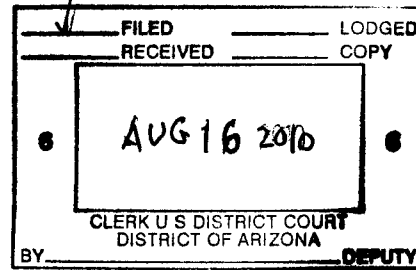


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10

11 UNITED STATES DISTRICT COURT FOR THE
12 DISTRICT OF ARIZONA

13 *In the Matter of:*

14 Establishment Inspection of
15 **DESERT DIAMOND CASINO**,
owned by The Tohono O'odham Nation.
16 7350 S. Nogales Highway
17 Tucson, AZ 85756

CIVIL ACTION NO.
CIV 10-501-TUC HCE
MEMORANDUM OF LAW IN SUPPORT
OF *EX PARTE* APPLICATION FOR
INSPECTION WARRANT UNDER THE
OCCUPATIONAL SAFETY AND
HEALTH ACT OF 1970

18 COMES NOW the Secretary of Labor, United States Department of Labor, acting
19 through the Occupational Safety and Health Administration ("OSHA"), by and through
20 the undersigned attorneys of record, and submits the following Memorandum of Law in
21 Support of her application to this Court for an inspection warrant pursuant to the
22 Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, (hereinafter "the
23 Act").

24 Desert Diamond Casino ("the employer"), a corporation wholly owned by the
25 Tohono O'odham Nation ("Tohono O'odham Nation"), is engaged in the operation of a
26 worksite located at 7350 S. Nogales Highway, Tucson, Arizona, which is within the
27 jurisdiction of this Court. The employer operates a casino within the gaming industry.

28 The Secretary is informed and believes that the aforesaid worksite houses the workplace

1 of employees who are employed by an employer believed to be engaged in a business
2 affecting commerce. The employer employs both Indians and non-Indians.

3 On January 11, 2010, June 2, 2010, and July 22, 2010, OSHA received
4 complaints from three different employees of the Desert Diamond Casino stating that
5 ozone levels at the employer's worksite may be above the permissible exposure limit. A
6 letter was sent to the Desert Diamond Casino following the January 11, 2010 and June 2,
7 2010 complaints notifying it that OSHA was conducting an inquiry into the percentage of
8 ozone that is pumped into the casino. OSHA was satisfied with the employer's response
9 until it received yet another complaint on July 22, 2010.

10 On July 29, 2010, a duly authorized compliance officer of the Occupational
11 Safety and Health Administration, United States Department of Labor, pursuant to and in
12 accordance with the Act, presented herself to the manager on duty, the general manager,
13 construction manager, safety manager, and legal counsel, to conduct an investigation
14 pursuant to the Act. She was denied entry to conduct her investigation and told to
15 produce a warrant for inspection.

16 ARGUMENT

17 A. THE ACT AUTHORIZES THE ISSUANCE OF *EX PARTE* WARRANTS

18 Congress enacted the Occupational Safety and Health Act of 1970, 29 U.S.C. §§
19 651-78 (hereinafter "the Act"), in furtherance of the expressed Congressional purpose
20 "... to assure so far as possible every working man and woman in the nation safe and
21 healthful working conditions and to preserve our human resources" 29 U.S.C.
22 § 651(b). Under Section 5 of the Act, each employer is under the duty to provide safe
23 and healthful employment free from recognized hazards and in compliance with the
24 safety and health standards promulgated under the Act. *See* 29 U.S.C. § 654. An
25 "employer" is defined in Section 3(5) of the Act as including any "person engaged in a
26 business affecting commerce who has employees." *See* 29 U.S.C. § 652(5).

27 The administration and enforcement of the Act is vested in the Secretary of Labor.
28 Section 8(a) of the Act authorizes the physical entry by representatives of the Secretary

1 into worksites for the purpose of conducting safety and health inspections. See 29 U.S.C.
2 § 657(a). Section 8(a) reads as follows:

3 In order to carry out the purposes of the Act, the Secretary, upon
4 presenting appropriate credentials to the owner, operator, or agent in
charge is authorized –

- 5 (1) to enter without delay and at reasonable times any factory, plant,
6 establishment, construction site or other area, workplace or
7 environment where work is performed by an employee of an
8 employer; and
9 (2) to inspect and investigate during regular working hours and at
other reasonable times, and within reasonable limits and in a
reasonable manner, any such place of employment and all pertinent
conditions, structures, machines, apparatus, devices, equipment,
and materials therein, and to question privately any such employer,
owner, operator, agent or employee.

10
11 Under the authority of section 8(g)(2) of the Act to prescribe “regulations dealing
12 with the inspection of an employer’s establishment” the Secretary of Labor has
13 promulgated 29 C.F.R. § 1903.4, authorizing the Area Director of the Occupational
14 Safety and Health Administration or his designee to obtain compulsory process to
15 conduct an inspection, including ex parte application for an inspection warrant.

16 The Court has jurisdiction for the ex parte issuance of an administrative
17 inspection warrant under section 8(a) of the Act, 29 U.S.C. § 657(a). *Marshall v.*
18 *Barlow’s Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978); *Marshall v. W and W Steel Co., Inc.*,
19 604 F.2d 1322 (10th Cir. 1979). Probable cause for the issuance of an administrative
20 warrant under section 8(a) of the Act may be based either upon specific evidence of an
21 existing violation or upon a showing that the proposed inspection is pursuant to an
22 administrative plan containing specific neutral criteria. *Marshall v. Barlow’s Inc.*, 436
23 U.S. at 319, 98 S.Ct. at 1824; *Martin v. International Matex Tank Terminals – Bayonne*,
24 928 F.2d 614, 622 (3rd Cir. 1991).

25 When an employer refuses to allow the required inspection, an *ex parte* warrant is
26 appropriate. 29 C.F.R. § 1903.4. *E.g.*, *Marshall v. Barlow’s Inc.*, 436 U.S. at 316-320;
27 *Reich v. Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1162-64 (7th Cir. 1994); *Stoddard*
28 *Lumber Co., Inc. v. Marshall*, 627 F.2d 984, 989-90 (9th Cir. 1980). Under the authority

1 of Section 8(g)(2) of the Act, 29 U.S.C. § 657(g)(2), to prescribe “regulations dealing
2 with the inspection of an employer's establishment,” the Secretary has authorized the
3 OSHA Area Director or his designee to obtain compulsory process to conduct an
4 inspection, including *ex parte* application for an inspection warrant. *See* 29 C.F.R. §
5 1903.4.

6 Indian tribe-owned commercial businesses, such as Desert Diamond Casino, are
7 subject to the Act. *See U.S. Dept. of Labor v. Occupational Safety & Health Review*
8 *Com'n (Warm Springs Forest Products Industries)*, 935 F.2d 182, 185-87 (9th Cir. 1991);
9 *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *see also*
10 *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2nd Cir. 1996) (following
11 *Coeur d'Alene* standard).

12 B. SUFFICIENT ADMINISTRATIVE PROBABLE CAUSE EXISTS FOR THE
13 ISSUANCE OF AN INSPECTION WARRANT.

14 In *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), the Supreme Court held that
15 the warrant requirement of the Fourth Amendment is applicable to nonconsensual OSHA
16 inspections and that OSHA inspection warrants shall be issued only upon “administrative
17 probable cause”:

18 Whether the Secretary proceeds to secure a warrant or other process, with
19 or without prior notice, his entitlement to inspect will not depend on his
20 demonstrating probable cause to believe that conditions in violation of
21 OSHA exist on the premises. Probable cause in the criminal law sense is
22 not required. For purposes of an administrative search such as this,
23 probable cause justifying the issuance of a warrant may be based not only
24 on specific evidence of an existing violation but also on a showing that
25 “reasonable legislative or administrative standards for conducting an
26 inspection are satisfied with respect to a particular [establishment].”
27 *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). *Barlow's*, 436
28 U.S. at 320-21.

25 To establish “specific evidence” administrative probable cause, the Secretary's
26 warrant application need not establish the level of probable cause required in a criminal
27 setting. The application need only “provide enough specific evidence to support a
28 reasonable suspicion that an OSHA violation is occurring.” *In re Establishment*

1 *Inspection of Midwest Instruments Co.*, 900 F.2d 1150, 1154 (7th Cir. 1990). *See also*
2 *International Matex Tank Terminals, infra*, 928 F.2d at 624-625; *West Point-Pepperell,*
3 *Inc.*, 689 F.2d 950,958 (11th Cir. 1982); *Marshall v. Horn Seed Co.*, 647 F.2d 102 (10th
4 Cir. 1981); *Donovan v. Blue Ridge Pressure Castings, Inc.*, 543 F.Supp. 53, 58 (M.D. Pa.
5 1981).

6 OSHA has received evidence supporting a reasonable suspicion that one or more
7 OSHA violations are occurring. The accompanying affidavit of Nancy McCormick,
8 Acting Assistant Regional Administrator, describes the evidence received by OSHA as
9 follows:

10 On January 11, 2010, June 2, 2010, and July 22, 2010, OSHA received
11 complaints from three different employees of the Desert Diamond Casino alleging that
12 ozone levels at the employer's worksite may be above the permissible exposure limit. A
13 letter was sent to the Desert Diamond Casino following the January 11, 2010 and June 2,
14 2010 complaints notifying Desert Diamond that OSHA was conducting an inquiry into
15 the percentage of ozone that is pumped into the casino. OSHA was satisfied with the
16 employer's response until it received yet another complaint on July 22, 2010.

17 On July 29, 2010, at the aforesaid location, a duly authorized compliance officer
18 of the Occupational Safety and Health Administration, United States Department of
19 Labor, pursuant to and in accordance with the Act, presented herself to the owners,
20 operators, or agents in charge thereof for the purpose of conducting a safety and health
21 inspection at said location under the authority of the Act. At the attempt to carry out such
22 purpose, the representative was refused entry upon the premises by persons representing
23 the employer.

24 Based on her experience with OSHA, the Acting Assistant Regional
25 Administrator for Enforcement Programs believes that further investigation will likely
26 lead to evidence of hazards existing on Desert Diamond Casino's premises in violation of
27 Section 5 of the Act. *See* Declaration of Nancy McCormick. This is enough evidence to
28 meet the more relaxed standard that applies to establish administrative probable cause,

1 and the court should grant the warrant application.

2 C. THE SECRETARY IS ENTITLED TO OBTAIN AN INSPECTION WARRANT
3 *EX PARTE*.

4 The Secretary is entitled to seek and obtain an *ex parte* warrant for inspection
5 purposes where right of entry has been refused. *See* 29 C.F.R. § 1903.4. The regulation
6 states: “Ex parte inspection warrants shall be the preferred form of compulsory process in
7 all circumstances where compulsory process is relied upon to seek entry to a workplace
8 under this section.” 29 C.F.R. § 1903.4(d). The Ninth Circuit upheld this right in
9 *Stoddard*, 627 F.2d at 989-90 (citing *Barlow’s*, 436 U.S. at 316-21), holding that
10 “surprise searches” were authorized by the act and “contemplated” by the regulations. *Id.*
11 As stated earlier herein, the Act (29 U.S.C. § 666(f)) and OSHA regulations (29 C.F.R. §
12 1903.6) prohibit advance notice of inspections, with very few narrow exceptions. An
13 employer retains a right to challenge OSHA’s inspection warrant following the
14 inspection, *e.g. Trinity Marine Services, Inc. v. Chao*, 512 F.3d 198 (5th Cir. 2007) and
15 *National Engineering*, 45 F.3d at 479-81. The right to an *ex parte* warrant for inspection
16 is necessary to the fulfillment of the Secretary’s enforcement duties under the Act.

17 **CONCLUSION**

18 For the foregoing reasons, the Secretary of Labor respectfully requests that this
19 Court issue an Ex Parte Warrant for Inspection of Desert Diamond Casino in the form
20 that is annexed hereto.

21 Dated: August 12, 2010

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