

**IN THE UNITED STATES THE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE ST. CROIX CHIPPEWA)
INDIANS OF WISCONSIN)
)
Plaintiff,)
)
v.)
)
DIRK KEMPTHORNE, et al.)
)
Defendants.)
_____)

Civ. No. 1:07-cv--02210-RJL
Next Scheduled Court Deadline:
Federal Defendants' Response to
Plaintiff's Motion to Seal on
February 1, 2008

NOTICE OF FILING

The St. Croix Chippewa Indians of Wisconsin ("Plaintiff"), by and through counsel, hereby files with this Court as Exhibit A hereto the Indian Gaming Paper dated February 20, 2004 ("Indian Gaming Paper"). This document contains redactions on pages 2 and 14 as agreed to by the parties.

As recited in the Indian Gaming Paper (page 1) to then Secretary Norton wanted to be informed as to ". . .what discretion, if any, the law provides her in regard to the approval of off-reservation Indian gaming acquisitions that are great distances from an established reservation, so-called 'far-flung lands'."

The Indian Gaming Paper provided Secretary Norton with an answer -- supported by a detailed analysis. It was authored by senior officials within the Interior Department. Its conclusions were supported by the Chairman of the National Indian Gaming Commission. This document has extraordinary significance to the issues presented herein in that it delineates the Interior Department's own view that the distance of a proposed casino from an established reservation could not, consistent with Congressional intent, be used as a basis to deny

off-reservation casino applications. Ignoring its own analysis, the Plaintiff submits that the Interior Department has and will continue to use distance as a basis for denying off-reservation casino applications, including the Plaintiff's.

To place the Guidance Memorandum into proper context, a brief recitation of the surrounding events is important. On July 9, 2003, Aurene Martin, the Acting Assistant Secretary - Indian Affairs testified before the Senate Committee of Indian Affairs with respect to IGRA. In her written testimony, she informed the Congress that a review was being conducted for the Secretary of the law relating to whether or not IGRA, under its two-part determination, would allow the Secretary to use as a factor the distance between the proposed gaming establishment and the tribe's reservation. On July 13, 2004, Ms. Martin, then holding the position of Principal Deputy Assistant, Secretary -- Indian Affairs testified before the House Committee on Resources, at an oversight hearing on off-reservation, restored and newly-acquired lands. She stated in her written testimony: "We have spent substantial effort examining the overall statutory scheme that Congress has formulated in the area of Indian self-determination and economic development." She went on to state that the two-part IGRA determination, on its face, did ". . .not contain any express limitation on the distance between the proposed gaming establishment and the tribe's reservation. . . ." *Id.* She then stated that the Department's review concluded that while the trust acquisition regulations provide broad discretion, IGRA does not authorize the Secretary to consider criteria other than the best interests of the tribe (and its members) and any detriment to the surrounding community. *Id.* While not identified as such in her testimony, it is clear that the Indian Gaming Paper embodied the substantial examination to which she referred.

The Plaintiff's First Amended Complaint asserts, *inter alia*, that the Guidance Memorandum issued by Assistant Secretary Artman on January 3, 2008 ("Guidance Memorandum"), in describing the negative impact that a distant off-reservation casino would have on reservation life, had no basis by way of evidence, studies or empirical data to support its postulated theories. Amended Complaint, ¶¶ 47-49. Count I (¶ 59) similarly asserted that the Guidance Memorandum was issued without factual support and the Interior Department did not consider all important aspects of the issue and otherwise relied on factors which Congress did not intend for it to consider. For these reasons, the Amended Complaint asserts (¶ 59) that the Guidance Memorandum is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law in violation of 5 U.S.C. § 706(2)(A). Count III of the Amended Complaint asserts in its ¶ 64 that the issuance by the Federal Defendants of the Guidance Memorandum constituted an *ultra vires* action which was in excess of the Interior Department's statutory jurisdiction, authority or limitations, or short of statutory right and was therefore unlawful pursuant to 5 U.S.C. § 706(2)(C). Count V of the Amended Complaint (¶ 69) asserts that the issuance of the Guidance Memorandum was in violation of the trust responsibilities owed by the Federal Defendants to Indian tribes, including the Plaintiff.

Perhaps nothing could more convincingly evidence the substantial merit in Plaintiff's allegations than the Interior Department's own extensive analysis and conclusions as embodied in the Indian Gaming Paper. As briefly described below, the Interior Department itself carefully looked at the issue as to whether Congress, in enacting the Indian Reorganization Act and the Indian Gaming Regulatory Act ("IGRA") intended that distance of a proposed enterprise, including a casino, could be used as a limiting factor. The answer was no.

