UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WYANDOTTE NATION Plaintiff, v. 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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Plaintiff Wyandotte Nation[1] ("Wyandotte" or "Nation") hereby submits this brief in support of its Motion for Summary Judgment against Defendant Kenneth Salazar, Secretary of the Department of the Interior ("Secretary") and states as follows:

INTRODUCTION

> In light of the plain language of Pub. L. 98-602, the Associate Solicitor made the only conclusion that the statute would allow. . . The Bureau of Indian Affairs, reasonably enough, followed the legal advice provided by its attorney and decided that it was required to take this land into trust.[2]

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[1] The Wyandotte Nation is a federally-recognized Indian Tribe. 75 Fed. Reg. 60810, 60813 (Oct. 1, 2010)

[2] This language contained in a brief filed in the Tenth Circuit Court of Appeals in 2000 explains why the Secretary concluded, in 1996, that he was mandated to accepted into trust for the Wyandotte land purchased with funds set aside for that purpose under Pub. L. 98-602, 98 Stat. 3149 (1984) ("P.L. 98-602"). The referenced language can be found in the Administrative Record at page 1992 (hereinafter "A.R. ___")

This is a simple case. In 1992, the Wyandotte purchased land in Park City, Kansas ("Park City land") with funds set aside under P.L. 98-602.[3] In 2006, the Wyandotte submitted an application requesting the Secretary accept the Park City land into trust as a mandatory acquisition. In January 2009, the Department's regional office in Oklahoma transmitted the trust application to the Department under a cover letter stating the "acquisition should be approved as a mandatory acquisition pursuant to P.L. 98-602." [A.R. 943-947]. In October 2009, the Department began circulating a draft "Mandatory Acquisition Memo for the Park City property." [A.R. 1620]. By December, the Department's Deputy Secretary determined the Wyandotte application should be "refer[red] to the ASIS [Assistant Secretary—Indian Affairs] for mandatory acquisition." In September 2010, a Department email stated "[t]oday we surnamed and delivered to the client [ASIS] . . . Wyandotte Notice of Intent to take land into trust. [A.R. 1885]. A few days later, the ASIA sent an email stating "I have been told that the Wyandotte matter will be ready for decision any day." [A.R. 2583] In early October 2010, another Department email states "The AS-IS will be making a decision on taking land in trust as a settlement of a land claim for the Wyandotte Nation . . . This is a mandatory acquisition." [A.R. 2150] Later that month, the Department concludes it "would like final surname packages on the AS-IS desk by Nov. 2." [A.R. 2154]. Included in this list was the Wyandotte application. By the end of October, an email was circulated stating the Wyandotte Park City land into trust application is "ready for LEH's [ASIS] signature". [A.R. 2164]. In October 2011, a Department email concerning the Park City land into trust application states the "DIA's Branch of

[3] When the Wyandotte could not convince the Department to even consider their original efforts to place the Park City land into trust, the Nation refocused its efforts to acquire lands into trust to Kansas City, Kansas. In 1996, the Department considered the "plain language of P.L. 98-602" for the first time and "decided that it was required to take this land into trust." [A.R. 1992] The Kansas City land was ultimately accepted into trust by the Secretary as a mandatory acquisition. Since 1996, through 15 years of litigation, one simple fact has remained constant and fully supported and defended by the Department of Interior ("Department"), to-wit: Pub. Law 98-602 mandates the Secretary to take into trust lands purchased with monies set aside for that purpose.

Environment and Lands is drafting a decision document for ASIA's signature." [A.R. 2628-2630]

The law is clear. The Department acknowledges its mandatory duty to acquire the Park City land into trust. But, for almost four years now, the Secretary has refused to act when he and his Department have consistently concluded he is mandated to accept the Park City land (land purchased with P.L. 98-602 monies) into trust. The Nation's right to have the Secretary issue a decision on the Nation's Park City land into trust is beyond dispute. The Secretary's mandate to accept the Park City land into trust is set forth in P.L. 98-602--an Act of Congress. The Secretary's own position that P.L. 98-602 imposes a non-discretionary (mandatory) duty to take land into trust has been confirmed by both the Kansas federal district court and the Tenth Circuit Court of Appeals.

Under these circumstances, the Secretary's lengthy delay in taking a purely ministerial action that he and his department acknowledge he is required to perform is unreasonable. His refusal to fulfill his established trust obligation to act in the Nation's best interests, as well as his specific statutory obligation to the Wyandotte under Pub. L. 98-602, is unlawful. This Court should not permit that delay to continue. Based upon the law and facts, as hereinafter discussed, the Wyandotte are entitled to a judgment of mandamus and/or mandatory injunction directed to the Secretary compelling him to immediately act upon the Nation's application to acquire the Park City land in trust as a mandatory acquisition for the Wyandotte.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Civil Rule 56.1, Plaintiff Wyandotte Nation (the "Nation") submits the following statement of material facts to which no genuine issue exists:

1. On November 24, 1992, the Nation withdrew $25,000 of the judgment funds from the main investment account. [A.R. 1581-1588]

2. On January 21, 1993, the Nation submitted an application requesting the Department of the Interior ("Department") take the Park City Land into trust for the Nation pursuant to the mandate of P.L. 98-602. [A.R. 88-172]

3. On February 19, 1993, the Tulsa Field Solicitor's office sent a memorandum to the Director of the Muskogee Area Office (received on February 22, 1993) stating that P.L. 98-602 did not impose a mandatory duty on the Secretary to take the Park City land into trust and that the monies awarded to the Wyandotte under P.L. 98-602 were not in settlement of a land claim. [A.R. 991-1002]

4. On or about April 13, 2006, the Nation submitted a renewed application for the Department to take the Park City Land in trust for the Nation. [A.R. 1179-1180]

5. On May 2, 2008, the Nation again wrote the Department's Regional Director stating that the Park City Land was purchased with P.L. 98-602 judgment funds which required the Secretary take the lands into trust for the Nation. [A.R. 1369-1374]

6. The Wyandotte followed the May 2, 2008 letter with a "Supplement to Application for the Secretary of the Interior/BIA Muskogee Region to take Land Located in Park City, Kansas In Trust for the Wyandotte Nation and to Determine Such Trust Lands May be used for Gaming Purposes." [A.R.964-1026]

7. On January 30, 2009, the Muskogee Area Office transmitted the trust application to the Department with a cover letter stating "[t]he Region's evaluation of the request and supporting documents reveals that P.L. 98-602 authorizes the mandatory acquisition of the proposed property for the Nation. Based upon the above findings, the Region has determined

that the acquisition should be approved as a mandatory acquisition pursuant to P.L. 98-602." [A.R. 943-947]

8. On May 20, 2009, the Department determined that the Regional Solicitor had already determined the Park City Land was a mandatory acquisition in his August 27, 2008 legal memorandum. [A.R. 1558-1559]

9. On June 23, 2009, the Department prepared a draft legal memorandum evaluating whether the Park City Land "is a mandatory acquisition." [A.R. 1566] The memorandum is redacted from the Administrative Record but the subject of the memorandum is described in the Index as "[d]raft legal memo prepared for client evaluating whether Park City is a mandatory acquisition."

10. On June 23, 2009, the Department had determined two issues needed to be clarified before finalizing the memorandum. The two issues 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. [A.R. 1564]

11. On July 21, 2009, the Nation again met with the Department in Washington, D.C. to discuss the Park City Land trust application. [A.R. 1573-1575].

12. During the July 21, 2009 meeting, the Nation was asked to address the two issues needed for clarification before the Department could finalize its memorandum on taking the land into trust. [A.R. 1578-1579].

13. On August 18, 2009, the Nation addressed the two remaining issues discussed at the July 21st meeting in a letter from its legal counsel to the Department. [A.R. 1581-1591].

14. On September 10, 2009, Candace Beck, the attorney in the Department's Solicitor office charged with reviewing the two issues identified on July 21, 2009, stated in an email to her

supervisor that "I think I have figured out the money issue after reviewing this morning and comparing the statement to the KPMG audit." [A.R. 1605].

15. On September 22, 2009, Nation's Second Chief Billy Friend sought a meeting with the Department to again discuss the status of the Park City Land into trust application. [A.R. 1613-1614].

16. On September 23, 2009, the Department determined there was no "need to meet with the tribe. Candace [Beck] is finalizing her part, and will be done soon." [A.R. 1615].

17. On October 15, 2009, the Department completed the draft "Mandatory Acquisition Memo for the Park City property. [A.R. 1620].

18. On November 10, 2009, Maria Wiseman, then an assistant solicitor in the Division of Indian Affairs, reviewed the Wyandotte "Mandatory Acquisition Memo" and responded "Looks good. A few comments and questions." [A.R. 1642]

19. On November 10, 2009, Wiseman sent the "Mandatory Acquisition Memo" for the Wyandotte trust acquisition to Edith Blackwell for comment. [A.R. 1649]

20. On November 24, 2009, Edith Blackwell, Associate Solicitor for the Division of Indian Affairs, responded to Wiseman, "Sorry for the delay, this is fine with me." [A.R. 1663]

21. On December 3, 2009, Candace Beck sends an email to Pilar Thomas, Deputy Solicitor – Indian Affairs, stating "We are ready to send this on to the Office of Indian Gaming. Please let us know if you have any comments or questions." [A.R. 1669]

22. On December 7, 2009, Thomas addresses the "Wyandotte Opinion" in an email stating "I don't have any further questions or comments. As this does not appear to be a 'lands determination' will we be issuing a separate opinion on that?" [A.R. 1677].

23. On December 8, 2009, the Department held a "gaming meeting" where it discussed "Land Acquisitions" "Wyandotte". [A.R. 1680].

24. On or about December 8, 2009, the Deputy Secretary [of Indian Affairs] sent a memo to the Secretary [of Indian Affairs] concerning "Pending Land into Trust Applications for Gaming Purposes". The memo stated "The summaries are for applications that are expected to have agency action within the next sixty (60) days, and thus are likely to attract some level of attention in the short term." [A.R. 1687].

25. The Deputy Secretary's December 8th memo identified the Wyandotte as one of the tribes and identified an exception for "Land Settlement." The next action on the application was to "refer to the ASIS for mandatory acquisition" and it was noted that the governor of Kansas and the county opposed the action. [A.R. 1687 and A.R. 1690].

26. On January 5, 2010, Wiseman instructed Candace Beck to "go ahead and get this [Wyandotte Opinion] ready for signature." [A.R. 1705]

27. On January 9, 2010, Wiseman tells Beck that "I'm surnaming this now and will give it to Edith." [A.R. 1706].

28. On or about February 1, 2010, the Wyandotte Tribal Letter and Wyandotte Memo to the Eastern Oklahoma Regional Office were prepared. [A.R. 2763].

29. On March 16, 2010, David Hayes sends an email to Thomas asking "for a succinct list of the land in trust acquisitions that are on the "mandatory" side (i.e., not subject to the two part test) and that would be ready to go soon (e.g., within the first three months or so) after the Secretary gives a green light to Larry." [A.R. 1722]

30. On March 16, 2010 Thomas responds to Hayes' request by transmitting a list titled "Pending Gaming Land into Trust Applications that could be 'Ready to Go' within 90

Days". Included on that list was the "Mandatory acquisition of 10.5 Acres in Park City, Sedgwick County, KS" for the Wyandotte. [A.R. 1722-1723].

31. The list provided to Hayes by Thomas on March 16th also contained under the heading "Status of Indian Lands Opinion" "Issued Opinion on Mandatory Settlement; None requested by BIA." [A.R. 1723]

32. On March 16th, Thomas also sent a email to Hillary C. Tompkins and Vincent J. Ward with a subject heading of "Gaming Applications – Not 2 Part Determinations" and an attachment described as "pending gaming apps non 2 part." [A.R. 1725]

33. In the attachment to the March 16th email, under the heading "Land Into Trust for Purposes of Gaming" "Section 20 Exceptions", was listed the Wyandotte Nation. [A.R. 1728].

34. On April 5, 2010, Thomas sent an email to Del Laverdure with the subject listed as "Gaming Applications" and the attachment identified as "Pending Gaming LIT 90 Days Out". The Nation is identified on the attachment. Under the heading "Status of Lands Opinion", in it is the noted that the Department has "Issued Opinion on Mandatory Acquisition" and the "next step" is to "Draft ROD". [A.R. 1762-1763].

35. On June 15, 2010, Wiseman sent an email to Arlana Viswanathan, Office of Solicitor, with the subject matter identified as "Wyandotte FR notice package". [A.R. 1799].

36. On July 15, 2010, Thomas sent an email to Blackwell and Karen Lindquist stating "we need to complete the surname for the Notice of intent for Wyandotte." [A.R. 1843].

37. On July 22, 2010, Nancy Pierskalla of the Office of Indian Gaming sent an email to Karen Lindquist inquiring into "the status of these two applications. We delivered them to you on 7/16. Pilar told Paula on Tues evening that she had already surnamed the Wyandotte file, so we would like to make sure that it is moving." [A.R. 1858].

38. On August 4, 2010, Davis sent an email to Tompkins, Thomas and Laverdure referencing a gaming meeting to take place the following day. Davis said "[w]e want to talk about the status/timing of pending applications that are in the IGRA exception category, in particular those that could be ready to move in a very near time frame. I am assuming that is {redacted} Wyandotte." [A.R. 1866].

39. On August 5, 2010, Blackwell emailed Thomas stating "Maria has Wyandotte on her desk, do you want her to surname and send it to your or should she keep it?" [A.R. 1867]

40. Less than two minutes after receiving the Blackwell email, Thomas responded "Let's {redacted} surname the Wyandotte Notice." [A.R. 1867]

41. On August 24, 2010, former Kansas Senator Bob Dole wrote to the Secretary, with a copy to Rahm Emanuel, requesting a meeting to discuss "the pending application" "that would place land in Park City, Kansas into trust." [A.R. 1872].

42. Senator Dole set up the meeting on behalf of his client, Peninsula Gaming. [A.R. 2582]

43. On August 25, 2010, a number of emails were exchanged between Thomas, Gary Art, Ed Keable and Blackwell concerning Senator Dole's request for a meeting. [A.R. 1873-1875].

44. On August 26, 2010, Wiseman sent an email to Blackwell stating "I have the [Wyandotte] decision package – a FR notice for the decision may be included in that. There is no NEPA because this is a mandatory acquisition." [A.R. 1876].

45. On August 26, 2010, Blackwell responded to Wiseman's email, stating "I sent you the Pilar/Art exchange. Tomorrow let's talk about where the package should reside in the interim." [A.R. 1876].

46. On August 30, 2010, Mike Marshall, policy advisor and communications director to Senator Dole at Alston + Bird, LLP, sent an email to Jordan Finegan as a "follow up on the email Senator Dole sent to Secretary Salazar last week" and thanking Jordan "for your help with this." [A.R. 1876-1877]

47. On August 31, 2010, Laura Davis emailed Assistant Secretary-Indian Affairs Larry Echohawk stating "The Secretary has asked that you personally handle this meeting request from Senator Dole." [A.R. 1878].

48. On September 2, 2010, Blackwell notified Thomas in an email with the subject matter described as "{redacted} and Wyandotte" that "I surnamed both and they are in my outbox." [A.R. 1883]

49. On September 2, 2010, Thomas responds to Blackwell in an email stating "I have surnamed and sent back." [A.R. 1884]

50. On September 2, 2010, Thomas sent a separate email to Tompkins stating "Today we surnamed and delivered to the client. {redacted} Wyandotte Notice of Intent to take land into trust." [A.R. 1885].

51. On September 3, 2010, Marshall sent an email to Laverdure stating "I will be in touch as you suggest to work out an agreeable time for you and Mr. Echo Hawk. Of course, we would like the opportunity to discuss the issues surrounding this application before action is taken on your part. If it is possible could you please let us know if that is the case." [A.R. 1887].

52. On September 9, 2010, Marshall sent an email to Echohawk, with a copy to Rahm Emanuel, "**On Behalf of** Dole, Bob" (emphasis by Marshall) stating representatives of our client

want to meet with you but cannot do it until late next week and obviously want to meet before any decision is made." [A.R. 2583].

53. On September 9, 2010, Echo Hawk respond to Dole's email stating "I have been told that the Wyandotte matter will be ready for decision any day." [A.R. 2583]

54. On September 13, 2010, Kansas Attorney General delivered a letter with attachments to EchoHawk opposing the Park City Land into trust acquisition. [A.R. 1960-2133].

55. On September 16, 2010, the meeting arranged by Senator Dole with Larry Echohawk was held. Representatives from the state of Kansas, the Kansas congressional delegation, Peninsula gaming and Senator Dole's staff were in attendance. [A.R. 2582]

56. On October 1, 2010, Paula Hart advised Wiseman that she had completed her review of the documents submitted by the Kansas Attorney General and provided her analysis. [A.R. 2142-2143].

57. On October 1, 2010, Marshall emails Bryan Newland and thanks him for introducing Marshall to "Pilar and Edith." In the email Marshall writes "Pilar and Edith, I wanted to offer to provide the Solicitor's office with the same briefing we provided to the Assistant Secretary Larry Echo Hawk. I would be happy to arrange the Kansas group if and when you have time to visit with them." [A.R. 2146]

58. On October 8, 2010, Margaret Treadway sent an email to Laverdure that proposed several "Significant/noteworthy announcements" including "The AS-IS will be making a decision on taking land in trust as a settlement of a land claim for the Wyandotte Nation of Oklahoma in Kansas. This is a mandatory acquisition. This acquisition is opposed by all of the tribes that are presently in Kansas and the state of Kansas." [A.R. 2150]

59. On October 11, 2010, Senator Dole requests s meeting with the Department. Thomas instructs the meeting be set up "at everyone's convenience." Id.

60. On October 18, 2010, Blackwell sent an email to Thompkins stating "Del (Laverdure) would like the following applications ready to go as soon as possible. He would like final surname packages on the AS-IS desk by Nov. 2. {a.-f. redacted} g. **Wyandotte**. Del wants the final package for the AS-IS to consider in this group. No additional SOL work needed. OIG says final package is ready." [A.R. 2154]

61. The October 18th Blackwell email also contained an attachment titled "SOL Workload on Pending Gaming Acquisitions." The attachment contained the following entry for the Wyandotte: SOL NEPA – "n/a"; SOL Carcieri – "n/a"; SOL IGRA – "done"; Additional Information – "Mandatory acquisition. Land claim funds used. Upcoming mtg. with Senator Dole." [A.R. 2163]

62. On October 29, 2010, Hart sends an email with the subject matter "status of gaming documents as of October 29, 2010" which states "**ready for LEH's signature** with appropriate surnames 1. {redacted} 2. Wyandotte Nation package (letter to the Tribe, letter to the RD, letter to the RD and NOI to take land in trust)". [A.R. 2164]

63. On October 29, 2010, Thomas met with the "Kansas folks" and was "presented a substantial amount of information legal and otherwise—regarding the Wyandotte trust acquisition." [A.R. 2167].

64. On November 3, 2010, Thomas notifies Blackwell, Wiseman, Tompkins and others that "Del has agreed that we need to consider the additional information presented." Blackwell responds to Thomas asking "is there a particular time-frame in which he would like the reconsidered opinion?" "No" is Thomas' response. [A.R. 2168].

65. On November 5, 2010, Kansas Governor Parkinson submits another letter to the Secretary thanking him EchoHawk and Thomas "taking the time to meet with representatives of my office and the State of Kansas to discuss the Park City matter." [A.R. 2169]

66. On November 8, 2010, Adam Nordstrom of the lobbying firm of Chambers, Conlon & Hartwell, LLC in Washington and who is the Washington Director for the State of Kansas, sent an email to Lori Faeth thanking her for the meeting which he also attended. [A.R. 2170].

67. On November 11, 2010, Mark Gunnison of the firm of Payne & Jones, Chartered, who also attended the October 29th meeting, sent a letter with "a Legal and Administrative Record Analysis" enclosed to Thomas. [A.R. 2205-2217]

68. On November 15, 2010, Kansas Attorney General Steve Six sent a letter to the Secretary responding to "Solicitor Thomas requested further briefing and documentation from Peninsula Gaming's and Kansas interests. Attached is a legal analysis and supporting exhibits prepared by Mark Gunnison, attorney for Peninsula Gaming. We have reviewed Mr. Gunnison's legal analysis and concur with it." [A.R. 2218-2385].

69. On December 10, 2010, Blackwell circulates a "SOL Workload on Pending Gaming Acquisitions" to Thompkins. Notations next to the Wyandotte included "SOL IGRA – Being revised" and "Additional Information – AS-IA ofc asked DIA to review legal opinion based on input from the Kansas Delegation." [A.R. 2400]

70. On December 14, 2010, the Nation again met with the Department to discuss the Park City Land into trust acquisition. At the meeting, the Nation was provided for the first time with a copy of the previous correspondence from the state but, because of the size of the volumes

of documents submitted with the correspondence, the Nation was not given copies to review. [A.R. 2419]

71. On December 23, 2010, the Nation responded to the previous Kansas correspondence. [A.R. 2427-2432]

72. In early January, 2011, David Moran, an assistant Solicitor in the Department of Indian Affairs sent a fax to the National Indian Gaming Commission "[p]roviding legal analysis to NIGC attorney re: Wyandotte Park City trust acquisition." [A.R. 2433]

73. On January 18, 2011, Wiseman inquires of Moran as to the "status of our review [of the Wyandotte]." [A.R. 2435].

74. On February 11, 2011, Wiseman inquires of Moran "How are you coming with the Wyandotte memo?" [A.R. 2436].

75. On February 15, 2011, Moran responds to Wiseman "Re Wyandotte, I have requested clarifying info from the tribe (via Findaro) and should receive a response by Monday. If so, I should have a final draft ready by next Wed." [A.R. 2437].

76. On March 3, 2011, Kansas Attorney General Derek Schmidt sends a letter to the Secretary "to express continued opposition of the Office of Attorney General to the Wyandotte Nation's Land into Trust application in Park City." [A.R. 2439-2459].

77. On June 24, 2011, Wiseman sent an email to Moran stating "Del [Laverdure] has asked Patrice [Kunesh] about this [Wyandotte opinion]. He would like to finalize. How is your draft coming?" [A.R. 2476].

78. On June 27, 2011, Moran replied to Wiseman "I will have a final draft on Friday." [A.R. 2476].

79. On July 29, 2011, Wiseman responds to an inquiry from Laverdure, "You asked about the status of our Wyandotte review. David [Moran] has asked for more info from the Kansas people so he can complete his review. He has not received it yet." [A.R. 2480].

80. On July 29, 2011, Moran responded to an inquiry from Wiseman about the Nation filing this current suit against the Department stating "I heard – Findaro called me a short while ago. I will prepare an entry for the weekly. I will finalize the opinion and circulate it for review (Findaro said I should have the additional info by Monday) unless you feel otherwise." [A.R. 2503].

81. On August 10, 2011, Senator Dole sent an email to the Secretary reminding him that Dole was "representing the company that will operate an incoming casino in Kansas" and stating "The Wyandotte Nation has now sued you and the Department to force a decision. It is our hope that the Department will respond to the suit and its specious claims. In the meantime, could our lawyers have an opportunity to brief you on the topic?" [A.R. 2530].

82. On August 30, 2011, Kunesh sent an email detailing certain considerations that had to be addressed to answer the meeting request made by Senator Dole. [A.R. 2539]

83. On August 30, 2011, Moran respond to the Kunesh email stating "The schedule outlined below seems reasonable to me. It should be added that I am finalizing an opinion." [A.R. 2539].

84. On or about October 5, 2011, the Department notified Senator Dole that his request for a meeting made in August would be declined. [A.R. 2580].

85. On October 17, 2011, Wiseman sent an email to Moran stating "I have to meet with ASIA and PK tomorrow on the gaming issues. Can you give me an update on the Wyandotte decision?" [A.R. 2619].

86. On October 17, 2011, Moran responds "I am just about done. Provided nothing else comes up that takes priority, I plan to have a final draft for review completed by the end of the week." [A.R. 2619].

87. On October 24, 2011, Jeffrey Nelson sent an email to Kunesh containing "a list of the major current gaming matters under way at the DIA." Included in the list was the following: "**Wyandotte – Park City:** The DIA's Branch of Environment and Lands is drafting a decision document for ASIA' signature." [A.R. 2628-2630]

88. On November 22, 2011, Wiseman sent an email to Moran and Rebecca Ross with the subject matter "Wyandotte plan". "Since there are several things that must be worked on simultaneously for this issue, here is what I propose: Wyandotte decision – Rebecca, Admin. Record – David to start, then Rebecca after decision document, Answer – David. David, please get docs together for Rebecca for the decision." [A.R. 2638].

89. On November 30, 2011, Moran sent an email to Wiseman stating "I will get a draft opinion to review by the end of the week." [A.R. 2641].

90. On December 7, 2011, later in the day, Wiseman sent an email to Moran stating "Patrice wants to see the decision draft ASAP." [A.R. 2648]

91. On December 8, 2011, Moran sent Wiseman an email with the attachment "Wyandotte Park City FTT draft opinion", stating "Attached is the draft Wyandotte FTT decision letter." [A.R. 2650]

92. On December 8, 2011, Moran sent an email to Wiseman with the subject listed as "Wyandotte" and the attachment described as "EB's opinion". [A.R. 2652]

93. On December 8, 2011, Moran sent an email to Wiseman with the subject listed as "Wyandotte" and the attachment described as "Briefing memo-FTT decision letter 12.08.11."

Moran's message reads "[a]ttached is the briefing memo for the Wyandotte meeting." [A.R. 2654].

94. On December 12, 2011, Wiseman sent an email to Hart with the subject listed as "Wyandotte and stating "I was looking through some docs that I had. Did we issue a final decision on the Coliseum Center property? The decision letter I have is in draft." [A.R. 2740]

95. On December 12, 2011, Wiseman sent a follow-up email to Hart stating "This draft memo looks like it was written for Park City. Could it be the same parcel?" [A.R. 2741].

96. On December 13, 2011, Pierskalla responds to Wiseman's inquiry on the Coliseum Center property and states "it is the same parcel". [A.R. 2762].

97. On December 12, 2011, Moran sent an email to Wiseman with an attachment identified as "Wyandotte Park City FTT draft opinion" and stating "Attached is the final draft of the Wyandotte memo." [A.R. 2759].

98. On December 13, 2011, Wiseman distributed a "Wyandotte Tribal Letter" stating "OIG already had a draft prepared, so I just amended it a bit." [A.R. 2768].

99. On December 13, 2011, Newland distributed an agenda for a meeting to take place on December 15th to consider "Pending Gaming Applications Near Final Decision". Under the section titled "Mandatory or Solicitor Determination" was "Wyandotte (Oklahoma/Kansas – Settlement of a Land Claim Exception). [A.R. 2772].

100. On December 14, 2011, Kunesh provided her "comments/ edits to [Wyandotte Tribal Letter]. [A.R. 2773].

101. On December 14, 2011, Wiseman sent the Wyandotte Tribal Letter Draft 12-14-11 to Newland for review. [A.R. 2775].

102. On December 15, 2011, Wiseman sent an email to Hart with the subject identified as "draft Wyandotte decision letter" stating "Waiting for Bryan's comments. Do you have any comments?"

103. On December 15, 2011, Wiseman sent an email to Kunesh and others with the subject identified as "decision docs" and the message "I have forwarded the finals of {redacted} and Wyandotte to OIG to prepare of surname packages. Changes can still be made, but I wanted to keep things moving." [A.R. 2794].

104. On December 15, 2011, Hart sent an email to Newland with the subject identified as "decision documents" and attachment identified as "Wyandotte Tribal Letter DRAFT FINAL 12-15-11", and the message "Would you like us to prepare in final?" [A.R. 2797].

105. On January 30, 2012, Ross provides Wiseman and Moran with a document styled "Updated Briefing Comparison" and states the attached draft is "OK". [A.R. 3380]

106. On February 10, 2012, Wiseman transmits two documents to Ross. The documents are identified as "Wyandotte Tribal Letter Draft Final 12-15-11" and Wyandotte briefing 12-14-11". Wiseman asks Ross to "Please look these over. Still good?" [A.R.3384]

107. On February 10, 2012, Ross responds to Wiseman's email, stating "Just a couple of edits to the letters". [A.R. 3389]

108. On February 10, 2012, Wiseman sends an email to Tompkins stating "Per Patrice's request, I am forwarding the Wyandotte draft decision letter, a briefing paper, and Edith's memo of 2010." [A.R. 3396]

109. On February 14, 2012, Ross notifies Wiseman that "I'm also editing the briefing memo a bit more – there were a couple of formatting and non-substantive fixes that were needed. I'll send that to you asap." [A.R. 3408]

110. On February 14, 2012, Ross sends an email to Wiseman with the subject styled "Wyandotte – off-reservation and geographical limitation questions". Ross states that she has "address[ed] Hilary's questions." [A.R. 3433-3434]

111. On February 14, 2012, the Ross email is forwarded to Kunesh. [A.R. 3678-3681]

112. On February 16, 2012, the Kansas Attorney General sent a letter with attachments to the Department stating "There are two documents from the AR I would like to bring to your attention." [A.R. 2810-2843]

113. On or about February 28, 2012, the Department received the letter from the Kansas Attorney General. The letter "is now among the documents the Department is reviewing in connection with the Wyandotte Nation's request for the Secretary to take land in Kansas into trust for the Nation." [*CERTIFICATION OF PRE-DECISIONAL ADMINISTRATIVE RECORD,* Case Civ. No. 11-2656-JAR-DJW, Document 38, p.1, ¶ 2].

114. By letter dated March 29, 2012, the Department first notified the Wyandotte of receipt of Kansas' February 16th letter. [A.R. 4056]

115. By letter dated March 29, 2012, the Department sent a letter to the Kansas Attorney General acknowledging receipt of the February 16th letter stating the Department was "reviewing the issues raised in the letter and will consider them as part of the Nation's application. [A.R. 4057]

STATEMENT OF FACTS

I. P. L. 98-602 MANDATES THE SECRETARY TAKE LAND INTO TRUST

On October 30, 1984, Congress enacted P. L. 98-602. The new law provided that eighty percent of the funds allocated to the Wyandotte should be distributed in the form of per capita

payments to Wyandotte members and the remaining twenty percent shall be distributed as follows:

> (b) (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.
>
> . . . .
>
> (c) (1) Except as provided in paragraph (2) and notwithstanding any other provision of law, the approval of the Secretary for any payment or distribution by the Wyandotte Tribe of Oklahoma of any funds described in subsection (b) (on or after the date such funds are allocated pursuant to section 103(b)) shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds.
>
> (2) The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of this title.

A. ***Wyandotte submit original Park City land trust application.*** On November 24, 1992, the Nation withdrew $25,000 of the P.L. 98-602 funds from the main investment account to purchase the Park City land. [Fact #1] On January 21, 1993, the Wyandotte submitted an application to the Department to take the Park City land into trust for the Nation. [Fact #2]

On February 19, 1993, the Tulsa Field Solicitor's Office issued a Memorandum to the Area Director containing a number of conclusions, including the following that addressed the two issues identified above. [Fact #3] The Field Solicitor found:

- Public Law 98-602 did not mandate that the Secretary of the Interior take the land into and that the Secretary was required to exercise his discretion in determining whether the land should be taken into trust.

- The funds allocated under public Law 98-602 were not monies distributed as part of a land claim settlement and thus the land did not fall under the exception found in 2719 for lands taken into trust as part of a land claim settlement.

The Wyandotte continued to prosecute its trust application for the Park City land but the application languished within the BIA for more than two more years. The Nation became convinced during the process that it would eventually receive a favorable decision from the

Secretary of the Interior on the mandatory acquisition of land into trust under Public Law 98-602 but at the same time came to the conclusion that it would have to engage in protracted litigation to prevail on its argument that the 602 funds were part of a land claim settlement.

B. ***Wyandotte make P.L. 98-602 trust application in Kansas City, Kansas.*** Partly as a result of the 1993 memorandum described above, the Wyandotte shifted its focus from the Park City land to a tract of land in Kansas City, Kansas. On January 29, 1996, the Nation filed with the Department a Fee-to-Trust Land Acquisition Application a .52 acre tract of land in Kansas City, Kansas. *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1256 (10th Cir. 2001)

On February 13, 1996, the Associate Solicitor for the Department of Interior issued an opinion that the provisions of Pub. L. 98-602 mandated the Secretary to acquire the Kansas City land in trust on behalf of the Nation. *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d at 1256.

On June 12, 1996, the Assistant Secretary for Indian Affairs ("Assistant Secretary") published a Notice in the Federal Register stating that the BIA intended to accept title to the Kansas City land in trust for the benefit of the Wyandotte. 61 Fed. Reg. 29757 (June 12, 1996). Thus began, as described by the Tenth Circuit Court of Appeals, " a long-running dispute over whether the Secretary of the Interior . . . properly took . . . land into trust on behalf of the Wyandotte. . ." *Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1228 (10th Cir., 2010).

In 2001, the Tenth Circuit concluded that P. L. 98-602 was a mandatory trust acquisition statute and that, if funds allocated to the Wyandotte from P. L. 98-602 were used to acquire the Kansas City land, the Secretary had no discretion and was required to accept title to the Kansas City land in trust for the Wyandotte. See *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d

1250, 1257 (10th Cir. 2001. Thereafter, the United States accepted title to the Kansas City land in trust for the Wyandotte's benefit on July 15, 1996. Id.

The 2010 Tenth Circuit opinion in *Iowa Tribe of Kansas & Nebraska* signaled the conclusion of almost 15 years of litigation between and among the Wyandotte and the four other Kansas Tribes, the state of Kansas, the National Indian Gaming Commission and Department.[4]

II. WYANDOTTE SUBMITS SECOND PARK CITY LAND TRUST APPLICATION

On April 13, 2006, as much of the Kansas City litigation was slowly winding down, the Wyandotte submitted an application to the Eastern Oklahoma Regional Office—Bureau of Indian Affairs ("EORO") requesting the Secretary accept the Park City land in trust for the Nation. [Fact #4] Following the submission, the Wyandotte notified the Regional Director that the Park City land was purchased with P.L. 98-602 monies—just as the Wyandotte had initially informed the Secretary in 1992. [Fact #5] The Wyandotte followed up this notice with a "Supplement to Application for the Secretary of the Interior/BIA Muskogee Region to take Land Located in Park City, Kansas In Trust for the Wyandotte Nation and to Determine Such Trust Lands May be used for Gaming Purposes." [Fact #6] The Wyandotte submitted the supplement in response "to a request by the BIA—Muskogee Region for the Wyandotte Nation to provide justification for its position that the Park City land must be taken into trust for gaming purposes." Id.

A. *2008—Department makes Decision to Take Park City land into trust for the Wyandotte.*

> [T]the Region has determined that the acquisition should be approved as a mandatory acquisition pursuant to P.L. 98-602. [5]

[4] On September 1, 2010 the Kansas Attorney General sent a letter to counsel for the Wyandotte stating "[w]hile the time to appeal [the Tenth Circuit decision] has not officially expired, by this letter we are informing you that we will not be appealing the matter." [A.R. 3787]

After considering the Wyandotte trust application for nearly two and a half years, the EORO made the decision that the Park City land should be taken into trust under P.L. 98-602. [Fact #7] The EORO forwarded the Park City land into trust application to Department on January 30, 2009. Id. In the transmittal letter, the EORO Director stated "[t]he Region's evaluation of the request and supporting documents reveals that P.L. 98-602 authorizes the mandatory acquisition of the proposed property for the Nation. Based upon the above findings, the Region has determined that the acquisition should be approved as a mandatory acquisition pursuant to P.L. 98-602." Id.

B. ***2009—Department makes decision to refer the Park City land trust application to the Assistant Secretary-Indian Affairs for mandatory acquisition.***

"[G]o ahead and get this [Wyandotte Opinion] ready for signature."[6]

On May 20, 2009, the Department requested the Regional Solicitor's memo on the nature of the mandatory acquisition of the Park City land. [Fact # 8] A few weeks later, the Department prepared a draft legal memorandum evaluating whether the Park City Land "is a mandatory acquisition." [Fact # 9] The Department identified two issues to be clarified before finalizing the memorandum. The two issues were: (1) when was the Park City purchased and (2) whether the money used to purchase the Park City Land was withdrawn from the investment account. [Fact #10]

On July 21, 2009, the Wyandotte met with the Department to discuss the Park City land trust application. [Fact #11]. During that meeting, the Wyandotte was asked to address the two

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[5] Quote in letter to Department transmitting decision by Department's Regional Office to take Park City land into trust application on January 30, 2009. [Fact #7]

[6] On January 5, 2010, Wiseman instructed Candace Beck to "go ahead and get this [Wyandotte Opinion] ready for signature." [Fact # 26]

issues raised by the Department. [Fact #12]. The Wyandotte responded on August 18, 2009. [Fact #13].

On September 10th, Candace Beck, the attorney in the Department's Solicitor office charged with reviewing the two issues identified on July 21, 2009, notified her supervisor that "I think I have figured out the money issue after reviewing this morning and comparing the statement to the KPMG audit." [Fact #14].

On September 22nd, the Wyandotte sought a meeting with the Department to again discuss the status of the Park City Land into trust application. [Fact #15]. The Department determined there was no "need to meet with the tribe. Candace [Beck] is finalizing her part, and will be done soon." [Fact #16].

By October 15th, the Department completed a draft "Mandatory Acquisition Memo" for the Park City property. [Fact # 17]. On November 10th, the Department's assistant solicitor reviewed the Wyandotte "Mandatory Acquisition Memo" and responded "Looks good. A few comments and questions." [Fact #18] In the ensuing two months, the "Mandatory Acquisition Memo" was vetted throughout the Department. [Facts #19-23]

On or about December 8th, the Deputy Secretary of Indian Affairs sent a memo to the Secretary of Indian Affairs concerning "Pending Land into Trust Applications for Gaming Purposes". The memo stated "The summaries are for applications that are expected to have agency action within the next sixty (60) days, and thus are likely to attract some level of attention in the short term." [Fact #24]. The memo identified the Wyandotte as one of the tribes and identified an exception for "Land Settlement." Id. According to the memo, the next action on the application was to "refer to the ASIS [Assistant Secretary of Indian Affairs] for mandatory

acquisition" and it was noted that the governor of Kansas and the county opposed the action. [Fact #25].

C. ***2010—Department surnames and delivers to Assistant Secretary-Indian Affairs decision to take Park City land into trust as a mandatory acquisition.***

> **Ready for LEH's signature** with appropriate surnames . . . Wyandotte Nation package (letter to the Tribe, letter to the RD, letter to the RD and NOI to take land into trust)[7]

On January 5, 2010, Wiseman instructed Beck to "go ahead and get this [Wyandotte Opinion] ready for signature." [Fact #26] On January 9th, Wiseman notifies Beck that "I'm surnaming this now and will give it to Edith." [Fact #27]. On or about February 1, the letters notifying the Wyandotte and the EORO of the decision to take the land into trust were prepared. [Fact # 28].

On March 16, 2010, David Hayes asked Thomas "for a succinct list of the land in trust acquisitions that are on the 'mandatory' side (i.e., not subject to the two part test) and that would be ready to go soon (e.g., within the first three months or so) after the Secretary gives a green light to Larry [EchoHawk]." [Fact #29] Thomas responded to Hayes' the same day, transmitting a list titled "Pending Gaming Land into Trust Applications that could be 'Ready to Go' within 90 Days". Included on that list was the "Mandatory acquisition of 10.5 Acres in Park City, Sedgwick County, KS" for the Wyandotte. [Fact #30]. The list also contained the notation under the heading "Status of Indian Lands Opinion", "Issued Opinion on Mandatory Settlement; None requested by BIA" when referring to the Wyandotte. [Fact #31].

On the same day, Thomas sent Hillary C. Tompkins and Vincent J. Ward, under the subject heading of "Gaming Applications – Not 2 Part Determinations," a document that listed

[7] With a subject line of "Status of gaming documents as of October 29, 2010", Paula Hart circulated a document containing this language. [Fact # 62]

the Wyandotte under the heading "Land Into Trust for Purposes of Gaming" "Section 20 Exceptions". [Facts #32 and #33].

On April 5, 2010, Thomas emailed Del Laverdure with the subject listed as "Gaming Applications" and the attachment identified as "Pending Gaming LIT 90 Days Out". Under the heading "Status of Lands Opinion", it states the Department has "Issued Opinion on Mandatory Acquisition" on the Wyandotte application and the "next step" is to "Draft ROD". [Fact #34].

On June 15, 2010, Wiseman sent an email to Arlana Viswanathan with the subject matter identified as "Wyandotte FR notice package". [Fact #35]. The same day, Thomas notified Blackwell and Karen Lindquist that "we need to complete the surname for the Notice of intent for Wyandotte." [Fact #36].

On July 22, 2010, Nancy Pierskalla of the Office of Indian Gaming sent an email to Karen Lindquist inquiring into "the status of these two applications. We delivered them to you on 7/16. Pilar told Paula on Tues evening that she had already surnamed the Wyandotte file, so we would like to make sure that it is moving." [Fact #37].

On August 4, 2010, Davis contacted Tompkins, Thomas and Laverdure concerning a gaming meeting to take place the following day. Davis said "[w]e want to talk about the status/timing of pending applications that are in the IGRA exception category, in particular those that could be ready to move in a very near time frame. I am assuming that is {redacted} Wyandotte." [Fact #38].

On August 5, 2010, Blackwell emailed Thomas stating "Maria [Wiseman] has Wyandotte on her desk, do you want her to surname and send it to your or should she keep it?" [Fact # 39] Less than two minutes after receiving the Blackwell email, Thomas responded "Let's {redacted}

surname the Wyandotte Notice." [8] [Fact # 40]. On August 26, 2010, Wiseman notified Blackwell stating "I have the [Wyandotte] decision package – a FR notice for the decision may be included in that. There is no NEPA because this is a mandatory acquisition." [Fact #44]. Blackwell's response was "I sent you the Pilar/[Gary] Art exchange. Tomorrow let's talk about where the package should reside in the interim."[9] [Fact #45]

On September 2, 2010, Blackwell notified Thomas in an email with the subject matter described as "{redacted} and Wyandotte" that "I surnamed both and they are in my outbox." [Fact # 48] Thomas responded, stating "I have surnamed and sent back." [Fact #49] On the same day, Thomas notified Tompkins that "Today we surnamed and delivered to the client. {redacted} Wyandotte Notice of Intent to take land into trust." [Fact #50].[10]

On September 9th, Marshall sent an email to Echohawk, with a copy to Rahm Emanuel, "**On Behalf of** Dole, Bob" (emphasis by Marshall) stating "representatives of our client [Peninsula Gaming] want to meet with you but cannot do it until late next week and obviously want to meet before any decision is made." [Fact #52]. Echo Hawk responded stating "I have been told that the Wyandotte matter will be ready for decision any day." [Fact #53]

On September 13th, the Kansas Attorney General delivered a letter to EchoHawk opposing the Park City land into trust acquisition. [Fact #54]. Three days later, the meeting

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[8] On August 24, 2010, former Kansas Senator Bob Dole wrote to the Secretary, with a copy to Rahm Emanuel, requesting a meeting to discuss "the pending application" "that would place land in Park City, Kansas into trust." [Fact #41]. Senator Dole set up the meeting on behalf of his client, Peninsula Gaming. [Fact #42] On August 25, a number of emails were exchanged between Thomas, Gary Art, Ed Keable and Blackwell concerning Senator Dole's request for a meeting. [Fact #43].

[9] On August 30, Mike Marshall, policy advisor and communications director to Senator Dole at Alston + Bird, LLP, sent an email to Jordan Finegan as a "follow up on the email Senator Dole sent to Secretary Salazar last week" and thanking Jordan "for your help with this." [Fact # 46] On August 31, Laura Davis emailed Assistant Secretary-Indian Affairs Larry Echohawk stating "The Secretary has asked that you personally handle this meeting request from Senator Dole." [Fact #47].

[10] On September 3, 2010, Marshall sent an email to Laverdure stating "I will be in touch as you suggest to work out an agreeable time for you and Mr. Echo Hawk. Of course, we would like the opportunity to discuss the issues surrounding this application before action is taken on your part. If it is possible could you please let us know if that is the case." [Fact #51].

arranged by Senator Dole with Echohawk was held. Representatives from the state of Kansas, the Kansas congressional delegation, Peninsula gaming and Senator Dole's staff were in attendance. [Fact #55].

On October 1st, Paula Hart advised Wiseman that she had completed her review of the documents submitted by the Kansas Attorney General and provided her analysis. [Fact #56]. The same day, Marshall emails Bryan Newland and thanks him for introducing Marshall to "Pilar and Edith." In the email Marshall writes "Pilar and Edith, I wanted to offer to provide the Solicitor's office with the same briefing we provided to the Assistant Secretary Larry Echo Hawk. I would be happy to arrange the Kansas group if and when you have time to visit with them." [Fact #57]

On October 8th, Margaret Treadway contacted Laverdure proposing "Significant/noteworthy announcements" including "The AS-IS will be making a decision on taking land in trust as a settlement of a land claim for the Wyandotte Nation of Oklahoma in Kansas. This is a mandatory acquisition. This acquisition is opposed by all of the tribes that are presently in Kansas and the state of Kansas." [Fact #58] On October 11th, Senator Dole requests a meeting with the Department. [Fact #59]. Thomas instructs the meeting be set up "at everyone's convenience." Id.

On October 18, 2010, Blackwell sent an email to Thompkins stating "Del (Laverdure) would like the following applications ready to go as soon as possible. He would like final surname packages on the AS-IS desk by Nov. 2. {a.-f. redacted} g. Wyandotte. Del wants the final package for the AS-IS to consider in this group. No additional SOL work needed. OIG says final package is ready." [Fact #60] The email contained an attachment titled "SOL Workload on Pending Gaming Acquisitions." The attachment contained the following entry for

the Wyandotte: SOL NEPA – "n/a"; SOL Carcieri – "n/a"; SOL IGRA – "done"; Additional Information – "Mandatory acquisition. Land claim funds used. Upcoming mtg. with Senator Dole." [Fact #61]

On October 29th, Hart sends an email with the subject matter "status of gaming documents as of October 29, 2010" which states "ready for LEH's signature with appropriate surnames 1. {redacted} 2. Wyandotte Nation package (letter to the Tribe, letter to the RD, letter to the RD and NOI to take land in trust)". [Fact #62].

At the time Hart sends out her email, Thomas is meeting with the "Kansas folks" and was "presented a substantial amount of information legal and otherwise—regarding the Wyandotte trust acquisition." [Fact #63]. The next week, Thomas notifies Blackwell, Wiseman, Tompkins and others that "Del has agreed that we need to consider the additional information presented." Blackwell responds to Thomas asking "is there a particular time-frame in which he would like the reconsidered opinion?" "No" is Thomas' response. [Fact #64].

On November 5th, Kansas Governor Parkinson submits another letter to EchoHawk thanking him for "taking the time to meet with representatives of my office and the State of Kansas to discuss the Park City matter." [Fact #64].

On November 8, 2010, Adam Nordstrom of the lobbying firm of Chambers, Conlon & Hartwell, LLC in Washington and who is the Washington Director for the State of Kansas, sent an email to Lori Faeth thanking her for the meeting which he also attended. [Fact # 66]. On November 11, 2010, Mark Gunnison of the firm of Payne & Jones, Chartered, who also attended the October 29th meeting, sent a letter with "a Legal and Administrative Record Analysis" enclosed to Thomas. [Fact #67].

Kansas Attorney General Steve Six followed up with a November 15th letter to the Secretary regarding "Solicitor Thomas requested further briefing and documentation from Peninsula Gaming's and Kansas interests. Attached is a legal analysis and supporting exhibits prepared by Mark Gunnison, attorney for Peninsula Gaming. We have reviewed Mr. Gunnison's legal analysis and concur with it." [Fact #68].

On December 10th, Blackwell circulates a "SOL Workload on Pending Gaming Acquisitions" to Thompkins. Notations next to the Wyandotte included "SOL IGRA – Being revised" and "Additional Information – AS-IA ofc asked DIA to review legal opinion based on input from the Kansas Delegation." [Fact #69].

On December 14th, the Nation met with the Department to discuss the Park City Land into trust acquisition. The Nation was provided for the first time with a copy of the previous correspondence from Kansas but, because of the size of the exhibits, the Nation was not given copies to review. [Fact #70]. On December 23, the Nation responded to the previous Kansas correspondence. [Fact #71].

D. ***2011—Department prepares decision documents for Assistant Secretary-Indian Affairs to take Park City land into trust as a mandatory acquisition.***

> I was looking through some docs that I had. Did we issue a final decision on the [Park City] property? The decision letter I have is in draft.[11]

In early January, 2011, David Moran, an assistant Solicitor in the Division of Indian Affairs, sent a fax to the National Indian Gaming Commission "[p]roviding legal analysis to NIGC attorney re: Wyandotte Park City trust acquisition." [Fact #72] On January 18th, Wiseman inquires of Moran as to the "status of our review [of the Wyandotte]." [Fact #73]. On February 11, 2011, Wiseman inquires of Moran "How are you coming with the Wyandotte

[11] December 12, 2011 email from Wiseman to Hart. [Fact #94].

memo?" [Fact #74]. Moran responds that "Re Wyandotte, I have requested clarifying info from the tribe (via Findaro) and should receive a response by Monday. If so, I should have a final draft ready by next Wed." [Fact #75].

On March 3rd, Kansas Attorney General Derek Schmidt sends a letter to the Secretary "to express continued opposition of the Office of Attorney General to the Wyandotte Nation's Land into Trust application in Park City." [Fact #76].

On June 24th, Wiseman notified Moran that "Del [Laverdure] has asked Patrice [Kunesh] about this [Wyandotte opinion]. He would like to finalize. How is your draft coming?" [Fact #77]. Moran replied "I will have a final draft on Friday." [Fact #78].

The Wyandotte filed this present action on July 26th. On July 29, Wiseman responds to an inquiry from Laverdure, stating "You asked about the status of our Wyandotte review. David [Moran] has asked for more info from the Kansas people so he can complete his review. He has not received it yet." [Fact #79]. On the same day, Moran told Wiseman that "I will finalize the opinion and circulate it for review . . . unless you feel otherwise." [Fact #80].

On August 10th, Senator Dole sent an email to the Secretary reminding him that Dole was "representing the company that will operate an incoming casino in Kansas" and stating "The Wyandotte Nation has now sued you and the Department to force a decision. It is our hope that the Department will respond to the suit and its specious claims. In the meantime, could our lawyers have an opportunity to brief you on the topic?" [Fact #81]. On August 30th Kunesh sent an email detailing certain considerations that had to be addressed to answer the meeting request made by Senator Dole. [Fact #82] Moran responded to the Kunesh email stating "The schedule outlined below seems reasonable to me. It should be added that I am finalizing an opinion."

[Fact #83]. The Department eventually notified Senator Dole that his request for a meeting would be declined. [Fact #84].

On October 17th, Wiseman emailed Moran stating "I have to meet with ASIA and PK tomorrow on the gaming issues. Can you give me an update on the Wyandotte decision?" [Fact # 85] Moran responded "I am just about done. Provided nothing else comes up that takes priority, I plan to have a final draft for review completed by the end of the week." [Fact #86].

On October 24th, Jeffrey Nelson sent an email to Kunesh containing "a list of the major current gaming matters under way at the DIA." Included in the list was the following: "Wyandotte – Park City: The DIA's Branch of Environment and Lands is drafting a decision document for ASIA' signature." [Fact #87].

On November 22nd, Wiseman sent an email to Moran and Rebecca Ross with the subject matter "Wyandotte plan". "Since there are several things that must be worked on simultaneously for this issue, here is what I propose: Wyandotte decision – Rebecca, Admin. Record – David to start, then Rebecca after decision document, Answer – David. David, please get docs together for Rebecca for the decision." [Fact #88].

On November 30, 2011, Moran sent an email to Wiseman stating "I will get a draft opinion to review by the end of the week." [Fact #89]. On December 7, Wiseman contacted Moran stating "Patrice wants to see the decision draft ASAP." [Fact #90]. The following day, Moran sent Wiseman a document styled "Wyandotte Park City FTT draft opinion", stating "Attached is the draft Wyandotte FTT decision letter." [Fact #91]. On December 8th, Moran sent an email to Wiseman with the subject listed as "Wyandotte" and the attachment described as "EB's opinion". [Fact #92]. Moran also sent an email to Wiseman with the subject listed as "Wyandotte" and the attachment described as "Briefing memo-FTT decision letter 12.08.11."

Moran's message reads "[a]ttached is the briefing memo for the Wyandotte meeting." [Fact #93].

On December 12, 2011, Wiseman sent an email to Hart with the subject listed as "Wyandotte" and stating "I was looking through some docs that I had. Did we issue a final decision on the Coliseum Center property? The decision letter I have is in draft." [Fact # 94] Wiseman sent a follow-up email to Hart stating "This draft memo looks like it was written for Park City. Could it be the same parcel?" [Fact #95]. Pierskalla responds that "it is the same parcel". [Fact # 96]

On December 12th, Moran emailed Wiseman with an attachment identified as "Wyandotte Park City FTT draft opinion" and stating "Attached is the final draft of the Wyandotte memo." [Fact #97]. Wiseman then distributed a "Wyandotte Tribal Letter" stating "OIG already had a draft prepared, so I just amended it a bit." [Fact #98].

A meeting was scheduled for December 15th to consider "Pending Gaming Applications Near Final Decision". Under the section titled "Mandatory or Solicitor Determination" was "Wyandotte (Oklahoma/Kansas – Settlement of a Land Claim Exception). [Fact # 99].

On December 14th, Kunesh provided her "comments/ edits to [Wyandotte Tribal Letter]. [Fact #100]. Wiseman sent the "Wyandotte Tribal Letter Draft 12-14-11" to Newland for review. [Fact #101]. The next day Wiseman emailed Hart with the subject identified as "draft Wyandotte decision letter" stating "Waiting for Bryan's comments. Do you have any comments?" [Fact #102]

On December 15, 2011, Wiseman sent an email with the subject identified as "decision docs" and the message "I have forwarded the finals of {redacted} and Wyandotte to OIG to prepare of surname packages. Changes can still be made, but I wanted to keep things moving."

[Fact # 103] Hart sent an email to Newland with the subject identified as "decision documents" and attachment identified as "Wyandotte Tribal Letter DRAFT FINAL 12-15-11", and the message "Would you like us to prepare in final?" [Fact #104].

E. ***2012— Department prepares decision documents for Assistant Secretary-Indian Affairs to take Park City land into trust as a mandatory acquisition.***

> Per Patrice's request, I am forwarding the Wyandotte draft decision letter, a briefing paper and Edith's memo of 2010.[12]

On January 30, 2012, Ross provides Wiseman and Moran with a draft of a revised briefing document on the Wyandotte application and asks if it "looks OK". [Fact #105]. On February 10, Wiseman forwards the "Wyandotte Tribal Letter DRAFT FINAL 12-15-11" and "Wyandotte briefing 12-14-11" by email to Ross stating "Please look these over. Still good?" [Fact #106] Ross responds with "[j]ust a couple of edits to the [Wyandotte Tribal] letter." [Fact #107] Wiseman then notifies Tompkins that "[p]er Patrice's request, I am forwarding the Wyandotte draft decision letter, a briefing paper, and Edith's memo of 2010." Enclosed in the email was the "Wyandotte Tribal Letter FINAL 2-10-12". [Fact #108]

On February 14, 2012, Ross notifies Wiseman that "I'm also editing the briefing memo a bit more – there were a couple of formatting and non-substantive fixes that were needed. I'll send that to you asap." [Fact #109] Later that same day, Ross sends an email to Wiseman with the subject styled "Wyandotte – off-reservation and geographical limitation questions". [Fact 110] Ross states she has "address[ed] Hilary's questions." Id. Even later in the day, the email is forwarded to Kunesh [Fact #111]. Finally by the end of the day on February 14, Kunesh forwards the response to Tompkins. Id.

[12] February 10, 2012 email from Wiseman to Hilary Tompkins with attachment "Wyandotte Trust Letter FINAL 2-10-12". [Fact #108].

On February 16, 2012, the Kansas Attorney General sent a letter with attachments to the Department stating "There are two documents from the AR I would like to bring to your attention." [Fact #112] The two documents were "a December 22, 2010 letter from David McCullough (the attorney for the Wyandotte Nation) to David Moran (Office of the Solicitor" and "Mr. McCullough's letter of August 18, 2009 to Candace Beck (Office of the Solicitor)." Id.

On or about February 28, 2012, the Department received the letter from the Kansas Attorney General. The letter "is now among the documents the Department is reviewing in connection with the Wyandotte Nation's request for the Secretary to take land in Kansas into trust for the Nation." [Fact #113].

On March 29, 2012, DOI first notified the Wyandotte of receipt of Kansas' February 16th letter. [Fact #114]. On the same day, the Department sent a letter to the Kansas Attorney General acknowledging receipt of the February 16th letter stating the Department was "reviewing the issues raised in the letter and will consider them as part of the Nation's application. [A.R. 4057]

F. September 28, 2012—Nearly Six Years and Still Awaiting Secretary's Decision on Wyandotte's mandatory Park City land into trust application.

Kansas' February 16th letter references two documents for review by the Department. In chronological order the first was a letter to Candace Beck and the second was a letter to David Moran.

As for the Beck letter, on September 10, 2009, this Department attorney stated in an email to her supervisor that "I think I have figured out the money issue after reviewing this morning and comparing the statement to the KPMG audit." [Fact #14]. On September 23, the Department determined there was no "need to meet with the tribe. Candace [Beck] is finalizing

her part, and will be done soon." [Fact #16]. On or about December 8, 2009, the Deputy Secretary of Indian Affairs sent a memo to the Secretary of Indian Affairs concerning "Pending Land into Trust Applications for Gaming Purposes". [Fact #24] The memo identified the Wyandotte as one of the tribes and identified an exception for "Land Settlement." Id. According to the memo, the next action on the application was to "refer to the ASIS [Assistant Secretary of Indian Affairs] for mandatory acquisition". [Fact #25].

The December 19, 2010, letter to Moran was in response to his request that the Wyandotte reply to the State's November 2010 letter. [Fact #70] Moran was the DIA attorney charged with drafting the opinion for the Park City trust application. On December 8, 2011, Moran sent an email to Wiseman with an attachment identified as "Briefing memo-FTT decision letter 12.08.11" and stating "Attached is the final draft of the Wyandotte memo." [Fact #93].

Each of these "documents that caught our [the State's] attention" [A.R. 2810] had been fully vetted by the Department. Each was addressed to a Department attorney. More than a year after the second of the two documents had been submitted and considered, Department officials asked themselves "Did we issue a final decision on the [Park City] property? The decision letter I have is in draft."[13] The February 16th letter offered nothing new to the consideration of the Wyandotte fee to trust application and the Wyandotte is left to ask the same question posed by the Department nine months ago, to-wit: Why hasn't the Department "issue[d] a final decision on the [Park City] property?"

JURISDICTION STATEMENT

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.

[13] December 12, 2011 email from Wiseman to Hart.

"The two statutes are, after all, merely different means of `compelling an agency to take action which by law it is required to take.'" *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995). "With regard to jurisdiction, the Tenth Circuit, along with most other courts, has held that courts may entertain challenges to unreasonably delayed agency action on the basis of § 1331 jurisdiction and § 706(1) of the A[dministrative] P[rocedures] A[ct]." *Rios v. Aguirre*, 276 F.Supp.2d 1195, 1199 (D. Kan., 2003), citing *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, Broth. of Painters and Allied Trades, AFL-CIO v. Brown*, 656 F.2d 564, 567 (10th Cir., 1981). The Court has jurisdiction to grant Plaintiff's requested relief.

ARGUMENT AND AUTHORITIES

Under the Administrative Procedure Act, a federal agency must resolve any matter presented to it "within a reasonable time." 5 U.S.C. § 555(b). The APA directs reviewing courts to enforce this common-sense rule by "compel[ling] agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). This remedy parallels the relief traditionally available via a writ of mandamus and now provided by 28 U.S.C. § 1361, which authorizes suits "in the nature of mandamus" in order to "compel an officer ... of the United States or any agency thereof to perform a duty owed to the plaintiff."

To obtain relief under either § 706(1) or § 1361[14], a plaintiff must show (1) that "the agency violated its statutory mandate by failing to act," and (2) that "the agency's delay in acting

[14] "The inquiry which the court must make under section 706(1) of the APA is the same as for an action in mandamus under 28 U.S.C. § 1361." Id. See also *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 567 (10th Cir.1981) ([B]oth mandamus and injunctive relief [under § 706(1)] are available" to remedy an agency's "dereliction in discharging a mandatory duty.") The substantive requirements for relief under the two provisions are the same, and a court can rely on either provision, "or both," in ordering an agency to perform a mandatory duty. Id.; see also, e.g., *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (explaining that § 706(1) "carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus"); "[I]n 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. *Hernandez-Avalos v. INS*, 50 F.3d 842, 844 (10th Cir. 1995).

is unreasonable." *Matzke v. Block*, 564 F.Supp. 1157, (D. Kan., 1983), *aff'd* in part and *rev'd* in part 732 F.2d 799 (10th Cir.1984), citing *Health Systems Agency of Oklahoma v. Norman*, 589 F.2d 486, 492 (10th Cir.,1978).[15] "[I]t is the court's duty in a mandamus action to measure the allegations in the complaint against the statutory and constitutional framework to determine whether the particular official actions complained of fall within the scope of the discretion which Congress accorded the administrators.... If, after studying the statute and its legislative history, the court determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir., 1984) . It is appropriate for the Court to compel performance here because the Secretary acknowledges the mandatory requirement of the Congressional act [P.L. 98-602] but, despite this acknowledgement, the Secretary has continued to delay taking action on the Wyandotte's trust application.

First, the Secretary has "failed to discharge a duty owed to plaintiff[] which Congress has directed [the Secretary] to perform." *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, Broth. of Painters and Allied Trades, AFL-CIO v. Brown*, 656 F.2d at 567 (10th Cir., 1981); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (the Secretary has failed "to perform a ministerial or non-discretionary act" in the face of "a specific, unequivocal command" from Congress.") (internal quotation marks omitted). Since 2008, the Department has consistently and steadfastly, in light of political pressures, recognized that the

[15] The Tenth Circuit has held, in similar language, that mandamus is appropriate where the person seeking the relief "can show a duty owed to him by the government official to whom the writ is directed that is ministerial, clearly defined and peremptory." *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir., 1984), *citing Carpet, Linoleum & Resilient Tile Layers* 656 F.2d at 566 (quoting *Schulke v. United States*, 544 F.2d 453, 455 (10th Cir.1976)).

Park City land is a mandatory acquisition under P.L. 98-602.[16] "Mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991).

Second, the Secretary's continuing failure to act in the face of this clear obligation is unreasonable by any standard and unlawful. It has now been 44 months since the EORO transferred the Wyandotte Park City land application to the Secretary with the recommendation that should be taken into trust pursuant to the mandate in Pub. L. 98-602. See Fact # 7. The Secretary has not acted on the application even though Department officials, on numerous occasions over the past 44 months, surnamed and prepared the record of decision and administrative notices required for the Secretary to authorize the acceptance of the Park City land into trust. See Fact # 35 ("Wyandotte FR notice package")[17]; Fact # 40 ("Let's {redacted} surname the Wyandotte Notice."); Fact # 44 ("I have the [Wyandotte] decision package – a FR notice for the decision may be included in that.") The Secretary has, despite repeated requests from the Wyandotte, steadfastly refused to complete the process necessary to accept trust title to the Park City land, to give any reason for his inaction, or even to specify a date by which he will act. "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." Id. The Secretary has a clear, recognized, acknowledged duty to act and has failed to do so.

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[16] "[T]he acquisition should be approved as a mandatory acquisition pursuant to P.L. 98-602". [Fact # 7]. See also Fact # 18 (2009 email referencing Wyandotte "Mandatory Acquisition Memo"); Fact # 30 (2010 Department transmittal referencing "Mandatory acquisition of 10.5 Acres in Park City, Sedgwick County, KS" for the Wyandotte); Fact # 88 (2011Department email referencing "Wyandotte-Park City" stating "a decision document [is being drafted] for ASIA's signature").

[17] 25 C.F.R. §151.12 requires the Secretary to publish in the Federal Register notice of his intent to take land into trust.

The Wyandotte intend to construct a casino on the Park City land. The Secretary's inaction is more egregious because he has allowed competitors of the Wyandotte to gain competitive advantage over the Wyandotte in the Park City area. The competitors who are intent upon delaying the Secretary from undertaking his mandatory duty are the State of Kansas and Peninsula Gaming.[18] Each has a vested financial interest in limiting gaming located anywhere near Park City.[19] It cannot be argued, and the actions of Kansas and Peninsula gaming confirm, that continued delay in ruling on the trust application will mean lost casino revenues to the Wyandotte and its tribal people. This loss of revenue has a direct impact on the health and general welfare of the Tribe and its members.[20] The Secretary's inaction also continues to delay a process the Wyandotte began 20 years ago and had every right to have completed at that time. It has cost the Wyandotte millions of dollars in legal and other fees. The Wyandotte can proceed no further until the Secretary performs his duty and accepts the property into trust.

Finally, while the Secretary's failure to act warrants relief even under these generally applicable principles of administrative law, he must be held to a higher standard in this case. Even beyond the general trust responsibility that the United States owes to all Indian tribes, Pub. L. 98-602—by mandating land purchased by the Wyandotte "shall be held in trust by the Secretary for the benefit of the Tribe"—recognizes a special relationship with the Wyandotte in

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[18] Peninsula Gaming was awarded one of the casino licenses authorized under the Kansas Expanded Lottery Act ("KELA"). The state of Kansas and Peninsula have agreed that "the defense of the South Central Gaming Zone is an expense directly attributable to the operation of KELA." See Exhibit A to the *Affidavit of David McCullough*, Exhibit 1 to this Memorandum (hereinafter "*McCullough Aff.*") Because of this fact, all legal fees associated with defense of the South Central Gaming Zone is "an expense of the Kansas Lottery and Peninsula will reimburse those expenses." Id. In addition to the legal fees, Peninsula is paying most, if not all, of the fees for the lobbying efforts at the Department of the Interior. According to records compiled at the website OpenSecrets.org (taken from the Senate Office of Public Records), Peninsula Gaming paid Senator Dole's firm (Alston + Bird) approximately $450,000 between 2010 and 2012 for lobbying on Peninsula's behalf. *McCullough Aff.*, Ex. C. In addition, Peninsula Gaming paid BRG Group $70,000 additional fees in 2011 for increased lobbying efforts. Id.

[19] Since Peninsula Gaming opened its Kansas Star Casino near Mulvane, Kansas (approximately 25 miles from the Park City land) on December 20, 2011, the state of Kansas and the local governments have received approximately $32.4 million in distributions from the casino. *McCullough Aff.*, Ex. B. Peninsula Gaming has generated $130 million in revenues since the opening. *McCullough Aff.* Ex. B.

[20] See *Affidavit of Billy Friend*, Exhibit 2 to the Memorandum (hereinafter "Friend Aff.")

this particular context and imposes a fiduciary duty on the Secretary to act in the best interests of the Nation. "[W]here the Secretary is obligated to act as a fiduciary[,] ... his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (internal quotation marks omitted). The Secretary's continued delay cannot begin to satisfy this heightened standard because it violates a trustee's most fundamental obligations: to perform its fiduciary duties with reasonable care and to act faithfully in the best interests of the trust beneficiary. Cf *Restatement (Second) of Trusts* §§ 169, 174 (1959). Particularly when measured against this standard, the Secretary's continued inaction cries out for judicial intervention.

I. THE SECRETARY HAS A CLEAR, NON-DISCRETIONARY DUTY TO ACCEPT THE PARK CITY LAND IN TRUST UNDER P.L. 98-602

A plaintiff seeking to compel agency action under § 706(1) or § 1361 must establish that the agency "owes [plaintiff] a clear duty." *Rios v. Aguirre*, 276 F.Supp.2d 1195, 1199 (D. Kan., 2003); see also *Carpet, Linoleum & Resilient Tile Layers*, 656 F.2d at 566 ("Mandamus relief is appropriate only when the person seeking such relief can show a duty owed to him by the government official"); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (the plaintiff must show that "an agency failed to take a discrete agency action that it is required to take" (emphases omitted)). The Department first opined in 1995 that Pub. L. 98-602 mandated the Secretary take certain lands in trust for the Wyandotte. [A.R. 1983-1984] In the seventeen years since that time, the Department has continually and consistently recognized that P. L. 98-602, mandates the Secretary to take into trust land purchased with P. L. 98-602 monies. As clearly shown in the statement of undisputed facts, the Department continues to acknowledge it owes this duty to the Wyandotte. Finally, although competitors hostile to the Wyandotte's

plans have raised various objections to its application, all of them are baseless, irrelevant to the taking of the Park City land into trust, or both. Indeed, the need for the Wyandotte to dedicate precious resources to fighting these well-financed transparent efforts to derail its project is a prime indication of the harm being visited on the Wyandotte by the Secretary's violation of his statutory and trust responsibilities to act.

A. Pub. L. 98-602 Imposes A Mandatory Duty. Section 105(b)(1) of Pub. L. 98-602 Act provides that, "a sum of $100,000 . . . shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Tribe. Congress's choice of language makes clear that this provision imposes a mandatory duty.

From the filing of the first lawsuit by the State of Kansas in 1996, the Wyandotte and the Secretary have been involved either directly or indirectly in litigation that has centered upon (1) whether P.L. 98-602 funds were used to purchase land in question; (2) if P.L. 98-602 funds were used to purchase land, then is the Secretary mandated take the land into trust; and (3) whether P.L. 98-602 funds were provided to the Wyandotte as part of settlement of a land claim and thus the lands acquired are subject to the land claim exception for gaming on lands acquired after 1988.

As a result of the nearly 15 years of litigation, the Secretary has been given a clear direction—actually mandate—to follow when it receives an application from the Wyandotte to take into trust lands purchased with P.L. 98-602 funds. For the entire 15 years, the Department has defended its position that P.L. 98-602 imposed a mandatory duty on the Secretary. The Courts consistently acknowledged and/or upheld the Secretary and the Department's position. See *Sac and Fox Nation of Missouri, et. al. v. Babbitt, et. al.*, 92 F.Supp.2d 1124, 1128 (D.Kan. 2000) ("if required to decide whether the Secretary was required by law to take the [Kansas City

Land] into trust, the court would answer "yes.""); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1262-1263 (10th Cir. 2001) ("Notwithstanding the IRA and its implementing regulations, the Secretary concluded that his discretion regarding whether to acquire the Shriner Tract on behalf of the Wyandotte Tribe was curtailed by Pub. L. 98-602. . .In our view, the Secretary's interpretation is easily affirmed . . . Subsection (c)(1) [of P.L. 98-602] clearly indicates that the Secretary shall have no discretion in deciding whether to take into trust a parcel of land purchased by the Wyandotte Tribe with Pub. L. 98-602 funds. We therefore agree with the Secretary and the district court that, notwithstanding the provisions of the IRA, Pub. L. 98-602 imposed a nondiscretionary duty on the Secretary. . ."); *Wyandotte Nation v. NIGC*, 437 F.Supp.2d 1193, 1199 (D.Kan., 2006) ("The case found its way back to the Tenth Circuit, which concluded that **Pub.L. 98-602 is a mandatory trust acquisition statute**, that the Secretary had no discretion in accepting title to the Shriner Tract in trust for the Tribe, and that neither National Environmental Policy Act of 1969 (NEPA) nor National Historic Preservation Act (NHPA) analyses were required for the **non-discretionary decision to take the property into trust.**") (emphasis added)

Notably, the Secretary has never denied that P. L. 98-602 imposes a mandatory duty to accept the Park City land into trust for the Wyandotte. Just the opposite: In processing the Park City land trust application over the last six years, the Department has specifically considered the question and has time-and-time again concluded that it is a mandatory acquisition. The statement of undisputed facts contains many record citations where that conclusion has been expressed over and over again since 2008.

Under P. L. 98-602 the Department "owes [plaintiff] a clear duty" subject to enforcement via mandamus and § 706(1). "If, after studying the statute and its legislative history, the court

determines that the defendant official has failed to discharge a duty which Congress intended him to perform, the court should compel performance, thus effectuating the congressional purpose." *Estate of Smith*, 747 F.2d at 591, *citing* *Carpet, Linoleum and Resilient Tile Layers*, 656 F.2d at 566.

It is not necessary for this Court to consider whether Congress intended the Secretary to perform this duty. Previous case law (set out above) has established this fact. The Department has determined its duty to act on the Park City land is mandatory. The Court should compel the Secretary to act upon the Wyandotte Nation's trust application.

B. Department recognizes this obligation and has on many occasions prepared the package for the Secretary to execute. Department officials have continued to recognize that P. L. 98-602, as first expressed in 1996, requires the Secretary to take the Park City land into trust. Never once has Department waivered from the EORO's 2008 decision that the Secretary's obligations under P. L. 98-602 are mandatory and permit no exercise of discretion. Yet the Secretary has failed to take the ministerial steps necessary to acquire trust title to the Park City land. On at least three separate occasions[21], the Department has prepared the decisional record and appropriate notices necessary for the Secretary to take the Park City land into trust. Yet, the Secretary, despite the Department's multiple determinations and a corresponding legal duty to do so, has failed to take the ministerial steps necessary to acquire trust title to the Park City land. Neither the Department nor the Secretary has offered any justification for its failure to act, nor has it provided the Wyandotte with any indication of when it might act.

C. Efforts By Competitors To Obstruct The Nation's Project Do Not Alter Or Undermine The Secretary's Non-discretionary Duty. As authorized by IGRA, the Nation intends

[21] See Fact # 35 ("Wyandotte FR notice package")[21]; Fact # 40 ("Let's {redacted} surname the Wyandotte Notice."); Fact # 44 ("I have the [Wyandotte] decision package – a FR notice for the decision may be included in that.")

to develop a gaming facility on the Park City land once it is taken into trust. Because of these plans, the state of Kansas and Peninsula Gaming, Kansas' licensed Casino operator, have interjected themselves into the Wyandotte's Park City land into trust application and have sought to thwart the Wyandotte's trust acquisition. Their arguments are meritless, irrelevant to the Secretary's non-discretionary duty at issue in this litigation, or both.

First, this case is not about gaming. It is about whether the Secretary is mandated to take the Park City Land into trust. *See, e.g.*, *Stop the Casino 101 Coalition v. Salazar*, 2009 WL 1066299, at *4 (N.D. Cal. Apr. 21, 2009) (agreeing with Secretary's contention that plaintiffs lacked standing to object to mandatory trust acquisition of land that tribe planned to use for gaming, because the Secretary's decision did not interpret IGRA or constitute approval of gaming on the site). The Department has already determined that the Nation's Park City land into trust application falls into "the IGRA exception category." See Fact # 38.

Second, and more egregious, the Secretary has either used or allowed actions of gaming competitors Kansas and Peninsula Gaming to delay taking the Park City land into trust for the Wyandotte. The administrative record supports no other conclusion.

1. On August 5, 2010, the Department determined it would "surname the Wyandotte Notice." Fact #40. On August 24, Sen. Dole sends an email to the Secretary requesting a meeting to discuss the "pending application filed by the Wyandotte Nation." Fact #41. Sen. Dole identifies his client as Peninsula Gaming. Fact #42. A Department attorney on August 26 sent an email to Solicitor Blackwell stating "I have the [Wyandotte] decision package – a FR notice for the decision may be included in that." Fact #44. On the same day, Blackwell responds "let's talk about where the package should reside in the interim." Fact #45. The phrase

"in the interim" was a reference to a delay pending the response to Sen. Dole. See Fact #43 and Fact #45.

2. On September 2, 2010, a Department email states "Today we surnamed and delivered to the client. {redacted}. Wyandotte Notice of Intent to take land into trust." On September 3, an email was sent on behalf of Sen. Dole requesting the "opportunity to discuss the issues surround this application before action is taken on your part." The Assistant Secretary—Indian Affairs responded on September 9 that "the Wyandotte matter will be ready for decision any day." Fact #53. On September 13, the Kansas Attorney General delivered a letter with attachments to the AS-IA opposing the Park City Land into trust acquisition. Fact # 54. On September 16, representatives from the state of Kansas, the Kansas congressional delegation, Peninsula gaming and Senator Dole's staff met with the Department. Fact #55. No further action was taken on the notice of intent.

3. On October 8, 2010, the Department circulated an email stating "The AS-IS will be making a decision on taking land in trust as a settlement of a land claim for the Wyandotte Nation of Oklahoma in Kansas. This is a mandatory acquisition." Fact #58. By October 11, the Department received another request for a meeting from Sen. Dole. Fact #59. On October 29, a Department email states "states "**ready for LEH's signature** with appropriate surnames 1. {redacted} 2. Wyandotte Nation package (letter to the Tribe, letter to the RD, letter to the RD and NOI to take land in trust)". Fact #62. That same day Department officials met with the "Kansas folks" and were "presented a substantial amount of information legal and otherwise—regarding the Wyandotte trust acquisition." Fact #63. On November 3, 2010, a Department email states the additional information from Kansas will be reviewed and no timeframe would be established to complete the review. Fact #64.

4. On June 24, 2011, Wiseman notified Moran that "[Laverdure] has asked Patrice [Kunesh] about this [Wyandotte opinion]. He would like to finalize." Fact #77. On June 27, Moran responds that he would have a draft by the end of the week [Fact #78] but by July 29, "[Moran] has asked for more info from the Kansas people so he can complete his review. He has not received it yet." Fact #79. However, later that day he responds that he would "finalize the opinion and circulate it for review." Fact #80. On August 10, Sen. Dole contacts the Secretary emphasizing that Dole was "representing the company that will operate an incoming casino in Kansas" and asking whether "our lawyers [could] have an opportunity to brief you on the topic?"

5. On February10, 2012, a Departmental email circulates the "Wyandotte draft decision letter, a briefing paper, and Edith's [Blackwell] memo of 2010." Fact #108. The draft decision letter is circulated and comments are received through February 14. Facts # 109-111. On February 16, the Kansas Attorney General sent a letter with attachments to the Department stating "There are two documents from the AR I would like to bring to your attention." Fact #112. On March 29, the Department notified Kansas the it was "reviewing the issues raised in the letter and will consider them as part of the Nation's application." Fact #115.

Interestingly, in each of the five examples listed above, Kansas, Peninsula and its lobbyists contacted the Department within days of a Department decision to move the land into trust. If only the Wyandotte had also received such timely notice of the Secretary's intent to place the land into trust. In each example, the Department failed to complete the mandatory acquisition while it explored the latest "information" presented by Kansas. In examples 1 thru 4, after reviewing the "information", the Department did not change its position that the Park City land was a mandatory acquisition. In each case, the Department proceeded forward until the next round of new "information".

The same conclusion as to the mandatory nature of the Park City land acquisition will also be reached in the fifth example. As set out in the statement of undisputed facts, both of the "documents that caught our [the State's] attention" [A.R. 2810] had been fully vetted by the Department. Each was reviewed and addressed by Department attorneys. More than a year after the second of the two documents had been submitted and considered, Department officials asked themselves "Did we issue a final decision on the [Park City] property? The decision letter I have is in draft."[22] The February 16th letter offered nothing new to the consideration of the Wyandotte's Park City land mandatory trust application. The Secretary is still under the mandate of Congress to acquire the Park City land into trust for the Wyandotte.

"Mandamus relief is an appropriate remedy to compel and administrative agency to act where it has failed to perform a nondiscretionary, ministerial duty. Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co.*, 937 F.2d at 500.

For the foregoing reasons, the Wyandotte is owed a clear duty by the Secretary to act upon the Park City land trust application. The only remaining question is whether the Secretary's continuing delay in fulfilling that obligation is reasonable.

II. THE SECRETARY HAS UNREASONABLY DELAYED THE PERFORMANCE OF HIS DUTY UNDER P.L. 98-602

"Through § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). "In our opinion, when an agency is required to act—either by organic statute or by the APA—within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable." Id. at 1190. Such a

[22] December 12, 2011 email from Wiseman to Hart.

"court-imposed deadline for agency action constitutes an extraordinary remedy." *Qwest Communications Intern., Inc. v. F.C.C.*, 398 F.3d 1222, 1239 (10th Cir. 2005)

In *Qwest*, the Tenth Circuit delineated four factors a court should consider in determining whether agency delay qualifies as unreasonable:

(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, and (4) administrative difficulties bearing on the agency's ability to resolve an issue.

Id. at 1239, citing *In re International Chem. Workers Union*, 958 F.2d 1144, 1149-50 (D.C. Cir. 1992). In this case, all four factors indicate that Department's delay of six plus years and counting is unreasonable.

1. **The extent of the delay**. While the *Qwest* court did not elaborate more specifically, the court in *International Chem. Workers Union* stated "the court should ascertain the length of time that has elapsed since the agency came under a duty to act." Id. at 1149 (internal quotation marks omitted). "The central question in evaluating a claim of unreasonable delay [under the APA] is whether the agency's delay is so egregious as to warrant mandamus." *In re Core Communications, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008)

In this case, the Secretary has been under a duty to act since the Wyandotte submitted its trust application on April 13, 2006. In the more than six years the Secretary has had the trust application, the Department has prepared notification letters for the Secretary to send to the Wyandotte —but the Secretary has failed to take the necessary action. All of this action, or inaction, has occurred even though Department officials have consistently acknowledged this mandatory duty to act for more than 15 years.

In a similar case in which a government agency delayed a decision for more than six years, a Court had this to say:

> There is "no *per se* rule as to how long is too long" to wait for agency action, *In re Int'l Chem. Workers Union*, 958 F.2d at 1149, but a reasonable time for agency action is typically counted in weeks or months, not years. *See Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C.Cir.1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" (quoting *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 340 (D.C.Cir.1980))). FERC's six-year-plus delay is nothing less than egregious.
>
> *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)

The Secretary clearly is required to take the Park City land into trust for the Wyandotte. The Secretary is required to do so even though the state of Kansas and Peninsula Gaming continue to raise frivolous objections to the Park City land being taken into trust. It is clear that the Secretary was prepared to take the land into trust prior to the time Senator Dole and Peninsula Gaming first interjected themselves into the process. There is no doubt that the efforts of these gaming competitors has influenced the Secretary to not act—in spite of the clear duty to do so. The Wyandotte has also consistently made clear that nothing raised by Senator Dole, Peninsula Gaming and Kansas could undermine the Secretary's duty promptly to accept the Park City land into trust. At a minimum, the Secretary "is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition." *Families for Freedom v. Napolitano*, 628 F.Supp. 2d 535, 540 (S.D.N.Y. 2009). The Secretary has failed to fulfill that obligation for six years. This clearly meets the definition of unreasonable delay.

2. **The reasonableness of the delay in the context of the legislation authorizing agency action**. "Even in mandamus cases, which inherently involve court discretion, we have often spoke in strong, and occasionally even absolute, language with regard to the court's duty to enforce agency action mandated by Congress." *Forest Guardians*, 174 F.3d at 1187. "Shall

means shall. The Supreme Court and this circuit have made clear that when a statute uses the word shall, Congress has imposed a mandatory duty upon the subject of the command." Id. (internal quotation marks omitted). Of course, as set out elsewhere in this brief, on at least three occasions, the federal district courts in Kansas and the Tenth Circuit have reached this same conclusion. More strikingly, in each case (decided between 2000 and 2010), it was the Secretary seeking ratification by the courts of his legal position that Pub. L. 98-602 mandated the Secretary to take into trust lands purchased with 602 monies. See *Sac and Fox Nation v. Babbitt*, 92 F.Supp.2d at p. 1128 ("if required to decide whether the Secretary was required by law to take the Shriner Tract into trust, the court would answer "yes."); *Sac & Fox Nation v. Norton*, 240 F.3d at p. 1268 ("Pub.L. 98-602 imposed a nondiscretionary duty on the Secretary" to take land into trust purchased with 98-602 funds). This factor alone distinguishes this case from many unreasonable-delay precedents. The processing of a trust application under Pub. L. 98-602 does not, for example, require anything like the "complex transition to a competitive communications market" that the court was considering in *Quest*, 398 F.3d at 1239. There is nothing complex about this process. This process is simple. P. L. 98-602 gives the Secretary no discretion, requiring only that the Park City land is purchased with P. L. 98-602 monies. Delays that would be wholly appropriate in the administration of a complex regulatory regime are clearly unreasonable in performance of such ministerial tasks.

In examining the statutory context, "[t]he court must also estimate the extent to which delay may be undermining the statutory scheme" by, for example, "frustrating the statutory goal." *Cutler v. Hayes*, 818 F.2d 879, 897-898. P.L. 98-602 states the Secretary "shall" take land purchased with 602 monies into trust. The Secretary has determined the Park City land has been purchased with 602 monies.

> Mandamus is an extraordinary remedy reserved for extraordinary circumstances. *See, e.g.*, *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549 (D.C.Cir.1999). An administrative agency's unreasonable delay presents such a circumstance because it signals the "breakdown of regulatory processes." *Cutler v. Hayes*, 818 F.2d 879, 897 n. 156 (D.C.Cir.1987).

In re American Rivers, 372 F.3d at 418. Every day the Secretary fails to act consistent with the Congressional mandate undermines the statutory scheme.

3. **The consequences of the delay.** "The court must examine the consequences of the agency's delay." *In re International Chem. Workers Union*, 958 F.2d at 1149. In particular, "the court should consider the nature and extent of the interests prejudiced by delay." *Public Citizen Health Research Group*, 740 F.2d at 35. Continued delay severely prejudices the economic and health and general welfare interests of the Wyandotte and its people. The Courts have consistently held that such harms should be given great weight because "economic harm is more tolerable than harm to human health and welfare." *Orion Reserves Ltd. Partnership v. Kempthorne* 516 F.Supp.2d 8 (D.D.C. 2007), citing *In re American Rivers*, 372 F.3d at 418. The uncontested facts here demonstrate that the Secretary's inaction has been particularly harmful because it has permitted competitors of the Wyandotte in the Park City area to delay Wyandotte plans to construct its own casino. In the course of the delay, the State of Kansas ($32 million) and Peninsula Gaming ($130 million) have generated large revenues to the exclusion of the Wyandotte.[23] A portion of those gaming dollars, if the Secretary had timely acted upon the Wyandotte's Park City land into trust application, would have gone to the Wyandotte. Those dollars would have been used to promote the health and welfare of Wyandotte tribal members. See *Friend Aff.* The consequences of the Secretary's inaction has proven to be detrimental to the Wyandotte and its people.

[23] The two parties entered into an agreement "for the defense of the South Central Gaming Zone" [*McCullough Aff.*, Ex. A]. Included in the South Central Gaming Zone is Sedgwick County where Park City is located. Sedgwick County also receives a portion of the revenues generated by Peninsula Gaming. Id. Ex. B.

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

The court should consider "any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources." *International Chem. Workers Union*, 958 F.2d at 1149 (internal quotation marks omitted). In other words, the "agency must justify its delay to the court's satisfaction." *Cutler*, 818 F.2d at 898. This Court's assessment of this factor will necessarily depend on whatever explanation the Secretary proffers for his inaction. It is clear, however, that many of the common justifications for Department delay simply have no application here. Most obviously, there is no "practical difficulty" in carrying out the straightforward requirements of P.L. 98-602 as clarified by the courts in the litigation surrounding the public law. Most importantly, the Department cannot claim inadequate staff resources to carry out the tasks required by the statute. The administrative record makes clear that the Department staff had carried out its review and determined, no later than June 2009, that the Wyandotte's application must be granted. As the uncontested facts demonstrate, the mandatory acquisition has been approved by everyone involved—having been on at least three occasions put in final form for the Secretary's approval. The subsequent delay—now stretching to nearly forty-four months—thus appears to be attributable to the Secretary's own unwillingness to make a decision, not to any lack of resources.

This case thus presents a situation in which an agency has delayed for well more nearly four years in performing a straightforward, ministerial task; this ongoing delay imposes severe prejudice to the Wyandotte; and the Department's substantive review has been complete for years and Department officials have concluded that it has a duty to act. Under these circumstances,

continued delay is "so egregious as to warrant mandamus." *In re Core Commc'ns*, 531 F.3d 849, 855 (internal quotation marks omitted).

III. THE SECRETARY'S FAILURE TO ACT IS PARTICULARLY UNREASONABLE IN LIGHT OF HIS FIDUCIARY OBLIGATIONS TO THE WYANDOTTE

For the foregoing reasons, the Secretary's delay warrants judicial intervention even under the ordinary standards applicable to all administrative agencies. But the Secretary owes the Wyandotte more than the bare minimum of administrative regularity required by the APA. The Supreme Court has long recognized "the distinctive obligation of trust incumbent upon the Government" in Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). "This principle has long dominated the Government's dealings with Indians," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), and it imposes on the Secretary an "overriding duty ... to deal fairly with Indians," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). In particular, it is "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (internal quotation marks omitted).

In addition to the United States' general fiduciary duties, P.L. 98-602 imposes a specific trust obligation. By its terms, P.L. 98-602 requires the Secretary to hold land "in trust for the benefit of the Tribe." This Court has equitable powers to grant prospective relief for wrongful agency conduct. See *Cobell v. Norton*, 240 F.3d at 1099 (When the Secretary is acting as a trustee, his actions "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.")

"If a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order *any appropriate relief*." Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 69, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) (emphasis added).

Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

In carrying out his duties under P.L. 98-602, the Secretary unquestionably owes a fiduciary duty to the Wyandotte. And because the Secretary is acting as a trustee, his actions "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." Cobell, 240 F.3d at 1099 (internal quotation marks omitted).

The Secretary's treatment of the Wyandotte's Park City land into trust application plainly cannot satisfy these standards. For nearly four years the Department has consistently maintained that the Park City land trust application is a mandatory acquisition. The Secretary's long and unexplained delay in acting upon the application cannot be reconciled with the duty to exercise reasonable care. The Secretary has not only failed to comply with the requirements of the APA, but has also breached his fiduciary duties.

CONCLUSION

For all of these reasons, the Wyandotte respectfully requests that this Court issue either a writ of mandamus or an injunction under the APA directing the Secretary immediately to immediately take action upon the Park City land into trust for the benefit of the Wyandotte.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

/s/ William W. Hutton
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