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 REPLY BRIEF OF APPELLANT

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GLOSSARY

APA	Administrative Procedure Act
Brief or Br.	Federal Defendants' Brief
Complaint	First Amended Complaint
Interior	Department of Interior
The Tribe or the St. Croix Tribe	The St. Croix Chippewa Indians of Wisconsin

SUMMARY OF ARGUMENT

In their responsive brief, the Federal Defendants attempt to avoid *Motor Vehicle Manufacturers Association of the United States, Inc v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29 (1983) by claiming that the Department of Interior's ("Interior") decision to make the Part 151 determination prior to the two-part IGRA determination was purely an internal procedural decision. However, this was clearly an "agency action" to which *State Farm* applies. The case law is clear that no actual decision under the agency's new change of course must take place in order for an arbitrary and capricious claim to be asserted under the Administrative Procedure Act ("APA"). Clearly, legal consequences flowed from Interior's change of course in that, in this case, the St. Croix Tribe's off-reservation gaming application was reviewed under Part 151 rather than under IGRA as Congress intended.

The Federal Defendants artificially characterize the Guidance Memorandum as simply an advisory document which carried out Part 151's directive to apply "greater scrutiny" as the distance increased to a proposed casino. The Guidance Memorandum, in fact, represented a significant revision of the regulations adding the new concept of "commutability" and the elevation of job creation issues over the income stream which a tribe anticipated from a proposed casino. The Guidance Memorandum was a legislative rule which failed to comply with notice

and comment requirements. By its terms and its implementation in numerous denial letters issued pursuant to it, it is clear that it was both binding on its face and applied in a binding manner.

The St. Croix Tribe has both Article III and prudential standing to bring its claims. The Complaint fully met the Article III standing requirements for a Declaratory Judgment action set out by the Supreme Court in *MedImmune, Inc. v. Genentech, Inc., et al.*, 549 U.S. 118 (2007). The Tribe suffered procedural harm as the result of Interior's failure to comply with *State Farm* when changing course. The Tribe suffered procedural harm by Interior's issuance of the Guidance Memorandum which substantively amended the regulations. The St. Croix Tribe is not a disinterested party to these issues given that it had a pending application before Interior which was directly affected by Interior's actions.

The Tribe's claims, seeking declaratory relief, are ripe for review. The issues presented are strictly legal in nature and no further factual development is required or needed. There can be no legitimate hardship to Interior by having these issues decided now rather than allowing a flawed process to continue which will spawn further litigation.

ARGUMENT

I. INTERIOR'S REVERSAL OF COURSE CONSTITUTED FINAL AGENCY ACTION

Secretary of the Interior Salazar and Assistant Secretary for Indian Affairs, Larry Echo Hawk (hereinafter the "Federal Defendants") contend that the decision to make the Part 151 determination before the two-part determination under IGRA was a "purely internal, procedural decision" from which no legal consequences flowed. Federal Defendants' Brief at 15 (hereinafter "Brief" or "Br."). See also Brief at 21 " . . . merely a matter of agency procedure." The Federal Defendants cite no authority which would exclude from the purview of *State Farm* requirements an agency's change of course characterized as relating to "internal agency procedure." Indeed, Interior's change of procedure was not strictly internal in that it had a direct effect on applicants, such as the St. Croix Tribe in terms of the procedure by which its application would be reviewed and decided.

An agency's change of course which is arbitrary and capricious under the APA for its failure to comply with *State Farm* arises from an "agency action." 5 U.S.C. § 706(2)(A). See *Ramaprakash v. Federal Aviation Administration, et al.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003). There can be no doubt but that Interior's decision to change course by making the Part 151 determination prior to the IGRA determination, constituted an "agency action."

The First Amended Complaint (hereinafter "Complaint") asserted that in its decision to make the Part 151 determination first, Interior changed course. Complaint, ¶¶ 9 and 39. The Federal Defendants' Brief confirms this. Br. at 17 ("Interior's decision to conduct one statutory analysis prior to another . . . .") See also Br. at 20 " . . . Interior's decision to make the two-part determination under the IRA prior to the Part 151 determination under IGRA . . . ." The Complaint further asserts that, on information and belief, Interior did not inform Indian tribes or the public at large of this change of course or the reasons therefor. Complaint, ¶ 30. The Federal Defendants' responsive brief does not claim otherwise.

The Supreme Court's very recent decision in *Federal Communications Commission, et al. v. Fox Television Stations, Inc. et al.*, 129 S. Ct. 1800 (2009) provides further support for the conclusion that Interior failed to comply with *State Farm*. The Court held at 11:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books." (citation omitted). And of course the agency must show that there are good reasons for the new policy. (emphasis in original).

Id. at 1811.

Herein, despite Interior obviously changing course, there was no acknowledgment by it at the time of having done so. Instead, the change was sub silentio.

The case law in this Circuit makes it clear that an agency's change in a policy or procedure brings with it the requirement that it comply with *State Farm.* As this Court held in *Ramaprakash*, *supra* at 1124: "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." (citation omitted).

An agency's change in procedure which affects third parties outside the federal government must comply with *State Farm.* An agency's decision to no longer permit face-to-face appointments with courier/expedite firms in the approval process for a proposed label was the subject of 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 (D.C. Cir. 2000). The Federal Defendants characterize this case as one only involving a challenge to a final agency rule that had been published in the *Federal Register.* Br. at 23. *Hurson* stood for more than that. In *Hurson*, the agency published notice of its change in procedure in the *Federal Register* and stated reasons therefor. *Id.* at 280. Nonetheless, *Hurson* attempted to assert an arbitrary and capricious claim, based

on *State Farm*, claiming that the four reasons stated by the agency (in the *Federal Register* notice) for its elimination of face-to-face review were "pretextual, implausible, counter to the attendant facts, and show a failure to consider important factors . . . ." *Id.* at 284. While the Court viewed *Hurson*'s arbitrary and capricious claim as "exceptionally weak" it nonetheless held that it would survive a Rule 12(b)(6) motion to dismiss. *Id. Hurson* demonstrably indicates that the District Court erred in dismissing the St. Croix Tribe's *State Farm* claim.

In *National Coalition Against the Misuse of Pesticides, et al. v. Lee and Thomas Administrator, Environmental Protection Agency, et al.*, 809 F.2d 875 (D.C. Cir. 1987), an issue presented was whether the agency violated *State Farm*. Therein, on September 1, 1985, a zero tolerance for ethylene dibromide (EDB) on imported mangoes took effect. However, some two months later, the EPA did an about-face, proposing to abandon the zero tolerance policy and instead revive the expired 30 ppb tolerance. *Id.* at 877. The arbitrary and capricious claim under *State Farm* was based on the position that the EPA shifted its position without having a proper factual basis to do so. *Id.* at 878 and 881. In holding that the EPA failed to comply with *State Farm*, the Court stated at 883: "The record is virtually barren of reasons for this *volte face*." The Court further stated: "On this record, we conclude that [EPA's stated] rationale is wholly inadequate, it reflects an unexplained reversal from EPA's position just three months earlier." *Id.* The

Court further held at 884: "In the absence of any such evidence or other explanation, its about-face is inexplicable and under well-settled principles of law, stands condemned as arbitrary and capricious."

As the St. Croix Tribe set out in its opening brief at 35, 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. There, a 1986 Manual marked the agency's change in coverage for investigational medical devices. The Federal Defendants incorrectly view this decision as one only involving a challenge to a final decision denying Medicare coverage for experimental treatment. Br. at 23. In fact, *Yale-New Haven* did not involve any actual denial of benefits.

The Federal Defendants attempt to minimize the scope of *State Farm* by asserting that it does not pertain to agency actions made in anticipation of future agency action. Br. at 18-20. Yet, they do not cite any case law which places such a limitation on *State Farm*. Instead, a change in course of historical practice or procedure is sufficient to trigger the agency's need to comply with *State Farm*.

Although acknowledging, as they must, that Interior made a decision to reverse the order of its decision making, the Federal Defendants assert that this was not a consummation of its decision making process. Br. at 19. In supporting this argument, the Federal Defendants first assert that its reversal of course did not represent the consummation of any decision making process in that no decision

had been made on the St. Croix Tribe's application. Br. at 20. However, *State Farm* speaks to an agency's reversal of course in its policies or procedures and does not require that, based upon an agency's new direction, a "final agency action" wait until an actual decision had been made under its new policy or procedure. The Federal Defendants fail to cite any *State Farm* decision by any Court which supports their assertion. Certainly, the Supreme Court, in its most recent treatment of *State Farm* in *Fox Television*, did not suggest that an agency's change of position would not be actionable until it had taken a specific action under its new position.

Although ignoring the fact that the Complaint asserted a change of course by Interior, wholly apart from the Skibine Letter itself, and that the St. Croix Tribe had properly raised this issue during the District Court proceedings, the Federal Defendants nonetheless argue that the Skibine Letter did not reflect the consummation of Interior's action in that it was written by a subordinate official. Br. at 22. Mr. Skibine was decidedly not a "subordinate official." He was the individual selected by then Assistant Secretary Artman to respond to the Tribe's request for confirmation as to whether rumors were accurate that the Part 151 determination would be made prior to the two-part IGRA determination. Complaint, ¶ 28. Further, during the District Court proceedings, the only affidavit or declaration presented by the Federal Defendants was one of Mr. Skibine. It was

provided in support of the Federal Defendants' Motion to Dismiss as Exhibit 1 [JA00179-180]. Therein, Mr. Skibine stated that he was the Director of the Office of Indian Gaming within the Office of the Assistant Secretary-Indian Affairs in the Department of the Interior and that he had held this position since 1997. Mr. Skibine also stated that he was the Acting Deputy Assistant Secretary for Policy and Economic Development within the Office of the Assistant Secretary-Indian Affairs and had held that position since it was created in 2003. Quite clearly, Mr. Skibine, in sending his letter of August 21, 2007 (Complaint, ¶ 29) spoke for the Bureau of Indian Affairs.

The Federal Defendants contend that, even given Interior's change of course, this does not constitute final agency action in that no rights or obligations had been determined or did legal consequence flow. Br. at 20. Once again, the Federal Defendants attempt to re-write *State Farm* to add the additional requirement that an agency's change of course, even without public notice or explanation, is not actionable unless and until a decision adverse to a party's interest has been made under the new policy or procedure. Neither *State Farm* nor any of the numerous related cases decided in this Circuit have imposed such a requirement.

II. THE GUIDANCE MEMORANDUM CONSTITUTED FINAL AGENCY ACTION

In order for there to be a proper cause of action, the Guidance Memorandum must either: (1) reflect "final agency action" pursuant to 5 U.S.C. § 704; or (2) constitute a de facto rule or binding norm that could not properly be promulgated absent compliance with the notice and comment rule making procedure. *Center for Auto Safety and Public Citizen, Inc. v. National Highway Traffic Safety Administration*, 452 F.3d 798, 806 (D.C. Cir. 2006). In this case, both standards are satisfied.

In its responsive brief, the Federal Defendants assert that the Guidance Memorandum does not determine rights or obligations nor do legal consequences flow from it. Br. at 26. Instead, the Federal Defendants (using revisionism) contend that the Guidance Memorandum simply advises Interior staff how to analyze fee-to-trust applications and does nothing to disturb the applicable regulatory regime. *Id.* The Federal Defendants further assert that the only way in which the Guidance Memorandum could have an effect on the St. Croix Tribe is in the context of a ruling on its fee-to-trust application. Br. at 27. According to the Federal Defendants, the Guidance Memorandum does not set forth any new "binding norms" but instead only sets forth Interior's view of what the regulations require where land sought to be acquired for gaming exceeds a certain distance

from the reservation. Br. at 28. The Tribe submits that these contentions lack merit.

The Federal Defendants artificially limit this Court's decision in *General Electric Co. v. Environmental Protection Agency* 290 F.3d 377 (D.C. Cir. 2002). Br. at 35. The Tribe submits that *General Electric* strongly supports its position herein. The Federal Defendants only read *General Electric* as a case in which a guidance document was held to be a legislative rule because it required petitioners to use one of two specified risk assessment methods and bound the EPA to accept applications which used one of those methods. *Id.* In point of fact, *General Electric*, as applied to the Guidance Memorandum at issue herein, evidences that it was a legislative rule. In *General Electric*, the pertinent regulations did not inform applicants how to conduct the necessary risk assessment for the cleanup and disposal of PCB waste. *Id.* at 379. The Guidance Document issued by the EPA provided that applicants may take either of two approaches to risk assessment. *Id.* The Court held that the controversy was ripe for judicial review, and that the Guidance Document was final agency action, in that it marked the consummation of the EPA's decisionmaking process and determined the rights and obligations of both applicants and the agency. The EPA's position was that the Guidance Document was a statement of policy setting forth EPA's judgment, based on the available scientific data and analysis of the toxicity value, which was appropriate

in order to avoid an unreasonable risk to health or the environment. *Id.* at 382. The Court, however, viewed the issue as whether the agency action either imposed any rights or obligations or "genuinely leaves the agency and its decisionmakers free to exercise discretion" (citation omitted). *Id.* According to the Court, the common standard as to whether an agency action binds private parties or the agency itself with the "force of law" is whether the document expresses the change in substantive law or policy (that is not an interpretation) which the agency intends to make binding or administers a binding effect. *Id.* at 382-383. The Court held that the mandatory language of a document alone can be sufficient to render it binding before it is actually applied if the affected parties were reasonably led to believe that failure to conform would bring adverse consequences such as denial of an application. *Id.* at 383. The Court proceeded to hold that the commands of the Guidance Document indicated that it had the force of law. *Id.* at 385. On its face, the Court concluded, the Guidance Document imposed binding obligations upon applicants who submit applications which conformed to the Document and upon the EPA not to question applicant's use of the toxicity factor specified in the Document. *Id.* The Court further held: " . . . the Agency's application of the Document does nothing to demonstrate that the Document has any lesser effect in practice. Consequently, we conclude that the Guidance Document is a legislative

rule." *Id.* So too herein, no actual application of the Guidance Memorandum is required.

Similar to the Court's analysis of the Guidance Document in *General Electric*, the Guidance Memorandum herein imposed a substantive change in the law or policy which was not simply an interpretation of the regulations. The Guidance Memorandum created a "commutability standard" which nowhere can be found within Part 151. Part 151.11(b) only spoke of "greater scrutiny" to the Tribe's justification of anticipated benefits from a proposed off-reservation casino. Rather than applying guidance as to how to scrutinize the anticipated benefits, the Guidance Memorandum created, out of whole cloth, an entirely new standard that if the proposed gaming facility was not within a "commutable distance" of the reservation, tribal members (who are residents of the reservation) will either not be able to take advantage of the job opportunities if they desire to remain on the reservation or will be forced to move away from the reservation to take advantage of job opportunities. In either case, according to the Guidance Memorandum, the negative effects on reservation life could be considerable. There is simply no credible argument that these provisions merely served to provide "guidance" to decisionmakers as to how to apply the "greater scrutiny." Instead, they introduce entirely new substantive changes to the regulations. Further, rather than allowing the BIA decisionmaker to more closely examine the proposed benefits to a Tribe

on a case by case basis as the circumstances warranted, the Guidance Memorandum directed the decisionmaker to look to job opportunities rather than the overall benefits to the Tribe, including an increased revenue stream. The Guidance Memorandum is an effort to amend Part 151.11(b) while avoiding the APA's notice and comment rulemaking process.

Just as in *General Electric*, the Guidance Memorandum herein reasonably led both the BIA decisionmakers and tribal applicants to believe that failure to conform applications to the requirements of the new commutability standard and the new focus on job opportunities would lead to the denial of the applications. The Guidance Memorandum itself (page 3, ¶ 2) provided that if an initial review revealed that the application either failed to address or did not adequately address the issues in the guidance, then, " . . . the application should be denied and the tribe promptly informed." The Guidance Memorandum further provided that should the Tribe apply for a future off-reservation acquisition for gaming purposes, " . . . those future applications will be subject to the same guidelines." *Id.* While the implications of this provision are clear on their face, their application by Interior makes it even clearer that the Guidance Memorandum was an absolute directive to decisionmakers rather than being mere words of suggestion. The eleven denial letters issued on January 4, 2008 were made part of the District Court

record. [JA00206-209 and JA00220-262]. A review of the denial letters reflects that they were cookie-cutter in nature.[1] See denial letters, pages 3-4,

The binding effect of the Guidance Memorandum becomes evident once it is understood that the same language was used in justifying the denial of ten applications despite the fact that the individual tribes, spread across the country, presented very different needs and circumstances. Yet, identical language was used -- on the same day -- to deny each of the applications. The Guidance Memorandum provided on its page 6 that Regional Directors "shall" use this clarification to guide the recommendations or determinations on future applications to take off-reservation land into trust. And, this directive was carried out.

It is fundamentally clear that after the issuance by Interior of the Guidance Memorandum, its decisionmakers were not left "genuinely free" to approve an application wherein the location of the proposed casino was beyond a "commutable distance" from the established reservation. As this Court held in *General Electric*, such a Guidance Memorandum, on its face, had a binding effect on the agency.

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[1] The sole exception was the letter sent to the Honorable George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians. In it, the emphasis of the denial was on the opposition by local officials to the proposed gaming facility as well as the absence of a Memorandum of Understanding with the City to provide local services. (See page 4, ¶ F).

This Court's decision in *Croplife America, et al. v. Environmental Protection Agency, et al.*, 329 F.3d 876 (D.C. Cir. 2003) is also supportive of the St. Croix Tribe's position. The Federal Defendants narrowly construe *Croplife* as a case limited to its facts of barring the use of third-party human studies in pesticide registration applications. Br. at 35-36. However, as the Federal Defendants acknowledge in their Brief at 36, "the Memo [the Guidance Memorandum at issue herein] does state that applications that do not address the concerns set forth in the Memo will be rejected . . . ." The Guidance Memorandum injured the St. Croix Tribe and other tribal applicants in that it "unambiguously precludes the agency's consideration" of an application whereby the proposed casino was beyond a commutable distance from the established reservation. See *Croplife, supra* at 884.[2]

The Federal Defendants look to *Center for Auto Safety, supra*, for support for their position that the Guidance Memorandum did not carry the force of law and was not a final agency action despite language in it providing that applications will be rejected if they did not address the concerns set forth. Br. at 36-37. But,

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2 The Federal Defendants do not correctly present the colloquy between the District Court Judge and counsel for St. Croix at the hearing on the St. Croix Tribe's Motion for a Preliminary Injunction. [JA00333-386]. Br. at 32. The Court's question strictly dealt with the change of procedure, *i.e.*, making the Part 151 determination first. This colloquy did not relate, as the Federal Defendants represent, to the implications of Interior's issuance of the Guidance memorandum.

Center for Auto Safety only demonstrates why their position is flawed. As this Court pointed out, the guidelines in question in that case continually reinforced the notion of flexibility in their application. *Id.* at 432-433. For example, the generic letter stated that "NHTSA has concluded, that in general, it is not appropriate for a manufacturer . . . " (emphasis in original). The language relating to notification obligations for a short-term exposure defects was "similarly conditional," the letter stating that "NHTSA believes that in some cases it may be permissible for a manufacturer to modify . . ." (emphasis in original). *Id.* at 433. The Court further noted that the concluding portion of the guidelines " . . . emphasize that the agency's position on regional recalls remains flexible." *Id.* In contrast, the Guidance Memorandum in question herein contains no statement or suggestion of flexibility. An application which failed to address or did not adequately address the issues identified in the guidance "should be denied and the tribe informed promptly." Guidance Memorandum at 3, ¶ 2. As the Federal Defendants acknowledge, the Guidance Memorandum specified that applications which did not address the concerns set forth in the memo "will be rejected." Br. at 36.

The Guidance Memorandum did not leave the BIA decisionmaker free to approve an application where the proposed casino was, for example, 250-300 miles from the established reservation -- even if the decisionmaker concluded that the anticipated benefits from the project were significant, without consideration of

whether the proposed casino would affect employment of tribal members (whether on the reservation or at the proposed casino facility). Had the BIA decisionmakers genuinely been free to conclude that there were significant anticipated benefits due to the anticipated income stream from the proposed casino, which outweighed any negative employment impact by tribal members leaving their reservation(s), then we would not have seen the denial letters of January 4, 2008. Ten of those letters stated that a primary, if not the primary, expected benefit was the income stream from the gaming facility. See for example, letter to the Honorable Virgil Moorehead, Chairman, Big Lagoon Rancheria at 3 which provided ("In your application you state that, 'the Tribe is currently unable to engage in any meaningful economic development on its existing reservation . . . .' Therefore, the primary expected benefit is the income stream from the gaming facility, which can provide support for existing governmental services . . . .") Yet, as the Guidance Memorandum mandated, the anticipated benefit of the income stream was ignored in making the denial determinations. The denial letters at no point questioned the legitimacy of the tribes' anticipation of the income streams. This cannot be said to be "greater scrutiny" of the benefits to the tribe(s). For, even with such "greater scrutiny," BIA decisionmakers were instructed to ignore the benefits to the tribe of the anticipated income steam. A fair reading of the denial letters makes it evident that the anticipated income stream was the primary purpose of the proposed

casinos. However, the Guidance Memorandum made that irrelevant. Quite clearly, the Guidance Memorandum rewrote the regulations under the rubric of only applying "greater scrutiny."

The Federal Defendants are simply incorrect in their discussion of the 2004 Indian Gaming Paper. Br. at 31-32. The Federal Defendants assert that "nothing in the Indian Gaming Paper . . . suggests that the distance from the reservation was not a relevant factor in deciding whether to take land into trust." Br. at 31. In point of fact, the Indian Gaming Paper clearly stated that distance could not be used as a limiting factor in the approval of off-reservation gaming applications. Indian Gaming Paper at 8 and 16.

In its opening brief at 22-25, the Tribe stated that Interior, in its issuance of the Guidance Memorandum, failed to comply with Executive Orders 12866 and 13422 as well as OMB's Bulletin for Agency Good Guidance Practices. The Tribe stated that Interior's omissions were not discovered until after the case had been fully submitted to the District Court for its decision on the pending Motion to Dismiss. The Tribe, in its brief at 58-59, submitted that this Court should exercise its discretion to review these issues in its consideration of this appeal. In their response, the Federal Defendants take no position as to whether or not Interior complied with the two Executive Orders and the OMB Bulletin. This strongly suggests that Interior failed to comply. Instead, the Federal Defendants assert that

the Tribe has waived this claim in that it failed to present it to the District Court. Br. at 34.

The St. Croix Tribe submits that Interior's non-compliance with the Executive Orders and the OMB Bulletin is an important issue which should be considered by this Court in its analysis of the Tribe's facial challenge to the Guidance Memorandum as being in violation of the APA. The issuance of the Guidance Memorandum in January 2008 created instant controversy. It led to an Oversight Hearing before the House Resources Committee on February 27, 2008. Despite all of this, and the involvement of numerous tribes (and their representatives) whose interests were affected by the Guidance Memorandum, there was no public discovery of Interior's failure to comply with the two Executive Orders and the OMB Bulletin. The St. Croix Tribe's counsel uncovered this in August-September 2008.[3] These issues were promptly brought to the attention of both Interior and OMB. An explanation was requested of Interior which was not forthcoming. The Federal Defendants should not be able to avoid these issues by its assertion that they were waived. Once discovered, they were promptly and appropriately raised with Interior and OMB. The Tribe's counsel dealt with these issues in a timely and professional manner. The Tribe respectfully

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[3] By all appearances, St. Croix's attorneys were the first, outside of the federal government, to have discovered this.

suggests that this Court should exercise its discretion to consider them in this appeal.

III. THE ST. CROIX TRIBE HAS STANDING TO ASSERT ITS CLAIMS

In their brief, the Federal Defendants misstate, once again, the St. Croix Tribe's position as to the injury in fact which it has suffered. Br. at 39-40. The Federal Defendants claim that the Tribe's injury claim is restricted to the increased "possibility" that the Beloit Application will be denied. That is simply not the case. As set forth in its opening brief, the St. Croix Tribe made it evidently clear to the District Court that its complained of injury was a procedural harm. See St. Croix Tribe's opening brief at 53-54.

The St. Croix Tribe has both Article III and prudential standing to bring its claims. It had an application pending before Interior many years prior to Interior reversing course in deciding to make the Part 151 determination first and thereafter issuing the Guidance Memorandum which obviously and directly impacted any review of its application by a decisionmaker at Interior. Contrary to the Federal Defendants' position, and the District Court's decision in dismissing the Complaint, no actual decision on the Beloit Application was required in order for the Tribe to have Article III and procedural standing. The Tribe's burden, which it has satisfied, is that its Complaint asserts that it has been "or will in fact be perceptibly harmed by the challenged agency action." *Competitive Enterprise*

Institute et al. v. National Highway Transportation Safety Administration, et al., 901 F.2d 107, 112 (D.C. Cir. 1990). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice to withstand a motion to dismiss based on there being no requisite injury in fact. *Bennett v. Spear,* 520 U.S. 154, 168 (1997).

The Federal Defendants assert that St. Croix, in its brief filed with this Court and during the District Court proceedings, failed to specify the manner in which there had been violations of its procedural rights. The Federal Defendants further claim that neither the Guidance Memorandum nor Interior's decision to conduct the Part 151 determination first have any effect on St. Croix. Br. at 42. That statement gets to the crux of the matter. With its pending application before Interior for decision (having been favorably recommended for approval by the BIA Regional Office), the St. Croix Tribe was demonstrably effected by both Interior's reversal of course and its Guidance Memorandum. With respect to its decision to make the Part 151 determination first, without public notice or explanation of its decision, the Tribe was not provided with notice of this procedural change nor the reasons therefor. That is the fundamental requirement behind *State Farm*. The Tribe had a legitimate expectation that its application would be decided, consistent with Interior's historical practice and Congressional intent expressed in IGRA, by having the gaming considerations first determined under the two-part IGRA

determination. The Tribe had the further legitimate understanding and expectation that the Part 151 decision would be made only with respect to the jurisdictional issues, after any favorable two-part IGRA determination and concurrence by the Governor. With respect to the Guidance Memorandum, the St. Croix Tribe suffered procedural injury in that it was obviously issued by Interior for use not only for the pending Beloit Application but other similar applications. The Guidance Memorandum was a legislative rule which failed to comply with the APA's notice and comment provisions. Further, the Guidance Memorandum was issued in violation of Interior's prior commitment to promulgate fee-to-trust standards only through rule making after consultations with Indian tribes. See the Tribe's opening brief at 51.[4]

The Federal Defendants rely on *Center for Law and Education v. Department of Education*, 396 F.3d 1152 (D.C. Cir. 2005) for their contention that the St. Croix Tribe had no concrete interest in this procedural rights case or issue. Br. at 42-43. However, in *Center for Law and Education* at 1157, the Court made it clear that the procedural rights at issue were insufficient for standing in that they were not designed to protect some concrete interest of the organizations. According to the Court, the only interest arguably enjoying implicit protection

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[4] In their responsive brief, the Federal Defendants do not deal with these issues.

were those of parents, students, educators and education officials. *Id.* Similarly, in the case at bar, Indian tribes, including the St. Croix Tribe with a pending application before Interior, were directly impacted by Interior's change of course and its issuance of the Guidance Memorandum. The St. Croix Tribe clearly enjoyed, at a minimum, implicit protection.

The Federal Defendants place reliance on the Supreme Court's recent decision in *Summers v. Earth Island Institute, et al.*, 129 S. Ct. 1142 (2009). Br. at 38 and 40. The Court's holding in *Summers* does not diminish the Tribe's standing. Indeed, the Court held " . . . respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above." (emphasis in original). *Id.* at 1149. In its decision, the Court looked to the specificity of affidavits submitted by organization members as to the imminence of their plans to visit various sites under the control of the Forest Service. *Id.* at 1149. For example, an affidavit submitted by Jim Bensman asserted that he had suffered injury in the past from development on Forest Service land (without identifying any particular site). The Court held that, because this affidavit dealt with past injury, rather than imminent future injury, this did not suffice to satisfy the standing requirement. *Id.* at 1150.

No such arguments can be leveled against the St. Croix Tribe's standing claims. They did not relate to past injury but instead to imminent future injury --

Interior's change of course without complying with *State Farm* and its issuance of the Guidance Memorandum which failed to comply with the APA's rule making requirements.

Finally, in its opening brief, the Tribe at 54 stated that the Article III standing requirements for action seeking relief under the Declaratory Judgment Act were set forth by the Supreme Court in *MedImmune.* The Tribe further asserted at 55 that this Court had earlier addressed the Article III standing requirement for declaratory judgment in its decision in the *City of Houston, Texas v. HUD*, 24 F.3d 1421, 1430 (D.C. Cir. 1994). The Federal Defendants' responsive brief fails to discuss either of these decisions.

IV. THE TRIBE'S CLAIMS ARE RIPE

The Federal Defendants argue that the Tribe's claims are not ripe because they only involve the speculative claim of future injury -- what was, at that time, only the anticipated denial of the Beloit Application. Br. at 43-51. In addition to the authorities set out by the Tribe in its opening brief at 52-53, the Tribe submits that *General Electric* strongly supports the conclusion that its claims are ripe for judicial review.

The Court's discussion in *General Electric* of the ripeness issue began with the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). *General Electric, supra* at 380. Pursuant to *Abbott Laboratories*, the

Court held that it must evaluate the fitness of the issues for judicial decision and the hardship to the parties arising from withholding Court consideration. This Court further held that in determining the fitness of an issue for judicial review, it must look " . . . to see whether the issue is purely legal, whether considerations of the issue would benefit from a more concrete setting, and whether the agency's action was sufficiently final." (citation omitted). *Id.* This discussion, was of course, related to *General Electric*'s challenge to EPA's Guidance Document.

In arguing that there was no fitness of the issues for judicial review, the EPA contended that " . . . GE was asking the court to consider factual questions, such as how the EPA would evaluate an application that did not use either of the approaches to toxicity set out in the guidance document . . . ." *Id.* The EPA further asserted that the issues were not fit for review because "the Court's consideration would be aided by further application of the agency's position to particular facts" and that judicial review was premature because "adjudication may well prove unnecessary." *Id.* These arguments are strikingly similar to the Federal Defendants' herein. The Court rejected them, holding that the issues were fully fit for review. According to the Court: " . . . whether the Guidance Document is a legislative rule is largely a legal, not a factual, question, turning as it does in this case primarily upon the text of the Document . . . ." *Id.* The Court proceeded to hold that the Guidance Document was a final agency action because it marked the

consummation of the EPA's decisionmaking process and it determined the rights and obligations of both applicants and the Agency. *Id.*

The Tribe submits that the same conclusion should be drawn in this case. Its challenge to Interior's reversal of course, and to the issuance of its Guidance Memorandum, are purely legal in nature. Consideration of those issues would not benefit from a more concrete setting. And, the agency's actions are clearly final in nature. As the Court held in *General Electric*, "[W]e do not think 'the Court's consideration would be aided by further application of the agency's position to particular facts.'" *Id.* at 381.

With respect to the hardship issue, EPA argued that GE would not be harmed if the Court deferred review of the Guidance Document because GE could later challenge under the APA any decision of the EPA denying its application for risk-based alternative. *Id.* at 381. This mirrors the argument of the Federal Defendants herein.

There will be hardship to St. Croix if these issues are not reviewed and decided at this time. An amended complaint, or the filing of a new lawsuit, asserting the present issues together with Interior's more recent denial of the Beloit Application, would substantially expand the scope, complexity and expense of the litigation. There should be no hardship for Interior to have these issues reviewed and decided at the present time. Its reversal of course, in deciding to make the

Part 151 determination first, affects numerous tribes whose applications have been denied and others which are presently pending. The Guidance Memorandum similarly affects numerous tribes. The validity of these actions should be decided at this time by this Court so that Interior will not proceed down the path of making its administrative reviews and decisions based on an invalid new procedure (in violation of *State Farm*) and on the Guidance Memorandum which is a legislative rule issued in violation of the APA. To conclude otherwise would have the effect of fostering costly litigation by tribes across the country (many of which have limited financial resources to pay for litigation) whose applications were denied as the result of the process utilized by Interior in making the Part 151 determination first and its reliance on the Guidance Memorandum.

V. THIS CASE IS NOT MOOT

As set forth in its opening brief at 60-61, the St. Croix Tribe submits that the Supreme Court's decision in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) is strongly supportive of its position that this appeal is not moot despite Interior's denial of the Beloit Application. In their discussion of *Super Tire*, the Federal Defendants assert that St. Croix has not alleged any continuing injury as a result of Interior's procedures for considering fee-to-trust applications. Br. at 54. They further assert that unlike *Super Tire*, Interior's Guidance Memorandum and its internal procedures for processing fee-to-trust applications do not constitute a

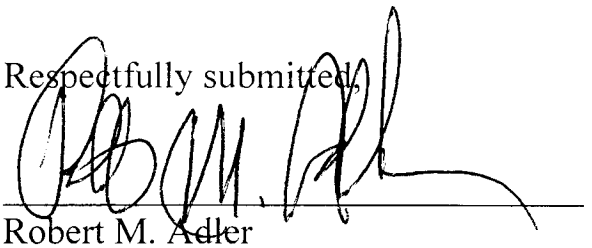
"continuing and brooding presence" having any sort of effect on St. Croix's interests. Br. at 54-55.

The St. Croix Tribe strongly disagrees. As the Federal Defendants recognize in their Brief at 56, the St. Croix Tribe could file another application with Interior to take land into trust. In that case, it would still be faced with Interior's decision to make the Part 151 determination first despite its noncompliance with *State Farm*. Interior would, absent judicial intervention, predictably rely on the Guidance Memorandum in its decision. Accordingly, both Interior's reversal of course and its Guidance Memorandum remain a "continuing and brooding presence." Further, they have a " . . . substantial adverse effect on the interests of . . . " the St. Croix Tribe. *Super Tire*, 416 U.S. at 122. Separately or together, they substantially diminish the possibility of a favorable decision by Interior on any off-reservation casino application which the St. Croix Tribe might file wherein the location of the proposed casino facility is beyond a "commutable distance." Unless this Court hears and decides this appeal, this case decidedly presents an injury that is "capable of repetition yet evading review." *Clarke v. United States*, 915 F.2d 699, 703 (D.C. Cir. 1990).

CONCLUSION

For the foregoing reasons, the St. Croix Tribe respectfully submits that this Court should reverse the District Court's dismissal of its Complaint and remand this case for further proceedings consistent with this Court's decision.

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 6,943 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 Reply Brief of Appellant on the following:

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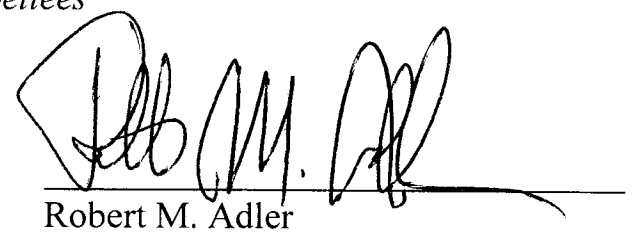

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