distance that will result in an application's being denied.[2]

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[2] There is likewise no basis for St. Croix's assertion that the Guidance Memo creates a "safe harbor" for applications to take land within a "commutable distance" into trust. *See* Br. 47. It goes without saying that such an application

And contrary to St. Croix's assertions, the Guidance Memo creates no new standards, obligations, or legal consequences by using a label of "commutable distance." Rather, in the context of a fact-specific analysis of anticipated benefits, the Memo notes that negative impacts from having to commute to work at an off-reservation casino "could" be considerable, and encouraging reservation residents to leave the reservation "could" have negative implication on the tribal community. JA 216. In doing so, the document only clarifies the concern behind the IRA's implementing regulations: that there is a potentially inverse relationship between benefits and distance.

For this reason, St. Croix is mistaken in asserting that the Guidance Memo is at odds with a 2004 Indian Gaming Paper, in which Interior stated that the IRA does not limit the exercise of the agency's fee-to-trust authority "to lands with-in a fixed distance from an existing reservation." *See* Br. 19, 49, *citing* JA 317. Contrary to St. Croix's suggestion (Br. 49), nothing in the Indian Gaming Paper contravened the Part 151 regulations, or suggested that distance from the reservation was not a relevant factor in deciding whether to take land into trust. The Guidance Memo does not direct the Secretary to deny applications that are

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would not be denied because the land is more than a commutable distance from the reservation. But the heightened scrutiny of the Part 151 regulations would still apply to any application to take off-reservation land into trust, and there could be many other factors that would result in denial of such an application.

more than a set distance from Tribes' reservations. The Part 151 regulations make clear that the distance from the reservation is a factor to be considered in all applications, and the Guidance Memo spells out what some of the implications of a great distance between a reservation and proposed gaming site might be.

St. Croix incorrectly asserts that the Guidance Memo created a new requirement that Indian tribes negotiate intergovernmental agreements with state and local governments prior to submission of an application. *See* Br. 44. As an initial matter, we note that St. Croix did not raise this argument in the district court, and therefore it is waived. *Trout v. Secretary of the Navy*, 540 F.3d 442, 448 (D.C. Cir. 2008). Indeed, at a hearing on St. Croix's motion for a preliminary injunction, counsel for St. Croix told the district judge that the issuance of the Guidance Memo and Interior's decision to undertake the IRA analysis first did not result in any new obligations on the part of St. Croix. JA 372. To confirm, the district court asked whether there was "nothing new or additional or expensive or whatever that your client would have to do pending the decision on . . . its application . . . than before." Counsel for St. Croix answered "Right." *Id.* St. Croix has waived this argument, and cannot raise it for the first time on appeal.

Regardless, the Guidance Memo does not create a new obligation to enter into intergovernmental agreements. The Memo states that "the application *should* include copies of any intergovernmental agreements, and that the absence of such

an agreement "*should* weigh heavily" against approval of the application, but it does not require rejection of an application on that basis. JA 217 (emphasis added). As the Guidance Memo makes clear, intergovernmental agreements are a way of assuring Interior that the jurisdictional concerns of Part 151 have been taken into account by both the tribe and by local and state governments. Part 151 requires Interior to consider "jurisdictional problems and potential conflicts of land use which may arise," and to give greater weight to those concerns as distance increases. 25 C.F.R. § 151.10(f). The Memo explains that "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. . . . . Distant local governments are less likely to have experience dealing with and accommodating tribal governments with their unique governmental and regulatory authorities." JA 217. Nonetheless, the Memo's use of the word "should" makes clear that it is not controlling, and thus it does not change Part 151 or impose new requirements not already encompassed within the regulations.[3/]

[3/] The reason for the waiver rule is clear in this case: because St. Croix did not raise this argument below, there is no information in the record regarding the well-established practice of drafting intergovernmental agreements as part of the fee-to-trust application process. In fact, St. Croix entered an intergovernmental agreement with the City of Beloit and Rock County as part of the Beloit application, well before the issuance of the Guidance Memo. But because St. Croix did not make this argument in the district court, the agreement is not in the

St. Croix has also waived its argument that Interior's issuance of the Guidance Memo failed to comply with guidelines of the Office of Management and Budget. *See* Br. 58-59. St. Croix has offered no explanation for its failure to assert this claim at an earlier stage in these proceedings. The executive orders were issued in 1993, 2002, and 2007, well before the district court's ruling in this matter. Because St. Croix failed to present this claim to the district court, it is waived. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984).

St. Croix is also incorrect to assert that Interior's denial of other land-into-trust applications after issuance of the Guidance Memo demonstrates that the Guidance Memo is, in fact, final agency action. *See* Br. 44, 45. As explained above, the Guidance Memo does not impose a distance limitation or require the denial of any application for land beyond a particular distance from a reservation. The fact that applications were denied after issuance of the Memo proves nothing. The denials themselves are not in the record in this case, and there is no reason to conclude that the Guidance Memo mandated the denials, rather than that the Secretary weighed the applicable considerations, applied statutory and regulatory

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record on appeal. Clearly, however, intergovernmental agreements are nothing new to tribes seeking filing fee-to-trust applications.

standards and the considerations set forth in the Guidance Memo, and exercised his discretionary authority to deny the applications.

St. Croix is mistaken to rely on *General Electric Company v. E.P.A.*, 290 F.3d 377 (D.C. Cir. 2002). *See* Br. 37, 45. There, this Court found that the EPA's guidance document was a legislative rule, because it required petitioners to use one of two specified risk assessment methods when applying to use an alternative method for sampling, cleaning up, or disposing of polychlorinated biphenyl remediation or bulk product waste. *Id.* at 379, 380. In addition, the guidance document bound the EPA to accept applications that used one of the two accepted methods, and thus this Court concluded that the guidance document "does purport to bind both applicants and the Agency with the force of law." *Id.* at 380, 384-385. Similarly, in *Croplife America v. E.P.A.*, 329 F.3d 876 (D.C. Cir. 2003), this Court found that the guidance document in question imposed binding obligations on petitioners, because it barred them from relying on third-party human studies in pesticide registration applications. *Id.* at 881, 883. As this Court explained, "the disputed directive concretely injures petitioners, because it [] precludes the agency's consideration of all third-party human studies, *i.e.*, studies that petitioners previously have been permitted to use to verify the safety of their products." *Id.* at 884. The ban represented a "dramatic change in the agency's

established regulatory regime," and "binds private parties [and] the agency itself with the force of law." *Id.* at 883-884.

The Guidance Memo in this case contains no such binding requirements. St. Croix points to statements in the memorandum indicating that Interior expects applicants to address "the issues identified in this guidance." Br. 46. These "issues," however, are nothing more than what is required by the regulations of Part 151, and the Secretary is not constrained to accept applications that address the regulatory factors. As the Guidance Memo makes clear, the regulations at Part 151 require the Secretary to give heightened scrutiny to all off-reservation acquisitions. 25 C.F.R. 151.11; JA 215. As the Memo explains, "this memorandum does not diminish that responsibility, but only provides guidance for those applications that exceed a daily commutable distance from the reservation." *Id.* The Memo does state that applications that do not address the concerns set forth in the Memo will be rejected, but it also makes clear that such a rejection does not prevent the filing of another application. *Id.* at 2. The guidelines that this Court examined in *Center for Auto Safety*, 452 F.3d at 803-804, also set forth factors that manufacturers needed to address in their applications for regional recalls. But this Court concluded that those requirements did not carry the force of law, and that the guidelines therefore were not final agency action. Unlike the agency orders in *General Electric Co.* and *Croplife America*, the Guidance Memo

clarifies but does not alter the legal regime for applications to take land into trust for gaming. As the district court properly concluded, "where the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purposes of judicial review." JA 442, *citing Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d at 15.

This Court "appl[ies] the finality requirement in a 'flexible' and 'pragmatic' way." *National Ass'n of Homebuilders v. United States Army Corps of Engineers*, 417 F.3d 1272, 1279 (D.C. Cir. 2005). Nonetheless, it is clear in this case that St. Croix has failed to challenge a final, reviewable agency action, and the district court properly dismissed the amended complaint for failure to state a claim on which relief could be granted.

III. ST. CROIX LACKS STANDING.

Standing is an "essential and unchanging predicate" to the exercise of federal jurisdiction. *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996). The doctrine of standing "requires federal courts to satisfy themselves that 'the plaintiff has alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009), *citing Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). The standing requirement "assures that there is a real need to exercise the power of judicial review in order to protect the interests of the

complaining party." *Summers*, 129 S. Ct. at 1149, *citing Schlesinger v. Reservists Comm. To Stop The War*, 418 U.S. 208, 221 (1974). "Where that need does not exist, allowing courts to oversee legislative or executive action 'would significantly alter the allocation of power' away from a democratic form of government." *Summers*, 129 S. Ct. at 1149, *citing United States v. Richardson*, 418 U.S. 166, 188 (1974).

In this case, the policies and procedures St. Croix challenges are not directed at St. Croix, but rather have to do with Interior's internal processing of fee-to-trust applications. "When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers*, 129 S. Ct. at 1149, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). The burden of establishing standing rests on the plaintiff, whose standing is determined as of the time the complaint is filed. *Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005); *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

In order to satisfy the "irreducible constitutional minimum of standing," a plaintiff must demonstrate three things. First, that it has suffered an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical."

Defenders of Wildlife, 504 U.S. at 560 (internal citation and quotations omitted). Second, there must be a causal connection between the injury and the conduct complained of—that is, the injury has to be fairly traceable to the challenged action of the defendant. *Id.* at 560-561. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 561. As the Supreme Court noted in *Defenders of Wildlife*, the elements of standing are "not mere pleading requirements but rather an indispensable part of [plaintiffs'] case . . . ." *Id.*

Here, St. Croix cannot establish the first element of standing – that it has suffered an injury in fact. Nowhere in its brief on appeal does St. Croix explain how it suffered a concrete, particularized, actual injury as a result of Interior's decision to make the IRA Part 151 determination prior to the IGRA determination, or as a result of the issuance of the Guidance Memo. In its amended complaint and in its filings in the district court, St. Croix's only allegations of injury were based on its speculation that the Beloit application would be denied if the Secretary made the Part 151 determination prior to the two-part determination under IGRA, and if it applied the considerations set forth in the Guidance Memo. JA 40, 54. As the district court correctly noted, "St. Croix's only claimed injury is the increased 'possibility' that the Beloit application will be denied," but "such predictions are not enough to withstand the injury in fact requirement set out by

the Supreme Court." JA 435. The mere imminence of an agency decision, which might or might not be adverse to a plaintiff, does not meet the requirement for actual injury. *Tozzi v. U.S. Dept. of Health & Human Servs.*, 271 F.3d 301, 307 (D.C. Cir. 2001) ("[t]he plaintiff's allegations must not be purely speculative - the ultimate label for injuries too implausible to support standing.") (internal quotation omitted). Rather, to satisfy the injury-in-fact requirement, a plaintiff must demonstrate harm that is actual, specific and concrete. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-106 (1983). The district court thus correctly concluded that St. Croix had not alleged facts in its amended complaint sufficient to confer standing under Article III.

St. Croix asserts that the standing requirements are relaxed here because it is asserting a procedural harm. Br. 53-54. "[A] litigant to whom Congress has accorded a procedural right to protect his concrete interests . . . can assert that right without meeting all the normal standards for redressability and immediacy." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517-518 (2007). However, "[t]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 129 S. Ct. at 1151. Thus, even if St. Croix's suit asserted a procedural right, and we demonstrate below that it does not, St. Croix's lack of injury dooms its claim of procedural standing.

In order to demonstrate procedural standing, a litigant must show "(1) that their procedural right has been violated," and (2) that the violation of that right has resulted in an invasion of their concrete and particularized interest." *Center for Law and Education*, 396 F.3d at 1159. Nowhere in its brief on appeal does St. Croix identify the specific 'procedural right,' on which it bases its claims, nor what concrete interests that procedure is designed to protect. *See* Br. 53-57. In discussing the standards for declaratory judgment actions, St. Croix states that its claims rest on alleged violations of the APA. *See* Br. 55. St. Croix's amended complaint sets forth violations of the APA, 5 U.S.C. 706(2)(A)-(D), alleging that Interior's actions were arbitrary and capricious, contrary to St. Croix's constitutional rights, *ultra vires* and in excess of authority, and without observance of procedure required by law. JA 286-289. But St. Croix does not explain the manner in which its wide-ranging claims set forth the violation of a procedural right. It failed to do so in the district court as well. For this reason, the district court properly rejected St. Croix's claim that it had alleged the violation of a procedural right, stating that "[a] simple assertion that 'the APA grants the Plaintiff a procedural right to protect its interest by challenging the [sic] Interior's final agency action' [JA 266-267], is not enough." JA 444.

Regardless, even if St. Croix had identified a procedural right, it could not satisfy the requirement to show an invasion of a concrete and particularized

interest. As explained above, in the course of this litigation, the only injury St. Croix has alleged is the "increased possibility that the Beloit application will be denied." JA 444. However, "unadorned speculation will not suffice to invoke the judicial power." *Center for Law and Education*, 396 F.3d at 1159. A plaintiff asserting a procedural right must "show [that] it has itself 'suffered personal and particularized injury' because of the challenged substantive result." *Wisconsin Public Power, Inc. v. F.E.R.C.*, 493 F.3d 239, 269 (D.C. Cir. 2007) (internal citations and quotations omitted). Neither the Guidance Memo nor the decision to conduct the IRA inquiry first have any effect on St. Croix. "Deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* - is insufficient to create Article III standing." *Summers*, 129 S. Ct. at 1151.

Just as in *Center for Law and Education*, St. Croix "appear[s] to misunderstand the difference between the 'procedural right' and the 'concrete interest' in a procedural rights case. . . . The two things are not one and the same." 396 F.3d at 1159 (rejecting the argument that "[t]he Department's denial of this right constitutes sufficient injury to support standing."). To satisfy the procedural standing requirements, St. Croix must allege "injury beyond mere procedural misstep per se," and it fails to do so. *See id.* at 1160. Because St. Croix failed set

forth any actual, concrete and specific harm that it has suffered as a result of Interior's policy decisions, it cannot establish procedural standing.

St. Croix also contends that it has standing under the zone of interests test, *see* Br. 56, but that relates to prudential standing rather than Article III standing. A plaintiff must demonstrate both Constitutional and prudential standing. *Bennett*, 520 U.S. at 162. However, the Court need not address prudential standing here because it unquestionably lacks jurisdiction due to St. Croix's failure to establish Article III standing. *See Bhd. of Locomotive Eng'rs and Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 27 (D.C. Cir. 2006). St. Croix is incorrect to contend that the District Court improperly injected a new requirement into the zone of interest test. *See* Br. 57. The district court did not reach that aspect of the standing inquiry, and the section of the court's opinion that St. Croix cites relates to procedural, not prudential *standing*. *See* JA 444 n. 17.

IV. ST. CROIX'S PRE-ENFORCEMENT CLAIMS ARE NOT RIPE.

"The ripeness inquiry springs from the Article III case or controversy requirement that prohibits courts from issuing advisory opinions on speculative claims." *Munsell v. Dep't of Agriculture*, 509 F.3d 572, 585 (D.C. Cir. 2007). Under the ripeness doctrine, "an Article III court cannot entertain the claims of a litigant unless they are constitutionally and prudentially ripe." *Wyoming Outdoor Council v. United States Forest Service*, 165 F.3d 43, 48 (D.C. Cir. 1999) (internal

citations and quotation omitted). St. Croix's claims fail to satisfy either standard for ripeness.

Under Article III, litigants may not pursue a cause of action "to recover for an injury that is not certainly impending." *Id.* (internal quotations and citation omitted). As this Court has explained, "just as the constitutional standing requirement for Article III jurisdiction bars disputes not involving injury-in-fact, the ripeness requirement excludes cases not involving present injury." *Id.* On appeal, St. Croix has failed to identify any injury it has suffered as a result of Interior's challenged policies. In the district court, St. Croix's only alleged injury was the possibility that its fee-to-trust application would be denied as a result of Interior's policies. JA 444. However, "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Id., citing Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Because St. Croix has not demonstrated any concrete, particularized injury stemming from Interior's challenged policies, St. Croix has failed to meet the threshold ripeness requirement for Article III jurisdiction.

St. Croix's claims also fail to satisfy the prudential requirements of the ripeness doctrine, which are intended to prevent courts "from entangling themselves in abstract disagreements over administrative policies" and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." *Abbott Labs.*, 387 U.S. at 148.

In assessing whether a suit is ripe, a court must evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. To do so, the court considers "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n*, 523 U.S. at 733 (1998); *see also Wyoming Outdoor Council*, 165 F.3d at 48-49. As this Court has explained, the

> primary focus of the prudential aspect of the ripeness doctrine is to balance the [plaintiff's] interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.

Id. at 49 (internal quotations and citation omitted). As the district court correctly concluded, under this standard, St. Croix claims are not ripe for review. JA 443.

Delayed review would cause no hardship to St .Croix. *See Ohio Forestry*, 523 U.S. at 733. Hardship is not established if a complaining party "is not required to engage in, or to refrain from, any conduct." *Texas v. United States*, 523 U.S. 296, 301 (1998); *see Munsell*, 509 F.3d at 586. Interior's Guidance Memo and decision to undertake the IRA analysis prior to the IGRA analysis have no impact on St. Croix's day to day operations, nor do they force St. Croix to

"modify its behavior in order to avoid future adverse consequences." *See Ohio Forestry*, 523 U.S. at 734.

The Supreme Court has addressed the question whether pre-enforcement challenges to agency regulations such as St. Croix's are ripe for review, and it has explained that "[u]nder the terms of the APA, [a plaintiff] must direct its attack against some particular agency action that causes it harm." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). Although Congress may provide that broad regulations are immediately reviewable under the APA "even before the concrete effects normally required for APA review are felt," in the absence of such a provision, "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.; see also Reno v. Catholic Social Services, Inc.,* 509 U.S. 43 (1993). The "major exception" (*National Wildlife Federation*, 497 U.S. at 891) to this rule is where the agency regulation "presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993). However, where the impact of the regulation "could not 'be said to be felt

immediately by those subject to it in conducting their day-to-day affairs,'" then the challenge "would not be ripe before the regulation's application to the plaintiffs in some more acute fashion, since 'no irremediably adverse consequences flow[ed] from requiring the later challenge.'" *Catholic Social Services*, 509 U.S. at 58, *citing Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

In this case, St. Croix challenged Interior's procedures for reviewing fee-to-trust applications before Interior had ruled on St. Croix's own application. Neither the IRA nor IGRA provides for pre-enforcement judicial review of Interior's gaming or land-into-trust regulations.[4] Interior's Guidance Memo and decision to undertake the IRA analysis prior to the IGRA analysis have no impact on St. Croix's day-to-day operations, nor do they force St. Croix to "modify its behavior in order to avoid future adverse consequences." *See Ohio Forestry*, 523 U.S. at 734. Indeed, as noted above, counsel for St. Croix conceded in the district court that the issuance of the Guidance Memo and Interior's decision to undertake the IRA analysis first did not result in any new obligations on the part of St. Croix. JA 372. The only injury St. Croix alleged in the district court was the possibility that its fee-to-trust application would be denied as a result of Interior's policies.

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[4] Of course, St. Croix has not challenged a final agency regulation in this case, and it has failed to state a claim for that reason. The analysis of the Supreme Court's pre-enforcement review cases nonetheless is applicable to the question whether St. Croix's claims are ripe for review.

JA 444. A "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Atlantic States Legal Foundation v. E.P.A.*, 325 F.3d 281, 284 (D.C. Cir. 2003), *citing Texas v. United States*, 523 U.S. at 300. St. Croix therefore was required to wait, and challenge those policies, if necessary, in the context of the denial of its fee-to-trust application.

By contrast, in *Abbott Labs*, 387 U.S. at 152 -153, the petitioner's pre-enforcement claim was ripe for review because petitioners faced a choice to either comply with new Food and Drug Administration regulations, at significant financial cost, or "risk serious criminal and civil penalties for the unlawful distribution of misbranded drugs." Moreover, in *Abbott Labs*, the Court concluded that petitioners would be "severely and unnecessarily" harmed if they waited to challenge the regulations in defense to suit for noncompliance, because they "deal in a sensitive industry, in which public confidence in their drug products is especially important." *Id.* at 153. In this case, St. Croix's complaint asked the district court to resolve an "abstract disagreement over administrative policies" that had yet to be "formalized and . . . felt in a concrete way by" St. Croix. *See Worth v. Jackson*, 451 F.3d 854, 862 (D.C. Cir. 2006), *citing Abbott Labs*, 387 U.S. at 148-149.

St. Croix's claims also fail to pass muster under the other two elements of

Memo likewise would be applied to the detriment of fee-to-trust applicants. Examination of these claims in the context of a ruling on a particular application would help to clarify and either confirm or deny St. Croix's assertions. Judicial review of Interior's procedure for reviewing land-into-trust applications "is likely to stand on a much surer footing in the context of a specific application of [the procedure] than could be the case in the framework of the generalized challenge made here." *Munsell*, 509 F.3d at 587 (*quoting Toilet Goods Ass'n*, 387 U.S. at 164). St. Croix's claims are "not yet ready for judicial airing." *Worth*, 45 F.3d at 862.

St. Croix's reliance on *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007), is unfounded. *See* Br. 53. In that case, plaintiffs alleged that the Bureau of Indian Affairs had violated statutorily-required procedures in approving a lease of tribal land for construction of a liquefied natural gas terminal. The court held that the challenge to the lease was ripe, because the BIA admitted its action was final, and the injury to the plaintiffs was the failure to make statutorily required findings before approving the lease of the tribe's land. *Id.* at 33. Here, by contrast, Interior's policies are not final agency action and St. Croix has established no injury as a result of the challenged policies themselves.

For all of the foregoing reasons, the district court properly determined that St. Croix's claims were not ripe for review.

V. THIS CASE IS MOOT.

The district court properly dismissed St. Croix's complaint for failure to state a complaint on which relief could be granted and for lack of jurisdiction. Even if St. Croix had set forth a valid claim, however, now that Interior has denied St. Croix's application, any claim St. Croix might have had is moot.

Article III of the Constitution restricts the jurisdiction of the federal courts to "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990). A federal court does not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). "Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Clarke*, 915 F.2d at 701, *citing Transwestern Pipeline Co. v. F.E.R.C.*, 897 F.2d 570, 575 (D.C. Cir. 1990). An appeal must be dismissed as moot "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing

party." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted).

St. Croix's suit challenges Interior's standards and procedures for processing fee-to-trust applications. St. Croix concedes that, now that Interior has ruled on its fee-to-trust application, St. Croix's request for injunctive relief is moot. *See* Br. 61. Any justiciable claim St. Croix may have had for declaratory relief (and we do not concede that St. Croix had any such claim) is moot as well. The "Article III case or controversy requirement is as applicable to declaratory judgments as it is to other forms of relief." *Conyers v. Reagan*, 765 F.2d 1124, 1127 (D.C. Cir. 1985) (citations omitted). As this Court has explained, in cases where a request for injunctive relief has become moot, a request for declaratory relief "forbidding an agency from imposing a disputed policy in the future" is also moot unless the plaintiff "has standing to bring such a forward-looking challenge and the request for declaratory relief is ripe." *City of Houston v. Dep't of Housing and Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994). Thus, "plaintiffs attempting to make out such claims must show that their risk of injury is "'actual or imminent, not conjectural or hypothetical.'" *Id.* at n.6, *citing Defenders of Wildlife*, 504 U.S. at 560.

St. Croix's request for declaratory relief does not survive a mootness challenge, however, for the same reason that its claims were dismissed by the

district court. St. Croix cannot demonstrate any actual, imminent injury or risk of injury as a result of Interior's challenged policies. St. Croix states that the Guidance Memo and Interior's decision to make the IRA determination prior to the two-part ruling under IGRA have a "substantial adverse effect" on its "interests," (Br. 62), but does not explain what that adverse effect is. In fact, a ruling regarding the Guidance Memo or the process by which Interior should decide fee-to-trust applications would have no effect on St. Croix, and would be merely an advisory opinion. The federal courts do not have power to issue advisory opinions. *Better Government Ass'n v. Dep't of State*, 780 F.2d 86, 90-91 (D.C. Cir. 1986).

Nor, as we explained above, are St. Croix's claims ripe for review, outside the context of an actual application of those policies to St. Croix's fee-to-trust application. Delay of review would cause no hardship to St. Croix; judicial intervention would interfere with the administrative process and could well amount to unnecessary adjudication; and as the district court concluded, it would benefit from further factual development of the issues presented by St. Croix's claims. *See Ohio Forestry*, 523 U.S. at 733; *City of Houston*, 24 F.3d at 1430-1431. St. Croix can obtain review of Interior's decision-making procedures in the context of a challenge to Interior's final decision on the Beloit application. This opportunity for future review is "sufficient to warrant [the Court's] abstaining

from deciding a moot case." *GTE California, Inc. v. FCC*, 39 F.3d 940, 946 (9th Cir. 1994) (declining to decide a case where the petitioner could raise the same constitutional claims in a future suit challenging the agency's decision on the petitioner's tariff filing).

St. Croix's reliance on *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) and *Better Government Ass'n*, 780 F.2d 86, is misplaced. *See* Br. 60-62. In *Super Tire,* an employer sought a declaratory judgment that a state law making striking workers eligible for public assistance payments was in violation of federal labor laws. The Supreme Court held that even after the strike was over, the employer's claim was not moot, because the challenged state policy of offering financial support to striking workers had an ongoing influence on the bargaining relationship between the employer and its workers, by lessening the cost to employees of going out on strike. *Super Tire*, 416 U.S. at 122. As the Court explained, the state law, "by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Id.*

By contrast, in this case St. Croix has alleged no continuing injury as a result of Interior's procedures for considering fee-to-trust applications. Unlike in *Super Tire,* Interior's Guidance Memorandum, and its internal procedures for processing fee-to-trust applications, do not constitute a "continuing and brooding presence" having any sort of effect on St. Croix's interests. *See Super Tire*, 416

U.S. at 122.

In *Better Government Ass'n*, 780 F.2d at 91, this Court held that a facial challenge to the validity of Department of Justice ("DOJ") guidelines and Interior regulations for granting fee waivers for Freedom of Information Act ("FOIA") requests was not moot, despite the fact that DOJ had reversed its initial denial of plaintiffs' fee waiver request. The appellants, this Court determined, "are frequent FOIA requesters," who had alleged a continuing injury as a result of DOJ's and Interior's enforcement of their policies regarding fee waivers. *Id.* In its discussion of ripeness, this Court elaborated on the impact of the agencies' policies, explaining that appellants "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities . . . . Access to information through FOIA is vital to their organizational missions." *Id.* at 93. St. Croix has alleged no such ongoing injury as a result of Interior's policies for considering fee-to-trust applications.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A decision in the present lawsuit cannot affect St. Croix's rights. Interior has denied the Beloit application. The policies St. Croix challenges have no effect on St. Croix outside the context of a ruling on a fee-to-trust application,

and therefore those policies have no more than a speculative chance of affecting St. Croix in the future. This Court therefore cannot "grant any effectual relief whatever" to St. Croix. *See Fund for Animals, Inc.*, 460 F.3d 13, 22 (D.C. Cir. 2006). A ruling on St. Croix's claims "will neither presently affect [St. Croix's] rights nor have a more-than-speculative chance of affecting them in the future," and St. Croix's claims therefore are moot. *Transwestern Pipeline Co. v. F.E.R.C.*, 897 F.2d 570, 575 (D.C. Cir. 1990).

St. Croix has not argued that any exception to the doctrine of mootness applies in this case, nor could it. This case does not present an injury that is "capable of repetition, yet evading review." *See Clarke*, 915 F.2d at 703. To be justiciable under this exception to the mootness doctrine, two conditions must be satisfied: (1) "the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration," and (2) "there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Conyers v. Reagan*, 765 F. 2d 1124, 1128 (D.C. Cir. 1985) (internal quotations and citation omitted). Although St. Croix could file another application with Interior to take land into trust, its claims regarding Interior's policies and processes will not evade review, because they can be heard in the context of a challenge to the final decision that Interior issued on the Beloit application in January 2009, or on a final decision on any future application. St. Croix's claims

are not "inherently of such short duration that they cannot ordinarily be fully litigated before their cessation." *Hall v. C.I.A.*, 437 F.3d 94, 99 (D.C. Cir. 2006). Nor does the "voluntary cessation" exception apply, *see Clark,* 915 F.2d at 703, because the suit did not become moot as a result of Interior's voluntarily changing or withdrawing the policies St. Croix challenges.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of St. Croix's complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel WordPerfect X3, the foregoing brief contains 13,592 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)(2).

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CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 2009, I am causing two copies of the foregoing Brief of Appellees to be served on the following counsel by first-class United States mail, postage pre-paid:

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

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ADDENDUM A

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 29. Indian Gaming Regulation (Refs & Annos)
§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, 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; or

(B) lands are taken into trust as part of--

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to--

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering opera-

tions shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

CREDIT(S)

(Pub.L. 100-497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

Current through P.L. 111-42 approved 7-28-09

END OF DOCUMENT

ADDENDUM F

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25 C.F.R. § 151.3

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

→ § 151.3 Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

25 C. F. R. § 151.3, 25 CFR § 151.3
Current through July 23, 2009; 74 FR 36402

END OF DOCUMENT

ADDENDUM G

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25 C.F.R. § 151.10

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

→ § 151.10 On-reservation acquisi- tions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR

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5 U.S.C.A. § 551 Page 1

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 5. Administrative Procedure (Refs & Annos)
Subchapter II. Administrative Procedure (Refs & Annos)
→ **§ 551. Definitions**

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, ap- pendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub.L. 94-409, § 4(b), Sept. 13, 1976, 90 Stat. 1247; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373.)

Current through P.L. 111-42 approved 7-28-09

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ADDENDUM B

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5 U.S.C.A. § 704

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)
§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

Current through P.L. 111-42 approved 7-28-09

END OF DOCUMENT

ADDENDUM C

Westlaw

5 U.S.C.A. § 706 Page 1

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)
§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Current through P.L. 111-42 approved 7-28-09

END OF DOCUMENT

ADDENDUM D

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 14. Miscellaneous
Subchapter V. Protection of Indians and Conservation of Resources (Refs & Annos)
→ **§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption**

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

Current through P.L. 111-42 approved 7-28-09

ADDENDUM E

31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

25 C. F. R. § 151.10, 25 CFR § 151.10
Current through July 23, 2009; 74 FR 36402

END OF DOCUMENT

ADDENDUM H

Westlaw

25 C.F.R. § 151.11

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

→ § 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

[60 FR 32879, June 23, 1995, as amended at 60 FR 48894, Sept. 21, 1995]

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d-10, 1466, 1495, and other authorizing acts.

25 C. F. R. § 151.11, 25 CFR § 151.11
Current through July 23, 2009; 74 FR 36402