UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.* Derek Schmidt, Attorney General, BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SUMNER, KS; CITY OF MULVANE, KANSAS; SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA; and IOWA TRIBE OF KANSAS AND NEBRASKA,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:20-cv-02386
DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; TARA SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs of the U.S. Department of Interior, Bureau of Indian Affairs	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND REVIEW OF FINAL AGENCY ACTION

COME NOW Plaintiffs by and through their respective counsel, and state and allege as follows:

JURISDICTION

1. The District Court has original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361, in that Plaintiffs assert claims arising under 25 U.S.C. § 465, 25 C.F.R. § 151.10 and 25 C.F.R § 151.11, 25 C.F.R. § 292.2, 25 C.F.R. § 292.5, 25 U.S.C. § 2719, Public Law 98-602, 98 Stat. 3149 (1984) ("PL 602") and is aggrieved by actions of officers and employees of the United States and invokes 5 U.S.C. §§ 702 and 706 in that Plaintiffs have

suffered legal wrong and have been adversely affected and aggrieved by final agency action. Finally, this action presents an actual case or controversy pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

VENUE

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and § 1391(e), in that a substantial part of the events or omissions giving rise to the claims occurred in this District, and all of the real property that is the subject of this action is located in this District.

PARTIES

3. Plaintiff State of Kansas is one of the fifty sovereign states of the United States, and brings this action on relation of its duly-elected Attorney General Derek Schmidt. Due to the decision complained of, the State of Kansas (sometimes hereinafter referred to as "Kansas" or "State" or "Plaintiff") has been deprived of its lawful right to be consulted regarding applications by Indian Tribes to have land within Kansas accepted into trust. Moreover, the only lawful means by which gaming can occur on the land in question is pursuant to 25 U.S.C. § 2719(b)(1)(A), which requires the approval of both the Secretary of the Department of Interior and the State, acting through its Governor. The State has been deprived of its lawful right of consultation and approval regarding Indian gaming on the tract of land in issue as it was not consulted about the matter nor was its approval sought or given for gaming to occur on the land in issue.

4. Plaintiff Board of County Commissioners of the County of Sumner, Kansas (hereinafter referred to as "Sumner County") is the body politic and corporate for Sumner County, Kansas and is empowered under Kansas law to, among other things, sue and be sued and to exercise the powers of home rule. *See* K.S.A. 19-101, 2019 Supp. 19-101(a). The tract of land

in Park City, Kansas that is the subject of this action is located in the south central gaming zone, *see* K.S.A. 74-8702(f), which includes Sumner County and, as such, Sumner County has been deprived of its lawful right to be consulted regarding applications by Indian Tribes to have land within the south central gaming zone accepted into trust, including for gaming purposes.

5. Plaintiff City of Mulvane, Kansas (hereinafter referred to as "City of Mulvane") is a municipality empowered under Kansas law to, among other things, sue and be sued and to exercise the powers of home rule. *See* K.S.A. 12-101 and Kan. Const. Art. 12, § 5. The tract of land in Park City, Kansas that is the subject of this action is located in the south central gaming zone, *see* K.S.A. 74-8702(f), which includes the City of Mulvane and, as such, the City of Mulvane has been deprived of its lawful right to be consulted regarding applications by Indian Tribes to have land within the south central gaming zone accepted into trust, including for gaming purposes.

6. The Sac and Fox Nation of Missouri in Kansas and Nebraska ("Sac and Fox") is a federally recognized Indian Tribe and is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation and other lands located in Kansas, some of which land is held in trust for the Sac and Fox by the United States of America. Sac and Fox and the other Tribal Plaintiffs herein are each a party to a Tribal-State Compact with the State of Kansas giving Sac and Fox and the other Tribal Plaintiffs rights to conduct Class III Indian gaming in Kansas pursuant to federal and state laws.

7. Plaintiff Iowa Tribe of Kansas and Nebraska ("Iowa Tribe") is a federally recognized Indian Tribe and is the beneficial owner of and exercises jurisdiction over the Iowa Tribe Indian Reservation and other lands located in Kansas, some of which land is held in trust for the Iowa Tribe by the United States of America. Iowa Tribe and the other Tribal Plaintiffs

herein are each a party to a Tribal-State Compact with the State of Kansas giving Iowa Tribe and the other Tribal Plaintiffs rights to conduct Class III Indian gaming in Kansas pursuant to federal and state laws.

8. Defendant David Bernhardt is the Secretary of the Department of Interior of the United States of America (the "Secretary") and is being sued in his official capacity as an officer and agent of the United States Government. The Secretary is responsible for the decisions made by the Department of Interior, Bureau of Indian Affairs and its officers and employees in connection with applications by Indian Tribes to have land placed in trust for their benefit, including for gaming purposes and to effectuate the implementation of such decisions. In that capacity, the Secretary is responsible for the Department of Interior's May 20, 2020, Decision in which it determined that it had a mandatory duty under PL 602 to accept certain land in Park City, Kansas in trust for the benefit of the Wyandotte Nation for purposes of gaming, and that such land is eligible for gaming pursuant to the provisions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq (*the "May 20, 2020, Decision" or "Decision").

9. Defendant Tara Sweeney is the Assistant Secretary-Indian Affairs of the Department of Interior of the United States of America, Bureau of Indian Affairs (the "Assistant Secretary") and is being sued in her official capacity as an officer and agent of the United States Government. The Assistant Secretary is directly responsible with the Secretary for the decisions made by the Department of Interior, Bureau of Indian Affairs and its officers and employees in connection with applications by Indian Tribes to have land placed in trust for their benefit for purposes of gaming and to effectuate the implementation of such decisions. In that capacity, the Assistant Secretary is directly responsible, along with the Secretary, concerning the May 20, 2020, Decision that the Department of Interior has a mandatory duty under PL 602 (as defined

below) to accept certain land in Park City, Kansas in trust for the benefit of the Wyandotte Nation for purposes of gaming and that such land is eligible for gaming pursuant to the provisions of IGRA.

SUMMARY OF THE CASE

10. In the 1970s, the Wyandotte Tribe (n/k/a the Wyandotte Nation) (sometimes referred to hereinafter as the "Wyandotte," the "Nation," or the "Tribe") brought a number of claims against the United States in the Indian Claims Court seeking additional compensation for land it ceded by treaties with the United States in the 1800s. The Wyandotte claimed that the compensation it received pursuant to the treaties was "unconscionable" under the Indian Claims Commission Act of 1946. Ultimately, the claims asserted before the Indian Claims Commission and Court of Claims resulted in money judgments in the late 1970s against the United States and in favor of the Wyandotte and a group of Wyandotte descendants known as the Absentee Wyandottes, some of which were affirmed by the Court of Claims. Congress appropriated funds to satisfy these judgments in the late 1970's and passed Public Law 97-371, 96 Stat. 1813 (1982) ("PL 97-371") providing for a formula for the distribution of the appropriated funds amongst the Wyandotte and the Absentee Wyandottes. However, shortly after passage of PL 97-371, the Tribe and the Department of the Interior raised concerns about the fairness of the distribution formula set forth in PL 97-371. Congress revisited the distribution formula and in 1984, it passed Public Law 98-602, 98 Stat. 3149 (1984) ("PL 602"). PL 602 repealed the prior distribution formula and mandated the Department of the Interior to distribute funds to the Tribe and the Absentee Wyandottes according to the revised distribution formula set forth in PL 602. Also, in one provision of PL 602, Congress set aside $100,000 of the previously appropriated funds (sometimes referred to as the "set-aside funds") to be used for the purchase of real property

which, when so purchased, was to be held in trust by the Secretary for the benefit of the Tribe. This is the so-called "mandatory trust" provision of PL 602 at issue in this case.

11. After the funds from PL 602 were distributed, the Wyandotte did not buy land with the $100,000 set-aside funds. Instead, the Tribe invested the $100,000 set-aside funds in 1986 in mortgage obligation bonds and deposited the bonds into a segregated investment account. In December, 1991, the Wyandotte closed that investment account and commingled the funds into its general investment account. There was only $529.91 in cash in the account that housed the PL 602 bonds at the time of the commingling.

12. In July, 1996, the Wyandotte purchased land in Kansas City, Kansas (the "Shriner Tract") for at least $180,000 and requested that the United States acquire this land in trust for the Wyandotte pursuant to the mandatory provisions of PL 602. Before agreeing to acquire the Shriner Tract in trust for the Wyandotte under PL 602, the Department of the Interior required that the Wyandotte acknowledge that the funds used to purchase the Shriner Tract included all of the principal $100,000 set-aside funds from PL 602, plus interest/earnings on the investment of those funds between 1986 and 1996. This was done so that the use of the set-aside funds was accounted for to fulfill the mandate of PL 602 so that such funds could not be the source of a second mandatory trust acquisition under PL 602. The Wyandotte provided the acknowledgment that the $100,000 set-aside funds were the source of money used to buy the Shriner Tract, and accepted this as the condition upon which the Shriner Tract would be accepted into trust by the United States.

13. With the satisfaction of this condition clearly established, the United States accepted the Shriner Tract into trust in July, 1996. That act resulted in litigation that lasted over fourteen (14) years. In that litigation, both the United States and the Wyandotte readily admitted

and represented to the federal courts that the Shriner Tract was purchased with all of the $100,000 set-aside funds from PL 602 for the purchase of land, plus interest and earnings generated from the investment of the set-aside funds between 1986 and 1996. The Department and the Wyandotte also readily admitted and represented to the federal courts that the Shriner Tract trust acquisition fulfilled the mandate of PL 602 and that no further trust acquisitions for the Wyandotte could be predicated on the mandatory trust provisions of PL 602. The Wyandotte operate a Class II casino on the Shriner Tract at the present time.

14. In 2006, the Wyandotte filed an application to have a tract of land in Park City, Kansas ("Park City") that it had purchased in 1992 accepted into trust pursuant to the Secretary of Interior's ***discretionary*** authority under 25 U.S.C. § 465. Two years later, despite the record generated during the Shriner Tract acquisition and the litigation that ensued, the Wyandotte reversed course and began demanding that the Park City land be accepted into trust pursuant to the mandatory trust provisions of PL 602 and that the land was eligible for gaming under IGRA.

15. In or about September, 2010, this effort by the Wyandotte to invoke the mandatory provisions of PL 602 a second time came to the attention of the State of Kansas and the four federally recognized Indian tribes with reservations in Kansas. Thus began a dialogue in September, 2010 between federal and state officials from Kansas, as well as representatives of the four tribes that continued until July, 2014. The Wyandotte was likewise separately engaged in its own dialogue with the Department of Interior during this time frame.

16. In the course of this dialogue, Kansas advanced multiple positions why the mandatory trust provisions of PL 602 could not be invoked a second time for the Park City tract, including for gaming purposes. These positions included the following:

a. The administrative and legal record relating to the Shriner Tract trust acquisition conclusively established that the "shall" or mandate in PL 602 to acquire land in

trust purchased with all of the $100,000 set aside for that purpose was fulfilled with the Shriner tract trust acquisition and a second trust acquisition could not be predicated on PL 602;

b. The $100,000 set-aside funds from PL 602 for the purchase of land that triggered the mandate in PL 602 had been fully expended on the Shriner Tract; the mandate in PL 602 cannot be triggered by the purchase of land with funds from only interest and earnings on the investment of the $100,000 set-aside funds but none of the actual $100,000 principal funds.

c. The land in Park City could not have been bought with only interest and earnings from the investment of the PL 602 funds given that $180,000 of such funds ($100,000 principal funds and $80,000 in interest and earnings) was used for the purchase of the Shriner Tract in July 1996;

d. The Park City land, even if somehow acquired in trust under PL 602, did not qualify as land in settlement a land claim under IGRA, including pursuant to 25 C.F.R. §§ 292.2 and 292.5 and was not otherwise eligible for gaming under IGRA since it was acquired after 1988.

17. In July, 2014, Assistant Secretary-Indian Affairs Kevin Washburn issued a decision letter that resolved the matter. Assistant Secretary Washburn determined that the Park City land could not have been purchased with only PL 602 funds after accounting for the $180,000 of such funds used to acquire the Shriner Tract. (**Exhibit 1**, July 14, 2014, letter of Kevin Washburn). Accordingly, he denied the Wyandotte's application to acquire the Park City tract in trust under the mandatory provisions of PL 602. Because this decision was dispositive of the Tribe's application, Assistant Secretary Washburn did not address any of the other issues Kansas had raised in opposition to the mandatory trust application of the Park City land under PL 602. He also did not address the issue of whether such land would have been eligible for gaming.

18. Kansas heard nothing further on the matter for almost six (6) years. Then, in June 2020, it learned that Assistant Secretary Sweeney had issued a final agency decision dated May 20, 2020, in which she determined that the Park City land ***was*** purchased with only PL 602

funds. (**Exhibit 2**, May 20, 2020, Decision). She concluded that the land must be accepted into trust under the mandatory trust provisions of PL 602. On June 3, 2020, pursuant to the Decision, the Park City tract was deeded into trust.

19. In this same Decision, the Assistant Secretary also determined that the Park City land qualified for gaming under the exception in IGRA for land taken into trust in settlement of a land claim pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). She based her determination solely on a 2006 Kansas federal court decision involving the Shriner Tract acquisition but engaged in no analysis of whether that decision was applicable to the Park City acquisition. Moreover, she completely ignored 25 C.F.R. §§ 292.2 and 292.5, the Department's definitive and controlling guidance since 2008 for when gaming can occur on newly acquired lands (i.e., lands acquired after October 17, 1988) under that particular exception in IGRA.

20. Assistant Secretary Sweeney's May 20, 2020, letter revealed that in October, 2017, the Wyandotte submitted to the Department what she alternatively characterized as "a new application" or a "supplement" that reportedly included a new financial analysis, "additional records not previously reviewed," and audits that had never been produced in the many years that this debate has been ongoing. (**Exhibit 2**, p. 1). These materials were evidently reviewed between October, 2017, and May, 2020. Yet, no notice of any kind was provided to Kansas or any of the other Plaintiffs despite their significant participation in the administrative proceedings and litigation involving the proposed the Park City trust acquisition between September, 2010, and July, 2014.

21. In her May 20, 2020, letter, Assistant Secretary Sweeney went so far as to warn that if anyone should seek these never before disclosed records the Wyandotte submitted in October, 2017, involving the same factual matters that had been the subject of open debate

between September, 2010 and July, 2014, they will not be produced as the Department had pre-determined they are exempt from disclosure under Exemption 4 of Freedom of Information Act. (**Exhibit 2**, p. 1, n.4).

22. The May 20, 2020 Decision is flawed as it relied on rulings and findings made in federal district court decisions that have been supplanted by the Department's 2008 regulations and/or that were vacated by the Tenth Circuit. Moreover, the May 20, 2020 Decision failed to address any of the other significant issues the State had raised between 2010 and 2014 that revealed that the Park City land cannot be acquired in trust under PL 602. Instead, the May 20, 2020 decision addressed only the singular issue addressed by Assistant Secretary Washburn in his July, 2014 decision.

23. The May 20, 2020, Decision is final agency action. This lawsuit challenges the determination that the Park City land had to be accepted into trust by the United States under the mandatory trust provisions of PL 602 for the reasons that it is patently wrong and because it is arbitrary and capricious, contrary to law, inconsistent with prior agency decisions, fails to address significant issues and adopts positions that the Department and its officials should be judicially estopped from taking at this point in time.

24. This lawsuit also challenges the determination that the Park City land is eligible for gaming under IGRA. It is not. That determination is likewise wrong and is arbitrary and capricious, contrary to law, and inconsistent with and violates the agency's own regulations.

ALLEGATIONS COMMON TO ALL CLAIMS

PL 602

25. Congress passed PL 602 in 1984 to mandate the distribution of judgment funds to the Wyandotte and Absentee Wyandottes, arising out of certain claims the Tribe had asserted

against the United States before the Indian Claims Commission and the Court of Claims for money damages pursuant to the Indian Claims Commission Act, 60 Stat. 1049. These claims sought additional compensation for the value of its lands ceded in treaties with the United States in the 1800s.

26. PL 602 set forth the manner in which the Wyandotte may use the funds as follows:

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

b. Section 105(b)(1) provided that of the remaining 20%, "a sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Tribe."

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

(**Exhibit 3**, Pub. L. 98-602)

27. PL 602 was not legislation passed by Congress that resolved or extinguished with finality any claim by the Wyandotte to land or which resulted in alienation or loss of possession of some or all of the lands claimed by the Wyandotte.

28. The land in Park City was not acquired by the Wyandotte under a settlement of a land claim that was executed by the Wyandotte and the United States that returned to the tribe all or part of the land claimed by the tribe and that resolved or extinguished with finality any Wyandotte claim regarding returned land, nor was it acquired as part of a final order by a court or pursuant to an enforceable agreement that predates October 17, 1988, and which resolves or extinguishes with finality the land claim at issue.

29. With respect to the Tribe's purchase of land with the $100,000 funds distributed and set aside under Section 105(b)(1) of PL 602 and its subsequent application to have that land put in trust, the Tenth Circuit found that the usual requirements and procedures involved in the

Secretary's discretionary taking of land into trust under 25 U.S.C. § 465 did not apply. *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001). Rather, according to the Tenth Circuit, PL 602 mandated that the Secretary take into trust real property purchased with the $100,000 set-aside funds so long as the property was purchased with only the PL 602 set aside funds. *Id.* at 1261–64.

30. If the Wyandotte chose to initially invest the $100,000 set aside by PL 602 for the purchase of land before applying those funds to the purchase of land, there is nothing in PL 602 that required the Wyandotte to use any of the earnings from such investment for the purchase of land, as opposed to the principal $100,000 funds which were required to be used for the purchase of land. Those earnings could be used at the discretion of the Wyandotte.

31. In May 1986, the Tribe invested the $100,000 set aside funds from PL 602 by purchasing mortgage obligation bonds. (**Exhibit 4**, December 5, 2001, letter of John Gruttadaurio to George Skibine; **Exhibit 5**, Wyandotte Tribe 1986 Investment Account Statements). Those bonds were segregated in a separate account until December 1991, after which the Tribe commingled them (plus the cash in the account at the time in the amount of $529.91) with other assets in another investment account. (**Exhibit 4**).

1992 Park City Land Acquisition and 1994 Fee-to-Trust Application

32. In or about November 1992, the Tribe withdrew $25,000 in cash from the money market portion of its general investment account to purportedly purchase land in Park City, Kansas. (**Exhibit 6,** McCullough August 18, 2009, letter and November, 1992, account statement). The principal $100,000 PL 602 set aside funds represented at that time by the mortgage obligation bonds housed in that account were not used or liquidated in any fashion for the purchase of the Park City land. (**Exhibit 6**). That withdrawal of cash necessarily included

non-PL 602 funds since the only cash attributed to the PL 602 bonds as of the date of commingling of the accounts in December, 1991 was $529.91 and the PL 602 bounds could not have generated $24,470.09 in the eleven months between December, 1991 and the cash withdrawal in November, 1992 that was used to buy the Park City property.

33. In 1994, just two years before the Tribe sought to invoke PL 602 to have the Shriner Tract accepted into trust, the Tribe applied to have the Secretary of Interior accept the Park City land into trust under PL 602. (**Exhibit 7,** p**.** 11–12, Intervenor Response to Plaintiffs' Joint Brief; **Exhibit 8**, Chief Bearskin Letter to John Duffy)**.** At the time, the Tribe contended that it could conduct gaming operations on the Park City land once the Secretary took the land into trust because the land constituted "land in settlement of a land claim" pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). (**Exhibit 8**).

34. However, a year earlier, the Field Solicitor for the Department of Interior in Tulsa had concluded that the Park City land did not fall within this exception to the general prohibition against gaming under IGRA. (**Exhibit 9**, Joint Answering Brief of Federal Appellees filed with the Tenth Circuit, p. 15–16; **Exhibit 10**, February 19, 1993, Opinion of M. Sharon Blackwell). This decision was sent to, among others, Penny Coleman, Acting Associate Solicitor, Division of Indian Affairs, Michael D. Cox, General Counsel, NIGC and the Regional Solicitor, Southwest Region, Albuquerque.

35. Through at least November, 1995, (and just a few months before formally submitting the Shriner Tract fee-to-trust application), the Tribe continued to push the Park City application and argued that the Field Solicitor's decision was wrong. (**Exhibit 9**, p. 15–16; **Exhibits 11, 12 and 13**, correspondence from the Wyandotte Tribe or its representatives to the Department of Interior and Office of Solicitor of the Department of Interior).

36. In or about December, 1995, the Tribe withdrew its request to have the Park City land taken in trust under the mandatory provisions of PL 602, electing instead to apply to have the Shriner Tract taken into trust under the same mandatory provisions of PL 602. (**Exhibit 7**, p. 12; **Exhibit 14**, December 7, 1995, letter of David McCullough to Heather Sibbison of the Department of Interior and Robert Anderson**,** Associate Solicitor for the Department of Interior)**.** The Tribe submitted its application to have the Shriner Tract accepted into trust under PL 602 in or about February, 1996. The Department of Interior deliberated on the matter thereafter until announcing its intention to accept the land in trust under PL 602 in June 1996.

37. In July, 1996, the Wyandotte closed on the purchase of the Shriner Tract in Kansas City, Kansas, for at least $180,000 (and in reality for more than $325,000) from funds generated from its general investment account, and demanded that the Department of Interior put the Shriner Tract in trust under the mandatory provisions of PL 602. This demand spawned litigation that involved several trips to the Tenth Circuit and at least two remands to the Secretary for further findings. The litigation lasted 14 years.

38. The Administrative Record that was generated during the course of the Department of Interior's processing of the Shriner Tract fee-to-trust application and remand proceedings and the Judicial Record generated during the course of the Shriner Tract litigation established that:

a. the Congressional mandate of PL 602 (that $100,000 worth of land purchased with the funds set aside by PL 602 for that purpose be placed in trust) was fulfilled thus barring the use of PL 602 as the basis for a subsequent mandatory trust acquisition;

b. all of the $100,000 set aside by PL 602 for the purchase of land was attributed to the purchase of the Shriner Tract and none was expended on the Park City purchase;

c. the Park City land was not purchased with any of the $100,000 set aside by PL 602 for the purchase of land; and

d. the Park City land could not have been purchased with only earnings from the investment of the PL 602 set aside funds.

The Administrative Record on Shriner Tract Fee to Trust Acquisition Compels the Conclusion that the Congressional Mandate of PL 602 is Fulfilled and No Further Trust Acquisitions May Be Made Under that Statutory Authority.

39. In February, 1996, the Tribe formally applied to have land in Kansas City, Kansas, placed in trust pursuant to the mandatory provisions of PL 602, as it intended to use the $100,000 set aside by PL 602 towards the purchase of such land. The application was subsequently reduced to a singular tract, the Shriner Tract. (**Exhibit 15**, excerpts from Shriner Tract fee to trust application; **Exhibit 16**, April 19, 1996, letter from Chief Bearskin to George Skibine).

40. The Shriner Tract fee-to-trust application involved real property worth more than the "sum of $100,000" that was set aside in PL 602 for a land purchase and subsequent mandatory trust acquisition by the Department. Due to this development, and consistent with the Tribe's election, the Department sought the assurance from the Wyandotte Tribe that the entirety of the principal $100,000 set-aside funds (plus earnings on such sum) were being attributed to the purchase of the Shriner Tract.

41. The Wyandotte readily provided the assurance sought as set forth in the paragraph immediately above, including in Chief Bearskin's letter of April 19, 1996 (**Exhibit 16**; see also **Exhibits 26 and 28** below, excerpts from Wyandotte Brief to the Tenth Circuit and Wyandotte Petition for Panel Rehearing, respectively). In turn, the Department made it clear that once the Shriner Tract was taken in trust pursuant to the mandatory provisions of PL 602, the "shall" of that law would be deemed fulfilled and no future ***trust*** (as opposed to merely land) acquisitions could be made under that statutory authority because the entirety of the $100,000 set aside funds

would be exhausted in the purchase of the Shriner Tract.

42. The Department made sure that the Tribe, through the use of the entirety of the $100,000 PL 602 set-aside funds for the purchase of the Shriner Tract, received $100,000 worth of land in trust in fulfillment of the Congressional mandate of PL 602. The Department also made sure that once this mandate was so fulfilled, the Tribe could not return years later to some future administration and, once again, seek to invoke the mandatory trust provisions of PL 602.

43. The Shriner Tract administrative record specifically demonstrates the following:

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

b. On April 19, 1996, Chief Leaford Bearskin of the Wyandotte Tribe wrote George Skibine, Director, Indian Gaming Management Staff, and reminded him of Assistant Solicitor Anderson's opinion that "the Secretary lacked any discretion and must accept land in trust which the Tribe purchases with the $100,000 allocated under P.L. 98-602 for trust acquisition 'plus any interest that has accrued since the award.'" He then advised that the Wyandotte tribe would be purchasing the Shriner Tract for $100,000 and a building for $80,000. (**Exhibit 16**).

c. On April 19, 1996, Department of Interior financial analyst Tom Hartman reviewed the Tribe's fee-to-trust application for the Shriner Tract in conjunction with the Department's obligations under PL 602 and sent a memorandum to George Skibine on the subject. First, he commented on the fact that Section 105(b)(1) of PL 602 provided that only "the sum of $100,000 of such funds shall be used for the purchase of property which shall be held in trust by the Secretary for the benefit of such Tribe" and contrasted that to the provisions of Section 105(b)(3) which addressed the use of interest or investment income accruing on the funds described in 105(b)(2) (the remainder of the judgment funds after subtracting the sum of $100,000 set aside for the purchase of land) and concluded:

"Comment: While the Tribe may spend the accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that ***future acquisitions*** are not covered by this public law. (emphasis added)."

Mr. Hartman then noted that the Tribe's fee-to-trust application suggested that the Shriner Tract will be purchased with "a portion" of the PL 602 set-aside funds and commented to Mr. Skibine that if "the purchase price of the Shriner Tract exceeds $100,000 (which it did) then the Department should state clearly that the settlement funds have been expended in accordance with the law, and that ***no funds remain to implement further the "shall" of the law."*** (emphasis added). This is precisely what the Department proceeded to do, as seen below.

Finally, Mr. Hartman expressed concern to Mr. Skibine that a recital in the Shriner Tract warranty deed indicated a purchase price of "$1.00 and other valuable consideration" and noted "that could leave $99,999 left in the settlement fund"— obviously not a desired result. (**Exhibit 18**).

d. On June 5, 1996, George Skibine, Director, Indian Gaming Management Staff, sent a memorandum to Ada Deer, Assistant Secretary, Indian Affairs, addressing the Tribe's fee-to-trust application for the Shriner Tract. In that letter, he wrote that the Muskogee Area Office "must inform the Tribe that the acceptance in trust of the Shriner Tract exhausts the land acquisition authority of Pub. L. 98-602, and that subsequent ***trust acquisitions*** for the Tribe must be made under other statutory authority." (**Exhibit 19**). (emphasis added).

e. On June 6, 1996, Assistant Secretary Deer wrote a memorandum to the Muskogee Area Office Director regarding the Tribe's application for the Shriner Tract. She sent a copy of the memorandum to Chief Bearskin. In this memorandum, Assistant Secretary Deer specifically instructed the Director that upon "transfer of the property in trust for the Tribe, you must inform the Tribe that this trust acquisition fulfills the Secretary's mandatory obligation to take land in trust pursuant to Pub. L. 98-602, and that subsequent ***trust acquisitions*** must be made under a different statutory authority." (**Exhibit 20**). (emphasis added).

f. With this condition obviously in mind, Assistant Secretary Deer gave notice on the same day that the Secretary "shall acquire title in the name of the United States in trust for the Wyandotte Tribe for one tract of land (the Shriner Tract)." (**Exhibit 21**). This notice was subsequently published in the Federal Register.

g. On July 12, 1996, Robert Anderson, Associate Solicitor, Division of Indian Affairs, wrote to several others in the Department of Interior addressing a request that the taking of the Shriner Tract into trust be delayed. Mr. Anderson recommended against any delay because "he (the seller) is expected to substantially raise the price (of the Shriner Tract) and could remove from the tribe the benefit of the statutory provision that ***requires that the Secretary take land in trust if property worth $100,000 is taken in trust…"*** (**Exhibit 22**). (emphasis added).

The Judicial Record During the Shriner Tract Litigation Affirms that the Acceptance Into Trust of the Shriner Tract Fulfilled the Mandate Under PL 602 and That No Further Trust Acquisitions May be Made Under that Statutory Authority

44. The Secretary's publication of intent to take the Shriner Tract into trust spawned some fourteen (14) years of litigation. The judicial record generated during the course of this litigation buttresses the conclusion that all parties (including the Wyandotte Nation) understood (and so advised the Courts) that once the Shriner Tract was taken into trust, the fund of $100,000 set aside by PL 602 for the mandatory purchase of land was exhausted, the mandate of PL 602 was fulfilled, and no future trust acquisitions could be made under that statutory authority.

45. This recognized fulfillment of the Congressional mandate did not restrict the Wyandotte from acquiring additional land if it wished to do so-it simply meant that it had no further right to seek to have any such land acquired in trust by the Secretary pursuant to the mandatory provisions of PL 602. This record, just as the Administrative Record did, conclusively established the fact that the fund created by PL 602 for the mandatory purchase of land (i.e., the $100,000) was entirely exhausted on the Shriner Tract purchase, a fact which the Defendants should now be judicially estopped from denying.

46. This judicial record includes the following:

a. In July, 1996, the Tribe asked the Tenth Circuit to dissolve the District Court's Temporary Restraining Order preventing the Secretary from taking the Shriner Tract in trust. In urging the Tenth Circuit to allow the Shriner Tract to go into trust under the mandatory provisions of PL 602, the Tribe unabashedly told the Tenth Circuit that the "United States' acceptance of title to the subject land, once completed, would ***finally satisfy*** the Congressional purpose of the 1984 Judgment Act (PL 602)…" (**Exhibit 23**, p. 38–39, excerpts from the Tribe's Emergency Application for Stay Pending Appeal**.** (emphasis added)

b. In his January 15, 1998, deposition, George Skibine was asked about the Tom Hartman memorandum that is referenced in paragraph 26 above. He explained that the intent was that "we wanted to make sure that this was not going to go on (subsequent trust acquisitions beyond the Shriner Tract) so we wanted assurance that, once the land is purchased…***and the purchase price was over $100,000,***

then it would exhaust the fund and there would be no mandatory obligation to take any land in trust — to take any additional land in trust besides the Shriner tract. (**Exhibit 24**, Skibine depo., pp. 143–44). (emphasis added).

c. In her October 30, 1998, deposition, Heather Sibbison was asked if she recalled how the issue of the PL 602 funds got resolved (the issue relating to parceling out the $100,000 set aside to make multiple land purchases) and she testified that her "admittedly fuzzy recollection is that the tribe agreed to spend the $100,000 in one place…***we didn't have to continue to parse the statute out to make it function the way we thought it should function because the tribe agreed to spend the entire amount in one place***." (**Exhibit 25**, pp. 128–30).

d. In January, 1999, in its brief to the District Court in the Shriner Tract litigation, the Tribe urged the Court to sanctify the Shriner Tract trust acquisition, and it specifically stated that the funds used to purchase the Park City land should ***not*** be characterized as PL 602 funds. (**Exhibit 7**, p. 11–12, Wyandotte Tribe Intervenor Responsive Brief). (emphasis added).

Later in this same brief, the Tribe approvingly cited Mr. Hartman's admonition set forth above that if "the purchase price of the Shriner Tract exceeds $100,000, then the Department should state clearly that the settlement funds have been expended in accordance with the law, and that no funds remain to implement further the 'shall' of the law." *Id.* at 61–62. The "shall" of the law (PL 602), of course, relates to the mandatory requirement that the Secretary take land in trust purchased with the $100,000 set-aside funds.

The Tribe also recognized that the agency sought the Tribe's "assurances that all of the $100,000 is expended on the Shriner Tract … to ensure that future acquisitions are not covered by this public law." *Id*. at 62. Without doubt, the reference to acquisitions is to "trust acquisitions," as George Skibine and Assistant Secretary Deer made clear.

e. In September, 2000, the Tribe repeated its assertion to the Tenth Circuit that the funds used to purchase Park City land should ***not*** be characterized as PL 602 funds. (**Exhibit 26**, p. 5, Tenth Circuit Brief of Appellee/Intervenor). (emphasis added).

In this same brief, the Tribe repeated to the Tenth Circuit precisely what it told the District Court, as set forth in paragraph (d) immediately above. *Id.* 52–53. In doing so, the Tribe observed that the "Secretary intended that all of the principal 98-602 funds were to be allocated to the purchase price of the land (the Shriner Tract)." *Id.*

f. In September, 2000, in a statement that was entirely consistent with the administrative record created in 1996, then Secretary Bruce Babbitt told the Tenth Circuit that "the Assistant Secretary of Indian Affairs required the Area Director to inform the Wyandotte that 'this trust acquisition fulfills the Secretary's

obligation to take land into trust pursuant to (PL 602), and that ***subsequent trust acquisitions*** must be made under different statutory authority'…. There is no reason to believe that the money used to purchase the Shriner Tract was anything other than money available under (PL 602), and, in any event, the administrative record demonstrates that this acquisition ***exhausts*** the funds available to the Tribe under section 105(b)(1) of that statute." (**Exhibit 9**, p 41–42). (emphasis added).

g. On May 14, 2001, the Wyandotte Nation filed a Petition for Panel Rehearing with the Tenth Circuit Court of Appeals following the decision in *Sac and Fox Nation of Missouri v. Norton,* 240 F.2d 1250 (10th Cir. 2001). In the Petition, the Wyandotte approvingly cited the deposition testimony from George Skibine and Heather Sibbison, set forth above, in which both officials testified the purchase of the Shriner Tract "exhausted the fund" and the "tribe agreed to spend the entire amount in one place," respectively. They were both testifying about the $100,000 set aside by PL 602 for the purchase of land. The Wyandotte confirmed this to the Tenth Circuit in its Petition where it stated that "the Secretary intended that ***all of the principal 98-602 funds were to be allocated to the purchase price of the land (the Shriner Tract).***" (**Exhibit 27**, Wyandotte Nations Intervenor/ Appellee's Petition for Panel Rehearing, pp. 8–10). emphasis added).

In this same brief, the Wyandotte acknowledged the difference between the permissive use of the interest that had accrued on the investment of the $100,000 set aside by PL 602 for the purchase of land as opposed to the mandatory use of the principal to purchase land where it noted the statement the Department had made on April 19, 1996, that while "the Tribe ***may*** spend the accrued interest, ***only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law.***" *Id.* at p. 10. (emphasis added).

h. In September, 2002, in briefing to the Secretary on the remand issue about whether the Shriner Tract was purchased using only PL 602 funds, the Tribe recognized the Department's position that the mandatory nature of the trust acquisition provision of PL 602 was exhausted once the Shriner Tract was taken in trust where it noted that the "requirement proposed by the agency in its April 19, 1996, statement was that 'while the Tribe may spend accrued interest, only the $100,000 must be spent on trust land. Therefore, assurances that all of the $100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by law.'" (**Exhibit 28**, p. 18–19). The Tribe went on to approvingly cite the June 5, 1996, memorandum by Mr. Skibine to Assistant Secretary Deer and her memorandum the next day to the Muskogee Area Office, both of which set forth the same condition that after the Shriner Tract was accepted into trust, subsequent ***trust acquisitions*** for the Tribe had to be made under other statutory authority. *Id.* (*See also* **Exhibits 19 and 20**). (emphasis added).

i. In her Opinion on Reconsideration, the Assistant-Secretary of Indian Affairs specifically found that the "Shriner Tract was purchased with the $100,000 set aside by P.L. 98-602 plus interest and investment income derived from that principal." (**Exhibit 29**, Opinion on Reconsideration, p. 6). Later, she noted "it was clear that PL 602 was intended to benefit the Tribe and that a piece of real property was to be purchased by them and taken into trust by the United States." *Id.* at 7.

47. The Park City land cannot qualify for a second mandatory trust acquisition under PL 602 as the intent of Congress was to provide that land worth at least $100,000 purchased by the Wyandotte with the principal $100,000 set aside funds (plus earnings attributed to same under the rationale of the Secretary) would be put into trust on a mandatory basis. (**Exhibit 20**). That has been done and the Wyandotte has received the benefit of the statute. The mandate has been fulfilled and no further trust acquisitions can be predicated on PL 602 — just as the Department concluded in 1996 and which was a condition precedent to that trust acquisition. The Secretary's May 20, 2020, Decision fails to address this point and fails to explain why a second trust acquisition can somehow now be predicated on PL 602 when the mandate was previously indisputably fulfilled and such fulfillment was the predicate upon which the Shriner Tract was acquired in trust, something the Courts were led to understand based on the representations of the Department officials and the Wyandotte. (**Exhibit 2**).

The Park City Land was Not Purchased with any of the $100,000 Set-aside PL 602 Funds and, to the Extent it Matters, was Not Purchased with Only Interest and Earnings from the Investment of Those Funds

a. Investment of $100,000 Set-aside Funds from PL 602, Purchase of Land in Park City, Kansas and Purchase of Shriner Tract in Kansas City, Kansas

48. As noted above, in May, 1986, the Tribe used the $100,000 set-aside funds from PL 602 for the purchase of land to invest in mortgage obligation bonds ("PL 602 bonds") instead of buying land with those funds at that time. (**Exhibit 4**; **Exhibit 5**). These bonds were

deposited in a segregated investment account that had approximately $33,000 in it at the time the bonds were deposited into that account. (**Exhibit 5**).

49. By November 30, 1991, the Tribe's net withdrawals of money from that segregated account (which included earnings from the PL 602 bonds) resulted in there being only $529.91 in cash left in the account. The PL 602 bonds had a face value of $109,000 at the time for a total account value of $109,529.91. (**Exhibit 30**, November, 1991, account statement).

50. In December, 1991, the Tribe closed the investment account that had separately housed the PL 602 bonds and transferred the account holdings (remaining cash of $529.91 and bonds with a face value of $109,000 for a total of $109,529.91) into its general investment account where they were commingled with the other assets in that account.

51. In November, 1992, the Tribe withdrew $25,000 from the cash portion of the general investment account which it claims it used to purchase the Park City land. (**Exhibit 6,** McCullough letter.) None of the PL 602 bonds were liquidated to raise the $25,000. This fact allowed the Tribe to assure the Department some 5 years later that it was using and fully attributing all of the principal $100,000 PL 602 set aside funds, plus earnings, to the purchase of the Shriner Tract. This also enabled the Tribe to claim in federal court that the money used to purchase the land in Park City was ***not*** PL 602 funds. (**Exhibit 7,** p. 11-12). (emphasis added).

b. The Secretary's June, 2003, Opinion on Reconsideration on Remand

52. In 2001, in the course of the Shriner Tract litigation, the Tenth Circuit issued a remand order whereby it directed the Secretary to determine if "only" PL 602 funds were used to acquire the Shriner Tract in order to trigger the mandatory trust acquisition provisions of PL 602.

53. One of the arguments that surfaced in the remand proceedings before the Secretary was whether earnings from the investment of the initial $100,000 set-aside funds could

be used ***along with*** the principal $100,000 to buy land worth more than $100,000 and still trigger the mandatory trust acquisition provisions of PL 602.

54. The Secretary noted that there was no "definitive legislative history that guides whether the $100,000 from Sec. 105(b)(1) had to be used alone, or could ***include*** interest or investment income which accrued prior to mandatory real estate purchase." (**Exhibit 29**, p. 4). (emphasis added). Notably, the issue before the Secretary was never whether PL 602 could be triggered by the purchase of land using only interest and earnings from the PL 602 funds but none of the principal $100,000. The Defendants' May 20, 2020, Decision fails to address this point.

55. The Governor of the State of Kansas argued on remand at the time that "since Sec. 105(b)(3) specifies that interest and income from the money provided to the Tribal Business Committee in Sec. 105(b)(2) can be used for the purposes enumerated in that section, Congress could not have intended that any interest or investment income be used from the $100,000 provided in paragraph 1 (of Section 105(b) of PL 602) or they would have stated such in the statute." (**Exhibit 29**, p. 5). Plaintiffs maintain that position today, among others.

56. The Assistant Secretary concluded that "there is no evidence … that Congress had any intention to prevent interest and investment income from the $100,000 provided in Sec. 105(b)(1) ***to be added*** to the principal $100,000 … and that there is no language in the statute triggering the defeat of the trust purchase if more than the $100,000 is used to purchase the real estate, when the additional funds were derived from the original Sec. 105(b)(1) award" (**Exhibit 29**, p. 6). (emphasis added). Key to the Secretary's rationale was that the principal $100,000 from PL 602 was fully expended on the Shriner Tract.

57. After specifically finding that the "Shriner Tract was purchased with the $100,000

set aside by P.L. 98-602 ***plus*** interest and investment derived from that principal," the Assistant Secretary determined that all of the funds used to purchase the Shriner Tract were from the settlement moneys granted pursuant to Section 105(b)(1) of P.L. 98-602. (**Exhibit 29**, p. 7). (emphasis added).

58. Given the amount of cash and the value and coupon rate of the PL 602 bonds in the segregated PL 602 account in December, 1991, at the time the account was closed and the assets commingled into the Wyandotte general investment account, the PL 602 bonds could not have generated enough earnings to accumulate the sum of $25,000 in cash for purchase of the land in Park City in November, 1992. The Defendants' May 20, 2020, Decision fails to address this point.

59. Moreover, it is not mathematically possible for the PL 602 funds to have generated enough earnings to account for the purchase of both the Park City land and the Shriner Tract. (**Exhibit 31A,** Gottlieb Report on Value of Section 602 Funds; **Exhibit 3IB**, Summary Accounting Documents).

60. As such, the Wyandotte made an election in July, 1996, to have the Shriner Tract placed in trust under the mandatory provisions of PL 602 by claiming that the Shriner Tract was purchased with only PL 602 funds, while taking the position that the Park City land was not purchased with PL 602 funds. (**Exhibits 7, 31A, 31B**).

2006 Park City Fee to Trust Application

61. On April 13, 2006, the Tribe submitted a trust application to have the Park City land taken into trust under the Secretary's discretionary authority pursuant to 25 U.S.C. § 465. (**Exhibit 32**, April 13, 2006, Chief Bearskin letter to Jeanette Hanna). Two years later in May 2008, and almost twelve (12) years after expending all of the $100,000 set aside by PL 602 for

the purchase of land (plus at least $80,000 of earnings supposedly derived from the investment of that money between May, 1986, and July, 1996), the Tribe wrote the Secretary and claimed that the land in Park City had been purchased with only PL 602 funds and that the Secretary was mandated to take that land into trust under the same mandate that resulted in placement of the Shriner Tract into trust. (**Exhibit 33**, May 2, 2008, letter from Chief Bearskin).

62. However, as set forth above, it is not possible for both the Shriner Tract and the Park City land to have been acquired with only PL 602 funds. The Wyandotte elected to attribute the use of those funds to the purchase of the Shriner Tract and have that land placed in trust under PL 602. The fact that the Park City land was purchased before the Shriner Tract does not change any of that.

63. The Park City land cannot and does not qualify for the mandatory trust acquisition provisions of PL 602 for the reason that it was not purchased with only PL 602 funds, in addition to the fact that the mandate of PL 602 was finally and completely fulfilled long ago when the Shriner Tract was placed in trust in July 1996 under the mandatory provisions of PL 602.

64. Moreover, land acquired with, at most, only ***earnings*** from the investment of principal $100,000 set aside by PL 602 for the purchase of land, but none of the principal funds, cannot trigger the mandatory trust provisions of PL 602. This is especially true where the demand for a second mandatory trust acquisition has occurred ***after*** the principal $100,000 set aside funds were admittedly fully used and attributed by the Wyandotte to buy the Shriner Tract (worth more than $100,000) that resulted in the Wyandotte availing itself of the benefit of the mandatory trust provisions of PL 602 by demanding that the Secretary take that land in trust.

Settlement of Land Claim Exception in IGRA Does Not Apply to Park City Land

a. ***Wyandotte Nation v. NIGC***

65. In its letter dated May 8, 2008, in which the Wyandotte sought to invoke PL 602 a second time as to the Park City land, the Wyandotte also sought to have the Secretary proclaim that if taken into trust, the Park City land would qualify for gaming under the "settlement of a land claim" exception set forth in 25 U.S.C. § 2719(b)(1)(B)(i).

66. In 2004, the Wyandotte sought approval of its gaming ordinance with the National Indian Gaming Commission ("NIGC"). Ultimately, the NIGC issued its final decision that the Wyandotte could not lawfully game at the Shriner Tract under IGRA because the land was accepted into trust after 1988 and did not meet any of the exceptions to the prohibition to gaming on such land that are set forth in 25 U.S.C. § 2719 (hereinafter referred to collectively as the "IGRA exceptions").

67. Thereafter, the Wyandotte filed an APA action in the Kansas Federal District Court challenging the NIGC decision that it could not game at the Shriner Tract.

68. In 2006, the District Court disagreed with the NIGC on one point and found that the "land in settlement of a land claim" exception pursuant to 25 U.S.C § 2719(b)(1)(B)(i) applied to the Shriner Tract. *Wyandotte Nation v. Nat'l Indian Gaming Comm'n,* 437 F. Supp. 2d 1193, 1207–12 (D. Kan. 2006). The NIGC initially appealed this decision to the Tenth Circuit but the appeal was voluntarily dismissed. This is the sole decision relied on by the Defendants in their May 20, 2020, letter decision regarding the applicability of the "land in settlement of a land claim" exception.

69. The District Court determined that the land claim exception in IGRA applied to the Shriner Tract acquisition "because Congress mandated that $100,000 of the Tribe's ICC judgment funds be utilized to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's land claim." *Id.* at 1210. Absent this

Congressional mandate, the Court specifically acknowledged that the argument that the land claim exception did not apply "might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ICC." *Id.*

70. The *NIGC* case is not authority for applying the land claim exception from IGRA to the Park City land. The Park City land was not purchased with the principal $100,000 set aside by PL 602 for the mandatory purchase of land, all of which had been attributed to the purchase of the Shriner Tract. Additionally, the land was purchased with funds over which the Wyandotte exercised discretionary authority. As such, the nexus between PL 602 and the land claims of the Wyandotte that the District Court relied upon in applying the land claim exception to the Shriner Tract is lacking with the Park City land such that the land claim exception cannot be applied to the Park City land, even if accepted into trust.

71. The Defendants' May 20, 2020, Decision failed to engage in any analysis of this issue and simply concluded, erroneously, that the *NIGC* decision controlled this issue. (**Exhibit 2**, p. 10).

b. 2008 Department Regulations

72. Effective June 19, 2008, the Department of Interior adopted new regulations that, among other things, interpreted the IGRA exceptions, the "settlement of a land claim" exception. In that regard, 25 C.F.R. § 292.2 defined a land claim as follows:

> Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:
>
> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October, 17, 1988

25 C.F.R. § 292.5 contains the criteria for meeting the "settlement of a land claim" exception as follows:

> Section 292.5. When can gaming occur on newly acquired lands under a settlement of a land claim?
>
> This section contains criteria for meeting the requirements of 25 U.S.C. § 2719(b)(1)(B)(i), known as the "settlement of a land claim" exception. Gaming may occur on newly acquired lands if the land at issue is either:
>
> (a) Acquired under a settlement of a land claim that resolves or extinguishes the finality of the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, ***in legislation enacted by Congress***; or
>
> (b) Acquired under a settlement of a land claim that:
>
> (1) is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the return of land; or
>
> (2) is not executed by the United States, but is entered as a final order by a court of competent jurisdiction whereas there was an enforceable agreement that neither case predates October 17, 1988, and resolves or extinguishes with finality the land claim at issue.
>
> (emphasis added).

73. The claims asserted by the Wyandotte before the Indian Claims Commission and Court of Claims are not "land claim(s)" as interpreted under 25 C.F.R. § 292.2 because the claims did not concern the impairment of title or other real property; nor did the claims concern the loss of possession. The claims asserted before the Indian Claims Commission and Court of Claims were claims against the United States for additional compensation to the Wyandottes for lands the Tribe ceded to the United States by treaties in the 1800's. The Tribe did not claim that the treaties resulted in impairment of the Tribe's title and interest to real property. Nor did the Tribe claim that it was illegally disposed of the land. Rather, the claim, and the underlying dispute between the Tribe and the United States in the proceedings, concerned whether the

amount paid for such ceded lands was "unconscionable compensation" under the Indian Claims Commission Act which expressly authorized such claim.

74. Even if these claims can be construed as land claims under 25 C.F.R. § 292.2, and they cannot, no lands were acquired for the Tribe under the terms of the final orders of the Indian Claims Commission and Court of Claims, including the Park City land, which was placed into trust over 50 years after the final orders were issued. As such, and for the foregoing reasons, acquisition of the Park City land does not qualify as lands acquired under the settlement of a land under 25 C.F.R § 292.2 or § 292.5(b)(2).

75. Similarly, PL 602 is not a land claim nor is it a Congressional enactment that effectuated a settlement of a land claim as defined in 25 C.F.R. § 292.2 and 25 C.F.R § 292.5. First, although certain Congressional acts that are significantly and legally distinguishable from the provisions of PL 602 may in fact qualify as a settlement of a land claim, a Congressional act itself cannot be construed as a land claim because, among other things, it is not a claim brought by a Tribe. Second, PL 602 did not resolve or extinguish with finality the Wyandotte's purported land claims in whole or in part. Rather, it resolved a disagreement concerning Congress's prior formula for allocating between the Wyandotte and the Absentee Wyandottes the funds the Indian Claims Commission and the Court of Claims awarded to these groups for unconscionable compensation concerning the cession of their lands. Third, PL 602 did not result in the alienation or loss of possession of some or all of the lands claimed by the Wyandotte because the Tribe's lands were expressly alienated and forever lost when it ceded its lands to the United States over one hundred years ago in treaties in the 1800's. Fourth, therefore and not surprisingly, PL 602 does not concern – in fact does not mention – a claim by the Tribe for lands (either in the ceded territory or elsewhere) and the Tribe did not make a claim for any lands in its

claims before the Indian Claims Commission and the Court of Claims. PL 602 was merely the vehicle for payment of money judgments rendered by the Indian Claims Commission and the Court of Claims in favor of the Wyandotte and Absentee Wyandottes for land ceded to the United States in the 1800's for which they claimed to have received unconscionable compensation.

76. PL 602 is not a Congressionally enacted Indian land claim settlement act. See, 25 U.S.C. § 2719; 25 C.F.R. § 292.2 and 292.5.Rather, PL 602 was merely the means by which Congress mandated a distribution formula (as between the Wyandotte and the Absentee Wyandottes) of the funds (and use thereof) appropriated years earlier in satisfaction of judgments rendered by the ICC and Court of Claims against the United States in favor of the Wyandotte which judgments resolved the Wyandotte claims for additional compensation for its ceded lands.

77. Neither the claims brought by the Tribe under the Indian Claims Commission Act, the final orders rendered pursuant thereto, nor PL 602-either individually or by some combination of the same-establish that the acquisition of the Park City land meets the Department's requirements of the "settlement of a land claim" exception or any of the other IGRA exceptions. As such, the Wyandotte cannot lawfully engage in gaming on this land regardless of whether it was acquired in trust under PL 602 or not.

78. The May 20, 2020, Decision failed to analyze or even mention these Department regulations. (**Exhibit 2**). Moreover, there is no basis to conclude the Department has ever analyzed whether the Park City land qualifies under the "settlement of a land claim," pursuant to its own regulations found in 25 C.F.R. §§ 292.2 and 292.5.

79. The May 20, 2020 Decision additionally failed to explain the prior inconsistent position the Department had adopted that the Park City land was not "land in settlement of a land

claim". **Exhibit 10.**

FIRST CLAIM FOR RELIEF

[Administrative Procedures Act, 5 U.S.C. § 706]
[Declaratory Judgment, 28 U.S.C. § 2201]
[Unlawful Exercise of Trust Authority, 25 U.S.C. § 465, PL-602]

80. Plaintiffs incorporate herein by this reference the allegations set forth in Paragraphs 1 through 79 inclusive as if fully and completely set forth herein.

81. The Court should hold unlawful and set aside the final agency action of the Defendants set forth in the May 20, 2020, letter of the Assistant Secretary and the subsequent acquisition of the Park City land in trust for the reason that the agency action, findings and conclusions that the acquisition of the Park City land in trust was mandatory pursuant to PL 602 was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, was in excess of statutory jurisdiction, authority, or limitations, and the trust acquisition was accomplished without observance of applicable procedures required by law, including those set forth in 25 U.S.C. § 465 and 25 C.F.R. Parts 151.10 and 151.11, including, but not limited to, the following reasons, each of which standing alone justify setting aside the Decision:

a. the Park City land cannot be taken into trust under PL 602 because the Congressional mandate of PL 602 that $100,000 worth of land purchased with the funds set aside by PL 602 for that purpose be placed in trust was fulfilled with the Shriner Tract acquisition thus barring the use of PL 602 as the basis for a subsequent mandatory trust acquisition;

b. the Park City land cannot be taken into trust under PL 602 because all of the $100,000 set aside by PL 602 for the purchase of land was used to acquire the Shriner Tract and none was used to purchase the Park City land; and/or

c. the Park City land cannot be taken into trust under PL 602 for the reason that the Park City land could not have been purchased with only PL 602 funds and was purchased with none of the $100,000 set aside by PL 602 for the purchase of land.

82. By reason of the Defendants' unwarranted and unlawful decision to take the Park

City land into trust, the Plaintiffs have suffered harm, loss of procedural and other rights, and have suffered a legal wrong and been adversely affected and aggrieved by such agency action.

WHEREFORE, Plaintiffs pray as hereinafter set forth.

SECOND CLAIM FOR RELIEF

[Unlawful Exercise of Trust Authority, 25 U.S.C. § 465, PL-602]
[Administrative Procedures Act, 5 U.S.C. § 706]
[Declaratory Judgment, 28 U.S.C. § 2201]
[Judicial Estoppel]

83. Plaintiffs incorporate herein by this reference the allegations set forth in Paragraphs 1 through 82 inclusive as if fully and completely set forth herein.

84. Defendants should be judicially estopped from denying that the mandate of PL 602 was fulfilled with the Shriner Tract acquisition, from denying that the $100,000 set aside by PL 602 for the purchase of land was fully expended on the Shriner Tract acquisition and from invoking PL 602 a second time for the Park City land because:

a. to allow the Defendants to claim otherwise in this case would be clearly inconsistent with the positions taken in the Shriner Tract litigation on these issues;

b. the Defendants administratively established and successfully persuaded the prior courts to accept their earlier position and judicially endorse the Shriner Tract trust acquisition by persuading the courts that the mandate of PL 602 would be fulfilled with the Shriner Tract acquisition because, in part, all of the $100,000 set aside by PL 602 for the purchase of land was used on the Shriner Tract and the "shall" of the law would be deemed fulfilled such that judicial acceptance of the inconsistent positions in this case would create the perception that the courts in the Shriner Tract litigation were misled; and/or

c. allowing the Defendants to maintain inconsistent positions in this Court on the matters set forth herein would give the Defendants an unfair advantage and/or would impose an unfair detriment on Plaintiffs in this case.

85. The Defendants' decision to take the Park City land into trust on a mandatory basis pursuant to PL 602 is unlawful, fails to meet statutory requirements, is unwarranted by the facts, is in excess of legal authority, is in violation of Department of Interior regulations and

applicable law, is an abuse of discretion, constitutes arbitrary and capricious action, is internally inconsistent with the Administrative and Legal record generated during the Shriner Tract fee-to-trust acquisition and the Department's prior pronouncements and fails to explain its departure from the same, is not founded on a reasoned evaluation of the relevant factors, and fails to explain prior inconsistent Department positions on the same subject matter, including for the following reasons, among others, each of which standing alone justify setting aside the Decision:

a. the Park City land cannot be taken into trust under PL 602 because the Congressional mandate of PL 602 that $100,000 worth of land purchased with the funds set aside by PL 602 for that purpose be placed in trust was fulfilled with the Shriner Tract acquisition thus barring the use of PL 602 as the basis for a subsequent mandatory trust acquisition;

b. the Park City land cannot be taken into trust under PL 602 because all of the $100,000 set aside by PL 602 for the purchase of land was used to acquire the Shriner Tract and none was used to purchase the Park City land; and/or

c. the Park City land cannot be taken into trust under PL 602 for the reason that the Park City land could not have been purchased with only PL 602 funds and was purchased with none of the $100,000 set aside by PL 602 for the purchase of land.

86. By reason of the Defendants' unwarranted, unlawful and arbitrary and capricious decision that the Park City land must be acquired in trust pursuant to PL 602, Plaintiffs will sustain harm, loss of certain procedural and other rights, and have and will suffer legal wrongs and have been adversely affected and aggrieved by such agency action, including in the following particulars:

a. The State of Kansas will be deprived of its right to approve gaming in Kansas pursuant to 25 U.S.C. § 2719(b)(1)(A);

b. The State of Kansas, Sumner County, the City of Mulvane and the Plaintiff Tribes will be deprived of their right of consultation regarding the Defendants' determination whether to accept land in Kansas in trust for the Wyandotte, including for gaming purposes;

c. The State's significant interest in maintaining its sovereignty over the Park City tract of land will be lost as they will lose the control they currently exercise over

the tract in terms of sales tax revenues, labor laws, liquor laws and other generally applicable laws;

d. The State will lose its taxing and regulatory control over the Park City land;

e. All Plaintiffs will be harmed by the engagement of the Wyandotte in gaming on the land in Park City if acquired in trust pursuant to PL 602 for gaming purposes.

WHEREFORE, Plaintiffs pray as hereinafter set forth.

THIRD CLAIM FOR RELIEF

[Unlawful Exercise of Trust Authority, 25 U.S.C. § 465, PL 98-602]
[Administrative Procedures Act, 5 U.S.C. § 706
[Declaratory Judgment, 28 U.S.C. § 2201]
[25 CFR Part 292.2]
[25 CFR Part 292.5]

87. Plaintiffs incorporate herein by this reference the allegations set forth in Paragraphs 1 through 86 inclusive as if fully and completely set forth herein.

88. The Defendants' decision that the Park City land qualifies for gaming under the exception set forth in 25 U.S.C. § 2719 (b)(1)(B)(i) and approval of gaming on such land is unlawful, unwarranted by the facts, in excess of legal authority, in violation of the Department of Interior regulations and applicable law under IGRA, an abuse of discretion, arbitrary and capricious action, and not founded on a reasoned evaluation of the relevant factors (including the Department's own applicable regulations) and fails to explain prior inconsistent Department positions on the same subject matter including for the following reasons, among others, each of which standing alone justify setting aside the Decision:

a. For all of the reasons set forth above;

b. The Park City land, even if in trust, was not acquired with any of the $100,000 set-aside funds by PL 602 for the purchase of land and, as such, there is no nexus between the purchase of the Park City land and the Nation's land claims filed with the ICC and Court of Claims;

c. PL 602 is not a Congressional enactment that effectuated settlement of a land

claim, it did not resolve or extinguish with finality the Nation's land claims in whole or in part, and it did not result in the alienation or loss of possession of some or all of the lands claimed by the Nation and does not otherwise qualify as land acquired in settlement of a land claim pursuant to the Department of Interior's own regulations, 25 CFR Part 292.5;

d. none of the other exceptions to the prohibition against gaming on lands acquired in trust after October 17, 1988 as set forth in IGRA apply to the Park City land.

89. By reason of the Defendants' unwarranted and unlawful decision that the Park City land qualifies for gaming under the exception set forth in 25 U.S.C. § 2719(b)(1)(B)(i), Plaintiffs will sustain harm as well as loss of certain procedural and other rights. Plaintiffs have and will suffer legal wrong and have been adversely affected and aggrieved by such agency action, including by depriving the State of Kansas of its right, through the Governor, to approve gaming in Kansas pursuant to 25 U.S.C. § 2719(b)(1)(A);

WHEREFORE, Plaintiffs pray as follows:

1. That the Court enter judgment setting aside the May 20, 2020 final agency action for the reason that PL 602 does not mandate that the Defendants take the Park City land into trust for the benefit of the Wyandotte Nation as that statute cannot be used as authority for trust acquisitions on behalf of the Wyandotte Nation after the Shriner Tract trust acquisition, and order that such land be deeded out of trust because of the failure of the Defendants to comply with the procedural and other requirements of a discretionary trust acquisition.

2. That the Court enter judgment setting aside the May 20, 2020 final agency action for the reason that PL 602 does not mandate that the Defendants take the Park City land into trust for the reason that the Park City land was not purchased with any of the $100,000 set aside by PL 602 for the purchase of land and order that such land be deeded out of trust because of the failure of the Defendants to comply with the requirements of a discretionary trust acquisition.

3. That the Court enter judgment setting aside the May 20, 2020 final agency action

for the reason that PL 602 does not mandate that the Secretary take the Park City land into trust for the reason that the Park City land was not purchased with any of the principal $100,000 PL 602 funds and order that such land be deeded out of trust because of the failure of the Defendants to comply with the requirements of a discretionary trust acquisition.

4. That the Court enter judgment setting aside the May 20, 2020 final agency action for the reason that PL 602 does not mandate that the Secretary take the Park City land into trust for the reason that the Park City land was not purchased with only PL 602 funds and order that such land be deeded out of trust because of the failure of the Defendants to comply with the requirements of a discretionary trust acquisition.

5. That the Court enter judgment setting aside the May 20, 2020 final agency action for the reason that even if accepted into trust, the Park City land does not qualify for gaming under IGRA.

6. That the Court enter judgment setting aside the May 20, 2020 final agency action for the reason that Defendants acted in excess of their trust authority under PL 602 and 25 U.S.C. § 465 by accepting the Park City land into trust on a mandatory basis and order that such land be deeded out of trust because of the failure of the Defendants to comply with the requirements of a discretionary trust acquisition.

7. That the Court award Plaintiffs the cost of suit and attorneys' fees to the extent authorized by law.

8. That the Court grant Plaintiffs such other and further relief as the Court may deem just and equitable.

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