

# **EXHIBIT 2**



## United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

MAY 20 2020

The Honorable Billy Friend,  
Chief, Wyandotte Nation  
64700 E. Highway 60  
Wyandotte, Oklahoma 74370

Dear Chief Friend:

In 2006, the Wyandotte Nation (Nation) submitted an application to the Bureau of Indian Affairs (BIA) to acquire in trust approximately 10.24 acres of land in Park City, Sedgwick County, Kansas (Park City Parcel), for gaming and other purposes. The Nation stated that it purchased the Park City Parcel using funds from its 1984 Settlement Act Land Acquisition Fund,<sup>1</sup> which mandates the acquisition of certain lands by the Secretary of the Interior (Secretary).

In 2014, the Department of the Interior (Department) determined the Nation had not provided documentation to show that there were sufficient Land Acquisition Funds to purchase both the Park City Parcel and a later-purchased parcel, referred to as the Shriner Tract (2014 Denial Letter).<sup>2</sup> The 2014 Denial Letter denied the Nation's application for mandatory acquisition of the Park City Parcel because if the Nation did not use funds solely from the Land Acquisition Fund to purchase the Park City Parcel its acquisition is not mandatory under the Settlement Act. The 2014 Denial Letter also stated, "[s]hould the Nation later be able to address the accounting issues raised by the State, it would be free to submit a new application."<sup>3</sup> In response, on October 20, 2017, the Nation submitted a new application that provided information addressing the accounting issues raised by the State, including annual audits, a financial analysis prepared by the auditing firm RSM US, LLP and additional records not previously reviewed.<sup>4</sup> The Nation's new application incorporated the Nation's earlier application record and is herein referred to as the 2017 Supplement. The Nation stated that the 2017 Supplement showed that

<sup>1</sup> Pub. L. 98-602, 98 Stat. 3149 (Oct. 30, 1984) (hereinafter Settlement Act). We note that the funds identified for the acquisition of land as provided by Section 105(b)(1) of the Settlement Act have been identified by a number of different names throughout the record due to the lengthy procedural history. We refer to this fund as the Land Acquisition Fund and the money in the fund as Land Acquisition Funds.

<sup>2</sup> Letter from Kevin K. Washburn, Assistant Secretary- Indian Affairs, U.S. Department of the Interior, to The Honorable Billy Friend, Chief, Wyandotte Nation (Jul. 3, 2014) (hereinafter 2014 Denial Letter) at 1; In the 2014 Denial Letter, the Land Acquisition Fund was identified as "602 Funds."

<sup>3</sup> 2014 Denial Letter at 10.

<sup>4</sup> Letter from The Honorable Billy Friend, Chief, Wyandotte Nation to Paula Hart, Director, Office of Indian Gaming (Oct. 20, 2017) with attachments (hereinafter 2017 Supplement). The Nation's 2017 Supplement and attachments contain the Nation's commercial and financial information and would not customarily be released to the public. Therefore it is confidential and will be withheld from the public under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and 43 C.F.R. §§ 2.23-24.

there were sufficient Land Acquisition Funds, and that the Nation only used Land Acquisition Funds to purchase the Park City Parcel. We analyze this additional documentation below.

## **Decision**

As explained in the 2014 Denial Letter, the sole remaining question after years of litigation is whether the Nation used Land Acquisition Funds alone to purchase the Park City Parcel. After reviewing the requirements of the Settlement Act, numerous court cases, previous records submitted, and the Nation's 2017 Supplement, we determine that the Nation had sufficient Land Acquisition Funds and used only these funds to purchase the Park City Parcel. Therefore, the Department will acquire the Park City Parcel in trust as a mandatory acquisition.

## **Background**

### *Removal 1795 -1855*

Beginning around 1700, conflicts with the Iroquois Confederacy prompted the Wyandot (now Wyandotte) to relocate from Ontario, Canada to what is today Michigan and Ohio. After the American Revolution, American settlers began pushing west into what is now Ohio. In the 1795 Treaty of Greenville, signatory tribes - including the Wyandot - collectively ceded much of southern Ohio to the United States. Subsequent treaties resulted in the Wyandot relinquishing their remaining land in Ohio, Michigan, and Indiana. In 1843, the Wyandot were removed from Ohio to what is now Kansas. Then in 1855, the Wyandot were moved to what is now Oklahoma.

### *Indian Claims Commission*

Between 1973 and 1978, the Indian Claims Commission adjudicated four separate claims by the Wyandotte Nation against the United States stemming from the value of the Nation's land it ceded in Ohio, Michigan, and Indiana. The Indian Claims Commission found that the United States provided unconscionable consideration for the land that was ceded, and ordered the United States to pay fair market value for the land.<sup>5</sup>

### *The Settlement Act*

In 1984, Congress enacted the Settlement Act, "to provide for the use and distribution of certain funds awarded to the Wyandotte [Nation]" and for other purposes.<sup>6</sup> Congress appropriated approximately \$4.7 million to the Nation in the Settlement Act.<sup>7</sup> The Settlement Act required

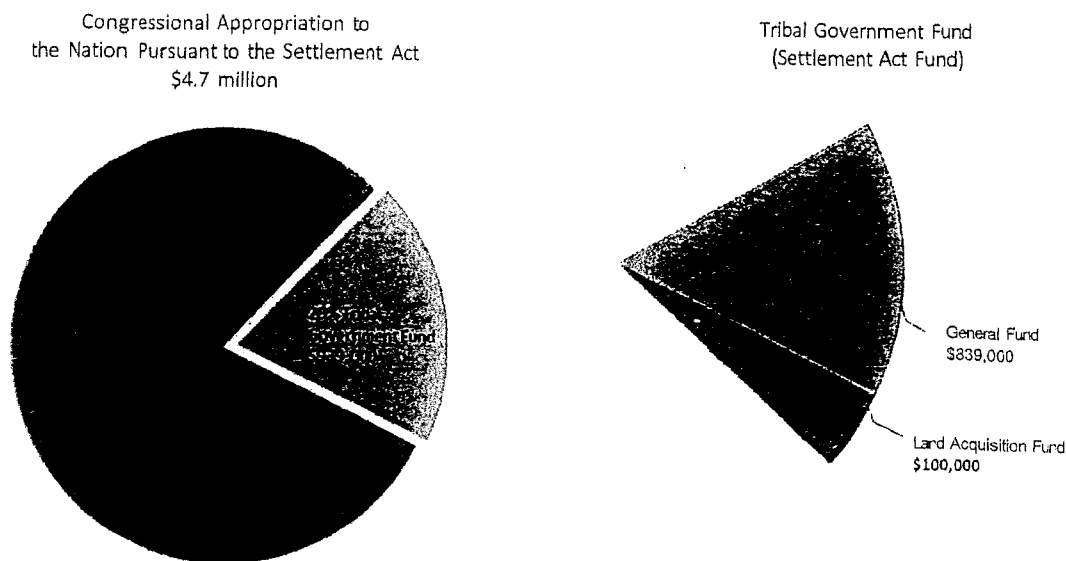
<sup>5</sup> See e.g. James Strong, et al. v. United States 30 Ind. Cl. Comm. 337 (May 23, 1973) Doc. No. 141; Lawrence Zane, on behalf of the Wyandotte Tribe and Nation v. United States, 38 Ind. Cl. Comm. 561 (Aug. 5, 1976) Doc. No. 212 and 213; and Wyandotte Tribe and Nation v. United States 43 Ind. Cl. Comm. 311 (Sept. 22, 1978) Doc. No. 139.

<sup>6</sup> Preamble to Settlement Act.

<sup>7</sup> 2017 Supplement, Exhibit 11 at 4 (hereinafter Settlement Act Fund Annual Audits). According to the audit, the total award to the Nation under the Settlement Act was \$4,693,530.20. We rounded this figure to the nearest \$100,000 for ease of reference.

that the \$4.7 million be distributed so that 80% went to the Nation's members by per capita payments and 20% went to the Nation for land acquisition, government services, and other purposes (Settlement Act Fund).<sup>8</sup>

### *Wyandolle Settlement Act Funds*



Congress designated \$100,000 from the Settlement Act Fund to "be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of [the Nation]" (Land Acquisition Fund).<sup>9</sup> Congress directed the Tribal Business Committee to use the remaining \$839,000 for the benefit of the Nation (General Fund).<sup>10</sup>

### *Settlement Fund Chronology*

When the Nation received the settlement funds, it initially held the Land Acquisition Fund separately from the General Fund. In 1991, the Nation merged the Land Acquisition Fund and the General Fund into one account. In 1992, the Nation purchased the Park City Parcel for approximately \$25,000.<sup>11</sup> The Nation submitted an application requesting that the Secretary acquire the Park City Parcel in trust pursuant to the Settlement Act, but withdrew the application

<sup>8</sup> Settlement Act § I 05; *see also* Settlement Act Fund Annual Audits at 4.

<sup>9</sup> Settlement Act § I 05(b)(1).

<sup>10</sup> Settlement Act § I 05(b)(2). Per Section I 05(b)(2), the remaining 20%, minus the \$100,000 Land Acquisition Funds, was distributed to the Wyandotte Tribal Business Committee to be used for education, health, economic development, land purchases, investments, cemetery maintenance, building maintenance, and administration. We refer to the funds identified in § I 05(b)(2) as the General Fund. *See also* Settlement Act Fund Annual Audits at 4. According to the audit for the fiscal year ended July 11, 1986, the General Fund total was \$838,706.04. We rounded this number to the nearest \$1,000 for ease of reference.

<sup>11</sup> 2014 Denial Letter at 3. *See also* 2017 Supplement, Exhibit I 1992 Park City Purchase Deed.

in 1995. In 1996, the Nation purchased the Shriner Tract for approximately \$180,000 using Land Acquisition Funds. The Secretary acquired the Shriner Tract in trust pursuant to the Settlement Act that year.

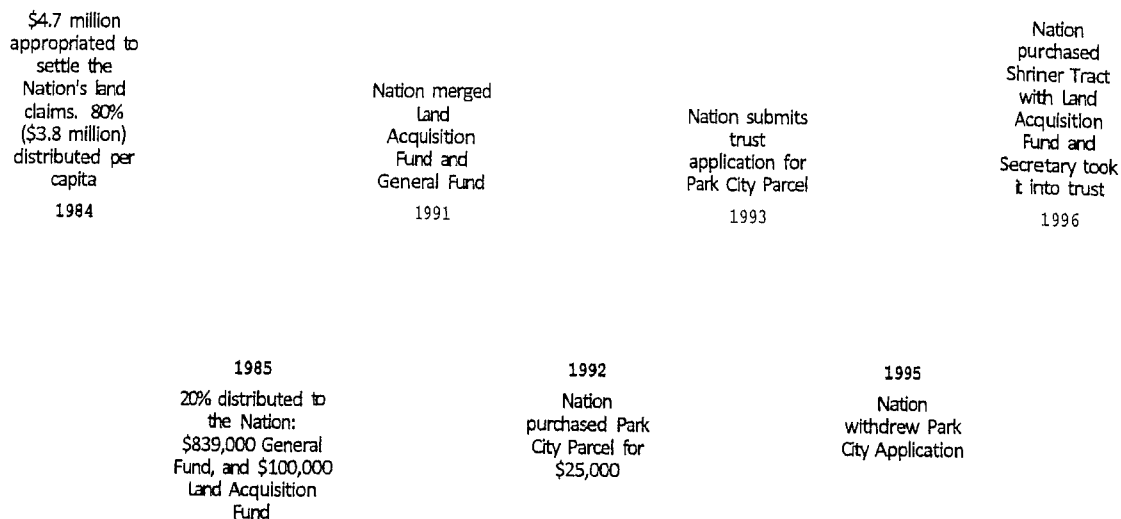


Figure 1 Wyandotte Timeline 1984-1996  
Shriner Tract Litigation

The Secretary's 1996 acquisition of the Shriner Tract in trust resulted in years of litigation. The following holdings are applicable to the Park City Parcel:

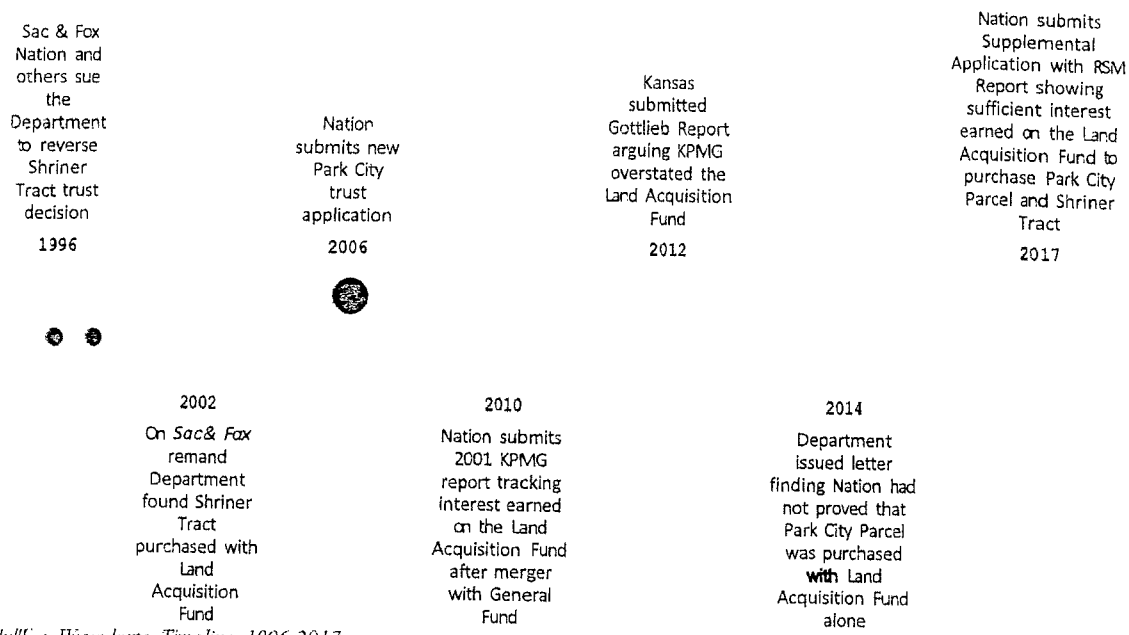
- In *Governor of Kansas v. Norton*, the United States District Court for the District of Kansas ruled that the Nation could invest the Land Acquisition Fund and add the interest it earned into the Land Acquisition Fund to purchase property for acquisition under the Settlement Act.<sup>12</sup>
- In *Sac & Fox Nation v. Norton*, the United States Court of Appeals for the Tenth Circuit held that the Settlement Act mandated the Secretary to acquire in trust land purchased with Land Acquisition Funds.<sup>13</sup>
- In *Wyandotte Nation v. the National Indian Gaming Commission*, the United States District Court for the District of Kansas held that land purchased with Land Acquisition Funds and taken in trust pursuant to the Settlement Act meet the criteria for the Indian Gaming Regulatory Act's (IGRA) "settlement of a land claim" exception, and, thus, the Nation may conduct gaming on those lands.<sup>14</sup>

<sup>12</sup> *Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204, 1217-20 (D. Kan. 2006), rev'd on other grounds; *Governor of Kansas v. Kempthorne*, 516 F. 3d 833, 846 (10th Cir. 2008).

<sup>13</sup> *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1260-61 (10th Cir. 2001).

<sup>14</sup> *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d at 1211 (D. Kan. 2006) (no appeal taken). See IGRA, 25 U.S.C. § 2719 (b)(1)(B)(i).

In accord with these cases, if the Nation can prove that it purchased the Park City Parcel with Land Acquisition Funds, then the Secretary must acquire the Park City Parcel in trust and the Nation may conduct gaming on the Park City Parcel.



*Visual: Wynwalorte Timeline 1996-2017*

*Park City Trust Application Procedural History*

In 2006, the Nation resubmitted an application for the Secretary to acquire the Park City parcel in trust. In that application, the Nation stated that the Secretary must acquire the Park City Parcel under the same reasoning applied to the Shriner Tract, because it purchased the Park City Parcel with Land Acquisition Funds.

*2001 KPMG Report*

In 2010, the Nation submitted a 2001 report prepared by the auditing firm KPMG (KPMG Report) to support its mandatory acquisition assertion.<sup>15</sup> The KPMG Report was relied on in the Shriner Tract litigation and contained an accounting analysis of the interest earned on the Nation's Settlement Act Fund from 1986 to 1996. The KPMG Report determined that the Nation kept the Land Acquisition Fund and the General Fund in separate accounts until December 30, 1991, when the Nation merged the accounts. The KPMG Report then determined the prorated interest earned on the Land Acquisition Fund in the merged account by calculating the percentage of the Settlement Act Fund comprised by the Land Acquisition Fund. Based on that calculation, the KPMG Report found that there were sufficient Land Acquisition Funds to allow the Nation to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996.

<sup>15</sup>The KPMG Report was originally submitted to the Department by Letter from John Gruttadaurio to George Skibine enclosing the KPMG Report (Dec. 5, 2001). See 2014 Denial Letter notes 14 and 18.

*2012 Submission from the State of Kansas*

In 2012, the State of Kansas hired the accounting firm Gottlieb, Flekier & Co. to review the KPMG Report analysis and prepare a report evaluating the sufficiency of the KPMG Report's conclusions (Gottlieb Report).<sup>16</sup> Relying on the Gottlieb Report, the State asserted that the KPMG Report failed to account for certain interest-related deductions applied against the Nation's merged account. The State also asserted that by not factoring these deductions into its analysis, the KPMG Report overstated both the amount of interest earned by the Settlement Act Fund as well as the amount of interest earned by the Land Acquisition Fund. The State alleged that the margin interest deductions identified in the Gottlieb Report were related to the Nation's use of margin interest loans to purchase securities the Nation owned in connection with the purchase of various bonds. These appeared on the Nation's financial statements as deductions for "margin account interest" and "accrued interest." The Gottlieb Report concluded that, after deducting the cost of purchasing the Park City Parcel in 1992, the resulting amount of the Land Acquisition Fund would have been insufficient to purchase the Shriner Tract for \$180,000 in 1996.

The State noted that the Gottlieb Report analyzed incomplete financial information because the Nation's account statements it relied upon were incomplete and "entirely missing for the years 1992 and 1993, except for November, 1993."<sup>17</sup> Additionally, the Gottlieb Report noted the "incomplete" copies of the Nation's AG Edwards monthly investment accounts from May 1986 through July 28, 1989, and "incomplete" copies of the Nation's monthly Mercantile Investment Services statements from January 1989 through November 29, 1991. The Gottlieb Report describes the AG Edwards statements as incomplete because they did not include all pages of the statements for each month, and in some months, account information was entirely omitted. The Gottlieb Report also notes that it reviewed only "incomplete copies of monthly Mercantile Investment Services statements from January 1989 through November 29, 1991," noting there was at least one, if not more, statements missing for this account and that the Mercantile account information was "incomplete in a fashion similar to the AG Edwards account statement."<sup>18</sup>

The Gottlieb Report contains a Scope Limitation Note that states the information and documents described have been useful in reaching the conclusions of the report.<sup>19</sup> The Gottlieb Report noted, however, that for purposes of complete documentation, it would have preferred to review

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<sup>16</sup> Letter from Kansas Special Assistant Attorney General, Mark Gunnison, to Secretary Salazar (Sept. 20, 2012), regarding Wyandotte Nation Land into Trust Application, Park City, Kansas. *See also* Letter from Kansas Special Assistant Attorney General, Mark Gunnison, to Secretary Salazar (Oct. 24, 2012) transmitting corrected Gottlieb Report.

<sup>17</sup> The Nation's attorney submitted the missing 1992 account statement was in August of 2009. Letter from Kansas Special Assistant Attorney General, Mark Gunnison, to Secretary Salazar (Sept. 20, 2012).

<sup>18</sup> The Gottlieb Report was submitted as an attachment to a Letter from Kansas Special Assistant Attorney General, Mark Gunnison, to Secretary Salazar on Sept. 20, 2012, and again on October 24, 2012, which included the Gottlieb Report corrected for pagination and collating errors in the report. Letter from Kansas Special Assistant Attorney General, Mark Gunnison, to Secretary Salazar (Oct. 24, 2012).

<sup>19</sup> Gottlieb Report at 3.

the annual audited financial statements for the Nation for the entire period of review. It also noted, "if no other documents are furnished, those conclusions are sound and accurate."<sup>20</sup>

### ***2014 Denial Letter***

On July 3, 2014, the Department denied the Nation's 2006 application because the Nation did not submit accounting evidence rebutting the Gottlieb Report. The Department explained in the 2014 Denial Letter that it could not conclude that the Nation purchased the Park City Parcel solely with Land Acquisition Funds. The 2014 Denial Letter also stated, "[s]hould the Nation later be able to address the accounting issues raised by the State, it would be free to submit a new application."<sup>21</sup>

### ***Nation's 2017 Response to the 2014 Denial Letter***

On October 20, 2017, the Nation submitted a new application directly replying to the 2014 Denial and addressing the accounting issues raised by the State. The Nation's new application—herein referred to as the 2017 Supplement—incorporated the Nation's earlier application record and provided new information to rebut the Gottlieb Report.<sup>22</sup> The Nation explained that it obtained information from BIA's Eastern Oklahoma Regional Office detailing the distribution of the Settlement Act Fund to the Wyandotte Nation. The Nation submitted in the 2017 Supplement annual audits of the Settlement Act Fund for 1986 through 1996, with the exception of the 1988 audit.<sup>23</sup> The Nation had not previously submitted those annual audits. Finally, the Nation commissioned a new analysis from the auditing firm RSM US, LLP (RSM Report), for the Land Acquisition Fund within the Settlement Act Fund from 1986 to 1996 using the annual audits and the monthly account statements.<sup>24</sup> As discussed below, the RSM Report shows that there were sufficient Land Acquisition Funds to acquire both the Park City Parcel in 1992 and the Shriner Tract in 1996.<sup>25</sup>

### ***RSM Report***

The RSM Report analyzed the annual audits from 1986 through 1996 and the monthly account statements for the Nation's three investment accounts—the AG Edwards 3010, Mercantile 7769, and Mercantile 7750—which held the Land Acquisition Fund and the General Fund. Thus, the RSM Report was based on actual audited financial statements of the relevant Settlement Act Fund as well as the accountant statements reviewed in the KPMG Report and the Gottlieb Report. The RSM Report deducted margin interest-related costs before the interest earned was

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<sup>20</sup> Gottlieb Report at 3.

<sup>21</sup> 2014 Denial Letter at 10. On December 3, 2015, the Nation submitted a new application, which it then withdrew on August 23, 2017.

<sup>22</sup> 2017 Supplement.

<sup>23</sup> Settlement Act Fund Annual Audits. The Nation's auditor, Roy A. Ober, CPA, refers to the Settlement Act Fund as the "Claims Money Fund."

<sup>24</sup> 2017 Supplement, Exhibit 6 at 4 (RSM Report).

<sup>25</sup> RSM Report at 6.



attributed to the Land Acquisition Fund.<sup>26</sup> That calculation addressed the Gottlieb Report's critique of the KPMG Report and found that the growth of the Land Acquisition Fund was not overstated. The RSM Report and annual audits provided dollar amounts distributed to the Nation from the Settlement Act, which totaled approximately \$4.7 million. Of that amount, approximately \$939,000, was distributed to the Nation's government on July 12, 1985, to be used for certain defined purposes. That amount included the \$100,000 Land Acquisition Fund and the \$839,000 General Fund. The Nation noted that the dollar amounts distributed to the Nation were shown in the annual certified audits of the Settlement Act Fund from 1986 through 1996.<sup>27</sup>

### **Analysis**

The Nation's 2017 Supplement contained new information that the Department had not previously reviewed, including the annual audits and the RSM Report. The RSM Report analyzed the Nation's financial documentation to determine whether the interest earned on the merged funds and attributed to the Land Acquisition Fund resulted in sufficient funds for the purchase of the Park City Parcel in 1992 and the Shriner Tract in 1996 after factoring in interest-related deductions. The RSM Report showed that these returns generated funds sufficient to purchase both the Park City Parcel and the Shriner Tract.

### ***Consultation with the Office of Financial Management***

On February 26, 2020, the Office of Financial Management reviewed the RSM Report and underlying financial statements.<sup>28</sup> The Office of Financial Management noted that the RSM Report analyzed the annual audits and the monthly account statements for the Nation's three investment accounts—the AG Edwards 3010, Mercantile 7769, and Mercantile 7750—which held the Land Acquisition Fund and the General Fund. The RSM Report shows when taking the entirety of the Settlement Funds into account from 1986 to 1996, the Land Acquisition Fund was earning returns from 5.27% to 8.84% with an average return of 7.795%.

The RSM Report and annual audits show approximately \$939,000 was distributed to the Nation's government on July 12, 1985, to be used for certain defined purposes.<sup>29</sup> That amount included the \$100,000 Land Acquisition Fund and the \$839,000 General Fund as established by Congress. That year, the Land Acquisition Fund was approximately 10.65% of the Settlement Funds. The RSM Report found that after factoring in interest-related deductions and investment income earned in 1985-1986, the balance of the Land Acquisition Fund had risen to \$108,661, by July 11, 1986. The RSM Report's analysis of the following years also calculated the Land

<sup>26</sup> Memorandum from Bruce V. Bush, Senior Director, RSM US LLP, to Philip Bristol, Policy Advisor, Office of Indian Gaming, BIA, at 2 (Feb. 14, 2018) (hereinafter Bush Letter).

<sup>27</sup> 2017 Supplement.

<sup>28</sup> Memorandum from Tonya R. Johnson, Deputy Chief Financial Officer and Director Office of Financial Management (PFM), to Paula Hart, Director Office of Indian Gaming, dated Feb. 26, 2020, regarding Analysis of Wyandotte Nation's accounting of the Land Acquisition Fund prepared by RSM US LLP dated September 29, 2017, (hereinafter PFM Memorandum).

<sup>29</sup> RSM Report at Exhibit B.

Acquisition Fund as a percentage of the Settlement Funds, and allocated interest-related deductions and interest earned accordingly.

*Available Funds for the Park City Purchase*

The Nation purchased the Park City Parcel on November 25, 1992.<sup>30</sup> The RSM Report found that the Land Acquisition Fund had a balance of \$173,647 on September 1, 1992, and accounted for approximately 19.17% of the Settlement Act Fund.<sup>31</sup> The RSM Report showed a deduction of \$25,000 for the Park City Parcel from the Land Acquisition Fund and included a prorated deduction of \$19,178 to account for the number of days after the purchase of the land until August 31, 1993, the end of the fiscal year on which these funds were not earning interest. The RSM Report included this deduction to "ensure that the interest and dividend income allocated to the Land Acquisition Fund was not overstated."<sup>32</sup> After the purchase of the Park City Parcel, the RSM Report stated that the remaining balance in the Land Acquisition Fund was \$162,967, on August 31, 1993.<sup>33</sup>

*Available Funds for the Shriner Tract Purchase*

The Nation purchased the Shriner Tract on July 12, 1996. The RSM Report states that the Land Acquisition Fund had a balance of \$187,950 on September 30, 1995, and accounted for approximately 17.31% of the Settlement Act Fund.<sup>34</sup> The Shriner Tract purchase consumed \$180,000 of the Land Acquisition Fund with 80 days remaining until the end of the fiscal year. As a result, RSM deducted a prorated amount of \$39,452 from the account to "ensure that the interest and dividend income allocated to the Land Acquisition Fund was not overstated."<sup>35</sup> After the purchase of the Shriner Tract, the RSM Report states the remaining balance in the Land Acquisition Fund was \$17,854 and the remaining balance of the General Fund was \$857,853.

The Office of Financial Management reviewed the RSM Report and the underlying annual audits. The RSM Report deducted margin interest-related costs before interest earned was attributed to the Land Acquisition Fund.<sup>36</sup> That calculation addressed the Gottlieb Report's critique of the KPMG Report and ensured the growth of the Land Acquisition Fund was not overstated. The Office of Financial Management concluded the RSM Report's methodology, calculations, and assumptions are consistent with industry standards and the RSM Report's conclusions are reliable.<sup>37</sup>

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<sup>30</sup> 2017 Supplement, Exhibit 1 *1992 Park City Purchase Deed*. See also RSM Report at 6.

<sup>31</sup> RSM Report at 6.

<sup>32</sup> Bush Letter at 2.

<sup>33</sup> RSM Report Exhibit B.

<sup>34</sup> *Id*

<sup>35</sup> Bush Letter at 2.

<sup>36</sup> *Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204, 1217-20 (D. Kan. 2006) (hereinafter *Governor of Kansas*), concluding that the Nation could apply investment interest to the Land Acquisition Fund; rev'd on other grounds; *Governor of Kansas v. Kempthorne*, 516 F. 3d 833,846 (10th Cir. 2008).

<sup>37</sup> PFM Memorandum.

### *Conclusion*

After reviewing the RSM Report, the Gottlieb Report, the KPMG Report, and the audits and other financial documents in the records, and after consulting with the Department's Office of Financial Management regarding the annual audits and the RSM Report, we find the Nation's 2017 Supplement and rebuttal of the Gottlieb Report to be convincing and reliable. The annual audits of the Nation's Settlement Act Fund appear to be valid and reasonable. The RSM Report was based on those annual audits, which were unavailable to either KPMG or Gottlieb, as well as the account statements both KPMG and Gottlieb analyzed. The RSM Report deducted costs related to the margin interest loans prior to allocating interest income. The RSM Report also prorated deductions to account for the number of days after each purchase on which these funds were not earning interest. These deductions avoid any over-statement of interest earned. The resulting calculations show the Nation had sufficient Land Acquisition Funds to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996. We agree with the methodology relied on in the RSM Report and find its conclusions reasonable.

Having found the RSM Report convincing and reliable evidence, we are persuaded by the report's conclusion that the Land Acquisition Funds were sufficient to purchase both the Park City Parcel and the Shriner Tract. We find that when the Nation purchased the Park City Parcel on November 4, 1992 it had sufficient funds to do so in the Land Acquisition Fund. The RSM Report and annual audits indicate that as of September 1, 1992, the Land Acquisition Fund had a balance of \$173,647. After the purchase of the Park City Parcel, the RSM Report showed the remaining balance in the Land Acquisition Fund was \$162,967.<sup>38</sup>

We also find that the RSM Report supports our previous conclusion that when the Nation purchased the Shriner Tract on July 12, 1996, it had sufficient funds in the Land Acquisition Fund to do so: The RSM Report and annual audits indicated that as of September 30, 1995, the Land Acquisition Fund had a balance of \$187,950.<sup>39</sup> This balance was sufficient to acquire the Shriner Tract for \$180,000 the following year.

### **Eligibility to Conduct Gaming**

In the Department's 2014 Denial Letter, then Assistant Secretary- Indian Affairs declined to make a determination whether the Park City Parcel, if acquired in trust, would be eligible for gaming because he was unable to determine that the Nation had sufficient Land Acquisition Funds to purchase the Park City Parcel. Following the determination that the Nation purchased the park City Parcel with Land Acquisition Funds, I now determine that the Nation may conduct gaming pursuant to the "settlement of a land claim" exception to Section 2719 of IGRA. This determination is consistent with the Department's acquisition of the Shriner Tract as upheld by the court in 2006 in *Wyandotte Nation v. the National Indian Gaming Commission*.<sup>40</sup>

<sup>38</sup> RSM Report Exhibit B.

<sup>39</sup>Id.

<sup>40</sup> *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d at 1211 (D. Kan. 2006) (no appeal taken).

### **Acquisition of the Park City Parcel in Trust**

In *Sac & Fox Nation v. Norton*, the United States Court of Appeals for the Tenth Circuit held that the Settlement Act mandates that the Secretary acquire in trust land purchased with Land Acquisition Funds.<sup>41</sup> Here, the Nation purchased the Park City Parcel with Land Acquisition Funds. Therefore, the Secretary is mandated to acquire the Park City Parcel in trust.

The Department's trust land acquisition regulations governing notice and comment and requiring the consideration of certain regulatory criteria at 25 C.F.R. Part 151 are not applicable to mandatory acquisitions of trust land.<sup>42</sup> Instead, the Department has issued guidance governing the review of mandatory acquisitions.<sup>43</sup> Pursuant to this policy guidance, the Department requires a legal description of the property and performance of environmental due diligence as articulated in Section 3.1.3 of the *Fee-to-Trust Handbook*.

### ***Legal Description and Title to the Property***

The Nation's 2017 Supplement contains a deed dated November 25, 1992, and a Commitment for Title Insurance in favor of the United States for the Park City Parcel as proof that the Nation owns the Park City Parcel.<sup>44</sup> The Nation also submitted a legal description for the approximately 10.24 acre Park City Parcel.<sup>45</sup> A legal description is included as Attachment I.

### ***Environmental Due Diligence***

It is well established that the environmental review requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, are not applicable to mandatory acquisitions.<sup>46</sup> The due diligence requirements of 602 DM 2 (Real Property Pre-Acquisition Environmental Site Assessments) are also not applicable to mandatory acquisitions.<sup>47</sup> Instead, the Department's policies and procedures require the Department to perform due diligence by conducting an initial site inspection and documenting the results. These steps are not, however, a precondition to completing the mandatory acquisition process. The BIA conducted an environmental site inspection on May 8, 2018, at the Park City Parcel and found no issues of concern.<sup>48</sup> Additionally, a Phase I Environmental Site Assessment was prepared for the Park City Parcel on

<sup>41</sup> *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1260-61 (10th Cir. 2001).

<sup>42</sup> See 25 C.F.R. § 151.10 and § 151.11.

<sup>43</sup> See Echo Hawk Memorandum, in *Fee-To-Trust Handbook* at 56 - 60.

<sup>44</sup> 2017 Supplement, Exhibits 1 and 19.

<sup>45</sup> 2017 Supplement, Exhibit 3.

<sup>46</sup> See Echo Hawk Memorandum at 5, citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) (NEPA only applies to discretionary agency actions); see also *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1262-63 (10th Cir. 2001).

<sup>47</sup> *Fee-to-Trust Handbook* § 3.1.3 at 34.

<sup>48</sup> Memorandum from Acting Division Chief, Division of Environmental and Cultural Resources to BIA Realty Officer, Division of Real Estate Services, regarding Wyandotte Nation's Coliseum Center Property (Park City, Kansas) (May 11, 2018). Note the Deed and some other documents refer to the Park City Parcel as the "Coliseum Center Property."

September 19, 2017, which found no evidence of hazardous materials.<sup>47</sup> The Eastern Oklahoma Regional Office will complete a final site inspection prior to the acquisition of the Park City Parcel in trust. This satisfies the due diligence requirements of 602 OM 2.

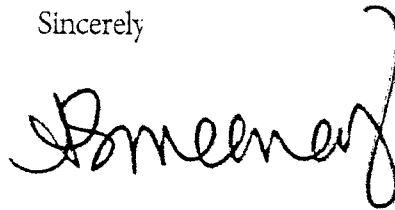
### Conclusion

After evaluating the new documentation presented by the Nation, I find that the Nation has rebutted the Gottlieb Report as well as the Department's previous conclusion that there was insufficient Land Acquisition Funds available to purchase the Park City Parcel. I now conclude, based on the RSM Report, the annual audits, the previous submissions by the Nation and the State, and the record before me, that there were sufficient Land Acquisition Funds to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996.

The record shows that the Nation has adequately traced the Land Acquisition Fund and its earnings to account for the purchases using Land Acquisition Funds. Because the Nation made both purchases with Land Acquisition Funds, the Settlement Act requires the Secretary to acquire the Park City Parcel in trust. As determined by the Court in *Wyandotte v. the National Indian Gaming Commission*, this acquisition qualifies as a "settlement of a land claim" exception to the IGRA Section 2719 prohibition on gaming on lands acquired after October 17, 1988. Therefore, once acquired in trust, the Nation may conduct gaming pursuant to Section 2719 of IGRA.

The Department will acquire the Park City Parcel in trust for the Nation as a mandatory acquisition. Consistent with applicable law, the Regional Director shall immediately take the necessary steps to acquire the Park City Parcel in trust.

Sincerely



Tara Sweeney  
Assistant Secretary - Indian Affairs

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<sup>49</sup> 2017 Supplement, Exhibit 20.