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Secretary of Labor, U.S. Department of Labor

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF ARIZONA

13 *In the Matter of:*

CIVIL ACTION NO. **CV 10-501-TUC HCE**

14 Establishment Inspection of:
15 **DESERT DIAMOND CASINO**
16 owned by The Tohono O'odham Nation.

) **DECLARATION OF NANCY**
) **MCCORMICK**
) **(IN SUPPORT OF EX PARTE**
) **APPLICATION FOR INSPECTION**
) **WARRANT UNDER THE**
) **OCCUPATIONAL SAFETY AND**
) **HEALTH ACT OF 1970)**

17 7350 S. Nogales Highway
18 Tucson, AZ 85756

19
20 I, Nancy McCormick, hereby depose and state as follows:

21 1. I am the Acting Assistant Regional Administrator for Enforcement Programs of
22 the Occupational Safety and Health Administration (OSHA), United States Department of Labor,
23 San Francisco Regional Office (Region IX), located at 90 Seventh Street, 18th Floor, San
24 Francisco, California.

25 2. In my capacity as the Acting Assistant Regional Administrator for Enforcement
26 Programs, my duties and responsibilities include the supervision of Compliance Safety and
27 Health Officers in their inspections of workplaces, and the issuance of citations for
28 noncompliance with the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C.

1 §§ 651-678, as a designated representative of the Secretary of Labor in enforcement of the Act. I
2 also am responsible for scheduling the assignments of the individual inspectors engaged in
3 enforcement activity within the Region and the selection of individual work establishments to be
4 inspected pursuant to Section 8 of the Occupational Safety and Health Act of 1970. I have been
5 employed by OSHA since 1990.

6 3. Upon information and belief, Desert Diamond Casino (“the employer”), a
7 corporation wholly owned by the Tohono O’odham Nation (“Tohono Nation”), is engaged
8 in the operation of a worksite located at 7350 S. Nogales Highway, Tucson, Arizona,
9 which is within the jurisdiction of this Court.

10 4. The employer operates a casino within the gaming industry. Upon information
11 and belief, the aforesaid worksite houses the workplace of employees who are employed by an
12 employer believed to be engaged in a business affecting commerce and subject to the
13 requirements of Section 3(3) the Act, 29 U.S.C. § 652(3).

14 5. Upon information and belief, the employer employs both Native Americans and
15 non-Native Americans.

16 6. Section 8(a) of the Act, 29 U.S.C. § 657(a), and 29 C.F.R § 1903.3 authorizes a
17 representative of OSHA: to enter without delay, and at reasonable times, any factory, plant,
18 establishment, construction site, or other area, workplace or environment where work is
19 performed by an employee of an employer; to inspect and investigate during regular working
20 hours and at other reasonable times, and within reasonable limits and in a reasonable manner,
21 any such place of employment, and all pertinent conditions, structures, machines, apparatus,
22 devices, equipment and materials therein; to question privately any employee, owner, operator,
23 agent or employer; to take photographs, video recordings, measurements and environmental
24 samples; and to review records required by the Act and regulations, and other records which are
25 directly related to the purpose of the inspection.

26 7. Such inspections are scheduled and conducted on the basis of administrative
27 instructions and are of two basic types: programmed and unprogrammed.

28 8. Programmed inspections are those in which an establishment is scheduled for

1 inspection based upon objective or neutral selection criteria pursuant to administrative
2 instructions that are promulgated by an OSHA National, Regional, and/or Area Office in order to
3 achieve wide dispersion of inspection activity, enforcement penetration into many different types
4 of industries and employment, and allocation of resources primarily to high hazard sections of
5 employment.

6 9. Unprogrammed inspections include: complaint, referral, and follow-up
7 inspections; imminent danger and fatality/catastrophe investigations; and other situations in
8 which probable hazards or violations are observed or brought to the attention of the Area Office.
9 Unprogrammed inspections, including complaint inspections, are scheduled with certain
10 priorities according to OSHA Instructions CPL 02-00-140 and CPL 09-00-148 and various
11 OSHA Local Emphasis Programs.

12 10. On January 11, 2010, June 2, 2010 and July 22, 2010, OSHA received complaints
13 from three different employees of the Desert Diamond Casino stating that ozone levels at the
14 employer's worksite may be above the permissible exposure limit at the Desert Diamond Casino.
15 Each of the complaints state that the casino is pumping ozone into the casino through the air
16 conditioning/filtering system to remove smoking odors throughout the casino. The employees
17 complain of headaches and nausea as a result of the ozone in the air.

18 11. Section 8(f) of the Act, 29 U.S.C. § 657(f), requires the Secretary to conduct an
19 inspection if, upon receiving an employee complaint alleging the existence of serious safety or
20 health violations at the place of employment, the Secretary or her authorized representative
21 concludes there are reasonable grounds to believe such violation or danger exists. A letter was
22 sent to the Desert Diamond Casino following the January 11, 2010 and June 2, 2010 complaints
23 notifying Desert Diamond Casino that OSHA had received a complaint and asked for
24 information documenting the percentage of ozone that is pumped into the casino. Such an
25 inquiry is allowed through OSHA's field operations procedures. OSHA was satisfied with the
26 employer's response until it received yet another complaint on July 22, 2010.

27 12. I concluded that these complaints present reasonable grounds to believe that
28 violations of mandatory occupational safety and health standards and/or Section 5(a)(1) of the

1 Act exist or existed at the workplace. Accordingly, on July 29, 2010, a duly authorized
2 compliance officer of OSHA visited the worksite of Desert Diamond Casino for the purpose of
3 conducting an inspection of the worksite. The compliance officer conducted an opening
4 conference with several representatives of the employer to investigate the claims asserted in the
5 employees' complaints. The compliance officer produced a copy of the June 2, 2010 employee
6 complaint and spoke with the following persons: Michael Chana, Manager on Duty; Richard
7 Masterson, Director of Facilities; Henry Childs, General Manager; Randy Howe, Construction
8 Manager; Britt E. Clapham II, Assistant General Counsel; Edward Manuel, Assistant Security
9 Director; and Nicole Amarillas, EMS Safety Manager. The compliance officer was denied entry,
10 was told to produce a warrant for inspection, and was told that they wanted to follow procedures
11 set by the Tribal Nation.

12 13. The compliance officer explained that OSHA possesses jurisdiction over Tribal
13 Lands and urged them to reconsider. She was unable to inspect the employer's worksite.

14 14. As of the date of this declaration, the employer has refused to allow OSHA to
15 enter its premises to conduct an investigation into the circumstances surrounding the existence of
16 hazardous conditions.

17 15. An inspection warrant is, therefore, necessary to obtain entry into the worksite
18 without delay, as contemplated by the Act. Accordingly, application is hereby made for an
19 administrative warrant that would authorize such inspection.

20 16. Under Section 5 of the Act, 29 U.S.C. § 654, each employer is under a duty to
21 provide safe and healthful employment free from recognized hazards and in compliance with the
22 safety and health standards promulgated under the Act.

23 17. Based on my experience and training and the information provided to me to date,
24 I believe hazardous conditions exist on Desert Diamond Casino's premises in violation of
25 Section 5 of the Act.

26 18. As the representative of the Secretary who has been designated to seek
27 compulsory process on her behalf, I affirm that this *ex parte* inspection warrant is being sought

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1 pursuant to the authority granted by the Act and is necessary to the enforcement of the Act.

2 I swear under penalty of perjury under the laws of the United States that the foregoing is
3 true and correct to the best of my knowledge, and that this document was executed on this 12
4 day of August 2010, in SAN FRANCISCO California.

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8 NANCY MCCORMICK
9 Acting Assistant Regional Administrator
10 for Enforcement Programs

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