UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WYANDOTTE NATION, Plaintiff, vs. KENNETH L. SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, Defendant, and STATE OF KANSAS, *ex rel,* DEREK SCHMIDT, Attorney General, Intervening Defendant.	)	Case No. 2:11-CV-02656-JAR-DJW

INTERVENING DEFENDANT STATE OF KANSAS' COMBINED MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS COUNTER-MOTION FOR SUMMARY JUDGMENT

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COMES NOW Intervening Defendant State of Kansas ("Kansas"), by and through its counsel, and for its Combined Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Counter-Motion for Summary Judgment, states and responds as follows:

INTRODUCTION

Plaintiff Wyandotte Nation ("Wyandotte"or the "Tribe") has filed a summary judgment motion that relies heavily, if not exclusively, on preliminary actions of regional representatives of the Bureau of Indian Affairs. This is curious because the Wyandotte's application in 2006 to

have the Park City land placed in trust specifically said it was for gaming purposes – and the Secretary of the Department of Interior ("Secretary") has not delegated to the regions decision-making authority for such applications.

Just as curious, the Wyandotte do not bother to address the substantive issues that are before the Department of Interior ("Department") in connection with the Wyandotte's fee-to-trust application involving land in Park City, Kansas. The Wyandotte claim that the Secretary has a mandatory obligation to accept that land into trust under § 105(b)(1) of Pub. Law 98-602 (hereinafter "PL 602"). Yet, the Wyandotte provide no actual support for this conclusion despite the issues that are before the Department.

One issue before the Secretary is whether he has any remaining duty under PL 602 to accept land in trust for the Wyandotte. From the standpoint of Kansas, any such mandatory duty under PL 602 was long ago conclusively fulfilled when land in Kansas City, Kansas (the "Shriner Tract"), worth well in excess of $100,000, was accepted into trust under PL 602 for the benefit of the Wyandotte. Notably, it was Kansas that brought this issue to the attention of the Department for the first time, in September, 2010. Despite opportunities presented thereafter to provide substantive input on this issue, the Wyandotte have not done so.

Likewise, the Wyandotte do not address a second significant issue before the Secretary. This second issue involves whether the Park City land was purchased with money that can be properly attributed to the PL 602 funds in question. If it was not, the Wyandotte cannot rely on PL 602, regardless of whether the mandatory duty thereunder had previously been fulfilled. This issue arises from the historical fact that $180,000 of the PL 602 funds (including the entirety of the principal $100,000 set aside under PL 602 for the purchase of land) was attributed to the purchase of the Shriner Tract in July, 1996. This was the foundational basis upon which that

tract of land was accepted into trust on a mandatory basis under PL 602. There is nothing remaining from the principal PL 602 funds from which the Park City property purchase funds can be attributed-and the money used to purchase the Park City property cannot otherwise be entirely attributed to the PL 602 funds. Because of the attribution of the PL 602 funds to the Shriner Tract purchase, no mandatory duty exists under that statute to place the Park City property into trust – assuming for the sake of argument, any such mandatory duty survived the Shriner Tract acquisition.

Furthermore, the Wyandotte complain about perceived delays by the Department in processing the Park City application, the Wyandotte appear to forget that the initial application submitted in 2006 sought to have the Park City land placed into trust under the Secretary's ***discretionary*** authority under 25 U.S.C. § 465. It was not until more than two years later that the Wyandotte changed course and apparently decided to take a shot at foisting PL 602 on the Secretary a second time. In doing so, the Wyandotte never disclosed the substantial administrative and legal record from the Shriner Tract acquisition, which cast serious doubt on the availability of PL 602 for a second mandatory trust acquisition.

Moreover, it was not until August, 2009 (some three and a half years after its initial discretionary trust application) that the Wyandotte corrected more than a decade of misinformation about the source of the funds used to buy the land in Park City. For years, the Wyandotte maintained that the land in Park City was bought with money withdrawn in November, **1991** from a segregated account that housed only the mortgage investment bonds that the Wyandotte purchased with the $100,000 set aside by PL 602 for the purchase of land.[1]

[1] The $100,000 allocated to the Wyandotte under PL 602 to purchase land was first used for investment purposes to purchase mortgage obligation bonds that were housed from May, 1986 to November, 1991 in a Wyandotte investment account. In November, 1991, that account was closed and the holdings in that account were commingled into a general investment account of the Wyandotte. [Administrative Record ("AR") 3114].

However, in August, 2009, the Wyandotte revealed that the Park City land was actually bought in November, **1992**, and the cash used to buy the property came from cash withdrawn in November, **1992** from a commingled general investment account.[2] Because of this commingling of funds, the cash used to purchase the Park City property cannot be traced to the PL 602 funds.

As a result, determining whether the money withdrawn in November, 1992 to buy the land in Park City was entirely PL 602 funds becomes a matter of attribution. This attribution issue becomes problematic for the Wyandotte because in July, 1996, $180,000 of the PL 602 funds was attributed to the purchase of the Shriner Tract. That $180,000 included ***all*** of the principal $100,000 set aside by PL 602 for the purchase of land and another $80,000 in supposedly accrued interest and earnings on that principal sum as of July, 1996. With this as an established fact, it is not possible for the Wyandotte to establish that the Park City land was purchased with entirely PL 602 funds as there simply was not enough of such funds to attribute to the purchase of both the Shriner Tract and the Park City property.

In other words, if the $25,000 in cash used to purchase the Park City land is deducted from the calculation of the accrued interest and earnings on the principal PL 602 funds starting in November, 1992, there would not have been enough money in July, 1996 to account for the $180,000 needed to be attributed to the purchase of the Shriner Tract. And because the attribution of the PL 602 funds to the purchase of the Shriner Tract is part of established history, the $25,000 withdrawn from the commingled investment account in November, 1992 to buy the Park City land cannot be attributed entirely to the PL 602 funds. Accordingly, PL 602 is

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[2] To prove this assertion in August, 2009, the Wyandotte provided the Department, for the first time, with a November, 1992 account statement for this commingled investment account – despite claiming since 2001 that the statement, along with many others, was missing. (AR 1581-1588; 3114). Kansas did not know of this until the initial administrative record was filed in this case in January, 2012. Upon learning of this, Kansas raised matters relating to this issue to the Department in February, 2012. (AR 2810-2843).

not available as the source of a mandatory trust acquisition for the Park City property – assuming the mandatory duty in that statute has not already been extinguished as a result of the Shriner Tract trust acquisition.

Mandamus does not exist as an available remedy for the Wyandotte in light of these significant, material issues. There is no clear, mandatory duty owed by the Secretary under PL 602. Any such mandatory duty under PL 602 was long ago completely fulfilled when the Shriner Tract was accepted into trust pursuant to the mandatory provisions of PL 602.

Moreover, there has been no unreasonable delay by the Department, especially where the Wyandotte are the chief culprits in extending this process by pursuing this trust acquisition under the Secretary's discretionary authority for more than two (2) years, by supplying inaccurate information, and by failing to address substantive issues when requested by the Department to do so.

RESPONSE TO WYANDOTTE STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1, Kansas submits the following response to the Wyandotte's Statement of Undisputed Material Facts to which it claims no genuine issue exists:

1. Denied. To the extent the reference to the "judgment funds" is intended to refer to the monies set aside by PL 602 for the purchase of land, this is specifically denied for the following reasons:

a. The only support offered for this conclusion as to the source of funds is the August 18, 2009 letter of David McCullough with a six (6) page attachment that consists of pages from the November, 1992 Wyandotte commingled general investment account (AR 1581-1588). There is absolutely nothing in those six (6) pages of account statements that reflects that the $25,000 disbursement in November, 1992 came from the PL 602 funds, as opposed to any of

the other commingled funds in that account-just as there is no such indication for any of the other disbursements that occurred that month from that account. (AR 1587).

b. In Mr. McCullough's letter, he explains that the $25,199.67 "redeemed" in November, 1991 from the investment account that housed the bonds purchased with the PL 602 funds was NOT used for the purchase of any real property – and that the Park City land was purchased with $25,000 withdrawn from the commingled general investment account in November, 1992, a year later. (AR 1581).

c. In his letter, Mr. McCullough harkens back to KPMG's analysis of the Wyandotte's investment account to suggest, without explanation, that the mistake (relating to which funds withdrawn from which account were used to purchase the land in Park City) is of no consequence to the issue. Yet, among the items he fails to explain is the fact that the money withdrawn from the investment account in November, 1991 ($25,199.67) was in fact withdrawn and the $25,000 redeemed and used to purchase the land in Park City was a second, previously unaccounted for, withdrawal. (AR 1581).

d. Mr. McCullough's reliance on the KPMG analysis for the purported "undisputed material fact" is also flawed because KPMG failed to account for funds that had been withdrawn between May, 1986 and November, 1991 from the account that housed the PL 602 funds. (AR 3119-3128; 3132-3333). As a result, KPMG reported that in December, 1991 there was $131,707.14 in that account when it was closed and commingled into the general investment account of the Wyandotte. (AR 3124). In reality, the total ***face*** (and not the lesser market) value of all PL 602 bonds in the account, plus all of the cash was only $109,529.91. (AR 3332-3333).

e. Mr. McCullough's reliance on the KPMG analysis is further flawed because, while KPMG pro-rated the gross earnings from the commingled account to the theoretical value of PL 602 funds between December, 1991 and July, 1996 (in an effort to show that the value of those funds had grown to at least $180,000), it failed to pro-rate charges imposed for interest on the margin account balance during that same time frame. (AR 3124-3128; 3334-3375).

f. A review of the administrative record, including the Wyandotte and KPMG analysis of the Wyandotte investment account statements, reveals that, after accounting for the analytical errors KPMG made, the $25,000 the Wyandotte claim was withdrawn from investment account in November, 1992 to purchase the land in Park City, cannot be attributed to the PL 602 funds. A reduction of $25,000 from the PL 602 funds in November, 1992 would have prevented those funds from growing to the sum of $180,000 that was attributed to the Shriner Tract purchase in July, 1996. It was this attribution that sanctified the mandatory trust acquisition of the Shriner Tract under PL 602 at that time.[3] [AR 3110-3175; See also, Exhibit A attached hereto, September 20, 2012 letter from Mark Gunnison to Secretary Salazar; Exhibit B attached hereto, October 24, 2012 letter from Mark Gunnison to Secretary Salazar enclosing the October 23, 2012 cover letter of Jerrold Gottlieb; and Exhibit C attached hereto, affidavit of Jerrold Gottlieb, in which his Report on Value of Wyandotte Tribe of Oklahoma Section 602 Funds as of July12, 1996 ("Report") is attached as Exhibit 1 thereto]. Everything that Mr. Gottlieb relied upon in his Report is derived from the administrative record in this case. (Exhibit C, ¶ 4).

[3] This conclusion remains the same whether the withdrawal in November, 1991 of $25, 199.67 is deducted from the available PL 602 funds or not. (Exhibit C, Report, p. 7 and Exhibits D and G to Report).

g. The Wyandotte's reliance on Mr. McCullough's letter and the six account statement pages for the purported "undisputed material fact" set forth in paragraph one (1) is also problematic because it fails to acknowledge that in July, 1996, the Wyandotte had previously attributed all of the $100,000 principal funds set aside by PL 602 to the purchase of the Shriner Tract. In doing so, the Wyandotte recognized that it was using the entirety of the funds set aside by PL 602 for the purchase of land, and that no further trust acquisitions could be predicated on PL 602 as a result. That was the election the Wyandotte made when it demanded that the Shriner Tract be accepted into trust by the Secretary in July 1996 under the mandatory provisions of PL 602. (AR 2205-2217; 2232-2385; see also, Kansas's Statement of Undisputed Material Facts ("Kansas' Facts") ¶ 6-45).

h. Since the entirety of $100,000 principal funds set aside under PL 602 has been fully attributed to the purchase of the Shriner Tract, the most that can be said of the $25,000 withdrawn in November, 1992 is that while ***part*** of it may be attributed to interest and earnings on the PL 602 funds-none of it can be attributed to the principal $100,000. (AR 2312-2313; 2315-2317; 2322-2329).

2. Admitted.

3. Admitted. Furthermore, it was due to this decision that the Wyandotte later chose to abandon the 1993 Park City application and elected to insist upon a mandatory trust acquisition of the Shriner Tract under PL 602. (AR 1371). Specifically, on May 2, 2008, the Wyandotte told the Department that while "the Wyandotte did not agree with the Solicitor's opinion, the Nation determined that its best legal course to take in vindicating its rights granted under Pub. L. 98-602 would be available on land in Kansas City, Kansas (the Shriner Tract)." (AR 1371).

4. Admitted. However, in this application the Wyandotte applied to have the Park City land placed in trust for gaming purposes under the ***discretionary*** authority of the Secretary under 25 U.S.C § 465-not under PL 602. (AR 1179-1180). Also, at this time, the Wyandotte were still claiming that the money used to purchase the land in Park City was withdrawn from an account in November, 1991. (AR 1173-1174).

5. Disputed. On May 2, 2008, the Nation wrote the Department and, in connection with the Park City fee-to-trust application, took the position, for the first time, that PL 602 applied. (AR 1369-1374). Still, the Wyandotte continued to claim that the money used to purchase that land was withdrawn in November, 1991, from its separate investment account that held the bonds purchased with the $100,000 set aside by PL 602 for the purchase of land. (AR 1369-1374). This was not corrected until at least August, 2009. (AR 1581-1588). Additionally, the Wyandotte have never addressed the matters set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6 -45. (AR 1960-2133; 2205-2385; 2814-2830).

6. Admitted that the Wyandotte sent a "Supplement to Application," but the date of its submission does not appear from the document. However, the Wyandotte argument set forth in that supplement focuses on statements made in the course of the Shriner tract litigation that were based on the Wyandotte's representation that it was money withdrawn in November, 1991 from the segregated account that was used to purchase the land in Park City-not a November, 1992 cash withdrawal from the commingled general investment account. (AR 964-1026; AR 1044). This was not corrected until August, 2009. (AR 1581-1588). Kansas did not become aware of this until the filing of the AR in this case. Kansas then brought this issue to the attention of the Secretary in February, 2012. (AR 2810-2843). Additionally, the Wyandotte

"Supplement to Application" did not address the matters set forth in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385; 2814-2830).

7. Admitted that the Muskogee Area Office sent such a cover letter. Denied that the trust acquisition of Park City is a mandatory acquisition. (See paragraph 1(a)–(h) above and citations contained therein. See also Kansas' Facts, ¶ 6-66). Finally, this "fact" is irrelevant as the Assistant Secretary has not delegated decision-making authority to the regions for applications that involve gaming. (AR 555). Moreover, none of the information set forth above, or in Kansas' Facts, was presented to the Muskogee Area Office. (AR 943-947). As of the date of this letter, the Wyandotte had not even corrected the misidentification of the account from which the funds used to buy the Park City land were withdrawn, or the date of that withdrawal. (AR 1581-1588).

8. Disputed. The document cited by the Wyandotte's does not support this statement. Additionally, the Wyandotte never addressed the matters set forth in paragraphs 1(a)-(h) above or set forth in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385; 2814-2830). Finally, as of the date of this memo, the Wyandotte had not even corrected the misidentification of the account from which the funds used to buy the Park City land were withdrawn, or the date of that withdrawal. (AR 1581-1588).

9. Disputed. The document cited is completely redacted. Admit what is stated in the index.

10. Admitted that the memo states what it does. However, additional issues not brought to the attention of the Department also need to be considered, including those set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. The Wyandotte never brought these issues to the attention of the Department.

11. Disputed in that the documents cited reflect only that a meeting was to be scheduled. Evidently the Wyandotte did not take this opportunity to disclose to the Department those matters set forth in paragraphs 1(a)-(h) above or those set forth in Kansas' Facts, ¶ 6-45.

12. Disputed. The memo refers to a previous conversation-not a meeting. In this memo, the Wyandotte perpetuate the misidentification of the funds used to purchase the land in Park City as coming from a November, 1991 withdrawal of cash. (AR 1578-1579). Also, Mr. McCullough did not address matters such as those set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385; 2814-2830).

13. Disputed that what was addressed in the August 18, 2009 letter constituted the "only two remaining" issues. (See paragraphs 1(a)-(h) above and Kansas' Facts, ¶ 6-45. Moreover, Mr. McCullough's letter did not address any of those matters. (AR 1581-1582).

14. Admitted. However, Ms. Beck was not presented with the information set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. The Wyandotte never brought these issues to the attention of the Department.

15. Admitted.

16. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385).

17. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

18. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

19. Admitted.

20. Admitted.

21. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

22. Admitted.

23. Admitted.

24. Admitted. However, even by the time of this memo, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

25. Admitted.

26. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas's Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

27. Admitted.

28. Disputed. The document cited does not support the factual assertion.

29. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

30. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

31. Admitted. However, this "fact" is irrelevant as the Assistant Secretary has not delegated decision-making authority to the regions for applications that involve gaming. (AR 555).

32. Admitted.

33. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above or that set forth in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

34. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above or that set forth in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

35. Admitted.

36. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts,

¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

37. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

38. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Intervenor Kansas' Facts, ¶ 6-45 . The Wyandotte never brought these issues to the attention of the Department.

39. Admitted.

40. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

41. Admitted.

42. Admitted.

43. Admitted.

44. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

45. Admitted.

46. Admitted.

47. Admitted.

48. Admitted.

49. Admitted.

50. Admitted. However, as of this time, the Department had not been presented with certain information, including that set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department.

51. Admitted.

52. Admitted.

53. Admitted.

54. Admitted. These communictions reflect the first time the Department was advised of those matters set forth in Kansas' Facts, ¶ 6-45. (AR 1960-2133; 2205-2385). The Wyandotte never brought these issues to the attention of the Department and failed to address them when presented with the opportunity.

55. Admitted.

56. Admitted.

57. Admitted.

58. Admitted that the e-mail says what it says. Disputed that the Park City acquisition is a "mandatory acquisition." (See Paragraphs 1(a)-(h) above and Kansas' Facts, ¶ 6-45).

59. Admitted.

60. Admitted.

61. Admitted that the e-mail says what it says. Disputed that the Park City acquisition is a "mandatory acquisition." (See Paragraphs 1(a)-(h) above and Kansas' Facts, ¶ 6-45).

62. Admitted.

63. Admitted.

64. Admitted.

65. Admitted.

66. Admitted.

67. Admitted.

68. Admitted. These are the matters are set forth in Kansas' Facts, ¶ 6-45.

69. Admitted.

70. Admitted.

71. Admitted that the Wyandotte sent a letter dated December 23, 2010. Disputed that the letter actually responded to the arguments and positions advanced by Kansas. (AR 1960-2133; 2205-2385). In the letter, the Wyandotte argument is based on statements made during the Shriner Tract litigation that were in response to the Wyandotte representation that the money used to buy the Park City land came from a cash withdrawal in November, 199l, not from a second withdrawal of cash in November, 1992 from the commingled, general investment account. (AR 2427-2432). The letter fails to address the substantive issues raised by Kansas, including those set forth in paragraphs 1(a)-(h) above and in Kansas' Facts, ¶ 6-45. The Wyandotte have never responded to the substance of those matters.

72. Admitted.

73. Admitted.

74. Admitted.

75. Admitted.

76. Admitted.

77. Admitted.

78. Admitted.

79. Admitted.

80. Admitted.

81. Admitted. Senator Dole also commented in this e-mail about the meeting that had taken place in September, 2010 that included Assistant Secretary Echo Hawk during which facts were presented that had not been previously presented to the Department, including facts that demonstrated that the Wyandotte knew that PL 602 had been satisfied when the Shriner Tract was accepted into trust. (AR 2530).

82. Admitted.

83. Admitted.

84. Admitted.

85. Admitted.

86. Admitted.

87. Admitted.

88. Admitted.

89. Admitted.

90. Admitted.

91. Admitted.

92. Admitted.

93. Admitted.

94. Admitted.

95. Admitted.

96. Admitted.

97. Admitted.

98. Admitted.

99. Admitted that such an agenda was distributed. Disputed that the Park City acquisition is a "mandatory acquisition". (See Paragraphs 1(a)-(h) above and Kansas' Facts, ¶ 6-45).

100. Admitted.

101. Admitted.

102. Admitted.

103. Admitted.

104. Admitted.

105. Admitted.

106. Admitted.

107. Admitted.

108. Admitted.

109. Admitted.

110. Admitted.

111. Admitted.

112. Admitted. The receipt of the administrative record in this case was the first time that Kansas had been made aware that the Park City land was supposedly purchased with money

withdrawn from the Wyandotte commingled, general investment account in November, 1992 and the issues created thereby were presented to the Secretary in February, 2012 and thereafter. (AR 2810-2843; Exhibit A, B and C attached hereto).

113. Admitted.

114. Admitted.

115. Admitted.

KANSAS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

1. Congress passed PL 602 in 1984 to appropriate and distribute judgment funds to the Wyandotte Tribe of Oklahoma, later known as the Wyandotte Nation (hereinafter referred to as the "Tribe" or the "Wyandotte Nation" or "plaintiff") arising out of certain claims the Tribe had asserted against the United States. PL 602 prescribed the manner in which the Tribe may use the funds:

b. Section 105(a) required that 80% of the funds were to be distributed to members of the Tribe.

c. Section 105(b)(1) provided that of the remaining 20%, "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 the Tribe." (Emphasis supplied).

d. Section 105(b)(2) directed that the funds in excess of the $100,000 set aside for "the purchase of real property" described in Section 105(b)(1) were to be held in trust by the Tribe's Tribal Business Committee.

(AR 2235-2240).

2. In May, 1986, the Tribe used $95,000 of the $100,000 funds set aside from PL 602 for the purchase of land, to purchase mortgage obligation bonds. (AR 3112-3115; 3132).

3. Those bonds were segregated in a separate account until December, 1991 when the Tribe closed that account and commingled the proceeds into its general investment. (AR 3112-3115; 3332-3334).

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4. In November, 1992, the Wyandotte withdrew $25,000 in cash from its commingled, general investment account which it now claims was used to purchase the land in Park City. (AR 1581-1588).

5. There is nothing contained in the November, 1992 account statement that identifies the source of the $25,000 withdrawn to purchase the Park City land. (AR 1583-1588).

6. In or about 1993, the Tribe applied to have the Secretary of Interior accept the Park City land into trust under PL 602. (AR 2259-2260; 2280-2281).

7. At the time, the Tribe contended that it could conduct gaming operations on the Park City land once the Secretary took the land into trust because the land constituted "land in settlement of a land claim" pursuant to 25 U.S.C. §2719(b)(1)(B)(i). (AR 2259-2260).

8. However, in 1993, the Field Solicitor for the Department of Interior in Tulsa had concluded that the Park City land did not fall within this exception to gaming under IGRA. (AR 2270-2281).

9. Through at least November, 1995, (and just a few months before formally submitting the Shriner Tract fee-to-trust application), the Tribe continued to push the Park City application and argued that the Field Solicitor's decision was wrong. (AR 1371; 2283-2289).

10. In December, 1995, due to the Solicitor's opinion, the Tribe withdrew its request to have the Park City land taken in trust, electing instead to have property in Kansas City, Kansas

(the Shriner Tract) taken into trust under the mandatory provisions of PL 602. ((AR 2252; 2291-2295).

Administrative Record on Shriner Tract Fee-to-Trust Acquisition Compels the Conclusion that Congressional Mandate of PL 602 Was Fulfilled and No Further Trust Acquisitions after the Shriner Tract Acquisition Could Be Made under that Statutory Authority

11. In February 1996, the Tribe formally applied to have its land in Kansas City, Kansas put in trust pursuant to the mandatory provisions of PL 602, which application was subsequently reduced to a singular tract, the Shriner Tract. (AR 2298-2310; 2312-2313).

12. The Shriner Tract fee-to-trust application involved real property worth more than the "sum of $100,000" that was set aside in PL 602 for a land purchase and subsequent mandatory trust acquisition by the Department. (AR 2305).[4]

13. Due to this development, and consistent with the Tribe's election, the Department sought the assurance from the Wyandotte Tribe that the entirety of the principal $100,000 set aside funds (plus interest and earnings on such sum) were being used (or at the very least, attributed) to purchase the Shriner Tract. (AR 2312-2329).

14. Once that assurance was received, the Department made it clear that when the Shriner Tract was taken in trust pursuant to the mandatory provisions of PL 602, the "shall" of that law would be deemed fulfilled and no future ***trust*** (as opposed to merely land) acquisitions could be made under that statutory authority, because the entirety of the $100,000 set aside funds would be exhausted in the purchase of the Shriner Tract. (AR 2320-2329).

15. The Department made sure that the Tribe, through the use of the entirety of the $100,000 PL 602 set aside funds for the purchase of the Shriner Tract, received $100,000 worth of land in trust, in fulfillment of the Congressional mandate of PL 602. (AR 2312-2329).

[4] At the time of the application, the Wyandotte said it was purchasing the Shriner tract for $325,000. (AR 2305).

16. The Department also made sure that once the mandate of PL 602 was so fulfilled, the Tribe could not return years later to some future administration and, once again, seek to invoke the mandatory trust provisions of PL 602. (AR 2312-2329).

17. On February, 13, 1996, Assistant Solicitor Robert Anderson concluded that the Secretary lacked his usual discretion as to whether to take land in Kansas City, Kansas in trust, due to the mandatory provisions of PL 602, because the Tribe's fee to trust application indicated that the land will be "purchased using P.L. 98-602 funds, which ***include the initial $100,000*** plus any interest that has accrued since the award." (Emphasis supplied) (AR 2315-2317).

18. On April 19, 1996, Chief Leaford Bearskin of the Wyandotte Tribe wrote George Skibine, Director, Indian Gaming Management Staff, and reminded him of Assistant Solicitor Anderson's opinion that "the Secretary lacked any discretion and must accept land in trust which the Tribe purchases with the $100,000 allocated under P.L. 98-602 for trust acquisition 'plus any interest that has accrued since the award'" and advised that the Wyandotte will be purchasing the Shriner Tract for $100,000 and a building for $80,000. (AR 2312-2313).

19. On April 19, 1996, Department of Interior financial analyst Tom Hartman was reviewing the Tribe's fee to trust application for the Shriner Tract in conjunction with the Department's obligations under PL 602 and sent a memorandum to George Skibine on this subject. (AR 2320).

20. In that memorandum, Hartman commented on the fact that § 105(b)(1)of PL 602 provided that only "the sum of $100,000 of such funds shall be used for the purchase of property which shall be held in trust by the Secretary for the benefit of such Tribe" and contrasted that to the provisions of § 105(b)(3) which addressed the use of interest or investment income accruing

on the funds described in 105(b)(2) (the remainder of the of the judgment funds after subtracting the sum of $100,000 set aside for the purchase of land). (AR 2320).

21. Hartman concluded that "while the Tribe may spend the accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that ***future acquisitions*** are not covered by this public law. (Emphasis supplied). (AR 2320).

22. Mr. Hartman noted that the Tribe's fee to trust application suggested that the Shriner Tract will be purchased with "a portion" of the PL 602 set aside funds and commented to Mr. Skibine that if "the purchase price of the Shriner Tract exceeds $100,000 (which it did) then the Department should state clearly that the settlement funds have been expended in accordance with the law, and that ***no funds remain to implement further the "shall" of the law".*** (Emphasis supplied). (AR 2320).

23. Finally, Mr. Hartman expressed concern to Mr. Skibine that a recital in the Shriner Tract warranty deed indicated a purchase price of "$1.00 and other valuable consideration" and noted "that could leave $99,999 left in the settlement fund". (AR 2320).

24. On June 5, 1996, George Skibine, Director, Indian Gaming Management Staff, sent a memorandum to Ada Deer, Assistant Secretary, Indian Affairs, addressing the Tribe's fee to trust application for the Shriner Tract and advised that the Muskogee Area Office "must inform the Tribe that the acceptance in trust of the Shriner Tract exhausts the land acquisition authority of Pub. L. 98-602, and that subsequent ***trust acquisitions*** for the Tribe must be made under other statutory authority." (Emphasis added) (AR 2326).

25. On June 6, 1996, Ms. Deer wrote a memorandum to the Muskogee Area Office Director regarding the Tribe's application for the Shriner Tract and sent a copy of the memorandum to Chief Bearskin of the Wyandotte Tribe. (AR 2328-2329).

26. In this memorandum, Ms. Deer specifically instructed the Director that upon "transfer of the property in trust for the Tribe, you must inform the Tribe that this trust acquisition fulfills the Secretary's mandatory obligation to take land in trust pursuant to Pub. L. 98-602, and that subsequent ***trust acquisitions*** must be made under a different statutory authority." (Emphasis added) (AR 2329).

27. On the same day, Ms. Deer gave notice that was subsequently published in the Federal Register that the Secretary "shall acquire title in the name of the United States in trust for the Wyandotte Tribe for one tract of land (the Shriner Tract)." (AR 2331-2335).

28. On July 12, 1996, Robert Anderson, Associate Solicitor, Division of Indian Affairs, wrote to several others in the Department of Interior addressing a request that the taking of the Shriner Tract into trust be delayed. (AR 2337).

29. Mr. Anderson recommended against any delay because "the seller" is expected to substantially raise the price (of the Shriner Tract) and could remove from the tribe the benefit of the statutory provision that ***requires that the Secretary take land in trust if property worth $100,000 is taken in trust…***". (Emphasis supplied) (AR 2337).

Judicial Record during Shriner Tract Litigation Affirms that Acceptance into Trust of the Shriner Tract Fulfilled the Mandate Under PL 602 and No Further Trust Acquisitions May be Made under that Statutory Authority

30. In July, 1996, the Tribe asked the Tenth Circuit to dissolve the District Court's Temporary Restraining Order preventing the Secretary from taking the Shriner Tract in trust. (AR 2340-2346).

31. In urging the Tenth Circuit to allow the Shriner Tract to go into trust under the mandatory provisions of PL 602, the Tribe told the Tenth Circuit that the "United States' acceptance of title to the subject land, once completed, would ***finally satisfy*** the Congressional purpose of the 1984 Judgment Act (PL 602)…". (Emphasis supplied). (AR 2342-2343).

32. In his January 15, 1998 deposition, George Skibine, when asked about the Tom Hartman memo that is referenced in paragraphs 19-23 above, explained that the intent was that "we wanted to make sure that this was not going to go on (subsequent trust acquisitions beyond the Shriner Tract) so we wanted assurance that, once the land is purchased…and the purchase price was over $100,000, then it would exhaust the fund and ***there would be no mandatory obligation to take any land in trust – to take any additional land in trust besides the Shriner tract.*** (Emphasis supplied) (AR 2348-2349).

33. In her October 30, 1998 deposition, Heather Sibbison, when asked if she recalled how the issue of the PL 602 funds got resolved (the issue relating to parceling out the $100,000 set aside to make multiple land purchases), she testified that her "admittedly fuzzy recollection is that the tribe agreed to spend the $100,000 in one place…we didn't have to continue to parse the statute out to make it function the way we thought it should function because the tribe agreed to spend the entire amount in one place." (AR 2351; 2356).

34. In January, 1999, in its brief to the District Court in the Shriner Tract litigation, the Tribe urged the Court to sanctify the Shriner Tract trust acquisition, specifically stating that the funds used to purchase Park City should ***not*** be characterized as PL 602 funds. (AR 2251-2252).

35. Later in this same brief, the Tribe approvingly quoted Mr. Hartman's admonition that if "the purchase price of the Shriner Tract exceeds $100,000, then the Department should

state clearly that the settlement funds have been expended in accordance with the law, and that no funds remain to implement further the "shall" of the law. (AR 2256).

36. The "shall" of the law (PL 602) relates to the mandatory requirement for the Secretary to take land in trust purchased with the $100,000 set aside funds. (AR 2235-2240; 2320).

37. The Tribe also recognized that the agency sought the Tribe's "assurances that all of the $100,000 is expended on the Shriner Tract …to ensure that future acquisitions are not covered by this public law", clearly a reference to "trust acquisitions," as George Skibine and Ada Deer made clear. (AR 2256).

38. In September, 2000, the Tribe repeated its assertion to the Tenth Circuit that the money used to buy the land in Park City, Kansas was ***not*** properly characterized as PL 602 funds. (AR 2359).

39. In this same brief, the Tribe repeated to the Tenth Circuit that the "Secretary intended that all of the principal 98-602 funds were to be allocated to the purchase price of the land (the Shriner Tract)". (AR 2360-2363).

40. In September, 2000, then Secretary Bruce Babbitt told the Tenth Circuit that "the Assistant Secretary of Indian Affairs required the Area Director to inform the Wyandotte that 'this trust acquisition fulfills the Secretary's obligation to take land into trust pursuant to (PL 602), and that ***subsequent trust acquisitions*** must be made under different statutory authority'…. There is no reason to believe that the money used to purchase the Shriner Tract was anything other than money available under (PL 602) and, in any event, the administrative record demonstrates that this acquisition exhausts the funds available to the Tribe under section 105(b)(1) of that statute." (Emphasis added) (AR 2266-2267).

41. In September, 2002, in briefing to the Secretary on the remand issue about whether the Shriner Tract was purchased using only PL 602 funds, the Wyandotte noted that the "requirement proposed by the agency in its April 19, 1996 statement was that 'while the Tribe may spend accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by law.'" (AR 2370-2371)

42. The Tribe approvingly cited the June 6, 1996 memorandum by Mr. Skibine to Ms. Deer and Ms. Deer's subsequent memorandum to the Muskogee Area Office of the same date, both of which set forth the same condition that after the Shriner Tract was accepted into trust, subsequent ***trust acquisitions*** for the Wyandotte tribe had to be made under other statutory authority. (Emphasis supplied) (AR 2370-2371).

43. In her Opinion on Reconsideration, the Assistant Secretary of Indian Affairs specifically found that the "Shriner Tract was purchased with the $100,000 set aside by P.L. 98-602 plus interest and investment income derived from that principal. (AR 2378).

44. Later in that same Opinion, the Assistant Secretary noted "it was clear that PL 602 was intended to benefit the Wyandotte Tribe and that a piece of real property was to be purchased by them and taken into trust by the United States". (AR 2378-2379).

45. On April 13, 2006, the Wyandotte submitted a trust application to have the Park City land taken in trust for gaming purposes under the Secretary's discretionary authority pursuant to 25 USC § 465. (AR 2381-2384).

Funds Used to Purchase Park City Land Did Not Include the $100,000 Set Aside Funds From PL 602-No Mandatory Trust Acquisition Since Those Principal Funds Were Entirely Used to Purchase the Shriner Tract

46. In May, 1986, the Tribe used $95,000 of the $100,000 funds set aside from PL 602 to purchase certain mortgage obligation bonds. (AR 3112-3115; 3132).

47. Those bonds were segregated in a separate account until December, 1991, after which the Tribe closed that account and commingled the proceeds in that account (the PL 602 bonds and remaining cash) into its general investment account. (AR 3112-3115; 3332-3334).

48. The Wyandotte Tribe retained KPMG to analyze its investment account as part of remand proceedings before the Secretary of the Department of Interior to try to demonstrate that after the funds were commingled in December, 1991, the PL 602 were theoretically worth at least $180,000 in July, 1996 to attribute to the Shriner Tract purchase-$100,000 in the principal PL 602 funds set aside for the purchase of land and another $80,000 in imputed earnings through July, 1996. (AR 3112-3117).

49. At the time of the commingling of the accounts in December, 1991, the account statement reflects that the cash plus the total ***face*** value of the bonds purchased with the PL 602 funds in that account was only $109,521.91. (AR 3332-3333).

50. However, KPMG reported that there was $131,707.14 in bonds and cash in the account at the time. (AR 3124).

51. One reason KPMG overstated the actual amount of the face value of the bonds and cash in the account at the time was because KPMG failed to account for net withdrawals of approximately $28,000 from the account between May, 1986 and December, 1991 which resulted in reducing the actual assets that were in the account. (AR 3118-3128; 3132-3333; Exhibit C and Exhibit 1 attached thereto, Report; Exhibit F to Report).

1992 Park City Land Acquisition and Attribution of PL 602 Funds

52. In November, 1991, the Tribe withdrew $25,991.67 from the cash portion of the account. While this money was withdrawn from the account, it was not used to purchase land in Park City. (AR 1581-1582; 3332).

53. In or about November, 1992, the Tribe withdrew another $25,000 in cash from its general, commingled investment account that it now claims was used to purchase the land in Park City. (AR 1581-1588).

54. There is nothing contained in the November, 1992 account statement produced in August, 1999 that identifies the source of the $25,000 withdrawn to purchase the Park City land. (AR 1581-1588).

55. In analyzing the commingled investment account to determine if there was $180,000 in theoretical value of the PL 602 funds in July, 1996, KPMG never considered pro-rated deductions for the margin interest charges against the funds in the account, including the PL 602 funds, in the same manner that it attributed pro-rated interest and dividend earnings to such funds. (AR 3119-3128; 3334-3375).

56. A review of the Wyandotte and KPMG analysis of the Wyandotte investment account, along with the account statements, reveals that the Park City land was not purchased entirely with the PL 602 funds, because the entirety of the $100,000 of the principal funds from PL 602 had already been attributed to the Shriner Tract purchase. (See ¶ 17-29 above and citations contained therein).

57. A review of the Wyandotte's and KPMG analysis of the Wyandotte's investment account, along with the account statements, reveals that the Park City land was not purchased entirely with the PL 602 funds because, after accounting for the analytical errors KPMG made,

reducing the PL 602 funds by the $25,000 withdrawn in November, 1992 would result in the PL 602 funds being those funds being worth less than $180,000 by July, 1996-a sum that has already been attributed to the Shriner Tract purchase and upon which the mandatory trust acquisition of that property pursuant to PL 602 was dependent. (AR 3120-3128; 3130-3375; Ex. C and Exhibit 1 attached thereto, Report, p. 7).

58. Everything that Mr. Gottlieb relied upon for the opinions in his Report is derived from the administrative record in this case. (Exhibit C, Affidavit, ¶ 4).

The Secretary's June 2003 Opinion on Reconsideration is consistent with the conclusion that PL 602 cannot be invoked to compel a second mandatory trust acquisition for the Park City land

59. In the course of the Shriner Tract litigation, the matter was remanded to the Secretary of Interior for a determination of whether the Tribe had purchased the Shriner Tract with only PL 602 funds such that the purchase triggered the mandatory trust taking provisions of that statute. (*Sac and Fox Nation v. Norton,* 210 F. 3d 1250, 1268 (10th Cir. 2001).

60. One of the issues the Secretary addressed was whether the $100,000 set aside by PL 602 for the purchase of land had to be used alone or could include interest and investment income which had accrued on it prior to the real estate purchase and still trigger the mandatory trust acquisition provisions of PL 602. (AR 2377).

61. The Secretary noted that there was no "definitive legislative history that guides whether the $100,000 from Sec. 105(b)(1) had to be used alone, or could ***include*** interest or investment income which accrued prior to the mandatory real estate purchase." (Emphasis supplied) (AR 2377).

62. The Governor of the State of Kansas and the "four Kansas Tribes" at the time argued that "since Sec. 105(b)(3) specifies that interest and income from the money provided to

the Tribal Business Committee in Sec. 105(b)(2) can be used for the purposes enumerated in that section, Congress could not have intended that any interest or investment income be used from the $100,000 provided in paragraph 1 (of Section 105(b) of PL 602) or they would have stated such in the statute. (AR 2377).

63. The Assistant Secretary concluded that "there is no evidence …that Congress had any intention to prevent interest and investment income from the $100,000 provided in Sec. 105(b)(1) ***to be added*** to the principal $100,000 … and that there is no language in the statute triggering the defeat of the trust purchase if more than the $100,000 is used to purchase the real estate, when the additional funds were derived from the original Sec. 105(b)(1) award" (Emphasis supplied) (AR 2378).

64. After specifically finding that the "Shriner Tract was purchased with the $100,000 set aside by P.L. 98-602 ***plus*** interest and investment derived from that principal," the Assistant Secretary determined that the funds used to purchase the Shriner Tract were from the settlement moneys granted pursuant to 105(b)(1) of P.L. 98-602. (Emphasis supplied) (AR 2378).

65. Land purchased from proceeds that are derived only in part from interest and earnings on the principal PL 602 $100,000 set aside funds but not of the actual principal funds cannot trigger the mandatory trust provisions of PL 602. [*Sac and Fox Nation v. Norton,* 210 F. 3d 1250, 1268 (10th. Cir. 2001); AR 2374-2379].

66. The Assistant Secretary never addressed whether land purchased with none of the principal $100,000 set aside funds from PL 602 could trigger the mandatory trust provisions of PL 602-especially where the demand for a second mandatory trust acquisition has occurred ***after*** the principal $100,000 set aside funds have already been fully attributed to the purchase of land

worth more than $100,000 that was accepted into trust pursuant to the mandatory provisions of PL 602. (AR 2374-2379; see also, ¶ 12-29 above and citations contained therein).

FACTUAL SUMMARY

A. There are substantial and significant issues regarding whether PL 602 mandates that the Secretary take a second tract of land (the land in Park City, Kansas) into trust for the Wyandotte – issues which the Wyandotte continue to ignore.

Throughout the Wyandotte brief, it appears to be assumed that PL 602 mandates that the Park City land be placed in trust simply because that is what the Wyandotte want. No facts and no substantive argument are offered as to how and why PL 602 applies to require the Secretary take this second tract of land into trust after already accepting the Shriner tract in trust pursuant to the mandatory provisions of PL 602. Likewise, the Wyandotte baldly conclude that the Park City land was purchased with PL 602 proceeds without providing any real factual support for the supposition. As noted above, there are significant issues before the department on both of these issues.

1. The Secretary is not mandated by PL 602 to accept the Park City land into trust

With regard to whether the Secretary is mandated under PL 602 to accept the Park City land into trust, the following facts have been presented to the Department and ignored by the Wyandotte:

a. Section 105(b)(1) of PL 602 did provide that of the money set aside, 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 the Tribe. (Kansas' Fact ¶ 1).[5]

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[5] In commenting on this statutory provision, all that the Tenth Circuit stated in *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) is that the Secretary has no discretion in deciding whether to take into trust ***a parcel of land*** purchased by the Wyandotte Tribe with PL 602 funds. (Emphasis supplied). That is not the question raised in the case at bar. The question raised in the case at bar is whether this mandatory duty was completely fulfilled when the parcel of land known as the Shriner tract (worth more than $100,000 and purchased with the $100,000 in principal funds set aside by PL 602 for that purpose) was put in trust under PL 602.

b. In or about December, 1995, the Tribe withdrew its request to have the Park City land take into trust because of a dispute with the Department as to whether that land would constitute land in the settlement of a land claim, and elected instead to have property in Kansas City, Kansas (the Shriner tract) placed into trust under the mandatory provisions of PL 602. (Kansas' Fact ¶ 10; Kansas Response to Wyandotte Statement of Undisputed Fact No. 3 [hereafter "Wyandotte Fact No."]).

c. The Shriner tract fee-to-trust application involved real property worth more than the sum of $100,000 that was set aside in PL 602 for a land purchase and subsequent mandatory trust acquisition. (Kansas' Fact ¶ 12).

d. On February 13, 1996, Assistant Solicitor Robert Anderson concluded that the Secretary did not have discretion as to whether to take the Shriner tract into trust because the Tribe's fee-to-trust application indicated that the land would be purchased using the initial from PL 602 plus interest that accrued since the award. (Kansas' Fact ¶ 17).

e. On April 19, 1996, Chief Leaford Bearskin of the Wyandotte Nation wrote to George Skibine of the Indian Gaming Management staff and confirmed that the Tribe would be purchasing the Shriner tract with the $100,000 allocated under PL 602 for trust acquisition, plus interest that has accrued since the award. (Kansas' Fact ¶ 18).

f. On April 19, 1996, the Department of Interior financial analyst, Thomas Hartman, after reviewing the Tribe's fee-to-trust application for the Shriner tract, concluded that the Department should get assurances that all of the $100,000 set aside by PL 602 will be expended on the Shriner tract so that future acquisitions are not covered by PL 602. (Kansas' Fact ¶ 19-21).

g. Mr. Hartman further noted that if the purchase price of the Shriner tract exceeds the $100,000 (which it did), then the Department should state clearly that the "settlement funds have been expended in accordance with the law and that no funds remain to implement further the "shall" of the law. (Kansas' Fact ¶ 22). This is exactly what the Department proceeded to do as set forth below.

h. On June 5, 1996, George Skibine wrote the memorandum to Ada Deer, Assistant Secretary Indian Affairs, and indicated that the Tribe must be informed that the acceptance "in trust of the Shriner tract exhausts the land acquisition authority of Pub. L. 98-602 and that subsequent trust acquisitions for the Tribe must be made under other statutory authority." (Kansas' Fact No. 24).

i. Ada Deer wrote a memorandum to the Muskogee Area Office on June 6, 1996 advising that the Tribe must be informed that the Shriner tract acquisition fulfills the Secretary's mandatory obligation to take land in trust pursuant to PL 602, and that subsequent trust acquisitions must be made on a different statutory authority. (Kansas' Fact ¶ 25, 26).

j. In July, 1996, when the Tribe was requesting the Tenth Circuit to dissolve the temporary restraining order that was preventing the Secretary from taking the Shriner tract into

trust, the Tribe specifically told the Tenth Circuit that the acceptance of title into trust but for the Shriner tract, once completed, would "finally satisfy the Congressional purpose of the 1984 Judgment Act (PL 602)." (Kansas' Fact ¶ 30-31).

k. In deposition testimony in the course of the Shriner tract litigation, George Skibine and Heather Sibbison both noted that they were seeking assurances that the Tribe was spending the entirety of the $100,000 set aside by PL 602 for the purchase of the Shriner tract so that it would exhaust that fund and there would be no mandatory obligation to take any land in trust, that is any additional land in trust besides the Shriner tract and the PL 602. (Kansas' Fact ¶ 32-33).

l. In briefing to the United States District Court and the Tenth Circuit during the course of the Shriner tract litigation, the Tribe specifically represented that the funds used to purchase the Park City land some seven years earlier should ***not*** be characterized as PL 602 funds. (Kansas' Fact ¶ 34;38).[6]

m. In briefing to the District Court approvingly quoted Mr. Hartman's admonition that "if the purchase price of the Shriner tract exceeds $100,000, the Department should state clearly that the settlement funds have been expended in accordance with the law, and that no funds remained to implement further the "shall" of the law. (Kansas' Fact ¶ 35).

n. The Tribe acknowledged that it was aware that the Agency was seeking the Tribe's "assurances that all the $100,000 is expended on the Shriner tract . . . to insure that future acquisitions were not covered by this public law – PL 602." (Kansas' Fact ¶ 37).

o. In September, 2000, the Secretary of the Department of Interior told the Tenth Circuit that "the Assistant Secretary of Indian Affairs required the area director to inform the Wyandotte that the Shriner tract trust acquisition fulfilled the Secretary's obligation to take the land into trust under PL 602 and that subsequent trust acquisitions must be made under different statutory authority. The Secretary went on to note that the Administrative Record demonstrates that the acquisition exhausted the funds available to the Tribe under Section 105(b)(1) appeal of 602. (Kansas' Fact ¶ 48).

p. In September, 2002, the Wyandotte noted in briefing to the Secretary that "the requirement proposed by the Agency in its April, 1996 statement was that while the Tribe may spend accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended and the Shriner tract should be sufficient to insure that future acquisitions" were not covered by PL 602. (Kansas' Fact ¶ 49).

s. In this same briefing to the Secretary, the Tribe approvingly recited the June 6, 1996 memorandum by Mr. Skibine to Ada Deer, and Ms. Deer's subsequent Memorandum to the Muskogee Area Office of that same date that set forth the condition that after the Shriner tract was accepted into trust, subsequent trust acquisitions for the Wyandotte Tribe had to be made under other statutory authority." (Kansas' Fact ¶ 42).

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[6] Among the issues before the Department is whether the Wyandotte are judicially estopped from now claiming that the money used to buy the land in Park City was from the PL 602 funds.

Given this record, it is not surprising that in April, 2006, the Wyandotte sought to invoke the Secretary's discretionary authority under 25 U.S.C. § 465 in its fee-to-trust application for the land in Park City, Kansas. (Kansas Fact No. 45).

To date, the Wyandotte have never disclosed the existence of this record to the Department, which includes the conditions under which the Shriner tract was accepted into trust, the fact that the Wyandotte acknowledged that the $100,000 set aside by PL 602 for the purchase of land was entirely attributed to the purchase of the Shriner tract, the fact that the Department told the Wyandotte that no further trust acquisitions (beyond the Shriner tract) could thereafter be predicated on PL 602 and that such matters were not only urged as true by the Wyandotte in briefing to the United States District Court and Tenth Circuit, but were used to attempt to persuade such courts to sanctify the Shriner Tract trust acquisition by the then Secretary.

Yet, the Wyandotte never mention any of this to the current Secretary. It was not until September, 2010 that the Shriner Tract events of 1995-1996, and the statements made in the litigation thereafter, were presented to the Department by Kansas. (Wyandotte Fact No. 54).

When provided the opportunity by the Department to substantively respond to these matters, the Wyandotte did not do so. (Wyandotte Fact No. 71). In briefing to this Court, the Wyandotte recognize the burden to prove that the Secretary owes the Wyandotte a "clear duty" (Doc. No. 61 at 41) or that PL 602 imposes a pure ministerial, mandatory duty on the Secretary (Doc. No. 61at 42). Yet, the Wyandotte still offer nothing of substance on these issues in briefing to this Court, other than a preliminary recommendation of a regional official on an issue about which that official has no delegated authority. (See Kansas Response to Wyandotte Fact No. 7). It certainly is not enough for the Wyandotte to rely upon the suggestion of a regional

official with no authority to decide the issue and who was not presented with anything close to a full and complete record.

Based on the record, it cannot be disputed that serious and substantial issues exist regarding whether PL 602 remains as a source of a mandatory trust acquisition, given that the Shriner tract trust acquisition that involved the acquisition of land worth well more than $100,000 that was purchased with the $100,000 set aside by PL 602 for that very purpose.

2. There are serious and substantial issues as to whether the Park City land was purchased with funds that can be attributed to PL 602.

As to this issue, the Wyandotte's solitary offering is the singular statement that the $25,000 withdrawn from the general, commingled investment account in November, 1992 constituted the "judgment funds" or PL 602 funds. (Wyandotte Fact No. 1). No explanation is provided beyond David McCullough's letter and the "missing" account statements for November, 1992. Those statements reveal nothing other than a cash withdrawal that month, among others.

In or about January, 2012, when the Administrative Record was first filed and Mr. McCullough's letter first came to the attention of Kansas, Kansas wrote to the Secretary and raised the issue above whether the money used in November, 1992 to purchase Park City could actually be attributed entirely to the PL 602 funds. (AR 2810-2843).[7]

The facts that are before the Department on this issue include the following:

a. In May, 1986, the Tribe used $95,000 of the $100,000 funds set aside for PL 602 not to buy land, but to purchase mortgage obligation bonds. (Kansas' Fact ¶ 53).

[7] An additional issue that is raised and has yet to be judicially addressed is whether PL 602 can even be invoked if none of the principal $100,000 funds set aside for the purchase of land are used for the land acquisition and only, at least in part, interest accrued on the principal funds is used for the purchase of land.

b. Those bonds were segregated in a separate account of the Wyandotte until December, 1991 when the Tribe closed that account and commingled the proceeds, plus any remaining cash, into its general investment account along with all the other assets in that account. (Kansas' Fact ¶ 54).

c. In the *Sac and Fox Nation of Missouri,* 210 F.3d at 1268, the Tenth Circuit remanded the case because it concluded that the Secretary's determination that "only Pub. L. 98-602 funds were used for the acquisition was not supported by substantial evidence in the record."

d. When the matter was remanded to the Secretary, the Wyandotte retained KPMG to analyze its investment accounts as part of the remand proceedings in an effort to demonstrate that after the PL 602 funds/bonds were commingled in December, 1991, the principal $100,000, plus accrued interest and earnings on that sum had grown to at least $180,000 in theoretical value in July, 1996 to attribute to the Shriner tract purchase. (Kansas' Fact ¶ 55).

e. At the time of the commingling of the accounts in December, 1991, KPMG reported that there was $131,707.14 in bonds and cash in the account when, in fact, the total face value of the bonds purchased with the PL 602 funds and the remaining case was only $109,521.91. (Kansas' Fact ¶ 56 and 57).

f. One reason that KPMG overstated the actual amount of the face value of the bonds and cash in the account was that it failed to take into account the net withdrawals of approximately $28,000 from the segregated account that held the PL 602 bonds between May, 1986 and December, 1991 that resulted in reducing the actual assets that were in the account. (Kansas' Fact ¶ 51).

g. In November, 1991, the Tribe withdrew $25,991.67 from the cash portion of the account, but that money was not used for the purchase of land. (Kansas' Fact ¶ 59)

h. In or about November, 1992, the Tribe withdrew another $25,000 in cash that it claims it used to purchase the land in Park City – but the account statement does not identify the source of those funds. (Kansas' Fact ¶ 60 and 61).

i. In its analysis of the commingled investment account between December, 1991 and July, 1996, while KPMG prorated interest and earnings to the PL 602 funds, it never deducted prorated margin interest charges against the PL 602 funds. (Kansas' Fact ¶ 62).

j. The Park City land was not purchased with any of the principal $100,000 set aside by PL 602 for the purchase of land because all of that money was attributed to the purchase of the Shriner tract. (Kansas' Fact ¶ 63).

k. In fact, the Park City land was not purchased with only PL 602 funds because, after accounting for the analytical errors KPMG made, reducing the PL 602 funds by $25,000 in November, 1992 would result in those funds being worth less than $180,000 by July, 1996. However, the sum of $180,000 in PL 602 funds have already been attributed to the Shriner tract

purchase and that formed the basis for the mandatory trust acquisition of that property under PL 602. (Kansas' Fact ¶ 64)

Clearly, there are significant issues that the Wyandotte have not addressed in communications with the Department and in briefing to this Court. Kansas submits the attribution of the $25,000 used in November, 1992 to buy the Park City property to PL 602 would undermine the very foundation upon which the Shriner tract purchase was mandated in July, 1996. If this $25,000 is removed (as of November, 1992) from the calculations that KPMG performed, there would not have been enough money to grow into the $180,000 that has already been attributed to the Shriner tract purchase in July, 1996. Since that has already been done, one can not rewrite history and now attribute the $25,000 withdrawn in November of 1992 to the PL 602 funds.

ARGUMENT AND AUTHORITY

The Wyandotte seek mandamus relief pursuant to 28 U.S.C. § 1361 and relief under 5 U.S.C § 706(1) on a claim that the Department has "unreasonably delayed" a decision on its application to place the Park City land into trust. (Doc. No. 61 at 37). Kansas acknowledges that the inquiry the Court must make under the mandamus inquiry pursuant to 28 U.S.C. § 1361 is much the same as the inquiry under § 706(1) of the APA. *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981). In "evaluating claims of unreasonable agency delay, which seek either mandamus or a mandatory injunction under the APA, or both, the Tenth Circuit applies the same principles and standards, both to determine jurisdiction over the claim and to assess the merits of the claim." *Yu v. Brown*, 36 F. Supp.2d 922, 928 (D. N.M. 1999), citing *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th. Cir. 1995).

The Tenth Circuit noted that since mandamus "requires no other remedy be available and the APA provides a means of challenging unreasonably delayed Agency action, technically mandamus is no longer available in such cases. *Yu*, 36 F. Supp.2d at 928, citing *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1059 (10th Cir. 1993). However, the Tenth Circuit has also recognized that the mandatory injunction authorized under the APA "is essentially in the nature of a mandamus relief." *Mt. Emmons*, 117 F.3d at 1170; *Estate of Smith v. Heckler,* 747 F.2d 583, 591 (10th Cir. 1984).

To be entitled to mandamus relief due to alleged unreasonable agency delay, the Wyandotte must establish "(1) that his or her claim is 'clear and certain'; (2) that the duty owed is ministerial and so plainly prescribed as to be free from doubt"; and (3) that no other adequate remedy is available. *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990).

In considering whether there has been an unreasonable agency delay, the lack of a deadline specified for Agency action simply means that an Agency is subject to the general reasonableness requirements of the APA. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). The factors that a court may consider in determining whether Agency action has been unreasonably delayed, include the following: (1) the extent of the delay; (2) the reasonableness of the delay in the context of the legislation authorizing Agency action; (3) the consequences of the delay; (4) administrative difficulties bearing on the Agency's ability to resolve an issue; (5) the complexity of the task envisioned by the court's remand order. *Kim v. United States Citizenship and Immigration Services*, 551 F.Supp.2d 1258, 1265 (D. Co. 2008) citing *Qwest Commc'ns Int'l Inc. v. Federal Commc'ns Comm'n*, 398 F.3d 1222, 1239 (10th 2005).

Based on the material undisputed facts, mandamus is not justified and there has been no unreasonable delay by the Department as a matter of law. This conclusion is true under any and/or all of the analytical factors set forth above.

A. Mandamus Relief Is Not Available

As a matter of law, the Wyandotte cannot establish the factors necessary to warrant mandamus relief pursuant to 28 U.S.C. § 1361 on its claim of unreasonably delayed Agency action.

1. There is no current duty owed to Plaintiff by the Agency.

What has been set forth above reflects that there are substantial questions as to whether PL 602 continues to impose any mandatory duty on the Secretary to place Land and Trust at the request of the Wyandotte. Kansas contends the undisputed material facts set forth above establish that once the Shriner tract was accepted into trust, any duty on behalf of the Secretary pursuant to PL 602 was completely fulfilled such that any future trust acquisitions, including Park City, must be predicated under some other statutory authority and not PL 602. All of the $100,000 principal funds set aside by PL 602 for the purchase of land were expended on the Shriner Tract. The acceptance into trust of the Shriner Tract fulfilled Congressional intent that the Wyandotte receive in trust land worth $100,000 purchased with the $100,000 set aside in PL 602 for that very purpose.

Moreover, the Tenth Circuit has noted that the mandatory obligation under PL 602 is invoked if only PL 602 funds are used to purchase the property. *Sac and Fox Nation,* 240 F. 3d at 1268. The facts set forth above reflect the existence of significant questions regarding whether the $25,000 withdrawn in November, 1992 can be attributed to the purchase of the Park City

property, without destroying the fundamental, historical basis upon which the Shriner Tract was manditorily accepted into trust back in 1996.

Not only are there serious and significant issues bearing on the validity of this second attempt by the Wyandotte to claim a mandatory duty under PL 602, the Wyandotte provide nothing of substance on any of these issues in briefing to this Court. The primary argument the Wyandotte make to this Court is that some time ago, a regional official within the Department, without delegated authority to even decide the issue, made a recommendation that the land should be put in trust. The claim of the Wyandotte in this regard is that the "Region's evaluation of the request and supporting documents" reveals that PL 602 mandates the acquisition of the proposed property. (Wyandotte Fact Statement No. 7). The "documentation" that the Wyandotte had presented at that time (January, 2009) continued to reflect that the Park City land was purchased from cash withdrawn in November, 1991. This same "documentation" failed to include anything related to the administrative and legal record from the Shriner Tract acquisition set forth above.

In addition to lacking the authority to decide the issue, it is apparent that this regional official was not provided the factual and legal background necessary to properly evaluate the issues. Yet, this regional recommendation appears to form the foundation of the argument advanced by the Wyandotte to this Court. Beyond that, the Wyandotte offer up little more than a chronological progression of this matter within the Department, but nothing of substance on the underlying issues facing the Department.

It is on this basis that Wyandotte suggest that somehow they are entitled to summary judgment as a matter of law, despite the overwhelming record demonstrating that there is no further duty owed to the Wyandotte under PL 602.

2. There is no duty owed to the Wyandotte that is ministerial and so plainly prescribed as to be free from doubt.

What is set forth in the section above applies equally to this argument. Indeed, it is likely the Wyandotte sought to invoke the Secretary's discretionary authority to accept the Park City land into trust (for over two years) precisely because of the record created during the course of the Shriner tract acquisition which conclusively established that any mandatory duty under PL 602 no longer existed after the Shriner tract was placed in trust.

At a minimum it cannot be seriously contended that there exists some form of purely ministerial duty under PL 602 that is so plainly prescribed as to be free from doubt. There is nothing offered in the Wyandotte briefing to this Court to support such a conclusion-and the showing by Kansas proves the exact opposite.

This attempt at a second trust acquisition by the Wyandotte, after already receiving land worth more than $100,000 in trust under PL 602, involves substantial questions of law and fact that are before the Department. The existence of these issues is testament to the fact that mandamus relief is not available to the Wyandotte. This matter should be dismissed and the Department should be allowed to proceed to resolve the issues before it. Nothing put forward by the Wyandotte supports any contrary conclusion.

B. <u>There Has Been No Unreasonable Delay</u>

Before addressing the factors to be considered in determining whether there has been unreasonable delay by an agency, such that the Court should entertain some form of relief, it must be pointed out that any delay in this case has been largely occasioned by the conduct of the Wyandotte. The Wyandotte spent the first two years and several months pursuing the fee-to-trust application for Park City under the Secretary's discretionary authority. The Wyandotte also failed to disclose (until August, 2009) that the Park City land was purchased from a cash

withdrawal from its general investment account in November, 1992 – not from a segregated account holding the PL 602 bonds in November, 1991. This was also the first time that the Wyandotte presented the November, 1992 account statements showing this $25,000 cash withdrawal, when it had asserted some eight years earlier that those statements were missing.

Finally, at no time have the Wyandotte disclosed to the Department the administrative and legal record generated during the course of the Shriner Tract acquisition and subsequent litigation, which certainly impacts the question of whether a mandatory duty remains under PL 602 for the Secretary to take any action regarding Park City. This was not brought to the attention of the Department until September, 2010 –and then by Kansas. Afterwards, when offered the opportunity to comment substantively on such matters, the Wyandotte did not do so.

Finally, when the State learned in January, 2012 that the Park City property was purchased in November, 1992 from a withdrawal of money from the general investment account at that time as opposed to what had been represented for years, the State brought to the Department's attention certain issues that this raised. (AR 2810-2843). The State subsequently had the account statements and available documents analyzed by a CPA and that report has been furnished to the Department.

The Wyandotte do not address any of the accounting issues. Rather, all the Wyandotte offer is that the $25,000 cash withdrawn in November, 1992 constituted "judgment funds". (Wyandotte Fact Statement No. 1). Very little, if any, further attention is devoted to this significant issue. The Wyandotte do not explain how and why the $25,000 withdrawn from its general investment account in November, 1992 can be attributed to PL 602, and what impact that would have on the previous accounting and attribution of funds that has already been

accomplished to justify the Shriner Tract acquisition under PL 602 back in 1996. While the Wyandotte do not address these issues, they are issues the Department must address.

Put in its proper context, there has not been any delay-much less unreasonable delay. For this reason as well, this action should be dismissed as a matter of law.

1. Extent of the delay

What has been set forth above reflects that whatever "delay" that has occurred in this case has been at the instance of the Wyandotte. Any consideration of the "extent" of any such delay must take into account what has transpired during the course of this effort of the Wyandotte to foist PL 602 a second time upon the Department. Seen in this context, the extent of any delay has not been significant as the Department has been forced to deal with many of the issues in piecemeal fashion. The Wyandotte are in no position today to complain about the extent of any "delay" under all of the facts and circumstances.

2. The reasonableness of the delay in the context of the Legislation authorizing Agency action

Kansas suggests that there has been no delay. Certainly, the conduct of the Department to date has been reasonable given the fact that the Wyandotte : (1) spent the first two years and some months pursuing this as a discretionary application; (2) did not divulge until August, 2009 the fact that it had misstated for years the source of funds used to purchase Park City and when those funds were withdrawn; (3) never brought to the Department's attention the administrative and legal record generated during the course of the Shriner tract that is set forth above; and (4) failed to comment on such matters substantively when furnished the opportunity by the Department to do so. Under all of these facts and circumstances, the Department's action on the application to date has been reasonable from a timing standpoint. Certainly, there has been no unreasonable delay.

3. The consequences of the delay

The Department has not engaged in any delay, and the fact that the Wyandotte application is in the situation that it presently is in is due in large part to the conduct of the Wyandotte. Any consequences can only be the result of the calculated efforts of the Wyandotte's approach to this fee-to-trust application and the tactics employed.

4. Administrative difficulties bearing on the Agency's ability to resolve an issue

Kansas is unaware of any particular administrative difficulties bearing on the Agency's ability to resolve this issue-other than accumulation of the vast legal and administrative record from the Shriner Tract acquisition in order to attempt to achieve harmony and consistency in the Departments dealings with these events and related issues that have spanned more than twenty (20) years.

Certainly, the Department's task to address the accounting issues has been rendered more difficult by the Wyandotte, including by virtue of the following:

--investing the money set aside by PL 602 for a land purchase into mortgage bonds;

--commingling "trust" funds (the PL 602 bonds) into a general investment account;

--requiring the calculation of interest and earnings on the PL 602 bonds after December, 1991 to be a somewhat blind exercise due to the alleged absence of account statements for large gaps of time;

--engaging in calculations of the value of the PL 602 bonds that ignored matters such as the actual dissipation of assets from the account housing the PL 602 bonds-resulting in the Wyandotte reporting to the Department that in December, 1991 that the value of the PL 602 bonds and cash in the account at that time $131,000 when in fact the account statement reflects

that there was only $109,000 in the account at the time-based on the face value of those PL 602 bonds and cash in the account.

--advising the Department some three and a half years into the application process that the Park City property was actually purchased with funds withdrawn in November, 1992 from a commingled, general investment account-and supporting that assertion with the production of an account statement that for years had been represented as being lost or unavailable.

5. The complexity of the task envisioned by the Court's remand order

What has been set forth above responds equally to this inquiry. The complexity of the Department's task is in part due to the history of the agency dealings on the Shriner Tract that goes back twenty (20) years or more. This is compounded by the difficulties presented by the accounting issues discussed above.

On balance, and as a matter of law, there has simply not been any unreasonable delay on behalf of the Department in light of all of the above and foregoing.

CONCLUSION

For all of these reasons, Kansas respectfully requests that this Court dismiss the Wyandotte Complaint for the reason that, as a matter of law, there has not been any unreasonable delay on behalf of the Department of Interior in its processing of the Wyandotte Nation's fee-to-trust application for land in Park City, Kansas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 29th day of October, 2012, I caused the above to be filed using the Court's Electronic Case Filing System, which will send notification of such filing to the following parties:

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