IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WYANDOTTE NATION, Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior, Defendant, -and- STATE OF KANSAS, Defendant-Intervenor.	Case No. 11-CV-02656-JAR-DJW

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS STATE OF KANSAS'S CROSS-CLAIMS

The Defendant-Intervenor State of Kansas's cross-claims against the Secretary of the Interior in the above-captioned action should be dismissed. The State has failed to identify an applicable waiver of sovereign immunity or establish that it has standing under Article III of the Constitution. The Court therefore lacks jurisdiction. Similarly, the State has failed to identify a private right of action for the claims it brings. If the State has intended to bring claims under the Administrative Procedure Act (APA)—an intent that is not stated in the cross-claims—those efforts also fail. The State has not established how it is aggrieved by any of the Secretary's actions, nor has it identified a final agency action that would allow it to state a claim under the APA. And any effort by the State to compel a specific outcome on Plaintiff Wyandotte Nation's

application is nothing more than an effort to substitute itself (or this Court) as the initial decision-maker despite Congress's delegation of such authority to the Secretary of the Interior.

BACKGROUND

In April 2006, the Wyandotte Nation ("Wyandotte" or "Tribe") renewed a previous application for the Secretary of the Interior to acquire 10.53 acres of land in Park City, Kansas, ("Park City Land") in trust for the Wyandotte's benefit under Public Law No. 98-602. *See* Pl.'s Compl. ¶¶ 27–32 (ECF No. 1). Public Law 98-602, 98 Stat. 3149 (1984), "provid[es] for the appropriation and distribution of money in satisfaction of judgments awarded to the Wyandottes by the Indian Claims Commission and the Court of Claims. The judgments were compensation for lands in Ohio that the Wyandottes had ceded to the United States in the 1800s." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1255 (10th Cir. 2001) (internal citations omitted). As relevant to the Wyandotte's and State of Kansas's claims here, Congress directed that "$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Tribe." Pub. L. 98-602, § 105(b)(1), 98 Stat. at 3151. The Wyandotte seek to have the Park City Land acquired in trust under Public Law 98-602 so that the Tribe can open a casino on the property.[1] *See* Resolution No. 06-04-13 (Apr. 13, 2006) (ECF No. 6–4). The Indian Gaming Regulatory Act only authorizes Indian gaming on "Indian lands," which can include lands held in trust by the United States for the benefit of a tribe. *See* 25 U.S.C. §§ 2703(4), 2710(d), 2719.

[1] The Wyandotte's application for the Park City Land to be acquired in trust is separate from its previous application relating to the "Shriner Tract," the trust acquisition of which was subject to years of litigation in this Court and the United States Court of Appeals for the Tenth Circuit. *See Gov. of Kan. v. Norton*, 430 F. Supp. 2d 1204, 1207–10 (D. Kan. 2006) (detailing the procedural history of that prior litigation).

Dissatisfied with the amount of time the Department of the Interior is taking to review the Park City Land application, the Tribe filed suit on July 26, 2011, under the Mandamus Act (28 U.S.C. § 1361), the Administrative Procedure Act (5 U.S.C. § 706(1)), and the Department of the Interior's alleged fiduciary responsibilities, claiming that the Secretary of the Interior has unreasonably delayed an allegedly mandatory duty to accept title and hold the Park City Land in trust for the Tribe's benefit. *See* Pl.'s Compl. ¶¶ 33–50. The Tribe asks the Court to direct the Secretary "immediately to accept trust title to the Park City Land and hold it in trust for the benefit of the [Wyandotte] . . . ." Pl.'s Compl. Prayer for Relief ¶ 1; *see* Pl.'s Compl. ¶¶ 39, 44. The Secretary's review of the Tribe's application remains on-going.

On April 11, 2012, the Court granted the State of Kansas's motion to intervene as a defendant. *See* April 11, 2012, Order (ECF No. 41). The State's answer in intervention also brings counterclaims against the Wyandotte and cross-claims against the Secretary. *See* Counterclaim/Cross-Claim for Declaratory and Injunctive Relief ("State's Cross-cl.") ¶¶ 44–58 (ECF No. 44).[2] The State seeks the opposite relief of that sought by the Tribe: declaratory relief and an injunction prohibiting the Secretary from acquiring the Park City Land in trust. *See* State's Cross-cl. ¶¶ 46, 49, 57. After the Court granted the State's motion to intervene, the parties conferred and agreed that any jurisdictional issues with respect to the State's counterclaims and cross-claims should be resolved prior to the Court addressing the merits of the Wyandotte's complaint or, to the extent the Court determines it has jurisdiction, the State's counterclaims and cross-claims. The Court therefore vacated the prior summary judgment briefing schedule. *See* April 18, 2012, Order (ECF No. 43).

[2] The allegations associated with the State's counterclaims and cross-claims begin on page 10 of its Answer, which is found on the docket at ECF No. 44.

STANDARD OF REVIEW

"[C]ross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration . . . . [and] are governed by the same rules as direct suits." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). The Secretary brings this motion under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Federal courts are courts of limited jurisdiction that may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). In a suit where the United States or one of its agencies is a defendant, a waiver of sovereign immunity is a prerequisite to subject matter jurisdiction. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006). The party invoking federal jurisdiction has the burden of proving jurisdiction exists. *See Kokkonen*, 511 U.S. at 377; *Ely v. Hill*, 35 Fed. Appx. 761, 763 (10th Cir. 2002). Federal Rule of Civil Procedure 12(h)(3) requires dismissal of any claim for which "the court determines at any time that it lacks subject-matter jurisdiction . . . ." Fed. R. Civ. P. 12(h)(3).

Additionally, a cross-claimant must "show[] that [she] is entitled to relief," Fed. R. Civ. P. 8(a)(2), by identifying "either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). At the motion to dismiss stage, "[t]he court's function . . . is not to weigh potential evidence that the parties might present at trial, but to assess whether *the [cross-claimant's] complaint alone* is legally sufficient to state a claim for which relief may be granted." *Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993) (citation and internal quotation omitted).

ARGUMENT

The State of Kansas's cross-claims against the Secretary should be dismissed because they are speculative, untimely, and attempt to inappropriately place the merits of the Wyandotte's application before the Court. The problems with the State's cross-claims can be articulated in a myriad of ways: failure to identify a waiver of sovereign immunity; lack of standing; lack of ripeness; failure to state a claim; or requested relief that is contrary to prudential limitations on judicial review of on-going agency proceedings. Regardless of the chosen path, however, the result is the same. Though the State may properly be an Intervening Defendant in the Wyandotte's suit, its cross-claims against the Secretary must be dismissed.

I. The State has Failed to Identify an Applicable Waiver of the United States' Sovereign Immunity.

A waiver of sovereign immunity is a prerequisite to subject matter jurisdiction for claims against the United States. *High Country Citizens Alliance*, 454 F.3d at 1181. Any waiver of sovereign immunity must be express. *United States v. King*, 395 U.S. 1, 4 (1969). The State of Kansas, as the party bringing cross-claims against the Secretary, holds the burden of establishing federal court jurisdiction. *See Kokkonen*, 511 U.S. at 377. Where the party asserting claims against the United States has failed to identify an applicable waiver of sovereign immunity, the claims must be dismissed. *See Fostvedt v. United States*, 978 F.2d 1201, 1204 (10th Cir. 1992).

Here, the State has failed to identify <u>any</u> waiver of sovereign immunity, let alone one that would apply to its cross-claims. Kansas references several statutory provisions as providing this Court with jurisdiction. *See* State's Cross-cl. ¶ 1. But none of them waive the United States' immunity from suit. Sections 1331 and 1362 to Title 28 of the United States Code are general jurisdiction statutes and do not constitute waivers. *High Country Citizens Alliance*, 454 F.3d at 1181 (28 U.S.C. § 1331); *Scholder v. United States*, 428 F.2d 1123, 1125 (9th Cir. 1970) (28

U.S.C. § 1362). Nor does the Declaratory Judgment Act, 28 U.S.C. § 2201. *See United Tribe of Shawnee Indians v. United States*, 55 F. Supp. 2d 1238, 1243 (D. Kan. 1999). Sections 465 and 2719 to Title 25 of the United States Code do not even reference district court jurisdiction, and certainly do not include language that explicitly waives the United States' sovereign immunity.[3] *See* 25 U.S.C. §§ 465, 2719. The same is true for Public Law 98-602. *See* 98 Stat. 3149. For those reasons alone, the State's cross-claims should be dismissed.

II. The State Lacks Standing to Bring its Cross-Claims.

Even if Kansas had identified a waiver of the United States' sovereign immunity, its cross-claims would still require dismissal because the State lacks standing. The standing requirement is derived from Article III's limitations on federal court jurisdiction.[4] *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc. (TOC),* 528 U.S. 167, 180 (2000); *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1233 (10th Cir. 2010). To establish standing, a plaintiff must demonstrate (1) an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) a causal connection between the injury and the conduct of which the plaintiff complains; and (3) that the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotations omitted). The elements of standing are "not mere pleading requirements but rather

[3] The State also lists the Department of the Interior regulations at 25 C.F.R. § 151.12 as a basis for jurisdiction. But only Congress can waive the United States' sovereign immunity. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992).

[4] The standing inquiry also includes prudential elements. *See Wilderness Soc'y v. Kane Cnty., Utah*, 632 F.3d 1162, 1168 (10th Cir. 2011). But the Court need not reach that inquiry given the State's failure to demonstrate Constitutional standing. *Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1224 n.7 (10th Cir. 2008).

an indispensable part of [a party's] case . . . ." *Id.* at 561. "The requirement of injury in fact is a hard floor of Article III jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Here, Kansas's cross-claims do not even allege a concrete and particularized injury-in-fact. That failure alone should result in the dismissal of the cross-claims. The closest the State comes is alleging an irreparable harm related to its request for injunctive relief. *See* State's Cross-cl. ¶ 58. The State claims that once the Park City Land is acquired in trust, the Quiet Title Act's Indian lands exception, 28 U.S.C. § 2409a, preserves the United States' immunity from suit. *See* State's Cross-cl. ¶ 58; *Gov. of Kan. v. Kempthorne*, 516 F.3d 833, 843 (10th Cir. 2008).[5] But any alleged injury associated with a potential loss of the opportunity for judicial review is speculative. It could only occur if the Secretary first determines that Public Law 98-602 funds were used to purchase the Park City Land and that the Public Law therefore requires that the land be acquired in trust for the Tribe. *See* Pub. L. 98-602, § 105(b)(1), 98 Stat. at 3151 ("$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Tribe."). That determination has not been made. And even if the Secretary were to make such a determination, the Department would notify the public and wait a minimum of thirty days from that notification before acquiring title. *See* 25 C.F.R. § 151.12(b).

[5] The question of whether suits challenging the United States' acquisition of land in trust for Indian tribes after the United States acquires title are actions under the Administrative Procedure Act or the Quiet Title Act is currently before the United States Supreme Court. *See Salazar v. Patchak*, Nos. 11-246, 11-247 (U.S. 2011). The United States Court of Appeals for the Tenth Circuit has interpreted the Quiet Title Act as applying to such actions, thus implicating that Act's preservation of the United States' sovereign immunity for challenges involving Indian lands. *See Gov. of Kan.*, 516 F.3d at 843. The United States believes the Tenth Circuit's interpretation to be the correct one.

The interests that the State articulated in its motion to intervene also do not establish an injury-in-fact. *See* Statement of Points and Auths. in Supp. of the State of Kansas' Mot. to Intervene ("Mot. to Intervene") 4–6 (ECF No. 7). Kansas claimed that, if the Park City Land is acquired in trust, the State will lose regulatory control over the land and could lose revenue if the Wyandotte's planned casino out-competes a nearby State-owned casino. *See* Mot. to Intervene at 4–5. But those claimed harms are also contingent upon the Secretary determining that Public Law 98-602 requires the Park City Land to be acquired in trust for the Wyandotte. Only if the Secretary makes such a determination would the State's alleged harms rise to anything other than speculation. Should the Secretary ultimately deny the Wyandotte's application, the State's feared harms will simply never occur. The alleged injuries are therefore insufficient to demonstrate standing. *Cf. St. Croix Chippewa Indians of Wis. v. Kempthorne*, No. 07-cv-2210-RJL, 2008 WL 4449620 at *7 (D.D.C. Sept. 30, 2008) (dismissing action seeking to prevent a decision on an application to have land acquired in trust because plaintiff had failed to demonstrate an injury from the government's ongoing consideration), *aff'd*, 384 Fed. Appx. 7 (D.C. Cir. 2010).

Absent a determination by the Secretary that Public Law 98-602 requires the acquisition of the Park City Land in trust, the State's cross-claims amount to a request for an advisory opinion as to what determination the law may or may not require the Secretary to reach on the application. Indeed, the State's cross-claims even seek declaratory and injunctive relief on the question of whether the Park City Land can be acquired in trust under the authority Congress delegated to the Secretary in the Indian Reorganization Act, 25 U.S.C. § 465, an issue that is not even currently before the Secretary. *See* State's Cross-cl. ¶¶ 47–49, 54–56. Federal courts lack jurisdiction over such hypothetical claims. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

More simply, only if the Secretary determines that Public Law 98-602 requires the Park City Land to be acquired in trust can the State's potential claims against the Secretary be ripe. The "ripeness doctrine is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 n.18 (1993). In its Constitutional form, where a threatened injury is not imminent, the Article III requirements for a case or controversy are not satisfied. *Cf. Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (quoting *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1432, 1428 (D.C. Cir. 1996)). Because the Secretary's ultimate determination on the Wyandotte's application remains unknown, any harm that may inure to the State from one potential outcome of the Secretary's review does not rise to the level of an imminent, concrete, and particularized injury-in-fact that is necessary to establish federal court jurisdiction.

IV. The State Could Not Bring its Cross-Claims Under the Administrative Procedure Act.

The State's cross-claims against the Secretary must also be dismissed because the State has failed to identify a viable cause of action. "As the Supreme Court has observed, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'" *Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1232 (10th Cir. 2003) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, (1979)). The State's cross-claims reference the Declaratory Judgment Act (28 U.S.C. § 2201); Public Law 98-602; the Indian Reorganization Act and a portion of its implementing regulations (25 U.S.C. §465; 25 C.F.R. § 151.12); and the Indian Gaming Regulatory Act (25 U.S.C. §465). *See* State's Cross-cl. ¶¶ 1, 44–58. But none of those statutes include a private right of action against the Secretary. A request for declaratory judgment "is not cognizable as a

separate cause of action." *Walpin v. Corp. for Nat'l & Cmty. Serv.*, 718 F. Supp. 2d 18, 24 (D.D.C. 2010) (citation and internal quotation omitted). Public Law 98-602 does not include language that can be construed as granting a cause of action. *See* 98 Stat. 3149. The Indian Reorganization Act does not give rise to a cause of action. *See Beams v. Norton*, 327 F. Supp. 2d 1323, 1330 (D. Kan. 2004). And nowhere does the Indian Gaming Regulatory Act provide a private cause of action to directly sue the Secretary of the Interior for a violation of its provisions. *See Hartman*, 319 F.3d at 1232–33 (discussing caselaw and statute); *compare* 25 U.S.C. § 2710(d)(7)(A) (granting United States district courts jurisdiction over certain actions related to Tribal-State gaming compacts).[6] Because the State has not identified a cause of action, its cross-claims must be dismissed. *See Bryson*, 534 F.3d at 1286; *Stevens v. U.S. Sprint Tel. Co.*, 755 F. Supp. 972, 972 (D. Kan. 1991).

Though the State does not allege the statute as a basis for its cross-claims, the APA does provide a cause of action for challenges to certain federal agency actions. *See* 5 U.S.C. §§ 704, 706. But the APA is not applicable to the State's cross-claims. First, the APA's waiver of sovereign immunity does not apply to the circumstances here. Second, Kansas has not identified a "final agency action" that would be subject to judicial review under the APA. And, third, the APA does not authorize judicial review of on-going agency administrative proceedings.

[6] The State also references Federal Rule of Civil Procedure 65 as part of its cross-claims. *See* State's Cross-cl. ¶¶ 51–58. But the Federal Rules of Civil Procedure do not expand federal court jurisdiction. *See* Fed. R. Civ. P. 82; *see also McDonald v. Am. Red Cross*, 505 F. Supp. 2d 143, 148 n.6 (D.D.C. 2007) (holding that plaintiff was not entitled to injunction where he had not established a cause of action for the underlying claim).

A. The APA's Waiver of Sovereign Immunity would be Inapplicable Because the State is not Aggrieved by the On-Going Review of the Tribe's Application.

Even if the State had brought suit under the APA, the State still would not have identified an applicable waiver of sovereign immunity. The APA does contain such a waiver. *See* 5 U.S.C. § 702; *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006). But, in determining whether it applies to a given claim, that waiver "must be unequivocally expressed[,] . . . construed strictly in favor of the sovereign[,] . . . and not enlarged . . . beyond what the language requires." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992) (citations and internal quotations omitted). Here, the APA's waiver does not apply to the State's claims. The APA's waiver states that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States

5 U.S.C. § 702 (emphasis added). Thus, to bring a claim under the APA, "the prospective [cross-claimant] must show that [the] agency action has caused him to suffer 'legal wrong,' or that he is 'adversely affected or aggrieved' by that action." *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1055 (10th Cir. 1993) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). The State has not demonstrated how it is "suffering legal wrong" or is "adversely affected or aggrieved" by the Secretary's on-going review of the Wyandotte's application. As described above, the State's claimed harms all rely upon a presumption that the Secretary will determine Public Law 98-602 requires the Park City Land to be acquired in trust. But the State

would only be aggrieved—and the APA's waiver of sovereign immunity implicated—if the Secretary makes such a determination. Indeed, to the extent the State seeks to prevent the land from being acquired in trust, the State is actually benefitted by the fact that a determination has yet to be made.

B. The State has not Identified an Agency Action that is Reviewable Under the APA.

Assuming the APA's waiver does apply—which it does not—Kansas's cross-claims would still require dismissal because the State has not identified an agency action for this Court to review. Only "final agency action" is subject to judicial review under the APA. *See* 5 U.S.C. § 704; *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55, 61–62 (2004) ("Where no other statute provides a private right of action, the 'agency action' complained of must be '*final* agency action.'"); *accord Kansas v. United States*, 249 F.3d 1213, 1222 (10th Cir. 2001) ("To establish statutory standing under § 702 of the APA, a plaintiff must first identify 'final agency action.'").[7] In order to determine the finality of an agency action, courts "look to [1] whether its impact is direct and immediate; [2] whether the action marks the consummation of the agency's decisionmaking process; and [3] whether the action is one by which rights or obligations have been determined, or from which legal consequence will flow." *Miami Tribe v. United States*, 198 Fed. Appx. 686, 690 (10th Cir. 2006) (quoting *Colo. Farm Bureau Fed'n v. U.S. Forest*

[7] The APA also authorizes judicial review to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Wyandotte Nation bases its complaint against the Secretary, in part, on that provision, seeking to compel action on its application. *See* Pl.'s Compl. ¶¶ 33–50. The APA requires that all federal agencies conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555(b). Thus, while certain of the Wyandotte's requested relief against the Secretary may run afoul of the APA, the Wyandotte, unlike the State, can present a conceivable legal theory for its claims against the Secretary with respect to on-going review of the application.

Serv., 220 F.3d 1171, 1173–74 (10th Cir. 2000)). The burden of proving the agency action's finality is on the party seeking judicial review. *Miami Tribe*, 198 Fed. Appx. at 690.

The State's cross-claims do identify an agency action that meets the APA's prerequisite for finality. Notably, the State does not even attempt to identify an agency action that it is asking the Court to review. And, until the Secretary actually makes a determination on the application, the State likely cannot identify one. As detailed above, the State would only impacted by the Secretary's review of the Wyandotte application if the Secretary determines that Public Law 98-602 requires the acquisition of the Park City Land in trust for the Wyandotte. And, because the Secretary's review of the application is still on-going, there has yet to be a "consummation of the agency's decision-making process." Similarly, until that process does reach its consummation, the agency's review of the Wyandotte application does not determine any rights or obligations, or result in any legal consequences for the State. The State therefore has no viable claim under the APA.

C. The State's Cross-Claims Seek to Remove from the Secretary the Delegated Decision-making Authority in Public Law 98-602.

Absent a final agency action that Kansas could challenge under the APA, the State's cross-claims effectively seek to supplant the Secretary's decision-making under Public Law 98-602 with that of the State or the Court. Such a request is not only outside the scope of judicial review under the APA, but is also contrary to general principles of administrative law.

First, the State's cross-claims conflict with the prudential limits courts have placed on their exercise of injunctive and declaratory judgment remedies, which are discretionary. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Federal courts should be reluctant to entertain requests to exercise that discretion on agency determinations until such a time that "an administrative decision has

been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148–49. Premature adjudication of agency action amounts to judicial involvement in generalized disagreements about agency policies, *see id.* at 148, a role which is contrary to the limited jurisdiction of Article III courts. The United States Court of Appeals for the Tenth Circuit has articulated four factors through which to assess the applicability this "prudential ripeness doctrine":

> (1) Whether the issues in the case are purely legal; (2) whether the agency action is "final agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704; (3) whether the action has or will have a direct and immediate impact upon the [cross-claimant;] and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency.

Mobil Exploration & Producing U.S., Inc. v. Dep't of the Interior, 180 F.3d 1192, 1197 (10th Cir. 1999) (quoting *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 243 (10th Cir. 1991) (quotation and alteration omitted)).

Here, each of those four factors demonstrates why the State's cross-claims require dismissal. Most notably, as discussed above, there is not yet a "final agency action" under the APA. And, before reaching a determination on the Wyandotte's application, the Secretary must consider the factual question of whether the Tribe used Public Law 98-602 funds to purchase the Park City Land. The Wyandotte and the State disagree on the answer to that question. *Compare* Pl.'s Compl. ¶¶ 16, 36 *with* State's Cross-cl. ¶ 45. But the Tenth Circuit has recognized that Congress delegated decision-making on that factual inquiry to the Secretary. *See Sac & Fox Nation*, 240 F.3d at 1263–64 (remanding to the Secretary the question of whether Public Law 98-602 funds were used to purchase the lands at issue in the Shriner Tract litigation); *see also Gov. of Kan. v. Norton*, No. 03-cv-4140-JAR, 2005 WL 1785275 at *4 (D. Kan. July 27, 2005) (same). Allowing the Secretary to complete that decision-making will not harm the State. As

detailed above, the State will not be harmed at all if the Secretary ultimately determines that the acquisition of the Park City Land is not required by Public Law 98-602. If the opposite determination is reached, the State will have an opportunity to challenge that decision. *See* 25 C.F.R. § 151.12(b) (thirty-day public notice period of trust acquisitions).

Second, and for similar reasons, the State's cross-claims conflict with the doctrine of primary jurisdiction. The doctrine "'is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). The doctrine applies when a party asks the court to resolve "[an] issue[] which, under a regulatory scheme, [has] been placed within the special competence of an administrative body." *W. Pac. R.R. Co.*, 352 U.S. at 64. Here, Congress has delegated to the Secretary of the Interior the question of whether a given piece of property was purchased with Public Law 98-602 funds and therefore must be acquired in trust. *See* Pub. L. 98-602 § 105(b)(1), 98 Stat. at 3151; *Sac & Fox Nation*, 240 F.3d at 1263–64. As presently postured, the Secretary of the Interior is caught between two parties, the State of Kansas and the Wyandotte Nation, urging directly opposing conclusions on whether Public Law 98-602 requires that the Park City Land be acquired in trust. But that dispute does not justify moving the inquiry from the administrative process to a judicial proceeding.

CONCLUSION

Based upon the foregoing, the State of Kansas's cross-claims against the Secretary of the Interior should be dismissed.

Respectfully submitted on this 7th day of May, 2012,

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CERTIFICATE OF SERVICE

I certify that on May 7, 2012, I caused the above to be filed using the Court's Electronic Case Filing System, which will send notification of such filing to all parties.

s/ Kristofor R. Swanson
Kristofor R. Swanson