Case No. 06-3213

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KATHLEEN SEBELIUS, GOVERNOR OF THE STATE OF KANSAS; IOWA TRIBE OF KANSAS AND NEBRASKA; KICKAPOO TRIBE OF INDIANS OF THE KICKAPOO RESERVATION IN KANSAS; and SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA,

Plaintiffs-Appellants,

vs.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR FOR THE UNITED STATES GOVERNMENT; and SECRETARY OF THE DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS FOR THE UNITED STATES GOVERNMENT,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
The Honorable Julie A. Robinson

Governor of the State of Kansas, et al. v. Gale Norton, Secretary of the Interior, et al.
No. 03-4140-JAR

APPELLANTS' OPENING BRIEF
(Oral Argument Requested)

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PRIOR OR RELATED APPEALS

This case is the aftermath of a remand order issued by this Court in *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001). That case was initiated by the Appellants ("Kansas Parties") to enjoin the Secretary of Interior from taking a .52 acre tract of land in Kansas City, Wyandotte County, Kansas (known as the "Shriner Tract") into trust on behalf of the Wyandotte Tribe of Oklahoma ("Wyandotte" or "Wyandottes"). This Court reversed the United States District Court's opinion with directions to remand the matter to the Secretary for further consideration of the issue of whether funds set aside for the trust purchase of property were used exclusively to purchase the Shriner Tract. *Id.* The district court entered a final judgment consistent with this Court's mandate on August 23, 2001. *Sac and Fox Nation v. Norton*, No. 03-4140-JAR (D. Kansas August 23, 2001).

STATEMENT OF JURISDICTION

Jurisdiction of this action was proper in the United States District Court. 28 U.S.C. § 1331 (1994) (federal question); 28 U.S.C. §§ 2201, 2202 (1994) (declaratory and injunctive relief); 5 U.S.C.§ 701 *et. seq.* (1994) (Administrative Procedure Act). The United States' action in placing the Shriner Tract in trust for the Wyandotte Indian Tribe of Oklahoma is a final agency action reviewable under the APA. *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997). The

appropriateness of that action is a federal question. This Court has jurisdiction of this appeal from the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1291, 28 U.S.C. § 1331, and the Administrative Procedure Act.

TIMELINESS OF APPEAL

The Kickapoo Tribe in Kansas, the Iowa Tribe of Kansas and Nebraska, the Sac and Fox Nation of Missouri and the Governor of the State of Kansas timely filed this appeal within 60 days of the district court's final Memorandum Opinion and Order dated May 12, 2006. Fed. R. App. 4(a)(l)(B). The Kansas Parties filed their Notice of Appeal on June 6, 2006. (A.A. 172.)

APPEAL FROM FINAL ORDER

The Kickapoo Tribe in Kansas, the Iowa Tribe of Kansas and Nebraska, the Sac and Fox Nation of Missouri and the Governor of the State of Kansas appeals the May 12, 2006 Order of the United States District Court for the District of Kansas, which disposed of all parties' claims.

ISSUES PRESENTED FOR REVIEW

Whether the Secretary acted arbitrarily and capriciously in departing from the plain language of section 105(b)(1) of P.L. 98-602 ("P.L. 602") to authorize the use of investment income earned from the original award of $100,000.00 to purchase the Shriner Tract as a non-discretionary trust acquisition.

Whether the Secretary's determination that the Shriner Tract was purchased exclusively with funds awarded under section 105(b)(1) of P.L. 602 was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, and whether such determination is supported by substantial evidence.

STATEMENT OF THE CASE

A. Nature of the Case

The Kansas Parties brought this action in the United States District Court challenging the Secretary of the Interior's ("Secretary") decision to place the .52 acre parcel of property into trust for the benefit of the Wyandotte Indian Tribe of Oklahoma ("Wyandottes") pursuant to section 105(b)(1) of P.L. 602. Appellants the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, and the Kickapoo Tribe of Indians, are three of the four federally-recognized Indian tribes currently residing within the State of Kansas. Along with Appellant Governor of the State of Kansas, Kathleen Sebelius, the Kansas tribes request this Court to reverse the Secretary's decision to take the Shriner Tract into trust or to remand the matter back to the Secretary for further proceedings.

B. The Course of Proceedings

Pursuant to this Court's order in the *Sac and Fox Nation v. Norton* case, on August 23, 2001, the United States District Court for the District of Kansas entered a judgment remanding the case to the Secretary of Interior to reconsider whether

"Pub. L. 98-602 funds alone were used to purchase the Shriner Tract in connection with the decision to approve the taking of the Shriner Tract into trust for the Wyandotte Tribe of Oklahoma." (A.A. 231.) On or about March 11, 2002, the Secretary published in the *Federal Register* the determination that "funds used to purchase the Shriner property in Kansas City, Kansas were from the Section 602 settlement on specific land claims." 67 Fed. Reg. 10,926 (March 11, 2002). The Secretary "affirmed the trust status of the subject lands." (*Id.*) On May 8, 2002, the Secretary amended the March 11, 2002 determination to correct transposed numbers regarding the value of the $100,000.00 award as invested, and to clarify that her determination should not be construed to authorize gaming activities on the Shriner Tract. 67 Fed. Reg. 30,953 (May 8, 2002).

On April 10, 2002, the Kansas Parties filed a request for reconsideration of the Secretary's decision, which was granted on June 6, 2002. (A.A. 512.) The parties briefed the issues before the Assistant Secretary – Indian Affairs, although the Kansas Parties' requests for discovery were denied. (A.A. 531.) The Kansas Parties filed a motion to conduct discovery and supplement the Administrative Record with the United States District Court in the *Sac and Fox v. Norton* matter, which was denied for lack of jurisdiction. (A.A. 507.) The Secretary issued an Opinion on Reconsideration on June 12, 2003, which affirmed that the Wyandottes

purchased the Shriner Tract with P.L. 602 funds, and the tract was properly taken into trust. (A.A. 092.)

On July 11, 2003, the Kansas Parties filed a Complaint for Declaratory and Injunctive Relief, Mandamus, and Review of Final Agency Action in the United States District Court for the District of Kansas, asserting that the Secretary's decision was arbitrary and capricious. The Kansas Parties requested that the court reverse the Secretary's decision to place the Shriner Tract into trust, and direct the Secretary to conduct a review of the Wyandotte's trust application under the standards applicable to discretionary trust acquisitions. (A.A. 033.) In the alternative, the Kansas Parties requested the court to remand the matter to the Secretary for "further consideration and evidentiary development of the record." (*Id*.)

On July 27, 2005, the district court remanded the matter to the Secretary to allow the Kansas Parties to supplement the administrative record ("Record"). (A.A. 077.) The scope of remand was narrowed to "additional investigation or explanation" of the evidence submitted by the Kansas Parties regarding a $5000.00 earnest money deposit for the Shriner Tract issued by North American Sports Management ("NORAM"). (*Id.*)

On December 16, 2005, the Secretary issued an Opinion on Remand that concluded the materials submitted by the Kansas Parties did not alter the June 12,

2003 Opinion on Reconsideration. (A.A. 088.) The Secretary determined the Wyandottes used only funds awarded pursuant to P.L. 602, and upheld the initial trust acquisition. (*Id*. at 091.)

C. Determinations of the Court Below

On May 9, 2006, the district court issued its opinion affirming the Secretary's determination that only P.L. 602 funds were used to purchase the Shriner Tract, and rejecting all of the Kansas Parties' arguments. *Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006). The court rejected the Kansas Parties' interpretation of 105(b) of P.L. 98 602, and supported the Secretary's decision to permit the Tribe to use interest and earnings on the original $100,000.00 award for the trust purchase of the Shriner tract. *Id.* at 1218. The court also affirmed the Secretary's determination that a $5,000.00 loan from NORAM deposited as earnest money was not applied to the purchase price of the Shriner tract based on a document in the Administrative Record regarding a refund of $9668.00 for a non-specified overpayment, providing its own reason for the overpayment. *Id.* at 1221-22.

The court upheld the Secretary's determination that only P.L. 602 funds were used to purchase the Shriner Tract based on the $180,000.00 withdrawal from the commingled investment account, which consisted of P.L. 602 and other unspecified funds. *Id.* at 1222. Likewise, the court affirmed the Secretary's

determination that the purchase of the Shriner tract with a margin account loan constituted the use of exclusively P.L. 602 funds. *Id.* at 1223.

Finally, the court upheld the Secretary's acceptance of the Tribe's valuation of the available P.L. 602 funds with interest and earnings at the time of the margin account loan, which purportedly demonstrated sufficient funds to purchase the Shriner Tract. *Id.* at 1223-24. The Secretary's position that the actual purchase price of the Shriner Tract was $180,000.00, not $325,000.00 as advanced by the Kansas Parties, was also affirmed. *Id.* at 1225. The Kansas Parties filed their Notice of Appeal on June 6, 2006.

STATEMENT OF RELEVANT FACTS

This litigation arises from the Wyandotte's efforts to take the .52 acre parcel of property known as the Shriner Tract into trust allegedly under the mandate of section 105(b)(1) of P.L. 602 for the purposes of conducting gaming in Kansas City, Kansas. The Kansas Parties are the Governor of Kansas and the three of the four federally-recognized Indian tribes with reservation lands in Kansas. Each Kansas tribe is the beneficial owner of and exercises jurisdiction over its tribal reservation lands in Kansas, which are held in trust for each respective tribe. The Wyandotte Indian Tribe of Oklahoma is a federally recognized Indian tribe located

in Ottawa County, Oklahoma, and the owner of several parcels of land in Kansas, including the Shriner Tract.

In 1978, the Indian Claims Commission ("ICC") awarded $561,424,21 to the Wyandotte Tribe for its share of lands ceded pursuant to the Fort Industry Treaty of July 4, 1805. *Sac and Fox Nation*, 240 F.3d 1250, 1255 n. 7. In 1979, United States Court of Claims awarded Wyandotte an additional $2.3 million for lands ceded under two treaties from 1817 and 1818. *Id.* In 1984, Congress enacted Public Law 98-602, an Act to Provide for the Use and Distribution of Certain Funds Awarded to the Wyandotte Tribe of Oklahoma ("P.L. 602"). At issue here is section 105(b)(1) of P.L. 602, which provided a "sum of $100,000.00 of such funds shall be used for the purpose of real property which shall be held in trust by the Secretary for the benefit of [the Wyandotte Tribe]." Pub. L. No. 98-602, 98 Stat. 3149, 3151, § 105(b)(1) (Oct. 30, 1984).

In 1989, the bonds purchased with P.L. 602 funds were transferred from A.G. Edwards Account No. 232 02-393 00 to Mercantile Investment Account No. 240 677 69. (A.A. 320-374). In November, 1991, $25,199.67 was withdrawn from Mercantile Account No. 240 677 9 by the Wyandottes, purportedly for the purchase of the Park City, Kansas property. (A.A. 429, 431.) The last Mercantile statement for Account No. 240 677 9 before the commingling of funds in December, 1991, is the November, 1991 statement that states the value of the

bonds as approximately $79,000.00 and the cash funds as $629.91. (A.A. 451-53.) As of November, 1991, $79,000.00 in value attributed to the P.L. 602 funds was transferred from Mercantile Account No. 240 677 9 to the Wyandotte Tribe's investment account with Mercantile and commingled with other assets. (*Id*.)

In April 1995, Wyandotte authorized the purchase of the Shriner Tract with "a portion of" the funds set aside in section 105(b)(1) of P.L. 602. (A.A. 199.) The resolution designated the property would be "used for gaming purposes." (*Id.*) In July 1995, Nations Realty Corporation, Inc. ("Nations Realty") entered into a Commercial and Industrial Real Estate Sale Contract with McCurry Enterprises to purchase the Shriner Tract for $325,000.00. (A.A. 209.) Nations Realty is a subsidiary of the North American Sports Management, Inc. ("NORAM"), with whom the Wyandotte Tribe had contracted for financing and development of gaming facilities on the Shriner Tract. *Kansas*, 430 F. Supp. 2d at 1212. The legal description of the subject property in that agreement is:

> A tract of land in the NW Quarter of Section 10, Township 11, Range 25, in Kansas City, Wyandotte County, Kansas, described as follows: Beginning at the SW corner of Huron Place, as shown on the recorded Plat of Wyandotte County, in Kansas City, Kansas, thence North 150 ft.; thence East 150 ft; thence South 150 ft.; thence West 150 ft. to the point of the beginning, meaning and intending to describe a tract of land 150 square in the SW corner of Huron Place as show on the recorded Plat of Wyandotte City, which is marked "Church Lot" thereon.

(A.A. 209.)

The fee to trust land application included an amended Chicago Title Insurance Company commitment for title insurance dated January 24, 1996 in the amount of $325,000.00, (A.A. 206-07), and contained a Commercial and Industrial Real Estate contract between McCurry Enterprises, Inc. ("McCurry Enterprises") and Nations Realty for the same amount. (A.A. 209). This contract specifically obligated Nations Realty to pay a sales commission of 6% of the purchase price ($19,500.00) to Karbank, the identified real estate broker. (*Id.*) The real estate contract between Nations Realty and McCurry Enterprises specifically references the $5,000.00 earnest money and as part of the consideration for the sale. (*Id.*)

On October 12, 1995, Karbank delivered to the escrow agent, Guaranty Title of Wyandotte County, Inc., a check in the amount of $5,000.00 as the earnest money in connection with the $325,000.00 real estate contract between Nations Realty and McCurry Enterprises. (A.A. 121.) The check itself was drawn on NORAM for $5,000.00, and specifically referenced the Shriner's building. (*Id.*) An appraisal report in the Administrative Record reflected a purchase price of $325,000.00 for the Shriner Tract. *Governor of Kansas*, 430 F. Supp. 2d at 1213.

Jim Fields, Acting Director, Muskogee Area Office, BIA issued a memorandum to Sharon Blackwell, Tulsa Field Solicitor, BIA requesting commencement of title examination process reflecting a title commitment of

$325,000.00 for the Shriner Tract. *Id*. A February, 1996 appraisal done on the Shriner Tract by the Department of Interior reflected a value of $182,000 for the property. *Id*. at 1213. On March 25, 1996, Sharon Blackwell, Tulsa Field Solicitor, to Muskogee Area Office, issued a memorandum and mentioned a preliminary title opinion in the amount of $180,000.00. *Id.*

In June, 1996, Nations Realty and McCurry Enterprises entered into two contracts. The first was a revised real estate contract reducing the price of the Shriner Tract from $325,000.00 to $180,000.00. (A.A. 215.) This contract specifically set forth in handwritten amendments that a $5,000.00 earnest deposit had already been paid – a reference to the monies previously paid by NORAM/Nations Realty. (*Id.*) The property description is exactly the same as the July 1995 agreement for $325,000. (*Id.*) This revised agreement still specifically obligated Nations Realty to pay $19,500.00 to Karbank in real estate commission, even though that amount is 6% of $325,000.00 – not $180,000.00.[1] (A.A. 216.)

The second contract entered into on the same day was a noncompetition and nondisclosure agreement between McCurry Enterprises and Nations Realty. (A.A. 220.) Nations Realty, the entity purchasing the Shriner Tract, agreed to pay $152,250.00 in exchange for McCurry Enterprises', the seller of the Shriner Tract,

[1] Six percent of $180,000.00 is $10,800.00.

agreement not to engage in a competitive gaming or other entertainment facility within a one-mile radius of the Shriner Tract and not to disclose the information regarding the purchase agreement. (A.A. 220-224.) A July 11, 1996 memorandum from Sharon Blackwell referenced an alleged assignment of Nations Realty's interest in the real estate contract to purchase the Shriner Tract to the Wyandotte Tribe. (A.A. 551.) The record is silent on what agreements were actually assigned to which parties. The same memorandum states the seller, McCurry Enterprises, Inc., was to receive $195,000.00 in proceeds from the sale. (*Id*.)

The Administrative Record contains several checks exchanged at or around the date of the closing of the purchase of the Shriner Tract: (a) a check from Guaranty Title, the escrow agent, issued to McCurry Enterprises in the amount of $15,646.98 reflected as proceeds; (b) a check in the amount of $15,000.00 dated July 11, 1996 from Nations Realty to Guaranty Title of Wyandotte County, Inc.; and (c) a check from the trust account of Thomas Richard Reehorn III, P.A. to McCurry Enterprises, Inc. dated July 17, 1996 in the amount of $76,125.00 reflected as being made for "note payment." (A.A. 225.) However, the Administrative Record does not contain a complete record of the transactions at closing, such as closing statements, settlement statements, wire transfer

information, or any other evidence of the actual proceeds (and the sources of such proceeds) delivered at the closing of the purchase of the Shriner Tract in July 1996.

A July 1996 statement from Mercantile Investment Services, Inc. reflects that $180,000.00 was withdrawn from funds in the form of a loan on a margin account, which loan was shown as a liability against the account. (A.A. 488.) The Administrative Record contains no documents demonstrating the recipient of that disbursement. An analysis performed by the Wyandottes calculated the value of the invested P.L. 602 funds at $212,170.00. (A.A. 239.) At the request of the Wyandottes, the accounting firm KPMG reviewed its analysis, stating "This analysis was presented to us by you and we have not independently computed a separate analysis." (A.A. 240.) KPMG subsequently stated the "computations were appropriate," and agreed with the Wyandottes' analysis. This information was transmitted to the Secretary on December 5, 2001. The Secretary requested that Thomas Hartman, the financial analyst for the Department of the Interior's Office of Indian Gaming Management, review KPMG's analysis. (AA. 493.) Mr. Hartman's review found KPMG's analysis accurate. (*Id*.) Without conducting an independent audit or contacting the Kansas Parties, the Secretary issued her determination that only P.L. 602 funds were used to purchase the Shriner Tract, and approved the trust acquisition. 67 Fed. Reg. 10, 926 (March 11, 2002).

The Kansas Parties petitioned for reconsideration, which was granted by the Assistant Secretary – Indian Affairs (AS-IA). (A.A. 512.) In his letter granting reconsideration, he stated "The sole issue remanded to the BIA was whether the Wyandotte Nation purchased the Shriner tract in Kansas City, Kansas, with money appropriated by Congress in satisfaction of judgments awarded after successful litigation of land claims." (*Id.*) In that letter, the AS-IA added:

> It would be most helpful if the briefs focused on the issues regarding whether Public Law 602 money "alone" was used:
>
> * Whether or not money from other sources was such, such as interest earned on the Public Law 602 money or money commingled with other funds;
>
> * Whether Congress intended the mandatory nature of the trust acquisition to be defeated if Public Law 602 money "alone" was not used;
>
> * Whether Congress prohibited use of interest, *etc.*

(*Id.* at 514 (emphasis added).)

The Kansas Parties requested discovery regarding the production of documents supporting the purchase of the Shriner Tract, identifying all disbursements out of the investment accounts (including an explanation of all such disbursements), supporting the use of P.L. 602 funds to purchase property. (A.A. 524.) The Kansas Parties made a subsequent request for missing account statements from Wyandotte. (A.A. 529.) The Attorney Advisor to the AS-IA

denied both requests, alleging that the items sought would go outside the federal court's "narrow remand." (A.A. 531.)

A separate review of the Wyandotte's analysis was performed by Purinton, Chance & Mills, LLC on behalf of the Kansas Parties, which valued the invested funds at $112,959.00. (A.A. 537.) On February 5, 2003, the Office of Indian Gaming Management's financial analyst responded to a September 9, 2002 internal memorandum from the Attorney-Advisor to the AS-IA requesting Mr. Hartman to respond to the Kansas Parties' factual allegations, which included:

1. PL 602 funds were invested "and they lost money on such speculation."
2. The purchase price of the Shriner tract was $325,000 not $180,000.
3. The 10 "reasons" why the KPMG report is "seriously flawed and unreliable . . . ."[2]
4. At most, "only 112,000[] of the value represented by the 602 funds as of July 1996" existed.

(A.A. 541.) As to each issue, Mr. Hartman concluded that no funds were lost on the investment, the Shriner Tract was purchased for $180,000.00,[3] the analyses conducted by both the Wyandottes and Purinton, Chance & Mills, LLC were valid because the value of the bonds could be calculated at both face value (value upon maturity) or market value (actual value at the time of purchase). (A.A. 543.)

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[2] Those ten reasons were found in the Brief of Kansas Governor and Tribes on P.L. 602 Funds (on Reconsideration).

[3] Mr. Hartman's analysis of the price of the Shriner Tract is based on a representation by the Wyandottes that the property would be purchased for $180,000.00 (A.A. 542.)

Based on this information, the Secretary issued an Opinion on Reconsideration on June 12, 2003. That opinion confirmed the May 11, 2002 decision to take the Shriner Tract into trust. (A.A. 547.)

In the proceedings below, the district court remanded this matter to the Secretary to permit the Kansas Parties to supplement the administrative record on the limited issue of the source and disposition of the $5000.00 earnest money deposit. (A.A. 077.) The Kansas Parties provided copies of additional documents, including the July 1995 real estate contract for $325,000.00 between McCurry Enterprises and Nations Realty, the revised June 1996 real estate contract for $180,000, the closing statement from the purchase that reflected $5000.00 was applied towards the purchase price of the Shriner Tract, and a series of correspondences between Karbank and Guarantee Title regarding the $5000.00 earnest money deposit. (A.A. 109.)

Without performing a forensic accounting, and in reliance on representations from the Wyandottes asserting non-P.L.602 funds were only applied towards closing costs, the Secretary affirmed the June 12, 2003 Opinion on Reconsideration. (A.A. 088.) The Secretary relied, in part, on KPMG's review of the analysis performed by the Wyandottes, in determining the purchase price was $180,000.00, and that P.L. 602 permitted the Wyandottes to use income earned from the section 105(b)(1) award to purchase the Shriner Tract. (A.A. 093-94.)

SUMMARY OF THE ARGUMENT

The central question here is whether the Secretary of the Interior ("Secretary") properly determined that the Wyandotte Tribe used exclusively funds provided to Wyandotte pursuant to P.L. 602 to purchase the Shriner Tract in Kansas, thus triggering the Secretary's obligation to take the land into trust.

P.L. 602 states: "A sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of [the Wyandotte] Tribe." P.L. 602, § 105(b)(1). The question is whether land purchased by the Wyandotte Tribe for somewhere between $180,000.00 and $325,000.00 qualifies under section 105(b)(1) to be taken into trust.

Previously, this Court in *Sac and Fox Nation of Missouri v. Norton* directed the Secretary of the Interior to determine whether the Shriner Tract was purchased with only funds awarded by P.L. 602. This Court criticized the Secretary's failure to make a complete factual inquiry and the Secretary's complete reliance upon the representations of the Wyandotte Tribe. This Court identified evidence in the Administrative Record which supported the Kansas Parties' arguments that non-P.L. 602 funds were used to purchase the Shriner Tract.

The Secretary subsequently determined that the tract was purchased only with funds provided by P.L. 602. However, in reaching that decision, the Secretary wrote language into P.L. 602 that Congress did not use, ignored evidence

in the record, and failed to examine other relevant data. The Secretary's decision, in consequence, was a clear error. By adopting the Secretary's decision, and by curing some of the Secretary's errors in doing so, the district court similarly erred.

The Secretary determined that funds provided under P.L. 602 plus interest earned on those funds were used to purchase the real estate. The Secretary's legal conclusion that investment income was the equivalent of funds provided by Congress was not in accordance with P.L. 602. The plain language of the section, viewed in context and in light of Congressional intent to designate the use and distribution of the full award, provides that the $100,000.00 award is not "open ended" seed money to be parlayed into a larger fund to purchase substantially more property than that contemplated by P.L. 602. Interpreting section 105(b)(1) of P.L. 602 to include a potentially unlimited amount of interest and earnings from the investment of the original $100,000.00 award is contrary to statutory language and Congressional intent, and leads to an absurd result.

In addition, the Secretary's determination was arbitrary and capricious because it was based on an incomplete record. Despite the directive issued by this Circuit, the Secretary failed to gather and fully examine relevant data, denied the Kansas Parties the full and fair opportunity to discover and analyze evidence, improperly narrowed the scope of its decision upon reconsideration, and failed to respond to evidence specifically identified by this Court that pointed to the use of

non-P.L. 602 funds to purchase the Shriner Tract. This absence of evidence and unduly narrow scope of review upon reconsideration make it apparent that the Secretary's action was not a product of reasoned decision-making. The failure to conduct independent audits, investigate and reasonably explain financial inconsistencies, and adequately address contradictory evidence identified by this Court are illustrative of the Secretary's inability or unwillingness to make a reasonable determination based on a complete record of information.

The district court upheld the Secretary's determination by attempting to explain away these evidentiary shortcomings. The attempt to rescue the Secretary's decision was improper. A reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574-75 (10th Cir. 1994). Unlike the Secretary, the district court at least reviewed some of the evidence and its opinion demonstrates an attention to detail absent from the Secretary's decisions. Nonetheless, the district court's decision cannot be substituted for the Secretary's failure to submit a decision based on substantial evidence. *Id.* at 1574.

For these reasons, the Kansas Parties ask this Court to invalidate the Secretary's decision as arbitrary and capricious, to declare void the trust determination of the Shriner Tract, and alternatively, to remand the case, again, to

the Secretary for a full and fair review of the question of whether only funds awarded by P.L. 602 were used to purchase the tract.

ARGUMENT

I. STANDARD OF REVIEW

This Court has held that the "essential function of judicial review [of an administrative agency decision] is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with the prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion . . . ." *Olenhouse,* 42 F.3d at 1574. A determination of whether the agency acted within the scope of its authority "requires a delineation of the scope of the agent's authority and discretion, and consideration of whether on the facts, the agency's action can reasonably be said to be within that range." *Id*. A determination of whether the agency complied with the prescribed procedures "requires a plenary review of the record and consideration of applicable law." *Id*. This Court "owe[s] no deference to the district court's decision. Rather, the scope of [] review is *de novo*." *Sac and Fox Nation*, 240 F.3d at 1260.

II. AS PART OF THE DETERMINATION THAT ONLY P.L. 602 FUNDS WERE USED TO PURCHASE THE SHRINER TRACT, THE SECRETARY IMPROPERLY INTERPRETED SECTION 105(B)(1) TO ARBITRARILY AUTHORIZE THE USE OF INTEREST AND EARNINGS FROM THE ORIGINAL $100,000.00 AWARD.

The question is whether the Wyandotte Tribe used only those funds authorized by P.L. 602 ($100,000.00) to purchase the Shriner Tract. Because the purchase price of the tract was either $325,000.00 or $180,000.00 (depending upon which purchase agreement one reads), the answer to that question is not clear without a thorough and probing investigation into the facts – a task the Secretary failed to carry out.

The Wyandotte Tribe, the Secretary, and the district court interpreted P.L. 602 to mean something other than what it says. According to them, P.L. 602's award to the Wyandottes of $100,000.00 for the purchase of real estate includes income derived from investing the original $100,000.00 award. The Secretary, having added investment income to the Congressional award, then attempted to determine whether the combined amounts constituted the only funds used to purchase the property. If P.L. 602 lawfully permitted the Wyandottes to add funds to the Congressional award, their purchase of real estate with the combined amount triggers the Secretary's obligation to take the land into trust. It does not. The non-discretionary trust designation applies only to real property purchased solely with the $100,000.00 award. The use of any funds in excess of the $100,000.00 award

removes the property from the mandatory trust provisions of section 105(b)(1).[4] Here, the plain language of section 105(b)(1) provides that up to $100,000.00 (and no more) may be used to purchase land that must be taken into trust. The Secretary's strained interpretation of these plain words must be set aside.

A. Congress has directly spoken in limiting the amount to the $100,000.00 awarded under section 105(b)(1) of P.L. 602, which may be used for the purchase of land to be taken into trust, thus excluding the use of any income earned from the investment of such funds.

The relevant language of section 105(b) of P.L. 602 provides:

> Twenty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 103(b) shall be used and distributed in accordance with the following general plan:
>
> > (1) A sum of $100,000.00 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.
> >
> > (2) The amount of such funds in excess of $100,000.00 shall be held in trust by the Tribal Business Committee of such Tribe for the benefit of such Tribe.
> >
> > (3) Any interest or investment income accruing on the funds described in paragraph (2) may be used by the Tribal Business Committee of such Tribe for any of the

[4] An internal correspondence between Thomas Hartman, financial analyst for the Office of Indian Gaming Management, and George Skibine, Director of the Office of Indian Gaming Management, demonstrates this was the general understanding: "While [Wyandotte] may spend the accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law." (A.A. 230.)

> following purposes: [education, health care, economic development, non-trust land acquisition, etc.] . . . .

Pub. L. No. 98-602, 98 Stat. 3151 (1984).

In reviewing agency decisions interpreting federal statutes, this Court is guided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984). *Sac and Fox Nation v. Norton*, 240 F.3d at 1260. The reviewing court must "give effect to the unambiguously expressed intent of Congress" if Congress has "directly spoken to the precise question at issue." *Id.* However, "if the statute is silent or ambiguous," the court is "generally required to defer to the agency's interpretation if it is based on a permissible construction of the statute." *Id.* at 1261. Here, Congress has spoken without ambiguity.

Congress authorized an expenditure of no more than $100,000.00 on real estate to be taken into trust. Congress expressly authorized the use of interest and investment income only on section 105 (b)(2) funds, the amount of the award in excess of the $100,000.00 designated specifically for purchase of real property to be taken into trust. No interest or investment income is mentioned in section 105 (b)(1) real property purchases subject to the non-discretionary trust acquisition. Congress had in mind the concept and the fact of investment income; it expressly chose not to include that source of funds in the trust property acquisition section.

The district court followed the lead of the Secretary and read into Congress' plain words some ambiguity; the court then resolved that purported ambiguity in accordance with the dictates of *Chevron*. *See Governor of Kansas*, 430 F. Supp. 2d at 1218. It is difficult to discern any ambiguity in the plain words of the Act that limit the funds to be spent on property to be taken into trust to $100,000.00, and to allow the use of additional funds *plus* investment income to be used for other purposes including acquisition of non-trust land. *See* P.L. 602, § 105(b)(1). Congressional intent is unambiguous, and must be given effect. *Id.* at 842-43. For this reason alone, the Secretary's interpretation is not entitled to deference.

B. Even If the Exclusion of Language Governing the Use of Income Earned in Section 105(B)(1) Is Determined to Be Ambiguous, the Secretary's Interpretation Is Based on an Impermissible Construction of the Statute in Light of the Context, As Well As the Overall Purpose of P.L. 602, to Distribute And Specify the Use of Any Awards.

This Court has held "[a]s a general rule of statutory construction, a statute is ambiguous if it is capable of being understood in two or more possible senses or ways." *Houghton ex rel. Houghton v. Reinertson,* 383 F.3d 1162, 1169 (10th Cir. 2004). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Even if the statute is somehow considered ambiguous, the

Secretary's interpretation is based on an impermissible construction that leads to an absurd result that could not have been contemplated by Congress.

Under the Secretary's interpretation, the Wyandottes could theoretically place the $100,000.00 in high-yield investments, generate investment income which would then be added to the $100,000.00 Congress specified for trust land acquisition, and use the combined amounts to purchase of unlimited parcels of land all of which would have to be taken into trust, provided the purchases were made with income derived from the original $100,000.00 funds. Such an interpretation leads to results that go far beyond the Congressional designation of a maximum of $100,000.00 to purchase land to be taken into trust.[5]

In determining that the exclusive use of section 105(b)(1) funds included interest and income earned from the original $100,000.00 award, the Secretary stated "[t]here is no language in the statute triggering the defeat of the trust purchase if more than the $100,000.00 is used to purchase the real estate, when the additional funds were derived from the original . . . award." (A.A. 548.) The

[5] Appellants do not argue the Tribe was prohibited from investing the $100,000.00 award. Appellants do not argue the Tribe could apply any income earned from that investment to the purchase of the Shriner Tract, or any parcel of real property. Appellants simply demonstrate that the addition of that investment income to the $100,000.00 Congress specified for acquisition of real property takes the acquisitions outside the scope of section 105(b)(1) – the property is thereby not subject to the non-discretionary trust designation. In fact, Congress said precisely that. Section 105(b)(3) (investment income from amounts in excess of the $100,000.00 may be used for non-trust land acquisition).

Secretary further concluded that, despite the plain language of the statute, any ambiguity should be resolved in favor of the Wyandotte Tribe, pursuant to the canon of construction that ambiguities shall be resolved in favor of the Native Americans it was intended to benefit. *Id.*

However, in this Circuit, this canon is inapplicable when "the [competing] interests at stake involve Native Americans." *Governor of Kansas v. Norton*, 430 F. Supp. 2d at 1219 (citing *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995)); *Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649-655 n. 7 (1976). The "competing interests" at stake here involve, on the one hand, the interests of the resident tribes currently located within the State of Kansas, and on the other hand, the interests of the Wyandotte Tribe, a tribe relocated in its entirety to the State of Oklahoma. The canon is therefore inapplicable and does not save the Secretary's extraordinary interpretation of section 105(b)(1) of P.L. 602.

The legislative history demonstrates that at no time did Congress consider the use of income earned from the original $100,000.00 award as triggering the mandatory trust status of land purchased with investment income. The Congressional Record on P.L. 602 reflects that the differentiation between the trust land acquisition limited to a maximum of $100,000.00, as compared to the use of interest income for other endeavors (including purchase of non-trust land), remained virtually unchanged from start to finish. *See* U.S. House of

Representatives Report form the Committee on Interior and Insular Affairs on H.R., *Congressional Record,* No. 97-819, p.1 (A.A. 175) ("A sum of one hundred thousand dollars ($100,000.00) shall be utilized to purchase land for the tribe to be held in trust by the Secretary"); Committee on Interior and Insular Affairs Report, (September 16, 1982); U.S. Senate Report from the Select Committee on Indian Affairs on S. 2824, *Cong. Rec.,* No. 98-609, (September 17, 1984) (A.A. 182) (same); and Select Committee on Indian Affairs U.S. House of Representatives Report from the Committee on Interior and Insular Affairs on H.R. 6221, *Cong. Rec.,* No.98-1067, Committee on Interior and Insular Affairs Report, (September 24, 1984) (A.A. 188) (same). Each time Congress addressed this matter, it provided that one fund, limited to $100,000.00, could be used for the mandatory acquisition of trust land (subsection (b)(1)), and other funds combined with investment income could be used for other purposes including purchase of non-trust property (subsection (b)(2)).

In sum, the language of section 105(b)(1) of P.L. 602 authorizes the use of $100,000.00 for the purchase of land, which, this Court has determined, must be taken into trust by the United States for the use and benefit of the Wyandotte Tribe. The plain language itself limits to $100,000.00 the amount of money to be used to purchase real estate to be held in trust.

The Secretary attempted to create ambiguity where none existed. (A.A. 088 ((Dec. 15, 2005 Opinion on Remand).); (A.A. 544 (June 12, 2003 Opinion on Reconsideration).) The Secretary's interpretation is not a "permissible construction of the statute," is not reasonable, and should be set aside. *Sac and Fox Nation v. Norton,* 240 F.3d at 1261.

III. THE SECRETARY'S DECISION THAT ONLY SECTION 105(b)(1) FUNDS WERE USED TO PURCHASE THE SHRINER TRACT IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, AND NOT BASED ON SUBSTANTIAL EVIDENCE BECAUSE IT IS BASED ON A CURSORY EXAMINATION OF AN INCOMPLETE ADMINISTRATIVE RECORD UNDULY LIMITED BY THE SECRETARY THROUGHOUT THE DECISION MAKING PROCESS.

Under the arbitrary and capricious standard:

> The court must ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made . . . [T]he reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.

Olenhouse, 42 F.3d at 1574.

Agency action will be set aside:

> If the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.

Id. 1574 (citing *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1993)) (internal citations omitted); *see also Miami Tribe of Oklahoma v. United States*, 5 F. Supp.2d 1213, 1216 (D. Kan. 1998).

Moreover, the reviewing court cannot make up for deficiencies in the agency record and/or decision making and "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Olenhouse,* 42 F.2d at 1574-75. If the agency has failed to provide a reasonable explanation for its actions, "or if limitations in the administrative record make it impossible to conclude the action was a product of reasoned decision making, the reviewing court may supplement the record or remand the case to the agency for further proceeding." *Id.* 42 F.3d at 1575 (citing *Motor Vehicles Mfrs. Ass'n.*, 463 U.S. at 34, 50-57); *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 643-44 (10th Cir. 1980).

In addition to requiring a reasonable basis for the agency action, the "arbitrary or capricious" standard requires "an agency's action to be supported by the facts in the record." *Olenhouse,* 42 F.3d at 1575. In this regard, this Circuit has adopted the analysis articulated by the District of Columbia Circuit in *Association of Data Processing v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1994), which ruled that agency action "will be set aside as arbitrary if it is

unsupported by substantial evidence." *Olenhouse,* 42 F.3d at 1575. The Secretary violated those standards in this case.

A. The Secretary Failed To Collect Relevant Data, Did Not Permit Kansas Parties to Collect Relevant Data by Denying Kansas Parties' Discovery Requests, And Failed to Conduct Any Independent Analyses of the Information Submitted by the Wyandotte Tribe.

1. The Secretary undertook no reasoned analysis of the source of the funds used to purchase the Shriner Tract.

The Administrative Record demonstrates that prior to issuance of the March 11, 2002 decision the Secretary made no inquiry as to the source of the actual funds utilized to purchase the Shriner Tract, did not determine the actual amounts paid for the property, and did not determine the identities of all of the persons or entities who paid those amounts. (*See generally* A.A. 231-493.). The Secretary neither conducted nor reviewed actual audits to substantiate the Wyandotte's financial analysis. Although the Wyandottes submitted additional purported financial records to the Secretary following remand from the district court, the Secretary issued the decision without the affording the Kansas Parties the opportunity to submit their own evidence or conduct discovery to analyze the evidence provided by the Wyandottes. The Administrative Record remained largely unchanged from the time of this Court's remand in *Sac and Fox Nation*.

On March 11, 2002, the Secretary published the determination that "funds used to purchase the Shriner property in Kansas City, Kansas were from the Section 602 settlement on specific land claims." 67 Fed. Reg. 10,926 (March 11, 2002). The Secretary "affirmed the trust status of the subject lands." *Id*. The only evidence considered by the Secretary prior to this determination was the KPMG accounting firm's confirmation of an analysis performed by the Wyandotte Tribe. KPMG purports to have reviewed, at the Wyandotte's request, the Wyandotte's own valuation of the invested $100,000.00 award; that review was conducted years after $95,500.00 of such funds were withdrawn by the Wyandotte Tribe and used to purchase corporate bonds, all of which were later commingled with other Wyandotte investment assets.[6]

The record demonstrates that KPMG's analysis was based entirely on an analysis *already performed* by the Wyandotte Tribe. (A. A. 236 (stating KPMG confirmed the analysis previously done by the Wyandottes).) KPMG simply analyzed the Wyandotte's analysis. According to KPMG, "This analysis was presented to us by you and we have not independently computed a separate analysis." (A.A. 240.) In addition, KPMG specifically declared that its analysis

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[6] It is apparent from the record that the Secretary made no efforts to determine whether the commingling of assets impacted the value of the invested section 105(b)(1) funds. In fact, no inquiry whatsoever was made regarding the commingling of 105(b)(1) funds, investment income allegedly earned from those funds, and other Wyandotte investment assets.

did "not constitute an audit, examination or review in accordance with standards established by the American Institute of Certified Public Accounts." *Id.* This review, lacking in logical analysis, and not in conformance with generally accepted accounting principles, was simply accepted by the Secretary.

The Secretary requested Thomas Hartman, a financial analyst with the Office of Indian Gaming Management, to review the Wyandotte Tribe's materials. In response, Mr. Hartman provided a one-sentence analysis of the KPMG analysis of the Tribe's analysis. (A.A. 493.) Mr. Hartman's analysis is founded upon, and twice-removed, from the original analysis performed by the Wyandotte Tribe itself. Without a valid audit, and on the basis of analyses which are derived from that of the Wyandotte Tribe itself, the Secretary nevertheless affirmed the prior decision that only section 105(b)(1) funds were used to purchase the Shriner Tract.

The Secretary did not "examine relevant data," did not consider "all relevant factors," and "entirely failed to consider an important aspect of the problem," in affirming its prior decision. *Colorado Wild v. United States Forest Service,* 435 F.3d 1204 (10th Cir. 2006). The Secretary had no factual basis upon which the agency could have determined the source of the funds used for the Shriner Tract purchase.

2. On reconsideration, the Secretary again denied the Kansas Parties the opportunity to gather relevant evidence regarding the purchase of the Shriner Tract and the manner in which §105(b)(1) funds were invested and used.

The Kansas Parties did not learn of the Secretary's decision until it was published in the Federal Register. The Kansas Parties requested reconsideration, which was granted on June 5, 2002. (A.A. 512.) When the agency accepted the Kansas Parties' petition for reconsideration, it stated "The sole issue remanded to the BIA was whether the Wyandotte Nation purchased the Shriner tract in Kansas City, Kansas, with money appropriated by Congress in satisfaction of judgments awarded after successful litigation of land claims." *Id.* The letter stated further:

> It would be most helpful if the briefs focused on the issues regarding whether Public Law 602 money "alone" was used:
>
> * Whether or not money from other sources was used, such as interest earned on the Public Law 602 money or money commingled with other funds;[7]
>
> * Whether Congress intended the mandatory nature of the trust acquisition to be defeated if Public Law 602 money "alone" was not used;
>
> * Whether Congress prohibited use of interest, *etc.*

[7] The language of the Secretary's letter suggests that the agency itself agrees that the term "other sources" includes "interest earned on the Public Law 602 money." If the tract was purchased with money from sources "other" that section 105(b)(1) funds, the tract was not subject to being placed automatically into trust.

Id. at 0098 (emphasis added). This language was subsequently interpreted as narrowing the scope of reconsideration to these issues. By this improper narrowing of the issues on reconsideration, the Secretary refused to consider additional relevant evidence.

On July 22, 2002, the Kansas Parties requested discovery for the purpose of gathering all available financial information necessary for a reasoned accounting analysis, including documents reflecting all disbursements from the investment accounts that Wyandotte and KPMG claimed to have analyzed (A.A. 542.)[8] On July 25, 2002, the Kansas Parties submitted an additional request for missing account statements from Mercantile Investment Services, Inc. (A.A. 529.)

On July 29, 2002, the agency denied the Kansas Parties' request for discovery, stating that the agency "disagreed with [Kansas Parties] that they don't have enough information or that the record is incomplete." (A.A. 531.) As a basis for the denial, the agency stated the documents requested were either already available from the closed litigation, *Sac and Fox Nation v. Norton,* or were "reflected in memorandums [sic] prepared by [the agency] in the normal course of processing the Shriner Tract acquisition." *Id.* The agency claimed further that granting the discovery request would "re-litigate a closed case or go beyond the

[8] The July 22, 2002 letter was omitted, without explanation, from the Administrative Record, though it is referenced in the Secretary's July 29, 2002 letter denying Appellants' discovery request. (A.A. 531.)

federal courts narrow remand." *Id.* On the contrary, the Kansas Parties' requests for access to information were directed entirely to the question of whether section 105(b)(1) funds "alone" were used to purchase the Shriner Tract.

Although there is no constitutional right to discovery in administrative proceedings, this Court has recognized that a complete denial of discovery that causes prejudice could result in a due process violation. *Sims v. NTSB*, 662 F.2d 668, 671-72 (10th Cir. 1981). The Kansas Parties have such a case here.

The Secretary thus failed to gather relevant facts itself and denied the Kansas Parties' request to examine financial records concerning the Shriner Tract's purchase. Other than the Wyandotte Tribe's analysis, KPMG's non-conforming review of that analysis, and the agency's one-sentence review of the KPMG review, there was no evidence on which the Secretary could reasonably base a determination. By preventing the Kansas Parties from doing what the Secretary failed to do, *i.e.* audit the financial records of the funds used to purchase the tract, the Secretary insured that the decision would not bear a rational relationship to the facts. *Olenhouse,* 42 F.3d at 1574. The Secretary's decision, which included the denial of discovery at these levels of administrative review, was an abuse of discretion.

B. Upon the Second Remand from the District Court of Kansas to Supplement the Administrative Record with Specific Information Regarding the $5000.00 Earnest Money Deposit, the Secretary Issued an Opinion That Again Relied Solely on the Representations of the Wyandotte Tribe And Again Failed to Examine All Relevant Data.

In his decision upon the second remand, the Secretary upheld the original determination based entirely upon the claims of the Wyandotte Tribe and failed to conduct his own investigation as to the validity of the Wyandotte's assertions. (A.A. 088.) The Opinion on Remand is not based on substantial evidence or upon relevant facts.

This Court is required to review the agency's decision making process and determine whether the agency examined all relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Olenhouse,* 42 F.3d at 1576. The court is also required to "conduct a plenary review of the record to ascertain whether the agency's action was supported by substantial evidence." *Id*. Again, the Secretary's failure to authorize discovery and conduct appropriate and independent factual inquiries renders the Secretary's decision arbitrary and capricious.

The district court ordered the Secretary to supplement the Administrative Record regarding the use of a $5000.00 earnest money deposit of non-P.L. 602 funds on the purchase of the Shriner Tract. (A.A. 088.) As discussed in more

detail below, the record revealed that the $5000.00 earnest money deposit was applied to the purchase price. (*Id.*) The Wyandotte Tribe claimed the funds were applied to the closing costs of the property, and that the closing costs were somehow different from the purchase price. (*Id.*)

Rather than conduct its own independent investigation, the Secretary just adopted the Wyandotte Tribe's position. (*Id.*) ("We find no reason to discount Wyandotte's assertion.") The Secretary admitted the "Department has not performed a forensic accounting to resolve this matter, and is doubtful that authority or need exists to do so." (*Id.*) The agency referred to KPMG's analysis of the Wyandotte's analysis, but otherwise did not attempt to gather, review or provide any additional evidence on which to base its final determination on remand. (*Id.*) Mr. Hartman, the financial analyst used by the Secretary, admitted that "individual investment components of that account were not analyzed." (A.A. 542.) He acknowledged further that he simply relied upon the Wyandotte Tribe's accountants: "KPMG used the actual earnings of the account value to determine the earnings to be apportioned, *or so I was lead to believe*." (*Id.*) (emphasis added). The Secretary engaged in no independent, reasoned analysis of the claims of the Wyandotte Tribe.

The Secretary's failure is puzzling in light of the odd circumstances surrounding the purchase: there were two purchase agreements, one stating the

price at $325,000.00 and the second at $180,000.00; the realtor's commission of 6% was computed on the basis of the higher of the two purchase prices; the section 105(b)(1) funds were commingled with other Wyandotte funds; a $5000.00 deposit toward the purchase price had been paid by an entity other than the Wyandottes; even adding investment income to the $100,000.00 award, its value at the time of purchase ($112,000.00) was substantially less than even the lower of the two purchase prices. (A.A. 541). The record reflects that the Secretary did not consider these troubling issues.

The failure, or, as here, the refusal to consider relevant facts renders the agency decision invalid. *Colorado Wild,* 435 F.3d at 1213.

IV. THE SECRETARY'S DETERMINATION REGARDING THE WYANDOTTE TRIBE'S USE OF SECTION 105(B)(1) FUNDS IS ARBITRARY AND CAPRICIOUS AND NOT BASED ON SUBSTANTIAL EVIDENCE DUE TO MATERIAL INCONSISTENICES AND CONTRADICTORY EVIDENCE THROUGHOUT THE ADMINISTRATIVE RECORD.

A. The $5,000.00 Earnest Money Deposit towards the Purchase of the Shriner Tract Was Paid with Non-Act Funds, but the Administrative Record Contains No Evidence Regarding How the Deposit Was Applied Towards the Purchase.

The real estate purchase agreement between McCurry Enterprises and Nations Realty executed in July 1995, stated a purchase price of $325,000.00. (A.A. 209.) This contract provided that the sum of $5,000.00 was to be deposited by Nations Realty in an escrow account of Guaranty Title as part of the

consideration for the sale. (A.A. 209.) On October 12, 1995, B.A. Karbank and Company delivered a check in the amount of $5,000.00 drawn on NORAM, payable to Guaranty Title Company for the Shriner purchase. (A.A. 118-21.) This check was accompanied by a letter that identified this $5,000.00 as coming from the buyer as earnest money pursuant to the contract between McCurry Enterprises and Nation Realty. (A.A. 120.)

In June, 1996, the parties entered into a revised purchase agreement setting the purchase price at $180,000.00; this agreement acknowledged that the $5,000.00 earnest deposit had already been paid. (A.A. 124-29.) The record is clear that the $5,000.00 was applied to the total purchase price for the Shriner Tract; it is equally clear that the funds came from a non-P.L. 602 source as it was paid by NORAM/ Nations Realty – entities separate and distinct from the Wyandotte Tribe. *Id*.

In the initial rounds of this dispute, the district court remanded this issue to the Secretary for further consideration. (A.A. 077.) The Secretary concluded that as part of the closing of the purchase, a disbursement statement was issued on July 16, 1996, showing the total amount of funds presented at closing by the Wyandotte Tribe: $180,000.00 (purchase price), $19,823.50 (realtor commission of 6% computed on a purchase price of $325,000.00), and $5,000.00 (the earnest money deposit previously received from NORAM). (A.A. 090.) This disbursement statement further stated that in some unexplained manner, the Wyandotte Tribe had

made an overpayment in the total sum of $9,668.00 and a refund of that amount was issued. (A.A. 136.)

The Wyandotte, without evidentiary support, claimed that the $5,000.00 from NORAM was applied towards closing costs, not the purchase price. (A.A. 090.) In his opinion on remand, the Secretary without examination simply accepted that claim; the Secretary "found no reason to discount Wyandotte's assertion." (*Id.*) The Secretary neither sought, nor examined, relevant evidence despite the mandate of the district court that the agency do so. *Olenhouse,* 42 F.3d 1574 (duty to examine relevant evidence).

Other than a lump sum refund for an "overpayment" of $9668.00, the Administrative Record contains no evidence of credits, nor any evidence which would account for the provenance or fate of the $5000.00 earnest money deposit. In affirming the Secretary's decision, the district court found that the overpayment amount was "more than enough to repay the $5000.00 earnest money deposit." *Governor of Kansas,* 430 F. Supp. 2d at 1221. The Secretary's decision and the district court's surmise are wholly lacking in any factual foundation; there is simply no explanation in the record for the ultimate disposition of the $5000.00 deposit. The Secretary's determination that the $5000.00 deposit was applied to closing costs is not based on substantial evidence. In fact, it is not based on any evidence at all.

B. The Totality of the "Purchase Price" for the Shriner Tract Included Prorations, Closing Costs and Other Agreed Expenses Established at Closing, to which the Non-P.L. 602 Funds from NORAM in the Amount of $5,000.00.00 Were Applied.

The purchase prices for the Shriner Tract were defined in paragraph 4 of both of the real estate sale contracts, though in substantially differing amounts. ((A.A. 113) (1995 Agreement); (A.A. 124 (1996 Agreement).) The second of these contracts specifically defined the purchase price to include not only the $175,000.00.00 remaining due after application of the $5,000.00.00 paid by NORAM, but also any and all other funds due at closing for "prorations, closing costs and other agreed expenses." (A.A. 124.)

The Secretary dealt with these facts in the most cursory manner. (A.A. 090-091.) The "purchase price" was defined in the real estate contracts. Both contracts unequivocally defined the purchase price to include prorations and agreed expenses. These agreed expenses included the $19,500.00 real estate commission, among other items. The Shriner Tract could not have been purchased by the Wyandotte Tribe if it did not provide funds adequate to cover the totality of the purchase price, including the closing costs and the real estate commission which Wyandotte agreed to pay. Even if one adopts Wydandotte's suggestion that the $5,000.00 earnest money was eventually applied against closing costs, those closing costs were part of the entire "purchase price" for the Shriner Tract as

defined by the contracts. The Secretary simply ignores that part of the purchase price for the Shriner Tract, the $5000.00 deposit, was paid by an entity other than the Wyandotte Tribe from funds other than the $100,000.00 awarded in section 105(b)(1). Since non-P.L. 602 funds were used, the tract is deprived of its automatic trust status by operation of P.L. 602.

Again, the Secretary failed to consider all relevant facts in rendering its decision. *Olenhouse,* 42 F.3d at 1574.

C. The Administrative Record Contains No Explanation for the $9668.00 Overpayment Refund.

The Secretary's determination that only section 105(b)(1) funds were used to purchase the Shriner Tract is subject to further doubt in light of the unexplained $9668.00 "overpayment" refund to Wyandotte. The record reveals that a purported $9668.00 "overpayment" was returned to Wyandotte. (A.A. 136.) However, there is nothing in the record which explains how this overpayment was calculated, nor its potential impact on the use of section 105(b)(1) funds.

First, the nature, reasons for, and amount of the purported overpayment is not described in any document in the Administrative Record. Despite the Kansas Parties' request for more detailed information regarding the actual payment of the purchase price in the form of transfers, receipts, or similar documents, the Secretary never addressed these questions.

Second, the realtors' commission of $19,500, which is contained in the real estate purchase contract, is 6% of $325,000.00 – the original purchase price of the Shriner Tract. (A.A. 125.) If the actual purchase price was $180,000.00, as the Secretary maintains, a 6% commission would be $10,800. If the purchase price truly was $180,000.00, the Wyandotte Tribe overpaid the commission price by $8,700. But since that is $968.00 less than the overpayment, a reimbursement of the realtor commission would not explain the alleged overpayment. The Administrative Record contains no evidence that the refund covered this particular overpayment.

Third, the district court correctly pointed out that the prorated real estate taxes of $4878.96 plus the $5000.00 deposit equals $9878.96 . *Governor of Kansas*, 430 F. Supp. 2d at 1214. However, that amount, which is still approximately $210.00 more than the overpayment, cannot explain the reimbursement either. The Administrative Record contains no evidence that the overpayment was related to real estate taxes or the deposit.

The Secretary simply did not gather, and certainly did not evaluate, the relevant facts concerning the actual purchase price of the property. *Olenhouse,* 42 F.3d at 1574. Nor did the Secretary draw a rational connection between the curious facts of the purported "overpayment" and the decision that the full amount

of the purchase was paid only with section 105(b)(1) funds. *Id*. The Secretary's decision simply cannot stand.

V. THE ACTUAL PURCHASE PRICE OF THE SHRINER TRACT WAS AT LEAST $325,000. 00 – AN AMOUNT EXCEEDING ANY CLAIMED VALUE OF THE WYANDOTTE TRIBE'S SECTION 105(b)(1) FUNDS .[9]

Nations Realty entered into a contract with McCurry Enterprises to purchase the Shriner Tract and agreed to pay the sum of $325,000.00. (A.A. 113.) Nations Realty then exercised options to extend the closing date on the $325,000.00 purchase agreement to maintain the right of Nations Realty to purchase the Shriner Tract pursuant to that agreement. (A.A. 116.)

Subsequently, the Department of Interior appraised the Shriner Tract at a value of $182,000.00. *Governor of Kansas*, 430 F. Supp. 2d at 1213. In June, 1996, for reasons not disclosed in the record, two new agreements were entered into between Nations Realty and McCurry Enterprises. One was a revised real estate contract for the purchase of the Shriner Tract at the substantially lower price of $180,000.00, and the other was a non-compete, non-disclosure agreement between the parties pursuant to which Nations would pay McCurry $152,250.00. (A.A. 124-28 (1996 Agreement); A.A. 220 (Non-compete agreement).) The

[9] The Kansas Parties raised this issue on reconsideration, and the Secretary requested Mr. Hartman to provide additional information on this claim. (A.A. 541.) Mr. Hartman relied on the Wyandottes' representation that the purchase price was $180,000.00. (A.A. 542.)

combination of these two contracts obligated Nations to pay McCurry $332,250.00, slightly more than the original agreed purchase price.

These documents demonstrate that the Shriner Tract was still being purchased for a price of $325,000.00 or more. Nations Realty remained obligated to pay a realtor commission of 6%. Despite a substantial reduction in the purported purchase price, that commission remained fixed at $19,500.00. (A.A. 125.)

The record is silent as to any explanation for McCurry Enterprises' agreement to accept a significant reduction of the purchase price of the Shriner Tract from $325,000.00 to $180,000.00. It is silent as to the reasons for the companion agreement of the buyer's agent to pay an additional $152,000.00 to the seller. It is silent as to the reasons for Nations' agreement to pay a realtor commission of $19,500. The record is equally silent as to the manner in which the seller and the buyer exchanged funds, as well as the actual amount of the funds exchanged upon purchase. The Secretary and the district court denied the Kansas Parties' requests to obtain this information. (A.A. 060.)

The Secretary concluded that the actual purchase price of the Shriner Tract was $180,000.00 based on representations from the Wyandotte Tribe, the agency appraisal of the tract at $182,000.00, and the Title Commitment of $180,000.00. *Governor of Kansas*, 430 F. Supp. 2d at 1215. This evidence may confirm the

market value of the Shriner Tract, but it does not necessarily lead to the conclusion that the total price actually paid for the property was $180,000.00, especially when one considers the companion "non-compete" agreement valued by the buyer and seller at an additional $152,000.00. The Secretary simply assumed, on the basis of scanty evidence primarily limited to the Wyandotte Tribe's claims, that the value of the property was also the price paid for it. In the absence of evidence demonstrating the details of the actual purchase, the Secretary's conclusion that the actual price paid for the Shriner Tract was $180,000.00 is not supported by substantial evidence. The Secretary failed to consider "an important aspect" of this transaction: the reduced purchase price coupled with a "non-compete" agreement, the combined value of which exceeds the original purchase price. *Colorado Wild,* 435 F.3d at 1213. That failure causes the Secretary's decision to be invalid. *Id.*

VI. THE ADMINISTRATIVE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE SUPPORTING THE SECRETARY'S DETERMINATION THAT THE VALUATION OF THE INVESTED SECTION 105(b)(1) FUNDS EXCEEDED THE TOTAL PURCHASE PRICE OF THE SHRINER TRACT.

The record reveals that $95,500.00 of the $100,000.00 Congress provided the Wyandottes to purchase trust land was initially used in June, 1986 to purchase Ryan Mortgage Acceptance Corporation 8.375% Series 23 bonds. (A.A. 254.) Whatever remained of the $100,000.00 was retained as a cash deposit. (*Id.*)

The record also reflects that an additional $25,199.67 was withdrawn from the Congressionally-awarded funds in the Mercantile account to purchase property in Park City, Kansas. (A.A. 451-52.) The remainder of these investment bonds remained in the Mercantile account, and in December, 1991, were commingled into a general Wyandotte Tribe investment account where they remained through at least July, 1996.(A.A. 453.)

The Secretary relied on the opinions of the Wyandottes' consultant, KPMG, and the Wyandotte Tribe in accepting their valuation of these commingled investments; the Secretary concluded that the value of the investments was approximately $212,000.00, and was therefore sufficient to cover the $180,000.00 total purchase price of the Shriner Tract. (A.A. 094-95.) In doing so, the Secretary rejected the Kansas Parties' assertion that the market value of the investments totaled approximately $112,000.00[10] at the time of the purchase, considerably less than even the lowest possible purchase price, the $180,000.00 figure. (*Id.*) The Secretary also relied on the Office of Indian Gaming Management financial analyst's opinion stating, without elaborating further, that both calculations (the Wyandottes' and the Kansas Parties') had "validity for some purposes." (A.A.

[10] Appellants' assertion is supported by a separate analysis of the limited information submitted by the Tribe provided by Purinton, Chance & Mills, LLC. (A.A. 537.)

095.) The Secretary's unexplained favorable treatment of one methodology over another is arbitrary and capricious and not based on substantial evidence.

VII. THE SECRETARY FAILED TO ADDRESS THE EVIDENCE CITED BY THIS COURT THAT IDENTIFIED THE POTENTIAL USE THE WYANDOTTE TRIBE OF NON-P.L. 602 FUNDS.

This Court in *Sac and Fox Nation* reviewed the Administrative Record and criticized the Secretary's reliance on the Wyandotte's representation that the Shriner Tract was purchased with only section 105(b)(1) funds. *Sac and Fox Nation,* 240 F.3d at 1263-1264. Specifically, this Court noted that documents in the Administrative Record evidenced that only a portion of the total PL 602 funds were to be used for the purchase of the Shriner Tract, that the purchase price for the Shriner Tract was in excess of the $100,000.00 allocated to the Wyandottes for the land to trust acquisition, and that employees of the Secretary (in the Bureau of Indian Affairs) had determined that "the PL 602 funds remaining and available to fund this purchase would not cover the entire purchase price of the Shriner Tract". *Id.* The Secretary, however, has ignored these factual anomalies.

First, an April 12, 1995 resolution of the Wyandotte Tribe authorized the purchase of the Shriner Tract "with a portion of the PL 602 set aside funds." (A.A. 199.) This Court opined that, at best, only a portion of the §105(b)(1) funds would be used to purchase the Shriner Tract. *Sac and Fox Nation*, 240 F.3d at 1263. The

Secretary did not address the Wyandotte resolution in administrative proceedings on remand.

Second, an April 19, 1996 letter from the Wyandotte Tribe to the BIA stated "the funds required for closing on the Shriner's building will be wired from another account." *Id.* The evidence demonstrated the intent to use non-P.L. 602 funds to fund at least part of the purchase price. Neither the Secretary nor the Wyandottes submitted further documentation, such as wire transfers, receipts, or other documents that confirmed the manner in which the transaction was conducted, nor in any other manner demonstrated convincingly that the funds actually used to purchase to Shriner Tract came from the invested (and commingled) P.L. 602 funds.

Third, this Court cited the internal email message from Mr. Hartman to George Skibine stating there were not enough P.L. 602 funds remaining to cover the Shriner Tract's purchase price. *Id.*; (A.A. 230.). At best, the financial data submitted by the Wyandotte Tribe attempted to resolve this particular issue; the Secretary simply accepted, once again, the Wyandotte's claims that only P.L. 602 funds were used. At worst, the competing financial analyses submitted by the parties did not fully answer the question in the absence of more information. For example, in a letter from the Wyandotte Tribe to the Department, the Wyandottes acknowledged that financial data from December 1991 through August 1993 could

not be located. (A.A. 535.) Further, the record reveals a complete absence of reputable audits conducted by the Wyandottes or the Secretary. Critical information that would create a basis for reasoned decision is missing from the Administrative Record. Accordingly, the Secretary's determination is not based substantial evidence, is arbitrary and capricious, and "entirely fail[s] to consider an important aspect of the problem" despite this Court's mandate. *Colorado Wild,* 435 F.3d at 1213.

CONCLUSION

For the foregoing reasons, the Kansas Parties ask this Court to invalidate the Secretary's decision as arbitrary and capricious, to declare void the trust determination of the Shriner Tract, and alternatively, to remand the case, again, to the Secretary for a full and fair review of the question of whether only funds awarded by P.L. 602 were used to purchase the tract.

Respectfully submitted,

Dated: October 26, 2006

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_____/s/_____
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DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is 2030 Addison Street, Suite 410, Berkeley, California, 94704.

On October 26, 2006, I caused to be served the following document(s) in Governor of the State of Kansas, et al. v. Dirk Kempthorne, Secretary of the Interior, et al., Case No. 06-3213:

1) APPELLANTS' OPENING BRIEF
2) APPELLANTS' APPENDIX VOLUMES I AND II

by depositing a copy of each document with Federal Express, for second day delivery, to the following:

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Pursuant to F.R.A.P. 25(d)(2), I declare that in October 26, 2006, I caused to be sent via third-party commercial carrier for next day delivery the original and 7 copies of the Appellants' Opening Brief and 2 copies of the Appellants' Appendix Volumes I and II to the following address:

Clerk of the Court
U.S. Court of Appeals for the Tenth Circuit
Byron White United States Courthouse
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Denver, CO 80257

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on October 26, 2006, at Berkeley, California.

/s/
Liza Cachero

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is 2030 Addison Street, Suite 410, Berkeley, California, 94704.

On October 27, 2006, I caused to be served the following document(s) in Governor of the State of Kansas, et al. v. Dirk Kempthorne, Secretary of the Interior, et al., Case No. 06-3213:

1) APPELLANTS' OPENING BRIEF

Pursuant to 10th Circuit Rule Emergency General Order, I declare that in October 27, 2006, I caused to be sent via electronic transmission a copy of the Appellants' Brief to the following addresses:

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Pursuant to F.R.A.P. and Tenth Circuit Rules, I certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk. The attached document has been scanned for viruses with the program McAfee Virusscan, version 10.0.27, updated October 26, 2006.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on October 27, 2006, at Berkeley, California.

/s/
Liza Cachero