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

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Division No. 98-1

Before: Sentelle, Senior Circuit Judge, Presiding, Cudahy,
Senior Circuit Judge and Fay, Senior Circuit Judge

# FINAL REPORT OF INDEPENDENT COUNSEL

## In Re:

## BRUCE EDWARD BABBITT

CAROL ELDER BRUCE
Independent Counsel

August 22, 2000
Washington, D.C.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA** ciRCU[ft$_{ited}$ ^ court of Appeals
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In re: Bruce Edward Babbitt Division No. 98-1

Before: **SENTELLE**, *Presiding Judge*, **FAY** and **CUDAHY**, *Senior Circuit Judges.*

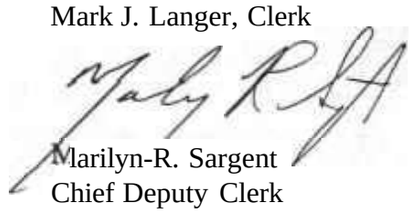
**O R D E R**

Upon consideration of the motion of Independent Counsel Carol Elder Bruce requesting authorization to release and publish her Final Report, it is

**ORDERED** that the motion be granted. It is therefore

**ORDERED, ADJUDGED,** and **DECREED** that the Final Report of Independent Counsel Carol Elder Bruce, inclusive of an appendix containing all comments or factual information submitted by any individual pursuant to 28 U.S.C. § 594(h)(2), shall be released to the public.

*Per Curiam*
For the Court:
Mark J. Langer, Clerk

by 

Marilyn-R. Sargent
Chief Deputy Clerk

## ACKNOWLEDGMENTS

Upon my appointment on March 19, 1998, as Independent Counsel in the matter of Bruce Babbitt, I immediately set about the task of assembling an able staff, finding office space, and reviewing the files of the Department of Justice's preliminary investigation of the matter. Having previously served as a Deputy Independent Counsel under Independent Counsel James C. McKay in the second investigation of Edwin Meese and as an Assistant United States Attorney for the District of Columbia, and having been a white collar criminal defense attorney for over ten years, I was familiar with the requirements and sensitivities of a significant public corruption probe.

I knew that the most important ingredient for achieving a just result was to hire lawyers, investigators, and support staff with strong legal or investigative case experience, integrity, good team skills, and excellent judgment. I also wanted a team wherein the players had no personal or political agendas and no sharp elbows or loose lips that would cause them to compromise the work of the office or needlessly damage other persons' reputations through the self-serving, unauthorized disclosure of confidential investigative information. As we submit this Final Report, I am grateful beyond words that we, in fact, were able to assemble precisely the team that was needed and that these professionals - each one of them - deserve the highest praise for their outstanding service to the United States government and to the cause of justice.

Special thanks and appreciation are in order for my Deputy and old friend, Cary M. Feldman. Cary and I were classmates many years ago at the George Washington University Law School and have enjoyed similar career paths since then. Cary brought an enormous dose of investigative experience to the investigation, having served for over six years in the U.S.

Attorney's Office for the District of Columbia, including as Deputy Chief of the Grand Jury Section, and having been a very able white collar criminal defense attorney thereafter. The most important by-products of that investigative experience were Cary's common sense instincts and his straight-forward, plain-speaking, analytical approach to dealing with and solving all manner of issues - administrative and investigative - that confronted us on our journey. Cary generally oversaw the work of the lawyers and also served in the very necessary but time-consuming roles as the Designated Agency Ethics Official and the press spokesperson for our Office. I am grateful to Cary's firm, Piper, Marbury, Rudnick & Wolfe, for allowing Cary to perform this public service and I am very grateful to Cary for his service.

I have been a lawyer conducting and defending against white collar criminal investigations for well over two decades and can say, without hesitation or doubt, that our three Senior Associate Independent Counsel who served as our three team leaders are among the best in the business. I owe each of them an enormous debt of gratitude. Each one of them were true professionals, skilled investigators, and respected leaders and, had there been any case to be brought, would have constituted an unparalleled trial team.

Phil Inglima headed the so-called Washington Team that principally investigated lobbyist and other contacts with Members of Congress, the Democratic National Committee, and the White House. A consummate, unflappable professional who sets the standard in case preparation and cross-examination skills, Phil's grasp of the facts and the issues were rivaled only by his own keen ability to sense when a question should be phrased differently, deferred, revisited, or dropped altogether in light of the witness's given answers. In short, Phil always was well-prepared for a witness but not wedded to a script, and possesses what every trial lawyer

wants - the ability to listen to a witness's answers and make adjustments in pursuing interrogation goals.

Mary K. Butler, a very experienced public corruption federal prosecutor from Miami, Florida, brought a consistently excellent level of performance to her management of the so-called Interior team, a team that investigated both the Interior Department's internal decision-making process on the Hudson casino matter and any outside contacts with the Interior Department relative to that matter. Mary's style of interrogation was exemplified by an unfailingly courteous manner coupled with a razor sharp awareness of all of the nuances of the facts and issues laid out before her and any witness. Mary also was the "point person" in all contacts with the Interior Department's lawyers on document production and served this Office and United States well in the careful, methodical way she identified any deficiencies or issues with such productions.

Shanlon Wu, an experienced federal prosecutor from the District of Columbia, had the greatest management challenge in organizing and leading the Wisconsin team in its investigation of tribal and lobbyist activity and local and regional community reaction relative to the Hudson casino proposal in places near and remote in Wisconsin and Minnesota. Shan displayed an ability for quickly garnering the loyalty and respect of lawyers, FBI agents and other investigative support personnel in this difficult and sensitive assignment. He inspired people to work long hours by his side and brought his considerable interpersonal skills and a polished, effective interrogation style to the task of collecting necessary evidence and testimony from disparate, sometimes difficult, sources.

I also am very grateful for the considerable contributions of Associate Independent Counsels David B. Deitch, Eric J. Glover, Andrew L. Wexton, Vicki J. Larson, and Christopher

P. Reid. Each worked on one or more teams in our small office to accomplish the investigation goals and each brought a different but invaluable professional experience and persona to the task. Eric, Andrew, and Vicki each had the benefit of having worked in large firms where they developed and honed their research, case organization, and writing skills. David had this experience, too, plus the added benefit of having served as an Assistant District Attorney in Manhattan. Chris brought the unique experience and perspective of having served on a United States Senator's staff and as a senior lawyer in the New Hampshire Attorney General's Office where he was responsible for, among other things, enforcing campaign finance laws violations. Each worked long hours and showed themselves to be excellent researchers, interviewers, and writers and each contributed mightily to the ultimate work product.

The Office also was very fortunate to have the extremely able assistance of a number of paralegals, law clerks, and FBI interns for the life of the investigation. Two of our law clerks - Dennis A. Somech and Melissa Handrigan - hailed from George Washington University Law School and two - Ashley N. Bailey and Eumi K. Lee - from Georgetown Law Center. All managed to juggle their full-time academic loads and the demands of this office seemingly effortlessly and each one made a significant contribution to the development of our legal analysis in this case. The paralegals, Jessica L. Hately, Miles Clark, Matthew J. Flaherty, Kelli A. Perkins and Bethany C. Frye often worked long hours to log in and plow through reams of documents and transcripts to assist the attorneys in preparing for interviews and grand jury examinations. Moreover, they each took the initiative to develop individual and discrete areas of evidence - from the campaign contribution histories of the individual tribes to the fine chronological and connecting details that emerged from a careful review of several persons' records - e.g., time log

and phone log entries and correspondence - surrounding key meetings and events.

The Office also reaped the benefits of having an experienced and able group of legal secretaries on board for the life of the investigation, including Reva L. Lovett-Grisby, Amy J. Hoy, Currie C. Gunn, Carol M. Counselman, and Linda M. Cincotta. They each took to their individual assignments with genuine professionalism, skill, and good humor. During the particularly demanding days of the grand jury segment of our inquiry, they worked long hours without complaint in supporting the work of the lawyers and FBI agents as we readied for witnesses or prepared the all-important reports of witness interviews. Amy had the additional and thankless job of coordinating attorney usage of grand jury time and, for a while, had to coordinate that usage with another independent counsel's office who was using the services of the same grand jury.

Near the end of our investigation we made the decision to reach outside our fine group of lawyers and other professionals to someone who could bring an independent and learned perspective to our case analysis. Were this Office a part of a broader prosecutor's office, this outreach would find us simply down the hall in the office of a colleague who had not worked on our particular case. But, being a one-case, independent investigative entity and wanting to preserve that independence, we chose to reach out to a respected academician who also happened to have substantial experience under his belt as a twice-serving Assistant United States Attorney for the Southern District of New York and a counselor to at least two prior Independent Counsels. I am most grateful to Professor Gerard E. Lynch, a constitutional and criminal law scholar at the Columbia University School of Law, for his willingness to serve on a consultant basis as Counsel to the Independent Counsel, despite his misgivings about the now expired

independent counsel statute. Prof. Lynch provided invaluable guidance in navigating the shoals of two important areas of law involved in this case: first, public corruption law where the case involves campaign contributions and, second, the law of perjury - perjury being an offense that received much national attention earlier this year with the presidential impeachment proceedings. Prof. Lynch's extraordinary ability to quickly master the facts necessary to any decision and his generous, dispassionate, and wise advice on the application of the law to these facts, was invaluable in shaping our factual and legal analysis in this Final Report. I am deeply grateful to him.

Valuable assistance also was provided by the Federal Bureau of Investigation. I am especially thankful to Supervisory Special Agent James H. Davis for his assistance in assembling and managing a team of agents in Washington, D.C., and St. Paul, Minnesota, and for running interference within the Bureau whenever our agent resources were threatened by competing Bureau needs. While I am grateful for the work of each of the numerous agents who served our office from time to time, I am particularly indebted to four agents who served the longest continuous stretch and who took great initiative at some considerable personal sacrifice to get the job done and get it done well. These Special Agents are Patricia Doyle, Pamela J. Lane, and W. Eric Paris of the Washington, D.C. Field Office and Paul A. McCabe of the Minneapolis Field Office. Their dedication and witness management and interrogation skills were of the highest caliber and they are a credit to the Bureau. Finally, I wish to express particular thanks also to two retired FBI Special Agents - Dag Sohlberg and John Schulte, who also served as investigators on our team. Their wisdom, experience, and good judgment in investigations involving local and regional political figures, citizen activists, and Indians from Wisconsin and Minnesota were

genuine assets for our team of lawyers who were in large part unfamiliar with investigations involving these particular constituencies.

Others within the Department of Justice similarly deserve our special thanks and appreciation. We were particularly pleased with the professional and mutually beneficial relationship we quickly established with the Campaign Financing Task Force ("CampCon") and with its two successive chiefs, first Charles LaBella and later, for the longer period of overlap with our investigation, David Vicinanzo. David, whose tenure corresponded more with ours, was generous in providing our Office with complete and important access to the CampCon database and to other investigative information. David readily agreed to coordinating with us carefully on the question of immunizing witnesses and entering plea bargains. Neither one of us wanted to take any prosecutorial or investigative step that would undermine the other, and both of us were eager for one or the other of us to bring to justice any people whom we could prove transgressed the law. The sharing of information and coordination of effort was conducted in such a way as to clearly enhance and never compromise or hurt the collection of evidence and the forward movement of our separate investigations. Such a relationship was contemplated by the independent counsel statute and it worked well in our case.

Likewise, I am grateful to Justice Department attorneys Stevan Bunnell and JoAnn Farrington and to Assistant Attorney General, Criminal Division, James K. Robinson for their assistance throughout our investigation in revisiting and reaffirming the breadth and boundaries of our investigative mandate. Again, this type of consultation and coordination was specifically contemplated by the now expired independent counsel statute and worked extremely well for us in our particular case.

There are others to whom we owe special thanks, including the United States Attorneys in the Eastern and Western Districts of Michigan, the Eastern District of Wisconsin, and the District of Minnesota, for their assistance in identifying and providing Assistant United States Attorneys within their respective offices with whom we could consult on questions of law and fact concerning certain issues relating to Indian tribes and activities within their districts. We are particularly grateful to the United States Attorney for the District of Minnesota, B. Todd Jones, for his allowing us to finish our Wisconsin/Minnesota investigation from office space within his St. Paul office suite that was, happily for us, available for occupancy during the final few months of our investigation in his district. Similarly, we are thankful to Mary Schwappach, the Facilities Manager for the U.S. District Court in Minnesota, who graciously guided and supported us in our temporary rental of offices within the United States District Courthouse in St. Paul for the greater part of our inquiry in that district.

Further on the administrative front, I am grateful to the very able and consistently reliable assistance provided to us by James D. Sizemore of the Administrative Office of the U.S. Courts. Jim recently retired from government and his services will be greatly missed by all of the remaining independent counsel and their Administrative Officers. I also am very thankful for the assistance of Chief Deputy Clerk of Court, Marilyn Sargent, who provided very helpful and necessary guidance as to the Special Division's filing practices and procedures.

Last but far, far from least, I wish to thank my Administrative Officer ("AO"), Martha Jane Day, for all her tireless and extraordinarily capable efforts in running this Office. Martha had no prior experience as an AO, but came to the job with an impeccable reputation as a very effective legal assistant in a large law firm in Washington. Martha was the very first person I

hired and it is easy to imagine the many missteps and pitfalls we escaped due to Martha's able administrative management of this Office. I trusted my instincts in the wisdom of giving Martha free reign to manage the Office. She didn't disappoint me. She quickly mastered the often arcane government procurement, leasing, personnel and other regulations and as quickly enlisted the part-time services of an extremely talented accounting consultant, Philip J. Rooney. With Phil's able assistance and Martha's tight control systems, Martha was able to steer this Office through every GAO audit with perfect scores. She also did an extraordinarily good job in keeping costs down at every turn, including costs associated with a major and necessary office move and with two consecutive openings of offices in St. Paul. In addition to her extremely capable management, Martha is a truly decent and caring person who gave more than just her skills and good counsel to this Office and to me. She set the tone for a harmonious and healthy work place. I know I speak for every one who worked in this Office when I say we all benefitted greatly from Martha's management and her personal style and are very, very grateful to her.

There were others who worked in a full-time or part-time capacity for our Office during periods of the investigation whom I have not mentioned here. To every one of them, I am thankful for their contribution.

With the sunset of the independent counsel statute, there is uncertainty as to what the future holds should the Department of Justice determine that there is a high-placed government official who is accused of wrong-doing and the Department has a conflict of interest in investigating that person's conduct. Statute or none, I am of the humble belief that if a lawyer is appointed by some executive, judicial, or legislative body to investigate this hypothetical high-placed official and that lawyer has the good fortune to assemble a staff as capable and

professional as my staff was, the United States government and the public will be very well served and the integrity of the investigation and its findings will be above reproach. I am honored to have been appointed to the position of Independent Counsel in the first instance, and am deeply honored and fortunate to have had the assistance of such a fine and dedicated group of people.

Carol Elder Bruce
Independent Counsel

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## PREFACE

### A. The Mandate

On Feb. 11, 1998, Attorney General Janet Reno applied to the Special Division of the U.S. Court of Appeals for the District of Columbia Circuit for the appointment of an independent counsel "to investigate whether Bruce Edward Babbitt, Secretary of the Interior, committed a violation of federal criminal law in connection with his sworn testimony on October 30, 1997, before the Senate Governmental Affairs Committee, and to determine whether prosecution is warranted."[1] Secretary Babbitt had testified before the Committee on matters relating to the application of three Wisconsin Indian tribes to have land taken into trust by the United States, and to conduct casino gaming on that trust land. The testimony focused on his July 14, 1995, conversation with Paul Eckstein, a long-time friend and colleague of Secretary Babbitt, hired as a lobbyist for the applicants. Attorney General Reno based her request on a conclusion that there were "reasonable grounds to believe that further investigation is warranted into whether Secretary Babbitt may have violated a federal criminal law other than a Class B or C misdemeanor or an infraction in connection with his testimony about his conversation on July 14, 1995."[2]

On March 19, 1998, the Special Division issued an order granting the Attorney General's request, and appointing Carol Elder Bruce as "Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994, whether Bruce Edward Babbitt, Secretary of the Interior,

[1] 'Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel, In re Bruce Edward Babbitt (Feb. 11, 1998), at 1.

[2] *Id.* at 4.

may have violated federal criminal law, including but not limited to 18 U.S.C. §§ 1621 and 1001, in connection with" his Senate testimony.[3] "To the extent necessary to resolve the allegations that Secretary Babbitt made false statements concerning this decision by the Department of the Interior,"[4] the Court also authorized the Independent Counsel "to investigate the decision itself to determine whether any violation of federal criminal law occurred in connection with the Department of Interior's consideration of the application."[5]

B. **Structure of the Investigation**

To investigate Secretary Babbitt's testimony and the underlying Interior decision, lawyers employed by the Office of Independent Counsel (OIC) were divided into three teams, each of which focused on a different group of witnesses. The Department of the Interior Team focused on how the Department reached its decision on the Hudson casino application, as well as the law, policy and history of similar Indian gaming decisions. The team was led by Senior Associate Independent Counsel Mary K. Butler - an Assistant U.S. Attorney on detail from the Southern District of Florida - and included Associate Independent Counsels David B. Deitch and Andrew L. Wexton. The Wisconsin Team focused on the conduct of the Wisconsin and Minnesota Indian tribes - including both applicants and opponents - with respect to the Hudson application, and the state and local reaction to the proposal. That team was led by Senior Associate Independent Counsel Shanlon Wu - an Assistant U.S. Attorney on detail from the District of

[3]Order Appointing Independent Counsel, In re Bruce Edward Babbitt (March 19, 1998), at 1-2.

[4]*Id* at 2.

Columbia - and included Associate Independent Counsels David B. Deitch, Vicki J. Larson, Christopher P. Reid and Andrew L. Wexton. The Washington Team focused on the actions of lobbyists, political fund-raising organizations (such as the Democratic National Committee (DNC) and the Clinton/Gore '96 Committee), members of Congress and their staff, and the White House in relation to the Hudson casino application. The Washington Team was led by Senior Associate Independent Counsel Philip T. Inglima; it primarily included Associate Independent Counsel Eric J. Glover, with assistance from other OIC attorneys. Deputy Independent Counsel Cary M. Feldman assisted Independent Counsel Bruce in the overall supervision and direction of the investigation. He also served as the OIC's press spokesman and designated agency ethics official.

The OIC established a main office in Washington, D.C., and opened a temporary office in St. Paul, Minn. The FBI detailed a number of Special Agents to the two offices; their numbers varied throughout the investigation. Special Agent James H. Davis was assigned as the managing agent shortly after the investigation began. Due to a strain on FBI resources in St. Paul, the OIC also hired as special investigators two recently retired FBI Special Agents who had served long terms in the Minnesota and Wisconsin area. On certain occasions, the OIC also obtained the assistance of FBI Special Agents not otherwise affiliated with the OIC in connection with interviews or other investigative activities.

The OIC conducted its investigation with a grand jury empaneled by the U.S. District Court in the District of Columbia. A total of 167 grand jury subpoenas were issued and served for production of documents, resulting in the production of over 630,000 pages of documents, all

of which were reviewed by the OIC. In addition, the OIC conducted interviews of over 460 people; 58 individuals appeared as witnesses before the Grand Jury. As required by 28 U.S.C. § 594(f), the investigation was conducted in accordance with "the written or other established policies of the Department of Justice respecting enforcement of the criminal laws" to the extent not inconsistent with the OIC's mandate.

In the course of its investigation, the OIC examined certain other events in which people involved in the Hudson matter had been involved in similar patterns of conduct. In this regard, the OIC consulted closely with the Assistant Attorney General in charge of the Justice Department's Criminal Division and the Public Integrity Section of DOJ. These consultations were conducted to confirm that these matters fell within the scope of the OIC's investigative jurisdiction because of the potential for each such event to assist the OIC in evaluating the evidence relating to its core mandate.

Consistent with the letter and spirit of the independent counsel statute, the Department of Justice cooperated extensively with the OIC in sharing information and in determining the extent to which DOJ's and the OIC's interests in particular subject matters and witnesses were overlapping. In addition, the OIC was permitted access to substantial information from the database maintained by DOJ's Campaign Financing Task Force.

The OIC also reviewed the information - including documents and testimony - generated by three congressional investigations and two civil lawsuits relating to the Hudson proposal.

### C. Purpose and Approach of the Report to the Special Division

While the OIC's investigation resulted in the collection of an enormous amount of information, we do not attempt to recount all of that information in this Final Report. We recognize that when Congress passed the Independent Counsel Reauthorization Act of 1994, it placed great emphasis on the accountability function of the reporting requirement.[6] At the same time, Congress offered an admonition regarding the damage to reputation that can result from a final report that sets forth unflattering information not pertinent to the decision to bring or not bring charges against the target or any other individual:

> With regard to an individual whose conduct was only tangential to that of the person for whom the independent counsel was appointed, an independent counsel should normally refrain from commenting on the reason for not indicting that person unless it is to affirm a lack of evidence of guilt. On the other hand, the conferees consider to be crucial a discussion of the conduct of the person for whom the independent counsel was appointed to office. This discussion should focus on the facts and evidence and avoid the use of conclusory statements in the absence of an indictment.[7]

However, Congress also acknowledged that the public interest may require an independent counsel to explain, with conclusions based upon evidence and reasonable inferences therefrom, why a specific individual was not charged:

> The conferees believe that, in assessing whether an explanation should be provided with respect to a specific unindicted individual, an independent counsel should base the decision on whether it would be in the public interest for such information to be disclosed. The public interest encompasses a wide range of concerns which need be carefully balanced, including understanding the basis for

[6] "An independent counsel shall. . . before the termination of the independent counsel's office under Section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel. . . ." 28 U.S.C. § 594(h)(1)(B) (1998).

[7] H.R. Conf. Rep. No. 511, 103rd Cong., 2nd Sess., 1994, 1994 U.S.C.C.A.N. 792, 45-46.

> the independent counsel's decision not to indict; taking into account the extent to which the individual was central or peripheral to the independent counsel's jurisdictional mandate; exonerating the innocent; and protecting individual rights to due process, privacy and fairness.[8]

In recognition of these competing considerations identified by Congress, and balancing the public interest, we have adopted the following approach in the preparation of this Final Report. We describe at length the facts relevant to the Independent Counsel's mandate and, in particular, to the conduct of Secretary Babbitt, the person who is the focus of that mandate; but for the most part we avoid criticism of others more tangential to the investigation. In addressing Secretary Babbitt's conduct, we have sought to describe the facts and the reasonable factual inferences that can and should be drawn from those facts, and we provide an explanation for our decision not to seek an indictment. We believe such an approach is consistent with both the letter and the spirit of the law, and with the public interest.

[8] H.R. Conf. Rep. No. 511, 103rd Cong., 2nd Sess., 1994, 1994 U.S.C.C.A.N. 792, 45.

## I. SYNOPSIS OF EVENTS LEADING TO THE APPOINTMENT OF THE INDEPENDENT COUNSEL

By letter dated July 14, 1995, the Department of the Interior (DOI) denied a request by three Wisconsin Indian tribes to take land into trust in Hudson, Wis., for the purpose of conducting casino gaming on that property, citing the Indian Reorganization Act of 1934 and the Indian Gaming Regulatory Act of 1988.[9] Under certain provisions of these statutes, the Secretary of the Interior is authorized to accept off-reservation land to be held in trust by the United States for the benefit of an Indian tribe or tribes, and casino gaming can be conducted on that property if approved by the Department and the governor of the state in which the property is located. Under other provisions of these statutes, Indian gaming is authorized on-reservation and in other limited circumstances. Indian gaming has grown significantly during the 1990s, and has been an important tool of economic development for many poverty-stricken Indian tribes.[10] During this period, although there have been disputes between tribes and state governments, gaming on Indian reservations has gained some acceptance. On the other hand, proposals such as the one in Hudson - in which the tribes sought to have land taken into trust for gaming that was off-reservation, that is, outside of the tribes' reservations - typically have been unpopular and highly controversial. Through early 1995, Interior had approved about half of such requests that had made it past the regional offices to Washington, and the governors involved had then vetoed all

[9]The site of the proposed casino was an existing greyhound racing track in Hudson called St. Croix Meadows. Accordingly, this Report refers to the site of the proposed Indian gaming facility as the "Hudson dog track" and refers to the proposal as the "Hudson casino application," or "Hudson application."

[10]"American Indian groups, as officially recognized by DOI, are denominated by numerous terms, including "tribe," "band," and "community." For ease of reference, this report uses the term "tribe" solely as a generic term for a separate American Indian group recognized by DOI.

but one of those proposals. Interior based its denial of the Hudson application primarily on the opposition of the local community, including the opposition of a nearby Indian tribe with an existing gaming facility.

That denial led to the filing of a lawsuit on Sept. 15, 1995, in U.S. District Court in the Western District of Wisconsin by the three applicant tribes against the Secretary and three other DOI officials, seeking review of that decision. In their complaint, the plaintiffs alleged, among other things, that the denial of their application was arbitrary and capricious and that it was the product of improper political influence on the decision-making process within the Department of the Interior."

On July 12, 1996, the Wall Street Journal published an article entitled, *Midwest Indian Tribes Flex Washington Muscle In Successful Drive To Sink Rival Gaming Project.* The article highlighted the tactics of lobbyists retained by gaming tribes opposed to the Hudson proposal. In particular, the article quoted from a May 8, 1995, letter from Patrick O'Connor (a lobbyist for one of those tribes) to White House Deputy Chief of Staff for Policy and Political Affairs Harold Ickes, in which O'Connor stressed the tribal opponents' history of financial support for the Democratic Party. The article also recounted that O'Connor and the opponent tribes had met with Democratic National Committee National Chairman Donald Fowler to seek his assistance, and that Fowler subsequently contacted Ickes and perhaps DOI. The article noted that, between May 1995 and July 1996, approximately $70,000 in contributions had been made by three of the tribes opposed to the casino application. The article also described a conversation between Paul Eckstein (a lobbyist for the applicants) and Secretary Babbitt on the day the decision was issued,

"The lawsuit was recently settled pursuant to an agreement dated Oct. 8, 1999.

in which, according to Eckstein, Babbitt refused to delay issuance of the decision because Ickes "had called the Secretary and told him that the decision had to be issued that day." The strong implication of the article was that campaign contributions and pledges of contributions had caused the White House to intercede in the Department's consideration of the application.

Thereafter, the Chairman of the Senate Committee on Indian Affairs, Sen. John McCain (R-Ariz.), wrote letters on July 19, 1996, to Secretary Babbitt, Deputy Chief of Staff Ickes and President Clinton seeking answers to a series of questions about possible impropriety in the decision on the Hudson casino application. In particular, Sen. McCain focused on the allegation that campaign contributions, or promises to make such contributions, led the White House to pressure Interior to deny the application. McCain asked specific questions about Babbitt's statements to Eckstein and about White House and DNC involvement in Indian matters.

Secretary Babbitt responded to Sen. McCain in a letter dated Aug. 30, 1996. In the letter, Babbitt denied knowledge of any attempt to influence improperly the decision-making of the Department on the Hudson proposal, and asserted that his staff was likewise unaware of those efforts. With respect to Eckstein's allegations about their meeting, Babbitt stated:

> I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay. I never discussed the matter with Mr. Ickes; he never gave me any instructions as to what this Department's decision should be, nor when it should be made.

In a reply letter, Sen. McCain said that he was satisfied by Secretary Babbitt's explanation.

During 1997, the media reported a number of alleged improprieties relating to campaign fund-raising by the Democratic Party during the 1996 elections. Although the allegations encompassed a variety of matters, many shared the common theme that access to or influence

with the Clinton Administration had been purchased with campaign contributions. Citing these allegations, the Senate Committee on Governmental Affairs, chaired by Sen. Fred Thompson (R Tenn.), conducted a series of hearings relating to campaign fund-raising for the 1996 elections. As one aspect of that investigation, Sen. Thompson's Committee subpoenaed a broad range of documents from DOI relating to its Hudson decision, and took depositions from a number of DOI employees involved with that decision. The Committee also deposed lobbyists, and DNC and White House officials.

Thompson's Committee sought to conduct a private interview of the Secretary about the Hudson decision. Because Interior officials felt that the Committee had selectively leaked testimony that suggested wrongdoing by the Department, the Secretary declined to be interviewed privately, but agreed to testify publicly during the hearings. The Secretary sent an Oct. 10, 1997, letter to Sen. Thompson confirming his unwillingness to be interviewed privately. In doing so, he also made a statement about the Eckstein conversation and the Hudson application:

> [W]hile I did meet with Mr. Eckstein on this matter shortly before the Department made a decision on the application, I have never discussed the matter with Mr. Ickes or anyone else in the White House. Mr. Ickes never gave me instructions as to what this Department's decision should be, nor when it should be made.
>
> I do believe that Mr. Eckstein's recollection that I said something to the effect that Mr. Ickes wanted a decision is correct. Mr. Eckstein was extremely persistent in our meeting, and I used this phrase simply as a means of terminating the discussion and getting him out the door. It was not the first time that I have dealt with lobbyists by stating that the Administration expects me to use my good judgment to resolve controversial matters in a timely fashion, nor do I expect it to be the last.

The Secretary also used his letter to explain the administrative process for decisions such as the Hudson denial.

News accounts immediately after Secretary Babbitt sent this letter declared that Babbitt's account of his conversation with Eckstein in the letter to Sen. Thompson conflicted with that in his Aug. 30, 1996, letter to Sen. McCain. The reported points of conflict concerned comments attributed to Babbitt by Eckstein suggesting that White House pressure had improperly influenced the Department's decision-making process.

Following these media accounts, on or about Oct. 14, 1997, the Department of Justice commenced an initial inquiry pursuant to the Independent Counsel Act. Two weeks later, on Oct. 30, Secretary Babbitt testified under oath concerning these allegations before the Senate Committee on Governmental Affairs. His statements before that Committee became the focus of the inquiry by the Department of Justice.[12] These facts and circumstances were at the center of the Attorney General's request to appoint an independent counsel for further investigation of possible violations of criminal law.

The essence of the Independent Counsel's mandate was to determine whether Secretary Babbitt violated federal criminal law in connection with his Senate testimony regarding the Hudson decision and, to the extent it would help to resolve that issue, to determine whether Interior's consideration of the Hudson application was criminally corrupted. With respect to Secretary Babbitt's Senate testimony, the investigation focused on two main areas of potentially false and perjurious testimony: his testimony about what he said in July 1995 to Eckstein about

[12]On Jan. 29, 1998, Secretary Babbitt also testified before the House Committee on Government Reform and Oversight, chaired by Rep. Dan Burton (R-Ind.).

Ickes's involvement in the Hudson decision, and his testimony as to whether he intended to mislead Sen. McCain in his letter to the Senator in August 1996.

For reasons described in this Report, the United States, by Independent Counsel Carol Elder Bruce, decided to decline prosecution and not to seek any indictments in connection with the Hudson casino application and decision, or the congressional testimony of Secretary Bruce

## II. REVIEW OF EVIDENCE

### A. Origins of the Hudson Casino Proposal

Although Indian tribes have conducted games such as bingo for years, there has been a dramatic increase in gaming activity among Indian tribes since the late 1980s. From 1988 to 1996, about 110 of the 554 federally-organized tribes in the United States opened a total of 230 gambling facilities, more than half of which were full-fledged casinos.[13] By 1997, Indian gaming comprised approximately three percent of all U.S. gaming, with approximate gross revenue of $6 billion and approximate net revenue of $750 million. Gaming has become the largest source of income for some tribes, exceeding revenue from agriculture, and from oil, gas and mineral resources.

Gaming has brought new-found wealth to many tribes, but the benefits of gaming have not accrued equally to all tribes - in particular, not to those tribes located far from lucrative urban markets. Tribes with remote on-reservation casinos have sometimes sought to have land taken into trust for their benefit closer to urban areas, where gaming is generally more successful.

For tribes that have benefitted from gaming, the proceeds have permitted them to alleviate the high unemployment rates among their members, and to modernize the housing and infrastructure on their reservations. In addition, a few tribes have opted to make per capita distributions to members from tribal revenues, ranging from modest benefits to hundreds of

[13] O'Brien, Timothy L., *Bad Bet: The Inside Story of the Glamour, Glitz and Danger of America's Gambling Industry* at 138 (1998). The General Accounting Office reports roughly consistent statistics. According to the GAO Report, *Tax Policy: A Profile of the Indian Gaming Industry* at 3, 6 (May 1997), as of Dec. 31, 1996, 184 of the 555 tribes in the United States were operating 281 gaming facilities.

thousands of dollars a year per person.[14] With this new-found wealth, tribes - in most cases, for the first time - have participated in national political lobbying on business and policy issues and electoral campaigns on a large scale. It is the intersection of these phenomena - Indian gaming, lobbying, and campaign fund-raising - that forms the context for the Hudson casino controversy.

### 1. Indian Gaming in Minnesota and Wisconsin Is a Lucrative Industry in Which Established Participants Have the Ability to Protect Their Financial Interests

Minnesota Indian tribes led the opposition efforts against the Hudson casino proposal. A brief examination of the Indian gaming industry in Minnesota illuminates the economic motivations behind the Minnesota tribes' actions. Indian gaming in Minnesota is a highly lucrative industry, with gross annual revenue estimated in the hundreds of millions of dollars. Gaming is conducted by all 11 Indian tribes in the state: seven Ojibwe (commonly known as Chippewa) tribes located in the northern half of the state, and four Dakota (also known as Sioux) tribes located in the southern half of the state. Every tribe owns and operates at least one casino on its reservation; many operate two or even three casinos. The most lucrative casinos are located near the Twin Cities of Minneapolis and St. Paul, a metropolitan area of almost three million people.[15]

[14] For example, the Wisconsin St. Croix Chippewa tribe distributes between $ 1,000 and $1,500 to each member each month, while the Minnesota Shakopee Mdewakanton Sioux Community distributes at least $70,000 monthly to its members. In contrast, the Oneida Nation of Wisconsin - a tribe that has enjoyed great financial success from gaming - makes no per capita payments.

[15] A map of Minnesota and Wisconsin, denoting the locations of the relevant Indian tribes and cities (hereinafter "the Map"), is appended to the inside rear cover of this Report.

The most profitable casino complex is the Mystic Lake Entertainment Center owned and operated by the Shakopee tribe, located just 30 minutes southwest of Minneapolis. Although no tribe in the state makes its earnings public - to the contrary, every tribe guards its revenue figures as highly proprietary - it appears the gross revenue from the Mystic Lake casino alone approximates $200 million a year. All profits from the operations of the casino go to the tribe.[16]

Next, in terms of profitability, are the casinos owned and operated by the Mille Lacs Band of Ojibwe, located just 75 miles north of the Twin Cities. Total gross revenue from the Mille Lacs casinos (Grand Casino Hinckley and Grand Casino Mille Lacs) exceeded $50 million for the period 1991 to 1994. The Treasure Island casino owned by the Prairie Island Dakota Community, located about 50 miles southeast of St. Paul, and the Fond du Lac casinos round out the top four.[17] Not surprisingly, the Shakopee, Mille Lacs, and Prairie Island tribes - which stood to lose the most should a casino open in nearby Hudson - took the lead among Minnesota tribes in organizing the opposition.

To protect their financial interests, the 11 tribes joined together in 1988 to form the Minnesota Indian Gaming Association.[18] MIGA has been described as a sort of "clearing house" which monitors and informs its members about issues and initiatives affecting their industry.[19]

[16]The Shakopee also operate a smaller casino, Little Six, with gross revenue approximating $10 million per year.

[17]One of the Fond du Lac tribe's casinos is located off-reservation in downtown Duluth, Minn., on land taken into trust for the tribe by BIA prior to the enactment of IGRA.

[18]The White Earth tribe terminated its membership in MIGA prior to the association's lobbying activities on the Hudson application.

[19]OIC Interview of John McCarthy, Nov. 12, 1998, at 2.

John McCarthy has been MIGA's executive director since 1992. MIGA employs a lobbyist in Washington, D.C., Frank Ducheneaux, and a lobbying firm in the Twin Cities, North State Advisors, to work on state issues. Most of the Minnesota tribes also employ their own lobbyists[20] and these lobbyists, although not employed directly by MIGA, often work on MIGA's behalf to promote the tribes' common goals.

MIGA is officially governed by a three-member governing board - consisting of a Chairman, Vice-Chairman and Secretary-Treasurer - elected by the membership. During the pendency of the Hudson application, Myron Ellis (a tribal leader with the Leech Lake Band) initially served as the MIGA Chairman and Stanley Crooks (Chairman of the Shakopee Mdewakanton Sioux) was Vice-Chairman. Melanie Benjamin, a tribal officer with the Mille Lacs Band, served as MIGA's Secretary-Treasurer during this period. MIGA is funded primarily through dues paid by the member tribes, with most of its annual operating budget - which in 1994-95 was approximately $450,000 - paying fees for lobbying, public relations and consulting services.

In neighboring Wisconsin, Indian gaming is also common among the 11 recognized tribes with reservations in the state.[21] The Oneida Nation of Wisconsin, located near Green Bay, operates a highly successful casino that draws a large portion of its clientele from the Chicago area. The Ho-Chunk Nation, whose land is spread throughout 16 counties in south central

[20] *E.g.*, Virginia Boylan works for the Shakopee, Gerry Sikorski works for the Mille Lacs and Larry Kitto worked for several Minnesota tribes.

[21] *See* the Map.

Wisconsin, operates moderately successful casinos that draw largely from the same customer base.

The St. Croix Band of Chippewa Indians of Wisconsin - whose reservation includes land in five counties in northern and northwestern Wisconsin - operates two casinos; the larger St. Croix Casino in Turtle Lake has annual gross revenue of approximately $100 million and annual net revenue of approximately $30 million. The potential effect of a Hudson casino upon the Turtle Lake casino became a focus of the opposition to the proposal.

The three tribes seeking to develop a casino in Hudson were the Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("LCO"), the Red Cliff Band of Lake Superior Chippewa Indians ("Red Cliff) and the Mole Lake Band of the Sokaogon Chippewa Community ("Mole Lake"). The LCO tribe is based in Sawyer County, in northwestern Wisconsin, and has a total enrolled membership of about 5,500. Almost 2,000 members live on the reservation, and more than 1,000 others live within 150 miles of the reservation. At the time of the Hudson application, the tribal Chairman was gaiashkibos, who had held the post since July 1989. The tribe's operating budget at that time was around $20 million, with more than half of that coming from federal government programs. The tribe was carrying debt of more than $6 million. The tribe generated about $1.5 million in profits in 1993, and $1.8 million in 1994. At the time of the Hudson casino proposal, the LCO casino was moderately successful.[22] According to gaiashkibos, tribal unemployment at the time generally ranged from 45 percent in the summer months to 70 percent in the winter.

[22]Since that time, the LCO tribe has renovated its on-reservation casino, and it is now financially more successful.

The Red Cliff tribe is based in Bayfield County, on the northern-most tip of Wisconsin, and has a total enrolled membership of about 3,000, with almost half of the members living on or near the reservation. At the time of the Hudson application, the tribal Chairwoman was Rose Gurnoe, who took over the leadership role from her father in July 1993. In July 1996, George Newago, former Vice-Chairman, assumed the position of Chairman. Red Cliff has a small, financially-troubled casino on its northern Wisconsin reservation.

Like the Red Cliff tribe, Mole Lake suffered from severe economic disadvantages, including high unemployment rates, insufficient housing and limited resources for education or medical care. Based in Forest County, in northeast Wisconsin, the tribe had a total enrolled membership of about 1,500, with about one-third living on or near the reservation. At the time of the Hudson application, the tribal Chairman was Arlyn Ackley, who had held that post from 1983 to 1989, and again from 1993 to 1998. Ackley's unofficial Chief of Staff was DuWayne Derickson, a non-Indian employed as tribal planner who figured prominently in the Hudson application process. At the time of the application, the average income of tribal members was $7,000 per year.

Some Wisconsin tribes have off-reservation gaming. The Forest County Potawatomi Tribe operates a gaming facility in Milwaukee, and at least one casino - the St. Croix's Turtle Lake facility - was established off-reservation before the implementation of the Indian Gaming Regulatory Act of 1988.

Unlike the Minnesota tribes, the gaming tribes of Wisconsin have not sustained a strong, unified organization to represent their common political interests.[23] Though there was for a time the Wisconsin Indian Gaming Association (WIGA), it shared little in common with its Minnesota counterpart than the form of its name. WIGA was a loose confederation of the Wisconsin gaming tribes, and it disbanded in 1995 after a dispute relating to the Hudson casino proposal.

### 2. The City of Hudson Is an Attractive Site for Gaming Because of Its Proximity to the Twin Cities

Hudson is well-situated geographically to attract gaming customers from both Minnesota and Wisconsin. Located on the eastern shore of the St. Croix River, near the border of these two states, the City of Hudson is less than 20 miles from the major metropolitan area of the Twin Cities. The drive from downtown St. Paul to Hudson is along a major east-west highway, Interstate Highway 94 (1-94), and takes only a half-hour. Gaming, first in the form of dog racing and later in the form of a proposed Indian casino, emerged as a controversial issue within the Hudson community following a 1987 amendment to the Wisconsin constitution allowing parimutuel on-track betting.

In the fall of 1988, it became generally known that a dog track likely would be approved in each of five potential markets in Wisconsin, including one in western Wisconsin to service the Twin Cities area. Dog track promoters from across the country sent agents to the area to scout locations and to recruit local partners. The promoters understood that in order to receive a license, they would need to: (1) join with Wisconsin partners; (2) obtain local support in the form of a city council resolution; and (3) secure approval of the state racing board.

[23]Some witnesses did describe, however, an effort among the Wisconsin tribes to unify in 1997 in negotiations for renewal of their gaming compacts with the state.

Several proposals surfaced for a dog racing track in a community near the City of Hudson. The most promising proposal, which eventually was approved, was by a Florida company, HAH Enterprises, represented by Fred Havenick,[24] in partnership with a local businessman. The Havenick partnership purchased options on a large property located mostly in the neighboring Town of Troy, and proposed to annex the property into the City of Hudson.[25] This property had several advantages, including its easy access to the highway and, after annexation, hook-ups to the City of Hudson water and sewer systems.

The dog track proposal, however, soon attracted resistance from some Hudson and Troy residents. The resistance eventually included a lawsuit against the Hudson Common Council regarding the procedures used in voting for the zoning, a mayoral recall, a lawsuit about the recall, a new mayoral election, and a lawsuit brought by neighbors of the proposed site. In the fall of 1988, an advisory referendum was proposed by opponents of the dog track. The Hudson Common Council, however, postponed the referendum until a few days after the license for the

[24]Havenick became involved in dog tracks though his in-laws after his 1977 marriage to Barbara Hecht. The Hecht family had owned and operated dog tracks in Florida since 1953. Havenick became involved in the day-to-day management of Hecht family investments, including Southwest Florida Enterprises, Inc. ("Southwest"), which owned the controlling interest in several Florida racetracks.

Southwest also acted as a parent company, creating subordinate companies to do business in other states. Southwest created Croixland Properties Limited Partnership ("Croixland") to own the Hudson dog track, and HAH Enterprises of Wisconsin, Inc. ("HAH of Wisconsin") to operate the track. Because Wisconsin requires dog tracks to have a majority of Wisconsin owners, 59 percent of Croixland stock is held by Wisconsin state residents; HAH of Wisconsin, a wholly-owned Southwest subsidiary, owns the remaining 41 percent.

[25]Under Wisconsin law at the time, all that was needed to take the property away from the Town of Troy and annex it to the City of Hudson was agreement between the City of Hudson and the owners of the property. The Town of Troy had no way to prevent the annexation even if the town was against it. In fact, Troy opposed both the annexation and the dog track proposal.

dog track was granted. The license was granted on May 19, 1989. Although moot, the referendum was held, resulting in a vote of 1,289 to 810 against the dog track proposal.

The dog track built in Hudson was a state-of-the-art facility costing some $40 million. Construction, including state-mandated improvements to a highway exit and creation of a new access road to 1-94, delayed the opening of the dog track until June 21, 1991. In contrast, the four other Wisconsin dog tracks had already been operating since the spring and summer of 1990. This delay cost the Hudson dog track dearly because, by June 1991, the advent of Indian gaming had radically transformed the landscape of gaming in both Wisconsin and neighboring Minnesota.

Indian gaming in Wisconsin and Minnesota had begun in earnest following the United States Supreme Court's 1987 decision in *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 210 (1987),[26] and the 1988 passage of the Indian Gaming Regulatory Act (IGRA), *see* Section II.B. 1 .b., *infra.* Indian casinos had become widespread by the time the Hudson dog track opened. All the Wisconsin tribes negotiated gaming compacts,[27] with each entitled to one or two casinos. The growing number of Indian casinos adversely affected all five of the dog- racing tracks in Wisconsin, but the Hudson dog track - located near several successful casinos in both Minnesota and Wisconsin - suffered most of all. In particular, the Mystic Lake Casino (operated by the Shakopee Mdewakanton Sioux in Prior Lake, Minn.), the Grand Casinos Hinckley and Mille Lacs (operated by the Mille Lacs Band in Minnesota), Treasure Island (operated by the

[26] In *Cabazon,* the Supreme Court limited states' power to regulate gaming on Indian lands.

"Gaming compacts, required under IGRA, are agreements negotiated between Indian tribes seeking to conduct gaming and states containing the proposed sites.

Prairie Island tribe in Welch, Minn.), and the Turtle Lake Casino (operated by the St. Croix Chippewa tribe), all created debilitating competition for the Hudson dog track.[28] Furthermore, the track's building costs had been greater than that of other tracks, and its delayed opening had deprived it of a year or more of operation prior to the emergence of Indian casinos. Financial losses for the Hudson dog track mounted from opening day, eventually reaching up to $7 million a year.

### 3. The Hudson Dog Track Owners First Attempted to Establish An Indian Casino by Seeking a Partnership with the St. Croix Tribe in 1992

In an effort to make the Hudson dog track profitable, Fred Havenick began discussions in June 1992 with the St. Croix Band of Chippewa Indians about forming a partnership to develop a casino at the track.[29] Under the proposed partnership, the St. Croix Tribe would purchase the track and then seek to have the track taken into trust so that the tribe could operate a casino on the premises. The discussions involved both the tribe and its non-Indian casino management group, the Buffalo Brothers. On Aug. 12,1992, Havenick and the tribe announced their intention to form a partnership.[30]

In reaction to this announcement, the City of Hudson held a meeting of its Common Council on Aug. 17, at which citizens expressed their views on the casino proposal. At the end of the meeting, the Common Council passed a resolution opposing the casino proposal. The

[28]The location of each of the tribes is indicated on the Map.

[29]Prior to contacting the St. Croix Chippewa tribe, Havenick had unsuccessfully approached the Wisconsin state legislature about allowing slot machines at the track.

[30]The St. Croix had previously explored opportunities to establish off-reservation casinos in more lucrative urban markets such as the convention center in Spooner, Wis.

town board of the neighboring Town of Troy also passed a resolution opposing the proposal. Furthermore, the City of Hudson scheduled a referendum on the proposal for Dec. 3, 1992. The question put to referendum was:

> Do you support the transfer of St. Croix Meadows to an Indian tribe and the conduct of casino gaming at St. Croix Meadows if the tribe is required to meet all financial commitments of Croixland to the City?

The resulting vote was 51.2 percent to 48.8 percent in favor of conducting casino gaming at the Hudson dog track. State officials, however, considered the Hudson referendum vote too close to consider it evidence of local support for a casino. At the time, both Gov. Tommy Thompson and the Chairman of the Wisconsin Gaming Commission,[31] John Tries, expressed the view that the divided vote was not sufficient to gain their approval. The Town of Troy held its own referendum on Dec. 6, 1992, on the question, "Do you favor expansion of the present St. Croix Meadows Dog Track to Casino gambling?" The vote was 71 percent opposed. No other surrounding towns held referenda on the issue.[32]

#### 4. Minnesota Indian Gaming Association Opposition to the Initial Hudson Proposal

When the Minnesota tribes learned of the St. Croix's interest in establishing a casino in Hudson, the issue was put on the agenda for the next MIGA meeting, scheduled for Sept. 1,

[31]The Gaming Commission has had several names. It is now known as the Division of Gaming in the Department of Administration.

[32]However, Wisconsin held a statewide advisory referendum on gaming issues in April 1993. Voters at that time supported a constitutional amendment restricting gambling casinos in the state.

1992." The minutes of that meeting reflect a detailed discussion of such matters as whether the Hudson City Council and local community residents supported the initiative, whether the Governor of Wisconsin would approve the proposal, and how long the process for petitioning to put the land into trust would actually take. At the end of the discussion, it was decided that MIGA would refrain, for the moment, from taking any position. One attendee's notes reflect that the membership wanted to oppose the St. Croix proposal at that time, but decided to wait until they could discuss the issue with Wisconsin tribes. According to MIGA minutes, MIGA also may have refrained initially out of reluctance to interfere with another tribe's sovereign decisions.

In October 1992, MIGA did take a public position. A lengthy discussion of the St. Croix Tribe's proposal occurred at an Oct. 15 meeting, after which the MIGA membership voted to approve a resolution formally opposing the St. Croix's efforts. Specifically, MIGA passed Resolution No. 3-92, which opposed "any attempt by the State of Wisconsin, or others, to operate a tribal gaming facility off reservation at the Hudson Wisconsin Dog Track site."[34] The resolution was considered by all 11 tribes and passed by a vote of 10 to none, with one abstention.

MIGA Resolution No. 3-92 was drafted by Kurt BlueDog, a Minnesota attorney who at that time represented the Upper Sioux, Shakopee and Prairie Island tribes, and Franklin Ducheneaux, MIGA's Washington lobbyist. The resolution invoked Section 20(b)(1)(A) of the

[33]This is the first reference to the Hudson casino proposal that appears in MIGA's minutes.

[34]MIGA Resolution No. 3-92, Oct. 15, 1992.

Indian Gaming Regulatory Act, and asserted it "clearly requires that any such action by the Secretary be taken only after consultation with 'officials of other nearby Indian tribes' so that the economic interests of those tribes, which might be impacted by such action, can be protected."[35] The resolution, as adopted, claimed that "no consultation has been held in this situation and several of the Minnesota Indian Gaming Association tribes will be impacted by this action," and asserted that MIGA "has gone on record opposed to any expansion of gaming activity, if that expansion is off reservation." The resolution concluded by requesting "the intervention of the Secretary of Interior, the Governor of the State of Minnesota, and the Governor of the State of Wisconsin to stop all such action from occurring." On Oct. 21, 1992, MIGA enclosed the resolution in a letter to then-Interior Secretary Manuel Lujan expressing MIGA's formal opposition to the St. Croix proposal.

Within the next two weeks, both the Prairie Island and the Shakopee Mdewakanton Sioux also passed resolutions opposing the St. Croix's efforts to place the Hudson land in trust for gaming.[36] The two resolutions were essentially carbon copies of the one passed by MIGA earlier that same month, although the Shakopee made the additional assertion that the geographical area

[35]MIGA Resolution No. 3-92. Ducheneaux, who served for 18 years as counsel to the U.S. House of Representatives subcommittee concerning Indian affairs, was one of the principal drafters of Section 20, and it was he who insisted during the drafting process that the law include a provision requiring consultation with "nearby tribes." Grand Jury Testimony of Franklin Ducheneaux, May 5, 1999, at 9-12 (hereinafter "Ducheneaux G.J. Test.").

[36]BlueDog played a leading role in drafting these resolutions as well, as he was General Counsel to both tribes at the time.

in which the Hudson dog track is located "has historically been Sioux (Dakota), aboriginal territory, for centuries."[37] Both resolutions also were forwarded to Secretary Lujan.

While all three of these resolutions complained that DOI had not consulted with nearby tribes about the proposal, such assertions were premature because the St. Croix tribe had not yet applied to take the Hudson dog track land into trust. The St. Croix never did file such an application with the DOI; negotiations between the track owners and the tribe stalled, and they could not agree on final terms for the partnership.

### 5. The Hudson Dog Track Owners Form the Four Feathers Partnership with Three Wisconsin Indian Tribes in a Second Effort to Establish An Indian Casino at the Dog Track

Despite the failure of the potential St. Croix Chippewa partnership, Havenick and his partners took inspiration from the positive results of the December 3, 1992, referenda. Michael Brozek, a state lobbyist working for Havenick, hired John William ("Bill") Cadotte to assist them in recruiting other Indian tribes to join in a partnership that would seek to establish a casino at the Hudson dog track. Cadotte - a member of the LCO tribe with an MBA from Stanford - had been working as a consultant to a number of Wisconsin Indian tribes. Cadotte naturally approached LCO first, and by March 1993 LCO had agreed to be Havenick's first tribal partner. LCO was a particularly significant partner to gain because its Chairman, gaiashkibos, was at that time President of the National Congress of American Indians, a post that earned him national prominence.

[37] "Shakopee Mdewakanton Sioux Community Business Council Resolution No. 10-28-92-001, Oct. 28, 1992, at 2.

In the fall of 1993, the Red Cliff tribe joined the partnership. Havenick and tribal representatives from LCO and Red Cliff soon thereafter met with Gov. Thompson. They came away from the meeting believing that the Governor would view more favorably an effort by three tribes, rather than two, seeking to take land into trust. Havenick and Cadotte then approached several tribes about becoming the third tribal partner. After another set of unsuccessful discussions with the St. Croix tribe, they reached agreement in September 1993 with the Mole Lake Band of the Sokaogon Chippewa Community. As discussed previously, all three of these tribes were among the poorest tribes in Wisconsin.

The three tribes and the dog track partners (headed by Havenick) named their partnership the Four Feathers Casino Joint Venture ("Four Feathers"). On the Havenick side, Galaxy Gaming and Racing Limited Partnership ("Galaxy Gaming") - the Hecht family's representative entity in the Four Feathers Partnership - was created to manage and jointly operate the casino and racing facility pursuant to a joint operating agreement.

On Oct. 12, 1993, the three tribes submitted to the Minneapolis Area Office (MAO) of DOI's Bureau of Indian Affairs (BIA) an application seeking to take portions of the Hudson dog track land into trust, for purposes of operating a casino at the site through Four Feathers. The plan called for Croixland, the owner of the dog track, to sell the land under the track itself (about 55 acres) to the three applicant tribes for $1. Upon approval, that land would then be placed in trust by the federal government for the benefit of the tribes. The facilities (including the buildings and other fixed assets and improvements on that land) would be owned by economic development corporations (EDCs) established by each of the three tribes. A majority of the dog track's $39 million mortgage would be transferred from the land to the facilities (because land to

be placed in trust must be free of all encumbrances), and the mortgage obligation would be assumed by the tribal EDCs.

Land adjacent to the casino itself - consisting primarily of the parking lot (about 60 acres) - would be owned in equal parts by the three tribes and Croixland (as a parking lot joint venture). Also, the portion of the $39 million mortgage attributable to the parking lot would be assumed by the joint venture. The parking lot venture would rent the parking lot to the tribal EDCs at a rate essentially equal to the mortgage payments. The casino would be managed by Galaxy Gaming and the three tribes under a joint operating agreement, which called for each party to receive 25 percent of the net cash flow, after debt.

The Four Feathers partnership soon commenced negotiations with the City of Hudson and St. Croix County to reach an agreement for government services, such as additional police presence needed for the expected casino customers. The agreement would specify financial contributions to be made by Four Feathers towards the cost of providing such services. The agreement also would serve to compensate the city and county for the potential loss of tax revenues from the land taken into trust. Negotiations concerning the agreement for services were concluded on April 18, 1994, when the agreement was signed by LCO, Red Cliff, Mole Lake, their economic development commissions, the City of Hudson and the County of St. Croix.

## B. The BIA Area Office Consideration of the Hudson Casino Proposal

### 1. Legal Framework and Procedures Governing Land to Trust Acquisitions for Off-Reservation Gaming

In deciding whether to approve or deny the Hudson application, DOI employees had to apply principally two statutes: the Indian Reorganization Act of 1934 and certain regulations implementing the statute, and the Indian Gaming Regulatory Act of 1988.

#### a. The Indian Reorganization Act of 1934

Section five of the Indian Reorganization Act (IRA) authorizes the Secretary of the Interior "in his discretion, to acquire ... any interest in lands, water rights, or surface rights to lands, within or without existing reservations,... for the purpose of providing land for Indians."[38] Under IRA, land can be taken into trust for Indian governments and individuals.[39] The statute was intended to remedy the effects of legislation passed in the 19th Century that enormously decreased tribal-owned land by allotting reservation lands to individual Indians and non-Indians.[40]

Since the passage of IRA, tribes and tribal members have prevailed upon DOI to take land they own into trust for their benefit for a wide variety of purposes - including gaming, as well as other forms of economic development. Tribes with "checkerboard" reservations interspersed

[38]25 U.S.C. § 465 (1995). The statute authorizes acquisition through "purchase, relinquishment, gift, exchange or assignment... for the purpose of providing land for Indians." *Id.*

[39]Under IRA, tribes eligible for land in trust benefits are those federally recognized tribes with constitutions approved by DOI.

[40]McSloy, *Back to the Future: Native American Sovereignty in the 21st Century,* 20 N.Y.U. Rev. L. & Soc. Change 217, 248 (1993).

with non-tribal land have off-reservation land put into trust to create larger contiguous tribal lands within the reservation's boundaries. If tribes or their members acquire fee title to lands, they are subject to the same taxation and other jurisdiction as any other landholder. If, however, a tribe or tribal member acquires property and the title to such property is held by the United States in trust, the land is not subject to state or local control, including state or local taxation.[41] Thus, tribes gain sovereignty - albeit limited - over those lands held in trust.

In 1980, the Department of the Interior promulgated regulations to govern its exercise of authority to take land in trust under IRA. These regulations, contained in Chapter 25, Part 151 of the Code of Federal Regulations (Part 151), set forth the procedures to be used and factors to be considered when the Department reviews a trust land acquisition. Until they were amended effective June 23, 1995, 25 C.F.R. § 151.10 listed the following factors:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
(b) The need of the individual Indian or the tribe for additional land;
(c) The purposes for which the land will be used;
(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from removal of the land from the tax rolls;
(f) Jurisdictional problems and potential conflicts of land use which may arise; and
(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional

[41] 25 U.S.C. § 465; *see e.g., U.S. v. Anderson,* 625 F.2d 910, *cert, denied,* 450 U.S. 920 (1980).

> responsibilities resulting from the acquisition of the land in trust status.[42]

One of the June 1995 amendments specifically provided that as the distance from the reservation increases, "greater scrutiny" be given to the "tribe's justification of anticipated benefits from the acquisition" in trust, and "greater weight" be given to the acquisition's potential impacts on the regulatory and taxing jurisdiction of the state and local governments.[43]

IRA governs acquisitions of land to be held in trust regardless of whether or not the purpose of the acquisition is to conduct casino-style gaming. Where gaming is the purpose of the acquisition, however, the tribe's request also implicates the Indian Gaming Regulatory Act of 1988.

[42] 25 C.F.R. § 151.10 (1994).

[43] 25 C.F.R. § 151.11(b) (1995). Interior has made at least two prior unsuccessful attempts to provide some guidance, by published policy and regulation, for the acquisition of off-reservation land, including acquisitions for gaming purposes. In February 1986 - prior to the enactment of IGRA in 1988 - the Department published in the Federal Register a "Notice of Policy Decision" in which it stated that it would be "the policy of the Department of the Interior to decline to accept off-reservation lands in trust for the purpose of establishing bingo or other gaming enterprises." 51 F.R. 5993 (Feb. 19, 1986). Following the announcement of this policy, in June 1987 the Department proposed a rule that "would prohibit the acquisition in trust status of lands located outside the boundaries of Indian reservations for individual Indians or Indian tribes if the purpose of the acquisition is to establish a bingo or other gaming enterprise." 52 F.R. 23560 (June 23, 1987). In January 1988, after receiving comments "overwhelmingly in opposition to the rule," the Department withdrew the proposed rule, noting that "in unique circumstances, a bingo enterprise, even though established on trust land outside the reservation boundaries, may be essential to the economic well being [sic] of a tribe which has a very limited natural or financial resource base." 53 F.R. 1797 (Jan. 22, 1988).

### b. The Indian Gaming Regulatory Act of 1988

The Indian Gaming Regulatory Act of 1988 (IGRA) was Congress's reaction to *California v. Cabazon Band of Mission Indians,*** in which the Supreme Court held that states had limited power over gaming on Indian lands. Specifically, the Court held that as long as state law did not explicitly prohibit a form of gambling altogether, tribes could conduct that form of gambling without complying with state or local laws concerning hours of operation, betting limits or other regulations.

Although Indian tribes have long been recognized as "distinct, independent political communities,"[45] the tribes possess only the *"inherent* powers of a limited sovereignty."[46] In other words, any power attributable to Indian sovereignty is not absolute; it "exists only in the absence of federal law to the contrary,"[47] and Indian tribes "are not beyond the reach of the federal law."[48] Thus, "tribal sovereignty does not extend to prevent the federal government from exercising its

[44]480 U.S. 202 (1987).

[4]-*Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832) *(quoted in United States v. Funmaker,* 10 F.3d 1327, 1330 (7th Cir. 1993)).

[46]F. Cohen, *Handbook of Federal Indian Law* 122 (1948) *{quoted in United States* v. *Wheeler,* 435 U.S. 313, 322, 98 S.Ct. 1079, 1086 (1978) and *Funmaker,* 10 F.3d at 1330) (emphasis in original).

^*Funmaker,* 10 F.3d at 1330 *(citing* U.S. Const. Art. I, § 8, cl. 3 (Congress has power "[t]o regulate Commerce . .. with the Indian Tribes")).

[48]M *(citing Worcester,* 31 U.S. (6 Pet.) at 560-61).

superior sovereign powers,"[49] because the "right of tribal self-government is ultimately dependent on and subject to the broad power of Congress."[50]

IGRA was an attempt to balance "the states' demands that their laws be enforceable on the reservations" and "the tribes' contentions that their sovereignty permitted them to develop gambling enterprises entirely according to their own regimes."[51] Congress recognized that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[52] At the same time, Congress "extend[ed] to States a power withheld from them by the Constitution" by offering states an opportunity to participate with Indians in developing regulations for Indian gaming.[53]

IGRA also divides all Indian gaming activity into three classes and assigns a separate regulatory scheme for each class. Class I gaming, comprised of "social games for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals," is subject to

[49] *Quileute Indian Tribe* v. *Babbitt,* 18 F.3d 1456, 1459 (9th Cir. 1994).

[50] *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 2585 (1980) *{quoted in Smart* v. *State Farm Ins. Co.,* 868 F.2d 929, 935 (7th Cir. 1989)).

[51] S. Levin, *Betting on the Land: Indian Gambling and Sovereignty,* 8 Stan. L. & Pol'y Rev. 125, 127 (Winter 1997).

[52] 25 U.S.C. § 2701(5) (1995).

[53] *^Seminole Tribe of Florida v. State of Florida,* 116 S. Ct. 1114, 1124 (1996).

tribal regulation alone, with no federal or state input.[54] Class II gaming includes bingo and non-casino card games played entirely in accordance with state law; such gaming is subject to tribal regulation with federal oversight, but with no input from the states.[55] "[A]ll forms of gaming that are not class I gaming or class II gaming" are considered class III gaming.[56] This includes casino' style gaming such as blackjack, keno, and roulette, as well as slot machines and video poker games. Class III gaming is subject to both state and federal control. The Hudson casino application was a proposal to conduct Class III gaming.

Under IGRA, tribes that wish to conduct Class III gaming on reservations must fulfill three requirements. First, the tribal government must adopt an ordinance authorizing such gaming, and that ordinance must be approved by the National Indian Gaming Commission.[57] Second, the land on which the gaming is to occur must be "located in a State that permits such gaming for any purpose by any person, organization, or entity."[58] Finally, the tribe must negotiate a "Tribal-State compact" with the state in which the land is located; that agreement

[54] 25 U.S.C. §§ 2703(6) and 2710(a)(1) (1995).

[55] 25 U.S.C. §§ 2703(7), 2710(b) (1995).

[56] 25 U.S.C. § 2703(8) (1995).

[57] 25 U.S.C. § 2710(d)(1)(A) (1995). The National Indian Gaming Commission (NIGC) is a federal commission created under IGRA. NIGC's approval of tribal ordinances and financial agreements governing the operation of casinos is independent of DOI's analysis of applications under IRA and IGRA. NIGC review can be sought simultaneously, but cannot be concluded until after DOI takes the land into trust because NIGC jurisdiction is generally limited to agreements and ordinances affecting land held in trust for Indians or land owned by Indians.

[58] 25 U.S.C. § 2710(d)(1)(B) (1995).

may include provisions for a wide variety of issues relating to the application of state law to the operation of gaming activities by the tribe.[59]

By its terms, the Indian Gaming Regulatory Act of 1988 prohibits gaming on any lands acquired in trust for the benefit of an Indian tribe after Oct. 17, 1988, unless the tribe's request to conduct such gaming falls under one of several enumerated exceptions. For example, IGRA's prohibition does not apply to on-reservation gaming - that is, where the land on which the contemplated gaming activity is "within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988."[60] There are also certain provisions in IGRA for gaming by tribes without a reservation or tribes that had obtained land through settlement of a land claim as of 1988. Some of the largest Indian-operated casinos in the U.S. were approved under these exceptions.

With respect to off-reservation gaming, Section 20(b)(1)(A) of the statute states that this prohibition against gaming will not apply if:

> The Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.[61]

[59] 25 U.S.C. § 2710(d)(3)(C) (1995). Such tribal-state compacts are also subject to approval by the Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B) (1995).

[60] 25 U.S.C. § 2719(a)(1) (1995). An "Indian reservation" is generally defined as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction" or, in some cases, the land constituting a former reservation of a tribe. 25 C.F.R. § 151.2(f) (1980).

[61] 25 U.S.C. § 2719(b)(1) (1995).

The requirement of IGRA that the Secretary make a two-part finding of "no detriment" to the community and "best interests" of the tribe was the focus of decision-making on the application to take land into trust for gaming in Hudson. Neither the statute nor the case law defines what constitutes the "best interest of the Indian tribe and its members," what circumstances would or would not "be detrimental to the surrounding community," or even what constitutes the "surrounding community," or how to identify the "nearby tribes." Moreover, the statute does not establish the quality or quantity of evidence necessary to support the Secretary's findings on these issues. These ambiguities formed an important context for consideration of the Hudson application.

In September 1994, the Bureau of Indian Affairs issued a "Checklist for Acquisitions for Gaming Purposes" ("the Checklist") to assure that a proposed land acquisition for gaming purposes "is fully documented prior to its submission to Central Office for review."[62] The document was circulated to Area Offices and in use by their staffs several months before the memo was officially distributed. Area Office staff said they used the Checklist in reviewing and processing the Hudson application. The Checklist set forth the topics that must be addressed by the Area Office in its consideration of and recommendation regarding an application to take off-reservation land into trust for gaming purposes in accordance with IGRA and the Part 151 regulations implementing IRA. It also provided limited guidance in interpreting some of the terms of IGRA.

[62]Memo from Acting Deputy Commissioner of Indian Affairs Patrick A. Hayes to all Area Directors, Sept. 28, 1994.

The Checklist provided that the Area Director is responsible for the consultations required under IGRA and IRA with applicants, nearby Indian tribes and state and local government officials. Consultation, according to the Checklist, will usually be conducted by letter, but not to the exclusion of other means, like public hearings. Through the consultation process, officials and nearby tribes are to be advised of the application and invited to provide specific information relevant to the two-part determination. Appropriate state and local officials under IGRA are defined as including the Governor of the state in which the land is located, and the government officials of any city, county, parish or borough within 30 miles of the site. Nearby tribal officials are defined as including tribal governing bodies of all tribes located within 100 miles of the site. Interior witnesses said the mileage limits in the September 1994 official Checklist have changed over time, and were based only on what seemed reasonable in terms of who could be affected by the decision. The Checklist also instructed Area Directors to give applicants an opportunity to address or correct any problem raised during the consultation process.

The Checklist further directs the Area Director to "prepare specific Proposed Findings of Fact with citations to supporting exhibits or documentation" and to forward them to the central office:

> These findings must address each of the factors of 25 CFR 151.10 but should include any additional findings independently made by the Area Director on issues or matters that will facilitate a decision. The Area Director's discussion or narrative of each Finding should lead the reader to conclude that the Area Director independently analyzed the factors and made the findings. Simply incorporating the findings made by the Tribe is not sufficient.

In language that tracks Section 20(b)(1)(A) of IGRA, the Checklist noted that, for off-reservation gaming acquisitions, "the Area Director must recite separate proposed factual findings to support a favorable determination by the Secretary that the gaming establishment on newly acquired lands is in the best interest of the tribe and its members and is not detrimental to the surrounding community." The appropriate Field Solicitor is responsible according to the Checklist for ensuring that the completed acquisition package addresses adequately all legal requirements.

Although intended as an important tool for the Area Office, the Checklist provided little specific guidance for interpretation of the two criteria governing the Secretary's determination under Section 20(b)(1)(A), that the application was in the "best interests" of the applicants and "not detrimental to the surrounding community." According to Hilda Manuel - former Director of the Indian Gaming Management Staff (IGMS) within the BIA and current Deputy Commissioner of the BIA - the Checklist was originally intended as an internal guide for Area Office employees, but was publicly distributed outside of BIA to tribes, contractors and developers following requests from interested parties.

Manuel stated that the drafting of regulations for the application of IGRA under the Administrative Procedures Act was underway during at least the period from 1991 to June 1995, but none were adopted. None of the draft regulations, however, purported to define the statutory terms. The failure to adopt regulations apparently was due to the press of other business and the relatively low priority IGMS assigned to the project.

The Checklist provides that the decision whether to permit gaming under Section 20 of IGRA may be made before all of the requirements for taking land into trust generally under IRA

and Part 151 regulations are satisfied, but cautions that where particular factors are important to both assessments, the Part 151 analysis should be completed simultaneously. The decisions, however, are separate. The Checklist expressly provides that a positive determination under Section 20 "does not constitute a final decision to acquire the land under Part 151."[63]

### 2. DOI Experience and Procedures for Reviewing Gaming Applications

In May 1998, Kevin Gover, the current Assistant Secretary for Indian Affairs, testified that, since the enactment of IGRA in 1988, only 10 applications to take off-reservation land into trust for gaming purposes had been forwarded to the Bureau of Indian Affairs central office for consideration.[64] Of these 10 applications, the Secretary made a positive two-part finding under Section 20(b)(1)(A) in five cases:

- the 1990 approval of a request by the Forest County Potawatomi Tribe of Wisconsin to take land into trust in Milwaukee;
- the 1992 approval of a request by the Siletz Tribe to take land into trust in Salem, Ore.;

[63]IGRA specifically provides that it does not "affect or diminish the authority and responsibility of the Secretary to take land into trust [under IRA]." 25 U.S.C. § 2719(c) (1988). Several DOI employees interviewed noted that, at the time the Hudson application was under consideration, there was no statutory or regulatory guidance as to whether DOI should first determine whether the tribe's request satisfies IGRA and then determine whether to take the land in trust under IRA or vice versa. George Skibine, the Director of the IGMS of the BIA beginning in February 1995, believed that information was to be gathered simultaneously for both determinations, but that DOI had to determine first that it would take the land into trust under IRA before determining whether it would permit gaming on those lands.

[64]Statement of Kevin Gover, Assistant Secretary-Indian Affairs, Department of the Interior, before the Committee on Indian Affairs, United States Senate, on Proposed Amendments to Section 20 of the Indian Gaming Regulatory Act of 1988 in S.1870, the Indian Gaming Regulatory Improvement Act of 1998, at 5. *See* Section II.B.l., *infra* (discussing procedure for applications).

the 1993 approval of a request by the Coushatta Tribe of Louisiana to take land into trust in Allen Parish, La.;

- the 1994 approval of a request by the Sault Ste. Marie Tribe of Michigan to take land into trust in Detroit; and

  the 1997 approval of a request by the Kalispel Tribe of Washington seeking a determination under Section 20 to permit gaming on off-reservation land already held in trust for the tribe in Airway Heights, Wash.

In only one of these five cases - the request by the Potawatomi Tribe - did the governor concur in the Secretary's finding. Accordingly, gaming was not permitted under the auspices of IGRA in the other four instances.[65]

Gover also testified that, since 1990, 12 parcels of land have been taken into trust for gaming in addition to the parcel sought by the Potawatomi tribe. All 12 fell under exceptions in Section 20 for lands on or contiguous to existing, former, new or restored reservations of the tribe making the request. These 12 were not subject to the Secretarial two-part determination found in Section 20(b)(1)(A) applicable to off-reservation gaming.

Also, IGRA specifically excluded from its prohibition gaming on lands taken into trust prior to Oct. 17, 1988. Similarly, Section 20(b)(1)(A) of IGRA does not apply to land taken into trust as a result of land settlement claims. Thus, while applications to take off-reservation land into trust for gaming command a high level of attention, they represent a relatively small portion of Indian gaming. There is obviously far more Indian gaming than these statistics suggest; much Indian gaming occurs "on-reservation."

[65]In the case of the Sault Ste. Marie Tribe, the tribe continues to pursue state approval to operate a casino in Detroit outside of the context of IGRA.

The Department of the Interior and its Bureau of Indian Affairs are charged with administrative oversight of the majority of issues affecting American Indians over which the federal government has jurisdiction. In 1995, some of these matters related to gaming or land in trust acquisitions, such as: judicial review of DOI's acquisitions; whether DOI would intervene in stalled compact negotiations between tribes and states; possible amendments to IGRA; threatened taxation of revenues from Indian gaming; and threatened deep cuts in the BIA budget. There also were numerous Indian affairs issues that were largely unrelated to gaming - relating, for example, to water rights, education, health care or other BIA funding issues. In 1995, there were approximately 75,000 employees at Interior, with BIA employing approximately 10,000 people, making it one of DOI's largest components.[66]

The BIA is divided into 12 geographic areas, each of which is managed by an "Area Office." In addition, within each area are several regional "Agencies," each of which deals with the whole range of issues affecting a particular tribe or group of tribes in its portion of the Area Office's region. In most cases, tribal contact with the BIA on everyday issues begins (and often ends) with the Agency. The Agency's actions are, in many cases, conducted at the direction of the Area Office, or subject to its review.

The Hudson casino application fell within the purview of BIA's Minneapolis Area Office (MAO), which interacts with tribes in Minnesota, Wisconsin, Michigan and Iowa. The Great Lakes Agency, the subdivision of the MAO located in Ashburn, Wis., responsible for interaction

[66] Other sections of Interior include the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, the Minerals Management Service, and the U.S. Geological Survey and the Bureau of Reclamation.

with 10 of the 11 recognized tribes with reservations in Wisconsin, was also involved in reviewing the Hudson application.

Denise Homer became the acting MAO Area Director in or about November 1993, and was made the permanent Director in the spring of 1994. Although Homer had previously served in several different capacities in the BIA, in the field and in Washington, she had no prior direct experience with gaming issues.[67]

Prior to July 1990, Area Offices had the authority to determine whether to grant or refuse applications to take land into trust - whether for on- or off-reservation land and whether for gaming or for some other purpose - although the Secretary of the Interior or his designee actually signed the documents taking the land into trust.[68] Gaming applications were then handled by the Area Offices and the BIA Office of Trust Responsibilities, with significant input from the Solicitor's Office.[69]

In July 1990, then-Secretary Manuel Lujan centralized the decision-making process for off-reservation gaming trust acquisition applications by reserving to the "central office" in

[67]Homer retired from the BIA in December 1995. She stated that neither her decision to retire nor the timing of that decision related to the Hudson application.

[68]According to a May 2,1995, briefing memo to the Secretary of the Interior issued by the IGMS staff about the legal and administrative process governing off-reservation gaming, in the period of January 1994 to February 1995, there were 360.98 acres taken into trust for four tribes in Minnesota for purposes other than gambling.

[69]The Office of the Solicitor is the legal counsel's office for DOI. Headed by a Solicitor, it includes a division of Indian Affairs - headed by an Associate Solicitor for Indian Affairs - that provides legal advice on most issues relating to tribes or tribal members. The Solicitor's Office also includes regional offices, known as Field Solicitors, that provide assistance to Area Offices and agencies. The Minneapolis Area Office and the Great Lakes Agency relied upon the Twin Cities Field Solicitor's Office for legal advice on their activities.

Washington the final authority to grant such applications. This change reflected a recognition of the increasing number of requests to take off-reservation land into trust for gaming and the complex issues that such requests implicated.[70] The policy was reaffirmed formally by Assistant Secretary for Indian Affairs Ada Deer in a May 26, 1994, memorandum to all BIA Area Directors. Under the centralized arrangement, the local agency was still responsible for working with the applicant tribe to collect the required information. Specifically, the Area Office was responsible for (1) ensuring that all of the necessary information was included with the tribe's application before forwarding it to the central office in Washington, D.C., and (2) making a recommendation based on that information. To address these gaming acquisition issues more effectively, in January 1992 Secretary Lujan also created the Indian Gaming Management Staff within the BIA. Area Office recommendations for off-reservation gaming were to be submitted to IGMS in Washington, which would review the Area Office recommendation and make its own recommendation to the Assistant Secretary.

Around March 1992, Secretary Lujan appointed Hilda Manuel as the first IGMS Director. Manuel served as Director through September 1994. In May 1994, Manuel was named acting Deputy Commissioner of the BIA, a career senior executive service position. She served both in that position and as the IGMS Director until September 1994, when she was formally appointed as Deputy Commissioner. In that office, Manuel is the operational chief of the BIA.

[70]Witnesses, including BIA Deputy Commissioner Hilda Manuel and former Solicitor's Office staff attorney Penny Coleman, confirmed that this policy change reflected these concerns, and was ordered amidst growing concern that Indian gaming was taking place without proper authorization or regulatory oversight.

George Skibine was named as the IGMS's second Director in approximately January 1995, and began serving in that capacity on Feb. 6. Prior to his appointment as IGMS Director, Skibine worked in the general Indian legal activities branch of the DOI Solicitor's Office, on matters involving Indian self-determination and claims against the United States.[71] Skibine had not worked on gaming issues while in the Solicitor's Office and had only a general familiarity with the issues involved in Indian gaming. Skibine had worked in the Solicitor's Office for approximately 18 years, and he explained that he sought the IGMS post because it offered an opportunity for economic advancement that was unlikely to present itself soon in the Solicitor's Office.[72]

Authority to determine policy issues on Indian affairs at Interior is vested in the Assistant Secretary for Indian Affairs. The position is one which requires presidential nomination and Senate confirmation. Ada Deer, a member of the Menominee Tribe of Wisconsin and a former elected leader of that tribe, served as Assistant Secretary for Indian Affairs from July 16, 1993, through November 1997. As a general matter, according to Deer and other DOI witnesses, Deer was not extensively involved in gaming decisions, which had been closely monitored by Secretary Babbitt's counselor, John Duffy, for nearly seven months by the time of Deer's confirmation. As discussed in greater detail later, Deer signed several letters responding to concerned parties but did not participate in the actual consideration of the Hudson application;

[71] Skibine reported that he continued to do extensive work throughout the spring, summer and fall of 1995 on matters over which he previously had responsibility at the Solicitor's Office, including proposed rulemaking for the Indian Self-Determination Act.

[72] When Skibine was named IGMS Director, he advanced one pay grade. Neither he nor any of his IGMS staff were political appointees.

ultimately Deer recused herself and delegated her authority to decide the Hudson matter to Deputy Assistant Secretary for Indian Affairs Michael Anderson.[73]

A large number of employees in the BIA are themselves members of Indian tribes, including Skibine, Manuel, Homer andThomas Hartman. However, none of the BIA employees who participated in the decision-making process on the Hudson application were members of the applicant tribes or of the Wisconsin and Minnesota tribes opposed to the application. The Menominee Tribe of Wisconsin - whose members include Assistant Secretary Deer and her assistant, Michael Chapman - did not advise BIA whether they supported or opposed the Hudson casino application. Although Chapman drafted letters for Deer's signature acknowledging receipt of information on the issue, and probably reviewed the draft denial letter, he did not participate in the meetings related to the decision-making process and had no decision-making authority himself.

Michael Anderson, BIA's Deputy Assistant Secretary during the period when the Hudson casino application was under consideration, is a political appointee. Prior to his appointment to that position in April 1995, Anderson had been Associate Solicitor for Indian Affairs since mid-

[73]Michael Anderson and other witnesses told investigators that there was nothing unusual about the delegation of the Assistant Secretary's decision-making authority down to the Deputy Assistant Secretary, although witnesses could cite no examples of delegation on off-reservation gaming decisions.

[74]The Associate Solicitor for Indian Affairs is the senior lawyer in the Solicitor's Office with responsibility for Indian issues, and reports directly to the Solicitor. Prior to Anderson's employment at DOI, he was Associate Counsel and then General Counsel of the Senate Special Committee on Investigations, and then the Executive Director of the National Congress of American Indians, an interest group for American Indian tribes.

The legal authority over nearly all matters in BIA is vested ultimately with the Secretary of the Interior. However, under both Secretary Lujan and Secretary Babbitt, much of this authority has been delegated to the Assistant Secretary for Indian Affairs. This includes the power to take land into trust for gaming.

Secretary Babbitt took office in January 1993. After graduating from the University of Notre Dame, Babbitt received a masters degree in geophysics from the University of Newcastle, England, where he studied on a Marshall scholarship. In 1965, Babbitt graduated from Harvard Law School. From 1965 to 1967, Babbitt worked for the U.S. Office of Economic Opportunity, first as an attorney in the Austin, Tex., field office - setting up Head Start, Legal Aid and other community action programs in the southwest - and then in the Washington, D.C. offices. In 1967, he joined the Phoenix law firm of Brown, Valassis & Bain, where he remained until 1974, becoming a partner during that time. He was elected and served as Attorney General of Arizona from 1975 until 1978. From 1978 to 1987, he served as Governor of Arizona. He became Governor upon the death of the incumbent, and thereafter was twice elected to the post. From approximately 1988 until 1993, Babbitt worked as a partner in the Phoenix office of the law firm Steptoe & Johnson, in a law practice that included some lobbying activities. During this period, Babbitt was also the President of the League of Conservation Voters. Babbitt was a candidate in the Democratic presidential primaries in 1988, and was seriously considered for appointment to the United States Supreme Court when President Clinton was filling vacancies in 1993 and 1994.

Secretary Babbitt's Chief of Staff was Thomas Collier from early February 1993 through June 1,1995. Collier had worked at Steptoe & Johnson, primarily in its Washington offices, from 1976 until 1979, and from 1981 until 1993. In the intervening period, he was a Deputy

Assistant Secretary of the Department of Housing and Urban Development. Collier said he became acquainted with Babbitt after Babbitt joined the Phoenix office of Steptoe & Johnson, where Collier had worked on certain matters. After leaving the chief of staff post, Collier continued to work at Interior during a brief transition period, and resigned from DOI effective July 1, 1995. Collier then returned to Steptoe & Johnson in Washington.

Several DOI employees reported that Collier kept very tight control over access to the Secretary. Matters of any significance within DOI usually came to Collier for transmission to the Secretary for a decision. Babbitt and Collier delegated responsibility for a number of Indian issues, including gaming, to John Duffy, a counselor to the Secretary.

The IGMS staff and other Interior witnesses indicated that Duffy was the Secretary's designated policy spokesman on gaming matters. Prior to his employment at DOI, Duffy was an attorney at the Baltimore law firm of Piper & Marbury. Duffy began working for DOI as a consultant in January 1993, and served as counselor to the Secretary from some time in 1993 until mid-July 1996, almost a year after the Hudson decision. As counselor, Duffy was ultimately responsible for formulating and overseeing the Secretary's policy on gaming issues. He routinely participated in discussions of policies related to gaming issues or specific applications. As previously mentioned, Duffy's authority over Indian gaming was enhanced by the fact that Assistant Secretary Deer was not significantly involved in Indian gaming issues.

Few Interior staff members said they had direct access to the Secretary. Collier and Solicitor John Leshy were the only two employees who had access limited solely by their own discretion and the Secretary's extensive travel schedule. Duffy worked directly with the Secretary on certain projects; on others he would communicate with Babbitt through Collier.

Leshy has been the Solicitor for Interior since May 1993. The Solicitor position requires presidential appointment and Senate confirmation. Leshy previously worked in the Solicitor's Office during the Carter Administration. He had returned to Washington from his professorship at the Arizona State University Law School to work as special counsel to the House Interior Committee when he was asked to work on the DOI transition team for the Clinton Administration in 1992. According to Leshy, it was not known that Babbitt would be nominated as Interior Secretary until after Leshy was already working on the transition. When Babbitt was named Secretary, Leshy expressed interest and Babbitt asked him to remain on as Solicitor. Leshy stated that he had known Babbitt as Governor and had been appointed by Babbitt's office to serve on various commissions and boards over the years. Leshy also told investigators that he had known and worked some with Paul Eckstein over the years. They had some interaction when Eckstein acted as prosecutor in the impeachment of a governor of Arizona, because Leshy had written on the aspects of the Arizona constitution that were involved in that proceeding. Leshy also noted that Eckstein serves on the Board of Governors of the ASU Law School.

V. Heather Sibbison was hired in 1993 as a special assistant to the Secretary to assist Duffy. Prior to her DOI employment, Sibbison was an attorney at the Washington law firm of Patton, Boggs & Blow. She had previously worked with Duffy as a law clerk at Pierson, Ball & Dowd, where Duffy had been a partner. At DOI, Sibbison worked closely with Duffy on gaming and other issues, and continued to work on gaming matters after his departure in mid-July 1996. Sibbison said she had some contact with Collier, but virtually no direct contact with the Secretary.

Michael Anderson reported that he had contact with Collier and some, but limited, interaction with the Secretary. Skibine stated he had frequent contact with Duffy and Sibbison, but had never met the Secretary, and had very little contact with Collier as of the time of the Hudson decision.

IGMS staffer Thomas Hartman said he had occasional contact with Duffy and Sibbison, but little with Michael Anderson or Collier and none with Babbitt. Hartman was one of the principal IGMS employees involved in the review of the Hudson application. Manuel hired Hartman in the late summer or early fall of 1994 as a financial analyst for IGMS. Hartman had an MBA from the University of California at Berkeley, and had been involved in several businesses, but had no prior experience with Indian gaming or applications to take land into trust. Hartman told investigators that Hudson was the first land into trust application in which he was directly involved.

### 3. Consultation Process and Review of the Hudson Application

In December 1993, in accordance with the draft Checklist, Minneapolis Area Office employees prepared form letters to fulfill the consultation requirement stating that the Four Feathers partnership had submitted an application to take land into trust and to conduct gaming in Hudson. The letters described the two-part IGRA test and solicited "findings and data" regarding whether the project would have a detrimental effect; responses were requested within 60 days.

The letters seeking comments were sent to virtually all Indian tribes in Minnesota and Wisconsin.[75] Although many of these tribes were well beyond the 100-mile radius set forth in the draft Checklist, the Twin Cities Field Solicitor had concurred with the MAO's recommendation that all tribes served by it should be consulted.[76]

Letters seeking comments also were sent to the local governments in the City of Hudson, the nearby Town of Troy and St. Croix County, in accordance with the Checklist requirement to consult with communities within 30 miles of the site. Consultation letters were not sent to the Governor of Wisconsin or to any other state or federal elected official.[77]

**a. Responses by Local Governments**

On behalf of the City of Hudson, Mayor Thomas Redner submitted to the MAO various materials with a March 17, 1994, letter. Redner wrote that the city had "a strong vision and

[75]The Menominee Tribe in Wisconsin was not included in the solicitation for unknown reasons.

[76]MAO witnesses said that the expansive consultation was made in light of the proximity of Hudson to Minneapolis, and perceived arbitrariness of the suggested radius in the Checklist. Some thought that a decision could be made later as to whether geographic proximity should be weighed in assessing the solicited comments. They also noted that in connection with the application made by the Sault Ste. Marie tribe in Michigan in 1994, the MAO consulted all tribes in the state of Michigan.

"Whether the Governor must be consulted at this early stage in the process, or whether such consultation could be deferred unless and until the Secretary sought his or her concurrence, was an open question at that time. According to the MAO employee directly responsible for work on the application, Tim LaPointe, the MAO staff believed that, for IGRA Section 20 purposes, the consultation requirement would be fulfilled when the Secretary sought the Governor's concurrence, assuming that the application was granted by DOI. In their view, the Governor should be consulted by the MAO only as part of the IRA and Part 151 analysis process. IGMS Director Manuel thought the MAO should have consulted the Governor and, in January 1995, she directed the MAO to do so; there is no evidence it was ever done by IGMS or the MAO.

planning effort for the future and that [the proposed casino could] apparently be accommodated with minimal overall impact, just as any other development of this size." The attachments to Redner's letter included the results of the Dec. 3, 1992, referendum in which 51.1 percent of voters supported allowing an Indian casino at the Hudson dog track.

The Board of Supervisors of St. Croix County - the county containing the site of the proposed facility - wrote a letter on April 15, 1994, to the MAO noting that BIA had failed to provide complete information about the size of the proposed operation to permit a complete impact analysis. Based on what is described as limited information, the Board stated that it "[could] not conclusively make any findings on whether or not the proposed gaming establishment [would] be detrimental to the surrounding community."[78]

The Town of Troy, which borders the Hudson dog track on three sides, also complained about the lack of information about the size of the casino on which to base its response to the BIA consultation letter. Nonetheless, in its March 14, 1994, letter, the Town raised concerns about the impact of a casino on jobs, traffic, housing and the quality of life, without quantifying these impacts.

**b. Responses by Local Residents and Activists**

Although the MAO did not send solicitation letters to individual residents or elected officials, it did receive some correspondence from them. On June 10, 1994, Nancy Bieraugel, a Hudson resident active in several local issues, provided the MAO with a petition opposing the casino in Hudson on which she and other volunteers obtained 3,100 signatures of citizens of

[78] Letter from Richard Peterson to Robert Jaeger, April 15, 1994.

Hudson and surrounding communities. The MAO also received a petition containing 800 signatures of local area residents supporting the casino.

Hudson resident William Cranmer's June 24, 1994, letter to Secretary Babbitt in opposition to the casino proposal also was forwarded to the MAO. Cranmer attached a report he had prepared which he believed established that the casino would be "detrimental to the nation, state, tribes and Hudson area community."[79] Sheila Harsdorf, the state representative from the assembly district containing Hudson, sent a letter dated June 21,1994, to Secretary Babbitt and Assistant Secretary Deer, which was forwarded to the MAO. Her letter suggested that the appearance of support or neutrality by local governments was not a true reflection of community feeling.

Most of the community activists who opposed the casino were local citizens. Many, but not all, had opposed the original proposal to build the dog track. They did not limit their activities to contact with the MAO on the Hudson issue. In early summer 1994, Bieraugel delivered the petition she had developed to the Chairman of the Wisconsin Gaming Commission, John Tries, garnering media coverage in Wisconsin and Minnesota. Within a few days, the Governor's Office then contacted Bieraugel, and a meeting with the Governor was arranged through State Rep. Harsdorf.

To demonstrate that opposition to the Hudson casino proposal existed among leaders of the local community, Bieraugel brought several business leaders with her to the meeting with Gov. Thompson. Also among the group was Kenneth Tilsen, a professor at Hamline Law

[79] Letter from William Cranmer to Bruce Babbitt, June 24, 1994.

School. Tilsen became an important advisor on the Hudson proposal to Bieraugel, as well as to his good friend. Sen. Paul Wellstone (D-Minn.), whom Tilsen advised to oppose the application.

The press covered the casino opponents' July 20 meeting with Gov. Thompson, and Bieraugel and her supporters believed that it went well. She recalls the Governor telling the group that "[w]ith this opposition, you have nothing to worry about," and she understood him to be opposed to the Hudson casino proposal.[80] When interviewed by OIC investigators, Gov. Thompson recalled that he probably told the group that if the local people were not for the casino, then he would oppose it.

After the meeting with the Governor, the group named itself "A Better Future for Hudson" and held regular meetings at a local business. The group amassed a war chest of $15,000 to $20,000, funded by the local businesses. Bieraugel said she turned down offers of assistance from the St. Croix tribe and one of its lobbyists.[81] Bieraugel testified that no one outside the City of Hudson had assisted in the opposition efforts. These monies were spent on ads opposing the Hudson application, and postage for mailings. The group solicited letters opposing the casino proposal from such groups as a nearby YMCA camp and a local church.

[80]OIC Interview of Nancy Bieraugel, Oct. 7, 1998, at 4 (hereinafter "OIC Bieraugel Int.").

[81]Bieraugel testified in the Grand Jury that she vaguely recalled Ann Jablonski, a lobbyist for the St. Croix tribe, making a general offer of assistance. Jablonski also later drafted a letter for Bieraugel, which Bieraugel declined to use. The St. Croix Chairman offered to pay Bieraugel's airfare for a trip to Washington to attend the April 28, 1995, meeting at the DNC. Although Bieraugel initially was inclined to accept, upon reflection she decided to reject the offer.

Bieraugel made contact with Chairman Lewis Taylor of the St. Croix tribe, and began an ongoing process of sharing information about the opposition with Taylor. Taylor sent his tribal attorney, Howard Bichler, to meet with the Better Future for Hudson group.

Though the Four Feathers partners alleged that much of the community opposition to the Hudson proposal was generated by wealthy gaming tribes that opposed the expansion of gaming in the Twin Cities market, our investigation did not develop evidence to support this claim. The community opposition appears to have been largely genuine and locally based.

### c. Responses by Wisconsin and Minnesota Tribal Governments and Associations

#### 1) Tribal Opposition to the Hudson Application Was Led by the Minnesota Indian Gaming Association

As in the case of the earlier casino proposal contemplated by the track owners and the St. Croix tribes, the Minnesota tribes learned of the Four Feathers proposal before the fee-to-trust application was filed with the Department of the Interior; they immediately commenced opposition efforts. At their Oct. 27,1993, meeting - more than two months before the MAO solicited comments - MIGA Chairman Myron Ellis opened discussions about the three Wisconsin tribes purchasing the Hudson dog track. Because the group went into executive session for discussion of this issue at its next meeting at the suggestion of attorney Kurt BlueDog, no recordings or minutes of this discussion exists, and no witnesses now recall what was discussed.

Following another discussion about Hudson at a MIGA meeting on Nov. 23, 1993, the tribes agreed that Executive Director McCarthy should re-submit MIGA Resolution No. 92-3,

along with an updated letter, to Secretary Babbitt.[82] The letter was sent on Dec. 1, barely seven weeks after submission of the Hudson application. The letter asserted, *inter alia*, that Section 20(b)(1) of IGRA requires consultation by the Secretary with surrounding tribes, and that "[f]o date, none of the Tribes currently operating gaming facilities in the area have been consulted." also pointed out that MIGA "has gone on record opposing off reservation gaming activity in Minnesota."

**2) MIGA and Its Members Contact the BIA in Washington**

MIGA sent another letter dated Jan. 10, 1994, to Secretary Babbitt acknowledging the BIA Area Director's letter soliciting comment, and reiterating the arguments made in the December 1993 MIGA letter to the Secretary opposing the casino. The Jan. 10 letter explained the two reasons for MIGA's opposition: first, because the Minnesota tribes, as part of their tribal-state compacts, had "promised not to expand tribal gaming off-reservation"; and second, because the Four Feathers proposal would have a "potential economic impact on Minnesota tribes." MIGA urged that the proposal would harm Minnesota tribes with casinos close to the Twin Cities, as well as tribes with casinos in more remote areas, because both groups draw their customers from the Twin Cities. MIGA claimed, though, that it was more worried about the Hudson casino's political implications in Minnesota than its potential as a market competitor, noting that its members had fought hard in recent years to defeat proposals within the state of Minnesota to expand gaming to non-Indian interests, "assuring lawmakers that we view tribal

[82] In fact, MIGA never passed a new resolution. This may explain, in part, why the Minnesota tribes kept insisting that the BIA had offered "no consultation" - because such an allegation appeared in the 1992 resolution. While this was true in 1992, it was not true in 1994.

gaming as a tool for reservation and community development."[83] The letter also took issue with several specific points made by the applicant tribes in a letter they had sent to Secretary Babbitt on Dec. 24, 1993. The letter contained no economic analysis or market impact data to show how, or to what extent, the surrounding tribes would be harmed. Reflecting the political awareness inherent to its strategy, MIGA sent copies of the letter to more than 30 individuals and entities, including the governors of Wisconsin and Minnesota, members of both states' congressional delegations, and newspapers in Milwaukee, Green Bay, St. Paul and Minneapolis.

Many of these same points were further emphasized in a meeting that same day - Jan. 10, 1994 - between IGMS Director Hilda Manuel and Mille Lacs Band Chairwoman Marge Anderson and other representatives of the tribe, along with their Washington lobbyist, Gerry Sikorski. According to Anderson's memorandum summarizing the meeting, tribal representatives asserted that a casino in Hudson might push Minnesota lawmakers "over the edge" because "as a consortium we have promised the State that there would be no further new casino developments."[84] Indeed, the Mille Lacs described this as "our biggest fear" - that a new major casino in the Minneapolis metropolitan area "could be the death" of Indian gaming in Minnesota.[85] Anderson stated that the Hudson application raised a basic issue of "fairness" for the Minnesota tribes, since many Minnesota tribes are more remotely located than the applicant

[83]To support these assurances, MIGA wrote that its tribes had not sought off-reservation gaming in Minnesota, and they believed that the Wisconsin tribes should be similarly bound: "We have not closed the door on off-reservation gaming in Minnesota only to have other tribes in Wisconsin jeopardize all we have fought to maintain."

[84]Memorandum from Marge Anderson to Member Tribes, MIGA, undated.

[85]Talking Points for Mtg. with Hilda Manuel, undated.

tribes and yet "have never pursued off-reservation land acquisitions in the Twin Cities in spite of their right to do so."[86] In addition, in their view, the intent of IGRA was to promote "on-reservation economic development." Anderson's memo asserted that the Hudson application was the "bail-out of a failed non-Indian dog-track," a phrase coined by the tribe's Washington lobbyists and repeated throughout the course of this matter.[87]

Manuel assured the Mille Lacs representatives that the Secretary must consult with the Mille Lacs. Manuel also reportedly advised the Mille Lacs Chairwoman that opponents to another then-pending off-reservation gaming application (that of the Sault Ste. Marie tribe) had argued against allowing the applicant tribe in that case to develop a casino on property that was not "historically tribal lands." Anderson also reported that Manuel said there is a MAO precedent that mandates consultation with all tribes within in a 350-mile radius of the proposed project.[88] Manuel encouraged any tribes opposing the application to respond in writing to DOI's request for input. The memo suggests that Manuel heartened the Mille Lacs by noting that, to

[86]Memorandum from Marge Anderson to Member Tribes, MIGA, undated.

[87]Babbitt himself adapted a variation of this slogan during his testimony before the House Committee, deriding "the gambling interests financing this application" for "their interest in bailing out their failing dog track." *The Department of the Interior's Denial of the Wisconsin Chippewa's Casino Applications, Vol. I: Hearings Before the Comm. on Government Reform and Oversight,* 105th Cong., 2nd Sess. 578 (1998) (testimony of Bruce Babbitt) (hereinafter "Babbitt House Test.").

[88]Memorandum from Marge Anderson to Member Tribes, MIGA, undated. Manuel did not recall the meeting but added it would be common for her to meet with tribal leaders if asked. How accurately Anderson recorded Manuel's statements is uncertain. The decision had been made to consult with all tribes in Minnesota and Wisconsin, but not apparently by setting any mileage radius.

date, the Secretary had "never approved an off-reservation land acquisition for gaming purposes" (emphasis in original).[89]

In March 1994, DOI responded to MIGA's Jan. 10 letter to Secretary Babbitt. The letter, signed by Assistant Secretary Deer, explained that the Hudson application was under review by the MAO, which had initiated a consultation process as required by Section 20 of IGRA. The letter further explained: "Because this is the only opportunity for the tribes to express their views and objections to the proposed trust acquisition, it is important that the tribes respond to the Area Director's consultation letter." The letter continued: "Any and all factual information in support of [the tribes'] respective positions should be provided to the Area Director for consideration."

### 3) MIGA and Its Members Contact the Minneapolis Area Office of BIA

A few days after its January meeting with Manuel, the Mille Lacs Band sent a letter dated Jan. 15, 1994, to MAO Director Homer in response to her request for input, incorporating by reference the arguments made in MIGA's Jan. 10 letter to Babbitt. The letter emphasized that IGRA "was designed to act as a reservation based economic tool" and was "never intended as a dog-track bail out tool." The letter further argued, without providing any supporting data, that a casino in Hudson "would almost certainly, and perhaps dramatically, negatively affect business at our casino facilities, causing inevitable lay-offs." A copy of the letter also was sent to Manuel.

[89]In fact, by the time of the meeting, Secretary Babbitt had approved at least the Coushatta tribe's application in Louisiana, although the Governor had vetoed it. Secretary Babbitt's predecessor had also approved two applications under IGRA, the Forest County Potawatomi's and the Siletz tribe's applications. The Siletz application was later vetoed by the Governor, but the Forest County was approved by the Governor, resulting in the establishment of a casino in Milwaukee.

By letter dated Jan. 22, 1994, MIGA forwarded to Homer what it called its "official response" to the request for comments. The response consisted of a brief two-paragraph letter asserting that MIGA was "totally opposed to this action by the Wisconsin tribes." The letter attached three documents that had previously been sent to Interior: (1) MIGA's Dec. 1, 1993, letter to Babbitt; (2) MIGA Resolution 92-3; and (3) MIGA's Jan. 10, 1994, letter to Babbitt. The letter also stated that MIGA "would be happy to meet with you to discuss in more detail the particulars of our position." No supporting data was included with the response to substantiate the claim by the Minnesota tribes that a casino in Hudson would result in severe economic impact to their tribal operations.[90]

On Feb. 8, MIGA sent another short letter to Director Homer extending an open invitation for her to attend MIGA meetings. Neither Homer nor any other MAO representative accepted this offer to discuss the casino proposal while it was pending at the Minneapolis Area Office.[91] In late 1994 - after the MAO had recommended approval of the Hudson application - a number of tribal leaders did meet with Homer at a meeting sponsored by the Minnesota Chippewa Tribes, the official governing body for six Chippewa reservations located in northern

[90]Following MIGA's official response to BIA on Jan. 22, 1994, McCarthy sent a "reminder" memorandum to "All M.I.G.A. Tribes/M.I.G.A. Reps" regarding "B.I.A. Dog Track Response" on Jan. 27. The memo stated, in relevant part: "Just a reminder that the information requested by the Bureau on the impact of the St. Croix Dog Track purchase is due on February 1. 1994." (Emphasis in original.)

[91]In MIGA's view, this invitation was not unusual. Homer's predecessor, Earl Barlow, who had been the Minneapolis Area Director since 1982, had attended MIGA meetings on a fairly frequent basis, and the Minnesota tribes felt that they had a very close working relationship with him. Barlow retired in October 1993 following allegations that he had improperly accepted complimentary vouchers for use at one or more of the Minnesota casinos. The contrast between Barlow's and Homer's interaction with MIGA and the Minnesota tribes may have caused the tribes to feel cut off from Homer.

Minnesota. According to tribal leaders who attended the meeting, "[t]here wasn't much discussion on gaming except that when asked about the Wisconsin Dog Track issue the Area [Director's] response was that the tribes had not submitted much information to her."[92]

The Minnesota Chippewa Tribe (MCT) also sent the MAO a resolution opposing the application in January 1994.[93] This resolution expressed two objections to the Hudson proposal: first, that the member reservations "feel that a number of their tribal gaming operations will be economically impacted by this proposed action"; and second, that the member reservations "also feel that the approval of this application would set a dangerous precedent creating an open market for expansion by other reservations onto off-reservation fee lands for gaming purposes."[94] The resolution was attached to a Jan. 28, 1994, letter addressed to Babbitt and copied to the MAO. The letter to Babbitt asserted that the "most significant" reason the MCT opposed the Hudson proposal was that the Minnesota tribes "have promised not to expand gaming off-reservation." The MCT supplied no market impact data or study with the letter to support its assertion that the MCT reservations - none of which are located in close proximity to Hudson - would be "economically impacted" by a casino at that site.

Several individual tribes within the MCT also sent comments opposing the application. In February 1994, the Leech Lake Tribe sent their own resolution to Babbitt opposing the Hudson application and provided a copy to the MAO. Their cover letter noted their decision not to seek

[92]MIGA Meeting Minutes, Dec. 19,1994.

[93]The six member tribes of the MCT are the Mille Lacs, White Earth, Bois Forte, Grand Portage, Leech Lake, and Fond Du Lac.

[94]Minnesota Chippewa Tribe Resolution 143-94, Jan. 27, 1994.

off-reservation gaming and their belief that if DOI approved any, it would have serious economic and political effects on on-reservation gaming nationwide.

Similarly, the Prairie Island tribe sent a letter to the MAO in January 1994 opposing the application and attaching a January resolution in which the tribe re-confirmed its previous opposition to the development of a casino in Hudson. Prairie Island asserted that "if the Hudson casino were in fact approved, it would impact our casino by no less than a 30% to 50% reduction in customers" and that this "loss in casino revenue would be devastating to our Community."[95] It further asserted that the proposed casino "would saturate the already extremely competitive Minneapolis-St. Paul market area." The tribe provided no data or studies to support the assertions of estimated customer loss or economic impact on its casino.

The Minnesota Chippewa Tribe's claim of potential economic harm to its members should be viewed in light of the fact that none of its tribes are close to Hudson. Several of the MCT tribes are hundreds of miles from Hudson. The MCT's negative response to the Hudson application may have been due to MIGA's having asked for their support, and/or a request from Mille Lacs Chairwoman Anderson, whose tribe was an active and vocal Hudson casino opponent.[96] Most of the MCT tribe leaders now concede that their tribes were simply too far removed to be impacted by the proposal.

[95]Letter from Curtis Campbell to Robert Wynecoop, Jan. 31, 1994.

[96]In addition to the Mille Lacs, another member of the MCT - the Leech Lake Band - passed a resolution opposing the Hudson dog track. The Leech Lake resolution made the same general objections as set forth in the MCT and MIGA resolutions. The Leech Lake reservation is located some 250 miles north of Hudson. Both John McCarthy and Myron Ellis, who was then Chairman of MIGA, had strong ties to the Leech Lake Band and may have asked the tribe to support their opposition efforts.

In February 1994, the Shakopee sent to the MAO another resolution opposing the Hudson proposal. This resolution largely reiterated the points made in the tribe's 1992 resolution. The cover letter's argument that the Hudson dog track land was historically considered Mdewakanton Sioux land echoed arguments made by the Sault Ste. Marie tribe, about which Hilda Manuel had informed the tribe. As with the comments submitted by MIGA, MCT and other Minnesota tribes, the Shakopee provided no data to show the extent of the asserted harm.

The Shakopee tribe's opposition efforts may have been deliberately modest despite McCarthy's apparently being "upset" with the tribe for failing to take a stronger stand while the Hudson application was pending before the Area Office.[97] A well-publicized disclosure of the generous annual per capita payments made to each Shakopee tribal member from tribal revenues had precipitated a public-relations crisis for MIGA and its member tribes.[98] The size of the payments appears to undercut arguments that the Twin Cities market was incapable of supporting any further casino competition, and witnesses acknowledged that public knowledge of the large Shakopee payments made it difficult for the Minnesota tribes, as a whole, to make a principled opposition to the Hudson casino proposal. Moreover, to the extent that the BIA needed to see hard data showing the negative impact of the Hudson proposal on nearby tribes, the Shakopee were unable or unwilling to provide it.

From the Wisconsin tribes, the MAO received a more mixed response to the Hudson casino proposal. The St. Croix Chippewa - the Wisconsin tribe located closest to the proposed

[97]Ducheneaux G.J. Test., at 18.

[98]Payments were said to amount to about $400,000 in 1993, and were expected to be around $500,000 in 1994. *Mystic Lake Opens Boohs, and the Numbers are Large,* Minneapolis Star Tribune, April 27, 1994, at 1A.

casino site - voiced concerns similar to those of the Minnesota tribes about the possible economic harm its casino would suffer from a casino in Hudson, as well as the potential broader effect on Indian gaming. Three other Wisconsin tribes also sent letters to the Minneapolis Area Office in early 1994; two stated that they were not opposed to the proposed facility. The Lac du Flambeau tribe stated that it believed the casino would, in fact, have a beneficial impact. The Oneida made a more limited statement, noting that, strictly from their perspective, the proposed facility was too far away to have any impact on their existing facility. A third Wisconsin tribe - the Ho-Chunk Nation - expressed opposition to the proposal, but the only stated basis for their opposition was their insistence upon resolution of their dispute with the state of Wisconsin over situating a gaming facility in Madison before approval of the Hudson proposal.

**4. The BIA Issues a Draft Finding of No Significant Impact**

Around May 1994, the MAO took steps to ensure compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, (NEPA) which applies to virtually all governmental decisions. NEPA mandates examination of the potential environmental impacts of the proposed use of the land to be put in trust and requires, at a minimum, the performance of an environmental assessment. NEPA evaluations include assessment of land use issues, as well as issues of pollution and impact on protected archeological sites or wild life. If the Area Office determines there is a potential for detrimental impacts, it may require the performance of an environmental impact study, a much more extensive, expensive and time-consuming examination of the potential environmental impacts.

If it finds no significant negative impact, the evaluating agency can issue a Finding of No Significant Impact (FONSI). The FONSI is first made available to the public in draft form so

that comments may be submitted. After those comments are analyzed, a final FONSI may be issued. At the time of the Hudson application, the agency superintendent or area director was authorized to sign a final FONSI. Appeal from the FONSI is authorized by statute within a defined period after publication of the final FONSI.

Robert Jaeger, the Superintendent of the Great Lakes Agency of the MAO, was responsible for this review on the Hudson application. On June 20, 1994, Jaeger circulated a draft FONSI for public comment within 30 days. He based his findings on a study performed in 1988 in connection with the proposed dog track, which the Hudson applicants had submitted, with some supplementation, as their environmental assessment in compliance with NEPA.

The Minnesota tribes felt they were dealt a substantial blow by the MAO's issuance of its draft FONSI because it then appeared to them that the BIA Area Office might actually approve the application. The draft FONSI was widely circulated to all MIGA members, their attorneys and lobbyists. Notwithstanding the alarm set off by the draft FONSI, the Minnesota tribes again failed to submit any hard data to BIA to contradict its draft findings. Three days before the 30-day comment deadline, MIGA sent the MAO Director a two-paragraph letter challenging the draft findings and requesting a 60-day extension and a meeting. By letter dated Aug. 8, 1994, Jaeger denied the extension and refused the request to meet. The Aug. 8, 1994, letter denying these requests made it plain that the BIA was fully aware of MIGA's previous comments to the MAO and to Secretary Babbitt directly.

After reviewing comments received, Jaeger signed a final FONSI in September 1994. This conclusion of no significant impact was based largely on the fact that the proposed casino plan required relatively minor alterations to the existing dog track, roads and parking system,

which had been approved previously and operated in apparent compliance with federal, state and local regulations. In support of the FONSI, the BIA also reported its conclusion that the proposed Hudson casino could have a 20 percent share of the blackjack market and 24 percent share of the slot and video market in the primary market zone based on two studies supplied by the applications, and found that the gaming market was of sufficient size to support this additional operation.

After receiving the final FONSI determination on Sept. 14, 1994, MIGA again sought an MAO meeting. When this request, too, was turned down, the Minnesota tribes were upset. According to McCarthy, the tribes took the FONSI to mean that the BIA had simply failed to take into account the views of the Minnesota tribes. MIGA wrote a letter on Sept. 21, 1994, to the MAO Director protesting the issuance of the final FONSI. Although MIGA had not submitted any economic or environmental data to controvert the BIA's findings, the letter claimed that the BIA had simply "ignored our challenge to the validity of these findings." The letter also urged MAO Director Homer to meet with MIGA to discuss the matter, and expressed MIGA's "disappointment] that our last letter requesting a meeting was not even granted the courtesy of an acknowledgment from your office." A week later, the MAO Director responded to MIGA's letter. Homer's response explained that, under IGRA, both the Area Office and the Great Lakes Agency would review the application. The letter declined the invitation by MIGA for a meeting, explaining that "since the processes have closed, the MAO is of the opinion that a meeting would not accomplish the desired objective."[99] The letter concluded: "The MAO is aware of the opposition expressed by the MIGA to the Hudson Dog Track proposal."

"Letter from Denise Homer to Myron Ellis, Sept. 28, 1994.

### 5. Minneapolis Area Office Recommends Approval Under IGRA

The task of analyzing the Hudson application in the Minneapolis Area Office fell to Timothy LaPointe. LaPointe had been hired by the MAO as a tribal operations specialist in May 1994. He was named the gaming coordinator for the MAO, although he had no prior experience in gaming matters.

When LaPointe assumed his new position in June 1994, he was directed to review the file of correspondence sent in reply to the December 1993 consultation letters on Hudson, and told to advise Area Director Homer of the status of the application. Because he had not previously handled a gaming acquisition, LaPointe, a lawyer, familiarized himself with the process by researching IGRA and other related law,[100] by reviewing the work previously performed by the MAO on the 1992 application of the Sault Ste. Marie Tribe of Chippewas to conduct gaming in the Greektown area of Detroit, and by reviewing a copy of the findings prepared in connection with the 1992 application submitted by the Siletz tribe in Oregon.[101]

[100]LaPointe told investigators that he relied upon a draft version of the Checklist for reviewing off-reservation gaming applications, which was finalized later in 1994. *See supra* at 37-40. The Checklist did not make clear whether an applicant needed to submit a separate application to show compliance with IRA and 25 C.F.R. Part 151 requirements for land acquisitions. The applicants later submitted additional information to comply with the remaining provisions of IRA and Part 151. The MAO's eventual positive recommendation under IRA and its regulations in Part 151 was forwarded to IGMS by letter dated April 20, 1995.

[101]"LaPointe told investigators that he also contacted the National Indian Gaming Commission on or about June 12,1994, to ask how long consideration by the NIGC might take, in part because he did not feel experienced enough to review the real estate and financial agreements between the tribes and their non-Indian partners. He was advised that it could take up to a year for NIGC approval but that employees of the management company whose contract with the tribe was pending review could be hired as employees of the tribe during the pendency of the review. An NIGC financial analyst told investigators that this was her standard time estimate and advice in that time period, although reviews are currently taking place at a faster

(continued...)

LaPointe wrote his findings of fact and recommendation beginning in approximately June 1994. In his report, he observed that while the local governments of St. Croix County, the City of Hudson, the Town of Troy, and the Hudson school district (which he considered to be the local community) had not expressed strong support for the proposal, they had not expressed strong opposition either. He did note that some of the municipalities asserted they lacked information to make a complete impact assessment. He cited the government services agreement the local governmental bodies had negotiated with the applicants, which provided for financial compensation by the applicants, as mitigating most of their complaints,[102] and the 1992 referendum by residents of Hudson reflecting nearly equal opposition and support for the casino at Hudson. He also noted the 1993 statewide referendum in which 65.4 percent of St. Croix County residents voted in favor of a constitutional amendment restricting casino gambling. LaPointe concluded that "[w]hile the Hudson Proposal may be an expansion of a type of gaming in Hudson, it will not be an expansion of a gaming facility," since the dog track already exists.[103] In addition, LaPointe found it did not represent an expansion of gaming in Wisconsin because the applicants had committed to closing certain of their existing casinos if the Hudson casino were operating.

[101](...continued)
rate.

[102]In mid-April 1994, the Four Feathers partnership, the City of Hudson, St. Croix County and the Hudson school district entered into a government services agreement providing for certain payments to be made by Four Feathers in lieu of taxes which would otherwise be derived from the property if privately owned. Such agreements are expressly encouraged by the BIA to ameliorate the impacts of the property tax loss and other costs imposed on the community due to the operation of the business including, for example, law enforcement resources.

[103]MAO's Recommended Findings of Fact and Conclusions, Nov. 15, 1994, at 18.

LaPointe further noted the MAO received approximately 76 individual letters and petitions in opposition to the proposal, and Bieraugel's petition containing 3,000 signatures.[104] He found that nearly all the responses and certainly the petitions failed to give any documentation or other specific evidentiary support for their opposition.[105] To him, this opposition evidence indicated possible future conflict with the local community, but not grounds to reject the proposal.

LaPointe also observed that the MAO received responses from 11 Indian tribes and tribal organizations, and that nine out of 11 were emphatically against the proposal. He analyzed the objections as economic and political. He found that most of the tribes expressed opposition based on the potential impact on their gaming operations, but gave no hard evidence to support the claim that a Hudson casino would result in a reduction in their revenues. Specifically, he stated that in the absence of evidence provided by the tribes that they would be "devastated] economically," he placed great weight on the reports by Arthur Andersen and Dr. James Murray furnished by the applicants.[106] While he thought the proposed casino might have an impact on

[104]LaPointe also stated in his findings that he made no effort to verify the signatures on the petitions submitted for and against the Hudson proposal. He suggested that the petitions be directed to the Governor.

[105]The sole exception that LaPointe acknowledged was the letter submitted by William Cranmer, a local resident opposed to the casino application. LaPointe's review included not only the materials that had previously been received in response to the MAO's official solicitation, but also letters and petitions which continued to arrive during LaPointe's work on the application. LaPointe did not enforce any cut-off date for the submission of relevant information; any information received prior to the MAO recommendation was considered, and information received afterwards was forwarded to the IGMS.

[106]MAO's Recommended Findings of Fact and Conclusions, Nov. 15,1994, at 23. The applicants provided to the MAO, along with their financial and real estate agreements, two

(continued...)

nearby tribal casinos, he concluded that mere competition in the market was not a basis to deny the application.[107] He further noted that the applicant tribes had shown, by the Arthur Andersen and Dr. Murray studies, that the market for casino gaming in that area was not saturated. Both sides had been asked for data specifically on the issue of economic competition between existing facilities and the proposed casino, and neither had complied by providing such data. The applicants, however, responded in essence that competition was not a legal basis for rejection of the proposal. LaPointe further found that the applicants could not provide more market studies without more data from the opponents. LaPointe also found that the claim by the existing casino operators that expansion of gaming would erode their political power to protect Indian gaming did not outweigh the interests of the three applicant tribes in gaming within the limits of IGRA.

While LaPointe had some concerns regarding the parking lot lease arrangement between the applicant tribes and the track's owners, he ultimately decided that the NIGC would address whether that arrangement was appropriate and decided not to withhold his recommendation of approval.

Based on his review, LaPointe concluded that the acquisition would not have a "detrimental effect on the surrounding community" as those terms are used in IGRA Section

[106](...continued)
studies estimating the likely net receipts of the casino operation, one by Arthur Andersen's Las Vegas, Nev., office dated March 1994, and one by James M. Murray, Ph.D., a professor at the University of Wisconsin at Green Bay.

[107]As for the St. Croix, the casino operator closest to the Hudson site, LaPointe "question[ed]" their opposition because they had two casinos currently in operation and they were contemplating the purchase and conversion of the Lake Geneva dog track to a casino. *Id.* at 19-20.

20(b)(1)(A).[108] His written draft findings of fact and recommendation that the proposal be approved were reviewed by a credit officer and staff in the realty branch at the MAO and given to Area Director Homer. Homer was not involved directly with either the preparation of the findings and recommendation by LaPointe or the consultation process. According to LaPointe and Homer, she reviewed the drafts and suggested largely grammatical changes, but did not alter the substance of the analysis. LaPointe did not feel as if he or others at the MAO had been aggressively lobbied by opponents of the casino application. Other than the letters submitted to the MAO, LaPointe had no recollection of any contact by opponents or their representatives. Homer told investigators that she did not receive what she considered to be pressure or lobbying by opponents or supporters of the application, but she may have spoken to tribal leaders who inquired as to how much longer the review might take. In her view, the tribes knew that the decision would ultimately be made in Washington. The draft findings were sent to the Field Solicitor for final review. Homer approved and signed the proposed findings of fact and recommendation on or about Nov. 15, 1994. The application itself and all correspondence the MAO received about it were attached as exhibits to the MAO Findings of Fact and Recommendation, as required by the Checklist, and the documents were forwarded to IGMS in Washington.

[m] *Id.* at 32.

### C. Coordinated Opposition Efforts By Minnesota and Wisconsin Tribes

From the earliest mention of the Hudson casino proposal, Minnesota tribes expressed their opposition to the venture. Beyond their direct communications with the Interior Department and the BIA area office, described above, the tribes also took early steps towards what would ultimately become a full assault on the proposal through a united Washington lobbying effort. One of these first steps was coordination of the Minnesota tribes' efforts with their allies in Wisconsin.

By January 1994, this process had begun. At McCarthy's request, Ducheneaux provided information about the Wisconsin congressional delegation - names, addresses, and information about which tribes they represented - to McCarthy, specifically mentioning the Red Cliff and Lac Courte Oreilles tribes. That same month, representatives of Prairie Island were in direct contact with the St. Croix tribe, apparently so they could coordinate their responses to BIA on the issue of economic detriment. Indeed, the St. Croix tribe shared with Prairie Island a redacted version of an analysis estimating the impact of a Hudson casino on the St. Croix's Turtle Lake casino.

Tribal leaders invited Tilsen - the Hudson area law professor - to address the MIGA membership at the March 16, 1994, meeting. It is possible that Kurt BlueDog - a former student of Tilsen - arranged for Tilsen's appearance. According to McCarthy, Tilsen had asked to address the Minnesota tribes to explain why he opposed the Hudson proposal; he wanted to make sure the MIGA members understood his position and did not perceive him to be "anti-tribal."[109] The minutes further reflect that McCarthy "was instructed to set up another meeting" with Tilsen.

[109]Grand Jury Testimony of John McCarthy, Feb. 24, 1999, at 48-49 (hereinafter "McCarthy G.J. Test., Feb. 24, 1999").

McCarthy acknowledged that MIGA's intent at this point was to coordinate the opposition efforts of MIGA with those of its allies in Wisconsin.

### 1. Opponents Mobilize Congressional Support

By March 1994, it was clear that the Minnesota tribes, in words of BlueDog, "actively opposed" the Hudson casino proposal.[110] On March 9, Stanley Crooks and Kurt BlueDog of the Shakopee Tribe met with Congressman David Minge (D-Minn.) - who represented the district containing the Shakopee reservation and casinos - to discuss the tribe's position on the Hudson casino proposal. BlueDog cannot clearly recall what transpired at this meeting; Minge does not recall either, but he does recall meeting with BlueDog on the Hudson matter from time to time, and perceiving that the Shakopee were the prime movers against the application.

On March 25, BlueDog sent a follow-up letter to Rep. Minge and attached a proposed letter for the Minnesota congressional delegation to send to Secretary Babbitt. BlueDog asked Minge to "coordinate an effort among the Minnesota Congressional delegation to collectively correspond with Interior Secretary Babbitt in opposition to the proposal." A signed version of this Minnesota congressional delegation letter sponsored by Minge's office was sent to Secretary Babbitt on May 1.[111]

The final signed version of the delegation letter was nearly identical to the draft letter written by Ducheneaux in March. The only substantive difference was that the final version

[110]Letter from Kurt BlueDog to David Minge, March 25,1994.

[111]The signatories were Sen. David Durenberger (R-Minn.) and Reps. Minge, James Oberstar (D-Minn.), Martin Sabo (D-Minn.), Bruce Vento (D-Minn.), Timothy Penny (D-Minn.), Collin Peterson (D-Minn.) and James Ramstad (R-Minn.). Of the seven congressmen and one senator who signed the May 1 letter, five were Democratic members and two - Sen. Durenburger and Rep. Ramstad - were Republican.

included a new argument, that the land on which the Hudson dog track is situated has been historically recognized as Dakota Mdewakanton territory, and thus should not be used to promote the interests of three Wisconsin Chippewa tribes. This argument was developed by the BlueDog law firm on behalf of its client, the Shakopee Mdewakanton Sioux.

Notably missing from the signature page of the final signed delegation letter was Sen. Wellstone, who, according to information conveyed to BlueDog, was not supportive of this opposition initiative. BlueDog contacted Tilsen, whom Wellstone has described as a good friend. On May 25, Tilsen wrote to Wellstone, stating that he would like to talk to him. Shortly thereafter, on June 6, BlueDog wrote to Wellstone to request Wellstone's "direct intervention with the Secretary of Interior" to oppose the Hudson proposal.[112]

At a MIGA meeting on July 21, the minutes reflect that a 30-minute recess was taken so that tribal leaders could meet with staff from Sen. Wellstone's office. No witnesses were able to recall what this break-out meeting was about. However, in light of MIGA's recent letter to Wellstone soliciting his help opposing the Hudson proposal, it is likely it was arranged so tribal leaders could discuss in person their concerns on Hudson with Wellstone's staff.[113] The meeting

[112]BlueDog's billing records show that Tilsen and BlueDog were working together in late May and early June to get Wellstone's office on board in the effort against Hudson. BlueDog, and perhaps other opponents, clearly thought Tilsen to be instrumental in getting Wellstone on record in opposing Hudson. Wellstone told investigators, however, that Tilsen's efforts were not the reason he ultimately opposed the Hudson casino. He stated that he opposed the Hudson proposal because he is anti-gaming generally, and because this proposal would negatively impact Minnesota tribes like the Mille Lacs who, according to Wellstone, have tried many ways to make themselves economically self-sufficient and have found success only at gaming.

[113]Kurt BlueDog could not recall what the break-out session was for, but he noted, "It's curious because it had to be a pretty rare occasion for someone from Senator Wellstone's staff to meet with the MIGA tribes...." Grand Jury Testimony of Kurt BlueDog, Dec. 9, 1998,

(continued...)

was apparently successful as, less than a week after the meeting, Sen. Wellstone wrote to Secretary Babbitt "to add my voice of concern to the voices of my Minnesota Congressional colleagues" in opposition to the Hudson proposal."[114] Wellstone's July 26, 1994, letter to Secretary Babbitt expressed arguments similar to those in the May 1 letter from other members of the Minnesota congressional delegation.[115]

On June 7, 1994, BlueDog also sent a letter on behalf of MIGA, to Rep. Rod Grams (R-Minn.). On Aug. 12, 1994, he sent a nearly identical letter to Rep. Bill Richardson (D-N.M.), Chairman of the House Subcommittee on Native American Affairs. These letters described the Hudson casino proposal as a matter "of the utmost importance to the Minnesota Tribes," and sought aid from the legislators in the form of "your direct intervention with the Secretary of the Interior" in opposing the proposal.[116]

[113](...continued)
at 71-72.

[114]Letter from Paul Wellstone to Bruce Babbitt, July 26, 1994.

[115]According to Wellstone Legislative Director Michael Epstein, he and Wellstone Chief of Staff Kari Moe subsequently met with opponent representatives in the Hart Senate Office Building. Epstein also recalls that someone suggested that Wellstone place a telephone call to Douglas Sosnik or Harold Ickes at the White House, possibly about opposing Hudson, though Epstein could not recall. Epstein told them that it would be a bad idea for Wellstone to make such a call, and there is no evidence that Wellstone did so. Wellstone did later co-sign a June 12, 1995, letter to Ickes. *See* Section II.E.4.e.3., *infra.*

[116]McCarthy now downplays MIGA's characterizations of the proposal as having the "utmost importance" to it as an exaggeration designed to better gain congressional attention to the proposal. Grand Jury Testimony of John McCarthy, Jan. 27, 1999, at 126.

There was also activity involving Wisconsin's members of Congress at this juncture. On Aug. 1, 1994, Sen. Kohl met with representatives of the three applicant tribes. Kohl legislative assistant Melissa Jampol wrote Kohl a memorandum about the meeting, recommending that he remain neutral on Hudson due to the political volatility of the proposal; she told Kohl to "not

(continued...)

### 2. MIGA Considers Political Contributions

As early as May 1994, the MIGA meetings had also turned to issues of politics and money. The minutes of the May 18 meeting reflect - for the first time - discussion by the membership of political contributions. Similarly, the agenda for the June 1994 meeting reflects that MIGA lobbyists were slated to discuss "recommendations on campaign contributions" and "election strategy."

McCarthy and other witnesses have disavowed any direct link between the Hudson casino issue and the issue of political contributions at this time.[117] At the MIGA meeting held on Aug. 9, 1994, however, the Hudson casino issue and political support appear to be linked. Although the Hudson proposal was not on the agenda for that meeting, the minutes reflect the following:

> Mr. Kitto gave a report on issues with the state lobbying program. Candidates need money. Randy Asunma made some comments on new challengers who are running for the first time. Tom Anzelec made a brief report on the Wisconsin Dog Track issue. Tom also commented on the state wide races that are upcoming.
>
> Mr. McCarthy commented on the need for M.I.G.A. to develop policies on Who and How to assist in the political arena. Mr. Kitto and Mr. McCarthy will investigate a M.I.G.A. P.A.C.

[116](...continued)
take a position on this issue." OIC Interview of Melissa Jampol, Nov. 18, 1998, at 1. Kohl appeared to follow Jampol's advice; he never took a position on Hudson. In addition, on Aug. 10, Rep. Steve Gunderson (R-Wis.), whose district included Hudson, had written to MAO Director Homer requesting a copy of the conclusion she was to forward to the Indian Gaming Management Staff in Washington. Around this time, some lobbyists also made their first overtures to Wisconsin congressmen on Hudson, such as Mille Lac's lobbyist Gerry Sikorski, who called on Rep. David Obey's (D-Wis.) chief of staff on Sept. 6, 1994.

[1] "McCarthy has acknowledged that when MIGA formed its political action committee (PAC) later in 1994, it was done to help the tribes receive better recognition.

(Emphasis in original.) It appears that the Hudson casino proposal was discussed by MIGA lobbyists in the very same breath as issues of political fund-raising."[8]

At the next MIGA meeting, the Hudson dog track was again on the agenda. The minutes reflect that BlueDog and another attorney reported on the Hudson casino proposal and, at the end of the report, McCarthy was "directed to again address the issue with the B.I. A.""[9] There was also discussion about political activity by the Minnesota tribes. In particular, Kitto reported on "the research that he has been doing on political action committees and political funds." It appears contributor limits were also discussed.[120] McCarthy was "instructed to file an application for a political fund."[121]

At the Oct. 24 meeting, McCarthy reported that the political fund had been set up and was ready to be used; in fact, MIGA had already received requests for contributions from both parties. MIGA named its political fund "Education Committee for Equality in Government," and it was registered with the Minnesota Ethical Practices Board as a state PAC. BlueDog volunteered to be chairman of the PAC, while McCarthy became treasurer. The PAC was initially funded by dues from the tribes totaling $39,000.

On Nov. 4, 1994, President Clinton appeared as a guest speaker at a fund-raiser in Duluth, Minn., for Ann Wynia, a Democratic candidate for the U.S. Senate. MIGA, through its

[118]Asunma and Anzelec are state lobbyists. Asunma's clients include the Lower Sioux and Fond Du Lac, while Anzelec's include the Prairie Island. Our understanding is that, because they work at the state level, neither had active involvement in the Hudson matter.

[119]MIGA Meeting Minutes, Sept. 6,1994.

[m]*Id.*

political fund, contributed $8,000 towards the event to "assist in defraying costs to bring President Clinton to Minnesota."[122] Notably, one witness reported that Kitto and several tribal leaders spoke with the President about the Hudson application in a brief hallway meeting at the fund-raiser.[123]

### 3. The Coordinated Opposition Lobbying Effort Focuses Its Political Arguments and Agenda

#### a. The Tribal Opponents Identify Their Arguments, and Their Audience

Once the area office recommended approval of the casino application, the Minnesota tribes, along with their Wisconsin allies, undertook a well-orchestrated Washington lobbying effort to defeat the application. Their initial theme, unsupported by the record, was that the MAO had simply ignored the concerns of the Minnesota tribes and had denied them consultation.

Another theme developed by the lobbyists once the application went to Washington, but downplayed by witnesses in this investigation, was that the casino application, if approved, would hurt Democrats and help Republicans. As it unfolded, this theme entailed explicit reference to both the political support the opponent tribes had provided to the Democratic Party

[122]Letter from John McCarthy to Ann Wynia, Nov. 8,1994. The contribution was made to an entity called the United Democratic Fund, which is an organization that contributes to both federal and state candidates and apparently organized the effort to bring President Clinton to Duluth.

[123]In a civil deposition, Kitto stated he would have taken the opportunity at a fund-raiser to discuss the Hudson issue with the President or Vice President if the occasion arose, but denied that he ever actually spoke with the President about the Hudson matter, and could not recall whether he ever spoke with the Vice President about it. McCarthy recalled that the lobbyists, including Kitto, had informed MIGA members that they had raised the Hudson issue with the Vice President at one or more fund-raisers.

through the years, and the financial contributions the opponents had made, and could make in the future, to Democratic candidates and organizations.

The timing of the MAO recommendation adds context to this particular strategy: the recommendation was issued on Nov. 15,1994, just a week after the mid-term elections in which the Democrats, for the first time in decades, had lost control of Congress. The day after the area office issued its recommendation, Kitto sent a lengthy memo to his tribal clients regarding the "Impact of national elections on Tribal gaming." The first numbered paragraph of the memo reads: "The Democrats are no longer in control." After outlining the various changes in committee leadership positions and the implications of those changes for the Minnesota tribes, Kitto wrote:

> Building an ongoing relationship with the White House will prove to be helpful. . . . Tribes may need to use the White House to deliver policy messages about Indian affairs or Tribal gaming to the new Congressional leadership.

Kitto emerged as one of the key players in coordinating the opposition by the Minnesota and Wisconsin tribes.[124] His own tribal clients included Wisconsin's St. Croix, and Minnesota's Prairie Island, Upper Sioux, Leech Lake, and Mille Lacs. According to Kitto's deposition testimony, there "absolutely" was a coordinated lobbying effort by the opposing tribes to defeat the Hudson casino application.[125] Kitto disclaimed that there was a single person responsible for

[124]Kitto was severely ill and was never available for interview or examination during the pendency of this investigation. He died on July 9,1999. His recollection of facts relating to these matters has been gleaned from four days of deposition testimony in connection with civil litigation over the Hudson matter, as well as from his documents.

[125]*Four Feathers v. City of Hudson* Deposition of Larry Kitto, April 17,1997, at 189-90 (hereinafter "Kitto *Four Feathers* Dep., April 17, 1997").

the coordination, although Kitto depicted himself as "extremely involved."[126] Others who were heavily involved were John McCarthy and Frank Ducheneaux on behalf of MIGA, Gerry Sikorski and Emily Segar on behalf of the Mille Lacs, and Ginny Boylan and Kurt BlueDog on behalf of the Shakopee.[127]

In late November 1994, there was discussion by the Minnesota tribes of arranging a meeting with John Duffy, who they considered to be Secretary Babbitt's "hit man on Indian gaming."[128] Segar placed a call to Duffy's office in an unsuccessful effort to arrange the meeting; she apparently requested that, in Duffy's absence, they meet with "someone else who is not in the BIA,"[129] as part of the lobbyists' attempts to meet with high level DOI staff.

At a December meeting, the MIGA tribes approved making requests to Rep. Oberstar and other members of the Minnesota delegation to help arrange a meeting between tribal leaders and Secretary Babbitt. This was an unusual step, as MIGA had never before made a request to meet with Babbitt, nor had the group ever met with Babbitt on any issue.

On Dec. 28,1994, McCarthy sent a detailed six-page memorandum to "All Interested Parties;" he described it as "an outline for our meeting with Secretary Babbitt on the Dog Track

[n6] *Id.*

[127] Sikorski recalls exchanging information with Scott Dacey. Dacey was a member of the Wisconsin lobbying firm of Broydrick & Associates, which operated in Washington, D.C., as Broydrick, Broydrick & Dacey. The firm was retained by the Oneida Nation. Ducheneaux also was communicating with Dacey about the status of the Hudson proposal, including the Governor's position and the MAO recommendation.

[128] Ducheneaux G.J. Test, at 37.

[129] DOI Phone Message Slip, undated.

Issue." McCarthy was still working on the date and location of the meeting, but informed tribal leaders that MIGA was shooting for Jan. 17 or 18.

In his memo, McCarthy noted that he had talked with staff members for Oberstar, Minge, and Wellstone "about assisting us in our effort to meet the Secretary of the Interior on the dog track issue." MIGA's "goal," he explained, was "to secure a meeting with Secretary Babbitt or his designee (probably John Duffy) to discuss this issue." The memo outlined the "specific strategy" that the opponents would use to try and "overrule the recommendations of the Bureau." The strategy included the arguments that "the consultation was flawed," that "we were not given a fair opportunity to present our case," and that the FONSI was invalid.

The proposed strategy also entailed impressing upon the Secretary that the BIA "failed to take into account the political impact this action would have on the Minnesota tribes." (Emphasis in original.) By "political impact," McCarthy meant that the BIA failed to recognize the "unwritten" agreement by the Minnesota tribes not to expand gaming off-reservation or into the downtown areas. Allowing a casino in Hudson, in MIGA's view, would push Indian gaming down a slippery slope, as it would stimulate activity to put casinos in every urban center. Such action would hurt Indian gaming revenues.[130]

Another part of the strategy was to "identify the potential for a conflict of interest" on the part of BIA. By this, McCarthy meant that the opponents questioned whether Assistant Secretary Deer could be a neutral, unbiased decisionmaker. In their view, a potential conflict of interest

[130]McCarthy later conceded "the bottom line is that [it] all equates to economics." Grand Jury Testimony of John McCarthy, Jan. 29, 1999, at 29 (hereinafter "McCarthy G.J. Test., Jan. 29, 1999").

existed in that Deer was an enrolled member of a Wisconsin tribe and was a good friend of Chairman gaiashkibos.[131]

Finally, McCarthy outlined "a few key political issues to keep in mind and to point out to the Secretary":

Chairman gaiashkibos, a "key" player for the applicant tribes, is a Republican and "will no doubt work hard against Bill Clinton in the next two years." McCarthy noted, "We also need to point out to the Secretary that it would not be in his best interest to in any way help the Republicans erode any additional Indian votes or Indian political contributions."

- "The Governor of Wisconsin, Tommy Thompson, is also a Republican."

McCarthy testified later there were rumors that Thompson was interested in running for president, and McCarthy surmised that "if in fact this dog track went through, that would generate a pocket for the Republicans to defeat the President" and "the Republicans then would have more access to funds."[132]

'•"According to McCarthy, the Minnesota tribes "couldn't figure out" why the BIA "wasn't paying a lot of attention to our position," and there was "some thought that it was because Ada Deer had influenced in some fashion their decision to move forward with it rather than to consider both sides." McCarthy G.J. Test., Jan. 29, 1999, at 35. Yet, for reasons that remain unclear, the Minnesota tribes never did try to lobby Ada Deer, even though Ducheneaux, their Washington lobbyist, had known her on a personal level for more than 25 years and was clearly aware that, under the regulations, she would have made the formal decision to approve or disapprove the Hudson application. BlueDog recalled that there were efforts to meet with Deer on the Hudson matter, but that she was not receptive to a meeting with the opponent tribes.

It also appears that the opponents never directly petitioned Interior for Deer's removal from the matter. Kitto conceded that the lobbyists had plans to try to remove Deer through a conflict, "but we never had to do that. She removed herself." Kitto *Four Feathers* Dep., April 17, 1997, at 277-78.

[132]McCarthy G.J. Test., Jan. 19,1999, at 38.

- The Minnesota tribes "have been very active politically and are strong Democrats. We contributed heavily in the November [sic] elections and played a key role with our support for President Clinton in 1992." McCarthy later explained that by stating that the tribes "contributed heavily," he was suggesting that the opponent tribes make the Secretary aware of their ability to make financial contributions to the Democratic party, and to let him know that an adverse decision could jeopardize the good support the tribes historically provided the Democrats.

McCarthy acknowledged that his intention in outlining these "key political issues" was for the opponent tribes, in making their arguments to Secretary Babbitt, to make a direct link between political contributions and the Secretary's decision. McCarthy encouraged tribal leaders at this time to emphasize to the Secretary that they were "good Democrats."[133]

**b. O'Connor & Hannan Joins the Opposition**

Kitto added further resources to the Hudson opposition in early 1995 by enlisting O'Connor & Hannan, L.L.P., to make the case in Washington on behalf of the St. Croix tribe. The firm's background in both lobbying and Indian gaming equipped it for what became a lead role in the opposition lobby effort.

O'Connor & Hannan was established in 1957, and since the early 1960s, the firm was closely associated with the Democratic Party. Founding partner Patrick O'Connor played an active role in Hubert Humphrey's 1960 pursuit of the Democratic presidential nomination, and remained active in the national party into the 1970s. In more recent years, the firm purposefully diversified its lobbying practice by adding well-known Republicans to its ranks, including

[m] *Id.* at 37.

Patrick E. O'Donnell and former Rep. Thomas J. Corcoran (R-Ill.), who joined the firm in 1991.[134]

Corcoran provided O'Connor & Hannan its introduction to Indian gaming. Since 1989, Corcoran had represented Buffalo Brothers, the private management company that operated the St. Croix tribe's gaming operations in Wisconsin. When Corcoran joined the firm in 1991, he brought Buffalo Brothers with him as a client.

During this same time, Kitto was performing state-level lobbying work in Minnesota for variety of clients in the area of Indian gaming. Since 1985, Kitto, an enrolled member of the Mdewakanton Santee Sioux tribe of Nebraska, had functioned through his own firm, Management and Public Affairs Consultants (MPA), in St. Paul. One of Kitto's MPA clients was Little Six, Inc., the Shakopee Mdewakanton Sioux tribal corporation that owned and operated the tribe's Mystic Lake casino.

Through his lobbying efforts in Minnesota, Kitto became acquainted with a partner in O'Connor & Hannan's Minnesota office. When Little Six needed Washington lobbyists, Kitto brought them to O'Connor & Hannan. Little Six retained the firm in the fall of 1993 for a general Washington representation on gaming issues.

Over time, Kitto and O'Connor & Hannan developed a close working relationship. In order to serve the firm's Indian client development goals and Kitto's interest in being able to represent his tribal clients in Washington, Kitto associated with the firm as a consultant. The firm eventually added Kitto (who was not a lawyer) to its formal roster as a member of its

[134]Corcoran joined the firm in a consulting capacity as a lobbyist. In 1994, he became a non-attorney, general partner, as permitted by D.C. Bar rules.

Government Relations group in the fall of 1994. Both before and after that formal association, Kitto continued to serve many of his clients individually through MPA.

Corcoran already was familiar with the Hudson casino proposal before Kitto's late 1994 overture. On Dec. 10, 1993, Corcoran had sent a memorandum to Little Six Chairman Leonard Prescott and Kitto regarding the proposed purchase of the Hudson dog track by a consortium of Wisconsin Indian tribes, and the conversion of the dog track to an Indian gaming establishment. The memo referred to previous discussions about this "problem," and suggested, "[i]f you want to oppose this development, I know you would have allies with the St. Croix tribe and their gaming facility managers." Buffalo Brothers and Little Six were then O'Connor & Hannan's only Indian gaming clients. This client development effort failed to generate an alliance involving O'Connor & Hannan in opposition to the Hudson proposal.

The **first** documented contact between Corcoran and Kitto relating to the coordinated Hudson opposition effort took place on Nov. 16, 1994, the day after the Minneapolis Area Office of BIA forwarded the application to Washington with its recommendation of approval. Daytimer records reflect intermittent Hudson-related activity by Corcoran and Kitto between Nov. 16, 1994, and O'Connor & Hannan's formal retention by the St. Croix tribe on Feb. 7, 1995. Much of this activity was focused on attempting to build a coalition of Minnesota and Wisconsin tribes to oppose the dog track's conversion.[135] Though Corcoran had hoped to interest

[135] On Dec. 10, 1994, Kitto wrote to St. Croix Chairman Lewis Taylor (on MPA letterhead), informing Taylor that Kitto had **"[Recently** ... joined the O'Connor & Hannan law **firm** in Washington, D.C." in order to "provide government relations services in D.C." for his tribal clients. The opening paragraph concluded with:

> Currently we are working at putting together a coalition of tribes from Minnesota

(continued...)

a few tribes in retaining O'Connor & Hannan on the Hudson matter, ultimately only the St. Croix responded positively.[136] The St. Croix's retainer agreement called for Corcoran and Kitto to "assume overall responsibility" for the account, but also to "draw upon the assistance, as needed, of others in the firm."[137]

A principal reason for executing the retainer agreement on Feb. 7 was so that O'Connor & Hannan would be in a position to participate in the meeting with senior Interior officials in Congressman Oberstar's office, which was scheduled for Feb. 8. On Feb. 6, Kitto sent Lewis Taylor a memo (on MPA letterhead) juxtaposing the unexecuted retainer agreement and the importance of attending the meeting. "[Hjopefully," Kitto wrote, "we can finalize [the agreement] in Washington this Wednesday [Feb. 8th]." Kitto noted in the memo that Taylor's name had been added to the list of participants for the meeting in Oberstar's office. The memo also informed the St. Croix chairman that Patrick O'Connor was "working with Secretary Babbitt's office to confirm his participation in the meeting."[138] The memo concluded:

[135](...continued)
and Wisconsin to lobby the Congress and the Clinton Administration and KILL THE HUDSON DOG TRACK ISSUE forever. (Emphasis in original.)

[136]By this time, O'Connor & Hannan was no longer representing the Buffalo Brothers or Little Six.

[137]Letter from Thomas Corcoran to Lewis Taylor, Feb. 7, 1995.

[138]As early as Jan. 20, 1995, records suggest Corcoran and O'Connor discussed the Hudson dog track issue in conjunction with O'Connor & Hannan's possible representation of the Prairie Island Sioux. On Feb. 2, Corcoran and O'Connor had another telephone conversation about Hudson, this time in conjunction with the firm's likely representation of the St. Croix tribe. Billing records summarize the conversation as "regarding forthcoming meeting with Duffy of Interior regarding creating trust lands at Hudson, Wisconsin dog track for a casino and need to contact Thomas Collier." Billing records evidence a similar conversation between Corcoran and

(continued...)

"Depending on the outcome [of the Feb. 8, 1995 meeting], we will outline, for your approval, an action plan involving the Congress and White House."[139]

### c. The Opponents Secure a Feb. 8 Meeting with Secretary Babbitt's Counselor, John Duffy

The meeting set for Feb. 8, 1995, was the result of the opponent tribes' persistence in pushing the Minnesota congressional delegation to obtain a meeting with Secretary Babbitt or John Duffy.[140] On Jan. 6, 1995, Rep. Minge wrote his Minnesota colleagues asking them to join him and Rep. Oberstar in sending a letter to Babbitt "urging" Babbitt or Duffy to meet with representatives of MIGA, due to "concern" that BIA had recommended approval of the project. Within a week, eight members of the Minnesota delegation - including Sen. Wellstone - took Minge up on his request. On Jan. 11, they sent a joint letter to Secretary Babbitt requesting that he or Duffy meet with their tribal constituents. The letter explained, "Because this decision impacts seriously Minnesota Indian Tribes' economic viability and our entire state economy, we urge you to meet with and hear the concerns of Minnesota's Tribal leaders."[141]

[138](...continued)
O'Connor on Feb. 6, as well as a call from O'Connor to Collier's office.

[139]Kitto proposed this "action plan" in a Feb. 20, 1995, memo to Taylor. *{See infra* at 115-16.)

[140] At least some of the opponents viewed Duffy as an adequate substitute for the Secretary, because these fee-to-trust applications "were always very political" and "it was always felt that if you wanted to influence a decision, you would at some point have to talk to Duffy." Ducheneaux G.J. Test, at 37-38.

[141]This letter was signed by Sen. Wellstone and Reps. Oberstar, Sabo, Vento, Ramstad, Peterson, Minge and William Luther (D-Minn.) - all of whom, save Ramstad, are Democrats. Ramstad apparently agreed to sign the letter only because he is anti-gaming, and because Minge's and Oberstar's staffs repeatedly called seeking his signature. Although the letter

(continued...)

Two days later, McCarthy informed tribal leaders that a meeting with Secretary Babbitt was scheduled for Jan. 24 in Washington. The meeting was rescheduled, however, to Feb. 8, and by the time McCarthy notified members of that change on Jan. 18, it also had become uncertain that Babbitt himself would attend.

Corcoran got O'Connor involved in the matter at this time to pursue the Secretary's participation in the Feb. 8 meeting, or to assure his attendance at another meeting with the opponent representatives.[142] To that end, on Feb. 7, Corcoran drafted, signed and faxed on O'Connor's behalf[43] a letter to Collier, explaining a message he left for Collier to call him. The letter opened with a brief description of the Hudson dog track issue, informing Collier that O'Connor & Hannan represented the St. Croix tribe in the matter, and then stated that all Minnesota tribes with casinos opposed this project. The letter then states:

> We have been advised that John J. Duffy will meet with our client and the Minnesota casino owners at Cong. Jim Oberstar's office on Wednesday, Feb. 8, at 1:30 p.m. to discuss this matter. I would like to talk to you about this meeting and

[141](...continued)
mentions that MIGA was seeking a meeting with the Secretary, Ramstad's office heard nothing more about it, and apparently was not invited to attend the Feb. 8 meeting.

[142]O'Connor's daytimer notes from Feb. 6,1995, when he spoke with Corcoran about the matter, make references to "Babbitt attending" and "future meeting," O'Connor states that he has no recollection of insisting on a meeting with Babbitt, nor does he recall that the objective of his initial involvement in the St. Croix matter was to get a meeting with Babbitt. He maintains that he was happy with the meeting with Collier that he eventually obtained on March 15. *See* Section II.D.3., *infra.*

[143]O'Connor and Corcoran both indicated that Corcoran sent this letter, and other documents like it, over O'Connor's name and with O'Connor's permission, in the Hudson matter.

> arrange, at some future date, an appointment with the Secretary to express our views on this matter.

The letter ended with the number where O'Connor could be reached that day.

O'Connor has maintained consistently that he had no intention of seeking a meeting with Secretary Babbitt.[144] Corcoran testified, however, that it was "O'Connor's view... that this [was] a matter which ought to be brought to the attention of Secretary Babbitt."[145] Corcoran added, "Pat's view was I want to talk to the boss." Corcoran understood O'Connor to be a longtime friend of, and former fund-raiser for, Babbitt.

By the end of this flurry of activity, the opponent tribes had united their efforts and focused them on a Washington lobbying campaign that targeted, initially, Capitol Hill and the top officials at Interior. Based on the results of that initial phase of the Washington lobby campaign, they ultimately would broaden the Washington audience for the arguments advanced by McCarthy and Kitto to this point.

[144]In his civil deposition O'Connor maintained, "Well, I wanted to see Collier because he was going to be a factor in making that decision. And I don't see - it just isn't the way I work. I wouldn't - if I wanted Babbitt, I would go to Babbitt." *Four Feathers* v. *City of Hudson* Deposition of Patrick O'Connor, Feb. 5,1998, at 430.

Prior to his involvement in the Hudson matter, however, O'Connor secured at least two meetings with the Secretary on two separate matters involving O'Connor & Hannan clients. In the first instance, O'Connor believes his firm was retained for the sole purpose of securing a meeting with Babbitt. On the second matter, O'Connor reached out to Collier for help in scheduling an appointment with the Secretary directly. Collier commented during this investigation that O'Connor was "off the charts" in his persistent attempts to contact the Secretary about that second matter. OIC Interview of Thomas Collier, May 14,1999, at 9 (hereinafter "OIC Collier Int.").

[145]Grand Jury Testimony of Thomas Corcoran, June 6,1999, at 58-59 (hereinafter "Corcoran G.J. Test.").

### D. Events Occurring During Early Analysis of the Hudson Application by DOPs Indian Gaming Management Staff (December 1994 - May 1, 1995)

#### 1. IGMS's Initial Analysis Identifies Concerns With the Best Interests Analysis, But Finds That The Casino Would Not Be Detrimental to The Surrounding Community

In early December 1994, the MAO findings and recommendation were received by the Bureau of Indian Affairs's Indian Gaming Management Staff in Washington. Copies of the application were distributed by Emily Ramirez to the IGMS employees with responsibility for evaluating the application, Thomas Hartman and Edward Slagle.[146] Just as with the Area Office, for several key members of the IGMS staff - including the Director - the Hudson application was the first request they had analyzed seeking to take off-reservation land into trust. While Ramirez had worked directly on off-reservation gaming applications before this one, and Slagle may have reviewed environmental aspects of two or three others, new IGMS Director George Skibine had no experience and Hartman merely had reviewed some materials from previously-decided applications.

No regulations, checklist or any other DOI directive provided specific guidance in interpreting and applying the ambiguous terms of section 20 of IGRA - the two-part determination that was the focus of IGMS's analysis. In particular, although the statute required consultation with "nearby Indian tribes," the staff lacked guidance as to whether those tribes were part of the "surrounding community" to which they had to determine whether the proposal would be "detrimental." Moreover, there was no firm interpretation of what constituted "detriment," or

[146]Hilda Manuel hired Edward ("Ned") Slagle to be the IGMS environmental specialist in March 1993. Slagle had been a geologist and then an environmentalist with the Bureau of Land Management for 10 years before becoming BIA's first environmental specialist.

what quality or quantum of evidence would be required to support a finding that the proposed facility would be "detrimental." The staff also lacked familiarity with any official policy on these or other issues that might have been reflected in other gaming decisions.

In early January 1995, Slagle and Hartman met with two or three representatives of the applicants, including Mole Lake Chairman Arlyn Ackley and a member of the Red Cliff tribe. The purpose of the meeting apparently was for the applicants to introduce themselves and to explain the application. Thereafter, Hartman had frequent conversations with Du Wayne Derickson of Mole Lake, both on the phone and in person at DOI. Derickson testified that he would regularly drop in on the IGMS and see Hartman whenever he was in Washington.

Slagle and Hartman next spent the week of Jan. 23,1995, at the Lakewood, Colo., office of the IGMS reviewing and evaluating the application with Ramirez. During that time, the three began to write their tentative conclusions about the aspects of the application on which each was focused: Hartman on the financial aspects of the deal between the tribes and their non-Indian partner, and the claimed financial detriment to the surrounding community; Slagle on the environmental impact; and Ramirez on land acquisition issues. Ramirez did most of the drafting with input from the others. Hartman edited the document, with some review by Ramirez, after he returned to Washington.

While the Area Offices are delegated the authority to take many actions and make many decisions without input from Washington, that was not the case with off-reservation gaming in 1995. As discussed above at 42-43, the Secretary of the Interior in the Bush Administration centralized such power in Washington. Secretary Babbitt continued the policy.

In accord with this policy, the decision-makers in Washington did not assign much weight to the area office's recommendation. Skibine read and considered the MAO recommendation, but considered it his job to look at the application "anew" and see whether the area office recommendation was "justified."[147] Skibine reported that he did not consider overriding an area office recommendation unusual, and he noted other instances where the IGMS had done so.[148] Hartman believed that it was IGMS's role to perform a *de novo* review. At the time of the Hudson application, Hartman said he probably viewed the MAO recommendation as "having strong presumptive validity,"[149] but he did not feel bound to follow it.

During this initial analysis, IGMS staff focused primarily on the applicants' financial agreements and the results of consultation reported in the MAO findings and recommendation. The three staffers identified several concerns about whether the proposal was in the "best interests" of the tribe and described them in contemporaneous draft reports. First, they were concerned that the arrangement between the tribes and the track owner created a "doughnut" of land around the trust lands not within the control of the tribes or the United States as trustee. If the parking lot lease with the tribes were canceled, their non-Indian partner could control, and limit, access to the casino facility.[150] Second, Hartman was concerned that the parking lot lease

[147]Grand Jury Testimony of George Skibine, June 25, 1999, at 55-56 (hereinafter "Skibine G.J. Test.").

[148]As discussed above in Section H.B.2., as of May 1998, only five of 10 applications forwarded to central BIA from the Area Offices with approval recommendations received a favorable two-part finding under IGRA Section 20(b)(1)(A).

[149]Grand Jury Testimony of Thomas Hartman, May 12,1999, at 26.

[150]*Id.* Hartman and others said that concern about this issue was heightened because it

(continued...)

payments were excessive and that the term of the parking lot lease was longer than the tribes' compacts with the state; if the compacts were not renewed, the tribe could be liable for lease payments long after they could no longer conduct gaming at that location. This was part of a broader concern that the total payments from the tribe exceeded the fair market value of the property to be purchased by the tribe and taken into trust.[151] The tribes were assuming $39 million in debt already owed by the dog track's owners. To address some of these concerns, the applicants provided additional information during this period regarding the title and the precise boundaries of the property to be acquired at IGMS's request.

On the other hand, contemporaneous draft memos reflect that the IGMS staff tentatively found (as had the Area Office) that the casino proposal would not be "detrimental to the surrounding community." Hartman found, for example, that concerns about increased crime would be addressed by the hiring of additional police as provided for by the tribes' payments under the agreement for government services. The local community was mildly supportive with a few vocal opponents. Hartman also said it was his understanding that mere opposition to a gaming proposal - without factual evidence of harm - was insufficient to support a finding of "detriment." In Hartman's view, expressions of opposition alone were insufficient because more than anti-Indian or anti-gaming sentiment was required to find detriment. Similarly, opposition

[150](...continued)
had been overlooked in a different, previous application and caused significant problems.

[151]An NIGC financial analyst confirmed that Hartman - and maybe Skibine - discussed with her certain aspects of the agreements between the tribes and Galaxy Gaming. Hartman expressed his concern that the tribes were paying Galaxy Gaming far in excess of the appraised value for the land.

by nearby tribes because a new casino would compete with their existing facilities was insufficient.[152]

The one staffer who took exception to the conclusion of "no detriment" was Slagle. He believed the environmental assessment was inadequate. He suggested that a more extensive, environmental impact statement should be required.[153] Among his criticisms were that the NEPA analysis did not mention the potential impact of the project on the St. Croix Riverway, although it had generally noted the absence of a wild and scenic riverway assessment required by statute.

### 2. The Feb. 8,1995 Meeting of Opponent Tribal Representatives and DOI Officials at Congressman Oberstar's Office

As a result of congressional requests spurred by tribal lobbying, senior Interior gaming officials met with legislators and tribal opponents on Capitol Hill to discuss the Hudson application on Feb. 8, 1995. There were actually two meetings concerning the Hudson casino application held in Rep. Oberstar's office on that date. In the first meeting, tribal leaders and lobbyists met with several members of the Minnesota delegation and their staff to review strategy prior to meeting with officials from Interior. In the second meeting, John Duffy and George Skibine joined the group of tribal leaders and lobbyists already convened in Oberstar's office,

[152]Hartman told investigators that his understanding that "detriment" required factual evidentiary support was the result of a conversation with Manuel and his own views. Manuel said that her working interpretation of the term when she was IGMS director was that factual support - more than bald allegations - was necessary to establish "detriment."

[153]Slagle recalled that Ramirez told him that an environmental impact statement was not going to be required, regardless of his analysis. He said that this was consistent with his experience throughout his tenure at IGMS and not unique to the Hudson application. *See* n. 375, *infra.*

and additional members of the Minnesota delegation - all Democrats - "stopped in" for brief periods during the meeting.[154]

The congressmen involved in the Feb. 8 meeting likely understood the importance that the tribes placed on this meeting with top Interior officials. In a memorandum prepared shortly beforehand, Oberstar staff member Waylon Peterson described the meeting as **"a very important meeting for the tribes."**[155] (Emphasis in original.) Peterson told investigators there were two purposes to the meeting: (1) to get the comment period extended; and (2) to get the application "killed."[156] Peterson's memo to Oberstar listed a series of points to be made in the meeting: deficient consultation by BIA with nearby tribes in Minnesota, a flawed FONSI, and the notion that the "Wisconsin [application] supporters, including Tommy Thompson, are Republicans; why should the Clinton Administration help them?"

**a. The "Strategy" Meeting**

The tribal opponent representatives recall that they met in a "strategy" meeting with members of the Minnesota delegation for about 40 minutes, immediately before the Interior officials arrived. Opponent attendees included: John McCarthy, Frank Ducheneaux and Myron Ellis on behalf of MIGA; Larry Kitto and Lewis Taylor on behalf of the St. Croix; Kurt BlueDog, Stanley Crooks and Ginny Boylan on behalf of the Shakopee; and Melanie Benjamin on behalf of the Mille Lacs. Oberstar and Vento hosted the meeting, along with their staffers, including Waylon Peterson.

[154]McCarthy G.J. Test., Feb. 24,1999, at 37-38.

[155]Memorandum from Waylon Peterson to James Oberstar, Feb. 6, 1995.

[156]OIC Interview of Waylon Peterson, Oct. 21,1998, at 3.

At the strategy meeting, there was discussion as to who would take the lead with the Interior officials. The consensus of the group was that tribal leaders should do most of the talking, as they believed this would be more effective in getting their message across. McCarthy also distributed to the attendees copies of the "Wisconsin Dog Track Chronology of Events" that he had prepared in late December.

It does not appear that the strategy discussion focused on the "political angle" set forth in McCarthy's Dec. 28 memo. According to McCarthy, the tribal leaders and lobbyists decided to focus on the consultation issue instead. This apparently was the course recommended by Ducheneaux, who reportedly had told McCarthy prior to the meeting that the political angle "probably is not something you'll want to talk with the Secretary about in this kind of meeting."

**b. The Meeting with John Duffy and George Skibine**

Skibine and Duffy told investigators they attended the Oberstar meeting with very little awareness of the application or issues involved. Duffy told investigators that the request that he attend this meeting was the first he had heard of the Hudson application.[157] He stated that he had not taken any steps to prepare himself for what he thought would be a meeting with congressional staff. At most, he thinks Skibine may have briefed him in the car en route to the meeting. Skibine's first day as director of IGMS was Monday, Feb. 6. He had not familiarized himself with the status of its pending matters prior to his move to IGMS and he had not worked previously on gaming matters. When he arrived at IGMS, Skibine received several notebooks of

[1] "Before the Feb. 8 meeting, Duffy had sent several letters written by DOI staff on the Hudson matter, mostly responding to letters to the Secretary. Duffy reviewed the letters in this investigation and said it would be routine for him to have signed letters responding for the Secretary and he probably read the letters before signing them, but he does not think he remembered the letters when he went to the Feb. 8 meeting.

material describing pending matters, but had not reviewed them extensively. On Monday or Tuesday of that week, Skibine was informed - probably by Duffy himself - that he would be accompanying Duffy to the Oberstar meeting.

Around 2 p.m., Duffy and Skibine joined the Congressmen, staffers and tribal leaders in Oberstar's office. It was a crowded meeting, with people packed into the Congressman's office, some even sitting on the floor. In addition to the hosts, Reps. Oberstar and Vento, the meeting was attended by Sen. Wellstone and four additional Democratic members of the Minnesota delegation: Reps. Luther, Minge, Peterson and Sabo. Most of the Congressmen were accompanied by at least one staff member each.[158]

The meeting opened with the congressmen and the tribal leaders presenting their views of the application and the deficiencies in the MAO-BIA's process. Oberstar made the opening "pitch" against the Hudson casino proposal by pointing out how distant the land at issue was from the applicants' reservations.[159] Skibine said that Congressman Oberstar did not merely facilitate access for his constituents in this meeting, but openly advocated the tribes' opposition to the Hudson casino application. Wellstone, who recalls only attending the meeting for the first 30 minutes or so, made known his opposition and may have made some general comments about Indian matters.

[158]Not all of the members were there for the entirety of the approximately hour-long meeting, but each was reportedly there for at least 20 to 30 minutes. There were no Republican members present, nor does it appear any were invited, despite the fact that Rep. Ramstad co-signed the letter requesting the meeting.

[159]0IC Interview of James Oberstar, Dec. 1,1998, at 4 (hereinafter "OIC Oberstar Int.").

Tribal leaders Lewis Taylor, Myron Ellis and Stanley Crooks reportedly spoke about the effects the decision would have on surrounding tribes. Crooks expressed his view that fee-to-trust applications require the actual approval of surrounding tribes before they may be approved under IGRA. BlueDog argued that applicants should not be permitted to take control of the land on which the Hudson dog track is situated because it historically belonged to the Dakota Sioux. BlueDog and others apparently expressed their dismay at the lack of established procedures at Interior for deciding whether to approve such applications. BlueDog reportedly also asserted at the meeting that the tribes had been historically solid or strong Democrats who supported the Administration and other Democrats and should be given at least an opportunity to be heard by the Administration.[160] No witness recalls any explicit mention or discussion of campaign contributions during either of the meetings in Oberstar's office on this date.

Skibine recalled that the tribes and congressmen pushed Duffy to state during the meeting that the application would be denied. Duffy and Skibine both recalled that, when it became apparent that he would not do so, the attendees complained that tribes opposed to the casino had not had an adequate opportunity to express their views on the application, and wanted to provide economic analyses of the impact of the new casino on their existing operations. Duffy responded that they would have an opportunity to provide any information they wanted. At the time Duffy made that promise, neither he nor Skibine was aware of whether the claim of non-consultation was valid, but thought that it seemed unreasonable not to allow the opponent tribes to submit

[160]Duffy stated that someone (he could not recall whom) approached him as the meeting was breaking up and made the point to him that the applicants were Republicans and the Administration should not help them. He said that he did not take this comment seriously, and denied that party affiliation had any effect on the decision-making process.

additional information.[161] Duffy said at the time he did not know if it was unusual to allow extra time to provide additional comments after the area office had conducted its consultation.

Skibine and Duffy told investigators that the tone of the meeting was "aggressive." Independent evidence confirms this tenor. For example, in a letter to Taylor the day after the meeting, Corcoran stated that he had spoken with Kitto about the Oberstar meeting and it sounded "like Duffy now knows he's got a fight on his hands."

Skibine took notes during the Feb. 8 meeting, which he later circulated to some of his IGMS staff. In his notes, Skibine listed concerns raised by the meeting attendees, including:

- the economic impact on existing gaming enterprises (including those in Minnesota);
- the potential political fallout from establishment of an off-reservation casino because of the agreement among Minnesota tribes not to seek off-reservation gaming opportunities and fear of a "backlash against all gaming tribes," with the possibility that Congress will then "amend IGRA to the detriment of all Indian tribes";
- a claim that there had been "no adequate consultation with Indian tribes under sec. 20 of IGRA" due to lack of clarity on the part of BIA about the meaning of "nearby";

  a claim that the acquisition involved lands within the historical territory of the Shakopee Mdewakanton Sioux;

  opposition by local Wisconsin communities;

[161] Witnesses also recall that Frank Ducheneaux provided his interpretation of the consultation provision of IGRA. Ducheneaux had previously had contact with Skibine on unrelated matters.

Ducheneaux served as counsel on Indian affairs to the House Committee on Interior and Insular Affairs from 1973 to 1990. During that time, Ducheneaux met both George Skibine and his brother, Alex Skibine. Ducheneaux said both brothers applied for employment with his committee, and he hired Alex. They worked together for two or three years. Ducheneaux said he met with Skibine along with Duffy two or three times on the Hudson matter, one of which was a large meeting on Capitol Hill on Feb. 8, 1995.

- inadequate information about the application to permit the tribes to respond; and
- unhappiness that Duffy and Skibine were unwilling to decide against the application during the meeting.[162]

Skibine's notes indicate he and Duffy expressed in the meeting that DOI generally supports tribes in their gaming efforts "as a means to self-sufficiency and economic development." They told the meeting attendees that the IGMS staff was preparing a report to the IGMS director, but that there was no deadline for a decision on the application and additional material could be submitted directly to IGMS. Duffy also agreed to the Minnesota congressional delegation's request for another meeting before DOI would issue a final decision. Skibine's notes indicate they explained at the meeting that a positive recommendation from Interior would be insufficient without concurrence by the Governor, but Skibine's notes reflect that the tribal representatives "made it clear that they [did] not want to chance this on the action of the Wisconsin Governor." Duffy told investigators that he did factor into his eventual analysis of the Hudson matter his

[162] On his own initiative, Hartman later wrote a memo to Skibine responding to the concerns listed in Skibine's notes. He noted that all of the Minnesota and Wisconsin tribes except one were consulted by the MAO. He stated the Shakopee's historical claim to this land was not legally valid, and rejected the idea that the tribes' right to establish a casino was based solely on the results of any referendum. Hartman noted that over time the position of local governments on the dog track and on Indian gaming had varied and only 80 opposing letters from the public had been received. In response to the complaint that the tribes and municipalities lacked information to develop adequate impact analyses, Hartman agreed that it might be helpful in the future for area offices to provide more extensive information about applications. On the other hand, he rejected the notion that IGMS should provide any information about the status of an application beyond the fact that it was under review. As for the Minnesota tribes' professed concern about the effect of a Hudson casino on the politics of Minnesota Indian gaming, Hartman asserted that "[political expediency for tribes in Minnesota is not binding on other tribes and states." Memo from Thomas Hartman to George Skibine, undated. Skibine reported that he reviewed and considered Hartman's response.

perception from this meeting that there was active opposition by the entire Minnesota delegation and the Wisconsin congressman from the district in which the casino would operate.

### 3. Opponent Representatives Meet with DOI Chief of Staff Thomas Collier on March 15,1995

Following the Feb. 8 meeting in Congressman Oberstar's offices, tribal representatives "strongly recommended" that the tribes "[d]o an economic study to document negative impact on Minnesota and Wisconsin tribes" from the proposed Hudson casino.[163] In the weeks that followed, John McCarthy's focus was on making sure that the tribes followed through on preparing economic impact studies and submitting them to DOI. Similarly, O'Connor & Hannan had persuaded the St. Croix to commission Coopers & Lybrand to conduct an in-depth market analysis - an expensive endeavor estimated to require 45 to 60 days to complete.

Notwithstanding Duffy's pledge to permit additional comments, representatives of the opponent tribes became concerned that the rapid progress of the application would foreclose consideration of additional materials. In a March 2 memo to Taylor, Corcoran reported that he had spoken with Kevin Meisner in the DOI Solicitor's Office, and Meisner expected to receive Skibine's recommendation on the application in about two weeks. Corcoran stated that he had asked Ducheneaux to talk to Skibine "to clarify this matter," and to ask Oberstar and Vento to call Skibine as well. Corcoran also reported that he and O'Connor were going to try to meet with Babbitt's chief of staff, Thomas Collier, early the following week "to get a commitment that we be given adequate time" to submit a report from Coopers & Lybrand on the potential impact of a

[163] "Minnesota Legislative Update," from Larry Kitto to Tribal Clients, Feb. 6-10, 1995.

Hudson casino at a time when it will "be given meaningful consideration in BIA's review of this application."

The following day, March 3, O'Connor sent a fax to Collier in which he expressed concern that "this application is moving so swiftly that there [would] not be time enough for [the St. Croix] to get the results of [the] Coopers & Lybrand analysis into Interior's decision-making process."[164] O'Connor requested that he, Corcoran and Kitto be permitted to meet with Collier the following week.

O'Connor, Kitto and Corcoran met with Collier and Heather Sibbison, Duffy's assistant, on March 15, 1995. According to Corcoran's March 17 memo to Kitto, Collier committed to giving them additional time to submit a Coopers & Lybrand report so that the impact on their client could be appropriately evaluated by Skibine and by Collier for Secretary Babbitt. Corcoran recalls - and his memo reflects - that Collier said the final decision would be made by Collier or the Secretary "depending on the level of controversy this application generate[d]."[165] Corcoran told investigators he took the lead on behalf of the opponents in the meeting. In interviews, Corcoran said that during the meeting, O'Connor and Kitto told Collier and Sibbison that the tribes he represented were "good Democrats" - a phrase that Corcoran understood to be "code"

[164]In accordance with their work routine, Corcoran authored and sent this fax on O'Connor's behalf.

[165]Corcoran understood this remark to be an indication that the opponents needed to increase the appearance of controversy surrounding the Hudson application. O'Connor does not recall a comment about the level of controversy. He remembers Collier saying his role would be to make a recommendation and discuss it with the Secretary.

referring to financial campaign contributors.[166] During testimony, Corcoran said he was not certain that these were the precise words spoken, but believes Kitto and/or O'Connor communicated that his clients were supportive Democrats.[167]

Corcoran said that Collier responded to this comment by nodding in a manner that Corcoran believed reflected Collier's understanding. According to Kitto, Collier had been briefed for the meeting, yet he "was not overly sympathetic" to the concerns of the opponent tribes, nor was he "overly concerned about the socio-economic impact this project would have on the surrounding communities."[168] Nonetheless, Kitto reported, Collier did commit (or re-commit) to giving the opponent tribes 30 days in which to submit their economic impact studies. Corcoran's recollection is generally consistent, except that he added that Collier said no decision had been made about the weight to be given to the socio-economic impact on the community.

Collier said that in preparation for the meeting, he talked with his staff to learn generally DOI's procedures and responsibilities in fee-to-trust transfers for gaming purposes and to get a sense of where the Hudson application stood in the process, but he did not learn the specifics of the arguments for or against the application. Collier said he had no recollection of statements at the meeting about the party support or affiliation of the opponents, but would not categorically deny that they were made. Sibbison also did not recall such statements. Collier did not recall making any statement that he and/or Babbitt might make the ultimate decision, and doubts he

[166]OIC Interview of Thomas Corcoran, March 16, 1995, at 15.

[167]0'Connor does not recall any discussion of the political implications of the matter or the political affiliations of the applicants and opponents.

[168]Memo from Larry Kitto and Thomas Corcoran to Lewis Taylor, March 27,1995.

would have said that. Sibbison did not recall such a statement, either. Neither Sibbison nor Collier retained any notes or wrote any memoranda about the meeting.

Collier acknowledged that O'Connor had asked originally to meet with the Secretary. Collier said he made the decision not to permit such a meeting, probably without discussing it with the Secretary. Collier said he thought the Secretary knew O'Connor from his 1988 presidential bid, but that Babbitt had no strong relationship with O'Connor.

On March 15, the opponent lobbyists also met with staff from Rep. Oberstar's office. They asked, among other things, that Oberstar contact Skibine's office to verify that he would send out a letter confirming that the tribes now had a 30-day extension in which to submit additional documentation of economic impact.

**4. DOI Sets April 30,1995, Deadline For Additional Comments**

Sometime after the Feb. 8 congressional meeting, Skibine realized that the failure to set a deadline for the submission of additional information might permit the opponents to string out the process indefinitely, effectively preventing a positive decision on the application. Skibine drafted, and had Duffy sign, letters to the Feb. 8 meeting participants to confirm that DOI had agreed to allow the tribes to submit additional information for consideration of the Hudson application. The letter, dated March 27, stated that any additional information would need to be submitted by April 30, 1995, in order to considered in the review process.[169]

A similar letter was sent to the applicant tribes, advising them that BIA was continuing to accept comments, and was now setting an April 30 deadline. The letter to the applicants

[169]At some point after the Feb. 8 meeting, Skibine learned that the views of all tribes in Minnesota and Wisconsin, in fact, already had been solicited by letter from the area office during its initial consideration of the application.

informed them of the Feb. 8 meeting, and described some of the concerns voiced at that meeting. The letter noted the tribal opponents said they did not believe the BIA complied with the tribal consultation requirements of Section 20, complained they lacked sufficient information to adequately respond to the proposed acquisition, and "specifically requested that they be granted additional time to submit reports detailing the impact of the proposed acquisition on nearby tribes." In the letter, Duffy offered his assurance that the opportunity extended to the opposing tribes would "not delay consideration of other aspects" of the application by IGMS. He concluded: "Should areas of concerns with the application be identified, you will be so notified."[170]

By letter dated March 30, 1995, and signed by Chairpersons Ackley, Gurnoe and gaiashkibos, the applicant tribes formally protested BIA's willingness to accept further comments from the opposing tribes. On April 14, Duffy wrote to Gurnoe explaining that his decision to extend the comment period would allow DOI "to ensure that all relevant view points ha[ve] been heard." On May 8, Assistant Secretary Deer also responded to the March 30 letter from the three applicant leaders. Deer explained that IGRA "gives the Secretary discretion to collect information relevant to his review of applications to take land into trust for gaming purposes" and stated "the Secretary acted well within his discretion when he agreed to accept additional information about the application at issue here."

[170]Skibine later asserted that this statement promised such notification only with respect to areas other than the "detriment" analysis. Skibine also asserted that the statement referred only to new concerns about information reviewed by the area office. Chairman Ackley of the Mole Lake tribe and his assistant, Derickson, discussed the extension with Skibine at a March 8 meeting at DOI. Skibine recalls the two angrily denouncing it and storming out of his office. Havenick recalled that Derickson called him that day - March 8 - with news of the additional comment period.

The only formal BIA policy governing consultation time periods is set forth in the Checklist, and is directed at the area office performance of its consultation function. Accordingly, under DOI or BIA policy, it appears Duffy, as counselor to the Secretary, and Skibine, as IGMS Director, had the discretion to accept additional comments. IGMS staff questioned by investigators reported that, although it is essential that all parties be given an opportunity to comment on an application during the area office's review, as a practical matter, comments and additional information are routinely accepted and considered up to the time a decision is actually made by the IGMS director.

The opposing tribes also sought to gain access to further information about the details of the proposed casino. The tribal representatives complained that, without more specific financial information about the proposed casino, the tribes could not estimate with any accuracy the impact the facility would have on their existing gaming operations. After consulting with the applicant representatives, IGMS refused to provide all of the information requested, agreeing only to provide documents from which much of the proprietary financial information had been redacted.

### 5. The Secretary and Senior DOI Officials Meet with Wisconsin Tribes on April 8,1995

On April 8, 1995, Babbitt, Deer, Manuel and others from DOI traveled to Oneida, Wis., for a "tribal dialogue" attended by representatives from all of the Wisconsin tribes.[171] A major

[171] Although no representatives or senators attended the tribal dialogue, Sens. Herb Kohl (D-Wis.) and Russell Feingold (D-Wis.) and Reps. Gerald Kleczka (D-Wis.) and Thomas Barrett (D-Wis.) attended a Democratic dinner in Milwaukee that night with Secretary Babbitt. Tom Krajewski indicated in his Hudson billing records that he and JoAnn Jones met with Sens. Kohl and Feingold and Secretary Babbitt.

focus of the event was an open microphone session in which tribal leaders had the opportunity to describe to the Secretary issues of concern to their tribes. Manuel told investigators that, immediately prior to the meeting, she briefed the Secretary, and included a description of the issues relating to the Hudson casino application. Babbitt does not specifically recall being briefed on the Hudson matter before this meeting, but says he may have been. A briefing memo also was provided to Babbitt. The memo, issued under Skibine's name, recounted, among other things, the location of the proposed off-reservation land acquisition, the Area Office's favorable recommendation, and the fact that it was pending before IGMS. The memo also described the Feb. 8, 1995, Capitol Hill meeting Duffy attended in which strong opposition to the application was expressed:

> [T]he Minnesota Congressional delegation, as well as all Minnesota gaming tribes, and the St. Croix Tribe of Wisconsin expressed their opposition to this acquisition on the grounds that it will adversely affect Minnesota gaming tribes, and force these tribes into attempting to expand their gaming operations off-reservation, a move that may be opposed by State and local officials. They also requested that they be granted additional time in which to submit documentation supporting their opposition to the proposed acquisition on the grounds that it is detrimental to the surrounding community and neighboring tribes. The Department agreed to this request for additional time.[172]

Babbitt denied any specific recollection of reading the memo but said it was customary to provide him with such materials about issues pending in places where he was traveling on official business. He said he probably read or skimmed it on the plane en route to Wisconsin.

According to a transcript of the tribal dialogue, the Hudson proposal was only one of a number of issues discussed by tribal leaders. Some witnesses have indicated, however, that the transcript fails to reflect an angry exchange during the meeting between Lewis Taylor and Arlyn

[172]Briefing Paper from George Skibine to Secretary of the Interior, April 5,1995.

Ackley about the proposed facility. In his response to remarks about Hudson - and to other issues raised - the Secretary noted that off-reservation gaming applications were controversial and that the issue would be reviewed.[173] Babbitt has testified that he thinks he first learned about the Hudson matter in connection with a trip to Wisconsin in the fall 1994, but he recalls speaking publicly about it at the tribal dialogue.

### 6. Additional Comments Submitted to DOI on the Hudson Proposal

After Duffy's March 27,1995, letter advising tribes of the April 30 deadline to submit additional information, the Department received several responses regarding the Hudson application, most in the form of objections.

#### a. New Materials Indicating Changes In Support by Local Governments and Other Officials

Among the responses the Department received were materials reflecting the views of state and local officials and local residents, now mostly in opposition to the casino plan. In Hudson, Mayor Redner was unseated in an election which also caused the pro-track/pro-casino majority on the city council to lose support. Local business people, Cranmer and Bieraugel lobbied the mayor and council members to pass a resolution opposing the casino and on Feb. 6, the Hudson

[173]Before the House Government Reform and Oversight Committee, Secretary Babbitt testified that he told the attendees at the tribal dialogue "in some detail" that DOI "was not willing to cram casinos down the throats of unwilling communities." Babbitt House Test, at 803. There is no evidence from the transcript of the tribal dialogue or any other source that Babbitt made such a statement. In his Grand Jury testimony, the Secretary conceded that this was an overstatement or "hyperbole." Grand Jury Testimony of Bruce Babbitt, June 30, 1999, at 133-135 (hereinafter "Babbitt G.J. Test., June 30, 1999").

Common Council adopted a resolution stating that the City of Hudson "does not support" the casino.[174] The resolution, which was sent to IGMS, stated:

> **WHEREAS,** the Bureau of Indian Affairs in Minneapolis, Minnesota has recommended to the Secretary of the Interior in Washington, D.C. the approval of casino gambling at the St. Croix Meadows racetrack site; and
>
> **WHEREAS,** Governor Tommy Thompson has indicated that he will not support any expansion of gambling unless it is supported by the elected officials of the local communities;
>
> **NOW, THEREFORE, BE IT RESOLVED,** that the Common Council of the City of Hudson, Wisconsin does not support casino gambling at the St. Croix Meadows site.

The following day, Feb. 7, Mayor Jack Breault, who had replaced Redner, forwarded a copy of the resolution to Gov. Thompson, Secretary Babbitt, Assistant Secretary Deer, Sen. John McCain, State Sen. Alice Clausing and Wisconsin State Reps. Alvin Baldus, Sheila Harsdorf, Robert Dueholm. Melanie Beller responded on Babbitt's behalf on Feb. 27.

On Feb. 9, Bieraugel wrote to Secretary Babbitt enclosing a copy of the Hudson resolution. She also wrote to Duffy, attaching a copy of the resolution and advising him of her meeting with Secretary Babbitt the previous fall in Eau Claire.

On April 28, two days prior to the deadline for comments, Mayor Breault called a meeting of the Hudson Common Council to discuss a letter proposed by council member Peter

[174]Track owner Fred Havenick, Red Cliff Vice-Chairman George Newago and Four Feathers attorney Robert Mudge all spoke in opposition to the resolution, stating that the government services agreement had been negotiated fairly and well-received. Havenick warned the Council that adoption of the resolution could lead to a breach of contract suit based on the government services agreement if Interior were to deny the application. After the Department denied the application, a suit against the City of Hudson eventually was filed.

Post. This letter, addressed to Skibine, outlined the Council's concerns related to the casino and claimed detriment to the community. The letter stated:

> As members of the Common Council of the City of Hudson, we are opposed to the proposed transfer of the St. Croix Meadows racetrack in the City of Hudson to U.S. trust status for the purpose of casino gambling. We believe that a casino would be detrimental to the City of Hudson and the surrounding area. Listed below are some of the reasons for our opposition.
>
> 1. City of Hudson research shows that attendance at other area casinos is two or three times higher than the casino applicants estimate. This difference between their attendance estimate and the City's would substantially:
>
> - Increase the City's law enforcement expenses due to exponential growth in crime and traffic congestion.
> - Tax the City's waste water treatment facility up to its remaining operating capacity.
> - Generate problems with solid waste now that the County's incineration facility is permanently closed.
>
> 2. A casino would inhibit and adversely affect Hudson's future residential, industrial and commercial development plans by requiring tax payers [sic] to fund necessary infra-structure improvements before new development can occur.
>
> 3. A casino would cause serious difficulties for current Hudson businesses to find and retain employees, especially because our unemployment rate of 3% is one of the lowest in the state.
>
> The City can provide additional supportive documentation.
>
> Many of our business owners and residents also feel a casino would be detrimental to our community. Therefore, we request that vou deny the proposal for a federal land trust and casino in the City of Hudson. (Emphasis in original.)[175]

[175]Letter from Peter Post, Jack Breault, Ron Troyer, Richard Pearson, Cathy Morris and Judy Kelly to George Skibine, April 25,1995.

Attorney Anthony Varda, representing Four Feathers, was present at the meeting and warned the Common Council that sending the letter would breach the government services agreement. He handed out Wisconsin jury instructions on "Good Faith" and on "Implied Covenant of no Hindrance." All of the Council members but one approved and signed the letter, but the Council left the issue of sending the letter subject to the review of the city's attorney. On April 28, the city attorney, William Radosevich, notified the mayor that the proposed letter posed "some risk of liability" which had to be "measured against the possibility of monumental damages."[176] As a result of this opinion, the letter was not authorized to be sent to Skibine.

Despite the Common Council's decision not to send the letter, the letter found its way to DOI on May 1. Bieraugel obtained a copy of the unsigned letter on City of Hudson letterhead and sent it to both the Department and Chairman Taylor of the St. Croix Chippewa Tribe. On May 7, another copy of the letter was sent to Secretary Babbitt by Cranmer. Cranmer covered the Post letter with one of his own, in which he stated that the city's letter had not been sent because of threatened litigation. He also attached an article from the local newspaper describing the debate over the sending of the Post letter.[177] Both the resolution opposing the casino and the Post letter were treated as part of DOI's formal record for the Hudson decision.

Interior also received written communications opposing the Hudson casino from the Town of Troy (including a Dec. 12,1994 resolution opposing it), the Wisconsin Attorney General (who had been lobbied to oppose by St. Croix Chippewa lobbyist Ann Jablonski), the

[176]Letter from William Radosevich to John Breault, April 28,1995.

[177]On June 23,1995, Cranmer also sent Babbitt a copy of the approved minutes of the April 25 common council meeting and another copy of the Post letter.

Democratic leader of the Wisconsin State Senate, a Wisconsin state representative and, once again, from Cranmer. Interior also received written communications in support of the casino from a Wisconsin state senator, the Wisconsin state representative from the district containing the Red Cliff and Lac Courte Oreilles reservations, a former member of the Hudson Common Council, a St. Croix County supervisor, a school board member, and the Milwaukee county executive. Each of the supporters discussed the recent changes in local political officials and suggested that in fact there was long-term political support for the project.

**b. Additional Materials, Including Economic Impact Studies, Submitted by Opposition Tribes and Tribal Associations**

At the April 8 tribal dialogue on the Oneida reservation, Oneida Chairwoman Deborah Doxtator informed the Secretary and the assembled tribes that the Oneida business council had taken formal action two days earlier to oppose the Hudson application. By letter dated April 17, 1995, the Oneida confirmed that it was withdrawing its previously neutral stance and opposing the Hudson proposal. This new opposition was based in large part upon concern that approval of a Hudson casino would lead to approval of casinos at other Wisconsin dog tracks - in particular, those located south of the Oneida casino, closer to the lucrative Chicago market from which the Oneida drew many customers.

On March 15, the Mille Lacs band, through its lobbyist Gerry Sikorski, sent Skibine a two-page letter arguing that a casino in Hudson would result in an estimated 11 percent reduction in business, leading to a 9 percent reduction in employment. These figures, the letter pointed out,

were derived from an internal analysis performed by the tribe and its consultants.[178] Sikorski further argued that this impact would be "a knife to the heart of Band employment and economic development." Sikorski also spoke directly with Skibine by telephone at this time regarding the Mille Lacs's concerns about economic impact.

According to McCarthy, he first contacted Peat Marwick about preparing a report in late March. On April 28, Peat Marwick forwarded to IGMS the report that it had written on behalf of MIGA, the Mille Lacs, the St. Croix Chippewa and the Shakopee Mdewakanton Sioux concerning the potential impact of a Hudson casino.[179] The report projected, among other things, a "potential loss in market share to the existing casinos ... in excess of $114 million based on the market share estimates used by the BIA in their analysis."

Peat Marwick relied, as a baseline measure, on the same figures used by the BIA in making its finding of no significant impact - that the Hudson facility could result in a 20 to 24 percent loss of market share to tribes relying on the Twin Cities market.[180] Peat Marwick then went on to assume that, because Hudson is an "excellent place to build a casino," and in light of other factors, "we believe the Hudson share could be much higher" than that projected by BIA.

[178]Because this study had been done several years earlier, when the tribe was trying to assess the impact on its operations of expansions to the Shakopee's Mystic Lake casino, the letter to Skibine argued that the impact in this case may actually be higher, because a casino in Hudson would represent "an entirely new entry" into the market.

[179]Copies of the report were also sent to Sen. Wellstone, Stanley Crooks, Marge Anderson, Taylor, McCarthy and Kitto. On May 16, Patrick O'Connor forwarded the report to Ickes.

[180]The Peat Marwick analysis projected an impact substantially greater than some other studies. For instance, the Mille Lacs sent an impact analysis of its own to Skibine arguing that a casino in Hudson would lead to a decrease in revenue of about 11 percent.

The impact to these four tribes was based on the assumption that the Hudson share of the market would be between 5 percent and 10 percent greater than that projected by the BIA.

Shakopee Chairman Stanley Crooks said that he was not particularly concerned with the economic impact of a Hudson casino. He stated that "we're close enough to be [affected]," although "[we] wouldn't be [affected] as much as other tribes."[181] Crooks was worried, however, that the politicians would have to allow slot machines in bars, if the Hudson proposal were approved. This development, in turn, would hurt the tribe economically.

The Minnesota tribe located closest to Hudson - Prairie Island - did not participate in the Peat Marwick analysis. Rather, they chose to remain publicly neutral. Although the Peat Marwick analysis cited Prairie Island's situation to make its "detriment" argument, the analysis was submitted only on behalf of MIGA and three other tribes - the Mille Lacs, the Shakopee, and the St. Croix - and MIGA absorbed Prairie Island's share of the bill.

Moreover, when offered the opportunity to retain O'Connor & Hannan jointly with the St. Croix to lobby against the Hudson proposal, Prairie Island declined. The evidence suggests the tribe chose to take a neutral posture because in the spring and summer of 1995 it also was trying to obtain an off-reservation parcel of land near the Twin Cities market to establish a casino.

Though the deadline for submitting additional materials was Sunday, April 30, Skibine permitted some late comments. By letter dated April 30, the St. Croix Chippewa tribe sent Skibine a Coopers & Lybrand report projecting a 15 percent loss of customers if a casino were to open in Hudson. By letter dated Monday, May 1, a tribal attorney for the Ho-Chunk Nation

[181] Grand Jury Testimony of Stanley Crooks, April 21, 1999, at 8 (hereinafter "S. Crooks G.J. Test., April 21, 1999").

urged Skibine to recommend denial of the application, complaining that the Ho-Chunk received limited information about the proposal. Accordingly, the Ho-Chunk resorted to using an assumption that the proposed facility would be comparable to the Ho-Chunk facility in Wisconsin Dells (with 1,000 to 2,000 slot machines and approximately 50 blackjack tables) in analyzing the effect of the Hudson proposal. Utilizing a survey conducted by the Ho-Chunk, the letter asserted that a Hudson casino would draw away approximately 10 percent of the customers at the Ho-Chunk's Majestic Pines casino. In the survey, more than half of the respondents stated that they would visit a Hudson casino if one were to open, but the letter did not indicate whether they were asked whether the existence of a Hudson casino would result in fewer visits by them to the Majestic Pines facility.

Duffy replied to the Ho-Chunk on May 31, in a letter asserting that IGMS had responded to the Ho-Chunk's request for data "to the extent permitted by law," and stating that the proposal would be considered carefully by the gaming staff. Duffy noted as well that the Ho-Chunk tribe's earlier response to the MAO consultation letter had not cited the grounds for opposition that were now relied upon.

**E. Tribal Opponents' Continuing Lobbying Efforts (Feb. 9,1995 - June 8,1995)**

On Feb. 9, 1995, the day after the meeting in Congressman Oberstar's office, O'Connor & Hannan's Thomas Corcoran called Penny Coleman, a senior attorney at the National Indian Gaming Commission, and formerly an attorney in the DOI Solicitor's Office. Billing records indicate he also met with Coleman the next day, Feb. 10. Corcoran said he contacted Coleman to find out what the administrative procedures were regarding DOI's consideration of fee-to-trust land transfers for gaming purposes. Corcoran recalls Coleman informed him that there was no

formal rulemaking procedure in place, but instead DOI had instituted an informal set of procedural guidelines. Coleman provided these guidelines to Corcoran in the form of the Checklist (discussed above at Section II.B.l .b.).[182] Corcoran, in turn, forwarded the guidelines to Lewis Taylor, Howard Bichler, Larry Kitto, and John McCarthy on Feb. 14, explaining that it would be useful in developing their strategy to oppose the Hudson proposal.

On Feb. 20, Kitto sent Taylor, Bichler and Corcoran a memo elaborating on the Feb. 8 meeting with the Minnesota congressional delegation and laying out a strategy of action items to be pursued by the opponents. Regarding the Feb. 8 meeting, Kitto wrote: "It was generally concluded by those in attendance that the Department of the Interior has changed its position on the status of the application process from 'this is a done deal' to 'a decision has not been made, we are still reviewing the application'." Kitto presented "action items" with the backdrop that "the reality of the situation is that this issue will probably be decided 'politically' rather than on the merits." Included in these items were: (1) plans to communicate with Secretary Babbitt both directly and through his Chief of Staff Tom Collier, who is "reported to be more political than Duffy;"[183] (2) plans to communicate directly with the White House, as well as indirectly through the DNC and DSCC; (3) an effort to get the Wisconsin congressional delegation to sign a joint letter in opposition to the Hudson proposal; and (4) an effort to mobilize other Wisconsin tribes

[182] According to Corcoran's time records, he contacted Coleman approximately four times during the period from approximately February through March 1995, while Corcoran and his firm represented the St. Croix in opposing the Hudson application. Coleman, however, did not recall the nature of the contacts.

[183] McCarthy recalls discussions with the lobbyists (including Ducheneaux and Kitto) about which individuals at Interior were "technical" versus "political," and learning that both Duffy and Collier were viewed "more on the political side." McCarthy G.J. Test., Feb. 24,1999, at 77-78.

to oppose the Hudson proposal. The memo called for "a great deal of communication between the St. Croix Tribe, the Minnesota Tribes, and Washington, D.C," to be achieved through Kitto's working relationship with McCarthy and Corcoran's coordination with Ducheneaux.

Despite their successful appeal for further time in which to present evidence of the negative economic impact the Hudson casino proposal would have upon them, the Minnesota tribes did not act immediately. Some tribal representatives placed a priority on such a submission. Boylan, the Washington lobbyist for the Shakopee, had a series of conversations with BIA gaming personnel regarding the Hudson matter in early January. Boylan informed her client and other Shakopee representatives that BIA would accept evidence of economic harm, and that BIA encouraged the Shakopee and any other affected tribe "to provide data showing a negative impact on their gaming activities should this proposed gaming activity proceed."[184] In addition, McCarthy frequently reminded the MIGA members that they needed to submit documentation to BIA as soon as possible.[185] Sikorski said a short time later: "Minnesota tribes who were critical of the BIA for not providing an opportunity to have input must now use the opportunity provided by BIA to truly weigh in." In the end, however, the only documentation of

[184]Memorandum from Virginia Boylan to Stanley Crooks, Kurt BlueDog and Frank Ducheneaux, January 10, 1995. Moreover, Boylan also informed her client that a BIA official had told her the only "consultation" required by IGRA was the December 1993 letter from Denise Homer requesting comments, and that the tribes' responses to that letter were considered their "input" to the consultation process. *Id.*

[185]In a March 2 letter to Stanley Crooks (copied to the Mille Lacs, St. Croix and Prairie Island) "urging" the tribes to get their impact studies to Skibine, McCarthy also wrote that he had just learned that Skibine was "fast approaching completion of his report" and that McCarthy had "asked Frank Ducheneaux to quietly look into this." McCarthy believed this timing information came from either Ducheneaux or Kitto. Ducheneaux had no independent recollection of having been asked to "quietly look into" anything, although he did not dispute the accuracy of the memo and said he may well have spoken to Skibine during this period. Ducheneaux G.J. Test, at 63-65.

economic impact submitted to DOI on behalf of any Minnesota tribe was the Mille Lacs's letter by Sikorski and the Peat Marwick study.

### 1. Opposition Lobbying on Capitol Hill

#### a. Opponent Representatives Continue to Lobby Individual Congressmen

While lobbying Interior directly, opponents of the casino proposal continued to work other Hill leads. On Jan. 17, Kitto met with Sen. Thomas Daschle (D-S.D.) and a Daschle staffer in an attempt to get Daschle to write a letter to Secretary Babbitt opposing Hudson. In addition, Rep. Gunderson again wrote the Secretary on Jan. 25 to point out the "strong opposition" to the casino from people in Troy, and asked whether there was validity to the claim that "repeated expressions of opposition were ignored by the [BIA]."

In March, the opponents of the Hudson proposal began a campaign to get members of Congress to call the Secretary personally to express their opposition. On March 3, Ann Jablonski wrote a memorandum to Congressman Obey's district director imploring him to get Obey involved in the fight against the Hudson casino proposal. In response, Obey legislative assistant Paul Carver spoke to IGMS staffer Hartman and learned that the application was pending further comment by the opponents, that IGMS was "expected to make a recommendation on this to the Secretary in the next week or so," and that it was therefore "an appropriate time for Obey to make his views known to the Department."[186] After reading Carver's memo conveying that information, Obey wrote a letter that same day to Secretary Babbitt asking that he deny the application because it "would represent a very dangerous and troubling precedent."

[186]Memo from Paul Carver to David Obey, March 7,1995.

On March 15, the lobbyists also met with staff on the Hill to seek intervention from the White House and help from Interior. They met with staff from Rep. Vento's office who, according to Kitto, said that Vento would "personally place a call to Secretary Babbitt, at the appropriate time, to express his concerns"[187] about the Hudson matter. But Vento and his staff said they do not recall Vento's ever contacting - or ever being asked to contact - any person at the White House or DOI, including Secretary Babbitt. Vento and his staff also did not recall ever informing Kitto or anyone that Vento would personally contact Secretary Babbitt. In a memo describing these efforts, Kitto said the lobbyists also met with staff from the offices of both Sen. Robert Kerrey (D-Neb.) and Sen. Daschle, who informed the lobbyists that their respective senators "will also communicate with the White House about this issue."[188] Kitto also was close personal friends with Kerrey's chief of staff, Paul Johnson, and Kitto thought that he probably requested that Kerrey communicate with Leon Panetta, or someone at the White House, about the Hudson matter at this time. Members of both senators' staffs who were interviewed denied making any such comments to Kitto.

Kitto testified that they wanted the White House and Congress to intervene to ensure that DOI would "look at the economic data,"and that the ultimate objective in making these contacts was not to get DOI to deny the application, but just "to get the Department of Interior to look at the data" because "[fjhey refused to accept it from us."[189] This testimony is at odds with the fact that the opponent tribes - at least the 11 tribes in Minnesota, along with MIGA - had failed until

[187]Memo from Larry Kitto and Thomas Corcoran to Lewis Taylor, March 27,1995.

[188]*Id.*

[189]Kitto *Four Feathers* Dep., April 17, 1997, at 224-26, 272.

that point to submit any economic data. Nor does the record support Kitto's assertion that BIA "refused to accept" economic impact data from the tribes. The evidence suggests that the opponent tribes generally were not prepared to make the case on economic harm. They had requested and received an extension of time, so they could no longer argue that the "process" was flawed or unfair.

On April 4, Martin Schreiber - a lobbyist for the Ho-Chunk Nation and former Governor of Wisconsin - wrote letters to several members of the Wisconsin delegation, including Sens. Kohl and Feingold, requesting their "help to defeat" the Hudson casino proposal. Billing records also reflect that St. Croix lobbyist Corcoran discussed the issue with staff members to certain Wisconsin delegation members. On April 6, 1995, Ho-Chunk President Jo Ann Jones wrote a letter to Reps. James Sensenbrenner (R-Wis.) and Scott Klug (R-Wis.), encouraging them to contact Secretary Babbitt and urge him to oppose the proposal.

David Bieging, a partner at Dorsey & Whitney and formerly a chief of staff to Rep. Sabo and a special assistant to Vice President Mondale, was also actively seeking Hill support for the opposition. On April 28, Bieging visited the offices of three Democratic members of the Minnesota delegation - Reps. Sabo, Vento and Oberstar - on behalf of his client, the Shakopee. Bieging told investigators that his purpose was to request that those members sign a letter from the Minnesota delegation about Hudson. Bieging noted that he did not have to do a great deal of persuading because all three offices were completely on board against the casino proposal.

Bieging's billing records indicate that he followed-up on these meetings in early May with telephone calls to the offices of Sabo and Oberstar. Bieging and his partner Virginia Boylan also faxed a memorandum dated May 3, 1995, to Sabo's office that laid out brief points on the

Hudson proposal. The memo, which Boylan characterized as "talking points," bore the subject line "Need for Minnesota Democratic Members to call White House to ask that Secretary Babbitt not approve plan of three Wisconsin tribes to acquire Hudson dog track … for gaming." The memo argued that a "Democratic White House/Administration should not reward Republicans and punish Democrats which is what would happen here (Minnesota Tribes are overwhelmingly supportive of Democratic party and contributions show that to be the case.)"[190]

Most likely as a result of this lobbying campaign, Interior continued to receive comments from congressmen relating to the Hudson proposal.[191] On April 24, 1995, Rep. Toby Roth (R-Wis.) wrote to express his opposition to the casino proposal. On April 28, Rep. Gunderson once again wrote to the Secretary to express his opposition. In his letter, Gunderson asserted that "[s]ince Congress passed the IGRA in 1988, the Secretary of the Interior has never approved the

[190]Bieging told investigators that he never discussed this point with any congressman or staff member, that he did not even recall having seen the point at the time he reviewed the memorandum, and that the point was "inappropriate." OIC Interview of David Bieging, Feb. 4, 1999, at 4. Boylan, on the other hand, told investigators that she wrote the memorandum precisely to serve as "talking points" for Bieging in his Hill meetings about Hudson. OIC Interview of Virginia Boylan, Feb. 3,1999, at 6. She did not know, however, whether he ever expressly made the point about contributions to any congressman or staff member.

[191]There was some debate within DOI as to whether elected federal representatives were "state and local officials" who must be consulted in connection with an off-reservation application under Section 20 of IGRA. Moreover, during IGMS's consideration of the Hudson application, Rep. Steve Gunderson - the Republican who represented the district in which the dog track was located - requested in writing that DOI lawyers opine on whether it was appropriate to weigh in on the issue. Kevin Meisner, then a lawyer in the Solicitor's Office, told investigators that he responded to this inquiry in the negative, although he reached this conclusion based on a general understanding of the statute, in the complete absence of any reported legislative or judicial precedents.

acquisition of off-reservation land to be used for casino gambling."[192] (Emphasis in original.) Gunderson issued a press release on May 2 stating that his opposition was based on his fear that approval "would set a dangerous national precedent." On May 3, 1995, Rep. Tom Barrett (D-Wis.) also wrote to the Secretary to express his opposition, relying in large part on the opposition of "the Ho-Chunk Nation, along with other tribes." Barrett added that the Hudson proposal was "really an attempt by the current owners of the dog track at Hudson to shore up their operations." Rep. Klug also sent a letter on May 3, forwarding a letter from JoAnn Jones expressing the opposition of his constituents, the Ho-Chunk Nation; Klug did not take a position himself.

In interviews, Interior employees generally agreed that the level of contacts from members of Congress relating to the Hudson application was high, but not unusual for an application to take off-reservation land into trust for gaming, given the controversial nature of such applications. At the time of the Hudson application, though, few of the participants in the decision-making process at Interior had any point of reference with which to compare their experience on the Hudson application. Melanie Beller, the director of the DOI congressional relations office, observed that contacts by members of Congress, which are frequent, are perceived with greater concern by the Department because of the role that the Congress plays in appropriations for BIA and the rest of Interior.

[192] A staff member from Gunderson's office had contacted Sibbison on April 19,1995, requesting information about whether DOI had approved any off-reservation gaming land acquisitions, and if so, how many, and how many were "in the pipeline." DOI E-mail generated by Heather Sibbison, April 19, 1995. Gunderson's assertion that DOI had not approved any such applications (presumably based on his staffs earlier contact with DOI) was incorrect. *See* Section II.C.l., *supra.*

The opponents also sought to "button-hole" certain senators and representatives at a $1,500 per person joint DSCC-DCCC dinner at the Washington Hilton Hotel on May 23, 1995. In a May 12 memo to tribal leaders, Kitto stated that there would "probably be at least 40 Senators and as many as 150 Congresspersons, plus key members of the Administration attending" the event. Kitto stated that he had "made arrangements for people representing Indian Tribes to sit at the same tables and to have a Senator or Congressperson to be a guest at that table." Rita Lewis - deputy director of the DSCC and one of the organizers of the event - told investigators that Kitto assisted her in organizing an Indian presence at the dinner, as well as in getting the tribal leaders seated where they wanted to be at the dinner.[193]

Sen. Feingold recalls Oneida lobbyist Scott Dacey approaching him during the course of the May 23 event and asking him to contact Secretary Babbitt about Hudson. Feingold remembers that he cut Dacey off and told him that he would only weigh in on Hudson through proper channels because it would have been inappropriate to have an *ex parte* telephone contact with the Secretary.[194]

Other members, however, did not share Feingold's reservations about calling Babbitt. Rep. Obey, who had written Babbitt to express his opposition to the Hudson proposal on March

In an April 1, 1995, memorandum to his tribal clients, Kitto stated that Lewis said she would communicate with the White House "about the political affect this proposal [Hudson] could have on the 1996 Presidential and Senatorial campaigns." Lewis told investigators that, although she recalls Kitto stopping by the DSCC after she arrived there in March 1995, she does not recall discussing the Hudson issue with him or ever telling him that she would contact the White House. Lewis also noted that she would not have stated as much because she simply did not have any "juice" with the White House. OIC Interview of Rita Lewis, Nov. 17, 1998, at 2-3.

[194]With support from his lobbying records, Dacey disputes that this conversation took place at the May 23rd dinner, which he believes he did not attend, and contradicts Feingold's recollection of the exchange. Rather, Dacey recalls, as he told Feingold staffer Mary Frances Repko at the time that Feingold had told Dacey at the May 23 dinner that he would call Babbitt, and would do it confidentially. Feingold told investigators that he told Dacey just the opposite. Repko and Feingold legislative director Suzanne Martinez told us that Feingold told them as much - that he had told Dacey that he would not call Babbitt - when they approached Feingold about Dacey's statement at the time.

7, recalled trying to contact Babbitt by telephone around May 10,1995. Obey recalls being unhappy about not being able to talk to Babbitt. He had a vague recollection of being put in touch with someone within the secretariat, but he could not recall who it was or what he said to that person. Obey believed he probably said something to the effect that he opposed the Hudson application, and that the only people who supported it were the dog track owners and the three applicant tribes.

Moreover, an Oberstar staffer stated that she was in an automobile in Minnesota with the Congressman some time between May 1994 and May 1995 when he called Babbitt on a cellular phone to discuss the Hudson matter. She recalls that the conversation was highly political in nature: Oberstar told Babbitt that the Minnesota Democratic delegation opposed the application, and he made clear that the application proponents were not political friends of the Democrats. Oberstar also expressed his concerns about the economic impact on Minnesota that might result from a Hudson casino. The staffer did not think that the call to Babbitt was impromptu; rather, she knew that the call had been pre-arranged for that day. After the telephone call, Oberstar did not provide her with any details about what Babbitt had said, nor did they talk about the substance of the Hudson application. Oberstar denies that such a telephone call ever took place, and states unequivocally that he never called Babbitt on the Hudson matter. Babbitt said he did not recall receiving a call from Oberstar about Hudson.[195]

On April 27, 1995, Gerry Sikorski - a former member of Congress and a lawyer and lobbyist for the Mille Lacs - had separate meetings about Hudson with Reps. Oberstar and Sabo.

[195]In this time period, neither the Secretary nor his special assistant kept records of calls placed or scheduled.

Sikorski was making the rounds on Capitol Hill that day with his client, Mille Lacs Chairwoman Marge Anderson, and they informed the Congressmen of the meeting that had been set for the next day with Chairman Donald Fowler of the Democratic National Committee. Sikorski said he wanted to enlist the Congressmen in making certain that the White House and Interior knew how serious the issue was to the opponent tribes.

### b. Hudson Opponents Lobby Sen. McCain With False Information Regarding the Ownership of the Hudson Dog Track

During the spring of 1995, the opponent lobbyists were pursuing a strategy of tainting the Hudson application by claiming that Delaware North Companies owned the track.[196] As part of that strategy, on June 8, 1995, three lobbyists for the opponents - Corcoran, Patrick O'Donnell and Ducheneaux - met with Sen. McCain to inform him that Delaware North owned the Hudson dog track, and that there were persistent rumors that Delaware North had connections to organized crime.[197]

[196]The first date on which the opponents employed this argument is unclear. A Jablonski memo in this period stated that Broydrick was "working on unearthing some information involving Delaware North to show [to] Loretta Avent" (a White House staffer), and that Ducheneaux was working on that issue as well. Jablonski's memo is undated, but its content suggests that it preceded an April 8 event to which it referred. On April 11, two O'Connor & Hannan lobbyists spoke with a Washington Post reporter about the allegation. In addition, at an April 28 meeting at the DNC, the opponents informed Chairman Fowler of the purported Delaware North connection with Hudson.

In fact, Delaware North had no ownership interest at Hudson. Delaware North owned the dog track in Kaukauna, Wis., and held a mortgage on the dog track in Wisconsin Dells, Wis. The owner of the Wisconsin Dells track - Thomas Diehl - was a minority partner in the Havenick venture that teamed with the three applicant tribes in the Four Feathers partnership. Thus, Diehl held a 1.99 percent interest in the proposed Hudson casino.

[1] "Delaware North was a significant name to any public official from Arizona. During the 1970s, Delaware North's predecessor entity, Emprise Companies, was embroiled in what

(continued...)

The Delaware North issue was raised with government officials by the opponents before the McCain meeting. Oneida lobbyist Scott Dacey raised it with DOI Deputy-Assistant Secretary Michael Anderson when he met with him on May 23, 1995. *See* Section H.F.5., *infra.* In his May 8 letter to Harold Ickes following up on the April 28 meeting, Patrick O'Connor had referred to Delaware North ownership as one of his "political" points:

> Senator D'Amato supports this project because it bails out Delaware North, the company that owns this defunct dog track and also operates another dog track in Wisconsin. Delaware North is located in Buffalo, New York.

Corcoran testified that he based his assertions about Delaware North's supposed Hudson track ownership on information he received from the St. Croix tribe, Kitto and Dacey.[198] Corcoran also testified that he based his belief on information indicating Sen. Alfonse D'Amato (R-N.Y.) had approached Sen. Daniel Inouye (D-Hawaii), the ranking Democrat on the Senate Indian Affairs Committee, and asked Inouye "to be neutral" on the Hudson issue.[199] O'Connor and O'Donnell maintain that they relied on information from their partner, Corcoran, and other opponent lobbyists with regard to Delaware North. Corcoran also believed that a state lobbyist -

'"(...continued)
McCain characterized as one of the most sensational crime stories in the state's history. In short, Emprise was tied to organized crime through rumors and evidence developed by, among others, an Arizona Republic reporter who was killed in a car bombing that appeared to be related to his investigative journalism. The Attorney General of Arizona whose office prosecuted the resulting murder charges was Bruce Babbitt.

[198]Corcoran recently testified that he still believes "that Delaware North has an economic interest in the project," and owns the track. Corcoran G.J. Test, at 117.

'"Corcoran G.J. Test, at 116-17. Information supplied by a Senate Indian Affairs Committee staffer suggests that in late 1994, D'Amato may have approached Inouye about an issue relating to a different Wisconsin dog track that Delaware North did own. In that instance, the staffer explained, Delaware North was seeking legislation to restrict Indian gaming.

Ho-Chunk lobbyist Thomas Krajewski, was his recollection - had supported this allegation of Delaware North ownership. Records reflect, however, that opponent state lobbyists reacted with concern to the Delaware North allegations.

In a May 12 fax to Ho-Chunk President Jones, Krajewski commented on the inaccuracy of this and other assertions in Patrick O'Connor's May 8 letter:

> Enclosed is a letter from O'Connor & Hannan to the White House re: Hudson. I am concerned that this letter "shades the truth." You will note that on page 2 he says that Delaware North owns the Hudson track. According to all accounts this is not accurate. If it was, Delaware North would be in trouble with the Wisconsin Gaming Commission for failing to report. He says that the Wisconsin Democratic Congressional delegation opposes the project. We are working to that end but that statement is not accurate at this time. I am concerned that this may damage the credibility of opponents to the Hudson track. I am trying to reach Larry Kitto to express my concern.

Krajewski's discomfort with the Delaware North allegations apparently was shared by at least one other opponent tribal lobbyist, Ann Jablonski. In a May 23 memo to Brady Williamson (a Madison lawyer and Democratic activist), Jablonski noted that the assertions tying Delaware North to the Hudson track were inaccurate:

> By the way, representation of the facts is inaccurate in this letter [from O'Connor to Ickes dated May 8, 1995].... Delaware North does not own St. Croix Meadows. It owns the Kaukauna track and holds a second mortgage on Wisconsin Dells Racing. The connector to St. Croix Meadows is Tom Diehl, who will have a 1.99 percent share in the Four Feathers project (that's the casino at Hudson) and who owns the Dells track... .[201]

[200]Corcoran's handwritten notes in his diary include a May 31,1995, entry that reads: "Memo from T. Kraj on Delaware North." Corcoran states, nonetheless, that Krajewski never told him that Delaware North was not the owner of the Hudson dog track and that he was unaware of any such concerns.

[201]Memorandum from Ann Jablonski to Brady Williamson, May 23,1995.

In any event, Corcoran and his colleagues decided that the Delaware North information should be provided to government officials. Corcoran's handwritten notes from a June 1 telephone conversation with MIGA lobbyist Ducheneaux and an unnamed third person read as follows:

> However now a new element i.e. Delaware North-mafia connection - should not Interior Sec given his trust responsibility for all Indian tribes recognize that that [sic] this Mafia connection whether true or not means that this project should not be forced over the protests of the Tribes into existence, he has a responsibility to protect all the tribes from allowing this kind of element from entering Indian gaming or it will be used however unfairly by the opponents of Indian gaming to hint + hurt Indian gaming for all tribes and for all time.[202]

The next day, June 2, Corcoran enlisted his partner O'Donnell, a long-time friend of Sen. McCain, to set up a meeting with McCain to inform him of the Delaware North allegations. O'Donnell set up the meeting, specifically requesting that none of McCain's staff be allowed to attend - a request with which McCain complied. The meeting, which took place on June 8 at 2:00 p.m., was attended by McCain, Corcoran, Ducheneaux and O'Donnell. Although accounts of the meeting vary, it is clear that the three lobbyists brought Delaware North's purported ownership of the track to McCain's attention, and provided him with a 1994 Wall Street Journal article raising questions about Delaware North's supposed ties to organized crime. McCain told

[202] Similarly, in Kitto's June 5, 1995, memorandum to "Tribal Clients" - which also was sent to Corcoran - Kitto listed among the elements of his proposed Hudson opposition strategy the need to "[g]et a story in The Washington Post about Delaware North and their relationship with the tracks in Wisconsin."

Though Corcoran and another O'Connor & Hannan partner did bring the Delaware North issue to the attention of a Washington Post reporter, no such story ever appeared in The Post. *See* George Lardner, *Tribal Lobbyists Accused Of Defaming Track Owner; Suit Alleges False Depiction of Mafia Ties in Casino Dispute*, The Washington Post, Sept. 16, 1997 (confirming that no such article ever ran in the Post).

investigators that the lobbyists asked him to take the matter to the Department of Justice; the lobbyists told investigators that McCain offered to take the matter to Justice. Notwithstanding the jubilant tone of Corcoran's fax to Lewis Taylor a few days later announcing, "Mission Accomplished!," McCain stated that he never did anything with the erroneous information.

### 2. Tribal Opponents Seek and Obtain the Assistance of the Democratic National Committee

#### a. Emergence Of A Strategy For DNC Involvement

In his Dec. 28, 1994, memorandum, MIGA Executive Director McCarthy had counseled the opposing tribes that they should point out to the Secretary of the Interior "key political issues" he should bear in mind in evaluating the Hudson casino application. McCarthy urged the tribes to emphasize Interior's need to be sensitive to the possible erosion of "Indian political contributions" as a consequence of the Hudson decision, and the fact that opponent Minnesota tribes had been "very active politically and are strong Democrats ... [who] contributed heavily in the November elections and played a key role in our support for President Clinton in 1992." Seizing on this theme that political considerations would "probably" affect the outcome on the Hudson application, on February 20, 1995, Kitto advised the St. Croix Tribe to elicit support from the White House and national Democratic organizations in the Hudson lobbying campaign.[203] Kitto advised the St. Croix to consider:

> Communicating directly with the White House about how the politics of this issue, if approved, will help the Republicans and hurt the Democrats....

[203]Memo from Larry Kitto to Lewis Taylor, Howard Bichler and Thomas Corcoran, Feb. 20,1995.

> Using Senator Bob Kerry's [sic] office (Kerry was just elected to be head of the Democratic Senatorial Campaign Committee) and the Democratic National Committee (DNC) to influence the White House.[204]

Kitto published this strategy to his client just two weeks after his O'Connor & Hannan colleague, Patrick O'Connor, became actively involved in the St. Croix's opposition efforts. O'Connor's long history of active involvement in national Democratic politics included substantial fund-raising efforts, stretching back to the 1960 Presidential campaign. In 1968, he served as Sen. Humphrey's presidential campaign treasurer, and then as the DNC Treasurer in 1969 and 1970. He had been active in numerous other national campaigns, including Walter Mondale's 1980 presidential run and Al Gore's primary campaigns in 1988, for which he and his wife, Evelyn, served on the finance committee. O'Connor had raised money for each of these candidates and many other Democrats, had served as chairman of the House and Senate Campaign Council for four years, and had attained the status of a DNC trustee for his substantial fund-raising and personal contributions in the early 1990s.

The O'Connors' fund-raising activity in recent years included roles as Minnesota finance chairs for the Clinton-Gore ticket in 1992, which stemmed from their friendship with the Vice President. Though Patrick O'Connor's personal financial contributions had waned during 1993 and 1994, by early 1995 the DNC was looking to him again as a contributor and a member of its old guard who could help introduce the new party leadership to important Democrats in Minnesota.

To that end, DNC Regional Finance Director David Mercer reached out to the O'Connors in early 1995 for help in introducing the new DNC national chairman, Donald Fowler, to

Minnesota Democratic leaders and contributors. Mercer worked with the O'Connors to plan a "prospecting" brunch at the O'Connors' home in Minneapolis for that purpose on Sunday, March 5, 1995.[205] At the function, Patrick O'Connor welcomed the guests and introduced Fowler, who spoke to the gathering and also met privately with top finance prospects after the function. Coincidentally, at this time O'Connor also was looking for an opportunity to introduce Kitto to Fowler.[206] O'Connor made sure that Kitto was invited to the March 5 event, but Kitto was unable to attend.

The March 5 brunch was not Fowler's first encounter with O'Connor. Fowler recalled meeting O'Connor in the early 1970s, and felt the two men had developed a casual friendship rooted in their involvement in national Democratic politics. Fowler looked to O'Connor as one of the more senior, established members of the DNC. Nonetheless, O'Connor told investigators he could not recall ever having directly met Fowler prior to the March 5 brunch event.

Fowler's national and party prominence increased radically when he was elected National Chairman of the DNC on Jan. 21, 1995, having been nominated for the post by President Clinton after Clinton received the counsel of his Deputy Chief of Staff for Policy and Political Affairs, Harold Ickes. Following the Democrats' disastrous performance in the 1994 mid-term elections, when they lost control of Congress, and with the President facing a re-election contest less than two years away, the White House had decided to change the leadership at the DNC and selected Fowler.

[205]Event Briefing from David Mercer to Chairman Fowler, March 3, 1995.

[206]The brunch briefing memo suggests that O'Connor was identifying Kitto to the DNC as a resource for Indian outreach. O'Connor cannot now recall if he also had determined by that time that Fowler and the DNC could be helpful to him and Kitto on the Hudson matter.

### b. DNC's Fund-Raising Strategies in Anticipation of the 1996 Presidential Election

The DNC is the primary national operational organ of the Democratic Party. The Committee itself is a group of about 440 elected and *ex officio* representatives from the various states and territories, with elected national and general chairmen and certain inferior elected officers (treasurer, secretary, vice-chairmen and finance chairmen). The DNC operates through a central headquarters in Washington, D.C, which is administered and staffed by a nonprofit corporation, the DNC Services Corporation.[207]

As of early 1995, the DNC was organized into several divisions, primary among them Administration (operations and accounting), Finance (fund-raising), Campaign (political) and Communications (message). The national chairman oversaw all of these units, with divisional directors reporting to him directly as well as through a chief of staff, who reported to the national chairman and essentially functioned as the executive director and day-to-day administrator of the organization. Most of the DNC staff were paid professionals.

Fowler's election as National Chairman represented something of a departure from the DNC's traditional organizational alignment. For the first time, the party chose to install a bifurcated leadership team, with "National Chairman" Fowler sharing duties and authority with a "General Chair," Sen. Christopher Dodd (D-Conn.). Effectively, Fowler conducted the business of the DNC, while Dodd served more as a spokesman, with primary communications duties and

[207]That entity holds by assignment all funds raised and owned by the DNC, except non-federal contributions *{i.e.,* funds not regulated by federal law), which the DNC uses typically to support state party committees.

shared, lesser duties in all other areas. The two chairmen consulted before finalizing significant decisions, such as the naming of divisional directors.

By its own description, the DNC has three major functions: (1) overseeing the Democratic presidential nominating process and staging the Democratic National Convention; (2) developing and communicating policy positions; and (3) helping to elect Democratic candidates at all levels of government. The finance division supports particularly the first and third of these functions. Though it has its own chairman, who serves both an honorific and an active function without pay, Fowler stated the DNC chairman is the ultimate head of the finance division, with final responsibility for its bottom line. He must pursue the finance division's mission of raising financial support for the operations of the DNC, including its convention and campaign support activities, while cultivating and promoting the relationship of the national party with its core financial supporters.

To cultivate, sustain and promote contributors, the DNC recognized various fund councils, divided along giving levels and, in some cases, certain demographic lines. As of 1995, entry level contributors were often solicited to groups such as the Saxophone Club and the Women's Leadership Forum. Individual donors able to contribute at least $5,000 annually were recruited to the National Finance Council, while individual and business contributors within the $10,000 to $15,000 base level were solicited for the Democratic Business Council. The two highest councils were the trustees, who each contribute at least $50,000 or raise at least $100,000

annually, and the managing trustees, who each give at least $100,000 or raise $250,000 from others.[208]

Though housed in the DNC's headquarters building, two congressional finance operations work separately to raise funds for federal candidates: the Democratic Senatorial Campaign Committee (DSCC) and the Democratic Congressional Campaign Committee (DCCC). Both organizations target many of the same contributors who support the DNC and the Democratic presidential campaign committees, but the spending focus of these entities is on congressional candidates, and their staffs and fund-raising efforts are both of a far more limited scale. These committees both compete and coordinate with the DNC and the presidential campaign committees, the latter efforts occurring at times when donors have reached their maximum levels of participation to one organization, and can then be encouraged to support the others.

As Chairmen Fowler and Dodd took over the reins at the DNC, there was an unprecedented imperative to increase the DNC's fund-raising capacity. The Republicans had dominated the Democrats in the 1994 congressional elections, from which the DNC emerged saddled with $4 million in debt, and the 1996 general election was expected to cost more than

[208]The DNC promoted membership in these councils by assigning certain perquisites to each level of giving. One DNC document described the trustee program as "a small circle of the Party's most committed, influential members," "the true foundation of the Democratic Party," composed of "special friends of the Party" who "serve as valuable spokespersons and counselors, guiding the Democratic Party in its effort to make government an asset to American families and businesses." Undated DNC Trustee Program Profile. Another program profile outlined trustee privileges including, among other things: invitations to a number of events each year with the President and Vice President; opportunities to participate in foreign trade missions; frequent news and policy briefings; and a promise that "[e]ach Trustee is specifically assigned a DNC staff member to assist them in their personal requests." Undated DNC Trustee Events and Membership Requirements Profile. When the news media published highly critical reports based on such program materials in June and July 1995, however, the DNC revamped the fund councils, eliminating specific promises of benefits and reducing the number of councils.

any previous election in U.S. history. By early April 1995, the Finance Chairman and Finance Director of the DNC had moved to the Clinton/Gore '96 Committee headquarters to establish the finance arm of the President's re-election campaign. Over the subsequent 19 months, Harold Ickes would oversee a close coordination of the finance and budget functions of the DNC and Clinton/Gore '96 to ensure that sufficient money was raised to wage and support the President's campaign.

Since January 1994, Ickes had served as White House Deputy Chief of Staff for Policy and Political Affairs. In that role, he had both substantive and political duties within the Administration. It was Ickes who contacted Fowler late in 1994 and asked if he would accept the DNC's national chairmanship.[209] Ickes also participated subsequently in the selection of other key DNC officials under Fowler.

By early 1995, Ickes had become the Administration's point man for contact with the DNC and the Clinton/Gore '96 Committee. As that year progressed, Ickes said a larger and larger focus of his work was to ensure the re-election of the President. Ickes stated that he closely coordinated the efforts of both political organizations with regard to fund-raising goals and results, as well as scheduling of the President's and the Vice President's time for finance

[209]Ickes and Fowler were well acquainted before Fowler took the reins at the DNC in January 1995. They had worked together on the 1980 Democratic National Convention, and had served together for many years (and still do) on the DNC's Rules and By Laws Committee.

activities.[210] Over time, Ickes noted, this three-way coordination also entailed the conduct of the campaign itself.

Ickes conferred several times a week with both the DNC and Clinton/Gore '96 finance leaders, and Fowler personally reported to Ickes systematically on the fund-raising operations and results at the DNC. According to Ickes, he and Fowler developed a close working relationship, speaking several times per week on various matters during the first half of 1995.

By the late summer of 1995, the DNC's role in support of the President's re-election campaign became further magnified. On Sept. 10, the White House determined that a major advertising campaign should be launched promptly, with the DNC financing issue ads supporting the President's accomplishments and agenda. This project significantly increased the DNC's fund-raising burden for the 1995-96 cycle, when the DNC assumed responsibility ultimately for raising approximately $200 million in support of its various activities, including the media campaign supporting the President's re-election effort.

### c. DNC Native American Fund-Raising Prior to Spring 1995

By early 1995, the DNC had received significant contributions from only a few Indian tribes. Though traditionally a strong Democratic constituency, Native Americans had long felt neglected by both major national political parties. During the 1992 general election, some Indian leaders mobilized their electorate by organizing Native Americans for Clinton-Gore (NACG), a national group directed primarily at organizing voter registration and turn-out drives in key states

[210] Looking back on this activity, Ickes stressed that his fund-raising focus was on "aggregate" numbers and not individual contributors, and that the fund-raising itself was not done from the White House. Grand Jury Testimony of Harold Ickes, April 28, 1999, at 14-15 (hereinafter "Ickes G.J. Test.").

where Indians represented large or swing constituencies. Kevin Gover (who became Assistant Secretary for Indian Affairs at Interior in 1996) and Michael Anderson (who has served as Deputy Assistant Secretary for Indian Affairs since early 1995) were among the leaders of this group. Both men had been active in Indian legal and political issues in the past. NACG remained active on a reduced level after the 1992 general election.

As compared to this electoral organizing, far less work had been done historically on the national level to court Indian political contributions. One obvious reason was the relative poverty of many Indian tribes. Indian gaming altered the financial landscape of Indian country, however, equipping several tribes to participate in state and national politics through financial support of candidates and parties. By early 1995, only a few tribes had distinguished themselves as substantial supporters of either state or federal candidates and parties, or both. Some of the tribes opposed to the Hudson casino proposal were already regular supporters of their congressional representatives and state Democratic parties - either through tribal contributions, PAC giving, or donations from tribal leaders personally.[211] No tribe in the country, however, had developed a contribution record to rival that of the Mashantucket Pequots of Ledyard, Conn.

Having only opened their Foxwoods Resort Casino in February 1992, by early 1995 the Pequots were a major force in political finance. In both 1992 and 1993, the tribe made $100,000 contributions to the DNC. In 1994, the Pequots contributed $250,000 directly to the DNC and an additional $500,000 to a variety of state Democratic parties through the DNC's "directed donors"

[211] *See* Section II. J.6., *infra,* for a summary and evaluation of opponent tribal contributions.

program.[212] During that year, they were the second largest contributor of any kind to the DNC, and they received attention befitting this stature.[213] Their Chairman, Richard "Skip" Hayward, was recognized as a DNC trustee, and invited to numerous functions over the next few years, including dinners and coffee with the President at the White House. Pequot tribal leaders met privately with then-DNC Chairman David Wilhelm in 1994, and again with National Chairman Fowler in late 1995. The Pequot tribal leaders were able to arrange meetings with high-ranking Administration officials on matters of concern to them, including a meeting with Ickes regarding an application they had pending during 1994 and 1995 for acquisition of land-in-trust for the expansion of their Foxwoods Resort Casino property.

[212]Through this program, the DNC solicited contributions to state party committees which contributors delivered to the DNC and the DNC then distributed the checks. This program allowed the DNC to make allocation decisions about non-federal money it collected and then distributed directly to the committees, receiving credit for the fund-raising and maintaining some influence over the contributions of major donors.

[213]The Pequots' political activity also received substantial national media attention. *See, e.g., Leading GOP Business Donor Gave Democrats Late Help,* The Washington Post, Dec. 9, 1992, at A21 (noting Pequots' $100,000 DNC contribution in 1992); *Indian Leaders Bring Concerns to Clinton Team,* Gannett News Service, Dec. 17, 1992 (quoting Michael Anderson, executive director of the National Congress of American Indians, who described the Pequots' $100,000 1992 DNC contribution and the efforts of Native Americans for Clinton-Gore during the presidential campaign); *Party Finances Do Not Reflect the Victors and the Vanquished,* The Washington Post, Feb. 22,1994 at Al 5 (noting Pequots' $100,000 DNC contribution in 1993 to the Democrats' health care campaign); *Givers' Largess Is Putting Heat on Clinton,* the New York Times, June 22, 1994 at Al (reporting Pequots' Democratic Party contributions from July 1992 to March 1994 as $300,000); *Gambling Means Wealth, Political Access for One Tribe,* National Public Radio, Aug. 8, 1994 (quoting Kevin Gover of NACG: "I don't believe in the theory of buying politicians, but I do believe in buying access, and that's what the Mashantuckets have done."); *New Game for Pequots: Party Politics,* the New York Times, Aug. 30, 1994 at Bl (describing Pequot contributions and pledges to state Democratic parties in 1994 totaling $500,000); *Tribe Donates $10 Million to Planned Indian Museum,* The Washington Post, Oct. 25,1994 (noting Pequots' donations of $500,000 to DNC).

Before 1995, the DNC made only halting efforts to recruit and reward Native American support for the Democratic Party. Recognizing that the volunteer organizational support of Native Americans for Clinton-Gore and the financial support of the Pequots had been influential in the 1992 elections, in 1994 the DNC considered the formation of an American Indian Advisory Council and the hiring of an Indian staffer, as recommended by both NACG and the Pequots. Based on the support and success of the Pequots, the DNC leadership in 1994 also recognized the potential for other Indian gaming tribes to support the Party financially. The DNC finance chairman from 1994 through early 1995 understood that the Pequots were clearing a profit of $1 million per day at Foxwoods.[214] Prior to 1995, however, the DNC did nothing more in this regard than to designate a campaign division staffer as Native American outreach coordinator. Likewise, aside from direct, high level cultivation of the Pequots, there is no indication that the DNC assigned priority or resources to developing further financial support from the Indian community prior to the spring of 1995. The DNC finance director attributed this fact to the DNC's habit of relying on established donors for repeated support, without aggressively courting new resources.

Amidst this climate, two seemingly independent developments in 1995 focused the DNC's attention on the Native American community as a financial resource: first, Patrick O'Connor's efforts to enlist DNC support for the Minnesota and Wisconsin tribes opposing the

[214] *See also, Tribe Donates $10 Million to Planned Indian Museum,* The Washington Post, Oct. 25,1994 at Al ("The Pequot casino reportedly earns profits of $600 million a year."); *Indian Tribes Say Aid Comes Only To Those Who Donate to Democrats,* the New York Times, Nov. 17,1997 at A20 ("Foxwoods Resort Casino grosses $1 million a day"); O'Brien, *Bad Bet* at 131 (Foxwoods revenue estimated at $811 million for 1995).

Hudson casino proposal; and, second, DNC finance staffer Adam Crain's efforts to cultivate Indian contributions nationally through contacts with a number of volunteer solicitors.[215]

### d. Patrick O'Connor and Larry Kitto Meet with DNC Chairman Fowler on March 15,1995

O'Connor's efforts to get DNC support for the Hudson opponent tribes began soon after the Minneapolis luncheon he and his wife hosted for Fowler. On March 13, Mercer informed DNC Finance Chairman Truman Arnold and the senior DNC finance staff that Patrick and Evelyn O'Connor would be coming to Washington soon and should meet with Arnold about their role in fund-raising in Minnesota, as a follow-up to their March 5 visit with Fowler. Mercer proposed that Arnold recruit the O'Connors to a "Blue Ribbon Committee" of supporters, or at least that he hold them to "a committed amount for 1995 and 1996."[216] Arnold responded to this proposal by meeting with the O'Connors and Mercer over lunch on March 16. The participants had no recollections and there is no documentation of the discussion at that gathering, but O'Connor did bill the St. Croix Tribe for attending this meeting.

By March 15, Mercer learned from Patrick O'Connor that O'Connor would be joined in Washington during this trip by his O'Connor & Hannan colleague, Larry Kitto, whom O'Connor wanted to introduce to Fowler. In a briefing memo to Fowler clearly identifying both O'Connor and Kitto as representatives of American Indian interests and labeling Kitto as both a lobbyist and an executive with an American Indian gaming company, Little Six, Inc., Mercer explained two "issues" for this meeting, as he understood them from O'Connor:

[215]The latter course of events is discussed in Section H.J.3., below.

[216]Memorandum from David Mercer to Truman Arnold, Richard Sullivan, Ari Swiller and Jennifer Scully, March 13,1995.

> Kitto is supportive of the DNC and O'Connor believes we can raise his level of participation. The meeting helps to reinforce Kitto's relationship with the DNC and by extension our relationship with the American Indians in Minnesota.
>
> O'Connor and Kitto are meeting with Tom Collier to represent the concerns of several Minnesota tribes about a neighboring Wisconsin dog track that might be converted into a casino. Apparently several Wisconsin tribes, led by the St. Croix [sic], have submitted a bid on the track and are seeking to establish "land in trust" with the Department of Interior. According to O'Connor and Kitto, this would lead to direct competition to Minnesota gaming operations - Little Six and Treasure Island casinos - and bring economic hardship to Minnesota tribes.[217]

Mercer scheduled time for O'Connor and Kitto to meet with Fowler on March 15, which happened to be O'Connor's 75th birthday. This meeting followed O'Connor and Kitto's meeting with Collier at Interior on the same date. Mercer informed his superior, DNC Finance Director Richard Sullivan, that the March 15 meeting was part of an effort to cultivate O'Connor as a contributor and fund-raiser. Mercer specifically noted that O'Connor had Indian clients whom O'Connor had identified as potential DNC financial contributors.

In advance of the March 15 meeting, Fowler's staff "briefer" met with Mercer, who told her that Minnesota Indian tribes contributed money to the DNC, while Wisconsin Indian tribes did not. The briefer's notes of the discussion suggest that either she or Mercer felt Fowler should be "non-committal re: casino."[218]

No witness has recalled any details of the discussion during Fowler and Mercer's March 15 meeting with O'Connor and Kitto.[219] A week later, however, Fowler sent acknowledgment

[217]Memorandum from David Mercer to Chairman Fowler, March 15, 1995.

[218]Memorandum from David Mercer to Chairman Fowler, March 15, 1995 (annotated version).

[219]0'Connor only recalls generally that, sometime prior to April 28, he introduced Kitto

(continued...)

letters to both O'Connor and Kitto. Fowler thanked O'Connor for the introduction to Kitto and "the good discussion on how we might reach out further to the American Indian community." Fowler expressed appreciation to Kitto for his "leadership … in the American Indian community," and his "ongoing support." Kitto's subsequent report of the event was more specific as to the Hudson matter, however. In his March 27, 1995, status report to the St. Croix, Kitto wrote that Fowler and DSCC official Rita Lewis (with whom O'Connor and Kitto had a separate meeting on March 15):

> both said that they would communicate with the White House, at the appropriate time, about the political affect [sic] this proposal could have on the 1996 Presidential and Senatorial campaigns that are just now being launched.

There is no direct evidence of any further contact with Fowler by O'Connor and Kitto prior to April 28, 1995. In the meantime, though, Fowler did have occasion to take note of the massive financial capacity and Democratic support of the Pequots. A March 30,1995, briefing memo to Fowler stated: "[t]he Pequot Tribe have been very generous to the [DNC] in terms of donations. Skip Hayward … has given $325,000 in reportable donations and $250,000 in directed donor dollars." In fact, both figures understate the actual Pequot contributions to that point in time, but they reflect the minimum level of documented information Fowler had received about gaming tribes' contributions to the DNC.

[219](...continued)
to Fowler and discussed fund-raising from American Indians.

### e. Discussions Among the Tribal Opponents in Anticipation of the April 28,1995 Meeting

Coordination between the Minnesota and Wisconsin tribes opposed to the Hudson application continued throughout the spring. In late March, Lewis Taylor sent a memo to Stanley Crooks inviting MIGA members to an "informal meeting" on March 31 in Eau Claire, hosted by the St. Croix and Ho-Chunk tribes of Wisconsin.[220] The purpose of the meeting, according to Taylor's memo, was "to develop strategies on 'killing' the Hudson project."[221] Although the Minnesota tribal leaders did not attend this meeting, the memo reflects the avowed common goal of the Minnesota and Wisconsin tribes at this time.

On April 6, the Ho-Chunk Nation issued a press release formally opposing the Hudson casino proposal. Echoing MIGA's view, the press release stated that the Ho-Chunk "oppose the casino because it could cause the uncontrolled expansion of gambling," leading to the approval of other off-reservation casinos, to the ultimate detriment of "all of Indian gaming." At this time, Ducheneaux was exchanging information on the Hudson matter with Cindi Broydrick, a lobbyist for the Oneida tribe in Wisconsin. McCarthy was circulating information to MIGA members regarding the recent break-up of the Wisconsin Indian Gaming Association. Kitto, representing the St. Croix, also was giving MIGA regular updates on the activities of the Wisconsin tribes.

During the week of April 18,1995, the National Indian Gaming Association held its annual conference in Green Bay. The conference was held at the Oneida tribe's Radisson Hotel,

'Letter from Lewis Taylor to Stanley Crooks, undated.

and was attended by a number of tribal leaders and lobbyists, including Kitto, McCarthy, Taylor, Sikorski and Ducheneaux. On April 20, the last day of the conference, tribal leaders and lobbyists from Minnesota and Wisconsin held a well-attended separate break-out meeting "jointly to plan a strategy to defeat the Hudson Dog Track proposal."[222] Kitto represented the St. Croix at the meeting, and reportedly was a very active and vocal participant. According to Sikorski, Kitto described the involvement of O'Connor & Hannan, and the fact that both O'Connor and Corcoran were advancing the St. Croix's efforts to oppose the application. Kitto also cited the alleged involvement of Delaware North and its purported ties to organized crime, explaining that this was information that should be brought to the attention of Interior policymakers or others in the Administration. Kitto encouraged the group repeatedly to contact members of Congress and to enlist the DNC, as part of an effort to impress upon Interior and the White House the importance of this matter. Sikorski recalls Kitto's specifically noting that O'Connor would be attempting to contact Ickes.

Kitto emerged from the April 20 meeting focused on pursuing a DNC meeting. The very next day, O'Connor's daytimer notes contain the names "David Mercer" and "L. Hartigan," with their office phone numbers, suggesting that he was attempting to reach the DNC Deputy Finance Director and the Clinton/Gore '96 Finance Director at this time. O'Connor's billing records reflect specifically that he and Kitto discussed setting up appointments with the DNC and the White House during an April 22 conversation, suggesting that the DNC meeting was arranged on that day or soon thereafter. Kitto recalls that he personally made the arrangements, apparently

[222] "Minnesota Legislative Update," from Larry Kitto to Tribal Clients, April 17-21, 1995.

with the assistance of Mercer, who was by then O'Connor and Kitto's point of contact at the DNC.

By April 25, O'Connor and Kitto had gotten the opponent group on Fowler's schedule for a meeting on the afternoon of Friday, April 28. MIGA's McCarthy promoted the meeting to his membership in a memo that day, claiming that in addition to Fowler, "a top level White House Staff member, and top level staff from Senators Kerrey, Daschle and Wellstone's offices would attend. McCarthy added:

> The purpose of this meeting is to discuss our position on the Wisconsin Dog Track Fee to Trust Proposal with influential **[Democrats** in Washington. The people we **will** be meeting with are very close to **[President** Clinton and can get the job done. Your input is very essential as these folks want to talk with elected Tribal officials.

A day later, MIGA held a meeting in St. Paul, at which Kitto, BlueDog and McCarthy reported on the schedule set for the DNC meeting and other meetings that tribal opponent leaders were arranging for April 27 with members of the Minnesota and Wisconsin congressional delegations.[223]

Notwithstanding McCarthy's assertion in his April 25 memo, no White House witness had any recollection of receiving an invitation to the April 28 DNC meeting, or even any notice of it. There is no evidence of what came of the suggestion of having White House

[223] As noted above at 123-24, on April 27, Sikorski and Chairwoman Anderson met with Reps. Oberstar and Sabo, and informed the congressmen of the April 28 DNC meeting. On that same afternoon, an Oberstar staffer called Duffy's office to schedule a meeting for Oberstar with Duffy and Collier. The meeting - which Collier, Duffy and Skibine all attended - took place at Oberstar's office on May 2. *See* Section II.F.l., *infra.* Neither Sikorski nor Anderson recalls prompting Oberstar at their April 27 meeting to set up the Interior meeting, but the timing makes it likely Oberstar's desire for a meeting with Collier and Duffy was precipitated by the Sikorski-Anderson meeting.

representatives at that gathering. Likewise, no witness from the offices of Sens. Wellstone, Kerrey or Daschle has any recollection of being invited to the April 28 meeting, and there is no evidence - apart from McCarthy's memo - that anyone from those offices ever agreed to attend the meeting. In addition, all available evidence indicates that there was no congressional presence at that meeting, though not for want of effort by opponent lobbyists.

McCarthy's memo did not mention the Senators from Wisconsin, Russell Feingold and Herb Kohl; yet, their staffs recall that they considered attending the DNC meeting. On April 27, Feingold legislative assistant Mary Frances Repko met with Ho-Chunk President JoAnn Jones.[224] At that meeting, Jones raised the April 28 DNC meeting with Repko, telling Repko that Chairman Fowler and White House staff would be attending. As Repko was meeting with Jones, Ann Jablonski called Feingold's office to invite Feingold or his staff to the DNC meeting. She indicated that, in addition to the opponent tribes and their representatives, staff from the offices of Sens. Kerrey, Daschle and Wellstone would be in attendance.[225]

In response to Jablonski and Jones's invitation, Repko asked whether Sen. Kohl's office had been invited to the DNC meeting; Jablonski told her that Kohl had not been invited due to an oversight by Lewis Taylor. Repko then called Melissa Jampol, a Kohl staffer, to ask whether she would attend the DNC meeting with Repko. Jampol told Repko that she had not heard about the

[224]Feingold had met the previous day, April 26, with Red Cliff Chairwoman Rose Gurnoe and other applicant tribal leaders concerning their casino application.

[225]It is quite possible that Jablonski may have based this information on the McCarthy memorandum itself.

DNC meeting, but that she was interested in attending.[226] Jampol then spoke with Kohl's chief of staff, Ted Bornstein, who told Jampol to find out more about the DNC meeting. Jampol called the DNC and spoke to an unidentified woman who took a message. After her first call to the DNC, Jampol spoke to Bornstein and Kohl's legislative director, Kate Sparks. Bornstein and Sparks decided that Jampol should not attend the DNC meeting because Sen. Kohl's position was not going to change - he would take no position on the Hudson application - and because the Hudson issue should not be linked with the DNC and its fund-raising efforts.

Sometime after Kohl's office made the decision not to attend the April 28 meeting, Fowler personally returned the telephone call to Jampol. Jampol does not recall any substantive details of what she believes was a three or four-minute call. A contemporaneous record, however, reflects that Fowler asked Jampol if she would be attending the meeting, and she said no.[227] Fowler has no recollection of speaking to Jampol or to any other congressional staffer about the April 28 meeting.

In the wake of media reports of potentially improper political influence and contributions affecting the Hudson application, Sen. Feingold's legislative director prepared a February 1997

[226]Jampol stated that sometime on April 27, Scott Dacey also called to invite her to the April 28 DNC meeting.

[227]Repko created a contemporaneous record of Jampol's comments about the Fowler call, and has a present recollection of her conversation with Jampol, as well. Jampol apparently called Repko back after the Fowler call and recounted the call to her. Repko recalls Jampol's telling her that Fowler was "surprised" to hear that the April 28 tribal meeting, about which she had called the DNC, related to the Hudson casino proposal. OIC Interview of Mary Frances Repko, Nov. 6 and 10, 1998, at 5. Jampol informed Repko that Fowler understood the meeting to be a "courtesy call" with the tribes, arranged by McCarthy. Memo from Mary Frances Repko to Sen. Feingold, April 27,1995. Repko reported that, according to Jampol, Fowler "didn't know this was a controversial issue." *Id.*

memo that documented two instances of "inappropriate contact" in connection with the Hudson matter.[228] One of those instances concerned the invitation to attend the April 28 meeting at the DNC.[229] The memo contains details that conflict somewhat with Repko's and Jampol's recollections. Feingold agreed with Martinez that no one from his office should attend the DNC meeting. Feingold told investigators that the invitation to attend the meeting was unusual and "inappropriate" in light of the substantive nature of the meeting at the DNC.

**f. Tribal Opponents Meet with Fowler on April 28,1995**

On April 28, 1995, at 3:00 p.m., at least 10 representatives of the tribes opposing the Hudson application met at DNC headquarters with National Chairman Fowler and Deputy Finance Director David Mercer.[230] Various accounts indicate that the meeting lasted somewhere between one and two hours. On the day of the meeting, Kitto provided Mercer a list of expected attendees, a list of the applicant tribes, and a brief synopsis of the opponent group's concerns:

> All tribal leaders at this meeting oppose the conversation of the dog track at Hudson, Wisconsin, to an Indian gambling casino .... Mr. gaiashkibos "Gosh" is the Tribal Chairman of the Lac Courte Oreilles Band, and he ran for the Wisconsin State Senate as a Republican. We believe that Republican Governor Tommy Thompson of Wisconsin will support this off-reservation Indian gambling project; we also believe it will become a huge off-reservation, destination-entertainment complex project vacuuming most of the existing tribal gaming

[228]Memo from Suzanne Martinez to Sen. Feingold, Feb. 22,1997.

[229]The other instance is discussed above at 122 and n. 194.

[230]The known opposition participants in the meeting were Carl Artman (Oneida lobbyist), Melanie Benjamin (Mille Lacs tribal officer), Kurt BlueDog (Shakopee counsel and lobbyist), Stanley Crooks (Shakopee Chairman), Franklin Ducheneaux (MIGA and Mille Lacs counsel and lobbyist), JoAnn Jones (Ho-Chunk President), Larry Kitto (MIGA and St. Croix lobbyist), Patrick O'Connor (St. Croix counsel and lobbyist), former Rep. Gerry Sikorski (D-Minn.) (Mille Lacs counsel and lobbyist), and Lewis Taylor (St. Croix Chairman).

customers in this region of the country. The present owners of the dog track are from New York, and Senator Al D'Amato is pushing their bail out very hard.

Fowler's schedule for this date reflects the expected attendees, and notes that a separate briefing would be available that morning. Mercer suspects he did create such a document, but no copy of it has ever been produced to investigators.

O'Connor's billing records indicate that he and Kitto met with Mercer prior to the group meeting, to discuss a "contributions program for the Indians." Neither O'Connor, Kitto nor Mercer recalls such a discussion on April 28. Kitto recalled fund-raising discussions with Mercer around this time, but did not recall a particular meeting on the subject.[231] Mercer acknowledges that he was in contact with O'Connor and Kitto throughout this time frame regarding fund-raising generally, and Indian fund-raising in particular, but he and Fowler both dismiss the notion that the April 28 meeting was meant to include any discussion of Indian fund-raising along with the planned focus on the tribes' concerns about the Hudson casino application.[232] Yet, Mercer acknowledges that the April 28 meeting was a "follow-up" to the March 15 meeting of O'Connor and Kitto with Fowler and Mercer.[233] Mercer's own briefing sheet for that earlier meeting demonstrates that the focus of the March meeting was on two issues: Native American participation in the DNC and the Hudson matter.

[231]Kitto acknowledged that his April 26,1995, daytimer contains notations he made about Indian fund-raising goals he was then discussing with other persons relating to the DNC and the Re-election Campaign.

[232]Kitto testified, however, that Fowler was aware that O'Connor and Kitto were helping to raise money for the DNC.

[233]OIC Interview of David Mercer, Oct. 22, 1998, at 5.

O'Connor and Kitto both assign the purpose of the April 28 meeting squarely to the Hudson issue, and their hope that Fowler would contact the White House and cause it to intercede with Interior so that DOI would pay heed to the opponent tribes' arguments. O'Connor testified before the House Committee on Government Reform & Oversight that he specifically was targeting Ickes as the person he wanted Fowler to call, and further hoped that this intercession might yield a meeting for O'Connor and his clients with Ickes directly.[234]

Among the 12 known participants in the April 28 meeting, there are significant differences of recollection on certain important issues. Indeed, even the authors of notes and roughly contemporaneous memoranda about the event have present recollections that sometimes conflict with their own prior writings. One central witness to the events - Larry Kitto - has since died. Nonetheless, certain predominant themes emerge from the available record and recollections of the meeting.

Most witnesses, including Fowler, recall that he greeted the large group after their arrival and met with them in his office, joined by Mercer. Fowler opened the meeting by expressing his interest in hearing the group's concerns, and thanking their representative, O'Connor, for bringing them to see him. Fowler was receptive, responsive and attentive, taking notes through much of the discussion. From the outset of the meeting, Fowler acknowledges that he understood that the group wanted him to call the White House and Interior on their behalf.

O'Connor and Kitto proceeded to introduce the tribal leaders and their representatives. According to most of the meeting participants, O'Connor either stressed or said words to the

[234] In statements to investigators on this issue, O'Connor backed away from the certainty of his prior testimony. Sikorski recalls, however, that prior to the April 28 meeting, Kitto had said O'Connor would be trying to contact Ickes about the Hudson matter.

effect that the tribes and their representatives had been "good, loyal Democrats" and "good friends" of the Democratic Party who had supported the DNC and the Clinton/Gore campaign in the past.[235] Fowler recalls that O'Connor "clearly identified these people as being supporters of the Democratic Party," and added that, knowing O'Connor, "it would not surprise [Fowler] that [O'Connor] did mention financing."[236] O'Connor denies recollection of any comments about financial support, but his own partner, Corcoran, recalls O'Connor's reporting such details to him shortly after the DNC meeting.

One lobbyist, Carl Artman,[237] maintains that later in the meeting, Fowler responded to these remarks regarding financial support and the tribal requests for assistance by commenting that the tribes would need to be supportive of the party in the future; President Jones recalls the DNC chairman's remarking that he "hoped" the tribes' support would continue.[238] Yet another of the lawyer-lobbyists at the meeting, Sikorski, specifically recalls that it was O'Connor who told Fowler that these tribal leaders had been "very strong supporters" or "contributors" in the

[235] *See, e.g.,* Ducheneaux G.J. Test, at 86 ("I think [O'Connor] probably made the pitch that these were good loyal Democrat tribal representatives … [who] supported the President, [and] supported Democratic candidates."); Grand Jury Testimony of Kurt BlueDog, Dec. 16, 1998, at 116 (O'Connor "probably" said that the tribes were "good Democrats or had been supporters of the Democratic Party in the past."); and S. Crooks G.J. Test., April 21, 1999, at 86 (he "think[s]" either O'Connor or Kitto said that "the tribal representatives who were [at the meeting] had been good supporters of the Democrats in the past." He also remembers that either, or both, used the phrase "good friends.").

[236] Grand Jury Testimony of Donald Fowler, May 21, 1999, at 89-90 (hereinafter "Fowler G.J. Test.").

[237] Artman was an employee of the Oneida Nation and an enrolled member of the tribe.

[238] Grand Jury Testimony of JoAnn Jones, Oct. 23,1998, at 23 (hereinafter "J. Jones G.J. Test.").

past. Sikorski recounts that O'Connor then cast a "predatory look" at the tribal members and assured Fowler that they would contribute again in the future.[239]

When O'Connor yielded the floor to the tribal members, at least three of the tribal officials spoke: Taylor, Jones and Crooks. They spoke of their tribes, and the opportunities that gaming operations had afforded them. They described their past support for Democrats, while frequently referring to Lac Courte Oreilles Chairman gaiashkibos as a Republican. They also generally aligned the applicants with Republican politics. They detailed the geography of the tribes on each side of the issue and, framing the issue in relation to the IGRA factors for off-reservation applications, they explained their pursuit of economic impact studies and their desire to submit those studies to Interior to establish that a Hudson casino would be "detrimental to the surrounding community."[240] Fowler's notes reflect that the tribal leaders further alluded to the opponent group's contact with Interior Chief of Staff Collier, whom they believed was disposed in favor of the application. Fowler also noted that they provided their understanding of the positions being taken by Gov. Thompson and some of the area's congressmen and senators.

Several witnesses recall St. Croix Chairman Taylor commenting specifically on his tribe's past financial support of the Democrats, and the St. Croix's willingness and intention to continue that support. Indeed, Artman recalls Taylor's announcing, "I can write a check right

[239]Sikorski felt that O'Connor crossed the line - at least Sikorski's "personal line" - in drawing a nexus between future contributions and a request for specific assistance through this remark.

[240]Donald Fowler's Meeting Notes, Apr. 28,1995.

now."[241] Taylor himself acknowledges having told Fowler at the meeting that he would be willing to contribute more funds if it would help consideration of his tribe's various concerns. Fowler does not recall that statement. No witness suggests that Fowler responded to it directly, except Taylor, who recalls Fowler's saying that sometimes political contributions help, sometimes they do not, but that Fowler could promise nothing.[242]

As the meeting progressed, various lawyers and lobbyists for the opponent group added perspectives and information on IGRA and the Hudson case. Fowler recalls that someone voiced the allegation that the Hudson project was merely a bail-out for a failing dog track owned by Delaware North, a New York based corporation, and that Sen. D'Amato was pushing Interior to approve the application for that reason. The opponents added the assertion that Assistant Secretary for Indian Affairs Ada Deer was tainting the process with a pro-applicant bias, because of her past association with applicant leader gaiashkibos.

O'Connor recounted to Fowler his efforts to contact the White House through that date, including his unanswered calls to White House aide Loretta Avent and his subsequent contact with President Clinton and aides Bruce Lindsey and Linda Moore in Minneapolis earlier that week, and his exchange of calls with Ickes.[243] O'Connor noted that he had then heard back from

[241]Grand Jury Testimony of Carl Artman, Oct. 14, 1998, at 33 (hereinafter "Artman G.J. Test.").

[242]Mercer, who as the DNC Deputy Finance Director was responsible for staffing this meeting for Fowler and preparing any appropriate follow-up, recalls none of these various comments about financial contributions, or much of anything else discussed at the meeting. Kitto denied (and O'Connor could not recall) having made or heard any mention of contributions at the meeting.

™*See* Section II.EAb., *infra.*

Avent. At bottom, though, despite direct contacts with the Interior chief of staff and White House aides, O'Connor told Fowler that the opponents felt they were not receiving the response they should get, and that they wanted his help to communicate with Ickes. They hoped that Ickes would communicate with the Interior Department so that it would focus on the position of these opponent tribes.[244]

All of the guests left the meeting feeling generally they had achieved what they set out to do. Several of them recall that Fowler pledged to contact Ickes[245] and have Ickes in turn call Secretary Babbitt to convey to him that these tribal leaders were "friends" of the Democratic Party who should receive fair consideration.[246] Sikorski provided Fowler documentation on the issue, including letters reflecting congressional positions on the project, and a typed sheet listing phone and mailing contact information for Babbitt, DOI Chief of Staff Collier and IGMS Director Skibine.

Artman recalls that the tribal leaders proceeded immediately from Fowler's office that day to a gathering at the curbside outside DNC headquarters, where Kitto conducted a brief

[244] Artman recalls that Fowler said Ickes is the person who "can get the job done." Artman perceived that Fowler's comments, combined with his solicitation of future support, suggested a *quid pro quo* arrangement. Artman G.J. Test, at 28-30. No other witness supported either this recollected statement or this perceived agreement, though Sikorski recalled Fowler's saying that "you're talking to the right person or you're targeted at the right target" when O'Connor said he was trying to reach Ickes. Grand Jury Testimony of Gerald Sikorski, Oct. 16, 1998, at 85-86 (hereinafter "Sikorski G.J. Test.").

[245] Jones recalls that the group asked Fowler to contact both Ickes and the Interior Department directly.

[246] These witnesses, and Fowler himself, understood the references to "supporters" and "friends" to be suggestive of solid voting and financial support. *See e.g., Four Feathers* v. *City of Hudson* Deposition of Lewis Taylor, Dec. 17,1996, at 69-72; J. Jones G.J. Test, at 23-25; and Fowler G.J. Test, at 89-92.

review of necessary follow-up. Artman claims Kitto at that time emphasized the need for the tribes to begin contributing to the DNC in order to get the Hudson application denied. Though Kitto was unavailable for examination on this specific allegation, he denied ever linking a contributions solicitation with the Hudson application's outcome. Kitto denied any such comments, and no other witness confirmed Artman's recollection.

At the DNC, Mercer wasted no time in pursuing his own follow-up to the meeting, and continuing his efforts to cultivate the opponents as DNC supporters. On Saturday, April 29, he sent a handwritten note to Ducheneaux, stating:

> It was a pleasure to meet you last Friday. You were very helpful in summarizing the gaming issue and its implications for Chairman Fowler. I hope you found the meeting encouraging. Let's stay in touch on further developments. Let me know if I can be of further assistance.

Mercer acknowledges that he probably sent similar notes to other meeting participants.[247]

Ducheneaux responded to Mercer in writing on May 4, noting that he was "amazed and pleased that [Fowler] would devote so much of his time to the [Hudson] issue. The tribal leaders appreciated his time and interest very much." Ducheneaux also seized the opportunity to note that he, Kevin Gover and other Indian leaders had supported the Clinton-Gore ticket in 1992, and would surely "rally 'round the Clinton-Gore flag in the coming months." But, Ducheneaux added, "I must say there has been some disappointment in concrete White House support for Indian country since the election." For Mercer's "information," Ducheneaux also provided a copy of a letter that he and his partner were providing to the Indian nations they represented. The

[247]Fowler also sent notes to the tribal leaders and some of their representatives on May 8, 1995. In these letters, he assured the April 28 guests that "the DNC is committed to assisting in the solution of the problems we discussed in our meeting. I hope that this matter can be resolved in the near future and that all concerned can benefit and learn from the final outcome."

letter reviewed the commitment and support to Indian issues demonstrated by the Republican Senators, one of whom was a likely presidential candidate for 1996. The letter noted that tribal leaders had in recent years demonstrated a "growing sophistication … in national politics," understanding that they "should not be tied to any political party."

Meanwhile, Kitto promptly prepared a "legislative update" for the Minnesota tribes, describing the April 28 meeting's central theme:

> On Friday April 18 [sic], a delegation of tribes from Minnesota and Wisconsin met with DON FOWLER, CHAIRMAN OF THE DEMOCRATIC NATIONAL COMMITTEE (DNC). The purpose of the meeting was to request the DNC and the Committee to re-elect [sic] the President, to help communicate with the White House and the President about why the Department of the Interior should not approve the fee-to-trust land transfer for the Hudson Dog Track. The message was quite simple: all of the people against this project, both Indian and non-Indian are Democrats who have a substantially large block of votes and who contribute heavily to the Democratic Party. In contrast, all of the people for this project are Republicans. Fowler assured the group that he would take this issue up with high ranking officials in the White House and, if necessary, would arrange a meeting with Tribal officials and the White House, and that he would do this in a very timely manner. They spent almost two hours educating the DNC on the issue and felt the meeting was both timely and productive.

(Emphasis in original.) On May 1, Artman summarized the meeting in a similar fashion for his partner and their Oneida clients:

> [T]ribal members at the meeting appealed to Mr. Fowler for help in convincing Secretary Babbitt of the deleterious ramifications [of approving the proposal]. The problem was framed as a situation in which tribes with pronounced Republican leanings are about to receive approval of their proposal, which will hurt tribes which have traditionally supported Democrats. Mr. Fowler stated that he would speak with the President's assistant, Harold Ickes. He would urge Mr. Ickes to urge Secretary Babbitt to make a closer examination of the proposed operation.

On May 3, Ho-Chunk lobbyist Tom Krajewski reported to his client that Kitto had cast Fowler' response in these terms:

> He Listened, [sic] He took notes. He asked questions. He got the message: "Its [sic] politics and the Democrats are against it and the people for it are Republicans."

Within the DNC, it was apparent that Fowler and Mercer were being attentive to the opponent tribal group. Richard Sullivan observed that Mercer was preoccupied with the Indian group on April 28, and Mercer later reported to Sullivan that Fowler was "taking care of the Indians,"[248] and was "going out of his way for the Indian tribes."[249] Sullivan also observed Fowler making proactive efforts to cultivate the Indians as contributors, which Sullivan understood entailed Fowler's communicating with the Interior Department and Ickes on their behalf. Sullivan understood that O'Connor and Kitto were soliciting their clients as DNC donors. He also recalls Mercer eventually reporting to him that the Indians were pleased with the assistance Fowler provided them, and that Mercer anticipated the Indians would be making contributions to the DNC, possibly that coming fall.[250] Sullivan understood that Mercer was following-up with O'Connor, Kitto and their clients to that end.

O'Connor and Kitto acknowledge that they were engaged in a running dialogue with Mercer in the spring of 1995 about efforts to raise money from the Indian community for the DNC's Washington Gala. The Gala, scheduled for June 28, 1995, was the DNC's largest annual

[248]Grand Jury Testimony of Richard Sullivan, June 2, 1999, at 41-42 (hereinafter "Sullivan G.J. Test., June 2, 1999").

[249]Grand Jury Testimony of Richard Sullivan, Nov. 13,1998, at 49-50.

[250]As noted below, some of the Hudson opponent tribes first began making substantial DNC contributions in the fall of 1995. Sullivan recalls no indication that there was a direct correlation between any specific action or outcome on the Hudson casino application and the Indians' inclination to financially support the DNC, but he understood that "their appreciation for [Fowler's] responsiveness created a conducive environment for them to be politically supportive." Sullivan G.J. Test., June 2,1999, at 46.

event and required, at that time, a contribution of $ 1,000 per ticket. Mercer provided Fowler a briefing memo prior to a Minnesota trip Fowler had scheduled for May 20 which stated:

> The O'Connors are on the hook with [Clinton/Gore '96 Campaign Chairman] Peter Knight to raise $50k for the re-election. I'm meeting with them tonight to talk to them about bringing in the American Indian money of $5 Ok for the Gala [as well as the solicitation of a new trustee]. You might want to reinforce this and thank them for their support. Pat is certain to inquire about the status of the Indian gaming issue at Interior.[251]

The same memo suggests that Fowler also make a courtesy call to Kitto, and notes:

> Interested in issue pending at Interior. Still should be reminded of the help we need from him to recruit table buyers from the American Indian community for June Gala.

Mercer did meet with the O'Connors over dinner the evening of May 19, but he maintains that Hudson was discussed only in passing late in the meal,[252] and that financial commitments were not discussed because the occasion was more social in nature.[253]

For his part, O'Connor insists that he never made a specific commitment of what he could raise for the DNC from the Indians, and suggests that the task, in any event, was Kitto's responsibility. Yet, whoever may have been directly responsible to make it happen, O'Connor's

"'Memorandum from David Mercer to Chairman Fowler, May 19, 1995.

[252]Though he claims the discussion was limited, Mercer says that O'Connor's remarks were consistent with the letters concerning the subject (presumably O'Connor's May 8 letter to Ickes), including specific references to Gov. Thompson's and Sen. D'Amato's supposed support for the application and the allegation that alleged Hudson dog track owner Delaware North was tied to organized crime.

^Notwithstanding his own May 19 memo, Mercer also disputes that O'Connor ever made a specific commitment of funds he could raise from any Indian source. Mercer testified that he played no part in the Hudson matter after the April 28 meeting, other than hearing out O'Connor during his periodic calls, and Mercer says he never knew of contributions being solicited or received from the Hudson opponent tribes.

notes recorded in his daytimer on May 5, 1995, suggest that by that date he had agreed to raise $50,000 for the DNC from Indians.[254] As explained more fully below in Section II.J., the Indian tribes O'Connor and Kitto introduced to the DNC on April 28 did support the Party financially in the fall of 1995, and further into the 1996 election cycle, to an extent none of them had previously approached.

#### g. The DNC Contacts DOI and the White House About Hudson

On the heels of his lengthy April 28 meeting with the opponent tribal group, Fowler recalls taking three specific steps. First, he called Ickes and related what he had learned from the tribal representatives about the Hudson matter. Second, he called the Department of the Interior and related this same information to an Interior official. Third, he sent a memo to Ickes concerning the Hudson matter, as a follow-up to his call. Fowler asserts that he can recall no further efforts or contacts on the Hudson matter during the pendency of the application, and that he had no reason to do more than those three things.[255]

##### 1) DNC Contact with the White House

Fowler testified that within a few days of the Friday afternoon meeting, he called Ickes and informed him of the April 28 meeting and what O'Connor's group had conveyed:

> I recall telling him that I had met with this group, that they had a serious question, that it concerned the establishment of an Indian gaming facility in the vicinity of

[254] The notes read: "Indians - 50 DNC - Larry Kitto," directly above another note reading, "Committee to Reelect." On each of the preceding three days, O'Connor's billing records show that he was in touch with the DNC.

[255] Fowler's recollection is contradicted at least to the extent that Ickes's assistant, Jennifer O'Connor, recalls that Fowler called and spoke with her directly during the pendency of the Hudson application to inquire about its status. *See infra* at 192.

> existing gaming facilities, and their position was that the Interior Department had not properly considered the fact or the possibility that the establishment of this proposed facility would have a negative impact on the existing facilities. And it seemed to me that that was justification for reconsidering the - reconsidering is probably not the best word, but reviewing the determination that the staff of the Interior Department had made. And I recall having told him that these people who had visited me were supporters of the Democratic Party.[256]

Fowler testified that he did not recall asking Ickes to do anything in particular, but he expected that Ickes would look into it, and "review the determination and the complaint" that O'Connor's group had brought to Fowler.[257] He cannot recall how Ickes responded to the call, but does not believe Ickes made any promise or offer of specific action.

Fowler followed this call with a memo to Ickes, which was drafted for Fowler by Mercer. The May 5 memo, which said that it was regarding "Indian Gaming Issue," stated:

> This is to follow up our conversation regarding the Hudson Wisconsin Casino proposal. Below is an outline of the issues raised during my meeting with several tribal leaders and DNC supporters who oppose the project. I've also attached a Peat Marwick impact study forwarded by our supporters. Please let me know how we might proceed. Thanks for your attention.
>
> - The proposal to convert a dog track to a casino is being pushed by American Indian tribes who are supporters of Governor Thompson who is opposed to gaming, but would let stand the Interior Secretary's designation of the project as "land in trust" and thus eligible to establish a gaming operation.
>
> - The current owners of the dog track operate out of Buffalo, NY and so Sen. D'Amato is advancing their proposal at the Interior Department, where the decision to grant the land in trust is made at the 'discretion' of the Secretary.
>
> - The tribes-Wisconsin St. Croix and Ho-Chunk, Minnesota Shakopee Sioux, Upper Sioux, Prairie Island Sioux and Mille-Lac Lake-I met with

[256]Fowler G.J. Test, at 143-44.

[257]*Id.* at 146-47.

argue that their gaming operations will be adversely impacted if this project is granted "land in trust."

- The above tribes would like an opportunity to present their impact study to the Interior Secretary or the appropriate Administration officials in response to the study submitted by the Hudson tribes.

Fowler did not recall conveying to Ickes that these supporters also wanted an in-person meeting with Ickes himself. That point was made clear in O'Connor's subsequent letter to Ickes, which was copied to Fowler.[258] According to O'Connor's billing records, it also is a specific point he pursued with Mercer on at least six occasions in the five weeks after the April 28 meeting with Fowler.

**2) DNC Contact with the Department of the Interior**

Probably within the same time frame as his contacts with Ickes *(i.e.,* a week or so after the April 28 meeting), Fowler recalls placing a phone call to Interior about the Hudson casino project. His staff assisted him in making the call, but he can recall neither who assisted him nor whom he called. He knows with certainty only that he did not call Secretary Babbitt. Fowler says he did not know DOI Chief of Staff Collier, but recognizes that Collier's name was brought to his attention at the April 28 meeting, and acknowledges the possibility that it was Collier he called. Collier, likewise, recalls no such phone call, but does not rule out that it occurred, and concedes that he was the most likely point of contact for Fowler at Interior.

Fowler believes that the content of his communication with Interior was similar to what he related in his May 5 memo to Ickes. He could not recall whether he included the information that these people were supporters of the DNC or Democratic Party. Nonetheless, he defended the

[258]Copies of the May 8, 1995, letter from O'Connor to Ickes were found in DNC files, but Fowler has no recollection of having seen the letter in May 1995.

propriety of including such information, so long as there was no suggestion of linkage between financial contributions and the position the DNC supporters sought to advance.

### h. DNC Policies and Practices Concerning the Intersection of Fund-raising and Contacts with Administration Officials

The direct evidence of DNC conduct with regard to the Hudson matter is mixed. Some testimony and documents suggest that lobbyists, tribal representatives and DNC officials discussed jointly the hope or expectation that the opponents would repeat in the future the Democratic contribution habits they had established in the past, while also discussing DNC intervention with the White House and Interior consistent with the tribes' opposition to the Hudson application. Other testimony, including that of Fowler, Mercer and O'Connor, indicates that there was no linkage between discussion of planned or potential contributions and discussion of the casino application. Fowler defended his conduct in the Hudson matter as proper and fully within his role and prerogative as National Chairman of the DNC, which he felt called for him to serve as a link between Democratic constituents and the Democratic Administration.

Like so many aspects of potential corruption cases, investigation of the actual conduct and motivations of key participants in the Hudson matter has entailed review of similar scenarios and related conduct by those individuals in other instances. Because direct proof of criminal *quid pro quo* is often elusive, circumstantial and pattern evidence is sometimes the pivotal proof of what actually transpired in the case at issue, particularly in relation to issues of knowledge and intent. For that reason, we have examined in some detail available records and witnesses for evidence of DNC policies, practices and events that might shed light on the Hudson matter. Ultimately, we identified evidence of some questionable practices and evidence of policies that

were neither universally understood nor uniformly followed, but we did not find proof that the DNC or its officials participated in a criminal *quid pro quo* arrangement relating to political contributions and Administration actions in this matter.

### 1) DNC Finance Policies on Administration Contacts

The obvious focus of the DNC Finance Division's efforts was raising money, and cultivating relationships that would help achieve that goal. Yet, during the same time frame as the O'Connor and Kitto meetings with Fowler and Mercer at the DNC, evidence suggests that DNC finance staff felt frustrated by the reluctance of Administration personnel to assist "money person[s]"[259] by setting up meetings for DNC donors or "being associated with finance."[260] In several March 1995 memoranda addressing issues relating to servicing its members, finance staff advocated developing a more supportive and proactive DNC role on behalf of donors. Since one of the "benefits" offered to DNC Fund Council members at that time was the use of the Fund Council "to help them set up meetings with the administration, agencies, and Members of Congress," one Fund Council director suggested that it would be helpful to have a person designated at the White House "whose only job is to take care of DNC donors."[261] Several senior finance staffers extolled the need to "foster a sense of advocacy" in relation to finance donors, so

[259]Memorandum from Fran Wakem to David Mercer, March 13,1995.

[260]Memorandum from David Mercer, Fran Wakem, Ari Swiller, Jennifer Scully and Peter O'Keefe to Finance Chairman Truman Arnold and Richard Sullivan, March 14, 1995.

[261]Memorandum from Fran Wakem to David Mercer, March 13, 1995.

that the DNC could "sell and represent our donors [in dealings with the White House and other DNC divisions] as supporters that represent more than contributions."[262]

Finance staffers formulated these proposals in response to admittedly frequent requests from contributors for assistance in obtaining meetings on Capitol Hill or with Administration officials, but the proposals conflicted with existing DNC policies and were not adopted. Those policies existed in the form of a written set of "Legal Guidelines for Fund-raising," promulgated since at least December 1993 by the DNC general counsel, which admonished the finance staff, among other things, that:

> [S]pecial care must be taken to avoid giving any donor the impression that he or she will enjoy any special access to or favor from any Administration official or agency, whether in connection with [a DNC fund-raising event] or elsewhere.
>
> In no event should any DNC staff ever promise a meeting with or access to any government official or agency in connection with a donation, or ever imply that such contact or access can be arranged, or ever contact an Administration official on behalf of a donor for any reason.[263]

(Emphasis in original.) DNC General Counsel Joseph Sandler stated these guidelines were designed to provide guidance on what contact between DNC Finance and the Administration was deemed appropriate. In this regard it is important to note that the guidelines do not cite any criminal prohibitions on the conduct they proscribe, and do not purport to track the limits of criminal statutes; rather, they seem to reflect the DNC's own perception of appropriate ethical

[262]*See* n. 260, *supra.* Mercer was a co-author of this document, which also suggested that "each agency and White House department should have a list of supporters and a staff person identified and devoted to handle matters related to reaching out to our donors."

[263]Memorandum from Joe Sandler and Neil Reiff to Finance Staff, Dec. 15,1993, at 8.

limitations. Sandler said he provided these guidelines to all finance staff and updated them periodically through written and oral briefings.

Some DNC staffers understood the quoted prohibition on taking action for donors to be quite absolute. By contrast, Fowler and some of the senior finance staff construed these rules to be essentially a prohibition on *quid pro quo* arrangements. Fowler interpreted the "in connection with a donation" language to modify all elements of the second paragraph quoted above, and stressed that literal construction of this sentence would preclude the DNC from pursuing even mundane servicing requests, like tours and photo opportunities, on behalf of donors. He also understood the White House office of political affairs to be exempted effectively from the definition of "Administration official" as used in this guideline. Sandler generally supported this reading of the text, noting that he expected Fowler would be in regular contact with the Political Affairs Office at the White House, and thus the guidelines would not apply to Fowler.

Fowler maintains that, as National Chairman, his role was to provide an interface between Party membership and the Administration, and to participate in a continuing dialogue with those constituencies on matters of policy and substance. Accordingly, in his view, the legal guidelines were addressed only to the "finance staff and not to the Chairman. Sandler agreed with Fowler's view that he was not a Finance staff member. Sandler also noted, though, that he did not believe it was necessary to instruct the Chairman on his proper role, as he was assumed to know and understand it.[264]

[264]Both Fowler and Sandler acknowledged, however, that on more than one occasion in 1996, Fowler was reprimanded by White House officials for making contact directly with Administration officials (other than Political Affairs's staff) concerning matters of interest to DNC contributors.

Fowler asserts that his conduct was circumscribed not by these guidelines, but by prohibitions on criminal *quid pro quos*, as well as by his own ethical view that it was inappropriate to link discussion of contributions with discussion of substantive matters of interest to the donor, or to take action for a donor on the basis of a contribution. Yet, evidence suggests that Fowler and his staff engaged in fund-raising discussions with contributors for whom they then interceded with the Administration about various other matters.

**2) Evidence of DNC Conduct in Other Matters Involving Both Contributions and Issues Pending Before the Administration**

Fowler insists that he was motivated to meet with the O'Connor group on April 28, 1995, simply because O'Connor was a friend who had just hosted a luncheon for Fowler six weeks earlier, and not because of a fund-raising agenda.[265] Yet, evidence suggests that Fowler dealt with DNC constituents or their representatives on other occasions where the anticipated agenda included both discussion of contributions and specific matters pending before the Administration. With regard to Patrick O'Connor in particular, documents and other evidence demonstrate that O'Connor repeatedly approached Fowler in just such situations following the Hudson application process.

Fowler can recall only two meetings during Fowler's tenure as DNC Chairman when O'Connor brought clients of his to meet with Fowler. The first was the April 28 Hudson opponents' group meeting, which was preceded by Fowler's March 15 meeting with O'Connor

[265] O'Connor insists that he and Fowler were mere acquaintances prior to the March 5, 1995, brunch, and that his appeal to Fowler on the Hudson matter was not born out of friendship - even though other witnesses, including O'Connor's own partner, understood that the two men were close friends.

and Kitto (without clients) about both their tribal client's cause and their fund-raising efforts with American Indians on behalf of the DNC. The second O'Connor meeting Fowler recalls was a September 1995 meeting with another O'Connor & Hannan client, Hong Kong businessman Eric Hotung, regarding a matter unrelated to the Hudson casino application.[266] Fowler admits he knew in advance of that meeting that O'Connor was soliciting Hotung's wife, Patricia Hotung - a past DNC contributor, and a U.S. citizen - for a substantial DNC contribution.[267]

On Sept. 7,1995, O'Connor sent a letter to Fowler stating that he had a "commitment" of $100,000 from Patricia Hotung, and then remarking: "To make this happen, I will need your help. Eric would like appointments with the following: 1. The President; 2. Anthony Lake [then National Security Advisor to the President]; and 3. Sandy Berger [then Deputy National Security Advisor]." The letter further stated that Hotung was a "wealthy humanitarian" with high level Chinese relationships and extensive investments in Hong Kong who sought to help ease tensions between the U.S. and China.[268] Fowler acknowledges receiving this letter in early September 1995.

[266]Fowler and other witnesses were questioned about this matter in connection with the same Senate committee investigation that examined the Hudson matter.

[267]0'Connor's billing records reflect that he first called Fowler on behalf of Eric Hotung on Aug. 15,1995. Fowler's undated, handwritten notes of his initial phone conversation with O'Connor about Hotung show that O'Connor informed Fowler that Patricia Hotung wanted to be a DNC trustee at the $100,000 level, and that Fowler and O'Connor discussed the possibility of identifying White House officials who "work[ed] on Chinese problems." Those notes also reflect that in this same conversation O'Connor related to Fowler the status of his various fund-raising efforts, including a comment that things were "going very well" with the Hudson opponent tribes, and that "knocking them out was key." *See* Section H.J.4., *infra.*

[268]Eric Hotung confirmed that he sought meetings with U.S. officials so he could play a role in U.S.-Chinese official interaction in view of the imminent change in control of Hong Kong.

On Sept. 15, Fowler met with O'Connor and Eric and Patricia Hotung, who attended a White House dinner that evening with the President and the First Lady.[269] Records reflect that within five days after the meeting: (1) O'Connor followed-up with Mercer in pursuing a meeting for Eric Hotung with the National Security Advisor's office; (2) O'Connor confirmed in writing to the DNC that Patricia Hotung would be making a DNC contribution; and (3) Fowler sent the White House Political Affairs staff a memo requesting a meeting for Eric Hotung with either Lake or Berger later that month - twice noting in the memo that Eric and Patricia Hotung were "strong supporters" of the DNC.[270] On the basis of Fowler's request, Sandy Berger met briefly with Eric Hotung on Oct. 4, 1995, at the White House.[271] James Symington of O'Connor & Hannan and Mercer accompanied Hotung to this meeting but did not participate in it.

Fowler insists that he did nothing to assist O'Connor or Eric Hotung in relation to the promise of a $100,000 gift from Patricia Hotung to the DNC. Indeed, he suggests that he "just didn't focus on" (and perhaps did not even read) the language in O'Connor's Sept. 7 letter that

[269]Mercer's Sept. 14, 1995, memo to Fowler about this meeting mentioned both the expected contribution and the White House dinner, as well as the fact that the DNC would be "helping to set up a meeting with the Hotungs at the [NSC], hopefully with Sandy Berger." Review of documents and interviews of witnesses from, among other sources, both the White House and the DNC indicate that Eric Hotung did not meet privately with President Clinton during this timeframe, though he was later invited to a March 27,1996, White House dinner and an April 1,1996, White House coffee.

[270]Memorandum from Don Fowler to Doug Sosnik (via Karen Hancox), Sept. 20,1995.

[271]Berger testified during the Senate Committee's investigation that he has no recollection of this meeting, which his records characterized as a "photo op." Samuel Berger Appointment Schedule, Oct. 4, 1995. Both before and after his meeting with Berger, Hotung met with the NSC Director for Asian Affairs. The first such meeting was held at the offices of O'Connor & Hannan. Hotung did not meet at any time with Anthony Lake.

links the meeting requests and O'Connor's ability to "make [the contribution] happen."[272] Likewise, O'Connor asserts that Patricia Hotung (with whom he admittedly never spoke about this contribution) was committed to making the donation, regardless of the meeting requests. Nonetheless, internal O'Connor & Hannan documents and bank records reflect that the contribution monies were sent to a trust account controlled by the firm on behalf of the client's spouse, and that O'Connor did not "trigger"[273] the payments from the trust account to the DNC bank account until the day after Eric Hotung's meeting with Berger.

In both this instance and the Hudson matter, the meeting set with Fowler for O'Connor and his clients was set up by DNC Deputy Finance Director Mercer.[274] In each case Mercer provided Fowler a written briefing in advance of the meeting. In the second instance, Fowler also had the stark information related by O'Connor's Sept. 7 letter. Thus, despite Fowler's claim that he found it intolerable to link a contribution to any specific conduct on his part, this second incident suggests that he engaged in just such an arrangement. Further, it suggests that O'Connor anticipated that the proposal he presented to Fowler in the Sept. 7 letter would be well-received, perhaps on the basis of his experience with Fowler in the Hudson matter. Though this second incident involved a client request that, by all available information, amounted to no more than a

[272]Fowler G.J. Test, at 216.

[273]Memorandum from Thomas Corcoran to James Symington, Oct. 5, 1995.

[274]As noted earlier, Mercer also planned the O'Connors' March 5 luncheon. The March 3 briefing Mercer provided Fowler for that event stressed the need to solicit the guests' "advice and counsel and their financial support over the coming months." Mercer noted that the guests had "particular concerns" to which the Chair should provide "some level of responsiveness to encourage future participation and financial support." In pursuit of these goals, Mercer's talking points advised Fowler to "[s]peak to more efficient and effective communication between the Party and the White House."

request for access - meetings with Administration officials - these facts call into question Fowler's contention that he did not at the time clearly understand that each of these O'Connor meetings related in some way to fund-raising as well as a client's substantive agenda with the Administration.[275]

O'Connor was not the only person close to the Hudson matter whose conduct subsequent to the Hudson decision suggests that he perceived that Fowler and the DNC would respond favorably to discussion of both contributions and a request for intercession with the Administration. After leaving his post as DOI Chief of Staff, lobbyist Thomas Collier approached the DNC in 1996 to seek Fowler's assistance for Collier's client, the Shakopee Mdewakanton Sioux Community.[276]

[275]Though Fowler recalled no other O'Connor meetings, evidence reflects that Fowler had at least a third, and possibly a fourth, meeting with O'Connor in 1996 about yet another client from whom O'Connor was soliciting a DNC contribution while simultaneously trying to advance a matter before the Administration - in this case, as in the Hudson matter, a client with interests relating to Indian gaming and the Interior Department. Fowler's calendar entry for that third O'Connor meeting, on Oct. 14, 1996, states that the meeting would be about O'Connor's efforts to secure a $100,000 donation for the DNC. On that date, O'Connor billed the affected client for: "Meeting in Washington and discussion regarding client matters." O'Connor's handwritten daytimer notes reflect that he intended to review with Fowler a memorandum and data concerning his client and discuss the roles of Interior officials involved in the client's matter, while also reviewing the status of his efforts to secure a contribution commitment from that client. One week later, O'Connor recorded in his daytimer an entry reading: "Discussion with Don Fowler by telephone .. . regarding status of call to Interior."

[276]Federal laws governing conflicts of interest generally restrict the ability of former officials to lobby federal agencies after leaving government employment, but the provisions of 25 U.S.C. § 450i(j) make these restrictions inapplicable to representation of Indian tribes. Documents produced by Collier and DOI also show that, prior to representing the Shakopee, Collier also sought and obtained from a DOI ethics official a written confirmation that such representation would be legally permissible.

On June 4, 1996, Fowler met with Shakopee representatives, including Chairman Stanley Crooks and lawyer-lobbyist Kurt BlueDog, both of whom had attended the April 28 meeting about Hudson. At the meeting, the tribal representatives delivered to the DNC a $20,000 contribution from the tribe. The day before this meeting, Collier had written a briefing memorandum (in which he identified himself as "Former, Chief of Staff, Secretary Bruce Babbitt") informing DNC staff that the Shakopee - whom he said "own and run one of the most financially successful Casinos in America"[277] - had not been very politically active in the past, but would be bringing $20,000 to the meeting, with "a very real interest in possible significant contributions in the future."[278] Collier stated in his memo that the Shakopee were "interested in raising one substantive issue with the Chairman: The Department of Interior's possible reconsideration of the tribe's adoption ordinance."

The Adoption Ordinance issue concerned the legal process for adding members to the tribe. As such, given the enormous per capita distributions of gaming proceeds the being made by the tribe, and the capacity of new members to effect tribal elections, the ordinance had serious implications relating to both tribal control and the tribe's gaming operations. Although the tribe had received DOI approval for the ordinance, tribal dissidents who were seeking reconsideration of the measure had retained a "well connected Democrat"[279] to advance their cause. As Fowler's

[277]Fowler also recalls that during the June 4 meeting the tribal representatives informed him that their tribes made monthly distributions to its members of $50,000 to $60,000 each.

[278]Memorandum from Thomas Collier to Gretchen Lerach, June 3,1996. Within three and a half months of this meeting, the Shakopee would contribute an additional total of $75,000 to the DNC.

[279]*Id.*

notes of the June 4 meeting reflect, the Shakopee felt this dissident lawyer had "tilted [the] playing field" by his contacts with DOI Deputy Secretary John Garamendi, with whom he had a relationship, and the Shakopee wanted the field "levelled out." Collier proposed in his memo the specific means of achieving that goal: Fowler would inform Ickes of the tribe's concern, and Ickes would then inform Garamendi at DOI.

Collier denied there was any linkage between the Shakopee's June 4 contribution and their request for Fowler's assistance, though he did not dispute that during the June 4 meeting the Shakopee representatives requested that Fowler ask Ickes to contact Garamendi, as indicated in Collier's June 3 memo. He said the memo - which describes the tribe's contribution history, its June 4 new contribution, its future giving interest and its pending need for assistance - was written at the request of a DNC staffer. Collier also maintained that the Shakopees raised multiple concerns in the June meeting - a claim that is squarely contradicted by every other witness who recalls the meeting, as well as Fowler's notes of the meeting and Collier's own briefing memo.

For his part, Fowler did not recall reaching out to Ickes or doing anything else on this issue, and remembered learning at some point that the matter had been resolved - though he cannot recall how or from whom he got that information. There is no evidence indicating that Fowler or the DNC took any action regarding this matter after the June 4 meeting. Interior Solicitor John Leshy informed the tribal dissidents by a letter dated June 19,1996, that DOI (the Secretary) had decided not to undertake a review to reconsider approval of the adoption ordinance. There is no evidence, however, that this decision was influenced by the White House or the DNC. Nonetheless, the Shakopee's interaction with Fowler tends to corroborate that there

was a perception on the part of veterans of the Hudson matter that the DNC - and specifically Fowler - was willing to request White House intervention (specifically by Ickes) on behalf of contributors in matters pending before the Administration, and even in connection with the discussion of specific contributions. This scenario also raises questions about the shared experience of Fowler and Collier, both in relation to Hudson and in their general course of dealing with the White House and Interior. Secretary Babbitt's former Chief of Staff apparently perceived that an appropriate means of lobbying his former agency was to make a contribution to the DNC and seek its intervention with Ickes and the White House, who then would contact Interior, instead of relying solely upon Collier's or the tribe's contacting Interior directly.[280]

### 3. Tribal Opponents Seek Assistance of Clinton/Gore Campaign

Contemporaneous with his efforts to solicit the assistance of the DNC and the White House in communicating the opponent groups' message to the Interior Department, Patrick O'Connor contacted the finance leadership of the Clinton/Gore '96 Committee ("the re-election campaign") for help in getting Ickes's attention. O'Connor seized opportunities stemming from the re-election campaign's solicitation of his support to raise the Hudson casino matter.

The leaders of the re-election campaign's finance staff were National Finance Chairman Terence McAuliffe and Finance Director Laura Hartigan. In 1994, McAuliffe had served as the

[280]Collier had, in fact, contacted DOI officials on behalf of the Shakopee on multiple occasions prior to June 4,1996, including a December 1995 meeting attended by Crooks and Collier for the tribe, and Hilda Manuel, Michael Anderson and Robert Anderson for DOI, as well as a meeting that Gover recalls having with Collier. In a May 31, 1996, letter to Assistant Secretary Deer, Crooks wrote that the tribe was assured at that meeting "that the department viewed the adoption ordinance approval as final and had no intention of revisiting [it.]" Crooks's May 31 letter - and the June 4 DNC meeting - followed close in the wake of a May 10, 1996, letter from Deer to Rep. Elton Gallegly (R-Cal.) advising the Congressman that DOI was evaluating a request for reconsideration of the adoption ordinance.

elected Finance Chairman of the DNC, while Hartigan had been the DNC Finance Director from 1994 through early 1995. By mid-April 1995, they had established the framework for the re-election campaign's finance department, with headquarters in Washington, D.C. They set out on a mission of raising funds for the President's 1996 campaign, with the goal of hitting the matching funds maximum level at the earliest possible date, so that the finance operation could then be shut down and the resources assigned to other parts of the campaign.[281]

Patrick and Evelyn O'Connor both had been active supporters of the Clinton/Gore ticket in 1992, each contributing at the $1,000 maximum level, and both raising funds from others as well. In 1995, Hartigan asked Patrick O'Connor to join the National Finance Board of the re-election campaign. Board membership required a total of $50,000 raised in no more than $1,000 increments, with the first half of the fund-raising obligation being due by June 19, when the board would have its initial meeting in Washington. As an alternative, fund-raisers also could receive recognition at one of the two levels of the re-election campaign's steering committee by generating either $15,000 or $25,000 in contributions.

On April 21, 1995, O'Connor's daytimer reflects Hartigan's name and number, but no detail of a call.[282] On April 25, O'Connor spoke with Hartigan by phone, and billed the conversation to the St. Croix Tribe on the Hudson matter. Neither O'Connor nor Hartigan has any recollection of their discussing the Hudson matter. Records suggest, nonetheless, that

[281]They reached that goal in November 1995, when the combination of raised funds and federal matching funds totaled $43.2 million, after which many of the re-election campaign's finance staff moved over (or back) to the DNC.

[282]By April 22, however, O'Connor had some information about the re-election campaign's agenda, since he billed two non-Hudson clients for providing information to them regarding "Committee to Reelect and DNC plans for '95 and '96."

O'Connor and Kitto discussed the DNC's and the re-election campaign's finance activities as they advanced their Hudson lobby efforts. Kitto's daytimer record for April 26 (the day after O'Connor's conversation with Hartigan) lists the tribal attendees for the April 28 meeting with Fowler at the DNC, and then contains fragmentary notes corresponding to finance activities and goals for the DNC and the re-election campaign.[283] O'Connor's May 5 daytimer contains similar notations, following a list of all the persons or offices that he at least had attempted to contact about the Hudson matter as of April 25, 1995.[284]

O'Connor does not recall ever pledging to raise a specific amount for the re-election campaign, even though Mercer believed by May 19,1995, that the O'Connors were "on the hook" to raise $50,000 for the campaign.[285] Ultimately, O'Connor was not named to the re-election campaign steering committee or finance board. He and his wife did attend a May 18,

[283] One line of the entry reads: "Gore June 1 - 2 - 5." The DNC would host a breakfast with the Vice President and major fund-raisers on June 5,1995, at the Old Executive Office Building. Below the words "DNC" and "Committee to Re-elect," Kitto also noted: "25 people at 1,000 each" and then "President - 19 & 20 June 50grand>." This appears to be a reference to raising $25,000 of the $50,000 board member commitment prior to the June 19 initial meeting of the national finance board. *See supra* at 158 and n. 254.

[284] O'Connor's entry reads: "Committee to Reelect / Briefing - May 9th / Hillary May 18 $5000 / $50 - committee before primaries / no events - 1000 / June 19th." These notes appear to reflect news of: (1) a May 9 briefing; (2) a May 18 re-election campaign luncheon with the First Lady, before which O'Connor thinks he was being asked to raise $5,000 (in fact, around the time of that event, O'Connor, his wife and their son each contributed $1,000 to the re-election campaign, and a month later two of his St. Croix clients contributed $1,000 each); (3) the need to raise $50,000 in $1,000 increments before the primaries to be a member of the National Finance Board, which would first meet on June 19; and (4) the fact that "no events" would be available to pitch the general solicitation for re-election campaign contributions.

[285] Memorandum from David Mercer to Chairman Fowler, May 19, 1995.

1995, luncheon with the First Lady, however, and O'Connor recalls raising about $14,000 for the re-election campaign.

It is undisputed that O'Connor brought the Hudson matter to McAuliffe's attention through subsequent contacts. O'Connor's May 23,1995, billing entry charges the St. Croix one hour with the description: "Meet with Larry Kitto and Terry McAuliffe explaining our story." This exchange apparently took place at the joint Democratic congressional dinner at the Washington Hilton that evening. O'Connor recalls he merely asked McAuliffe for help in getting a meeting with Ickes, and nothing more, and does not know what, if anything, McAuliffe did in response to the request. O'Connor also asserts that he spoke with McAuliffe about the Hudson matter only once, never in conjunction with any discussion about fund-raising, and certainly not from the Hudson opponent tribes. Yet, in his very next Hudson billing entry, O'Connor charged the St. Croix for traveling to the re-election campaign's offices to meet with McAuliffe and for "asking him to agree to call Harold Ickes and arrange appointment for Indians."[286] These are the only two occasions on which O'Connor records meeting with McAuliffe and Kitto, and O'Connor's own account indicates that during a meeting at the re-election campaign offices, McAuliffe asked him and Kitto to raise money specifically from Indians for the campaign.

McAuliffe recalls the O'Connors coming to the campaign's offices to deliver their contributions, and also vaguely recalls talking with O'Connor at some point about the Hudson

[286]0'Connor's daytimer entry for this date uses the phrasing: *"getting* him to agree to call ...." (Emphasis added.)

matter, but has no recollection of a specific request for help.[287] McAuliffe insists that he agreed to do - and did - nothing in response to O'Connor's comments about the Hudson matter. He further recalls that O'Connor subsequently "bombarded" him with phone calls on Hudson to the point that he had O'Connor taken off of his "call list," so that he would not be distracted by the calls.[288]

O'Connor also copied McAuliffe on a June 2, 1995, facsimile he sent to the White House, Interior and Hill staffs asserting that the Hudson application would set a bad precedent for other Wisconsin dog tracks seeking to convert their facilities to Indian casinos. O'Connor billed the St. Croix for discussions with Corcoran on June 6 "regarding Terry MacAuliffe [sic] arranging appointment with Harold Ickes," and discussions with Kitto on June 19 "regarding support to be given to Committee to Re-elect and D.N.C." Finally, on July 14, 1995, O'Connor met with Kitto and recorded time spent discussing "necessity to follow-up with ... Terry Mac at the Committee to Re-elect - outlining fund raising strategies."

McAuliffe dismisses the notion that there was any connection between the general fund-raising efforts of the re-election campaign or its national finance board and the Indians opposing Hudson casino application, and asserts that he and Hartigan never expected O'Connor would be

[287]McAuliffe acknowledges that contributors approached him "all the time" and everywhere he went with requests for assistance in matters before the Administration, but maintains that he followed the re-election campaign's instructions that he "never call a department" himself. Grand Jury Testimony of Terence McAuliffe, July 16, 1999, at 48-50 (hereinafter "McAuliffe G.J. Test."). Instead, he would relay the matter to the Political Affairs staff at the White House, and let them "handle the traffic," and decide what should be done with the request. *Id.* In the Hudson matter, though, he asserts that he did not even do that much. *Id.* at 50-51.

™*Id.* at 46.

able to deliver on the $50,000 target for board members (as to which O'Connor fell far short). The significance of O'Connor's various cryptic notations and his approach to McAuliffe on the Hudson issue is heightened in light of Fred Havenick's claim (addressed more fully in Section H.I.2., below) that McAuliffe boasted to Havenick in August 1995 that McAuliffe in fact had helped to "kill" the Hudson application - a claim for which there is no independent corroboration, and which McAuliffe flatly denies.

#### 4. Tribal Opponents Contact the White House, and the White House Contacts Interior

The ultimate focus of the opponents of the Hudson casino proposal was, of course, the decision-makers at the Interior Department. To that end, the opponents sought to exert any pressure they could on those DOI decision makers. By April 1995, the opponents had reached out to senators, congressmen, and the Chairman of the DNC and his Finance staff. In April, the opponents contacted directly the White House and the President himself.

##### a. Patrick O'Connor's First Attempts to Involve the White House

O'Connor led the opponents' efforts to involve the White House in defeating the Hudson casino proposal.[289] O'Connor's first approach to the White House was by telephone on April 7, 1995. He called Loretta Avent, who was Special Assistant to the President for Intergovernmental Affairs. Avent oversaw Indian issues within the Office of Intergovernmental Affairs (01 A).[290]

[289]Because Corcoran, the O'Connor & Hannan partner in charge of the St. Croix representation, was a Republican, O'Connor took the lead on lobbying the DNC and the White House.

[290]The OIA traditionally handled issues concerning municipal and state governments, but in the Clinton Administration the OIA also handled issues concerning Indian tribes. Avent

(continued...)

O'Connor was not successful in reaching Avent by telephone. Accordingly, on April 19, O'Connor sent Avent a facsimile stating that he wanted to talk to her about the supposed fact that she had told representatives of an applicant Indian tribe that she would "help them get approval from Interior Secretary Babbitt" for the off-reservation casino at Hudson.[291] In the facsimile, O'Connor also expressed his desire "to discuss some aspects of this matter which I believe are important to the Clinton Administration." Avent was out of town when O'Connor sent his facsimile, and she again did not respond to O'Connor.

**b. O'Connor Speaks to President Clinton and Bruce Lindsey**

Unable to speak with Avent, O'Connor decided to take advantage of the opportunity afforded by an upcoming presidential event in Minnesota. On April 24,1995, President Clinton was in Minnesota, where he addressed a gathering of the American Association of Community Colleges at the Minneapolis Convention Center. Early on the morning on April 24, O'Connor called the White House to provide Avent with one last chance to be responsive to his concerns about Hudson before he approached the President with them at the Minnesota event, but he did not reach her. He then proceeded with his plan to take up the Hudson matter with the President.

After the President's speech at the convention center, he worked a "ropeline," which consisted of the President walking down a line of about 50 to 60 people pre-selected by the White House to shake hands with the President. Bruce Lindsey, Assistant to the President and

[290](...continued)
reported to Marcia Hale, the head of the OIA, and to Harold Ickes, in his role as White House Deputy Chief of Staff for Policy and Political Affairs.

[291]Avent told investigators that O'Connor's statement was untrue; she never told the applicant tribes that she would assist them with the Hudson casino application.

Deputy Counsel to the President, was walking behind the President as he worked the line. When the President came to him, O'Connor shook the President's hand and told him that Indian tribes O'Connor represented were concerned about a proposal to build a casino across the river near Hudson, Wis. The President called Lindsey over to speak with O'Connor so that the President could move on. O'Connor described the Hudson issue for Lindsey, including his unsuccessful attempts to discuss the matter with Avent and his concern that Interior was not considering the serious economic impact a Hudson casino would have on neighboring tribes. Lindsey also recalls that O'Connor told him that Delaware North was the owner of the dog track where the casino was to be installed. Lindsey recalls that he told O'Connor that he would get Avent to return his calls.[292]

Shortly thereafter, Lindsey took up O'Connor's issue with Ickes, who was accompanying the President on the trip to Minnesota.[293] As described above, O'Connor had told Lindsey that Delaware North was involved in the Hudson casino application. Lindsey recalls that he did not want to handle the matter because his former law firm had represented Delaware North, so he tried to hand the Hudson issue off to Ickes. Ickes told Lindsey that he knew O'Connor and that he would handle O'Connor's issue.

[292] In his appearance before the House Committee on Government Reform and Oversight, O'Connor testified that he believed Lindsey told him, "You will get a call from Loretta Avent, and perhaps from Harold Ickes." *The Department of the Interior's Denial of the Wisconsin Chippewa's Casino Applications, Vol. 1: Hearings Before the Comm. on Government Reform and Oversight,* 105th Cong., 2nd Sess. 433 (1998) (testimony of Patrick O'Connor).

[293] Lindsey specifically recalls talking to Ickes about the Hudson matter in Minneapolis on April 24,1995. Ickes does not recall being on the trip to Minnesota or any details of his discussion with Lindsey, but Air Force One manifests confirm that Ickes was on the trip.

Lindsey also promptly placed a telephone call to Avent to discuss the O'Connor issue, as he told O'Connor he would. Lindsey told Avent that O'Connor had complained to the President that she was not returning O'Connor's calls. Avent told Lindsey that it was Administration policy not to talk to lobbyists on matters concerning Native Americans without prior consent from the leader of the tribe that the lobbyist was representing. Lindsey told Avent that he understood her position, but that she should nonetheless return O'Connor's telephone calls and tell him just that; *i.e.*, absent tribal consent, she dealt only with Indian leaders directly.

After her telephone conversation with Lindsey, Avent wrote a memorandum to Ickes about O'Connor and the Hudson situation. Avent informed Ickes that she had just received a call from Lindsey about the O'Connor situation, and recounted for Ickes what she told Lindsey: that she dealt only with tribal leaders absent consent from the tribe. "Following the legal advice we have received concerning these kinds of issues, I have not and would not speak with him, or any lobbyist or lawyer."[294] Avent set forth for Ickes her view that White House involvement in the Hudson matter would entail adverse consequences for the President and the White House. Avent was cognizant of the "politics and the press surrounding this particular situation," and stated that it was in the White House's "best interest to keep [the Hudson matter] totally away from the [W]hite [H]ouse in general, and the [President] in particular." Avent told Ickes that the Hudson matter was a "hot potato" that was "too hot to touch," and that the "legal and political implication of our involvement would be disastrous." As Avent's memo explained, her concerns were based in part on her desire not to put the Administration in the position of violating the "government-

Memorandum from Loretta Avent to Harold Ickes, Apr. 24, 1995.

to-government" relationship it had pledged to follow with respect to Indian tribes.[295] Yet Avent's concerns were also based in part on her belief that the White House could not legally intervene with Interior. Avent wrote to Ickes: "This is a Department of Interior [matter]... and that's where it should stay." Avent further informed Ickes, as she did Lindsey, that she would call O'Connor and then "give you an update." She closed by warning Ickes that the "press is just waiting for this kind of story. We don't need to give it to them."

After writing her memo to Ickes, Avent and Michael Schmidt, a Domestic Policy Council senior analyst who worked on Indian gaming issues, together placed a telephone call to O'Connor. Avent told O'Connor that neither she nor her staff could or would meet with him because it was Administration policy to deal only with tribal leaders, not lobbyists, on Indian issues, absent tribal consent. At this point, Avent later recounted, O'Connor became short with her. O'Connor told her that he would bring the Hudson issue to the attention of DNC Chairman Fowler at a meeting later that week on Friday, April 28. He then hung up on her.

After the telephone call to O'Connor, Schmidt sent an e-mail on behalf of Avent to Cheryl Mills, who was an Associate Counsel to the President. In the email, Schmidt related the events of the April 24 conversation with Patrick O'Connor, as well as Avent's proscriptions about the situation. As Schmidt informed Mills, Avent felt that the White House could not "legally intervene with the Secretary of Interior on this issue." Accordingly, Avent asked Mills to "[p]lease have Harold [Ickes] call Don Fowler and explain that there are no secrets in Indian Country, that... it would be political poison for the President or his staff to be anywhere near

[295]The "government-to-government" relationship is a term used to express the Clinton Administration's policy of treating Indian tribes as sovereign nations, not merely as a constituency.

this issue." Avent asked Mills to "do what you think we need to do to take care of the President's best interests on this." Mills has no recollection of providing any information or guidance to Ickes or his staff about the Hudson matter, and does not recall receiving any information about White House communications with Interior on this application.[296] Likewise, neither Ickes nor his staff has any recollection or record of receiving any information or guidance from Mills about the Hudson matter.

Notwithstanding Avent's notice to both Ickes and O'Connor that the White House should not and could not intervene in the Hudson matter, Ickes tried to reach O'Connor about Hudson in the days following O'Connor's April 24 conversations with the President and Lindsey. Ickes called O'Connor on April 25 and 26, and O'Connor called back at least twice on the 26. They apparently missed one another on each occasion. O'Connor called Ickes again on April 27, but again to no avail. O'Connor said that he then decided to rely upon the intercessions of Fowler to reach Ickes.[297]

[296]Sept. 3,1999, Mills Responses to Questions Posed by Office of Independent Counsel at 1. This Office sought interviews or testimony of numerous White House witnesses. The only such witness who did not fully and promptly comply with the request was Mills, who agreed at the end of the investigation to submit sworn written responses to written questions in lieu of an interview. She submitted these written responses (totaling 11 sentences of text) more than 12 weeks after the seven narrow questions were submitted, and more than five months after this Office first identified her to the White House as a witness in this investigation.

[297]Corcoran's time billing records reflect that he had several discussions with Heather Sibbison and a discussion with George Skibine the day after O'Connor's encounter with the President. Again on April 27, his records reflect discussions with Sibbison. Corcoran recalls that during this time period he informed Sibbison that O'Connor had briefly talked with the President about the Hudson matter and that the President had handed the issue off to Bruce Lindsey. Although he also remembers informing Sibbison that O'Connor was getting some response for the first time from the White House at the staff level, Corcoran cannot recall whether or not he mentioned Harold Ickes. He acknowledges, however, that he was aware that

(continued...)

O'Connor met at the DNC with Fowler on April 28, just as he told Avent and Schmidt he would. At the meeting, which is described in detail above in Section II.E.2.f., O'Connor and the opponent tribal leaders and lobbyists asked Fowler to call Ickes and have him contact Interior about the Hudson application, which Fowler agreed to do. Fowler and Ickes spoke about the Hudson matter within days thereafter, and Fowler told Ickes that he had met with opponents to the Hudson casino who were supporters of the DNC, that "they were on our side."[298] As noted above in Section II.E.2.g.l., Fowler testified that he told Ickes that Interior's purported determination to approve the Hudson casino should be reconsidered in light of the deficiencies in the process the opponents had pointed out to Fowler. Ickes told Fowler that he would look into the Hudson matter and asked Fowler for a memo on the issue.

Ickes was a logical person for Fowler to contact at the White House regarding a constituent matter. Ickes was the Administration's main point of contact with the DNC, and Fowler had developed a close working relationship with him. As the Deputy Chief of Staff for Policy and Political Affairs, Ickes also was the White House's primary liaison for political matters generally. Further, Ickes was in a position to speak for the Administration on matters of policy.[299]

[297](...continued)
Ickes had called O'Connor at the time he had this discussion with Sibbison.

For her part, Sibbison does not recall such a conversation and thinks it is something she would have both remembered and probably would have brought to John Duffy's attention.

[298]Fowler G.J. Test, at 144.

[299]Fowler insisted that matters like the Hudson application merit White House attention because it is effectively a matter of policy for the Administration to determine how to apply statutes such as IGRA.

Ickes has explained his view that there is and should be "a very, very close working relationship ... between the White House and the agencies" in order to implement the President's policies.[300] Ickes also insisted, however, that he was not routinely involved in Interior Department policy matters, and that his attention to substantive matters generally was driven by issues the Chief of Staff asked him to handle, not a relationship of oversight or responsibility for any particular agency. Ickes said he was not Secretary Babbitt's "boss," and the Interior Secretary did not report or answer to Ickes in the performance of his routine functions.[301] Moreover, Ickes stated that Fowler asked him to do nothing but make a "status check" on the Hudson matter, and that he did nothing more.[302]

Fowler wrote a memorandum to Ickes on May 5, 1995, to "follow up our conversation regarding the Hudson Wisconsin Casino proposal." In the memo, Fowler provided Ickes with "an outline of the issues raised during my meeting with several tribal leaders and DNC supporters who oppose the project," and attached an economic study given to Fowler by "our supporters."[303] Fowler asked Ickes to "[pjlease let me know how we might proceed," and thanked Ickes for his attention.[304]

[300]Ickes G.J. Test, at 49-50.

[301]*Id.* at 38-39.

[302]*Id.* at 146-47, 268. Ickes initially stated that Fowler only implicitly requested a report on the status of the matter, but then testified that Fowler asked that Ickes "get back to" Fowler after checking into the matter. *Id.* at 147.

[303]Fowler stated that his use of the word "supporters" includes financial support of the DNC as well as general support. Ickes stated that the nature of support from the interested party would have no bearing on how he would respond to such a request.

[304]No copy of Fowler's memorandum to Ickes concerning Hudson was produced by the (continued...)

### c. O'Connor's May 8,1995, Letter to Harold Ickes

O'Connor followed up on Fowler's memo to Ickes by writing a letter to Ickes three days later, on May 8, which he copied to Fowler, Mercer and the people who attended the April 28 DNC meeting.[305] O'Connor expressed his appreciation to Ickes for calling him on April 25 and 26, and noted that he "assume[d] these calls were prompted by my discussions with the President and Bruce Lindsey on April 24 when they were in Minneapolis." O'Connor explained that, while he had tried to call Ickes back, he did not continue to try to reach Ickes because he already had a meeting scheduled with Fowler for April 28 about the Hudson casino proposal. O'Connor added that he had been advised that Ickes and Fowler had spoken about the matter, and that Fowler had sent Ickes his memo outlining the basis for the opposition to the casino proposal. O'Connor went on to describe how the opponents to the casino proposal had presented their economic impact study to certain officials at the Interior Department (a copy of which O'Connor later forwarded to Ickes), and how the opponents needed access to the information the applicants submitted to Interior.

O'Connor wrote that he also wanted "to relate the politics involved in this situation" to Ickes. O'Connor asserted that Republican officials supported the casino proposal, including Gov. Thompson of Wisconsin and Sen. D'Amato of New York. O'Connor pointed out to Ickes

[304](...continued)
White House, but multiple copies were produced from DNC files. Ickes thinks Fowler sent him a memo, though he is not sure he reviewed it at the time. In addition, Ickes's special assistant, Janice Enright (whom Fowler described as Ickes's "alter ego," OIC Interview of Donald Fowler, Sept. 18,1998, at 5), recalled that Ickes received something in writing from Fowler about Hudson.

[305]The copy to these individuals was by use of a blind copy (a "bcc"), but the letter the White House received included the "bcc" page.

the fact that "all of the representatives of the tribes that met with Chairman Fowler are Democrats and have been so for years." O'Connor wrote that he could "testify to their previous financial support to the DNC and the 1992 Clinton/Gore Campaign Committee." In closing, O'Connor requested a meeting with Ickes as soon as possible.[306]

O'Connor followed his May 8 letter with numerous attempts over the ensuing weeks to reach Ickes in order to secure a meeting with him.[307] O'Connor communicated with Mercer of the DNC several times over the remainder of May 1995, and even into June, about a possible

[306]The applicant tribes immediately obtained a copy of O'Connor's letter to Ickes through a public records request made upon the City of Hudson, which had a copy of the letter on May 8 because O'Connor had apparently contemporaneously faxed the City his letter to Ickes. Three leaders of the applicant tribes drafted their own letter to Ickes dated May 11, 1995, responding point by point to O'Connor's letter to Ickes. The response included a criticism of O'Connor's invocation of the opponent tribes' financial support to the DNC and the Clinton/Gore campaign:

> The placement of land in tribal trust is a solemn matter and it is wrong of Mr. O'Connor to suggest that financial support to the DNC and the Clinton/Gore campaign is a relevant criterion. Certainly, the Indian Gaming Regulatory Act that allows for decisions about land being placed into trust for the economic benefit of Indian tribes does not contemplate that political contributions to any party or candidate would be relevant.

The tribal leaders further stated that they "must rely on [their] faith in the fairness of the Clinton administration, the Secretary of the Interior and the IGRA process to make decisions based on our needs without regard to partisan politics." The signatories to the letter have stated that the letter was faxed to the White House on May 11, and telephone records indicate that a facsimile was sent to the White House on that date. No copy of the letter was produced to the OIC from the White House files, and Ickes had no recollection of ever receiving it.

[307]It is not surprising that O'Connor pursued a direct meeting with Ickes. Corcoran recalls that shortly after the St. Croix hired O'Connor & Hannan on Feb. 7, O'Connor reviewed a list of White House personnel for Corcoran to see whom O'Connor could contact on behalf of the tribe. O'Connor singled out Ickes as someone with whom he had friendly relations, and offered to talk with Ickes to see if Ickes would be willing to help the St. Croix get a better hearing at Interior.

meeting between O'Connor and Ickes. There is no evidence indicating that Ickes ever met or spoke with O'Connor. O'Connor also tried other means to get his message through to Ickes.[308]

**d. Thomas Schneider's Contacts With Ickes**

On May 9, 1995, O'Connor enlisted the help of his O'Connor & Hannan colleague, Thomas Schneider, in the effort to get the opponents' message across to the White House. Schneider, who is an attorney, was a partner at O'Connor & Hannan until sometime in 1995, and has remained "Of Counsel" to the firm since that time, while operating separately his own consulting business. O'Connor and Corcoran sought Schneider's assistance because he is a close personal friend of President Clinton with good access to White House officials. According to his billing records, O'Connor spoke with Schneider by phone on May 9, briefed him on the "problem" relating to the St. Croix matter, and then faxed him material.[309]

[308]O'Connor's daytimer and St. Croix billing records suggest that one of those means may have been through the Office of the Vice President, but the evidence does not support that conclusion. O'Connor states that he and his wife have a close and longstanding relationship with Vice President Gore. On May 24,1995, O'Connor billed the St. Croix for "Dinner with Al Gore; Conference with Peter Knight and David M. Strauss regarding Indian problem regarding Hudson dog track." At that time, Strauss was the Vice President's Deputy Chief of Staff, while Knight had been Gore's Chief of Staff when the Vice President earlier served in the House of Representatives and the Senate. A week later, O'Connor also faxed to Strauss a news clipping and note regarding the precedential impact of the Hudson case, which O'Connor sent to several White House, DNC and DOI officials.

As O'Connor later acknowledged, the May 24 event was a large political reception, not a private dinner, as the billing record might suggest. O'Connor testified before the Burton Committee that he did not discuss the Hudson matter with the Vice President, and that in speaking with Knight and Strauss, O'Connor merely mentioned his involvement in the matter, without asking for anything. Strauss had no recollection of any such conversation, and there is no further evidence to suggest that the Vice President's office had any contacts or communications relating to the Hudson matter.

[309]This fax has not been located through document searches or interviews.

According to Schneider, during this initial conversation O'Connor briefly outlined the Hudson casino issue, describing it as a dispute involving Indians O'Connor & Hannan represented who were trying to stop other Indians financed by a private company from converting a dog track into a casino. O'Connor told Schneider either that he had already talked with Ickes about the matter, or that he had been trying unsuccessfully to talk to Ickes about it; Schneider's recollection on this point has varied.[310] Schneider now says that O'Connor's request was that Schneider tell Ickes to talk to O'Connor.[311]

On May 16, 1995, Schneider learned that the President would be attending a DNC reception at the Mayflower Hotel in Washington, and Schneider went to the event, uninvited. Schneider knew Ickes from past campaign and White House events, and saw him at the reception. Schneider approached Ickes and engaged him in a short conversation about the presidential campaign. According to Schneider, he then briefed Ickes about the Hudson issue,

[310]During his civil deposition, Schneider testified, "I'm pretty certain he said that he'd spoken with Harold Ickes and that - he related sort of Ickes' response, which was sort of he'd look into it type of response." *Four Feathers* v. *City of Hudson* Deposition of Thomas Schneider, Sept. 8, 1997, at 11 (hereinafter "Schneider *Four Feathers* Dep."). In a deposition before the House Committee on Government Reform and Oversight, Schneider testified that O'Connor "explained to me that he had had conversations with Harold Ickes in the White House asking for his help and that Harold Ickes had told him that he would look into it." House Committee on Government Reform and Oversight Deposition of Thomas Schneider, Dec. 10, 1997 (hereinafter "Schneider House Dep."). During this investigation, Schneider was "not sure" if O'Connor had previously talked to Ickes. OIC Interview of Thomas Schneider, April 15, 1999, at 3 (hereinafter "OIC Schneider Int.").

[311]'In his civil deposition, Schneider described a somewhat different dimension to the request. Explaining that O'Connor was concerned that he was being "blow[n]-off' by Ickes, Schneider said O'Connor "asked if I could, knowing that I know a lot of people in the White House and sort of -1 mean we'd talked about this within the firm - if I would be willing to raise the issue in order to try to get the White House to actually look into it." Schneider *Four Feathers* Dep. at 13-14.

and asked him to follow-up on it, which Ickes agreed to do.[312] Ickes testified that he has no

[3,2]Schneider's explanation of his request to Ickes, and what Ickes said in response, has varied significantly over time. During his September 1997 deposition in the Wisconsin civil lawsuit concerning Hudson, Schneider testified:

> [I said,] T understand that you've been in contact with Pat O'Connor about some Indian casinos in Wisconsin,' at which point in time [Ickes] acknowledged that he had. And I said, you know, from my understanding of the issue, you know, 'You ought to take it seriously.' And he said that he had told Pat that he'd look into it, and I said, T appreciate that, but you really ought to.' And at that point in time he said that he would....

*Id.* at 17.

* * * *

> He [O'Connor] had said that he had explained to Harold what he wanted.... So from my point of view, I don't know what he wanted Harold to do and I didn't say it. I simply said, 'Look, you've had conversations.' Harold admitted, I mean he said that he did, and at that point in time the substance was there and I was just really urging him to follow through with what he was going to say because that too often doesn't happen.... [M]y charter was to try to get the White House to take what [O'Connor] had laid out seriously....

*Id.* at 19-20.

* * * *

> He said, 'I'll follow through with it,' I mean almost exactly those words. And it just - again, we had a relationship which - Harold is not someone to pull a lot of punches, and we had a relationship that if he said he was going to do something he'd do it. But he did -1 mean he specifically, as I said a few minutes ago, he recalled the conversations and contact with Pat, so at that point in time it was - there was a lot of stuff that was unsaid - unstated. And that's why when I walked away I sort of - I was able to say back to Pat, 'He will follow through.'

*Id.* at 25. Later that year, in his House Committee deposition, Schneider swore:

> I asked him [Ickes] if he had talked to Pat about the dog track, the Indian and dog track issue. He recalled that he had and said that he had told Pat that he was going to look into it. I said to Harold that I thought that it deserved looking into and I would appreciate it if he would.

(continued...)

recollection of speaking with any member of O'Connor & Hannan (including O'Connor or Schneider) at any time about the Hudson matter, and that he does not even know Schneider and does not think he knew him in 1995.

Soon after the May 16 event at the Mayflower, Schneider phoned O'Connor to update him on what transpired. Schneider recalls telling O'Connor that he went to the Mayflower, spoke with the President,[313] discussed the Hudson matter with Ickes, and was assured by Ickes that he was looking into it. O'Connor responded with skepticism regarding whether or not Ickes would, in fact, follow up on O'Connor's request. Based on his past experience with the White House, Schneider assured O'Connor that he was confident Ickes would do what he had said he would.

About two weeks later, on his own initiative, Schneider called Ickes at the White House to see if Ickes had followed up on the Hudson matter. Irritated, Ickes told Schneider words to the

[312](...continued)
Schneider House Dep. at 15. Yet, during this investigation Schneider stated that he simply implored Ickes to get in touch with O'Connor. Schneider's earlier recollection, which is consistent in most regards with his colleagues' recollection of what they learned about the exchange in 1995, indicates that Ickes was aware of both the matter and O'Connor's interest in it and was agreeing to "follow through" or "look into" it in a manner that is suggestive of a more substantive contact than a "routine status inquiry."

[313]Schneider does not dispute that he had a brief conversation with President Clinton at the Mayflower. Schneider consistently has maintained, however, that he never discussed the Hudson casino matter with the President. Yet, his colleagues reported to their clients, and billed them, for such a discussion. Confronted with O'Connor's May 16 billing record that reads "Get report from Tom Schneider that he talked to President Clinton regarding status of matter," Schneider maintained that did not speak with the President "then or ever about the dog track and Indians," and asserted that O'Connor "hears what he wants to hear." OIC Schneider Int. at 4.

effect of "I told you I would follow up, therefore I will."[314] Schneider is certain that he did not report back to O'Connor after this conversation with Ickes, and that he had no further conversations about the Hudson matter with anyone at the White House or at O'Connor & Hannan.[315]

**e. Ickes's Office Contacts the Interior Department**

At some point in early May 1995, in response to the O'Connor and Fowler communications, Ickes asked Special Assistant to the President Jennifer O'Connor[316] to handle these inquiries about the status of the Hudson casino application. Jennifer O'Connor assisted Ickes in handling substantive issues relating to both policy and political affairs. She and Ickes first worked together in 1991 on the Clinton primary campaign in New York, and by May 1995 Ickes said she enjoyed his implicit trust.

Ickes hired Ms. O'Connor in January 1995. Prior to working for Ickes, she had been Special Assistant to the President for Cabinet Affairs, a position in which she interacted on both policy and political matters with various chiefs of staff of departments and agencies, including

[314] M

[315] The decision to deny the Hudson casino proposal was made public on July 14,1995. The night before, July 13, Schneider hosted a fund-raising dinner at his Maryland home for Clinton/Gore '96, which President Clinton and First Lady Hillary Rodham Clinton attended, along with scores of campaign contributors and other guests. Neither Secretary Babbitt nor Ickes attended the event. As set out in Section II.G. of this Report, DOI's decision to deny the Hudson casino proposal was made well before the fund-raising dinner at Schneider's home. Indeed, DOI inadvertently disclosed the decision to deny on July 13 to one of the opponent tribes. In any event, there is no evidence that Schneider or anyone else discussed the Hudson casino proposal with President Clinton or any other Administration official at the July 13 event, nor that the decision was influenced in any way by Schneider's hosting of the event.

[316] Jennifer O'Connor is not related to Patrick O'Connor.

DOI Chief of Staff Collier, whom she got to know prior to the Hudson matter. O'Connor also came to know DNC Chairman Fowler, interacting with him frequently throughout 1995 in connection with her work for Ickes.

Ickes recalls that he assigned the Hudson matter to Jennifer O'Connor sometime after he heard from Fowler. Ickes stated that he asked her to find out what the issue was about, and to check the status of it. He recalls giving her no direction about any follow-up, and states that, given their working relationship, she would have "broad latitude" to decide for herself what more should be done, including providing information or feedback to Fowler or Patrick O'Connor.[317] Ickes never learned from Jennifer O'Connor, however, what she did on the Hudson matter - though he testified that he got the "impression" she spoke with Fowler about the matter.[318]

In fact, Jennifer O'Connor does recall being contacted directly by Fowler about the Hudson matter, although she cannot recall the timing of Fowler's telephone call. According to O'Connor, Fowler's inquiry - which she said was an unusual one for Fowler - was whether she knew anything about the Hudson decision because he had a group of people to whom he wanted to be responsive. She did not know if he was meeting with them at the time of the call, but sensed that Fowler wished to report immediately to these interested persons. O'Connor cannot recall whether Fowler contacted her before or after Ickes tasked her with handling the Hudson issue.

[317] Ickes G.J. Test, at 171.

[318] *Id* at 173-74.

At some time after speaking with Ickes, and by no later than May 18, Jennifer O'Connor called Interior.[319] As a result of her relationship with Collier, she believes that she likely reached out to him initially. She thinks that Collier, in turn, is likely the person who put her in touch with Heather Sibbison.[320]

**1) Jennifer O'Connor's May 18,1995, Memo**

Jennifer O'Connor believes that her first telephone conversation with Heather Sibbison most likely took place on May 18, 1995, or perhaps the preceding day.[321] As reflected in a memorandum to Ickes she wrote on May 18, O'Connor asked Sibbison about the status of the Hudson application. O'Connor believes that at the beginning of the conversation she said she was calling on behalf of Ickes only to make a status inquiry about the pending matter, and was not calling to affect the decision in any way. O'Connor states that this was her standard practice in dealing with departments or agencies. In her first interview with this office, Jennifer

[319]Jennifer O'Connor acknowledges that she received a copy of Patrick O'Connor's May 8 letter to Ickes sometime before she spoke with Sibbison. Neither Jennifer O'Connor nor Ickes, however, can recall when or from whom she received it.

[320]Collier said he did not think he knew who Jennifer O'Connor was at that time, except that he would have known from her telephone number that she worked at the White House. He said he would not have delegated responsibility to return her call without knowing the reason for her call, but he has no recollection of speaking to her and speculated that he may have had his secretary ask why she was calling. He said he probably would have delegated a question like the status of Hudson to John Duffy, who in turn would delegate it to Sibbison. Sibbison said Duffy asked her to return Jennifer O'Connor's call.

[321]Circumstances suggest that the timing of Ms. O'Connor's call may have been effected by O'Connor & Hannan communications to Ickes around May 16. Schneider had approached Ickes about the Hudson matter at the Mayflower on the evening of May 16, and Ickes told him that he would look into the matter. Over the course of that same day and the one before it, Patrick O'Connor had placed five telephone calls to Ickes, none of which appear to have resulted in his getting through to Ickes. Records indicate that Ickes's administrative assistant informed Jennifer O'Connor of these calls, though she does not recall being aware of them.

O'Connor initially maintained that, notwithstanding Patrick O'Connor's description of the Hudson application in his May 8 letter, she understood the Hudson matter to be a "policy" matter, not an adjudicative or even quasi-adjudicative matter.[322] She stated that with regard to "policy" matters, there was no problem with the White House's weighing in or advocating a specific outcome.[323]

As reflected in Jennifer O'Connor's May 18 memo, Sibbison informed O'Connor that the decision whether to take land into trust to facilitate the creation of an Indian casino was within the discretion of the Secretary. Sibbison stated that the Department was in the process of reviewing the Hudson application, and that the "staff' had met the previous night, May 17, and had arrived at the preliminary decision to deny the request. After providing some of the reasons Interior was leaning against the proposal, Sibbison stated that the Department was reviewing the comments received during the comment period, which had ended April 30, and that the decision would be final in one month.[324]

[322]OIC Interview of Jennifer O'Connor, April 2 and 9, 1999, at 5 (hereinafter "OIC J. O'Connor Int., April 2 and 9,1999").

[323]*Id*

[324]As memorialized in Jennifer O'Connor's memo, Sibbison indicated three main reasons for the preliminary decision to deny the Hudson application: 1) the "almost uniform[]" opposition of the local community; 2) the uniform opposition of the Minnesota congressional delegation, fueled by the opposition of the Minnesota tribes located near Hudson, and 3) the desire to avoid shining a spotlight on the Indian Gaming Regulatory Act, which could face amendment or repeal in the face of resulting negative attention if the application were to be granted.

Sibbison also informed Ms. O'Connor of a primary argument favoring approval, that of free market economics. She noted that some DOI staff worried that the "bottom line" of the opposition is that other tribes that already have successful casinos in the area oppose the Hudson application out of fear of competition, and are able to hire "bigger lobbyists" than the applicants.

(continued...)

Sibbison does not dispute that she told O'Connor that the consensus of opinion among officials with authority over the Hudson application was that it would be denied. Although she maintained she does not recall saying there was a meeting on May 17 when this was decided, Sibbison stated that she probably conveyed that this recognition of a consensus was a recent event and states that she thinks it was accurate to say that a preliminary decision to deny had been reached. Nonetheless, there is some evidence that DOI staff did, in fact, meet and reach a "preliminary decision" on May 17,1995. By May 17, the IGMS staff had reviewed with others the information received after the Feb. 8 meeting on Capitol Hill which indicated that the local community reaction had changed from weak to strengthened opposition. Additionally, according to IGMS Director George Skibine's calendar, he was scheduled to meet at 4 p.m. that day in John Duffy's office regarding a gaming compact for the Wampanoag tribe of Massachusetts, and the meeting was to be attended by BIA Deputy Commissioner Hilda Manuel and Deputy Assistant Secretary for Indian Affairs Michael Anderson. When asked about that entry, Skibine conceded that it was possible that Hudson also was discussed during the meeting.[325] Anderson testified that he specifically recalled a meeting on that date which began late in the afternoon, and that staff at the meeting were leaning against granting the Hudson application.

It is unclear what Ickes or Jennifer O'Connor did, if anything, with the information they received from Sibbison about the Hudson application. Jennifer O'Connor's stated reason for

[324](...continued)
However, Sibbison noted, the staff did not believe that concerns over this aspect of the opposition negated the genuine concern about local community opposition.

[325]Skibine and Duffy had just met with applicant representatives earlier that same day, as discussed below in Section II.F.3.

obtaining the information from DOI was to provide Ickes with a status update on the casino application. Ickes did not, according to O'Connor, instruct her to provide the information she had obtained to Fowler, nor, by her recollection, did she tell Fowler anything more than that the application would be decided soon, and that she could tell him nothing else. O'Connor wrote in her memo to Ickes that the information was not in the public realm, and therefore had to be kept confidential. Yet, in her first interview concerning the Hudson matter, Jennifer O'Connor told Justice Department lawyers and the FBI that, in fact, she likely told Fowler that the application would probably be decided in about a week, and that he could not tell anyone because the decision had not yet been made.[326] Ickes has stated he had no interest in the Hudson matter or receiving information about it, apart from the requests he had received.

Sibbison has no recollection of what O'Connor said about the purpose of her call, but she believes it was a request for status information. She recalls O'Connor did not advocate for any particular position and did not say on whose behalf she was calling. Sibbison confirmed that the reasons for denial recounted in the O'Connor memo are correct. She said she thinks it was true that the Minnesota delegation opposed it, but said that was not a matter of discussion on May 17 and "wasn't a factor in the decisionmaking."[327]

[326]This latter statement is consistent with the fact that it was Fowler who requested action on the matter and who, as O'Connor recalls it, phoned her directly with a desire to provide information to a group with which he was dealing. Moreover, while O'Connor wrote in her memo to Ickes that the information was confidential, the placement of that restriction in the memo suggests that it may have applied only with respect to the reasons underlying Interior's preliminary decision, not as to the fact that the preliminary decision was to deny the application.

[327]Grand Jury Testimony of Heather Sibbison, June 18, 1999, at 129.

In any event, one week later, on May 25, records show that Jennifer O'Connor placed a telephone call to John Duffy, the highest-ranking DOI official directly involved in evaluating the Hudson casino application, and that she left a message for Duffy to call her back. Neither Duffy nor Jennifer O'Connor, however, recall speaking to one another about Hudson at this point in time.[328] Several days later, on May 30, Duffy wrote Patrick O'Connor's name on Duffy's phone message log. Next to the message, Duffy wrote "take his call," which Duffy says reflected the fact that Collier had told Duffy that Patrick O'Connor was someone whose calls he should take. Yet, Duffy has no recollection of speaking with Patrick O'Connor, who likewise does not recall talking with Duffy. At some point between May 25 and May 31, Duffy apparently returned Jennifer O'Connor's call, because on May 31, Jennifer O'Connor left another message for Duffy returning his call. Duffy, in turn, returned that call, as is reflected in his phone log. Notwithstanding this flurry of telephone messages, neither Duffy nor Jennifer O'Connor recall any conversation in this time period about the Hudson casino proposal.

**2) Heather Sibbison's June 6,1995, Conversation with the White House**

On June 1,1995, Patrick O'Connor sent Ickes a facsimile of a newspaper article reporting that an Indian tribe in Wisconsin had approved the purchase of a defunct dog track in Kaukauna, Wis. He noted on his facsimile cover sheet that the article confirmed the opponents' argument that approving the Hudson casino application would establish a bad precedent concerning off-reservation Indian gaming. On the cover sheet, Ickes's administrative assistant made a notation to Jennifer O'Connor asking whether she wanted to meet with Patrick O'Connor. Jennifer

[328] It appears from Duffy's phone log that he was tasked by Collier to return the call. He is sure someone did return it, but has no recollection of who did, or what was said.

O'Connor responded with her own hand-written notation on the same page: "Call Heather Sibbison at Interior. Ask her if there is a date by which Interior will announce a decision on the Wisconsin dog track." Jennifer O'Connor ultimately gave that task to White House intern David Meyers,[329] who spoke with Sibbison on June 6, 1995. As recorded in Meyers's same-day memorandum to Jennifer O'Connor, Sibbison informed Meyers that Interior would make the decision within "the next two weeks." Meyers wrote that Sibbison informed him Interior was "95% certain" that the application would be denied. Meyers reported that Sibbison said that there was significant local opposition to the casino proposal, but that much of that opposition was the by-product of wealthier tribes who opposed the application. His memo indicates that Sibbison said DOI would decline the application without offering "much explanation" based on its '"discretion"' in the matter. The memo concludes by noting that Sibbison told Meyers that Jennifer O'Connor should call Sibbison with her "thoughts" if she had "feedback" on the Hudson matter.

Sibbison disputes certain aspects of Meyers's version of their conversation. She denies having solicited White House views on the Hudson matter, but says she may have indicated that O'Connor should call her if she had any additional questions. While Sibbison states she probably did tell Meyers it was likely to be denied and the decision would be announced soon, she specifically denies having given him any answer in percentage terms. Sibbison also thinks

[329] In June 1995, Meyers was an unpaid intern in Ickes's office. He worked frequently with Jennifer O'Connor on issues within Ickes's office. Prior to that time, Meyers had held several positions within the White House, including a previous unpaid internship with Ickes from January 1994 to August 1994, and a paid position with the National Economic Council beginning in August 1994. He left his position with the NEC after about two and a half months in order to focus on law school, but returned to the White House in May of 1995 to intern again with Ickes's office.

the comment about wealthier tribes generating the opposition must have been essentially an over-simplification of a greater explication she provided. Meyers has no present recollection of the conversation, but maintains that he would not have included any information in his report to O'Connor except what Sibbison provided him.

Sibbison did not disclose her May and early June contact with O'Connor or Meyers when she wrote the August 1996 memo that was attached to Secretary Babbitt's letter to Sen. McCain regarding White House contacts. *See* Section II.K.l.d., *infra.* Sibbison explained that she did not recall the contacts at that time, and that her recollection was subsequently refreshed by reviewing documents. She has only a vague recollection of either conversation.

#### 3) Department of the Interior Assistance in Responding to the June 12,1995, Congressional Letter to Ickes

In June, Ickes received a letter dated June 12 from several Democratic members of the Minnesota Congressional delegation.[330] The letter indicated that it was also copied to Secretary Babbitt and Chief of Staff Panetta. The letter expressed the signatories' opposition to the Hudson casino application, and referred to the delegation members' "understanding that the Department of Interior is leaning toward approving the application." The members then wrote, "because of your understanding of the problems surrounding this proposal, we ask you to explain our concerns to Secretary Babbitt." In a recent interview, Ickes recalled generally that he received this letter and provided it to Jennifer O'Connor to handle. Jennifer O'Connor also recalled receiving the letter from Ickes and seeking Interior's assistance in dealing with it.

[330]The letter was signed by Sen. Wellstone, as well as Congressmen Sabo, Oberstar, Vento, Peterson, Minge and Luther.

Records show that on June 26, 1995, Jennifer O'Connor forwarded the Minnesota Democratic delegation letter to Sibbison at Interior and requested that Sibbison draft a response. The following day, June 27, Sibbison faxed a memorandum back to O'Connor with two draft responses. The first response to the Democratic members of the Minnesota delegation stated that DOI was reviewing the matter. The second response stated that DOI had denied the Hudson casino proposal, which Sibbison's cover memo said "may be made public later this week." Sibbison noted that Ickes could wait and then write that the application had been denied - the result for which the delegation had been pressing - when the decision was made public.[331]

In both of the draft letters, Sibbison suggested that Ickes say in the first person, "I have contacted the Department of the Interior." Moreover, in the draft letter stating that Interior was reviewing the application but had not yet made a decision, Sibbison proposed the following statement by Ickes:

> I have contacted the Department of the Interior and have been assured that the Department is aware of the concerns you articulated in your letter. I also understand that similar concerns were expressed in a meeting between members of the Minnesota delegation and Department of the Interior officials.

Sibbison's drafts stated that Ickes contacted DOI, not simply that his staff had done so. Even if this phrasing simply reflects literary license in referring to staff contacts, one draft indicated that Ickes had "been assured" that DOI was "aware" of the Democratic members' "concerns" about

[331] In the memo, Sibbison encouraged O'Connor to call her for any further assistance, and stated that she would notify O'Connor "as soon as the final decision has been announced."

the casino application. Moreover, Sibbison's draft noted that Ickes (or his office) understood that the Congressmen had expressed similar concerns at a prior meeting.[332]

Ultimately, the response to the June 12 letter from the Minnesota delegation opposing the casino proposal was sent over Secretary Babbitt's signature on Sept. 14, 1995, two months after DOI announced the decision to deny the Hudson application. Ickes expressed surprise that his office did not directly respond to the congressional officials. According to Ickes, his office's standard procedure in dealing with a letter such as this one - from a United States Senator and six other Congressmen - would be for O'Connor to provide Ickes a draft personal response from Ickes to the officials.

**f. White House Policy Regarding Contacts With Agencies**

It is undisputed that there were contacts between the White House and the Department of the Interior in May and June 1995, when Interior's decision-making process on Hudson was on-going. *(See* Section II.E.4.e., *supra.)* Staff at Interior and the White House have asserted that the contacts were nothing more than "routine status inquiries."[333] The available direct evidence of those contacts is generally consistent with that description. By comparison, some circumstantial evidence suggests that the contacts may have been more than routine status inquiries, but does not prove that those communications had any specifically prohibited content or impact. To help assess issues of knowledge and intent relating to witnesses' accounts of how and why these contacts took place, we examined internal White House policies in effect at that time concerning contacts with administrative agencies or departments about pending administrative matters.

[332] O'Connor had no recollection of sharing Sibbison's drafts with Ickes.

[333] *See* Sections II.E.4.e.l. & 2, *supra. See also* Section II.K.l.a., *infra.*

In 1994 and 1995, the White House had written policies on the propriety of contacting administrative departments or agencies about pending matters. Each year, the Counsel's Office provided guidance to all White House employees on these policies. In addition, staff routinely sought, and attorneys in the Counsel's Office routinely provided, advice regarding the application of those policies, such as when Avent enlisted the assistance of then-Associate Counsel Cheryl Mills in connection with O'Connor's calls to Avent in April 1995.

The written White House contacts policies turned largely on the nature of the agency or department and the nature of the pending matter that was the subject of the inquiry. For instance, any contact with an independent department or agency, such as the Federal Election Commission or the Federal Communications Commission, had to be cleared through the White House Counsel's Office, regardless of the nature of the inquiry. The policy was less strict if the contemplated contact was with an executive branch department or agency, such as the Interior Department. In that case, the policy depended on the nature of the matter pending at the department or agency. If the matter was a rule-making proceeding and the contemplated contact was not intended to influence the outcome of the proceeding *(e.g.*, a status inquiry), White House staff could make the contact without approval from the Counsel's Office.[334]

If, however, the contemplated contact involved a pending adjudication at an executive branch department or agency, the contact was prohibited absent prior approval from the Counsel's Office, and even then the contact had to be made by the Counsel's Office, not the White House staff member. That policy was set forth in a memorandum dated Nov. 10, 1994,

[334] In such a case, though, the policy required the White House staff member making the contact to state at the outset of the communication that the purpose of the contact was not to influence the outcome of the rulemaking proceeding.

from Counsel to the President Abner Mikva and Deputy Counsel Joel Klein to White House staff, addressing "White House Contacts with Agencies and Departments Regarding Investigations, Enforcement Actions, and Adjudications."[335] The memo stated that these categories of White House contacts are "particularly important" contacts, and that it is "imperative" that "all" White House staff abide by the rules set out in the memo. After defining the relevant terms (including "adjudication"),[336] the memo stated that any contact made by the White House in connection with adjudicatory and the other enumerated actions "should be undertaken only by the Counsel's Office." The memo enjoined White House staff: "You should not contact any department or agency regarding any such matter. Rather, you should request that the contact be made by the Counsel or Deputy Counsel, who will decide whether the contact is appropriate ...." The memo further provides that staff likewise should consult Counsel's Office if anyone contacts the White House about making such a contact. Notably, the memo also stated that if the staff member had any "question about whether a department or agency matter involves

[335]Based on documents produced by the White House, this memo appears to embody the policy that would have been in force throughout the first half of 1995. This office first sought documents reflecting exactly this type of policy in a subpoena served May 28, 1998. Based on representations made by the White House Counsel's Office in response to the original subpoena demand, this Office did not know for nearly a year that such memoranda actually existed, and the responsive documents were not produced until June 16,1999, after interviews and Grand Jury examinations of nearly all White House witnesses had been completed.

[336]Adjudication is defined in the memo as a matter "decided at an administrative or judicial hearing, or similar proceeding in which a department or agency determines the rights of particular individuals or entities." *Cf.* 5 U.S.C. § 551 (Administrative Procedures Act defining "adjudication" as the "agency process for formulation of an order" and defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing").

an investigation, enforcement action or adjudication," he or she should "direct it promptly to the Counsel's office."

The definition of adjudication provided in the White House policy memo does not seem to directly embrace an agency application like the Hudson casino application. Interior did not, for instance, hold a "hearing" on the Hudson matter. In addition, Interior held substantial discretion under the applicable statutes - IGRA and IRA - in the determination of the application. Arguably, though, an application by a group of tribes who seek license to engage in specific permitted activity, pursuant to defined statutory and agency requirements - those governing operation of a casino on off-reservation land taken into trust for that purpose - implicates "the rights of particular individuals or entities" under constitutional (due process) and common law standards for agency action.[337]

The only White House employee who had contact with an outside individual about the Hudson matter and then sought the advice of Counsel's Office about how to respond to that contact was Avent. No one on Ickes's staff contacted Counsel's Office, though it is unclear whether that was due to deliberate choice, ignorance of the policy or a perception that the contacts policy did not embrace administrative matters such as the Hudson application. The evidence suggests the latter basis as the most likely cause. Jennifer O'Connor, for example, seems to have perceived that the Hudson application constituted a "policy" matter as opposed to an adjudicative or quasi-adjudicative matter, and simply recalled following her habit of providing

[337]Secretary Babbitt himself sensed that greater ethical restrictions and "extra care" should apply to what he termed "quasi-regulatory things where you are issuing a permit or making a specific decision," as opposed to situations where the agency has "pure discretion." Grand Jury Testimony of Bruce Babbitt, July 7,1999, at 129-30 (hereinafter "Babbitt G.J. Test., July 7, 1999").

a disclaimer during the agency contact, consistent with the proscription described in the White House contacts policy memorandum relating to agency rule-making matters. *See supra* at 203. Apparently, she did not feel the Hudson circumstances were ambiguous enough to merit contacting Counsel's Office, as advised by the policy memo on adjudications, to resolve any question about the definition of matters falling within the policy's terms.[338]

For his part, Ickes said he did not think there was a "black letter or specific rule or line" governing such contacts.[339] Nonetheless, he said the general practice in his office was to check with Counsel's Office prior to contacting an agency about even a "quasi-judicial" matter, and that he felt the nature of the Hudson situation and her own work habits would have led Jennifer O'Connor to confer with Counsel's Office before making any calls to Interior.[340] Yet, he likewise made no effort to ensure that his staff sought the advice of Counsel's Office before handling the requests for contact with Interior on behalf of the DNC and Patrick O'Connor.[341]

[338]Ms. O'Connor stated that she probably would have called Counsel's Office first and proceeded differently if Ickes asked her to determine what role he would play in the matter. Because she believed that he only wanted to know the status of the application, however, O'Connor said she felt she could call the agency directly, without prior approval from White House counsel.

[339]Ickes G.J. Test, at 45-48. Ickes said he saw no problem with contacting an agency about the status of a pending matter, regardless of the nature of the matter, but he testified: "My impression was that if it involved rule making or an adjudicatory issue, White House Counsel's Office certainly wanted us to contact it before making contact with the agency and, as far as I know, that was followed by and large." *Id.* at 48.

[340]Ickes G.J. Test, at 46-48, 252-53. At the time of his testimony, Ickes was unaware that Ms. O'Connor did not confer with Counsel's Office before making her calls to Interior in the Hudson matter.

[341]Indeed, as to his office's contacts with Interior about Hudson, Ickes testified that he did not think that it would have been inappropriate for Jennifer O'Connor to have informed Interior

(continued...)

### g. O'Connor & Hannan Curtails Its Lobbying of the White House Prior to the Decision on July 14,1995

Patrick O'Connor's push for White House action on the Hudson matter, including his push for a meeting with Harold Ickes, subsided in June 1995. As late as June 6, O'Connor's daytimer and billing records reflect that he was calling David Mercer concerning the Hudson application and the status of efforts to arrange a meeting with Ickes. After June 6 (the date of the David Meyers memo), such notations cease, and the forms and frequency of O'Connor's billing entries shifts considerably. On June 12, O'Connor recorded time for getting an update from Corcoran regarding "new White House developments." Neither O'Connor nor Corcoran could recall what those developments were.

During the time period from June 12 until the July 14 decision, O'Connor & Hannan's lobbying efforts with respect to the White House (and, indeed, with respect to Hudson generally) dropped off precipitously. O'Connor's only time entry during that entire interval was a June 19 entry concerning an update from Kitto about developments involving local and federal legislators, as well as a "discussion regarding support to be given to Committee to Re-Elect and D.N.C."[342] Nonetheless, there is no direct evidence that the opponents or their representatives

[341](...continued)
staff that the status check on Hudson was being made on behalf of Fowler, or even for her to have informed Interior that she was making the inquiry on behalf of a contributor. While O'Connor testified that she made no such comments in her communications with Interior, Ickes's view of permissible conduct in this regard certainly seems at odds with the presumptive purpose of the White House contacts policies - avoiding even the appearance of impropriety in agency decision-making - as well as Ickes's own stated belief that "even if something is not illegal in a strict sense, actions can be taken, it seems to me, that do undermine the confidence of the public in the decisionmaking process." Ickes G.J. Test, at 253.

[342]0'Connor also recorded notations in his daytimer on June 19, which were not
(continued...)

knew that the Hudson application would be denied prior to the date on which the decision was made public, July 14, nor that the opponents decreased their lobbying efforts in opposition to the casino as a result of receiving such information.

**5. Other Tribal Opponents Continue Lobbying**

From June 21 through June 23, 1995, Oneida lobbyist Scott Dacey and Vice Chairman Gary Jordan met with a variety of individuals in Washington, including Interior Department personnel, to discuss the Hudson casino application and, to a lesser extent, other Indian law issues. Dacey summarized the events in a June 28,1995 memorandum to Jordan. The document describes a meeting with John Duffy (also attended by St. Croix tribal attorney Howard Bichler) at which the Oneida representatives presented their position with respect to the Hudson proposal, and informed Duffy of the intention of the Stockbridge-Munsee tribe to establish a casino at the dog track in Kaukauna, Wis.[343] According to Dacey's memorandum, Duffy indicated his

[342](...continued)
captioned for billing, reading:

Larry Kitto
a) Hudson - Lawyer
b) DNC - Comm to ReE
c) Letters follow up?
d) What about Ickes?
e) What about Foley.

The meaning of these last two notes is unclear even to O'Connor himself. No one has ever suggested, however, that Kitto had any role in communicating with Ickes or the White House. It should be noted that O'Connor was abroad for about 10 days in mid-June 1995, including June 19, when he spoke by phone with Kitto.

[343]The Stockbridge-Munsee plan was of particular concern to the Oneida, who feared that approval of a Hudson casino would lead to casinos at several dog tracks in southeastern Wisconsin. This concern stemmed from the belief that such casinos would take away a large portion of the Chicago market for the Oneida casino in Oneida, Wis., adjacent to Green Bay.

awareness of Stockbridge-Munsee interest in the Kaukauna dog track. Dacey reported that, with respect to Hudson, Duffy gave "no indication as to the position the Secretary would take on the matter," but said that the decision "would be coming out soon." Dacey noted Duffy's expression of concern for "the double standard the Department would be establishing should they decide against" the proposal, noting that "tribes petitioning for the land acquisition ... usually want lands taken into trust over the objections from area communities and businesses."

According to his memo, Dacey also met with Babbitt's Chief of Staff, Thomas Collier, during this period. Dacey reported that Collier would be leaving DOI at the end of that month. According to the memo, Collier had been meeting with a number of tribes and Collier said he was preparing a report to the Secretary "concerning the future of Indian gaming."[344] With respect to Hudson, Dacey reported that "Collier said the Department of Interior will not sign off on the Hudson proposal as long as Governor Thompson and the area community is [sic] opposed to the deal." According to Dacey, Collier viewed the Governor and the community as opposed to the Hudson proposal.

On June 29,1995, after months of lobbying by opponents, Sen. Feingold of Wisconsin announced that he opposed the Hudson casino proposal. In addition to issuing a press release, Sen. Feingold sent a letter to Secretary Babbitt, urging him to reject the casino application.

[344]Neither DOI nor Collier produced such a report pursuant to subpoena, and Collier said he did not write a report on Indian gaming. Dacey speculated in his memo that Collier was then planning to re-join the law firm of Steptoe & Johnson, and that "his recent desire to meet with Indian tribes [was Collier's] unique way of looking for future clients."

### F. Events Occurring During On-Going Analysis of Application by DOI in Washington, D.C. (May 1,1995-June 8,1995)

Most Interior Department witnesses interviewed said the decision to deny the application was not made on a particular day or at any particular meeting. Rather, they describe a gradual process of analysis and discussion. No witness said that there was any Indian Gaming Management Staff employee or other Washington-based DOI staffer advocating approval of the application. Even those who felt there was no "detriment" believed substantial work was needed to meet the "best interest" of the tribes test of IGRA Section 20. Several current and former DOI employees said virtually all off-reservation gaming applications face an uphill battle for approval because strong local political opposition surrounds most of these proposals.[345]

By May 17, IGMS staff had reviewed and discussed with Duffy and Sibbison the information that came in after the Feb. 8 meeting, which indicated that local governments had changed their positions from neutral or weak opposition to strengthened opposition. Between April 30 and May 17, Interior officials had several meetings with applicant and opponent representatives.

#### 1. Collier, Duffy and Skibine Meet with Congressman Oberstar on May 2,1995

On Thursday, April 27, Congressman Oberstar's office called DOI to schedule a meeting with Duffy and Collier regarding "Hudson gaming."[346] Collier, Duffy and Skibine all attended

[345]The actions of former Secretary Lujan centralizing the procedures for review of such applications, and DOI's prior policy and proposed rulemaking pronouncements, tend to corroborate this view. *See supra* at 42-43.

[346]Note from Doris Johnson to John Duffy, April 27,1995.

the meeting with Oberstar and his staff member, Waylon Peterson, at 3:00 p.m. on May 2 in Oberstar's office.

In a memo prepared the day before the meeting, Peterson wrote that the "3 o'clock with Interior officials is **extremely** important"[347] (emphasis in original). He listed two issues for discussion: local tax implications of fee-to-trust acquisitions by Indians, and the "Hudson gaming casino transfer." The section of Peterson's memo dealing with the Hudson matter largely repeated his memorandum to Oberstar on the issue prior to the Feb. 8 meeting. The May 1 memo, however, also stated that "[i]n your meeting with Duffy in February, you made the following points," and then listed several substantive points, as well as a final point that Oberstar is said to have made to Duffy in February: "The Wisconsin supporters ... are Republicans; why should the Clinton Administration help them?"

At the meeting itself, Oberstar pushed the Interior officials to deny the application, stressing what he called the "over-saturation"[348] of Indian casinos. Oberstar told investigators that he would not have made the point about the politics of the situation described in the Peterson memo, because it would not have been an argument on which Collier and Duffy could base a denial, which is what he wanted them to do. Peterson believed he, Peterson, probably did make the points set out in his May 1 memo.[349]

[347]Memorandum from Waylon Peterson to Rep. Oberstar, May 1, 1995.

[348]OIC Oberstar Int. at 5.

[349]Alana Christensen, a staff member for Rep. Minge, later discussed the May 2 meeting with Peterson. In a May 4 memorandum to Minge regarding "Hudson Dog Track," she described the meeting:

(continued...)

Although Collier was aware from Duffy of high-level congressional interest in the Hudson application, Collier said he never perceived the application as a particularly important issue for him or the Secretary. Collier expressed complete confidence in Duffy's ability to handle the matter without his help.[350] Duffy also downplayed the degree of controversy or congressional pressure surrounding the Hudson application, describing it as being only one of many important issues. He had no explanation for why Collier attended the meeting with him.

**2. The Four Feathers Partnership Enlists Lobbyists**

Concerned that the applicants were not gaining sufficient access to the top decision-makers at Interior, on March 31, 1995, Mark Goff - a public relations consultant retained by Havenick - contacted Paul Eckstein of the law firm of Brown & Bain on behalf of the venture

[349](...continued)
Oberstar met with George Skibine ... and Tom Callier [sic]... on May 2 to give their final push for the MN tribes. The Dept. indicated that they have a lot of information and to be honest are not looking forward to the political ramifications of this decision and therefore may put this off for months. I will follow up with George Skibine on a regular basis to check the status of the case.

Both Collier and Duffy deny having made such a statement and further deny having delayed the final decision for such a reason. Christensen's memo also bears several handwritten notations she made, including the following notations that she cannot now explain: "Harold Icckes [sic], Jr."; "Leon Panetta"; "Babbit's [sic] said it was done deal."

[350]Collier described Duffy as one of the few DOI employees in whom he had complete confidence to handle congressional meetings like this. He also said he would not accompany Duffy unless the congressman was really angry or Duffy was tired of dealing with him. Collier did not recall attending the meeting or why he went with Duffy, but stated he only attended meetings on Capitol Hill if he was directly involved in the issue or the DOI staff member working on the issue was being "beat up." OIC Collier Int. at 18.

[351]'Circumstances suggest that Collier's decision to attend may have related to controversy then surrounding DOI land in trust decisions in the wake of DOI's May 1, 1995, announcement of its approval of the Pequot tribe's application to enlarge its land holdings adjacent to its casino.

partners. As described in detail below in Section II.G.8.**C,** Goff was referred to Eckstein on the basis of Eckstein's close friendship with Secretary Babbitt. Eckstein was a highly regarded attorney in Phoenix who had previously represented clients in matters before Interior, but who had not lobbied Babbitt during the Secretary's tenure in Washington. Despite initial reluctance, Eckstein agreed to get involved for the applicant group, at least to the extent of seeking answers for them as to where the application stood in the aftermath of the additional comment period.

On April 6, Eckstein contacted Secretary Babbitt by phone and announced his entry into the Hudson matter for the applicant group. Eckstein testified that he also sought and obtained Babbitt's agreement that no decision would be made on the application until the applicant tribal leaders had received an opportunity to make their case directly to the Secretary. Babbitt cannot now recall the conversation, but believes he agreed only that the applicants could meet with the decision-makers, as opposed to Babbitt himself.

Sometime in March or April, Fred Havenick contacted his friend Jerome Berlin for a recommendation of a well-connected Democratic lobbyist in Washington. Berlin was himself a prominent Democratic supporter and DNC trustee, with close ties to the Administration. Berlin' suggestion was Jim Moody, a former Democratic congressman from Wisconsin, who was then performing lobbying work independently. Havenick and Goff brought Moody into the matter.

The applicant group became concerned about the status of the Hudson application yet again on May 8, when they received a copy of Patrick O'Connor's letter to Harold Ickes. Records show that by May 9, Havenick, Goff, Eckstein and Moody were conferring about what more the applicants could do to promote the application at Interior. Moody contacted Duffy by

May 15 and secured a meeting for the applicant tribal leaders and their representatives with Duffy and Skibine.

### 3. Four Feathers Partners Meet with Duffy and IGMS Staff on May 17,1995

Representatives of the applicant tribes and their partners traveled to Washington for meetings at DOI on May 17, 1995.[352] They met first with John Duffy and George Skibine in Duffy's office. After about 45 minutes, Duffy indicated that he had to leave; they then convened in Skibine's office, where Thomas Hartman joined them.

At the initial meeting in Duffy's office, the discussion was dominated by the tribal leaders, who spoke of the financial plight of the tribes and the benefits they could reap from the Hudson casino. Witnesses generally agreed that Duffy primarily listened, initially offering little indication of where he stood; it is unclear if Skibine spoke at all. Applicant witnesses felt that Duffy had projected an attitude of indifference, and that this agitated Red Cliff Vice-Chairman George Newago - who had spoken emotionally of the continuing needs of his tribe. Several witnesses recalled Duffy's telling the group that approval of the application was not a "slam dunk."[353] Duffy testified that he also explained to the tribes that "there were concerns about the

[352]Witnesses differed in their recollections of who attended the meeting for the applicants, although there was general agreement that the meetings were very crowded, with all the seats taken in Duffy's office and, later, people overflowing out of Skibine's office. It appears certain the attendees included Chairman Ackley and Derickson of Mole Lake, Red Cliff Vice-Chairman Newago, and LCO Vice-Chairman Trepania, as well as Goff, Havenick, Eckstein and Moody.

[353]Goff described this comment as a reply to Havenick, who asserted in the meeting that the decision "seems like a slam dunk." OIC Interview of Mark Goff, Aug. 25, 1998, at 11 (hereinafter "OIC Goff Int., Aug. 25,1998"). Goff recalls that Duffy retorted, "it's not as much of a slam dunk as you think." *Id.* Duffy's testimony is generally consistent on this point. *See also, e.g.*, OIC Interview of Paul Eckstein, March 10,1999, at 5.

application that... were giving the Department pause."[354] Eckstein recalled that Duffy told the applicant group that Skibine and his staff were going to prepare a report on the application, which would take four to six weeks, and that no decision would be made on the application until the report was completed.[355]

Witnesses have differing recollections of the second session in the IGMS offices with Skibine and Hartman. Some described a brief period of superficial discussion of the application, which was reported to be fine; others described a more involved meeting, lasting an hour or more, at which Skibine and Hartman asked some questions and flagged some issues. Four Feathers witnesses generally agreed that they were told there were no major flaws with the application. One tribal leader reported that Skibine noted certain problems at this meeting, including environmental concerns and the local opposition. Havenick stated that the IGMS staffers mentioned the local opposition, but that they seemed to downplay its significance.

Skibine said he could not separate out the discussions from this second meeting on May 17 from those at a May 31 meeting, discussed *infra* at 220.[356] By mid-May, Skibine did have a version of Hartman's memo containing an analysis of the "best interests" of the tribes and remembered discussing at one of the meetings with some Four Feathers representatives aspects

[354]Grand Jury Testimony of John Duffy, May 12,1999, at 95 (hereinafter "Duffy G.J. Test., May 12, 1999").

[355]Eckstein acknowledges that someone in the Office of the Secretary later notified him that Babbitt would be willing to meet with Eckstein again on Hudson, but only without the tribal leaders themselves. Eckstein says he ignored that call because he still planned to seek such a meeting with the tribal leaders included, if it became necessary.

[356]Skibine recalled two different meetings with applicants, but was unclear on dates, attendees and other specifics. He recalls one meeting may only have included Havenick, Moody and perhaps another person. This was probably the second meeting, held on May 31.

of the deal that were not in the "best interests" of the tribes, as well as the opposition of both the local community and the nearby tribes. According to Skibine, the discussion of whether the deal was in the "best interest" of the applicant tribes lasted over an hour, was "very involved," and became "very argumentative," although it remained "not unfriendly."[357] It appeared to Skibine that the concerns that he and Hartman raised about this issue were "news" to the Four Feathers representatives.[358] Skibine and Hartman avoided detailed discussion of these problems, thinking they should only tell the applicant tribes in more detail later because they were issues that needed more study by BIA and required renegotiation of the financial agreements with the non-Indian partners. Skibine recalls the participants in the meeting saying they were willing to try to address DOI concerns "when the time came" and there was no specific discussion of a timetable.[359]

Skibine also reported that Havenick claimed the local opposition had been generated by the St. Croix Chippewa tribe, and offered to send Skibine documentation of his claims. Skibine never received any such documentation.[360]

Between the time that the Hudson application reached Washington and their meeting with John Duffy on May 17, 1995, the applicants had maintained a steady dialogue with the Department. As previously discussed, tribal leaders came to Washington for an introductory meeting with IGMS staffers on Jan. 12,1995. Financial analyst Hartman also reported several

[357]OIC Interview of George Skibine, Nov, 6, 1998, at 6-8.

[358]*Id.* at 7.

[359]*Id.*

[360]There is little evidence to corroborate the applicants' fears that opponents had inflated or otherwise deceived DOI about the true local community sentiment. *See* Section II.BJ.b., *supra.*

contacts with Bill Cadotte and other tribal representatives during and immediately after the IGMS review of the application in Lakewood, Colo., at the end of January. Hartman had frequent conversations with DuWayne Derickson of the Mole Lake tribe, both on the phone and in person at DOI. Derickson testified that he would regularly drop in on the IGMS and see Hartman whenever he was in Washington.

#### 4. White House Contacts with Interior During Consideration of the Hudson Application

The only Interior Department employees who recall having any contact with the White House regarding the Hudson matter were Heather Sibbison and Robert Anderson. As discussed above in Section II.E.4.e., Sibbison stated she spoke with Ickes's staffers Jennifer O'Connor and David Meyers before the final decision was announced. Anderson said he spoke with Elena Kagan in the White House counsel's office in the time period after Sen. McCain wrote to Babbitt in July 1996. Collier denied that he received any communication from the White House that could be construed as a directive or a request for improper action. Collier further explained that his relationships with the offices of Personnel and Intergovernmental Affairs directly, and the White House Chief of Staff indirectly, were somewhat strained as a result of prior disputes over political appointments at DOI, as well as conflicts with governors of Western states over matters within the DOI's jurisdiction.

While phone records from DOI officials and Ickes's office reflect contacts during the period that the Hudson proposal was pending, the evidence suggests that at least some of those calls likely related to other matters pending at Interior. For example, Ickes's log of incoming telephone messages for March 31,1995, reflects a call from Duffy at 8:36 a.m. relating to "Indian issues," and a call from Secretary Babbitt at 8:37 a.m. Neither Duffy nor the Secretary

recalled making calls to Ickes on that date, and could not identify the likely subject matter of the calls. Babbitt and Ickes's logs for April 4, 5 and 6, 1995, suggest that Babbitt, Duffy and Ickes were trading calls then, but at least some of these calls more likely related to the application of the Mashantucket Pequot Indians of Connecticut to take land into trust, the approval of which was announced by DOI on May 1,1995. Ickes recalled that he may have asked Duffy to meet with the Pequots about that matter. See *infra* at 362. The April 6 message on Ickes's log from Duffy contains a handwritten notation by Ickes that includes the name "Lieberman" - an apparent reference to Sen. Joseph Lieberman (D-Conn.), who was active in negotiations concerning the dispute relating to the Pequot application. Babbitt testified that while unsure of the subject of these telephone calls, he was aware of no other DOI matter in which Lieberman was involved. In any event, Babbitt denied speaking to Ickes about the Pequot matter, and Ickes had no recollection of discussing it with Babbitt. Collier also denied knowing that Babbitt and Duffy were exchanging calls with Ickes or the reason for any communication.

Regarding Sibbison's conversations with White House employees, Collier and Duffy denied any recollection of her reporting back to them about the substance of the calls until July 1996. Interior employees questioned about the conversations uniformly told investigators that they did not believe it improper to have shared with White House personnel a preliminary decision by DOI staff that had not yet been finalized. Sibbison also noted to investigators that the information she conveyed was not confidential in a legal sense, but that it just did not make sense for the information to be publicized given that it was subject to change. Sibbison emphasized that her answers to Ickes's staff might have been different if she had known that the White House intended to share the information with others outside of the government. Babbitt

also said that the propriety of releasing information regarding internal discussions where further disclosures may be made to persons outside the government by the White House is a much more complicated issue.

### 5. Tribal Opponents Meet with Michael Anderson and IGMS Staff on May 23,1995

On May 23, 1995, Deputy Assistant Secretary Anderson, Skibine and Hartman met with Oneida Chairwoman Doxtator and Oneida lobbyists Dacey and Artman. The discussion focused mainly on the definition of "detriment," for purposes of the Section 20 analysis. According to Skibine and Anderson, Hartman did much of the talking about the standard to be applied. Hartman's statements, as recounted by Dacey in a memo, suggested that the Hudson proposal would be deemed "not detrimental to the surrounding community":

> The term 'detrimental' means activities which might arise other than normal competitive pressures. For example, an argument establishing detriment might include increased auto traffic, a drain on the area water supply, or other environmental concerns. However, even environmental concerns can be offset by parties willing to negotiate new traffic patterns, additional parking lots, new roads, new sewers, etc. Public sentiment or opinion is not considered 'detrimental,' therefore, little weight is given to communities which pass resolutions in opposition to gaming unless they demonstrate an impact on the community. Moreover, the economic impact a gaming establishment might have on other gaming or non-gaming establishments is also of little concern to the BIA because it falls into the definition of a 'normal competitive pressure.'[361]

Dacey also noted Anderson's concern that denial of the application might set a dangerous precedent as an incursion against the sovereignty of the applicant tribes. Dacey concluded it would be difficult for IGMS to conclude that the casino would be detrimental to the surrounding community, noting that neither the economic impact statements nor political opposition from

[361] Memo from Scott Dacey to Chairwoman Doxtator, May 25,1995.

surrounding municipalities would carry much weight. Dacey suggested the opponents explore the law governing IRA and Part 151 as a basis for denial.

According to Dacey, after the meeting ended and all others had left the room, Dacey wordlessly handed a newspaper article to Anderson that discussed rumors of organized crime ties to Delaware North, and an Arizona connection between that company and Secretary Babbitt while he was governor. Dacey recalls that when he saw Anderson at a function at the National Press Club that evening, Anderson expressed anger at Dacey's suggestion that anything but the merits would determine the decision. Anderson told Dacey that was not the way the Interior Department did things, and they would "try to thread the needle" on this application.[362] Dacey understood Anderson to mean that DOI would seek to reach a fair resolution on a difficult decision. Dacey explained to investigators that he told Anderson the reason for giving the article was concern that the process not be corrupted by an alleged personal relationship between people associated with Delaware North and the Secretary (based on the erroneous belief that Delaware North owned the Hudson dog track).

Anderson's recollection of the contact with Dacey is slightly different. Although Anderson conceded his recollection was influenced by his having read Dacey's memo of the meeting, and Anderson himself kept no notes or summary of the meeting, he said he recalls he was "tough" on the Oneidas, asking them why they were interfering in the sovereignty of other tribes.[363] He said Hartman did a lot of the talking in the meeting, expressing his view of "detriment" as not ensuring a lack of competition between tribes. Anderson did not contradict

[362]OIC Interview of Scott Dacey, Oct. 9, 1998, at 5.

[363]OIC Interview of Michael Anderson, Dec. 8,1998, at 5.

him. Anderson also stated he received a news article from Dacey either at the beginning or at the end of the meeting. He said he thought Dacey was trying to suggest that unscrupulous people get involved in gaming and he dismissed it.[364] His comment about "threading the needle" meant they would decide this application on the facts presented. Hartman has no specific recollection of the meeting other than that he met with Oneida tribal representatives who opposed the Hudson application.

### 6. Four Feathers Representatives Meet with IGMS Staff on May 31,1995

After May 17, Jim Moody called Duffy several times seeking to arrange a second meeting for the Four Feathers representatives but was able only to obtain a May 31 meeting with Skibine and Hartman. Moody brought Eckstein and Havenick with him; it is unclear if Goff was present. Moody could not recall any details of this meeting, but Havenick said the IGMS staffers did not raise any significant problems or issues about the application at this meeting. Eckstein testified to a vague recollection that the local opposition was discussed, but maintained that no major problems were flagged. Eckstein also said that either Skibine or Hartman indicated that the decision would ultimately be made by the higher-ups, using words to the effect of "the political people" or "the political appointees," which Eckstein took to mean Babbitt or Duffy.[365] Skibine and Hartman told investigators they are not able to accurately parse out what was discussed at the May 31 meeting as opposed to the one on May 17. Skibine testified, however, that on other

[364] 0ther DOI witnesses, including Skibine and Duffy, told investigators that they had not heard any allegations pertaining to Delaware North related to the Hudson application, and were aware of no purported connection between that company and the proposed casino.

[365] Grand Jury Testimony of Paul Eckstein, March 26,1999, at 78 (hereinafter "Eckstein G.J. Test.").

occasions he has said his job was to make a recommendation to the Assistant Secretary and he knew Duffy, as the counselor involved in the issue, would have input in the final decision.

On June 5,1995, Sen. Daschle wrote to Secretary Babbitt on behalf of Havenick and Moody to request that Babbitt meet with Havenick and Moody to discuss the merits and status of the application.[366] In his letter, Daschle emphasized that he did not take any position on the merits of the proposal, and was acting only to facilitate a meeting between the Secretary and the two management representatives. Daschle's letter noted that, according to the two men, the proposal had been before the BIA for 18 months, and "[t]hey are frustrated at what they consider to be the slow pace of the Interior Department review process."[367]

On June 7, Sibbison responded to Daschle's letter to the Secretary. In her letter, Sibbison stated that the Secretary's busy schedule precluded an opportunity to meet with Havenick and Moody. Sibbison also asserted that the two men had already had "ample opportunity to express their views" in meetings with Duffy and Skibine on May 17, and in a second meeting with Skibine the week prior to the letter.

[366]Havenick had enlisted Daschle's aid through their mutual friend from the Miami area, Jerome Berlin. As noted above in Section II.F.2., Berlin had long been active in the Democratic Party, including in fund-raising activities with the Democratic Senatorial Campaign Committee.

[367]Less than two weeks earlier, St. Croix lobbyist Corcoran had forwarded to Daschle's staff a proposed letter for the Senator to send to Secretary Babbitt. The draft letter did not expressly urge denial of the application, but described the MAO recommendation favoring it as "incredibl[e]." Draft letter from Sen. Daschle to Sec. Babbitt, May 26, 1995 (attached to Letter from Thomas Corcoran to Deborah Dubray, May 25, 1995). The draft letter requested that the Secretary meet with the leaders and representatives of tribes opposed to the Hudson casino proposal. Daschle and his staffer recall talking to Kitto about the Hudson matter, but neither recalls him or anyone else asking them to send a letter on their behalf. There is no record of such a letter being sent.

### 7. Further Contact Between IGMS Staff and Applicant Representatives

Contacts between the applicants and Interior Department personnel continued throughout June. Derickson testified that, during one of their meetings, Hartman showed him a draft document, signed by Hartman, recommending approval of the application.[368] Hartman denies showing Derickson his memorandum or any other IGMS documents.

Hartman and Derickson developed a friendly relationship during the Hudson application process. Hartman said he and Derickson had "sort of bonded" at their first meeting, largely because both men were Vietnam veterans, and said he probably spoke more often, and with more candor, to the applicants than he normally would.[369]

This friendship between Hartman and Derickson also resulted in certain contacts that could be described as "off the record."[370] Hartman gave Derickson his home phone number, although Hartman said he did not recall the circumstances. Hartman stated that he sought to build a good rapport with Derickson, so that the applicants would be more likely to listen to his advice on fixing the flaws in their application. Hartman testified, however, that he did not recall saying anything to Derickson from his home that he would have felt uncomfortable saying from the office. In addition, Ackley testified that he and Derickson had met briefly with Hartman in

[368]This was likely a memo dated June 8, in which Hartman found that the casino would not be detrimental to the surrounding community and recommended that IGMS continue its analysis to see if it could satisfy the "best interests" prong of the Section 20 test. *See* Section H.F.8., *infra.* Based on the date of the memo and certain phone message slips, it is likely that this meeting occurred on or about June 20.

[369]OIC Interview of Thomas Hartman, April 29 and May 7,1999, at 6.

[370]*Id.*

the lobby of a Washington hotel during the pendency of additional comment period. Hartman said he did not recall ever meeting with Derickson or Ackley outside of the Department.

Hartman told investigators that he repeatedly told Derickson that local community opposition was a stumbling block to approval of the application. Hartman also said he had specifically suggested to Derickson at various times that the applicants should consider paying more money to the surrounding towns in the government services agreement if that would help to ameliorate local opposition. Derickson denied that Hartman made such suggestions, but Ackley stated that Hartman may have. Hartman said that, at first, he felt Derickson understood the problem and would try to address it. Over time, however, he felt that no efforts were being made to try to change the community feeling. Based on their inaction and later discussions, Hartman believed they had instead adopted a strategy of arguing the community opposition was irrelevant.

Hartman reported that in one phone call, he revealed to Derickson that the Secretary's discretion was being discussed as the legal basis for a decision, and that the DOI attorneys felt that Section 20 was a weak basis for a denial. Hartman confirmed that he probably even said that Duffy was the main advocate for giving greater weight to local community opposition and that his opinion was very important.

On May 8, 1995, Chairwoman Gurnoe of the Red Cliff tribe wrote to Skibine reminding him that the "Secretary had informed" them a short delay was to be expected to review additional comments submitted before April 30. She asked to see the comments and for the appropriate date when DOI's review would be complete. On June 14, Skibine responded to Gurnoe by letter, stating that the analysis of the "detrimental" prong of the two-part Section 20 analysis would be completed by the end of the month.

Eckstein also spoke with Hartman by phone about the status of the application and the report. On June 16, Eckstein called Hartman asking whether there were any problems with the application. He recalls that Hartman told him "nothing that cannot be cured."[371] On June 26, Eckstein placed a similar call to George Skibine. Given that more than five weeks had elapsed since the Duffy meeting, Eckstein asked for the status of the report. He recalls that Skibine's response was to the effect of, "I can't tell you. I don't want to lose my job,"[372] or "if I told you I would lose my job." Skibine told investigators he does not recall saying this and doubts he did. He believes it is more likely that he said it would be against Department policy to reveal internal preliminary staff discussions.

### 8. IGMS Concludes that the Hudson Casino Proposal Would Not Be Detrimental to the Surrounding Community

IGMS continued its analysis of the Hudson application as new materials were received through April 30 and into early May. Because the additional comments had been expected to relate primarily to the "detriment" issue - and a negative finding on that issue would make the "best interests" issue moot - Skibine had directed his staff to confine its focus to "detriment."

Although prior to June 8, the staff had been working on a draft memo containing the analysis of both "best interests" and "detriment" within the meaning of IGRA Section 20,[373] on June 8 Hartman completed a draft of a newly-revised memorandum analyzing only whether the

[371] Eckstein G.J. Test, at 80.

[372] *Id.* at 84.

[373] Skibine told investigators that he had reviewed one of the drafts of the memo Hartman wrote that addressed both the "best interests" and "detrimental"issues. He is not certain which draft he saw.

Hudson casino would be "detrimental to the surrounding community." The memo, which was addressed to Skibine from the IGMS staff, and stamped "DRAFT," concluded that the proposal would not be "detrimental to the surrounding community" and that IGMS should proceed with an analysis of whether the proposal was in the "best interests" of the applicant tribes. The memo did not address the question of whether the proposal was in the tribes' "best interests." It was later reprinted as a memo to the Assistant Secretary-Indian Affairs from Skibine with some revisions by him, but never signed by him nor put in final form.

Skibine told investigators unequivocally that he agreed with Hartman's conclusion - expressed in the June 8 memo - that the facts of the Hudson application did not support the assertion that the proposed gaming facility would be detrimental to the surrounding community. Thus, while neither Skibine nor Hartman can be said to have recommended approval of the application, both believed the proposed casino was "not detrimental" under the two-part determination of Section 20 of IGRA.

With some exceptions, the June 8 memo incorporated the work product related to the "detriment" analysis created by Hartman, Ramirez and Slagle during their initial analysis of the Hudson casino proposal in Lakewood in January 1995. Hartman's June 8 memo did not include Slagle's previously-stated concerns relating to the potential environmental impact a Hudson casino.[374] Instead, Hartman concluded that environmental issues in the context of the Secretary's determination under Section 20 of IGRA were foreclosed by the final FONSI.[375]

[374]In a May 16,1995, memo requested by Skibine, Slagle reiterated his belief - first expressed in January - that the environmental assessment for the Hudson proposal was deficient.

[375]According to Slagle, it was almost routine that he recommended greater environmental

(continued...)

Hartman's memo also included his analysis of new materials submitted since January 1995. Those materials included market impact studies submitted by the St. Croix Chippewa and other opponent tribes, recent municipal government resolutions opposing the casino proposal and letters and petitions of support and opposition from various individuals. Hartman analyzed whether each of the anti-casino submissions provided a factual basis for finding that the proposal would be "detrimental to the surrounding community." In the spring of 1995, it was Hartman's understanding of IGMS policy that an objection would be given weight only to the extent that it was factually supported; a mere, unsupported objection - even by a local government - would carry little or no weight.[376]

[375](...continued)
scrutiny than was ordered. He believed BIA's duty to promote tribal interests caused its environmental enforcement function to be given low priority. He stated the prevailing view at BIA appeared to be that environmental concerns should not thwart Indian gaming opportunities.

[376]The decision ultimately reached on the Hudson application reflects a different standard for evaluating community opposition. The July 14,1995, decision letter provides in pertinent part:

> Because of our concerns over detrimental effects on the surrounding community, we are not in a position, on this record, to substitute our judgement for that of local communities directly impacted by this proposed off-reservation gaming acquisition.

Duffy characterized this decision as saying that Congress, in enacting IGRA, did not intend to require communities to show detriment. He felt a community could make a simple claim of unacceptable traffic congestion or crime, for example, and the burden would shift to the applicants and BIA to disprove it. He acknowledged that this would require in some cases that applicants prove the negative, admittedly a difficult burden, but believed this was the balance Congress struck in IGRA.

As set forth in the ultimate decision letter, the test for evaluating tribal opposition reflects a combination of a presumption of economic impact and the distance away from the applicant's reservation. The letter provides in pertinent part:

(continued...)

In his memo, Hartman noted that, after the Minneapolis Area Office submitted its findings, the Town of Troy passed a resolution in December 1994 opposing the proposal. The City of Hudson submitted a resolution opposing the casino application - notwithstanding the earlier letter from Mayor Thomas Redner supporting the project. St. Croix County wrote that it would take no position on the Hudson Common Council resolution and offered little more. Hartman remarked that the City of Hudson's resolution - like other objections submitted by St. Croix County and the Town of Troy - lacked evidence to support its assertions of potential harm. Accordingly, Hartman concluded that these objections could be given no significant weight.[377]

Hartman also analyzed the further objections submitted by nearby tribes, most of which focused on the potential impact of a Hudson casino on their existing gaming facilities. He acknowledged that the Oneida Tribe of Indians of Wisconsin said their operation was not likely to be hurt due to its distance from Hudson. At the same time, he noted they complained without hard evidence of "growing undue pressure from outside non-Indian gambling interests that could set the stage for inter-Tribal rivalry for gaming dollars."

[376](...continued)
The record indicates that the St. Croix Casino in Turtle Lake, which is located within a 50-mile radius of the proposed trust acquisition, would be impacted. And, while competition alone would generally not be enough to conclude that any acquisition would be detrimental, it is a significant factor in this particular case. … Rather than seek acquisition of land closer to their own reservations, the Tribes chose to 'migrate' to a location in close proximity to another tribe's market area and casino.

[377]The memo contains no discussion of the positions taken by Wisconsin state legislators or U.S. Congressmen and Senators. Another draft of Hartman's memo revised after June 8 - which was addressed to the Assistant Secretary, Indian Affairs through the Deputy Commissioner of Indian Affairs - discussed the views of state officials, but neither draft of the memo mentions the views of any federal elected officials.

With respect to the St. Croix Band of Chippewa Indians, who had submitted a Coopers & Lybrand impact study, Hartman concluded their estimates of nine percent revenue losses were inflated and, in any event, failed to take into account their own estimated increase in attendance. Relying on the Smith Barney *Global Gaming Almanac 1995,* Hartman asserted that the market for gaming in Minnesota and Wisconsin was expected to increase by "an amount sufficient to accommodate a casino at Hudson and profitable operations at all other Indian gaming locations." Factoring in the expected increase in the overall market, Hartman concluded that the St. Croix's Turtle Lake casino would suffer a loss of only about 1.25 percent. Similarly, Hartman concluded that the Ho-Chunk casino in Black River Falls would suffer lost revenues of less than five percent.

After analyzing the report submitted by KPMG Peat Marwick on behalf of MIGA, the Mille Lacs, the St. Croix Chippewa and the Shakopee Mdewakanton Sioux, Hartman noted that KPMG believed the MAO had used a test of "not devastating" impact rather than the less rigorous "not detrimental" test in the statute. Nevertheless, he concluded that the five casinos that were the subject of that study would suffer revenue reduction between $1 million and $8 million - *i.e.,* between one and eight percent. Given the large revenues enjoyed by those tribes, Hartman asserted that such a loss would not amount to "detriment" because "[t]he detrimental effect would not be expected to materially impact Tribal expenditures on programs under IGRA Section 11."

In the "Summary Conclusion" of his memo, Hartman identified circumstances that were not factors in determining whether the casino would have detrimental impact. "Moral

opposition" to gambling, "opposition to economic activity" and "[opposition to Indian gaming" were three such circumstances. Another was opposition based on competition:

> Business abhors competition. Direct competition spawns fear. No Indian tribe welcomes additional competition. Since tribal opposition to gaming on others' Indian lands is futile, fear of competition will only be articulated in off-reservation land acquisitions. Even when the fears are groundless, the opposition can be intense. The actual impact of competition is a factor in reaching a determination to the extent that it is unfair, or a burden imposed predominantly on a single Indian tribe.

In the memo, Hartman also addressed the type of evidence on which he based his analysis of "detriment":

> Detriment is determined from a factual analysis of evidence, not from opinion, political pressure, economic interest, or simple disagreement. In a political setting where real, imagined, economic, and moral impacts are focused in letters of opposition and pressure from elected officials, it is important to focus on an accurate analysis of facts. That is precisely what IGRA addresses in Section 20 - a determination that gaming off-reservation would not be detrimental to the surrounding community. It does not address political pressure except to require consultation with appropriate government officials to discover relevant facts for making a determination on detriment.

Hartman noted that "Indian economic development is not subject to local control or plebiscite," and warned of "[t]he danger to Indian sovereignty, when Indian economic development is limited by local opinion or government Action."

### G. The Department of the Interior Decides to Deny the Hudson Application

#### 1. Internal Debates Over the Basis of Denial: IGRA Section 20 or IRA and Part 151 Regulations

While IGMS staff, in particular Hartman and Skibine, were reviewing the additional materials received after Feb. 8, internal meetings on the Hudson matter continued intermittently. Skibine, Hartman and Sibbison usually attended; Duffy was occasionally present, as were representatives from the Solicitor's Office - including Meisner and sometimes Woodward - and

Manuel. Michael Anderson and Robert Anderson rarely attended, and probably not before May.[378] Witnesses confirm IGMS had been advised of the change in the position of the Hudson Common Council from neutral or mildly supportive to opposed. They were also aware from meetings with opponent representatives, and reports of such meetings, that several tribes and tribal organizations were strongly opposed but had not provided documentation of feared economic or political harm.

Witnesses involved in the DOI internal discussions deny there was a specific meeting at which a decision was reached. They characterize the events as more of a recognition of a growing consensus that the Hudson application could not be approved. Several witnesses stated that the inter-tribal dispute over the proposal made this a difficult decision for which the staff felt they lacked guidance. Witnesses reported that the decision was complicated by the BIA's trust responsibility to all tribes and the importance placed on tribal sovereignty. Some also reported that the equities were further tested for them by the contrast between the relatively-wealthy opposing tribes and the relatively-poor applicant tribes.

Sibbison told investigators that, although the proposal presented difficult issues, from the beginning she thought many people believed the application would be denied, even though no vote was taken. Every witness questioned said there was no IGMS or DOI employee in Washington who advocated granting the application in the form submitted. Hartman advised that until he saw Skibine's first circulated draft of the denial letter on or about June 29, he could not

[378]Michael Anderson attended only a couple of the meetings in which the application was discussed. He said he would not normally have attended such meetings if he were not responsible to sign the decision, and he did not know the decision would be delegated to him until June 1995. He was not at the July 5,1995, meeting discussed below in Section II.G.3.

say for certain whether it was headed for approval or denial. At bottom, Sibbison and others involved in the application's consideration said the DOI personnel who participated in the decision - including Duffy, herself, Michael Anderson, Skibine and lawyers from the Solicitor's Office - would have liked to have found a way to grant the application, but could not do so because of the local opposition. Sibbison, Manuel and Skibine stated that the internal discussions during the spring of 1995 focused on how best to articulate that decision to deny the application.

According to most witnesses, discussions within the Department were not focused on how to conform the decision with prior decisions, but rather how to render a unique decision that avoided setting undesired precedent. Sibbison, Skibine and others did not want to send a message that non-Indian local opposition could simply veto trust acquisitions. There was equal concern - expressed by Hartman, Manuel and others - to avoid sending the message that tribes with existing casinos could bar other tribes from competing in their markets.

Hartman told investigators he would not have denied the application based on a finding of "detriment," but that substantial changes would have been needed to the agreements between the tribes and the non-Indian partners to meet the "best interests" test. Drafts of his June 8 memo corroborate his testimony that he held this same opinion in spring 1995. He believed, however, that the non-Indian partners eventually would make the concessions required because of the lack of alternatives for the failing track.

Skibine told investigators that he had an open mind initially about the application, but came to the view that it was appropriate to deny the application because of local opposition. Skibine said that he knew Duffy believed that the application should be denied, and cannot say

that he did not consider Duffy's view, but Skibine believes that he came to the same conclusion based upon the merits.[379] He said his job was to make a recommendation, but he knew the ultimate decision would be made by the politicals - the Secretary and his staff.[380]

Manuel, who had been involved in gaming issues since at least November 1991, when Secretary Lujan appointed her to the gaming task force, said local opposition has always been problematic for off-reservation gaming applications and it was significant in the Hudson matter. Citing the Siletz application, she said even where the Secretary approved the application over local opposition, the Governor vetoed it. She also said Hudson was unique because the tribes were trying to establish a casino a great distance from their reservations in competition with other tribes. She did not think IGRA was supposed to be used to facilitate that competition.

Manuel noted that she considers Skibine to be a friend and colleague. She met privately with him a couple of times during the Interior consideration of the Hudson application and perceived that he wanted to find a way to approve the application. She recalls that he took a

[379]Although Duffy attended several key meetings - Feb. 8 with opponents and congressmen; May 17 with the Four Feathers representatives; May 31 with Havenick and the Four Feathers lobbyists; and July 14 with Eckstein - and signed the bulk of the responses to congressional letters, he rejected efforts to characterize him as one of the decision-makers. Rather, he said he merely monitored the progress of the analysis. Because he believed it was going to be denied - which was consistent with his view of what the Secretary would do - he said he felt no need to intervene to advocate for a denial. Interior witnesses said they knew Duffy thought the application should be denied and that he spoke for the Secretary. No Interior witnesses disagreed with the ultimate conclusion that they believed Duffy espoused, only the basis for the denial.

[380]Penny Coleman, attorney at the National Indian Gaming Commission and a former DOI attorney, said she considers herself a close friend and colleague of Skibine's. She said they discussed the Hudson application generally and Skibine said he disagreed with the basis but not the decision to deny. Based on her experience in gaming matters going back to Sec. Lujan's 1991 gaming task force, she believed off-reservation gaming applications without local support were doomed.

position in support of the application in a group meeting the two of them attended with Duffy, Sibbison and Robert Anderson. By the end of that meeting, though, the consensus view against approving the application prevailed. Nonetheless, Manuel says Skibine has never told her that he was upset by the denial or that he felt he had been overridden unfairly on the denial decision.

There was a split in Interior between those who wanted to rest a denial entirely on the Secretary's discretionary authority under IRA and Part 151 to take (or not take) land into trust, and those who wanted to base it on a negative two-part determination under IGRA Section 20. At that time, many Interior Department witnesses believed that the Secretary's discretion under IRA was unfettered and unreviewable; proponents of this basis for a decision - Sibbison, Skibine and the junior attorneys from the Solicitor's Office - believed such a decision would be more defensible in court because of their interpretation of the "detriment" test of Section 20. Those who wanted to rely on IGRA Section 20 - primarily Duffy and Robert Anderson - saw it as a way to send a message to congressional and other critics that DOI would apply IGRA reasonably, and accordingly, there was no need to amend IGRA or otherwise cut back on Indian gaming. Much of this debate took place while Skibine's draft denial letter was being circulated for review.

### 2. Skibine Drafts a Decision Letter Denying the Hudson Application Based Only Upon the Secretary's Discretion Under IRA and Part 151 Regulations

On June 28, 1995, Skibine circulated by e-mail his first draft of a letter denying the Hudson casino application.[381] In this draft, Skibine based the denial solely on the discretion

[381]The addressees of the e-mail attaching the draft were Troy Woodward and Kevin Meisner of the Solicitor's Office, BIA Deputy Commissioner Hilda Manuel, and Paula Hart and (continued...)

vested in the Secretary under IRA (25 U.S.C. § 465) and Part 151 regulations, and avoided a Section 20 two-prong analysis under IGRA. Skibine also attempted to counter Duffy's viewpoint that Section 20 should be included as a basis for the denial by writing in an accompanying e-mail that IGMS was still drafting a memo concerning the Section 20 analysis. The memo, Skibine offered, would conclude that the Hudson casino proposal would not be detrimental to the surrounding community. Such a conclusion, if adopted, would have made it impossible to base the denial upon Section 20. In the same e-mail, Skibine reminded the Interior personnel that the applicants had been told the Section 20 analysis would be completed by the end of the month.

On June 30, at 10:50 a.m., Sibbison e-mailed Skibine and Woodward, stating that she had faxed the draft letter to Duffy that morning, and he had promised a response that afternoon. In her e-mail, Sibbison suggested the draft not include reference to the opposition of nearby tribes, for two reasons. First, she suspected that if the applicants could garner local non-Indian support, the Department would reconsider its denial. Second, Sibbison agreed with Collier's uneasiness about some tribes "getting all the goodies." In addition, in her e-mail, Sibbison recommended having Assistant Secretary Deer sign the denial letter - thus eliminating any rights of appeal within the Department - as a means for getting the applicants to work on "trying to build a

[381] (...continued)
Thomas Hartman of the IGMS. Skibine told investigators that he had likely been working on that draft for at least several days before it was circulated.

consensus in the local towns" rather than focusing on their legal appeal.[382] In an e-mail sent at 3:53 p.m., Skibine agreed to abide by whatever Sibbison and others decided.

Sibbison later told investigators that one reason for her suggestion that the reference to other tribes be omitted was a concern that the decision would be seen as a precedent for tribes with casinos to veto other nearby Indian gaming facilities. Sibbison said she knew that Michael Anderson placed more emphasis on tribal objections. Sibbison stressed that, at least for her, local non-Indian opposition - and not inter-tribal competition - was the main basis for the Hudson denial. To Sibbison, however, the two issues were somewhat blurred in the case of Hudson because the St. Croix tribe was located within fifty miles of the proposed facility, and therefore was considered part of the "local community." She noted the Checklist did not say how to treat nearby tribes within 50 miles.

At 4:15 p.m. that same day - Friday, June 30 - Sibbison again e-mailed Skibine. She stated that Duffy had not called in with comments, and that she would work with Hart and Hartman to complete the letter during the next week, while Skibine was on vacation.

At 7:04 p.m., Skibine sent a final e-mail to Sibbison, Hart, Hartman, Woodward and Meisner. In it, Skibine disagreed with Sibbison's position that reference to the opposition of nearby tribes should be omitted. He stated that tribal opposition should be included because "[i]t certainly is a factor" under Section 465 and Part 151 regulations, "and it would strengthen our

[382]The letter was drafted for Deer's signature but noted that, if the letter were signed by BIA Deputy Commissioner Manuel instead, the applicants would have appeal rights within the Department. The only change in a Skibine re-draft of the letter dated June 29,1995, was the addition of language regarding appeal rights.

defense to an abuse of discretion lawsuit by the three tribes." Skibine further disagreed with Sibbison's view of the significance of this opposition:

> I also sense that even if the Town of Hudson [sic] and the Town of Troy embrace the proposal, we may still not change our position because of political opposition on the Hill, largely generated by the Minnesota and Wisconsin Tribes who oppose this acquisition. My vote is to leave it in.

In his e-mail, Skibine also continued to press his viewpoint that Section 20 would be an inappropriate basis upon which to deny the application, by alluding again to Hartman's draft conclusion that the application caused "no detriment to surrounding communities."

> Tom Hartman of my staff also prepared a memo regarding the section 20 "not detrimental" analysis. Unfortunately, I have been unable to finish the review because of computer difficulties. Our tentative conclusion is that the record permits us to make a finding that a gaming establishment at that location will not be detrimental to the surrounding community. We have not finalized the document, and I have bnot [sic] yet determined whether it should be signed or simply stay in draft form. Please obtain a copy of the draft document from Tom.

On Wednesday, July 5, at 12:20 p.m., Troy Woodward sent an e-mail to Hartman requesting an electronic copy of Hartman's analysis by 1:30 p.m. Woodward requested the document in anticipation of a meeting later that day with Duffy and others to discuss the basis for the Department's planned denial of the application. At 12:55 p.m., Hartman sent a reply e-mail attaching "the DRAFT review." Hartman added that "George plans some revisions to the opening paragraphs."

The memo Hartman sent to Woodward reached the same conclusion as his June 8 memorandum - *i.e.*, that the proposal would not be detrimental to the surrounding community - but differed from the prior memo in a few respects. First, he now addressed the memo to the Assistant Secretary - Indian Affairs, through the Deputy Commissioner of Indian Affairs, from the Director of IGMS. Second, he added reference to materials that had been recently received,

most of which favored the casino proposal. In the section called "Consultations with state," the section now contained mention of a March 28, 1995, letter from State Rep. Sheila Harsdorf (from the Hudson area), and 28 other representatives expressing "strong opposition" and listing four areas of detriment.[383] The memo bore a computer-generated "DRAFT" stamp on each page.

### 3. Duffy Directs that Denial Be Based Upon Section 20 of IGRA, As Well As Section 465 of IRA and its Part 151 Regulations

Woodward attended a meeting with Duffy, Sibbison and Robert Anderson on the afternoon of July 5 to discuss Skibine's draft letter denying the application solely under IRA and Part 151 regulations. Skibine was on vacation. Woodward's notes of the meeting - which he distributed to Skibine, Hart, Hartman, Meisner and Larry Scrivner by e-mail the following morning - reflect that "[t]he main issue discussed was why the letter indicated that the Secretary's denial was under Section 151 and not Section 20 of the Indian Gaming Regulatory Act." At the meeting, "Duffy advocated the position that this was the perfect opportunity to calm the fears of communities that Indian gaming would not be foisted upon them without their consent." Woodward noted Duffy's position was at odds with what he understood to be existing DOI policy in this area:

> Duffy thinks that the local communities may veto off-reservation Indian gaming by objecting during the consultation process of Section 20. I expressed the opinion, advocated by George and which we have used to evaluate objections in the past, that the consultation process does not provide for an absolute veto by mere objection, but requires that an objection be accompanied by evidence that

[383] The detriment described included reduced tax revenues, and possible increases in racial tension and crime, as well as public opposition to gambling and likelihood that the casino would negatively impact other tribes with on-reservation gaming in remote locations.

> the gaming establishment will actually have a detrimental impact (economic, social, developmental, etc.).[384]

According to Woodward's notes, Robert Anderson agreed with Duffy because he felt that this would calm communities' fears, but would not lock DOI in as precedent because it was unusual to have a tribal proposal to place a casino so near another existing Indian gaming facility. Woodward stated "the upshot of the meeting" was that Duffy wanted the letter rewritten to include Section 20 of IGRA as a further basis "because the consultation process resulted in vehement and wide-spread local government and nearby Indian tribes' opposition to locating a casino at this site."

After receiving Woodward's notes of the July 5 meeting, Meisner sent a reply e-mail in which he strongly disagreed with Duffy's position:

> My view on this matter is that the bald objections of surrounding communities including Indian tribes are not enough evidence of detriment to the surrounding communities to find under section 20 of IGRA that the acquisition for gaming will be detrimental to the surrounding communities.... Specific examples of detriment must be presented by the communities during the consultation period in order for us to determine that there will be actual detriment. A finding of detriment to surrounding communities will not hold up in court without some actual evidence of detriment.[385]

[384]Duffy told investigators that he believed this interpretation of IGRA as generally prohibiting off-reservation gaming where local communities object is consistent with his discussions with legislators and their staff who were involved in Indian Affairs issues during his tenure at DOI. Duffy also inferred that the decision to structure IGRA as a list of exceptions to a broad prohibition on off-reservation gaming reflected a congressional bias against such acquisitions. *Compare* discussion of statute in Section II.B.l.b., *supra.* He conceded, however, that the written legislative history contains little explicit insight into Congressional intent.

[385]E-mail from Kevin Meisner to Troy Woodward, George Skibine, Paula Hart, Tom Hartman and Larry Scrivner, July 6,1995.

Meisner also stated his belief that "a decision not to exercise our discretionary authority to take the land into trust under 151 is enough to show surrounding communities that we take into consideration their opposition and that casinos will not be foisted upon them against their will."

Duffy was the primary advocate, and prevailed, in arguing that DOI should not look behind the stated objections of local communities to determine if the objections were based on arguably irrelevant criteria like moral opposition to gaming or prejudice against Indians, as Hartman, Skibine and others urged. Skibine returned from vacation and, on Saturday, July 8, e-mailed his staff about a new draft letter he had prepared that incorporated the changes suggested while he was away, "per Duffy and Heather's instructions." In the e-mail, he stated that "[t]he Secretary[386] wants this to go out ASAP because of Ada's impending visit to the Great Lakes Area." (Deer was scheduled to travel to Wisconsin on July 12.) Consistent with Duffy's "instructions," the draft at that point rested the decision primarily on Section 20's detriment prong, but stated that DOI would deny the request under Part 151 as well.[387]

Although Skibine's July 8 e-mail directed that the letter be put into final form, it appears that editing continued for the next week. In particular, those involved with the letter continued to wrestle with whether and how to describe the position of nearby tribes.[388] According to Michael

[386]Skibine reported that he and others often referred to "the Secretary" when meaning the "Office of the Secretary," which included such staff as Duffy, Sibbison and Michael Anderson. Skibine G.J. Test, at 77.

[387]In testimony, Duffy conceded that Skibine had deferred to Duffy's view that the decision should rely on Section 20 despite Skibine's disagreement.

[388]Language discussing the possible negative economic effects on other tribes, with reference to the accounting firm reports submitted by them, was added and then deleted in the drafting process. Ultimately, the only specific reference is made to the St. Croix which has the

(continued...)

Anderson, who reviewed a draft only during the week the final letter went out, he recommended that the St. Croix Chippewa's opposition be included to lessen the emphasis on the opposition of the local non-Indian community. But again, others were concerned that reference to tribal opposition would create an unwanted precedent for tribal vetoes of other tribes' applications.

At the same time, there were continued questions about the wisdom of relying upon Section 20 of IGRA as a basis for the denial. In a July 11 e-mail to Skibine and Sibbison, Meisner questioned why Section 20 had been added as a basis for the denial. Meisner had seen Skibine's July 8 redraft of the letter, and he noted that he "thought after the Friday meeting that everyone (except Duffy who we had not yet consulted) agreed that there was not enough evidence supporting a finding of 'detriment' to the surrounding communities under section 20 and therefore we would decline to acquire the land under 151..." (Ellipsis in original.) In an e-mail to Woodward later that day, Meisner reported that Robert Anderson - Meisner's and Woodward's superior in the Solicitor's Office - "thought that since Duffy wanted the Section 20 finding so badly that we would let the letter go through." Meisner added: "I still think that there was not enough evidence for a section 20 finding of detriment."[389]

[388](...continued)
closest casino to Hudson. "A loss of market shares and revenues" to the St. Croix posed by the new casino is presumed but not detailed.

[389]Our investigation uncovered no evidence that any DOI employee involved in consideration of the Hudson application was pressured to keep silent about their support for the application or was rewarded in any way for statements made after the denial in the course of the various investigations.

### 4. Recusal of Assistant Secretary Ada Deer

Assistant Secretary for Indian Affairs Deer recused herself from the Hudson application decision, probably sometime between May 22 and the end of June 1995. As Assistant Secretary, Deer was delegated the Secretary's decision-making authority on such land-to-trust applications and would have been expected to sign the ultimate decision. Prior to her recusal, Deer did discuss the application in at least general terms with applicant tribal leaders and signed some correspondence. Nevertheless, Deer and other DOI personnel describe her as having been uninvolved in ongoing internal discussions about the application.

Deer stated she recused herself because she is from Wisconsin, is acquainted with many of the tribal leaders involved in the matter and had contributed $250 to help retire the campaign debt of gaiashkibos, chairman of the applicant LCO tribe, which he accrued during his unsuccessful run in the 1994 Republican primary for Wisconsin state senate. Deer was already thinking about whether she should recuse herself under these facts when her assistant, Michael Chapman, suggested she should consider whether to recuse herself. It is unclear when Deer began having these misgivings about her role in the matter; she had previously expressed none to any tribal leaders with whom she discussed Hudson.

Deer reported that although she was a big supporter of Indian gaming for economic development, she never knew enough about the Hudson application to render an opinion about whether it should be approved or not. Deer said she did not believe she would have been unduly influenced by her acquaintances or support for gaiashkibos, but was concerned that these facts

would be "misused and misinterpreted" if she rendered the decision.[390] She said the recusal was her decision, made without pressure from anyone at DOI.[391] Deer remembered advising Michael Anderson of her recusal orally but not in writing.[392] It is unclear exactly when she may have done this. Anderson remembered learning of the recusal from Chapman in June and that Deer's political contribution to gaiashkibos was the reason cited. As late as June 30, when another draft of the denial letter was prepared, however, Sibbison still thought that Deer might sign the final decision letter.[393]

### 5. The Issuance of the Decision Letter

The final version of the denial letter was signed by Michael Anderson and sent to the applicants on July 14, 1995.[394] The letter denied the application on the ground that the proposed casino would be "detrimental" to the surrounding community under IGRA Section 20, but added that even if the factors described in the letter were insufficient to support that finding, "the Secretary would still rely on these factors, including the opposition of the local communities, state elected officials and nearby Indian tribes, to decline to exercise his discretionary authority,

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[390]OIC Interview of Ada Deer, Aug. 20,1998, at 5.

[391]Two witnesses from applicant tribes recounted hearing her say, without further explanation of the circumstances, that she refused to sign the letter.

[392]Witnesses reported there was no formal obligation imposed upon DOI employees to commit a decision to recuse themselves to writing or to set forth the timing and basis for the recusal. Meisner noted that delegating authority to a subordinate is not unusual at DOI.

[393]Although evidence exists of a plan by opponents to the application to force Deer to recuse herself, there is no evidence that the plan was ever implemented. Deer and other IGMS staffers state that they were unaware of such a plan.

[394]Anderson and Skibine were at meetings outside of Washington on other BIA business on Monday, Tuesday and Wednesday, July 10 through July 12, and were editing the draft denial letter by fax and phone conversations.

pursuant to Section 5 of the Indian Reorganization Act of 1934 . . . to acquire title to this property in Hudson, Wisconsin, in trust for the Tribes."

In support of its "detrimental" conclusion, the letter cited the opposition of local communities, noting that DOI would not "substitute [its] judgment for that of local communities directly impacted" by the proposed casino. The letter also cited strong opposition "by neighboring Indian tribes, including the St. Croix Tribe of Wisconsin:"

> The communities' and State officials' objections are based on a variety of facts, including increased expenses due to potential growth in traffic congestion and adverse effect on the communities' future residential, industrial and commercial development plans. Because of our concerns over detrimental effects on the surrounding community, we are not in a position, on this record, to substitute our judgment for that of local communities directly impacted by this proposed off-reservation gaming acquisition.
>
> In addition, the record also indicates that the proposed acquisition is strongly opposed by neighboring Indian tribes, including the St. Croix Tribe of Wisconsin. Their opposition is based on the potential harmful effect of the acquisition on their gaming establishments. The record indicates that the St. Croix casino in Turtle Lake, which is located within a 50-mile radius of the proposed trust acquisition, would be impacted. And, while competition alone would generally not be enough to conclude that any acquisition would be detrimental, it is a significant factor in this particular case. The Tribes' reservations are located approximately 85, 164, and 188 miles respectively from the proposed acquisition. Rather than seek acquisition of land closer to their own reservations, the Tribes chose to "migrate" to a location in close proximity to another tribe's market area and casino. Without question, St. Croix will suffer a loss of market share and revenues.

Unlike some prior drafts, the letter did not cite the amount of the impact on the St. Croix, nor did it specifically refer to the opposition of nearby Minnesota tribes or of Wisconsin tribes that were considerably further from Hudson.

Finally, the letter cited concern that the environmental documents submitted in connection with the application did not address adequately the potential impact of the casino on the nearby St. Croix Scenic Riverway. Some witnesses said it was unusual to cite an

environmental concern in a denial letter. Slagle said the issue was the failure of the environmental assessment to address the issue; there was as yet no evidence of negative impact.[395]

The St. Croix Tribe accidentally received early notification of the decision on July 13, when Duffy's secretary faxed the tribe a letter stating that the Hudson application had been rejected. The letter had been prepared by Sibbison as a response to additional comments the tribe had submitted; Sibbison anticipated sending the letter only after the decision had been announced. Departmental witnesses testified that the early release of this response was done by mistake and was not intended to provide opponents with advance notice of the decision.[396] On July 14, Sibbison sent a "corrected" copy of the letter to Beverly Benjamin (a member of the St. Croix tribal council) with the "correct date" - *i.e.*, July 14. Sibbison requested that Benjamin "dispose of the old version."

Witnesses reported a variety of explanations for the timing of the final decision letter. Some cited an effort to publish the decision prior to Assistant Secretary Deer's planned attendance at a Lac Courte Oreilles powwow. Difficulties in finalizing the language of a letter with so many drafters delayed the release until the Assistant Secretary was already there. Witnesses also stated the applicants were perceived to be pushing for a decision, and some added

[395]The issue of the waterway apparently came to the attention of others at DOI besides Slagle after a magazine article inspired letters to DOI on that subject. In any case, Slagle discounted the notion that the application was denied because of this environmental concern.

[396]This position is corroborated by evidence: 1) that the DOI employees involved in drafting the decision letter expected the denial letter to be going out that week; 2) the absence of any specific need for the St. Croix to know the outcome only a few days in advance of its full public disclosure; and 3) the consistent testimony of DOI witnesses that no one thought Babbitt would intervene to change the decision or the timing of it.

that DOI staff were tiring of the continuous lobbying on the proposal. Though there is evidence that the applicants tried unsuccessfully to delay through the White House the issuance of the denial decision, the only evidence supporting the theory that the opponents affected the timing of the decision through the White House or the DNC is Babbitt's own remark to Eckstein about Ickes on July 14, 1995.

### 6. Interior Department Witnesses Deny Both Being Influenced by Political Party Affiliations and Being Aware of the Hudson Opponents' Efforts to Obtain Assistance from the DNC

All Interior Department witnesses who were asked denied that the political party affiliation of the applicants or their opponents played any role in the consideration of the Hudson application at any stage in the process. Most denied any awareness of the affiliations. At least one witness said he assumed virtually all Indians were supportive of Democratic Administrations, if they were politically active at all. At least two witnesses reported they could recall having only one conversation explicitly about party affiliation of a person with a matter pending before the Department. The remark was made by someone who was not a decision-maker and the pending matter did not involve a gaming decision. The remark was to the effect of: "we are going to help the person anyway, even though he was not a Democrat." Robert Anderson said he knew of involvement of the Mashantucket Pequots with the DNC and some information about their contributions through his relationship with the tribal chairman, but never heard contributions discussed at Interior.

Duffy said he thought after the Feb. 8 meeting that the entire congressional delegation of Minnesota and Wisconsin opposed the casino. He recalled no mention of contributions at that meeting, but vaguely recalled a comment at another time about the level of campaign

contributions by a tribe with a different matter pending at Interior. He denied it had any effect on the outcome of that matter. *See infra* at 408. No other witness could recall any mention of campaign contributions in connection with any Interior matter pending during any witness's employment at the Department.

All Interior employees except Collier denied being contacted by Fowler or other DNC officials about Hudson. Collier said he was aware Fowler had said that he called someone at Interior about the Hudson matter but could not remember whom. Collier said he did not recall speaking to Fowler, but allowed that if Fowler called anyone at DOI, it was probably him, since he was Chief of Staff.[397] In April 1995, Collier knew that Fowler was Chairman of the DNC, but Fowler testified that as of that point in time he did not know Collier and did not know what position he held.

Duffy told investigators that when he met with Eckstein on July 14, 1995, he did not know who Fowler was. Duffy testified that he was unaware of any other Department employee being contacted by DNC officials on any matter while he was at Interior. He further stated he had not heard that Collier sought DNC help on Shakopee tribal matter, although he knew the tribe made a DNC contribution.

[397]The only other reported contact between Fowler and DOI officials came after the Hudson decision. Babbitt's second Chief of Staff, Anne Shields, reported she had been contacted by Fowler one time. She thought it occurred while she was Chief of Staff (beginning in July 1995), and may have related to a gaming compact issue involving the Wampanoag Tribe of Gay Head, Massachusetts, or the Sault Ste. Marie Tribe's Detroit casino proposal. She said she spoke to him, but did nothing and told no one involved in the issue about it. Fowler's remarks were along the lines of "[t]hese are good people. You should hear them out." OIC Interview of Anne Shields, Jan. 1, 1999, at 13. Shields could not recall on whose behalf he was calling, and she considered the entire call irrelevant.

None of the witnesses interviewed recalled any discussion about the option of returning the application to the area office (or directly to the tribes) as an alternative to an outright denial.[398] It appears that other applications had been treated in that manner when Manuel was IGMS director, but some witnesses noted that it would have served little purpose this time since the defects in the Hudson application - in particular, the opposition of the local community - were neither a technical omission nor readily curable. Others, including Sibbison and Duffy, said sending it back to the Area Office would not have served the other purpose especially important to Duffy, that of sending a message to Congress that Interior would not "jam" casinos into communities against their wishes.

Where gaming applications had been approved in the past, witnesses said the Department's detailed written basis was provided to the governor along with a formal letter from the Secretary seeking his concurrence. The letters were signed by the Secretary out of courtesy, but the decision was made by the Assistant Secretary.

### 7. The Policy Reason Given for the Hudson Decision Was Neither a Long-Standing, Nor a Consistently Applied, Interior Policy

Interior Department witnesses stated that the policy articulated in the Hudson decision is that great weight will be accorded to the opposition of local communities in deciding whether to take land into trust for off-reservation gaming. The policy has frequently been referred to by DOI

[398] In Grand Jury testimony, Skibine said he thought he may have discussed his thought that since it was going to be denied based on secretarial discretion, it was pointless to return to the MAO or tribes. Because it served no purpose to tell the Area Office that local opposition was the problem, he though it was better to just inform the tribes at that point.

witnesses as one of not "cramming" casinos "down the throats" of unwilling communities.[399] While the evidence developed would not support a claim that the Hudson decision reflected application of a clear, long-standing DOI policy consistent with other cases, neither does the evidence establish that the reasons given for the Hudson decision are not reasons actually considered by DOI employees in reaching their decision.

There is evidence that this policy had been voiced by senior Interior officials prior to the consideration of the Hudson application. Even before Secretary Babbitt's tenure, off-reservation gaming applications were viewed as difficult to approve, at least because of opposition by local communities and political leaders. The Department had, in 1986 and 1987, by policy statement and proposed rule, tried to effectively prohibit off-reservation gaming. In 1990, Babbitt's predecessor, Secretary Lujan, centralized off-reservation gaming decisions in one office at BIA in Washington in an effort to provide for greater scrutiny of such applications.[400] Witnesses - including Babbitt, Collier, Duffy, Thornberry and Leshy - recounted that in 1993, early in his tenure as secretary, Babbitt drew a distinction between on- and off-reservation gaming.[401] According to Babbitt and his senior staff, he was at that time involved in a dispute with certain governors over Indian gaming compacts in Arizona. Some governors believed they had or should have the ability to limit on-reservation gaming to ceremonial games or bingo and were refusing to enter into compacts with tribes without such limitations. While Babbitt viewed the

[399] *See e.g.,* Duffy G.J. Test., May 12,1999, at 51.

[400] *See supra* at 42-43.

[401] Thornberry was the Executive Director of the National Governors' Association at the time.

law as requiring him to be an aggressive advocate for all types of on-reservation gaming, he was less supportive of off-reservation gaming because of the ill will such operations generated in communities that were opposed to them. Although there do not appear to be any formal public announcements by Babbitt of a policy incorporating this distinction, there are news reports of the Arizona compact controversy. These attribute to the Secretary some general statements very supportive of all types of gaming on Indian reservations, though in at least one statement he suggested that he might apply a different standard to off-reservation gaming.

But Interior's decisions on other applications before and during Secretary Babbitt's tenure do not appear to be consistent with this policy of not imposing casinos on objecting communities. For example, in 1992, Secretary Lujan approved the application of the Siletz Indians of Oregon, notwithstanding local community opposition.[402] Likewise, in May 1995, the Department announced that it would take land into trust for the Mashantucket Pequots adjacent to their Foxwoods casino to be used, in part, as a parking lot. That application was approved despite substantial local opposition.[403] More recently, in August 1997, the Department approved an

[402]Documents produced by DOI indicate that there was local Indian and non-Indian community opposition to the Siletz application. Nonetheless, the Department concluded that the Indian opposition was factually inaccurate as to a claim that the site was another tribe's aboriginal land and without factual basis as to fear of competition with an existing bingo enterprise. The Department further concluded that the non-Indian local opposition, based on claims of inadequate roads and increasing crime levels, lacked factual basis and reflected moral opposition to gaming which was an insufficient basis for detriment under Section 20(b)(1)(A). Despite this analysis, the Governor vetoed the application. At least one DOI lawyer who worked on that application said that the lesson learned in the Siletz case was that if the state politicians are not supportive, it is fruitless for DOI to try to push the application through.

[403]The Department did not treat the Pequot application as an off-reservation gaming acquisition, under the provision of Section 20(b)(1)(A) that requires a finding of "no detriment" and "best interest of the tribe," even though the Checklist then in force specifically identified an

(continued...)

application by the Kalispel Tribe of Indians of Washington to conduct gaming on off-reservation land already held in trust for other purposes. In the Kalispel case, DOI appears to have followed the policy of requiring the support of state and local communities, but refused to engage in a presumption of economic harm to nearby tribal casino operators, as it did with respect to the St. Croix Chippewa in the Hudson denial.[404]

[403](...continued)
acquisition of land for a casino parking lot as a use for which the two-part Secretarial determination was required. According to some witnesses, including Babbitt, the land to be acquired was considered contiguous to the existing Pequot reservation, which would fit it under a different exception of IGRA and did not require the two-part determination. Regardless of whether the application was treated as one governed by Section 465 and its Part 151 regulation or both Section 465 and Section 20(b)(1)(A), witnesses agreed that local opposition was relevant even to non-gaming acquisitions (via the application of the Part 151 regulations). Moreover, the Hudson decision letter itself provides that each of the factors on which the denial under Section 20(b)(1)(A) is based, including local opposition, is an appropriate basis for denial under Section 465 of IRA, which applies to all acquisitions. Accordingly, DOI's effective dismissal of community opposition in May 1995 in the Pequot acquisition appears inconsistent with the July 1995 Hudson decision, where great weight was given to community opposition.

[404]As cited in Babbitt's letter seeking the Washington Governor's concurrence, the Department was required to make the two-part determination under Section 20(b)(1)(A) - the same provision of IGRA applicable to the Hudson application. DOI accepted the Area Office's December 1996 approval recommendation where the consultation record established support or non-opposition by the local communities and strong opposition by the tribal casino operator nearest the proposed site. (Some of the local community support appeared to dissipate, but apparently not until after DOI sought the Governor's concurrence.) The Area Office consulted nearby tribes within 100 miles and state and local officials within 30 miles of the site. One of the tribes consulted said it would not be affected, one did not respond and the Spokane Tribe, with three casinos all within 58 miles of the City of Spokane, strongly objected to the loss of business it would suffer. DOI concluded that the Spokane tribal opposition did not amount to "detriment" to the tribe under Section 20 because the Spokane Tribe operated casinos with slot machine gaming, whereas the applicants proposed to operate only table games and bingo. Thus, they would not be direct competitors. The fact that the Kalispel casino would be only five miles from the City of Spokane - from which all Washington casinos derived most of their patrons - was not deemed material because customers would not have to pass the Kalispel's casino on public roads to two of the Spokane Tribe's casinos. DOI's report of its approval provided:

(continued...)

In making its decision on the Hudson matter, the Department reversed an area office decision recommending approval. Such a practice is not unprecedented, although it appears that before Skibine became IGMS director, applications were often returned to Area Offices by BIA, rather than denied by letter directly to the applicants, as was done with the Hudson application. Information provided by DOI indicates there have been several instances where IGMS returned off-reservation gaming applications to Area Offices after the Area Office recommended approval, effectively rejecting the recommendation as having an insufficient basis. Three of these reversals, governed by the same statutory provisions as the Hudson application, took place before the Hudson decision was announced, one during Secretary Lujan's tenure and two during Secretary Babbitt's term.

During Secretary Lujan's tenure, in January 1992, the BIA in Washington rejected an area office recommendation dated Sept. 1,1991, to take land into trust for gaming under Section 465

[404](...continued)

> There is no reliable model for predicting competitive interactions. Slot machines have greater customer appeal than table games. The existence of table games in Airway Heights should have little impact on the Spokane slot revenues at its casinos. It is possible that the new casino will stimulate gambling interest in Spokane consumers, increasing slot machine business at the Spokane Tribe's casinos.... Distance is only one factor in customers' complex gaming decisions, and may not be the decisive factor.

Findings of Fact attached to Letter from Bruce Babbitt to Gary Locke, Aug. 19,1997. At the same time, DOI noted that if the Kalispel were allowed to operate slot machines due to possible changes in state law, "[t]here is no way to predict the outcome of competition, but intense competition can be expected." *Id.* Nevertheless, the application was approved. No rationale for the approval was provided other than the report of compliance with IGRA, a common practice for approval letters. No effort appears to have been made to distinguish this decision from the Hudson application. As a point of comparison to the Hudson situation, the Kalispel were seeking to operate approximately 25 miles closer to their reservation (about 60 miles away) than the closest of the Hudson applicant tribes (about 85 miles away).

and Section 20 for the Santee Sioux Tribe of Nebraska. The Santee Sioux wanted to acquire land for gaming in Iowa. In returning the application, the BIA noted that the Iowa governor opposed it, and that it would put a Nebraska tribe in direct competition with Iowa tribes who opposed the application.[405]

Early in Secretary Babbitt's tenure, in April 1993, the IGMS returned an Area Office's February 1993 recommendation to take land into trust under Section 465 and Section 20 for the Wyandotte Tribe of Oklahoma, approximately 150 miles from their reservation. IGMS said in rejecting the recommendation that there was insufficient evidence of consultation of state and local officials. The application was not resubmitted.

In January 1994, the IGMS returned to the Area Office its positive recommendation of Aug. 9, 1993, regarding the application of the Sault Ste. Marie Chippewa to take land into trust approximately 330 miles from its reservation. IGMS criticized the area office's "best interests" analysis under Section 20. The rejection memo also noted that the other six tribes in Michigan opposed the proposal. In mid-August 1994, after IGMS's review of evidence of new agreements between the tribe and its non-Indian partner, and evidence of support or neutrality by the other Michigan Indian tribes, the IGMS decided to take the land into trust for gaming. The Governor would not concur in DOI's finding, however, and the land was not taken into trust.

In addition, in September 1995 the IGMS returned the application of the Keweenaw Bay Indian community in Michigan to take land into trust and conduct gaming under Section 465 and

[405]The Santee Sioux assigned their rights to the property to the Omaha tribe of Nebraska and resubmitted the application. The Area Office again recommended approval, noting the support of the nearby town and county. The application was pending at IGMS for five months before being withdrawn by the tribe.

Section 20. The BIA Area Director had recommended approval some nine months earlier. In rejecting the Area Office recommendation, the IGMS cited a lack of sufficient evidence of compliance with NEPA, and a need to evaluate the local community support or opposition. Further work on the application was suspended due to the pendency of litigation between the tribe and DOI.[406]

### 8. Secretary Babbitt's Involvement in Consideration of the Hudson Application

#### a. Babbitt's Participation in Indian Gaming Matters Generally

Secretary Babbitt testified that prior to July 14, 1995, he generally understood the process for considering off-reservation acquisitions for gaming and the applicable statutes, although he had little involvement in any land into trust acquisitions. Leshy, Collier and Duffy all testified that Babbitt generally avoided involvement in Indian gaming issues. Babbitt said when he became Interior Secretary, he decided that, if there was going to be gaming, "Indians should be at the head of the line, not the end where Indians always are regarding economic opportunities."[407] However, Babbitt stated his view has been "[o]ff-reservation gaming was a dicey deal because it heads straight into conflict."[408] Babbitt related his experience with governors of certain western states in a meeting in 1993 in which the governors were saying that no gaming, even on reservations, should be allowed except in accordance with state law. Babbitt said he recognized from this experience that there was a political conflict on Indian gaming. He said he knew then

[406]Skibine said that in early 1999, he also returned to the Area Office a favorable recommendation involving the Mohawk Tribe of New York.

[407]OIC Interview of Bruce Babbitt, June 21, 1999, at 9 (hereinafter "OIC Babbitt Int.").

[408]*Id.*

that he could defend and sell gaming on reservations very easily as part of Indian sovereignty. He said he had vigorously defended on-reservation gaming both as Governor and Secretary; however, off-reservation gaming is different. He said the Department must be very careful about approving off-reservation casinos if local community conflicts cannot be resolved.

He conceded that there had not been a public articulation of this position prior to the Hudson case. He said there were not a lot of these applications. He was unaware of any time when the Department had to take a policy position about off-reservation gaming prior to Hudson. He said applications were handled on a case-by-case basis.

Babbitt said he was aware of an application to DOI by the Mashantucket Pequot tribe to take land into trust for use as a parking lot for the tribe's casino, which had been established prior to his arrival as Secretary. Babbitt said he probably first became aware of the parking lot issue through a phone call from Sen. Dodd. It is also possible that he got a call from Sen. Lieberman. Both calls would have been placed to him personally. He did not recall when Dodd called, but he said that the issue was ongoing and "heated enough for a United States Senator to become involved."[409] He said he does not recall when the Department decided to treat the application as a non-gaming land acquisition. Babbitt denied any recollection of being contacted by other public officials on this matter. He said he was aware there was a big letter-writing campaign by the local officials, but he neither saw the letters nor met with any local officials.

Babbitt said he discussed the Pequot issue with President Clinton, but only months after Interior made its May 1995 decision in that matter. He did not recall when the conversation

[409]OIC Babbitt Int. at 2.

occurred, but he knew he had written a memo reflecting the conversation.[410] Babbitt did not recall any other input or contact from the White House on this issue. He has no recollection of any contact from any Democratic campaign organizations, to either himself or his staff, either before or after the decision.

Babbitt said he had no direct contact with lobbyists on the Pequot issue and he had no information as to whether anyone on his staff was contacted.[411] He said he had met Chris McNeil, a Pequot lobbyist, once or twice at meetings, either on the reform of IGRA or for the National Congress of American Indians. He was unsure whether McNeil is a member of the tribe or its lobbyist.

Babbitt said he is now aware that the Pequots have made campaign contributions on the federal and state level and to the DNC. At the time their application was pending at Interior, Babbitt said he suspects the Pequots were in the press a lot; he believed that the tribe had been politically active in the 1992 campaign, but he had no specific recollection of seeing any items in

[410]Babbitt identified this memo as one dated Feb. 23, 1996. The memo indicated Pequot Chairman Hay ward "got what the Tribe wanted - acreage taken into trust for casino expansion. Because of intense local controversy, and the concerns of Senators Lieberman and Dodd we structured the transaction so that the parties could have their day in Court in a direct appeal, rather than being forced to seek to TRO on the front end. He [Hayward] has no reason to complain; he should be grateful for our getting a very sticky issue resolved in his favor."

[411]Duffy gave a deposition in civil litigation over DOI's decision in the Pequot matter in which he said Babbitt met several times with Guy Martin, a lawyer who represented parties opposed to the acquisition, and that Babbitt received calls from Sen. Dodd and Sen. Lieberman. Duffy testified that Babbitt had asked Duffy to "monitor" the Pequot trust acquisition, and Duffy understood that instruction resulted from contact between Martin and the Secretary. *State of Conn.* v. *Bruce Babbitt, et al.* Deposition of John Duffy, March 28,1996, at 91-92. He also recalled participating in a conference call with Babbitt, Lieberman, Dodd, the Pequot leaders, Martin, local legislators and community officials to discuss a mediation process in the Pequot dispute, which Babbitt then asked Duffy to oversee. Media reports reflect that this was an extremely controversial issue in Connecticut.

the press.[412] Babbitt stated his current awareness of the tribe's campaign contributions is "about the same:" he knows that the Pequots are "heavy hitters," they have given a "bunch of money" to the American Indian museum and are "sort of a fixture."[413]

Babbitt described two other Indian gaming matters in which he became involved. He said he spoke with Rep. Barney Frank (D-Mass.) by phone about the application of the Wampanoag Tribe of Gay Head, Mass., to conduct off-reservation gaming and he was aware that his senior staff was meeting with White House officials and Rep. Frank about it. He also said he spoke to White House Chief of Staff Leon Panetta, or knew that Collier did, concerning the off-reservation gaming application of the Sault Ste. Marie Tribe of Chippewa Indians in Michigan. On that same matter, he had a conversation with Detroit Congresswoman Barbara Rose Collins (D-Mich.) at the request of the White House. *See infra* at 362-63.

### b. Babbitt's Role in the Hudson Decision-Making Process and Early Contacts with Interested Parties

Babbitt said he had little involvement in the consideration of the Hudson application specifically, and Interior Department witnesses agreed. With regard to the Hudson application, none of the Interior witnesses recalls Babbitt's attending a deliberative meeting, making any statements, or taking any actions prior to Eckstein's request for a meeting early the week of July 14. Both Collier and Duffy said that they probably mentioned the status of the application to Babbitt on one or more occasions as one of a list of items for discussion, and perhaps informed him they expected it would be denied. Babbitt said Duffy was the person on his staff who

[412]National newspaper reports of Pequot political contributions appeared repeatedly from December 1992 through late 1994, and beyond. *See* n. 213, *supra.*

[413]OIC Babbitt Int. at 3.

worked on gaming issues with the BIA and the Assistant Secretary for Indian Affairs. The Solicitor also was always involved in policy issues. Babbitt said Duffy would typically bring matters to his attention in a very unstructured way. He said he has no specific recollection of any conversations with Duffy or Collier about the Hudson application prior to July 14, 1995, but allows that he must have discussed it with them in a very casual way.

Beyond Hilda Manuel's briefing of Babbitt in relation to the April 8, 1995, tribal dialogue in Wisconsin, no other DOI Interior personnel testified to discussing the application with him. Skibine testified that he had never met or spoken to Babbitt at all, and had no direct knowledge of the Secretary's views on Indian gaming as of July 14, 1995. Babbitt said he never discussed the Hudson matter with Assistant Secretary Deer, and he only learned of her recusal during later investigations of the denial decision.

No Interior Department staff member recalls communicating to Babbitt the fact that DOI had received letters from congressmen, senators and other public officials concerning the Hudson application, nor that they had fielded telephone calls from members of Congress. Babbitt has no recollection of reviewing such letters or receiving any such calls, including from Rep. Oberstar. *See supra* at 123. He said he has seen "piles of letters" the Department received on the Hudson matter, but he was not aware of them before July 14.[414] He has no recall of knowing at the time that Duffy attended a meeting about Hudson on Capitol Hill in February 1995.[415] Babbitt said it

[414]DOJ Preliminary Investigation Interview of Bruce Babbitt, Nov. 6, 1997, at 2 (hereinafter "DOJ Prelim. Babbitt Int.").

[415]Duffy testified that he may have told Collier about the meeting, but does not recall telling the Secretary. Babbitt also testified he may have read a briefing memo provided to him in connection with the April 1995 tribal dialogue which described the application, the Feb. 8

(continued...)

would not be unusual for him to be unaware of letters or meetings, even those involving congressmen and senators.

Babbitt testified that he never sees 95 percent of all correspondence addressed to him. He said when he gets directly involved in responding to congressional contacts, it is usually because the issue involves the way the Department does its business (for instance, appropriations matters), or because the person calling is a chairman or a member of one of the committees overseeing Interior. Such involvement in these instances, he said, is an effort to maintain good relations with them.[416] He also said phone calls from congressional leaders are harder to delegate to staff than letters; this is why he was personally involved in phone contacts with senators and congressmen on other Indian gaming matters, though he maintained he was not involved in congressional calls on Hudson.

Babbitt said he knows he traveled to Wisconsin or Minnesota four or five times during the pendency of the Hudson application and may have heard about the Hudson matter then. He recalls being aware it involved a dog track, but does not recall discussing the matter, even though he has seen news articles that quoted him addressing it in Minnesota in late 1994. He also said he had no recollection of contact with citizens or local officials prior to the decision.

[415](... continued)
meeting and the applicants' irritation over the additional comment period.

[416]Babbitt said he was not aware of any rules in effect at Interior prior to July 14,1995, or at the time of this investigation governing how Departmental employees should handle congressional contacts. He also said there were and are no rules governing contacts with lobbyists or members of Indian tribes with matters of interest pending before the Department. Babbitt further stated that he has never had a "bright line policy" or practice for himself as to when or if he will meet with people from outside the Department with business before the Department or whether he will meet with them without having a staff member present. Babbitt G.J. Test., July 7, 1999, at 186.

Nonetheless, on Nov. 7, 1994, Hudson casino activists Nancy Bieraugel and Kenneth Tilsen talked with Secretary Babbitt about the Hudson casino proposal after he spoke at a fund-raiser held in Eau Claire for congressional candidate Harvey Stower. According to Bieraugel and Tilsen, they told Babbitt that they thought the casino proponents were misrepresenting the views of the Hudson community. Bieraugel and Tilsen reported that Secretary Babbitt appeared to have a general knowledge of the casino proposal. He told them that he did not know the details, but that he had read that the Governor opposed the casino, so it was "a moot point."[417]

At the dinner that followed the event, Bieraugel and Tilsen told investigators, they were seated next to the Secretary and conversed with him for about an hour and a half, explaining the history of the dog track and specifics of the community's reaction to the Hudson application. Bieraugel expressed her concern that Assistant Secretary Ada Deer might be biased in favor of the applicants. She also expressed her desire to bring a delegation to meet with Babbitt in Washington. Bieraugel recalled Secretary Babbitt reassuring her about his faith in Deer and his belief that the issue probably was moot because of Gov. Thompson's opposition. He also expressed concern about the potential effect upon the St. Croix waterway of the proposed casino. He discouraged her from bringing a delegation to Washington, and promised that he would give her a chance to come to Washington should the Hudson application appear likely to be approved.

[417]OIC Bieraugel Int. at 6. Gov. Thompson had made a seemingly strong anti-Hudson casino statement during a campaign debate in this time frame. Generally, however, the Governor's statements allowed him some flexibility, as he normally stated only his opposition to any expansion of gambling. Applicant representatives claim that the Governor would not have opposed the project if they had eliminated one of their pre-existing casinos and agreed to build no more. In interviews with OIC investigators, Thompson stated that he understood that a joint application by two or more tribes could result in a net reduction of gambling. In any event, Thompson now states that he would most likely have sought further local reaction through a referendum on the Hudson application if Interior had approved the application.

At the end of the dinner, Babbitt gave Bieraugel an autographed card that read: "to Nancy - Keep up the fight!"

Babbitt testified that he had no specific recollection of these conversations with Bieraugel and Tilsen, but believed that they could have occurred. He said the statements attributed to him sound like the kind of general statements he may have made, but did not reflect any specific knowledge he had about the Hudson proposal. Babbitt also testified that the type of local views and reactions conveyed to him by Bieraugel and Tilsen were not the sort of information he would have relayed back to his staff. He denied any knowledge of follow-up correspondence that Tilsen sent to him after the Eau Claire event.

He recalled that the April 1995 tribal dialogue in Wisconsin was the first time he spoke publicly about the Hudson application, and he thinks that it was also his only contact with tribal members regarding Hudson. It is possible, however, he had some contact with tribal members interested in the Hudson matter at either a meeting of the National Congress of American Indians or an annual budget meeting with the tribes.[418]

Babbitt said he spends "eighty percent of his time on five percent of DOI's business."[419] Babbitt said the job of his chief of staff was to bring to Babbitt's attention only policy questions, matters in which he was directly involved or matters specifically requiring Babbitt's attention.

[418]Babbitt acknowledged he may have been aware of who was seeking meetings with him and something about their positions on Hudson through review of the charts of meeting requests his schedulers prepared in the ordinary course of business. He typically reviewed these in meetings with his chief of staff and schedulers on a weekly basis. These reflect two meeting requests by applicants or their representatives prior to July 14, dated May 5 and June 5, and two requests by tribes opposing the application, the St. Croix Tribal Committee on June 1 and the Oneida Tribe of Wisconsin on June 2.

[419]Babbitt G.J. Test., June 30,1999, at 12.

He gave examples of when he would likely be involved, including situations where the staff disagrees about what policy to follow or the application of a policy in a particular decision, neither of which Babbitt was aware of during the Hudson decision-making process.[420] He specifically denied knowing about any disagreement among the career and political staff about the interpretation of "detriment" in Section 20, and said there was no disagreement that the application should be denied.

Babbitt said he did not know that Chairman Fowler or anyone at the DNC had expressed an interest in the Hudson casino matter prior to the time the decision was made. Babbitt said he barely knew Fowler in July 1995. Prior to the investigation of the Hudson casino application, Babbitt would have recognized Fowler as a familiar face but may not have been able to associate his name. He met Fowler in 1987 or 1988 in connection with Democratic politics. He did not see him again until Fowler was named Chairman of the DNC. While he was DNC Chairman, Babbitt said he would see Fowler infrequently at political functions. He said during the 1995-96 election cycle, he had no discussions about fund-raising with Fowler, nor about anything Fowler wanted from Babbitt or the Department. Babbitt said also that prior to the Hudson decision, he had "zero" direct contacts with Clinton/Gore '96.[421] He added that he expects that some people from those organizations were arranging his campaign schedule, but those people did not contact

[420]Although these matters did not involve internal policy disputes or internal disagreements about the application of policy, Babbitt said he was involved to varying degrees in at least three Indian gaming matters which were pending during roughly the same time period as the Hudson application: the Pequot, Wampanoag and Sault Ste. Marie matters, described below at 360-63.

[421]OIC Babbitt Int. at 13-14.

him directly.[422] Babbitt said that prior to July 14, 1995, he had no knowledge or awareness of fund-raising efforts by the Democratic Party targeting the American Indian community.[423]

Babbitt said he never talked to Ickes or anyone at the White House about the Hudson application. While his relationship on many matters "went right back to the Deputy Chief of Staff,"[424] Ickes, Babbitt said he would have remembered if White House officials had asked him to move something along because that would have been unusual. Babbitt first learned of White House interest in the Hudson application in August 1996 when he read Sibbison's memo that was prepared as an attachment to Babbitt's Aug. 30,1996, letter to Sen. McCain.

In describing his relationship with Ickes, Babbitt said that prior to 1993, he knew of Ickes but had no working relationship with him. Ickes was interested in Interior issues and in the National Park Service. He said Ickes did not involve himself in environmental policy issues; those went to the Council on Environmental Quality, which is the province of Vice President Gore. Rather, Ickes tended to handle things which were in dispute, and Babbitt had personal contact with Ickes on several specific issues. Babbitt said those included water issues in the Western states, the 1995 government shut down including its impact on the Grand Canyon

[422]Babbitt heard about proposed campaign appearances at his DOI staff scheduling meetings. He said he did a lot of campaign stops in 1996, but few fund-raisers. Babbitt said his staff understood he disliked fund-raising.

[423]Babbitt said he thought Kevin Gover had been the New Mexico Chairman of the Clinton/Gore campaign in 1992. He was not specifically aware that Gover was engaged in fund-raising at the time, although he assumes that such a position would involve fund-raising. Babbitt said he believes he started to recruit Gover for the position of Assistant Secretary for Indian Affairs in 1996, but he is not sure what Gover was doing at the time. Babbitt said he is sure he never discussed fund-raising with Gover and was unaware of an organization called Native Americans for Clinton/Gore.

[424]DOJ Prelim. Babbitt Int. at 3.

National Park, fire management and the transition in Indian Affairs when Assistant Secretary Deer was leaving DOI and Loretta Avent was leaving the White House.

Babbitt said he interacted with Ickes because Ickes was the Deputy Chief of Staff at the White House who was in the line of his responsibilities, especially on resource management issues, although Babbitt said there was never an Indian-related resource issue that Babbitt discussed with Ickes. He described Ickes as being entitled to intervene anywhere on the domestic side of the agenda and having regular involvement in managing crises. Babbitt said he was unfamiliar with the members of Ickes's staff.

As to Ickes's role in fund-raising, Babbitt said it never crossed his mind. "[M]y knowledge was zero."[425] Babbitt said he is "not in the fimdraising business, never [has] been and [is] not even close to it."[426] He said he came to Washington to run the Interior Department. He said he was not aware in the winter/spring of 1995 of whether Ickes was involved, on behalf of the White House, in coordinating with the DNC to raise funds on a large scale. He was not aware at that time of whether the DNC and the White House were eager to raise a substantial amount of money as quickly as possible. He said he was not aware at that time whether Ickes was involved in raising money for the presidential campaign, but he allowed that he may have read it in passing if it were reported in the newspapers.[427]

[425]OIC Babbitt Int. at 7.

[426]*Id.* at 1.

[427]Babbitt acknowledged that he did participate in some political and campaign events in his role as a Cabinet officer, but he stressed his desire to avoid them. For instance, records show that Babbitt was scheduled to attend a White House political meeting relating to the 1996 presidential re-election campaign on May 15,1995, followed by a DNC dinner for Cabinet

(continued...)

Babbitt did not know of Collier's March 15 meeting with Patrick O'Connor, although Babbitt knew O'Connor from their years in politics.[428] Babbitt said he had no recollection of having any contact with lobbyists regarding the Hudson application, other than with Paul Eckstein.

[427](… continued)
members at the Hay Adams Hotel. Babbitt recalls attending this DNC dinner, but not the White House political meeting - though Babbitt's counsel told the press in February 1998 that Babbitt was "quite sure that he had no conversation with Ickes or anyone else about the casino issue at that meeting." *Babbitt Attended Political Session Days Before the Initial Decision on Casino,* the New York Times, Feb. 21, 1998, at A8. That article also reported the attendees at the May 15 White House meeting as Babbitt, Collier, Sosnik and Democratic pollster Mark Perm.

In any event, even if Babbitt received on May 15 no information on Ickes's role in the 1996 campaign and the fund-raising needed to support the campaign, there was ample opportunity for Babbitt to gather such knowledge from major media sources prior to July 14. *See, e.g., Clinton, Using Old Hands and New, Slowly Creates a Re-election Team,* the New York Times, Feb. 27,1995, at B6 (describing Ickes as "the President's political major-domo," and head of the day-to-day campaign effort); *With Drive to Generate Funds, Clinton Reelection Team Prepares to Set Up Shop,* The Washington Post, March 5, 1995, at A6 (reporting that Ickes is overseeing early effort, much of which "is driven by money," and that "fund-raising will drive the outside-the-White House reelection efforts, at least for several months"); *Clinton in '96: The Check Request Is in the Mail; A List ofWould-Be GOP Opponents Grows, President Prepares to Open Reelection Office,* The Washington Post, April 14,1995, at A9 (citing party sources who say Ickes has been "designated to run the campaign from the White House"); *The Traveling Salesman; Clinton Hits Campaign Trail Although He Claims It's Too Early,* The Washington Post, June 11, 1995, at A8 (reporting that Ickes is "overseeing the reelection effort at the White House"); *Bill Clinton's Son of a Gun; Deputy Chief of Staff Harold Ickes Rides Herd On Some Ornery Critters. Might Say He's One Himself,* The Washington Post, June 22, 1995, at CI (noting that "Ickes is responsible for organizing the campaign," and quoting Ickes as saying: "The main focus right now is the fund-raising operation…").

[428]Babbitt said he knew O'Connor on a social basis. It is possible they met during the Carter Administration. Babbitt stated that he does not know whether O'Connor raised money for him during Babbitt's 1988 presidential bid, but he probably did. Babbitt recalled meeting with O'Connor at Interior in 1993 in connection with a matter involving Soka University in California. He was not aware that O'Connor had represented anyone in connection with the Hudson matter until the investigation of the decision.

### c. Secretary Babbitt's Contact with Paul Eckstein

Bruce Babbitt and Paul Eckstein met in 1962, when they both were first-year law students at Harvard University. They were introduced by a mutual friend because they both came to Harvard from Arizona. Though not close friends during school, upon their graduation in 1965 they took a bar review course together and then drove to the Tucson exam site together. Eckstein then joined the Phoenix law firm of Brown, Valassis & Bain as an associate, while Babbitt went to Texas for his work with the Office of Economic Opportunity. *See* Section H.B.2., *supra.*

In 1967, Babbitt returned to Phoenix and joined the Brown, Valassis & Bain firm as an associate, becoming only the eighth lawyer in the firm at that time. He and Eckstein remained in practice together at that firm over the next seven years, both eventually becoming partners. Babbitt left the firm in 1974, upon his election as Attorney General of Arizona, a campaign in which Eckstein supported him.

Babbitt became Governor of Arizona in March 1978 by succession when the incumbent died in office. Over the next few months, Eckstein provided political advice and support to Babbitt, becoming known in the local media as a member of Babbitt's "kitchen cabinet."[429] Eckstein also played a supportive role in Babbitt's successful campaign for election to his new office in the fall of 1978, and in 1982 Eckstein served as Chairman of Babbitt's re-election campaign. As Campaign Chairman, Eckstein occasionally appeared and spoke on Babbitt's behalf, and played an active role in fund-raising for the campaign.

When Babbitt ran for President in the 1988 primaries, Eckstein was unable to play an active role because he was preoccupied as co-lead prosecutor in the Arizona Senate impeachment

[429]Eckstein G.J. Test, at 13.

trial of Gov. Evan Mecham.[430] Eckstein also served as counsel for Babbitt on one occasion when, as Attorney General, Babbitt was sued for defamation and turned to Brown, Valassis & Bain for representation. On other occasions, Babbitt referred potential clients to Eckstein.

The two men considered each other good friends, stemming mostly from their law practice together and their common activity in Arizona Democratic politics. Over the years, they socialized occasionally together with their spouses, and saw each other regularly at Democratic fund-raisers, several of which Eckstein hosted or managed for various Arizona Democrats. When Babbitt came to Washington, D.C, Eckstein and he remained in occasional contact, particularly when Babbitt was under serious consideration in 1993 and again in 1994 for appointment to the U.S. Supreme Court. During that time, sensational, untrue news stories about Babbitt were jeopardizing his prospects, and Eckstein attempted to intercede with the responsible journalists to get them to retract or curtail their stories. Ultimately, an investigation by the United States Attorney in Arizona cleared Babbitt of the cloud generated by these reports. Eventually, White House discussion of Babbitt as a high court nominee reached the point where Babbitt turned to Eckstein for assistance in drafting an acceptance speech, in case what seemed like an imminent offer should be made.

Babbitt testified to his high opinion of Eckstein, calling him "an honest guy and a good man," whom Babbitt had not known to lie and whom Babbitt knew to be well-regarded in the Phoenix community.[431] He confirmed that, as of early 1995, the two men were on good terms,

[430]The trial resulted in the Republican Governor's conviction on the articles of impeachment and ouster from office.

[431]Babbitt G.J. Test, July 7,1999, at 58.

with no falling-out in their relationship. In the fall of 1994 Eckstein, who was a member of Pomona College's Board of Trustees, nominated Babbitt to receive an honorary degree at the College's 1995 commencement. In February 1995, Eckstein called and wrote Babbitt to confirm that the Secretary had received the offer letter from the College President and would accept the honor at the planned May 14 ceremony.

It was against this background that the applicants contacted Eckstein and sought his assistance in the Hudson matter. Mark Goff instigated this effort, apparently on his own initiative, in the fall of 1994. At the time, the applicants were awaiting the outcome of the Area Office review, and Goff felt it might be wise to explore engagement of a lobbyist who would be able to navigate the highest offices of the Interior Department. Goff cannot recall who referred him to Eckstein.

Eckstein had engaged in both state and federal lobbying over the years, but that form of practice was not his specialty, and he did not promote it as such. He had represented Indian nations in various matters, including land-in-trust applications at the Interior Department and one Indian gaming matter, but he had never handled an off-reservation casino application under IGRA. His legal expertise and distinction was in the area of litigation, and particularly First Amendment issues. On Nov. 14,1994, in his first meeting with Goff, Eckstein asked why the applicants felt that they needed him, and expressed something between reluctance and caution, due to his familiarity with Bruce Babbitt. Eckstein suggested that his involvement might actually

be more harmful than helpful to the application because Babbitt might "bend over backwards because [Eckstein was] involved and look at it more critically."[432]

Goff left that meeting with Eckstein on an open-ended note, saying that he might get back in touch with Eckstein at some point if the applicants wanted to pursue his assistance. Eckstein expected never to hear from Goff again. As soon as he learned that the Minneapolis Area Office approved the application on Nov. 15,1994, and forwarded it to Washington, Goff likewise felt the applicants would not need Eckstein's services.

As a result, Eckstein was surprised when he received a phone call and a package of documents on the matter from Goff in early April 1995. Goff explained the recent history of the application, and the applicants' alarm when they learned that the comment period had been extended by Interior for unexplained reasons. Having operated without a Washington representative until this point in time, Goff told Eckstein the applicants now wanted someone in contact with DOI who could apprise them of what was happening.

Eckstein had never before lobbied Babbitt during the Secretary's tenure at Interior, though he had represented at least two clients in matters before him while Babbitt was Attorney General and Governor in Arizona. Eckstein discussed with Goff how he might help, including the possibility of contacting Interior Solicitor John Leshy, whom Eckstein also knew from Arizona; Leshy had taught at Arizona State University's College of Law.[433] Ultimately, Eckstein

[432]Eckstein G.J. Test, at 21-22. Eckstein testified that he expected Babbitt might be uncomfortable with Eckstein representing a client in a formal proceeding before DOI, but said that his involvement for this client should not be surprising because Babbitt was familiar with Eckstein's background in Indian law matters.

[433]Eckstein had represented a client briefly in a matter dealing with Leshy's office at DOI (continued...)

agreed to enter the matter at least for purposes of contacting the Secretary to ascertain the status of the application and the process.[434]

Eckstein first spoke with Babbitt regarding the Hudson matter by phone on April 6, 1995.[435] Eckstein recalls that he explained he had been retained by the applicant group and they were concerned by the reopening of the comment period. He also asked specifically that, if the Department decided that the application was going to be denied or found a problem with it, Eckstein be given an opportunity to bring the applicant tribal leaders in to see the Secretary. Though he cannot recall all of the details of the conversation, Eckstein recalls that the Secretary readily agreed to that request. He also recalls getting the distinct impression that Babbitt was familiar with this matter already. Eckstein based that conclusion on the fact that Babbitt expressed general recognition of the Hudson casino application when Eckstein referred to it, as well as the fact that Babbitt specifically asked Eckstein what position the Governor of Wisconsin, Tommy Thompson, was taking on this issue. Eckstein took this remark as recognition that the Governor would have a veto opportunity after Interior exercised its statutory review and

[433](...continued)
in the summer of 1994.

[434]By early April, Eckstein understood that the applicant group was composed of three Indian tribes, who were partnered with the owners of the Hudson dog track, the latter being represented by Fred Havenick. Eckstein said he was formally retained by Goff, whom he understood to be coordinating the effort for the applicants. Eckstein's compensation was to be based on actual hours accrued, with no contingency of any kind.

[435]Eckstein determined the specific date by reference to his time billing records and corroborating telephone records. The latter indicate that the call lasted 15.5 minutes.

decisional obligations, as well as possibly awareness of the varying media reports about what Gov. Thompson would do in this matter.[436]

Babbitt cannot recall any details of his early contact with Eckstein, but disputes this account only to the extent that Babbitt recalls he committed merely that the DOI decision-makers would meet with Eckstein's clients, not that Babbitt himself would meet with them. This divergence is curious, in that Eckstein maintains that Babbitt never told him that Babbitt had delegated his statutory decision-making responsibility in the Hudson case to a lesser official, or that Babbitt would not be participating in the decision in any manner. A confirming letter that Eckstein sent to Babbitt's Director of Scheduling on May 5,1995, may reflect the nub of this discrepancy:

> Several weeks ago I spoke with Secretary Babbitt and advised him that I and several other representatives of the [applicant] Tribes wanted to meet with him to present the case in support of the application .... The Secretary said that we would be given an opportunity to be heard. With the extended comment period on the Tribes' application having expired ... the Tribes believe the application is now ready to be considered by the Secretary and would like to have a meeting with him at the earliest possible date.

The letter reflects that Eckstein made a specific request and received a somewhat round response from the Secretary, which Eckstein took to be assent. Nonetheless, Eckstein's letter made clear

[436]It is possible that Babbitt had recently been briefed on the Hudson matter when he received the April 6 phone call. His travel itinerary reflects that on April 6 he was due to travel to California, in advance of an April 8 visit to Wisconsin for the tribal dialogue, described above in Section H.D.5., where he was quite predictably confronted with questions about the Hudson application. Babbitt cannot recall having received a briefing on that event as of April 6. Babbitt also may have been highly attuned to issues of local opposition to Indian land-in-trust applications because the Pequots' land acquisition request was then a matter of controversy. In fact, on that same date, April 6, Babbitt and Ickes exchanged a series of phone calls, likely on the Pequot matter.

that he was proceeding on the understanding that his clients would meet with Babbitt, not a delegate.[437]

After the initial phone discussion, Eckstein and Babbitt did not speak again concerning the Hudson matter until May 14, 1995. Eckstein did little on the case during the balance of April, as he, Goff and Havenick had determined that they would review the status of the matter in early May, after the April 30 deadline for additional comments. After that date passed, Eckstein's contact was with staff in Babbitt's office concerning the general scheduling request. At the same time, other applicant representatives were engaging the DOI staff, principally through Duffy and Skibine, in discussions that led to the scheduling of the May 17 meetings in Washington.

It was with these developments in mind that Eckstein mentioned the Hudson matter to Babbitt in passing during the Pomona College commencement events on May 14, 1995. The two men were together for much of that day on the Claremont, Calif, campus, but Eckstein did not engage Babbitt in any substantive discussion of the matter. Rather, during a quiet moment when the two were alone, Eckstein recalls mentioning that he would be at Interior that week to see Duffy on the Hudson application. According to Eckstein, Babbitt responded with general approval, and suggested that Eckstein stop in and see Babbitt during the visit. Babbitt recalls being with Eckstein at the Pomona ceremony, but does not recall this exchange.

""Eventually, Eckstein recalls that he received word from the Secretary's staff that Babbitt would see Eckstein but not his clients. Eckstein dates this communication sometime in May or June, after his May 17 meetings with John Duffy and the Secretary.

### d. Eckstein and Babbitt's May 17 Meeting

That Wednesday, May 17, after Eckstein, Havenick and Goff had completed their meetings with their clients and Duffy and Skibine, *see* Section II.F.3., *supra*, Eckstein called Babbitt's office and arranged to meet with the Secretary. Eckstein then visited Babbitt in the Secretary's main office at Interior. Eckstein came to the meeting prepared for a substantive discussion of the Hudson matter and, after some social pleasantries, he provided the Secretary a briefing book he had prepared on the matter, and set out on a review of the application's background and status.[438] Eckstein believes this was the longest discussion between the two men about Hudson.

As he had during their initial phone conversation, Secretary Babbitt asked Eckstein about Gov. Thompson's position on the application. Prepared for that issue this time, Eckstein pointed out to him a news clipping about the Governor's statements which showed that Thompson had taken various positions on the issue. Eckstein also stressed that the compacts already in place between the Wisconsin tribes and the state of Wisconsin specifically anticipated and permitted certain levels of off-reservation gaming, which the applicant tribes would not exceed. For his part, Babbitt pointed to the high level of opposition to the application from members of Congress, neighboring towns, and the Minnesota and Wisconsin tribes, and said that trying to put this casino in Hudson was like an out-of-state tribe trying to put a casino in downtown Phoenix. Eckstein replied by noting that the Hudson site was within the aboriginal area of the applicant

[438]Eckstein had prepared an identical notebook for Duffy, and provided it to Duffy during their meeting earlier on May 17. Although Eckstein recalls that he left copies behind with both Duffy and Babbitt, the DOI administrative record of the Hudson decision does not contain either binder of materials, and DOI did not produce them in response to OIC subpoenas.

tribes prior to the advent of their forced relocation to remote reservations, and that the proposed facility was already being used for a gaming purpose, so the impact on the local community would be relatively slight.

During the course of this discussion, Eckstein pointed to the Pequot and Sault Ste. Marie applications as examples of favorable DOI treatment to off-reservation requests. Babbitt expressed familiarity with both applications, distinguishing them from the Hudson case on their facts. He noted that the Pequot land was adjacent to the reservation, while the Hudson site was remote from all three tribes. In the Sault Ste. Marie case, Babbitt stressed the presence of local support for the proposed casino. Eckstein replied that the Pequot land may have been adjacent, but the local opposition was intense, while the local support in the Sault Ste. Marie case (like the local opposition in the Hudson case) had become predominant only over time. Eckstein also pointed out the favorable local resolutions, and the services contract with the local authorities that addressed some of the area impact. Finally, Eckstein recalls Babbitt's comment to the effect that perhaps there should be a higher standard of review in the case of off-reservation applications than on-reservation submissions, so as to avoid undermining IGRA through approval of strongly-opposed applications.

All of the foregoing information about this meeting derives from Eckstein's recollection, sometimes refreshed by reference to his case file and materials. Some elements of Eckstein's recollection are corroborated by contemporaneous statements he made to his colleagues in the applicants' group. By contrast, like most details of their communications on Hudson, Babbitt recalls very little of his dealings with Eckstein on May 17. What he does recall is that Eckstein

spoke with him "several" times by phone and "once or twice"[439] at the Department between the time of Eckstein's entry to the case and the July 14 meeting, and that Eckstein raised the request for a meeting between his clients and Babbitt during the May 17 discussion, which Babbitt recalls ended with Babbitt's providing Eckstein a car ride while Babbitt was en route to his health club - a detail that generally matches Eckstein's recollection.

Eckstein went away from his May 17 meeting with Babbitt with the strong impression that the Secretary considered the lack of identifiable political support *(i.e.,* from members of Congress and local officials) to be a major hurdle. Though he and Babbitt both believe it is possible they saw each other during Eckstein's next visit to the Department on May 31, the two did not have another substantive discussion of the application until July 14. During that interval, the focus for Eckstein and his colleagues was on trying to rally political support from Congress for the application, while also keeping communication open with the IGMS staff.

**e. Additional Approaches to Babbitt by Applicant Representatives**

On June 8, 1995, at about 5:20 p.m., Interior Department records indicate Eckstein called the Secretary, saying that he needed "desperately" to meet with Babbitt regarding the Hudson application. According to the message, Eckstein hoped that Babbitt would meet with him in Washington on June 23, and Eckstein planned to bring two or three other people. Stacey Hoffman, Deputy Director of Scheduling, sought guidance from Heather Sibbison on whether the

[439] Babbitt G.J. Test., July 7, 1999, at 66-67.

Secretary should agree to this meeting with Eckstein.[440] By handwritten note, Sibbison advised Hoffman to avoid the meeting. In a June 16 e-mail, Sibbison elaborated on her warning:

> We understand that the Secretary would like to meet with Mr. Paul Eckstein regarding the St. Croix Meadows Greyhound Racing Track in Hudson, Wisconsin. It is my understanding that Mr. Eckstein represents persons opposed to the acquisition of the dogtrack [sic] for Indian gaming purposes.[441]
>
> Just as a head's [sic] up, please also be aware that, if memory serves, we declined a request for a meeting from former Congressman Jim Moody (a request forwarded by Senator Daschle), who represents persons in favor of acquisition of the dogtrack [sic]. One of the reasons given was that if the Secretary met with one side, he would have to also meet with the other side, and his schedule did not permit multiple meetings.

Handwritten comments on the e-mail - which Hoffman identified as Daniel-Davis's handwriting - indicate a "moratorium" on discussion of this issue "with anyone," and that Babbitt would see Eckstein personally, but not relating to his client's interest in the Hudson application. A notation on another document also indicates that Babbitt would see Eckstein but not with his client, and that Sibbison would do a memorandum for the Secretary.[442]

During this timeframe, Babbitt also was contacted on behalf of the applicants by Jerome Berlin, a long-time Democratic fund-raiser from the Miami area. In late June 1995, Havenick

[440] At that time, the Scheduling Office in the Office of the Secretary had responsibility for advising the Secretary which of the many invitations and requests he received for meetings and other appearances he should accept. The recommendations of the scheduling office were reviewed with the Secretary in a weekly scheduling meeting attended by the Secretary, his Chief of Staff, his personal assistant, and staff from the Scheduling Office. According to Hoffman and Laura Daniel Davis - then the Director of the Scheduling Office - the Scheduling Office's recommendations frequently were based on consultation with DOI staff believed to be knowledgeable about the requestor or the issues related to the request.

[441] Of course, this understanding was incorrect. Eckstein represented the applicant group.

[442] No such memorandum was produced by DOI, and Sibbison did not recall drafting any such memo.

had asked his friend, Berlin, if he would raise the status of the Hudson matter with Babbitt at a Washington political event Berlin was planning to attend. Havenick and Eckstein then spoke with Berlin after the event - which most likely was a June 19 event relating to the Clinton/Gore '96 National Finance Board meeting.

Eckstein had an "absolutely clear" recollection of a three-way call with Havenick and Berlin in late June or early July in which Berlin spoke of seeing Babbitt at a function at the White House and telling Babbitt that his friend Fred Havenick was a really good guy and had an interest in the Hudson project, and wanted to know its status.[443] Eckstein recalled distinctly that Berlin then told him that "Babbitt had said something like you can't get any more blood out of the stone or out of this stone, or a stone, and there was discussion about a lot of people had contacted him [the Secretary]."[444] Havenick recalled a similar account from Berlin, with the Secretary reportedly saying, "What, are you trying to get blood out of a stone?"[445] Havenick also understood the comment to be a lament by Babbitt about the number of times he had been approached on the same question. In sharp contrast to these accounts, Berlin testified that he merely informed the Secretary that a friend was involved with the Hudson casino application, and had been waiting for a decision for quite a while; he then asked if Babbitt knew how much longer it would be. He recalled that Babbitt simply indicated that Interior was "working on it,

[443]Eckstein G.J. Test, at 87.

[444]M at 87-88.

[445]OIC Interview of Fred Havenick, Aug. 27,1998, at 7.

but it would be a while."[446] Babbitt had no recollection of discussing the Hudson matter at any time with Berlin, and testified that "blood from a stone" is "not my kind of phrase," so he said it was plausible that he told Berlin it would take some time to resolve the application, but "a lot less plausible" that he made the other remarks attributed to him.[447]

### H. Events of July 14,1995

#### 1. Eckstein Arranges a Meeting with Duffy

In the weeks leading up to July 14, Eckstein was in communication with IGMS staff and his Four Feathers colleagues by telephone. By the end of June, the news the Four Feathers representatives were obtaining about the status of the application alarmed him enough that he thought it best to reach out to Secretary Babbitt again regarding the request for a meeting between the Secretary and the applicant tribal leaders.[448] Eckstein attempted to reach Babbitt by phone on June 26 and then again on July 5, leaving a message the second time asking if Babbitt had any time for a phone conversation about the Hudson application. Eckstein and Moody also left a phone message for Duffy on July 7. It appears that Babbitt and Eckstein then traded calls without speaking until July 11.

On Tuesday, July 11, Eckstein reached Babbitt by phone and said that it had been more than six weeks since the Duffy meeting and the applicants had not seen a report but they were

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^Grand Jury Testimony of Jerome Berlin, June 18,1999, at 33.

[447]Babbitt G.J. Test., July 7, 1999, at 48. Berlin said he has met Babbitt from time to time at political events over the years, including an event at Berlin's home when Babbitt was qualified for matching funds during his aborted 1988 run for president. Babbitt said he knew Berlin as someone he would see at Democratic Party functions working the room.

[448]The applicant group was hearing mostly negative rumors indicating that the application would be denied.

hearing rumors that the decision was imminent. Eckstein says that he reminded Babbitt that the Secretary had agreed at the outset of Eckstein's appearance in the matter that Eckstein would get an opportunity to bring his clients to see the Secretary before any adverse action, and the Secretary acknowledged that he had said as much. According to Eckstein, Babbitt's response was to say that he would have Duffy call Eckstein. Babbitt does not recall this conversation, and maintains that all he ever promised Eckstein was a chance for his clients to be heard at the Department before the decision was made.

The next day, Duffy called Eckstein at his office in Phoenix from an airplane telephone, and said that the Secretary had asked him to call Eckstein because Eckstein wanted a meeting. Duffy agreed to meet with Eckstein and Moody, and requested that they come to his office the next day, expressing urgency about the matter. Eckstein recalled that he had a full schedule and required travel time, so he asked for a meeting the next week. He said Duffy insisted that the meeting be that week. Eckstein and Duffy agreed upon a meeting that Friday, July 14, in Washington.

**2. Eckstein and Moody Meet with Duffy on July 14,1995**

Eckstein, Havenick and Goff came to Washington by the evening of July 13 and met over dinner with Moody. They were expecting the worst, based upon the rumors they had heard and the urgency Eckstein had detected in his conversations with Babbitt and Duffy. Yet, Moody informed them that he had spoken to Duffy on July 13 and had gotten the impression that the Interior staff still had an open mind on the matter. Indeed, Moody recalled Duffy's saying that it

would be "worthwhile" for Eckstein and Moody to come in to see Duffy.[449] Moody's impression was clearly mistaken, as the decision had been made and the release of the denial letter awaited only the completion of Duffy's meeting with Eckstein and Moody.

On Friday, July 14, Eckstein and Moody met with Duffy in offices adjacent to the Secretary's suite at Interior. The entire meeting lasted approximately 40 minutes, with Duffy quietly listening to Eckstein and Moody present arguments in support of approving the application. Duffy even seemed to Eckstein to be nodding in agreement with some of the points. About 30 minutes into the meeting, however, Duffy interrupted the presentation and said that he had to cut it off because the application was going to be denied, and the denial was going out that day. According to Eckstein, Duffy cited as the reasons for the denial (1) the local opposition to the project and (2) the prospect of harm to the St. Croix gaming facility at Turtle Lake. Eckstein understood this latter point to be made in the context of the detriment criterion under IGRA Section 20, so he and Moody presented further arguments about what should properly constitute detriment under the statute. Moody also recalled Duffy's saying at this meeting that "Bruce is really opposed to letting gaming go off reservation,"[450] though Eckstein does not recall this remark. After five or 10 minutes more, however, they clearly perceived that they were making no headway, and the meeting concluded.

Outside of Interior, Havenick and Goff were waiting for Eckstein and Moody when they emerged from the Duffy meeting. Upon hearing that Interior was going to turn down the application, Moody and Eckstein recalled that Havenick became extremely upset. Moody

[449] OIC Interview of Jim Moody, Oct. 29, 1998, at 6.

[450] *Id.*

explained to Havenick and Goff that Duffy listened to the merits of their case before telling Eckstein and Moody that the application was going to be denied and that the letters were going out that day. Havenick recalled being told that Duffy's stated reason was "if you do this with Hudson, then all these other race tracks are going to start doing the same things with Indian tribes and there will be so many Indian casinos that people are going to get mad at the Indians and it's not a good idea."[451] This was the first time the applicants had heard from Interior that the application would be denied, and the first time this particular factor against the proposal had even been mentioned by the Department.

The four men drove back to Moody's office to take whatever steps they could to get the decision reversed, or at least delayed until the following Monday so that they could bring the tribal leaders to Washington and make another pitch. The four spread out into different offices and tried calling various people to seek their assistance. Havenick asked Eckstein to call Babbitt and seek the meeting with the tribal leaders that they understood Babbitt had promised Eckstein. Eckstein called Babbitt's office, leaving a message, which Babbitt's staff soon returned. Eckstein requested a meeting with the Secretary, and was given a time to see Babbitt that afternoon.[452]

[451]Grand Jury Testimony of Fred Havenick, June 4,1999, at 96 (hereinafter "Havenick G.J. Test.").

[452]Babbitt stated he had no recollection of speaking with Duffy, Collier, Shields or any of their secretaries on July 14, 1995, about Eckstein's call or about the Hudson decision. Babbitt said he thinks he knew on July 14, 1995, that the Hudson decision had been made or was about to be made. His best sense of how he knew is that he must have been told by Duffy. Babbitt now infers that when he told Duffy that he wanted Duffy to see Eckstein, Duffy must have said the decision was ready to go, and that the decision would be a denial. Babbitt said he believes he knew this when he sent Eckstein to meet with Duffy.

From another phone, Havenick called Berlin at around 12:15 p.m. to inform Berlin what had transpired in the meeting and to ask him if he could help delay the decision. Berlin said that he would make some calls and get back to Havenick.[453] Eckstein understood that Berlin was going to call Babbitt to seek a delay. Berlin supports this version only in limited part. He recalls talking to Havenick a few times that day, but does not specifically recall Havenick's asking him for his help. *See,* Section H.H.4., *infra.*

The group also discussed the possibility of releasing Patrick O'Connor's May 8,1995, letter to the press. Moody recalls that he and Berlin did not believe that releasing the letter would advance their cause.[454] Eckstein always had opposed releasing it. Ultimately, the decision on whether to show the letter to Secretary Babbitt that afternoon was left to Eckstein's discretion.

At 2:20 p.m. and 2:55 p.m., Goff placed calls to Four Feathers lobbyist Michael Brozek's cellular phone. During one of his first two calls to Brozek that day, Brozek recalls Goff s telling him that "if something miraculous didn't happen in the next 15 minutes, they would be turned down."[455]

[453] Shortly after speaking with Berlin, Havenick left for the airport to travel back to Florida for an important family matter.

[454] Berlin recalls discussing the May 8 letter and recommending against publishing it, but he cannot recall when this discussion took place. He believes it is possible that his involvement in discussing this issue may have taken place later, after the July 14 decision was announced.

[455] OIC Interview of Michael Brozek, Sept. 3,1998, at 6 (hereinafter "OIC Brozek Int., Sept. 3,1998").

### 3. Eckstein's July 14,1995, Meeting with Secretary Babbitt

At some point that afternoon, probably around 2:45 p.m., Goff drove Eckstein to Interior for the meeting with Secretary Babbitt. Eckstein knew that Havenick had been in touch with Berlin that day, and wanted to call Berlin before going in to see Babbitt, on the chance that Berlin would have some news of the effort to buy time, but Eckstein was not able to reach Berlin before seeing the Secretary.

At about 3:00 p.m., Babbitt met with Eckstein in the Secretary's private office.[456] The two men sat alone in the middle of the large room, a few feet apart. Eckstein recalls he had come prepared with the binder of materials he used to support his arguments on the application. He began by explaining to Babbitt that he had met that morning with Duffy, and Duffy had told Moody and Eckstein that the application was being denied that day. Eckstein reminded Babbitt that he had earlier promised that the tribal leaders could come in for a meeting before such an action were taken, and Eckstein sensed that Babbitt had forgotten that statement, even though they had discussed it just three days earlier. To afford an opportunity for such a meeting, Eckstein asked Babbitt for an extension until the next business day, Monday, July 17, for issuance of the decision.

Eckstein testified that at this point - within two minutes of when they sat down and began the conversation - Babbitt said "words to the effect that Harold Ickes had called and directed him

[456]There is no specific record of the meeting time, but Babbitt's schedule for this date reflects an open period from 3:00 to 3:30 p.m., and records of phone traffic and Eckstein's airplane flight that afternoon suggest that this was likely the window that Babbitt's staff afforded Eckstein.

to issue the decision that day."[457] Eckstein did not detect any particular discomfort on the part of Babbitt in making the statement, and Babbitt said and did nothing that indicated to Eckstein that he was trying to terminate the meeting.

Babbitt recalls meeting with Eckstein that day, and recalls Eckstein's reference to the earlier discussion of Babbitt's meeting with the tribal leaders, and Eckstein's pursuit of a delay to permit such a meeting. Babbitt flatly disagrees, however, with Eckstein's recollection of the words Babbitt used in reference to Ickes:

> My best recollection is that at some point in the conversation making an excuse for my inability or my unwillingness to grant an extension or to intervene in the decision, that I said something to the effect that Ickes wants or expects me to make a decision promptly.[458]

Babbitt testified before the Senate Committee that this meeting with Eckstein lasted only 10 minutes, His recent recollection is no different, though he concedes that number is an estimate. In any event, he recalls making this comment about Ickes later in the discussion than the first two minutes, but cannot say when.

Given Duffy's insistence during the July 14 morning meeting that the denial was going out that day, Eckstein took Babbitt's statement as absolutely true, though he was surprised if not

[457]Eckstein G.J. Test, at 105. Eckstein has been quite consistent in describing this statement as including the words: "Ickes;" "directed" or "told;" and "today," or "that day," on each of the several occasions when he has recounted it for investigators or other officials. *Coir}'are* Eckstein Affidavit, Jan. 11,1996, at 6 with *Investigation of Illegal and Improper Activities in Connection with the 1996 Federal Election Campaign -PartX: Hearings Before the Senate Comm. on Governmental Affairs,* 105th Cong., 1st Sess. 195 (1997) (testimony of Paul Ectetein) and Eckstein G.J. Test, at 105-06. He also has consistently stated that he did not hear orinderstand Babbitt to say that Ickes or the White House was controlling the outcome of the derision, only its timing.

[458]Babbitt G.J. Test., July 7, 1999, at 105.

shocked by Babbitt's mention of Ickes. He recalls that he immediately thought of the May 8 Patrick O'Connor letter to Ickes, but did not mention it at that time. Instead, he decided that he now had his last opportunity, "however minimal it might be,"[459] to try to persuade Babbitt, and he began hitting hard on the points that he felt should turn the decision around, consistent with his briefing materials on the merits of the application.

Eckstein testified that he proceeded to make his presentation, while Babbitt listened patiently. After about 15 minutes, when Eckstein had covered all his points, Babbitt stood up and made a comment to the effect that the meeting was over, or he had another meeting. Eckstein then decided to raise the issue of the Patrick O'Connor letter. He explained that there was a letter sent to Ickes in May by O'Connor that Eckstein "really found offensive,"[460] and that his clients had wanted to do something with it, but Eckstein had talked them out of it. Eckstein recalled that Babbitt made no comment to indicate that he was unfamiliar with this subject; in fact, Eckstein read Babbitt's body language and demeanor to indicate that he knew something of this matter.

Eckstein recalled that he then started addressing some of the points in the O'Connor letter that he found unfair or inaccurate. In response to the letter's assertion that Delaware North was associated with the application, Eckstein said that Havenick had nothing to do with Emprise, the predecessor to Delaware North that had been linked to organized crime, and which Babbitt's office had prosecuted while he was Attorney General of Arizona. Other than the Delaware North issue, Eckstein testified that he cannot recall exactly which of the points raised in O'Connor's

[459]Eckstein G.J. Test, at 107.

[460]A* at 109-10.

May 8 letter he addressed in his comment, but he now "infers" - based on what happened next in the conversation - that he also made reference to O'Connor's assertion that the opponent tribes were giving money to the Democrats.[461]

At this point in the conversation, with the two men standing close to each other and the conversation appearing to Eckstein to be concluding, Eckstein testified that Babbitt asked him, "do you know how much money Indians give to the Democrats."[462] Eckstein further explained that he is not certain whether Babbitt's actual phrasing was "these Indians," or "Indians that have gaming contracts," or if Babbitt said "to the Democrats," or "to the Democratic Party."[463] In essence, though, Eckstein was confident that:

> [I]t was a question which I interpreted as a rhetorical question, giving money to Democrats and Indians. And I said something to the effect I don't know or I don't have the slightest idea. And he said half a million dollars.[464]

Eckstein recalled that the meeting ended shortly after that remark, with little more said. Eckstein offered no further reply to Babbitt's remark about contributions, viewing the comment as a rhetorical "come back" to Eckstein's invocation of the O'Connor letter, and unable to think of anything to say at the moment.[465]

[461] M at 110-11.

[462] *Id.* at 111.

[463] *Id.*

[464] *Id.* at 111-12.

[465] *Id.* at 112,133. Eckstein has stated consistently that he did not understand Babbitt's remark about Indian contributions to be an indication of a *quid pro quo,* or a statement that contribution considerations were controlling the decision-making.

Babbitt swears he has no recollection of this exchange. He testified that he has no recollection of Eckstein raising the O'Connor letter, and that he was unaware of the letter and O'Connor's other communications with the White House in July 1995. He further testified that he had no recollection of making any remark about contributions by Indians to Democrats, or any comment concerning half a million dollars in contributions. Indeed, Babbitt swears that he recalls no further details about this meeting than what he has provided in his testimony. *See* Section U.K., *infra.* Yet, Babbitt acknowledges now, as he did in his Senate hearing testimony, that it is "conceivable" he made a remark consistent with the contributions comment Eckstein recalled.[466]

According to Eckstein, at no point in the July 14 meeting - nor at any point before that day - did Babbitt or anyone at Interior indicate to the applicants that Babbitt would be uninvolved in the Hudson decision. Eckstein added that until the issuance of the decision letter, none of the applicants knew the decision would be delegated to an official two steps removed from the Secretary, and none of them had even heard Michael Anderson's name during the entire course of the application.

After Eckstein emerged from his meeting with Secretary Babbitt, he spoke with Goff, who was waiting in a car to take Eckstein to the airport. Goff recounted Eckstein's statement as being that Babbitt "couldn't give [Eckstein] any more time because Harold Ickes called today and said the decision had to go out today."[467] Goff also recalled that Eckstein said he had tried to talk about the merits of the case, but Secretary Babbitt said that "there was too much money

[466]Babbitt G.J. Test., July 7,1999, at 156-58.

[467]OIC Goff Int., Aug. 25,1998, at 16.

involved."[468] Eckstein told Goff that he did not show O'Connor's May 8, 1995, letter to Babbitt, but he mentioned it after Babbitt raised Ickes's name.

Goff proceeded to drive Eckstein to the airport, where Eckstein would take a 4:50 p.m. flight to Arizona. From the car, the two men called their colleagues with news of the meeting's outcome. Phone records show two calls to Moody's office after 3:38 p.m., one lasting five minutes at 3:39 and another three minutes at 4:04,[469] but Moody stated that he does not think he spoke with Eckstein again that day about the Babbitt meeting. Moody is not certain when he heard about the discussion at that meeting, or from whom he heard it. He believes he was aware of Babbitt's remark concerning Ickes, because he eventually called Ickes himself about the application in August 1995. *See* Section II.I.l., *infra.* Moody states that he does not recall having any knowledge of the remark about Indian contributions and half a million dollars in 1995, and is uncertain that he ever got a debriefing on the meeting from Eckstein. Eckstein does not recall speaking with Moody on July 14 after the Babbitt meeting, and no available phone records show any contact between the two men after that date.

While driving to the airport, Eckstein recalls trying to reach Berlin by phone, as Havenick had suggested. Eckstein cannot recall whether he got through, but Goff stated that they did reach Berlin[470] and that Goff listened as Eckstein informed Berlin about the outcome of the Babbitt meeting and then got word of Berlin's unsuccessful efforts to delay the decision. Berlin's

[468] *Id.*

[469] Given its time, Goff may have made the latter call alone after Eckstein entered the airport.

[470] Goff s cellular phone records reflect at 3:51 p.m. a six-minute call to Berlin's office telephone.

recollection of the call is that Eckstein reported that Babbitt had just told Eckstein that Ickes had called and told Babbitt that "this issue had to be resolved before sundown."[471]

After dropping Eckstein at the airport, Goff returned to Moody's office to make a number of phone calls. Over the next hour, he spoke with Michael Brozek and Fred Havenick.[472] Brozek recalled that Goff said Secretary Babbitt was told to deny the application. Goff also reported to Brozek that Babbitt mentioned Ickes and the fact that the opposing tribes were "big Democratic Party contributors."[473]

Florence Eckstein, Paul Eckstein's wife, remembers speaking with her husband on the afternoon of July 14,1995, when he called her at work from an airport while en route home from Washington, D.C.[474] At the time, Ms. Eckstein knew what business her husband was conducting in Washington. She recalls that her husband told her that he had seen their friend Bruce Babbitt on behalf of his client, and that Babbitt had told Eckstein that Harold Ickes was somehow involved in the decision-making on denial of the client's matter. She also recalls her husband telling her that political contributions were somehow involved in the decision-making process, though she cannot recall how. She attributes her memory of this brief conversation to the fact

[471]Grand Jury Testimony of Jerome Berlin, Sept. 15,1999, at 37 (hereinafter "Berlin G.J. Test, Sept 15,1999").

[472]Records show that Havenick made a number of calls to his office and to office numbers for Goff, Brozek and Berlin during his flight to Florida. Goff was able to connect with Havenick through his own office or Brozek's office when Havenick called those locations.

[473]OIC Brozek Int., Sept. 3, 1998, at 6.

[474]Eckstein's flight departed from Washington and connected through Columbus, Ohio. He stated that he may have called his office's "800" phone number from one of these airports, and then gotten connected with his wife, but no available phone records reflect this call.

that Babbitt was a close friend of the Ecksteins. She did not remind her husband of the conversation until the matter hit the press. Paul Eckstein has no recollection of the conversation with his wife, but also has no reason to believe it did not occur.

Later that evening, Goff called Havenick's office from Chicago. In these calls, Goff relayed to Havenick more details of Eckstein's meeting with Secretary Babbitt. Havenick recalled learning that Eckstein had said "no" in response to Babbitt's asking "do you know how much money is involved," to which the Secretary proceeded to reply, "somewhere on the order of a half million dollars."[475]

Eckstein has no recollection of speaking with Havenick on July 14 after the Babbitt meeting, but he recalls speaking at length with Havenick and Goff the next day by phone.[476] At that time, Eckstein says that he recounted all details of his meeting with Babbitt.

In addition, not long after his return to Phoenix, Eckstein spoke with the senior partner in Brown & Bain, Jack Brown, about the Hudson matter and his meeting with Babbitt. Brown had known Babbitt since his days as an associate at the firm, when Brown was a mentor to the future Secretary. In significant detail, Brown recently recalled that conversation, and Eckstein's relating to him that Babbitt had told Eckstein the application was being denied because the White House wanted it decided that day, as well as a closing question by Babbitt in the discussion to the effect of, "[d]o you know how much money the Indian tribes have been contributing to the Democratic

[475]Havenick G.J. Test, at 108.

[476]Phone and time billing records reflect such a call.

Party? Somewhere on the order of half a million dollars."[477] Brown noted how disappointed Eckstein seemed at the time over his friend Babbitt making such remarks. Eckstein recalled speaking with Brown about the Babbitt meeting, but could not recall what details he related to his partner.

#### 4. Further Efforts By the Applicant Representatives to Delay the Decision

There is evidence to suggest that on July 14 Berlin may have tried to reach the DNC and the White House in an attempt to help the applicants at Havenick's request. A DNC phone message slip shows that at 1:00 p.m., Berlin left a message asking Fowler, whom he knew well through his fund-raising activities, to call him back, saying it was "Important." Berlin does not recall making this phone call but he does not deny it. He also allows that he might have told his secretary to try to get Fowler on the phone. He said it would not usually be his practice to characterize a call in a message as "important," so it suggests serious time constraints on his part, if he left the message. He also noted the possibility that his secretary appreciated the urgency and left that message.[478] In any event, Berlin has no recollection of ever talking to Fowler about Hudson. He also does not recall speaking with Fowler at all on that day.

Berlin did say, however, that if Havenick had asked him to contact someone to pursue a short delay, he would have had no hesitation about trying to do so and would have made calls. He also stated that if Havenick told him that Fowler or Ickes were involved in the matter, he would have called them. He considers them accessible to him for this type of request. He does

[477] OIC Interview of Jack Brown, March 4,1999, at 2.

[478] Berlin G.J. Test., Sept. 15,1999, at 27-28. Berlin, however, acknowledged that he almost always places his own calls.

not believe he would have called anyone at Interior directly because he does not think he knows any DOI staff. He said he would not have called Babbitt. Havenick and Goff, however, have a strong memory of receiving feedback that day from Berlin about his efforts to get the White House to delay the Hudson decision.

While waiting for his flight home on July 14, Havenick placed a two-minute call to Berlin's office at 3:17 p.m. According to Havenick, Berlin said he had called the White House and spoken to Ickes's special assistant, Janice Enright, who told Berlin that the decision to reject the Hudson application was not going out that day. Goff recalls Havenick's recounting this telephone call with Berlin on July 14. Havenick had another conversation with Berlin from the airplane, this one for three minutes at 3:41 p.m. Havenick was trying to see if anything was happening on Berlin's front, and learned nothing new. Havenick then called Goff at 3:44 p.m.[479] Havenick called Berlin's office at 4:26 p.m. to resolve the conflict between what Berlin had said earlier and Eckstein's account of the meeting with Secretary Babbitt. At that point, according to Havenick, Berlin said he was unable to do anything to delay the decision and there was nothing else they could do.

On the following day, Eckstein recalls speaking with Havenick who said that Berlin had spoken to Ickes on July 14 and that Ickes had told Berlin that the decision would be held until July 17. Berlin does not recall talking to Enright or anyone else at the White House, but adds that he would have tried to call Ickes if Havenick had asked him to do so. According to the

[479]Goff received an incoming call at this time. It is possible that this is when Havenick first learned the results of the meeting with Secretary Babbitt. Goff relayed that Babbitt had said to Eckstein that "I know it sounds crass, Paul, but do you know how much money is involved in this" and that the decision had "to go out by sundown because that's what Harold Ickes had said." Havenick G.J. Test, at 106.

available White House phone records, there were two calls placed from the Old Executive Office Building to numbers that match Berlin's area code and exchange on July 14, 1995.[480] The first call occurred at 11:29 a.m. and lasted no more than one minute. The second call lasted almost 19 minutes, beginning at 2:19 p.m.

Berlin stated that there are no other employees at his office who would have had any reason to have a substantive call with anyone at the Old Executive Office Building. He said sometimes DNC employees worked out of his office when planning Miami area events, but he could not recall one being there in the July to September 1995 time period. Berlin swears he did not talk to Ickes that day. He said he would call Enright if Ickes were unavailable, but he does not recall doing it. At the same time, he said he believes Havenick is an honest and honorable person with more reason than Berlin to remember the events of that day.

For her part, Enright has no recollection of speaking to Berlin on July 14, and no other staff from Ickes's office at that time recalls any such contact. Ickes has no recollection of speaking to Berlin on July 14, and has no recollection of Enright's telling him about a request to delay the decision.[481]

[480]Consistent with a system that has reportedly been followed for years, White House telephone records do not record the extension of a phone number dialed from a White House phone. The call detail indicates only the area code and exchange of calls placed from the White House and the Old Executive Office Building.

[481]There are no records of phone calls from Ickes or Enright to DOI on that date. None of the DOI employees recalls any contact with Ickes or anyone from the White House regarding a delay in the decision at any time.

In addition, White House access records do not reflect entry on July 14 by Ickes or Enright. Records do show Jennifer O'Connor - whose office was in the Old Executive Office Building - was at work that entire day, but neither she nor Berlin recalls any communication between them.

## I. Efforts to Reverse the Hudson Denial

### 1. The Applicants and Havenick Seek Reconsideration of the Denial

The Four Feathers group went into a second phase of action after the July 14 denial in an attempt to have the Hudson decision reconsidered. The primary vehicle for obtaining their objective soon became a federal lawsuit against Secretary Babbitt and other Interior officials. Before filing that action, however, they first attempted to gain Interior, White House or DNC support for reversal of the decision.

Applicant tribal leaders personally contacted Loretta Avent at the White House in July soon after the decision was made public. The tribal leaders complained to Avent about the White House involvement in the denial of the application by Interior. Avent tried to disabuse the tribal leaders of this notion. As stated in her memo to Ickes dated July 27, 1995, "I've explained to them that we had no direct involvement."[482] Avent at that point in time did not know that Ickes and his staff had been in contact with both the DNC and Interior regarding the Hudson matter. Accordingly, Avent wrote to Ickes that her "initial instinct on this was right **(STAY OUT OF THIS. WHOEVER THE PRESSURE COMES FROM COULDN'T BE WORTH OUR GETTING INVOLVED. I DIDN'T, THANK GOD!)"** (Emphasis in original.) While a handwritten note by one of Ickes's assistants indicates that Ickes wanted to know more about

[482] A vent's July 27 memo contained a "re:" line which stated, "Concerning previous discussion." Neither Avent nor Ickes could recall any such previous discussion. Avent's memo was copied to Cheryl Mills, Margaret Williams and Michael Schmidt, who had been recipients of some of her earlier correspondence concerning Patrick O'Connor's calls about the Hudson matter in April 1995.

Avent's concerns, Ickes and his staff could recall no follow-up conversations or communications with Avent in August.

A few weeks later, on Aug. 18, Avent wrote another memo about potential Hudson fall-out, this time to White House Associate Counsel Cheryl Mills, with copies to Ickes and Lindsey, among others. Avent's memorandum attached a memo to Avent from applicant tribal leader Arlyn Ackley complaining that the decision was, among other things, a "political one" and not in accordance with applicable law. Avent notes that she "assume[s] this means they're [the applicants] building up to something."

The applicant group also pressed their case directly with the Interior Department. DuWayne Derickson called Thomas Hartman at home on Aug. 2 to find out what had happened with the application. Derickson says that he took contemporaneous notes of the conversation, and that those notes formed the basis for Ackley's Aug. 3 memo to Avent alleging staff disagreement with the Hudson denial. Derickson also called Hartman once more, after the initiation of the litigation. Derickson reports that the last was a brief call, in which Hartman indicated he was uncomfortable with Derickson's calling him at home at that point.

In the days immediately following the denial, Eckstein advised Havenick that they should take measure of the specific legal standard that would control any litigation challenging DOI's admimstrative decision on the Hudson application. Havenick agreed, and Eckstein then had two of his colleagues prepare a ten-page memorandum summarizing the applicable law. Eckstein forwarded the memo to Havenick on July 19. Eckstein advised Havenick in a cover letter that the better course would be to petition DOI for reconsideration of the decision. The legal memo suggested that such an effort "may give the Tribes the opportunity to put further political pressure

on Secretary Babbitt and the White House," but Eckstein's letter noted that "absent extreme political pressure," (emphasis in original) a reversal would not be likely.[483]

Eckstein also spoke again with the Secretary, on Aug. 1. According to Eckstein, at the behest of Havenick or Goff he asked Babbitt whether the Department would approve an application to conduct Class II gaming at the Hudson site. Eckstein reported that Babbitt's response was: "if there's local opposition, I'm not going to approve it." Babbitt has no recollection of such a conversation. Records show the call lasted seven minutes, during which Eckstein recalls no further discussion of the matter, or of the prior contact between the two friends on July 14. Since that date, they have not spoken about this matter, or any other.

The Four Feathers group also tried more formal appeals to the Secretary. The Mole Lake tribe hired its own counsel, lobbyist Ronald Piatt and attorney Jon van Home of McDermott, Will & Emery. Piatt promptly drafted a detailed letter to Secretary Babbitt rebutting the reasoning of the July 14 denial letter. The 10-page letter, dated Aug. 4, 1995, explained why DOI's reliance on community opposition, the opposition of nearby tribes, environmental concerns and secretarial discretion were each inappropriate. After noting that DOI has broad

[483]The legal memo was prepared by a Brown & Bain associate, and reviewed by Eckstein and a second Brown & Bain partner. Eckstein met with those two attorneys to discuss the assignment on Monday, July 17. Though Eckstein and the partner cannot now recall the specific content of that discussion, the former associate (who is now a White House employee) recalls Eckstein's informing the two colleagues that he had met with Babbitt after learning of the imminent decision and reminded the Secretary that he had promised Eckstein that no adverse decision would issue until Eckstein's clients had the opportunity to meet with Babbitt. The lawyer recalled Eckstein's recounting that Babbitt replied with words to the effect of "I can't do that, Harold Ickes wants a decision today." OIC Interview of Charles Blanchard, Aug. 6,1999, at 2. The lawyer understood this statement to indicate that Ickes was compelling the timing of the decision. The lawyer had no recollection, however, of any remark concerning political contributions by Indians. He said that he and Eckstein discussed "political interference" as an issue in the assignment, and he may have looked into that area. *Id.*

discretion in IGRA fee-to-trust applications, Piatt wrote, "we believe that there is little or no support for the conclusions reached in the Anderson letter." The footnote to this statement contained an extended, indirect but obvious reference to the May 8 Patrick O'Connor letter to Ickes. It explained the applicants' concern that "matters, not part of the statutory policy and possibility [sic] misrepresented, may have impacted the conclusions in the Anderson letter." The footnote then proceeded to rebut one by one the specific points labeled as the "politics … in this situation" in O'Connor's May 8 letter, suggesting that those factors were all as irrelevant to the decision as "the fact that [Piatt is] an active Democrat and strong supporter of this Administration."

At the same time, Piatt reached out to the IGMS staff to address concern about the appealability of the decision. DOI lawyers responded on Aug. 10, stating the Hudson denial was final for the Department. Van Home then met with DOI Solicitor's Office attorneys David Etheridge and Troy Woodward on the morning of Aug. 30, and informed them that the applicants intended to file suit in federal district court challenging the validity of the denial; van Home furnished them with a copy of the draft complaint.

Piatt also sent Babbitt an Aug. 15 letter requesting a meeting between the Secretary and representatives of the applicant tribes. While Piatt received no official reply to his letters, he and van Home were able to schedule a meeting the week of Sept. 11 with John Duffy. Piatt and van Home attended, along with Ackley, Newago and others. The meeting was not productive, as Duffy indicated a general apprehension about talking to them due to their impending lawsuit, and further stated that Michael Anderson, as the decision-maker, was the person with whom they should speak.

In addition to the continued efforts of Eckstein, Piatt and van Home, Havenick sought further legal assistance, hiring Mitchell Berger of Berger & Davis in Fort Lauderdale, Fla., on July 24. Berger said that Havenick hired him partly because of his experience in litigating administrative matters, but mostly because Berger was "very politically active" with both the DNC and the Clinton/Gore campaign, and had a good personal relationship with Babbitt.[484] Havenick told Berger that he wanted Berger to call Secretary Babbitt. Berger, doubting that such a tactic would be appropriate or effective, first undertook to learn more about the decision. According to Berger, he initially conferred with a friend and political advisor who was well-connected to the Native American community. With the benefit of intelligence he thus gained about the Hudson controversy, Berger reported back to Havenick on some conciliatory efforts the applicants might attempt in order to ease community and tribal opposition. According to Berger, Havenick remained insistent that Berger call the Secretary.[485] Nonetheless, Berger testified that he never spoke directly with Babbitt concerning the Hudson matter. Babbitt said he knew Berger as a result of Berger's involvement in Florida Everglades issues, but he had no recollection of discussing the Hudson matter with Berger.

Instead, on July 31, Berger called Christopher Thomson, a special assistant to Babbitt with whom Berger had previously dealt on scheduling matters for Babbitt's visits to Florida on environmental issues. Berger asked Thomson for information on the Hudson application, and for

[484]Grand Jury Testimony of Mitchell Berger, Feb. 19, 1999, at 78 (hereinafter "M. Berger G.J. Test.").

[485]Berger's own memorandum reflects that, after gathering background information, he intended to call Interior "to see what I can do with Secretary Babbitt." Memorandum from Mitchell Berger to Fred Havenick, July 28,1995.

assistance in connecting with the appropriate parties within DOI. Thomson did not immediately respond, but called Berger on Aug. 8 to assure Berger that he had not forgotten about him. Berger ultimately had a substantive conversation with Thomson on Aug. 15. As memorialized by Berger in an Aug. 16 memo to Havenick, Thomson cited three reasons motivating the denial: strong community opposition, the need to take off-reservation land into trust and, to a lesser degree, tribal opposition based on fears of competition and over-saturation of the market. In what Berger characterized as an "off-the-record" conversation, Thomson stressed to Berger that this last reason would not have been sufficient, by itself, to warrant the denial.[486] Thomson has no recollection of speaking with Berger or anyone on the Hudson matter, though he vaguely recalls speaking with Berger on some issue in this time frame.

From what he had learned to this point, Berger was inclined to work on softening tribal and community opposition and negotiating a solution. Havenick, however, was "much more litigious."[487] Berger testified that Havenick felt he had been wronged, and thus felt justified in taking an aggressive approach in seeking redress.

Berger made one last attempt at contacting DOI, speaking with Heather Sibbison on Aug. 25. As noted in an Aug. 28 letter from Berger to Havenick, Sibbison informed Berger that the denial was considered final for the Department, but that it could be appealed in federal district court. Based in part upon his conversation with Sibbison, Berger informed Havenick that Gov.

[486]Memorandum from Mitchell Berger to Fred Havenick, Aug. 16, 1995.

[487]M. Berger G.J. Test, at 122.

Thompson's opposition to the project "both legally and politically prevented the Secretary from approving the land transfer."[488]

When it became clear that Havenick wished to resort to litigation against Interior that might also include DNC Chairman Fowler, Berger stepped aside from the representation because he felt a conflict was emerging in his professional and political activities. Berger was actively involved in the DNC's efforts to broaden its outreach to Indian tribes, and was in regular contact during this time frame with Adam Crain of the DNC to that end. In fact, records show that Berger was in telephone contact with Fowler himself sometime between Aug. 11 and Aug. 15.[489] Though Berger acknowledged that Havenick hired him in part for his Democratic connections, he could not recall discussing the Hudson matter with Fowler; yet, he would not rule out that he may have spoken with Fowler just to give "fair warning" that litigation could result and that the tribes and interested parties might be able to work out a resolution of the matter.[490] Fowler had no recollection of his contact with Berger at this time.

One month after the denial, on Aug. 15, Havenick recalls he encountered Terence McAuliffe, the National Finance Chairman of the Clinton/Gore '96 Committee, at a campaign event at the Biltmore Hotel in Coral Gables, Fla. Havenick had known McAuliffe since the mid-1980s, when they had met during other Democratic fund-raising activities. Although Havenick had not seen McAuliffe in several years, he reported that McAuliffe recognized him instantly

[488]Letter from Mitchell Berger to Fred Havenick, Aug. 28, 1995.

[489]DNC Trustee Director Ari Swiller made notes of a Fowler fund-raising conversation with Berger relating to "Indians," which apparently transpired on August 15.

[490]M. Berger G.J. Test, at 149-51.

when their paths crossed. Havenick recalled that McAuliffe greeted him as "Dog Track Freddie" and asked playfully "what's happening in doggie-dom?"[491] After discussing his efforts to get slot machines at his tracks in Florida, Havenick mentioned that he was having "a terrible problem with a dog track in Wisconsin."[492] Without hearing any further detail, McAuliffe reportedly stated "I took care of that problem, I killed the casino at the Hudson dog track."[493] Havenick said that he then pulled McAuliffe aside, and McAuliffe said, "I killed Delaware North's attempt to get the casino in Hudson.... I worked with Don Fowler and we killed it."[494] Havenick corrected McAuliffe as to the fact that it was Havenick's casino deal, and McAuliffe seemed surprised. McAuliffe then called over his assistant, gave Havenick both of their cards, and said he would look into the matter.

McAuliffe denied ever having this conversation with Havenick, and characterized Havenick as having "a vivid imagination" and being "prone to exaggeration."[495] Although he confirmed that he may have run into Havenick at the fund-raising event[496] - he stated he talks briefly with almost everyone he encounters at these events - and may have made vague expressions of concern for Havenick's plight, McAuliffe is certain he never took credit for killing the Hudson deal. McAuliffe reported that he never gets involved in policy matters, nor in taking

[491]Havenick G.J. Test, at 120-21.

[492]*Id.* at 123.

[493]*Id.*

[494]*Id.* at 123-24.

[495]McAuliffe G.J. Test, at 83.

[496]Havenick produced to investigators the business cards from McAuliffe and his assistant that he says he received that evening.

any action with the Administration. He also was adamant that he had very limited contacts with Fowler - from his viewpoint, they ran competing fund-raising institutions in 1995 - and that he certainly would not work with Fowler on any matter of substance. However, he did acknowledge that he had been made aware of the Hudson application by this point in time by Patrick O'Connor.

Havenick related his story of the meeting with McAuliffe to several people, including the applicant tribal leaders and lobbyist Piatt. Piatt, who had known McAuliffe for years,[497] wrote to him on Aug. 18. While indicating that the tribes had wanted to resort to public disclosure or litigation, Piatt intimated his desire to resolve the matter quietly. Piatt requested a meeting with McAuliffe, but did not mention what he had heard from Havenick.

Meanwhile, Piatt sought a meeting with Fowler to raise the specter of litigation in pursuit of a favorable resolution. On Aug. 28, he called and, through staff, requested a meeting alone with Fowler, which Fowler granted for the next day. On Aug. 29, Fowler and Piatt met at the DNC, and Piatt provided Fowler a copy of Piatt's Aug. 4 letter to Babbitt, as well as O'Connor's May 8 letter to Ickes. Piatt claims that he told Fowler that the applicants were prepared to allege improper political interference in the decision by, among others, Fowler himself, and that Piatt wished to offer Fowler a friendly heads-up. Fowler reviewed the letters, became quiet and said he did not want to discuss further the Hudson matter. Fowler disputes this version, saying that he

[497]Platt describes McAuliffe as an old friend, and stated that it would not surprise him if McAuliffe took credit for the decision and puffed up his role, even if he played no part.

agreed to a request from Piatt that Fowler meet with the applicant tribes, even though Piatt was "fairly hostile" in the meeting, and that Piatt and the tribes never contacted Fowler again.[498]

Piatt subsequently called McAuliffe on Sept. 5, when he had Havenick, Ackley and Derickson in his office, and arranged to bring the three over to see McAuliffe. Piatt reported that the meeting was quite substantive, and included showing McAuliffe the May 8 O'Connor letter. Piatt told investigators that McAuliffe was taken aback by the letter, and commented that the person who wrote the letter was "stupid."[499] Piatt stated that McAuliffe claimed to not have been involved in the decision, but offered that he would look into the matter. When Piatt later contacted McAuliffe, McAuliffe indicated that he could not or would not get involved. Havenick's memory is that the Sept. 5 meeting was just a chance for McAuliffe to meet the Indians. Havenick said he had not wanted to put McAuliffe on the spot by talking about what McAuliffe had told him in front of the others. In fact, Havenick maintains that he went out of his way to keep the prior McAuliffe conversation to himself.

McAuliffe reported initially that Piatt never reached out to him about the Hudson application. After being shown a copy of Piatt's letter of Aug. 18,1995, McAuliffe said that he had never seen the letter before, but allowed that he could not rule out the possibility that someone might have contacted him about Hudson. He said that he would have listened to the person, and would have done nothing about the matter. Upon further reflection and review of the Aug. 18 letter, McAuliffe believed that Piatt might have contacted him about the Hudson issue

'Fowler G.J. Test, at 186-89.

OIC Interview of Ronald Piatt, May 20,1999, at 3.

and might have been the person who mentioned to McAuliffe that Hudson was "a potentially] huge political problem."[500]

Havenick also remembered arranging a meeting with McAuliffe at The Palm restaurant in Washington on Sept. 12, where both had separate lunch plans. Havenick said that he and his attorney, Robert Friebert, met with McAuliffe for five to ten minutes. Havenick and Friebert informed McAuliffe of their plan to sue DOI, and McAuliffe reportedly said "go ahead and sue."[501] McAuliffe did not reveal whether he knew anything more about the Hudson decision, but Havenick recalled that McAuliffe agreed to discuss the matter further with Friebert. McAuliffe, once again, had no memory of this meeting or conversation - and found it odd that he would plan such a meeting - but he said that "go ahead and sue" does sound like something he might say.[502] He would make such a statement, he explained, because it would tend to deflect efforts to further involve him.

Havenick also canceled a meeting that Piatt had scheduled for the Indians with McAuliffe. The same afternoon that Havenick had met McAuliffe at The Palm, there was a Four Feathers meeting at which Piatt and Friebert had a falling out. Havenick decided that he should retain Friebert and keep McAuliffe as a resource for himself, so he called McAuliffe and

[500]McAuliffe G.J. Test, at 128. McAuliffe had testified to a general recollection of someone saying that the Hudson decision might be "very embarrassing for the President" or have "tremendous political ramifications," but he was unable to remember when he had been so informed or who informed him. *Id.* at 62.

[501]Havenick G.J. Test, at 132.

[502]McAuliffe G.J. Test, at 133.

canceled a meeting with Piatt scheduled for the next day. Piatt remained involved in the Hudson matter as counsel to the Mole Lake applicant tribe.

During this same period, Havenick enlisted the assistance of Jim Moody to press for further review of the Hudson denial. In August 1995, Moody called Harold Ickes at the White House to see if he could assist in gaining reconsideration of the decision. Moody recalls that Ickes called him back and they spoke for a few minutes about the Hudson matter. Moody got the impression that Ickes was not very familiar with the issue, and Moody urged him to take a further look at it, as Moody felt the applicants had a meritorious position. Moody mentioned that the applicants had hired Friebert to represent them, and Ickes commented that he knew Friebert, who was active in Democratic politics. Moody then suggested that Ickes call Friebert about the application, which Ickes said he would do. However, Friebert never heard from Ickes. Ickes has no recollection of ever speaking with Moody about the Hudson matter.

Moody also tried to speak with McAuliffe about the Hudson controversy. On Aug. 21, Moody called Clinton/Gore '96 headquarters in Washington. The next day, he sent a one page handwritten fax to McAuliffe at the Clinton/Gore offices, with the subject line reading: "heading off trouble." The fax states:

> As you know, Democratic friend + supporter Fred Havenick has been royally screwed by the process. So were the Indians who needed help the most. Attached is a 'dry run' pitch the Indians will be releasing in several days if the [sic] don't get an audience for their grievances. Please call me ASAP. Jim

Moody stated that he attached to this fax a mock New York Times news article, drafted by Mark Goff, that depicted potential news coverage of the lawsuit the Four Feathers group was

contemplating against DOI.[503] The mock article referred at length to the alleged involvement of Fowler, Ickes and McAuliffe himself in this matter and quoted Goff as saying "We going [sic] to supoena [sic] everyone involved in this case … including Mr. Panetta, Mr. Ickes and Mr. Duffy. We're going to put them on the stand and find out who was promised what, and by whom."

For his part, McAuliffe states that while he did know Moody in 1995, and would have taken a call from him, he has no recollection of receiving Moody's fax and its attachment. McAuliffe further said that he would recall it if he had received it, because he would have been "highly offended" by its threatening content.[504]

Piatt continued his negotiation efforts on behalf of his tribal client, Mole Lake. Piatt arranged a meeting at the White House with White House Political Director Douglas Sosnik.[505] At the meeting, which likely took place in early fall 1995, Piatt believes he provided Sosnik with the letter he had written to Secretary Babbitt and sought Sosnik's assistance in facilitating a settlement among the Interior Department and the various interested parties over the Hudson casino proposal. Havenick reported that Piatt informed him of several meetings with senior White House officials on Hudson - including an Oval Office meeting with President Clinton, Bruce Lindsey, and White House Counsel John ("Jack") Quinn. Piatt denies most of Havenick's assertions, insisting that Havenick had misinterpreted some of Piatt's earlier statements (which Piatt admitted may have contained some puffery). According to Piatt, the misunderstandings

[503] No copy of the Moody fax or mock article were produced by Clinton/Gore '96, and no records in Moody's possession verify transmission of the fax. Goff produced a copy of Moody's fax cover sheet from his records, as well as a copy of the article he had drafted.

[504] *Id.* at 78-79.

[505] Sosnik later became Senior Advisor to the President for Policy and Strategy.

involved situations where Piatt had Administration contacts for other reasons - while attending fund-raising events, for instance - into which Havenick mistakenly inferred a Hudson component.

### 2. Eckstein Provides an Affidavit Regarding Contact with Secretary Babbitt in Litigation Challenging DOI's Denial of the Hudson Application

On Sept. 15, 1995, the applicants filed their federal lawsuit, naming as defendants Secretary Babbitt, Deputy Assistant Secretary Anderson, Counselor to the Secretary Duffy, and IGMS Director Skibine. The complaint identified nine claims for relief, consisting mostly of allegations that DOI had violated the applicants' rights to due process by allowing additional comments, meeting with opponents without notice to the applicants, and failing to sufficiently consult with the applicants about the application.

In support of the litigation, Fred Havenick and his attorneys, Robert Friebert and Todd Farris of Friebert, Finerty & St. John, S.C., traveled to Phoenix on Dec. 8, 1995, to interview Paul Eckstein about his dealings with DOI and his July 14 meeting with Secretary Babbitt. Havenick introduced the attorneys to Eckstein, and then left the meeting. The attorneys described to Eckstein the status of the litigation. Eckstein recalls that he spoke with Friebert and Farris for more than an hour, answering their questions, but not volunteering anything. At some point during this interview or soon thereafter, Friebert informed Eckstein that he and Farris would be drafting an affidavit for Eckstein's signature.[506]

[506]Friebert's and Farris's recollections and notes of this meeting indicate that Eckstein made no mention at this time of the alleged Indian contributions remark by Babbitt, though he fully recounted the remark about Harold Ickes, as reflected in the resulting affidavit. Friebert recalls, and his notes confirm, that in April 1997 Eckstein described to Friebert the Indian

(continued...)

On Jan. 5, 1996, Eckstein reviewed and edited a draft affidavit Farris had sent. He executed the affidavit on Jan. 8. The Eckstein affidavit described his entry to the Hudson matter and some, but not all, of his specific communications with the Department about the application.[507] It also quoted at length the May 8, 1995, O'Connor letter to Ickes. The affidavit described briefly Eckstein's meetings with both Duffy and Babbitt on July 14, 1995, including this reference to the Babbitt discussion:

> I asked the Secretary if he would delay the release of the decision on the Tribes' application until the following Monday to allow time for the Tribes to attempt to respond to the political pressure being exerted against the application. Secretary Babbitt said that the decision could not be delayed because Presidential Deputy Chief of Staff Harold Ickes had called the Secretary and told him that the decision had to be issued that day.

Eckstein testified that he did not spend a lot of time on the affidavit, and that it certainly did not purport to be a complete chronicle of his dealings with Interior. In particular, Eckstein testified that it did not reference all of the elements of his meeting with Babbitt on July 14, including his showing Babbitt the O'Connor May 8 letter and Babbitt's rhetorical question about political contributions by Indians.[508] Eckstein said he was aware of these shortcomings at the

[506](...continued)
contributions element of the July 14 Babbitt meeting. Eckstein had no recollection of mentioning the Indian contributions remark during the December 1995 meeting with Friebert and Farris, but he stated that he would have described it if the attorneys had asked him directly about it, particularly since he knew they were working with Havenick, to whom Eckstein had told the full details.

[507]For example, it does not document Eckstein's April 6 phone discussion or his May 17 meeting with Babbitt, his May 31 meeting with Skibine and Hartman, or his July phone contacts with Babbitt and Duffy.

[508]There also were one or two inaccuracies in the affidavit. For example, Eckstein's billing records indicate that he was working on Hudson with Goff and Havenick by April 5,
(continued...)

time he signed the affidavit, but did not add the information because he did not want to publish it, and he did not think it relevant to the purpose of the affidavit. Moreover, the evidence strongly suggests that Eckstein did not want to unnecessarily embarrass Babbitt with this revelation.[509] Eckstein testified that he was uncomfortable signing an affidavit, but that he preferred providing a "minimalist affidavit," over which he had some control, to submitting to a deposition.[510]

### 3. Applicant Tribes Meet with IGMS Director Skibine and Staff Members on Dec. 3,1996

In the fall of 1996, members of the LCO tribe sought DOI assistance in preparing to renegotiate their compact with the state of Wisconsin. Because all of the Wisconsin tribal compacts were set to expire at about the same time, and the 11 tribes intended to present a unified front in their renegotiations with the state, LCO invited IGMS staffers to address all of the Wisconsin tribes at the LCO reservation. At the request of the applicant tribes, a separate meeting was set up at which Skibine and other BIA staff would meet with the applicant tribes on Dec. 3, the day before the larger meeting involving all the Wisconsin tribes.[511] Although the applicant tribes made clear to the IGMS that they wanted the separate meeting devoted to the

[508](...continued)
1995, but the affidavit states he was retained on or about May 1.

[509]Eckstein reported that his understanding at the time was that the affidavit was going to be filed in support of a motion seeking additional discovery, and he testified that he believed the affidavit as it stood contained information sufficient for that purpose. Eckstein's affidavit was filed Jan. 11, 1996, in support of a motion for summary judgment.

[510]Eckstein G.J. Test, at 140.

[511]One IGMS witness stated that there was never any intent on the part of DOI to give the applicant tribes a separate meeting.

topic of the Hudson application, the IGMS would agree only to discuss land acquisitions generally. Interior representatives said they could not discuss the Hudson application due to the ongoing litigation.[512] Despite IGMS's expressed desire to avoid the topic of the Hudson denial, some members of the applicant tribes believed that discussion at the meeting would include the topic of the denial.[513] Fred Havenick thought the purpose of the meeting was for Interior to suggest ways in which the applicants could perfect their application should they decide to re-submit it, but understood that they must avoid discussing the actual lawsuit with DOI.

Skibine arrived late for the land acquisition meeting, arriving during the question and answer session. About 20 members of the applicant tribes and Havenick were present. Witnesses generally recall that the questioning and discussion became heated at some points. Skibine recalls the mood in the room as tense and unpleasant, and stated that many of the questions, although phrased generically, seemed designed to raise Hudson. He noted, however, that the questions seemed more intended to address what might happen to a re-submission of the

[512]Skibine expressed his intent to avoid the topic of the Hudson denial in internal e-mails to other IGMS staff. Skibine also emphasized this to one of the LCO tribe members who arranged the meeting in more than one telephone conversation. Skibine also brought a lawyer from the DOI Solicitor's Office with him to help ensure statements were not made regarding the litigation.

[51] invitations sent by the LCO leadership to the Mole Lake and Red Cliff tribes contained wording that probably added to this confusion. The first invitations read, in part: "[the IGMS staff] have suggested they come to Wisconsin ... to meet only with the Chippewa tribes interested in acquiring off reservation land for purposes of establishing a casino, specifically, Hudson." Letter from Raymond Wolf to Arlyn Ackley and Rose Gurnoe, Nov. 7,1996. The IGMS staffer coordinating the visit said she objected to this language in the letter and insisted that a corrected invitation be sent removing any reference to Hudson. A revised invitation complying with that request was sent.

Hudson application - they were "forward-looking" - rather than aimed at hashing out what had happened in 1995.[514]

Disagreement exists between several applicant tribe members and Four Feathers representatives and IGMS personnel as to whether Skibine made a statement during the meeting suggesting that the application was denied for an improper purpose. Specifically, four affiants swore Skibine said: "it was not his department that did not approve Hudson, it was approved by both Ashland and Minneapolis, however, when it got to Washington, politics took over, politics killed the deal!"[515] Havenick recalls Skibine as having made a similar remark in a moment of exasperation at being questioned about what had happened to cause the denial of the Hudson application. Arlyn Ackley, Chairman of the Mole Lake tribe, construed the remark as having been made by Skibine in an effort to make himself and fellow DOI personnel look like they were on the side of the tribes. Not all applicant witnesses present for the meeting recall such a remark.[516] BIA personnel present at the meeting only recall that Skibine generally deflected questions about Hudson at the meeting by stating that the questions should be directed at the Secretary's office. Skibine, himself, denies making such a statement and does not remember any

[514]OIC Interview of George Skibine, Feb. 11,1999, at 11-12.

[515]Affidavits of Arlyn Ackley, DuWayne Derickson, Peter Liptack and Mary Ann Polar, Jan. 16, 1998. Four other affiants gave similar but slightly different accounts.

[516]For example, notes taken contemporaneously by the Red Cliff tribal attorney do not reflect the remark.

statements he made that could have been misconstrued to mean that "politics" had caused the denial of the Hudson application.[5-7]

At the time of the House Committee on Government Reform and Oversight hearings in January of 1998, several applicant tribe members and Four Feathers representatives were asked by the Committee to make affidavits attesting to their recollection of any remarks Skibine may have made at the Dec. 3, 1996, meeting. They did so, prompting several BIA personnel to make affidavits in which the BIA personnel disputed that any such remarks had been made.

### J. The Opponent Tribes Contribute Heavily to Democrats in the 1996 Election Cycle

At the outset of this investigation, prior reviews of the facts surrounding the denial of the Hudson casino proposal already had revealed evidence of substantial contributions by the opponent tribes to the DNC and other Democratic organizations and campaigns in the months following the decision. In light of evidence that opponent representatives had discussed such contributions with Party officials in conjunction with seeking assistance on the Hudson matter, this Office committed significant time and effort to determining the full extent of such contributions by Hudson tribal opponents and their representatives, including an analysis of the amounts, timing and motivation for the contributions. This process included exploration of previous donations by those contributors and alternative explanations for their decisions to make donations to national Democratic organizations and campaigns in the aftermath of both the April 28,1995, meeting at the DNC and the July 14, 1995, Interior decision on the Hudson application.

[5-7] Skibine G.J. Test, at 87-88.

In sum, the evidence obtained and evaluated by this Office does not prove that the contributions made by tribal opponents and their representatives after the Hudson decision were part of a *quid pro quo* arrangement, or any other contingency agreement. Furthermore, there is considerable evidence that a variety of facts and motivations led to the decisions to donate funds, which a number of individuals and entities made over the course of several months. This is not to say that the evidence rules out the Hudson decision as a factor in these contribution decisions; rather, the evidence fails to prove that these donations were payments pursuant to a *quid pro quo* obligation, and suggests that multiple legitimate factors led to the donations.

The following discussion sets forth the high points and a representative sampling of these factual findings. We have attempted neither to recount here all of the reviewed evidence, nor to draw every reasonable inference or conclusion that could be derived from it. Some detail is provided, however, to frame the context for how extensively national Democratic organizations and campaigns courted Indian political contributions during the relevant time frame.[518]

### 1. 1995 Contribution Activity Prior to the Hudson Decision

O'Connor and Kitto solicited their tribal clients for political contributions before Interior released its July 14 decision in the Hudson matter. The first such recorded effort by either lobbyist is Kitto's May 12,1995, memo to tribal leaders concerning the joint Democratic Congressional Dinner, scheduled for May 23. As noted above, Kitto presented the event as a chance to meet with members of Congress, *see supra* at 122, and several of the Hudson opponent

[518]Because of its limited probative value to the question of a possible *quid pro quo,* our analysis considered few facts relating to Republican Party solicitations and contributions within the Indian community. This is not to say such solicitations and contributions did not occur or were not reviewed, but they are not discussed in this report.

tribes availed themselves of this opportunity: The Ho-Chunk and Prairie Island each purchased one ticket for $1,500, while the Oneida Nation and the Shakopee's Leonard Prescott each bought two for $3,000. Kitto also pitched his tribal clients a June 11 fund-raiser supporting Sen. Paul Wellstone, which attracted contributions of $2,000 each from the Leech Lake, Prairie Island and Shakopee tribes and $1,000 each from the Lower Sioux and Mille Lacs. In the solicitation letters for these two events, Kitto made no reference to the Hudson matter or any other pending Indian administrative or legislative interest.

O'Connor and Kitto acknowledged that they also pursued their tribal clients for support of the June 28, 1995, DNC Presidential Gala in Washington. *See supra* at 156-58. Apart from contributions by O'Connor and his family, the only known contributions to this event by members of the Hudson tribal opponent lobby were two $1,000 payments by officers of O'Connor & Hannan's client, the St. Croix. There is no evidence that these payments related directly to the Hudson application.

**2. DNC Contacts with the Tribal Opponents in the Aftermath of the Hudson Decision**

On the day of the Hudson decision, O'Connor met Kitto for lunch in Minneapolis. In his daytimer, and his St. Croix billing entry, O'Connor noted this activity:

> Meeting with Larry Kitto in Minneapolis ... Discussion regarding necessity to follow-up with Harold Ickes at the White House, D. Fowler at DNC and Terry Mac at the Committee to Re-elect, outlining fund raising strategies.

O'Connor explains this reference to fund-raising as an ordinary part of his lobbying effort for the client. He recalls no agenda at that time to do fund-raising follow-up with Ickes, Fowler and McAuliffe on the basis of the Hudson decision. In fact, O'Connor denies that he knew the

outcome of the Hudson decision on July 14,[519] even though Kitto has testified that he learned of the decision before he met O'Connor for lunch that day in Minneapolis. Both of them insist that they learned of the outcome only after the denial letter had been released, and not due to any early leak or intelligence.

There is no clear evidence of when O'Connor and Fowler first spoke about the Hudson outcome, but phone records reflect a three-minute call from O'Connor's Minneapolis home to Fowler's office early on Tuesday, July 18, four days after the decision. The next day, O'Connor billed the St. Croix for "discussions with Chairman Donald Fowler regarding Department of Interior decision to reject an application for a casino at the Hudson, WI dog track," and for faxing Fowler copies of two news articles from the Minneapolis Star Tribune concerning the Hudson decision which contained allegations of political pressure in the decision-making. One of the articles was a July 10 piece detailing "intense" lobbying over the then-pending proposal.[520]

The second article O'Connor faxed was published July 15, the day after the decision. It quoted Mark Goff as saying:

[519] In his earlier testimony, O'Connor never addressed the issue of whether he first learned of the decision on the day it was published.

[520] *Lobbying intense over Hudson casino plan,* Minneapolis Star Tribune, July 10, 1995, at IB. The article quoted Kitto at length, who stated:

> We have carried on an intensive effort to stop this. This is a very serious matter for Minnesota and Wisconsin tribes. The president of the United States is aware of this, and I don't say that flippantly.

*Id.* Kitto was further quoted as saying that Minnesota congressmen had discussed the matter with Secretary Babbitt and White House Chief of Staff Leon Panetta. Kitto also described the April 28 meeting with Fowler as an effort "to help communicate to the White House the urgency of this issue." *Id.*

> It is very clear this decision was made based on sheer political pressure. The wealthy tribes were able to defeat poor tribes by effectively throwing their money around.

The article again noted that tribal opponents acknowledged having lobbied the White House and the DNC in addition to DOI on this issue.[521]

The day after his discussions with Fowler, O'Connor's St. Croix billing records reflect that he briefed Kitto on the Fowler conversations, had a discussion regarding "thank you" letters to the White House and members of Congress and had a discussion regarding fund-raising. Corcoran also engaged in follow-up efforts with the St. Croix, which included meeting with Kitto and Chairman Taylor on July 24.

Consistent with O'Connor's advice, soon after the July 14 announcement of the denial, the Indian tribes opposed to the casino application sent "thank you" letters to several individuals, including President Clinton, Chief of Staff Panetta at the White House, Chairman Fowler at the DNC, and Secretary Babbitt. For example, letters were sent over the signature of Ho-Chunk Nation President, JoAnn Jones to President Clinton and Babbitt stating, among other things, "Thank you for your role in the decision to deny the request to approve the Hudson casino." Ms. Jones denies writing or signing these letters. Fowler received at least three such letters in late July and early August 1995, one of which was sent by Stanley Crooks on behalf of all of MIGA. Kitto's records indicate that he drafted these notes for the tribes.

The DNC also undertook follow-up steps in the wake of the Hudson decision. Mercer apparently sent a card concerning the decision to tribal lobbyist Frank Ducheneaux, who

[521] O'Connor's time records reflect that he also spoke with Corcoran and Kitto that day about "criteria voiced by opposition," an apparent reference to the content of the news articles.

responded with his own letter on July 27.[522] Ducheneaux thanked Mercer for his "card regarding the [Hudson] decision," and noted the gratitude of the Minnesota tribes to Mercer and Fowler for their "assistance in advising the President and the Secretary on this matter."[523]

Fowler and his DNC staff solicited further Native American involvement with the DNC in the late summer and early fall of 1995, at the same time that the DNC stepped up its efforts to secure contributions from that community. Fowler met with Indian leaders on at least three separate occasions in September and October 1995,[524] and tribal leaders attended a number of additional meetings at Interior and the White House on various legislative and policy concerns which were coordinated in part by DNC staff. One of Fowler's meetings was specifically with leaders of gaming tribes, who were concerned about proposed taxation of Indian gaming revenues. During that same time, the DNC began receiving substantial contributions from tribes that had opposed the Hudson application, some of which were contributing to the DNC for the first time.

Mercer's boss, DNC Finance Director Richard Sullivan, was not surprised to see Indian contributions that fall. Sullivan recalled a Finance staff meeting during either the spring or

[522]No copy of such a card from Mercer to Ducheneaux was produced in this investigation. Mercer denies that he sent follow-up notes to the various tribes and lobbyists after the decision in July 1995, and questions whether he even sent one to Ducheneaux, notwithstanding Ducheneaux's reply letter.

[523]Ducheneaux also proposed a further action - this time concerning pending legislation - which the White House could take at that time on another matter "which would cement the support of the tribes to the Administration." This investigation did not pursue the outcome of Ducheneaux's request on this collateral matter, and there was no evidence in the available record of any improper communications by the DNC on this issue.

[524]Fowler also met with Pequot leaders on Nov. 13,1995, to hear of that tribe's concerns with pending Indian issues, and to ask the tribe to renew its $250,000 support to the DNC.

summer of 1995 concerning long term fund-raising prospects for the Party at which Mercer indicated that he had spoken with Patrick O'Connor and learned that the Indians with whom Fowler and Mercer had met about Hudson were pleased with what was done for them, or being done for them, and that there would be contributions from them in the fall. Sullivan understood that it was Mercer's task to follow-up with those tribes and pursue contributions from them.

Mercer testified that he did continue working with O'Connor on fund-raising efforts, and it is possible that he remarked to his Finance colleagues about prospects from O'Connor's clients. Mercer acknowledged that there were occasions when he and O'Connor discussed both the Hudson matter and O'Connor's fund-raising efforts in the same conversation, but Mercer said he never received any contributions from the tribes. Indeed, he had no recollection of knowing that those same tribes had contributed to the DNC until the Hudson investigation began. Mercer went so far as to note that he should have received some credit for those contributions (which he did not in internal DNC records) because of his role in the cultivation of those constituents.

3. Other DNC Native American Fund-Raising Efforts in 1995

Determining the precise motivation and cause for the DNC's heightened interest in Indian affairs, and its sudden expansion of Indian fund-raising, is not a simple matter. As noted above in Section II.F.2**.C,** Fowler and Mercer's efforts with O'Connor and Kitto were not the only DNC attempts to forge stronger relations and improve fund-raising with the Indian community in the spring of 1995. By early May of that year, DNC National Finance Council (NFC) Director Adam Crain had begun efforts to increase the DNC's Native American outreach. Crain was aware of the enormous financial contributions the Mashantucket Pequots had made previously to the DNC. Crain recalled working extensively since at least May 1995 with NFC volunteer Co-

Chairman Mitchell Berger to increase the DNC's financial support from Indian tribes, particularly gaming tribes.[525]

Soon after Crain embarked on this Indian-focused agenda, Mercer made him aware that he should "stay away" from Minnesota and Wisconsin tribes involved in the Hudson matter, whom Fowler and Mercer were handling.[526] Crain recalled Mercer's explaining that he and Fowler were handling an issue of interest to these tribes on a casino matter, and telling Crain he "should not approach them for money because that was already being handled by [Mercer] or somebody in the chairman's office and possibly the Chairman."[527] Accordingly, Crain's early efforts in this regard did not target Minnesota or Wisconsin tribes.

In May 1995, Berger introduced Crain to Indian leaders and activists from Florida and set in motion a cultivation process that would peak in August 1995. One of the early steps in this process was Crain and Berger's effort to set up a June meeting in Washington for Indians from across the country to meet with Harold Ickes and leaders of the DNC and the Clinton/Gore '96 Committee. Crain, Sullivan and Berger communicated with Fowler, McAuliffe and Ickes about this proposal in May and June 1995. The idea was to provide a forum for discussion of ways that Native Americans could support the Administration and the President's re-election effort. These

[525]Crain said he also worked with volunteer John Garamendi of California (who subsequently became Deputy Secretary of the Interior) in connection with a May 10,1995, Fowler visit to Los Angeles and other solicitation efforts in California. Garamendi introduced Crain to leaders of California gaming tribes, including officers of the Cabazon Band of Mission Indians, who by May had pledged $100,000 to the Clinton/Gore '96 Committee, and who later that summer pledged $100,000 to the DNC. At Crain's suggestion, Fowler was soliciting the Cabazon from May through the summer.

[526]Grand Jury Testimony of Adam Crain, Dec. 4,1998, at 18-20.

[111] *Id.* at 18-21.

efforts culminated in a June 22 meeting with representatives of the DNC, the Re-election Campaign and the White House. Though Sullivan had requested Ickes's participation, and understood initially that Ickes would attend, the White House was represented at the meeting by Craig Smith of the White House Office of Political Affairs, not Ickes.[528] Initially, Crain also wanted to combine the June meeting with a specific Indian fund-raising event, but Berger rejected the idea as premature. Nonetheless, Crain and Berger presented this entire effort as cultivation of the fertile Democratic fund-raising prospects within the Indian gaming community.

Also in May 1995, Fowler met for the first time with Kevin Gover and Catherine Baker Stetson of New Mexico, who offered their assistance to the DNC in its Indian outreach. Gover, a Pawnee Sioux Indian, had helped organize Native Americans for Clinton/Gore in 1992, and had national contacts in the Indian community. Stetson, his law partner, was committed primarily to an Indian law practice, and was active with New Mexico Democratic politics, especially in fund-raising efforts.[529] Fowler met with Gover and Stetson in Albuquerque on May 28, where they hosted a meeting with New Mexico Indian leaders at their firm's offices.[530] Gover and Stetson also became actively involved in planning and staging the June 22 meeting in Washington.[531]

[528]Berger's planning materials reflect that Pequot Chairman Skip Hay ward and the Minnesota Chippewa Tribe were among initial invitees, but Hayward did not attend. Chairwoman Marge Anderson attended on behalf of the Mille Lacs.

[529]Stetson was reportedly the top Clinton/Gore fund-raiser in New Mexico in 1992.

[530]A principal issue on the agenda at that time was Indian gaming in New Mexico.

[531]A June 19 briefing memo Gover and Stetson sent the DNC and Re-election Campaign in anticipation of the June 22 meeting laid out a number of points, including these:

You are fighting a perception that your Indian supporters are treated no better than

(continued...)

On June 22, about 20 Native American leaders met at Clinton/Gore '96 headquarters in Washington with representatives of the Campaign, the DNC and the White House. Fowler was originally expected to attend, among others, but was out of town due to a scheduling conflict. The DNC was represented by Crain, General Counsel Joseph Sandler and DNC Western Political Director Judy DeAtley, who had been the main liaison in setting up the event. According to DeAtley's June 23 memo to Fowler describing the meeting, Craig Smith stressed that the "Indian vote and financial support is critical" to the 1996 election. Crain and his Finance counterpart on the Re-elect Campaign staff explained that the Campaign needed to raise $42 million, and that the Campaign would direct funds "over and above those permitted by law" to the DNC and state parties "that have an Indian Plan." DeAtley's memo also reflected that many of the points framed by Gover and Stetson in their June 19 briefing memo were covered at the June 22 meeting (including those noted in n. 531, *supra).*

On the evening of June 22, the DNC hosted a dinner for the visiting Indian leaders, which featured a DNC presentation concerning its Finance division and its other components. Records

> "'(...continued)
> your Indian enemies.... When it comes [to] politics, though, <u>you should embrace your friends</u> and keep your adversaries at a distance....
>
> There is a lot of money in Indian country, and a lot of it has gone to the DNC and other Democratic causes in the last decade....
>
> [T]he tribes can be major financial players in California, Minnesota, Wisconsin, Florida, New Mexico, and Washington.

(Emphasis in original.) The memo also discussed at length the political potency of the Indian vote in certain key states, and specific political strategies for appealing to Indians and locking up their support. A note by Fowler reflects that he asked his political director to set up a meeting after reviewing this memo.

show that Crain and Sandler again attended, as did Assistant Secretary of the Interior Ada Deer and her deputy, Michael Anderson.

On June 23, Fowler and DeAtley met privately at the DNC with Gover and Stetson, who briefed Fowler on the prior day's events. Fowler's notes of the meeting reflect a discussion of key Indian states from the standpoint of votes and finance prospects, with Minnesota being recorded in the money category. Fowler recalls little of this meeting, even though by June 20 - as reflected in another DNC document generated by DeAtley - Gover had made a commitment to Fowler to raise $1,000,000 for the DNC and the Re-election Campaign.[532] Gover did not recall a specific million-dollar commitment in 1995 to that effect, but stated that he may have spoken rhetorically about "a million dollars and a million votes."[533]

#### 4. The DNC's Parallel Indian Fund-Raising Efforts Collide in August 1995

Though the Indian political events in Washington in June 1995 met with mixed reviews from the tribal participants, Crain became energized to start soliciting the Indians for money. He also became motivated by his DNC superiors' rising expectations of fund-raising by the NFC, as reflected in a phone message he left for Berger on July 18, asking if at that point he and Berger could "go after Indians for NFC." Berger recalled being reluctant to make the money pitch to the

[532]Fowler has no recollection of such discussions with Gover; Gover stated that he would not have discussed such a goal with Fowler the first time he met him. An August 1995 solicitation letter Gover sent Indian leaders for contributions specifically to the Clinton/Gore '96 Primary Committee described a commitment of 100 tribes at $1,000 each, for a total of $100,000.

[533]Gover does recall that in 1996, he and Stetson explored the possibility of doing a single fund-raiser to generate $1 million in "soft money" from Indians for the Re-election Campaign. The event never materialized.

Indians at that point, but agreed with his friends in the Indian community that the DNC should have a presence at an important upcoming gathering of tribal leaders - the National Indian Gaming Association (NIGA) convention in August in Milwaukee - which could introduce the DNC to a number of fund-raising prospects.[534] By early August, Crain, Berger and Berger's Indian advisors were conferring at length about strategies for a DNC presence at the Milwaukee convention. Crain proposed that Fowler or DeAtley address the group, and the DNC would then follow-up with a briefing-type meeting in Washington where a small group of key Indian leaders could meet with political and policy leaders. That group would then become the host committee for a major Indian fund-raiser.

Over the next month, Crain pursued this strategy, but it collided with fall-out from the Hudson controversy. As noted above, by late July, Berger had been retained by Havenick to pursue relief from the Hudson denial for Havenick and his Indian partners. *See* Section ILL 1., *supra.* As a result, Berger was focused on the NIGA convention not merely because of DNC fund-raising prospects, but also because he saw it as an opportunity for him or another Havenick representative to attempt to broker a Hudson compromise with the Minnesota and Wisconsin opponent tribes, thus promoting reconsideration of the application by Interior. By Aug. 16, Berger had gotten confirmation that the "Minnesota Sioux" would be at the NIGA convention,[535] and he then advised Havenick of this potential strategy.

[534]Though likely unknown to Crain and Berger at the time, in early June, NIGA had invited Fowler (as well as his Republican National Committee counterpart) to the August convention.

[535]Phone Message Slip from Guy Fringer to Mitchell Berger, Aug. 15, 1995. Furthermore, the "Minneapolis Area Nations" were identified as co-sponsors of the convention. NIGA 1995 Annual Convention and Trade Show, Milwaukee, WI, Promotional Pamphlet.

Ultimately, no one attended the NIGA convention on behalf of Havenick, and Fowler did not attend on behalf of the DNC. Part of the reason may lie in a phone call between Berger and Fowler on Aug. 15, 1995. Fowler had called Berger on the morning of Aug. 11, and as of Aug. 14, records show Berger's assistant was still reminding him to call Fowler back. Late on the next afternoon, while Fowler's trustee director assisted him in placing finance calls, DNC notes reflect that Fowler and Berger spoke about "Indians."[536] Neither Berger nor Fowler could recall discussing the Hudson matter in that call or at any time, but Berger was careful not to exclude that possibility.

Patrick O'Connor's St. Croix billing records provide one basis to believe that Berger and Fowler did discuss the controversy and the threat of litigation over the application's denial. Those documents reflect that on Aug. 17 Mercer called O'Connor regarding "possible law suit by Wisconsin Tribes that failed to get the race track trust land from Interior against Don Fowler and our clients." The entry clearly indicates that the call originated from Mercer, and nothing in O'Connor's notes or files reflects he had any prior knowledge of this information. Berger was well aware at this time that Havenick was inclined towards litigation, and Berger had reviewed Piatt's Aug. 4 letter to Babbitt laying out the basis for such a suit. Berger cannot rule out that he supplied this information to Fowler, and there is no record or indication of the DNC's receiving it from any other source.

An alternate explanation of why Fowler chose not to attend the NIGA conference relates to his review of a memo that Crain drafted around Aug. 9, which described the upcoming

[536]The trustee director's notes contain this shorthand, and also indicate that Fowler had tried to reach Patrick O'Connor by phone during the same session.

conference and encouraged Fowler to attend it. Crain sent the memo to Berger for vetting before submitting it to his DNC superiors.[537] Fowler and his staff may have had their own concerns about Fowler attending the NIGA convention based upon his perceptions of the Hudson outcome, especially in view of the information O'Connor had supplied Fowler in July about the immediate fall-out of the decision. *See supra* at 313-15. Still, there is no evidence that prior to the Aug. 15 Fowler-Berger phone call the DNC had any information that the applicants were contemplating a lawsuit, much less one naming Fowler as a defendant.

On Aug. 15, however, the DNC's focus became clear when Crain called Berger about Fowler's concern over potential Hudson litigation. At 5:25 p.m. that day, Crain left a message with Berger's assistant reading in part:

> (1) Don's only concern - re Milwaukee is that he's worried that the Pat O'Connor / Dog track issue would come up. He doesn't want to be in hot water.

The next day, Mercer entered this dialogue, leaving a message with Berger's assistant that read in part:

> (1) Follow up on conversation of Adam + you re: Milwaukee Event - Fowler was going to be named in a suit about the dog track. Tribal leaders in that suit must not be in attendance.
>
> (2) Also - no money has come in the door yet - who will be the person responsible for the $ raised out there

(Emphasis in original.) Crain also left a message on Aug. 16 asking Berger to speak with Mercer. Later that day, Crain left Berger a second message on this subject, which stated:

> Looks like Fowler is not going to go

[537] No copy of this memo has been located.

(1) wants to go to San Diego[538]
(2) Dog track scares him.
(3) Scheduling problem (nightmare)
If [Berger's Indian advisor] gets the $ people together Adam says he can go - meet with $ people - listen to concerns, take copious notes - talk about event in DC. What are your thoughts?[539]

Crain reported to Mercer and Sullivan about his fund-raising efforts, including the plans relating to the NIGA convention and the Indians. Crain also informed Sullivan that he was frustrated by Mercer's efforts with Indians, which were interfering with Crain's.

Consistent with these developments, Crain attended the Milwaukee NIGA convention on behalf of the DNC.[540] The day after the convention concluded, Crain reported to Berger that the NIGA leadership was happy the DNC sent a representative, and that he had toured the convention floor with Berger's Indian friends for "lots of one on one meetings."[541] Crain termed the event "very productive" and noted their need to "strategize about what to do next."[542] Later

[538]That October, the National Congress of American Indians had its conference in San Diego. Fowler did not attend, but DeAtley did go on behalf of the DNC.

[539]Berger also sensed from these communications that Mercer and Crain might be competing for credit on these Indian finance prospects, and that Mercer was quite focused on the immediate (not long-term) fund-raising potential of this group of gaming tribes.

[540]Kitto also attended the convention to address the gathering on "the importance of contributing to Democratic Senators who support tribal gaming," and to identify candidates who the tribes should support in the 1996 Senate races. Kitto also wrote to the DSCC's Rita Lewis that he would have a "private session with Indians who are Democrats" at the convention to develop an "activist position and program" for the 1996 races, including a goal of raising "$30,000 to $50,000 before the end of 1995." Memo from Larry Kitto to Rita Lewis, Aug. 5, 1995. O'Connor's and Corcoran's St. Croix billing records show that they briefed Kitto on the threatened lawsuit before he attended the NIGA convention and that Corcoran then conferred with Kitto and NIGA representatives during the convention itself.

[541]Phone Message Slip from Adam Crain to Mitchell Berger, Aug. 23, 1995.

[542]M

that same day, he called Berger again to propose a conference call on Aug. 25 with Mercer to discuss plans for a Native American meeting in Washington during the October NFC conference. By Aug. 28, however, plans were made to invite tribal leaders to a DNC Issues Conference and dinner with Vice President Gore on Sept. 11 in Washington, D.C.[543]

On a parallel course, O'Connor remained in contact with the DNC about the threat of litigation through September 1995, when the suit was actually filed. During that time frame, records reflect he spoke with Mercer at least three times about Hudson, and that he called Sullivan about the issue at least once. During this time, O'Connor also spoke with Fowler, both about the threat of a Hudson lawsuit and about fund-raising from the Indians. Fowler's Aug. 25 finance call sheet advised him to call O'Connor, providing as "Background" nothing more than: "Money from the Native Americans."[544] Notes on that same document reflect that Fowler placed a call to O'Connor on Aug. 28, but suggest they did not speak on that date. O'Connor's time billing records reflect that the two spoke on Aug. 15 regarding another O'Connor client,[545] and then again on Sept. 6 regarding Fowler's Aug. 29 meeting with Ron Piatt and the threat of a suit against Fowler and Ickes over Hudson. Neither entry reflects discussion of fund-raising from the Indians. However, Fowler made undated notes during this time frame which he believes correspond to his initial discussion with O'Connor about the second O'Connor client who was

[543]Crain prepared a memo for Fowler dated Aug. 28 detailing his Indian cultivation efforts since June 1995. In it, Crain noted that some of the Native American leaders who had offered to help the DNC reach out to tribal leaders across the country included Berger's contacts, NIGA's Chairman, Pequot Chairman Hay ward, and Gover and Stetson.

[544]Memorandum from Ari Swiller to Donald Fowler, Aug. 25, 1995.

[545]*See* n. 267, *supra.*

seeking DNC assistance with the White House. Fowler's notes reflect that during this conversation O'Connor told him that things were "going very well" with the "Indians," and "knocking them out was very important." Neither Fowler nor O'Connor could recall this portion of their conversation, but upon reviewing his own notes Fowler testified that these comments apparently related to knocking the applicant Indian tribes out of the Hudson casino matter. Fowler's notes then indicate that O'Connor could "raise $50,000." Again, Fowler could not recall this specific comment by O'Connor, but assumes now that it related to the Hudson Indians.

### 5. DNC Indian Solicitations and Contributions by the Hudson Opponent Tribes in Late Summer and Fall 1995

The first substantial DNC contributions by tribal opponents after the Hudson decision were made in connection with events organized by Crain. In late August 1995, Crain learned that the evening of Sept. 11 had come open on the Vice President's schedule, due to postponement of a DNC environmental conference. As a result, Crain was given responsibility for coordinating a day of Democratic Business Council (DBC) events, featuring meetings with Clinton Administration and Democratic Party officials and culminating in a fund-raising dinner with Vice President Gore. The opening afforded Crain a vehicle for soliciting the tribes, and he promptly began surveying his Indian contacts to identify prospects willing to pay the $10,000 price required to secure access to all events and the dinner.[546] As part of that effort, Crain conferred with Berger and his Indian contacts, as well as with Kevin Gover.[547] Crain also

[546]Crain's fax to DBC prospects describing this "DNC Day" listed a dues price of $10,000 in the case of a DNC federal (hard money) contribution, and $15,000 for DNC non-federal (soft money) contributions.

[547]Crain faxed Gover a list of all NIGA members, and on Aug. 31 Gover faxed the list (continued...)

conferred with Mercer about tribal prospects for the dinner, but cannot recall if Mercer specifically identified or solicited any contributions for the event.

As noted above, documents reflect that Fowler was communicating with O'Connor about Indian contributions at this time, but no witness recalls O'Connor or Kitto playing any role in soliciting contributors for the Sept. 11 dinner. Nonetheless, two tribes that had been active in the Hudson opposition effort were represented at the dinner and made contributions in connection with it: the Oneida of Wisconsin and the Mille Lacs of Minnesota.[548]

By Sept. 6, Crain reported by memo to Sullivan and Mercer that he had secured commitments of $10,000 from the Oneida and $15,000 from the Mille Lacs in connection with the dinner. On the basis of these donations, Oneida Chairwoman Deborah Doxtator and Mille Lacs tribal council members Melanie Benjamin and Doug Twait attended the Sept. 11 dinner with the Vice President, along with Fowler, Sen. Dodd, Mercer, Crain and a group of about 25

[547](...continued)
back to Crain, annotated with stars and comments designating a large number of worthwhile DNC finance prospects. While Gover placed stars beside many of the Hudson opponent tribes (and designated both Ho Chunk President JoAnn Jones and Oneida Chairwoman Deborah Doxtator as "Good Democrat[s]"), he also designated with stars both of the listed Hudson applicant tribes (the Mole Lake Sokaogon and the Lac Courte Oreilles), even while noting gaiashkibos as a "Republican" (and "Loretta Avent's friend").

[548]On Sept. 19, after the DNC had received contributions from the Oneida and Mille Lacs totaling $25,000, Mercer notified the DNC trustee director by memo that O'Connor's status as a trustee should be renewed. However, that memo made no reference to the September tribal contributions; instead, it cited O'Connor's recruitment of "Eric Hotung for $100k," and noted that O'Connor still had "$50k outstanding from the Native American community." This note suggests at a minimum that Mercer was unaware of any credit owed to O'Connor for the Oneida and Mille Lacs donations, but is consistent with both Mercer's May 19 memo and Fowler's more recent, undated notes indicating O'Connor "can raise $50,000" from Indians.

other contributors.[549] Briefing materials Crain generated for the dinner identified the Oneida and Mille Lacs officials and their tribes as "new DNC supporters."[550] Kevin Gover and Cate Stetson were among the other guests. DNC briefings noted that Gover was then "recruiting new DNC supporters," while Stetson had "raised several new DBC members from the Native American community and from other individuals in New Mexico."[551] Additional notes Crain created about this event listed both Gover and Stetson as "raiser[s]," indicating that they had solicited contributions from others.[552] Stetson recalls particularly that she solicited the Oneida and Mille Lacs contributions, though documents support her recollection only as to the Mille Lacs contribution. Gover had no recollection of Stetson's soliciting those contributions, and recalled being surprised to see Oneida and Mille Lacs members at the dinner.[553]

[549]Among the other guests were leaders of two California tribes to whom Crain had been introduced through his work with John Garamendi.

[550]DNC-generated List: Gore Dinner Attendees, Sept. 11, 1995.

[551]*Id.* One of those "other individuals" was apparently a New Mexico businessman who attended the Sept. 11 dinner, whom Stetson listed in her records as one of her solicitations.

[552]Memo from Adam Crain to Melissa Brunton, Richard Sullivan and David Mercer, Sept. 6,1995. Crain's briefing materials said that Fowler "should recognize Ms. Cate Stetson and Mr. Kevin Gover for their efforts to increase political and financial support from the Native American community for both the Committee to Re-elect and the DNC." Memo from Adam Crain to Chairman Dodd, Sept. 11, 1995.

[553]Some of Stetson's 1996 records of 1995-96 DNC tribal contributions reflect both of these tribes' contributions, but also reflect other contributions that Gover and the DNC attribute to other fund-raisers. Significantly, in an Aug. 21,1996, letter to Sullivan reviewing her fund-raising achievements, Stetson claimed credit only for the Mille Lacs's 1995 contribution, and not the Oneida's. Yet, Mille Lacs Chairwoman Anderson testified that she only recalled Stetson soliciting the tribe in connection with a subsequent Senate campaign.

The Oneida made their contribution by a $10,000 check dated Sept. 7, 1995, which Crain booked at the DNC, crediting himself as the fund-raiser.[554] The DNC received the Mille Lacs's $15,000 contribution on Sept. 13. Sullivan understood that these contributions were the result of a combination of efforts by Crain and Mercer pursuing their respective Indian contacts, but there is no direct evidence as to what role, if any, Mercer may have played in generating these specific contributions. Mercer recalled having no direct responsibility for raising these funds. Crain did not recall that these or any specific Indian contributions related to the Hudson casino matter.

In connection with the Sept. 11 dinner, Crain also organized a series of meetings for Indian leaders with DNC and Administration officials. Hundreds of Indian leaders were in Washington that week to lobby Congress and the Administration over appropriations issues and other matters of concern to the tribes. Fowler met with various Indian leaders on Sept. 7, and heard their concerns about BIA funding cuts proposed by Sen. Slade Gorton (R-Wash.), and about incursions on tribal sovereignty. The morning after the Sept. 11 dinner, Fowler met with the Indian leaders who had attended the dinner, along with Gover, Stetson and several other tribal leaders. Fowler's notes of the meeting reflect that the focus again concerned appropriations issues and other pending legislation that the leaders saw as threatening tribal sovereignty. Summarizing the meetings' critical points in a Sept. 15 memo to Fowler, Crain reiterated the Indian perspective on the pending appropriations bill:

> Without a veto threat or an actual veto, tribal leaders say Clinton/Gore will lose Indian votes and significant pledges of support.... Tribal leaders have asked that calls be placed to Leon Panetta and Harold Ickes to strongly recommend a

[554] DNC check-tracking forms provided spaces for identification of the volunteer solicitors of contributions, as well as the professional DNC fund-raisers. On the Oneida check forms, Crain identified no solicitor.

> Presidential veto threat or an actual veto on the Interior bill. Indian leaders have asked that the political and financial stakes be emphasized, particularly in the Western states.[555]

There is no record of whether Fowler made the requested calls.

Interaction between Indian leaders and both Fowler and his DNC Finance staff continued at a heightened level in the ensuing weeks, including correspondence with Gover and Stetson on positioning DNC Indian outreach,[556] and an Oct. 5 meeting Fowler hosted for Indian gaming leaders from Southern California. At that meeting, as in many of the fall 1995 communications, the Indians' focus was largely on a proposal to tax Indian gaming revenues that had passed the House Ways and Means Committee and was then pending before the Senate Finance Committee. After this meeting, Fowler provided a policy briefing memo to presidential aide Bruce Lindsey highlighting concern over this bill, as well as tribal interest in Interior appropriations issues, proposed amendments to IGRA and the defense of tribal sovereignty generally. With Crain's help, Fowler then immediately broadcast to Indian leaders news of Fowler's "communication to the President" of their concerns via a faxed memo dated Oct. 16. At the same time, Crain made plans for a further DNC event in Washington to draw Indian participation, and he advocated sending a DNC official to the San Diego convention of the National Congress of American Indians (NCAI) in late October. DeAtley ultimately represented the DNC at that event. Crain viewed the NCAI convention as an "opportunity to pitch" an upcoming Nov. 8 DNC fund-raising

[555] A Sept. 9 Crain memo on this same subject stated that the tribal leaders warned of loss of "significant pledges of support for the Committee to Re-elect and the DNC," and said that Indian leaders requested calls to Panetta, Ickes and Babbitt.

[556] Stetson's records reflect that she maintained a high level of DNC and Clinton/Gore '96 fund-raising efforts with various tribes from the fall of 1995 through 1996.

dinner with the Vice President featuring Indian contributors, so he enlisted DeAtley's assistance in reaching out to the Indians in San Diego.[557]

Crain set the cost of participation for the Nov. 8 dinner at $5,000 per person, with $15,000 securing membership in the DBC. By Nov. 7, he obtained solid commitments from four tribes, including the Oneida (at $10,000) and the St. Croix (at $15,000). Each of those tribes sent representatives to the dinner, with Chairman Lewis Taylor attending for the St. Croix along with a tribal council member. Among the small group of persons attending the dinner with the Vice President and Fowler were representatives of two other tribes, as well as Gover, who had solicited a contribution from a New Mexico tribal leader, and Kitto, who was described in Crain's briefing memo to Sullivan and Mercer as "an active Democratic party supporter" who "represents Native American tribes in Minnesota, Wisconsin and Michigan including the St. Croix tribe."[558] DNC records relating to the St. Croix's Nov. 6 $15,000 donation and the Oneida's Nov. 7 $10,000 contribution identify no volunteer solicitor, and note Crain as the fund-raiser credited for the receipts. Mercer, O'Connor and Kitto received no recorded credit for generating these contributions, despite Kitto's attendance at the dinner with the St. Croix. O'Connor later said that he was unaware of any efforts by Kitto to raise money from the St. Croix, but Gover recalled being at a fall 1995 NFC conference where Kitto boasted of O'Connor & Hannan's work to raise money from Indians.[559]

[557]Memo from Adam Crain to Judy DeAtley, Oct. 27, 1995.

[558]Memo from Adam Crain to Richard Sullivan, David Mercer and Jack Rosen, Nov. 7, 1995.

[559]Kitto's DNC and DSCC fund-raising efforts continued at a high level in 1996. In April (continued...)

At this time, the DNC's Indian outreach under Fowler and Crain was generating measurable results, but the efforts were not always well-received by the tribes. In a Nov. 11 memo to the DNC campaign division, DeAtley noted that "Chairman Fowler has been very responsive to Indians," but complained of "a major problem with all DNC Indian activity being generated through the finance department. The campaign division must take the lead."[560]

### 6. Summary and Evaluation of Tribal Opponents' National Democratic Contributions in 1995-96

By Nov. 9, 1995, Crain's tabulations showed that the DNC had generated $110,000 in contributions from Indian tribes that fall. All of those funds came from gaming tribes, and $50,000 of the total was from three tribes that had been active in the Hudson opposition effort.[561] From January 1992 to April 28,1995, none of those three tribes had given any national Democratic organization more than $2,000 in a single contribution, and the financial support to such organizations of all three combined totaled only $8,500.[562]

559 (...continued)
of that year, Kitto met privately with Fowler and discussed Kitto's goal of raising $600,000 from Indian gaming for the DNC in the general election year.

[560] An illustration of this problem noted by DeAtley was the Finance staffs telling the tribes if they pledged $150,000 to the DNC, then it would send someone to the NCAI convention.

[561] A11 three of those tribes had been represented at the April 28 DNC meeting with Fowler; two of the tribal leaders who attended dinners with Fowler had first met him at that meeting.

[562] These figures do not take measure of contributions directly to individual Senate and House campaigns. Several of the tribes had regularly supported the campaigns of their federal representatives in the past, though not nearly to the degree that some of them supported the DNC in 1995 and 1996.

O'Connor told investigators that he did not solicit funds from the Hudson opponent tribes for the DNC or the Re-election Campaign, even though Fowler's records suggest that "money from the Native Americans"[563] was a focus of O'Connor's solicitations and Mercer's memos attributed to O'Connor an "outstanding"[564] $50,000 Indian balance from Native Americans, as noted above. O'Connor's own earlier records suggest that the $50,000 figure was O'Connor's unfulfilled pledge of solicitations for the June 1995 DNC Gala. Likewise, his records seem to reflect a $50,000 fund-raising goal or commitment to the Clinton/Gore '96 Committee. *See supra* at 173-74 and nn. 283, 284.

O'Connor and Kitto did endeavor to raise funds from the tribes for the Re-Election Campaign, and in that effort they sought to motivate the tribes by direct reference to the Hudson outcome. Kitto said that he sent all his tribal clients and other persons associated with those tribes a letter dated Sept. 14,1995, over the names of both Kitto and O'Connor, which stated:

> The first eight months of the Republican controlled Congress have been difficult times for tribes across the country. Unquestionably, tribal governments will need to call upon the Clinton administration, and the President himself, to assert leadership and assist tribes through the difficult 1996 budget process and to help fend off attacks on tribal gaming. As witnessed in the fight to stop the Hudson Dog Track proposal, the Office of the President can and will work on our behalf when asked to do so.

The letter solicited ticket purchases at a cost of $1,000 each for a Clinton/Gore '96 presidential dinner on Sept. 26 in Washington, and made reference to an upcoming vice presidential dinner in

Memorandum from Ari Swiller to Donald Fowler, Aug. 25,1995.

Memorandum from David Mercer to Ari Swiller and Nancy Burke, Sept. 19,1995.

October.[565] O'Connor testified in his 1998 House committee appearance that he had not seen the letter when it was issued, and that Kitto had informed him during the civil case that Kitto sent it without O'Connor's knowledge. O'Connor said that Kitto assumed responsibility for such efforts to raise money from the Indians, and that O'Connor was not actively involved. Records show that three Hudson opponents contributed to this Clinton/Gore '96 event, with the Mille Lacs paying $500 and the Prairie Island and Upper Sioux tribes - and Kitto - donating $1,000 each.

In deposition testimony, Kitto readily acknowledged that he actively solicited his tribal clients, but denied that it was an effort exclusive to the Hudson lobbying effort.[566] Rather, he asserted that he advised all his tribal clients to contribute to political campaigns and organizations as a means of raising their profile with legislators and decision-makers, and he

[565]Kitto also prepared an Oct. 5, 1995, letter from Kitto and O'Connor to the tribes, repeating much of the same message as the Sept. 14 letter, but without reference to the Hudson Dog Track proposal. It solicited the purchase of tickets at $1,000 per person for a Clinton/Gore '96 vice presidential dinner on Oct. 24 in Washington. There is no record of any contributions by Hudson opponent tribes in connection with that event.

[566]Nonetheless, Kitto repeatedly used the Hudson experience as a solicitation pitch. In June 1996, almost a year after the Hudson denial, MIGA co-hosted a fund-raiser for Rep. Martin Sabo. In a May 26, 1996, memo to tribal clients informing them of the fund-raiser and soliciting contributions, Kitto wrote:

> I know everyone has been inundated with political fundraising requests this spring. However, Martin was relentless in leading the charge to stop the Hudson Dog Track Deal. It is appropriate that we recognize Martin for his diligence and hard work.

Likewise, in an Aug. 29, 1996, memo to his tribal clients, Kitto expressed support for Congressman Bruce Vento, noting that Vento was "a leading advocate for Minnesota Tribes in stopping the proposed Hudson Dog Track buy-out the previous year."

denied the existence of any contingent linkage between the Hudson outcome and the contributions by tribes that opposed the application.[567]

Tribal witnesses also denied such a connection. They asserted that their interest in supporting the DNC, the President's Re-election Campaign[568] and other national Democratic organizations during 1995 related to broad Indian political interests, including a variety of specific pending bills and BIA issues, such as those seeking to tax or limit Indian gaming, which the tribal representatives reviewed with Fowler in the September and October 1995 meetings. Records of congressional activity support this assertion. During the seven months that the Hudson application was under review at Interior in Washington, eight proposals were introduced in Congress relating to Indian gaming.[569] There also were a variety of non-gaming issues of

[567]Kitto supplied his tribal clients a Sept. 17, 1995, memo concerning political contributions and advising them of legal parameters governing such contributions. In the memo, he also conveyed his views concerning the direct and positive impact such contributions had on government decision-making. He told them "It is essential that Washington's decision makers know who you are. How heavily you weigh in politically, will directly effect how they support your issues."

A further example of Kitto's contributions philosophy was provided by an Oct. 29, 1996, letter he and O'Connor sent to tribal leaders concerning a Nov. 1 fund-raiser for congressional candidate Mary Rieder at O'Connor's Minneapolis home. The event featured as guest of honor Secretary Babbitt. The letter described the event as a small function providing the Indians "an opportunity to discuss Tribal issues with Secretary Babbitt."

[568]In the summer of 1995, Gover also was directly soliciting Indian tribes for contributions to the Re-election Campaign, with a stated goal of raising $1,000 each from 100 tribes. Gover advised tribal leaders that Indians could not afford to see Republicans take back both Congress and the White House, and called the stakes, "exceedingly high in 1996." Letter from Kevin Gover to Jo Ann Jones, Aug. 14,1995.

[569]*See* H. R. 140,104th Cong., 1st Sess. § 2 (1995); H. R. 462, 104th Cong., 1st Sess. (1995); H. R. 497, 104th Cong., 1st Sess. § 4(a)(2)(H) (1995); S. 487, 104th Cong., 1st Sess. (1995); H. R. 1364,104th Cong. 1st Sess. § 1 (1995); H. R. 1512,104th Cong., 1st Sess. (1995); H. R. 1578, 104th Cong., 1st Sess. (1995); H. R. 952, 104th Cong., 1st Sess. (1995).

interest to Indians pending on Capitol Hill during the period from 1994 through 1996. For example, there were proposals to amend: the American Indian Religious Freedom Act;[570] the Indian Child Welfare Act of 1974;[571] and the Indian Self-Determination Act.[572] Members introduced the American Indian Trust Fund Management Reform Act,[573] and several proposals to reorganize the Bureau of Indian Affairs.[574] In part due to the economic prosperity of some gaming tribes, deep cuts were proposed in appropriations for Interior - particularly for the BIA.[57:

Against this backdrop, tribes that had opposed the Hudson casino application made substantial and, in many cases, unprecedented contributions to the DNC, the President's Re-

[570]Rep. Richardson introduced two bills in 1994 to amend the American Indian Religious Freedom Act. *See* H. R. 4155, 103rd Cong., 2nd Sess. (1994) (requiring Federal agencies to manage land so as not to frustrate American Indian religious practice); H. R. 4230, 103rd Cong., 2nd Sess. (1995) (permitting the traditional use of peyote for American Indian religious purposes).

[m]*See* S. 764,104th Cong., 1st Sess. (1995) (relating to the adoption of Indian children); H. R. 1448, 104th Cong., 1st Sess. (1995) (same). *See also Birth Rights - Custody vs. Culture,* USA Weekend, Oct. 15,1995, at 4.

[572]Delay in the implementation of regulations required by the Indian Self-Determination Act of 1988 resulted in introduction of the Indian Self-Determination Contract Reform Act of 1994. *See* S. 1410, S. 2310,103rd Cong., 2nd Sess. (1994).

[573]This Act was intended to give Indians more control over money held in trust for them by DOI. H. R. 4833, 103rd Cong., 2nd Sess. (1994). *See also* Senate Oversight Hearings S. 104-514, 104th Cong., 1st Sess. (1995).

[57A]*See, e.g.,* S. 814, 104th Cong., 1st Sess. (1995).

[575]Amidst contentious congressional debates, Babbitt vowed to call on the President to veto the resulting bill. *See e.g., Tribes say gambling tax threatens self-sufficiency,* The Arizona Daily Star, Sept. 21,1995, at 3B ("Indian tribes in Arizona and other states suffered a double defeat yesterday as a new gambling tax headed toward the House floor and congressional negotiators restored only part of a cut in tribal funding.").

election Campaign and other national Democratic organizations in 1995 and 1996.[576] A sense of the exponential increase in such giving is conveyed by the aggregate figures. For purposes of this comparative analysis, totals were generated by adding the contributions of seven Minnesota tribes (Fond du Lac, Leech Lake, Lower Sioux, Mille Lacs, Prairie Island, Shakopee, Upper Sioux)[577] and three Wisconsin tribes (Ho-Chunk, Oneida, St. Croix) involved in the Hudson opposition lobby, as well as MIGA and the tribes' lead interfaces with the DNC and the Re-election Campaign - O'Connor and Kitto[578] - for two periods: Jan. 1,1992 through April 28, 1995; and April 29, 1995, through December 31, 1996. The first period effectively represents two political election (and fund-raising) cycles; the second encompasses only the time between the April 28, 1995, DNC meeting and the end of the 1996 general cycle. This division corresponds to evidence suggesting that the tribal opponents and the DNC discussed solicitations or pledges of financial support at the April 28 DNC meeting about the Hudson application.

[576]In this analysis, only contributions to the DNC, DSCC, DCCC, Democratic Leadership Council and Clinton/Gore '96 Committee (primary and general election accounts) have been considered. Nearly all of the studied tribes made contributions to federal congressional campaigns during the pre- and post-decisional time frames. The evidence does not indicate any improper connection between such contribution activity and the Hudson decision-making process, and those figures are not detailed in this report.

[577]Of the 11 Minnesota tribes, four made no contributions whatsoever at the federal level in 1995 or 1996: Bois Forte, Grand Portage, Red Lake, and White Earth.

[578]Totals for O'Connor and Kitto also include contributions by their immediate family members. This analysis includes O'Connor's and Kitto's prior DNC and Clinton/Gore '92 giving in large part because O'Connor's claims in spring 1995 about the strength of support the Hudson opponents had given to Democrats in the past seemed to consciously include the lobbyists. For example, in his May 8, 1995, letter to Ickes, O'Connor's described to "previous financial support to the DNC and the 1992 Clinton/Gore Campaign Committee" and attributed it to "the representatives of the tribes that met with Chairman Fowler" on April 28. Crediting the tribes in part through the past contribution activity of their lobbyists makes greater sense after viewing the prior giving records of those tribes.

| | |
|---|---|
| Total tribal opponent and MIGA contributions 1/1/92-4/28/95: | $ 61,100.00 |
| Total O'Connor and Kitto contributions 1/1/92-4/28/95: | $21.617.00 |
| Collective giving prior to DNC meeting: | $ 82.717.00 |
| Total tribal opponent and MIGA contributions 4/29/95-12/31/96: | $397,450.00 |
| Total O'Connor and Kitto contributions 4/29/95-12/31/96: | $ 18.025.00 |
| Collective giving after DNC meeting: | $415.475.00[579] |

Among these totals, the most significant are those relating to the tribes and MIGA. Those figures take on added dimension in view of the fact that from January 1992 to April 1995, contributions by Shakopee-related parties alone - Little Six, Inc., and former Chairman Prescott - accounted for $51,500 of the $61,100 contributed by the Hudson tribal opponents.

The contributing opponent tribes, and the post-April 28, 1995, donations they made[580] to national Democratic organizations *(see* n. 576, *supra)* during the 1996 election cycle, are as follows:

| | |
|---|---|
| Shakopee Mdewakanton Sioux | $ 127,500.00 |
| Oneida Nation of Wisconsin | 119,300.00 |
| St. Croix Chippewa | 59,000.00 |
| Mille Lacs Band of Ojibwe | 42,500.00 |

"'Figures were obtained by a search of public resources, such as reports filed with the Federal Election Commission and data recorded in its database, and records of the Minnesota Ethical Practices Board, as well as interviews, testimony and records obtained from a variety of sources, including contributors and recipients. No evidence was developed of any unreported cash contributions to the DNC or Democratic candidates during the examined time frame.

[580]Contributions attributed to tribes throughout this analysis include contributions made by tribal leaders.

| | |
|---|---|
| Prairie Island Sioux | 20,000.00 |
| Lower Sioux | 16,000.00 |
| Leech Lake | 6,650.00 |
| Upper Sioux | 3,000.00 |
| Fond du Lac | 2,000.00 |
| Ho-Chunk | 1,500.00 |

There was no apparent, coordinated wave of contributions to any one national Democratic organization by these donors in the immediate aftermath of either the April 28 DNC meeting or the July 14 Interior denial decision. In May 1995, when Kitto solicited support for the joint DSCC/DCCC dinner, tribal contributions to those two entities totaled only $6,000. In June, September and October 1995, when O'Connor and Kitto sought contributions for Re-election Campaign events, the opponent group tribes and O'Connor and Kitto collectively contributed $8,500 to the Campaign. The fall 1995 DNC contributions by three Hudson tribal opponents totaling $50,000 already have been noted, and none of those contributions can be tied conclusively to the Hudson outcome, much less a *quid pro quo* relating to it. Rather, the bulk of opponent tribal contributions came from a small group of tribes that made large contributions to the DNC in 1996 after playing lead roles in the opposition effort. The balance of this analysis will focus on the four lead contributing opponent tribes and the known circumstances surrounding their giving.

***Shakopee Mdewakanton Sioux***

The largest single contributor during the examined period was the Shakopee Mdewakanton Sioux. Prior to April 28, 1995, the most active contributors to national

Democratic organizations among the entire opposition group were the Shakopee's gaming corporation, Little Six, Inc., and former Little Six Chairman Leonard Prescott - both former Kitto and O'Connor & Hannan clients - who contributed a total of $51,500. After the May 1994 change in tribal control to the faction led by Stanley Crooks, giving by the tribe to national Democratic organizations did not begin in earnest until the spring of 1996. From May 1996 through October 1996, the Shakopee tribe made contributions to the DNC, DSCC and DCCC totaling $127,500.00,[581] as follows:

| Date[582] | Recipient | Amount |
|---|---|---|
| May 17, 1996 | DNC | $ 5,000.00 |
| June 3, 1996 | DNC | 20,000.00 |
| July 26, 1996 | DNC | 25,000.00 |
| Sept. 16, 1996 | DSCC | 15,000.00 |
| Sept. 16, 1996 | DNC | 25,000.00 |
| Sept. 16,1996 | DNC | 25,000.00 |
| Oct. 28, 1996 | DSCC | 7.500.00 |
| | | $127,500.00 |

[581] In August 1996, the tribe also contributed $5,000 to the National Unity Caucus, the PAC overseen by Marge Anderson of the Mille Lacs Band, which supported candidates friendly to Indian issues. In addition, from April 28, 1995, to Dec. 31, 1996, the tribe contributed $40,500 to the Minnesota Democratic Farm Labor Party and other statewide coordinated Democratic caucuses and funds, and at least $17,500 to individual federal congressional candidates.

[582] Contribution dates throughout this analysis are based upon the best available data. When known, the dates of actual checks are cited. When those dates are unknown, we reference the date a payment was received, or the date assigned to it in a filed finance report or other reliable record.

Shakopee witnesses attributed this burst of political finance activity to the general election cycle and the availability of funds to secure participation in political events for the benefit of tribal council members and the tribe itself, which sought attention in Washington to issues of concern to the Shakopee people.

The Shakopee tribe is governed by a three-member Business Council elected by the general membership to four-year terms. The Business Council is required to approve all political contributions. Tribal leaders and employees provided conflicting information about how particular contributions were approved or funded, but it appears that the Business Council relied heavily on the advice of its in-house legal counsel, William Hardacker, in making political contributions during this period. In January 1996, Hardacker was appointed by the Business Council specifically to handle all political contribution requests at the federal level, while the tribe was guided on state contributions by North State Advisors, a lobbying firm.

The Business Council met regularly, and the minutes reflect discussion of many, though not all, of the federal contributions made by the tribe in 1996.[583] In any event, no testimonial or documentary evidence indicates that the tribe's decisions to make political contributions beginning in 1996 were linked to Interior's denial of the Hudson application in 1995.

[583]For example, the May 22, 1996, $5,000 DNC contribution is mentioned in the minutes of the preceding Business Council meeting, as are the Sept. 16 DNC and DSCC contributions. In contrast, the tribe could produce no minutes or other documents reflecting discussion or approval of the $20,000 DNC contribution made on June 4, when the Business Council and its attorneys met with Fowler personally about the Shakopee adoption ordinance matter then pending at Interior.

The Shakopee budget features a separate line item for political contributions.[584] For fiscal year 1996, the tribe budgeted only $20,000 for political contributions; yet, as noted above, the tribe issued more than ten times that amount - some $200,000 in federal and state contributions - in fiscal year 1996. No witness was able to recall how the initial $20,000 budget figure was determined, despite the fact that even that amount was a substantial increase over the $667 budgeted for political contributions in fiscal year 1995.[585] Still, sometime during the formation of the budget in 1995, the Business Council approved the creation of a new line item in the budget, in the amount of $500,000, to cover what it dubbed "national and state gaming issues."[586] Tribal witnesses said that the tribe intended for this new line item to provide a cushion in the budget to cover an array of potential expenses relating to gaming issues, including lobbying efforts and political contributions. In addition, the head of accounting during this time recalled that, when the tribe began making substantial contributions in 1996 - thereby exceeding the originally-budgeted $20,000 amount - the accounting department, on advice of legal counsel, was expressly authorized to cover these expenditures by drawing on funds allocated to "national

[584]The tribe operates on a fiscal year that runs parallel to the federal fiscal year; thus, fiscal year 1996 began on Oct. 1,1995, and ended on Sept. 30, 1996. Tribal witnesses said that the budget for fiscal year 1996 was drafted and reworked in the spring and summer of 1995, and was approved by the tribal membership in September 1995.

[585]Nonetheless, it is noteworthy that the tribe budgeted only $20,000 for political contributions in the spring and summer of 1995, when the Hudson matter was pending and the opposition lobbying effort was most active.

[586]Shakopee Mdewakanton Sioux Community Proposed Budgets by Department for Fiscal Year 1996, Oct. 1,1995, through Sept. 30,1996.

and state gaming issues."[587] No witness or document could be found to recall specifically how and when this new line item was created, or why the figure of half a million dollars was selected - a very substantial amount compared to other line items in the same budget.

There is some evidence of how the 1996 Shakopee contributions were solicited, in each case shedding further light on the overall progression of DNC Indian fund-raising. The first $5,000 contribution, dated May 17, 1996, was raised by DNC Midwest Finance Director Mark Thomann in connection with a May 22 reception and dinner in honor of Vice President Gore in Minneapolis. Thomann knew the reputation of the Shakopee as a wealthy tribe and approached Hardacker, Stanley Crooks and Glynn Crooks in early 1996 about making a $50,000 contribution to obtain DNC trustee status. The tribe settled on the $5,000 donation instead. Thomann also coordinated his effort to raise funds for the May 22 event with Patrick and Evelyn O'Connor and Larry Kitto, who served as chairpersons for the evening. With the help of Patrick O'Connor and Kitto, the DNC also raised $5,000 each from the Lower Sioux and Prairie Island tribes and $2,000 from the Fond du Lac in connection with this event. Thomann recalls no awareness of the Hudson casino application at that time, and no mention of that matter during his discussions with O'Connor, Kitto and the tribes in connection with this fund-raising effort.

The next Shakopee contribution was made in connection with the tribe's June 4, 1996, meeting with Fowler on the tribal adoption ordinance matter before Interior. *See* Section II.E.2.h.2, *supra.* To help it secure a favorable ruling on the issue, the tribe had retained outside legal counsel with substantial experience and connections to the Department: former DOI Chief of Staff Collier, and his new employer, Steptoe & Johnson. Shakopee Chairman Stanley Crooks

[587] OIC Interview of Paul Kempf, June 1, 1999, at 1.

said that Collier was not hired to assist the tribe in making campaign contributions, but was hired for his substantive expertise on DOI issues. Even so, Collier stated that he provided the Shakopees "advice on how best to make a significant contribution to the President's re-election campaign,"[588] and he then arranged the June 4 meeting between the tribal leaders and Fowler at the DNC, with the assistance of Collier's former Deputy Chief of Staff at Interior, DNC Executive Director B.J. Thornberry. As discussed in detail above, Collier arranged the meeting both to present the check to Fowler and to discuss with him the tribe's adoption ordinance issue.

On June 3, 1996, the day before the scheduled meeting, the Shakopee Business Council approved a contribution to the DNC in the amount of $20,000, with express instructions that the check be hand delivered at the meeting with Fowler. The entire Business Council then traveled to Washington, accompanied by Shakopee General Counsel Kurt BlueDog. Along with Collier, this delegation of tribal officials met with Fowler in his office on June 4 to discuss the adoption and enrollment issues then pending at Interior and to deliver their contribution. Though Collier stated that there was no discussion of the Hudson matter in connection with this return visit to the DNC, Stanley Crooks recalled Fowler saying at the June 4 meeting that he remembered seeing Crooks previously at the meeting on "that dog issue."[589]

The next Shakopee contribution was $25,000 issued July 26,1996, in connection with a July 30 dinner in Washington with President Clinton, which Vice Chairman Glynn Crooks attended. Stetson also attended the dinner, having solicited the Shakopee contribution as well as

[588]Senate Committee on Governmental Affairs Deposition of Thomas Collier, Sept. 29, 1997, at 33-36.

[589]Grand Jury Testimony of Stanley Crooks, May 19, 1999, at 91-92.

large DNC donations for the event from two other Indian tribes.[590] The last two Shakopee DNC contributions in 1996 were both issued on Sept. 16, in checks of $25,000 each.[591] The tribe employed two checks in making this $50,000 total contribution so as to accommodate competing desires for fund-raising recognition on the parts of Thomann and Stetson, both of whom had pursued the Shakopee for an "upgrade" to managing trustee status ($100,000 in one year) at the time of the Democratic National Convention in August.[592] The DNC assigned one of these payments to the Shakopee's participation in an Oct. 23, 1996, Minnesota coordinated campaign and DNC fund-raising reception in Minneapolis honoring the Vice President, for which O'Connor and Kitto were again among the lead fund-raisers. The Shakopee had seven guests scheduled to attend this function. Other tribes represented at the reception included the Upper Sioux, Fond du Lac, Lower Sioux, Prairie Island, Leech Lake and St. Croix.

***Oneida Nation of Wisconsin***

Besides the Shakopee, the only other Hudson opposition tribe that attained DNC managing trustee status during this period was the Oneida Nation of Wisconsin. Its post-April 1995 national Democratic contributions included the following:

[590]Stetson had originally envisioned a single DNC event to raise $1 million in support of the re-election effort, but the July 30 event is all that came of it due to what she termed a lack of DNC interest.

[591]The tribe also made a $15,000 contribution to the DSCC on Sept. 16, along with scores of additional political contributions on the state and federal level. It appears that these contributions were all approved at a special meeting of the Business Council on Sept. 13, based on the recommendations of Hardacker and North State Advisors.

[592]The convention schedule featured a number of events directed at Native Americans, including a reception hosted by Gover, Stetson, Collier and John Duffy, who by that time was in private practice with Collier.

| Date | Recipient | Amount |
|---|---|---|
| May 31, 1995 | DCCC | $ 3,000.00 |
| Sept. 7, 1995 | DNC | 10,000.00 |
| Nov. 7, 1995 | DNC | 10,000.00 |
| March 28, 1996 | DNC | 30,000.00 |
| March 28,1996 | DNC | 100.00 |
| May 29, 1996 | DNC | 10,000.00 |
| Aug. 19,1996 | DNC | 50,000.00 |
| Aug. 23, 1996 | DNC | 3,000.00 |
| August 1996[593] | Clinton Birthday Victory Fund | 1,200.00 |
| Nov. 6, 1996 | DNC | 2.000.00 |
| | | $119.300.00 |

After attending both of the fall 1995 vice presidential dinners described above, the Oneida contributed an additional $30,000 to the DNC on March 28,1996, raising its six-month giving total to $50,000 and qualifying it as a DNC trustee. Based on this giving record, the DNC made Oneida Chairwoman Deborah Doxtator co-chairwoman of a March 26 luncheon honoring Vice President Gore in Milwaukee.[594] Thomann organized this event and was credited by the

[593]Within a ten day period, a number of persons associated with the tribe made individual contributions to this fund totaling the amount noted in this line.

[594]Tribal Legislative Director William Gollnick also knew in advance of the contribution that it would assure Doxtator's participation in a coffee with President Clinton on March 28, which Gollnick described in a March 26 memo seeking approval of the contribution as "a closed door meeting for our Chairwoman with President Clinton and a group of approximately 10 other (continued...)

DNC with generating the Oneida contribution. Oneida Legislative Director Gollnick confirmed that Thomann was responsible for the tribe's increasing contributions.

At the time of the Democratic convention, Stetson also solicited the Oneida in writing for an increase in its participation to the managing trustee level. The tribe responded with a further $50,000 contribution on Aug. 19, 1996,[595] bringing its DNC contributions to $103,000 since September 1995. Before the end of the year, the tribe contributed an additional $2,000 in connection with a DNC Saxophone Club event in Washington.

***St Croix Chippewa***

Like the Oneida, the St. Croix first contributed to the DNC on a large scale in the fall of 1995. As noted above in Section II.E.2.f, Kitto testified that he discussed specific fund-raising goals for the Indians with Mercer and others in spring 1995, but denied that such activities were dependent upon either the Hudson opponent tribes or the outcome of the Hudson casino application. In addition, Kitto acknowledged, with the same disclaimers, having advised St. Croix Chairman Taylor to increase his giving to the DNC in 1995 and 1996.[596] The tribe's national Democratic giving during that time frame included the following:

[594](...continued)
(non-Indian) leaders." Memorandum from Bill Gollnick to Kathy Hughes, March 26, 1996.

[595]Gollnick recalled that this contribution related to a birthday party celebration honoring President Clinton.

[596]Kitto's records reflect that in 1996 he provided expansive and explicit fund-raising advice to several of his tribal clients, including the St. Croix, Upper Sioux, Leech Lake and Prairie Island tribes, directed primarily at state and federal legislative elections. None of these records suggests the existence of any prior agreement to contribute relating to the Hudson casino matter.

| Date | Recipient | Amount |
|---|---|---|
| June 30, 1995 | Clinton/Gore'96 | $ 1,000.00 |
| June 30, 1995 | Clinton/Gore'96 | 1,000.00 |
| Nov. 6, 1995 | DNC | 15,000.00 |
| May 1, 1996 | DNC | 15,000.00 |
| Aug. 19, 1996 | DSCC | 5,000.00 |
| Oct. 29, 1996 | DSCC | 20,000.00 |
| Oct. 29,1996 | DNC | 2.000.00[597] |
| | | $ 59.500.00 |

Taylor testified that political contributions were typically approved by the tribal council and that he was involved in the process. Taylor personally viewed political contributions as a means of advancing his tribe's interests by ingratiating the St. Croix to the public officials who benefitted from the donations, so that they would remember the tribe when making decisions that affected it. Taylor denied, however, that any St. Croix contribution related to a specific matter pending before the federal government; rather, he maintained that the tribe had many interests that he felt would be well-served by such contributions.

After its $15,000 contribution in connection with the November 1995 dinner with Vice President Gore, described above, the tribe also continued giving to the DNC in 1996. The St. Croix made a further DNC contribution of $15,000 by check dated May 1,1996, to serve as a sponsor of the 1996 National Presidential Gala. Records reflect that DNC received the check on

[597]Tribal records indicate this check was sent to the DNC, but never debited against the St. Croix account.

June 18, and that the volunteer solicitor of the contribution was "Tom Quinn," O'Connor's partner at O'Connor & Hannan. Quinn recalled having no role in this contribution, or any by the tribe, and speculated that he may have simply delivered the check to the DNC. No tribal witness could recall how this specific contribution was solicited.

The St. Croix also contributed to the DSCC in 1996. On Aug. 19, the tribe contributed $5,000 to the Committee, apparently at Kitto's suggestion, earmarked for the benefit of Sen. Wellstone. On Oct. 29, the tribe followed Kitto's advice and made a further $20,000 contribution to the DSCC. Its cover letter to the Committee noted: "[t]he 105th Congress will be addressing many issues of critical importance to the St. Croix Tribe."[598]

***Mille Lacs Band of Ojibwe***

The Mille Lacs Band of Ojibwe, as a tribal entity, was making small political contributions at the federal level as early as 1992, but it had never made any contribution to the DNC or a national Democratic organization exceeding $2,000 until its $15,000 contribution in connection with the Sept. 11 DNC dinner. The tribe's contributions after April 1995 included the following:

[598] On Oct. 31,1996, the tribe also made a $5,000 contribution at Kitto's behest to the United Democratic Fund for the benefit of Sen. Wellstone's campaign committee. Kitto's Oct. 25, 1996, "Statement" to the tribe soliciting this contribution related it to an Oct. 23 reception honoring the Vice President sponsored by the Minnesota Coordinated Campaign and the DNC. Taylor attended the reception, for which Kitto and the O'Connors were listed fund-raisers.

| Date | Recipient | Amount |
|---|---|---|
| Sept. 13, 1995 | DNC | $ 15,000.00 |
| Sept. 25, 1995 | Clinton/Gore '96 | 250.00 |
| Sept. 29,1995 | Clinton/Gore '96 | 250.00 |
| Nov. 14, 1995 | DCCC | 1,000.00 |
| Jan. 6, 1996 | DCCC | 1,000.00 |
| Sept. 30, 1996 | DNC | 15,000.00 |
| Nov. 1, 1996 | DSCC | 10.000.00 |
| | Total: | $ 42.500.00 |

Many of these contributions were made through the Mille Lac's federal PAC. The tribe also maintained a PAC for state giving. Between the two, the tribe actively supported Democratic candidates for both the state and federal legislatures, as well as a number of Republican candidates and party organizations.

Mille Lacs tribal leaders indicated that contributions decisions were coordinated internally by tribal council member Doug Twait and were made in consultation with the tribe's state and federal lobbyists - Sikorski and his partners, and Kitto - as well as the tribe's gaming management partner. Contributions were made from the tribe's PACs, as well as from tribal accounts designated for public relations or discretionary funding, and even on occasion from generally budgeted funds. In any event, Anderson said the funds were always derived from casino revenues, and not other tribal resources.

Though Anderson did not recall Stetson playing any role in the tribe's decision to make its first substantial DNC contribution in September 1995, records show that Stetson did solicit the tribe for a greater DNC contribution in August 1996. The next month, the tribe made an additional $15,000 contribution to the DNC. However, the tribe made this contribution shortly

after the Democratic National Convention, and shortly before the presidential election, which were more likely factors in the tribe's contribution decision. Anderson recalled that the tribe increased its contributions activity in presidential election cycles.

Finally, Anderson said that the tribe's November 1996 $10,000 contribution to the DSCC was the Mille Lacs's response to a call from Sen. Kerrey. DSCC documentation indicates that the solicitation related to its fall 1996 dinner.

As to all of its contributions during this cycle, Mille Lacs leaders said that the tribe was not solicited or pressured to make payments in connection with the Hudson application, either before or after its denial. No witness from any of the tribes surveyed said that any particular contribution resulted from pressure to give money in anticipation of or in return for denial of the Hudson application, much less a promise to pursue that goal. Though the timing and often unprecedented levels of giving suggest that the tribes may have been inspired to give by the Hudson outcome, the evidence does not support a more sweeping, or incriminating, conclusion.

### K. Secretary Babbitt's Various Statements and Testimony

#### 1. The Wall Street Journal July 12,1996, Article

On July 12, 1996, the Wall Street Journal published a news article entitled, *Midwest Indian Tribes Flex Washington Muscle In Successful Drive to Sink Rival Gaming Project.* The article described, among other things, O'Connor & Hannan's efforts in lobbying the White House to weigh in at Interior against the Hudson casino application.[599] The article also described

[599]The article, for instance, quotes from the May 8, 1995, letter from Patrick O'Connor to Harold Ickes, in which O'Connor stressed his clients' history of financial support for the Democratic Party. The article also recounts that O'Connor and his tribal clients had met with DNC Chairman Fowler to seek his assistance, and that Fowler had subsequently contacted Ickes (continued...)

the allegations concerning Babbitt's invocation of Ickes at Babbitt's July 14, 1995, meeting with Paul Eckstein.

The article quoted portions of Eckstein's affidavit, filed in the federal court in Wisconsin, which concerned the statements that Babbitt was directed to decide the matter by Ickes. The article also stated that Ickes denied that he had "attempt[ed] to pressure the department to kill the project," although it noted that Ickes staffer Jennifer O'Connor had made status inquiries to Interior about the application. John Duffy reportedly denied allegations of a call between Ickes and the Secretary and allegations of improper political influence generally.[600]

Interior Department Director of Congressional Relations Melanie Beller recalled a conversation she had with Babbitt during a car ride to Capitol Hill right after the Wall Street Journal article appeared. Beller said she commented to Babbitt that the allegations were "ridiculous."[601] Babbitt replied, in an off-handed manner, something to the effect of, "it shows you not to say things in front of people."[602]

[599](… continued)
and an official at Interior. The article noted that, between May 1995 and July 1996, approximately $70,000 in contributions had been made by three of the tribes opposed to the casino application.

[600]The basis for Duffy's purported denial is uncertain. Duffy, Collier, Shields and Sibbison denied speaking with Babbitt about his conversation with Eckstein. Leshy said he simply asked whether Babbitt spoke to Ickes, and did so after July 19,1996, in connection with the preparation of Babbitt's response to a letter from Sen. McCain. *See* Section II.K.l.d., *infra.* Babbitt denies speaking about the details of his conversation with anyone.

[601]OIC Interview of Melanie Beller, Nov. 20,1998, at 2 (hereinafter "OIC Beller Int.").

[602]*Id.*

### a. Ickes's Office Examines the Hudson Matter Internally in Anticipation of the Wall Street Journal Article Alleging Potential Impropriety in the Hudson Decision

Sometime around July 1, 1996, the Wall Street Journal called Ickes seeking comment on the allegations of his role in Interior's denial of the Hudson application. Ickes did not comment, but gave one of his assistants, Thomas Shea, the task of looking into the Hudson issue. Shea had taken over Indian issues from Jennifer O'Connor when he began working for Ickes in April 1996, at which time he was briefed on the Hudson matter. Although O'Connor had been the staff person handling Hudson for Ickes in 1995, Ickes tasked Shea with gathering information to formulate a response to the Wall Street Journal, which Shea described as a pressing matter.

According to Shea, Ickes may have told him to check first with Jennifer O'Connor about the Hudson matter, which Shea did. O'Connor explained to Shea what she had done in connection with Hudson, including the fact that she had been the contact with DOI. Shea also called Robert Anderson at the Interior Solicitor's Office. Anderson provided Shea with background on the Hudson matter, including an opinion by Judge Crabb in the applicants' federal civil lawsuit. Shea ultimately went back to Ickes and asked Ickes whether he had ever spoken to Babbitt about the Hudson matter. Ickes told Shea that he had no recollection of talking to Babbitt about Hudson.

On July 3,1996, Shea wrote a memorandum to Ickes containing the information Shea had gathered on the Hudson matter. Ickes met with Shea to go over the information in the memorandum. After the meeting, Ickes instructed Shea to call the Wall Street Journal to provide them with whatever information he could. Shea did so, and is quoted as Ickes's spokesman in the Wall Street Journal article:

> Mr. Ickes's spokesman says he has no recollection of such a call, and that Mr. Ickes did not attempt to pressure the department to kill the project. Another aide to Mr. Ickes, Jennifer O'Connor (no relation to Patrick O'Connor) did make what the spokesman calls routine status inquiries to Interior about the project.

The day the Wall Street Journal article appeared, July 12, 1996, Shea wrote another memo about Hudson, this time to White House Press Secretary Michael McCurry, which was copied to Ickes. The memo provides "brief talking points" from which McCurry could answer press questions in the wake of the Wall Street Journal article. The memo notes that "DNC Chair Don Fowler has stated that he spoke to Harold about this issue," and that while Ickes did not dispute the fact that he may have spoken to Fowler about Hudson, Ickes had no recollection of speaking to Secretary Babbitt about Hudson. The memo also states that Jennifer O'Connor made "routine status inquiries throughout the course of the decision-making process."

The assertion in Shea's memo, based on his discussion with Jennifer O'Connor about the Hudson matter, that her status inquiries were "routine" and were made "throughout the course of the decision-making process" is inconsistent with Jennifer O'Connor's subsequent position. O'Connor told investigators that she was absolutely sure she did not make "routine status inquiries throughout the decision-making process."[603] O'Connor also said that the request from Fowler pursuant to which she made the inquiries was unusual, not routine. Moreover, O'Connor could recall only two conversations with Interior staff about Hudson.

[603] OIC J. O'Connor Int., April 2 and 9,1999, at 14.

### b. Sen. McCain Writes Letters to Secretary Babbitt, President Clinton and Deputy Chief of Staff Ickes

Sen. McCain read the July 12, 1996, Wall Street Journal article. As Chairman of the Senate Committee on Indian Affairs, McCain said he found the allegations in the article disturbing, particularly the allegations about campaign contributions influencing a decision concerning Indians at the Interior Department. He reacted by writing, in his capacity as Indian Affairs Committee Chairman, letters to President Clinton, Secretary Babbitt and Deputy Chief of Staff Ickes seeking answers about the factual allegations made in the article. McCain later explained that he thought it was important to get these answers to determine the course of action the Committee should take on Hudson, including whether it should hold hearings on the matter. In a press release issued July 19, the same day as the letters, Sen. McCain stated, "I intend to review the matter carefully in my capacity as Chairman of the Senate Committee on Indian Affairs and proceed quickly with further investigation and oversight if warranted by the responses we receive to the questions we've raised in these letters."

McCain wrote to Babbitt that he believed the facts gave rise to serious concerns about an appearance of impropriety. He stated:

> I was profoundly disturbed to read in last Friday's *Wall Street Journal* that top White House officials actively intervened last year to reverse a preliminary Interior Department decision to resolve a dispute between Indian tribes.... [T]he evidence cited by the *Journal* indicates that one group of tribes obtained White House attention and support primarily because they gave more campaign contributions to the Democratic National Committee (DNC) than did a competing group of tribes. The following events reported in the *Journal* are troubling to me and, at a minimum, contribute to an appearance of impropriety.

He then detailed certain specific facts alleged in the story, and repeated that he believed that "[t]he appearance of impropriety raised in the article is quite obvious - high-level White

House attention goes to where the money is, reversing an Interior resolution of a dispute between Indian tribes in favor of the tribes who have given the most money to the Democratic National Committee." He then posed the following questions and asked for answers:

> On or about July 14, 1995 was a telephone call made by Ickes or by someone on his behalf to you or someone on your behalf on this issue?
>
> If so, did Ickes or his delegate convey to you a message that the Interior Department should not delay release of its decision to favor O'Connor's client tribes on this matter?
>
> Paul Eckstein, the lobbyist for Indian tribes on the other side of the dispute, has sworn in an affidavit that he met with you on July 14, 1995 and that you told Eckstein that Ickes had called you and told you the decision in favor of Mr. O'Connor's client tribes had to be issued that day without delay? Is this true?
>
> I have never before been aware of such active involvement by high-level White House staff on resolving disputes between competing Indian tribes. Would you please describe any other occasions during your tenure as Secretary of the Interior when top-level White House staff have personally intervened in Interior Department policy or administrative decisions directly affecting Indian tribes?
>
> Likewise, I have never before been aware of such active involvement by high-level officials of the Democratic National Committee to intercede with the White House to broker a dispute between Indian tribes. Would you please describe any other occasions when Mr. Fowler or other high-level DNC officials have personally intervened with the White House or the Interior Department on policy or administrative decisions directly affecting Indian tribes?

In addition to his general concern that campaign contributions influenced a decision of the Clinton Administration affecting Indians, McCain was specifically concerned that Babbitt had told Eckstein that Ickes had called the Secretary and told him that the decision had to be issued that day. McCain later explained that he knew personally that Eckstein was a leading Democrat in Arizona who was a highly regarded attorney. Moreover, McCain understood (correctly) that Ickes did not have any specific role in or responsibility for, administrative decisions at Interior, particularly on Indian matters, and McCain was mindful that Ickes had a

major role as the interface between Democratic political organizations (such as the DNC) and the White House. McCain told investigators that the question of what Babbitt told Eckstein about Ickes's role in the Hudson matter in their meeting at DOI on July 14, 1995, was at the heart of the inquiry he was making as Chairman of the Committee on Indian Affairs in order to determine the course of action the Committee should take on Hudson.

On July 25, 1996, before Sen. McCain received any written responses to his July 19 letter, he sent another letter to Secretary Babbitt, this time about an Interior Department response to McCain's July 19 letter. On July 20, The Washington Post had published an article about McCain's July 19 letters. The article reported that an Interior spokeswoman responding to McCain's letter stated that a federal judge overseeing a lawsuit against the Interior staff concerning the Hudson denial had found "no relationship between the campaign contributions and Interior's handling" of the Hudson application. The article quoted the DOI spokeswoman as stating that the Department had been "vindicated by the courts."[604]

Sen. McCain said he was displeased with what he thought was a serious overstatement by Interior about the court's ruling. Accordingly, McCain again wrote to Babbitt, noting that he had reviewed the judge's ruling and disputed the Department's characterization of that order. McCain wrote that the court's ruling merely found that the facts as to which there was no dispute did not justify the "exceptional" circumstance of discovery beyond the administrative record in a lawsuit based on the Administrative Procedures Act. Sen. McCain stressed that "[fjhe allegations raised in the *Wall Street Journal* article remain in substantial factual dispute" and were not resolved by the court's order. McCain requested that Babbitt provide him with the basis

[604]Stephen Barr, *McCain Questions DNC*, The Washington Post, July 20, 1996, at A4.

for the Department's conclusion that it had been "vindicated" by the federal court's June 11 order. McCain again stressed that the allegations about the Hudson matter "remain of continuing interest to me and the Committee on Indian Affairs."

### c. The White House Responds to Sen. McCain's Letters to the President and the Deputy Chief of Staff

On July 24, 1996, Counsel to the President Jack Quinn received a memorandum concerning the fact that the White House had received Sen. McCain's letter, which was enclosed with the memo. Quinn sent the memo and McCain's letter to Associate Counsel to the President Elena Kagan with a note indicating that Quinn wanted Kagan to draft a response on behalf of the President prior to the August congressional recess. On Aug. 1, Kagan sent a handwritten memo to Quinn and his deputy attaching McCain's letter to Ickes, Ickes's response to McCain, and a draft of a letter over Quinn's name on behalf of the President. The letter to McCain from Quinn, which Quinn signed without editing, stated that a specific response to McCain's questions about the White House's involvement in the Hudson matter was being provided by Ickes in a separate letter. The letter from Quinn added, "the President of course agrees with you that the Department of Interior should make decisions regarding Indian affairs free from political influence and solely on the merits. This Administration has followed just such a practice with respect to these, as well as other, administrative actions."

As the Quinn letter stated, Ickes's response to McCain, also dated Aug. 1, provided more specific responses concerning White House involvement in Hudson.[605] In his letter, Ickes stated (among other things) that "[tjhere was no effort by the White House to influence this decision in

[605]Ickes's response was drafted by Ickes's assistant, Thomas Shea. Ickes reviewed Shea's draft in some detail, as evidenced by Ickes's extensive hand-written edits.

any way," and that the "White House's involvement in this matter ... was limited to routine status inquiries to the Department [of the Interior] by a member of my staff." While Ickes acknowledged in the letter the possibility that he spoke with Fowler about Hudson, he wrote that he had no recollection of speaking to the President or Bruce Lindsey about Hudson. Moreover, in response to McCain's inquiry about a discussion between Ickes and Babbitt about the timing of the Hudson decision, Ickes wrote that he did "not believe any such conversation ever took place."[606]

Comparison of Shea's initial draft of Ickes's response letter to the final version suggests that Ickes chose to respond to one question in McCain's letter not addressed in Shea's draft, the one about active involvement by high-level White House staff on resolving disputes between competing Indian tribes during his tenure. Ickes responded to McCain's comment and question with the following:

> The 'active involvement by high-level White House staff you refer to in your letter simply did not, and does not, occur. We are occasionally contacted by the Democratic National Committee, members of Congress, interested parties and others inquiring as to the status of particular decisions. In these instances, we merely seek to obtain the information necessary to respond to their requests. Where these efforts include an effort to secure our assistance in achieving a particular outcome, we decline to become involved, regardless of the source of the request. As a result, I cannot think of any instance during my tenure at the White House where I personally intervened in Interior Department decisions directly affecting Indian tribes.

Ickes's representations to McCain in this paragraph are at odds with his previous involvement, and that of other members of the White House staff, in "Interior Department

[606]Shea's draft of the Ickes letter stated: "I have absolutely no recollection of any such conversation ever having taken place." Ickes crossed out the word "absolutely" in that sentence, and in the final version Ickes changed the entire sentence to read as set forth in the above text.

decisions directly affecting Indian tribes." As of Aug. 1, 1996, the date of Ickes's letter, there were at least three Indian matters at DOI in which Ickes had been involved, and each of those matters related to gaming. Those three concerned the Wampanoag Tribe of Massachusetts, the Mashantucket Pequot Tribe of Connecticut, and the Sault Ste. Marie Tribe of Chippewa Indians of Michigan. The facts surrounding these other matters call into question the accuracy of Ickes's letter to McCain.

• *The Wampanoag Tribe:* The Wampanoag of Gayhead, Mass., wanted Interior to provide its opinion on whether the compact the tribe was in the process of negotiating with the Commonwealth of Massachusetts would be approved by Interior. The Department had expressed serious reservations about the compact because Massachusetts would not be granting the tribe the exclusive right to conduct gaming operations within the Commonwealth, yet would be demanding money from the tribe. States can demand payment from tribes for gaming exclusivity, but are prohibited from taxing tribes. Rep. Barney Frank got Ickes involved in the issue, and Ickes contacted Counselor to the Secretary Duffy and Deputy Secretary Garamendi. Ickes's call to Interior ultimately led to two meetings at Ickes's White House office in late 1995 at which DOI Chief of Staff Shields, Leshy, Sibbison and Duffy briefed Ickes and his staff on the issue. Most important, during at least one of those meetings, Ickes did more than simply gathering information. Rather, according to Interior witnesses, Ickes actively expressed his displeasure with Interior's position and advocated the Wampanoag's position, ultimately leading the Department to change its view of the compact to a favorable one.[607] At least one DOI official acknowledged the changed stance was due to the pressure applied by Ickes.[608]

• *The Mashantucket Pequot Tribe:* The Pequots are a tribe with only a few hundred members, but one which has come into tremendous wealth due to its successful Foxwoods Casino in Ledyard, Conn. At some point in 1995, the lead Washington lobbyist for the Pequots, Chris McNeil, approached Ickes about the Pequots' application to take land into trust near the tribe's casino in order to expand its gaming facilities, which was pending at Interior. Ickes met with McNeil and another tribal representative.

[607]No final decision by Interior was ultimately required because the gaming project failed for unrelated reasons.

[608]Ickes generally recalled setting up a meeting through the Interior chief of staff on this issue at the request of Rep. Frank, but he recalled neither attending a meeting with DOI officials nor expressing any view on how the matter should be resolved.

According to Ickes, McNeil advised him of the Pequots' pending matter and told him that the tribe wanted a meeting at Interior. According to McNeil, however, at the meeting with Ickes (which McNeil stated was a follow-up meeting to a White House breakfast that the tribe attended after having made a $500,000 contribution to the DNC in 1994), McNeil presented Ickes with the major issues facing the tribe at that time. McNeil stated he never asked Ickes to do anything and that neither Ickes nor anyone else at the White House set up meetings for the tribe on the land-to-trust issue. In any event, Ickes believes that he called either Duffy or Collier about the Pequots' land-to-trust application, and probably told Duffy that the tribe had an issue and wanted to meet. Duffy recalls speaking with Ickes about the Pequot issue. He characterized Ickes's call as a "status inquiry" in which Ickes indicated that the Pequots were supporters and friends of the Administration, but made no reference to campaign contributions.[609] Duffy said it was unusual for Ickes to call him. Based on a review of Ickes's and Duffy's telephone message logs, the call likely took place in the spring of 1995, as reflected by a flurry a calls back and forth between Ickes and Duffy (and one from Babbitt to Ickes) in late March and early April 1995.[610] There is no evidence establishing that Ickes's communications with Interior affected the Department's May 1, 1995, decision to approve the Pequots' application.[611]

• *The Sault Ste. Marie Tribe of Chippewa Indians:* The Sault Ste. Marie of the Upper Peninsula of Michigan had applied to DOI to take land into trust in order to establish a gaming facility in the Greektown area of Detroit. In August 1994, the tribe's application was sent to Washington for review by IGMS after approval by the BIA's Minneapolis Area Office. As evidenced by Babbitt's Aug. 11, 1994, memorandum to White House Chief of Staff Leon Panetta informing him that IGMS was prepared to approve the application, the White House was involved in this particular decision. The White House needed the support of Congresswoman Collins on a pending bill of importance to the Administration. Collins allegedly traded her vote on the bill for DOI's approval of the casino application.[612] Interior approved the application and sought the governor's concurrence by letter dated Aug. 18,1994.

[609]Grand Jury Testimony of John Duffy, May 26, 1999, at 65-66.

[610]On March 31,1995, Duffy left a message for Ickes at 8:36 a.m. regarding "Indian issues." Babbitt left a message for Ickes one minute later, at 8:37 a.m. the same morning. Ickes and Duffy also traded calls between April 4 and April 6.

[611]On May 1, the names and numbers of Ickes's assistants, Jennifer O'Connor and Janice Enright, were written on Duffy's phone log, suggesting that Duffy or his staff was planning to notify Ickes's staff about the Pequot decision on that date.

[612]*See Vote Trade Could Prompt Engler to Reject Casino,* The Detroit News, Aug. 28, 1994, at CI.

Gov. Engler of Michigan refused to approve the Greektown casino proposal, formally rejecting it on June 27, 1995. In early 1996, when the DNC solicited a $250,000 contribution from the tribe, the Sault Ste. Marie requested DNC assistance in enlisting White House support for their position that DOI could ignore Engler's veto. At the behest of the DNC, Ickes made himself available to tribal representatives at a DNC event to discuss briefly the tribe's arguments. Unlike the Wampanoag and Pequot matters, however, there is no evidence that Ickes took any action to influence DOI's consideration of the Sault Ste. Marie's pending issues.

During August 1996, after providing its own response to McCain, the White House Counsel's Office was aware of the progress of Babbitt's response to the Senator. Kagan communicated with one of the primary drafters of Babbitt's letter to McCain, DOI Associate Solicitor Robert Anderson, forwarding information about this issue to Anderson on August 5, at his request.[613] On Aug. 23, Anderson sent Kagan a draft of the Babbitt response. On the facsimile cover sheet attaching the draft letter, Anderson wrote: "Elena, We intend to send this out today. Please call after you read this. Thx, Bob." Anderson stated that the Department was soliciting White House input on Babbitt's response to McCain. Neither Anderson nor Kagan recall discussing the letter after he sent the draft to Kagan on Aug. 23, though Anderson stated they may have discussed it. There is no evidence of any other discussions within the White House, or between White House and Interior staff, concerning Babbitt's response to McCain.

[613]Kagan recalls that she forwarded to Anderson a copy of Ickes' Aug. 1 response to McCain, and a copy of that document did appear in White House records with Kagan's hand-written fax cover sheet. An identical copy of the fax cover sheet was in Kagan's own White House file on the McCain inquiry, directly in front of a copy of the Eckstein affidavit, but neither Kagan nor Anderson recalled her sending that document to Interior and there was no further evidence to confirm that she sent it to Interior.

### d. Babbitt Responds to McCain's July 1996 Correspondence

The Interior Department's response to Sen. McCain came in the form of a two-page letter dated Aug. 30 from Babbitt, with attachments consisting of memos by Solicitor Leshy and Special Assistant Sibbison. The Sibbison memo, dated Aug. 29, described the basics of the internal DOI decision-making process on Hudson, and answered most of the questions posed in McCain's July 19 letter, but omitted at least two White House contacts that she says she did not recall at that time. The Leshy memo, also dated Aug. 29, defended the Department and its spokeswoman against the assertions of McCain's July 25 letter, analyzing Judge Crabb's ruling in such a way as to bolster the DOI assertion of vindication.

The two-page letter Babbitt signed ultimately became a focal point of this controversy because of assertions it made about Babbitt's dealings with Eckstein and Ickes. Babbitt's letter first stated that the Wall Street Journal article "falsely insinuated that this Department has allowed campaign contributions to dictate Indian policy." It further provided that the attached two memoranda "answer most of the questions you ask." Babbitt then wrote:

> Your letter also inquired about communications directly involving me. I have no recollection of being contacted by attorney Patrick O'Connor on this matter, nor do I recall ever being informed by anyone in the Executive Office of the President of Mr. O'Connor's involvement. Further, like members of my staff, I did not learn of the April 25, 1996 [sic] letter from the Director of the Minnesota Indian Gaming Commission [sic] until well after the decision on the trust land application was made, and I had no knowledge of any meetings, memoranda, telephone calls or any other communications between Executive Office persons and tribal representatives opposed to the acquisition discussed in your July 19 letter.
>
> I met with Mr. Paul Eckstein, an attorney for the three tribes applying for the trust land acquisition, shortly before a decision was made on the application. Following this conversation, I instructed my staff to give Mr. Eckstein the opportunity to discuss the matter with John Duffy. I must regretfully dispute Mr.

> Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay. I never discussed the matter with Mr. Ickes; he never gave me any instructions as to what this Department's decision should be, nor when it should be made.
>
> To the best of my recollection I have never been contacted by 'top-level White House staff on any Interior Department decision directly affecting Indian tribes nor, to the best of my recollection, have I ever been contacted by any official from the Democratic National Committee trying to influence the Department's decisionmaking process on such decisions.
>
> Like you, I believe that this Department should make decisions like this one wholly on the merits, without any regard to campaign contributions or other partisan political considerations. We did just that in this matter.

Leshy edited the final draft of the Babbitt letter. One of his drafts, virtually identical to the final product and containing the language quoted above, was ready for review as early as Aug. 22.[614] Sibbison stated she authored the first draft, at the request of Shields and Leshy. She wrote a bullet-pointed document which replied point-by-point to McCain's allegations and questions, usually parroting back language of the question in the answer. Sibbison stated she thought this draft contained the essence of each of the three resulting documents. Sibbison also stated that the later draft of the document labeled as her memo to Babbitt was essentially a part of her first draft as reworked by Leshy into memo format.

Sibbison reported that, as part of her document, she drafted the initial version of the language in Babbitt's cover letter concerning the meeting between Babbitt and Eckstein. She

[614] On Aug. 23, the draft was faxed by Associate Solicitor Robert Anderson to the White House to the attention of Elena Kagan. Anderson recalls briefing Kagan on IGRA and the process for making land in trust determinations. He believes Leshy told him to contact her because McCain had sent similar letters to Ickes and the President and responses were being prepared. He said no changes were requested or made to the Secretary's draft letter. Anderson is not sure whether DOI received draft responses from the White House, but he did not discuss with anyone at the White House the facts concerning White House contacts with DOI or their possible responses. Kagan acknowledges talking to Anderson but recalls none of the specific details.

does not recall consulting anyone about whether Eckstein's allegations were true, but assumed they were not. Having been closely involved with the Hudson decision, she said she knew there had been no White House influence. Sibbison assumed a blanket denial of mention of Ickes was correct and wrote it that way. She reasoned at the time that, if there were some truth to the allegations, and some finesse was needed in answering McCain's charges, the drafting of the letter would not have been delegated to her level. Leshy then edited Sibbison's draft.[615]

Babbitt signed the letter. Babbitt and Leshy stated they discussed the letter before it went out, but not in detail. Leshy was the only witness who said he discussed with Babbitt the Secretary's meeting with Eckstein in preparing this response. Leshy said he did not on any occasion ask the Secretary for a detailed description of the meeting and the entire conversation. He said he knows he asked Babbitt if he talked to Ickes about Hudson and Babbitt replied no, without amplification. Leshy said he did not think it was important to know any more and did not expect further detail. Leshy and Shields both state they have no recollection of any discussion with Babbitt prior to his signing the letter about the significance of the words "told" or "instructed" used to describe the alleged communication by Ickes to Babbitt.[616]

McCain's letter stated that Eckstein claims Babbitt said he was "told" by Ickes to make the decision that day, quoting the Eckstein affidavits as the Wall Street Journal had. Babbitt's letter reads, "I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes

[615]Leshy incorporated a denial that Babbitt had been contacted by high level White House officials on other Indian gaming matters. Babbitt's Grand Jury testimony and other evidence recounted above in Sections II.G.8.a. and ILK.I.e. establishes that this is not correct.

[616]OIC Interview of John Leshy, July 29,1999, at 3. OIC Interview of Anne Shields, July 29, 1999, at 2-3.

instructed me to issue a decision in this matter without delay." The "instructs" language appears in Sibbison's earlier drafts and apparently was unchanged by Leshy. However, when Babbitt testified before the Senate Committee as well as the grand jury, he claimed that in his letter he was denying that he said he was "told" or "instructed" to do anything by Ickes. He emphatically asserted he told Eckstein that Ickes "wants" or "expects" a prompt decision.[617]

Babbitt said that he knew of the Eckstein affidavit before signing the McCain letter, but cannot recall when he saw it. Leshy told investigators he sent the Secretary a copy with a brief note, probably by internal office mail, around the time that the affidavit was received in the Solicitor's Office - probably in January 1996 - but that he and Babbitt only discussed the affidavit in the context of responding to the McCain letter. Leshy recalled asking Babbitt, without referring specifically to the affidavit, "Did you talk to Harold Ickes about this,"[618] to which Babbitt answered "no."[619] Leshy then edited the draft letter consistent with that denial.

Babbitt also said he could not be sure whether he has ever read the July 12 Wall Street Journal article itself, or only the description of it contained in Sen. McCain's letter; he acknowledged, however, that the article had probably been routed to senior DOI officials and that he usually reviewed the news clips circulated by the press office. Babbitt said he was not certain whether he had McCain's letter in front of him as he reviewed the draft he signed, but he feels

[617]The language Babbitt wrote for inclusion in his Oct. 10,1997, letter to Sen. Thompson also used the word "wants." *See* Section H.K.2., *infra.*

[618]OIC Interview of John Leshy, May 5, 1999, at 11.

sure he read it at some point.[620] No witnesses recall discussing the newspaper story with the Secretary, or seeing him read McCain's letter.

Approximately 41 days elapsed from McCain's letter to Babbitt's response. Witnesses stated, however, that responding to McCain was a priority. Explanations for the delay included the length and detail of the response, the Secretary's travel schedule, summer vacation for involved personnel, the fact that the Senate was in recess in August, and the lack of any particular pressure, including from reporters, for a faster response.[621]

**e. McCain's Reaction to the Responses**

After McCain read the responses to his letters on the Hudson matter from Quinn, Ickes and Babbitt, he decided his Committee need take no further action on the Hudson matter. McCain said that he based this decision on the representations in those responses - particularly Secretary Babbitt's letter and the attachments to it. McCain did not distribute the responses to the other members of the Committee on Indian Affairs; McCain said he was satisfied that, based on the responses received, no further action was necessary. McCain told investigators that he read Babbitt's denial of the allegations concerning Eckstein as a flat denial that Babbitt had said anything to Eckstein about Ickes at Babbitt's meeting with Eckstein on July 14, 1995. McCain added that he understood Babbitt's letter of Aug. 30, 1996, to be a rejection of the allegations in

[620]Leshy said normal DOI practice was to submit copies of both the incoming correspondence and the DOI draft response to the signer of a letter. As to whether the Secretary would be presented a copy of the incoming letter along with the outgoing letter to be signed, Shields said it is so rare for Secretary Babbitt to sign a letter, she cannot say what the standard procedure would be.

[621]McCain and his staff thought that the length of time Babbitt took to respond was unusual, and recalled that McCain's office did not receive Babbitt's letter until well into September.

the Wall Street Journal article, as well as of the specific questions that McCain had presented to Babbitt in his letter. Indeed, McCain understood Babbitt's statements concerning Eckstein in the last paragraph of the first page of Babbitt's letter to be a rejection of the assertions Eckstein had made in his affidavit.

McCain believed Babbitt must have been upset by McCain's initial letter. As Babbitt wrote in his Aug. 30 letter to McCain: "I regret that, relying solely on a newspaper article, you have chosen to so publicly call into question the integrity of our decisionmaking on this matter." As a result, on Sept. 19, 1996, McCain wrote a reply to Babbitt in which McCain conveyed to Babbitt that he had only been pursuing facts and had not intended to impugn Babbitt's integrity:

> Bruce, the purpose of my inquiry was not at all to give any life at all to accusations about your character or integrity but simply to get at the facts. In particular, the allegations had more to do with the purported actions of the DNC and the White House than with you and the Department. I appreciate very much the factual and candid nature of your response.

In that letter, however, McCain again underscored the seriousness with which he viewed the allegations, and the need to conduct an inquiry into those allegations.[622] McCain stated in his Sept. 19 letter that he had intended in his July 19 letter to Babbitt "to seek additional information on some highly inflammatory allegations published in a major national news medium." McCain added: "I am sure you would agree that, once published, allegations like those should be the subject of some inquiry."[623]

[622] As McCain testified about his Sept. 19 letter: "I wanted to assure Secretary Babbitt that, one, I thought they were serious allegations, but I was in no way trying to impugn his character or his - character or integrity." Grand Jury Testimony of John McCain, March 17, 1999, at 52 (hereinafter "McCain G.J. Test.").

[623] McCain also wrote: "That is why I sought out your views on these troubling

(continued...)

When McCain learned in October 1997 of Babbitt's acknowledgment to Sen. Thompson that in fact Babbitt had invoked Ickes to Eckstein, McCain felt he had been misled by Babbitt's Aug. 30, 1996, letter. Moreover, McCain indicated that he would have taken further action, including making further inquiries of Babbitt and Interior, had Babbitt provided him with the information Babbitt provided Sen. Thompson in October 1997 after Babbitt decided he had to be "more forthcoming" than he had been with McCain in August 1996.[624]

**2. Secretary Babbitt's Oct. 10, 1997, Letter to Sen. Thompson**

On March 11, 1997, the Senate authorized its Governmental Affairs Committee, led by Chairman Fred Thompson (R-Tenn.), to conduct "an investigation of illegal or improper activities in connection with 1996 Federal election campaigns."[625] A Dec. 31, 1997, deadline

[623](...continued)
allegations, and why I appreciate very much your response." Letter from Sen. McCain to Bruce Babbitt, Sept. 19, 1996.

[624]McCain G.J. Test, at 63.

[625]The Committee's jurisdiction generally is set forth in Rule XXV(k)(l), Standing Rules of the U.S. Senate, 105th Congress, which provides in pertinent part:

> Committee on Governmental Affairs, to which committee shall be referred all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects: ...
>
> 7. Intergovernmental relations...
> 10. Organization and reorganization of the executive branch of the Government...
> 12. Status of officers and employees of the United States, including their classification, compensation, and benefits.
> (2) Such committee shall have the duty of -
> (A) receiving and examining reports of the Comptroller General of the United States and submitting such recommendations the Senate as it deems necessary or desirable in connection with the subject matter of such reports; (B) studying the efficiency, economy, and

(continued...)

was imposed on the investigation. As part of this multi-faceted investigation, in the summer and early fall of 1997 Committee staff contacted Interior Department officials regarding the decision on the Hudson casino application, requested that DOI produce documents relating to that matter, and took several depositions of witnesses regarding the Hudson matter.

In early October, the Committee requested through Melanie Beller, Director of the DOI Congressional and Legislative Affairs Office, that the Secretary submit to an informal private interview. Beller conferred with Babbitt and others at Interior - Ann Shields, John Leshy, Director of Communications Michael Gauldin and perhaps Heather Sibbison - who were uncomfortable with the request because they believed selected portions of Eckstein's deposition had already been leaked to the media, leading to news allegations that Babbitt had implied to Eckstein that campaign contributions influenced the Hudson decision. They reportedly feared the Committee would selectively leak information from an interview with the Secretary in a further attempt to embarrass him or the Department. On Oct. 8, Beller informed a Committee staff member of the Secretary's decision that he would be willing to testify in an open forum, but would not sit for a private interview. He requested that the Secretary's refusal be put in writing. A two-page letter to Sen. Thompson was prepared.

(...continued)

> effectiveness of all agencies and departments of the Government; (C) evaluating the efforts of laws enacted to reorganize the legislative and executive branches of the Government; and (D) studying the intergovernmental relationships between the United States and the States and municipalities, and between the United States and international organizations of which the United States is a member.

Many witnesses involved in discussing and drafting the letter told investigators that it was how the Hudson decision was made that occupied the focus of their attentions, not concern over Babbitt's statements regarding his July 14, 1995, conversation with Paul Eckstein. Some DOI witnesses said they believed that Sen. Thompson would not call Secretary Babbitt as a witness in a public hearing, and viewed the letter as the only opportunity to put on the public record DOI's version of how and why the Hudson application was denied. Others, including Secretary Babbitt, said they assumed that he would be called to testify.

Asked who made the decision to write a letter to Thompson that went beyond the Secretary's refusal to be interviewed in private, Babbitt testified that he wanted to get in the public record his version of his conversation with Eckstein:

> Well, by this time, I'm awakening to the fact that this is a big deal and that the Eckstein - it's obvious that he had had his deposition taken, and it didn't take any dummy to see what was coming. So I thought I ought to get on the record my version of the Eckstein conversation.[626]

Babbitt said he also told his staff at the time that he thought it was time to lay out his version of the Eckstein conversation.

Legislative Counsel Jane Lyder volunteered to draft the letter on Thursday, Oct. 9, for quick turnaround. While writing a first draft that day, Lyder reviewed Babbitt's Aug. 30, 1996, letter to Sen. McCain. Lyder quoted certain language directly from the McCain letter for use in the Thompson letter.

Early on Oct. 10, Babbitt met with Shields, Leshy, Beller and Gauldin to discuss the Secretary's response to Sen. Thompson. At the meeting, Babbitt presented for inclusion in the

[626]Babbitt G.J. Test., July 7, 1999, at 227-28.

letter a few paragraphs he had typed at home regarding his conversation with Eckstein and his willingness to give public testimony but not a private interview. Babbitt's text read, in relevant part:

> I have never spoken with Harold Ickes or any other member of the White House staff regarding .... [ellipses in original]
>
> I believe that Mr. Eckstein's recollection that I said something to the effect that Ickes wants a decision is correct. Mr. Eckstein was extremely persistent, and I simply used this phrase as a means of terminating the discussion. It is not the first time, nor will it be the last, that I have dealt with lobbyists by suggesting that the administration expects me to use my good judgment to resolve matters promptly.[627]

[627]The text as printed corrects misspellings and typographical errors that appeared in the original. The complete original text as typed by Secretary Babbitt reads as follows:

> I have never spoken with Harold Ickes or any other member of the white House staff regarding————
>
> I believe that Mr. Eckstein's recollection that I said something to the effect that Ickes wants a decision is correct. Mr. Eckstein was extermely persisstent, and I simply used this phrase as a means of terminating the discussion. It is not the first time, nor will ilt be the last, that I have dealt with lobbyists by suggesting that the administration e xpects me to use my good judgment to resolvbe matters promptly.
>
> Thim matter came to me with a staff recommendation———
>
> Given that these allegations are now being aired iln public before the committee, I would respectfully request that the committee accord me the courtesy of making any further iquiriers of me in public as well. I acoreingly decline your request for private ilnterivews, but reaffirm my willingness to respond at any convenient time iln public, or to respond to a subpoena if you ilnsist on dealing wilth this behind closed doors.
>
> sincerley

This meeting was the first time Babbitt's staff learned that the Secretary actually had invoked Ickes's name during his July 1995 meeting with Eckstein.[628]

Beller gave this text to Lyder, who entered it in her draft, making only typographical corrections. Lyder noted that the Secretary's description of his conversation with Eckstein

[628]Nonetheless, Babbitt had explained his position on this event to a friend several months earlier. Don Bennett Moon, an Arizona attorney and friend of Babbitt, had dinner with the Secretary in San Francisco around March 23, 1997. Moon was then involved in an Arizona ballot initiative with Eckstein, whom Moon had just met. During casual conversation, Moon asked Babbitt about Eckstein generally. Moon says that Babbitt recounted a "falling-out" between Babbitt and Eckstein over an Indian matter. OIC Interview of Don Moon, March 11, 1999, at 2. Moon recalls that Babbitt told him that during a meeting on the matter, Eckstein had "poured it on heavily," so Babbitt told Eckstein that someone important - probably Ickes, in Moon's recollection - had told Babbitt that he had to "go in a different direction" than Eckstein wanted. *Id.* Babbitt told Moon that he said this in order to "brush off Eckstein. *Id.* Moon perceived that Babbitt was not angry with Eckstein, and seemed embarrassed about the matter. *Id.* Moon also recalls Babbitt's mentioning a communication he had with Sen. McCain about the Hudson casino matter. Moon perceived that Babbitt was concerned about maintaining his positive relationship with McCain. Moon also emphasized his observation that Babbitt's explanation - in Moon's words, "making up what he perceived to be a small falsehood as a means to end an unpleasant emotional interaction" - is very consistent with Babbitt's personality. Letter from Don Bennett Moon to OIC, March 15,1999, at 3.

Eckstein recalls speaking with Moon by phone in the same general time frame and Moon's telling him of this discussion with Babbitt. According to Eckstein, Moon told him that Babbitt was not angry with Eckstein. Eckstein recalls Moon saying that Babbitt told him, "I really did not have a meeting with Harold Ickes, but I did say to [Eckstein] what he says I did. There are some people I have trouble saying 'no' to and Eckstein is one of those people." OIC Interview of Paul Eckstein, June 2, 1998, at 4. In a second interview with this Office several months after this statement, Eckstein said that Moon told him that Babbitt said he made up the statement about Ickes directing him to get the decision out - when in fact Babbitt did not have a discussion or meeting with Ickes - as a means of getting rid of Eckstein. These two iterations, and Moon's own account during his interview with this Office, seem more consistent with Eckstein's recollection of the July 14 discussion than Babbitt's. Yet, Moon recalls having told Eckstein in March 1997 essentially what Babbitt told Moon about the July 14 meeting. In a letter to the OIC, Moon also stressed that he later read a news report of Babbitt's position and found that it "did not vary a centimeter" from what Moon reported to Eckstein after seeing Babbitt in March 1997. Letter from Don Bennett Moon to OIC, March 15, 1999, at 1. Moon, like Eckstein, recalled that Moon's main concern in relating to Eckstein what Babbitt had said about this matter was to assure Eckstein that Babbitt was not angry with him.

differed from the description in his letter to Sen. McCain, but said she believed the new text merely clarified the earlier statements by adding information. Lyder juxtaposed the new text with language from the earlier letter, and felt that they appeared compatible.

Lyder circulated her draft with the Babbitt text to Leshy, Sibbison, Michael Anderson, Babbitt, Shields and Gauldin. Sibbison told investigators that she was particularly troubled by the sentence that read "I do believe that Mr. Eckstein's recollection that I said something to the effect that Mr. Ickes wanted a decision is correct."[629] Sibbison was concerned that this sentence could be perceived as inconsistent on its face with the letter to McCain. She explained that while she believed the letters were not substantively inconsistent, she did not think that DOI could rely on readers of the letters to carefully parse them out. According to Lyder, when Sibbison expressed concern that the paragraph about the Eckstein comment was confusing and could be perceived as inconsistent with Babbitt's letter to McCain, Lyder responded that the text had been drafted by Babbitt himself and that Lyder was not going to change it.[630]

Lyder gave Leshy a copy of the letter on computer disk, the editing comments made by Sibbison - including her concerns about the Eckstein paragraph - and a draft with some mark-ups from the Secretary's office.[631] Leshy ultimately reorganized and rewrote most of the letter.

[629]OIC Interview of Heather Sibbison, Feb. 26,1999, at 16.

[630]Sibbison told investigators that Lyder responded to her expression of concern by committing to communicate her comments to Leshy, and stating that there would be a further draft. She does not recall being told the Secretary had written this text. Sibbison did not see the letter again before it went out. She had a conversation later with Leshy who told her he thought she had reviewed it again before it was finished. At that time, Leshy told Sibbison that the language in question had been drafted by Babbitt himself.

[631]In accordance with Lyder's usual practice, she later asked Leshy for the drafts,

(continued...)

Leshy left largely intact the language drafted by Babbitt regarding the Eckstein conversation. Leshy told investigators that he tried briefly and unsuccessfully to find a copy of the earlier letter to Sen. McCain, and did not review it during the drafting or editing of the letter to Sen. Thompson. Beller told investigators that she brought the final version of the letter to Babbitt for his review and signature, and he quickly read and signed the letter. The letter was promptly distributed that afternoon.

Within hours, Interior employees received calls from media representatives about the letters. Within days after the letter to Thompson was sent, media stories appeared asserting that Babbitt had lied to Sen. McCain, based on his recent letter to Sen. Thompson. Interior Department witnesses specifically recalled being stunned and dismayed to read an Oct. 12, 1997, article in The Washington Post entitled *Babbitt Admits Falsehood in Casino Bid.* The Interior staff involved in drafting the letter to Thompson maintain they saw the statements about the Eckstein conversation as not contradictory and a minor part of a much larger issue: the integrity of the DOI decision-making process, and whether the Hudson decision had been made for the right reasons. They stated that little attention had been paid by them to the only portion of the letter written by Secretary Babbitt - his comments on the Eckstein allegations - which became the focus of media attention.

There were three significant events in the immediate wake of Babbitt's Oct. 10 letter and the resulting press reports. First, White House officials told Babbitt to call Sen. McCain and apologize for misleading him with Babbitt's earlier letter. Second, on Oct. 14, the Justice

"'(...continued)
including the mark-ups by the Secretary, but Leshy said he did not have them and must have thrown them out.

Department Public Integrity Section launched a 30-day initial inquiry under the authority of the Independent Counsel Act. Third, Sen. Thompson decided that his Committee would hold open hearings on Hudson.

### 3. Secretary Babbitt's Telephone Conversation with Sen. McCain Regarding Babbitt's Aug. 30,1996, Letter

White House Chief of Staff Erskine Bowles said he read the Oct. 12, 1997, article in The Washington Post and found it troubling, as it alleged that Babbitt lied to a United States Senator. Bowles believed he had a duty to look into the matter. He therefore called Babbitt the next day, Monday, Oct. 13 (which was Columbus Day), and asked Babbitt if he had time to come to the White House to meet with him. Bowles did not provide Babbitt with the reason he wanted to meet, and Babbitt did not ask for one; Babbitt understood that Bowles wanted to discuss Babbitt's letters to Sens. McCain and Thompson.

When Babbitt arrived at the White House a short time later, he met with Bowles and Counsel to the President Charles F.C. Ruff in Bowles's office. Bowles opened the brief meeting by telling Babbitt that he had seen The Washington Post article on Babbitt's letters to McCain and Thompson. Bowles was not familiar with Babbitt's letters and did not accept the article at face value, but he told Babbitt that the allegation - lying to a United States Senator - was a serious matter and was unacceptable.[632] Babbitt told Bowles that he did not lie to Sen. McCain. Bowles told Babbitt that if that was the case, Babbitt should straighten the issue out with McCain, which Babbitt agreed to do.

[632] A White House document dated Oct. 28, 1997, and entitled, "Talking Points," which apparently was prepared for the President to use in response to anticipated questions from the press, confirmed that Bowles communicated to Babbitt at their meeting "the necessity of being candid in his communications with Congress."

Later that same day, Babbitt placed a call to McCain through the White House switchboard. McCain was traveling that day in Atlanta with a volunteer and a campaign consultant. While en route by car from the Atlanta airport, McCain placed a cellular phone call to Mark Salter, McCain's administrative assistant, who was at home in Northern Virginia. When McCain called, Salter was on the telephone to the White House switchboard, which had called Salter at home in an effort to locate McCain for Babbitt. Salter told McCain that Babbitt was trying to reach McCain through the White House switchboard. McCain and Salter hung up so that the White House switchboard could patch Babbitt through to McCain, which it did moments later.[633]

The telephone conversation between Babbitt and McCain was brief, lasting only between one and two minutes. Babbitt made what McCain described as an "abject apology" about the letter Babbitt wrote to McCain on Aug. 30, 1996.[634] During the call, McCain recalls Babbitt saying, "John, I misled you and owe you an apology."[635] Babbitt added that he would say as much in writing if McCain wanted him to do so. McCain accepted the apology, telling Babbitt that the two of them were friends and would remain so. McCain also told Babbitt that it would not be necessary to put anything in writing about the incident. According to McCain, Babbitt made a closing comment about the vicious nature of life in Washington. After McCain hung up with Babbitt, an aide who was with him heard McCain remark, "Babbitt's done it now."

[633]As recalled by an aide who was with McCain, as soon as McCain hung up with Salter to await Babbitt's call, he said aloud, "Babbitt's in trouble," apparently anticipating what Babbitt would be calling about. OIC Interview of Carla Eudy, March 10, 1999, at 3.

[634]OIC Interview of John McCain, Sept. 24, 1998, at 4 (hereinafter "OIC McCain Int.").

McCain immediately called his administrative assistant back and recounted to him the conversation with Babbitt, and in particular how Babbitt apologized at length about the misleading nature of his letter to McCain.

Babbitt testified before the Grand Jury that the facts recounted above were consistent with his recollection of the telephone call. When Babbitt testified before the Senate committee, however, he claimed that he told McCain, " I stand by that letter," and claimed that he had apologized to McCain for the letter only "[t]o the extent that it could be construed as misleading."[636] In Babbitt's subsequent testimony in this investigation, he said he did not tell McCain in the telephone conversation that he "stood by" his letter to McCain, and that in fact he apologized to McCain for it.[637]

#### 4. Secretary Babbitt's Testimony Before the Senate Governmental Affairs Committee

In the wake of media criticism and questioning of Secretary Babbitt and the initiation by the Department of Justice of an initial inquiry under the Independent Counsel Act, Babbitt was advised that Sen. Thompson's Committee would further investigate the Hudson decision. On or about Oct. 15,1997, Thompson's staff requested that Babbitt reconsider his position refusing a private interview. Babbitt again refused and offered to testify publicly, and the Committee responded with a letter dated Oct. 22 indicating that it had scheduled hearings on the Hudson

^*Investigation of Illegal and Improper Activities in Connection with the 1996 Federal Election Campaign -PartX: Hearings Before the Senate Comm. on Governmental Affairs,* 105 Cong., 1st Sess. 244 (1997) (testimony of Bruce Babbitt) (hereinafter "Babbitt Senate Test").

[637] In Babbitt's words, "I think I was a bit more direct with Senator McCain than you would pick up from that response" in the Senate testimony. Babbitt G.J. Test., July 7,1999, at 253.

matter. The Committee called Eckstein and Babbitt both to testify in separate appearances on Oct. 30.

Sometime prior to Oct. 21, Secretary Babbitt requested that the Interior Department's Solicitor's Office prepare a memorandum addressing the applicability of 18 U.S.C. §1001, the criminal law prohibiting making false statements to federal agencies, to his August 1996 letter to Sen. McCain. The resulting memo, dated Oct. 21, concluded that the statute did not apply to statements to Congress during the period up to Oct. 11, 1996, including the date of Babbitt's letter to McCain.[638]

Babbitt acknowledged having asked for this legal advice, probably through Leshy. No one recalls a substantive discussion with Babbitt about his concerns underlying his request. Babbitt found the conclusion of the memo to be "not terribly clear," and he was not fully "persuaded" by it.[639] However, he conceded he understood the ultimate conclusion - that his letter to McCain in August 1996 could not constitute a violation of that statute. Babbitt said he asked for the research because he was "getting a little worried . . . they were going to try to make a case against me on the McCain letter."[640] As Babbitt testified, "[t]he purpose of this [memo]

[638] As explained further below in Section III.C.2.a., the memo based its conclusion on the Supreme Court's 1995 opinion in *Hubbard v. United States*, 514 U.S. 695 (1995), which held that 18 U.S.C. § 1001 did not criminalize willfully false statements made to the U.S. Congress. A year later, Congress responded to the ruling by amending Section 1001 to apply explicitly to such statements. *See* 18 U.S.C. § 1001 (1994 & Supp. II 1996).

[639] Babbitt G.J. Test., July 7,1999, at 258.

[640] *Id.* at 255.

was that I really was looking back over the McCain letter, and as to whether or not it could be characterized" as a false statement.[641]

By Oct. 30, when Babbitt testified before the Senate Committee on Governmental Affairs, the Committee had taken testimony already in the form of sworn depositions from Paul Eckstein and five current and former DOI employees - Michael Anderson, Thomas Collier, Ada Deer, John Duffy and Heather Sibbison - regarding the Hudson decision. The Committee also had taken sworn testimony from certain current or former White House employees, including Harold Ickes and Jennifer O'Connor, and individuals employed by the DNC or associated with its fund-raising, including Donald Fowler and David Mercer.

Eckstein testified again, this time before the full Committee, immediately preceding Babbitt. The areas of dispute between Eckstein's and Babbitt's versions of their meeting had by this time been well-defined in the letters from the Secretary and Eckstein's affidavit in the civil litigation. Ickes had already denied under oath that he personally contacted Babbitt or anyone else at Interior, or communicated to Interior any position with respect to the timing or outcome of the Hudson decision. Similarly, Fowler had denied any knowledge that Ickes had intervened in or advocated a position regarding the Hudson matter to Babbitt or any Interior personnel, and had denied that he personally contacted Babbitt on the matter.

In sworn testimony in this investigation, Babbitt stated that his mindset while testifying before the Senate Committee was that they were trying to make a case on him based on the

[641] *Id.* at 256.

McCain letter and they were not interested in the facts, but were on a political "witch-hunt."[642] Nonetheless, comments by several Committee members, including two Democratic Senators, made clear that they felt the inquiry was well-justified and had been necessitated by Babbitt's own curious statements.[643]

Babbitt said that when he testified before the Senate Committee, he realized that he did not have a sufficient command of the facts regarding the Interior's consideration of the application to refute the picture he thought was being painted in the hearing, that the BIA career

[642] In responding to a question as to why he declined to be interviewed by the Committee, Babbitt explained his view of congressional hearings is that whoever runs them, they are not intended to ascertain truth:

> [T]his [the Senate committee hearing] wasn't a dispassionate inquiry.... [I was] not going to get up there and let them abuse process in the pretense of making an investigation.... [I]n light of what I know to this day, 90 percent of them are witch hunts; they're political show trials. They don't have a damn thing to do with trying to ascertain the truth.... They weren't interested in any kind of truth or an inquiry.

Babbitt G.J. Test., July 7,1999, at 223-25.

[643] Sen. Carl Levin (D-Mich.) stated:

> I think it's perfectly appropriate that you be called as a witness in light of your comment relative to Mr. Ickes. I think that does raise a question which appropriately should be addressed by you, so I think it's very appropriate indeed that you be given an opportunity to address that question.

Babbitt Senate Test, at 259. Similarly, Sen. Lieberman observed:

> You have given a series of answers regarding what you have said to Mr. Eckstein on that meeting on July 14,1995, that I find puzzling and disconcerting, and to some extent, they may affect your credibility before the Committee. I want to give you another chance to explain what you have said here, beginning in the colloquy that you had with Chairman Thompson.

*Id.* at 263.

officials' merit-based judgment to approve the application was overridden by political appointees carrying out a political agenda.

He said he believed while he was testifying that the facts were being "deliberately ... mischaracterized" by the Senators, although he acknowledged he did not know then what had actually happened.[644] He characterized the questioning as "intense" and "badgering." Babbitt noted as evidence that the Senators were not attempting to ascertain the truth about what happened in the Hudson matter the fact that they had not interviewed George Skibine, whom he described as a "major player" in the Hudson matter:

> And what the Senate Committee did to me I'm really still burning about because they did not call George Skibine. They did not depose him.
>
> And they set that hearing up in a way deliberately to make it look like this was a political - - "political deal" in which my staff, the political people, reversed the Hartman memo which they characterized as a consensus staff recommendation that went straight to the political people.
>
> And I believe to this day that the staff of that investigating council deliberately tried to hang me. They didn't even mention George Skibine.
>
> Now, I had never met George Skibine, but I had enough briefing before that hearing that I understood that George Skibine, who the senate did not come near or bothered to interview, was, in fact, a major player.
>
> And I'm there trying to - - getting raked over the public television and I'm at least trying to get George Skibine back in the game because they deliberately kept him out.[645]

Babbitt testified before the Senate that the decision in Hudson was made based on the recommendation of Skibine, an 18-year civil servant. In the Grand Jury, however, Babbitt

[644]Babbitt G.J. Test., July 7,1999, at 267.

"'Babbitt G.J. Test., June 30,1999, at 193-94. The Committee's records show that the Secretary testified on Oct. 30, 1997, and that Skibine was interviewed on Nov. 17, 1997.

conceded he may have "overstated" Skibine's role, acknowledging that he knew Skibine did not make his recommendation in a vacuum.[646]

During Babbitt's House testimony, he characterized his statement to Eckstein that Ickes wanted or expected a decision as "an excuse" for why he would not accede to Eckstein's request for an extension of time.[647] Rep. Henry Waxman (D-Cal.) characterized it as a "white lie."[648] In the Grand Jury, Babbitt further testified that he had decided before or during his congressional appearance that he was not going to admit explicitly to having told a "white lie" to Eckstein on national television.

> Q: You used the expression earlier today in your testimony that this was a white lie, by which I take it you mean a lie with no significance, no real impact?
>
> A: Yeah, an excuse.
>
> Q: Yet, in your House and Senate testimony, while other people used different references to this being some sort of dissembling or deception, you never did. Was there any reason for that, Secretary Babbitt?
>
> A: Look, I'm up there getting, you know, pilloried and beat around and, you know, a white lie is an easy word to use here.
>
> It's a hard word to use when you're thinking of the way the press operates in this country and, man, it's hard to step up to that in that context. That's all. I mean, it is.[649]

In answer to further questioning, Babbitt acknowledged that he also would not have conceded at the Senate hearing that his August 1996 letter to McCain was misleading:

[646] *Id* at 192.

[647] Babbitt House Test, at 773.

[648] Babbitt House Test, at 838.

[649] Babbitt G.J. Test., July 7, 1999, at 151-52.

A: But let me just say this: it would have been difficult to acknowledge any form of a misleading statement. Is that what you're after?

Q: That is one point of it.

A: Yeah, it would have been. Sure. Sure.[650]

When he appeared before the Senate Committee on Governmental Affairs on Oct. 30, 1997, Secretary Babbitt swore an oath to tell the truth and then read a brief prepared statement, which said, in pertinent part:

> In sum, the allegations that there was improper White House or DNC influence and that I was a conduit for that influence are demonstrably false. There is no connection at either end of the alleged conduit. At one end, as I have stated, I did not speak to Mr. Ickes or anyone else at the White House or the DNC, and at the other end, I did not direct my subordinates to reach any particular decision on this matter, although during my watch, the Department's policy has been not to approve off-reservation Indian gaming establishments over the objections of reluctant communities. The Hudson decision reflected that policy and nothing else.
>
> That should end the matter, and I suppose it would have ended the matter had I not muddied the waters somewhat in my letters to Senator McCain - Senators McCain and Thompson in describing a meeting that I had with Mr. Paul Eckstein on July 14, 1995.[651]
>
> *** * * ***
>
> Mr. Eckstein … asked to meet with me. Against my better judgment, I acceded to that requests, [sic] When he persistently pressed for a delay in the decision, I sought to terminate the meeting. I don't recall exactly what was said, but on reflection, I probably said that Mr. Ickes, the Department's point of contact on many Interior matters, wanted the Department or expected the Department to decide the matter promptly. If I said that, it was an awkward effort to terminate an uncomfortable meeting on a personally sympathetic note, but as I have said here today, I had no such communication with Mr. Ickes or anyone else from the White House.

[650] *Id.* at 155.

[651] Babbitt Senate Test, at 238.

> It has been reported that Mr. Eckstein recently made the additional assertion that I also mentioned campaign contributions from Indian tribes in this context. I have no recollection of doing so or of discussing any such contributions with anyone from the White House, the DNC, or anyone else.
>
> If my letters to Senator McCain and Senator Thompson have caused confusion, then I must and do apologize to them and to the Committee. I certainly had no intention of misleading anyone in either letter. My best recollection of the facts are as I have just stated them.[652]

Thus, Babbitt in his prepared testimony did not concede that his letters to McCain and Thompson were contradictory, or that either was inaccurate. He further testified that he had not intended to mislead Sen. McCain with the initial letter.

In answer to questions from the Senators, Babbitt testified that his initial denial about having said anything to Eckstein about Ickes's having instructed Babbitt to issue a decision that day, and his subsequent acknowledgment to Sen. Thompson that he probably did say something to Eckstein indicating that Ickes wanted a decision, were both true:

> Chairman Thompson:… In part of your letter, the last paragraph on the first page, you said, "I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay." Is that an accurate representation?
>
> Secretary Babbitt: Yes, it is.[653]
>
> Chairman Thompson:… Did you not say that in your testimony earlier that you told Mr. Eckstein that Mr. Ickes wanted you to issue a decision?

[652] *Id.* at 239.

[653] *Id.* at 244.

Secretary Babbitt: I told - to the best of my recollection, I said something to Mr. Eckstein to the effect that Mr. Ickes expected or wanted a decision.[654]

Chairman Thompson:... Are you saying that you were not correcting the record, more or less, with the letter to me?

Secretary Babbitt: Senator, I believe those statements are consistent. They both reflect my best recollection of what I said and what I didn't say.[655]

Later, Sen. Lieberman tried to explore the same concern that Sen. Thompson's questions expressed. Lieberman accepted Babbitt's explanation, but not without observing that "your statement to Senator McCain ... looks like it goes to a total denial of Mr. Eckstein's recollection that you even mentioned Ickes... ,"[656]

Sen. Lieberman: Now, why would you - why - why -1 presume that what you were saying in your letter to Chairman Thompson was that you had not really quite spoken the truth to Senator McCain - or let me put it another way, that on further reflection, you had changed your recollection of that meeting.

So help me - us understand what the difference is.

Secretary Babbitt: My response to Senator McCain is - - is precise and correct. It goes to the question that Senator McCain asked, did you ever talk to Harold Ickes, did Harold Ickes ever talk to you, and the answer is no.

Now, what I am attempting to do is, obviously, to ask myself what might have been said that gave Mr. Eckstein some kind of impression, and the best that I can do is to think that, Yes, I probably did say something to the effect

[654]W. at 245.

[655]*Id.* at 245.

[656]*Id.* at 264.

that it is time to decide this, Mr. Ickes wants a decision, Mr. Ickes expects a decision. That was not based on any communication about this matter that I had had with Mr. Ickes.[657]

Babbitt's response to Lieberman ignored the fact that McCain's July 19, 1996, letter specifically asked Babbitt about the truth of Eckstein's assertion concerning the content of Babbitt's statements to Eckstein. Lieberman then followed-up on his own question:

Sen. Lieberman: OK. So what you are saying is that your statement to Senator McCain, although it looks like it goes to a total denial of Mr. Eckstein's recollection that you even mentioned Mr. Ickes, you are saying now that your statement to Senator McCain was no, that you, in fact, had not talked to —

Secretary Babbitt: I think Senator McCain was asking in that letter —

Sen. Lieberman: [continuing] Mr. Ickes. Yes.

Secretary Babbitt: [continuing] Was there a communication between you and Mr. Ickes, and my response was, unequivocally, no, there was not.[658]

In his Senate testimony, Babbitt repeated the phrasing of the denial set forth in his Aug. 30,1996, letter concerning his use of the word "instructed" during his conversation with Eckstein:

Sen. Susan Collins: (R-Maine) .. .What part isn't true? The "without delay" part?

Secretary Babbitt: I did not tell Mr. Eckstein that Mr. Ickes had instructed me to make a decision.[659]

[657] *Id* at 263-64.

[65] **Id.* at 264.

[659] *Id.* at 267.

Both in his letter to McCain and his Senate testimony, Babbitt chose to deny having used the term "instructed" with Eckstein, even though neither Eckstein nor McCain ever attributed that phrasing to Babbitt. Eckstein had asserted in his affidavit that Babbitt had said Ickes "told him," and McCain adopted that phrasing in his July 1996 letter to Babbitt.[660] It is unclear why Babbitt chose to use the word "instructed" in his letter to McCain, when he denied that Ickes had instructed him to issue a decision that day.

During his Grand Jury testimony, Babbitt acknowledged that a "permissible inference" to draw from his letter to McCain is that Babbitt did not invoke Ickes in his meeting with Eckstein; it is, he testified, "a not unreasonable reading of the letter."[661]

Another lengthy line of inquiry by Senate Committee members concerned whether Babbitt made any remark to Eckstein about the timing of the decision. Babbitt said in his prepared remarks that he did not specifically recall what he said, but that he "probably said" to Eckstein that Ickes wanted him to make a decision "promptly."[662] He later adamantly rejected the possibility that he said "that day,"[663] "that very day,"[664] or "without delay,"[665] ultimately denying he made any statement about whether he told Eckstein that Ickes said anything about the timing of the decision.

'Eckstein Affidavit at 6.

Babbitt G.J. Test, July 7,1999, at 222.

'Babbitt Senate Test, at 239.

*M* at 242.

'***Id.*** at 241-42.

***Id.*** at 243.

Chairman Thompson: I would like to ask you about the meeting that you referred to on July 14 with Mr. Eckstein. You have addressed that. Mr. Eckstein, of course, said that you told him that Mr. Ickes wanted a decision today.

If you would, go back and state what you remember was discussed concerning that particular point.

Secretary Babbitt: . . . My recollection is that Mr. Eckstein came - - had been to several other offices within the Interior Department in respect to this matter and come to my office.

As I recall, his principal objective was to try to obtain some kind of delay in this matter, which my understanding, I believe, was that the Gaming Office and the Assistant Secretary - - Deputy Assistant Secretary were prepared to make the decision that day, and - -

Chairman Thompson: That day being July 14th?

Secretary Babbitt: I believe that is correct.

That the decision [sic][666] centered on that, and that during the course of that discussion, it is my recollection that I may well have said to him, "Mr. Ickes expects me to make a decision or Mr. Ickes wants me to make a decision."

Chairman Thompson: Today? Might you have said Mr. Ickes wants you to make the decision today.

Secretary Babbitt: I have no idea whether they did or not.

Chairman Thompson: Do you recall Mr. Eckstein's testimony that Mr. Quinn[667] said it was imperative that he get right in there immediately if he wanted to talk about this matter?

Secretary Babbitt: I don't recall that, no.

[666]Review of the hearing videotape indicates clearly that this word should be "discussion.

From the context of the question, it appears that Sen. Thompson was referring to John

Chairman Thompson: All right. Could you have said that Mr. Ickes wanted you to make the decision that very day?

Secretary Babbitt: No, sir.

Chairman Thompson: You definitely remember you did not say that?

Secretary Babbitt: I do, and I represented that much in my letter to Senator McCain.

Chairman Thompson: But, in fact - - well, we will get to that in a minute because you made a misrepresentation in your letter to Senator McCain, did you not?

Secretary Babbitt: No, sir.

Chairman Thompson: All right, we will get to that in a minute.

Mr. Eckstein said that you told him that Mr. Ickes wanted you to make a decision that day. You, in fact, did make a decision that day, but say that although you told him that Mr. Ickes wanted you to make a decision, you definitely remember that you did not say that you wanted it that day?

Secretary Babbitt: That is correct.

Chairman Thompson: Is that correct?

Secretary Babbitt: [Nodding head up and down][668]

* * * *

Chairman Thompson: So you knew that a decision was going to be made that day; that you were gong to sign off on it?

Secretary Babbitt: Senator, I didn't sign off on it. That was obviously a staff decision.

Now, my recollection of that is that I had probably learned from my staff that they were ready to make the decision and quite possibly that they had decided to make that decision that day.

[m] *Id.* at 240-42.

Chairman Thompson: All right. Did you tell Mr. Eckstein that Mr. Ickes had told you to make the decision without delay?

Secretary Babbitt: I did not.

Chairman Thompson: Tell us again what you told Mr. Eckstein about that.

Secretary Babbitt: Senator, my best recollection is that I may well have said something to the effect that Mr. Ickes expects me to make a decision or Mr. Ickes wants me to make a decision.

Chairman Thompson: Any time in the future, is that what you are telling us, that you were relating to him -1 mean, here you are. He has been told by your counselor to get immediately right in there. You knew that the decision was going to be made that very day. You told him that Mr. Ickes was in touch with you on it and wanted you to make a decision.

Secretary Babbitt: Right.

Chairman Thompson: Doesn't all of that imply that you were telling him that there was some concern being expressed to you that a decision be made immediately or that day or forthwith or rapidly?

Secretary Babbitt: Senator, there was no such expression made to me by Mr. Ickes or anyone else.[669]

* * * *

Chairman Thompson:... Did you not say that in your testimony earlier that you told Mr. Eckstein that Mr. Ickes wanted you to issue a decision?

Secretary Babbitt: I told - - to the best of my recollection, I said something to Mr. Eckstein to the effect that Mr. Ickes expected or wanted a decision.

Chairman Thompson: Well, certainly that meant something more than just carrying out your duties. I mean, clearly, a decision had to

[669] *Id.* at 243-44.

be made. Clearly you were stating something more than just what the law required you to do as a - -

Secretary Babbitt: No. That's really all I was stating.

Chairman Thompson: Did Mr. —

Secretary Babbitt: That's the whole point.

Chairman Thompson: In effect, Mr. Ickes wanted you to do your job?

Secretary Babbitt: That is correct. That is exactly correct.

Chairman Thompson: Kind of like saying Mr. Ickes wanted you to pay your Federal income taxes by April 15.

Secretary Babbitt: Yes.[670]

* * * *

Sen. Collins: How would that have prompted Mr. Eckstein to end the meeting and exit your office, which was your goal? I do not understand if all you were saying is I have to do my job, Harold Ickes expects me to do my job. Why would that prompt him to end the meeting which was your goal?

Secretary Babbitt: My intention was to say, look, this decision has got to be made. It is overdue, and now is the time to make it.[671]

* * * *

Chairman Thompson: Did Mr. Ickes tell you to make a decision?

Secretary Babbitt: He did not.

Chairman Thompson: … And you told Mr. Eckstein that he told you to make the decision?

Secretary Babbitt: I did not.

[670] *Id.* at 245.

[671] *Id.* at 266-67.

Chairman Thompson: What did you tell him?

Secretary Babbitt: Well, I've repeated that several times. I said I believe - what I believe I've said is that Mr. Ickes expects me or Mr. Ickes wants me to make a decision.[672]

Babbitt also denied any recollection of having made any remark about campaign contributions to Eckstein, although he said at one point it was "conceivable."[673] The issue had not been addressed in Eckstein's affidavit, but had been covered in Eckstein's Senate deposition as reported in the media, and Eckstein had provided more details in his testimony before the Committee that same day.

Babbitt expanded on his remarks that he invoked Ickes because Ickes was his "point of contact on many Interior matters"[674] and provided some examples, none of which involved matters related to Indian affairs. Responding to Sen. Lieberman, Babbitt said he had only irregular contact with Ickes, "once every 6 weeks maybe."[675]

### 5. Secretary Babbitt's Testimony Before the House Government Reform and Oversight Committee

The House Committee on Government Reform and Oversight, chaired by Rep. Dan Burton (R-Ind.), began investigating the Hudson matter as part of its investigation of possible

[672] *Id.* at 246.

[673] *Id.* at 277.

[674] *Id.* at 239.

[675] *Id.* at 282.

campaign fund-raising abuses at about the same time as the Senate Committee.[676] On Dec. 19, 1997, the chief counsel for the House Committee solicited Babbitt's public testimony.

According to witnesses, the Secretary sought to avoid repetition of what he, his advisors and his friends considered a poor performance before the Senate Committee by engaging in extensive preparation for his testimony before the House Committee. Leshy, Shields, Gauldin and Beller, as well as Babbitt's friends and political consultants Jim Maddy and Greg Schneiders, assisted Babbitt and his attorneys in approximately 12 preparation sessions, some of which were videotaped. Maddy had worked with Babbitt when Babbitt was Chairman of the Western Governor's Association and, later, Chairman of the League of Conservation Voters, which Maddy headed. Maddy then became the President of the National Parks Foundation. Maddy also served as an informal advisor to Babbitt during the beginning of his tenure as Interior Secretary. Schneiders is a pollster and public relations expert based in Washington, D.C. According to media sources, he has worked with the presidential campaigns of Babbitt, John Glenn and Paul Tsongas, and also served in the Carter Administration.

Babbitt's advisors worked with him on both substance and style. Efforts were made to help the Secretary master the facts of the underlying decision, which he said he had not attempted to do in preparation for his Senate testimony. Leshy coordinated the compilation of briefing books containing all of the significant documentation underlying the Hudson decision. In addition, Babbitt's attorneys retained a media consultant and speech writer to work with the Secretary. Shields and others felt that the Secretary had been too passive and polite before the

[676] On Aug. 20, 1997, Chairman Burton sent Secretary Babbitt a document request for "all records relating to the St. Croix Meadows Greyhound Racing Park."

Senate Committee. Shields, Beller and Gauldin all reported that Babbitt underwent several hours of mock question and answer sessions, which were videotaped.[677]

Babbitt said recently that he had worked with speech coaches previously during his career, but not in connection with testimony before Congress as Interior Secretary. He stated that in preparation for his House Committee testimony, he was given advice to try to make statements which would be quotable "sound bite[s]" favorable to him and the Department and he followed that advice:

> And by the time that hearing is over, I had said, "it was the right decision, made for the right reasons, in the right way," at least twenty times. That was the message.[678]

In Babbitt's testimony before the House Committee, he persisted in arguing that his letters to Thompson and McCain were consistent and truthful. He maintained that "the context of the two letters was different and accounts for the different language in the documents."[679] He also repeated his Senate testimony that he had no recollection of making a comment to Eckstein about political contributions by Indians. Babbitt denied White House and DNC intervention in DOI's affairs, and he made several statements about aspects of the decision-making process

[677]The tapes reveal no admissions by the Secretary that he intended to mislead Sen. McCain when he wrote to him, and no statements that the decision was improperly influenced. Similarly, there are no admissions in these tapes that Babbitt planned or intended to testify falsely or deceptively before the House committee. The tapes contain numerous examples of Babbitt practicing and being coached to provide a statement and responses to questions before a body he expected to be hostile to him.

[678]Babbitt G.J. Test, at 269-70.

[679]Babbitt House Test, at 773.

concerning the Hudson application which, more recently, he conceded were "hyperbole" or "overstatements." *See* discussion of Grand Jury at Section H.K.7., *infra.*

Babbitt's testimony before the House Committee on the issues associated with the July 14 Eckstein meeting was generally consistent with his Senate Committee testimony. Babbitt told the House Committee that he had "made up" the Ickes remark as "an excuse in an effort to end the meeting" with Eckstein.[680] He recalled the specific statement as follows:

> To the best of my recollection, I said that Harold Ickes wanted or expected the Department to make a decision promptly.[681]

This is the same formulation that Babbitt used in his written statement to the Senate Committee, including the use of the word "promptly." Babbitt was not pressed in the House hearing, however, as he was in the Senate, to reconcile his choice of "promptly" with his distinct recollection that he did not say "today" or "without delay."

Babbitt told the House Committee that he invoked Ickes "[s]imply because Harold Ickes was my liaison on these kinds of Interior matters at the White House."[682] He also said he should have declined the meeting with Eckstein, calling it "the first time in the course of this whole thing that I had met with any advocate or lobbyist of any kind, first time."[683]

[680] *Id.*

[681] *Id.*

[682] Babbitt House Test, at 798.

[683] *Id.* at 841. He indicated that the applicant lobbyists had engaged in "questionable behavior," *id.* at 772, and that they "tried to misuse personal access" to him. *Id.* at 778. He dismissed their accusations of official misconduct as a "half baked theory of improper political influence and intrigue" and "a conspiracy theory worthy of Oliver Stone." *Id.* at 769. In the Grand Jury, when asked to explain what he meant when he said the applicant lobbyists "tried to

(continued...)

### 6. Secretary Babbitt's Interviews During the DOJ Preliminary Investigation

Babbitt voluntarily agreed to be interviewed with his lawyers present on Nov. 6, 1997 - prior to his House testimony - by Special Agents of the FBI and lawyers from the Department of Justice in connection with their initial inquiry under the Independent Counsel Act. Regarding his July 14, 1995, meeting with Eckstein, Babbitt said that Eckstein told him they had previous meetings in which they discussed the Hudson matter. Babbitt said he does not dispute that assertion but has no recollection of other meetings.

Babbitt said he recalled being told on July 14 that Eckstein was in the building meeting with Duffy or Leshy to argue his case about the application and that he wanted to see Babbitt. He thinks Duffy or Leshy told him that, and not Eckstein by phone. Babbitt had been told by someone on his staff that the decision had been made, or was about to be made or released. Babbitt was told that Eckstein would be asking for a delay in making the decision. Babbitt saw no reason to intervene. He believed that Eckstein had been given "his chance."[684] Babbitt did not want to get involved and tell his staff what to do; nevertheless, he made a "spur of the moment decision"[685] to see Eckstein. Babbitt was not inclined to hear another plea, however, and felt he should not have met with Eckstein as soon as the meeting started.

[683](...continued)
misuse personal access," Babbitt responded only that it was "inappropriate" for him to have met with Eckstein. Babbitt G.J. Test., July 7,1999, at 123.

[684]DOJ Prelim. Babbitt Int. at 4.

[615]*Id.*

Babbitt said he has had difficulty recalling exactly what he said to Eckstein but that when he read Eckstein's account in the newspaper he recalled that it is "quite possible that I said something about Harold Ickes wants a decision;" or that "the front office wants a decision."[686] Babbitt described it as a "dissembling way"[687] of ending the meeting. Babbitt was certain he did not say that Ickes "instructed me to do anything, with or without delay."[688] Babbitt told the investigators he did not know if he addressed timing in his statement about Ickes during the Eckstein meeting; he did not recall saying anything about timing. Babbitt also said he did not recall posing a question to Eckstein about campaign contributions the opposing tribes made to the DNC, nor did he recall knowing information about the specific tribes or the amounts of money involved when he met with Eckstein. Babbitt said he did not discuss the Eckstein meeting with anyone after the meeting was over. He said the first time he discussed it was in connection with the lawsuit filed by the applicants over the Department's denial of their application.[689]

Babbitt offered an explanation for why he would have used Ickes's name in his conversation with Eckstein. He stated, "I'm invoking the White House, for better or worse."[690]

[686]/<* at 5.

™*Id*

[6]***Id.*

[689]During his testimony in this Office's investigation, Babbitt's best recollection was that he never recounted to any Interior official "who said what to whom" during his July 14, 1995, meeting with Eckstein in the context of preparing his Aug. 30,1996, letter to Sen. McCain or his Oct. 10,1997, letter to Sen. Thompson. Babbitt G.J. Test., July 7,1999, at 240.

[690]DOJ Prelim. Babbitt Int. at 5.

"I'm invoking the front office."[691] "Ickes is the guy that I deal with."[692] Babbitt pointed out that although Ickes is most often thought of in connection with his political responsibilities, he was a Deputy Chief of Staff at the White House, and "he had real line responsibilities. One of them was the Department of the Interior."[693]

Babbitt said his letter to McCain was drafted by others with input from him, and that he read and signed the letter. Babbitt stated that probably the letter was presented to him in draft form, he made some changes, the letter was redrafted and he signed it. In referring to the sentence "I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision without delay," Babbitt said that the wording of the sentence "doesn't sound like my language;" but "I think it's accurate and I agree with it."[694] Babbitt said the point of the letter was to answer McCain's question whether Ickes, the White House or the DNC had contacted Babbitt on the Hudson matter. Babbitt said "the answer is no."[695]

Babbitt stated that when he tries to recall his conversation with Eckstein, he is "reaching back two and a half years."[696] He is "being asked to recollect based on someone else's

[691] *Id.*

[692] *Id.*

[693] *Id.* Ickes testified that he did not consider himself as having "an oversight function" for the Department of the Interior, and told investigators that he had visited Interior only once during his three years in the White House. *See supra* at 184.

[694] *Id.* at 6.

[695] M

recollections."[697] He said that when he testified before the Senate Committee, he relied on the McCain letter as opposed to his then two-and-a-half year old recollection of a conversation.

Babbitt said he had not read Eckstein's Senate testimony or deposition, nor had he read any recent Wall Street Journal articles about the matter. He had not discussed the matter with Eckstein since the meeting; he did not recall any other conversations with Eckstein since their meeting.

**7. Secretary Babbitt's Grand Jury Testimony**

In his testimony before the Grand Jury, Babbitt conceded that certain sworn statements he had previously made either were not entirely accurate or at least constituted "overstatement."[698] Most of the statements to which he was referring were made during his sworn testimony before the House Committee. For example, Babbitt acknowledged that his House Committee testimony that he told the tribes at the April 8, 1995, tribal dialogue "in some detail" that Interior would not "cram casinos down the throats of unwilling communities" was hyperbole or an overstatement of what he actually said at the tribal dialogue.[699] He conceded that he was "paraphrasing and

[697] *Id.*

[698] *See e.g.,* Babbitt G.J. Test., June 30,1999, at 133-35,192.

[699] *Id.* at 133. While Babbitt did address off-reservation gaming - in the context of the Hudson application - during one portion of the tribal dialogue, his expressions of concern about off-reservation gaming were much weaker than he represented in the Senate, and were in fact undercut by his own later statements. Babbitt's relevant statements at the tribal dialogue were as follows:

> I think it is my job to make certain that as we consolidate and expanded [sic] gaming opportunities for those tribes who desire it, that I always be sensitive to the political implications … in the outside world. Because once again, there are plenty of people in Congress who would like to move to reject and even close

(continued...)

summarizing and overstating in an argumentative way"[700] when he testified that his comments at the tribal dialogue gave the applicant tribes "pretty good notice"[701] of the Department's concerns about the application.

Babbitt cited as an overstatement his prior assertion that Michael Anderson made the decision based on the recommendation of George Skibine. Relatedly, he admitted that his claim in the House hearing that the decision was made "the right way" was an overstatement, at least in light of his awareness of the criticisms made by the Assistant U.S. Attorney defending Interior officials against the applicant's civil lawsuit, who recommended that the civil lawsuit be settled because of problems with the consultation process.[702]

With respect to his testimony before the Senate Committee, Babbitt conceded that his testimony that Ickes was his boss was "not a very accurate way of phrasing."[703] Although he had

[699](...continued)
this down. So I think that's important consideration.

> Now obviously the most difficult issue is off reservation gaming. Which had some good successes in some states where we've been able to generate a consensus, not just the approval of the governor, but a real consensus about this being good for both the Indian community and the non-Indian community. It's a controversial issue. .. .
>
> I got to tell you, I've not yet figured out in my own mind with any degree of certainty what the best way to go is on this.

[700]Babbitt G.J. Test., June 30,1999, at 133.

[701]*Id* at 135.

[702]*Id.* at 194-98.

[703]Babbitt G.J. Test., July 7, 1999, at 141.

testified before the Senate Committee that Ickes was his "superior in [some] sense,"[704] Babbitt conceded that "Ickes is right in saying that he's not supervising me" - but added that "when Ickes is interested in something, you know about it and you relate and you respond and I did."[705]

Babbitt's Grand Jury testimony about the Eckstein meeting was consistent with his Senate and House testimony on the subject, particularly the prepared statements he had presented at the outset of each congressional hearing. He conceded, however, that his testimony before the Senate Committee that he did not mislead Eckstein "was an incorrect answer," and that he "clearly did mislead Mr. Eckstein."[706]

In his testimony before both the Senate Committee and the Grand Jury, Babbitt said he lacked clear recollection about virtually any other aspect of his July 14 conversation with Eckstein, but he nevertheless insisted that he is "quite certain" he did not say Ickes "told" or "directed" Babbitt to issue the decision, and that he did not say "that day" or "today" as opposed to "promptly."[707] Though he could not recall any other statement he made in that meeting, he said emphatically that he just knows what he did not say. Babbitt's explanation as to why he is confident about what he did or did not tell Eckstein regarding Ickes is essentially that he knew he was telling a "white lie" or "an excuse," and was intending not to be too specific.[708] He said he thinks people fairly commonly make those kind of general excuses:

[704]Babbitt Senate Test, at 282.

[705]Babbitt G.J. Test., July 7,1999, at 144.

[706]*Id.* at 147-48.

[707]*Id.* at 136-39; Babbitt Sen. Test, at 241-42, 246.

[708]Babbitt G.J. Test., July 7, 1999, at 136.

Now given that your recollection is solid, I take it, on both that you were telling him Ickes to get him out and you were telling him timing to show the need to do this promptly, the need to do it now, I'm wondering why you have a particular recollection that you did not use the words that Mr. Eckstein recalls. How is it that you have certain[ty] that though those were the two elements you meant to convey and they would be conveyed by both your permutation and his, why is it that you remember with certainty that you didn't say Ickes "told you" or Ickes "directed you," and you didn't say "today" as opposed to "promptly"?

Well, I can tell you pretty certainly what I didn't say. Let me just say this. If I'm making an excuse, a white lie, -1 have a hard time uttering the word "lie" but it really was a white lie -1 just - you know, I used the telephone analogy in some of my things, you know, to try to convey a flavor of what I think I was doing when I said that I think a lot of people have had this experience of saying - of winding up a phone conversation by saying there's somebody waiting on the other line when there may not be somebody literally on the other end of the line.

You make those kinds of excuses. I don't say I've got to get off this line because the executive vice president of the IBM Corporation is on the other line.

That's why I'm pretty certain or I'm quite certain that I didn't say that to Eckstein. Why would I make an excuse saying my boss - Ickes is not my boss, the President is my boss - but is ordering me around on this. I'm quite certain I didn't say that.

Mr. Babbitt, you know that Mr. Eckstein has never said that you told him on July 14th that Ickes said how this had to be decided, just when it had to be decided, so that's not saying that your boss is ordering you around on the application.

I understand.

And wasn't July 14th actually beyond all the estimates that the applicants had received of when this application would be decided?

I think I can accept that from all the stuff in the record, yes.

So you wouldn't be venturing much to say it has to be today. That would not be some amazing intrusion on your province from the

White House for you to say it has to be today in your view, would it?

A: Well, my recollection of this is look, I didn't want to give him an extension. The importance of this promptly stuff is because I wasn't giving him anything and in my recollection that's kind of- it's not easy because as I remember, and I don't remember this as direct or out of the transcript or what - he's saying give me another bite and another chance to bring my clients in, and I'm saying it's not very easy; I'm saying no.

Q: Mr. Babbitt, a moment ago you said if you're trying to get someone off the phone, you're not going to say who is on the other line. You're just going to say I've got another call.

A: Yes.

Q: But here you're saying Harold Ickes has gotten somehow in touch with you and that is driving the reason why you can't grant Mr. Eckstein's request.

A: Yes.

Q: If you would say Mr. Ickes in particular, why would you not say "he told me" or "today"? Why would those details of particularity be inconsistent with this white lie that you intended -

A: Because I just -1 know what I didn't say.[709]

[109]*Id.* at 136-39. Babbitt offered a further explanation for the divergence between his recollection and Eckstein's:

Q: Do you have any belief, knowledge, understanding that Paul Eckstein has wrongly testified about any of the particulars of his dealings with the Department of Interior and yourself on the Hudson casino application?

A: Well, I can tell you that we have a difference of recollection on the Ickes issues that we've discussed.

Q: Specifically, Mr. Babbitt, do you believe that you differ on that because one of you is right and one of you is wrong, or do you believe that there is a failure of memory perhaps on one or both sides of this equation?

(continued...)

At the same time, Babbitt said he had no recollection of the campaign contributions remarks Eckstein said he made:

> Q: Now, I believe some of the questions from the senators were, at least, driving towards what can you remember because you know it did not happen versus what are you allowing the possibility of.
>
> And is it fair to say that you're leaving open the possibility that you said it because you just can't say with certainty that you didn't make this contributions remark?
>
> A: Yes, slightly. Yeah, I guess I could parse that either way. I guess - I think that's a fair question, and I think that's a correct answer. I have no recollection of that.
>
> But in terms of the Ickes thing, I'm pretty clear about what I didn't say, as we've discussed.
>
> On this one, I think it's conceivable that that could have been a topic.
>
> Now, as I recall, Eckstein says this came out of his reference to the O'Connor letter, it followed in that sequence. I have no recollection. I've thought about this, and I've thought, you know, what is the sequence, how it might flow out of the O'Connor letter and it doesn't help.
>
> But is it conceivable? As I read his version, I think it is conceivable for this reason: his version of this, he doesn't seem to recall exactly what was said and he, as I remember his version, says, I'm not sure whether it was about these Indians, Indians with casinos or Indians, in general.

[709](...continued)

> A: I think it's very possible. You know, I think the important thing to remember is that people carry different perceptions away from conversations and it's entirely possible that there are failures of perception on both sides, one or the other.

*Id.* at 121.

And, you know, I guess, yeah, it's conceivable, yes. [1]

Babbitt rejected other possible explanations for why he would say something to Eckstein about contributions. For example, he said he was sure he did not say anything to Eckstein suggesting that gaming Indian tribes now have money to make significant contributions, or that through large contributions, tribes can pressure decision-makers, even though he had been friendly with Eckstein throughout his political life, including several campaigns:

> Q: On the one hand, you refer to your nominal boss or superior at the White House; on the other hand, you might refer to the cold realities of political influence by, in this instance, tribes that contribute - tribes that have the wherewithal to contribute to **[Democratic** politics.
>
> Is that second element of this discussion something that is consistent in any part of your memory, Mr. Babbitt.
>
> A: No, no.
>
> Q: Is there any reason you think that is not what happened?
>
> A: Okay. Again, I have no recollection of this - yeah, I have reason to think that it didn't happen because I was - during this period of time, to the very best of my recollection, I wasn't in -1 didn't have information or involvement in these funding issues.
>
> Now, you've cited the Duffy exchange which went to the Pequots. I don't know about that. I don't recollect that.
>
> But I have no reason to think that I was trying to rationalize or share or share the blame in terms of talking about contributions by these tribes. That strikes me as very, very unlikely.[711]

™*Id.* at 157-58.

"*Id.* at 176-77.

One potential explanation for Secretary Babbitt's alleged reference to $500,000 in Indian campaign contributions is that he was stating his observation of contributions made in the previous election cycle by the Mashantucket Pequot tribe of Connecticut. On May 1, 1995, during the period in which the Hudson application was under consideration, Interior announced its decision to take additional land into trust adjacent to the Pequot's Foxwoods Casino. Although all other witnesses told investigators that they had never heard Babbitt discuss campaign contributions by Indian tribes - nor heard that subject discussed in his presence - Duffy had a somewhat vague recollection that, at the end of a conference call, while he and Babbitt were still on the line or had just completed a call, it was mentioned that the Pequots had made campaign contributions on the order of $400,000.[712] Duffy was unable to precisely place that conversation precisely in time, but given the proximity in time between the Pequot and Hudson application decisions, it is certainly plausible that Babbitt would have in his mind these large contributions made by another Indian tribe. Babbitt testified he did not recall hearing any such comment and that in July 1995 he had no specific knowledge of the Pequot's contribution levels. However, he said "[i]f Duffy said it, [he has] no reason to dispute it."[713]

Regarding his correspondence with McCain and Thompson about Eckstein, Babbitt agreed that the August 1996 letter to Sen. McCain "could fairly be read to be misleading as to the

[712] As set forth above in note 411, Duffy recalled participating in a conference call with Babbitt on the Pequot dispute which involved senators, state and local officials, and representatives of both the tribes and its opponents, apparently prior to July 1995.

[713] *Id.* at 170-71.

question he had framed about whether [Babbitt] told Eckstein that Ickes had called [Babbitt]." Babbitt denied having thought - at the time he wrote to McCain - that if he said he mentioned Ickes's name to Eckstein, further investigation was likely. Nevertheless, he stated that he "thought it important to lay out the whole thing" in his October 1997 letter to Sen. Thompson because he "had some concern that the August 30 letter would mislead a reader about whether or not [he] had actually invoked Harold Ickes' name."[715] He said he does not know why his letter to Thompson did not address the statement by Eckstein that he (Babbitt) had made a remark about Indian political campaign contributions which had been discussed in the news media by that date.

In conflict with statements he made to investigators during DOJ's preliminary investigation, Babbitt denied in his Grand Jury testimony that he had edited the letter to McCain. In November 1997, he had told investigators the McCain letter was drafted by others and that he "probably" edited a draft, making some changes, then had it redrafted, and then signed it.[716] By contrast, he told the Grand Jury in July 1999 that he read the prepared letter, "adopted" it and was "satisfied" with the language.[717] He also said that he considered the letter to be an important matter when he read and signed it.

[714] *Id.* at 250-51.

[715] *Id.* at 240.

[716] DOJ Prelim. Babbitt Int. at 5.

[717] Babbitt G.J. Test, July 7, 1999, at 298-99.

Repeatedly, Babbitt testified that at the time he wrote to McCain, he did not believe that the question of what he had said to Eckstein was important to McCain, but he conceded that he did not answer all of McCain's questions:

> … There must have been a discussion of some kind somewhere in the process for me to make the first important point in the letter, which was that I never discussed the matter with Ickes. I mean, you know, I had to make that point, and the second point that I do not agree with the Eckstein assertion with respect to the conversation.
>
> All I would emphasize here is that the Eckstein conversation didn't seem very important to me when I wrote this letter to Senator McCain. You know, you can parse it a hundred ways after the fact.
>
> I'm writing to McCain saying - his concern is, you know, Ickes and whether or not there's White House involvement, and there clearly wasn't. There was no communication with Ickes.
>
> And I got that down because that's what I was really focusing on.
>
> So I walked past the Eckstein thing by saying I dispute his - what's the language - I just left it hanging. I shouldn't have done that, but I did.[718]

*** * * ***

> I think that's - it wasn't irrelevant, you know, looking back at the McCain letter. It's just that, as I looked at this issue coming from McCain, the issue was, you know, had you talked to Ickes; was Ickes involved in this. And my answer was no.
>
> And the Eckstein stuff, that seemed to me to be the purport of McCain's concern about the Eckstein conversation, is that it had not only misled Eckstein; it had understandably looked misleading to a lot of other people.

[in] *Id.* at 214.

> And that kind of spiked that by saying, no, I didn't talk to him, and that the - you know, my misleading Eckstein in that context just wasn't very significant to the issue that Senator McCain was interested in, which was improper influence.[719]

He also conceded that, contrary to his flat denial in the letter he wrote to Sen. McCain, he has had contact with high level White House staff on Interior Department matters having to do with Indian gaming issues. However, he denied that the contact was in the form of directing the outcome of a particular agency decision.

Regarding his motivation for addressing the Eckstein discussion as he did in the letter to Thompson, Babbitt volunteered that, in his Aug. 30,1996, letter to Sen. McCain, he was trying to be "oblique," and when the issue came up again with Sen. Thompson in October 1997, he knew that he "needed to be more forthcoming."[720] He further agreed that he knew that, if the Senate Committee concluded that he had lied to or deliberately misled Sen. McCain, it would lend credence to the argument that he was trying to conceal something truly awful about the Hudson decision:

> Q: But getting back to the earlier points that you made in response to my question, isn't it true that you were embarrassed by the alleged remarks, Mr. Eckstein's version of your remarks?
>
> A: Oh, yes.
>
> Q: Because you knew that they looked bad to others.
>
> A: Absolutely.

™*Id.* at 230.

*Id.* at 290-91.

And that they revealed that there may have been, may have been, either a corrupted administrative decision or, at the very least, an administrative process that though not corrupted had been touched to some degree by political interest or influence; it that correct?

Absolutely. I mean, my life has been changed by this indelibly, and I was embarrassed at the institutional damage as well. Sure.

Okay. And this embarrassment was compounded by the fact, was it not, that these remarks to Mr. Eckstein had become, as I said earlier, the centerpiece in the losing tribe's federal law suit against the Department of Interior, a law suit that alleged that the Hudson casino decisionmaking had been politically corrupted and asked that the decision be overturned; is that correct?

Yes, but in terms of my view of this, the law suit, the effects of a law suit, of a civil suit, are the least. I mean, the real damage to the image of the Interior Department, the image of government, the administration and, least of all, to me.

Yes. But the law suit may have contributed to the damaged image?

Yeah. I don't think it was the major issue, but yeah, it did, sure.

And it's the same embarrassment, was it not, that caused you to sign off on the admittedly misleading letter to Senator McCain a year earlier? Am I correct? So that when you signed the letter to Senator McCain in 1996 you were hoping that your response would make the whole issue go away? Is that a fair statement?

I'm hesitating on that because, as I testified earlier, I think a more accurate rendition of that letter was I really focused on the Ickes thing, on the underlying thing, and I'm not going to quarrel with you on that. I think that's a fair conclusion, but I'm not sure it's what was principally on my mind. That's all.

Well, wouldn't it be an honest statement, though, that it was in part in your mind, that you were hoping by being as succinct -

Oblique.

- and oblique that you, by not addressing the whole conversation you had with Mr. Eckstein, that maybe Senator McCain would not pursue this any further and it would all go away?

A: I would not contest that conclusion.

Q: So when you had to respond to the Thompson committee inquiry in September 1997 you knew that the issue had come back to haunt you, didn't you?

A: Yes.

Q: And that this time you needed to be more forthcoming, as you said earlier, with the committee than you had been with Senator McCain; is that correct?

A: Yes.

Q: And so I am I [sic] correct that you knew that you could not testify that Eckstein was a liar who had fabricated the entire account about the July 14 meeting, right?

A: Absolutely.

Q: You knew, did you not, that such an allegation wasn't true, and no [sic] incidently would only heighten the committee concern about the underlying Hudson decision; is that correct? If you walked in there and you accused Mr. Eckstein of fabricating the whole account, then, especially given his reputation in the community -

A: Oh, I would never dream of doing that. That's my bottom line.

Q: And apart from not dreaming of doing it, you had to know too what the impact of such a thing would be.

A: Yeah. Again, I'm not sure that was exactly on my mind, but sure, I had to know. Yeah.

Q: All right. And you also knew, however, didn't you, that if the committee concluded that you, Mr. Babbitt, had lied to or deliberately misled Senator McCain, it would lend credence to the argument that you were trying to conceal something truly awful about the Hudson decision.

A: Yes. Yes.

Q: Accordingly, Mr. Secretary, in September 1997 and later in January of 1998, when you appeared before these two committees, you struggled, did you not, for a way to reconcile your McCain and Thompson letters so that it would not appear that you had deliberately misled Senator McCain?

A: Sure.[721]

*Id.* at 288-94.

## III. LEGAL ANALYSIS OF EVIDENCE

### A. There Is Insufficient Evidence to Warrant Criminal Prosecution of Any Conduct Related to the Hudson Casino Proposal, Including Secretary Babbitt's Congressional Testimony

The Independent Counsel has found insufficient evidence to warrant criminal prosecution of anyone for conduct related to the Hudson casino proposal, including Secretary Babbitt for his testimony about the Hudson matter before Congress. The Special Division charged the Independent Counsel to investigate whether Secretary Babbitt, the "covered person" under 28 U.S.C. § 591, violated federal criminal law by making false statements in the course of congressional testimony and, as necessary to resolve that issue, to investigate whether any other violation of federal criminal law occurred in connection with the Department of the Interior's consideration of the Hudson casino application. This section of the Report sets forth the Independent Counsel's legal conclusions arising out of the investigation of the matters mandated by the Special Division.

#### 1. Babbitt's Testimony and Other Evidence Before the Senate Committee on Governmental Affairs Raised Questions About Whether the Hudson Casino Decision Had Been Criminally Corrupted by Campaign Contributions

When the Senate Committee on Governmental Affairs held hearings on the Department of the Interior's denial of an application by three Indian tribes to own and operate an off-reservation casino at an existing dog track in Hudson, Wis., Interior officials testified that there had been no improper influence on their decision.

But the sworn testimony of Secretary Babbitt himself before that Committee - in response to legitimate questions from Democratic and Republican senators alike - raised more questions than it answered, and heightened any pre-existing skepticism that the senators may

have had about the Secretary's truthfulness in the entire matter. The Secretary gave inconsistent and puzzling testimony about his version of a conversation with an old friend, Paul Eckstein, on the day of the casino decision in 1995, a version in which the Secretary essentially admitted making false and misleading statements to his friend. The Secretary also gave confusing and questionable testimony about his state of mind at the time that he wrote to Sen. John McCain about the Eckstein conversation. Contrary to Babbitt's testimonial protestations, the letter itself was misleading in both presentation and effect.

In addition to the Secretary's questionable testimony, the Senate committee uncovered a string of facts and circumstances that raised the specter that the Hudson casino decision may have been corrupted by bribes disguised as political contributions from opponent Indian tribes - tribes with casinos located near the Twin Cities metropolitan area, who wanted to prevent new competition in their gaming market. Specifically, the evidence suggested that the opponent Indian tribes may have given or promised campaign contributions to the Democratic Party as a result of an agreement with one or more government officials - from either the White House or the Department of Interior - for action against the casino application. That is, in return for the opponent tribes promising to make campaign contributions, White House officials may have interceded with the Interior Department on their behalf, or Interior officials may have influenced or effected the denial of the application.

### 2. These Weil-Founded Concerns About the Secretary's Testimony and the Facts and Circumstances Surrounding the Casino Decision Led to the Appointment of an Independent Counsel

The Department of Justice began an initial inquiry under the Independent Counsel Act shortly before the Secretary testified before the Senate Committee, based on the allegation that his letter to Sen. McCain was false or misleading. After the hearing, the Justice Department's review was broadened to encompass the Secretary's testimony about the Eckstein discussion and some of the facts and circumstances surrounding the Hudson casino decision. At the conclusion of that inquiry, the Attorney General identified the prospect of underlying corruption of the casino application process as a "hypothetical motive" for Secretary Babbitt's alleged perjury.[722] In requesting the Special Panel of the D.C. Circuit Court of Appeals to appoint an Independent Counsel, the Attorney General noted that such an Independent Counsel might conclude that to thoroughly investigate the false testimony allegations, the Independent Counsel must investigate the underlying casino decision to determine if it had been "criminally corrupted."[723] The Special

[722] Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel, In re Bruce Edward Babbitt (Feb. 11, 1998), at 8.

[723] 0f the preliminary investigation, Attorney General Reno wrote:

> We did not, however, attempt to resolve conclusively whether the underlying decision was criminally corrupted. The Independent Counsel might conclude that a thorough evaluation of the prosecutorial merit of the perjury and false statement allegations against Secretary Babbitt requires an investigation of the underlying decision for evidence of a possible motive to lie. Although our preliminary investigation uncovered no evidence of criminal misconduct by Secretary Babbitt in the underlying matter, a hypothetical motive to lie might arise not just from the Secretary's own conduct but also from the conduct of others within

(continued...)

Division's order appointing Independent Counsel Bruce indicated that the Independent Counsel had jurisdiction to investigate any corruption in Interior's decision in the Hudson matter "to the extent necessary to resolve the allegations" concerning whether Babbitt made false statements to the Congress.[724]

At the outset of its investigation, the Office of Independent Counsel determined that a full investigation of the Hudson casino application process and decision, including Secretary Babbitt's role in it, would be necessary to assess the allegations of criminality surrounding his testimony about his actions in the matter.

### 3. After a Thorough Investigation and Analysis of the Facts and Circumstances Surrounding the Alleged Corruption and Perjury, the OIC Has Concluded that No Prosecution Is Justified

At the conclusion of our investigation, we determined not to bring any prosecution for bribery, perjury or any other federal offense within our jurisdiction.[725] This finding was based on an evaluation of the nature of the proof in the case as a whole and not merely a sterile, element-by-element legal analysis of the evidence. Our decision was consistent with and guided by the Department of Justice policy that specifically discourages the bringing of marginal prosecutions.

[723](...continued)
the Department of Interior and elsewhere, if there was any such misconduct.

*Id.*

[724]Order Appointing Independent Counsel, In re Bruce Edward Babbitt (March 19,1998), at 2.

[725]While the following analysis also addresses other potential criminal offenses relating to the conduct at issue in this matter, no statute specifically prohibits the conduct established by the evidence in this case.

Under the relevant DOJ standard, a prosecutor should not bring a case simply because she believes that there is probable cause to obtain an indictment or that there is sufficient evidence to survive a motion for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure. Instead, a prosecutor should only recommend a prosecution

> if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be *sufficient to obtain and sustain a conviction*[726]

This DOJ standard requires that the prosecutor believe that "the person probably will be found guilty by an unbiased trier of fact."[727]

For the casino decision to have been criminally corrupted, the parties involved would have to have violated some criminal law, not simply transgressed a prosecutor's sense of what is appropriate lobbying or political activity. In evaluating the conduct of the casino opponents and their lobbyists, due deference was paid to two protections afforded by the First Amendment to the U.S. Constitution: (1) a citizen's right to petition the government,[728] and (2) the freedom of

[726]United States Attorneys' Manual (USAM) § 9-27.220(A) (Sept. 1997) (emphasis added). That section further provides that even if that evidentiary standard is met the prosecutor need not commence or recommend federal prosecution if, in the prosecutor's judgment, prosecution should be declined because (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. USAM § 9-27.220.

[727]*Id.* at § 9-27.220(B).

[728]We are particularly mindful that this right applies with equal vigor to paid lobbyists. "While, for some, the term lobbyist' has become encrusted with invidious connotations, every person or group engaged … in trying to persuade Congressional action is exercising the First Amendment Right of petition." *Liberty Lobby v. Person*, 390 F.2d 489, 491 (D.C. Cir. 1968). *See also United States v. Sawyer*, 85 F.3d 713, 731 n.15 (1st Cir. 1996) ("as with all lobbyists, [the defendant's] employment goal was to persuade and influence legislators to benefit certain interests. Such endeavors, however, are protected by the right 'to petition the Government for a

(continued...)

speech and association related to the making of campaign contributions. *See* n. 747, *infra.* Nevertheless, we also were confident that if the requisite proof demonstrated that contributions in this case were in fact payments pursuant to an illegal scheme, such as a violation of the federal bribery statute, a prosecution under that statute would neither chill nor burden the exercise of these constitutional rights.

As we conducted the investigation, we were mindful of the fact that in a pluralistic society and representative democracy career civil servants as well as politically-appointed decision- makers in executive branch departments are subject to a wide range of pressures - from Congress, special and public interest groups, interested or affected parties and from within the Administration itself. Such pressures ordinarily are healthy devices for keeping the bureaucracy accountable to the public it is supposed to serve. Administrative procedures and rules take into account the need for orderly and balanced consideration of appropriate political pressure.

In the midst of such pressures, civil servants must make decisions in individual administrative matters according to their perceptions of the public interest and the requirements of law. Statutes enacted by Congress and rules made by agencies define the law, but the determination of the public interest is a subjective and uncertain process, informed by, among other things, departmental precedent and priorities and broader Administration policy considerations. The public may expect career civil servants to be politically neutral and detached professionals, but these officials do not make decisions or determine the public interest in a perfect political vacuum - and many would say they should not. Our government layers political

(...continued)
redress of grievance' guaranteed by the First Amendment of the United States Constitution.") *(quoting United States v. Harriss,* 347 U.S. 612, 625 (1954)).

appointees atop these agencies with the design that the institutions remain responsive to the political will of the people, as expressed through permitted political activity.

Inherent in these notions of how government works is the expectation that those who petition the government for official action will receive fundamental fairness. Equality of access to government decision-makers cannot always be guaranteed and governmental processes are not always perfect decision-making systems, but the normal administrative process "tends in the long run to produce better policies than would a system in which all decisions are made according to the wishes of the highest bidder."[729] In our system of privately financed political campaigns, however, these principles of fairness can collide with the appearance that campaign contributors are given preferential treatment in particular administrative matters. Because the public expects and the law requires that agency decisions are not for sale, even the mere appearance of such influence undermines the effective functioning of government and the public's confidence in it.

Along the spectrum of proper to improper influences on agency decision-making, bribery is the clear and extreme example of prohibited activity. Bribery is a "despicable act" that strikes "at the root of fairness and democracy,"[730] at the integrity of the entire administrative process, and at public respect for and confidence in its government. But, as will be more fully developed below, the federal bribery law has strict proof requirements that limit its reach, particularly when applied to conduct involving campaign contributions.

[729]Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L.Rev. 784, 804 (1985).

[730]Id. at 843-50.

As explained in detail below, we declined to commence a prosecution for bribery because we found no evidence that there was a *quid pro quo* - a specific and corrupt agreement to give and receive something of value in exchange for an official act by a government official. Threshold evidence of such a *quid pro quo,* however, had sparked the interest of Senate and House committees in the Hudson matter, provoked Justice Department interest in the allegations and ultimately was identified by the Justice Department as a possible motivation for perjury.

From a criminal justice perspective, as long as large sums of money outside of the regulatory authority of the campaign finance laws - i.e., "soft money" - may be given to political parties, the possibility of attempted corruption of official actions will loom large, public confidence in the integrity of governmental decision-making will be undermined and federal prosecutors will too often be required to give extraordinary scrutiny to what should be ordinary administrative agency actions.[731]

Having fully investigated the possibility of criminal corruption of an agency decision, and having found none, we were left with an unappealing and marginal case of potential perjury in connection with Secretary Babbitt's testimony about his state of mind in old conversations and correspondence. The significance of the Secretary's sworn statements were diminished with the passage of time and the intervening finding of no corruption. Babbitt had given confusing and

[731] The solicitation and donation of private contributions can promote healthy interactions between politicians and their supporters. This process can inform government decisionmaking and improve the responsiveness of the political system to constituents' interests. But it can also lead to improper relationships between donors and policymakers or produce perceptions of influence that fuel public disaffection.

*Investing in the People's Business: A Business Proposal for Campaign Finance Reform, Committee for Economic Development* at 2 (1999).

contradictory sworn testimony about his version of a conversation with a friend - Eckstein - and about his later correspondence with a Senator - McCain - about the same conversation. Both the conversation and the letter were material to the Senate Committee because of the Committee's concern that campaign contributions caused the White House to inappropriately intervene in a DOI decision. Once proof of that connection failed, the lack of an equally compelling and provable alternative theory of motivation for any perjury reduced the small but significant discrepancies between Babbitt's and Eckstein's recollections of their conversation to far less consequential distinctions. Likewise, the possibility that Babbitt lied about whether he had the *intent* to mislead McCain in a letter that all agree had the *effect* of misleading the Senator became unworthy of the full moral authority of a criminal prosecution when it became clear that the letter was not a device to hide any criminal corruption of the decision.

In the final analysis, Babbitt's defensive and combative posture before the Senate Committee, which contributed mightily to his testimonial missteps and the resulting investigation, was apparently due in large part to his embarrassment about deceiving an old friend and then inartfully trying to deflect questions about that deceit from a Senator who was both a legislative overseer and a friend. It also was apparently the product of his strongly held view that, despite appearances to the contrary, neither he nor his department had done anything wrong in the Hudson matter and that the congressional committees that later examined the issue were on a political "witch hunt."[732] Such misplaced defensiveness did little to sharpen the precision of Babbitt's answers to the Senators' clear, unambiguous and well-founded questions about possible political corruption. Such defensiveness also dealt a disservice to - and

[732]Babbitt G.J. Test., July 7, 1999, at 223.

temporarily derailed - the legitimate oversight process of the United States Senate. Still, given the outcome of the bribery investigation, and the consequently diminished significance of Babbitt's testimony, any arguably perjurious statements that could be culled from the entirety of Babbitt's testimony failed to present a sufficient or persuasive case for criminal prosecution.

Finally, it was appropriate to consider the fact that Babbitt enjoys a strong reputation for integrity, truth and veracity in the community. Secretary Babbitt has a long record of honorable public service to his home state and the nation. Evidence of a subject's - Babbitt's - good character is properly considered by a federal prosecutor, just as it may be by a jury at trial, in determining whether that person committed the crime under investigation. Indeed, juries in federal court in D.C. are typically instructed that, in evaluating evidence of character and reputation for veracity:

> [T]he circumstances may be such that evidence of good character may alone create a reasonable doubt as to the defendant's guilt, although without it the other evidence would be convincing.[733]

It is worth noting that two central witnesses in this matter, Paul Eckstein and Sen. John McCain, both attest to Secretary Babbitt's good character and reputation for truthfulness, and their opinions in this regard undoubtedly would have been elicited at trial. While such evidence of good character would not, in and of itself, have justified declination of prosecution had the proof of bribery or perjury been sufficient to merit indictment, we were cognizant of this evidence in our weighing of the total circumstances of the case.[734]

[733] *See* Instruction 2.42, *Young Lawyers Section of the Bar Association of the District of Columbia,* Criminal Jury Instructions for the District of Columbia (1993).

[734] Character evidence, which prosecutors and jurors alike may properly consider in their (continued...)

### B. There is Insufficient Evidence to Prove that the Hudson Casino Decision Was Criminally Corrupted

#### 1. A Campaign Contribution Can Form the Basis of a Federal Bribery Charge Only If an Official and a Contributor Specifically and Corruptly Agree that a Contribution Is Being Given and Received in Exchange for an Official Act

Federal bribery law is the principal legal framework against which the OIC has assessed the results of its factual investigation into potential corruption of the Hudson decision, so a brief review of that law is in order. It is illegal for a person to offer a bribe to a public official,[735] and for a public official to accept a bribe.[736] In order to convict a defendant of offering or accepting a

[734](...continued)
decision-making, should not be confused with evidence of a subject's or defendant's popularity, which was not a factor in our decision. When the facts of a particular case and the need to enforce the rule of law require it, prosecutors muster the courage to bring worthy charges against popular defendants. "Public and professional responsibility sometimes will require the choosing of a particularly unpopular course." United States Attorneys' Manual at 9-27.230(B)(2) (Sept. 1997). Furthermore:

> The potential that - despite the law and the facts that create a sound, prosecutable case - the factfinder is likely to acquit the defendant because ... of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a . .. case involving an extremely popular political figure, it might be clear that the evidence of guilt - viewed objectively by an unbiased factfinder - would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to the objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

*Id.* at 9-27.220(B).

[735] 18 U.S.C. § 201(b)(1).

[736] 18 U.S.C. § 201(b)(2).

bribe, the jury or other fact finder must be convinced beyond a reasonable doubt as to three elements. First, in both cases, the object of the bribe must be a "public official."[737] Second, the person making the bribe must corruptly give, offer or promise - or the public official must corruptly demand, seek, receive, accept or agree to receive - a "thing of value," and the "thing of value" must be given or received "for the benefit of the public official or any other person or entity."[738] Third, to be convicted, the giver of the bribe must act with the intent (1) to influence an official act, (2) to induce the public official to commit a fraud on the United States, or (3) to induce the official to act in violation of the official's lawful duty.[739] The person making the bribe may be convicted so long as he or she possesses the requisite corrupt intent, regardless of whether the public official was, in fact, corrupted; the public official need not actually agree to take any particular official action.[740]

To convict a public official of bribery, there must be proof that he or she corruptly demanded, sought, received, accepted or agreed to receive or accept the bribe in exchange for an agreement (1) to be influenced in the performance of any official act, (2) to be influenced to

[737] 18 U.S.C. § 201(b)(1), (2).

[738] /rf.

[739] 18 U.S.C. § 201(b)(1).

[740] The bribery statute, 18 U.S.C. § 201(b)(1), explicitly criminalizes the "offer" of a bribe, without regard to its acceptance by the target of the bribe. Furthermore, "the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities." *United States* v. *Anderson,* 509 F.2d 312, 332 (D.C. Cir. 1974), *cert, denied,* 420 U.S. 991 (1975).

commit a fraud on the United States, or (3) to be induced to do any act in violation of his or her official duties.[741]

Campaign contributions to political parties can be "things of value" for purposes of the bribery statute.[742] However, the federal bribery statute has limited applicability in the context of election campaign activity protected by the First Amendment. Our political system operates to a large extent through private financing of political campaigns.[743] Citizens typically provide campaign contributions to candidates running for office who have supported or will support issues important to those citizens, and citizens will withhold campaign contributions from those candidates whose positions are not aligned with the interests of those constituents. Citizens frequently give campaign contributions with a generalized expectation of currying favor with the candidate benefitting from the contribution.[744] Because the line between rewarding an official with whom one agrees and rewarding an official who has taken or will take a specific action that favors one's economic interest is frequently not a bright one, the line between the legitimate and the corrupt in matters of campaign finance is especially difficult to police.[745] This is particularly

[741] 18 U.S.C. § 201(b)(2). Once proof of bribery is established, the additional crime of criminal conspiracy to violate the bribery statute could be established by showing that an overt act was committed in furtherance of the conspiracy involving two or more persons. *See* 18 U.S.C. § 371; *see also United States* v. *Gatling,* 96 F.3d 1511, 1518 (D.C. Cir. 1996).

[742] *See generally United States* v. *Brewster,* 506 F.2d 62 (D.C. Cir. 1974); *see also Department of Justice (DOJ) Criminal Resource Manual* at 2046.

[743] *Buckley* v. *Valeo,* 424 U.S. 1, 21 (1976); *see also DOJ Criminal Resource Manual* at 2046.

[744] *See McCormick v. United States,* 500 U.S. 257, 271-74 (1991); *see also DOJ Criminal Resource Manual* at 2046.

[745] *See McCormick,* 500 U.S. at 272-273 (stating that extortion cases involving campaign

(continued...)

true where the campaign contributions at issue otherwise comply with federal election laws and regulations. Unlike a bribe that may end up in an official's private bank account (or pocket), a campaign contribution that complies with the technical limitations and reporting requirements of the campaign financing laws has a presumptive - and even an intrinsic - legitimacy, absent specific proof to the contrary.[746] Courts have long recognized that campaign contributions are an integral part of our electoral system which implicate important First Amendment interests,[747] and accordingly place paramount importance on the need for clear evidence that contributions allegedly made pursuant to a bribery arrangement be given and received pursuant to a corrupt agreement.[748]

[745](… continued)
contributions are problematic because persons who hope that their interests will receive favorable treatment from elected officials legitimately may make campaign contributions to those officials); *see also United States* v. *Brewster,* 506 F.2d 62, 81 (D.C. Cir. 1974) (expressing need for caution in differentiating between legal campaign contributions and bribes, especially where the contribution goes to a *bona fide* campaign committee).

[746]*Brewster,* 506 F.2d at 79-83; *see also DOJ Criminal Resource Manual* at 2045.

[747]The Supreme Court has made clear that the right to make political contributions is protected by the First Amendment. Addressing the constitutionality of the Federal Election Campaign Act in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court found donations constituted an expression of political support protected on both free speech and freedom of association grounds. However, the Court noted that this right is not absolute, and upheld limits on political contributions. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.... Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 26-27.

[748]*See Buckley,* 424 U.S. at 27-28 ("[L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."); *cf. McCormick,* 500 U.S. 257 (1991) (noting that campaign contributions are part of the American political process); *see also Evans v. United States,* 504 U.S. 255 (1992)
(continued...)

That is why in cases where, as here, the "thing of value" is an otherwise legitimate campaign contribution, the government must prove the existence of a specific and corrupt agreement to give and receive the campaign contribution in exchange for an official act.[749] In the language used by the courts, the government must prove the existence of a *quid pro quo.*[150] Of course, the *quid pro quo* need not be spelled out in express terms or language. Otherwise prosecution of a corrupt agreement could be thwarted by the use of artful communication.[751] The intent of the official and the contributor to enter into the corrupt agreement may be proved from the words the official and the contributor spoke and the actions they took, as well as the

(...continued)
(same).

[749]This requirement applies uniquely to circumstances involving legitimate campaign contributions. Where a payment labeled a campaign contribution is merely a ruse for a gift inuring to the candidate's personal benefit, the payment may form the basis of a gratuity charge under 18 U.S.C. § 201(c), in which case the government need not prove the existence of a *quid pro quo. See, e.g., Brewster,* 506 F.2d at 81. Of course, a ruse contribution made pursuant to a *quid pro quo* would also form the basis for a bribery charge.

[750]*See United States* v. *Sun-Diamond Growers,* 526 U.S. 398 (1999) (defining *quid pro quo* under bribery statute). *Cf. Brewster,* 506 F.2d at 81 ("There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence."); *see also DOJ Criminal Resource Manual* at 2046 ("where the transaction represents a bona fide campaign contribution, prosecutors must normally be prepared to prove that it involved a *quid pro quo* understanding and thereby constituted a 'bribe'"); *McCormick v. United States,* 500 U.S. 257 (1991) (holding under Hobbs Act that when the allegedly corrupt payment represents a *bona fide* campaign contribution, government must prove existence of *quid pro quo).*

[751]*See Evans,* 504 U.S. at 274 (Kennedy, J., concurring) ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets."); *see also McCormick,* 500 U.S. at 270 ("It goes without saying that matters of intent are for the jury to consider.").

reasonable construction given to those words and actions. It is important to note that, where a specific and corrupt agreement to give and receive a campaign contribution in exchange for an official act exists, the fact that a campaign contribution is not made contemporaneously with the corrupt agreement does not preclude a finding that the contribution was a delayed payment in satisfaction of the prior corrupt agreement.[752] In addition, a campaign contribution can form the basis of a bribe regardless of whether the payment went directly to the public official's individual campaign or whether it went instead to a third party such as a bona fide political fund-raising organization.[753]

### 2. There Is Insufficient Evidence to Prove that the Hudson Matter Was the Subject of a Corrupt *Quid Pro Quo*

In this case, we declined to commence a prosecution for bribery because we found insufficient evidence to prove the existence of a specific and corrupt agreement to influence the decision on the Hudson casino application in exchange for campaign contributions. The following are some of the more important facts and inferences that form the basis for this determination.

There is strong evidence that the tribes opposed to the Hudson casino proposal attempted to use their status as contributors to the Democratic National Committee and Democratic campaigns, and their pledge to continue that financial support, to help them enlist the support of

[752] *See United States* v. *Campbell*, 684 F.2d 141, 149 (D.C. Cir. 1982) ("a bribe may be conveyed after the official act has been performed"); *see also United States v. Gatling*, 96 F.3d 1511,1522 (D.C. Cir. 1996) (same).

[753] *See Brewster*, 506 F.2d at 81; *see also DOJ Criminal Resource Manual* at 2045 (noting that it is of no consequence under bribery statute whether the payment is made "directly to the donee, or . . . instead to a 'third party' such as a *bona fide* political committee").

the DNC and the White House in their effort to get Interior to deny the Hudson casino application. As recounted above in the Review of the Evidence, on multiple occasions while lobbying against the casino, opponent tribal representatives intentionally made a direct link between campaign contributions to Democrats or the Democratic Party and the outcome of the Hudson casino decision at Interior. The opponent tribes' representatives also made such a link time and again in strategy memoranda concerning how best to defeat the Hudson casino proposal, including memoranda that were provided to Members of Congress.[754] When the leaders and representatives of the tribal opponents met with DNC National Chair Donald Fowler on April 28, 1995, they made clear that they had contributed and would contribute to the DNC and the Democrats, and they hoped that their past and future support would persuade Fowler to assist their effort to get the casino application denied. They were not disappointed, as they successfully enlisted Fowler to contact Interior and the White House about Hudson. As one contemporaneous memorandum states, the message the tribal opponents gave to Fowler at the

^Representatives of the opponent tribes again made the link between campaign contributions and the defeat of the Hudson casino decision after the application was defeated. In a letter to tribal leaders dated Sept. 14, 1995, lobbyists Larry Kitto and Patrick O'Connor stated:

> The first eight months of the Republican controlled Congress have been difficult times for tribes across the country. Unquestionably, tribal governments will need to call upon the Clinton administration, and the President himself, to assert leadership and assist tribes through the difficult 1996 budget process and to help fend off attacks on tribal gaming. *As witnessed in the fight to stop the Hudson Dog Track proposal, the Office of the President can and will work on our behalf when asked to do so.*

(Emphasis added.) The letter solicited ticket purchases at a cost of $1,000 each for a Clinton/Gore '96 presidential dinner on Sept. 26 in Washington, and made reference to an upcoming vice presidential dinner in October. Records show that three Hudson opponents contributed to the September event, with the Mille Lacs paying $500 and the Prairie Island and Upper Sioux tribes (and Kitto) donating $1,000 each.

meeting was "simple: all of the people against this project, both Indian and non-Indian are Democrats who have a substantially large block of votes and who contribute heavily to the Democratic Party. In contrast, all of the people for this project are Republicans."[755]

Not long after the meeting at the DNC, opponent lobbyist Patrick O'Connor spelled this out clearly for White House Deputy Chief of Staff Harold Ickes (who in the interim had been contacted by Fowler about Hudson): "All of the representatives of the tribes that met with Chairman Fowler are Democrats and have been so for years. I can testify to their previous financial support to the DNC and the 1992 Clinton/Gore Campaign Committee."[756] Indeed, there is evidence indicating that the opponent lobbyists contemplated and attempted to make a "financial support" pitch directly to high-level officials at Interior overseeing the Hudson matter.[757]

Notwithstanding this ample evidence of the opponent tribes' attempted use of campaign contributions to further their efforts, there is little evidence to suggest the existence of a *quid pro quo* relating to the outcome of the Hudson application. There is no evidence that anyone at the DNC or the White House communicated to the opponent tribes that the outcome of the Hudson matter depended upon the tribes' willingness to make campaign contributions. In addition, there

[755]"Minnesota Legislative Update," from Larry Kitto to Tribal Clients, April 17-21, 1995.

[756]Letter from Patrick O'Connor to Harold Ickes, May 8,1995.

[757]Opponent representative Thomas Corcoran told investigators that, during a meeting he attended on March 15, 1995, at Interior with Interior Chief of Staff Thomas Collier and Special Assistant to the Secretary Heather Sibbison, O'Connor and Kitto told Collier and Sibbison that the tribes they represented were "good Democrats" - a phrase that Corcoran understood to be "code" referring to financial campaign contributors. *See* Section II.D.3, *supra.*

is little evidence to suggest that the DNC or the White House made serious efforts to influence Interior's decision in any substantive way. Fowler did call an official at Interior - likely Collier - at the behest of the tribal opponents to relate what he had learned from the tribal representatives about the Hudson matter. Fowler may or may not - he could not recall - have conveyed explicitly the fact that these people were supporters of the DNC or Democratic Party; in any event, there is little doubt that the recipient of the call could have inferred as much from the fact of the call. Yet, Fowler denies that he suggested any linkage between financial contributions and the position the DNC supporters sought to advance and, with no one at Interior remembering such a call, there is no direct evidence to suggest otherwise.

Fowler also called Ickes and related what he had learned from the tribal representatives about the Hudson matter. At a minimum, Fowler communicated to Ickes that the opponent tribes were DNC supporters, who did not believe Interior had properly considered their view that the proposed casino would have a negative impact on their existing facilities. Fowler told Ickes that there was justification for reviewing Interior's decision-making process. However, Fowler does not recall asking Ickes to do anything in particular, though he expected that Ickes would look into it and "review the determination and the complaint" that O'Connor's group had brought to Fowler.[758] To follow-up on the call, Fowler sent a memorandum to Ickes, which largely tracks what Fowler says he told Ickes in the telephone call. For his part, Ickes stated that Fowler asked him to do nothing but make a "status check" on the Hudson matter, and that Ickes did nothing

[758] Fowler G.J. Test, at 146.

more than that.[759] Ickes also testified that Fowler asked that Ickes "get back to" Fowler after checking into the matter,[760] but that Ickes did nothing to ensure that he or his staff followed-up with Fowler.

There is little evidence, and no direct evidence, that Fowler asked either Ickes or the Interior official with whom Fowler spoke to influence the Hudson decision in any meaningful or substantive way. Moreover, although Fowler did mention to Ickes that the opponent tribes were Democratic supporters, there is no direct evidence Fowler asked Ickes or the Interior official to take any official action in exchange for, or even in direct connection with, campaign contributions to the DNC. It is, of course, difficult to accept Fowler's contention that he did not understand that each of his meetings with the tribal representatives related in some way to fund-raising. It is also difficult to escape the conclusion that Fowler, David Mercer and O'Connor all understood that the opponent tribes and their representatives were pursuing a substantive agenda at the time of these fund-raising efforts. Fowler's actions in the matter - contacting Interior and the White House about a pending substantive matter before Interior on behalf of DNC contributors - certainly heightened the appearance of possible corruption. Indeed, Fowler's actions were in conflict with the DNC's own "Legal Guidelines for Fund-raising," which admonished DNC Finance staff against linking donations to access to, or favors from, any Administration official or agency.[761] While Fowler testified, and the DNC General Counsel

[759]Ickes G.J. Test, at 145.

[160]*Id.* at 147.

[761] For a more comprehensive discussion of the DNC guidelines and their applicability to Chairman Fowler, *see* Section II.E.2.h.l., *supra.*

agreed, that the guidelines did not apply to the DNC Chairman, these internal guidelines should have made Fowler more sensitive to the appearance of impropriety created by his actions. Nonetheless, the evidence is insufficient to prove that his actions, however inappropriate, were intended to criminally corrupt the Hudson decision-making process, or that his actions did in fact criminally corrupt the decision on the Hudson casino application.

Likewise, there is no direct evidence to prove that Ickes's office attempted to influence Interior decision-making on the Hudson casino matter. Ickes's White House staff initiated several oral and written contacts with Interior officials about the Hudson casino proposal. There is little evidence to show that those inquiries were anything but inquiries into the status of the Hudson matter, and there is no evidence that they were made in exchange for future campaign contributions.[762] There is, in other words, no direct evidence that any of these contacts were made with the intent to corruptly influence Interior's decision on the matter. It was not unheard of for Ickes or his office to weigh in substantively on matters pending at Interior, or even to advocate that Interior should take a particular position, as Ickes did with regard to the Wampanoag tribe's gaming issue. *See supra* at 360-61. However, there is no evidence that Ickes's office did even that much with regard to Hudson.

[762]The evidence does not support the theory that the White House made the status-check inquiries in exchange for any implicit or explicit pledge by the Indians to contribute financially to the Democratic Party. Even if, as the evidence suggests but does not prove, campaign contributions may have gained access to the White House for the tribes and their lobbyists via the DNC, some courts have cast grave doubt on whether simply granting or denying access based on levels of such contributions is an "official act" to support a bribery prosecution. *See United States* v. *Carpenter,* 961 F.2d 824, 827 (9th Cir.), *cert, denied,* 506 U.S. 919 (1992) ("granting or denying access to lobbyists based on levels of campaign contributions is not an 'official act'" under the Hobbs Act); *see also United States* v. *Sawyer,* 85 F.3d 713, 731 n.15 (1st Cir. 1996) ("We do not think that the desire to gain access, by itself, amounts to an intent to influence improperly the legislators' exercise of official duties.").

Perhaps more important, there is no direct evidence to indicate that the contacts made by the DNC and the White House to Interior affected the decision-making process on the Hudson casino proposal in any meaningful way. It is possible to conceive of a situation in which the recipient of a so-called status-check inquiry knows that the inquiry is actually a thinly-veiled or coded message intended to influence a particular position or even to direct a decision without regard to the merits, but the evidence does not support such an inference in this case. Ickes's personal view that it would not have been inappropriate for his office to have informed Interior that the inquiries were being made on behalf of the DNC Chairman - or even that the inquiries were being made on behalf of a contributor - is troubling. Such a communication could, under certain circumstances, constitute evidence of potential illegality, even if the contact were not illegal *per se*.[763] But, as we have stated, there is no evidence to show that such an inquiry occurred in connection with the Hudson casino proposal. Indeed, there is little evidence of the content of the White House's communications to Interior on this matter.

To be sure, the evidence suggests that certain key Interior political appointees and staff involved in the Hudson decision-making process knew of the White House's interest, just as they certainly knew of the interest of certain Democratic Senators and Members of Congress. The evidence indicates that they also were aware of the lobbying effort to portray the opponents of the application - several wealthy Indian tribes - as financial supporters of the Democratic Administration, and to portray the applicants - three impoverished tribes - as Republicans or

[763]The potential impropriety of such communications no doubt was a primary consideration in the development of White House policies requiring prior approval from the White House Counsel's office for contacts by a White House staffer or official with an executive branch department or agency, such as the Interior Department, on adjudicatory matters. For a more detailed discussion of these policies, see Section II.E.4.f, above.

otherwise not as supporters of the Administration. There is evidence that Collier and Sibbison were informed as much at a March 15, 1995, meeting with opponent lobbyists, and that Counselor Duffy and IGMS Director Skibine were told of the parties' political affiliations (though not campaign contributor status) as early as Feb. 8, 1995, in a meeting with Democrats in the Minnesota congressional delegation. At least one high-level Interior official - most likely Collier - even knew that Chairman Fowler and the DNC were interested in the fate of the casino decision. There is no direct evidence, however, that Interior staff allowed any such information to influence their own views on the action that should be taken on the Hudson casino application or their comments and recommendations to others involved in the decision-making. After the Area Office sent its recommendation of approval to Washington, Interior officials made efforts, including several meetings with supporters and opponents, to give all parties an opportunity to submit their views on the Hudson application.[764] Although the Interior staff in Washington involved in evaluating the application, recommending a decision and drafting the denial letter had different perspectives on which statutory provision should control the decision, none of these career Interior civil servants supported approval of the Hudson casino proposal as submitted. Moreover, the evidence suggests that none were aware of any political pressure from the White House or the DNC when they prepared and submitted their draft decision.

As for Secretary Babbitt himself, there is no evidence that he played any meaningful role in Interior's decision to deny the Hudson application, and there is no evidence that he was part of

[764] Nonetheless, the applicants complained to Interior in the months following the decision that they were not afforded an opportunity to correct any deficiencies in their application. Conversely, the opponents complained - up until their meeting with the DNC and Fowler - that their views were not being given a full or fair hearing.

any agreement to deny the casino application in exchange for campaign contributions. Paul Eckstein, of course, testified that Babbitt told him on the day the Hudson decision was issued that Ickes told or directed him to issue the decision that day. Eckstein also testified that, in the same conversation, Babbitt mentioned the amount of money that Indian tribes were giving to the DNC or the Democrats. Babbitt provided to Sen. McCain and Sen. Thompson inconsistent statements about his meeting with Eckstein, and provided confusing testimony to Senate and House committees in an effort to reconcile those inconsistent statements. The Secretary's statements and testimony in this regard are troubling, and they are examined in detail in connection with the perjury analysis below. The Secretary's statements, however, do not establish that the Hudson decision was corrupted by campaign contributions in light of all the evidence. Even Eckstein did not think that Babbitt's statements meant or even implied that he was being pressured by Ickes or anyone else to decide the matter for or against the applicants. Moreover, Babbitt's remark about tribal contributions was made in a context suggesting not that it was a basis for Interior's decision, but rather as a comment on the crass financial assertion in O'Connor's May 8,1995 letter to Ickes. Eckstein states that he did not understand Babbitt's comment about tribal contributions to imply that campaign contributions influenced Interior's decision. Finally, although Babbitt's statements to Eckstein suggest that he may have been aware of Ickes's interest in the Hudson matter in advance of Interior's final decision, there is no evidence that Babbitt acted on that information to influence the Hudson decision.

Although Babbitt apparently told Eckstein that Ickes had pressed him for a decision that day, the weight of the evidence indicates that the timing of the decision, as well as its substance, was dictated from below Babbitt, rather than from above. The decision to reject the Hudson

application was apparently a consensus decision on the part of the subordinate Interior officials in charge of the matter, and the primary pressure against further delay appears to have come from those officials. Moreover, there is some evidence that the decision was consistent with a concern held by Babbitt and others at Interior that off-reservation gaming not be approved in the face of significant local opposition; a concern that was not weighed uniformly in prior or subsequent Interior land-into-trust decisions. In any event, Babbitt seems to have had no direct involvement in the decision.

It should be noted that evidence of events subsequent to the Hudson decision evinces a perception among those who opposed the Hudson proposal that the DNC (and specifically Chairman Fowler) was willing to request White House intervention (specifically by Ickes) for Democratic contributors on matters pending.before Interior, and even in connection with the discussion of specific contributions from the interested constituents. In June 1996, less than a year after Interior issued the Hudson decision, former Interior Chief of Staff Collier arranged a meeting for his new clients, the Shakopee tribe, with Fowler at the DNC about an adoption ordinance issue pending at Interior. The Shakopee were vigorously opposing an effort by a faction of Shakopee dissidents to get Interior to reconsider prior approval of an adoption ordinance. *(See supra* at 170-72.) Two of the participants in this meeting for the Shakopee tribe had attended the meeting at the DNC on April 28, 1995, in which the Shakopee and others sought Fowler's assistance with the White House and Interior to defeat the Hudson proposal. In the briefing memorandum Collier sent to the DNC the day before the meeting on June 4, 1996, Collier informed DNC staff that the Shakopee would be making a $20,000 contribution to the

DNC, and had "a very real interest in possible significant contributions in the future."[765] Collier stated in his memorandum that the Shakopee were "interested in raising one substantive issue with the Chairman: The Department of Interior's possible reconsideration of the tribe's adoption ordinance." Collier proposed in his memo the specific means of achieving that goal: Fowler would inform Ickes of the tribe's concern, and Ickes would then inform Deputy Secretary of the Interior John Garamendi. On the day of the meeting, Collier and the tribal representatives did in fact deliver to the DNC a $20,000 check from the tribe and asked Fowler to contact Ickes about the pending matter at Interior. On June 19, 1996, Interior Solicitor John Leshy sent a letter to the attorney for the Shakopee dissidents stating that Interior would not undertake a review to reconsider approval of the adoption ordinance.

Although there is no evidence to prove that Fowler, the DNC or Ickes took any action regarding this matter after the June 4 meeting, a troubling pattern emerges from these facts which suggests that Fowler and Collier both understood from prior experience that campaign contributions could lead Fowler to intervene with Interior via the White House. The route that Collier took to convey his clients' concerns about a specific administrative matter pending before Interior suggests that Fowler and Collier believed that an effective way to lobby Interior on a substantive matter concerning Indians was to link the matter to campaign contributions. Secretary Babbitt's former chief of staff apparently perceived that an appropriate means of lobbying his former agency was to make a contribution to the DNC and seek its intervention with

[765]Memorandum from Thomas Collier to Gretchen Lerach, June 3, 1996. In fact, the Shakopee made three additional contributions to the DNC totaling $75,000 over the subsequent four months. *See supra* at 340-46.

Ickes and the White House,[766] who then would contact Interior, instead of relying solely upon Collier's contacting Interior himself, as the Department's former Chief of Staff might be expected to do.[767] Like the Hudson matter itself, however, there is no evidence to prove that the decision was influenced by the White House or the DNC, notwithstanding Collier's efforts.

In conclusion, Babbitt's statements in his meeting with Eckstein, and his subsequent inconsistent statements about that meeting, suggested there may have been some substantive White House intervention in the matter, as well as a motive to later deny it. A full review of the evidence, however, indicates that neither Babbitt nor any government official at Interior or the White House entered into any sort of specific and corrupt agreement to influence the outcome of the Hudson casino application in return for campaign contributions to the DNC. The evidence is therefore insufficient to prove that the process and decision in this case were criminally corrupted by the promise of campaign contributions, or any other illicit consideration.[768]

[766]Similarly, less than two months after the Hudson denial, Patrick O'Connor again elected to seek assistance from Fowler and the DNC in connection with a request for White House access on behalf of another client, Eric Hotung, whose family was poised to make a substantial contribution to the DNC. O'Connor's letter to Fowler concerning that matter leaves no doubt that O'Connor drew a clear and direct nexus between obtaining Fowler's assistance in arranging high level Administration meetings with White House officials for Eric Hotung and O'Connor's ability to "make [Patricia Hotung's $100,000 DNC gift] happen." *See* Section II.E.2.h.2., *supra.*

[767]While federal officials are generally prohibited from lobbying their former agency for at least a year after leaving the government, *see* 18 U.S.C. § 207, Collier's lobbying of Interior was permitted under 25 U.S.C. § 450i(j), which created an exception to the general prohibition where the official is acting as an agent or attorney for an Indian tribe. There are certain procedural requirements attached to the exception - primarily involving notice to the agency by the former official - and Collier appears to have complied with all such terms.

[768]The evidence gathered during our investigation also would not support the commencement of a prosecution for violation of the gratuities statute under 18 U.S.C. § 201(c).
(continued...)

### 3. There Is Insufficient Evidence to Support a Finding that Any Other Federal Criminal Corruption Statutes Were Violated in the Hudson Matter

In compliance with Department of Justice practice, we evaluated the evidence in light of all other potentially applicable criminal corruption statutes. Our evaluation included the federal criminal corruption statutes concerning extortion,[769] honest services fraud,[770] and promise of federal benefit in consideration for political activity.[771] As with our analysis of the bribery statute, we found the evidence insufficient to warrant or sustain a prosecution. The same absence of sufficient evidence to establish a violation of the bribery statute - the actions, if any, that DNC or White House officials offered or agreed to take for the Hudson casino opponents, and whether those actions were taken in exchange for campaign contributions - precludes establishing violations of the extortion, honest services fraud and other corruption statutes.

[768](...continued)
Although, by its terms, the statute criminalizes the offering or receipt of anything of value "for or because of any official act performed or to be performed by a public official, the Supreme Court's recent decision in *United States* v. *Sun-Diamond Growers,* 526 U.S. 398 (1999), narrowed the range of conduct subject to the statute by requiring proof of a connection between the payment to be made and a specific official act. The same deficiency of proof that led us to forego commencing a prosecution for bribery counsels us to forego a prosecution for gratuities as well. *See United States* v. *Brewster,* 506 F.2d 62, 81 (D.C. Cir. 1974) (stating that a *bona fide* campaign contribution cannot constitute a gratuity if it does not inure to the recipient's personal benefit); *see also DOJ Criminal Resource Manual* 2046 (cautioning prosecutors that gratuity prosecutions for campaign contributions are "problematical," and that there appears to be "substantial judicial reluctance to extend the Federal crime of gratuities under section 201(c) to *bona fide* campaign donations").

[769] 18 U.S.C. § 1951.

[770] 18 U.S.C. § 1346.

[771] 18 U.S.C. §600.

The federal extortion statute, known as the Hobbs Act, prohibits "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[772] To prove a violation of the statute by a government official, the government must "show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts," or has attempted or conspired to do so.[773] In the Hudson matter, the evidence would have to be sufficient to show that White House or Interior officials offered or agreed to use their official positions to cause the denial of the application in exchange for campaign contributions, or that they threatened to ensure approval of the Hudson application (over the opponents' objections) absent an agreement to make campaign contributions.[774] Although courts have held that only a government official can commit extortion under "color of official right,"[775] a private citizen can commit extortion by obtaining property through actual or threatened economic harm.[776] Thus, for DNC officials acting independently of government officials,[777] the evidence would have to

[772] 18 U.S.C. § 1951(b)(2).

[773] *Evans* v. *United States,* 504 U.S. 255, 268 (1992).

[774] The official can be guilty of extortion even if he or she does not actually have the authority or power to take the official action at issue. It is sufficient if the victim could have reasonably believed that the official had the power. *See, e.g., United States* v. *Nedza,* 880 F.2d 896, 902 (7th Cir.), *cert, denied,* 493 U.S. 938 (1989).

[775] *See United States* v. *Tomblin,* 46 F.3d 1369,1383 (5th Cir. 1995); *United States* v. *McClain,* 934 F.2d 822, 831 (7th Cir. 1991).

[776] *See, e.g., McClain,* 934 F.2d at 831. Both forms of extortion require proof of a connection between the extortionate conduct and interstate commerce. *See United States* v. *Stephens,* 964 F.2d 424, 428-29 (5th Cir. 1992).

[777] If DNC officials were acting in concert with government officials, they could be

(continued...)

establish that the DNC officials claimed to the opponent tribal representatives that they could cause the Hudson application to be denied by Interior, or seek to do so, in exchange for campaign contributions, or that they could seek to have or have Interior approve the application if the opponents did not agree to provide contributions. As set forth above in the bribery analysis, there is insufficient evidence to prove any such extortionate conduct in the Hudson matter.

The statute prohibiting promise of a federal benefit, 18 U.S.C. § 600, provides as follows:

> Whoever, directly or indirectly, promises any … benefit, provided for or made possible in whole or in part by any Act of Congress … to any person as consideration, favor or reward for any political activity or for any support of or opposition to any candidate or any political party in connection with any general or specific election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, shall be fined under this title or imprisoned not more than one year, or both.

There is little case law on 18 U.S.C. § 600. The text of the statute appears to require a clear understanding that a specific benefit under a federal statute be promised in exchange for political activity. In the Hudson matter, the evidence would have to be sufficient to show that White House or Interior officials promised to take action to affect the Hudson application in exchange for campaign contributions or other political activity. As set forth above, there is insufficient evidence to prove any such conduct in the Hudson matter.

Finally, to establish a criminal deprivation of honest services, the government must show that an individual engaged in a scheme to defraud the public of its intangible right to the honest

"'(...continued)
subject to charges of conspiracy to commit extortion under the "color of official right" prong, 18 U.S.C. § 1951(a), or aiding and abetting or causing extortion under 18 U.S.C. § *2. See United States* v. *Spliter,* 800 F.2d 1267, 1276-78 (4th Cir. 1986); *United States* v. *Margiotta,* 688 F.2d 108, 130-33 (2d Cir. 1982), *cert, denied,* 461 U.S. 913 (1983).

and faithful services of a government official, and used interstate wires or mail in furtherance of the scheme.[778] In the Hudson matter, a violation of the statute could be shown if one or more White House or Interior officials agreed with the opponents to use their positions to deny the application without regard to the merits based on the promise of campaign contributions.[779] There is insufficient evidence to prove such conduct on the part of any White House or Interior official.[780]

### C. There Is Insufficient Evidence to Prove that Secretary Babbitt Perjured Himself Before Congress

In her application for appointment of an independent counsel, the Attorney General recounted that the Justice Department focused its initial inquiry and subsequent preliminary investigation on the conflict between Secretary Babbitt's testimony before the Senate Committee on Governmental Affairs[781] about his July 14, 1995, conversation with Paul Eckstein, and Eckstein's statements on that subject. The Attorney General concluded that this conflict

[778] 1 8 U.S.C. §§ 1341,1343 & 1346. *See United States* v. *Sawyer,* 85 F.3d 713, 723-24 (1st Cir. 1996); *United States* v. *Madeoy,* 912 F.2d 1486, 1492 (D.C. Cir. 1990), *cert, denied,* 498 U.S. 1105 (1991). A violation could be established by showing that a public or non-public official was involved in such a scheme. *See Sawyer,* 85 F.3d at 725.

[779] Any such agreement would also constitute a conspiracy to defraud the United States. *See* 18 U.S.C. §371.

[780] As with the other criminal statutes canvassed above, where a case is based on an implied inducement to take particular official actions in exchange for the promise or receipt of campaign contributions, successful prosecution is problematic under 18 U.S.C. § 1346. *See, e.g., United States* v. *Martin,* 1999 U.S. App. LEXIS 28128 at *8-l 1 (7th Cir. Nov. 1,1999).

[781] Secretary Babbitt also testified before the House Committee on Government Reform and Oversight on Jan. 29, 1998. Although we have examined Babbitt's testimony before the House Committee, we do not discuss it specifically because of its substantial overlap with the potentially perjurious testimony before the Senate Committee.

"warranted further investigation into whether Secretary Babbitt may have made material false statements during his testimony, in possible violation of 18 U.S.C. § 1621 (perjury) and 18 U.S.C. § 1001 (false statements)."[782] In particular, the Attorney General focused on Babbitt's assertion that in his conversation with Eckstein, the Secretary referred to what Ickes "wanted" or "expected" - as contrasted with Eckstein's recollection that Babbitt said Ickes had "called" and "directed" that a decision be made "that day."[783]

After a careful review of Secretary Babbitt's testimony and the surrounding facts and circumstances, we focused on two areas as potentially perjurious: (1) Babbitt's testimony about what he said on July 14,1995, to Paul Eckstein about Harold Ickes's involvement in the Hudson casino proposal; and (2) Secretary Babbitt's testimony about whether he intended to mislead Sen. John McCain in a letter to McCain dated Aug. 30,1996.

With respect to each area of Secretary Babbitt's potentially perjurious testimony, in order to obtain a conviction for perjury, an unbiased jury would have to be convinced beyond a reasonable doubt of the following elements of the offense: (1) Babbitt testified under oath; (2) Babbitt made a false statement during that testimony; (3) the false statement was material to the proceeding in which it was made; and (4) Babbitt made the false statement knowingly with the willful intent to provide false testimony.[784] In addition, the courts have noted at least two other

[782] Application to the Court Pursuant to 20 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel, In re Bruce Edward Babbitt (Feb. 11,1998), at 3.

[783] *Id.* at 4-5. Attorney General Reno concluded that "no further investigation [was] warranted with respect to potential perjury in connection with Secretary Babbitt's stated failure to recall his alleged comment about political contributions by Indian tribes." *Id.* at 7-8.

[784] *See* 18 U.S.C. § 1621 ("Whoever... having taken an oath before a competent tribunal, (continued...)

special defenses or proof requirements applying to perjury prosecutions: (1) the questions leading to perjured testimony must not be so vague that they could not reasonably be understood and (2) the common law "two-witness" rule must be satisfied in proving perjury. Based on the results of our investigation, we concluded that we could not be confident that a jury would be convinced beyond a reasonable doubt as to either area of testimony under consideration. We therefore declined to commence prosecution of perjury charges against Secretary Babbitt.

### 1. There Is Insufficient Evidence to Prove that Babbitt Perjured Himself in Testifying About What He Said to Paul Eckstein About Harold Ickes's Involvement in the Hudson Casino Proposal

A primary focus of the hearing conducted on Oct. 30, 1997, by the Senate Committee on Governmental Affairs was the meeting between Secretary Babbitt and Paul Eckstein, and, in particular, what Babbitt said to Eckstein about Ickes's involvement in the Hudson casino proposal.[785] Eckstein's recollection of his meeting with Babbitt was already a matter of public record. In an affidavit filed in a civil lawsuit in January 1996, Eckstein stated that Babbitt told him that Ickes "had called the Secretary and told him that the decision had to be issued that day."[786] In August 1996, Babbitt wrote a letter to Sen. McCain that seemed to be a complete

[784](. . .continued)
officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly,... willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury____"); *see also United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993).

[785]*See* S. Rep. No. 105-167, vol. 2, at 3167 (1998).

[786]Eckstein Affidavit at 6.

denial of having invoked Ickes's name in his meeting with Eckstein.[787] Eckstein repeated his account in Senate deposition testimony in late September 1997, and also reported that Babbitt had rhetorically asked Eckstein whether he knew the large amount of contributions made by Indian tribes - although Eckstein did not assert that he understood this latter comment to relate directly to the tribes that opposed the Hudson application. This confidential testimony was promptly reported in the news media. On Oct. 10, 1997, Babbitt wrote Sen. Thompson in anticipation of his testimony before Thompson's committee with an apparent reversal of his earlier position, stating now that he did in fact invoke Ickes's name with Eckstein, but that he never communicated with Ickes about the Hudson casino proposal.

The Senate Committee called Babbitt and Eckstein to testify on Oct. 30, 1997, about their meeting on July 14,1995. In his testimony before the Senate Committee, Babbitt identified two key parts of the July 14 conversation with Eckstein on which he disagreed with Eckstein's sworn statements. First, Babbitt disputed Eckstein's recollection that Babbitt had said Ickes told him he wanted a decision "that day," and asserted that he probably said that Ickes wanted a decision "promptly."[788] Second, Babbitt denied that he had told Eckstein that Ickes "told" or "instructed" him, but rather said that Ickes "wants" or "expects" a decision. This distinction was important to

[787]This letter could not form the basis for a federal false statement charge. *See* n. 835, *infra.*

[788]*See supra* at Section II.K.4. The critical distinction in Babbitt's mind would seem to have been that the less explicit "promptly" would allow for the interpretation that Babbitt was telling Ickes simply that in general, the White House expected him to act expeditiously, while "that day" would have to imply a specific discussion with Ickes about the timing of the Hudson decision in particular.

Babbitt,[789] notwithstanding his acknowledgment that he did not recall the precise words he had used. Babbitt addressed both of these focal elements of the Eckstein discussion in his prepared statement for the committee:

> Mr. Eckstein then asked to meet with me. Against my better judgment, I acceded to that requests [sic]. When he persistently pressed for a delay in the decision, I sought to terminate the meeting. / *don't recall exactly what was said,* but on reflection, *I probably said* that Mr. Ickes, the Department's point of contact on many Interior matters, wanted the Department or expected the Department to decide the matter promptly. *If I said that,* it was an awkward effort to terminate an uncomfortable meeting on a personally sympathetic note, but as I have said here today, I had no such communication with Mr. Ickes or anyone else from the White House.[790]

Babbitt conceded that he could not recall exactly what he said about Ickes, yet in the course of responding to questions from the Senators, Babbitt repeated his disagreements with Eckstein on the two key parts of the conversation:

> Chairman Thompson: … Did you not say that in your testimony earlier that you told Mr. Eckstein that Mr. Ickes wanted you to issue a decision?
>
> Secretary Babbitt: I told - to the best of my recollection, I said something to Mr. Eckstein to the effect that Mr. Ickes expected or wanted a decision.[791]

*** * * ***

[789]Here again, the distinction was important to Babbitt because his version - that he spoke in the passive voice - allowed for the possibility that Ickes had not actually called or even given any specific instructions. In Babbitt's estimation, such a statement, although it would have misled Eckstein about the reasons for denying his requested delay, would not have been an outright lie. Babbitt recalled that he would not have used such words as "told" or "instructed" because such words would falsely convey that Ickes had called, when he had not.

[790]Babbitt Senate Test, at 239 (emphasis added).

[791]*Id.* at 245.

Chairman Thompson: All right. Could you have said that Mr. Ickes wanted you to make the decision that very day?

Secretary Babbitt: No, sir.

Chairman Thompson: You definitely remember you did not say that?

Secretary Babbitt: I do, and I represented that much in my letter to Senator McCain.[792]

* * * *

Chairman Thompson:... Mr. Eckstein said that you told him that Mr. Ickes wanted you to make a decision that day. You, in fact, did make a decision that day, but say that although you told him that Mr. Ickes wanted you to make a decision, you definitely remember you did not say that you wanted it that day?

Secretary Babbitt: That is correct.

Chairman Thompson: Is that correct?

Secretary Babbitt: [Nodding head up and down][793]

*** * * ***

Chairman Thompson: All right. Did you tell Mr. Eckstein that Mr. Ickes had told you to make the decision without delay?

Secretary Babbitt: I did not.

Chairman Thompson: Tell us again what you told Mr. Eckstein about that.

Secretary Babbitt: Senator, my best recollection is that I may well have said something to the effect that Mr. Ickes expects me to make a decision or Mr. Ickes wants me to make a decision.

[792] *Id.* at 241-42.

[793] *Id.* at 242.

Chairman Thompson: Any time in the future, is that what you are telling us, that you were relating to him -1 mean, here you are. He has been told by your counselor to get immediately right in there. You knew that the decision was going to be made that very day. *You told him that Mr. Ickes was in touch with you on it and wanted you to make a decision.*

Secretary Babbitt: Right.

Chairman Thompson: Doesn't all of that imply that you were telling him that there was some concern being expressed to you that a decision be made immediately or that day or forthwith or rapidly?

Secretary Babbitt: Senator, there was no such expression made to me by Mr. Ickes or anyone else.[794]

* * * *

Chairman Thompson: And you told Mr. Eckstein that [Ickes] told you to make the decision.

Secretary Babbitt: I did not.

Chairman Thompson: What did you tell him?

Secretary Babbitt: Well, I've repeated that several times. I said I believe - what I believe I've said is that Mr. Ickes expects me or Mr. Ickes wants me to make a decision.[795]

* * * *

Sen. Collins: . . . What part isn't true? The "without delay" part?

Secretary Babbitt: I did not tell Mr. Eckstein that Mr. Ickes had instructed me to make a decision.[796]

™*Id.* at 243-44 (emphasis added).

[795]*Id.* at 246.

[796]*Id.* at 267. In both his prepared statement and in response to questioning, Babbitt also (continued...)

### a. Evidence Relating to Whether Babbitt's Testimony About His Conversation with Eckstein Was True or False

The law of perjury requires that the statement made in testimony under oath be false.[797] The evidence indicates that Babbitt's testimony about the Eckstein conversation was not an accurate account. The evidence supports Eckstein's account of the conversation. The Secretary's account is internally inconsistent and at variance with Eckstein's account on the central question of whether he told Eckstein that Ickes had called and directed that the Hudson casino decision had to be issued "that day."[798] Eckstein's account, in contrast, is entirely consistent with prior statements he made about the conversation to others, at a time when his recollection of the conversation was fresh. As set forth below, however, the evidence does not

[796](… continued)
denied any recollection of having made any remark about campaign contributions to Eckstein:

> It has been reported that Mr. Eckstein recently made the additional assertion that I also mentioned campaign contributions from Indian tribes in this context. I have no recollection of doing so or of discussing any such contributions with anyone from the White House, the DNC, or anyone else.

*Id.* at 239. Babbitt conceded in subsequent questioning by Sen. Bob Smith (R-N.H.) that it was "conceivable" that he made the statement about campaign contributions to Eckstein. *Id.* at 277. Our investigation did not uncover sufficient evidence to prove that the Secretary's claimed lack of recollection was false.

[797]The first element of perjury is that the statement at issue be made under oath. Babbitt took an oath to tell the truth, the whole truth and nothing but the truth when he testified before the Committee on Governmental Affairs. *Id.* at 236.

[798]Eckstein Affidavit at 6.

definitively demonstrate whether Babbitt's inaccurate testimony was based on a faulty recollection or whether it was knowingly false testimony.

### 1) Eckstein Repeated Key Parts of the Babbitt-Eckstein Conversation Shortly After the Meeting to at Least Four People, Each of Whom Has Corroborated Eckstein's Version of the Conversation

Within moments after his meeting with Babbitt, Eckstein recounted the entire conversation to Mark Goff, another representative of the Four Feather's group, and, in Goff s presence, described by cell phone the Secretary's explanation for his refusal to delay the decision to Fred Havenick's friend Jerome Berlin, who was trying separately to help secure a delay.[800] That evening while traveling back to Phoenix, Eckstein described the conversation by phone to his wife, Florence, and the next day he provided the full details to Havenick, who operated the Hudson dog track's parent company and was working in partnership with the three applicant tribes. Within days, Eckstein also recounted the key aspects of the conversation to his senior partner, Jack Brown, who is a longtime friend and former boss and mentor of Babbitt's.[801]

[799]The issue here is what Babbitt told Eckstein and not whether what Babbitt told Eckstein was true. Accordingly, this evidence does not impeach Babbitt's assertion that he did not talk to Ickes about the Hudson decision. As reflected in the Review of Evidence, Section II., above, there is no direct evidence apart from Babbitt's statement to Eckstein that supports the conclusion that Babbitt's statement to Eckstein was true.

[800]Berlin recalls, "He told me that he spoke to Mr. Babbitt and Mr. Babbitt told him that he received a call from Harold Ickes at the White House and Harold told him that this issue had to be resolved before sundown." Berlin G.J. Test., Sept. 15,1999, at 37.

[801]A former Brown & Bain associate whom Eckstein enlisted three days after the denial to assist in briefing the client on the appellate standard in the case recalls hearing from Eckstein only the Ickes component of the July 14 Babbitt discussion, but he recalls that key segment in details consistent with Eckstein's account. Likewise, Eckstein apparently provided a description

(continued...)

Eckstein had greater reason than Babbitt to recall the conversation distinctly, since this was the only matter on which he lobbied Babbitt during Babbitt's tenure at Interior, and because he was so shocked and disappointed by both the outcome of his clients' application and the stated reason that Babbitt could not accommodate his request for delay and a meeting with Eckstein's clients. Eckstein's credibility is bolstered further by his sincerely and consistently expressed belief (1) that Babbitt was not attributing to Ickes any role in the decision-making (only in its timing), and (2) that Babbitt's comment about Indians' contributions to Democrats was not necessarily related to the Indians opposing the Hudson application. Indeed, Eckstein did not perceive the latter comment as relating to any possible corruption of the Hudson decision. Obviously, a claim that this comment carried some illicit meaning vis-a-vis the Hudson decision would have served the interest of Eckstein's clients in overturning the decision, and Eckstein's scrupulous refusal to claim such an implication enhanced the credibility of his account.

Although these prior consistent statements by Eckstein to his colleagues, wife and client tend to corroborate his version of the Babbitt-Eckstein conversation, we are mindful that these statements might not be admissible at any trial under rules of evidence excluding prior consistent statements as hearsay.[802] Moreover, while these consistent statements show that Eckstein from

""(...continued)
of only the Ickes element of the discussion during his December 1995 meeting with Havenick's litigation counsel, which resulted in only that aspect of the discussion being featured in Eckstein's January 1996 affidavit for the civil lawsuit. Eckstein repeatedly has stated his inclination to limit circulation of any details about this conversation with his old friend, and that he provided the lawyers only those details either that they requested specifically or that he understood were necessary to the client's immediate legal objective. Eckstein's behavior is fully consistent with his professed desire to avoid giving unnecessary play to these facts.

[802]Under Fed. R. Evid. 801(d)(1), a prior consistent statement by a witness (Eckstein) is (continued...)

the beginning interpreted Babbitt's comments as meaning that Ickes had demanded an immediate decision on Hudson, they do not preclude the possibility that Eckstein had misheard or misinterpreted what Babbitt said.[803]

**2) Babbitt's Asserted Purpose for Invoking Ickes's Name Undermines His Subsequent Insistence that He Did Not Tell Eckstein the Decision Had to Be Issued "That Day"**

Babbitt's own explanation - that he was using a "white lie"[804] to get Eckstein out of his office - makes less credible his unequivocal assertions about the words he used. If, as Babbitt asserts, he invoked Ickes as a polite way to end his meeting with Eckstein, it seems logical that Babbitt would convey to Eckstein the sense that Ickes - and not Babbitt - was driving the process, that the timing of the decision was out of Babbitt's hands, and that it had to be acted upon immediately. Babbitt himself offered support for this view:

> Sen. Collins: How would that have prompted Mr. Eckstein to end the meeting and exit your office, which was your goal? I do not understand if all you were saying is I have to do my job, Harold Ickes expects me to do my job. Why would that prompt him to end the meeting which was your goal?
>
> Secretary Babbitt: My intention was to say, look, this decision has got to be made. It is overdue, and now is the time to make it.[805]

[802](... continued)
admissible only "to rebut an express or implied charge of recent fabrication or improper influence or motive."

[803]Presumably, Babbitt's defense at any trial would avoid arguing recent fabrication, and argue instead that Eckstein from the beginning misinterpreted or misheard Babbitt's comments.

^Babbitt G.J. Test, July 7,1999, at 136,151-52.

[805]Babbitt Senate Test, at 266-67.

Babbitt asserts that he would not have told a lie that suggested an actual conversation between him and Ickes. But the logic of what Babbitt himself says he was trying to accomplish in that conversation is strong evidence of the likely terms he would have chosen. The fact that Babbitt wanted to suggest that the decision was a "done deal" supports Eckstein's assertion that Babbitt used language that created that impression.[806]

### 3) Babbitt's Testimony About the Eckstein Conversation Was Internally Inconsistent

Moreover, Babbitt's testimony about his conversation with Eckstein is internally inconsistent, raising doubts about Babbitt's credibility. Babbitt testified in his opening statement before the Senate Committee that his recollection of the entire conversation is poor:

> Mr. Eckstein then asked to meet with me. Against my better judgment, I acceded to that requests [sic]. When he persistently pressed for a delay in the decision, I sought to terminate the meeting. / *don't recall exactly what was said,* but on reflection, *I probably said* that Mr. Ickes, the Department's point of contact on many Interior matters, wanted the Department or expected the Department to decide the matter promptly. *If I said that,* it was an awkward effort to terminate an uncomfortable meeting on a personally sympathetic note, but as I have said here today, I had no such communication with Mr. Ickes or anyone else from the White House.[807]

[806]This conclusion is not undermined by Babbitt's March 1997 conversation with his friend, Don Moon. Aware both that Eckstein had sworn in his January 1996 affidavit that Ickes told Babbitt to issue the decision on July 14, and that Moon would be seeing Eckstein shortly, Babbitt reportedly told Moon that Babbitt had merely invoked Ickes name because Eckstein is someone to whom Babbitt has a hard time saying "no." Moon OIC Int. at 2. Whether true or not, this fact does not change the analysis of how distinctly Babbitt would recall the specific words he employed in that effort to soften the blow to his friend, and only reinforces the notion that Babbitt would want to convey that the matter was out of his hands before Eckstein ever came to see him.

[807]Babbitt Senate Test, at 239 (emphasis added).

Babbitt's admitted uncertainty about the exact language of his conversation makes untenable his subsequent claim that he "definitely" did not say "that day" to Eckstein.[808] Furthermore, one week later, Babbitt told investigators conducting an interview as a part of the Justice Department's preliminary inquiry that he did not know if he addressed timing in his statement about Ickes during the meeting with Eckstein, and that he did not recall saying anything to Eckstein about timing. When confronted with the inconsistencies in his testimony at the same interview, Babbitt conceded that he really was not sure if he had only said Ickes wanted a decision or whether he had also added that Ickes wanted a decision promptly or within a specific time period. It is noteworthy that Babbitt can recall no other detail of his meeting with Eckstein, other than the formulation of his statement about Ickes on which he has been unshakeable.

Moreover, Babbitt was insistent in his Senate testimony that he said nothing to Eckstein to indicate that he had actually communicated with Ickes. Not all his answers, however, were consistent on that score. As recounted above, in framing a question about what Babbitt intended to convey to Eckstein, Sen. Thompson stated as a predicate fact "[y]ou told [Eckstein] that Mr. Ickes was *in touch with you* on it and wanted you to make a decision."[809] Secretary Babbitt responded with one word: "Right." Babbitt strenuously denied elsewhere that he said anything to Eckstein indicating that Babbitt and Ickes had communicated about the Hudson application or were otherwise in any way "in touch" about it. Babbitt's inconsistency on the subject, coupled with Eckstein's consistent and corroborated recollection, further supports the conclusion that Babbitt's testimony on the subject was false or mistaken.

[808] *Id* at 241-42.

[809] *Id.* at 244 (emphasis added).

**4)** Babbitt Fully Understood the Meaning of the Senators' Questions

Assuming all the other elements of perjury were present, a perjury charge based on Secretary Babbitt's testimony would not be barred on the basis of vagueness, because the questions and answers set forth above are clear and unambiguous.[810] Moreover, given the well-publicized goal of the Senate Committee to determine what Babbitt specifically said in his conversation with Eckstein, Babbitt cannot claim to have failed to understand the intended meaning of the questions posed. Under such circumstances, that evidence cures any ambiguity in the question for purposes of a charge of perjury.[811]

[810] C/ *United States* v. *Chapin,* 515 F.2d 1274,1279 (D.C. Cir. 1975) (stating *in dictum* that some questions may be so vague as to prevent the government from charging perjury based on the defendant's answer, but mere vagueness is insufficient to establish defense to perjury given that ambiguity can be found in almost any question). The testimony set forth above is only part of the entire record of Secretary Babbitt's statements on this subject. Other questions, however, were arguably ambiguous. Given the availability of unambiguous testimony, we did not evaluate potential perjury charges on Secretary Babbitt's other testimony.

[811] *See United States* v. *Milton,* 8 F.3d 39,45-46 (D.C. Cir. 1994) (holding, in false statements case, that meaning defendant attributed to ambiguity is decision for jury); *United States v. Farmer,* 137 F.3d 1265, 1269-70 (10th Cir. 1998) (where prosecutor presents evidence as to how defendant understood question, it is for jury to resolve); *United States v. Swindall,* 971 F.2d 1531, 1553-54 (11th Cir. 1992) (same); *United States* v. *Adi,* 759 F.2d 404, 410 (5th Cir. 1985) (if answer is sufficiently explicit, question may serve as predicate for perjury charge); *United States* v. *Sampol,* 636 F.2d 621, 655 (D.C. Cir. 1980) (jury's province to decide construction of question by defendant); *United States* v. *Slawik,* 548 F.2d 75, 86 (3rd Cir. 1977) (where jury can reasonably determine which meaning defendant attributed to question, case should go to jury); *United States* v. *Haldeman,* 559 F.2d 31,103-04 (D.C. Cir. 1976) (upholding trial court's refusal to instruct jury that defendant could not be convicted for perjury based on statement reasonably subject to more than one interpretation); *Chapin,* 515 F.2d at 1280-82 (jury may determine how defendant construed question and whether defendant answered truthfully). *Compare United States* v. *Manapat,* 928 F.2d 1097, 1098-99 (11th Cir. 1991) (where defendant checked "no" beside fundamentally ambiguous questions on an application form, no perjury charges would lie because it was impossible for jury to determine whether defendant's allegedly false answer was intentional or inadvertent).

### 5) The "Two-Witness Rule" Is Satisfied

To prove the crime of perjury, the prosecution must meet the requirements of the common law "two-witness rule." This rule maintains that a conviction cannot rely upon the uncorroborated testimony of a single witness to prove the falsity of the statement at issue in the perjury charge.[812] Though fashioned to prevent establishing the falsity of one person's oath by presenting another person's oath without more,[813] the rule does not require that a second independent witness be available; rather, it may be satisfied through other independent corroborating evidence, including circumstantial evidence.[814] Where the rule is applicable, the jury must be instructed on its requirements and meaning.[815]

The only direct evidence indicating that Babbitt's testimony may have been false concerning the specific disputed elements of his conversation with Eckstein - the issue of "wants" versus "told" and the issue of timing - is the testimony of Eckstein. Nonetheless, there is in this matter independent corroborating evidence that would satisfy the two-witness rule as a matter of law, including the following facts and inferences:

- Babbitt admitted during both his Senate Committee and Grand Jury testimony that he was motivated to terminate his meeting with Eckstein and attempted to do so by creating an impression that the application decision was overdue and was being

[812] *Hammer* v. *United States,* 271 U.S. 620, 626 (1926), *cited in Haldeman,* 559 F.2d at 97 n. 185.

[813] *Doto* v. *United States,* 223 F.2d 309, 310 (D.C. Cir. 1955).

[814] *See Haldeman,* 559 F.2d at 97-98; *Doto,* 223 F.2d at 310; *United States* v. *Chaplin,* 25 F.3d 1373, 1377 (7th Cir. 1994).

[815] *See e.g., Haldeman,* 157 F.2d at 97-98; *United States v. DeZarn,* 157 F.3d 1042, 1053 (6th Cir. 1998).

sought by the White House, which supports Eckstein's recollection of the phrasing of Babbitt's comments more so than it supports Babbitt's;

- Babbitt's testimony before the Senate Committee was internally inconsistent on the issue of whether he said the decision was needed promptly or within a set time frame, undermining the credibility of his claims to recall the precise wording of the disputed elements of the comments;

- In a related way, Babbitt has acknowledged repeatedly that he has virtually no recollection of the disputed meeting (or his earlier contacts with Eckstein), yet he insists on his recollection of certain words - and he once admitted that even as to those words, concerning timing, that he has no clear recollection of what he did or did not say;

- Babbitt has acknowledged that he knew that the decision was ready to be released by about the time that he first spoke with Eckstein during the week of July 14, and he conveyed to Eckstein that he - Eckstein - needed to see Duffy right away;

- Duffy told Eckstein early that week that the meeting Eckstein was seeking had to be on July 14 and could not be delayed until the next week, as Eckstein wanted, indicating the time pressure that existed when Babbitt referred Eckstein to Duffy;

- The denial decision letter in fact was already done by July 14, the decision having been made at least a couple of weeks earlier, and the final format of the letter having been determined by early that week; indeed, on July 13 Interior inadvertently notified the opponent St. Croix tribe that the application was being denied, and earlier that week Skibine had e-mailed the IGMS about the need for this decision to "go out ASAP,"[816] before Assistant Secretary Deer would travel to Wisconsin on a trip scheduled for that same week - so the timing of the actual decision release plainly mattered;

- Ickes's staff was in touch with Babbitt's staff repeatedly during the course of Interior's review of the application, including with reference to the June 12 Congressional delegation letter that specifically requested Ickes to communicate the Members's concerns to Babbitt; though Babbitt denies that he knew these facts at the time, it could still be argued these are simply more facts that probably were brought to Babbitt's attention at the time which he now cannot recall, but which then inspired his pretext for ushering Eckstein out of his office;

[816]E-mail from George Skibine to Miltona Wilkins, Tom Hartman, Paula Hart and Tina LaRocque, July 8,1995.

- Babbitt certainly knew Ickes had called Babbitt's office only two months earlier about the Pequot casino land into trust issue, and that the White House Chief of Staff had called Babbitt in August 1994 about the Sault Ste. Marie off-reservation gaming matter, increasing the likelihood that he would have attributed to Ickes a role in compelling at least the timing of the decision.

This independent circumstantial evidence provides ample support for Eckstein's separately corroborated recollection.[817] Though arguments can be made that some of this evidence also could support Babbitt's position, or the otherwise unsubstantiated notion that Babbitt and Ickes actually spoke at some point about the application, it is sufficient to clear the legal bar of the two-witness rule.

Despite this independent evidence, the defense in any case brought on these facts would undoubtedly characterize this situation as exactly the type of one-on-one "swearing contest" that the two-witness rule was meant to prevent from resulting in a criminal conviction. Because this issue would be considered by the jury, the prosecution would have to anticipate the substantial appeal of a defense predicated on this theory. While this factor alone would not dissuade us from bringing a case if all other elements of the charge were well-satisfied, we were mindful of this likely aspect of trial strategy.

[817] Eckstein's prior consistent statements to Goff, Florence Eckstein, Brown and Havenick about the conversation - all within a short time of the conversation itself - probably would not be admissible under the Federal Rules of Evidence in the government's case-in-chief, so would not aid in satisfying the two witness rule. Nevertheless, such prior consistent statements assisted investigators in evaluating the credibility of Eckstein's account.

### b. Babbitt's Testimony about His Conversation with Eckstein Was Material to the Senate Committee on Governmental Affairs

Perjury requires that the false statement provided under oath be material to the proceeding in which the statement was provided. Babbitt's false testimony about his conversation with Eckstein was material to the Senate Committee on Governmental Affairs. A material statement is one that has a natural tendency to influence or was capable of influencing the tribunal on the issue before it.[818] The testimony at issue need not have actually influenced, misled or hampered the proceeding,[819] and may relate even to only a subsidiary issue under consideration[820] or to an issue of credibility.[821] An important fact on which to base a materiality finding is the nature of the questions posed by the inquiring body - *i.e.*, what did it want to know? Notably, materiality is assessed as of the time the potentially perjurious statement was made; the materiality of the statement is not assessed in hindsight. Accordingly, a "false statement can be material even if

[m] *United States* v. *Barrett*, 111 F.3d 947, 953 (D.C. Cir. 1997); DOJ Manual at 9-1497.

[i9] *United States* v. *Harrison*, 671 F.2d 1159, 1162 (8th Cir. 1982); *United States* v. *Brown*, 666 F.2d 1196, 1200 (8th Cir. 1981); *United States* v. *Whimpey*, 531 F.2d 768, 770 (5th Cir. 1976); DOJ Manual at 9-1497.

[m] *UnitedStates v. Percell*, 526 F.2d 189,190 (9th Cir. 1975).

[821] *United States* v. *Nacrelli*, 543 F. Supp. 798, 800 (E.D. Pa. 1982); DOJ Manual at 9-1497. Sen. Lieberman's comments at the hearing on Oct. 30,1997, are interesting to note in this regard: "You have given a series of answers regarding what you have said to Mr. Eckstein on that meeting on July 14,1995, that I find puzzling and disconcerting, and to some extent, they may affect your credibility before the Committee. I want to give you another chance to explain what you have said here, beginning in the colloquy that you had with Chairman Thompson." Babbitt Senate Test, at 263.

ultimately the conclusion of the tribunal would have been the same."[822] Finally, materiality is a factual issue for the jury.[823]

The question of whether Babbitt and Ickes communicated on the Hudson decision was of paramount importance to the Committee.[824] In October 1997, and still today, there was insufficient evidence to prove that there was any such communication between Babbitt and Ickes. However, what Babbitt said to Eckstein about Ickes's involvement with the Hudson application was of enormous importance to the Committee's attempt to determine whether Babbitt and Ickes had communicated on the Hudson matter. This is particularly true in light of the fact that both Babbitt and Ickes denied they had communicated about the Hudson matter when the evidence at the time - both Eckstein's sworn testimony and documented contacts between the White House and Interior - indicated that they may have commimicated about it.

Babbitt's testimony about the terms used in his conversation with Eckstein had the potential to influence the proceedings in the Senate Committee hearings because they were highly probative of whether such a communication did in fact occur. Indeed, a main purpose of

[821] *DeZarn,* 157F.3dat 1051.

[822] *See United States* v. *Gaudin,* 515 U.S. 506, 509 (1995).

[824] Even the Secretary's attorneys have conceded that whether Ickes spoke to Babbitt about Hudson at the behest of campaign contributors was material to the Committee's work. As Sen. Levin commented during the hearing:

> I think it's perfectly appropriate that you be called as a witness in light of your comment relative to Mr. Ickes. I think that does raise a question which appropriately should be addressed by you, so I think it's very appropriate indeed that you be given an opportunity to address that question.

Babbitt Senate Test, at 259.

the hearing at which Babbitt testified on Oct. 30, 1997, was to determine what Babbitt said at the July 14, 1995, Babbitt-Eckstein meeting in order to better understand whether Ickes influenced - or even communicated with - Babbitt about the Hudson application at the request of the DNC and campaign contributors. In short, Babbitt's testimony was material because it was clearly capable of influencing lines of inquiry and further investigation into the conduct of Babbitt, Ickes and Interior in the Hudson matter. In reaching this conclusion, we are mindful that an argument could be made that the divergence between Babbitt's and Eckstein's accounts of their conversation, and the importance of those distinctions in the broader context of the Senate Committee's inquiry, rendered slight the impact of any false testimony on the Committee's efforts. Although we are of the view that this argument fails when measured against the applicable legal standard, we are cognizant of its potential jury appeal.

**c. There Is Insufficient Evidence to Prove that Babbitt Possessed the Requisite Intent to Provide False Testimony**

The law of perjury requires that the material false statement be made with the willful intent to provide false testimony. There is insufficient evidence to prove beyond a reasonable doubt that Secretary Babbitt intended to provide false testimony in making the false statements described above.

Secretary Babbitt arguably had a motive to testify falsely about the words used in his conversation with Paul Eckstein. Even if there was no corrupt influence on the Hudson decision, Babbitt was embarrassed by his remarks to Eckstein and had placed himself in a dilemma by sending inconsistent letters on this matter to Senators McCain and Thompson. In his letter to Sen. McCain, Babbitt created the impression that he had not even mentioned Ickes to Eckstein

during their conversation, going so far as to dispute Eckstein's statements under oath on the matter. In his later letter to Sen. Thompson, Babbitt conceded invoking Ickes's name to Eckstein, but stated that he did so as an excuse to end his meeting with Eckstein. One could argue that the only way that Babbitt could avoid the admission that he had lied to McCain was to assert that in his letter to Sen. McCain he "regretfully dispute[d]" only the specific words that Eckstein attributed to the Secretary - even though Babbitt conceded lack of clear recollection about the conversation. Babbitt also knew that if the Committee concluded that he had purposefully misled McCain, it would lend credence to the argument that there was something untoward to conceal about the Hudson matter.[825]

[825]Even if he were confident that Interior's decision in the Hudson matter was free of any improper interference or corrupt influence, Babbitt may also have been motivated to avoid the Committee's scrutiny of Interior's handling of other land into trust applications by gaming tribes. As noted in the Review of Evidence, Section II.G.8.a., above, evidence suggests that by July 1995 Babbitt was aware of massive campaign contributions to the Democrats by another tribe - the Pequots - who had just won Interior approval in May 1995 for a land into trust acquisition to expand their casino parking lot. *See also* Sections II.G.7 and ILK.I.e., *supra.* The Pequots' 1994 contributions of $500,000 to the DNC for distribution to state Democratic parties and $250,000 to the DNC itself were made and reported repeatedly by the news media that year, during intense controversy and local opposition to the Pequot's efforts to increase the land supporting their Foxwoods Casino. During that application's pendency, Babbitt met directly with at least one lobbyist opposed to the Pequot acquisition and participated in conference calls with concerned local and federal officials, and Harold Ickes intervened in the matter at the request of the Pequots. Although there is no evidence of impropriety in the Pequot matter (which we have not investigated in detail), when he testified before the Senate Committee, Babbitt may well have been motivated to avoid spawning a further Indian casino inquiry, which may have resulted if Babbitt acknowledged that, in his meeting with Eckstein, Babbitt could have invoked Ickes's name and mentioned the half million dollar contributions of other tribes as evidence of the political might of gaming tribes generally, based upon Babbitt's own recent experience in the Pequot matter. This motivation would have been reinforced by the fact that there was litigation pending against Interior in October 1997 concerning both the Pequot and the Hudson application decisions. When confronted with this theory of motivation, Babbitt testified that he had no recollection that the Pequot matter or Pequot contributions were in any way a part of his thoughts and comments during his July 14 meeting with Eckstein. Babbitt G.J. Test, at 144-45, 170-74.

An alternative explanation for his testimony is that Babbitt had a mistaken recollection of the specifics of the conversation and had committed himself to that recollection. An honest belief in the truthfulness of his recollection would constitute a defense to perjury because one of the elements of perjury is that the defendant willfully intended to provide false testimony. Babbitt testified that he believed his version was the correct version of what transpired in the July 14, 1995, meeting with Eckstein, but he left open the possibility that either he or Eckstein suffered from a failure of memory. *See* n. 709, *supra.*

In the final analysis, we concluded that the evidence was not sufficiently strong to convince a jury beyond a reasonable doubt that Babbitt intended to provide false testimony concerning the Eckstein conversation.

**2. There Is Insufficient Evidence to Prove that Babbitt Perjured Himself in Testifying About Whether He Intended to Mislead Sen. McCain with His Aug. 30,1996 Letter**

The second area of testimony on which we focused as a potential basis for a perjury prosecution was Babbitt's testimony that he did not intend to mislead Sen. McCain with his letter to the Senator dated Aug. 30,1996. Babbitt's letter was a response to a written inquiry from Sen. McCain which had been spurred by allegations in a July 12,1996, Wall Street Journal article suggesting that the Hudson casino decision had been corrupted. The article had alleged that opponents of the proposed facility had made campaign contributions to gain a denial of the application, and included a recounting of Eckstein's version of the July 14, 1995, meeting. In McCain's July 19, 1996, letter to Babbitt, he posed a series of specific questions; among those questions was one pertaining specifically to Babbitt's conversation with Eckstein:

> Paul Eckstein, the lobbyist for Indian tribes on the other side of the dispute, has sworn in an affidavit that he met with you on July 14, 1995 and that you told

> Eckstein that Ickes had called you and told you that the decision in favor of Mr. O'Connor's client tribes had to be issued that day without delay. Is this true?

McCain's letter asks Babbitt specifically to confirm or deny the truth of Eckstein's recollection about what Babbitt said to Eckstein about Ickes, not simply whether Babbitt and Ickes had communicated about the Hudson matter.[826] In his Aug. 30,1996, response, Secretary Babbitt stated:

> I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay. I never discussed the matter with Mr. Ickes; he never gave me any instructions as to what this Department's decision should be, nor when it should be made.

The most reasonable reading of this response was that Babbitt was denying that he either discussed the matter with Ickes or ever mentioned Harold Ickes in his conversation with Eckstein. McCain understood Babbitt's letter to be a flat denial of Babbitt's ever having invoked Ickes's name. Babbitt recently acknowledged that to be a reasonable reading of the letter and has apologized to McCain for misleading him in the letter.

Babbitt's disclosure, in his Oct. 10, 1997 letter to Sen. Thompson, that he had, in fact, invoked Ickes's name during his conversation with Eckstein gave rise to the allegation that he had intentionally misled Sen. McCain. Babbitt anticipated and addressed this issue in his prepared statement at the beginning of his testimony before the Thompson Committee:

[826]Indeed, the prior two separate questions McCain posed to Babbitt in the letter asked (1) whether Ickes or his staff called Babbitt or his staff around July 14,1995, about Hudson, and (2) whether Ickes conveyed to Babbitt that Interior should not delay release of its decision to deny the application.

> If my letters to Senator McCain and Senator Thompson have caused confusion, then I must and do apologize to them and to the Committee. I certainly had no intention of misleading anyone in either letter.[827]

In response to questioning from Sen. Thompson and others, Babbitt stood by the letter to McCain as true and correct, and as consistent with his letter to Thompson.[828] Babbitt testified that both his initial denial about having said anything to Eckstein about Ickes having instructed him to issue a decision that day, and his subsequent acknowledgment to Sen. Thompson that he probably did say something to Eckstein indicating that Ickes wanted a decision, were true:

> Chairman Thompson: . . . In part of your letter, the last paragraph on the first page, you said, "I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay." *Is that an accurate representation?*
>
> Secretary Babbitt: *Yes, it is.*[29]
>
> * * * *
>
> Chairman Thompson:... Did you not say that in your testimony earlier that you told Mr. Eckstein that Mr. Ickes wanted you to issue a decision?
>
> Secretary Babbitt: I told - to the best of my recollection, I said something to Mr. Eckstein to the effect that Mr. Ickes expected or wanted a decision.[830]
>
> * * * *

[827] Babbitt Senate Test, at 239. Babbitt also denied that the purpose of his letter to Sen. Thompson was to correct any misstatements in his earlier letter to McCain.

[i2i] *See, e.g.,* Babbitt Senate Test, at 244-45.

[i29] *Id.* at 244 (emphasis added).

[m] *Id.* at 245.

Chairman Thompson:… Are you saying that you were not correcting the record, more or less, with the letter to me?

Secretary Babbitt: *Senator, I believe those statements are consistent.* They both reflect my best recollection of what I said and what I didn't say.

By stating in his opening statement that he did not intend to mislead either Sen. McCain or Sen. Thompson, Babbitt actually went further than adopting the letter to McCain as literally true and correct; he affirmed under oath that the statement was not merely literally true (if perhaps misleading), but was not intended to mislead at all.

**a. Evidence Relating to Whether Babbitt's Testimony That He Did Not Intend to Mislead McCain Was True or False**

The law of perjury requires that the statement made under oath be false.[832] The evidence indicates that Babbitt may have intended to mislead McCain in his Aug. 30,1996, letter, and that Babbitt's testimony that he did not intend to mislead McCain may not have been truthful. There is no dispute that the letter itself misled by giving the impression that the Secretary had not mentioned Ickes to Eckstein. In the Grand Jury, Babbitt admitted as much;[833] prior to the Senate hearing, he also apologized to McCain for misleading him. The element of falsity at issue here, however, pertains to the falsity of Babbitt's testimony before the Senate Committee - *i.e.*, his

[m] *Id.* (emphasis added).

[832] The first element of perjury is that the statement at issue be made under oath. Babbitt took an oath to tell the truth, the whole truth and nothing but the truth when he testified before the Committee on Governmental Affairs. *See* Babbitt Senate Test, at 236.

[833] See Babbitt G.J. Test., July 7, 1999, at 222.

statement that he did not intend to mislead McCain - and not to the falsity of the letter itself.[834] Babbitt stands by his denial of intending to mislead McCain. However, the text of the letter, the circumstances surrounding the drafting and issuance of the letter, and Babbitt's subsequent conduct concerning the letter provide circumstantial evidence that Babbitt intended to mislead McCain.[835]

### 1) The Text of Babbitt's Letter to McCain Shows He Misled McCain

A strong argument can be made that the letter is most naturally read as a flat denial by Babbitt that he had invoked Ickes's name in conversation with Eckstein.[836] Babbitt's letter directly addresses Eckstein's allegations, and "regretfully dispute[s]" Eckstein's "assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay." While those words literally deny only the precise statement that he told Eckstein that Ickes "instructed" him to make a decision "without delay," Babbitt's letter does nothing to signal that these

[834]The allegedly false statement Babbitt made in the McCain letter could not be the subject of a prosecution for a violation of the federal false statements statute. Babbitt's letter to McCain was dated Aug. 30, 1996, which was after the Supreme Court of the United States held that 18 U.S.C. § 1001, the false statements statute, did not apply to statements made to the legislative branch. Congress amended the statute to make such statements subject to criminal liability on Oct. 11,1996. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, HR3166.

[835]The evidence that supports this conclusion is, of course, circumstantial evidence because - absent admissions - circumstantial evidence is the only way in which the government can prove state of mind. Courts accordingly have held the two-witness rule inapplicable when the sole issue is the defendant's state of mind. *See, e.g.,Behrle* v. *United States,* 100 F.2d 714, 715-16 (D.C. Cir. 1938), *cited in United States* v. *DeZarn,* 157 F.3d 1042, 1053 (6th Cir. 1998); *United States* v. *Chapin,* 25 F.3d 1373,1377 (7th Cir. 1994); *United States* v. *Nicoletti,* 310 F.2d 359, 363 (7th Cir. 1962), *cert, denied,* 372 U.S. 942 (1963).

[836]Sen. McCain believed that the letter could be read only as a flat denial of invocation of Ickes's name.

particular words are the ones he disputes, and a reader not given any such indication might naturally assume that Babbitt intended a blanket denial of the gist of Eckstein's statement, not a narrow denial that he used particular words. Taken together with the succeeding sentence, which is a broad denial of any significant contact with Ickes, the tone is clearly one of general denial.

Babbitt himself concedes that a reasonable reader could permissibly infer that his letter constituted a flat denial that he had invoked Ickes's name, though he insists that was not an inference he intended. Babbitt suggests that he was answering only the question of whether he and Ickes had ever communicated about Hudson, or whether Ickes had ever directed or instructed him to make a decision without delay, and not how he had invoked Ickes in speaking with Eckstein. The text of McCain's letter, however, plainly requests Babbitt to address the truthfulness of Eckstein's sworn account of what Babbitt said to Eckstein, not just whether Babbitt and Ickes had communicated about Hudson.[837] Moreover, if Babbitt only intended to answer the question of whether he and Ickes communicated on the Hudson application, he would not have needed to begin that portion of his response by "regretfully disputing] Mr. Eckstein's assertion."[838] Babbitt could have just stated what he states after that sentence - "I never

[837]Babbitt acknowledged that he either must have read McCain's July 19, 1996, letter or must have spoken with someone about it, but states that he cannot recall whether the letter was provided to him when he was finalizing his responsive Aug. 30,1996 letter to McCain. It was standard practice at Interior, however, to provide the Secretary incoming and outgoing letters side by side in a folder, with surnamed copies of the outgoing letter underneath. It seems unlikely that, given the allegations of impropriety contained in Sen. McCain's letter of inquiry and the fact that they concerned Babbitt personally, Babbitt would not have reviewed it as he prepared and edited his own response.

[838]In addition, at points in his Senate hearing testimony, Babbitt parsed distinctions between his recollection of the July 14 discussion and Eckstein's, and said that he had "represented that much in [Babbitt's] letter to Senator McCain." Babbitt Senate Test, at 242.

discussed the matter with Mr. Ickes." Additionally, if Babbitt intended to address only the question of whether he spoke with Ickes, it made little sense for the paragraph at issue to begin, as it does, with three sentences about Paul Eckstein These three sentences about Eckstein would be virtually superfluous if one were to accept Babbitt's account. The full paragraph reads:

> I met with Mr. Paul Eckstein, an attorney for the three tribes applying for the trust land acquisition, shortly before a decision was made on the application. Following this meeting, I instructed my staff to give Mr. Eckstein the opportunity to discuss the matter with John Duffy. / *must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay.* I never discussed the matter with Mr. Ickes; he never gave me any instructions as to what this Department's decision should be, nor when it should be made.[839]

Critically, in providing his refutation of Eckstein's "assertion" after his introduction of the Eckstein meeting, Babbitt gives no indication whatsoever that he is selectively disputing or agreeing with any particular phrasing employed by Eckstein himself, or any particular aspect of Eckstein's version.[840] In fact, the word "instructed" is Babbitt's, not Eckstein's.[841]

[839](Emphasis added).

[840]Of course, Babbitt could simply have stated to McCain what Babbitt now claims to be the truth: that Eckstein was correct, Babbitt did invoke Ickes's name and said that Ickes wanted the decision to go out promptly, but that this was a ruse to end the discussion with Eckstein, and that Babbitt never spoke with Ickes about the Hudson application. This option had the unappealing dimension of acknowledging a fact that would have invited further inquiry; thus, a seeming denial may have appeared at the time to be the most certain way of curtailing the matter, In other words, having told a "white lie" to get Eckstein out of his office, Babbitt may have decided to be oblique and even indignant in his response to Sen. McCain to thwart further inquiry into the Hudson matter.

[841]The fact that "instructed" is Babbitt's word and not Eckstein's makes it all the more odd that Babbitt disputed the word "instructed" in his Senate testimony:

> Senator Collins: What part isn't true? The 'without delay' part?

(continued...)

Yet another reason we do not credit Babbitt's suggestion that his letter to McCain was simply answering the question of whether he spoke to Ickes about the decision is the fact that in his letter Babbitt responded to all other questions posed in McCain's letter to him, i.e., those concerning White House and DNC involvement on other Indian matters.[842] Indeed, if one compares the letters side by side, Babbitt responded to the inquiries in basically the order in which they appeared in McCain's letter to Babbitt - *i.e.,* Babbitt addresses McCain's questions about Eckstein and Ickes first, the White House next and then the DNC.

Babbitt's testimony that the focus of the McCain letter was on the Ickes allegation and not on the Eckstein conversation is further undermined by his own testimony. Babbitt acknowledged that the Eckstein conversation - and not just whether he actually spoke to Ickes - should have been central to his role in responding to McCain (as opposed to the memos he supplied McCain from Interior staff): "I think it was clear that with respect to the Eckstein conversation, that was - you know, that was for me to respond to. I was the only person present then."[843] Moreover, Babbitt has taken inconsistent positions as to the phrasing in the key

[841](...continued)

Secretary Babbitt: I did not tell Mr. Eckstein that Mr. Ickes had instructed me to make a decision.

Babbitt Senate Test, at 267. *See also supra* at 389.

The word "instructed" first appeared in a draft of Babbitt's response to McCain prepared by Sibbison, who recalls having no knowledge of what actually transpired in the Eckstein-Babbitt discussion.

[842]*See* Letter from Sen. McCain to Bruce Babbitt, July 19,1995, at p.3.

[843]Babbitt G.J. Test., July 7,1999, at 213. *See also id.* at 204. On this point, Babbitt told the Grand Jury:

(continued...)

sentence of the letter to McCain. On the one hand, Babbitt states that the letter was "precise and correct";[844] on the other hand, in statements attributed to him, Babbitt said that the letter "was carelessly written."[845]

[843](...continued)
... There must have been a discussion of some kind somewhere in the process for me to make the first important point in the letter, which was that I never discussed the matter with Ickes. I mean, you know, I had to make that point, and the second point that I do not agree with the Eckstein assertion with respect to the conversation.

*Id.* at 213-14.

[844]Babbitt Senate Test, at 264.

^*Secretary Denies Wrongdoing in Decision on Indian Casino; But Admits Some 'Dumb' Moves,* Arizona Republic, Dec. 14, 1997, at A23 (interview with Babbitt). Babbitt testified more recently as follows:

All I would emphasize here is that the Eckstein conversation didn't seem very important to me when I wrote this letter to Senator McCain. You know, you can parse it a hundred ways after the fact.

Im writing to McCain saying - his concern is, you know, Ickes and whether or not there's White House involvement, and there clearly wasn't. There was no communication with Ickes.

And I got that down because that's what I was really focusing on.

So I walked past the Eckstein thing by saying I dispute his - what's the language -1 just left it hanging. I shouldn't have done that, but I did.

Babbitt G.J. Test., July 7, 1999, at 213-14.

### 2) Babbitt's Letter to McCain Was Drafted as a Flat Denial that Babbitt Invoked Ickes's Name

Babbitt's conduct in connection with the drafting of his letter to McCain demonstrates that his testimony to the effect that he did not intend to mislead McCain was less than candid. Babbitt knew he was the only person who could respond to McCain's question about his conversation with Eckstein. Babbitt knew about the Eckstein affidavit sometime after it was filed, and had discussed the Eckstein meeting with someone at DOI in connection with the filing of the civil lawsuit. Babbitt also was familiar with the controversy created by the Wall Street Journal article and McCain's July 19 letter, which he either saw or discussed with someone at Interior, or both. Indeed, Babbitt knew the controversy stemmed from his conversation with Eckstein because he told a DOI staffer after receiving McCain's letter but before the response that "it shows you not to say things in front of people."[846]

Yet by his own acknowledgment, Babbitt provided the drafters of the letter with no information regarding Eckstein's allegation except a blanket denial that he spoke to Ickes about Hudson. Babbitt does not recall a discussion with anyone about any specifics of his conversation with Eckstein in order to draft a response to the McCain letter; he states only that he "must have said to someone" that Eckstein's version is "incorrect."[847] Not surprisingly, one of the initial

[846]OIC Beller Int. at 2.

[847]Babbitt G.J. Test., July 7, 1999, at 219. No Interior witness testified to having any conversation with Babbitt about his July 14 conversation with Eckstein in connection with drafting the letter to McCain or at any time before that event, except Solicitor Leshy. Leshy said that he is reasonably sure he discussed the Eckstein conversation with Babbitt while drafting the McCain letter, but Leshy cannot recall that discussion. He has no recollection of learning that Babbitt had actually invoked Ickes until October 1997.

drafters of the response to McCain, Heather Sibbison, drafted the letter to be a "blanket denial" of the allegations raised by McCain.[848] Moreover, John Leshy, who edited the McCain letter and apparently altered the wording of the Eckstein denial, states - consistent with Babbitt's testimony - that he had no conversations with Babbitt about the Eckstein denial. At a minimum, then, Babbitt allowed the drafters of the letter to draft it under the false impression that the Eckstein allegations were flatly wrong, and they drafted the letter to McCain accordingly. When the final draft arrived on Babbitt's desk, he signed it as it was written.[849] Babbitt states that he "reviewed [the letter] with some care," "focused on" the phrasing of the Eckstein denial, and was "satisfied" and "confident" that it was an "accurate response" to McCain.[850]

Babbitt to this day stands by the McCain letter as consistent with both his recollection and his letter to Sen. Thompson. However, even assuming *arguendo* that the letter was literally accurate, Babbitt's parsing of his response to McCain, combined with his admissions concerning the letter, still show that he misled McCain. Babbitt admitted during this investigation that he was "oblique" in his letter to McCain.[851] Babbitt has conceded that he "chose" not to provide in the letter the fact that he invoked Ickes's name to Eckstein,[852] and has acknowledged that he

[848]OIC Sibbison Int. at 15.

^Babbitt has provided somewhat conflicting versions of his review of his letter to McCain. On the one hand, Babbitt has stated that he probably edited the letter before he signed it; yet elsewhere, Babbitt has denied that he made any edits to the letter before signing it.

[850]Babbitt G.J. Test, July 7, 1999, at 218-19,298-99.

[i5X]*Id.* at 290. According to Webster's II New College Dictionary, the term "oblique" is defined as "[i]ndirect or evasive," as well as "devious or dishonest." Webster's II New College Dictionary at 815 (Houghton Mifflin Co. 1995).

[852]Babbitt G.J. Test., July 7, 1999, at 220.

should have been "more forthcoming" about the Eckstein conversation with Sen. McCain;[853] that he had to be "more forthcoming" with the Senate Committee than he had been with McCain because the Eckstein conversation had "come back to haunt" him;[854] and that he had "to struggle" to reconcile his two letters before the Senate Committee so that it would not appear that he deliberately misled Sen. McCain.[855]

### 3) Babbitt's Subsequent Conduct Is Probative of Whether He Intended to Mislead McCain

Babbitt's subsequent conduct concerning his letter to McCain bears on the truthfulness of his testimony about the letter before the Senate Committee. This subsequent conduct includes his letter to Sen. Thompson and his apology to McCain on Oct. 13, 1997.

#### (a) Babbitt Wrote a Letter to Thompson in October 1997, Admitting That He Invoked Ickes's Name to Eckstein

In his letter to Sen. Thompson dated Oct. 10, 1997, Babbitt admitted that he invoked Ickes's name in his conversation with Eckstein. In contrast to the drafting process used with the letter to McCain, though, Babbitt decided to draft personally the key parts of the letter relating to the Eckstein exchange. *See* Section II.K.2., *supra.*

The question arises as to why Babbitt decided at that point in time to be "more forthcoming" with Sen. Thompson about the Eckstein conversation than he had been with Sen.

[853] M at 221.

[854] W. at 290.

[855] *Id.* at 292.

McCain. Babbitt has testified that he was aware that Eckstein's allegations about his meeting with Babbitt had become public through the leaking of Eckstein's deposition testimony. He therefore wanted to "get on the record my version of the Eckstein conversation,"[856] even though Thompson had not yet presented a single question to Babbitt.

Babbitt states that he had heightened concern with getting his version out in October 1997 because he was "sure" he would be called as a witness before Sen. Thompson's Committee and wanted to get his "version" out prior to his testimony.[857] Again, Babbitt acknowledged before the Grand Jury, he knew that the conversation with Eckstein "had come back to haunt him," and that this time he had "to be more forthcoming … than [he] had been with Senator McCain."[858]

**(b) Babbitt Telephoned McCain and Apologized for Misleading Him**

On Oct. 12,1997, The Washington Post ran an AP story headlined, *Babbitt Admits Falsehood in Casino Bid.* The next day, Columbus Day, White House Chief of Staff Erskine Bowles called Babbitt at his office and requested that he come to Bowles's office at the White House. Babbitt went to the White House not long thereafter and had a short meeting with Bowles and White House Counsel Charles F.C. Ruff. Bowles told Babbitt that lying to a United States senator was unacceptable and serious business. Bowles also told Babbitt that he should call Sen. McCain to make amends.

[856] *Id.* at 228.

[857] M

[858] M at 290-91.

Shortly thereafter, Babbitt reached McCain by phone in Atlanta. McCain recalls that the substance of the call to McCain was that of an abject apology, wherein Babbitt stated, "John, I misled you and owe you an apology."[859] This is not an admission by Babbitt that he intentionally misled McCain. However, in neither McCain's nor Babbitt's account of the conversation does Babbitt tell McCain that he did not intend to mislead him. At a minimum, the apology to McCain acknowledges that the substance of the letter was misleading, and that McCain could reasonably feel that he had been deceived. In this context, Babbitt's failure to assert that any deception had been unintentional is telling.

**4)** Babbitt Had a Motive to Mislead McCain

In addition to the facts set forth above, Babbitt had a motive for misleading Sen. McCain in August 1996: to short-circuit any further investigation into what he has admitted was the embarrassing fact of his conversation with Eckstein. Moreover, Babbitt arguably had a motive to prevent a congressional inquiry into White House political activity on the eve of the 1996 general election. It was only when the inquiry came back to haunt Babbitt in connection with the Senate investigation a year later that Babbitt decided that he needed to be more forthcoming with the Senate Committee than he had been with McCain. And Babbitt continued to have a strong motive to dissemble about the letter to McCain, even when appearing before the Senate Committee. Babbitt acknowledged that he knew that if the Committee concluded that he lied to

[859] OIC McCain Int. at 4.

or deliberately misled Senator McCain, it would lend credence to the argument that he was trying to conceal something unsavory about the Hudson decision.[860]

**b. Babbitt's Testimony About His Letter to McCain Was Material to the Senate Committee on Governmental Affairs**

As noted above, perjury requires that the false statement made under oath be material to the proceeding in which the statement was provided. Babbitt's testimony concerning his intent in writing Sen. McCain was material to the Senate Committee. As discussed above in Section II.C.l.b., to be material, testimony need not have actually influenced, misled or hampered the proceeding,[861] and even may relate only to a subsidiary issue under consideration[862] or to an issue of credibility.[863] Materiality is at heart a factual issue for the jury. *See Gaudin,* 515 U.S. at 509.

The hearing in which Babbitt testified was intended in part to explore whether corrupt influence had affected the Hudson casino decision. A conclusion by the Committee that Babbitt had lied to McCain would support the view that he was hiding corruption in the Hudson decision.

[860]Babbitt does not deny (nor does he admit) that these concealment motives were at play at the time he signed his response to Sen. McCain. Twice, Babbitt passed up the opportunity to state under oath that he did not mislead McCain in order to stave off further investigation by McCain about the role of Ickes and the White House in the Hudson casino decision. Instead, when asked whether he knew at the time that admitting to having invoked Ickes's name would almost certainly lead to further investigation into Ickes's role, Babbitt simply stated that he had "no recollection of thinking that." Babbitt G.J. Test., July 7, 1999, at 220. When asked virtually the same question a few minutes later, Babbitt stated: "I can't tell you what was on my mind at that time, when I wrote that letter, specifically, I really can't." *Id.* at 231.

^*United States* v. *Harrison,* 671 F.2d 1159,1162 (8th Cir. 1982); *United States* v. *Brown,* 666 F.2d 1196,1200 (8th Cir. 1981); *United States* v. *Whimpey,* 531 F.2d 768, 770 (5th Cir. 1976); DOJ Manual at 9-1497.

*[62]*UnitedStates* v. *Percell,* 526 F.2d 189, 190 (9th Cir. 1975).

^*UnitedStates* v. *Nacrelli,* 543 F. Supp. 798, 800 (E.D. Pa. 1982).

The fact that no evidence has been uncovered to prove that Interior's denial of the Hudson casino application was corrupt does not mean that the Committee's inquiries about potential corruption, or into matters such as Babbitt's truthfulness with McCain, were immaterial to the Committee at that time. Materiality is assessed as of the time the potentially perjurious statement was made, not with the benefit of hindsight. That is the reason a "false statement can be material even if ultimately the conclusion of the tribunal would have been the same."[864]

It would have been significant to members of the Senate Committee to learn that Babbitt intended to mislead McCain, particularly if Babbitt had misled McCain in order to prevent further inquiry by McCain and the Indian Affairs Committee into the Hudson matter.[865] The effect of that testimony by Babbitt before the Senate Governmental Affairs Committee would itself have had the effect of influencing lines of inquiry and further investigation into Hudson. While this testimony appears to us to have been legally material, the actual importance of the testimony arguably is limited, which could considerably reduce the jury appeal of a prosecution. The basic facts - what Babbitt wrote to McCain, and what the truth really was about the Eckstein conversation - were before the Committee. It was clear that Babbitt had in fact made a misleading statement to McCain, and clear that his having done so raised questions about what had really occurred in connection with Hudson and whether Babbitt's revised account of his conversation with Eckstein, and his consistent denials of improper contact with Ickes, were in fact truthful. Whether Babbitt's retrospective characterization of his motives and mental state

[864] *DeZarn*, 157 F.3d at 1051.

[865] Babbitt's answers to McCain's questions determined the course of action the Committee on Indian Affairs took and were at heart of what McCain was trying to establish through his inquiry to Babbitt.

when writing to McCain were correct or not might be deemed by a jury to be of marginal importance; and such a jury might well resist finding such testimony material.

### c. There is Insufficient Evidence to Prove that Babbitt Possessed the Requisite Intent to Provide False Testimony with Respect to the McCain Letter

The law of perjury requires that the material false statement provided under oath be made with the willful intent to provide false testimony. The evidence is insufficient to prove beyond a reasonable doubt that Babbitt knowingly and intentionally provided false testimony to the Senate Committee when he denied that he intended to mislead Sen. McCain in his Aug. 30, 1996 letter.

Proof of Babbitt's intent to provide false testimony on this issue must be established, in part, by the same factors considered in evaluating whether his testimony was false on this issue - *i.e.,* the text of the letter itself, the circumstances of the drafting of the letter and his subsequent conduct and statements. Babbitt insisted in his testimony that his letter could and should be read as making literally true statements in response to what both Babbitt and senior Departmental staff said they perceived to be the central questions implicit in Senator McCain's letter to Babbitt: whether Babbitt and Ickes had communicated about the Hudson matter, and whether the Hudson decision had been corrupted. Babbitt insists he simply did not pay sufficient attention to the literal demands of McCain's letter concerning Eckstein. Such a position requires a strained interpretation of the two letters - particularly in the context of all the facts - but must be considered in assessing reasonable doubt as to Babbitt's intention both when he signed the letter to McCain and when he gave testimony before the Senate Committee concerning the letter.

Babbitt's conduct and testimony regarding the McCain letter also must be assessed against the dearth of evidence that the decision-making was actually influenced by the White House or DNC, and the absence of direct evidence that Ickes directed or told Babbitt to decide the Hudson matter in any particular way. This evidence could be used to show that Babbitt was not motivated to lie in the letter to McCain about the Ickes aspect of the Eckstein discussion, and instead was merely trying too hard to clarify what he did *not* say about Ickes to Eckstein. Babbitt could also point to the fact that he attached to his Aug. 30, 1996, letter a memorandum from Sibbison that actually detailed her contacts with Ickes's staff (albeit incompletely) - evidence that Babbitt maintains shows he had no intent to mislead McCain or withhold Ickes-related information from him.

In addition, Babbitt could argue that his letter to McCain was literally true which, while not a complete defense to the accusation that he intended for the letter to be misleading, would support Babbitt's claim that he was unwittingly misleading with McCain, and nothing more. Finally, Babbitt's insistence in his recollection of the fine details of the Eckstein discussion, if credited by the jury as an honest and reasonable recollection (by a person credited even by adverse witnesses as having a reputation for good character and truthfulness) could contribute to a finding that he did not intend to mislead McCain with his partial recitation of that recollection.

Any damage caused by Babbitt's misleading letter to McCain was done when Babbitt initially misled Sen. McCain in his August 1996 letter. By misleading McCain, Babbitt effectively dissuaded the Senator and his committee from further investigating the matter of White House or DNC interference in the Interior decision at a time when memories would have been fresher and records more accessible than they were a year later when a different committee

looked into the matter. Such conduct by a Cabinet officer - if intentional - may be offensive to fundamental notions of accountability in our democracy, but was not criminal at the time.

In the end, the totality of the evidence as discussed above led to the conclusion that a jury would be unlikely to conclude guilt beyond a reasonable doubt on this potential perjury charge.

# APPENDIX

MICHAEL BROZEK

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FOR DISTRICT OF COLUMBIA CIRCUIT

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**March 14, 2000**

**UNITED STATES COURT OF APPEALS**
**For the District of Columbia Circuit**

FILED **MAR 2 0 £000**

**SPECIAL DIVISION**

***PRIVILEGED AND CONFIDENTIAL***

**United States Court of Appeals**
**Attn: Marilyn Sargent, Chief Deputy Clerk**
**District o Columbia Circuit**
**Washington, D.C. 20001-2866**

**RE: *In Re: Bruce Edward Babbitt***
**Division No. 98-1**

**Dear Ms. Sargent:**

**On behalf of Michael Brozek, we wish to make the following notations for the appendix to the Babbitt Report.**

1. **Page 281 - Mr. Brozek is still the lobbyist for the St. Croix Meadows Dog Track.**

2. **Page 288 - On July 14, 1995, Goff reached Brozek by cellular phone at a restaurant in Madison, Wisconsin. Goff reported to Brozek the conversation with Babbitt as described by Eckstein to Goff. Goff attributed to Babbitt a claim that Ickes had ordered the decision out that day, and that Babbitt had commented on the opponents having made almost a half million dollars in campaign contributions to the Democrats. Brozek, upon hearing Goff reporting that campaign contributions were involved, gave the telephone to his attorney, Anthony Varda, who was present in the restaurant at the time. Goff repeated the story to Attorney Varda. Immediately after completion of the phone call, a contemporaneous discussion ensued at the restaurant among Attorney Varda, Madison Attorney Bruce Harms, and Michael Brozek as to the significance of Babbitt's comments and the specific reference to substantial campaign donations.**

DEWITT
ROSS&STEVENS.
LAW 9IFTH

United States Court of Appeals
March 14, 2000
Page 2

I remain,

Very truly yours,

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DeWitt Rctes & StEVENS s.c.

inthony R. Varda

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# JOAIMIM JOIMES

*JoAnn Jones*

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April 17, 2000

**FTI.ED UNDER SEAL**

**Marilyn Sargent, Chief Deputy Clerk**
**United States Court of Appeals**
**District of Columbia Circuit**
**333 Constitution Avenue, NW, Room 5423**
**Washington, D.C. 20001-2866**

**Dear Ms. Sargent:**

**Pursuant to your letter of March 3, 2000, I am sending this letter after having reviewed the Report insofar as it relates to my client, JoAnn Jones, and after consultation with her.**

**On page 315, the Report states that consistent with Patrick O'Connor's advice, the Indian Tribes sent "thank you" letters to several individuals including President Clinton. The Report then states as follows:**

> **"Ho-Chunk President JoAnn Jones wrote to President Clinton: 'Thank you for your role in the decision to deny the request to approve the Hudson Casino."'**

**The unequivocal and unattributed statement in the Report that Ms. Jones wrote the letter is incorrect. She did not write it and we ask that the Report be corrected before its public release.**

**At the time she was interviewed, Ms. Jones indicated that the letter was not written by her. She stated that the signature was not hers and offered to provide handwriting samples so that her signature could be compared with the signature that appeared on the letter to verify her denial. There was no follow-up to her offer by the OIC. In addition, the sentence immediately following the quoted one is an incomplete sentence. It states: "Approval of this site would have served to increase the greatly increase the". Ms. Jones would not have written such a letter to anyone, certainly not to the President of the United States. She has been a member of the Wisconsin Bar since 1987, was an Assistant Corporation Counsel for Sauk County for four years, and Tribal Chair for Ho-Chunk for four years after that. All of the above information was brought to the attention of attorneys in the OIC.**

**In this context, I was astonished to read in the Report that authorship of the incoherent letter was nevertheless attributed to Ms. Jones. Such attribution is not correct and does a disservice to President Clinton, the Ho-Chunk, Ms. Jones and the reading public.**

**Thank you very much for the opportunity to respond to the assertion in the Report.**

Sincerely,

**LA FOLLETTE GODFREY & KAHN**

**Frank M. Tuerkheimer**

**FMT:jls**
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KERN

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**May 12, 2000**

**By Hand**

**Mark J. Langer**
**Clerk of the Court**
**United States Court of Appeals for the**
**District of Columbia Circuit**
**United States Courthouse**
**333 Constitution Avenue, N.W.**
**Fifth Floor**
**Washington, D.C. 20001**

**Re: Final Report of the Office of Independent Counsel Carol Elder Bruce (In Re: Bruce Edward Babbitt. Division No. 98-1)**

**Dear Mr. Langer:**

**Pursuant to the Order that was filed with your office on March 3, 2000, in the above-captioned matter by the Division for the Purpose of Appointing Independent Counsels (hereafter the "Special Division"), I have reviewed those portions of the Independent Counsel's Final Report (the "Report") that have been deemed "relevant" to my client, Gerald E. Sikorski, Esquire. On the basis of my review, and consistent with the purpose of 28 U.S.C. § 594(h)(2), I request that the following comments to, and corrections of, the Report be incorporated before the Special Division releases the Report. Alternatively, I ask that the following comments to, and corrections of, the Report be included in the Appendix to the Report.**

**Mr. Sikorski is presently a partner in the law firm of Holland & Knight.[1] Since 1992, Mr. Sikorski has been engaged by the Mille Lacs Band of Chippewa Indians (hereafter the "Mille Lacs" or the "Band") to provide legal representation on a host of issues, among them housing, taxes, Bureau of Indian Affairs ("BIA") funding, land-to-trust, and Indian gaming. Mr. Sikorski has also been retained by the Band to lobby the Executive and Legislative Branches on some of the same issues as well as other matters affecting the Band.**

[1] **Mr. Sikorski received his law degree from the University of Minnesota in 1973 and is a member of the bar of both the Minnesota and District of Columbia courts. After Mr. Sikorski left Congress in 1992, he joined the then-law firm of Schatz, Paquin, Lockridge, Grindal & Holstein as a partner. Mr. Sikorski practiced at the Schatz, Paquin law firm in its Washington, D.C. offices from March 1993 until December 1996. In January 1997, Mr. Sikorski joined Holland & Knight, where he is currently the chairman of that firm's Public Law Department.**

With regard to the Hudson casino proposal, Mr. Sikorski's primary, but by no means exclusive, role on behalf of the Mille Lacs was to contact representatives of the Interior Department and interested Members of Congress in order to educate them on the compelling policy issues weighing against the proposed request to introduce gaming at the Hudson dog track in Wisconsin. Throughout these lobbying endeavors, however, Mr. Sikorski remained, first and foremost, legal counsel to the Mille Lacs.

At pages 147 and 150 to 151, and in connection with his role concerning the Hudson casino proposal, the Report correctly describes Mr. Sikorski as counsel to, and lobbyist for, the Band.[2] In a number of earlier passages, however, the Report inaccurately describes Mr. Sikorski as a lobbyist, and no more, for the Mille Lacs.[3] In doing so, the Report leaves the impression that Mr. Sikorski is, by profession, exclusively a lobbyist — which he is not — and that the Band retains him for no purpose other than lobbying ~ which it does not. As a matter of consistency, completeness, and accuracy, the description of Mr. Sikorski as counsel to, and lobbyist for, the Mille Lacs is one that should be used throughout the Report and not simply at selected pages.

Out of fairness to Mr. Sikorski, and in deference to his professional standing as a practicing attorney and member of the bar of both the Minnesota and District of Columbia courts, I request that the Report be corrected in a fashion consistent with the foregoing comments. If not, then, at a minimum, this letter should be included in the Appendix to the Report.

Sincerely,

John W.Kern

cc: Office of the Independent Counsel Carol Elder Bruce

[2] Specifically, at page 147, footnote 230, the Report refers to Mr. Sikorski as the Mille Lacs "counsel and lobbyist"; at pages 150 to 151, the Report refers to him as "lawyer-lobbyist" for the Mille Lacs.

[3] See pages 16, fh. 20; 56; 74-75, fn.116; 111; 123; and 143.

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY,
STANLEY R. CROOKS, GLYNN A. CROOKS, SUSAN TOTENHAGEN,
PAUL KEMPF, KURT V. BLUEDOG, AND WILLIAM J. HARDACKER

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

**Division for the Purpose of**
**Appointing Independent Counsels**

**Ethics in Government Act of 1978, As Amended**

**In re: Bruce Edward Babbitt** **Division No. 98-1**

**Before:** **SENTELLE,** *Presiding Judge,* **BUTZNER and Fay,** *Senior Circuit Judges*

**RESPONSE OF SHAKOPEE MDEWAKANTON SIOUX, STANLEY R. CROOKS, GLYNN A. CROOKS, SUSAN TOTENHAGEN, PAUL KEMPF, KURT V. BLUEDOG AND WILLIAM J. HARDACKER TO THE FINAL REPORT OF THE INDEPENDENT COUNSEL**

**On February 11, 1998, the Attorney General of the United States Janet Reno, applied to this Court pursuant to 28 U.SG. § 592(c)(1), the Independent Counsel Reauthorization Act of 1994, for the appointment of an Independent Counsel to investigate whether Bruce E. Babbitt, Secretary of the Interior, committed a violation of federal criminal law in connection with his sworn testimony on October 30, 1997, before the Senate Governmental Affairs Committee, and to determine whether prosecution was warranted. On March 19, 1998, an Order of this Court was filed appointing Carol Elder Bruce, Esquire, as Independent Counsel to make such an investigation.**

**In connection with Ms. Bruce's investigation, on June 8, 1998, a Subpoena To Testify Before Grand Jury was served on the Custodian of Records for the Shakopee Mdewakanton Dakota Community, specifying a return date of June 30, 1998. The June 30, 1998 subpoena focused on documents relating to political contributions of the Shakopee Mdewakanton Sioux (Dakota) Community ("SMSC" or "Tribe") and to**

issues surrounding the Hudson Dog Track proposal. The SMSC is a federally recognized Indian tribe which retains those aspects of its inherent sovereignty not explicitly divested by Congress, including the right of sovereign immunity to legal process. However, in the spirit of cooperation with the Independent Counsel, SMSC determined that it would respond to the subpoena.

In response to the June 8, 1998 subpoena, SMSC and its lawyers searched the offices of the SMSC, the offices of counsel for the SMSC during relevant time periods and the offices of the tribal gaming operation, Little Six, Inc. ("LSI"), for documents. SMSC produced nearly 10,000 pages of non-privileged documents responsive to the subpoena and provided a detailed privilege log on June 30, 1998. On August 19, 1998, SMSC produced some additional responsive non-privileged documents which were discovered after the June 30th production.

On or about November 23, 1998, counsel for SMSC Kurt V. BlueDog received a Subpoena To Testify Before Grand Jury (dated November 20, 1998) specifying a return date of December 4, 1998, seeking the records of Kurt V. BlueDog and Mr. BlueDog's law firm BlueDog, Olson & Small P.L.L.P., which acts as general counsel for SMSC. In response to the June 8, 1998 subpoena on SMSC, the files of Mr. BlueDog and his firm were searched and some 550 pages of documents were produced on June 30, 1998. In response to the November 20, 1998 subpoenas these documents were identified and an additional 104 documents were produced along with substantive information concerning phone numbers and e-mail accounts.

**On February 5, 1999, a Subpoena To Testify Before Grand Jury was issued to the SMSC with a return date of February 26, 1999. This February 5, 1999 subpoena focused on SMSC membership issues. On March 10, 1999, counsel for SMSC again cooperated with the Independent Counsel and produced over 37,000 pages of non-privileged documents and a privilege log in response to the February 5, 1999 subpoena.**

**In addition to the documents produced by SMSC, counsel provided an explanation of matters related to the Tribe's actions concerning the process or criteria for membership within the Tribe. This explanation included the following information: The SMSC government, and its officials and agents, are all bound to comply with the terms of the Tribe's Constitution and Bylaws. Membership within the Tribe is controlled by Article II of the tribal Constitution. Section 2 of Article II requires that enactment of tribal ordinances and resolutions governing future membership, adoptions and loss of membership are subject to the approval of the Secretary of the Interior. SMSC, acting through its legislative body, the General Council, did on several occasions during the period 1995 and 1996 take actions concerning the Tribe. On each of those occasions the Secretary of the Interior or his designee, specifically declined to approve the measure.**

**The fundamental tribal law controlling tribal membership is the Enrollment Ordinance. The Tribe's General Council, the legislative branch of the Tribe, took action to amend it by enacting (1) Ordinance No. 12-28-94-005 (which was initially approved by the Department of Interior on February 17, 1995, and then the Department's approval was rescinded on May 17, 1995); (2) Ordinance No. 2-13-96-**

**001 (which was disapproved by the Department on March 1, 1996); and (3) Ordinance No. 3-12-96-006 (which was likewise disapproved by the Department in March of 1996.)**

**Additionally, SMSC took formal action on April 17, 1995, to amend its Constitution and Bylaws. Such an amendment under applicable federal and tribal law requires approval by the Department of Interior in a process referred to as a "Secretarial Election." The amendment would have, among other things, addressed (1) membership criteria for the Tribe and (2) the Department of Interior's approval requirement over some General Council enactments. The Secretarial Election was held in April of 1995, and the vote was in favor of adopting the amendments. However, the Assistant Secretary of the Interior for Indian Affairs, by letter dated June 2, 1995, declined to approve the Constitutional amendment. SMSC thereafter filed suit against the Department on this matter, but both the U.S. District Court and the Eighth Circuit Court of Appeals upheld the authority of the Department to disapprove the amendments.**

**One branch of the Department of Interior, the Interior Board of Indian Appeals (IBIA), did in a February 8, 1995 decision, rule in favor of SMSC. In that instance the IBIA overturned the BIA Area Director's decision to disapprove the Tribe's Adoption Ordinance 11-30-93. However, the Assistant Secretary then overturned that ruling by letter dated February 2, 1999.**

**This history clearly showed that SMSC has had no favorable treatment regarding membership issues from the Department of Interior.**

With regard to land issues, the SMSC on September 2, 1997 petitioned the government to transfer 593 acres of fee land located adjacent to the Tribe's reservation into reservation trust status. The Department by letter dated October 7, 1998 refused to do so. Therefore, the Department likewise provided no favorable treatment to SMSC on land issues.

In March and April 1999 counsel for SMSC cooperated with the Independent Counsel's office to schedule the interviews of the three SMSC Business Council members and approximately five of the various current and former employees of SMSC. Assurance from the Independent Counsel's office was received that the individuals who were sought to be interviewed were viewed as witnesses and not as subjects or targets of the investigation, and those interviews were scheduled and took place in both Washington, D.C, and Minneapolis, Minnesota.

On April 1, 1999, a subpoena was issued to Stanley R. Crooks, Chairman of SMSC, to testify before the Grand Jury on April 21, 1999. On April 22, 1999, a subpoena was issued to Kurt V. BlueDog, to testify before the Grand Jury on May 19, 1999. Both gentlemen did testify before the Grand Jury. Mr. BlueDog testified on three occasions.

In May and June 1999, counsel for SMSC cooperated with the Independent Counsel's office to respond to inquiries about documents the Independent Counsel's office felt needed explanation or supplementation and to schedule additional interviews of SMSC former employees.

On October 13, 1999, counsel for SMSC received correspondence from the Independent Counsel's office stating that the Office of Independent Counsel had

decided not to prosecute Mr. Babbitt or anyone else in connection with the Hudson casino application and decision.

On March 3, 2000, this Court issued an Order under seal stating that Ms. Bruce had delivered her Final Report, and authorizing Stanley R. Crooks, Glynn A. Crooks, Susan Totenhagen, Paul Kempf, Kurt V. BlueDog and William J. Hardacker or their attorneys to review the Final Report and submit comments or factual information for possible inclusion in the appendix to the Report by June 5, 2000.

Counsel for SMSC and for the above-named individuals have reviewed pages of the Report determined by the Independent Counsel's office to relate to our clients. On behalf of SMSC and these individuals, we oppose the unsealing of the Final Report or any dissemination of it to anyone. The final results of the investigation show its ill-conceived nature and purely political motivation. To allow the Report to become public is likely to lead to the publication of inflammatory out-of-context statements with no consideration of the ultimate determination. As the report indicates:

> A full review of the evidence, however, indicates that neither Babbitt nor any government official at Interior or the White House entered into any sort of specific and corrupt agreement to influence the outcome of the Hudson casino application in return for campaign contributions to the DNC. The evidence is therefore insufficient to prove that the process and decision in this case were criminally corrupted by the promise of campaign contributions, or any illicit consideration.

Final Report at 441.

With regard specifically to the SMSC no evidence of any wrongdoing was uncovered, and in fact SMSC did nothing wrong. To the extent that political

contributions from the Tribe increased above previous levels, this was solely due to the general election cycle and the availability of funds to effectively participate in the political process for the first time in tribal history. As the report states, "In any event, no testimonial or documentary evidence indicates that the tribe's decisions to make political contributions beginning in 1996 were linked to Interior's denial of the Hudson application in 1995." Final Report at 342.

While the general conclusion of the Tribe's honorable participation in the political process is bom out by the findings counsel was able to review in the report, SMSC disagrees with much that is in the report. SMSC did nothing more than to exercise its Constitutional right to petition the government. It is unfortunate that SMSC was forced to spend tens of thousands of dollars in attorneys' fees and risk damage to its good name and reputation and those of its employees because for the first time SMSC tried to participate in the political process. Investigations of this sort simply chill the right of all Native Americans to participate in the political process, a right that this country should instead encourage.

As previously stated, SMSC opposes publication of the Final Report, but if the report is to be unsealed, SMSC demands that this statement be included in the appendix.

Dated 2000

FAEGRE & BENSON LLP

nSi,*) notice

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THE HONORABLE
BRUCE EDWARD BABBITT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



Division for the Purpose of
Appointing Independent Counsels

Special Division

IN RE: Bruce Edward Babbitt

Division No. 98-1

**RESPONSE OF BRUCE BABBITT**
**TO THE FINAL REPORT OF**
**INDEPENDENT COUNSEL CAROL ELDER BRUCE**

**As counsel to Secretary of the Interior Bruce Babbitt and on his behalf, we respectfully submit the following response to Independent Counsel Carol Elder Bruce's Final Report dated December 30, 1999, in *In re Bruce Edward Babbitt,* Division No. 98-1 ("Report"). We make this submission pursuant to the provisions of the Independent Counsel Statute, specifically, 28 U.S.C. § 594(h)(2).**

**The Independent Counsel's investigation was searching, objective and professional. The Report, for the most part, reflects those qualities. Secretary Babbitt of course agrees with the Report's ultimate conclusions that no prosecutions are warranted. His interest in the Report's analysis and its wording as they affect his reputation, however, is extremely high. It is from that perspective that we write to address the Report's conclusions, in particular the Report's analysis of Secretary Babbitt's testimony about his August 30, 1996, letter to Senator John McCain, in which, in our view, the Report fails to maintain its otherwise high standards of objectivity and thoroughness.**

**1. The Department's Hudson Decision**

**The Report found "no corruption" in connection with the Department of Interior's denial of an application by three Indian tribes to own and operate an off reservation casino at an existing dog track. (Report at 422.) After noting that the evidence showed that Secretary Babbitt "seems to have had no direct involvement in the decision," *{id* at 439), and played no "meaningful role" in making it, *(id.* at 437-38), the Report states categorically:**

> **A full review of the evidence, however, indicates that neither Bruce Babbitt nor any government official at Interior or the White House entered into any sort of specific and corrupt agreement to influence the outcome of the Hudson casino application in return for campaign contributions to the DNC. The evidence is therefore insufficient to prove that the process and decision in this case were criminally corrupted by the promise of campaign contributions, or any other illicit consideration.**

***(Id.* at 441.)**

**That conclusion by the Independent Counsel, based on her exhaustive twenty-one month investigation, vindicates the probity of the Hudson decision and Secretary Babbitt's unwavering defense of the decision-making process. Indeed, his rock-solid belief in the integrity of the decision, and of the men and women of the Department of Interior who made it, has been at the heart of every statement Secretary Babbitt has made on the Hudson casino issue, including his letters to Senators John McCain and Fred Thompson, his testimony before committees of both Houses of Congress, his statements to the Independent Counsel and her staff and his testimony before the grand jury. As Secretary Babbitt has said repeatedly throughout this long ordeal, the Hudson casino decision was "the right decision made in the right way and for the right reasons." (Babbitt Testimony Before the House Committee on Government Reform and Oversight,**

**January 29, 1998 (hereinafter "Babbitt House Test.") at 18; *see also* Babbitt Grand Jury Testimony, July 7, 1999 (hereinafter "Babbitt Grand Jury Test") at 267:15-22.)**

**2. The Babbitt-Eckstein Conversation of July 14,1995**

**The Report does not find that Secretary Babbitt's testimony concerning his meeting on July 14, 1995, with Paul Eckstein was knowingly false. It does, however, credit Eckstein's testimony before the Senate Governmental Affairs Committee (the "Thompson Committee") about the words Secretary Babbitt used in the meeting, namely, that Secretary Babbitt told Eckstein that White House Deputy Chief of Staff Harold Ickes had "directed" him to issue the Hudson decision "that day," (Report at 452), and it does not credit Secretary Babbitt's denial that he used those words or his recollection that he "probably" told Eckstein that Ickes "wanted" or "expected" a decision to be made "promptly" *(id.* at 456).**

**The Report concludes: "There is insufficient evidence to prove that Babbitt possessed the requisite intent to provide false testimony." *(Id.* at 464.) That conclusion is justified for several reasons.**

**First, as the Report notes, Secretary Babbitt does not challenge the good faith of Paul Eckstein, *(id.* at 266, 286), and readily acknowledges that Eckstein's recollection of some of the words used in a conversation that occurred years earlier may be accurate. *(Id.* at 452 n.796.)**

**Second, the gossamer distinctions between whether Ickes "expected" or "directed" a decision "promptly" or "that day," *(id.* at 448) — in light of the undisputed facts that Mr. Ickes never communicated with Secretary Babbitt with respect to the Hudson casino decision and that the Secretary made up the Ickes "white lie" as a way of terminating the Eckstein conversation *(id.* at 448, 455) — simply would not bear the weight of a criminal prosecution.**

Third, although the Report concludes that Secretary Babbitt's testimony satisfies the technical requirement of materiality as an element of perjury *(id.* at 462), it recognizes that a fact finder might well conclude otherwise, particularly in view of the Report's conclusion that the Hudson decision — the propriety of which was the reason for Secretary Babbitt's testimony in the first place ~ was not corrupt *(id.* at 464).''

Finally, as the Report points out, Eckstein himself attests to the good character and reputation for truthfulness of Bruce Babbitt. *(Id.* at 424.)

3. The August 30, 1996, Letter from Secretary Babbitt to Senator John McCain

The Independent Counsel elected to address an issue neither specifically referred to her by the Attorney General nor suggested by the Attorney General as a possible avenue of inquiry, viz, whether Secretary Babbitt's denials to the Thompson Committee that he sought to mislead Senator John McCain in his letter to McCain of August 30, 1996, were truthful. The Report concludes that there was "insufficient evidence to prove that Babbitt possessed the requisite intent to provide false testimony with respect to the McCain letter." (Report at 482.) That is certainly the correct conclusion. But because the Report expresses skepticism about Secretary Babbitt's candor on the subject of the McCain letter, and because, in our view, that skepticism is based on a labored view of the evidence that fails to place some of Secretary Babbitt's testimony in context, we write to provide a more complete record.

^ As the Report makes clear, Paul Eckstein does not allege that Secretary Babbitt attributed to Ickes any views on the merits of the Hudson decision. (Report at 454.) Similarly, Eckstein explicitly notes that some comments he attributed to Secretary Babbitt about substantial Indian contributions to the Democratic National Committee (a subject Secretary Babbitt does not recall discussing with Eckstein) were of a general character and were not linked to the Hudson decision. *(Id.)*

**Following an article in the *Wall Street Journal* reporting on an affidavit filed by Paul Eckstein, Senator McCain wrote to Secretary Babbitt on July 19, 1996, asking, inter alia:**

> **On or about July 14, 1995 was a telephone call made by Ickes or by someone on his behalf to you or someone on your behalf on this issue?**
>
> **If so, did Ickes or his delegate convey to you a message that the Interior Department should not delay release of its decision to favor O'Connor's client tribes on this matter?**
>
> **Paul Eckstein, the lobbyist for Indian tribes on the other side of the dispute, has sworn in an affidavit that he met with you on July 14, 1995 and that you told Eckstein that Ickes had called you and told you the decision in favor of Mr. O'Connor's client tribes had to be issued that day without delay? Is this true?**

**(Report at 357.)**

**In response, Secretary Babbitt replied on August 30, 1996:**

> **I must regretfully dispute Mr. Eckstein's assertion that I told him that Mr. Ickes instructed me to issue a decision in this matter without delay. I never discussed the matter with Mr. Ickes; he never gave me any instructions as to what this Department's decision should be, nor when it should be made.**

***(Id.* at 467.)**

**Secretary Babbitt has consistently testified that in responding to Senator McCain he was addressing what he understood to be the heart of Senator McCain's inquiry, namely whether he had been contacted or pressured by Ickes on the Hudson matter, and that he did not intend to mislead McCain. (Babbitt Testimony Before the Senate Committee on Government Affairs, October 30, 1997 (hereinafter "Babbitt Thompson Comm. Test.") at 137, 182-83; Babbitt Grand**

Jury Test, at 212:22-214:13; 220:3-222:11; 229:16-231:3.)[2/]

A year later, immediately prior to his appearance before the Thompson Committee, Secretary Babbitt wrote Senator Thompson a more detailed description of his conversation with Eckstein in which he reiterated that he had received no instruction or contact from Ickes concerning the Hudson casino application but acknowledged that he had invoked Ickes' name "as a means of terminating the conversation." (Report at 373.)

The Report is skeptical of Secretary Babbitt's denial of an intent to mislead McCain. It *theorizes* that Secretary Babbitt (a) intentionally omitted his mention of Ickes to Eckstein in his August 30 letter to McCain in order avoid further inquiry into the possibility of high level White House pressure with respect to Hudson, (b) acknowledged mentioning Ickes to Eckstein in his letter to Senator Thompson only when he knew he would soon be under oath and (c) unpersuasively maintained in his testimony before the Thompson Committee the "strained" position that the two letters were consistent in order to avoid admitting that he had misled McCain and thereby escalate suspicions that there had been improper influence brought to bear concerning Hudson.*'

[1] As the Report itself notes, McCain's September 16, 1996, response to Babbitt's August 30 letter shows that the essential focus of his inquiry was allegations of improper influence by the DNC and the White House. (Report at 369.) Furthermore, as the Report also notes, Secretary Babbitt's August 30 letter attached a memorandum by a staff member disclosing the few status contacts that had occurred between the Department of Interior and Harold Ickes' office regarding Hudson (except for approximately two contacts she had forgotten). *(Id.* at 364.) These facts support Secretary Babbitt's belief that Senator McCain's interest was substantive, i.e. whether there had been inappropriate pressure from Ickes, and corroborate his assertions that he was not attempting to dissemble. (Babbitt Grand Jury Test, at 212:22-214:13; 220:3-221:11.)

[1] The Report states that Senator McCain was in fact misled by the letter. In hindsight, Secretary Babbitt acknowledges that reading the letter as a complete denial of the

**To support its theory, the Report relies heavily on testimony given by Secretary Babbitt before the Grand Jury. Regrettably, however, the Report places a sinister connotation on testimony that, read in context, is benign. And, in one important respect, the Report ignores important testimony that undercuts its theory.**

**Example: The Report states that:**

> **Babbitt has conceded that he "chose" not to provide in the [McCain] letter the fact that he invoked Ickes's name to Eckstein, and has acknowledged that he should have been "more forthcoming" about the Eckstein conversation with Sen. McCain; that he had to be "more forthcoming" with the Senate Committee than he had been with McCain because the Eckstein conversation had "come back to haunt" him; and that he had "to struggle" to reconcile his two letters before the Senate Committee so that it would not appear that he deliberately misled Sen. McCain.**

**(Report at 476-77 (citing Babbitt Grand Jury Test, at 220, 221, 290, 292).)**

**The full context of the testimony from which the quoted words are drawn show that they do not constitute the concessions by Secretary Babbitt suggested by the Report:**

> **Q. You don't dispute that it is true that you invoked Harold Ickes' name in the conversation with Paul Eckstein?**
> **A. That's correct.**
> **Q. But you chose not to say that in the August 30th letter?**
> **A. That's correct.**
> **Q. Mr. Babbitt, isn't it true that if you did say to Senator McCain on August 30th that you used Harold Ickes's name in response to - well, in the meeting with Paul Eckstein, that you knew that it would almost certainly lead to further inquiry by somebody as to what Harold Ickes' involvement had been in this transaction?**
> **A. *I have no recollection of thinking that.* You know what I really thought, what I believe I thought when I was drafting this letter - and again, this goes to this whole issue - that this letter come floating in. I haven't thought about this conversation, you know, since Eckstein walked out my door. It didn't, in my mind, relate to any external events at**

**entire Eckstein allegation, including the fact that Ickes' name was mentioned, is not unreasonable and is a "permissible inference." (Babbitt Grand Jury Test, at 222:8.)**

**all. I had made an excuse, and I'm looking through this stuff, reading this letter and *I'm saying, "Look, what's on John McCain's mind is, Were you talking to the While House,"' and the answer straight up was no. And I moved past this Eckstein stuff awful quickly because it had no relevance in my mind.***

**Q. Given that Senator McCain had specifically said in two places in his letter to you that, "These events are troubling to me and, at a minimum, contribute to an appearance of impropriety," wouldn't you - would you agree with me that further disclosures at this time about your invocation of Harold Ickes' name might lend credence to his claim of an appearance of troubling impropriety?**

**A. *No, I don't think so. In retrospect, I should have been more forthcoming about all of this.* At the time, I don't -1 can't recreate what was on my mind when I signed this letter. But to the extent that you're asking me to do so, / *would say this, to me, is an extraneous issue and it's not worth, you know, sort of elaborating on and, you know, working this all out by way of explanation.***

**(Babbitt Grand Jury Test, at 220:3-221:21 (emphasis added).)**

**Q. So when you had to respond to the Thompson committee inquiry in September 1997 you knew that the issue had come back to haunt you, didn't you?**

**A. Yes.**

**Q. And that this time you needed to be more forthcoming, as you said earlier, with the committee than you had been with Senator McCain; is that correct?**

**A. Yes.**

**Q. And so I am I [sic] correct that you knew that you could not testify that Eckstein was a liar who had fabricated the entire account about the July 14 meeting, right?**

**A. Absolutely.**

**Q. You knew, did you not, that such an allegation wasn't true, and no [sic] incidently would only heighten the committee concern about the underlying Hudson decision; is that correct? If you walked in there and you accused Mr. Eckstein of fabricating the whole account, then, especially given his reputation in the community -**

**A. Oh, I would never dream of doing that. That's my bottom line.**

*Q.* **And apart from not dreaming of doing it, you had to know too what the impact of such a thing would be.**

*A.* **Yeah. Again, I'm not sure that was exactly on my mind, but sure, I had to know. Yeah.**

**Q. All right. And you also knew, however, didn't you, that if the committee concluded that you, Mr. Babbitt, had lied to or deliberately misled Senator McCain, it would lend credence to the argument that you were trying to conceal something truly awful about the Hudson decision.**

**A. Yes. Yes.**

**Q. Accordingly, Mr. Secretary, in September 1997 and later in January of 1998, when you appeared before these two committees, you struggled, did you not, for a way to reconcile your McCain and Thompson letters so that it would not appear that you had**

**deliberately misled Senator McCain?**

**A. Sure.**

**Q. And at the same time you struggled for a way to contradict or simply deny recalling parts of Mr. Eckstein's version of the July 14 meeting just enough to take the political influence inference out of the Hudson decision without appearing to call Mr. Eckstein a liar. Is that a fair statement?**

**A. Well, I thought you were leading me toward exoneration. Now I think you're leading me toward an indictment.**

**Q. I'm just asking you what was in your mind.**

**A. No. I'm just kidding. There's a little more in that than I'm certain that 1 want to- well, let's do it again.**

**Q. All right. At the same time, in September 1997 and then again in January of 1998, when you were preparing to appear before the two committees, didn't you struggle for a way to both contradict or simply deny recalling parts of Mr. Eckstein's version of the July 14 meeting just enough to take the political influence inference out of the Hudson decision but without appearing to call Mr. Eckstein a liar?**

**A. *No. I don7 think so,* because I really don't have a recollection of this conversation other than the kind of barest kind of essentials about the Ickes interchange, *and I wasn 7 struggling for anything other than to, as best as I could, say what I thought I said in the context of being pretty certain that I didn 7 say this kind of highly specific deal, Ickes calling me.* Now if that's what you're getting at, that's kind of my sense. But I'm not struggling to suppress a discussion, because this discussion just kind of went by me just like that. And I had no reason to even think about the discussion for at least six months. *So I think we 're a little bit apart there.***

**(Babbitt Grand Jury Test, at 290:18-294:1 (emphasis added).)**

**Read in context, it is apparent that Secretary Babbitt's agreement with the prosecutor's use of the words and phrases "chose," "come back to haunt," and "struggle," and his retrospective recognition of the need to be more "forthcoming," were in no way intended to acknowledge attempting to mislead McCain. The Thompson Committee hearings, which Secretary Babbitt called a "witch hunt," (Babbitt Grand Jury Test, at 223:17), were openly and politically partisan. The Secretary's grand jury testimony was a frank recognition of the predicament in which he found himself as a witness testifying before a politically hostile Congressional committee whose Republican majority clearly suspected him of deceiving**

McCain in order to cover up a corrupt decision. It was in that political sense — and only in that political sense — that the McCain letter "haunted," the Secretary "struggled," and the need to be more "forthcoming" manifested itself."

Example: The Report relies on Secretary Babbitt's statement that he was being "oblique" in his letter to McCain as evidence that he was intentionally misleading McCain. (Report at 476.) It bolsters its conclusion by reciting from Webster's II New College Dictionary, which defines "oblique" as "indirect or evasive" or "devious or dishonest." The full exchange in the grand jury, however, is as follows:

> Q. And it's the same embarrassment, was it not, that caused you to sign off on the admittedly misleading letter to Senator McCain a year earlier? Am I correct? So that when you signed the letter to Senator McCain in 1996 you were hoping that your response would make the whole issue go away? Is that a fair statement?
> A. *I'm hesitating on that because, as J testified earlier, I think a more accurate rendition of that letter was I was really focused on the Ickes thing, on the underlying thing,* and I'm not going to quarrel with you on that. I think that's a fair conclusion, but I'm not sure it's what was principally on my mind. That's all.
> Q. Well, wouldn't it be an honest statement, though, that it was part in your mind, that you were hoping by being as succinct -
> A. Oblique.
> Q. - and oblique that you, by not addressing the whole conversation you had with Mr. Eckstein, that maybe Senator McCain would not pursue this any further and it would all go away?
>
> A. I would not contest that conclusion.

(Babbitt Grand Jury Test, at 289:19-290:17 (emphasis added).)

* With respect to his "more forthcoming" letter to Senator Thompson, for example, Secretary Babbitt testified in the Grand Jury:

> A. Well, by this time, I'm awakening to the fact that this is a big deal and that the Eckstein - it's obvious that he had had his deposition taken, and it didn't take any dummy to see what was coming. So I thought I ought to get on the record my version of the Eckstein conversation.

(Babbitt Grand Jury Test, at 228:3-8.)

**Once again it is clear from the immediate context that Secretary Babbitt's testimony is by no means an admission of an intention to deceive. He initially refuses to accept the insinuation of the questioner, suggesting that it would be "more accurate" to say that he was focused on "the Ickes thing, on the underlying thing," i.e. whether Ickes had, in fact, pressured Babbitt. His use of the word "oblique" (he did not consult a dictionary) is at most merely an acknowledgment *that he may have* elected not to advertise more about the conversation with Eckstein than he honestly believed McCain's inquiry called for.**

**Example: The Report states that "Babbitt does not deny (nor does he admit)" that he had reasons to conceal the details of his conversations with Eckstein "at the time he signed his response to Sen. McCain." (Report at 480 n.860.) It adds that he "refused under oath to state that he did not mislead McCain in order to stave off further investigation by McCain about the role of Ickes and the White House in the Hudson casino decision." *(Id.* (citing Babbitt Grand Jury Test, at 220, 230).)**

**These comments appear to be based on the unrealistic assumption that a grand jury witness must be alert to every damning insinuation in every clause of a prosecutor's question and must immediately snuff it out, or he fails to do so at his peril. That is unfair. In fact, Babbitt has emphatically denied all suggestions that he intended to mislead McCain. (Babbitt Thompson Comm. Test, at 124; Babbitt Grand Jury Test, at 220-22.) He explained his innocent intentions in the very colloquies that are excerpted in the Report. (Babbitt Grand Jury Test, at 220-22; 229-31.) If, as he repeatedly has testified, he did not intend to mislead McCain, then it follows that he did not intend to mislead McCain for *any* purpose, including the purpose of staving off further**

**investigation. Indeed, the Report elsewhere acknowledges that "Babbitt denied having thought - at the time he wrote to McCain - that if he said he mentioned Ickes's name to Eckstein, further investigation was likely." (Report at 409.)**

**Example: The Report finds "probative" the Secretary's telephoned apology to Senator McCain following a press account contrasting Babbitt's letters to McCain and Thompson. *(Id.* at 478-79.) It recites McCain's recollection that Babbitt made an "abject apology" ("John, I misled you and owe you an apology"). *(Id.* at 479.) The Report acknowledges that "this is not an admission by Babbitt that he intentionally misled McCain," but goes on to say that in neither McCain's nor Babbitt's account of the conversation does Babbitt tell McCain that he did not intend to mislead him: "At a minimum, the apology to McCain acknowledges that the substance of the letter was misleading, and that McCain could reasonably feel that he had been deceived. In this context, Babbitt's failure to assert that any deception had been unintentional *is telling."* *(Id.* at 479 (emphasis added).)**

**It would have been more complete, and much more fair, if the Report had noted that each time Secretary Babbitt recounted his version of the apology before the grand jury, he qualified the apology by beginning it with *"if I* misled you." (Babbitt Grand Jury Test, at 249:4-17) (emphasis added). Indeed just prior to stating that he had "no reason to challenge" Senator McCain's recollection that he had said "John, I misled you and owe you an apology," Secretary Babbitt explained:**

> **Q. And so at this point, speaking with John McCain, you apologized for misleading him through your letter on August 30, 1996. Did you explain to him what had actually happened?**
> **A. I don't think so. I think I had probably -1 don't know whether I mentioned to him that I had just talked with Bowles or not. I don't know. I think I, you know, probably**

> also said something, look, John, the last thing in the world I want to do is get cross-wise with you. We've had a good relationship on this stuff, and I want to get this patched up. And I didn't - you know, I'm pretty sure I didn't do any quibbling. You know, if I said I mislead your, it's not because I was conceding that the letter was technically - was or was not technology [sic] misleading. I wasn't interested in any of that kind of stuff. I was interested in his good will, and I said, look -1 got to it as quick as I could.

(Babbitt Grand Jury Test, at 251:1-18.) It also should be noted that, as the Report makes plain, Senator McCain, to this day, believes that Secretary Babbitt has "a good character and a reputation for truthfulness." (Report at 424.)

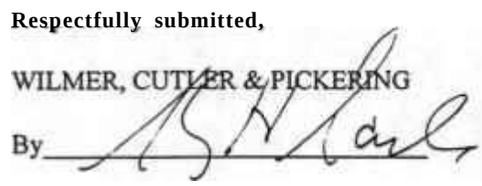
4. Conclusion

The Interior Department's decision to deny the Hudson casino application was made by diligent, honest and committed professionals without any improper influence of any kind, and Secretary Babbitt played no "meaningful role" in the decision. Secretary Babbitt never intentionally misled any public official about any aspect of the Department's handling of the application. The Report, and the supplementary context provided by this submission, should put to rest, once and for all, any speculation, or politically motivated innuendo, to the contrary.

We ask that the foregoing response be included in its entirety in the Appendix to the Final Report as provided for under the Independent Counsel Statute, 28 U.S.C. § 594(h)(2).

Respectfully submitted,

WILMER, CUTLER & PICKERING

By 

Lloyd N. Cutler
Stephen H. Sachs
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PATRICK J. O'CONNOR

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUUEicn (MM 0 2000

Division For The PURPOSE Of
Appointing Independent Counsels

Special Division

Ethics In Government Act Of 1978, As Amended

| | | | |
|---|---|---|---|
| In re: | Bruce Edward Babbitt | ) | Division No. 98-1 |

Before: SENTELLE, Presiding Judge. FAY and CUDAHY. Senior Circuit Judges

## RESPONSE OF PATRICK J. O'CONNOR TO DISCLOSED PORTIONS OF FINAL REPORT OF THE INDEPENDENT COUNSEL

Patrick J. O'Connor, by and through his undersigned counsel, hereby responds to the portions of the Final Report of Independent Counsel Carol Elder Bruce in the matter of Bruce Edward Babbitt (hereinafter "Final Report") that were disclosed to Mr. O'Connor.'

The Final Report seeks to conjure up the illusion of wrongdoing where the actual evidence has shown that no wrongdoing occurred. By filling hundreds of pages with cryptic calendar entries, notes, and excerpts from memoranda and letters - - much of which is taken out of context - - the Independent Counsel has succeeded in obscuring if not completely burying the exculpatory conclusions that she was compelled to reach *by the evidence.* The reader must wade through more than three hundred pages of the Final Report to learn that "the evidence ... does not prove that the contributions made by [the Hudson casino] opponents ... were part of a quid pro quo arrangement. Furthermore, there is considerable evidence that a variety of facts and

'Mr. O'Connor and his counsel were only permitted to inspect slightly over 100 pages of the Final Report which, according to the numbering sequence of the excerpts disclosed to Mr. O'Connor, exceeds 400 pages in total length.

motivations led to the decisions to donate funds, which a number of individuals and entities made over the course of several months." Final Report at 312. This conclusion is entirely consistent with the record evidence that the decision to deny the Hudson Casino application was made on the merits, by career civil servants of the Department of Interior, who received no pressure whatsoever to reach any particular result. *Hearings on the Department of Interior's Denial of the Wisconsin Chippewa's Casino Application, Before the House Committee on Government Reform and Oversight,* 105th Cong., 2d Sess. at v. 1, 205. (January 22, 1998) (statement of George Skibine).

Given the absence of evidence to support a prosecution theory, the Independent Counsel resorts to the device of using the mere temporal relationship between campaign contributions by various Indian tribes, and the events leading to the denial of the Hudson casino application, to insinuate in her Final Report that the lobbying effort to defeat the casino application was somehow corrupted. A notable example of this technique is found in the Final Report's observation that although the evidence revealed virtually no contact between Mr. O'Connor and DNC Chairman Donald Fowler prior to late April 1995, the Pequot Indian tribe gave 5325,000 in reportable donations and $250,000 in direct donor dollars in or about that time. Final Report at 141. In fact, Mr. O'Connor and his law firm did not represent the Pequot tribe, the tribe was not among the Hudson casino opponents who met with Chairman Fowler in late April 1995, and the portions of the Final Report disclosed to Mr. O'Connor offer no evidence that the Pequots were actively engaged in the opposition to the Hudson casino application.

In a similar vein, the Report observes that eight legislative proposals relating to Indian gaming were introduced in Congress during the time the Hudson casino application was pending. Final Report at 336. Yet, no evidence links the legislation with any aspect of the Hudson casino controversy, much less with any of the political contributions, and there is no indication that the

opponents of the Hudson casino application even had an interest in the legislation The Independent Counsel's reference to unspecified legislation, juxtaposed in the Final Report with a listing of political contributions by multiple, unrelated Indian tribes and their representatives, Report al 337-51, is nothing more than reliance on innuendo as a substitute for evidence. The use of innuendo and conjecture to support a charge of wrongdoing, especially when leveled in a judicial document such as the Final Report, is a "foul blow" that serves no acceptable governmental interest. *United Stales v. Briggs,* 514 F.2d 794, 803-06 (5th Cir. 1975).

In the end. the Final Report serves as a soapbox from which the Independent Counsel can express her distaste for the confluence of lobbying and political fund raising activities, and to make a thinly-veiled pitch for campaign finance reform. Admittedly, lobbying activity, especially when it must be performed during an election cycle, is often mischaracterized by cynical or ill-informed commentators. However, as the Independent Counsel should well know, a lobbyist' "employment goal [is] to persuade and influence ... to benefit certain interests [and] [s]uch endeavors are protected by the right to petition the government for a redress of grievance guaranteed by the First Amendment." *United States v. Sawyer,* 85 F.3d 713, 731 n. 15 (1st Cir. 1996). To the extent that political contributions facilitate access to public officials, enabling the lobbyist to petition more effectively, courts uniformly recognize that such practices are not unlawful. *See, e.g., United States \: Carpenter,* 961 F.2d S24, 827 (9th Cir. 1992) ("[t]his practice 'has long been thought to be well within the law [and] in a very real sense is unavoidable'") (citing *McCormick* v. *United States,* 500 U.S. 257, 272 (1991); *United States* v. *Rabbitt,* 583 F.2d 1014, 1028 (8th Cir. 1993). Dedicating hundreds of pages of the Final Report to suggest that the law should be otherwise is well outside the

**proper purposes of the Final Report provision of the Independent Counsel Act, and a waste and abuse of taxpayers funds.**

**Dated: June 2. 2000**

**Respectfully submitted.**

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**JUNE 5,2000**

United States Court OF Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**FILED JON , 5**

**SPECIAL DIVISION**

**Hon. Mark J. Langer, Clerk**
**United States Court of Appeals**
**District of Columbia Circuit**
**Washington, DC 20001-2866**

**Re: Thomas Collier**

**Dear Mr. Langer:**

**I write to comment and provide additional factual information on behalf of my client, Thomas Collier, in regard to the report submitted by the Independent Counsel in Division No. 98-1 - *In Re: Bruce Edward Babbitt.* While the report is quite long and detailed, there are a few areas where it has omitted important factual information that contradict the assertions made concerning Mr. Collier's activities in regard to the Shakopee Tribe adoption issue and the Hudson Dog Track matter.**

**A. While the Independent Counsel's report makes much of Mr. Collier's representation of the Shakopees in regard to an ordinance governing procedures for adoption of members of the Tribe, it mischaracterizes the events it discusses and leaves out important information.**

**1. The Independent Counsel's report states that Mr. Collier somehow had the perception that the appropriate way to lobby the Department of Interior ("DOI") was to make a contribution to the Democratic National Committee ("DNC") and at the same time seek its intervention on matters pending before DOI. This was rhetorically contrasted to a suggestion that Mr. Collier could have dealt directly with DOI on this issue. But in fact, Mr. Collier had significant and fruitful contacts about the adoption issue with DOI prior to the time he accompanied his Shakopee clients to the meeting with Don Fowler at the DNC. Due to these efforts, which were legal and proper, the issue concerning the adoption ordinance was in the process of being resolved in a manner favorable to the Shakopee Tribe. So as an initial matter, Mr. Collier did exactly what the Independent Counsel suggests he should have done in this matter.**

2. The second area ignored by the Independent Counsel concerns the circumstances surrounding the giving of the contribution to the DNC by the Shakopees, the way the subject of raising issues at the meeting with Mr. Fowler came up, and the purpose of raising the adoption issue at that meeting.

a. There was no connection between the Shakopees making the contribution to the DNC and the issue concerning the adoption ordinance. The Shakopees had decided, prior to any meeting being contemplated, that they wanted to become more involved in the Presidential race in 1996 and wanted to support President Clinton because his policies were favorable to the Tribe. There was no thought or discussion at that time of trying to raise any issues in connection with making the contribution.

b. Shortly before the Shakopee's meeting at the DNC, a person from the DNC asked Mr. Collier for certain information in order to brief Mr. Fowler. This was quite normal for a person such as Mr. Fowler who meets with many people in the course of a day. One aspect of the information being sought was what issues the Tribe wanted to raise with Mr. Fowler. It was at this time that the idea came up to raise any issues with Mr. Fowler at the meeting. Accordingly, there was no preconceived notion that the best way to lobby the administration was to do it through the DNC in conjunction with the making of a contribution.

c. The Independent Counsel mischaracterize the nature of the issue being raised with Mr. Fowler. It was not an effort to have him intervene with the White House and thereby have the White House intervene with DOI to affect a substantive decision pending at DOI. The substantive aspect of the decision had already been dealt with through Mr. Collier's prior legal work with DOI in the months prior to the meeting with the DNC. Rather, the issue had taken on a political cast through the efforts of a group that opposed the Shakopee Tribe's leadership on this issue. The opponents had hired a close personal friend of President Clinton who was also the person who had been closely involved, politically, in the appointments of both Secretary Babbitt and John Garamendi, another official at DOI. There was concern by Mr. Collier and the Shakopees that this was an effort to have the matter affected by the use of this person's political influence. Because both Mr. Collier and the Shakopees believed that the matter, in the absence of

political influence, would be resolved in a way that the Shakopees felt was appropriate, they wanted to make sure that no political influence occurred. The only reason for raising the matter with Mr. Fowler was to try to get him to make sure the matter was not subjected to political influence and would be considered on a level playing field. While this is noted in the Independent Counsel's report at page 171, it was ignored in reaching the faulty conclusion that Mr. Collier must have perceived that the most appropriate way to lobby DOI was to do it in conjunction with a contribution to the DNC. That is simply not born out by the facts available to the Independent Counsel and there is no evidence that establishes that this is what happened.

B. The Independent Counsel suggests that Mr. Collier gained this alleged perception through his involvement with the Hudson Dog Track issue. However, the facts clearly establish that Mr. Collier was not involved in. nor was he aware of any efforts to assert political influence in regard to the decision concerning the Hudson Dog Track. Not only was he not substantively involved in the decision process related to the track, but by the time the decision was being made, Mr. Collier had either left DOI or was in the process of leaving and was no longer involved in such matters. To suggest that Mr. Collier had had any involvement in that matter that carried over to later dealings he had on behalf of the Shakopee Tribe is pure speculation and is simply not supported by any evidence.

I ask that these comments be placed in the record along with the Independent Counsel's report so that all who read it will have the benefit of this factual information and these comments.

Sincerely,

James M. Cole

CHERYL D. MILLS

STATEMENT OF CHERYL MILLS IN RESPONSE TO REPORT OF INDEPENDENT COUNSEL CAROL ELDER BRUCE REGARDING SECRETARY BRUCE BABBITT

Comment Regarding page 182, footnote 296 of Report

Senior Associate Independent Counsel Philip Inglima of the Office of Independent Counsel Bruce (OIC) asked to interview Ms. Mills about the Hudson casino matter and outlined the kind of information the OIC would seek from her. Counsel's Office staff, including Ms. Mills, spoke directly to Mr. Inglima on several occasions to advise him that Ms. Mills had no factual information about this matter, and that any area of inquiry that might arise in an interview of Ms. Mills would implicate executive privilege. As a result of these conversations, Mr. Inglima decided to submit a set of interrogatories designed to establish that Ms. Mills indeed did not possess any non-publicly available factual information about the Hudson casino matter.

On June 15, 1999, Mr. Inglima sent those interrogatories to Ms. Mills. Over the next several weeks, Mr. Inglima was informed that Ms. Mills was out of the office on travel and that, subsequent to her return, the Counsel's Office was in the midst of a personnel transition with the departure of Counsel to the President Charles F.C. Ruff, which required Ms. Mills' full attention. As soon as practicably possible, Ms. Mills submitted to the OIC sworn and complete answers to these interrogatories that established that she did not possess any such factual information. The OIC neither commented on Ms. Mills' responses nor requested any additional information from her.

# DAVID MERCER

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**June 5, 2000**

**UNDER SEAL**

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**FILED** JUN - 5 2000

Special Division

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**c/o Marilyn Sargent, Chief Deputy Clerk**
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**District of Columbia Circuit**
**United States Courthouse, Room 5409**
**3rd and Constitution Avenues, N. W.**
**Washington, DC 20001-2866**

**Re: Division No.: 98-1—In re: Bruce Edward Babbitt**

**Dear Mr. Langer:**

**This law firm represents David Mercer, former Deputy Finance Director for the Democratic National Committee ("DNC"). Pursuant to your letter dated March 3, 2000, we have reviewed on Mr. Mercer's behalf those portions of Independent Counsel Bruce's Final Report (the "Report") that refer or directly relate to Mr. Mercer. This letter constitutes Mr. Mercer's comments for inclusion in an appendix to the Report.**

**Mr. Mercer is pleased with the Report's conclusion that the Independent Counsel did not find proof that the DNC or its officials participated in any criminal "quid pro quo" arrangement relating to political contributions and Administration actions in this matter. Mr. Mercer is aware of no information that is inconsistent with this conclusion.**

**Mr. Mercer cooperated fully and truthfully with the Independent Counsel's investigation. He voluntarily met with staff attorneys and investigators on several occasions as requested. He answered every question put to him to the best of his knowledge and recollection. He appeared voluntarily to testify under oath before the Grand Jury, and answered completely and truthfully every question posed to him in that forum.**

LAW OFFICES

LERCH, EARLY S BREWER, CHARTERED



Mr. Mercer is pleased that to a significant extent his recollection as to material events was corroborated by documents and the recollections of other witnesses as described in the Report, even though there are several statements contained in the Report with which Mr. Mercer disagrees. These statements involve differences in recollection between Mr. Mercer and other witnesses. Such differences are not surprising, given the amount of time that has passed since the matters in question occurred and the different roles the various witnesses played in those events. Mr. Mercer is not interested in challenging the honest recollections of his colleagues, even to the extent that those recollections differ from his own.

At all times during his tenure at the DNC (from 1993 through 1999), Mr. Mercer sought in good faith to comply fully with the legal and ethical constraints on fundraising imposed by the law and by the DNC Legal Guidelines for Fundraising. He is satisfied that his colleagues acted in like fashion. Mr. Mercer did not have primary responsibility with respect to Native American fundraising undertaken by the DNC. Rather, in his role as Deputy Finance Director, he sought to assist others at the DNC in fulfilling the mission of the Finance Department to be responsive to staff and constituents with respect to the concerns of all minority communities as those concerns were brought to his attention, and to facilitate communication between representatives of each such community and the DNC.

Like other communities, the Native American community has diverse and sometimes conflicting political and financial interests. In the spring of 1995, Mr. Mercer was made aware of the controversy surrounding the application of certain Wisconsin tribes to the Department of the Interior to take land in Hudson, Wisconsin into trust for the purpose of converting an existing dog track into a casino. The application was opposed by certain Minnesota tribes, who felt that the proposed facility would unfairly compete with an existing facility that they operated.

As reflected in the Report, Mr. Mercer acted at the request of representatives of the Minnesota tribes, including former DNC Treasurer Patrick O'Connor, to bring their concerns to the attention of Donald Fowler, Chairman of the Finance Department of the DNC, and to insure that Chairman Fowler was informed of the legitimate concerns of those tribes and their interest in engaging the political process to address those concerns. This was an appropriate, ethical and lawful exercise of Mr. Mercer's responsibilities. At no time did he seek on behalf of the DNC any contributions or quid pro quo in exchange for fulfillment of those responsibilities; nor is he aware of any other staff member or officer of the DNC having taken such actions.

To the extent that die Report suggests that Mr. Mercer sought or felt he was entitled to recognition for the solicitation of contributions to the DNC from the Native American community, it is mistaken. Others at the DNC had primary responsibility for fundraising in the Native American community, and Mr. Mercer respected and supported their efforts unselfishly. His communications with other DNC staff members involved in Native American fundraising were intended solely to facilitate such fundraising and to minimize duplication of efforts.

LAW OFFICES

**LERCH, EARLY 8 BREWER, CHARTERED**



**The DNC is largely responsible for bringing into the national political process many minority communities, including Native Americans. Mr. Mercer is very proud of the active and honorable role that he played in the DNC's efforts to insure that minority Americans would have a strong voice in the political process and in the future of the Democratic Party. At the same time, Mr. Mercer is discouraged by the unprecedented and unrelenting scrutiny to which minority donors and the DNC have been subjected over the past four years. As an African American with a deep and abiding respect for the institutions of our government, Mr. Mercer is hopeful that with the publication of Independent Counsel Bruce's Report, this process will be drawn to a close and that the attention and resources of the government once again can be focused upon the real and urgent concerns of all Americans.**

**Sincerely yours,**

Stanley J. Reed

**cc: Carol Elder Bruce, Esquire, Independent Counsel (via telefax and first-class mail)**
**Mr. David Mercer**
**Lauri E. Cleary, Esquire**

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June 5,2000

VIA US MAIL AND FACSIMILE

Honorable Carol Elder Bruce
Independent Counsel
c/o Marilyn Sargent, Deputy Clerk
U.S. Court of Appeals
District of Columbia Circuit
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Report References to Scott Dacey

Dear Ms. Bruce:

I am writing with regard to two excerpts on page 122 of your Report relating to my client Scott Dacey, that we believe are inaccurate and need to be either corrected or, at a minimum, supplemented with my client's recollection in the matter.

In specific, on page 122 of the text, Senator Russell Feingold of Wisconsin recalls a conversation with Mr. Dacey that supposedly occurred at a dinner on May 23, 1995. Not only does Mr. Dacey have no recollection of attending that dinner, a fact which a number of documents undoubtedly in the possession of the OIG bear out (see copies attached), but he unequivocally disputes Senator Feingold's account of the conversation which Mr. Dacey believes actually occurred after an event approximately a week earlier during a walk from the Rayburn House Office Building to the Senator's car.

On that occasion, Mr. Dacey outlined his client, the Oneida tribe's, interest in the Hudson issue. Mr. Dacey recalls Senator Feingold responding by stating that the proposal would not likely gain the support of Governor Thompson because Thompson opposed the expansion of gambling in Wisconsin. Mr. Dacey recalls explaining that the Governor had stated to individuals in Wisconsin who were working on the Hudson proposal that he could support the proposal if one of the three tribes involved in the Hudson effort would agree to close one of their existing

**casinos. Mr. Dacey further explained that one of the tribes involved in the Hudson proposal was headed by a tribal leader who had previously been a candidate for the state senate as a Republican and that this political connection between Governor Thompson and the tribal leader could play a role in the Governor's decision-making process. At the end of their discussion, Mr. Dacey recalls Senator Feingold telling him that he would quietly, or confidentially, contact Interior Secretary Babbitt about the issue. At no time in the conversation, to the best of Mr. Dacey's recollection, did Senator Feingold ever cut him off, or suggest in any way that he (Senator Feingold) thought it inappropriate to have an ex parte telephone conversation with Secretary Babbitt.**

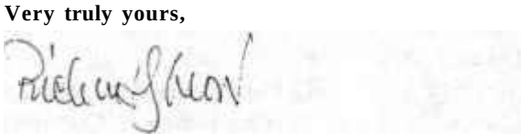
**Mr. Dacey recalls contacting Senator Feingold's staffer, Mary Frances Repko, the following day to let her know of his discussion with the Senator. He recalls Ms. Repko's being unaware of the discussion, and of Senator Feingold's intent to contact Secretary Babbitt or his office. Contrary to Ms. Repko's recollection contained in footnote 194 on page 122 of your Report, that conversation took place on approximately May 17, 1995; and certainly prior to the dinner on May 23, 1995.**

**We believe the Office of Independent Council has in its possession correspondence written by Mr. Dacey to the Oneida Business Committee on May 25, which further corroborates Mr. Dacey's recollection that he did not attend the event on May 23, 1995. Indeed, Mr. Dacey's memo of June 28, 1995 summarizing a meeting he had with Ms. Repko on or about June 21, further demonstrates that Mr. Dacey was still of the belief at that time that Senator Feingold intended to informally contact the Department of Interior. It was not until then that he was informed that Senator Feingold's senior staff had counseled the Senator to develop a public position on this issue rather than attempt to move "behind the scenes". Mr. Dacey recalls being told at that meeting that the Senator agreed with the advice of his staff and was still making up his mind. This was the first, and only time that Mr. Dacey was made aware of the Senator's change in approach on this matter.**

**We trust that this letter, together with attachments, will at a minimum be included in the Appendix to the Final Report. Hopefully, you will revise the text to reflect Mr. Dacey's contrary recollection to the Senator and his staff.**

**In the meantime, if you should have any questions, please do not hesitate to contact me at your earliest convenience. Until then, I remain,**

**Very truly yours,**



**Richard J. Leon**

**RJL/nem**

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TO: **Debbie Doxtator, Chairwoman**
**Oneida Business Committee**

**FROM:** **Scott Dacey**

**DATE:** **May 25,1995**

RE: **Meetings of May 23 and 24 in Washington, D.C.**

**The following is a report concerning the meetings T participated in during your trip to Washington, D.C. on May 22&23.**

**MAY 22**

**BIA: In an effort to better understand the current status of the Hudson track proposal, Debbie, Carl Artman and I met with Mike Anderson, Deputy Assistant Secretary for Indian Affairs, George Skibine, Director of the Office of Indian Gaming Management, and Tom Hartman, a member of Skibine's staff. The Indian Gaming Management Office will send a letter to the Red Cliff Tribal Council this week stating that their office expects to complete the review of the request within one month. The paperwork will then be sent to the Solicitors Office at Interior to make certain the Office of Indian Gaming and the BIA Minneapolis Area Office have complied with all of the requirements outlined under Section 20 of the Indian Gaming Regulatory Act The Solicitor would then pass the paperwork along to the Secretary's office for the approval or rejection of the petition. The Secretary has the ability to approve the transfer of land into trust under two areas of the law, first Section 20 of IGRA and second, Section 151 of the Code of Federal Regulations which governs land acquisitions by Indian Tribal Governments and individual Indians.**

**Section 20 of IGRA states that the Secretary must determine that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community. Skibine stated that their office is first attempting to assess whether this transfer would be "detrimental" to the "surrounding community".**

**Because neither "detrimental" nor "surrounding community" are defined in IGRA, the BIA has written guidelines, "Checklist for Acquisition for Gaming Purposes". "Surrounding community" includes most forms of non-Indian**

**government within a 30 mile radius of the lands in question and all Indian governments within a 50 mile radius of the lands in question. (The definition for Indian governments has been enlarged to a 100 mile radius for all future petitions.) The term "detrimental" means activities which might arise other than normal competitive pressures. For example, an argument establishing detriment might include increased auto traffic, a drain on the area water supply, or other environmental concerns. However, even environmental concerns can be offset by parties willing to negotiate new traffic patterns, additional parking lots, new roads, new sewers, etc. Public sentiment or opinion is not considered "detrimental", therefore, little weight is given to communities which pass resolutions in opposition to gaming unless they demonstrate an impact on the community. Moreover, the economic impact a gaming establishment might have on other gaming or non-gaming establishments is also of little concern to the BIA because it falls into the definition of a "normal competitive pressure".**

**Should BIA find the petition not to be detrimental to the surrounding community, they would then move to consider the impact such action would have on the tribe(s) requesting the transfer.**

**Mike Anderson clearly does not want to establish a precedent against tribes wishing to bring land into trust in the future. He largely wanted to know what justification the Oneida had in opposing the sovereign actions of another Indian Nation or group of Nations.**

**Maiy Frances Repko, Staff to Sen. Feingold: Debbie and I discussed the Hudson track and the recent conversations Debbie has had with representatives of the Stockbridge Munsee. She stated that Sen. Feingold intended to stay out of this issue. She said that he did not want to take sides against any tribe wishing to engage in gaming.**

**Senator Feingold is using the accord which Oneida reached with Ashwaebenon to illustrate how Tribal governments and local units of government can work together when bringing land into trust. This illustration is usually sent to constituents who complain about tribes taking land off the tax rolls.**

**(Note: Debbie and Bill Gollnick met with Senator Feingold on Tuesday evening. I was not present at that meeting.)**

May 23

**Senator Kohl: Debbie outlined the Oneida's opposition to the Hudson track and explained the Stockbridge proposal. We pressed Senator Kohl to contact Secretary Babbitt to let them know of his interest in the track issue, and he agreed.**

**Debbie also thanked the Senator for all of his help in securing funds for additional police officers on the Reservation. Funds were provided under the crime legislation passed last year and the Oneida were successful grant applicants.**

**Congressman Roth: Debbie outlined the Oneida's opposition to the Hudson track and explained the Stockbridge proposal. We thanked him for his letter to Secretary Babbitt in opposition to the Hudson Track. We also offered to get him any information he might need relative to the activity of the Stockbridge proposal. He had no immediate reaction to the proposal.**

ANALYSIS

**With respect to the Hudson track, things don't look good. BIA staff is interested in protecting the rights of tribes who might one day wish to take off reservation lands into trust for gaming purposes. Mike Anderson asks what criteria should be established to prohibit a tribe from moving off reservation land into trust for gaming purposes. An answer which does not threaten sovereignty is difficult to find.**

**Reaching the "detrimental" standard is difficult, too. According to Tom Hartman, all of the economic impact statements are of no value in this assessment. The addition of a new Indian gaming establishment to a market area brings "normal competitive pressures". The BIA has difficulty saying "no" to one tribe in favor of another, especially when the statute gives them no direction. BIA feels this decision is proper, and in the long run, will work to assist tribes when they are challenged by non-Indian groups with economic arguments alone.**

**In the case of the Hudson track, or for that matter the Kaukauna track, many of the environmental issues were addressed when the sites were originally established. Although one could argue that casino style gaming will bring more cars, busses, and people, it is likely that accommodations can be made to bring the facilities into line with current laws.**

**Finally, The political opposition from St. Croix County, the City of Hudson, Obey, Roth, and Gunderson may not be worth very much under the BIA definition of "detrimental" None of these letters say much other than to voice a general objection to the spread of gaming. BIA, in their willingness to uphold the interests of the greater number of tribes, has decided not to give such statements very much weight.**

**Mike Anderson said to me after our meeting that they are trying to keep this issue on the merits and they will "try to thread the needle" on this request**

**Things might change when the politicians like Babbitt and Duffy become involved, but without the law on their side it will be difficult to kill the deal.**

**Should Babbitt come out against Hudson, he will likely find his excuse in Section 151 of the CFR. I would strongly suggest we look into this area of the law to help Babbitt reach his conclusion.**

**As we know, Governor Thompson remains the key to stopping this effort.**

**Please let me know if you have any questions,**

**cc: Carl Artman**

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**TO.** **Gary Jordan, Council Member**

**FROM:** **Scott Dacey**

**DATE:** **June 28, 1995**

**RE** **Meetings of June 21-23 in Washington, D.C.**

**In an effort to follow up on our meeting from last week I thought it would be helpful summarize each of our meetings.**

**John Duffy, Counselor to Secretary Babbitt**

**We presented our position relative to the Hudson site and informed him of the actions the Stockbridge intend to take at the Kaukauna site. He was aware of the Stockbridge and their interest in Kaukauna.**

**Although he gave us no indication as to the position the Secretary would take on the matter, he did say the decision would be coming out soon. His chief concern related to the double standard the Department would be establishing should they decide against the tribes petitioning for the land acquisition—tribes usually want lands taken into trust over the objections from area communities and businesses.**

**Also attending this meeting was Howard Bichler, Tribal Attorney with the St. Croix Tribal Council.**

**Kathleen Nilles, Partner, Gardner, Carton & Douglas**

**Ms. Nilles is an attorney who specializes in tax law. She formerly worked for the House Ways and Means Committee and was responsible for all tax matters relating to Indians and Indian tribal governments. The intent of this meeting was to explore how she might be of assistance to Oneida in establishing and implementing a tribal tax code. We learned that her background and experience would allow the Oneida to structure a tax code to avoid criticism from the federal government and would allow the tribe to most effectively take advantage of international trade laws.**

**Ms. Nilles is expected to send a work plan and proposal to the Oneida within the next two weeks.**

**Mary Frances Repko, Office of Senator Feingold**

**Senator Feingold had expressed a willingness to confidentially contact Secretary Babbitt in opposition to the Hudson proposal. To date he has not made that connection. Evidently, his Legislative Director counseled him to develop a public position on this issue rather than attempt to move "behind the scenes." He agreed with the advice of his staff and is still making up his mind.**

**Ms. Repko has been in contact with each of the tribes proposing to lake the land into trust to determine their interest in this project. She tells me there is a high level of interest on behalf of the tribes.**

**I expect the Senator to make up his mind tomorrow—July 29.**

**Congressman John Ensign (R-NV)**

**Congressman Ensign is a member of the House Ways and Means Committee—the committee responsible for fixing the pension issue. He is also the Co-Chairman of the House Caucus on Gaming. Ensign is a former casino manager from Las Vegas.**

II

Ensign appeared to understand the pension problem and said that he would check with various folks in his district to see whether he should support the provision. He said he was inclined to help us out because there is no "cost" to the provision. I have asked the Las Vegas Indian tribe to write a letter of support to Ensign.

Ensign was very interested in Indian gaming matters, and asked whether the Oneida would support an amendment to IGRA that would place a moratorium on any new Indian gaming. He said that such a bill would insulate tribes like the Oneida from future competition and we should support the measure. We gave him very little feedback to this idea.

I think Ensign has his eyes set on the United States Senate and I would expect him to run against Harry Reid in 1998.

**Tom Collier, Chief of Staff to Secretary Babbitt**

Mr. Collier will be leaving the Department of the Interior at the end of June. He has been meeting with a number of tribes recently and says that he is putting a report to the Secretary together concerning the future of Indian gaming. 1 expect that he will be joining his old law firm of Stepptow and Johnson in Washington, D. C. and his recent desire to meet with Indian tribes is his unique way of looking for future clients.

With respect to Hudson, Collier said the Department of Interior will not sign off on the Hudson proposal as long as Governor Thompson and the area community is opposed to the deal. He currently views both parties to be opposed to the deal.

Collier is of the opinion that Indians should support a narrow form of means testing as a trade-off for a strong Indian gaming bill. He thinks such a move will pacify the Republicans who think all tribes are rich. He thinks only two tribes would actually be impacted by means testing.

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**He is also of the opinion that McCain has not been an honest broker in the area of Indian gaming. He feels if McCain were truly trying to protect tribes from any erosion to Cabazon he would simply not have any hearings on any bills impacting IGRA. Collier believes McCain's agreement to discuss this issue provides an avenue for change.**

**(Note: After thinking about Collier's ideas, I vigorously disagree with each of them. I will write a separate memo on this matter al your request.)**

**Jody Raskind, Small Business Administration**

**We discussed the SBA's Microloan Program. This program was expanded last year to allow Indian tribal governments to participate for the first time. The SBA will begin to accept applicants to the program within the next few months and I will keep you abreast of their progress. During our meeting we learned about the fundamentals of the program and that Oneida would in fact be eligible to participate in the program.**

**Should you have any questions, please do not hesitate to contact mc.**

DONALD L. FOWLER

**COMMENTS OF DONALD L. FOWLER**
**ON THE REPORT OF THE INDEPENDENT COUNSEL**
**ON DIVISION NO. 98-1- In Re: BRUCE EDWARD BABBITT**

**In stating on page 435 of her report that**

> **...the evidence is insufficient to prove that his (Fowler's) actions, however inappropriate, were intended to criminally corrupt the Hudson decision making process, or that his actions did in fact criminally corrupt the decision of the Hudson casino application...**

**the Independent Counsel brought into clear focus both the strength and weakness of her investigation. While her finding of no criminal conduct is certainly accurate, her editorial comment "however inappropriate" is itself inappropriate, skewed and unfounded.**

**There was never any intent or action on my part to engage in criminal or inappropriate conduct. Any person who is the chair of national political party has multiple responsibilities and deals with thousands of people on a multitude of issues, including fundraising. Implicit in the report of the Independent Counsel is the assumption that dealing with anyone who is a contributor, particularly a contributor of large sum of money, about matters relating to the government is inappropriate or suspect. Such an assumption demonstrates a lack of understanding of the customary, legal, and ethical conduct of contemporary politics.**

This conclusion results from an investigative mind set that imputes to those under investigation the worst, most venal motivations. Such a prejudice on the part of the Independent Counsel is unfair to those being investigated.

In her report the Independent Counsel failed to mention a number of factual matters that clearly would lead her to a different opinion about my conduct. She failed to mention that I proposed that the Democratic National Committee limit contributions by anyone to a total of $2,000. She also failed to mention that during my tenure I advocated, in testimony before a congressional committee, campaign finance reforms that would have eliminated the large contributions which concern her.

Political parties have a responsibility to elected officials, to rank and file party members, and to the public to act responsibly and ethically. Part of that responsibility is to provide linkage among party members, government officials and the public. Certainly the party chair should play a role in this linkage. While National Chair of the Democratic National Committee, I did contact Administration officials on behalf of Democrats. To have done otherwise would have been a dereliction of my duties.

Clearly, the circumstances under which such contacts are made are important. It would be inappropriate for any party official to contact an Administration official to ask for special or favored treatment for a person or group solely because that person or group makes contributions to the party, or in exchange for a promised contribution. I did not make contacts under such circumstances. Yes, I made appropriate contacts asking for appropriate review of decisions that

**were pending when I though such review was appropriate. Such requests are a matter of judgment and I am convinced that my judgments were ethical, sound and good.**

**While I made requests for reviews of some pending decisions on behalf of people who were contributors, I also made such requests on behalf of people who were not contributors, or who to my knowledge were not contributors, a fact the Independent Counsel failed to mention.**

**Finally, the American system of financing political campaigns and party operations has many faults and badly needs correcting. Doing this is a difficult task, but the difficulty should not be an excuse for not doing it.**

**For any institution or activity that is based on voluntary contributions — campaigns, churches colleges and universities, the United Way or the Red Cross — contributors of large sums of money have more influence than those who make small contributions.**

**Those who make large contributions usually will have more access to the decision-makers in these institutions than those who contribute small sums of money or those who do not contribute at all. Therein lies the imbalance. Unless and until reforms in campaign finance laws and practices are achieved, this imbalance will continue — and the appearance of impropriety will persist.**

**I am pleased to have an opportunity to make this statement in response to the Report of the Independent Counsel.**

THE HONORABLE
ALBERT GORE, JR

OFFICE OF THE VICE PRESIDENT
WASHINGTON

UNDER SEAL



June 5,2000

BY HAND

Mark J. Langer
Clerk
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001

Re: Final Report in In Re: Bruce Edward Babbitt

Dear Mr. Langer:

I have reviewed the 15 pages of the Final Report in In Re Babbitt which mention the Vice President which were provided to me by the office of the Independent Counsel. I have one factual comment. On page 187, the Report identifies Peter Knight as the Vice President's Chief of Staff on May 24, 1995. Mr. Knight was not the Vice President's Chief of Staff at this time. Mr. Knight was Chief of Staff to Congressman Gore and Senator Gore when the Vice President was in the House of Representatives and in the Senate, but he did not serve as Chief of Staff of the Office of the Vice President.

Please accept these comments for the record. Thank you for your consideration.

Sincerely yours,

Elizabeth M. Brown
Counsel to the Vice President

CHRIS MCNEIL JR.

**SKADDEN, ARPS, SLATE, MEAGHER S. FLOM LLP**

1440 NEW YORK AVENUE, N.W.

WASHINGTON, D.C. 20005-2111

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**PRIVILEGED AND CONFIDENTIAL**
**SUBJECT TO THE ATTORNEY WORK PRODUCT**
**AND ATTORNEY-CLIENT PRIVILEGES**

**May 12, 2000**

United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FILED JUN - 5 2000

**Special Division**

**Via Federal Express**

**Mr. Mark J. Langer**
**Clerk**
**United States Court of Appeals**
**District of Columbia Circuit**
**Washington, D.C. 20001-2866**

**Re: In Re: Bruce Edward Babbitt: Division No. 98-1**

**Dear Mr. Langer:**

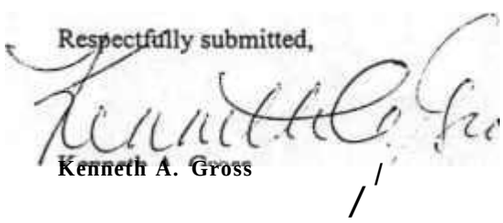
**Pursuant to your letter dated March 3, 2000, as counsel to Chris McNeil, Jr., we have the right to submit comments for possible inclusion in an appendix to Independent Counsel Bruce's Final Report ("Final Report") in the above-referenced matter. On behalf of Mr. McNeil, we submit the following comments for inclusion in the Final Report.**

**The Final Report states in a footnote in the section beginning at Page 255 that John Duffy testified that he recalled participating in a conference call with Secretary Bruce Babbitt, Senators Lieberman and Dodd and certain Mashantucket Pequot leaders regarding mediation processes in the Mashantucket Pequot land-in-trust matter. We would like the Final Report to note the following:**

**Mr. McNeil's recollection of the referenced conference call with Secretary Babbitt is that such call included not only those parties**

referenced in John Duffy's testimony, but also Guy Martin of Perkins Coie, counsel to the Towns of Ledyard, Preston, and North Stonington and Congressman Sam Gedjenson (D-Conn.). In addition, Mr. McNeil recalls that the Attorney General of the State of Connecticut, Richard Blumenthal, or his representative may have also participated in the conference call. Furthermore, according to Mr. McNeil, the only discussion that Mashantucket Pequot representatives ever had with Secretary Babbitt concerning the land-in-trust matter was telephonic and when all of the other parties of interest, including opposing parties, were on the line.

Respectfully submitted,



Kenneth A. Gross

cc: Chris McNeil, Jr.

ELENA KAGAIM

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TELECOPIER (202) 789-6190

**June 5,2000**

**VIA HAND DELIVERY** **UNDER SEAL**

**Mark J. Langer**
**Clerk**
**United States Court of Appeals**
**District of Columbia Circuit**
**333 Constitution Avenue, N.W.**
**Washington, D.C. 20001-2866**

**Re: In Re: Bruce Edward Babbitt. Division No. 98-1**

**Dear Mr. Langer:**

**I am writing on behalf of my client Elena Kagan regarding Independent Counsel Carol Elder Bruce's Report ("the Report") regarding Bruce Edward Babbitt, No. 98-1.**

**I respectfully request that the Report should be changed to reflect accurately the available evidence. The Report indicates in the text and a footnote on page 363 that Ms. Kagan, formerly Associate Counsel to the President of the United States, "faxed" a copy of an affidavit by Paul Eckstein to Department of Interior Associate Solicitor Robert Anderson on August 5, 1996 at his request. While the Eckstein affidavit was a public record at that time and it would have been appropriate for Ms. Kagan to transmit it to Mr. Anderson, the documents available to Ms. Kagan indicate that she did not transmit this document to him.**

**These documents suggest that the fax cover sheet of August 5, 1996 (see Exhibit 1), was not attached to the Eckstein affidavit but rather to another document. Ms. Kagan was interviewed by the Independent Counsel's Office on May 26, 1999. She was shown the August 5 fax cover sheet in the interview and told the staff that she believed she was sending Mr. Anderson a letter previously sent to Sen. McCain by Harold Ickes, Assistant to the President and Deputy Chief of Staff. Documents submitted to the Independent Counsel's Office bearing Bates**

Stamp Numbers BIC000593-595 (Exhibit 1) are the fax cover sheet and that letter. Ms. Kagan was asked by the Independent Counsel's staff whether she had attached the Eckstein affidavit to the August 5 fax cover sheet, and she responded that she did not recall doing so, but rather believed she had faxed the Ickes letter, as these documents reflect.

As noted above, transmission of the Eckstein affidavit to Mr. Anderson would have been entirely appropriate, and this matter thus has no significance. However, the available evidence does indicate that the Report is in error. For that reason, I respectfully submit that the record should be corrected.

Very truly yours,

David S. Krakoff

DSK:kma

Attachment

W A S H I N G T O N

k

COUNSEL'S OFTICE

FACSIMILE TRANSMISSION COVER SHEET

DATE:

TO:

FACSIMILE NUMBER:

TELEPHONE NUMBER:

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PLEASE DELRVER AS SOON AS POSSIBLE

**THE WHITE HOUSE**

WASH INGTON

**August I, 1996**

**The Honorable John McCain**
**Chairman, United States Senate**
**Committee on Indian Affairs**
**Washington, DC 20510-6450**

**Dear Senator McCain:**

**I am writing in response to your letter of July 19, 1996, requesting information regarding the White House's alleged intervention in a dispute between Indian tribes over off-reservation Indian gaming in Hudson, Wisconsin. I appreciate the opportunity to clarify any misperceptions which may have resulted from the recent *Wall Street Journal* article on this subject.**

**Contrary to the representations made in the *Journal* article, the decision not to take the Hudson land into trust for the purpose of Indian gaming was, as far as I know, made independently by the Interior Department, based solely upon the potential negative impact on the surrounding community. There was no effort by the White House to influence this decision in any way.**

**The White House's involvement in this matter, as alluded to in the *Journal* article, was limited to routine status inquiries to the Department by a member of my staff. While it is possible that I spoke to Democratic National Committee Chairman Donald Fowler about this issue, I have no specific recollection of such a conversation. Further, I do not recall receiving a memorandum from Mr. Fowler on this matter, nor can I find any such memorandum in my files.**

**I did place two phone calls to Mr. Patrick O'Connor on this subject, which, to the best of my recollection, were made in response to calls he initially placed to me. I have no recollection of discussing this matter with either the President or Bruce Lindsey, and I doubt that I did. I later received a memorandum from Mr. O'Connor explaining why he thought the Administration should support his clients' position. To my knowledge, this information was not conveyed to the Interior Department.**

**As a public official, I am certain you can understand how impossible it is to control the content of materials sent to you. Further, while Mr. O'Connor's representations to his clients about the decision-making process were indeed regrettable, I was completely unaware of them and unable to control them in any event.**

As you mentioned in your letter, the *Journal* article also alluded to a discussion between me and Secretary Babbitt about the uming of the announcement of the Department's decision. I do not believe any such conversation ever took place.

The "active involvement by high-level White House staff you refer to in your letter simply did not, and does not, occur. We are occasionally contacted by the Democratic National Committee, members of Congress, interested parties and others inquiring as to the status of particular decisions. In these instances, we merely seek to obtain the information necessary to respond to their requests. Where these requests include an effort to secure our assistance in achieving a particular outcome, we decline to become involved, regardless of the source of the request. As a result, I cannot think of any instance during my tenure at the White House where I have personally intervened in Interior Department decisions directly affecung Indian tribes.

Likewise, because contacts between the Democratic National Committee and the White House regarding Interior Department decisions are generally limited to the type described above, I have no persona] knowledge of any intervention by Don Fowler or other high-level Democratic National Committee officials in these types of decisions.

As a matter of practice, I can assure you that the departments and agencies of the federal government make these types of decisions independently based upon the respective merits of each case. I can also assure you that I share your belief that the Interior Department's policy decisions on Indian affairs should be made without regard to campaign contributions by the tribes. I hope you find this information helpful and responsive to your concerns.

Sincerely,

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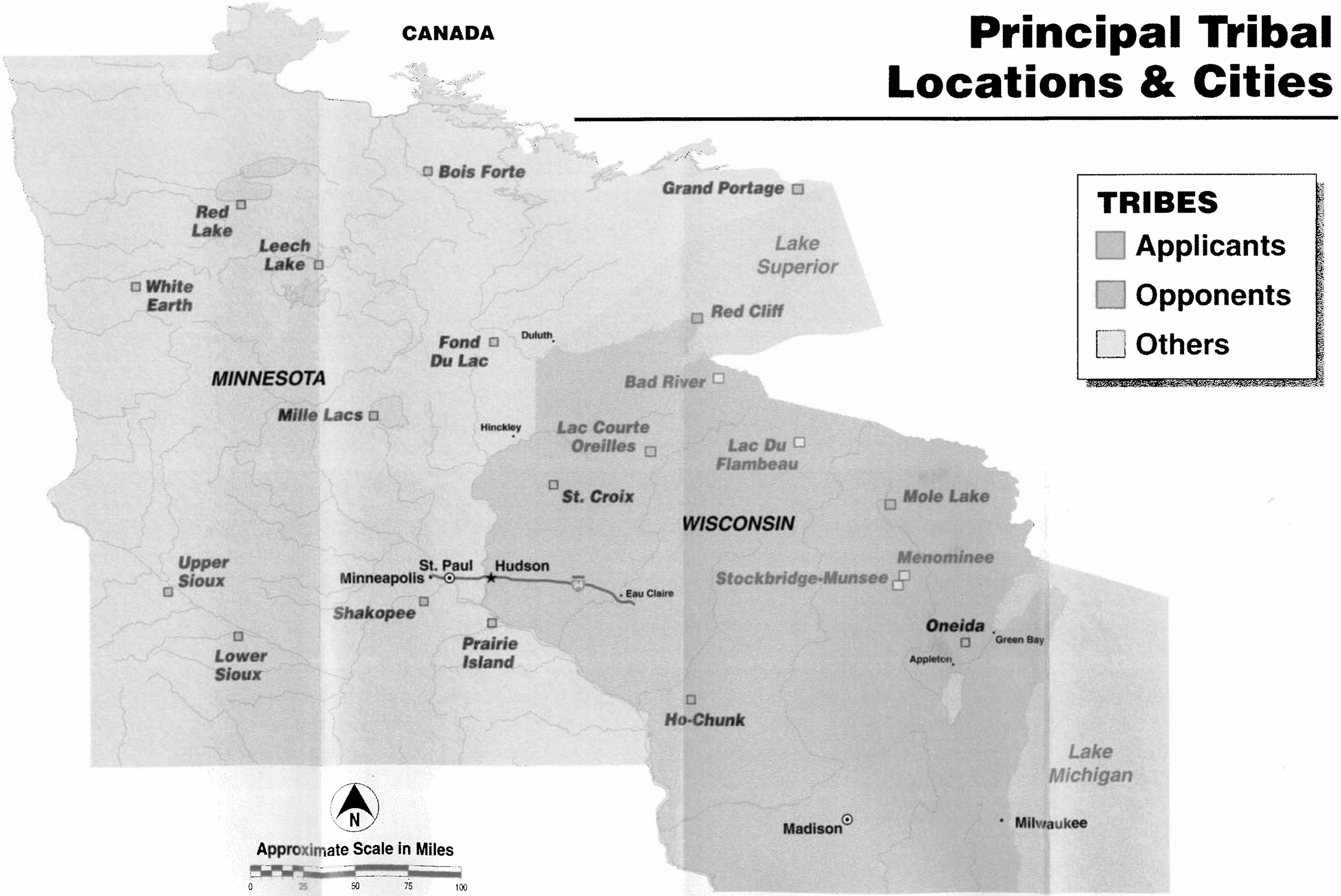
Harold Ickes
Assistant to the President and
Deputy Chief of Staff


CANADA
Principal Tribal Locations & Cities
TRIBES
Applicants
Opponents
Others
Bois Forte
Grand Portage
Red Lake
Leech Lake
Lake Superior
White Earth
Red Cliff
Fond Du Lac
Duluth
MINNESOTA
Bad River
Mille Lacs
Hinckley
Lac Courte Oreilles
Lac Du Flambeau
St. Croix
Mole Lake
WISCONSIN
Menominee
Upper Sioux
St. Paul
Hudson
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**U.S. Department of the Interior**
**Washington, D.C. 20240**

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