

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

TOHONO O’ODHAM NATION

Tribal Business Loop
Administration Building
Sells, AZ 85634,

Plaintiff,

v.

KENNETH L. SALAZAR, in his official
capacity as Secretary of the United States
Department of the Interior

1849 C Street, N.W.
Washington, D.C. 20240,

Defendant.

Civil Action No. _____

COMPLAINT AND PETITION FOR WRIT OF MANDAMUS

Plaintiff, the Tohono O’odham Nation (the “Nation”), by and through its counsel, hereby alleges as follows:

NATURE OF THE ACTION

1. The Nation, a federally recognized Indian tribe located in southern and central Arizona, brings this action against Defendant, the Secretary of the United States Department of the Interior (the “Department”), to redress Defendant’s inexplicable failure, for nearly 14 months, to comply with his non-discretionary duty to accept trust title to certain land and hold it in trust for the Nation’s benefit, as specifically required by the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) (the “Lands Replacement Act” or the “Act”).

PARTIES

2. Plaintiff the Tohono O’odham Nation is a federally recognized Indian tribe, formerly known as the Papago Tribe, whose reservation is located in the State of Arizona.

3. Defendant Kenneth L. Salazar is the Secretary of the United States Department of the Interior. Under the Lands Replacement Act, the Secretary is required, on the Nation’s request, to hold in trust any land that meets the requirements of the Act. Pub. L. No. 99-503, § 6(d). The Secretary is an officer of the Department and is sued in his official capacity.

JURISDICTION AND VENUE

4. The Court has jurisdiction of this action under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1361 (jurisdiction over “any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff”), and 28 U.S.C. § 1362 (jurisdiction over actions brought by Indian tribes arising under the Constitution, laws, or treaties of the United States).

5. Venue is proper in this District under 28 U.S.C. § 1391(e) because Defendant resides in this District and because a substantial part of the events and omissions giving rise to the claim occurred in this District.

BACKGROUND

6. The Tohono O’odham Nation is a federally recognized Indian tribe with more than 28,000 citizens.

7. Prior to 1986, the Nation’s lands included the 10,000-acre Gila Bend Indian Reservation (the “Gila Bend Reservation”). The reservation was located along the banks of the Gila River, where members of the Nation and their forebears have lived for centuries.

8. The Gila Bend Reservation was effectively destroyed when, to provide flood protection for non-Indian farmers and the City of Yuma, the United States built a dam on the

Gila River just downstream of the Nation's land. During the late 1970s and early 1980s, operation of the dam regularly flooded the reservation for months at a time. The repeated flooding destroyed a 750-acre farm that had been built at tribal expense and rendered essentially all of the reservation unfit for human habitation, agriculture, or any other economic use.

9. The destruction of the Nation's land led to serious economic and social problems, including exceedingly high rates of poverty, unemployment, and serious illness, and rendered the Nation "desperate for a land base that [could] provide [its people] realistic and reasonable opportunities for economic and social development." H.R. Rep. No. 99-851, at 7 (1986).

10. Recognizing both that the United States had a trust responsibility to remedy these harms and that the Nation had a variety of potential legal claims against the government based on the destruction of the Gila Bend Reservation, Congress enacted the Lands Replacement Act to settle the Nation's land claims. The stated purpose of the Act is to "facilitate replacement of [the Nation's lost] reservation lands with lands suitable for sustained economic use which is not principally farming and do[es] not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people." Pub. L. No. 99-503, § 2(4).

11. To that end, the Act required the Secretary to provide funds that could be used to purchase replacement lands to be held in trust for the Nation, provided the Nation (i) assigned the United States all right, title, and interest in 9,880 acres of its land within the Gila Bend Reservation, Pub. L. No. 99-503, § 4(a), and (ii) relinquished its land claims against the United States arising from injury to land or water rights with respect to the Gila Bend lands, *id.* § 9(a).

12. In 1987, as required by the Act, the Nation relinquished its land claims and assigned 9,880 acres of its Gila Bend Reservation land to the United States.

13. In return, the Lands Replacement Act authorized the Nation to “acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres” as replacement for its destroyed reservation lands. Pub. L. No. 99-503, § 6(c).

14. The Act imposes a non-discretionary obligation on the Secretary to hold lands purchased by the Nation in trust for the Nation’s benefit as long as the Act’s requirements are satisfied:

The Secretary, at the request of the Tribe, *shall* hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes.

Pub. L. No. 99-503, § 6(d) (emphasis added). The statute then sets forth certain objective criteria that must be met for land to be taken into trust, including the requirement that trust land be located in one of three Arizona counties and that it not be “within the corporate limits of any city or town.” *Id.*

15. The Department has repeatedly recognized that the Lands Replacement Act imposes a mandatory duty and leaves the Secretary no discretion to add further requirements or refuse to accept property that meets the Act’s requirements into trust.

16. On January 28, 2009, the Nation filed an application (the “Trust Application”) requesting that the Secretary hold in trust a parcel of approximately 135 acres located in unincorporated Maricopa County, Arizona, bordering the City of Glendale (the “Settlement Property”). The Nation paid approximately \$13.8 million for the property.

17. When the Nation’s Trust Application was filed, the entire Settlement Property unquestionably satisfied all the requirements of § 6(c) and § 6(d) of the Lands Replacement Act. Indeed, in May and June 2009, senior officials within the Department expressly determined that the Settlement Property meets the requirements of § 6(d) and thus that trust acquisition of the land is mandated by the Lands Replacement Act.

18. Despite this determination, the Department took no action on the Nation's Trust Application. The Secretary's delay has now stretched to nearly fourteen months since the Nation submitted its application, and nearly ten months since senior Department officials determined that the acquisition of the Settlement Property is mandated by the Lands Replacement Act.

19. As authorized by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, the Nation intends to develop a gaming facility on the Settlement Property once it is held in trust. Such a facility would be a significant source of revenue for the Nation and would provide thousands of much-needed jobs. In part due to these plans, however, the City of Glendale and others have mounted a concerted campaign to thwart the Nation's Trust Application by any means possible. The Secretary's lengthy delay in fulfilling his mandatory duty has allowed and encouraged these efforts to block the Nation from invoking its federal rights and to frustrate the central purpose of the Lands Replacement Act.

20. In particular, the City of Glendale has seized on the Act's requirement that land to be held in trust must be outside "the corporate limits of any city or town." Pub. L. No. 99-503, § 6(d). In June 2009, the City passed an ordinance purporting retroactively to annex a portion of the Settlement Property by reviving a previous annexation attempt that was abandoned in 2002 in response to a legal challenge. The Nation is contesting the legality of this transparently improper maneuver in state-court litigation (the "Arizona Annexation Litigation").

21. In light of the pending Arizona Annexation Litigation, the Nation has made clear to the Secretary since August 2009 that, at a minimum, the Secretary should accept trust title to a 54-acre portion of the Settlement Property, known as Parcel 2, that is not even arguably affected by Glendale's purported annexation. The portion of the Nation's application that is arguably affected by the litigation could then be held in abeyance pending the litigation's resolution. The Secretary, however, has failed to take any action at all.

22. Continued inaction threatens to burden the Nation with the need to overcome further state-law machinations. The Arizona House of Representatives has passed, and the Arizona Senate is currently considering, a special bill specifically aimed at frustrating the Nation's pending trust application. *See* H.B. 2297, 49th Leg., 2d Regular Sess. (Ariz. 2010). The proposed law would allow the City of Glendale to annex the Nation's land without complying with the generally applicable Arizona annexation statute—which requires, among other things, approval of the owners of more than 50% in value of the affected land. *See* Ariz. Rev. Stat. § 9-471(A). The Nation believes that this proposed law, if passed, would be invalid on several grounds and, even if valid, could not retroactively alter the eligibility of the Settlement Property to be held in trust under the Lands Replacement Act. Nonetheless, if the proposed law is enacted and the City purports to annex the entire Settlement Property, the Nation's planned development will be delayed still longer and the Nation will be burdened with more costly and unnecessary litigation.

23. Nearly 25 years after the passage of the Lands Replacement Act, the Act's promise has not been met. Based on the most recent figures available, average income for the Nation's members living on the reservation is less than \$8,200 a year—well below the average for U.S. reservations, and less than a third of the average income for all Americans. Forty-four percent of the Indian families resident on the reservation live in poverty, compared to 9% of all families in the United States. The 2005 American Indian Population and Labor Force Report measured unemployment on the reservation at 75%. And the Nation's disturbingly high rates of poverty and unemployment are accompanied by poor health and lowered life expectancy, overcrowded and substandard housing, and lack of educational opportunities.

24. Just as Congress envisioned when it enacted the Lands Replacement Act, the development of the Settlement Property would help alleviate the poverty and other ills that

plague the Nation's people by creating thousands of jobs and providing a significant source of revenue for educational and health-care needs. The Nation spent nearly \$14 million to acquire the Settlement Property, and it has invested and is continuing to invest substantial additional funds in its efforts to bring these plans to fruition. Yet those plans are stalled—and their ultimate achievement is now in jeopardy—solely because of the Secretary's continued failure to carry out a mandatory ministerial duty prescribed by federal law.

25. Since August 2009, the Nation and its representatives have made repeated and increasingly urgent inquiries about the status of its application. Yet, despite the Nation's repeated requests and its undeniable need for prompt action, the Secretary has refused to act on the Nation's Trust Application, to provide any reasonable explanation for his delay, or even to specify a date by which he will act. Accordingly, the Nation's needless additional burdens now include bringing this litigation to enforce its rights.

26. There is no justification for the Secretary's extended delay in taking a ministerial action that is required both by statute and by the Secretary's trust obligations to the Nation, and that is urgently needed to remedy long-standing harm to the Nation's people. This Court should not permit that delay to continue.

COUNT ONE

MANDAMUS UNDER 28 U.S.C. § 1361

27. The Nation repeats and realleges Paragraphs 1 through 26 of this complaint as if fully set forth herein.

28. The Nation properly filed its Trust Application on January 28, 2009, requesting the Secretary to hold the Settlement Property, including Parcel 2, in trust for the benefit of the Nation pursuant to the Lands Replacement Act.

29. The Lands Replacement Act imposes a non-discretionary obligation on the Secretary to hold land that satisfies the requirements of the Act in trust for the Nation.

30. The Nation has repeatedly made clear to the Department that, in light of the pendency of the Arizona Annexation Litigation, the Nation requests that the Department at a minimum accept trust title to Parcel 2 of the Settlement Property, which is unaffected by the litigation.

31. The Nation has also made clear that it is urgent that at least a portion of the Settlement Property be taken into trust if the Nation is to proceed with development that is critical to the economic, educational, and health-care needs of the Nation's people.

32. Defendant nonetheless has failed, despite repeated requests, to perform the ministerial act of accepting Parcel 2 of the Settlement Property in trust for the Nation's benefit. Nor has he provided any indication of when he intends to take action on the Trust Application.

33. Defendant's delay in performing the ministerial action required by the Lands Replacement Act severely prejudices the Nation's interests and has a direct impact on the Nation's health and welfare, as the delay further postpones the day the Nation will obtain what Congress intended: replacement lands suitable for non-agricultural economic development that can begin to help solve the serious socioeconomic problems facing the Nation.

34. There is no other adequate remedy available to the Nation.

35. Accordingly, the Nation is entitled to a writ of mandamus pursuant to 28 U.S.C. § 1361 to compel Defendant immediately to accept trust title to Parcel 2 of the Settlement Property for the Nation's benefit, as required by the Lands Replacement Act.

COUNT TWO

**UNREASONABLE DELAY AND UNLAWFULLY WITHHELD ACTION
UNDER THE ADMINISTRATIVE PROCEDURE ACT**

36. The Nation repeats and realleges Paragraphs 1 through 35 of this complaint as if fully set forth herein.

37. The Administrative Procedure Act imposes a non-discretionary duty on Defendant to act on matters before the Department “within a reasonable time,” 5 U.S.C. § 555(b), and grants this Court the authority to “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

38. Defendant’s delay of nearly fourteen months since the Nation filed its Trust Application, and nearly ten months since the Department itself acknowledged that the trust acquisition of the Settlement Property, including Parcel 2, was mandated by the Lands Replacement Act, is unreasonable under the circumstances of this case.

39. Defendant’s failure to perform the ministerial act of accepting Parcel 2 of the Settlement Property in trust for the Nation’s benefit, as required by the Lands Replacement Act, is an unlawful withholding of action required by law.

40. Pursuant to 5 U.S.C. § 706(1), the Nation is therefore entitled to judgment that Defendant’s failure to take Parcel 2 of the Settlement Property into trust pursuant to the Lands Replacement Act is unlawful and to injunctive relief compelling Defendant immediately to accept trust title to Parcel 2 of the Settlement Property.

COUNT THREE

BREACH OF TRUST OBLIGATION

41. The Nation repeats and realleges Paragraphs 1 through 40 of this complaint as if fully set forth herein.

42. The Supreme Court has long recognized “the distinctive obligation of trust incumbent upon the Government” in Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). In particular, it is “well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.” *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (internal quotation marks omitted). This trust relationship charges the Secretary with an “overriding duty ... to deal fairly with Indians.” *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

43. By directing Defendant to hold land “in trust for the benefit of the [Nation],” Pub. L. No. 99-503, § 6(d), the Lands Replacement Act creates a specific trust relationship and imposes additional fiduciary duties.

44. Accordingly, Defendant’s actions must not merely meet the requirements of the Administrative Procedure Act, but must satisfy the standard demanded of a fiduciary: to act faithfully in the best interests of the Nation.

45. Defendant’s continued failure to perform the ministerial act of accepting Parcel 2 of the Settlement Property in trust for the Nation’s benefit, as required by the Lands Replacement Act, is directly contrary to the Nation’s best interests and is a breach of the Department’s trust obligation to the Nation.

46. The Nation is accordingly entitled to judgment that Defendant’s failure to accept trust title to Parcel 2 of the Settlement Property pursuant to the Lands Replacement Act is a breach of his trust obligations to the Nation and to injunctive relief compelling Defendant immediately to accept trust title to Parcel 2 of the Settlement Property.

PRAYER FOR RELIEF

The Nation therefore respectfully requests that this Court:

1. Enter an order pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 706(1) compelling Defendant immediately to accept trust title to Parcel 2 of the Settlement Property and hold it in

trust for the benefit of the Nation, as required by the Lands Replacement Act and by Defendant's trust obligation to the Nation;

2. Award reasonable attorneys' fees and other costs and expenses incurred in this litigation pursuant to applicable law;

3. Award such other relief, legal or equitable, as this Court deems just and proper; and

4. Retain jurisdiction for the purpose of enforcing this Court's order and judgment and for the purpose of taking appropriate action pursuant to 28 U.S.C. § 1361 and/or 5 U.S.C. § 706(1) in the event that Defendant unreasonably delays or unlawfully withholds action on the remainder of the Nation's Trust Application for the Settlement Property following final resolution of the Arizona Annexation Litigation.

Dated: March 22, 2010

Respectfully submitted,

A handwritten signature in black ink, reading "Danielle Spinelli". The signature is written in a cursive, flowing style.

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