Case No. 08-3277

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

**SAC AND FOX NATION OF MISSOURI,
IOWA TRIBE OF KANSAS AND NEBRASKA, and
KATHLEEN SEBILIUS GOVERNOR OF THE STATE OF KANSAS**

Plaintiffs/Appellants,

vs.

DIRK KEMPTHORNE, Secretary of the Interior,

Defendant/Appellee.

APPELLANTS' OPENING BRIEF
(Oral Argument Requested)

**On Appeal from the United States District Court
for the District of Kansas
The Honorable Richard D. Rogers**

Sac and Fox Nation of Missouri, et al. v. Kempthorne
Case No. 96-4219-RDR

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PRIOR OR RELATED APPEALS

The Appellants ("Kansas Parties")[1] filed this lawsuit in July, 1996 to challenge and enjoin the Secretary of Interior from taking a .52 acre tract of land in Kansas City, Kansas (known as the "Shriner Tract") into trust on behalf of the Wyandotte Tribe of Oklahoma ("Wyandotte" or "Wyandottes"). This Court reversed the United States District Court's decision dismissing the lawsuit on Rule 19 grounds with directions to remand the matter to the Secretary for further consideration of the issue of whether funds congressionally set aside pursuant to section 105(b)(1) of P.L. 98-602 ("P.L. 602") for mandatory trust acquisition were used exclusively for the purchase of the Shriner Tract. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th. Cir. 2001).

Following the remand proceedings before the Secretary and final agency action, the Kansas Parties proceeded to challenge that agency action in the same case before the District Court. However, the District Court rejected that effort of the Kansas Parties and took the position that it had entered a final judgment when

[1] The present appellants are the Iowa Tribe of Kansas and Nebraska, the Sac and Fox Nation of Missouri in Kansas and Nebraska and Kathleen Sebelius, the Governor of the State of Kansas. The Prairie Band of Potawatomie Indians and the Kickapoo Tribe of Indians of the Kickapoo Reservation have withdrawn their participation in these proceedings.

it remanded the case to the Secretary and the case was closed. The District Court advised the Kansas Parties that any challenge of the remand determinations of the Secretary would have to be made in a new case.

The Kansas Parties filed a new case challenging the Secretary's decisions on remand. *Sac and Fox Nation v. Norton*, No. 03-4140-JAR (D. Kansas July 11, 2003). After a further remand of the matter to the Secretary, the District Court issued its opinion affirming the Secretary's determination that only PL 602 funds were used to purchase the Shriner Tract, and rejecting all of the Kansas Parties' arguments. *Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006).

On appeal, this Court did not reach the merits of the matter but instead dismissed the appeal and remanded to the District Court to vacate its judgment and dismiss the case. *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008). This Court applied the exception to the waiver of sovereign immunity provided by Congress in the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a since the *Kempthorne* case was filed *after* the Shriner Tract was taken into trust.[2] *Id.* In a concurring opinion joined in by Judge Hartz, Judge Briscoe

[2] In its initial opinion, this Court determined that this case filed in July, 1996 did not suffer from the same fatal flaw as it was filed before the Shriner Tract was taken into trust. *Governor of Kansas v. Kempthorne*, 505 F. 3d 1089 (10th Cir. 2007). That opinion was vacated on rehearing and replaced by *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th. Cir. 2008) that did not contain a discussion of the applicability of the QTA to the original complaint filed herein.

suggested vacutur of the final judgment in the *Sac and Fox Nation* case would be appropriate to reach the merits of the underlying issue of whether the Secretary was empowered to take the Shriner Tract in trust under PL 602. *Id.*

The Kansas Parties filed a Motion for Vacatur before the District Court in this case, and that motion was granted. Subsequently, the District Court sustained the Secretary's Motion to Dismiss, finding that the action was barred due to the sovereign immunity of the United States. *Sac and Fox Nation v. Kempthorne*, 2008 WL 4186890 (D. Kan. Sept. 10, 2008).

STATEMENT OF JURISDICTION

Jurisdiction of this action was proper in the District Court. 28 U.S.C § 1331 (1994)(federal question); 28 U.S.C §§ 2201, 2202 (1994) (declaratory and injunctive relief); 5 U.S.C § 701 *et. seq.* (1994) (Administrative Procedure Act "APA"). The Secretary's determination to place the Shriner Tract into trust for the Wyandotte's is a final agency action reviewable under the APA. *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th. Cir. 1997). The appropriateness of that action is a federal question. This Court has jurisdiction of this appeal from the United States District Court for the District of Kansas pursuant to 28 U.S.C § 1291, 28 U.S.C § 1331, and the APA.

TIMELINESS OF APPEAL

The Kansas Parties timely filed this appeal within 60 days of the district court's final Memorandum and Order dated September 10, 2006. Fed. R. App.P. 4(a)(1)(B). The Kansas Parties filed their Notice of Appeal on October 3, 2008. (Appellants' Appendix ("AA") at 212-214).

ISSUES PRESENTED FOR REVIEW

Whether the United States can manipulate the litigation of justiciable issues and divest a court of jurisdiction by purportedly taking land into "trust" *after* a timely complaint was filed under the APA.

Whether the United States can assert sovereign immunity in a timely filed lawsuit challenging the action of the Secretary of Interior for taking land into trust without statutory authority to do so.

STATEMENT OF THE CASE

A. Nature of the Case

The Kansas Parties brought this action in the United States District Court challenging the Secretary of Interior's ("Secretary") decision to place the Shriner Tract in trust for the benefit of the Wyandottes pursuant to PL 602. Appellants are the Sac and Fox Nation of Missouri ("Sac and Fox"), the Iowa Tribe of Kansas and Nebraska ("Iowa Tribe") and the Governor of the State of Kansas, Kathleen Sebelius ("Governor"). The Kansas Parties request that this Court reverse the

United States District Court's determination that this action is barred by the sovereign immunity of the United States. This matter should be remanded to the District Court for further proceedings on the merits of the issues raised in the Complaint, including whether the Shriner Tract was purchased with only PL 602 funds such that the Secretary was required to take the land in trust for the benefit of the Wyandottes without compliance with the discretionary procedures outlined in 25 C.F.R 151.10.

B. The Course of the Proceedings

This lawsuit was commenced by the filing of a complaint on July 12, 1996. (AA at 38-55). The lawsuit was commenced before the Shriner Tract was taken into trust and within 30 days of the announcement of the Secretary's intention to do so. 61 Fed. Reg. 29757 (June 12, 1996). (AA at 323-324; Appellants' Addendum attached hereto ("Addendum") at 40-41). The Kansas Parties obtained a temporary restraining order preventing the land from being taken into trust by the Secretary. (AA at 56-58). The Wyandotte Tribe intervened and sought an emergency appeal to the Tenth Circuit. The Kansas Parties advised this Court that they opposed the dissolution of the temporary restraining order because the Secretary had stated that if the land was taken into trust, any further claims would be barred by the Quiet Title Act. *Kempthorne*, 2008 WL 4186890 *1; AA at 59-64. However, the temporary restraining order was dissolved upon certain

conditions designed to preserve the issues which the parties sought to litigate, one of which was jurisdiction. (AA, p. 65-69).

Following the dissolution of the temporary restraining order, the Shriner Tract was purchased and supposedly taken into trust by the Secretary. *Kempthorne*, 2008 WL 4186890 *1. Ultimately, the District Court issued its decision in which it found it had jurisdiction and rejected the Secretary's jurisdictional challenge. *Sac and Fox Nation of Missouri v. Babbitt*, 92 F. Supp.2d 1124, 1126, n.1 (D. Kan. 2000). The District Court disposed of the case on the grounds that the Wyandotte Tribe was an indispensable party and it had not been joined as a defendant and could not be joined because of sovereign immunity. *Id*.

On appeal, the Tenth Circuit disagreed with the District Court's indispensable party analysis and exercised jurisdiction over the merits of the matter as the Secretary agreed the Court had jurisdiction because, under the facts of the case, the land was not yet in "trust" for the benefit of the Wyandottes. (Addendum at 1-12). The Tenth Circuit also made decisions regarding other issues raised in the case, and directed that the case be remanded for further administrative proceedings. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001). The District Court received the Tenth Circuit's mandate and remanded the case for further administrative proceedings before the Secretary, but at the time closed the case. *Kempthorne*, 2008 WL 4186890 *1-2.

When the administrative proceedings on remand were concluded, the Kansas Parties sought to supplement the record in this case, but were advised that the District Court had closed that case and were instructed to file a new action. A new case was filed to litigate the question of whether the Shriner Tract was purchased with only P.L. 602 funds and whether the Secretary had the power to take the land into trust pursuant to the mandates of P.L. 602. *Kempthorne,* 2008 WL 4186890 *2.

Ultimately, the District Court in that case affirmed the Secretary's decision to take the Shriner Tract into trust pursuant to P.L. 602. *Governor of Kansas v. Kempthorne*, 430 F. Supp.2d 1204 (D. Kan. 2006). That matter was appealed to this Court, which ultimately concluded that that case should be dismissed for lack of jurisdiction for the reason that at the time that case was filed in 2003, the Shriner Tract was held in trust for the Wyandotte Tribe. *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008).

In the concurring opinion in the *Kempthorne* case, two of the three judges suggested that the plaintiffs return to the District Court in this case and seek to reopen the case on the grounds that it was mistakenly closed and there were circumstances that justified reopening that action. *Id.* at 847.

Plaintiffs did in fact file a motion to open the case, which the Court granted without addressing jurisdictional issues. *Kempthorne*, 2008 W.L. 4186890, *2 AA at 105-121.

C. Determination of the District Court

The Secretary then filed a motion to dismiss for lack of jurisdiction under the Quiet Title Act. On September 10, 2008, the District Court issued its opinion concluding that the exception for Indian lands to the waiver of sovereign immunity under the Quiet Title Act, 28 U.S.C. §2409a, applied and sovereign immunity barred the action. *Kempthorne*, 2008 WL 4186890 *9. The Kansas parties filed their notice of appeal on October 3, 2008.

STATEMENT OF RELEVANT FACTS

A. Introduction

After 12 years of litigation – and several back and forth trips to the Tenth Circuit – the Secretary now wants this Court to uphold the dismissal of this lawsuit on jurisdictional grounds without ever reaching the merits, even though Secretary specifically told this Court in 2001 that this Court had jurisdiction to hear this case and reach a decision on the merits. The Secretary now contends that this Court cannot hear this matter because the land at issue is now in trust so the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act precludes jurisdiction. The District Court agreed.

However, this is not the law and the District Court erred in determining that the Secretary can divest a court of jurisdiction by conduct engaged in after a timely complaint under the APA was filed. The Secretary knew this, and admitted it to this Court as early as 2001 when he so informed this Court. Sovereign immunity has been waived pursuant to the APA and pursuant to the Secretary's regulations allowing for judicial review of the Secretary's decisions to take land into trust for Indian tribes. As the Secretary has already told this Court, this conclusion is underscored where the land is not deemed to be in "trust", given that the Kansas Parties timely filed their complaint under 25 CFR 151.12 and secured a temporary restraining order preventing the Shriner Tract from being taken into trust – only to have the TRO dissolved by an order of this Court under the conditions described below.

The Secretary should not now be allowed to assert sovereign immunity after Congress had waived it under the APA and the Secretary confirmed this waiver as described below. Because the Kansas Parties filed their Complaint *before* the United States took the land at issue into trust, there is a waiver under the APA and the Indian lands exception to the waiver of sovereign immunity does not apply.

Moreover, the Secretary was without authority to take the land in trust because the Shriner Tract was not purchased with only PL 602 funds. As such, his

conduct cannot be deemed to be that of the sovereign and he is stripped of the sovereign immunity defense.

B. Factual Background

This litigation arises from the Wyandotte's efforts to cause the .52 acre parcel of property known as the Shriner Tract to be taken into trust under the mandate of section 105(b)(1) of P.L. 602, by promoting the notion that the land was purchased for just $180,000 with only PL 602 funds. In 1978, the Indian Claims Commission ("ICC") awarded $561,424.21 to the Wyandotte Tribe for its share of lands ceded pursuant to the Fort Industry Treaty of July 4, 1805. *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1255 n. 7 (10th Cir. 2001). In 1979, the United States Court of Claims awarded the Wyandotte Tribe an additional $2.3 million for lands ceded under two treaties from 1817 and 1818. In 1984, Congress enacted Public Law 98-602, an Act to Provide for the Use and Distribution of Certain Funds Awarded to the Wyandotte Tribe of Oklahoma. (AA at 215-220; Addendum at 30-35). At issue here is Section 105(b)(1) of P.L. 602, which provided a "sum of $100,000.00 of such funds shall be used for the purpose of real property which shall be held in trust by the Secretary for the benefit of [the Wyandotte Tribe]." Pub. L. No. 98-602, 98 Stat. 3149, 3151, § 105(b)(1) (Oct. 30, 1984).

In May 1986, the Wyandotte Tribe deposited the $100,000 referenced in

Section 105(b)(1) into an A.G. Edwards & Sons account, and, in June of that year, invested $95,000.00 of the $100,000 in Ryan Mortgage Acceptance Corporation 8.375% Series 23 bonds. (AA at 337-340). In 1989, the bonds purchased with P.L. 602 funds were transferred from A.G. Edwards Account No. 232 02-393 00 to Mercantile Investment Account No. 240 677 9. (AA at 348).

In November, 1991, $25,199.67 of the $100,000 PL 602 funds in issue were withdrawn from Mercantile Account No. 240 677 9 by the Wyandottes, and used for the purchase of property in Park City, Kansas. (AA at 405; 427-428). The remainder of the P.L. 602 funds were commingled with other funds. The last Mercantile statement for Account No. 240 677 9 before the commingling of funds in December, 1991 was the November, 1991 statement which states the value of the bonds as approximately $79,000.00 and the cash funds as $629.91. (AA at 427). In or about November, 1991, the $79,000.00 in value attributed to the P.L. 602 funds was transferred from Mercantile Account No. 240 677 9 to the Wyandotte Tribe's investment account with Mercantile, and commingled with other investment assets. No account statements for this Mercantile investment account were presented by the Wyandotte Tribe for most of the calendar year 1992 or the remainder of the fiscal year 1993, which ran through August, 2003. The Wyandotte Tribe claimed they were unable to locate them. (AA at 431).

In April 1995, the Wyandotte Tribe authorized the purchase of the Shriner Tract with "a portion of" the funds set aside in section 105(b)(1) of P.L. 602. (AA at 221-222). The resolution designated the property would be "used for gaming purposes." In July 1995, Nations Realty Corporation, Inc. ("Nations Realty") entered into a Commercial and Industrial Real Estate Sale Contract with McCurry Enterprises (and several extensions thereafter) to purchase the Shriner Tract for $325,000.00. (AA at 223-234). Nations Realty is a subsidiary of the North American Sports Management, Inc. ("NORAM"), with whom the Wyandotte Tribe had contracted for financing and development of gaming facilities on the Shriner Tract.

On January 29, 1996 the Wyandotte Tribe filed with the Secretary a Fee to Trust Land Acquisition Application for four tracts of land in downtown Kansas City, including the Shriner Tract.[3] The fee to trust land application included an amended Chicago Title Insurance Company commitment in the Wyandotte Tribe's name, for title insurance dated January 24, 1996 in the amount of $325,000.00, (AA at 237-248), and contained a Commercial and Industrial Real Estate contract dated in July 1995 between McCurry Enterprises, Inc. ("McCurry Enterprises") and Nations Realty for the same amount. (AA at 223-234). This contract

[3] "In mid-April 1996, the [Tribe] narrowed the scope of their acquisition request to the Shriner Tract." *Sac and Fox Nation*, 240 F.3d at 1256.

specifically obligated Nations Realty to pay a sales commission of 6% of the purchase price ($19,500.00) to Karbank, the identified real estate broker. The real estate contract between Nations Realty and McCurry Enterprises specifically referenced the $5,000.00 earnest money as part of the consideration for the sale.

On October 12, 1995, Karbank delivered to the escrow agent, Guaranty Title of Wyandotte County, Inc., a check in the amount of $5,000.00 as the earnest money in connection with the $325,000.00 real estate contract between Nations Realty and McCurry Enterprises. (AA at 235-236). The check itself was drawn on NORAM for $5,000.00, and specifically referenced the Shriner building.

Jim Fields, Acting Director, Muskogee Area Office, BIA issued a memorandum to Sharon Blackwell, Tulsa Field Solicitor, BIA requesting commencement of title examination process reflecting a title commitment of $325,000.00 for the Shriner Tract. (AA at 302-305). A February, 1996 appraisal (AR3-0154-0205) done on the Shriner Tract by the Department of Interior noted the $325,000 purchase price. (AA at 250-301). The appraisal, however, only found an estimated value of $182,000. (AA at 290).

On March 25, 1996, Sharon Blackwell, Tulsa Field Solicitor, to Muskogee Area Office, issued a memorandum and mentioned a preliminary title opinion in the amount of $180,000.00. Thereafter, in June, 1996, Nations Realty and McCurry Enterprises split the transaction into two contracts. The first was a

revised real estate contract reducing the price of the Shriner Tract from $325,000.00 to $180,000.00. (AA at 308-317). This contract specifically set forth in handwritten amendments that a $5,000.00 earnest deposit had already been paid – a reference to the monies previously paid by NORAM/Nations Realty. The property description is exactly the same as the July 1995 agreement for $325,000. This revised agreement still specifically obligated Nations Realty to pay $19,500.00 to Karbank in real estate commission, even though that amount is 6% of $325,000.00 – not $180,000.00. (AA at 306-307). That is precisely the amount of the commission that the Wyandotte Tribe paid to the realtor, Karbank, at the closing of the purchase of the Shriner Tract. (AA at 331).

The second contract entered into on the same day was a noncompetition and nondisclosure agreement between McCurry Enterprises and Nations Realty. (AA at 318-322). Nations Realty, the entity purchasing the Shriner Tract, agreed to pay $152,250.00 in exchange for McCurry Enterprises', the seller of the Shriner Tract, agreement not to engage in a competitive gaming or other entertainment facility within a one-mile radius of the Shriner Tract (as if anyone seriously entertained any notion that they would) and not to disclose the information regarding the purchase agreement that was part of the record at the BIA.

A July 11, 1996 memorandum from Sharon Blackwell referenced an alleged assignment of Nations Realty's interest in the real estate contract to purchase the

Shriner Tract to the Wyandotte Tribe. (AA at 325-329). However, the record is silent on what agreements were actually assigned to which parties. The same memorandum states the seller, McCurry Enterprises, Inc., was to receive $195,000.00 in proceeds from the sale. The Administrative Record contains several checks exchanged at or around the date of the closing of the purchase of the Shriner Tract: (a) a check from Guaranty Title, the escrow agent, issued to McCurry Enterprises in the amount of $15,646.98 reflected as proceeds; (b) a check in the amount of $15,000.00 dated July 11, 1996 from Nations Realty to Guaranty Title of Wyandotte County, Inc.; and (c) a check from the trust account of Thomas Richard Rehorn III, P.A. to McCurry Enterprises, Inc. dated July 17, 1996 in the amount of $76,125.00 reflected as being made for "note payment." (AA at 330).

A July, 1996 statement from Mercantile Investment Services, Inc. reflects that $180,000.00 (presumably the funds delivered at closing) was withdrawn in the form of a loan on a margin account, which loan was shown as a liability against the account. (AA at 450-454). In other words, the PL 602 funds (or what was left of them after more than $25,000 of such funds had already been withdrawn and used by the Wyandotte Tribe to buy land in Park City, Kansas) were not actually withdrawn and used for the purchase of the Shriner Tract. Rather, the Wyandotte

Tribe borrowed $180,000 from the total assets then in the Mercantile investment account and it was those borrowed funds that were presented at closing.

On June 12, 1996, more than 30 days prior to the closing date for the transaction, the Secretary published notice, pursuant to 25 C.F.R. § 151.12(b), of his final determination to take the Shriner Tract into trust. 61 Fed. Reg 29757 (June 12, 1996). (AA at 323-324; Addendum at 40-41). This published notice indicated that the Shriner Tract was to be taken into trust pursuant to the provisions of PL 602 and not under the discretionary provisions of the Indian Reorganization Act, 25 U.S.C § 465. The significance of this is that if the conditions were not met for the mandatory taking of the Shriner Tract pursuant to PL 602 (i.e., the land was not purchased with only PL 602 funds), no other authority was cited or relied upon for doing so, and none was exercised. Thirty days later, on July 12, 1996, the Kansas Parties, along with the Prairie Band of Potawatomi Indians, brought this suit. (AA at 38-55). It was filed prior to the closing and before the land was taken into trust. They also obtained a Temporary Restraining Order preventing the land from being taken into trust. (AA at 56-58).

The Wyandotte Tribe intervened and sought an emergency appeal to this court seeking to dissolve the TRO, for the alleged reason that if the Shriner Tract transaction was not closed by July 15, 1996, the Secretary's right to acquire the Shriner Tract in trust would be lost. *Kempthorne,* 516 F.3d at 838. At the hearing

on the motion to dissolve the temporary restraining order before the Tenth Circuit, the Kansas Parties apprised this Court (as they had the District Court below) of the Secretary's position that that the Quiet Title Act would bar the action once the land was taken into trust. (AA at 59-64). Nonetheless, based upon the representation that the "land would be lost" the Tenth Circuit dissolved the temporary restraining order subject to the conditions set forth in that order and the one issued immediately thereafter. (AA at 65-69). Those conditions, urged and agreed to by the Secretary, included the preservation of the status quo and the "respective rights of the parties to obtain judicial review of all issues which have been raised in the complaint below…including standing of the parties, jurisdiction, compliance by the Secretary with all requirements of law, and the ultimate question of whether gaming should be permitted on the subject land". (AA at 65-69).

The very next day after the Tenth Circuit dissolved the temporary restraining order, the Wyandotte Tribe submitted a "Notice of Supplemental Information" in which it advised the Tenth Circuit, a day late, that the "emergency" did not in fact exist and there was in reality no need to dissolve the TRO to preserve the sale transaction. *Kempthorne,* 516 F.3d at 844-845, n. 6 (10th. Cir. 2008). (AA at 71-89).

As predicted, the Secretary eventually sought to have this case dismissed on sovereign immunity grounds pursuant to the Quiet Title Act during the proceedings

before the District Court. (AA at 90-96). In reply to this argument, the Kansas Parties argued, among other items, that this Court's Emergency Order preserved the Court's jurisdiction, that the United States Supreme Court ruling in *Department of Interior v. South Dakota,* 519 U.S 919 (1996) precluded dismissal for lack of jurisdiction, and that the Quiet Title Act did not prevent judicial review of the legality of the Secretary's actions in taking the Shriner Tract into trust under PL 602. (AA at 97-104). The District Court agreed on the basis of the "law of the case" doctrine and rejected the jurisdictional challenge. *Sac and Fox Nation,* 92. F. Supp. 2d at 1126, n.1.

However, on appeal to this Court of the District Court's initial disposition of this case, the Secretary told this Court that it ***agreed*** with the Kansas Parties that the Quiet Title Act was not a bar, that there was no sovereign immunity and this Court could proceed on the merits of the issues raised – which this Court did. In discussing the claims of the Kickapoo Tribe (who had filed a companion case with the Kansas Parties) and the Kansas Parties in connection with the Quiet Title Act and Rule 19 indispensable party issues, the Secretary made the following statements to this Court:

> …That outcome (dismissal of the *Kickapoo* case under the Indian lands exception to the Quiet Title Act) is the appropriate result in the *Kickapoo Tribe* appeal, No. 00-3095 (a companion case to the *Sac and Fox* case). Unlike the appellants in *Sac and Fox*, the Kickapoo Tribe was, apparently, unable to get its own TRO hearing from the district court before this property was taken into trust. The Kickapoo

> appellants are not protected by any orders entered by this Court in *Sac and Fox*, for they were not parties to that appeal. The Kickapoo Tribe's challenge to the trust status of the Shriner Tract should be dismissed because there are no defendants against whom it can proceed: As the Kickapoo Tribe has admitted, the Wyandotte Tribe has sovereign immunity from suit, as does the United States under the QTA's limit on challenges to Indian lands.
>
> As a practical matter, dismissing that aspect of the Kickapoo appeal will have little effect because under the facts of this case, the *Sac and Fox* challenge can go forward. Unlike the Kickapoo Tribe, the plaintiffs in *Sac and Fox* received a TRO from the district court halting the taking of this property into trust. On appeal, this Court dissolved that TRO, but did so "subject to the condition" that "the respective rights of the parties to obtain judicial review of all issues which have been raised in the complaint below shall be preserved." S/App. 56. We understand the Court's June 15, 1996, order as limiting our ability to raise the QTA argument based on "in trust" status of the Shriner Tract, and must therefore turn to the Rule 19 question, addressed at Part I.B., *infra*, and, ultimately, the merits, addressed at Part II, *infra*.
>
> …Nevertheless, we believe (notwithstanding our position in the district court) that these cases should not have been dismissed under Rule 19. Under the facts of this case, the Wyandotte's interests may rise to a level where serious Rule 19 analysis may be required only when they claim an existing interest in the property at issue (and, therefore, sovereignty over it)…
>
> Thus, with respect to the Shriner Tract, the *Kickapoo* challenge may not proceed against the United States alone because of the QTA, and there is no need to inquire into whether dismissal is appropriate under Rule 19. A similar analysis would apply to the *Sac and Fox* appeal if it were not for this Court's July 15, 1996, order, protecting the plaintiffs' ability to assert the issues raised in their original complaint.
>
> Given this Court's order of July 1996, the United States has concluded that the *Sac and Fox* challenge to the taking of the Shriner Tract into trust should not be dismissed under Rule 19. While Rule 19 analysis is extremely case- and fact-specific, *the United States has taken the position that the federal courts may generally review lawsuits challenging a decision to take property*

> *into trust as long as (1) the suit is filed within the 30-day period provided under 25 C.F.R. 151.12(b) and (2) the jurisdiction of the federal court is protected by order or by voluntary delay on the actual taking of the property into trust by the United States. See, e.g., U.S. Motion to Grant, Vacate and Remand in South Dakota v. U.S. Dept. of the Interior, U.S. Supreme Ct. No. 95-1956, granted, vacated, and remanded, 519 U.S. 919 (1996); 25 C. F. R. 151.12(b).* ***In such instances, the property is not yet held by the United States for the benefit of the tribe, and the interests in property and tribal sovereignty that might arise after property is taken into trust are not present.*** *Where the only dispute is over the propriety of the Secretary's decision to take land into trust, the United States' interest in protecting its own decision-making process under the Administrative Procedure Act is generally enough to protect the absent tribe's interest in the outcome of the case. See, e.g., Thomas v. United States, 189 F.3d 662, 668-69 (CA7 1999).* In the *Sac and Fox* challenge to this case, then, the Wyandotte Tribe's interest must be examined as if the property had not yet been taken into trust, in which case Rule 19 does not require dismissal….These merits challenges are, in essence, challenges solely to the legal validity of the agency's decision-making process.

(Addendum at 1-12). (Emphasis added).

With the Secretary admitting the fact that the Shriner Tract was not yet in "trust", as set forth above, for purposes of the Indian lands exception to the Quiet Title Act, this Court asserted jurisdiction under the APA, addressed the merits and remanded the case to Secretary for further proceedings on the PL 602 issue. *Sac and Fox Nation,* 240 F.3d at 1267-68. Following the remand to the Secretary on the PL 602 issue, the Wyandottes did an "analysis" that purported to calculate the value of the invested P.L. 602 funds at $212,170.00 at the time of the July, 1996 purchase of the Shriner Tract. This was presented to the Secretary on the issue of whether only PL 602 funds were used to purchase the Shriner Tract for $180,000.

(AA at 332-335). Additionally, the Wyandottes hired the accounting firm KPMG to review the analysis. To avoid any misunderstanding as to just what (or whose) this analysis was, KPMG stated that this "analysis was presented to us by you and we have not independently computed a separate analysis." (AA at 336). This information was transmitted to the Secretary on December 5, 2001. Without conducting an independent audit/study or even contacting the Kansas Parties (despite the fact that this was a proceeding on remand from the District Court and Tenth Circuit in which they were parties), the Secretary issued her determination that only P.L. 602 funds were used to purchase the Shriner Tract, and approved the trust acquisition. 67 Fed. Reg. 10926 (March 11, 2002); (AA at 445; Addendum at 42). A clarification was made to this determination. 67 Fed. Reg. 30853 (May 8, 2002). (AA at 456-457; Addendum at 43-44).

The Kansas Parties petitioned for reconsideration, which was granted by the Assistant Secretary – Indian Affairs (AS-IA). (AA at 458-460). The Kansas Parties requested discovery regarding the production of documents supporting the purchase of the Shriner Tract, identifying and explaining all disbursements out of the investment accounts supporting the use of PL 602 funds to purchase property. AA at 463-464). The Kansas Parties made a subsequent request for missing account statements from the Wyandottes. (AA at 461-462). The Attorney Advisor to the AS-IA denied both requests, alleging that the items sought would go outside

the federal court's "narrow remand." (AA at 465-466).

A separate review of the Wyandotte's analysis was performed by Purinton, Chance & Mills, LLC on behalf of the Kansas Parties, which valued the invested, commingled funds at $112,959.00 at the time of the purchase of the Shriner Tract in July, 1996. (AA at 467-476).

The Secretary issued an Opinion on Reconsideration on June 12, 2003. (AA at 477-483). The Kansas Parties sought to have these remand determinations considered by the District Court in this case but were instructed to file a new lawsuit. After doing so and after a few more years of litigation (including another remand to the Secretary), the District Court upheld the Secretary's determination. *Governor of Kansas v. Kempthorne*, 430 F.Supp. 2d 1204 (D. Kan. 2006). On appeal to this Court, this Court did not reach the merits but ruled that the sovereign immunity exception to the Quiet Title Act barred that action and remanded with directions that it be dismissed. *Kempthorne,* 516 F.3d at 846.

Taking a cue from the concurring opinion in that case, the Kansas Parties sought to reopen this case and were allowed to do so. The Secretary renewed his sovereign immunity defense in a motion to dismiss which the District Court sustained. This case is now before this Court once again.

SUMMARY OF ARGUMENT

The central issue in this case is whether the United States can avoid and manipulate the litigation of justiciable issues by the following:

1. Purportedly taking land into "trust" *after* a Complaint was timely filed pursuant to the Secretary's regulations that invite parties to seek such judicial review, and after a temporary restraining order was entered preventing the land from being taken into trust;

2. Urging the Tenth Circuit that it could lift the restraining order and preserve the jurisdiction of the Court to hear the merits of the issues challenging the Secretary's actions in deciding to take the land into trust;

3. Advising the Tenth Circuit that under the Secretary's regulations that "federal courts may generally review lawsuits challenging a decision to take property into trust as long as (1) the suit is filed within the 30-day period (which this one was) provided under 25 C.F.R 151.12(b) and (2) the jurisdiction of the federal court is protected by order or voluntary delay on the actual taking of the property into trust by the United States", citing, among other authority, *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996);

4. Advising the District Court in this case that now somehow the *Department of Interior* case should not be relied on because at the time the Department of Interior petitioned the United States Supreme Court to grant

certiorari, vacate and remand the case to the Secretary for consideration on the merits of the decision to take the land into trust (even though at the time the land was in trust), the Secretary supposedly told the Supreme Court in its Petition that it would voluntarily remove the land from trust status – even though no such statement is contained in the Petition.

5. Suggesting to this Court and the District Court that land cannot be removed from trust status (if it is deemed to be in such status) by virtue of timely filed actions under the Administrative Procedures Act, when this very thing was accomplished by the Secretary some seven months ***after*** and directly because the Supreme Court granted certiorari, vacated and remanded in *Department of Interior*..

The District Court was in error when it rejected the Kansas Parties' assertion that the time of filing should govern in determining whether a waiver of sovereign immunity exists in this case and in rejecting the clear jurisdictional implications of the Supreme Court's "GVR" in *Department of Interior*. In 2001, the Secretary admitted that the QTA was not a bar to the Kansas Parties' claims in this case, since the action was timely filed and the property (the Shriner Tract) "is not yet held in trust by the United States for the benefit of the tribe." (Addendum at 9-10).

In essence, the Secretary has always recognized the existence of a condition subsequent before the land is held in *full* trust for the benefit of the Wyandotte

tribe. The condition to which the trust status of the property is subject is the resolution on the merits of the issues timely raised in the complaint, and preserved by this Court's order when it dissolved the temporary restraining order – namely, did (or does) the Secretary have the power to take the land in trust pursuant to PL 602. If not, it was a void act, as this has never been a discretionary taking of land in trust pursuant to the Indian Reorganization Act, 25 U.S.C § 465. The Secretary is judicially estopped from now changing his position to suit his litigation needs. The Shriner Tract is not "Indian lands" as intended under the Indian lands exception to the Quiet Title Act waiver of sovereign immunity. The District Court had jurisdiction.

This certainly should come as no surprise to the parties to the transaction – the Wyandotte tribe and the Secretary (United States). Both were well aware of this condition to the trust acquisition and both readily invited its presence in the course of the emergency proceedings before this Court. This is not the situation for which the exception for Indian lands to the waiver of sovereign immunity under the QTA was designed – this is not an attempt to divest a tribe of its trust lands after the fact in a manner prohibited by the Quiet Title Act. Both parties walked into this transaction with their eyes wide open. The United States waived its sovereign immunity under the APA when the complaint was filed; this Court has jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

This Court owes no deference to the District Court's decision, as the scope of review in this APA case, involving purely questions of law, is de novo. *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th. Cir. 2001); *see also*, *United States v. Hardman*, 297 F.3d 1116, 1120 (10th. Cir. 2002); *Salve Regina College v. Russell*, 499 U.S. 225, 232-235(1991).

II. THE UNITED STATES CANNOT MANIPULATE THE LITIGATION AND DIVEST A COURT OF JURISDICTION BY PURPORTEDLY TAKING LAND INTO TRUST AFTER A COMPLAINT WAS FILED

A. The Secretary is Judicially Estopped from Arguing to This Court that the Quiet Title Act Divests this Court of Jurisdiction

"The doctrine of judicial estoppel is based upon protecting the integrity of the judicial system by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Bradford v. Wiggins*, 516 F.3d 1189, 1194 (10th Cir. 2008) (internal quotes omitted). "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotes omitted). In other words, judicial estoppel "prevents a

party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (internal quotes omitted).

"While the Court recognized the circumstances under which a court might invoke judicial estoppel will vary, three factors typically inform the decision whether to apply the doctrine in a particular case." *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (internal quotes omitted).

> [C]ourts typically inquire as to whether: 1) a party's later position is clearly inconsistent with its earlier position; 2) a party has persuaded a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and 3) the party seeking to assert the inconsistent position would derive an unfair advantage if not stopped.

Bradford, 516 F.3d at 1194 (internal quotes omitted). Judicial estoppel will apply equally as against the government as a litigant unless the government can show that estoppel would compromise a government interest in enforcing the law, the shift in the government's position is the result of a change in public policy, or the result of a change in facts essential to the prior judgment. *County of San Miguel v. Kempthorne*, 2008 WL 4839673 (D.D.C. Nov. 10, 2008).

Here, the Secretary initially represented to this Court, during the course of the emergency proceedings on the motion to dissolve the temporary restraining order, that taking of the land in "trust" would not effect the ultimate question of whether gaming could be conducted on the Shriner tract. (AA at 65-69). Later in the first appeal to this Court in this case, the Secretary elaborated on these

representations by stating that the United States was taking the position that the Indian lands exception to the Quiet Title Act would not apply because an action had been timely filed under his own regulations and a temporary restraining order obtained before any effort to take the land in "trust" and the order dissolving the TRO preserved the issues for judicial review such that the Shriner Tract was not in "trust" for the benefit of the Wyandotte tribe. (Addendum at 9-10).

This position is diametrically opposed to the position the Secretary has now taken with the District Court below, and that it will likely take with this Court. The Secretary persuaded this Court to accept its earlier litigation position in dissolving the restraining order and in the first appeal, such that it clearly appears that the court has been misled by virtue of the litigation position now being asserted. Moreover, the Secretary will derive an unfair advantage if allowed to perpetuate these inconsistent positions. Certainly, the dissolution of the temporary restraining order combined with the position that the Secretary is now taking – that sovereign immunity under the QTA divests this Court of jurisdiction – will allow the secretary to derive an unfair advantage.

In response to the Eighth Circuit's decision in *State of South Dakota v. Department of Interior*, 69 F. 3d 878 (8th. Cir. 1995), *judgment vacated by* 519 U.S. 919 (1996), the Secretary promulgated 25 C.F.R. 151.12 to provide for at least 30 day waiting period after final administrative decisions to acquire land into

trust under the Indian Reorganization Act and other federal statutes This regulation was intended to establish a procedure to "ensure the opportunity for judicial review of administrative decisions to acquire title to lands in trust for Indian tribes and individual Indians…This procedure permits judicial review before transfer of title to the United States." 61 Fed. Reg. 18082 (April 24, 1996). The Secretary went on to explain that the Eighth Circuit had noted that "judicial review was a factor in upholding a statute against a nondelegation challenge" such as was made, and carried the day, in the *South Dakota* case. *Id.* The Secretary also noted that review was available under the APA. *Id.*

In the case at bar, the Kansas Parties not only timely filed a complaint seeking judicial review, they sought and obtained a temporary restraining order that prohibited the Secretary from taking the land in trust. (AA at 56-58). Then, when the issue of the emergency appeal was presented to this Court, the Kansas Parties argued against dissolving the restraining order on the grounds that if lifted, the United States would take the land in trust and then seek to dismiss this case on the grounds of the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act. *Kempthorne*, 2008 WL 4186890, *1. (AA at 59-64).

Nonetheless, the restraining order was dissolved by an order of this Court that sought, with the urging of the Secretary, to preserve the status quo and all issues for judicial review. Thereafter, the land was conditionally taken into trust –

according to what the Secretary told this Court in his brief in 2001, when he unequivocally admitted that the Quiet Title Act was no bar as the Shriner Tract was not held in "trust" for the benefit of the Wyandotte tribe. (Addendum at 1-12).

Clearly, there is nothing else the Kansas Parties could have done to preserve the issues raised in their Complaint for judicial review. In order to avoid rendering the critical right to seek judicial review an illusory sham under the Secretary's regulation, 25 C.F.R § 151.12, the Secretary should be taken at his word and the determination of whether sovereign immunity under the Indian lands exception in the Quiet Title Act applies must be made at the time a complaint is filed under the APA challenging the Secretary's decision to take the land in trust. This is certainly true here, where the Secretary has acknowledged that the land has not been taken in trust for the benefit of the Indian tribe.

At a minimum, the Secretary should be estopped now from taking an entirely different and self-serving litigation position in this case regarding the status of the Shriner tract, the applicability of review under the APA of the issues raised in the complaint, and applicability of sovereign immunity as a defense under the APA.

B. The U.S. Supreme Court Has Already Decided In *Department of Interior* That Jurisdiction Under the APA and The Quiet Title Act Is Determined At The Filing Of The Complaint.

In *Department of the Interior v. South Dakota*, 519 U.S. 919 (1996), the Supreme Court recognized, at least implicitly by exercising jurisdiction, that the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act does not apply if the complaint under the APA is filed *before* the United States takes the land at issue into trust. Because Plaintiffs filed this lawsuit *before* the Secretary took the Shriner Tract into trust, this Court has jurisdiction – as the Secretary has admitted.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of [the U.S. Supreme Court] and then of the court from which the record comes." *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). It is the duty of the U.S. Supreme Court to recognize a jurisdictional question *sua sponte*. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 162 (1984). The U.S. Supreme Court has the power to consider jurisdiction *sua sponte* even if raised for the first time at the Court itself. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964). The U.S. Supreme Court on its own motion must deny its own jurisdiction where such jurisdiction does not affirmatively appear in the record. *Great Southern Fire Proof Hotel Co.*, 177 U.S. at 453.

In *Department of Interior*, the Supreme Court asserted jurisdiction over the case by granting certiorari, vacating the judgment, and remanding to the Secretary. *Department of Interior*, 519 U.S. at 919-20. By asserting jurisdiction to do these acts, the Court implicitly had to conclude that the Quiet Title Act did not divest the Court of its jurisdiction even though the land was in trust. Otherwise, it could not have acted on the case; it would have simply dismissed the matter and vacated the prior judgment for lack of jurisdiction (just as the 10th Circuit did recently in *Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008). Jurisdiction would have been the first issue addressed by the Court, and must have been found existing for the Court to have acted. *See Great Southern Fire Proof Hotel Co.,* 177 U.S. at 453. Certainly, this is not so novel a position as courts in the past have implied the resolution of jurisdictional questions from Supreme Court decisions. *See e.g. United States v. Bowman*, 679 F 798 799 (9th Cir. 1981) (concluding that the Supreme Court implicitly resolved jurisdictional questions under the Major Crimes Act, 18 U.S.C § 1153, when it decided *Keebel v. United States*, 412 U.S. 205 (1973).

However, reliance need not be placed solely on implication. Justice Scalia in his dissent clearly noted that the trial court in the case had found no jurisdiction because the Quiet Title Act explicitly prohibited "actions challenging title to Indian lands" once the Secretary took the land into trust. *Department of Interior*, 519

U.S. at 920 (Scalia, J., dissenting). And there was no doubt that Eighth Circuit and the Supreme Court knew that the land had been taken into trust before the case had reached the District Court. *South Dakota*, 69 F.3d 878, 880 (8th Cir. 1995), *judgment vacated by* 519 U.S. 919 (1996). Justice Scalia went on to note in his dissent that the Federal Government maintained this position throughout the litigation and never "altered its view that once title has passed to the United States, APA review is precluded by the QTA." *Department of Interior*, 519 U.S. at 921 (Scalia, J., dissenting).

The majority of the Court nonetheless exercised jurisdiction by granting certiorari (at the urging of the Secretary nonetheless), vacating the judgment, and remanding the case to the Secretary for a merits determination on whether the land should be take into trust. As Justice Scalia rightly noted, the majority could only have done that had it at least implicitly found that it had jurisdiction, even though the land was already in trust. *See Id.* at 922-23 (Scalia, J., dissenting).

According to Justice Scalia, the Secretary wanted the Court to remand "to the Secretary of the Interior for reconsideration and issuance of a new administrative decision." *Id.* at 922 (Scalia, J., dissenting). But given the Secretary's position that no court had jurisdiction once the land was taken into trust, Justice Scalia could not "imagine where [the Court] would derive the authority" to order the Secretary to do anything. *Id.* (Scalia, J., dissenting). He

continued:

> If, as the Government asserts in its brief, statutory judicial review of a land-trust decision under § 5 of the IRA is unavailable once title has passed to the United States, then certainly federal courts cannot construct the necessary conditions for judicial review by simply ordering the land acquisition undone.

Id. at 922-23 (Scalia, J., dissenting). It follows that the only basis on which the majority could have ordered the land acquisition undone by remanding to the Secretary was if there was jurisdiction under the APA since the complaint was filed *before* the land was taken into trust. *See South Dakota*, 69 F.3d 878, 880 (8th Cir. 1995) *judgment vacated by* 519 U.S. 919 (1996) (lawsuit filed in July 1992; land taken into trust in November 1992). The Indian lands exception to the Quiet Title Act waiver of sovereign immunity did not divest the High Court of jurisdiction.

The District Court erroneously rejected this argument by not even addressing the line of cases cited above noting the Supreme Court's responsibility to determine the existence of jurisdiction before taking substantive action on a matter. *Kempthorne*, 2008 WL 4186890 *5-6. Moreover, the fact that the South Dakota District Court in the *Department of Interior* case had dismissed the case on sovereign immunity grounds under the QTA was brought to the Supreme Court's attention in the Petition for Certiorari (Addendum at 13-29) and by Justice Scalia in his dissent. *Department of Interior*, 519 U.S at 921, (Scalia, J., dissenting).

This is not "supposition" as suggested by the district court in the case at bar *Kempthorne, 2008 WL 4186890 *6.* The reality of the matter is that the Secretary obviously urged the Supreme Court to assert jurisdiction over the matter even though the land was in trust and vacate the Eighth Circuit opinion and remand the matter to the Secretary – and the reality is this is exactly what the Supreme Court did. The final part of this reality is that seven months later the Secretary removed the land from trust status, announcing to the world that he was required to as a result of the Supreme Court's remand order. 62 Fed. Reg. 26551 (May 14, 1997). (Addendum at 43-44). That none of this could have happened without the United States Supreme Court first exercising jurisdiction is not supposition – it is reality.

Moreover, there is precedent for court's relying on implicit holdings, even as to jurisdictional issues as set forth above. For all these reasons, it is respectfully suggested that the district court erred in summarily rejecting *Department of Interior* as precedent for the proposition that sovereign immunity under the APA is waived upon the timely filing of a complaint under the APA and the conduct of the Secretary thereafter cannot deprive a court of its jurisdiction over such claims.

C. The Secretary's Interpretation of His Regulations and the Right to Judicial Review Should Control.

The Secretary, in interpreting 25 C.F.R § 151.12 in the context of this case, told this Court in 2001 that the right to judicial review under the APA, and his own regulations, was preserved in this case because the land was not in trust for the

benefit of the Wyandotte tribe and a timely complaint had been filed challenging that decision. The Secretary announced this as "the position of the United States" in a detailed breakdown that reconciled this case and the *Department of Interior* case with the right to review under 25 C.F.R §151.12 and the sovereign immunity exception for Indian lands under the QTA. (Addendum at 1-12). It is "well settled that an agency's interpretation of its own regulations is entitled to substantial deference, which means it must be given controlling weight unless plainly erroneous or inconsistent with the regulation." *City of Shakopee v. United States*, 1997 WL 57745, p. 9 (Feb. 6, 1997 D. Minn), citing *Board of Regents of the University of Minnesota v. Shalala*, 53 F.3d 940, 943 (8th. Cir. 1995).

The Secretary's interpretation is certainly not plainly erroneous. As necessarily acknowledged by the United States Supreme Court in the *Department of Interior* case, and supported in the discussion below, the time to determine if there is a waiver of sovereign immunity is the time the complaint is filed under the APA and 25 C.F.R. § 151.12. This is certainly true here as the Secretary has admitted the land is not in "trust" for the benefit of the Indian tribe since it is conditionally subject to the resolution of the issues timely raised and preserved under 25 C.F.R.§ 151.12.

But today, apparently emboldened by the freedom from the clutter of constitutional challenges to the discretionary powers granted him under the IRA,

25 U.S.C § 465, the Secretary now tries to put a different spin on the *Department of Interior* case to defuse its worth in the case at bar. The problem is that this spin is just not true. In his reply brief to the District Court in this case, the Secretary discussed the history of the proceedings in the *Department of Interior* case prior to petitioning the Supreme Court to grant certiorari and vacate and remand the case. (AA at 174-176). In discussing the petition to the Supreme Court that was filed at a time when the land was supposedly in trust, the Secretary stated that he (or his predecessor) petitioned the Supreme Court to grant a writ of certiorari, to vacate the Eighth Circuit's decision and to remand the matter to the Secretary of Interior "so that he could voluntarily take the land out of trust and allow the case to proceed anew pursuant to the new regulation." (AA at 175-176). However, nowhere in the petition for certiorari did the Secretary ever mention that he would "voluntarily" take the land out of trust. In fact, the notion of taking the land out of trust is not mentioned anywhere in the Petition – though the issues of sovereign immunity under the QTA are certainly discussed, as noted by Justice Scalia in his dissent. (Addendum at 13-29).

In fact, it was not until seven months *after* the Supreme Court granted certiorari that the Secretary took the land out of trust. Most significantly, when he did so, he did not state it was a voluntary act on his part. Instead, he stated it was done so because the "remand (from the Supreme Court) operates to take the land

out of trust so that judicial review under the APA may be available…". 62 Fed. Reg. 26551 (May 14, 1997); Addendum at 45-46). As such, the Secretary announced that as of December 24, 1996 the land "is no longer held in trust by the United States for the benefit of the Lower Brule Sioux Tribe". *Id*.

Likewise, in the case at bar, the Secretary made a similar pronouncement that the Shriner Tract was not held in trust that and any trust status was subject to resolution of the issues raised in the Complaint. He just did not publish it in the Federal Register. He published it in his brief to this Court where all the interested parties were gathered to address the issues.

In 2001, the Secretary reconciled this case under the APA and the right to review afforded the Kansas Parties under 25 C.F.R § 151.12. He maintained that review under the APA had been preserved thus obviating resort to or even discussion of immunity under the QTA. Certainly, the district court and this Court have jurisdiction to hear the case at bar. Just like the plaintiffs in the *South Dakota* lawsuit, the Kansas Parties in this lawsuit filed their complaint *before* the Secretary took the land at issue into trust. Just as the Supreme Court had jurisdiction to grant certiorari, vacate the judgment, and remand the case to the Secretary for reconsideration in the *Department of Interior* lawsuit while the land was in trust and to cause the Secretary to take the land out of trust, this Court must also have jurisdiction to hear the merits in this lawsuit under the APA for the reason

previously asserted by the Secretary. The Secretary himself has rendered his interpretation of the regulation and its application to the facts of this case. Such interpretation should be given controlling weight. This Court should therefore reverse the district court, as there is a waiver of sovereign immunity under the APA, this case was timely filed under the APA and the conduct subsequently engaged in cannot divest the court of its jurisdiction –just as the Secretary has articulated.

D. The Federal Government Waived Its Sovereign Immunity Under the APA At The Filing Of The Complaint.

Even if this Court rejects the necessary jurisdictional impact of the Supreme Court accepting jurisdiction in *Department of Interior* and remanding the matter to the Secretary for a merits consideration of the decision to take the land into trust, and the impact of the judicial/administrative admissions by the Secretary in the early stages of this litigation and in 2001 that the QTA act was not a bar, this Court should still find that it has jurisdiction because the United States cannot reassert its sovereign immunity once waived under the APA at the filing of a timely complaint pursuant to 25 C.F.R. 151.12. The Secretary is promoting, and the district court adopted, a position unrecognized by any other court –that the Secretary of the Interior can take land into trust *after* the filing of a complaint (and presumably even after an injunction prohibiting the taking of land into trust) and divest a court of its jurisdiction under the Indian lands exception to the waiver of sovereign

immunity in the Quiet Title Act. This Court should reject this unprecedented extension of the law.

The ruling of the District Court, taken to its logical end, would permit the following unfair and unconstitutional processes: The Secretary could litigate in the trial court on the basis of a timely filed action, and lose; litigate in the appellate court, and lose; and litigate in the U.S. Supreme Court, and, if it looks like it might lose there as well, simply take the land at issue into trust, divest all courts of jurisdiction, and deny the parties any resolution on the merits. Indeed, the Secretary could take such action even if a restraining order had been entered by just ignoring it. The result under the District Court's analysis would remain the same. "The unfairness of such a practice to the litigant who prevailed in the Court of Appeals is obvious." *Department of Interior*, 519 U.S. at 921 (Scalia, J., dissenting).

Congress surely did not intend to permit such gamesmanship by the Secretary when Congress created the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. §2409a. (Addendum at 47-49). The intent was to recognize the trust responsibility owed to Indian tribes once land had been taken into trust; not to allow the Federal Government to manipulate litigation to its advantage to avoid review on the merits for actions commenced before the land was taken into trust. See H.R. Rep. No. 92-1559 (Oct. 10, 1972) at 1972

U.S.C.C.A.N. 4547, 4556-57. Indeed, the following passage makes this clear:

> The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

Id.

The United Supreme Court has recognized this intent as well:

> In urging the Indian lands exemption to sovereign immunity be included in the Quiet Title Act, the Solicitor for the Department of Interior noted that excluding suits against the United States seeking title to lands held by the United States in trust for Indians was necessary to prevent abridgement of "solemn obligations" and "specific commitments" that the Federal Government had made to the Indians regarding Indian lands. A unilateral waiver of Federal Government's immunity would subject those lands to suit without the Indians consent. See *H.R.Rep. No. 92-1559, p. 13(1972)*

United States v. Mottaz, 476 U.S. 834, 843, n. 6 (1986).

In this case, which does not involve a taking of land intro trust pursuant to the IRA, 25 U.S.C. §465 (Addendum at 50-52) and where the complaint challenging the Secretary's action was filed before the land was ever purportedly in "trust," the interpretation adopted by the district court at the urging of the Secretary is patently unfair, irrational, unjust, and contrary to Congressional intent. *See TMG II v. United States*, 778 F. Supp. 37, 43 (D.D.C. 1991) (Congress should

not be presumed to have intended irrational and unjust results).

As such, the key question raised by the district court's reliance on the Quiet Title Act to dismiss this lawsuit – left undecided by the 10th Circuit in the most recent appeal – is as follows:

> [D]oes the fact that Plaintiffs brought the *Sac & Fox Nation* case challenging the Shriner Tract's trust status *before* the Secretary had actually taken the Tract into trust affect application of the Act?

Kempthorne, 516 F.3d at 842. The answer is "Yes." The Indian lands exception to the waiver of sovereign immunity does not apply if a complaint is filed *before* the land is taken into trust. The Secretary has already told this Court, some seven years ago, that he agrees with this position. Sovereign immunity under the APA and 25 C.F.R.§ 151.12 is waived, so this Court has jurisdiction.[4]

"The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). "It is a firmly established rule that subject matter

[4] The fact that the Plaintiffs in this lawsuit filed their complaint *before* the Shriner Tract was taken into trust distinguishes this case from both *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966 (10th Cir. 2005), and *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956 (10th Cir. 2004), where the complaints were filed *after* the land at issue had already been taken into trust. Neither *Shivwits* nor *Neighbors* is controlling or instructive given the facts of this lawsuit. Indeed, there is no authority cited by the district court in its opinion that involves an attempt by the United States to invoke sovereign immunity under the QTA act by taking land in trust *after* an APA case was filed in which the United States did waive its sovereign immunity.

jurisdiction is tested as of the time of the filing of the complaint." *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 392 n.12 (3rd Cir. 1991). The U.S. Supreme Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. KN Energy, Inc.*, 498 U.S. 426, 428 (1991). In other words, the parties cannot act subsequent to the filing of a complaint to divest the court of jurisdiction. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938); *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983). "This rule has been interpreted to include not only the acts of individual litigants, but also to preclude subsequent agency action from divesting a court of jurisdiction once jurisdiction is established." *Washington Intern. Ins. Co. v. United* States, 138 F.Supp.2d 1314, 1325 (C.I.T. 2001). The rule is intended to prevent the manipulation of federal jurisdiction, to promote judicial efficiency, and to constrain the use of strategic behavior by litigants. *New Rock Asset Partners v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1503-04 (3rd Cir. 1996).

Contrary to the district court's assertion that that the relief that the Kansas Parties seek now is to remove the Shriner Tract from being held in "trust", their claims have not changed. They seek only to have a merits determination of their claims under the APA, and the right to review in the federal courts. The Secretary

has admitted the land is not in "trust" until those issues are resolved on the merits.

Nor is this case "moot" as suggested by the district court. *Kempthorne,* 2008 WL 4186890, *4. It is no more moot than was the *Department of Interior* case when the United Supreme Court granted certiorari and vacated the Eighth Circuit and District Court opinions and remanded the case to the Secretary – who then took the land out of trust. In fact, it is even less so here, where the Secretary has admitted that the Shriner Tract is not in "trust" and resolution of the merits of the APA claims is appropriate under his regulations.

In this case, the Secretary seeks, and the district court has granted him the power, to do that which the above rule seeks to prevent – manipulate this Court's jurisdiction. Consistent with settled law, jurisdiction should be determined when a complaint is filed. When Plaintiffs filed the complaint in this case, the Shriner Tract had not been taken into trust. Therefore, the United States had waived its sovereign immunity under the Quiet Title Act. This Court had jurisdiction at the filing of the complaint.[5] The Secretary should not be allowed to divest this Court

[5] The argument that an actual controversy no longer exists once the Secretary purports to take land into trust because sovereign immunity forbids the judiciary from divesting the United States of its title to Indian trust land is a circular argument. It assumes no controversy exists because no waiver of sovereign immunity applies. But, if jurisdiction under the APA is determined as of the date the complaint is filed, then a waiver has occurred. There is no sovereign immunity to forbid the judiciary from acting no matter what the Secretary does later in the case – as Secretary has admitted when he conditionally took the land in trust.

of jurisdiction by reasserting sovereign immunity after the fact. This interpretation "restrains any tendency on the part of the government to manipulate its position subsequent to the filing of the complaint so as to present a situation that falls between the cracks of applicable waiver statutes." *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981).

In *Bank of Hemet*, a bank sued the United States to quiet title in real property. After the complaint had been filed, but before the complaint had been served, the United States sold the property. Under the Quiet Title Act, the Federal Government must "claim an interest" in property in order to be sued. Because the Federal Government no longer "claimed an interest" in the disputed property because it had sold the property, the United States argued that the waiver of sovereign immunity in the Quiet Title Act did not apply. The court disagreed.

The court held that the "presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed . . . ." *Id.* at 665. According to the court, such an interpretation of the Quiet Title Act would give the plaintiff its day in court, would recognize that the bar of sovereign immunity should not be preserved through strained and hyper-technical interpretations of relevant acts of Congress, and would restrain the government from manipulating its position after a complaint has been filed to avoid judicial review. "Therefore, because at the time the Bank filed suit the United States claimed title to the property, we find that [the

Quiet Title Act] waived the immunity of the United States to the Bank's quiet title action." *Id.* at 655. This case established the general rule that other courts follow.

The district court's effort at distinguishing *Bank of Hemet* is unavailing. *Kempthorne*, 2008 WL 4186890, *7-8. The District Court's sole basis for its position is that *Bank of Hemet* started out as a Quiet Title case, and the case at bar started out (and remains) an APA case. (*Id.*) But this is a distinction without a difference. The only distinction is that in *Bank of Hemet*, the source of the waiver of sovereign immunity is the Quiet Title Act and in the case at bar it is the APA. However, in both cases the United States attempts to invoke sovereign immunity and a merits determination by conduct engaged in *after* the lawsuit was filed. Why should the sovereign immunity defense be unavailable in the one case (*Bank of Hemet)* yet allowed in the case at bar where both cases involve manipulative acts designed to deprive the Court of jurisdiction after timely actions were filed?

Refusing to give effect to the manipulative efforts of the United States in both instances, and disallowing the government's reliance on sovereign immunity under the Quiet Title Act, is consistent with Congressional intent in both instances. Application of sovereign immunity under the Quiet Title Act in the case at bar (just as with the *Bank of Hemet* case) is not violative of Congressional intent, since the lawsuit under the APA was filed before any effort to take the land in trust. This is not an instance in which a party is attempting, for the first time, to attack land

already held in trust, an act Congress sought to prohibit with the Indian lands exception to the Quiet Title Act.

Likewise, the district court's similar attempts to distinguish *Delta Savings and Loan Ass'n v. I.R.S.,* 847 F.2d 248 (5th. Cir. 1988) and *LaFargue v. U.S.,* 4 F. Supp. 2d 580 (E.D. La. 1998*), aff'd* 193 F.3d 516 (5th. Cir. 1999) *cert. denied,* 529 U.S. 1108 (2000), are unavailing for the same reasons. *Kempthorne,* 2008 WL 4186890 *8. The district court's additional reliance on the provision in 2409a for disclaiming interest and ceasing jurisdiction that may apply when the government sells property and thereby cause jurisdiction to cease is likewise misplaced. If anything, it is helpful to the Kansas Parties' cause. *Id.* While this provision was not at issue in *Bank of Hemet* or *Delta Savings,* the district court's discussion of the application of the provision in LaFargue actually supports the position of the Kansas Parties. In *LaFargue*, the district court noted that "the government did assert a disclaimer", *Kempthorne,* 2008 WL 4186890 *8, citing *LaFargue,* 4 F. Supp.2d at 589-90, but the court held that §2409a(e) did not contemplate a disclaimer "based on the sale of the government's interest after the filing of a quiet title action." *Id.* Just as the attempt at disclaimer in *LaFargue* was not the type of situation contemplated by Congress to invoke that provision, nor is the application of sovereign immunity under 2409a in the case at bar the type of situation contemplated by Congress to invoke sovereign immunity as to Indian lands, where

the APA lawsuit was filed under the Secretary's regulations *before* the land was purportedly taken in "trust". This is not an action that was initiated to challenge the status of Indian lands *after* such lands acquired their status as such. It is only this latter situation that the sovereign immunity in 2409a for Indian lands was designed to address.

The general rule is that a waiver of sovereign immunity is determined at the time the complaint is filed, and once waived, sovereign immunity cannot be reasserted. *See Kabakjian v. United States*, 267 F.3d 208, 212 (3rd Cir. 2001) (waiver to allow jurisdiction determined by looking to facts existing at the time the suit was filed); *Kulawy v. United States*, 917 F.2d 729, 733-34 (2nd Cir. 1990) (waiver of sovereign immunity applied at time suit filed and government's subsequent conduct could not oust the court of jurisdiction validly invoked); *Delta Savings & Loan Association v. I.R.S.*, 847 F.2d 248, 249 n.1 (5th Cir. 1988) (Quiet Title Act waived immunity when complaint filed, notwithstanding subsequent actions by government). There simply is no precedent for the claim that the Federal Government "may *strip* a federal court of jurisdiction" by taking some action after the filing of a lawsuit. *See TMG II*, 778 F. Supp. at 42; *see also LaFargue v. United States*, 4 F.Supp.2d 580, 589 (E.D. La. 1998), *aff'd* 193 F.3d 516 (5th Cir. 1999) (government cannot oust court of jurisdiction by transferring

property subsequent to filing of complaint).[6]

Because the land at issue had not been taken into trust at the time Plaintiffs filed their complaint, the United States waived its sovereign immunity under the APA and the Indian lands exception under the Quiet Title Act has no application. The Federal Government cannot now reassert its sovereign immunity after taking the Shriner Tract into trust – especially where it has admitted that under the circumstances of this case it has not done so. This Court has jurisdiction and should reverse the District Court.

[6] It appears that both the Eighth Circuit and the Eleventh Circuit, if presented with the issue, would agree with this conclusion. *South Dakota,* 69 F.3d at 881, n.1 (8th. Cir, 1995), *judgment vacated by* 519 U.S.919 (1996)(stating that we "doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title" – but not deciding the issue)(emphasis in the original); *State of Florida, Department of Business Regulation v. United States Department of the Interior,* 768 F. 2d 1248, 1257, n. 11(11th Cir. 1985) (even when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations).

III. THE UNITED STATES CANNOT ASSERT SOVEREIGN IMMUNITY FROM THE TIMELY FILED LAWSUIT CHALLENGING THE ACTION OF THE SECRETARY OF THE INTERIOR FOR TAKING LAND INTO TRUST WHEN THE SECRETARY HAD NO STATUTORY AUTHORITY TO DO SO AND OTHERWISE DID NOT COMPLY WITH HIS OWN REGULATIONS.

A. The Shriner Tract "Trust" Acquisition was Strictly Pursuant to P.L. 602

There is no question that the statutory basis for the Secretary's determination to take the Shriner Tract into "trust" was P.L. 602, and not the Indian Reorganization Act, 25 U.S.C. §465. The latter statute grants the Secretary discretion to take land into trust so long as the Secretary follows the law and applies the regulatory factors set forth in 25 C.F.R. §151.10 in connection with such a discretionary taking. *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997). The regulatory factors contained in 25 C.F.R. §151.10 are binding regulations which the agency must follow. *Id.* at 1434, Note 5.

In the case at bar that the Secretary made no effort to consider the regulatory factors set forth in 25 C.F.R. §151.10 as the determination to take the land into trust was, according to the Secretary, mandated by the provisions of P.L. 602, thereby eliminating any discretionary determinations. *Norton*, 240 F.3d at 1261-62. (Addendum at 40-41).

Accordingly, if in fact the Shriner Tract was not purchased with only P.L. 602 funds, as alleged by the Kansas Parties, then the mandatory provisions of P.L.

602 are inapplicable, leaving the Secretary with no statutory basis to empower him to take the Shriner Tract in trust in light of the above and foregoing. (*Id*.)

B. The Conduct of the Secretary in Taking the Shriner Tract in "Trust" Was Not Authorized by P.L. 602, and therefore Exceeded the Secretary's Delegated Authority Such That Sovereign Immunity Does Not Bar this Action for Judicial Review of the Agency's Decision

There is no question that in the complaint, the Kansas Parties allege the Secretary exceeded his statutory authority in taking the land into trust pursuant to P.L. 602, because the facts and circumstances do not justify that mandatory taking. (AA at 38-55). The Kansas Parties have always maintained that the purchase price for the Shriner Tract was in reality $325,000, that the Wyandottes engaged in conduct in which they attempted to disguise this real purchase price, and that, in any event, the Wyandotte Tribe did not have $180,000 in actual P.L. 602 funds with which to make a purchase of land for even that amount.

If these facts are proved, then clearly the Secretary was acting outside his statutory authority in attempting to take the Shriner Tract in "trust" as an act mandated by P.L. 602, since in fact it was not. To the extent the Secretary's actions exceeded his delegated authority, as alleged in the Complaint, "they are not, of course, the actions of the United States, and, therefore, a suit against the officer with respect to such actions is not in effect a suit against the United States." *Zager v. United States*, 256 F. Supp. 396 (E.D. Wis. 1966). Otherwise stated,

courts have long recognized "that sovereign immunity does not bar an action for judicial review of an agency decision where (1) the government's officer's powers are limited by statute and his actions are ultra vires . . .". *State of Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9th Cir. 1994). The effect of this is that the sovereign immunity exception for Indian lands under §2409a of the Quiet Title Act is not a bar because sovereign immunity is not a defense where the Secretary's conduct exceeded his delegated statutory authority.

Here, the Secretary's conduct cannot be attributed to the United States as the sovereign because the Secretary, at least according to the allegations contained in the Complaint, had no power to take the land in trust under P.L. 602 and sought not to and did not exercise his discretionary powers granted him pursuant to the Indian Organization Act, 25 U.S.C. §465, and did not follow his own binding regulations set forth in 25 C.F.R. §151.10.

For this reason as well, sovereign immunity under the Quiet Title Act is not a bar to the claims in the Complaint. The district court erred and its decision should be reversed.

CONCLUSION

The District Court erred in applying the sovereign immunity exception under the Quiet Title Act. The time to determine the applicability of sovereign immunity was at the time the lawsuit was filed. Here, the lawsuit was filed prior to taking the

land into "trust." The Secretary has previously agreed that this Court has jurisdiction to pursue this matter and the Secretary has likewise affirmatively represented to this Court that in fact the land is not in "trust" until the final judicial resolution of the issues timely raised in the Complaint.

The district court's analysis resulting in the application of the sovereign immunity defense under 2409a of the Quiet Title Act is unavailing, contrary to law and should be rejected.

Likewise, the Complaint raises the claim that the Secretary exceeded his delegated statutory authority in taking the land in trust under P.L. 602 under the facts and circumstances discussed above and alleged in the Complaint. To that extent, the Secretary did not have authority to do so, and his actions cannot be deemed the actions of the sovereign. For that reason as well, a sovereign immunity defense under the Quiet Title Act is unavailable.

The decision of the district court should be reversed and this matter remanded for further proceedings on the merits of the issues raised in the Complaint as to whether the Shriner tract was purchased with only PL 602 funds.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13,925 (with footnotes) words.

I relied on my word processor to obtain the count and it is a Microsoft Word program.

/s/ Mark S. Gunnison
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STATEMENT REGARDING ORAL ARGUMENT

The Kansas Parties believe that oral argument may aid the Court in understanding the issues presented herein due to the procedural and factual history involved in this matter and the legal issues raised.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to 10th Circuit Emergency General Order, October 20, 2004, as amended on August 10, 2007, I certify that:

(a) all required privacy redactions have been made (none were necessary) and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(b) the digital submissions have been scanned for viruses with the most recent version of McAfee VirusScan Enterprises, version 8.0.0, updated through December 1, 2008, and according to the program, are free of viruses.

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