

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 REPLY IN SUPPORT OF MOTION
TO DISMISS STATE OF KANSAS’S CROSS-CLAIMS**

In its response brief, the State of Kansas concedes that “the only proper issue before the Court is whether there has been unreasonable delay under the [Administrative Procedure Act].” Intervenor’s Mem. in Opp’n to Def. Salazar’s Mot. to Dismiss State of Kansas’ Cross-Cls. (“Kansas Resp.”) at 2 (ECF No. 49). Kansas’s only opposition to the motion to dismiss its cross-claims is to assert that the claims are properly before the Court under 28 U.S.C. § 1367. *See* Kansas Resp. at 3–4. Kansas is wrong.

The supplemental jurisdiction statute, while providing federal courts with subject matter jurisdiction over certain claims, does not waive the United States’ sovereign immunity from suit. *See Bortiz v. United States*, 685 F. Supp. 2d 113, 122 n.4 (D.D.C. 2010) (citing *San Juan Cnty.*,

Utah v. United States, 503 F.3d 1163, 1181 (10th Cir. 2007) (en banc)). In this context, 28 U.S.C. § 1367 is similar to other Title 28 provisions that confer general jurisdiction but do not waive sovereign immunity. *See Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992). The case Kansas cites in an attempt to establish jurisdiction did not involve claims against the United States. *See* Kansas Resp. at 3 (citing *Amusement Industry, Inc. v. Stern*, 786 F. Supp. 2d 741 (S.D.N.Y. 2011)). And whether or not the United States has waived sovereign immunity for the Plaintiff Wyandotte Nation's claims is simply irrelevant—each claim against the United States must be grounded in a waiver of sovereign immunity. *Cf. In re Seneca Oil Co.*, 906 F.2d 1445, 1454 (10th Cir. 1990) (noting the court must conduct a jurisdictional inquiry for each claim). The State also ignores the fact that its cross-claims are much broader than those presented by either the Wyandotte's claims or the application upon which the Tribe seeks to compel action. *See* Counterclaim/Cross-Claim for Declaratory and Injunctive Relief ¶¶ 47–49, 54–56 (ECF No. 44). As the United States Supreme Court has clearly stated, “cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration.” *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). Kansas has failed to identify such consent here.

Even assuming a waiver of sovereign immunity, however, the cross-claims would still require dismissal because Kansas lacks Article III standing. Article III requires that the proponent of claims in federal court “have standing to seek each form of relief in each claim.” *Bronson v. Swenson*, 500 F.3d 1099, 1106 (10th Cir. 2007) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 (2006)). Kansas asserts that dismissal of the cross-claims will “irretrievably impair” the State's rights “**if** this Court proceeds to address the substantive merits of the Plaintiff's claims.” Kansas Resp. at 4 (emphasis in original). But speculative claims of

injury are insufficient for purposes of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (requiring claimed injury to be “concrete and particularized”). Further, that injury would result from an action by the Court, not the Secretary, thus failing Article III’s causation requirement. *See id.* at 560 (listing requirement of causal connection between claimed injury and defendant’s conduct). The assertion is also faulty as a practical matter. The Court has granted the State intervenor status, which will allow the State to respond to the Tribe’s arguments as it sees necessary. And a denial of the Wyandotte’s requested relief would avoid the very thing the State fears, a judicial decision requiring the United States to acquire the Park City Land in trust. The State’s cross-claims and requested relief are not necessary for the State to advocate against that outcome.

The State’s response also fails to rebut the Secretary’s argument that the Administrative Procedure Act provides no viable avenue for the cross-claims. Kansas is entirely correct that any efforts by the Wyandotte Nation to have the Court address the merits of its application would fall outside the Court’s jurisdiction. But the Wyandotte’s inclusion of such claims in its Complaint does not open Article III’s doors to the cross-claims that the State brings against the Secretary. The State of Kansas’s cross-claims should therefore be dismissed.

Respectfully submitted this 12th day of June, 2012,

IGNACIA S. MORENO
Assistant Attorney General

s/ Kristofor R. Swanson
KRISTOFOR R. SWANSON
(Colo. Bar No. 39378)
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611

Washington, DC 20044-7611
Tel: 202-305-0248
Fax: 202-305-0506
Email: kristofor.swanson@usdoj.gov

OF COUNSEL:

REBECCA ROSS
DAVID MORAN
Office of the Solicitor
U.S. Department of the Interior
Washington, DC

CERTIFICATE OF SERVICE

I certify that on June 12, 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