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 Interior, Defendant, –and– THE CITY OF GLENDALE, Defendant-Intervenor	Case No. 10-cv-00472-JDB

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION

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INTRODUCTION

Two months ago, and only a few days before filing this lawsuit, Plaintiff demanded the Department of the Interior accept into trust 54 acres of Plaintiff's 134-acre property in Maricopa County, Arizona. The Department's review of Plaintiff's application remains active and on-going. Yet, despite changing circumstances and the relatively recent request, Plaintiff asks this Court to compel the Department to acquire the 54 acres and for the Court to retain jurisdiction over the potential acquisition of other parcels. Plaintiff's request should be denied for three reasons. First, given the date of Plaintiff's most-recent demand, the Department has not unreasonably delayed making a determination. Second, the Gila Bend Indian Reservation Lands Replacement Act does not include a clear and undisputed duty to take land into trust. And, third, the Court lacks jurisdiction over any claim related to the potential future acquisition of the remaining parcels.

FACTUAL BACKGROUND[1/]

In August 2003, Plaintiff Tohono O'odham Nation purchased 134 acres of land in Maricopa County, Arizona. *See* AR2079 (memo accompanying Plaintiff's application). The property is composed of five parcels in Phoenix's northwest suburbs, straddling the City of Glendale's geographic boundary. *See* AR2064; AR0051–52 (maps). For nearly six years, the Nation took no action with respect to the property.

Then, in late-January 2009, hoping to open a casino, Plaintiff first requested that the Department of the Interior take the land into trust for the Nation's benefit under the Gila Bend

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[1/] Pursuant to Local Civil Rule 7(h)(2), Defendant does not submit a separate statement of undisputed material facts in support of its cross-motion, and instead cites to the administrative record ("ARxxxx").

Indian Reservation Lands Replacement Act. *See* AR2048–51 (application cover letter). The Department reviewed and assessed Plaintiff's application over the subsequent months. *See* AR0585; AR3637; AR3777. And, though the final decision on Plaintiff's request rests with the Assistant Secretary for Indian Affairs, the Director of the Bureau of Indian Affairs' Western Region made a recommendation on the application in June 2009. *See* AR0072; AR0737–38.

The facts underlying Plaintiff's original application, however, have changed. Two months after Plaintiff submitted its application, the City of Glendale claimed Plaintiff's property was within the City's jurisdiction and therefore could not be taken into trust.[2/] *See* AR0019–22. In June 2009—just ten months ago—the City informed the Department that it had previously annexed portions of the subject property. *See* AR1727. The City passed a resolution formalizing its conclusion that same month. *See* AR1711–24. Only eight weeks ago an Arizona state court upheld the City's annexation. AR0041–52. The annexation has left only one of Plaintiff's five parcels, Parcel 2, wholly outside the City's geographic border. *See* AR1444–48; AR00352 (map). The City continues to maintain that the entire property is within the City's "corporate limits" and is therefore ineligible to be taken into trust.

The Nation has also acted to change the scope of its application over the past year. On July 17, 2009—less than ten months ago—the Nation withdrew its request for an "Indian lands opinion" under the Indian Gaming Regulatory Act. AR1694–95. Then, in response to the City's annexation, on August 18, 2009—less than nine months ago—the Nation first disclosed that it

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[2/] Local communities often take great interest in tribal applications for the United States to take land into trust because of the impacts that arise from title transfer. These impacts can include changes to criminal or civil jurisdiction, tax revenue losses, changes to zoning and land use, and other related concerns.

would be willing to accept that the Department acquire only Parcel 2 in trust. AR1668–69. Three weeks later, however—just eight months ago—Plaintiff again refocused its request on the entire 134-acre property. AR1638–39. And as recently as January 28, 2010—less than four months ago—Plaintiff formally maintained that position. *See* AR3337–39.

More recently, the State of Arizona also appeared on the verge of taking action to prevent the Department from acquiring the land in trust. The Arizona state legislature had been considering a bill that would have allowed the City of Glendale to annex the remaining property. *See* AR0328–29. Fearing the bill would become law, Plaintiff increased its pressure on the Department to make a determination on its application. AR0326–27. In the days following the state court annexation decision, and immediately prior to the filing of this suit, Plaintiff declared it was only presently demanding to have Parcel 2 taken into trust. *See* AR1444–48; AR2742–44; AR0326 (Mar. 9, 2010, meeting notes stating full acreage); AR0321 (Mar. 11, 2010, e-mail stating full acreage).

Despite the changing land status and fluctuating application, the Department has continued to assess and review Plaintiff's request. *See, e.g.*, AR0102–03 (July 28, 2009, e-mail exchange regarding state litigation); AR1479 (Mar. 4, 2010, e-mail referencing Mar. 5, 2010 meeting); AR3597 (e-mail exchange regarding Aug. 25, 2009, meeting between Plaintiff and Department). The review continues as the Department balances Plaintiff's application with other matters currently before the Department, including other land-into-trust requests for gaming. *See* AR5020–23. Plaintiff nonetheless brings suit under the Administrative Procedure Act, 5 U.S.C. § 706(1), and Mandamus Act, 28 U.S.C. § 1361, seeking to compel the Department to take Parcel 2 into trust and asking the Court to retain jurisdiction over potential future requests.

STATUTORY BACKGROUND

In 1986, Congress passed the Gila Bend Indian Reservation Lands Replacement Act ("Lands Replacement Act" or "Act"). Pub. L. No. 99-503, 100 Stat. 1789 (Oct. 20, 1986). The Act provides the Tohono O'odham Nation with land-based economic opportunities because the Painted Rock Dam's impact on the Gila Bend Indian Reservation. *See id.*; H.R. Rep. No. 99-851 (Sept. 19, 1986). Congress intended the Act to "facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming . . . and promote the economic self-sufficiency of the O'odham Indian people." Pub. L. No. 99-503, § 2(4).

If the Nation waived certain claims and assigned certain lands to the United States, the Act provided for a monetary award to the Nation, and authorized the Nation to use the funds to purchase up to 9,880 acres of land. *See* §§ 4(a), 6(c), 9(a). The Act also enables the Nation to request that the United States hold the purchased lands in trust for the Nation's benefit. § 6(d). At the Nation's request, the Secretary of the Interior:

> 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. Land 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. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village.

Id.

Department of the Interior regulations set forth policy and procedures governing the United States' acquisition of land into trust. *See* 25 C.F.R. pt. 151. If a trust acquisition statute is determined to be "mandatory," certain regulatory provisions do not apply, including those requiring notice to local and state governments, compliance with the National Environmental

Policy Act, and consideration of certain factors that govern discretionary acquisitions. *See* 25 C.F.R. §§ 151.10(a)–(h), 151.11(a)–(d). Other regulatory provisions, however, continue to apply to "mandatory" acquisitions, including the requirements to publish notice of a decision to acquire land in trust, conduct contamination surveys pursuant to Department guidelines, and complete title examinations. *See* C.F.R. §§ 151.12(b); 151.13.

STANDARD OF REVIEW

The Administrative Procedure Act (APA) requires that federal agencies conclude the matters presented to them "within a reasonable time." 5 U.S.C. § 555(b). Section 706(1) of the APA grants a reviewing court the authority to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1). Where the form of the action itself is not legally mandated, a court may only order the agency to take action, without directing how the agency will act. *See Norton v. SUWA*, 542 U.S. 55, 63 (2004). In considering a claim of unreasonable delay, a court must satisfy itself "that the agency has a clear duty to act and that it has 'unreasonably delayed' in discharging that duty." *In re Am. Rivers & Id. Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). The issue of unreasonable delay "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). "The ultimate issue . . . [is] whether the time the [agency] is taking to act . . . satisfies the 'rule of reason.'" *Id.*

The United States Court of Appeals for the District of Columbia Circuit recognizes six principles relevant to whether an agency's delay is so "egregious" as to warrant relief:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason;(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) . . . the effect of expediting delayed action on agency activities of a higher or competing priority; (5) . . . the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

In re Barr Labs., Inc., 930 F.2d 72, 74–75 (D.C. Cir. 1991) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*")). But a finding of unreasonable delay does not, by itself, justify judicial intervention. *Id.* at 74.

The APA also grants a reviewing court the authority to "compel agency action unlawfully withheld . . . ." 5 U.S.C. § 706(1). But under the APA a court can only compel an agency to take action that the agency is legally required to take. *See SUWA*, 542 U.S. at 63. Similarly, the Mandamus Act gives federal district courts "original 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." 28 U.S.C. § 1361. The extraordinary remedy of mandamus is appropriate in "only . . . the clearest and most compelling cases." *13th Reg'l Corp. v. U.S. Dep't of the Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (citation and quotations omitted).

> The courts have achieved this limitation in part through a narrow definition of the term "duty." According to traditional doctrine, a writ of mandamus will issue "only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable."

Id. (citations omitted).

ARGUMENT

Plaintiff's requested relief is without merit. A judicial order requiring a decision on Plaintiff's application is inappropriate given the limited time that has passed since Plaintiff's March 12, 2010, request to take just Parcel 2 into trust. An order requiring the Department to actually acquire Parcel 2 would interfere with the administrative function prescribed by the Act and regulation. Before property can be taken into trust under the Lands Replacement Act, the Secretary of the Interior must make a determination that the property is eligible for acquisition, including whether it lies outside of the corporate limits of any city or town. Given the need for that determination, the Department's acquisition of Parcel 2 is not the clear and undisputed duty required for mandamus relief. And, even if a court could compel the acquisition, equity counsels against judicial intervention. Finally, regardless of the Court's determination with respect to Parcel 2, continuing jurisdiction over the remaining parcels is improper, as Plaintiff itself acknowledges that they are presently ineligible for acquisition under the Act.

I. The Department Has Not Unreasonably Delayed Reaching a Determination on Plaintiff's Request To Take Parcel 2 into Trust.

The Department has not delayed reaching a decision on Plaintiff's request to take Parcel 2 into trust. The Department's alleged "delay" is a matter of weeks, not fourteen months. Plaintiff nonetheless seeks relief that will allow its land-into-trust application to vault ahead of sixteen other pending applications, all received before its own, as well as many other matters. *See* AR5022. Relief based upon unreasonable delay requires a clear right to relief within a period of time—often one set by Congress[3/]—and that the agency's delay be egregious in light of

[3/] *In re Barr Labs., Inc.*, 930 F.2d 72 (D.C. Cir. 1991); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 114 (D.D.C 2005).

the "complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency," *Mashpee*, 336 F.3d at 1102, as well as events occurring outside of the agency's control. *In re Am. Fed'n of Gov't Employees, AFL-CIO*, 790 F.2d 116, 117 (D.C. Cir. 1986).

A. Plaintiff's Present Request to Take Parcel 2 into Trust Has Only Been Before the Department Since March 12, 2010.

Plaintiff did not make its request for the Department to take only Parcel 2 into trust until March 12, 2010—exactly two months ago. The APA requires that agencies resolve the matters before them "within a reasonable time." 5 U.S.C. § 555(b); *see also* 25 C.F.R. § 151.12 (requiring "prompt" consideration). The matter Plaintiff seeks to compel, however, has not been before the Department for the fourteen months that Plaintiff claims. Instead, Plaintiff made its most-recent request to take Parcel 2 into trust only days before it filed this action. Plaintiff's initial January 28, 2009, application requested that the Department take the entire 134 acres of land into trust. *See* AR2048–51. That initial application did not, as this lawsuit does, request that the Department acquire only Parcel 2.

Plaintiff bases it decision to limit its request to Parcel 2 on changing circumstances; the City of Glendale's June 2009 assertion that it had annexed part of the 134-acre property called into question the Department's authority to acquire the entire 134 acres. This fact merits attention because the Lands Replacement Act prohibits the Department from taking land into trust if it is "within the corporate limits of any city or town," Pub. L. No. 99-503 § 6(d). As Plaintiff has stated, the City of Glendale's annexation means that certain parcels do "not meet the requirements of the Lands Replacement Act." AR1668. As a result, Plaintiff first requested that

the Department take only Parcel 2 into trust via a letter submitted on August 18, 2009.[4/] AR1668–69. Nonetheless, on September 8, 2009, less than one month after Plaintiff's first Parcel-2-specific request, Plaintiff again asked that the Department acquire the entire 134 acres. AR1638. In January 2010, Plaintiff requested that the Department accept the entire property into trust before the end of February. AR3337–39. An Arizona state court has since affirmed the City's annexation. *See Tohono O'odham Nation v. City of Glendale*, No. 2009-023501, slip op. (Ariz. Super. Ct., Mar. 9, 2010); AR0041–52.

The confusion surrounding the scope of Plaintiff's application continued in the days leading up to Plaintiff's suit. In early-March 2010, Plaintiff orally told the Department of the Interior's Solicitor's Office "that it would be amenable to a Departmental decision taking only a portion" of the land into trust. AR2973. Yet, soon thereafter, Plaintiff recanted and instead stated that it wanted the entire acreage. *See* AR321. Only after the Arizona court upheld the City's annexation did Plaintiff's counsel request "that the Department immediately agree to accept trust title to Parcel 2" and "hold the remainder of the application in abeyance pending resolution of the state-court litigation." AR1446–47. This lawsuit seeks relief consistent with the Plaintiff's March 12, 2010, letter.

Throughout the Department's review process, Plaintiff and the facts surrounding Plaintiff's application have presented the Department with a moving target. The length of any alleged delay should be calculated from Plaintiff's March 12, 2010, letter. AR1444–48. Even ignoring Plaintiff's September 2009 return to its original 134-acre request, Plaintiff's present

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[4/] This was not the first time Plaintiff changed its application. On July 19, 2009, the Nation withdrew its request for an "Indian lands opinion" under the Indian Gaming Regulatory Act. *See* AR1694–95.

request has only been before the Department since August 18, 2009.

B. The Department's On-Going Review is Well-Reasoned.

The Department's on-going review is reasonable and prudent. "There is no 'per se rule as to how long is too long' to wait for agency action." *In re Am. Rivers*, 372 F.3d at 419 (citation omitted). Generally, "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. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980)). Rather than applying a hard and fast time-line, the reasonableness of a delay is governed by a "rule of reason," which accounts for the difficulty and complexity of the issue, problems beyond the agency's control, an agency's need to prioritize its own resources, and administrative error. *Cutler v. Hayes*, 818 F.2d 879, 898–99 (D.C. Cir. 1987). Here, the statute in question, interests at stake, and agency resources all ground the Department's on-going review.

First, the Lands Replacement Act itself does not present as simple an answer as Plaintiff portrays. A delay's reasonableness often turns on 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) (quotation omitted) (per curiam), and may be appropriate "in light of the importance and difficulty of the issues." *Ry. Labor Executives Assoc. v. U.S. R.R. Ret. Bd.*, 842 F.2d 466, 475 (D.C. Cir. 1988). As detailed below, the question of whether Parcel 2 lies within the City of Glendale's "corporate limits" requires legal analysis and consideration of state and federal law. *See* AR5021. And Plaintiff itself has initiated litigation in two judicial systems in hopes of reaching a favorable resolution to the "corporate limits" question.

Plaintiff's contention that the issues before the Department simple also ignores the brief period of time that the Department has had to consider Plaintiff's request. Neither the Act nor Department regulations set forth a timeline for considering land-into-trust applications. In the absence of a statutory timeline, "[a]n agency's own timetable for performing its duties . . . is due 'considerable deference.'" *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (quoting *Sierra Club v. Gorsuch*, 715 F.2d 653, 658 (D.C. Cir. 1983)); *see also Li v. Chertoff*, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007) (holding the pace of review is committed to agency discretion so long as reasonable efforts are made). Judicial intervention is not justified simply because the Department is not acting as quickly as Plaintiff would prefer. The delay must be "egregious." *TRAC*, 750 F.2d at 79. Courts have found that delays as long as four and five years are reasonable when explained by a shortage of resources, complex issues, and administrative complexities. *See Mashpee*, 336 F.3d 1094 (D.C. Cir. 2003); *In re Monroe Commc'ns. Corp.*, 840 F.2d 942 (D.C. Cir. 1988); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 107–09 (D.D.C. 2005). By contrast, mandamus is normally only justified after long periods of agency refusals to act or failures to explain delay. *See In re Core Comm'ns, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008) (agency failed, for six years, to respond to D.C. Circuit's remand); *In re Am. Rivers*, 372 F.3d at 420 (agency refused to explain its six-year delay); *In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000) (agency refused to act for nine years).

Second, any Departmental decision has impacts beyond just Plaintiff. Plaintiff seeks to open a casino in suburban Phoenix. And, while the Department may ultimately conclude that federal law allows that pursuit, the question should not be judged in a vacuum. In fact, the Lands Replacement Act explicitly recognizes and seeks to avoid interfering with municipal

interests through its "corporate limits" bar. Plaintiff's claimed prejudice in delay must be balanced by the fact that expediency could equally prejudice the City of Glendale.[5/]

Plaintiff's claimed need for relief is at least partially of its own making, and could also impact other Tribes. While Plaintiff attributes human health impacts to the Department's alleged delay (*see* Pl.'s Mem. at 19–22, 37), Plaintiff cannot reasonably attribute these effects to the Department given Plaintiff's six-year delay in submitting its application. And Plaintiff is not alone in attempting to improve the welfare of its members. Land-into-trust acquisitions generally aim to improve Tribal welfare by creating economic development opportunities. *See* 25 C.F.R. §§ 151.10, 151.11. Presently, at least sixteen other Tribes are seeking economic development via gaming on lands they similarly ask the Department to acquire in trust. *See* AR 5022. Courts must give consideration to "the effect of [mandamus] relief on competing agency activities." *In re Barr Labs*, 930 F.2d at 75. The Departmental component currently reviewing Plaintiff's request generally reviews applications "in the order in which they are presented." AR5022. Plaintiff should not be allowed to "vault to the head of the queue" solely on its own sense of primacy. *Mashpee*, 336 F.3d at 1101. Further, Plaintiff's requested relief will not immediately improve Tribal members' health and welfare. Plaintiff has stated its intent to open

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[5/] Plaintiff also cannot establish a claim for breach of fiduciary duty. *See* Pl.'s Mem. at 39–41. As Parcel 2 is not yet held in trust, there is no "control or supervision over tribal monies or properties" from which "the fiduciary relationship normally exists with respect to those monies or properties." *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (citation omitted). "The federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources. The elements of this type of common law trust are a trustee (the United States), a beneficiary . . . and a trust corpus (the regulated Indian property lands or funds)." *Inter Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (citations and quotations omitted). Here, the essential element of a trust corpus is missing. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297–98 (D.N.M. 1996), *aff'd* 104 F.3d 1546 (10th Cir. 1997).

a casino on the property, but has withdrawn its request for a determination that the land is eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21. *See* AR1694–95. Plaintiff cannot game on the property until and if the Department has made that determination.

Third, the responsible agency employees have not been "twiddl[ing] their thumbs," but working to resolve Plaintiff's request. *See In re Barr Labs.*, 903 F.3d at 75 (alteration in original). The Solicitor's Office Branch of Trust Responsibility, the office the Department office tasked with providing legal counsel on Plaintiff's application at its current stage, is currently responsible for 184 separate matters. AR5022. "[A] shortage of resources," the complexity of the problem, and "competing priorities" are all factors which should be considered before ordering an agency to act. *Mashpee*, 335 F. 3d at 1100, 1102. A delay is not unreasonable if an order would force the court to reorder agency priorities. *In re Barr Labs.*, 930 F.2d at 76. The Department "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985), and should be allowed to "meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Recognizing these principles, and "respect for the autonomy and comparative institutional advantage of the executive branch," has made courts "slow to assume command over an agency's choice of priorities." *In re Barr Labs.*, 930 F.2d at 74 (citing *In re Monroe Commc'ns Corp.*, 840 F.2d at 946). The Court should act with similar hesitancy here, where Plaintiff demanded a decision from the Court only weeks after it requested one from the Department. Given the complexity of issues, the brief period of time the Department has had to analyze the most recent request, and the agency's competing

priorities, any "delay" in reaching a decision has been prudent and reasonable.

II. There is No Clear and Undisputable Duty to Take Parcel 2 Into Trust.

Plaintiff does not request a date by which the Department must act. Instead, Plaintiff asks for a writ of mandamus compelling the Department to take Parcel 2 into trust, seeking in the process to transfer the Lands Replacement Act's requirement that the Secretary make certain determinations to this Court. Such a request violates principles of administrative law and tenets of the separation of powers. Under the APA, a court may only compel an agency to take an action it is legally required to take. *See SUWA*, 542 U.S. at 63. Similarly, the extraordinary remedy of mandamus is appropriate only where the act in question is ministerial, clearly defined, and undisputed. *See 13th Regional*, 654 F.2d at 760. The Department's acquisition of Parcel 2 does not meet these requirements.

A. The Lands Replacement Act Does Not Include a Duty to Take Land into Trust Simply at Plaintiff's Request.

The Lands Replacement Act requires more than the simple ministerial duty to rubber-stamp any trust acquisition Plaintiff desires. The Act's acquisition provision states that 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 [the Act] . . . ." Pub. L. No. 99-503, § 6(d). If the statutory directive stopped there, the Department's acceptance of Parcel 2 into trust may be a simple ministerial action. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1261–62 (10th Cir. 2001) (finding acquisitions for Wyandotte Tribe of Oklahoma mandatory under Section 105 of Public Law 98-602). But the Act goes further. It provides standards to which the Secretary must compare any requested acquisition. The Act excludes lands that: (1) exceed, in aggregate with other lands purchased under the Act, a total of 9,880 acres; (2) are outside three specific counties

in Arizona; (3) are inside "the corporate limits of any city or town"; and (4) are more than the third separate area of contiguous tracts taken into trust under the Act, at least one of which must be contiguous to the Nation's San Lucy District.[6] Pub. L. No. 99-503, §§ 6(c), (d).

Before the Department can take land into trust, the Secretary must determine that the land meets the Act's eligibility requirements. The Act delegates to the Secretary—not Plaintiff or the Court—the determination of whether a land request meets the Act's acquisition conditions. *See* § 6(d); *see also* H. Rep. No. 99-851 at 11 (Sept. 19, 1986) ("[T]he Secretary, at the request of the tribe, shall hold in trust as a Federal Indian Reservation land acquired by the tribe under [provisions of the Act] if it is within Maricopa, Pinal and Pima counties and outside the corporate limits of any city or town."). The Department has repeatedly stated this conclusion. AR0746–62 at 750; AR0910–21 at 910, 916; AR0923–28 at 924. And Plaintiff concedes that the determination must be made before land is eligible under the Act. *See* Pl.'s Mem. at 26; AR3337–39 (arguing that the Secretary must take land into trust if it meets all the statutory conditions).

Regulatory requirements governing Plaintiff's application also mean Plaintiff's requested relief would actually be contrary to law. Department regulations require certain procedural steps before the Department can formally take land into trust. These include the requirement to provide public notice once a decision to acquire land, but before title is passed. *See* 25 C.F.R. § 151.12(b). The notice requirement provides a plaintiff the opportunity to challenge the determination, including the acquisition statute's requirements. *See, e.g., Sac & Fox Nation of*

[6] The Act also grants the Secretary the authority to waive certain of these requirements. *See* Pub. L. No. 99-503, § 6(d).

Mo. v. Norton, 92 F. Supp. 2d 1124, 1128 (D. Kan. 2000), *rev'd* 240 F.3d 1250 (10th Cir. 2001). The relief Plaintiff seeks here ignores this regulatory requirement and, as discussed below, would preclude APA review of the acquisition.

Plaintiff's claim that the Department has already determined Parcel 2 meets the Act's conditions over-simplifies the issue. Plaintiff points to May 29, 2009, and June 3, 2009, letters from Department officials as evidence that the acquisition is a foregone conclusion. *See* Pl.'s Mem. at 30. The letters, however, make clear that the Department's ultimate decision-making authority rests with the Assistant Secretary for Indian Affairs. *See* AR0585; AR0072. As of June 3, 2009, the Bureau of Indian Affairs Western Regional Office had yet to make a formal recommendation to the Assistant Secretary on the acquisition. *See* AR0072.

Additionally, Plaintiff's own actions and arguments belie its contention that the Act's trust acquisition provisions are ministerial upon request. In 2006, Plaintiff requested that the Department take an entirely separate piece of property—the Painted Rock property—into trust. *See* Pl.'s Mem. at 9. Three years later, Plaintiff reconsidered and asked that the Department defer action on the Painted Rock application. *See* Pl.'s Mem. at 9 n.2. That request inherently includes an assumption that the Secretary's responsibilities are not ministerial upon the date of Plaintiff's application. Absent a clear and undisputed duty, accepting Parcel 2 into trust is not the kind of ministerial duty anticipated by Section 706(1) or a writ of mandamus. Likewise, the APA's alternative remedy of requiring the Department to reach a decision on Plaintiff's application precludes mandamus relief altogether. *See Liu v. Novak*, 509 F. Supp. 2d 1, 9 n.3 (D.D.C. 2007) (citing *Action Alliance of Senior Citizens v. Leavitt*, 483 F.3d 852, 858 (D.C. Cir. 2007)).

B. The Act Requires the Secretary to Define "Corporate Limits."

The Act also requires the Department to define the Act's use of "corporate limits of any city or town," a term that is fairly unique in federal law. Congress provided no definition for "corporate limits," as used in the Act. *See* Pub. L. No. 99-503, § 3. As an ambiguous statutory provision, the authority to interpret "corporate limits" rests, in the first instance, with the Secretary. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (citing *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984), for the proposition "that Congressional delegation to an agency on a particular question can be implicit").

As the administrative body that Congress made responsible for eligibility determinations under the Act, the Department holds primary jurisdiction over Plaintiff's submission. *See Action for Children's Television v. FCC*, 59 F.3d 1249, 1257 (D.C. Cir. 1995). The Office of the Solicitor's Phoenix Field Office opined on that question in April 2009. AR0746–62 at 756–61. But, as communications with Plaintiff's counsel make clear, the Department has yet to make a formal or final determination on the question. *See* AR2671–73; AR2691–92. And the Office of the Solicitor in Washington, DC, is currently reviewing the issue to advise the Department's ultimate decision-maker. *See* AR5020–22. The Court should allow that administrative process to run its course. *See Action for Children's Television*, 59 F.3d at 1257.

The Secretary's final interpretation of "corporate limits" with respect to Parcel 2 is particularly important given the facts surrounding Plaintiff's application. Parcel 2 sits entirely outside the City of Glendale's geographic boundaries. *Compare* AR0352 *with* AR0051. But Arizona law extends a city's jurisdiction beyond the city's geographic boundaries for certain government functions. *See* Ariz. Rev. Stat. § 9-461.11 (development planning); Ariz. Rev. Stat.

§ 9-462.07 (zoning); Ariz. Rev. Stat. § 9-463.04 (subdivision regulation). Whether the Department ultimately defines "corporate limits" as a jurisdictional or geographical term impacts whether the 134-acre property, or any portions thereof, is eligible. The determination is also likely to impact any future land-into-trust applications Plaintiff makes under the Lands Replacement Act. Given the metropolitan Phoenix area's rapid growth, future requests will likely require similar analysis. The Secretary must consider these issues before defining the term and reaching a determination on Plaintiff's application.

Given the need for the Department to define "corporate limits" in the context of Plaintiff's application, an order compelling the acquisition of Parcel 2 is inappropriate. For mandamus, the duty in question must be:

> "so plainly prescribed as to be free from doubt and equivalent to a positive command . . . . [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

Consol. Edison Co. of N.Y, Inc. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting *Wilbur v. United States*, 281 U.S. 206, 218–19 (1929)) (alterations in original). Here, the Lands Replacement Act and Arizona law do not define "corporate limits," preventing certainty with regard to the Department's duty. *See Smith v. Grimm*, 534 F.2d 1346, 1352 (9th Cir. 1976). Further, the City of Glendale and Gila River Indian Community both dispute the legal premises upon which Plaintiff bases its application. The Department must base its final decision upon the careful consideration of the application's legal intricacies and uncertainties.[7] By analogy, the

[7] The City of Glendale, Gila River Indian Community, and other interested parties present additional issues, including the proper application of federal Indian law and jurisprudence, that the Department is also in the process of analyzing. *See* AR5020–23

United States District Court for the Southern District of California noted in a case involving recovery of an equitable lien from the United States:

> To recognize the lien the officer must first determine its validity under state law and the effect of the Anti-Assignment Act, as well as ascertain the extent to which [the defendant] has satisfied [the plaintiff's] claims from other funds. To hold that these uncertainties can be removed by their adjudication and that, as a consequence, what originally was obscure is now clear, certain, and free from doubt would be contrary to [mandamus's] reasonable limits.

Id. Similar to *Smith v. Grimm*, Plaintiff here cannot derive a clear and undisputed duty from the Lands Replacement Act by asking this Court to adjudicate the legal arguments it has presented to the Secretary. The definition of "corporate limits" is in dispute and there is therefore not a "clear and undisputable" duty to take Parcel 2 into trust. *13th Regional Corp.*, 654 F.2d at 760 (citation omitted); *see also SUWA*, 542 U.S. at 63 (stating federal courts can only compel action under the APA that an agency is otherwise required to take).

Plaintiff's citation to *13th Regional* and its argument that the need for statutory interpretation does not prohibit a court from compelling agency action have no application here. *See* Pl.'s Mem. at 32 n.12. The *13th Regional* plaintiffs sought to compel the Department to study and report to Congress on federal programs designed to benefit Native Alaskans. *See* 654 F.2d at 759. Though denying relief on equitable grounds, the court found it had the power to interpret the statutory provision and defined it to require the Department to include programs for Native Alaskans whom no longer lived in Alaska. *Id.* at 760–61. The court, however, did not go so far as to apply the statute to the particular facts; the court did not define which specific federal programs benefit Native Alaskans. But the latter interpretation is precisely what Plaintiff asks the Court to do here—determine, in the first instance, whether or not Parcel 2 meets the Lands Replacement Act's eligibility requirements. That determination should rest with the

Department. In fact, with respect to statutes affecting Indians, the Supreme Court has made clear that "very great respect" should be given to federal agencies constructing the statutes they administer. *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) (quotation and citation omitted).

Plaintiff's request for mandamus relief would wholly subsume the executive branch's role with respect to Plaintiff's application. The Court should not allow Plaintiff to abandon the administrative process simply because Plaintiff believes the process is taking too long, particularly where Congress has allocated decision-making responsibilities to the Department. *See Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002).

C. The Extraordinary Remedy of Mandamus Should Not be Invoked Given the Permanency of Plaintiff's Requested Relief and Other Equitable Considerations.

Regardless of the Court's ultimate determination on whether the Department has a clear and undisputable duty to take Parcel 2 into trust, equity counsels against ordering such action. Even where a plaintiff has shown that the agency is required to take the action plaintiff seeks, "whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). The grounds for mandamus must "be clear and compelling on both legal and equitable grounds for a writ to issue." *13th Regional Corp.*, 654 F.2d at 760. Here, an order compelling the Department to take Parcel 2 into trust would frustrate the Department's administrative process on several grounds.

First, the extraordinary relief Plaintiff seeks would have impacts beyond just Plaintiff and the Department. Certain provisions of the Department's land acquisition regulations apply to

even "mandatory" acquisitions. *See* AR0907–08. Most importantly, before formally acquiring title, the Department must give public notice of the acquisition. *See* 25 C.F.R. § 151.12(b). The public notice requirement is not just a useless formality. The Quiet Title Act, 28 U.S.C. § 2409a(a), explicitly maintains the United States' sovereign immunity from suit for challenges to title to Indian lands. *See Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 283 (1983). Once the Department acquires title to Indian trust lands, interested parties cannot challenge that decision in federal court. *See United States v. Mottaz*, 476 U.S. 834, 842 (1986); *Governor of Kan. v. Kempthorne*, 516 F.3d 833, 841–43 (10th Cir. 2008); *Sac & Fox Nation of Mo. v. Kempthorne*, No. 96-4129, 2008 WL 4186890, *2–8 (D. Kan. Sept. 10, 2008). Recognizing that judicial bar, the Department promulgated 25 C.F.R. § 151.12(b) to allow parties to challenge land-into-trust decisions before they are formalized. *See* 61 Fed. Reg. 18,082–83 (Apr. 24, 1996). The relief Plaintiff seeks here would therefore not only transfer decision-making under the Lands Replacement Act from the Department to the Court, but also end all public debate on the subject.

Second, the Department's alleged delay has been minimal, and review remains on-going in light of changing circumstances. Only two months ago, an Arizona state court upheld the City's resolution annexing portions of Plaintiff's 134-acre property. *See* AR0041–52. As Plaintiff recognizes, the annexation brings portions of the property into the City's corporate limits in the geographical sense, clearly excluding certain parcels from acquisition under the Act. *See* AR1668–69. As a result of that exclusion, the scope of Plaintiff's acquisition request has remained in flux. In August 2009—after the City's annexation resolution—Plaintiff first expressed its willingness to accept the Department's acquisition of only Parcel 2. *See*

AR1668–69. As detailed above, the Nation's obfuscation of whether it wants only Parcel 2 or the entire 134-acre brought into trust has prevented the Department from reaching a simple conclusion. And, regardless, assuming the Nation wants only Parcel 2 taken into trust, that request has been before the Department for, at most, nine months and, more accurately, only since March 12, 2010. A two to nine-month delay does not warrant judicial intervention to compel action with the permanent result Plaintiff seeks.

Third, Plaintiff by no means acted with all-out haste in requesting that the Secretary take the lands into trust. Plaintiff purchased the 134-acre property nearly seven years ago. *See* Pl.'s Mem. at 9. Yet Plaintiff waited five-and-a-half years before making its initial request. *See* Pl.'s Mem. at 9. And Plaintiff derives its alleged harm, in part, from state and local government action that Plaintiff itself maintains will ultimately not impact the land's eligibility under the Act. *See* Pl.'s Mem. at 21–22.

Finally, as the City of Glendale's intervention demonstrates, land-into-trust acquisitions involve issues of much public debate, particularly when the Tribe in question intends to use the land for gaming. The administrative record demonstrates the significant public debate surrounding the Department's consideration of Plaintiff's application. That public debate and any related policy decision-making are properly held in the executive branch. Given considerations of administrative efficiency, and the reasons set forth above, the actual acquisition of Parcel 2 is not a judicially-compellable action.

III. Portions of Plaintiff's Requested Relief Ask the Court to Retain Jurisdiction Over Department Action For Which the Court Does Not Have Jurisdiction in the First Instance.

Even assuming the Department has unreasonably delayed making a decision on the Nation's application, the Court lacks jurisdiction to entertain the entirety of Plaintiff's requested relief. Plaintiff concedes that, at present, only Parcel 2 is potentially eligible under the Lands Replacement Act's conditions. Yet Plaintiff nonetheless asks this Court to maintain jurisdiction over speculative future acquisitions on the entire 134-acre property. *See* Compl. Prayer for Relief ¶ 4; Pl.'s Proposed Order (Doc. No. 4-4). Because Plaintiff is no longer requesting that the Department acquire the remaining parcels, their acquisition is not properly before the Court and Plaintiff lacks standing to challenge Department decision-making therefor.

Under the APA, a court may only compel an agency to take an action it is legally required to take. *See SUWA*, 542 U.S. at 63; *see also Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (setting forth factors for mandamus relief). Even assuming a piece of property would meet the Lands Replacement Act's conditions, the Act only authorizes the Secretary to take property into trust "at the request of the Tribe." Pub. L. No. 99-503, § 6(d). Department regulations echo this requirement: "[a]n individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary." 25 C.F.R. § 151.9. The request, among other things, must provide "a description of the land to be acquired." *Id.*

Here, Plaintiff has asked that the Department "defer action on the remainder of the Nation's Trust Application until resolution of the Arizona Annexation Litigation." Pl.'s Mem. at 15. That request may or may not impact the Secretary's authority to acquire the remaining

parcels, but it certainly impacts the specific decision currently before the Department. Quite simply, Plaintiff does not presently have a "request" before the Department with respect to the remaining parcels. Thus, the Department is not required to take action on those parcels. In fact, Plaintiff has directed the Department not to do so. *See* AR1444–48. Plaintiff's nimble attempts to keep all options open with respect to the geographical scope of its present request should not carry over into the judicial forum. Either Plaintiff is requesting the entire 134-acre parcel be taken into trust, or it is just requesting Parcel 2. If the former, the City's annexation arguably prevents the Department from approving the acquisition. If the latter, the remaining parcels are not presently at issue. Premature judicial involvement in the potential trust acquisition of the remaining parcels would only frustrate the administrative process.

For similar reasons, Plaintiff lacks standing to make its request for continuing jurisdiction over Department decision-making on the remaining parcels. Article III of the Constitution limits federal court power to the resolution of "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1. A key component of a justiciable controversy is the requirement that a litigant have standing to make the challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992). Plaintiff, as the party attempting to invoke federal jurisdiction, bears the burden to establish (1) that it has or will suffer an actual or imminent concrete injury-in-fact from Department decision-making on the remaining parcels; (2) that the injury is traceable to the Department's decision-making; and (3) that the injury is likely to be redressed by a favorable decision from the Court. *See id.* at 560–61. Here, Plaintiff concedes it is only presently requesting that the Department take Parcel 2 into trust. Plaintiff cannot suggest that the Department has unreasonably delayed action on the entire land-into-trust application when Plaintiff has requested the delay. Thus, any claimed

injury that derives from the Department's alleged unreasonable delay relates only to Parcel 2. There is simply not a "controversy" with regard to the other parcels. Plaintiff therefore does not have standing to challenge any delay associated therewith, and any judicial intervention or oversight is inappropriate.

CONCLUSION

Based upon the foregoing, Defendant requests Plaintiff's motion for summary judgment be denied, and Defendant's cross-motion be granted.

Respectfully submitted this 12th day of May, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2010, Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion was filed with the United States District Court for the District of Columbia's electronic filing system, to which the following attorneys are registered to be noticed:

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