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

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

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

STATEMENT REGARDING UNDISPUTED MATERIAL FACTS 2

I. The Secretary's Statement of Undisputed Material Facts 3

II. Response to Plaintiff's Statement 7

STATUTORY AND REGULATORY BACKGROUND 10

I. Land-Into-Trust Statutes Generally 10

II. Public Law 98-602 11

STATEMENT OF QUESTIONS PRESENTED 12

STANDARD OF REVIEW 12

ARGUMENT 14

I. The Department of the Interior Has Not Unreasonably Delayed Consideration of the Wyandotte Nation's Application 15

A. Neither Public Law 98-602 Nor the APA Provides a Statutory Deadline for Agency Action 16

B. The Department Has Not Yet Reached a Conclusion on Whether the Wyandotte Nation Purchased the Park City Land with Public Law 98-602 Funds 17

C. The Department's On-Going Review of the Wyandotte Nation's Application is Well-Reasoned 18

1. The Record Does Not Demonstrate a "Breakdown of Regulatory Processes" 19

2. The On-Going Review is Grounded in Efforts to Adequately Assess the Application's Factual and Legal Validity 21

3. The Funds Question is the Keystone of the Secretary's Authority and Occurs in the Context of the Wyandotte's Intent to Open a Casino on the Property 24

II. There Is No Clear, Undisputed Duty From Which the Court Can Compel the Secretary to Accept the Park City Parcel In Trust 25

III. The Wyandotte Nation Has Failed to State a Claim for Breach of Fiduciary Duty 28

CONCLUSION 29

INTRODUCTION AND SUMMARY

The Department of the Interior's timeline for review of the Wyandotte Nation's application for the United States to accept land in trust for the Tribe has been well-reasoned and fully within agency discretion. The Wyandotte's request for an order compelling the Secretary of the Interior to accept the land in trust is unwarranted for three reasons.

First, the Department has not unreasonably delayed its review of the Wyandotte Nation's application. Congress did not identify a date by which the Department must act upon the application, and the review time to date grows primarily from the Department's efforts to carefully assess the application's legal and factual validity in light of concerns raised by the State of Kansas. Some of those concerns—including whether the Wyandotte purchased the land with funds provided to the Tribe by Public Law 98-602—were subject to years of litigation following a prior trust acquisition. The Department's careful review of the application in that context should not be subverted.

Second, even if the Department's review timeline were unreasonable, the Court lacks the authority to grant the relief that the Wyandotte Nation seeks. Public Law 98-602 does not contain a clear, undisputable duty for the Secretary to simply to accept land in trust at the Wyandotte's request. Instead, the statute first requires the Department to engage in a certain level of factual and legal analysis. The Supreme Court has made clear that the Administrative Procedure Act grants federal courts the authority to compel only agency actions that the agency is required to take. Here, there is no requirement for the Secretary to take the action that the Wyandotte seek to compel.

Third, the Wyandotte have failed to state a claim for which relief can be granted with respect to the alleged violations of fiduciary duties. That claim must therefore be dismissed.

STATEMENT REGARDING UNDISPUTED MATERIAL FACTS

Pursuant to D. Kan. Rule 56.1, the Secretary of the Interior hereby submits his Statement of Undisputed Material Facts in support of his cross-motion, and responds to the Wyandotte Nation's Statement. The Wyandotte Nation's suit involves claims under the Administrative Procedure Act (APA), 5 U.S.C. § 706. *See* Compl. ¶¶ 40–44 (ECF No. 1). Under the APA, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "As all material facts are within the administrative record, no material issues of fact are in dispute." *LeBoeuf, Lamb, Greene & MacRae, LLP v. Abraham*, 215 F. Supp. 2d 73, 84 n.5 (D.D.C. 2002). The record review principle applies with equal force to claims of undue delay brought under 5 U.S.C. § 706(1), as the Wyandotte Nation brings here.[1] *See Sierra Club v. U.S. Dep't of Energy*, 26 F. Supp. 2d 1268, 1272 (D. Colo. 1998). The Secretary nonetheless provides the fact statement and response below to comply with D. Kan. Rule 56.1.

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[1] D. Kan. Rule 83.7.1 governs judicial review of administrative agency decision-making and, given record review principles, does not require that statements of undisputed material facts accompany the parties' briefs. Because the Department of the Interior has yet to make a decision on the Wyandotte Nation's application, it is possible that local rule 83.7.1 does not apply to these proceedings, making traditional motions for summary judgment the proper procedural mechanism for addressing the merits. But judicial review of the Wyandotte Nation's Complaint is still limited to the agency's administrative record. *See Sierra Club*, 26 F. Supp. 2d at 1272. The Secretary lodged the Department of the Interior's Administrative Record on January 19, 2012 (ECF No. 31), and, given that the Department's review of the Wyandotte Nation's application has continued, supplemented the Administrative Record on February 23, 2012, and September 10, 2012 (ECF Nos. 34, 59). The Secretary herein cites to the Administrative Record using the Bates numbers that appear on the lower right-hand corner of each page: "AR00xxxx."

I. The Secretary's Statement of Undisputed Material Facts

The Secretary provides the following summary of the facts contained in the Department of the Interior's Administrative Record:

1. In the early 1990s, the Wyandotte Nation of Oklahoma purchased approximately 10.5 acres of land near Park City, Kansas ("Park City Land").[2] *See* AR001581–82. Park City is located north of Wichita along U.S. Interstate Highway 135. *See* AR000028, AR000790, AR000792 (maps).

2. On April 13, 2006, the Wyandotte Nation filed an application with the Bureau of Indian Affairs Eastern Oklahoma Region to accept the Park City Land in trust for the benefit of the Wyandotte. AR001179–80. The Wyandotte Nation intends to use the Park City Land to operate a casino. AR001182–83; AR000082–86.

3. In its 2006 application, the Wyandotte Nation requested that the land be accepted in trust under authority granted to the Secretary of the Interior by the Indian Reorganization Act, 25 U.S.C. § 465. AR001179; AR001182–83 (tribal resolution). In May 2008, the Tribe changed course to argue that the Department could accept the land in trust under the authority in Public Law 98-602, 98 Stat. 3149 (1984). AR001369–74.

4. If the Wyandotte's application is approved, the Park City Land would constitute the second piece of property to be accepted in trust under Public Law 98-602. *See* AR000314 (portion of previous application). The Department of the Interior has previously accepted in trust for the Wyandotte land near Kansas City, Kansas, known as the "Shriner Tract." *See* AR001774. That decision and the Wyandotte's planned use for that land were subject to more than a decade

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[2] The Park City Land is also referred to as the "Coliseum Center Property" in certain places in the Administrative Record. *See, e.g.,* AR001173.

of litigation in this Court and the United States Court of Appeals for the Tenth Circuit.[3] AR001772–76.

5. On January 30, 2009, after completing its initial review of the Wyandotte's Park City application, the Eastern Oklahoma Region forwarded the application and a regional recommendation to the Department of the Interior's Central Office in Washington, D.C. AR001173–77.

6. Within a few months, Department staff in the Central Office had begun their review, and soon identified two issues surrounding the question of whether the Wyandotte had used funds allocated to the Tribe in Public Law 98-602 to purchase the Park City Land. AR001564. The first issue involved a discrepancy in the date on which the Wyandotte purchased the land and the source of the funds; the second involved a discrepancy in the purchase amount. AR001564.

7. Central Office staff met with the Wyandotte Nation in July 2009 to discuss the issues, and the Wyandotte submitted additional information a month later on August 28, 2009. AR001581–88. Based upon that information, the Wyandotte stated that the land had been purchased using $25,000 of Public Law 98-602 funds on November 24, 1992. AR001581–88. As a result, Department staff believed the two issues had been resolved. AR001605.

8. Thereafter, Department staff worked to finalize a recommendation to agency decision-makers on the application. *See, e.g.,* AR001620; AR001669; AR001705; AR001721; AR001769; AR001843.

[3] A summary of the litigation surrounding the Shriner Tract can be found in the memorandum supporting the Secretary's motion to transfer venue for the present action to the District of Kansas. *See* ECF No. 6-1.

9. By late October 2010, the application was ready for final review and decision-making by the Assistant Secretary for Indian Affairs. AR002154–55; AR002164 (noting documents that were "Ready for [Assistant Secretary-Indian Affairs Larry Echo Hawk's] signature").

10. In the interim, however, the State of Kansas had sent a September 13, 2010, letter to the Department identifying several concerns the State had now that it was clear the Wyandotte application was made under Public Law 98-602, rather than the Indian Reorganization Act. AR001960–2133. The State presented what it viewed as several statutory obstacles to acquiring the land under Public Law 98-602. AR001964–65 (summarizing arguments). The State later supplemented its letter with additional information in support of its statutory analyses. AR002218–2385; AR003110–3375.[4]

11. Upon receipt of the State's letter, the Department's Central Office undertook an initial review of the State's concerns. AR002142–43; AR002144. After a further meeting with the State to discuss the issues, the Department decided on November 3, 2010, to assess the State's legal interpretations in more detail before making a final decision on the Wyandotte application. AR002167; AR002168; AR002400.

12. The Department met with the Wyandotte Nation in December 2010 to discuss the State's concerns, after which the Wyandotte provided a written response. AR002418–24. The Department then revisited its analysis of whether Public Law 98-602 could provide the authority for the Park City fee-to-trust acquisition. *See* AR002437; AR002502; AR002619; AR002650; AR002759.

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[4] Several of the entries on the index for the Department of the Interior's Second Administrative Record Supplement are labeled with an incorrect starting Bates number. *See* ECF No. 59-2. That error does not affect the Secretary's citations here, which are to the actual documents.

13. Dissatisfied with the amount of time the Department was taking to review the application, the Wyandotte Nation filed this 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* 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] . . . ." Compl. Prayer for Relief ¶ 1; *see* Compl. ¶¶ 39, 44.

14. The Department completed its renewed legal analysis near the end of 2011, and the application was again nearing a decision in early 2012. AR002794; AR003384. On February 14, 2012, Department staff briefed the Department of the Interior Solicitor on their analyses and recommendation. AR003407, AR003678.

15. On February 16, 2012, the State of Kansas sent another letter to the Department. AR004022–55. The State highlighted what it viewed, based upon its review of the Administrative Record in this litigation, to be a previously-unknown expenditure of Public Law 98-602 funds. AR004022–25. According to the State, that fact, if accurate, would undermine previous efforts to account for expenditures of Public Law 98-602 funds. AR004024–25. The Department forwarded the State's letter to the Wyandotte Nation. AR004056.

16. In response to the State's letter, the Department has initiated a further review of the funds expenditures, which includes consultation with the Department's Office of Financial Management. AR003890; AR003951; AR004008.

17. The Secretary's review of the Tribe's application remains on-going. *See* AR004021.

II. Response to Plaintiff's Statement

The majority of the Wyandotte Nation's Statement of Undisputed Material Facts quotes or repeats information from the Department of the Interior's Administrative Record. *See* Pl.'s Mem. of Law in Support of Mot. for Summ. J. ("Wyandotte Br.") at 3–19 (ECF No. 61). The Secretary, however, makes the following clarifications to the Wyandotte Nation's Statement:

1. In Paragraph 1 of its Statement, the Wyandotte Nation alleges that on November 24, 1992, it withdrew $25,000 of Public Law 98-602 funds. The Wyandotte accurately cite the Administrative Record document, which is a letter from their counsel to the Department of the Interior. *See* AR001581–88. The Department of the Interior, however, has yet to make a final determination on whether, or the manner in which, the Wyandotte purchased the Park City Land using Public Law 98-602 funds. *See, e.g.,* AR004021.

2. In Paragraph 3 of its Statement, the Wyandotte Nation alleges that, in a February 19, 1993, memorandum, the Department's Tulsa Field Solicitor determined that Public Law 98-602 did not impose a mandatory duty. But the memorandum notes that, at the time, the Wyandotte had agreed to pursue the application under the Secretary's discretionary authority, not Public Law 98-602, making questions relating to Public Law 98-602 "moot." *See* AR000992.

3. In Paragraph 8 of its Statement, the Wyandotte Nation alleges that, on May 20, 2009, the Department determined that the Regional Solicitor had already concluded that the Department's acquisition in trust of the Park City Land was a mandatory acquisition. The Administrative Record documents to which the Wyandotte cite, however, do not support that contention. Regardless, the Department's Assistant Secretary for Indian Affairs holds the decision-making authority for the Wyandotte's application. *See* AR000555 (noting that the Assistant Secretary has not delegated decision-making authority for applications involving

gaming). The recommendation from the Eastern Oklahoma Region notes that the acceptance of the Park City Land in trust can only be mandatory "if the land proposed to be acquired is purchased with the $100,000 indentified as part of the settlement paid to the Tribe and set aside for the purchase of real property." AR001173. The Administrative Record demonstrates that the Assistant Secretary has yet to make a determination on whether the Wyandotte Nation used Public 98-602 funds to purchase the Park City Land. *See, e.g.,* AR004021.

4. In Paragraph 10 of its Statement, the Wyandotte Nation alleges that the two issues identified by Department staff in June 2009 were: when the Park City Land was purchased, and whether the money used to purchase the Park City Land was withdrawn from "the public funds account." The allegation paraphrases the first issue identified in the document to which the Wyandotte cite, but ignores the second. Summarized, the issues were (1) the purchase date and source of funds; and (2) the purchase amount. *See* AR001564.

5. In Paragraph 27 of its Statement, and numerous times thereafter, the Wyandotte Nation references the Department of the Interior's "surnaming" process. The term refers to the Department's internal process for reviewing and approving Department publications, such as correspondence, agency decision documents, or legal memoranda. When a Department official "surnames" a document, this means that such official has approved the document for the limited purpose of that person's role in the deliberative process. The surname process involves multiple Department officials, starting with the original drafter of the document or decision, passing through ever-higher-ranking officials, and ending, finally, with the official holding ultimate decision-making authority.

6. The Wyandotte Nation's Statement repeatedly references Department of the Interior staff by name. To assist the Court in its review of the parties' briefs and the Administrative Record, the Secretary provides the following:

a. Candace Beck, Edith Blackwell, Maria Wiseman, Karen Lindquist, David Moran, Jeffrey Nelson, and Rebecca Ross, were or are attorneys in the Department's Office of the Solicitor, Division of Indian Affairs (DIA), who at various times have been assigned to or supervised review of the Wyandotte Nation's application.

b. Hilary Tompkins is the Department's Solicitor, the highest-ranking attorney in the agency. Pilar Thomas was, and Patrice Kunesh currently is, the Department's Deputy Solicitor for Indian Affairs. Vincent Ward previously served as counselor to the Solicitor, and Ariana Viswanathan works on the Solicitor's administrative staff.

c. Larry Echo Hawk previously served as the Department's Assistant Secretary-Indian Affairs (AS-IA),[5] and Del Laverdure serves as the Deputy Assistant Secretary. Bryan Newland serves as a Policy Advisor to the Assistant Secretary, and Margaret Treadway previously served as a counselor to the Assistant Secretary.

d. David Hayes is the Deputy Secretary of the Interior, and Laura Davis is the Associate Deputy Secretary.

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[5] Mr. Echo Hawk has left the Department of the Interior. Kevin Washburn was sworn in as the Assistant Secretary-Indian Affairs on October 9, 2012.

e. Paula Hart and Nancy Pierskalla are, respectively, the Director and Deputy Director of the Department's Office of Indian Gaming (OIG).

f. Lori Faeth is the Director of the Department's Office of Intergovernmental Affairs. Jordan Finegan serves in that Office.

g. Art Gary previously served as the Department's Deputy Solicitor for General Law and Operations. Ed Keable was previously an Associate Solicitor in the Office of the Solicitor, Division of General Law, and is now the Deputy Solicitor for General Law and Operations.

STATUTORY AND REGULATORY BACKGROUND

I. Land-Into-Trust Statutes Generally

If authorized by an act of Congress, the Secretary of the Interior may hold title to land in trust for the benefit of an Indian tribe. *See* 25 C.F.R. §§ 151.3, 151.9. Generally, such trust acquisition statutes fall into one of two categories. "Discretionary" acquisitions are those for which Congress has delegated to the Secretary the determination of whether the acquisition is appropriate under the circumstances. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001). The most common discretionary acquisition statute is the Indian Reorganization Act of 1934. *See* 25 U.S.C. § 465. Department of the Interior regulations set forth factors the Secretary is to consider in exercising his discretionary authority to acquire land in trust. *See* 25 C.F.R. § 151.10 (on-reservation acquisitions); § 151.11 (off-reservation acquisitions). "Mandatory" acquisitions, on the other hand, are those for which Congress has directed the acquisition of land into trust, often identifying a specific parcel or certain eligibility requirements for the land. *See Sac & Fox Nation*, 240 F.3d at 1261.

When the acquisition statute is "mandatory," most of the regulatory factors applicable to discretionary acquisitions do not apply. *See* 25 C.F.R. §§ 151.10, 151.11. Most notably, the notice and comment provisions in 25 C.F.R. §§ 151.10 and 151.11(d), requiring that the Department notify state and local governments of the fee-to-trust application, are not applicable, and compliance with the National Environmental Policy Act, 42 U.S.C. § 4332, is not required. Further, the Secretary is not required to consider the criteria listed in 25 U.S.C. §§ 151.10(a)–(h) and 151.11(a)–(c). The Secretary, however, still interprets the regulations as requiring public notice of a decision to acquire land in trust (§ 151.12(b)), and internal Departmental guidelines require the Secretary to conduct a contaminant survey on the lands.

Though the Department of the Interior's Assistant Secretary for Indian Affairs has generally delegated decision-making authority for fee-to-trust applications to the Department's regional offices, the Assistant Secretary has not delegated that authority with respect to applications that seek to have the United States accept land in trust for gaming purposes (*e.g.*, to open a casino). *See* AR000555.

II. Public Law 98-602

In 1984, Congress passed Public Law No. 98-602. *See* 98 Stat. 3149 (1984). The legislation:

> provid[ed] 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. Under the 1984 law, Congress directed that 20% of the allocated funds be used and distributed in accordance with a series of directives. Key among those directives . . . was one providing that a sum of $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 such Tribe.

Sac & Fox Nation, 240 F.3d at 1255 (footnote and internal quotations omitted). In relevant part, the statute reads:

> (b) Twenty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 103(b) shall be used and distributed in accordance with the following general plan:
>
> > (1) A sum of $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 such Tribe. . . .

Pub. L. No. 98-602, § 105, 98 Stat. at 3151.

STATEMENT OF QUESTIONS PRESENTED

The Wyandotte Nation's Complaint presents three questions:

1. Whether, when presented with arguments creating uncertainty on the matter, the Department of the Interior's on-going review of the Wyandotte Nation's application to determine, among other things, whether the Wyandotte used Public Law 98-602 funds to purchase the Park City Land amounts to an unreasonable delay of agency action;

2. Whether Public Law 98-602 includes a clear, undisputable duty for the Secretary to accept title to the Park City Land and hold it in trust for the benefit of the Wyandotte Nation; and

3. Whether the Wyandotte Nation can state a claim for violation of fiduciary duty on the part of the Department of the Interior where the Park City Land is not currently held in trust by the United States for the Wyandotte Nation's benefit.

STANDARD OF REVIEW

The Wyandotte Nation's Complaint seeks to compel agency action under both the Administrative Procedure Act (APA), 5 U.S.C. § 706(1), and the Mandamus Act, 28 U.S.C. § 1361. *See* Compl. ¶¶ 33–44. "The availability of a remedy under the APA technically precludes

[the Wyandotte's] alternative request for a writ of mandamus." *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir.1997) (citing *W. Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1059 (10th Cir. 1993)). But the available remedy under both statutes is essentially the same: a mandatory injunction. *Id.*; *see Norton v. S. Utah Wilderness Assoc. ("SUWA")*, 542 U.S. 55, 63–64 (2004).

Judicial review under the APA is based upon "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. As the United States Supreme Court has explained, "the focal point for judicial review [under the APA] should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *accord Fla. Power & Light*, 470 U.S. at 743–44. Thus, even though judicial review rests with a district court, the district court does not act as a fact-finder. *See id.* at 744; *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Instead, "[t]he task of the reviewing court is to apply the appropriate APA standard of review . . . based on the record the agency presents . . . ." *Fla. Power & Light*, 470 U.S. at 743–44 (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971)).

The APA requires that federal agencies conclude matters presented to them "within a reasonable time." 5 U.S.C. § 555(b). Section 706(1) of the APA grants a reviewing court the authority to "compel agency action . . . unreasonably delayed." 5 U.S.C. § 706(1). Where the form of the action itself is not legally mandated, a court may only order the agency to take action, without directing how the agency will act. *See SUWA*, 542 U.S. at 63. The issue of unreasonable delay "cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal*

Council, Inc. v. Norton, 336 F.3d 1094, 1102 (D.C. Cir. 2003). "The ultimate issue . . . [is] whether the time the [agency] is taking to act . . . satisfies the 'rule of reason.'" *Id.*

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

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

Id. (citations omitted).

ARGUMENT

Summary judgment should be granted in favor of the Secretary. The Department of the Interior has not unreasonably delayed its review of the Wyandotte Nation's application. There is no hard statutory or regulatory deadline by which the Department must act. And the Department's review timeline has been based upon efforts to assess the application's factual and legal validity in light of concerns raised by the State of Kansas. That review timeline has been reasonable under the circumstances. Even if the Department had unreasonably delayed its review—which it has not—summary judgment in favor of the Secretary is still required. Rather than requesting a decision on its application, the Wyandotte Nation seeks a court order compelling the Secretary to accept the Park City Land in trust. But Public Law 98-602 does not contain a clear, undisputed duty to take that action. The Court therefore lacks the authority under

the APA to compel the Secretary to so act. Finally, the Wyandotte Nation has failed to state claim for which relief can be granted with respect to the alleged violations of fiduciary duties.

I. The Department of the Interior Has Not Unreasonably Delayed Consideration of the Wyandotte Nation's Application.

A mandatory injunction is a drastic remedy that should be reserved for the most extraordinary circumstances. *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999); *see In re Copper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (in the context of requiring a district court to act). In considering a claim of unreasonable delay, a court must satisfy itself "that the agency has a clear duty to act and that it has 'unreasonably delayed' in discharging that duty." *In re Am. Rivers & Id. Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). The delay must be "egregious" to warrant a judicial order requiring action. *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79 (D.C. Cir. 1984).

To assess whether a delay warrants judicial intervention, the Tenth Circuit has referenced four factors set forth by the D.C. Circuit in *In re International Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992). *See Kim v. U.S. Citizenship & Immigration Servs.*, 551 F. Supp. 2d 1258, 1265 (D. Colo. 2008) (citing *Qwest Comm. Intern., Inc. v. F. C.C.*, 398 F.3d 1222, 1239 (10th Cir. 2005)). Those four factors are: (1) the length of time that has elapsed since the agency came under a duty to act; (2) the reasonableness of the delay in the context of the statute authorizing the agency to act; (3) the consequences resulting from the time that has passed; and (4) "the practical difficulty in carrying out the legislative mandate, or need to prioritize in the face of limited resources." *In re Int'l Chem. Workers*, 958 F.2d at 1149–50

(citations omitted).[6] This inquiry is governed by a "rule of reason," which accounts for the difficulty and complexity of the issue, problems beyond the agency's control, an agency's need to prioritize its own resources, and administrative error. *Cutler v. Hayes*, 818 F.2d 879, 898–99 (D.C. Cir. 1987). The time being taken for agency review should not amount to a "breakdown of regulatory processes." *Id.* at 897 n.156. Here, the Department's on-going review of the Wyandotte Nation's application does not amount to an unreasonable delay.

A. Neither Public Law 98-602 Nor the APA Provides a Statutory Deadline for Agency Action.

Judicial intervention into agency proceedings is not justified simply because the agency is not acting as quickly as a plaintiff would prefer. "There is no 'per se rule as to how long is too long' to wait for agency action." *In re Am. Rivers*, 372 F.3d at 419 (citation omitted). In the absence of a statutory timeline, "[a]n agency's own timetable for performing its duties . . . is due 'considerable deference.'" *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001) (citation omitted); *see also Li v. Chertoff*, 482 F. Supp. 2d 1172, 1178 (S.D. Cal. 2007) (holding that the pace of review is committed to agency discretion so long as reasonable efforts are made). In those situations, courts have found delays of four or five years to be reasonable. *See Mashpee*, 336 F.3d 1094; *In re Monroe Commc'ns. Corp.*, 840 F.2d 942 (D.C. Cir. 1988); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 107–09 (D.D.C. 2005).

Here, there is no statutory or regulatory deadline that requires action on the Wyandotte's application by a date certain. Instead, the Secretary's decision-making timetable is governed by the APA's requirement that federal agencies conclude matters presented to them "within a

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[6] Courts also often refer to a separate D.C. Circuit articulation of the relevant factors in *Telecommunications Research & Action Center*, 750 F.2d at 79–80. *See, e.g., Forest Guardian v. Babbitt*, 174 F.3d 1178, 1191 n.18 (10th Cir. 1999). Under either articulation, the inquiry is essentially the same.

reasonable time." 5 U.S.C. § 555(b). Under those circumstances, the Tenth Circuit has made clear that Section 706(1) of the APA "leaves the courts the discretion to decide whether agency delay is unreasonable." *Forest Guardian*, 174 F.3d at 1190. As set forth below, the time being taken for the Secretary's on-going review here is reasonable, and there is no basis for judicial intervention.

B. The Department Has Not Yet Reached a Conclusion on Whether the Wyandotte Nation Purchased the Park City Land with Public Law 98-602 Funds.

The Wyandotte Nation's arguments and requested relief are all premised on the faulty assumption that the Secretary has already determined that the Tribe purchased the Park City Land using Public Law 98-602 funds. *See, e.g.,* Wyandotte Br. at 51 ("The Secretary has determined the Park City land has been purchased with 602 monies."). In doing so, the Wyandotte ignore the entire basis for the Secretary's on-going review.

As discussed further below, the funds question is vital to whether Public Law 98-602 authorizes, let alone mandates, the Secretary to accept the Park City Land in trust. And the Administrative Record clearly demonstrates that the Department of the Interior has yet to reach finality on the question of whether the Wyandotte used 98-602 funds. After receiving a recommendation from the Eastern Oklahoma Region in early 2009, the Department's Central Office identified the funds question as an outstanding issue. *See* AR001564. By late 2009, Central Office staff believed they had resolved that issue. AR001605. But, after reviewing the Department's Administrative Record in this case, the State of Kansas provided February 2012 comments on what it saw as a discrepancy in the Wyandotte's account statements. *See* AR004022–55. The Department took those comments seriously and informed the Wyandotte Nation that the Department would be undertaking an additional inquiry into the funds question.

See AR004056. Soon thereafter, at the request of the Department's Solicitor, Central Office staff began consultations with the Department's Office of Financial Management on the question. *See* AR003951; AR004008. The Department's assessment remains on-going.

In effect, the Wyandotte confuse the agency's categorization of Public Law 98-602 as a "mandatory" acquisition statute with a determination that 98-602 funds were used to purchase the Park City Land. *See, e.g.,* Wyandotte Br. at 39 n.16 (referencing "Fact #30," which cites AR001722–73); Wyandotte Br. at 41 (citing AR001983–84, which addressed the previous Shriner Tract acquisition). But the Department's use of the descriptive "mandatory" to distinguish Public Law 98-602 and other acquisition statutes from the Secretary's discretionary authority under the Indian Reorganization Act does not, by itself, amount to a determination that acquisition of the Park City Land is mandated. *See Sac & Fox Nation*, 240 F.3d at 1263–64 (recognizing necessary inquiry of whether land was purchased with 98-602 funds). And, even if prior preliminary determinations had been made, it is the Assistant Secretary for Indian Affairs that holds the decision-making authority with respect to the Wyandotte Nation's application. AR000555. The record demonstrates that, given the on-going inquiry into the funds question, Central Office staff have yet to make a formal recommendation to the Assistant Secretary for final determination on whether Public Law 98-602 mandates that the Department accept the Park City Land in trust.

C. The Department's On-Going Review of the Wyandotte Nation's Application is Well-Reasoned.

The rule of reason and other factors demonstrate that the Department's on-going review is far from the type of egregious delay that would warrant an order compelling the Department to act. Rather than a breakdown of the regulatory process, the Department's review reflects a legitimate effort to adequately assess the factual and legal validity of the Wyandotte Nation's

application. That careful review is particularly appropriate given the years of litigation that followed the Secretary's decision to accept trust title to the Shriner Tract. In short, the Department's on-going review is well-reasoned under the circumstances.

1. The Record Does Not Demonstrate a "Breakdown of Regulatory Processes."

The Department's on-going review demonstrates implementation of a careful review procedure rather than a "breakdown of regulatory processes." *Cutler*, 818 F.2d at 897 n.156. The Wyandotte Nation submitted its present application to the Eastern Oklahoma Regional Office in April 2006. AR001179–80. Because the Wyandotte intend to use the Park City Land to open a casino, the Assistant Secretary, rather than the Region, holds the decision-making authority. *See* AR000555. Originally, the Wyandotte requested the acquisition pursuant to the Secretary's discretionary authority under the Indian Reorganization Act, which requires a much more extensive administrative review process. *See* AR001179; 25 C.F.R. § 151.11. In May 2008, the Wyandotte modified its application to instead request the acquisition under Public Law 98-602, AR001369–74, and by January 2009, the Region had sent its recommendation to the Central Office in Washington, D.C. AR001173–77.

Once it received the Region's recommendation, Central Office staff almost immediately began their review. By June 2009, the Central Office had identified two issues that needed to be resolved, AR001564, and met with the Wyandotte later that summer in an effort to resolve them. *See* AR001581–88. Department staff then worked to finalize its recommendation for agency decision-makers, *see, e.g.,* AR001705 (Jan. 5, 2010), and met again with the Wyandotte Nation in March 2010. AR001720. During this period, the Department was also assessing the impacts, if any, of the Supreme Court's then-recent decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). The administrative record demonstrates numerous discussions regarding *Carcieri* during the

spring of 2010. *See, e.g.,* AR001747–60 (listing potentially-impacted land-into-trust applications). The Department eventually determined that the *Carcieri* decision did not impact the Wyandotte Nation's present application. *See* AR002163.

By fall 2010, the staff recommendation package was complete. *See* AR002154–55; AR002164. Concurrently with completion of that recommendation, however, the State of Kansas, which had only recently learned that the Wyandotte were seeking the acquisition under Public Law 98-602 rather than the Indian Reorganization Act, presented the Department with what the State viewed as several statutory obstacles to acquiring the land. AR001964–65 (summarizing arguments). The Department undertook an initial review of the State's concerns and, in November 2010, decided to assess the State's legal interpretations in more detail before making a final decision on the Wyandotte application. *See* AR002142–43; AR002167; AR002168. After meeting with the Wyandotte Nation to provide it the opportunity to respond, *see* AR002418–24, the Department revisited its statutory analysis. *See, e.g.,* AR002650.

Near the end of 2011, the Wyandotte Nation's application was again nearing a decision. *See* AR002794; AR003384. In early 2012, Central Office staff brief the Department of the Interior Solicitor on their analyses and recommendation. AR003407, AR003678. After reviewing the Administrative Record in the present litigation, however, the State of Kansas submitted additional comments on what it believed to be a previously unknown expenditure of Public Law 98-602 funds. AR004022–25. According to the State, that fact, if accurate, would undermine previous efforts to account for 98-602 expenditures. AR004024–25. Department staff forwarded the State's letter to the Wyandotte Nation, AR004056, and again began to re-assess its recommendation in light of the State's concerns. AR003890; AR003951; AR004008. The Department has not yet reached a final determination on the funds question.

Thus, contrary to the Wyandotte Nation's arguments, the record consistently reflects efforts to move the application toward final approval, as well as to assess and respond to the concerns of those opposing the application. The Wyandotte take issue with the State's opposition. *See* Wyandotte Br. at 40. But the project's opponents have just as much right as the Wyandotte Nation to petition the government for relief. A federal agency's efforts to consider contrary arguments as part of its decision-making is not "delay" in the first instance, let alone a breakdown of the agency's application review process.

2. *The On-Going Review is Grounded in Efforts to Adequately Assess the Application's Factual and Legal Validity.*

The facts here also demonstrate that the Wyandotte's application has not just been sitting idle on a shelf. To the contrary, the record documents the Department's efforts to balance a reasonable review timeline with sound decision-making. The Department has twice decided reevaluate the application when it was nearing a decision, but it did so based upon concerns the State raised at different times with: (1) the legal interpretation of Public Law 98-602 that would be required to accept the Park City Land in trust; and (2) what the State believes to be a previously-unknown expenditure of Public Law 98-602 funds.[7] *See* AR001960–2133; AR002168; AR004022–25; AR003951. The Department's objective has been to evaluate the validity, if any, of the State's concerns. *See* AR002168; AR003951.

Certainly, the Department's decision to carefully review the State's concerns has added time to the review process. But it is the Department of the Interior that is best equipped "to deal with the many variables involved in the proper ordering of its priorities," *Heckler v. Chaney*, 470

[7] The Wyandotte Nation incorrectly states that the Department review has been near completion on three occasions. *See* Wyandotte Br. at 44. The Department has only twice been near a decision, in October 2010 (AR002154–55; AR002164) and again in February 2012 (AR002794; AR003384).

U.S. 821, 831–32 (1985), and should be allowed to "meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *see In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) ("respect for the autonomy and comparative institutional advantage of the executive branch," has made courts "slow to assume command over an agency's choice of priorities"). An agency's decision to take time to assess factual and statutory viewpoints that may differ from those of the project applicant or the agency's preliminary determinations can hardly be categorized as an unworthy goal, and is fully within the agency's discretion. That is particularly true when, as here, Congress has not provided a hard deadline for agency action.

And the Department did not delay in beginning those reassessments when it determined they would be necessary. After the Region submitted its recommendation in 2009, the Central Office quickly started the necessary review. *See* AR001558. The same can be said after the State detailed its legal concerns in 2010. *See* AR002142–43. Department supervisors continuously inquired with staff as to the progress being made on the application. *See* AR002435; AR002436; AR002477; AR002618; AR002648. When it appeared staff workloads were becoming excessive, the Department reassigned work. *See* AR002638. When the State raised its most-recent concerns regarding the funds question, the Department soon thereafter took steps to reassess the application, even involving staff from the Department's Office of Financial Management. AR003890; AR003951; AR004008.

The Wyandotte Nation claims that the review time has resulted in a competitive disadvantage compared to other casinos, and a delay in the potential revenues that the casino

could afford to the Nation.[8] *See* Wyandotte Br. at 40, 52. Notably, those harms are all based upon the speculative belief that the application will be approved. Regardless, however, the Secretary recognizes that, as with many tribes, the opportunity for economic development presents a possible solution to tribal social welfare issues. But the present circumstances are different than the cases to which the Wyandotte cite, which involved regulations to avoid Reye's syndrome and death in children and to curtail abuse at immigrant detention facilities. *See* Wyandotte Br. at 50, 52 (citing *Public Citizens Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984), and *Families for Freedom v. Napolitano*, 625 F. Supp. 2d 535 (S.D.N.Y. 2009)). What the Wyandotte Nation really requests here is that the Department make the Wyandotte's application its number one priority, regardless of the need to assess opposing viewpoints on the legality of the action in question. But the facts here do not support that outcome. Moreover, prioritizing the Wyandotte's application may result in a commensurate lengthening of the review process for actions requested by other tribes facing similar social and economic needs.

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[8] The Wyandotte Nation attached two extra-record affidavits to its summary judgment brief. *See* Affidavit of David McCullough (ECF No. 61-1); Affidavit of Billy Fried (ECF No. 61-2). But judicial review of the Wyandotte's claims is based upon the agency's administrative record. *See Sierra Club*, 26 F. Supp. 2d at 1272. The Wyandotte have not demonstrated that any of the exceptions to the record review principle apply here. *See Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007) (discussing exceptions). The Court should therefore not consider the affidavits in its review of the summary judgment cross-motions.

3. The Funds Question is the Keystone of the Secretary's Authority and Occurs in the Context of the Wyandotte's Intent to Open a Casino on the Property.

The Department's on-going review is reasonable, as the question of whether the Wyandotte purchased the Park City Land using Public Law 98-602 funds remains unresolved. The Wyandotte Nation takes issue with what the Tribe perceives to be overly-exhaustive review of the funds question in response to the State's submissions. *See* Wyandotte Br. at 45–48. But the Secretary's reactions to the State's concerns are neither surprising nor unreasonable.

First, the answer to the funds question determines whether Public Law 98-602 even authorizes the trust acquisition. Pub. L. No. 98-602, § 105(b)(1), 98 Stat. at 3151; *Sac & Fox Nation*, 240 F.3d at 1255. If Public Law 98-602 does not authorize the acquisition, the Wyandotte's application would need to be processed as an application under the Indian Reorganization Act, which grants the Secretary discretionary authority. *See* 25 U.S.C. § 465. That process includes numerous additional considerations, including impacts to tax rolls, conflicts in land use, notice and opportunity to comment for state and local governments, and compliance with the National Environmental Policy Act. *See* 25 C.F.R. § 151.11 (referencing 25 C.F.R. § 151.10)).

Second, the Secretary's approval of the Wyandotte Nation's Shriner Tract application under Public Law 98-602 resulted in a more than a decade of litigation. Much of that litigation focused on one of the issues that is now before the Secretary with respect to the Park City Land: whether the evidence demonstrates that the Wyandotte used 98-602 funds to purchase the property. *See Sac & Fox Nation*, 240 F.3d at 1263–64; *Governor of the State of Kan. v. Norton*, 430 F. Supp. 2d 1204, 1221–22 (D. Kan. 2006). Indeed, the courts in the Shriner Tract litigation twice remanded the funds question back to the Secretary for reconsideration. *See Sac & Fox*

Nation, 240 F.3d at 1263–64; *Governor of the State of Kan. v. Norton*, Case No. 03-cv-4140-JAR, 2005 WL 1785275 at **2, 4 (D. Kan. July 27, 2005). And answering that question requires some level of accounting forensics. *Governor of the State of Kan.*, 430 F. Supp. 2d at 1221–25. The Wyandotte make thinly-veiled and passing allegations of bad faith given the Department's decision to reassess the funds question. *See* Wyandotte Br. at 45, 47. The Tribe, however, provides no evidence of misconduct. To the contrary, the Department decided to reevaluate the Wyandotte's application only after reviewing information that the State submitted. *See* AR003951.

Third, the Wyandotte Nation intends to open a casino on the Park City Land. AR001182–83; AR000082–86. Indian gaming is a hotly-contested issue. The State's strong opposition here makes that readily apparent, and the record shows the Department's desire for careful decision-making in that arena. *See, e.g.,* AR001866 (referencing meeting with Deputy Secretary); AR002631. The pace of that decision-making should be left to the Department's discretion, *Lincoln*, 508 U.S. at 192, so long as it does not conflict with the APA's requirement for agencies to act upon matters present to them within a reasonable time. 5 U.S.C. § 555(b). Here, the Department's on-going review is well-reasoned, and the Wyandotte's request for judicial intervention into the decision-making process should therefore be denied.

II. There Is No Clear, Undisputed Duty From Which the Court Can Compel the Secretary to Accept the Park City Parcel In Trust.

Even if the Secretary's on-going review were unreasonable—which it is not—summary judgment still must be granted in the Secretary's favor because the Court lacks the authority to grant the Wyandotte Nation its requested relief. The Wyandotte do not request that the Court order the Secretary to make a decision on the application. Instead, the Tribe asks the Court to

order the Secretary to actually accept the Park City Land in trust. *See* Compl. Prayer for Relief. The Court should decline the invitation.

Section 706(1) of the APA "empowers a court only to compel an agency [1] 'to perform a ministerial or non-discretionary act,' or [2] 'to take action upon a matter, without directing how it shall act." *SUWA*, 542 U.S. at 64 (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)) (emphasis in original); *see Marathon Oil Co v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). Here, the Wyandotte Nation requests the former. But an order in the form of mandamus is an extraordinary remedy. *In re United Mine Workers*, 190 F.3d at 549. For such a remedy to issue, the duty in question must be:

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

Consol. Edison Co. of N.Y, Inc. v. Ashcroft, 286 F.3d 600, 605 (D.C. Cir. 2002) (quoting *Wilbur v. United States*, 281 U.S. 206, 218–19 (1929)). To be entitled to the relief it seeks, the Wyandotte Nation would need to establish that: (1) the Secretary owes it a clear duty; (2) the duty is mandatory, rather than discretionary; and (3) the right to relief is clear. *Rios v. Aguirre*, 276 F. Supp. 2d 1195, 1199 (D. Kan. 2003) (citation omitted); *see Rios v. Ziglar*, 398 F.3d 1201, 1208 (10th Cir. 2005) (noting that the right to the writ must be "clear and undisputable" (citation omitted)). It cannot make that showing.

There is no clear, undisputable duty for the Secretary to accept the Park City Land in trust. Public Law 98-602 certainly requires the Secretary to accept in trust lands acquired using 98-602 funds. *See Sac & Fox Nation*, 240 F.3d at 1262. But "application of that legal standard to [these] particular facts requires a determination whether [98-602 funds were actually used]."

Public Citizens Health Research Group, 740 F.2d at28 (addressing whether questions that certain drugs were "misbranded" for purposes of compelling FDA to issue regulations could be answered by courts). Where, as here, "the manner of [the agency's] action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what that action may be." *SUWA*, 542 U.S. at 64.

The Tenth Circuit's *Marathon Oil* opinion provides an apt analogy. There, the plaintiff had sought an order not only to compel the agency to complete review of six oil shale mining patents, but also to require that the agency approve and issue the patents. *Marathon Oil*, 937 F.2d at 499. The court of appeals held that the district court had exceeded its authority in ordering the agency to approve and issue the patents. *Id.* at 501. "The Department has not yet determined officially that all conditions to issuance of the patents have occurred." *Id.* So too here. The Department has not yet finalized its fact-finding as to whether the Wyandotte used Public Law 98-602 funds to purchase the Park City Land. "[W]hile the district court can compel the defendants to exercise their discretion, it cannot dictate how that discretion is to be exercised." *Id.* (citing *Wilbur v. Krushnic*, 280 U.S. 306, 319 (1930)); *see Smith v. Grimm*, 534 F.2d 1346, 1352 (9th Cir. 1976).

Further, the courts in the Shriner Tract litigation recognized that a Secretarial determination on whether 98-602 funds were used is a prerequisite for trust acquisition under the Public Law. *See Sac & Fox Nation*, 240 F.3d at 1263–64; *Governor of the State of Kan.*, 2005 WL 1785275 at **2, 4. The Wyandotte Nation does not appear to disagree. *See* Wyandotte Br. at 41, 42, 43, 51, (repeatedly stating that the statute mandates the Secretary take into trust lands purchased with Public Law 98-602 funds). Despite that concession, the Wyandotte request an order that would wholly subsume the executive branch's role under the statute and "amounts to

an attempt to bypass the administrative process." *Public Citizens Health Research Group*, 740 F.2d at 29. The Court should not allow the Wyandotte Nation to abandon that process simply because the Tribe believes the process is taking too long, particularly where Congress has allocated decision-making responsibilities to the Secretary. *See Burt Lake Band of Ottawa and Chippewa Indians v. Norton*, 217 F. Supp. 2d 76, 79 (D.D.C. 2002).

There are also post-decision regulatory obligations that would conflict with any order mandating the trust acquisition of the Park City Land. Regulations require the Secretary to provide public notice once he has made a decision to accept land in trust, but before title is passed. *See* 25 C.F.R. § 151.12(b). The notice requirement provides a potential plaintiff the opportunity to challenge the determination, including the acquisition statute's requirements. *See, e.g., Sac & Fox Nation of Mo. v. Norton*, 92 F. Supp. 2d 1124, 1128 (D. Kan. 2000), *rev'd* 240 F.3d 1250 (10th Cir. 2001). The relief that the Wyandotte seek here ignores this regulatory requirement and would preclude post-decision APA review by any affected parties. For that reason, and those stated above, the Wyandotte Nation's request for an ordering compelling the Secretary to accept the Park City Land in trust should be denied.

III. The Wyandotte Nation Has Failed to State a Claim for Breach of Fiduciary Duty.

The Wyandotte Nation's third count, which alleges a breach of fiduciary duty (Compl. ¶¶ 45–50), must be dismissed because the Wyandotte have failed to state a claim. As the Park City Land is not held in trust by the United States, there is no "control or supervision over tribal monies or properties" from which "the fiduciary relationship normally exists with respect to those monies or properties." *Cobell*, 240 F.3d at 1098 (citation omitted).

> The federal government . . . incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources. The elements of this type of common law trust are a trustee (the United States), a beneficiary . . . and a trust corpus (the regulated Indian property lands or funds).

Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (citations and quotations omitted). Here, the essential element of a trust corpus is missing. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297–98 (D.N.M. 1996), *aff'd* 104 F.3d 1546 (10th Cir. 1997).

CONCLUSION

Based upon the foregoing, the Wyandotte Nation's motion for summary judgment should be denied, the Secretary's motion for summary judgment should be granted, and the Wyandotte's complaint should be dismissed.

Respectfully submitted this 29th day of October, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2012, the above pleading was filed with the Court's CM/ECF system, which will provide notice to all parties.

s/ Kristofor R. Swanson
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