No Date Has Been Scheduled for Oral Argument

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-5430

ST. CROIX CHIPPEWA INDIANS OF WISCONSIN,

Appellant,

v.

KEN SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,

Appellees.

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

FINAL BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

1. Parties Before the District Court and This Court are:

The Plaintiff in the District Court and Appellant herein is the St. Croix Chippewa Indians of Wisconsin ("the Tribe" or "the St. Croix Tribe"), a federally-recognized Indian tribe.

Defendants in the District Court were Federal Defendants, Dirk Kempthorne, Secretary of the Interior, and Carl J. Artman, Assistant Secretary for Indian Affairs. Mr. Artman resigned on May 23, 2008. George T. Skibine was delegated all of the authority of the Assistant Secretary. The District Court substituted George T. Skibine for Carl J. Artman pursuant to Federal Rule of Civil Procedure 25(d). See Memorandum Opinion dated September 30, 2008 at 1 n.2. The new Secretary of the Interior Ken Salazar is being substituted for former Secretary Kempthorne pursuant to Fed. R. App. P. 43(c)(2). Federal Defendants Ken Salazar and George T. Skibine are the Appellees herein.

There were no *Amici* in the District Court and none in this proceeding.

2. Ruling Under Review

The ruling under review is the District Court's Memorandum Opinion and Order dated September 30, 2008 granting the Federal Defendants' Motion to Dismiss the Tribe's First Amended Complaint for: (a) lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that the Tribe

lacked standing and its claims were not ripe for review; and (b) failure to state a claim under Fed. R. Civ. P. 12(b)(6) in that there was no final agency action before the Court. See *St. Croix Chippewa Indians of Wisconsin v. Dirk Kempthorne et al.*, 2008 WL 4449620 (D.D.C. September 30, 2008). The District Court Judge was Richard J. Leon.

3. Related Cases.

The case on review has not previously been before this Court. There are no related cases pending before this Court.

4. Disclosure of Interest.

The St. Croix Tribe has no parent corporation. As a recognized Indian tribe, it does not issue stock.

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GLOSSARY

APA	Administrative Procedure Act
Bad River Band	Bad River Band of Lake Superior Chippewa Indians
Beloit Application	Off-reservation fee-to-trust application for a casino to be located in Beloit, Wisconsin
Complaint	First Amended Complaint
Denial Letter	Interior's letter dated January 13, 2009 denying the Beloit Application
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
Interior	Department of Interior
Guidance Memorandum	Interior issued a Guidance Memorandum on January 3, 2008 relating to 25 C.F.R. Part 151
NIGC	National Indian Gaming Commission
OIRA	Office of Information and Regulatory Affairs
OMB Bulletin	Bulletin for Agency Good Guidance Practices (72 Fed. Reg. 3432 (Jan. 25, 2007))
Paper	Indian Gaming Paper dated February 20, 2004
Part 151	25 C.F.R. Part 151

Secretary	Secretary of the Interior
Skibine Letter	Letter dated August 21, 2007 from George T. Skibine, Acting Deputy Assistant Secretary-Policy and Economic Development
The Tribe or the St. Croix Tribe	The St. Croix Chippewa Indians of Wisconsin
The Tribes	The St. Croix Tribe and the Bad River Band

I. STATEMENT OF THE CASE

reported as *St. Croix Chippewa Indians of Wisconsin v. Dirk Kempthorne, et al.*, 2008 WL 4449620 (D.D.C. September 30, 2008). This appeal followed.

On November 24, 2008, the Tribe filed its Opening Brief in this Court. On January 13, 2009, during the last few days of Secretary Kempthorne's tenure as Secretary of the Interior ("Secretary"), the Department of Interior ("Interior) issued a final decision denying the application ("Denial Letter") submitted by the St. Croix Tribe and the Bad River Band of Lake Superior Chippewa Indians ("Bad River Band") (collectively, "the Tribes") for an off-reservation casino to be located in Beloit, Wisconsin ("Beloit Application"). On the same day, the Federal Defendants-Appellees filed a Motion to Dismiss as Moot the Tribe's Consolidated Appeals. The St. Croix Tribe filed an Opposition to the Motion to Dismiss its appeal of the District Court's dismissal of its Complaint (Appeal No. 08-5430). At the same time, the Tribe agreed that the issuance of the Denial Letter rendered as moot the Tribe's appeal of the denial of its motion for a preliminary injunction. It proceeded to file a Consent Motion to Dismiss Appeal No. 08-5084. By this Court's Order of March 9, 2009, the Court granted the Tribe's Motion to Voluntarily Dismiss Appeal No. 08-5084. However, with respect to the Federal Defendants-Appellees' Motion to Dismiss Appeal No. 08-5430, the Order provided that this issue was referred to the merits panel and that it should be

addressed by the parties in their respective briefs on the merits. A Scheduling Order dated March 13, 2009 was thereafter entered.

II. STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1362 and 5 U.S.C. §§ 502, 553, 701-706. The District Court had authority to issue the requested Declaratory Relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 555(b) and 701-706. Complaint, ¶ 14. The Complaint asserted violations of a number of the provisions of the Administrative Procedure Act ("APA"). Pursuant to 28 U.S.C. § 1362, the District Court also had original jurisdiction of the action in that it was brought by an Indian tribe duly recognized by the Secretary of the Interior wherein the matter in controversy arose under the laws of the United States.

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the appeal of the District Court's Order dated September 30, 2008, dismissing the Complaint with prejudice, in that it was a final decision of that Court.

Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure provides that when the United States or its officer is a party to the litigation, a notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered. The District Court entered its Order of dismissal on September 30, 2008. The Tribe filed its Notice of Appeal on October 1, 2008.

III. STATUTORY PROVISIONS AND THE PART 151 REGULATIONS

Section 5 of the Indian Reorganization Act ("IRA") authorizes the Secretary to take lands into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The IRA and its implementing regulations set out the policies and procedures governing the Secretary's decision to take land into trust. See *id.;* 25 C.F.R. Part 151 ("Part 151"). The regulations provide, *inter alia*, that the Secretary may acquire land into trust "when [he] 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). The Part 151 regulations require consideration of a number of factors, including the Tribe's need for additional land, the purposes for which the land will be used, the impact on local tax rolls and any jurisdictional problems which might arise from the land being placed into trust. See 25 C.F.R. § 151.10(a)-(c), (e)-(h). Much of this controversy is centered on Part 151.11(b) which provides that "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. . . ."

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"). Congress intended 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[,] ... to ensure that the Indian tribe is

the primary beneficiary of the gaming operation, . . . and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702. The Senate Committee on Indian Affairs Report, in describing IGRA's exceptions, made it clear that they were meant to set "forth policies with respect to lands acquired in trust after [IGRA's] enactment." S. Rep. No. 100-446, at 20 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3090.

Under Section 20 of IGRA, 25 U.S.C. § 2701, tribes are prohibited from engaging in any gaming on land acquired after the date of IGRA's enactment, October 17, 1988, unless certain exceptions are satisfied. The exception, pertinent herein, is 25 U.S.C. § 2719(b)(1)(A), which provides that the prohibition of gaming on post-1988 land does not apply when:

> 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 [1] would be in the best interest of the Indian Tribe and its members, and [2] 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 ...

This exception is commonly referred to as the "two-part determination."

IV. STATEMENT OF FACTS -- THE TRIBE'S COMPLAINT

The St. Croix Tribe is a Federally-recognized Chippewa Tribe located in remote areas of northern Wisconsin. Complaint, ¶ 1. The Tribe has faced significant challenges to economic development and diversification, including significant unemployment. A substantial percentage of its employed members earn wages below the poverty level. Complaint, ¶ 2. The Tribe's ability to improve the financial condition of the tribal government and its members is largely dependent on the approval of the Beloit casino project. Complaint, ¶ 3. The project was originally the idea of the City of Beloit as a viable course by which it could restore the local economy which had seriously declined due to the loss of thousands of jobs due to factory closings. The casino project has been supported unanimously for many years by resolutions of the Beloit City Council. Complaint, ¶ 4. The Tribe has ancestral and historic ties to the Beloit region. Complaint, ¶ 5.

In July 2001, the Tribe, together with the Bad River Band, jointly filed the Beloit Application with the BIA Regional Office. It sought to take 26 acres of land into trust for gaming purposes in Beloit, Wisconsin. Complaint, ¶¶ 6 and 26. To date, the two Tribes have collectively spent in excess of $2 million in pursuit of the approval of the project. *Id.*

Interior's required decision making for a tribe's off-reservation casino application involves two separate, but related, statutory determinations (other than

for NEPA-related issues). First, whether a favorable two-part determination would be made under IGRA, 25 U.S.C. § 2719(b)(1)(A). Second, whether to take the designated land into trust pursuant to 25 U.S.C. § 465 and Part 151. Until August 2007, Interior's well-known procedure, in order to carry out the statutory scheme, was to make the two-part IGRA determination prior to making the Part 151 determination. Complaint, ¶ 9.

The Complaint challenged the facial validity of two actions by Interior which presently remain in place and in force: (1) the decision to make the Part 151 decision first, thereby reversing its historic decision making procedure for off-reservation fee-to-trust gaming applications while, at the same time, failing to inform the public of this change the reasons therefore as required by the Supreme Court's decision in *Motor Vehicle Manufacturers Association of the United States, Inc v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29, 43 (1983); and (2) the issuance of the Guidance Memorandum dated January 3, 2008 ("Guidance Memorandum") relating to Part 151 which was: (a) in actuality a legislative rule which should have complied with the APA notice and comment rule making requirements after consultations with Indian tribes; (b) arbitrary and

capricious in that it lacked factual and legal support; and (c) contrary to Congressional intent.[2]

A. Interior's Reversal of Historic Practice and Procedure Without Public Notice.

In order to insure that they correctly understood the procedures which would be required in order to gain approval for the Beloit Application, the Tribe's leaders, staff members and attorneys had numerous meetings with representatives of the BIA in both its Regional Office (located in St. Paul, Minnesota) as well as with senior officials of the BIA in its Central Office in Washington, D.C. Complaint, ¶ 8. During six years of these discussions, it was continuously represented by the BIA to Tribal leaders and representatives that the two-part IGRA determination would be made first by the Central Office; and, if the Governor concurred (as required by IGRA), the BIA would then proceed to make the fee-to-trust determination under Part 151. Complaint, ¶ 8.

In January 2007, the Beloit Application was forwarded by the BIA Regional Office to its Central Office with a favorable recommendation. Complaint, ¶ 9. Until August 2007, BIA officials continued to inform the Tribe's leaders and its representatives in meetings in the Central Office that the two-part IGRA

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[2] A copy of the Guidance Memorandum appears in the Tribe's Notice of Filing [JA00213-218].

determination would be made before the Part 151 determination. However, in August 2007, the Tribes were first notified that this process would be reversed and that the Part 151 determination would be made before the two-part IGRA determination. *Id.* This represented a 100% reversal of the decision making process during both the Clinton Administration and, thereafter, the Bush Administration. *Id.*

The Complaint provided the reason behind Interior's change in procedure. It asserted that, upon information and belief, Interior decided to make the Part 151 determination first in that it was fully aware that if it continued to make the two-part determinations first, there would be no realistic way to deny a number of pending applications before it, including the Beloit Application, in that they fully met the requirements for the two-part determination. Complaint, ¶ 12. Once a two-part determination was made (assuming concurrence by the Governor), this would leave no room for Interior to deny the applications under Part 151. *Id.* The Complaint asserted that, on information and belief, the underlying motive for the change in procedure was Secretary Kempthorne's negative personal views towards off-reservation gaming. Complaint, ¶¶ 10-11.

The Complaint alleged that, beginning in August 2007, Interior confirmed in two separate communications that the Part 151 determination would be made prior to the two-part IGRA determination. The first was a letter dated August 21, 2007

from George Skibine, Acting Deputy Assistant Secretary-Policy and Economic Development. Complaint, ¶ 29. ("Skibine Letter").[3] This letter was sent in response to a letter dated July 13, 2007 from the Tribe's undersigned counsel to Assistant Secretary Artman. Complaint, ¶¶ 27-28. That letter asked Assistant Secretary Artman whether the rumors were accurate that the Part 151 determination would be made before the two-part IGRA determination. *Id.* The Skibine Letter asserted that this did not represent a policy change in that the Department had never before specified a particular sequence for making the two determinations involved in the process.[4]

The BIA's decision to make the Part 151 determination first was further confirmed in a September 21, 2007 memorandum from Assistant Secretary Artman to BIA Regional Directors. Complaint, ¶ 39. The covering memorandum stated that the attached newly revised checklist contained a modification from the prior one "to clarify" that the BIA should not process an application for a two-part determination under IGRA unless the land was already in trust, or if not yet in

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[3] A copy appears as Exhibit C to the Affidavit of Robert M. Adler submitted in support of the Tribe's Motion for Injunctive Relief [JA00061].

[4] This was in contradistinction to the allegations set forth in Paragraph 9 of the Complaint that the Tribes were first notified in August 2007 that the decision making process would be reversed and that the Part 151 determination would be made before the two-part IGRA determination.

trust, until after the publication of a notice to take land into trust had been published in the *Federal Register*. *Id.*[5]

The Complaint alleged that, on information and belief, Interior had not informed other Indian tribes or the public at large that a decision had been made that Interior would no longer follow its historic practice of making the two-part determination prior to the Part 151 determination.[6] Complaint, ¶ 30. Moreover, Interior did not provide an explanation to the Tribe or to any other Indian tribe of the reasons for its change in historic practice and procedure. *Id.* Despite the representation in the Skibine Letter that Interior had never before specified a particular sequence in making the two decisions, as described below, the Complaint recited a number of prior statements by senior Interior officials to two Governors and a Wisconsin District Court that the two-part determination was and would be made prior to the Part 151 determination. Complaint, ¶¶ 32-36.

A letter dated December 21, 2006 from James E. Cason, the Associate Deputy Secretary of Interior to then-Governor of New York, George Pataki, stated, in pertinent part, that a favorable two-part determination had been made on an

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[5] A copy of this document appears as Exhibit G [JA00115-129] to the Affidavit of Robert M. Adler described in footnote no. 3.

[6] During the District Court proceedings, Interior never claimed that it had provided notice to the public about its decision to make the Part 151 decision first or the reasons therefore.

off-reservation casino application and that if the Governor concurred, then a decision would be made whether to take the land into trust pursuant to Part 151. Complaint, ¶ 32. A similar letter was sent on February 20, 2001 to then-Wisconsin Governor Scott McCallum by James H. McDivitt, Deputy Assistant Secretary-Indian Affairs (Management). That letter stated, in pertinent part, that if the Governor concurred in a favorable two-part determination, the land can be acquired by the United States in trust for the Tribes for gaming purposes provided that the requirements of Part 151 were met. Complaint, ¶ 33.

A brief was filed by the Department of Justice in March 2000 in Wisconsin litigation involving the challenge by three tribes of the denial of their off-reservation casino application. See *Sokaogon Chippewa Community, et al. v. Bruce C. Babbitt, Secretary*, No. 00-1137 (W.D. Wis.). In explaining the administrative process by which Interior made decisions, the Government stated in its brief on pages 2-3 and 22 that Interior must make the initial determination of whether an applicant tribe has satisfied the requirements of IGRA. The brief later stated that Interior may not exercise its authority under 25 U.S.C. § 465 to acquire land in trust if it will be used for gaming purposes unless, pursuant to the two-part IGRA determination, an applicant tribe can show that a proposed gaming operation

will be in its best interest and that the operation will not be detrimental to the surrounding community. Complaint, ¶ 35.[7] [and] [8]

In a brief filed in March of 2007 in this Court in *Citizens Exposing Truth About Casinos v. Dirk Kempthorne, et al.* (No. 06-5354), the Government stated: "What is more, Interior had to determine whether the Sackrider properly would qualify for gaming under 25 U.S.C. § 2719 in order to comply with the IRA [the Indian Reorganization Act, 25 U.S.C. § 465] and its implementing regulations." Complaint, ¶ 34.

The Complaint's Counts facially challenged Interior's reversal of procedure without public notice. Count I asserted a violation of the APA, 5 U.S.C. § 706(2)(A). It alleged that the actions by the Federal Defendants were arbitrary and capricious in that they caused Interior to depart from its established practice of making the two-part determination prior to the Part 151 determination without providing notice to Indian tribes and the public at large that Interior had changed its practice and procedure while failing to offer a reasoned explanation of this change. This Count also asserted in its Paragraph 58 that Interior had acted

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[7] A copy of the brief appears as Exhibit F [JA00063-113] to the Affidavit of Robert M. Adler described in footnote 3 above.

[8] The District Court's decision in Sokaogon recognized that the two-part determination was made by the BIA prior to the Part 151 decision. Sokaogon Chippewa Community, et al. v. Bruce C. Babbitt, Secretary, et al., 929 F.Supp. 1165, 1169-1170 (W.D. Wis. 1996). Complaint, ¶ 38.

contrary to Congressional intent as expressed in IGRA and failed to publicly state its reasoning as to why its new practice and procedure remained consistent with Congressional intent. Count II asserted a violation of 5 U.S.C. § 706(2)(B) in that the Federal Defendants' actions, in deciding to make the Part 151 determination prior to the two-part determination, were ultra vires in violation of the due process clause. Count III asserted that the Federal Defendants' actions, by deciding to make the Part 151 determination first, were ultra vires in that they exceeded Interior's statutory jurisdiction, authority or limitations and were accordingly in violation of 5 U.S.C. § 706(2)(C). Count IV alleged a violation of 5 U.S.C. § 706(2)(D) in that the decision to make the Part 151 determination first was without observance of procedure required by law.

In its Prayer for Relief, Paragraph 2(a), the Tribe asked the District Court to enter a Declaratory Judgment that the ". . . Department of the Interior's decision to make the Part 151 determination prior to the two-part determination under IGRA is invalid, unlawful and unenforceable . . . ." Paragraph 2(d) sought a Declaratory Judgment that Interior's denials of other Indian tribes' fee-to-trust applications for gaming purposes were invalid, unlawful and unenforceable if Interior utilized the procedure by which the Part 151 determination was made prior to the two-part IGRA determination.

B. The Guidance Memorandum.

In 2001, after completing the formal rule making process, Interior issued a substantially revised Part 151. 66 Fed. Reg. 3452 (Jan. 16, 2001) [JA00455]. Complaint, ¶ 52. However, the final rules were thereafter withdrawn in 2001. 66 Fed. Reg. 56608 (November 9, 2001) [JA00470]. Complaint, ¶ 54. In so doing, Interior committed to address the specific concerns raised in a "new rule" which would include "the standards of review used in reaching a determination of whether to accept land into trust." 66 Fed. Reg. at 56609-10 [JA00471-472]. Complaint, ¶ 54. In promulgating a new rule, Interior committed to have prior consultations with Indian tribes. *Id.*

The Guidance Memorandum was held out by Interior to only be a clarification of Part 151.11(b)'s "greater scrutiny" (based on the distance to a proposed casino site). The Complaint contended that it actually created a new rule. Complaint, ¶¶ 45 and 71. It established a new "commutable distance" standard and proceeded to create a presumption against approval of an application based on the unsupported proposition that a longer driving distance from the reservation to the proposed casino could negatively impact reservation life. Complaint, ¶ 45.

The Guidance Memorandum stated on page 3: ". . . as a general principle, the farther the economic enterprise –in this case, a gaming facility – is from the reservation, the greater the potential for significant negative consequences on

reservation life." *Id.* The Guidance Memorandum further stated, in pertinent part, on page 4:

> If the gaming facility is not within a commutable distance from the reservation, tribal members who are residents of the reservation will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity
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> * * *
>
> In either case, the negative impacts on reservation life could be considerable.

* * *

The Complaint alleged that these pronouncements amounted to sheer and unfounded speculation. Complaint, ¶ 48. They were also wrong. *Id.* See also Complaint, ¶ 47 (upon information and belief, Interior had no evidence, studies or empirical data which supported these theories).

The new "commutable distance" standard was in stark contrast to conclusions reached by Interior as to Congressional intent in its in-depth analysis set out in its "Indian Gaming Paper" dated February 20, 2004 ("Paper"). The Paper was prepared by senior Interior officials as well as attorneys in its Solicitor's Office.[9] Its conclusions were shared by the chairman of the National Indian Gaming Commission ("NIGC"). Paper at 1.

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[9] A copy of the Paper containing redactions, agreed upon by counsel for the

The Paper concluded, after thoroughly reviewing the case law and legislative history, that Congress, in enacting the IRA and IGRA, did not intend to limit Indian gaming to lands within a specific distance from a reservation. Paper at 6 and 8. Contrary to the Guidance Memorandum, Interior concluded that Congress did not believe that the distance from a tribe's established reservation to a proposed casino could be used as a basis to deny an off-reservation casino application. Pointedly, the Paper stated on page 6:

> In any event, it is certain that if Congress had intended to limit Indian gaming on lands within established reservation boundaries or even within a specific distance from a reservation, it would have done so expressly within IGRA. It clearly did not. Nor has Congress amended IGRA to add a distance limitation or any other geographic limitation since its passage in 1988.

The Paper stated that the IRA itself did not contain any distance limitations: "[B]y its clear language, the IRA envisions off-reservation acquisitions are free from state and local taxation and nowhere in the law does Congress purport to limit the exercise of that authority to lands with-in a fixed distance from an existing reservation." Paper at 8.

The Paper, in summarizing its conclusions, stated on page 13:

> Neither IGRA nor the IRA evince Congressional intent to prohibit off-reservation gaming or to limit it to close proximity to existing reservation lands.

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parties, appears in the District Court record [JA00317-332].

* * *

> Accepting the inherent market limitations within some rural states, distance limitations should not be grafted onto IGRA. To do so could deny the very opportunity for prosperity from Indian gaming that Congress intended IGRA to foster.[10]

Although the Guidance Memorandum's distance limitation was totally at odds with the Paper's conclusions as to Congressional intent, the Federal Defendants in the District Court litigation at no point attempted to disavow the analysis or conclusions reached in the Paper or otherwise reconcile the Guidance Memorandum with the Paper.[11] The Tribe emphasized to the District Court the significance of the Paper in demonstrating the arbitrary and capricious nature of the Guidance Memorandum (and that it was contrary to Congressional intent). Nonetheless, the Court's Memorandum Opinion dismissing the Complaint ignored the Paper. See the Tribe's Notice of Filing [JA00308-332].

On January 4, 2008, the day following the issuance of the Guidance Memorandum, Interior denied eleven pending fee-to-trust applications for

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[10] Interior informed the Congress that it was conducting this analysis xxx.

[11] Instead, Interior, in its zeal to create some ostensible basis by which to deny pending applications, apparently ignored the Paper and its conclusions when drafting the Guidance Memorandum.

off-reservation gaming. Complaint, ¶ 51.[12] A press release was issued by Interior on the same day describing the Guidance Memorandum as well as the denial letters sent to numerous tribes. *Id.* It stated, in pertinent part: (a) "the guidance clarifies how to interpret and apply the Part 151 terms 'greater scrutiny . . .'"; and (b) "Pursuant to the guidance, the Department of the Interior today issued letters to 22 separate tribes with pending applications to take land into trust." (emphasis supplied).[13]

The Complaint challenged the facial validity of the Guidance Memorandum. Count I asserted a violation of 5 U.S.C. § 706(2)(A), alleging that the Guidance Memorandum was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in that it was issued without factual support. Count I further alleged that Interior did not consider all important aspects of the issue and otherwise relied on factors which Congress did not intend for it to consider. Count III asserted that the issuance of the Guidance Memorandum was an ultra vires action in excess of Interior's statutory jurisdiction, authority or limitation and was therefore in violation of 5 U.S.C. § 706(2)(C). Count VI asserted that the Guidance Memorandum was a substantive or legislative rule (as defined in 5

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[12] Copies appear in [JA00206-209 and JA00220-262]. The letters were essentially cookie cutter in nature.

[13] A copy appears as Exhibit C to the Affidavit of Robert M. Adler [JA00306-307].

U.S.C. § 551(4)). The Count further asserted that Interior did not follow the APA's required notice and comment rule making requirements. Count VII asserted violations of 5 U.S.C. § 706(2)(A) and (D) in that Interior, by its issuance of the Guidance Memorandum, ignored its own prior commitment to conduct prior consultations with Indian tribes in its effort to "promulgate a new rule" relating to the proposed standards of review used in reaching a determination as to whether to accept land into trust.

In Paragraph 2(a) of its Prayer for Relief, the Tribe asked for a Declaratory Judgment that the Guidance Memorandum was invalid, unlawful and unenforceable. Paragraph 2(d) sought a Declaratory Judgment that Interior's denials of other Indian tribes' fee-to-trust applications for gaming purposes were invalid, unlawful and unenforceable if Interior utilized the Guidance Memorandum, or any portion thereof, as a basis for its denial decision(s).

V. EXECUTIVE ORDERS 12866 AND 13422 AND OMB'S BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES

After the Federal Defendants' Motion to Dismiss had been submitted to the District Court for decision, it became apparent to the Tribe's counsel that Interior,

in issuing the Guidance Memorandum had, in all probability, failed to comply with two Executive Orders and an OMB Bulletin.[14]

Executive Orders 12866 (1993) [JA00473-482] and 13422 (2007) [JA00488-490] require that a "significant guidance document," defined by Executive Order 13422 in its Section 3(h), as one which is disseminated to the general public that may reasonably be anticipated to either lead to an annual effect of $100 million or more, or adversely affect in a material way the economy, jobs or state, local or tribal governments or communities, must be provided in advance to the Office of Information and Regulatory Affairs ("OIRA"), which may require additional consultation before such a guidance is issued.

OMB issued a Bulletin for Agency Good Guidance Practices (72 Fed. Reg. 3432 (Jan. 25, 2007) ("OMB Bulletin") [JA00492]. It required that any significant guidance document first be posted in draft on the agency's website; and, thereafter, the agency respond to the public comment by postings on the internet before the final guidance memorandum is issued.[15]

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[14] This was apparently the first time that any attorney outside of the federal government became aware of this.

[15] The OMB Bulletin is based, in part, on Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993), as amended by Executive Orders 13258, 67 Fed. Reg. 9385 (February 28, 2002), and 13422, 72 Fed. Reg. 2763 (January 23, 2007). On January 30, 2009, President Obama issued an Executive Order and Presidential Memorandum rescinding Executive Orders 13258 and 13422, and directing the

The Tribe first raised its concerns as to Interior's compliance with the two Executive Orders in a letter dated August 11, 2008 to OMB Director James Nussle. [JA00447-448]. In order to ascertain whether Interior had provided OIRA with a draft of the Guidance Memorandum in advance of its issuance to the public, the letter contained a FOIA request. The responsive letter from an OMB FOIA Officer dated November 25, 2008 stated, in pertinent part: "After a careful review of your request, we conducted a search of OMB's files and did not identify any records or documents that are responsive to your request."

Thereafter, by letter dated September 4, 2008, the Tribe's undersigned counsel sent a letter to Kristofor Swanson, an attorney for the Federal Defendants at the Department of Justice who was the principal contact for the District Court litigation. [JA00449-451]. A response was requested as to whether Interior viewed the Guidance Memorandum as a "significant guidance document"; and if so, a statement as to whether Interior believed that it had complied with the two

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OMB to develop recommendations for a new Executive Order on regulatory review. See Executive Order 13497, 74 Fed. Reg. 6113 (February 4, 2009) [JA00491], and Presidential Memorandum of January 30, 2009, 74. Fed. Reg. 5997 (February 3, 2009).

On March 4, 2009, the Director of OMB issued a Memorandum to the Heads of Federal Departments and Agencies making clear that OIRA is to continue to review a draft of all proposed significant regulations and guidance documents under Executive Order 12866. [JA00454]. See http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf.

Executive Orders and the OMB Bulletin.[16] Rather than responding to whether the Guidance Memorandum complied with the two Executive Orders and the OMB Bulletin, Mr. Swanson's reply of September 22, 2008 merely stated that "We have forwarded the letter on to the appropriate Department of the Interior officials for their information." [JA00452-453]. As of that date, Interior's Motion to Dismiss had been fully submitted to the District Court.[17] On September 30, 2008, the Court granted the Federal Defendants' Motion to Dismiss. [JA00429-445 and JA00446].

VI. STANDARD OF REVIEW

The review by this Court of a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is *de novo*. *Krishna Muir v. Navy Federal Credit Union, et al.*, 529 F.3d 1100, 1108 (D.C. Cir. 2008).

When reviewing the dismissal of a complaint for lack of subject matter under Fed. R. Civ. P. 12(b)(1) on the grounds that the plaintiff lacked standing and its claims are not ripe for review, the review by this Court of that decision is also

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16 The Tribe's counsel also made his concerns known to the OMB General Counsel. In December 2008, the Tribe's counsel was informally advised by OMB staff that after reviewing the record, it came to the conclusion that in issuing the Guidance Memorandum, Interior did not comply with the two Executive Orders (12866 and 13422) and the OMB Bulletin. Further, despite OMB staff making this known to Interior in December 2008, Interior was nonresponsive.

17 The last memorandum which the District Court permitted to be filed on this issue was a Supplemental Memorandum filed on July 25, 2008 [JA00405-414].

de novo. *John W. Munsell, et al. v. Department of Agriculture, et al.*, 509 F.3d 572, 578 (D.C. Cir. 2007).

VII. SUMMARY OF ARGUMENT

The District Court erred in dismissing the Complaint with prejudice. The Complaint set forth in great detail that prior to August 2007, in both the Clinton and Bush Administrations, Interior had a well-known and established practice to first make the required two-part IGRA determination.

This sequencing was not just for convenience sake. Instead, as it publicly acknowledged, Interior historically made the IGRA determination first in order to determine if gaming would be permitted at the proposed off-reservation location. If so, then Interior would proceed to make the decision whether to take the property into trust. Contrariwise, if the Part 151 determination were made first, the purpose or use of the land to be taken into trust (issues identified within Part 151) would not be known since it would be indeterminate as to whether there would be gaming.

During the summer of 2007, without any public announcement whatsoever, Interior reversed its long established practice and procedure.

In the Memorandum Opinion, dismissing the Complaint's allegations relating to Interior's reversal of historic practice, the District Court totally ignored the Supreme Court's decision in *State Farm*. This was despite the Tribe repeatedly

representing to the Court that *State Farm* was at the heart of the Complaint's assertions as to Interior's "reversal of course" without public notice or announcement.

The District Court erred in determining that Interior had not taken "final agency action" by its decision to make the Part 151 determination first. This was a final decision, not a tentative one. It was confirmed by the Skibine Letter and the September 21, 2007 memorandum sent by then-Assistant Secretary-Indian Affairs Carl Artman to the BIA Regional Directors. Contrary to the District Court's decision, the Skibine Letter was not simply an advisory or opinion letter. A final decision had been made by Interior – without public announcement – and the Skibine Letter only served to confirm that decision.

The Complaint alleged that Interior had reversed its historic practice as of August 2007. This was sufficient to withstand the Federal Defendants' Rule 12(b)(6) motion even had the Skibine Letter never been written. Therefore, the first prong of *Bennett v. Spear,* 520 U.S. 154 (1997) ("*Bennett*") was satisfied in that the agency's decision making process had been consummated. Similarly, the second prong of *Bennett* was satisfied in that legal consequences would and did flow from Interior's reversal of historic practice. The decision to make the Part 151 determination first had easily identifiable legal consequences for the St. Croix Tribe (and other Indian tribes) even though no decision had been made

on any of the tribes' respective applications. Contrary to the District Court's analysis that the Skibine Letter was only a statement by Interior as to what it planned to do at some point, the letter on its face confirmed that a decision had already been made by Interior to make the Part 151 determination first. Further, the decision to reverse historic practice, on its face, bound Interior with the "force of law."

The District Court correctly concluded that the issuance of the Guidance Memorandum marked the "consummation" of Interior's decision making process in that it was not tentative or interlocutory. However, it erred in holding that the Guidance Memorandum did not constitute final agency action which would not take place until Interior made a decision on the Beloit Application. The Guidance Memorandum was binding on its face and was applied by Interior (in its denial letters of January 4, 2008 [JA00206-209 and JA00220-262]) in a way which indicated it was binding. The first and second prongs of *Bennett* were satisfied.

Contrary to the District Court's holding, the Guidance Memorandum was not a reiteration of the Part 151 regulations or a general statement of Interior's policy. It was in actuality an amendment to Part 151. A plain reading of the Guidance Memorandum evidences that it represented a significant change in Part 151.11(b) which simply provided that "greater scrutiny" should be given the benefits to a tribe as the distance increased. The Guidance Memorandum imposed

a new "commutable distance" test which cannot be found in Part 151. Contrary to the District Court's reasoning, it is irrelevant that the Guidance Memorandum, on its face, did not purport to be a rule change and was never published in the Code of Federal Regulations or the *Federal Register*. These factors are not germane to the issue presented. They have never been used by this Court to determine whether a Guidance Memorandum was a legislative rule. The Guidance Memorandum, on its face, had a binding effect on the BIA and its decision makers. It did not contain mere suggestions. As the District Court itself recognized, the Guidance Memorandum, in its conclusory section, stated that BIA Regional Directors ". . .shall use this clarification to guide the recommendations or determinations on future applications to take off-reservation land into trust." The District Court ignored prevailing case law holding that the binding nature of a guidance memorandum may be demonstrated by its having been applied by the agency in a manner which demonstrates that it was binding. The Complaint clearly asserted this, alleging that Interior's eleven denial letters of January 4, 2008 were issued "pursuant to" the Guidance Memorandum as stated by Interior's own press release of the same date [JA00306-307].

Interior had previously made a public commitment that in issuing revised standards to take land into trust it would only do so by rule making after consultations with Indian tribes. The Complaint alleged that Interior failed to do

so. The Supreme Court has held that an agency is required to follow its own procedures even if more rigorous than otherwise would be required. The District Court failed to reach this issue.

The District Court similarly erred in concluding, pursuant to Rule 12(b)(1), that the Tribe's claims were not ripe. The Tribe's challenges to Interior having reversed its historic practice, without any public statement acknowledging this (as well as not providing the reasons for this change), were ripe for adjudication. No actual decision on the Beloit Application was necessary. *State Farm* and cases following it in this Circuit have never held that a lawsuit, alleging non-compliance with *State Farm*, must be delayed until the agency's new course of direction actually resulted in a negative determination on an application or other similar submission to the federal government. This Court has rendered a number of decisions involving guidance memoranda, challenged on the basis that they constituted rule making which should have complied with the APA's rule making process. In none of them has the Court held that the challenge was not ripe because the particular guidance memorandum had not been utilized to make an agency determination on an application or similar request pending before an agency. Similar arguments made by Federal agencies have been rejected by this Court.

The District Court erred in holding that the Tribe lacked standing. The Tribe had both Article III Constitutional and prudential standing to assert its claims of facial invalidity. The District Court ignored the prevailing case law for Article III and prudential standing in seeking a Declaratory Judgment. As held by the Supreme Court in *MedImmune, Inc. v. Genentech, Inc., et al.*, 549 U.S. 118 (2007), the Tribe had Article III standing to assert its claims in that the dispute is concrete, real and substantial affecting the legal relations of parties having adverse legal interests and which seek specific relief through a decree of a conclusive nature. The requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) have also been satisfied. There is a causal link between the complained of procedural injuries and the conduct complained of -- Interior's violation of the APA. Further, the Tribe's claims are redressable in that there is a distinct possibility that a favorable outcome for the Tribe in this appeal will cause or require Interior to reconsider its decision to make the Part 151 determination first. Should the Tribe prevail in this appeal, Interior will presumably withdraw its Guidance Memorandum.

The Tribe has prudential standing to bring its claims in that it is within the "zone of interests" which are protected or regulated by the IRA and IGRA. This standard was satisfied in that it is evident that the Tribe's interests more than "arguably" fall within the zone of interests protected or regulated by the IRA and

IGRA. The Tribe is not a disinterested party to the process. It has a direct and specific interest in Interior complying with the APA in its review and determinations on the Beloit Application.

The Denial Letter has not rendered this appeal moot. As held by the Supreme Court in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), despite Interior's issuance of the Denial Letter, the request for declaratory relief may proceed in that a substantial controversy remains of an immediate nature between the Tribe and Interior as to the facial validity of Interior's reversal of historic decision making practice and its Guidance Memorandum.

VIII. ARGUMENT

A. Interior's Reversal of Historic Practice.

1) The District Court Erred in Dismissing the Complaint, Pursuant to Rule 12(b)(6), Which Properly Set Forth a *State Farm* Claim with Respect to Interior's Reversal of Practice.

The Complaint alleged that Interior reversed its historic practice, in the summer of 2007, by deciding that it would begin to make the Part 151 determinations on off-reservation fee-to-trust applications before the two-part IGRA determination. Complaint, ¶¶ 8, 9, 27, 29 and 39. In analyzing whether there had been final agency action, the District Court improperly looked only to the Skibine Letter. However, without reference to the Skibine Letter, the Complaint

separately pled that Interior had changed its historic practice. Complaint, ¶ 9. (" . . . a 100% reversal of the decision making process . . ."). Even had the Skibine Letter had never been written, the Complaint should properly have withstood a Rule 12(b)(6) motion.

The Complaint pled that Interior failed to notify Indian tribes or the public at large of the change in practice and procedure. Complaint, ¶ 30. Further, Interior did not provide to the public an explanation of the reasons for its change in historic practice and procedure. *Id.*

The Supreme Court held in *State Farm*, *supra* at 43,[18] that an action is "arbitrary and capricious" if it

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of a problem, offer an explanation for its decision to run counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *Ramaprakash v. Federal Aviation Administration, et al.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003), this Court held that:

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[18] The District Court's Memorandum Opinion ignored *State Farm* despite the fact that the Tribe had clearly stated that its APA arbitrary and capricious change of practice/procedure allegations in the Complaint were based on *State Farm*. See, for example, the St. Croix Tribe's Memorandum in Opposition to the Motion to Dismiss at 3 (". . . the Plaintiff's Complaint is based on. . .*State Farm*. . . .") [JA00183].

> Our review under the APA is highly deferential, but agency action is arbitrary and capricious if it departs from agency precedent without explanation. Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." (citations omitted).

A number of decisions by this Court have followed *State Farm*. See *New York Cross Harbor Railroad v. Surface Transportation Board, et al.*, 374 F.3d 1177, 1183 (D.C. Cir. 2004); *Owner-Operator Independent Drivers Association, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188, 203 (D.C. Cir. 2007), reh'g. en banc. denied, 2007 U.S. App. Lexis 23112 (D.C. Cir. Sept. 28, 2007); *Richard Blumenthal v. Federal Energy Regulatory Commission*, 552 F.3d 875, 881 (D.C. Cir. 2009); *National Cable & Telecommunications Association v. Communications Commission, et al.,* 2009 U.S. App. Lexis *19 (D.C. Cir. 2009); see also *State of North Carolina v. Environmental Protection Agency*, 531 F.3d 896, 906 (D.C. Cir. 2008), *modified, reh'g granted and denied, in part*, 550 F.3d 1176 (D.C. Cir. 2008).[19]

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[19] By Memorandum Opinion dated March 31, 2008, then Chief Judge Thomas F. Hogan invalidated Interior's change of course with respect to its interpretation of the IRA in that the agency failed to provide a reasoned analysis for its unexplained departure from prior agency policy and practice. *Indian Educators Federation v. Dirk Kempthorne*, 2008 U.S. Dist. Lexis 25878 (D.D.C. March 31, 2008).

This Court's decision in *James V. Hurson Associates v. Dan Glickman, Secretary of the United States Department of Agriculture, et al.*, 229 F.3d 277, 284 (D.C. Cir. 2000) demonstrates beyond peradventure that the dismissal of the Complaint herein was in error. In *Hurson*, this Court held that a proposed amended complaint by a courier service, asserting a *State Farm* challenge to the agency's change in its application procedure, could properly survive a Rule 12(b)(6) motion.

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

2) The District Court Erred in Concluding That the Two *Bennett* Prongs Had Not Been Satisfied for the Tribe to Pursue Its *State Farm* Claim.

The District Court held that the Skibine Letter was not the culmination of Interior's rethinking of the application process for off-reservation fee-to-trust gaming applications. *St. Croix, supra* at *4. The Court further held that the Skibine Letter did not amount to final agency action because "no rights or obligations have been determined" from which "legal consequences will flow" citing *Bennett*, *supra* at 177-78. *St. Croix, supra* at *5. The District Court was in error.

Initially, the District Court ignored the allegation in the Complaint, separate and apart from the Skibine Letter [JA00061], that Interior had reversed its historic decision making practice. See Complaint, ¶ 9. Further, in holding that there had not been any "consummation" of the agency's decision-making process, the District Court incorrectly viewed the Skibine Letter as either an advisory or an opinion letter. *St. Croix, supra* at *4. The Skibine Letter confirmed that the Part 151 decision would be made first. It was neither an opinion nor advisory. It was a direct and clear statement of fact sent by a senior BIA official at the behest of the Assistant Secretary in response to a formal inquiry from counsel for the Tribe with a pending application before the agency.

Even had the Skibine Letter never been written, the Complaint alleged that Interior's historic practice had changed. Complaint, ¶ 9. Count I of the Complaint, in asserting that Interior's change of established practice (without providing notice of that change or stating the reasons therefore), was "arbitrary and capricious" did not restrict itself to the Skibine Letter. Complaint, ¶ 58. Instead, the Complaint clearly alleged that the change in practice had taken place without notice to Indian tribes or the public at large. In dismissing the Complaint, the Court ignored the well-established maxim that "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Krishna Muir*, *supra* at 1108, quoting from *Erickson v. Pardus*, 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2000). As the Supreme Court held in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007): "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." The District Court erroneously failed to accept as true the allegations in the Complaint that Interior had changed its historic practice and procedure without providing to the public notice of that change and the reasons therefore.

The District Court improperly construed the Skibine Letter as ". . . simply a communication in response to an inquiry about the status of the Beloit application." *St. Croix, supra* at *4. Further, according to the Court,

". . . nor was it the culmination of the Department's rethinking of the application process . . . ." *Id.* The District Court ignored the real significance of the Skibine Letter – confirmation by a senior Interior official that the Part 151 determination would be made first. The Complaint pled numerous prior instances in which Interior (or the Department of Justice on its behalf) plainly stated that its procedure was to make the two-part determination first followed by the Part 151 determination.

The District Court's erroneous construction of the Skibine Letter was based on two District Court decisions, neither of which supported its holding. The first was *Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan v. Ashcroft*, 360 F.Supp.2d 64, 68 (D.D.C. 2004) . *Id.* In *Lac Vieux*, the Court held that a letter from the General Counsel of NIGC and another letter from the Department of Justice could not be considered reviewable action in that in the NIGC, only the Chairman or the Commission itself could make such a decision. *Id.* at 68. Mr. Skibine's letter was written on behalf of the Assistant Secretary, speaking for the BIA as a whole. There is no issue herein as it only being advisory or Mr. Skibine needing further approvals.

The second was *Sabella v. United States*, 863 F.Supp. 1, 6 (D.D.C. 1994). *St. Croix, supra* at*4. *Sabella* dealt with an opinion letter by the General Counsel of the agency which did ". . .not reflect a definitive agency position. . . ."

Sabella, supra at 5. According to the Court, ". . . the General Counsel limited her letter by claiming that it reflected her own opinion. . ." and that the Administrator was still free to disagree with the General Counsel's interpretation. *Id.* at 6. The Skibine Letter was written by a senior agency official – not legal counsel to the agency.

Sabella distinguished an earlier decision of this Court in *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). *Sabella, supra* at 4. In *National Automatic Laundry*, the Court held that a letter sent by the agency Administrator in response to an inquiry constituted final agency action. This is analogous to the Skibine Letter. The Court's analysis is instructive. It held that while the overwhelming majority of agency responses to inquiries will not be appropriate for review, a "letter intended as a deliberative determination of the agency's position at the highest available level on a question of importance" was distinguishable from the "mass of interpretive correspondence." *Id.* at 701. In the case at bar, the inquiry sent by the Tribe's counsel was to Assistant Secretary Artman [JA00058-059]. Complaint, ¶ 28. The response was sent, on Mr. Artman's behalf, by Mr. Skibine in his official capacity. Complaint, ¶ 29. Accordingly, as held in *National Automatic Laundry*, Mr. Skibine's letter constituted final agency action. See also *Tarbell v. Department of Interior*, 307 F. Supp.2d 409, 427 (N.D.N.Y. 2004), (letters from Philip N. Hogen, Assistant

Solicitor of the Division of Indian Affairs in the Interior Department ". . .articulating an official agency position" were a sufficient basis for review under the APA).

The issue under the second *Bennett* prong is whether Interior's reversal of course is one from which "legal consequences will flow." The District Court's construction was that even if Interior did reverse course, legal consequences did not flow because no decision had been made on the Beloit Application itself. *St. Croix, supra* at *5. Nowhere in *State Farm* did the Supreme Court hold or even suggest that a suit asserting a violation of the APA, based on non-compliance with the public notice requirements it set out, must await further action by the agency after it had changed its historic practice. Further, it is axiomatic that legal consequences will flow from a reversal of historic practice without proper disclosure to the public as required by *State Farm*. Otherwise, there will not be an informed public to police the actions of an agency.

3) By Deciding to Make the Part 151 Determination First, Interior Relied on Factors Which Congress Did Not Intend It to Consider.

In *State Farm*, the Supreme Court held that if an agency changes course, its decision is arbitrary and capricious if it ". . .has relied on factors which Congress has not intended it to consider. . . ." *State Farm, supra* at 43. By its

passage of IGRA in 1988, Congress intended that a favorable two-part determination would form the basis of a subsequent decision under the IRA (and Part 151) as to whether the Secretary would acquire the property in trust for the tribe. Interior's determinations under Part 151 as to whether the land is needed to facilitate tribal self-determination and economic development (Part 151.3(a)(3)), as well as the need and purpose of the proposed trust acquisition (Part 151.10(b)-(c)), cannot be determined in a vacuum. There must properly first be a two-part determination whether gaming will be permitted. Otherwise, the use and purpose of the proposed land acquisition into trust is unknown. Whether the land acquisition will facilitate the Tribe's self-determination and economic development will also be an unknown absent a prior gaming determination under IGRA. Interior has recognized the importance of this sequencing in that the Part 151 determination cannot be made unless and until the tribal applicant has first shown that the ". . . proposed gaming operation will be in its best interest and that the operation will not be detrimental to the surrounding community." Complaint, ¶ 35.

This Court recognized the proper sequence of the IGRA and the Part 151 determinations in *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007). At issue was the authority of Secretary Kempthorne to designate land for the benefit of an Indian tribe which fell within

the "initial reservation" exemption of Section 20. In finding that the Secretary had such authority, the Court held that:

> The Secretary's determination that the "initial reservation" exception applied to the Sackrider property was intended to have the force of law, as it formed the basis for the Secretary's decision under the IRA to acquire the property in trust for the Band.

Id. at 466-67.

Legal consequences clearly flowed from Interior's reversal of its historic practice without complying with *State Farm*. To hold otherwise would totally abrogate *State Farm* and later cases in this Circuit (*Ramaprakash, et al.*) which have followed it.

B. The Guidance Memorandum.

1) The District Court Erred in Holding That the Guidance Memorandum Did Not Constitute Final Agency Action.

The District Court correctly held that the Guidance Memorandum appeared to be the "consummation" of Interior's decision-making and therefore, *Bennett's* first prong was satisfied. *St. Croix, supra* at *5. However, its holding that the Guidance Memorandum failed *Bennett*'s second prong was in error. *St. Croix, supra* at *5.

The District Court characterized the Guidance Memorandum as "merely an internal communication to Interior employees, aimed at assisting

agency reviewers in their assessment of off-reservation fee-to-trust gaming applications." *St. Croix, supra* at *6. The Guidance Memorandum was much more than that. Whereas Part 151.11(b) only required the decision-maker to give "greater scrutiny" to the claimed benefits to an Indian tribe as the distance increased, the Guidance Memorandum effectively established a presumption that casinos located more than a "commutable distance" from the reservation negatively impacted tribes.

Rather than the Guidance Memorandum only being of possible assistance to agency reviewers, as the District Court viewed it, the last sentence of the Guidance Memorandum made it clear that Regional BIA Directors were required to use and apply it in their review process: "Regional directors shall use as clarification to guide their recommendations or determinations on future applications to take off-reservation land into trust." (emphasis supplied). The mandatory nature of the Guidance Memorandum is starkly evidenced by the fact that on the following day, Interior issued letters to eleven separate tribes "pursuant to" the Guidance Memorandum informing them that their applications had been denied.

Although Part 151.11(b) spoke broadly of "anticipated benefits" to tribes, the Guidance Memorandum arbitrarily focused on employment benefits rather than the overall benefits to tribes arising from revenues from a casino project

being used by tribes at their established reservations to increase tribal services, to provide for additional tribal housing and to improve the lives of tribal members. The Guidance Memorandum also imposed a new requirement for off-reservation acquisitions in that it effectively amended Part 151.11(d) by requiring Indian tribes to negotiate intergovernmental agreements with state and local governments (with jurisdiction over the lands proposed to be acquired) prior to submission of an application. It directed that "[f]ailure to achieve such agreements should weigh heavily against the approval of the application." Guidance Memorandum, page 5. On its face, the Guidance Memorandum was not a "reiteration" of the regulations as the District Court concluded. *St. Croix, supra* at *6.

Bennett's second test was satisfied in that the Guidance Memorandum resulted in "legal consequences." *Center for Auto Safety v. National Highway Traffic Safety Administration*, 452 F.3d 798, 807-811 (D.C. Cir. 2006). As this Court held, the second *Bennett* test is satisfied if an agency has created a new "binding legal norm." *Id.* at 808. For similar reasons, this Court held in *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) that a guidance memorandum was "binding" if, among other factors, the agency acted as if the document issued at headquarters was controlling and if it treated the document in the same manner as it treated a legislative rule. The language within the four corners of the Guidance Memorandum reflects that Interior intended it to

be controlling. Moreover, as the Complaint alleged, Interior's denial letters of January 4, 2008 "pursuant to" the Guidance Memorandum demonstrate this. Complaint, ¶¶ 44 and 51. Nonetheless, the District Court held that the Guidance Memorandum did not give rise to new legal obligations or consequences. *St. Croix, supra* at *6.

In *General Electric Co. v. Environmental Protection Agency* 290 F.3d 377, 382 (D.C. Cir. 2002), the Court held that whether a guidance document was a "rule" pursuant to 5 U.S.C. § 551(4) depended on whether it would be considered a legislative rule rather than a statement of policy or an interpretive rule. The Court held that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding. *Id.* Quoting with approval from a law review article, the Court stated at 383: "If the document is couched in mandatory language, or in terms indicating that it will be regularly applied, a binding intent is strongly evidenced." See also *Croplife America, et al. v. Environmental Protection Agency, et al.*, 329 F.3d 876 (D.C. Cir. 2003); *Cement Kiln Recycling Coalition v. Environmental Protection Agency, et al.*, 493 F.3d 207, 227 (D.C. Cir. 2007); *John Chiang v. Dirk Kempthorne*, 503 F.Supp.2d 343, 350 (D.D.C. 2007). By Interior's own acknowledgement, the Guidance Memorandum controlled the outcome of Interior's eleven denial letters of

January 4, 2008. Clearly, the Guidance Memorandum was applied in a binding manner.

In this case, the Guidance Memorandum was both binding on its face and applied in a manner which indicated it was binding. Rather than the Guidance Memorandum containing "recommended" language, it was clear by its own terms that its requirements had to be followed by the BIA decision-makers. See Guidance Memorandum on page 3 ("2. If the initial review indicates that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied and the tribe properly informed"). The Guidance Memorandum further provided that if the initial review reveals that an application failed to address or did not adequately address issues identified in the guidance, the application should be denied. *Id.* At the same time, the Guidance Memorandum stated that: "This denial does not preclude the tribe from applying for off-reservation acquisitions for gaming or other purposes. However, those future applications will be subject to the same guidelines."

This language is quite distinct from the "recommended" language which appeared in the proclamations which were the subject of this Court's decision in *National Assn. of Home Builders v. Norton*, 415 F.3d 8, 14 (D.C. Cir. 2005). The District Court incorrectly placed reliance on that decision. *St. Croix, supra* at *6. Further, the Court held, relying on *General Electric*, held that finality

can result from even a non-binding agency proclamation if the language of the document is such that private parties can rely on it as a norm or safe harbor by which to shape their actions. *Home Builders*, *supra.* at 15. That is the case herein. If a tribe's proposed casino is within a "commutable distance," then it will escape the risk of denial of its application on a distance basis.

This Court's analysis in *Cement Kiln* evidences why the District Court was incorrect in viewing the Guidance Memorandum as one only containing non-binding terms. *St. Croix, supra* at *6. The Court in *Cement Kiln, supra* at 297, held that the guidance document was not binding on the agency, in that it was "replete with words of suggestion." According to the Court, the guidance document pronouncements were described as recommendations which permitting authorities were encouraged to consider but were, at the same time, allowed to ". . . use approaches on a case-by-case-basis that differ from those recommended in this guidance where appropriate." *Id.* For these reasons, the Court held that the guidance document was not binding. That document was in stark contrast to the Guidance Document which specified (page 3) that if the application failed to address, or did not adequately address, the issues identified in the Guidance Memorandum, then, ". . .the application should be denied. . . ." Nowhere did the Guidance Memorandum state that BIA reviewers were free to use a different approach or ignore the "commutable distance" standard all together.

The District Court erred when holding that the Tribe cannot challenge the Guidance Memorandum but must instead wait to challenge the specific implementation of that memorandum to the Beloit Application. *St. Croix, supra* at *6. The error in its holding is revealed by the two cases the Court relied on. The first was *Fund for Animals v. U.S. Bureau of Land Management*, 460 F.3d 13, 22 (D.C. Cir. 2006). *St. Croix, supra* at *6. *Id.* The Court held that the Bureau's budget request was not reviewable under the APA as final agency action. The Guidance Memorandum has no resemblance to a budget request. The District Court also relied on *Reliable Automotive Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, 732 (D.C. Cir. 2003). *Reliable* dealt with the situation where there was an investigation of the sprinkler heads in question, a statement of the agency's intention to make a preliminary determination that the sprinkler heads presented a substantial product hazard, and a request for voluntary corrective action. These were preliminary procedural steps in the agency's process. This has no similarity to the Guidance Memorandum with its binding language and later treated by Interior in a binding manner.

This Circuit has dealt with a number of cases such as *General Electric* involving challenges to guidance memoranda, asserting that they were legislative rules issued in violation of the APA. In those decisions, this Court has never held that there was no final agency action subject to review because the guidance

memorandum in question had not actually been used to make a decision on a matter (such as a permit or application) pending before an agency. This point was made by this Court's decision in *National Association of Home Builders v. United States Army Corp of Engineers, et al.*, 417 F.3d 1272 (D.C. Cir. 2005), in which there had been no action taken as to any given project. The Court held that even though no action had been taken on any specific application the challenged nationwide permits carried "easily identifiable legal consequences" for would-be developers. *Id.* at 1279.

The District Court's decision was in error when holding that there was no "final agency action" upon which to challenge the Guidance Memorandum.

2) The Guidance Memorandum Ignored Congressional Intent.

The Guidance Memorandum's "commutable distance" standard is fundamentally at odds with Interior's analysis of Congressional intent. As set forth in its Paper, Interior concluded that Congress, in enacting the IRA and IGRA, did not intend the distance from a tribe's established reservation to a proposed casino to be used as a factor against Interior's approval of the proposal.

The Paper demonstrates that the Guidance Memorandum ignored Congressional intent. As this Court held in the context of a regulation. the ". . . [t]he authority to issue regulations is not the power to make law and a regulation contrary to a statute is void. *Orion Reserves Limited Partnership v. Ken*

Salazar, Secretary, et al., 553 F.3d 697, 703 (D.C. Cir. 2009), (citing *Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936)). Similarly, "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements. That is undoubtedly why the Supreme Court noted (*in dicta*) that APA rule making is required where an interpretation "adopt[s] a new position inconsistent with . . . existing regulation." *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995)). As held in *Paralyzed Veterans*, *supra* at 586, the APA rule making requirements would be undermined if an agency could change its interpretation of a substantive regulation without going through rule making. The D.C. Circuit "does not defer to the agency's view that its regulations are a mere 'clarification of an existing rule' pursuant to the APA; instead, the court conducts its own inquiry into whether the new rules 'work substantive changes in prior regulations.'" *Steinhorst Associates v. Steve Preston*, 572 F. Supp.2d 112, 119 (D.D.C. 2008) (quoting *Stuttering Found. of America v. Springer*, 498 F. Supp.2d 203, 211 (D.C. Cir. 2007)) (quoting *Sprint Corp. v. FCC,* 315 F.3d 369, 374 (D.C. Cir 2003)).

C. Interior's Issuance of the Guidance Memorandum Violated Its Commitment to Promulgate Fee To Trust Standards Only Through Rule Making After Consultations With Indian Tribes.

When withdrawing revised Part 151 in 2001, Interior publicly stated (through a *Federal Register* Notice) that it would promulgate new fee to trust standards through rule making after conducting consultations with tribes. It failed to do so. Complaint, ¶ 54. As asserted by the Complaint's Count VII, Interior violated the APA, 5 U.S.C. § 706(2)(A) and (B), in that it failed to follow its own procedures. The Supreme Court held in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) that when the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures ". . . even where the internal procedures are possibly more rigorous than otherwise would be required." Interior publicly committed that new fee to trust standards would only be promulgated by rule making after consultations. It was bound to follow that course. Moreover, Executive Order 13175, 3 C.F.R. 304 (2001), reprinted in 25 U.S.C. § 450 nt., prohibited each agency to the extent practicable and permitted by law, from promulgating any regulation with tribal implications unless it had ". . . consulted with tribal officials early in the process of developing the proposed regulation." [JA00483]. Complaint, ¶ 56. In issuing the Guidance Memorandum, Interior blatantly ignored this Executive Order.

D. The District Court Erred in Holding That the Tribe's Claims Were Not Ripe.

The District Court held that the Tribe's claims were not ripe because a delayed review would not cause hardship to it; that the Tribe could adjudicate a denial of its application if that came to pass; and, that the Court could benefit from further factual development – specifically, the grant or denial of the Beloit Application. *St. Croix, supra* at *7. The Court's analysis, and its conclusion, are in error.

The Tribe challenged Interior's procedural irregularities. There was nothing further which should have taken place in the administrative process to develop these claims. As held by the Supreme Court in *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998):

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

In *Appalachian Power Co. v. EPA*, *supra* at 1023 n.18, the Court similarly rejected the EPA's assertion that the Guidance document at issue therein was not ripe because ". . .the Court's review would be more focused in the context of a challenge to a particular permit." According to the Court: "We think there is nothing to this." The Court elaborated that whether or not EPA had properly

instructed state authorities as to how to conduct the reviews in question ". . . will not turn on the specifics of any particular permit." *Id.*

As this Court held in *Atlantic States Legal Foundation v. Environmental Protection Agency*, 325 F.3d 281, 284 (D.C. Cir. 2003): [To measure fitness, the court looks to] "whether [the issue] is 'purely legal, whether consideration of the issue would benefit from a more concrete setting and whether the agency's action is sufficiently final.'" See also *American Bird Conservancy, Inc., et al. v. Federal Communications Commission*, 516 F.3d 1027, 1031 n.1 (D.C. Cir. 2008) (purely legal issues are generally fit for review); and *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007) (the plaintiffs' claims were ripe because its alleged injury was the BIA's failure to follow federal law before approving a lease).

E. The District Court Erred in Holding That the Tribe Lacked Standing.

The Court premised its holding that the Tribe lacked standing on its belief that ". . . St. Croix's only claimed injury is the increased 'possibility' that the Beloit Application will be denied." *St. Croix, supra* at *7. The District Court ignored the claim for Declaratory relief. The Tribe made it evidently clear that its complained of injury was a procedural harm – which was elsewhere recognized by the Court. *St. Croix, supra* at *7 n.17 ("Plaintiff contends that the complained of

injury is a 'procedural harm. . .'"). Nonetheless, the Court held that the Tribe could not assert standing on the violation of a phantom right and that the Tribe must show that the procedures in question are "designed" to protect some threatened concrete interest of its which is the ultimate basis of a standing. *Id.* at *7; see also *Center for Law and Education v. Department of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) quoted therein.

The requirements for Article III standing for actions seeking relief under the Declaratory Judgment Act were set forth by the Supreme Court in *MedImmune*. The Court, in summarizing its earlier decision in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), stated: "Our decisions have required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts'". *MedImmune, supra* at 127. (internal citations omitted). The Court held, quoting from its earlier decision in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) that: " 'Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *MedImmune, supra* at 127.

This Court addressed the Article III standing requirement for a declaratory judgment action in *City of Houston, Texas v. HUD*, 24 F.3d 1421, 1430 (D.C. Cir. 1994). It held:

> . . . as is illustrated by our decisions in Payne and Better Government, if a plaintiff's allegations go not only to a specific agency action, but to an ongoing policy as well, the plaintiff has standing to challenge the future implementations of that policy, then declaratory relief may be granted if a claim is ripe for review.

These standards have been satisfied herein. Without doubt, there is a definite and concrete dispute involving adverse legal interests which is both real and substantial and which lends itself to the Tribe's request for specific relief for a declaratory judgment to declare unlawful, under the APA, Interior's reversal of procedure and the Guidance Memorandum. Interior's policies are ongoing.

The Complaint satisfied both the causal link and redressability requirements of *Lujan*, *supra* at 560-61. There is a causal link between the complained of injuries and the conduct complained of (violations of the APA). As held by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) the redressability standard has been satisfied in that there is ". . . some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Herein, should the Tribe prevail in this

litigation, Interior would be forced to withdraw the Guidance Memorandum and revert to making the two-part determination first.

The District Court did not reach the issue of whether the Tribe had prudential standing to bring its claims. Under the "zone of interests" test, 5 U.S.C. § 702, a person has standing to bring suit to challenge an administrative ruling if it has an interest sought to be protected which is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *National Automatic Laundry*, *supra* at 693, quoting from *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). Accordingly, ". . . even a minuscule pecuniary stake of the litigant may be sufficient if he provides a suitable and effective vehicle for vindication of larger values." *Id.* As held by this Court in *Home Builders, supra* at 1287 "[p]rudential standing requires 'that a plaintiff's grievance must *arguably* fall within the zone of interests protected or regulated by the statutory provision.'" (emphasis added) (quoting *Bennett*, *supra* at 162). "The zone-of-interest test, however, is intended to 'exclude only those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke v. Securities Indus. Ass'n,* 479 U.S. 388, 399, 107 S. Ct. 750, 93 L.Ed.2d 757 (1987)). See also *Emergency Coalition to Defend Educational Travel, et al. v. United States*

Department of the Treasury, et al., 545 F.3d 4, 11 (D.C. Cir. 2008). The Tribe's claims fell within the protected "zone of interests."

The District Court's holding that the Tribe lacked Article III standing was premised, to a large extent, on the District Court's view that the challenged procedures were not "designed" to protect concrete interests of the Tribe. *St. Croix, supra* at *7 n.17. The Court injected into Article III a requirement which does not exist. Such a requirement has been specifically rejected for the zone of interests test. The Court in *Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004) which held that: ". . . there need be no indication of Congressional purpose to benefit the would-be plaintiff." (quoting *Clarke,* supra at 396-397.) Instead, as this Court held in *Amgen, supra* at 109: ". . . the salient consideration under the APA is whether the challenger's interests are such that they 'in practice can be expected to police the interests that the statute protects.'" (citation omitted). Without question, the Tribe satisfies the "policing" test in that it is left to the Tribe (and other tribes with similar concerns) to contest Interior's actions which fail to comply with the APA. Complaint, ¶¶ 13-14 and Prayer for Relief, ¶ 2.

F. Interior Failed to Comply With Executive Orders 12866 and 13422 As Well As With the OMB Bulletin for Agency Good Guidance Practices.

The Guidance Memorandum was a "significant guidance document" as defined by Executive Order 13422 (Section 3(h)). Accordingly, Interior was required to provide its proposed Guidance Memorandum in advance to OIRA. It did not do so. Similarly, as a "significant guidance document," Interior was required to comply with the OMB Bulletin. This required Interior to first post a draft of the proposed Guidance Memorandum on its website. After comments were received, Interior was required to post its responses on its website before issuing the final Guidance Memorandum. It did not. These failures provide additional grounds to support the Complaint's Count I (violation of 5 U.S.C. § 706(2)(A)) (actions which were an abuse of discretion or otherwise not in accordance with law) and Count IV (5 U.S.C. § 706(2)(D)) (actions which were without observance of procedure required by law).

These issues were not raised in the Complaint in that the Federal Defendants' motion to dismiss had been fully submitted. Nonetheless, the Tribe submits that this Court should consider these allegations as an additional basis on which to hold that the Complaint properly set forth a viable cause of action. These are serious infractions. The issue of whether questions raised for the first time on

appeal are ". . . left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton, Chief, Bureau of Medical Services v. Wulff et al.*, 428 U.S. 106, 120 (1976). "[A] federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt (citation omitted) or where 'injustice might otherwise result.'" *Id.* The Tribe promptly raised its concerns directly with OMB and the Department of Justice. Injustice would result if this issue could not be considered by this Court. Interior should not be heard to claim that its failure to comply with the Executive Orders and the OMB Bulletin should have been discovered (and therefore raised) at an earlier date.

G. Interior's Denial of the Beloit Application Does Not Render Its Appeal Moot.

Despite Interior's denial letter of January 13, 2009, the Tribe's appeal of the dismissal of its Complaint is not moot. Its Complaint facially challenged the validity of Interior's reversal of historic practice (while failing to comply with *State Farm*) and the Guidance Memorandum. These assertions were separate and apart from the claims for injunctive relief. As an overall matter, prevailing case law holds that the Declaratory Judgment Act " 'should be liberally construed to achieve the objectives of the declaratory remedy.'" *Committee on the Judiciary v.*

Harriett Miers, et al., 558 F. Supp.2d 53, 83 (D.D.C. 2008) (quoting from *McDougald v. Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986)).

The controlling authority on the question of mootness, in a case where both injunctive and declaratory relief are sought, is *Super Tire*. See generally, *Halkin, et al. v. Richard Helms, et al.*, 690 F.2d 977, 1008 (D.C. Cir. 1982). In *Super Tire*, an employer, whose employees were on strike, brought suit seeking injunctive and declaratory relief against the enforcement of state welfare laws which made the striking employees eligible for public assistance payments. The state programs were alleged to have violated federal labor policy as well as the policies of the Social Security Act. The strike ended with the strikers returning to work and normal operations resuming prior to the time that the District Court heard the case. The District Court proceeded to hear and rule on the merits of the dispute. It thereafter denied the motion for preliminary injunction and dismissed the complaint. The Court of Appeals did not reach the merits, but instead remanded the case with instructions to vacate and dismiss it for mootness.

The Supreme Court reversed. The Court held that while the request for injunctive relief was mooted by the employees' return to work, the request for declaratory relief remained viable. *Super Tire*, *supra* at 121-122. The Court's basis for this holding was that the corporate petitioners in that case ". . . may still retain sufficient interests and injury as to justify the award of declaratory relief."

Super Tire, *supra* at 122. According to the Court, the issue is "whether the facts alleged, under all the circumstances, show there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* (citation omitted). *Id.* The Court continued: ". . . since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here 'capable of repetition, yet evading review,' so that petitioners are adversely affected by government, 'without a chance of redress'." *Id.* (citation omitted). In holding that the facts before the Court satisfied the constitutional standing requirement of Article III, Section 2 and the Declaratory Judgment Act, that a case with controversy existed between the parties, the Court held that ". . . the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire*, *supra* at 122.

The same can be said herein. Although the Tribe's Beloit Application has now been denied, and its request for injunctive relief mooted, Interior's decision to make the Part 151 determination prior to the two-part IGRA determination, ignoring *State Farm* in the process, and its issuance, without prior consultation, of a Guidance Memorandum, despite it being a legislative rule, are both firmly in

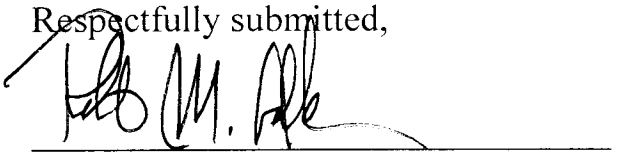
place and operative. Both have a "substantial adverse effect" on the Tribe's interests.

The Court's ruling in *Better Government Association v. Department of State, et al.*, 780 F.2d 86 (D.C. Cir. 1986) is on point. This decision stands for the proposition that a plaintiff's facial challenge to guidelines survive – despite the mooting of plaintiff's challenge to the specific action by an agency in applying the guidelines to it. Just as herein, ". . . additional counts were directed at the legality of the standards utilized by the appellees." *Id.* at 91. As held by the Supreme Court in *Super Tire*, the real issue is whether the challenged government practice continues. *Id.* at 121-22. See also *Better Government Association*, *supra* at 91 n.23. It clearly does herein.

CONCLUSION

The St. Croix Tribe submits that the District Court's dismissal of its Complaint was in error and should be reversed and remanded to the District Court.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Pursuant to F.R.A.P. 32(a)(7)(B)(i), I certify that this brief contains 13,921 words. In preparing this certificate, I have relied on the word count of the word processing system used to prepare the brief, Microsoft Word 2003.

Date: July 31, 2009

Robert M. Adler

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2009, I have caused to be served by first-class mail, postage prepaid, two true and accurate copies of the foregoing Final Brief of Appellant on the following:

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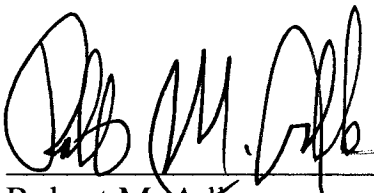

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