IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOHONO O'ODHAM NATION, Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, Defendant CITY OF GLENDALE, ARIZONA, Defendant-Intervenor.	Civil Action No. 1:10-cv-472-JDB

THE CITY OF GLENDALE'S MOTION FOR SUMMARY JUDGEMENT
AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The City of Glendale, Arizona hereby moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth in the accompanying Memorandum of Points and Authorities in Support of the City of Glendale's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, the City of Glendale requests that the Court enter an order denying the Nation's motion for summary judgment and granting summary judgment to the City and the Secretary.

Respectfully submitted,

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Dated: May 12, 2010

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE CITY OF GLENDALE'S MOTION FOR SUMMARY JUDGEMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this action, the Tohono O'odham Nation (the "Nation") seeks to have this Court compel the Secretary to take a parcel of land in Glendale, Arizona (the "City") into trust in order to carry out its plan to build a massive casino complex in the City. To obtain the relief it seeks under either the APA or through issuance of a writ, the Nation must prove that the Department (1) has a clear duty to act and (2) unreasonably delayed in discharging that duty. In this case, the plain language of the Gila Bend Act makes clear that the Secretary is prohibited from taking the very action the Nation seeks to compel. Accordingly, its claims fail.

Even if that were not so, the Nation's claims still must fail because there has been no unreasonable delay here. Having waited six years after purchasing the Glendale parcel to actually file its fee-to-trust application, the Nation is indignant that the Department has not yet done the tribe's bidding on an application submitted in 2009. Its indignation is particularly misplaced given the prominent role it played in the fourteen-month "delay" of which it complains, as it has switched course repeatedly on materials aspects of its application.

The Department's consideration of the Nation's application has also been extended because this controversial matter has generated a great deal of opposition. The City of Glendale, mayors of nearby communities, community leaders, the Arizona Governor, Congressional members, legislative leadership, and other Indian tribes have voiced strong objection to the Nation's proposal. Some opponents, including the City of Glendale and the Gila River Indian Community, have weighed in throughout the process, providing the Department with important facts and analyses for the Department's investigation and review. And, too, the relevant facts underpinning the Nation's application have changed during the pendency of the application, with the City taking action in June 2009 to recognize the prior annexation of a portion of the land the

Nation purchased in Glendale. The Nation responded to that action by suing the City in state court, spawning further delay and uncertainty.

Given the significant and vocal opposition to the Nation's acquisition of the Glendale parcel, it is not surprising that the Nation would want its application to be processed by the Department on an expedited basis. But the legal problems presented by the Nation's application weigh heavily against expediting – let alone compelling – agency action. The Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("Gila Bend Act"), requires that the Secretary ensure land meets certain criteria before acquiring it under the Act, an important and weighty determination which has been greatly complicated here by the Nation's ongoing barrage of amendments to its application and by litigation over the incorporation status of a certain portion of the Parcel. If it were even possible to conclude, in a grave and complex matter like this one, that the passage of fourteen months qualifies as "unreasonable delay," that delay is due much more attributable to the actions of the Nation than any inaction by the Department.

FACTUAL BACKGROUND 1/

The Nation Buys Land In Glendale

In September 2003, through a shell corporation called "Rainier Resources, Inc.," wholly-owned by the Nation, the tribe secretly purchased approximately 135 acres of land at 91st and Northern Avenues, in Glendale, Arizona. See AR497, 499-500, 502. The property remained

1/ Pursuant to Local Rule of Civil Procedure 7(h)(2), summary judgment motions in cases decided on an administrative record, and oppositions thereto, "shall include a statement of facts with references to the administrative record. " L. Civ. R. 7(h)(2). The rule expressly provides that Rule 7(h)(1), which requires separate statements of material fact for summary judgment motions and counter-statements of genuine issues, "shall not apply" in administrative record cases. Accordingly, the Nation's Statement of Material Fact should be disregarded. Id.

titled in the name of "Rainier Resources" until January 2009, when title was finally transferred to the Nation shortly before it submitted a trust application to the Department of the Interior (the "Department" or "Interior"), requesting Interior to take the acreage into trust for the benefit of the Nation and to grant the Nation authorization to game on the property. See Pl.'s Mem. in Support of Mot. for Summ. J. (hereafter, "TON Br.") at 9 & n.3. This lawsuit concerns approximately 54 acres of that land, known as "Parcel 2" (the Parcel" or the "Glendale Parcel").

The Nation's plan to establish trust land in the middle of the City of Glendale is surprising given the utter lack of connection between the City of Glendale and the Nation. Although the Nation owns 2.7 million acres in southern Arizona, a land base "comparable in size to the state of Connecticut," the Nation's closest land to the City is approximately 60 miles away, across the desert in Gila Bend, Arizona. See Inter Tribal Council of Arizona, Inc. website, at http://www.itcaonline.com/tribes_tohono.html (last visited May 12, 2010). The Nation's government seat is in Sells, Arizona, approximately 160 miles away, id., and the three casinos it already operates on existing reservation lands are in distant Sahuarita, Tucson, and Why, Arizona. See http://www.desertdiamondcasino.com/ (last visited May 12, 2010).

Glendale's Interest In Parcel 2

At the time of its incorporation in June 1910, the City of Glendale was a 1.01 square mile municipality. Declaration of Edward Beasley ("Beasley Decl.") ¶ 7 (attached hereto as Exhibit 1). Since then, through use of its annexation authority, the City of Glendale has grown to approximately 59 square miles in size, making it, on the basis of population, the fourth largest city in Arizona. Id. The City has made use of annexation to effectively manage urban development, to efficiently plan and provide city services, to create a stronger community, to

increase the City's economic base, to provide additional sources of revenue, and to ensure high quality development up to City standards. Id. ¶ 12.

Glendale annexed a large area to the west of the city center in 1977, thereby establishing its current corporate limits. Id. ¶¶ 8-9. The parcel at issue in this case, Parcel 2, is located within this area. By setting its outer boundaries through the 1977 annexation, Glendale established its exclusive right under Arizona law to annex all unincorporated land enclosed within city boundaries. See Republic Invest. Fund I v. Town of Surprise, 800 P.2d 1251 (Ariz. 1990); Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985, 987 (Ariz. Ct. App. 1982). Since that time, the City has guided the development of those lands through its General Plan, has formally annexed great swathes of the land, and has included the entire area enclosed by its boundaries, both incorporated and unincorporated, in its land use planning. Beasley Decl. ¶¶ 9-10. Indeed, virtually all of the land in the vicinity of Parcel 2 has been annexed into the City. Id. ¶ 9.

With knowledge that settled Arizona law protects its right to annex the fully-enclosed Parcel, Glendale has invested significant resources in the infrastructure surrounding the area, aggressively seeking to attract investment to that section of the City. Since 2003, city, state, and private interests have invested hundreds of millions of dollars to develop the general area around the Parcel. Public funds were invested in a $450 million stadium, a $240 million arena, and a $120 million Major League Baseball Spring training facility, all in accordance with the City's General Plan. Id. ¶ 17. 2/ Private entities also have invested, or planned to invest, hundreds of millions of dollars to construct several large residential and commercial developments in this

2/ See generally Map of Glendale's Western Area, at http://www.glendaleaz.com/indianreservation/images/WesternAreaMap.jpg (last visited May 12, 2010).

general area. Id. The area has several existing residential developments and more than 30,000 people, 30 percent of whom are younger than 20 years old and live within two miles of the proposed Tohono O'odham reservation and casino. Id. In 2005, the City built a new high school, serving nearly 2,000 students, right across the street from the Parcel. Id. ¶ 18.

The Nation's Application Pursuant To The Gila Bend Act

The Nation claims (erroneously) that the acquisition of the Glendale Parcel as Indian trust property is required by the Gila Bend Act. The creation of reservation land in the center of a city clearly is neither intended nor permitted under the Act, as the statute's language, purpose, and legislative history make clear. The statute was passed in 1986 to provide replacement lands to the Nation in exchange for approximately 10,000 acres of rural reservation land in Gila Bend, much of which had been damaged by flooding.

Under the Act, the Nation received $30 million in exchange for "all right, title, and interest of the Tribe in [9,880] acres of land within the Gila Bend Indian Reservation" and waiver of "any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the Gila Bend Indian Reservation." Gila Bend Act, §§ 4(a), 9(a). The Act also authorized the Secretary to take into trust up to 9,880 acres acquired by the Nation, in accordance with the specific terms and criteria set forth in the Act.

Congress did not give the Department license to take into trust any parcel of land the Nation chose to purchase. Instead, the Gila Bend Act only authorizes the Secretary to acquire trust land for the Nation if it meets certain express criteria. Among other requirements, the Act expressly provides that "[l]and does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or

town." Pub. L. No. 99-503 § 6(d) (emphasis added). Congress also did not intend for the Nation to set up small pockets of reservation land across the state, explicitly requiring that the land acquired by the Nation "be in no more than three separate areas consisting of contiguous tracts," one of which "must be contiguous to San Lucy village." AR440 (H.R. Rep. No. 99-851, at 11 (1986) (citing section 6(d) of the Act)). Congress made this vision express in the statute's legislative history, explaining that the Secretary was authorized to waive the three-area limitation under "appropriate" circumstances, such as "circumstances in which the tribe might purchase private lands that, while not entirely contiguous, are sufficiently close to be reasonably managed as a single economic or residential unit." Id. Clearly the Act does not contemplate that the Nation would seek to use that Act to transform a small parcel of property in the middle of a city into an Indian reservation.

The City's Opposition To Gaming And The Nation's Promise

The City of Glendale did not anticipate – and could not have anticipated – that a casino operated by a sovereign tribe outside of the control of state and local governments would be established on this parcel. This is so not only because the City had established its right to annex the lands within its corporate limits under settled Arizona law, but because a 2002 statewide referendum on gaming, actively supported by the Nation, was widely understood to proscribe that result.

Indeed, no one in the State of Arizona would have anticipated this particular possibility because the Tohono Nation was among seventeen tribes who endorsed Proposition 202, an Arizona proposition which, as then-Governor Jane Hull explained, would

> ensure[] that no new casinos will be built in the Phoenix metropolitan area and only one in the Tucson area for at least 23 years. Proposition 202 keeps gaming on Indian Reservations and does not allow it to move into our neighborhoods. 3/

Proposition 202 was the product of extensive negotiations among several interests, including the Governor and a consortium of Arizona tribes, and presented a more palatable alternative to the tribes than the two other gaming propositions then before Arizona voters. The 17 tribes published their own media material in support of Proposition 202. One such pamphlet explained that "Prop 202 reduces the number of authorized gaming facilities on tribal land [and] . . . . [u]nder Prop 202, there will be no additional facilities authorized in Phoenix, and only one additional facility permitted in Tucson." AR488-91 (Yes on 202, The 17-Tribe Indian Self-Reliance Initiative, Answers to Common Questions). Ned Norris, now Chairman of the Nation, advocated a similar interpretation of the proposition. In a Town Hall Meeting held in Tucson on September 25, 2002, Ned Norris spoke against a competing proposition, arguing that it would spread gaming into cities, a result contrary to the repeated expressions of the citizens of Arizona to limit gaming to tribal reservations. AR494 (Oct. 2, 2002 Ariz. Dep't of Gaming Mem. re: Town Hall Meetings, from H. Leyva to R. Pyper). With the support of the tribes, the Governor, Senator McCain, and others, Proposition 202 passed.

Within months of advocating that Prop 202 would keep gaming out of Arizona's cities, the Nation formed a shell corporation to seek out land to purchase in Glendale. By August 2003, the Nation closed on several contiguous parcels of land, all located within Glendale's boundaries. See TON Br. at 9; AR497, 499-500, 502.

3/ AR450, AR464, AR481 (Prop. 200 Pamphlet, at 40; Prop. 201 Pamphlet, at 65; Prop. 202 Pamphlet, at 97).

The Nation's Plan To Develop A Massive Gaming Complex Within Glendale

The Nation's trust application seeks to have the land it purchased in Glendale taken into trust so that the Nation can build and operate a large casino resort. The Nation already has engaged in a costly marketing endeavor to promote its planned $600 million, 1.2 million square feet facility. According to the Nation, the complex would include a 150,000 square foot casino, a 600 room hotel, 180,000 square feet of convention and meeting space, eight restaurants, a dozen retail shops, and parking for 4,000 cars. See AR541 (West Valley Resort at Northern Avenue: Project Description); see also Project/Facility Detail, West Valley Opportunity: A Partnership for the Future, at http://www.westvalleyopportunity.com/projectfacility-details (last visited May 12, 2010); 4/

The Nation included in its trust application a request for permission to conduct casino gaming on its Glendale property pursuant to the Indian Gaming Regulatory Act ("IGRA"). Congress enacted IGRA, 25 U.S.C. § 2707-2721, on October 17, 1988, to provide a statutory basis for the lawful operation of gaming by Indian tribes. IGRA generally prohibits the Department from taking land into trust for gaming purposes at any time after the statute's enactment in October 1988. 25 U.S.C. § 2719(a). Subject to limited exceptions, gaming may occur on Indian land taken into trust after that date only with the concurrence of the state where it would occur, a process known as a "two-part determination." Id. § 2719(b)(1)(A) (establishing that a tribe may only conduct gaming on lands acquired after IGRA's passage if the Secretary determines that gaming "would be in the best interests of the Indian tribe and its members, and would not be detrimental to the surrounding community but only if the Governor of the State in

4/ The Nation established this website to promote its planned casino development. See generally http://www.westvalleyopportunity.com/projectfacility-details (last visited May 12, 2010).

which the gaming activity is to be conducted concurs in the Secretary's determination") (emphasis added).

IGRA sets forth several narrow exceptions to the general prohibition against gaming on lands acquired after October 1988. The Nation seeks to conduct gaming pursuant to § 2719(b)(1)(B)(i), an exception for land taken into trust "as part of . . . a settlement of a land claim." If the trust land at issue qualifies as gaming-eligible under an exception, the Secretarial two-part determination procedure does not apply, nor is there any consideration of whether the proposed gaming would be "detrimental to the surrounding community." Id. § 2719(b)(1)(A)

The Department's Process For Reviewing Trust Applications For Gaming Acquisitions

Under established Department procedure, applications to take land into trust for gaming purposes are decided by the Assistant Secretary for Indian Affairs after an exhaustive review to ensure that both the trust acquisition and use of the land for gaming comply with the law. U.S. Dep't of Interior, OIG, Evaluation Report: Process Used to Assess Applications to Take Land into Trust for Gaming Purposes (Rep. No. E-EV-BIA-0063-2003) (Sept. 2005), at 9, available at http://www.doioig.gov/upload/2005-G-0030.pdf ("Evaluation Rep."). All applications are initially reviewed by a BIA Regional Office. See id. Unless the application is rejected by the Regional Office, the application is then forwarded to the Office of Indian Gaming Management ("OIGM") in Washington, D.C. See Evaluation Rep. at 9-10.

The OIGM then subjects the application to a second level of review to determine whether the application meets the requirements of both IGRA and the trust acquisition authority. Evaluation Rep. at 6. OIGM forwards the documents to the Assistant Solicitor for Indian Affairs for further review, and attorneys in that office engage in another round of analysis to determine whether the acquisition complies with IGRA and any other applicable federal laws, after which it

is passed along to the Assistant Solicitor for Indian Affairs for evaluation. Id. The Assistant Solicitor typically provides comments on the application and returns it to the OIGM, who will then forward the application with its recommendation for approval or disapproval to the Assistant Secretary for Indian Affairs. Id. It is the Assistant Secretary for Indian Affairs who makes the final determination with respect to the application, a decision which he makes in consultation with the Secretary. Id. Only if approval is granted is the authority to accept title land into trust status for gaming purposes delegated to the Regional Director. Id. n.7. If an application is approved, OIGM publishes a 30-day notice of intent to take the land into trust in the Federal Register and forwards the application to the Regional or Field Solicitor to prepare the final title opinion. Id. at 7. Upon satisfactory completion of all title requirements and following the 30-day period after publication in the Federal Register, the property is taken into trust and the title is recorded in the appropriate BIA title office. Id.

The process is frequently subject to delay for reasons outside the control of the Department. Often delay is due to deficiencies in the application package. As in the instant case, lawsuits also frequently delay the approval process. Evaluation Rep. at 7. Delays also occur because of insufficient personnel to address the many applications pending at any given time.

Based on the Administrative Record, it appears that the Nation's application is presently under review by the Office of the Solicitor. See AR5021-22 (Wiseman Decl.).

The City Of Glendale's Prior Annexation Of A Substantial Portion Of The Nation's Glendale Property

Glendale became aware of the Nation's plans to build a massive gaming complex within its city limits at the same time that the Nation submitted its trust application to the Department. Following careful deliberation, the City Council of Glendale determined that the creation of an Indian reservation within Glendale's boundaries would be detrimental to Glendale's interests. In

Resolution 4246, the Council formally opposed the Nation's application to have the property taken into trust and its request to use the land for casino gaming. Beasley Decl. ¶ 5 & Ex. A. Thereafter, City staff investigated various annexation and property records to learn more about the parcels at issue. Id. ¶ 14. As a result of that process, the City realized that a portion of the Nation's acreage had been annexed by the City in 2001. Id. In the intervening years, the City had treated the 2001 annexation as if it had been ineffective. After careful review of the annexation records and the governing state statutory provisions, the City concluded that the 2001 annexation was legally effective and any attempt to deannex that property would be statutorily invalid. Id. The City Council thereafter enacted an ordinance in June 2009 to recognize this annexation. Id.

The Nation responded to the City Council's action by filing suit against Glendale in the Superior Court of Maricopa County. Shortly thereafter, on August 18, 2009, the Nation asked the Department to proceed with its application as to Parcel 2, but to defer action on the remainder of the Nation's Trust Application until resolution of the Arizona annexation litigation. AR147-48 (Aug. 18, 2009 Letter from Ned Norris to George Skibine).

The Nation ultimately lost its bid to void the City's incorporation of approximately 39 acres of its Glendale property. The Superior Court granted summary judgment to the City of Glendale in March 2010, upholding the June 2009 ordinance. AR337-48. The Nation filed a notice of appeal on April 5, 2010.

Within two days of the Superior Court's ruling, the Department initiated contact with the Nation to seek clarification of the Nation's position regarding how the Department should proceed with respect to the trust application. AR1402-04 (Mar. 12, 2010 Letter from Maria Wiseman to Seth Waxman). The Nation responded the same day with a demand that the

Department take immediate action on Parcel 2, threatening to sue if the Department failed to take the Parcel into trust within a week of the date of the letter. AR1444-48 (Mar. 12, 2010 Letter from Seth Waxman to Sec'y Kenneth L. Salazar and Solicitor Hilary Tompkins).

The Nation's Misplaced Sense Of Urgency And Its Complicity In The Delay

It is apparent from the very fact of this lawsuit that the Nation feels a great sense of urgency about its trust application for its Glendale property. That urgency plainly does not originate with any unkept "promise" of the Gila Bend Act, despite the Nation's contrary assertions. See TON Br. at 20. After all, in more than 20 years since passage of the Act and the Nation's receipt of $30 million to purchase replacement lands, the tribe has only submitted two other trust applications pursuant to the Act, one in the late 1980s and another in 2006. Nor can its urgency derive from the acquisition of this particular parcel, which the Nation held for six years before seeking a trust acquisition.

Instead it appears that the urgency is rooted in the fear that that the many interested parties who are opposed to the Nation's plans may succeed in derailing the Nation's efforts. It should not come as a surprise to the Nation that an application to engage in off-reservation gaming has generated a controversy; that is par for the course. Here, the Nation's plans have been publicly opposed by both Senator McCain and Senator Kyl, by several Congressmen, by the Governor of Arizona, by a host of nearby cities, and by a number of other Arizona tribes. See, e.g., AR658-80 (letters from leaders of five Apache and Yavapai Tribes in Arizona); AR1674-775 (Aug. 27, 2009 letter from mayors of five Arizona cities and towns); AR1728 (Jun. 25, 2009 letter from U.S. Representatives Trent Franks and John Shadegg).

In particular, the Nation seems to be concerned that the Arizona legislature may enact legislation that would allow Glendale to annex the Nation's unincorporated Glendale lands

without the Nation's consent. TON Br. at 22. Earlier this year, the Arizona House of Representatives passed a bill which would allow Arizona cities to annex certain lands under specified circumstances without obtaining approval of the affected property owners. If this is the cause of the Nation's urgency, the cause is now moot. The bill was not presented to the Arizona Senate for a vote before the legislature went out of session in late April. In Arizona, bills do not survive the adjournment of the legislature and, as a result, there is no pending legislation. The legislature will not meet again to begin a new session until January 2011, and there is no indication a bill of similar effect would be proposed. Therefore, if the Nation's misplaced sense of urgency was premised on this potential legislation, it has no basis at this time. Moreover, nothing the Arizona legislature does diminishes the fact that the decision before the Department is a weighty one, with permanent effects, that should only be made with careful consideration of all the relevant law and circumstances. That consideration, mandated by the Act, cannot be cast aside at the Nation's request merely because additional factors bearing on the decision have arisen.

The Nation's Acquisitions Of Additional Reservation Land Under Of The Gila Bend Act

The Nation bemoans the "unfulfilled" "promise to the Nation" of the Gila Bend Act, TON Br. at 20, but in fact, the Nation already has reaped substantial benefit from the Act.

San Lucy Farms – the First Acquisition. The Nation already has acquired additional reservation land by using the Act. It first invoked the Act to have taken into trust a 3,200.53-acre parcel known as "San Lucy Farms." AR637-38 (Apr. 30, 2009 Mem. from W. Quinn to A. Anspach, at 7-8). The Nation made its request for San Lucy Farms to be taken into trust in the late 1980s. The Department took San Lucy Farms (formerly known as Schramm Ranch) into trust on the Nation's behalf, following the resolution of an appeal to the Interior Board of Indian

Appeals. See id.; Tohono O'odham Nation v. Phoenix Area Dir., Bur. of Indian Affs., 22 IBIA 220 (Int. Bd. of Indian Apps. Aug. 14, 1992).

The Painted Rock Property And The Purported Waiver. In 2002, the Nation purchased two contiguous parcels in Maricopa County, together totaling approximately 3,700 acres, known as the "Painted Rock property." AR4250 (Apr. 3, 2008 Mem. from Reg'l Dir. to Field Solicitor, Request for Legal Guidance Regarding the Purported Conveyance of 3,749.52 acres from the Tohono O'odham Nation to the "United States in Trust for the Tohono O'odham Nation," at 1). Rather than submitting its application to the Department as required, the Nation tried to self-effectuate the trust acquisition, executing and filing a warranty deed dated July 27, 2005, in the Maricopa County Recorder's office that purported to convey the Painted Rock Property to the "UNITED STATES OF AMERICA, IN TRUST FOR THE TOHONO O'ODHAM NATION." AR4251 (Id. at 2). Unfortunately for the Nation, its attempt to self-effectuate the trust acquisition without the United States' acceptance had no legal effect. So, on March 31, 2006, the Nation returned to standard procedure, invoking the Gila Bend Act to formally request that the Department place the Painted Rock Property in trust, an acquisition that would represent the second of the three parcels permitted the Nation under the Gila Bend Act. AR4264 (Mar. 31, 2006 Letter from Chairwoman Vivian Juan-Saunders to Superintendent, Papago Agency).

After waiting three years for the Department to take this land into trust, the Nation abruptly tabled the Painted Rock application in February 2009. AR1999-2000 (Feb. 13, 2009 Letter from Ned Norris to Allen Anspach, et al.). The cause of this change of course? Shortly after the Nation submitted its application for the Glendale property, a Department official, George Skibine, sent an e-mail to counsel for the Nation, questioning the legality of the

Department's 2000 blanket waiver of the Act's requirement that one of the three permitted parcels be contiguous to San Lucy Village. AR2032 (Feb. 9, 2009 E-mail from George Skibine to Ned Norris). Rather than addressing the issue raised by Skibine, however, the Nation apparently decided to try to moot the issue by asking the Department to defer decision on the Painted Rock property until the Glendale application was resolved. This way, the Nation presumed, the Glendale application could go forward as the second acquisition under the Act without butting into the Act's requirement that at least one of three parcels be contiguous to San Lucy Village.

In its original application concerning the Glendale parcel, the Nation disregarded the Gila Bend's three parcel/contiguity requirement on the ground that it had many years earlier obtained a waiver from the Department. In 2000, the Department purported to grant the Nation an unconditional waiver for two of the Gila Bend's statutory restrictions, waiving the requirement that one area of land be contiguous to San Lucy Village and waiving the Act's limitation that the Nation take no more than three areas of land in trust. AR552-60 (May 31, 2000 Letter from Acting Reg'l Dir. to Chairman Edward D. Manuel at 7 (responding to Jan. 25, 2000 Letter from Chairman Edward D. Manuel to Sec'y of the Interior, Bruce Babbitt, at 7)). The text of the statute and the legislative history leaves no doubt that these blanket waivers are illegal, 5/

5/ The plain language of the statute prohibits this result. The Gila Bend Act authorizes a waiver by the Secretary only if he "determines that additional areas are appropriate" – clearly referring to the three-area requirement, not the contiguity requirement. The Act's legislative history underscores the impropriety of these blanket waivers, indicating that the Secretary is only authorized to waive the three area requirement, and then only if the Secretary "deems it appropriate." AR440 (H.R. Rep. No. 99-851, at 11). The Committee made clear "that the term 'appropriate' include[s] circumstances in which the tribe might purchase private lands that, while not entirely contiguous, are sufficiently close to be reasonably managed as a single economic or residential unit." Id. This exercise of discretion would require a case-by-case assessment of the specific lands above the three-area cap for which acquisition is requested – an analysis that did not occur prior to issuance of this blanket authorization. In the present case, the Secretary

nevertheless, the issuance of these waivers has caused the Nation to believe that it is entitled under the Gila Bend Act to place up to five areas of land in trust, none of which must be contiguous to San Lucy Village. 6/ AR2081 (Jan. 28, 2009 Mem. from Samuel Daughety to George T. Skibine, et al., at 9).

In his February 9, 2009 e-mail, Acting Assistant Secretary Skibine questioned whether the Secretary had the authority to waive the requirement that one area of land must be contiguous to San Lucy Village and questioned whether the official waiving the requirement had the delegated authority to do so. AR2032 (Feb. 9, 2009 E-mail from George Skibine to Ned Norris). Rather than address the questions raised by the Acting Assistant Secretary, the Nation chose to put the Painted Rock acquisition on hold and focus its efforts exclusively on the Glendale parcel.

The Harm To The City Of Glendale Posed By The Nation's Application

The Nation's trust application and its claims in this lawsuit threaten substantial harm to the City. The Nation seeks to have an Indian reservation created within the City of Glendale's borders – exactly the injury Congress intended to prevent when it enacted the Gila Bend Act. If the Nation is successful, the City will lose its ability to control development on the Parcel, to regulate the impact on municipal infrastructure, to ensure compatibility with the surrounding community, and it will lose forever its exclusive authority to annex the Parcel. By operation of federal law, Arizona, Maricopa County, and Glendale will lose civil and regulatory authority

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purported to waive the requirement in May 2000, at a time when neither limitation was even implicated – an act plainly in violation of the statute.

6/ Pursuant to a FOIA request, the City obtained copies of the agency's records regarding the issuance of these waivers. Needless to say, the legal basis the Department relied on in granting the waivers is questionable at best, a fact apparently recognized by Acting Assistant Secretary Skibine in his February 9, 2009 e-mail. See AR2032. Because the documents underlying this decision have not been included in the administrative record in this case, it appears that the Department has not yet investigated the issue in connection with the Nation's application.

over the Parcel to a quasi-sovereign tribe that has no political accountability to Arizona, Maricopa County, Glendale, or its citizens. Beasley Decl. ¶ 20.

The City's injury is compounded by the Nation's plan to develop a massive casino complex located wholly within Glendale's borders – directly across the street from one of the area's newest high schools, less than two miles away from 12,000 homes, and within a quarter-mile of well-established neighborhoods, churches, and parks. Id. ¶¶ 17-18. The Nation's casino plans – which it promotes even now, before it has obtained trust status for the Parcel or the requisite legal finding that the Parcel would be eligible for gaming 7/ – will impose substantial burdens on the City. See id. ¶ 20. The Nation has not, to the City's knowledge, offered an estimation of the annual number of visitors to the planned casino development, but, based on the sheer size of the project, the influx of casino customers will cause the City substantial increased costs for police, fire, and other public safety services, traffic management, and road maintenance. Id. ¶¶ 20-22. Moreover, the City will lose substantial tax revenues from nearby restaurant, retail, and other entertainment businesses when their business is siphoned off by the Nation's self-contained casino-anchored resort. Id. ¶ 21. The City faces substantial and irreparable injury should the Nation be awarded the relief it seeks in this action.

LEGAL STANDARD

For actions brought under the Administrative Procedure Act, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Seminole Nation of Oklahoma v. Norton, 223 F. Supp. 2d 122 (D.D.C. 2002) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417 (1971)). "Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the

7/ See generally http://www.westvalleyopportunity.com (last visited May 12, 2010).

administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.'" Cottage Health Sys. v. Sebelius, 631 F. Supp. 2d 80, 89-90 (D.D.C. 2009) (quoting Occidental Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985)). Summary judgment serves as "the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." Id. at 90; see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971); Sw. Merch. Corp. v. NLRB, 53 F.3d 1334, 1341 (D.C. Cir. 1995); Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995). Although no final agency action has taken place here, presumably, because agency action reviewable under the APA is involved, the agency is to be given considerable deference. See Baystate Med. Ctr. v. Leavitt, 545 F. Supp. 2d 20, 34-35 (D.D.C. 2008) (citing Occidental Eng'g Co., 753 F.2d at 769-70) ("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.").

ARGUMENT

I. THE NATION CANNOT SHOW THAT THE SECRETARY IS UNDER A CLEAR DUTY TO TAKE THE GLENDALE PARCEL INTO TRUST

To prevail on its claims, the Nation must show that the Secretary is under a clear duty to take the Glendale parcel into trust. Indeed, federal courts normally do not have jurisdiction to hear a plaintiff's claims where no final agency action has been taken – it is only "where an agency is under a[ ] [ ] statutory duty to act" and fails to do so that a claim like this can succeed. See Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (quoting Sierra Club v. Thomas, 828 F.2d 783, 793 (D.C. Cir. 1987)) (internal quotation omitted). In this case, no such duty exists, and therefore the Nation cannot prevail on its claims.

The Nation's claims are premised on two fallacies: that the Parcel at issue qualifies for mandatory acquisition under the Act and that the Department has already decided that question. Both premises are wrong. First, the Gila Bend Act clearly precludes the Secretary from taking into trust lands like these that are located in a city or town. Second, the Secretary has made no decision on the issue. On the contrary, the Department is actively engaged in addressing the various questions presented by the Nation's application.

A. The Department Has No Authority Under The Gila Bend Act To Take The Glendale Parcel Into Trust

All of the Nation's claims rests on the assertion that Parcel 2 fulfills the criteria for trust acquisition under the Gila Bend Act. If that premise is wrong, as Glendale submits, or even if it is in doubt, the Nation's claims must fail. The Nation concedes that. See TON Br. at 32 n.12 (conceding that a plausible alternative construction of the statute would preclude relief). The statute makes clear that land cannot be taken into trust under the Act "if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town." Pub. L. No. 99-503 § 6(d) (emphasis added). The Nation appears to believe that any unincorporated lands in one of three listed counties meets the criteria, focusing solely on the words "corporate limits" and relying solely on a single Arizona statutory provision and an Alabama municipal tax case to make its point. The Nation is mistaken. When interpreted with the usual tools of statutory construction and with the benefit of the facts, it is clear that the Gila Bend Act does not permit acquisition of Parcel 2, land unquestionably within the City of Glendale's corporate limits.

The first step in statutory construction "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (citing United States v. Ron Pair Enters., Inc., 489 U.S.

235, 240 (1989)). At this stage, the Court employs the traditional tools of statutory construction – the text, legislative history, structure, and purpose. See New York v. EPA, 413 F.3d 3, 18 (D.C. Cir. 2005). "Statutory construction . . . 'is a holistic endeavor,'" United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988), and courts should look to the "'specific context in which [statutory] language is used, and the broader context of the statute as a whole.'" United States v. Wilson, 290 F.3d 347, 353 (D.C. Cir. 2002)(quoting Robinson, 519 U.S. at 341). When interpreting a statute, a court "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expressed the legislative purpose." Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (citation omitted); see also State ex rel. Indus. Comm'n of Ariz. v. Word, 211 P.3d 1267, 1270 (Ariz. Ct. App. 2009), vacated on other grounds, 224 P.3d 169 (Ariz. 2010) (stating "[w]hen interpreting a statutory provision, courts look primarily to the statute's language and give effect to the statute's terms in accordance with their commonly accepted meanings.") (citation omitted). In this case, the first step is the last step because the Gila Bend Act can have only one meaning "with regard to the particular dispute in the case." Robinson, 519 U.S. at 340.

The Gila Bend Act is plainly aimed at providing the Nation with enumerated benefits in exchange for its former lands at the Gila Bend Reservation, with the ultimate goal of improving the well-being of the people of the San Lucy District, those who were directly affected by the flood damage at the Gila Bend Reservation. Pub. L. No. 99-503 § 2. The Act provided the Nation with $30 million and the opportunity to obtain new lands not to exceed 9,880 acres. Id. § 4; 6(c). The statutory provision at issue, however, is a limitation on that opportunity. The specific phrase is clearly directed at preventing the establishment of trust lands in cities and towns – an unsurprising effort to prevent the kinds of conflicts that are likely to occur if trust

lands are created in more densely populated areas like cities and towns. The conclusion that Congress intended to keep trust lands outside of cities and towns is only bolstered by the other limitations in the Act. By limiting the Nation to three land acquisitions, requiring that one acquisition be contiguous to San Lucy Village (near the prior reservation some 60 miles away from Glendale), and at the same time authorizing acquisition of 9,880 acres, id. § 6, Congress clearly contemplated that the Nation would acquire a very small number of large swaths of land, each perhaps in the thousands of acres – more evidence that Congress intended acquisitions to be outside of cities and towns, where it would be highly unlikely that large holdings could be acquired.

A plain, straightforward reading of the statute – the type of reading favored by courts, Congress, and the statutory interpretation canons – leaves no doubt that a parcel of land located entirely within the City of Glendale's boundaries is not eligible for acquisition under the Gila Bend Act. In drafting section 6(d) of the Act, Congress clearly envisioned the hazards presented by the instant situation and carefully crafted the Act to benefit the Indian tribes and to protect the interests of cities and towns over the land within their borders. There is no doubt that the "within the corporate limits provision" was included in the statute expressly to prevent the situation here: an attempt to place a semi-sovereign nation – and the land use issues, jurisdictional conflicts, and diplomatic obstacles that come with it – entirely within the borders of a municipality.

The Nation's interpretation of the Act would hold any unincorporated parcels of land within the three identified counties eligible for trust acquisition. Careful consideration of the statute, however, demonstrates that the Nation's reading is wrong. First, of course, the statute does not refer to "unincorporated" lands, though it easily could have if that is what was meant. Congress has used that language before in an act relating to Maine Indian tribes. See 25 U.S.C.

§ 1724(i)(2) (1980) ("proceeds . . . shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine"). Second, there is nothing in the language of the Act or its legislative history that suggests that Congress meant to tie the terms of its federal statute to state municipal law. State municipal law is a creature of statute and there are at any given time 50 variations of it, all subject to change by the will of each state legislature. Congress surely did not intend, sub silentio, for the meaning of its Act to be subject to fluctuation based on the legislative enactments of the State of Arizona or all of the 50 states. Indeed, the vagaries of municipal law are so far outside Congress' purview that in the entire U.S. Code, the phrase "corporate limits" does not occur once.

Just as important, there is no basis to presume that Congress had any knowledge of the relatively unusual circumstance found in Arizona, whereby many relatively small pockets of unincorporated land can exist within the boundaries of a city or town – lands that even while unincorporated are subject to statutorily-required municipal planning, water management, and annexation powers. See Beasley Decl. ¶ 10. The Nation cites an Arizona statute using the term "corporate limits" to circumscribe the authority of a municipal court, and an Alabama case addressing the taxing power of a municipality but neither local judicial authority or taxing power is at issue here. Glendale plainly has substantial authority over the unincorporated parcels within its boundaries, and it gained that authority by enclosing the area – ages ago – and establishing its exclusive power to annex the lands.

Ultimately, the Nation's interpretation must fail because it is an unreasonable and impracticable reading of the plain text of the Act to argue that incorporated areas of a city are precluded from acquisition, but that a small unincorporated parcel –entirely enclosed by the same city and subject to substantial control by that city –somehow can fit within the statute. In either

circumstance, a trust acquisition would work substantial and permanent injury to a city, an injury Congress clearly meant to preclude. Nothing in the language, purpose, or legislative history of the Gila Bend Act supports the Nation's unreasonable result. Any reasonable construction of the statute must acknowledge the geographic reality that Parcel 2 is within Glendale's corporate limits.

In this case, the ordinary meaning of the phrase "within the corporate limits of any city or town," Pub. L. No. 99-503 § 6(d), clearly and unambiguously is intended to cover any property within the geography of any city or town. Indeed, the Department has described this provision as one that allows acquisitions "in either Maricopa, Pinal, or Pima Counties but not in any town or city[.]" AR2198 (Aug. 1, 2006 Mem. from Office of Solicitor to Reg'l Dir.) (emphasis added). Whether statutory language is clear or ambiguous 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." See Robinson, 519 U.S. at 341 (citations omitted). Here, the context of the "within the corporate limits" phrase underscores that the natural reading of the language uses a geographic lens, not the sort of political jurisdiction reading that focuses on metes and bounds. The statute states that "[l]and does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town." (emphasis added). From these descriptions of ineligible land, land eligible to be placed in trust must be land: (1) inside the three counties; and (2) outside the corporate limits of any city or town. This reading is supported by the Act's legislative history, which interprets this sentence the same way: eligible land must be "within Maricopa, Pinal and Pima counties outside the corporate limits of any city or town." AR440 (H.R. Rep. No. 99-851, at 11 (emphasis added)).

Focusing on whether land is inside or outside the city's boundaries (rather than zeroing in on metes and bounds descriptions of puddles within a city) is also consistent with the Arizona Supreme Court's construction of the term "within." The court construed the term this way in answering the question of whether a state enclave located entirely within the City of Flagstaff qualifies as being "within" the city's corporate limits for tax purposes. See Flagstaff Vending Co. v. City of Flagstaff, 578 P.2d 985, 987 (Ariz. 1978). The court noted that "the exterior boundary of Flagstaff completely surround[ed]" the enclave at issue, thereby satisfying the "within" requirement of the relevant ordinances; a conclusion which the court noted also comported with the "ordinary meaning of 'within' [–] 'on the innerside . . . inside the bounds of a region.'" Id. The same common sense understanding should control here, where the obvious Congressional purpose for the provision would be utterly obviated by the Nation's impracticable alternative construction. See United States v. Project on Gov't Oversight, 484 F. Supp. 2d 56, 65 (D.D.C. 2007) ("This construction of the statute is an eminently sensible one, and is therefore preferable under prevailing canons of construction.") (citation and quotation omitted); McPhee & McGinity Co. v. Union Pac. R. Co., 158 F. 5, 17 (8th Cir. 1907) ("[A] rational, sensible, and practical interpretation of a Constitution, statute, or contract should be preferred to one which is unreasonable, absurd, or impracticable.").

B. Preliminary Recommendations Of Department Personnel With No Authority To Issue A Decision On The Nation's Application Cannot Support The Claim That Taking The Glendale Parcel Into Trust Is "Legally Required"

The Nation also cannot show that the Department has "failed to take a discrete agency action that it is required to take." Kaufman v. Mukasey, 524 F.3d 1334, 1338 (D.C. Cir. 2008) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) (emphasis in original) ["SUWA"]). Where a plaintiff cannot show that an agency is "legally required" to take the

action requested, "that [p]laintiff['s] claims under section 706(1) must fail." Ass'n of Civilian Technicians, Inc. v. United States, 601 F. Supp. 2d 146, 161 (D.D.C. 2009), aff'd, ___ F.3d ___, 2010 WL 1728946 (D.C. Cir. 2010). Moreover, even where a statutory requirement is "mandatory as to the object to be achieved," if "it did not require any specific action by the agency," the statute lacks "the clarity necessary to support judicial action under § 706(1)[.]" Long Term Care Pharmacy Alliance v. Leavitt, 530 F. Supp. 2d 173, 186-87 (D.D.C. 2008) (citing SUWA, 542 U.S. at 66). That is the case here. The Gila Bend Act does not command the Secretary to take trust title to the Glendale Parcel. Instead, it directs the Secretary, upon application by the Nation, to take into trust only those parcels which satisfy all the Act's requirements. That statutory direction plainly requires the Secretary to reach a legal judgment about whether a particular acquisition satisfies the statute's criteria. The Secretary currently is engaged in making that determination, utilizing the same procedures of review it applies to analogous applications.

The Nation spends a non-negligible portion of its brief discussing the mandatory nature of the Gila Bend Act, TON Br. at 25-28, 31-33, but even assuming that the Act imposes a mandatory obligation on the Department, it certainly does not mandate any "specific action" by the Department for every application that is submitted. "To be the kind of 'agency action' that can be compelled under § 706(1), the thing to be compelled must be 'a discrete action.'" Friends of the Earth, Bluewater Network Div. v. U.S. Dep't of Interior, 478 F. Supp. 2d 11, 26 (D.D.C. 2007) (quoting SUWA, 542 U.S. at 55). A plaintiff may proceed under the APA "only if the defendant had a duty to perform a ministerial or nondiscretionary act," Hamandi v. Chertoff, 550 F. Supp. 2d 46, 50 (D.D.C. 2008), and the D.C. Circuit has defined the term "[m]inisterial" as

"not exercis[ing] judgment, discretion, or control[.]" Jacobson v. Dep't of Agric., 99 F. App'x 238, 239 (D.C. Cir. 2004).

But the Gila Bend Act is not an act in which nothing is left to the Department's judgment or control. The statute does not mandate a specific action – it does not direct the Secretary to take the Glendale Parcel, or any other particular land, into trust. Nor does it instruct the Department to take into trust land anytime the Nation requests it. Rather, the Gila Bend Act directs the Secretary to only take into trust land that meets specific statutory requirements, and, not surprisingly, the Department must undertake a detailed and thorough review of any application to determine whether these requirements are met. Putting aside the fact that the Glendale parcel does not meet those requirements, it is clear both that the Department is "legally required" by the statute to evaluate whether a parcel meets the requirements of the Act and that the Secretary has not yet made a final determination regarding whether the Parcel meets those requirements in this case.

The Nation hangs its claim that only a "ministerial act" remains to be performed on the thin thread of a letter from the Regional Office which expressly states that "the Assistant Secretary will be the final decision maker for the Department," and one letter from the Office of Indian Gaming, two divisions of the Department not charged with issuing a final opinion on the Nation's application in this instance. See AR637-38; AR584-85 (Apr. 30, 2009 Mem. from W. Quinn to A. Anspach, at 7-8; May 29, 2009 Letter from P. Hart to Craig Tindall). As this Circuit's precedent makes clear, statements made by a division or individual not authorized to render the final decision at issue cannot be viewed as binding on the Secretary. See Comcast Corp. v. FCC, 526 F.3d 763, 769 (D.C. Cir. 2008) ("We have recently reaffirmed our well-established view that an agency is not bound by the actions of its staff if the agency has not

endorsed those actions." (citation and internal quotation omitted)). Indeed, "there is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level." Id. (quoting Cmty. Care Found. v. Thompson, 318 F.3d 219, 227 (D.C. Cir. 2003)); see also Vernal Enters., Inc. v. FCC, 355 F.3d 650, 660 (D.C. Cir. 2004); Jelks v. FCC, 146 F.3d 878, 881 (D.C. Cir. 1998) (per curiam); Amor Family Broad. Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1990).

Moreover, the very letter the Nation relies on for its argument that the Department reached a final decision on the legal merits of its application in May 2009 expressly indicated that the determination was only preliminary, that an "exhaustive and deliberative review" remained before any final determinations would be reached, and that the final decisionmaker, the Assistant Secretary – Indian Affairs, had yet to weigh in: "We can assure you that the final decision to take land into trust for gaming will be made by the Assistant Secretary - Indian Affairs only after an exhaustive and deliberative review of all relevant criteria, factual information, and legal requirements." AR584-85 (May 29, 2009 Letter from Paula Hart to Craig Tindall, City Attorney for City of Glendale). Internal correspondence among Department officials confirms this reading of the letter. On June 3, 2009, four days after receiving his own copy of Paula Hart's letter to the City of Glendale, see AR584-85, Allen Anspach, BIA Western Regional Director, recounted to Paula Hart a conversation with a reporter, to whom he had "clarified the process . . . that we will forward our recommendation to you by month's end, but no TRUST decision will be made at this level due to the gaming issue." AR583 (Jun. 3, 2009 E-mail from Allen Anspach to Rodney McVey, et al.). The handwritten notes on Anspach's June 3, 2009 e-mail underscore this point: "no decision yet." Id.

Clearly, the Department has not yet reached a point where – as the Nation suggests – all that remained was the act of taking the Parcel into trust. See Spirit Lake Tribe v. N.D., 262 F.3d 732, 741-42 (8th Cir. 2001) (citation omitted) (recognizing that federal agencies issue an array of informal documents such as letters, manuals, and guidelines, and that these documents "lack the force of law" and do not bind the government) (internal citation omitted). Rather, the road ahead as of June 2009 – one month after the Nation insists the Department had reached a final determination actionable via mandamus – was one of additional review and inquiry by the Bureau of Indian Affairs' Regional Office, followed by substantial and appropriate additional review by the Assistant Secretary and others in Washington, D.C.

Despite the Nation's attempt to frame its request for relief as a mere "ministerial or non-discretionary act," TON Br. at 23 (quoting SUWA, 542 U.S. at 64), this lawsuit in fact seeks the Court's assistance in short-circuiting the Department's decisionmaking process. The Nation demands that the Court bind the Secretary to a preliminary conclusion issued by a branch of the Department not authorized to issue the ultimate decision. There is no precedent to support that demand. See Comcast Corp., 526 F.3d at 769 ("We have recently reaffirmed our well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions." (citation and internal quotation marks omitted)); Vernal Enters., Inc., 355 F.3d at 660 (same). In fact, forcing the Department to adopt a preliminary statement made by the Office of Indian Gaming in this case would be an open invitation to any agency petitioner to seek judicial intervention wherever he or she has received an encouraging status update from the agency.

The type of relief the Nation seeks is beyond the Court's authority under the APA, which is "limited to directing the agency to 'perform a ministerial or non-discretionary act, or to take

action upon a matter, without directing how it shall act.'" Long Term Care Pharmacy Alliance, 530 F. Supp. 2d at 186 (quoting SUWA, 542 U.S. at 64); see also Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States, 384 F.3d 721, 728 (9th Cir. 2004) (holding that section 706(1) of the APA "does not empower the district court to . . . order the agency to reach a particular result" (citations omitted)). Because the Nation has failed to show an affirmative duty to act on the part of the Secretary, summary judgment must be granted to the defendants.

II. THE DEPARTMENT'S DELAY IN TAKING FINAL ACTION ON THE NATION'S REQUEST IS NOT UNREASONABLE

Not only has the Nation failed to demonstrate a clear legal duty, it has failed to show that the passage of time between the Nation's initial application and its filing of the instant lawsuit amounts to an unreasonable delay. In this case, any "delay" is far from unreasonable: the Nation has been the cause of much of the delay of which it complains, the interests at stake are profound, and the overwhelmed and underfunded Department faces a backlog of other fee-to-trust applications, many of which predate the Nation's application, from other Indian tribes with similar needs.

The Nation brings the instant complaint to force immediate action on its application, but as the D.C. Circuit Court of Appeals has made clear, "[a]n agency's own timetable for performing its duties in the absence of a statutory deadline is due 'considerable deference.'" Cobell v. Norton, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984)) (emphasis added). Courts have been instructed not to "upset existing agency priorities [] unless the delay is egregious." Id. (internal quotation marks and citation omitted). Moreover, even a court's finding that a delay is unreasonable "does not, alone, justify judicial intervention." Id. (quoting In re Barr Labs., Inc.,

930 F.2d 72, 75 (D.C. Cir. 1991)). Rather, the Court must balance multiple factors to determine whether the delay alleged is, in fact, unreasonable.

The D.C. Circuit has set forth a four-factor test to evaluate whether agency action has been unreasonably delayed. First, "the court should ascertain the length of time that has elapsed since the agency came under a duty to act." Cobell, 240 F.3d at 1096 (internal quotation and citation omitted). Second, the court must evaluate "the reasonableness of the delay . . . in the context of the statute which authorizes the agency's action." Id. (internal quotation and citation omitted). Third, the court "must examine the consequences of the agency's delay." Id. (citation omitted). Fourth, the court is to give "due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." Id. (internal quotation and citation omitted).

Application of these four factors to the instant case leaves no doubt that there has been no "unreasonable delay" here.

A. Only A Short Period Of Time Has Elapsed

To determine whether a delay is unreasonable, "the Court must first ascertain the length of the time that has elapsed since the agency came under a duty to act." Beyond Pesticides/Nat'l Coalition Against the Misuse of Pesticides v. Johnson, 407 F. Supp. 2d 38, 39 (D.D.C. 2005) (quoting Cutler v. Hayes, 818 F.2d 879, 897 (D.C. Cir. 1987)) (internal quotation marks omitted). Because the Court can only compel an agency to take action that is legally required, SUWA, 542 U.S. 55, the Court must analyze the delay "from the point where the agency first became obligated to act." Beyond Pesticides, 407 F. Supp. 2d at 39; see also Orion Reserves Ltd. P'ship v. Kempthorne, 516 F. Supp. 2d 8, 13 (D.D.C. 2007) ("The reasonableness of defendants' delay

can only be measured during the periods in which defendants had a duty to act."). While typically a court treats the date of the petitioner's request that an agency undertake a mandatory duty as the relevant start date, see, e.g., id., in this case, the Nation's repeated alteration of its request to the Department makes it difficult to guess when one would start counting here.

A review of the administrative record reveals no clear point in time from which the Department conceivably could have been under a duty to acquire the Parcel. Even assuming that the Paula Hart letter relied on by the Nation had been issued by someone with authority and had been a final decision – which it clearly was not – a mere ten months passed between that letter and the instant lawsuit, a period of time no court has held to be an "unreasonable" delay.

Although the Nation expressly abandoned its request to bifurcate its application and proceed to acquire Parcel 2 alone in August 2009, id., it nevertheless urges this Court to conclude that the Department had a legal duty to fulfill this request going all the way back to the date of submission of its application. TON Br. at 35. In other words, the Nation asks the Court to hold that the Department was under an obligation to acquire Parcel 2 as of seven months before the Nation even requested that the Court take just Parcel 2 into trust (a request that the Nation expressly revoked not long thereafter). Another court in this Circuit has rejected just such an argument. In Beyond Pesticides, 407 F. Supp. 2d at 39-40, the D.C. district court found that an agency's duty to act did not begin until the specific action was formally requested by the plaintiff. In this case, the Nation requested that the entire Parcel be taken into trust in January, switched to Parcel 2 in August, but then changed back a few weeks later. AR1639 (Sept. 8, 2009 Letter from Ned Norris to George Skibine, et al., at 2). Even if the Nation could overcome the

fact that no legal duty exists in this case, it cannot claim that the Department had a duty to deviate from the Nation's express acquisition request. 8/

In September 2009, the Nation asked the Department again to acquire the entire 135 acres in Glendale, notwithstanding the fact that the Nation was engaged in litigation over whether a large portion of the parcel had been incorporated by the City of Glendale and therefore was unquestionably ineligible to be acquired under the Act. The Department had no duty to acquire land on behalf of the Nation when pending litigation placed a substantial portion of the property under a cloud of uncertainty. Given the Nation's request that the Department take the entire Glendale parcel into trust, a more reasonable starting point for any unnecessary or unreasonable delay would be upon issuance of the Superior Court's decision regarding the incorporation status of the parcel: on March 12, 2010. AR337-48. Of course, only ten days elapsed between the issuance of that opinion and the filing of the instant lawsuit – and the Secretary acted promptly during that short window of time to seek clarification from the Nation necessary to move the process forward. A review of cases across the county has revealed that no court has ever found a ten-day agency delay to be unreasonable.

8/ The Nation apparently contends that even though it demanded the entire parcel be taken into trust, the Department should have ignored that request and taken into trust Parcel 2 anyway. This is a highly questionable assumption. Indeed, most entities appearing before an agency do so to ensure the agency takes the specific action they request – not in the hopes that the agency use its own judgment to take some action that benefits them. Even were one to credit the Nation's current spin on its prior requests – that its demand that the Department take the entire Parcel into trust should be construed as advocating a "take either the entire Parcel or just Parcel 2" approach, its bifurcation request was first officially rescinded in September 2009, see AR16348-39 (Sept. 8, 2009 Letter from N. Norris to G. Skibine, et al., at 2), and a delay of six months (between September and the filing of the instant lawsuit) is hardly an "unreasonable delay" for a government agency. Pub. Citizen Health Research Group v. Brock, 823 F.2d 626, 628 (D.C. Cir. 1987) (six-year delay "tread[ed] at the very lip of the abyss of unreasonable delay"); Pub. Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (per curiam) (three-year delay unreasonable); MCI Telecomms. Corp., 627 F.2d at 324-25 & n.5, 342-44 (four-year delay unreasonable); The Fund for Animals v. Norton, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) (holding that a five-year delay "smacks of unreasonableness on its face.").

1. Because The Nation Has Played A Prominent Role In The Delay Of Which It Complains, It Cannot Claim The Resultant Delay Is Unreasonable.

The Nation's constantly-changing position has required the Department to seek clarification even up until the eve of the of filing this lawsuit. Over the course of less than a year, the Nation asked the Department to switch gears from one already-pending trust application (Painted Rock, see AR1999-2000) to a brand new application, to remove consideration of gaming from the application (AR1694-95) and, of course, and to jump back and forth regarding which particular lands are to be considered (AR350; AR1638-39; AR336). As discussed, the Nation has contributed mightily to the delay it complains of.

Even if the passage of fourteen months between the initial application and the instant lawsuit could be considered an "unreasonable delay," the bulk of that delay can be laid at the feet of the Nation. Courts across the country have held that when an agency supplicant contributes to the delay in the action requested, it cannot then sue the agency for unreasonable delay it caused. See, e.g., Box v. Dep't of Navy, 250 F.3d 757, 2000 WL 772718, at *2 (Fed. Cir. 2000) (holding that applicant whose delayed cooperation in the processing of a payment "contributed to the delay in his receipt of payment," could not claim unreasonable delay, when the agency did not unreasonably delay once the information was provided); Reddy v. Commodity Futures Trading Comm'n, 191 F.3d 109, 120 (2d Cir. 1999) (factoring petitioners' own delay into the determination of whether unreasonable delay occurred); Hall v. Bowen, 830 F.2d 906, 910 (8th Cir. 1987) (rejecting petitioner's argument that a 31-month delay was unreasonable due to lack of prejudice and petitioner's own contribution to the delay). In this case, from January 2009 to the present, the Nation has shifted course and amended its request to the Department multiple times by phone, e-mail, and letter, delaying the Department's response to its request

immeasurably. Given its own prominent role in any alleged delay, the Nation cannot now be heard to complain about the unreasonableness of the passage of fourteen months, the outermost period of delay it complains about.

2. The Delay Complained Of Is Reasonable Given The Department's Obligation To Consider All Issues Raised By The Nation's Application

Any delay on the part of the Department is entirely reasonable, too, given the obligation it is under to consider whether the Parcel qualifies for acquisition under the Gila Bend Act and whether it is gaming-eligible under IGRA. Here the City has focused on just one of the statutory criteria, but there are also additional issues concerning the application of the Act that the Department must consider. The Gila River Indian Community ("GRIC") discusses some of these in its brief, and both the City and GRIC have submitted materials to the Department for its consideration. In addition, the Department must decide whether the Parcel, if taken into trust, would be eligible for gaming under IGRA. The Nation has attempted to bypass this necessary process by withdrawing its request for a gaming opinion and asking the Department to address only the request to take the Parcel into trust. That course of action would be improper.

The Nation's January 2009 fee-to-trust application invoked section 20(b)(1)(B)(i) of IGRA (25 U.S.C. § 2719(b)(1)(B)(i)), seeking permission to use the Glendale property for its planned casino. The request for a gaming opinion set the Nation's application on a path that would begin at the Regional Office and ultimately end with a decision by the Assistant Secretary. As a matter of long-standing policy, the ultimate decision on IGRA eligibility is made by the Assistant Secretary, due to the controversial nature of such decisions. Evaluation Rep. at 9 ("approval level at the Assistant Secretary level was established in order to give 'policy-makers a voice in approving often controversial decisions related to these acquisitions.'").

Notwithstanding the fact that it has asked the Department to take the Parcel into trust without first obtaining the Department's decision on the gaming issue, the Nation maintains that it needs the Department to quickly take the Parcel into trust so that it can proceed with its plans to build a casino. TON Br. at 21. The assumption underlying that statement is that development of the gaming complex will proceed once the land is taken into trust, betraying the Nation's willingness to begin development of its gaming facility even without the requisite federal permission in hand.

Permitting the Nation to separate the trust acquisition question from the gaming eligibility question is improper and bad policy. First, it would flout the law. Pursuant to the Department's regulation implementing IGRA, 25 C.F.R. § 292.3(b), when a tribe seeks to game on newly acquired ands, the gaming eligibility question and the land into trust decision go hand-in-hand. This procedure benefits the Department because it helps ensure that gaming on newly acquired lands will be lawful under IGRA. It benefits tribes because it gives them certainty about their legal rights, and allows them to make prudent investments of their resources. And it benefits affected states, local governments, and other interested parties because it produces a final agency action, with a complete record, for which judicial review may be sought. All these benefits are lost if the Department abandons its procedure. And all these benefits would be lost here if the Court were to grant the Nation the relief it seeks.

Second, were this Court to grant the Nation the relief it seeks in this lawsuit, it effectively would endorse the gamesmanship the Nation has exhibited here and would encourage other tribes to limit applications to seeking a trust acquisition decision, and ignore the requirement for obtaining advance gaming authorization. See 25 C.F.R. § 292.3(b) As the Nation is no doubt aware, once land has been taken into trust for its benefit, the Department has limited resources

and authority to investigate unauthorized gaming. A 2005 Office of Inspector General ("OIG") report discovered that "certain tribes had converted the use of land acquired for them in trust by the Secretary for economic development (other than gaming) to gaming . . . . without a determination of eligibility of the land for gaming." Evaluation Rep. at 7. 9/ Id. In addition, granting the Nation the relief it seeks here also would encourage tribes to do what the Nation has done here – switch administrative tracks whenever a potential benefit is perceived. Given the unresolved "questions that [] need to be addressed" in connection with its request for a gaming opinion, 10/ and given the repercussions of permitting an applicant intent on gaming to switch from a gaming opinion application process midstream, the Department should be allowed to engage in a detailed and exhaustive review of the Nation's application.

3. The Delay Complained Of Is Far From Unreasonable Even Under The Nation's Calculation

Finally, even had the Nation played no role in prolonging the consideration of its application, the maximum possible delay in this case – fourteen months – is not considered "unreasonable" in the context of agency action. "There is no per se rule as to how long is too long to wait for agency action," In re Am. & Idaho Rivers United, 372 F.3d 413, 419 (D.C. Cir. 2004) (citation and internal quotation omitted), but there is indication within the D.C. Circuit "that a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" Midwest Gas Users Ass'n v. FERC, 833 F.2d 341, 359 (D.C. Cir. 1987) (quoting MCI Telecomms. Corp., 627 F.2d at 340); see also, e.g., Brock, 823 F.2d at 628

9/ In fact, there are at least ten instances of which the BIA is aware in which tribes have taken land into trust after October 17, 1988 and have converted the use of those lands from non-gaming to gaming. Id. at 7-8. Of those ten instances, five of the parcels have been determined to be gaming eligible, one has been determined to be ineligible (and ultimately was closed), and four had yet received any determination at the time of the report. Id. at 8. And, of course, there may well be more such instances of which the Department is not aware.

10/ AR1402 (Mar. 12, 2010 Letter from Hilary C. Tompkins to Seth Waxman, at 1).

(six-year delay "tread[ed] at the very lip of the abyss of unreasonable delay");Auchter, 702 F.2d at 1157-59 (per curiam) (three-year delay unreasonable); MCI Telecomms. Corp., 627 F.2d at 324-25, 388-42 (four-year delay unreasonable); Fund for Animals v. Norton, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) (holding that a five-year delay "smacks of unreasonableness on its face.").

B. The Department's Delay Is More Than Reasonable In The Context Of The Statute Which Authorizes The Agency's Action

Courts in this Circuit have been instructed to judge the reasonableness of any agency delay "in the context of the statute which authorizes the agency's action." In re Int'l Chem. Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (internal quotation marks and citation omitted). Even under the unlikely assumption that fourteen months would be viewed as the relevant timeframe for assessing delay, the passage of fourteen months between the Nation's submission of its application and the filing of its lawsuit is not an unreasonable time when viewed in the context of the serious consequences of the Gila Bend Act. The statute requires that the Secretary consider whether land meets certain specified criteria before authorizing the Secretary to take that land into trust – a process which necessarily requires careful deliberation.

When evaluating the reasonableness of an agency's delay, courts have been instructed to "take into consideration any congressional expectations or mandates regarding the speed at which a proceeding should advance." Beyond Pesticides, 407 F. Supp. 2d at 40 (citing In re Monroe Commc'n Corp., 840 F.2d 942, 945 (D.C. Cir. 1988); Cutler, 818 F.2d at 897). Where no statutory timetable has been set forth in the enabling statute, "an agency is entitled to considerable deference in how expeditiously it proceeds with agency action." Id. (citing Sierra Club v. Thomas, 828 F.2d at 797). The Gila Bend Act states that the Secretary "shall" take into trust lands that meet certain specified criteria, but it makes no mention of the timeframe in which the Secretary must do so. Therefore, the Secretary's determination regarding the speed with

which to process applications must be given "considerable deference." Id. Where, as here, no statutory timetable has been imposed, it has been held that an agency has acted in a reasonably timely manner where it acknowledged the need to respond to an application pursuant to the act and began processing the application. See, e.g, id.

Moreover, the Secretary is obligated by the Act to assess whether the application property meets the statute's criteria prior to taking land into trust under the Act. See Gila Bend Act § 6(d) (setting forth criteria and stating that the Secretary "may waive" certain requirements "if he determines that additional areas are appropriate"). This analysis "entails an examination of any legislative mandate in the statute and the degree of discretion given the agency by Congress." Biodiversity Legal Found. v. Norton, 285 F. Supp. 2d 1, 14 (D.D.C. 2003). The court is also to estimate the extent to which delay may be undermining the statutory scheme, "either by frustrating the statutory goal or by creating a situation in which the agency is losing its ability to effectively regulate at all." Id. (quoting Cutler v. Hayes, 818 F.2d 879, 897-98 (D.C. Cir. 1987) (internal citation omitted)).

While Congress could have crafted the Gila Bend Act to allow the Nation to convey trust title to any proposed reservation property, a feat the Nation attempted to undertake in its Painted Rock Application, Congress established the Secretary as gatekeeper for trust acquisitions under the Act, Congress also recognized the serious impact creation of reservation land has on cities and towns in particular, crafting section 6(d) of the Act to ensure that the Secretary had no authority to create reservation islands in the middle of any city or town. See also City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 201 (2005) (noting that creating a "checkerboard of [alternating] state and tribal jurisdiction" would "seriously burden the administration of state and local governments and [ ] adversely affect landowners neighboring

the tribal patches) (citation omitted)." Indeed, a decision to take land into trust has far-reaching consequences, profoundly transforming the land by ousting state and local governments of virtually all civil and regulatory control over the property. See generally United States v. Washington, 573 F.3d 701, 707-08 (9th Cir. 2009) ("Like states, Indian tribes are sovereign entities . . . ."). Congress's desire to protect the integrity of cities and towns from reservation encroachment is not surprising, given that the Act was aimed at replacing remote rural lands located nowhere near any major cities or towns. AR440 (H.R. Rep. No. 99-851, at 11).

In this case, the Department was well aware of the potential for far-reaching harm that wrongful application of the statute would have in this case, having received much correspondence from the City of Glendale, the Gila River Indian Community, and other impacted parties, and therefore properly recognized the need to carefully evaluate whether the Parcel conformed to the statutory criteria. AR5021 (Wiseman Decl. ¶ 3). As former Assistant Secretary for Indian Affairs Carl Artman testified in 2007, "[t]aking land into trust is an important decision not only for the Indian tribe seeking the determination but for the local community where the land is located." Test. of Carl Artman, Asst. Sec.-Indian Affs., Sen. Comm. on Indian Affs., at 5 (Oct. 4, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:39675.pdf (last visited May 12, 2010).

The Department's careful consideration does not threaten to "frustrat[] the statutory goal" or "creat[] a situation in which the agency is losing its ability to effectively regulate." Biodiversity Legal Found., 285 F. Supp. 2d at 14. Rather, it is necessary to effectuate the statute's purpose of obtaining appropriate land for the Nation while safeguarding the interests of towns and cities. By filing this lawsuit, the Nation seeks to avoid careful deliberation, cut in line ahead of other applicants, and skip the procedure which the Department has crafted to

accomplish the statute's objectives. Such a result is not what a section 706(1) claim was intended to accomplish.

C. The Nation Faces No Actionable Harm As A Result Of The Department's Delay

A court also must consider the consequences of agency delay in determining whether an alleged delay is reasonable. Cobell, 240 F.3d at 1096 (citation omitted). The Nation claims that this factor weighs heavily in its favor, asserting that its people are suffering grievous harm for every day the Department delays action on its petition. TON Br. at 36-38 (citing TRAC, 750 F.3d at 80, for the proposition that agency delay that harms human health and welfare is more serious than that causing economic harm).

This factor only weighs in the Nation's favor if one assumes (as apparently it does) that its application is the only application pending before the Department, and that otherwise the Department is not acting at all. In fact, the Nation's application is one among many applications and, indeed, was submitted later in time than pending applications from other Indian tribes. See AR5022 (Wiseman Decl. ¶ 6). Eighteen applications already were pending when the Nation submitted its application to the Department. Id. Sixteen of those applications, all filed prior in time to the Nation's, are still under review. Id.

As the Court of Appeals observed in the EPA context, the fact that a delay harms "human health and welfare" "can hardly be considered dispositive when . . . virtually the entire [agency] docket . . . involves issues of this type." Sierra Club v. Thomas, 828 F.2d at 798 (noting that "[g]iven that Congress provides EPA with finite resources to satisfy these various responsibilities, the agency cannot avoid setting priorities among them"). By acting on the Nation's application over an earlier submitted application, the Department causes to the same kind of harm of which the Nation complains to an equally needy tribe whose application was submitted earlier in

time. 11/ Indeed, the National Congress of American Indians recently sent the Department a letter criticizing the backlog of fee-to-trust applications and noting that "[t]he vast majority of Indian tribes are heavily affected by allotment and land loss," and that "[a]cquiring land into trust is critical for tribal cultural protection, preservation of natural resources, provision of basis services, housing and economic development." AR77 (Mar. 3, 2010 Letter from Jefferson Keel to Ken Salazar, at 1). Where as here, "putting the plaintiff at the head of the queue simply moves all others back one space and produces no net gain," the impact of the delay on human health and welfare is not relevant to the unreasonable delay analysis. See In re Barr Labs., Inc., 930 F.2d at 76).

Moreover, the Nation's indignation regarding a fourteen-month delay, and the resultant harm such delay has had upon the health and welfare of its people, seems somewhat disingenuous in light of the six-year delay between its acquisition of the Glendale parcel and the submission of its fee-to-trust application to the Department. Further underscoring the questionable "urgency" of the Nation's current petition is the fact that it has had a different fee-to-trust application pending for over three years ("the Painted Rock property") and has never filed suit over the delay in action on that parcel.

11/ The Nation's demand for expedited review in this proceeding is resulting in just such harm, diverting the resources of the Department when no real urgency exists under the facts of this case. In responding to the Nation's request for expedited review by this Court, six attorneys in the Branch of Trust Responsibility and two additional attorneys from within the Washington, D.C. Solicitor's Office have worked numerous overtime hours to prepare the pre-decisional administrative record, AR5022 (Wiseman Decl. ¶ 7), time that could have been spent processing pending applications for Indian tribes in need of additional reservation lands.

D. The Department's Delay Is Particularly Reasonable Given Its Valid Concern For Administrative Convenience And Its Need To Prioritize In The Face of Limited Resources

Courts in this Circuit have been instructed to give "due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." Cobell, 240 F.3d at 1096. "Concern for 'administrative convenience' certainly counsels against interfering with the government's . . . priorities." Id. at 1097 (quoting Grand Canyon Air Tour Coalition v. FAA, 154 F.3d 455, 476 (D.C. Cir. 1988) ("Although the APA gives courts the authority to 'compel agency action unlawfully withheld or unreasonably delayed,' we are acutely aware of the limits of our institutional competence in the highly technical area at issue in this case." (citations omitted)).

The Department is an agency with limited resources, important legislative mandates, and a constant stream of applications from parties with urgent and serious needs. It has a substantial backlog of trust applications, many of which have not yet undergone the Department's careful and thorough review process. In this case, in January 2009, the Nation requested that the Department acquire title to a parcel when it was unclear whether the parcel met the acquisition requirements of the Act. The Department's consideration of those requirements, including the corporate limits question, AR5021 (Wiseman Decl. ¶ 4), has been repeatedly delayed by the Nation's conflicting messages regarding the action it seeks.

Given the Department's limited resources and overwhelming workload, and the Nation's own flip-flopping, the time the Department has taken thus far has been entirely reasonable. The time is even more reasonable considering that the Nation was engaged in litigation relevant to its trust application for more than half the time that has elapsed since the date of its original

application. "When confronted with practical difficulties in executing a task and the need to prioritize limited resources, administrative agencies are in the best position to allocate their resources to complete the task in a timely manner." Orion Reserves Ltd. P'ship v. Kempthorne, 516 F. Supp. 2d 8, 14 (D.D.C. 2007) (citing In re Barr Labs., 930 F.2d at 76). Where, as here, an agency has been tasked with fulfilling a statutory mandate but has not been given a timetable, it is accorded "considerable deference in establishing a timetable for completing its proceedings." See Oil, Chem. & Atomic Workers Union v. OSHA, 145 F.3d 120, 123 (3d Cir. 1998) (citing Cutler, 818 F.2d at 896).

The Court of Appeals has made clear that "[a]n agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." Cutler, 818 F.2d at 896. The Department has done just that in this case. Notwithstanding its limited resources and overwhelming case load, the Department has been consistently responsive to the flood of letters, e-mails, and phone calls associated with the Nation's Glendale parcel application – many of which came from the Nation itself. The Nation seeks to paint a picture of a lackadaisical agency which for inexplicable reasons already has made a determination regarding its application but refuses to issue it. Even a cursory review of the Administrative Record demonstrates that the Department has committed substantial time and effort to the Nation's application. The delays caused by the Nation's equivocation and ongoing litigation cannot be laid at the feet of the Department and, indeed, given the Nation's actions, the Department cannot be said to have "unreasonably delayed" action on the Glendale parcel.

CONCLUSION

For the foregoing reasons, the City of Glendale respectfully requests that the Court deny the Nation's Motion for Summary Judgment, grant defendants' motions, and enter judgment for the defendants.

Respectfully submitted,

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