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; and TARA SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs of the U.S. Department of the Interior, Bureau of Indian Affairs Defendants.	)	**PLAINTIFFS REQUEST ORAL ARGUMENT**

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF AND/OR STAY OF ADMINISTRATIVE ACTION

COMES NOW Plaintiffs State of Kansas *ex rel* Derek Schmidt, Attorney General, Board of County Commissioners of the County of Sumner, Kansas, and City of Mulvane, Kansas, by and through their respective counsel, and set forth the following for their Memorandum in Support of Motion for Temporary and Preliminary Injunctive Relief and/or Stay of Administrative Action:

INTRODUCTION

On May 20, 2020 Defendant Assistant Secretary-Indian Affairs issued a final decision (hereinafter the "Decision") concluding that a tract of land in Park City, Kansas ("Park City

tract"), owned by the Wyandotte Nation had to be accepted into trust under the purported mandatory provisions of Public Law 98-602, 98 Stat. 3149 (1984) ("PL 602"). She also decided that once in trust, the Park City tract qualified for gaming under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.* This is referred to as "the Gaming Decision" in this Memorandum. The Decision is Exhibit 2 to the Complaint.[1] The Plaintiffs learned of this Decision from news reports, and indeed had no notice of the matter nor any opportunity to be heard—notwithstanding that some of them had been active participants in the earlier administrative proceedings on the very same subject matter.

The Complaint filed in this action challenges the Decision, as final agency action, on multiple grounds pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.* Plaintiffs contend that PL 602 did not mandate that the Park City tract be accepted into trust for a number of reasons. However, the instant motion for injunctive relief or stay of agency action is focused on the Gaming Decision and seeks that it be stayed pending a resolution on the merits of this case.[2]

QUESTION PRESENTED

Whether temporary and preliminary injunctive relief should issue pursuant to 5 U.S.C. § 705, staying implementation of the Gaming Decision. Plaintiffs contend such relief should issue

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[1] The exhibits that are referred to in this Memorandum that were filed with the Complaint will be referred to throughout using the same exhibit number as filed with the Complaint and are not refiled. Thus all Exhibits identified by a number were filed with the Complaint. Exhibits referred to in this Memorandum that were not filed with the Complaint are identified as Exhibit "A" and so on in this Memorandum and are filed with this Memorandum.

[2] Since the Complaint was not verified, Plaintiff has filed an affidavit of Keith Kocher with this Memorandum. Mr. Kocher, an employee of Plaintiff State of Kansas who serves as the Director of Gaming Facilities for the Kansas Lottery, verifies the factual allegations of the Complaint and those set forth below, as well as the authenticity and foundation for the Exhibits filed with the Complaint and with this Memorandum. (**Exhibit A,** Affidavit of Keith Kocher).

because the Gaming Decision is fatally flawed for two reasons:

(1) The Defendants failed to mention, much less analyze, their own agency regulations that govern the Gaming Decision subject matter and mandate a different result;

(2) Defendants placed sole reliance for the Gaming Decision on a prior court decision, without mentioning or addressing material, dispositive factual distinctions between the Park City tract situation involved in the Gaming Decision and the situation presented in the prior court case.

SUMMARY OF THE CASE FOR PURPOSES OF MOTION FOR TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF OR STAY OF AGENCY ACTION

Plaintiffs/Movants are State of Kansas *ex rel* Derek Schmidt, Attorney General (hereinafter the "State" or "Kansas"), Board of County Commissioners of the County of Sumner, Kansas (hereinafter "Sumner County") and the City of Mulvane, Kansas (hereinafter "Mulvane"). The other Plaintiffs in this case are the Sac and Fox Nation of Missouri in Kansas and Nebraska and the Iowa Tribe of Kansas and Nebraska.

Defendants are David Bernhardt, who is sued in his official capacity as the Secretary of the Interior, and Tara Sweeney, who is sued in her official capacity as the Assistant Secretary-Indian Affairs of the United States Department of the Interior.

The Wyandotte Nation is an Oklahoma tribe with its reservation in Oklahoma. It is not a party to this lawsuit due to its sovereign immunity from suit. However, Plaintiffs did advise the Wyandotte Nation of this lawsuit and offered it an opportunity to participate, given its interest in this matter and the gaming issues that have been raised. (**Exhibit B**, August 21, 2020 letter from Mark Gunnison for Plaintiffs to the Honorable Chief Billy Friend, Wyandotte Nation). The Tribe has chosen not to participate.

In the 1950's the Wyandotte Tribe (n/k/a the Wyandotte Nation) (referred to hereinafter as the "Wyandotte," the "Nation," or the "Tribe") brought a number of claims against the United States before the Indian Claims Commission ("ICC") seeking monetary compensation for land it ceded and relinquished title to by treaties with the United States in the 1800s. The Wyandotte claimed that the compensation it received for the ceded lands was "unconscionable" under the Indian Claims Commission Act of 1946, one of the five grounds under the Act that entitled a tribe to recover. In fact, the only recovery authorized by the Act was money damages.

Ultimately, the claims brought by the Wyandotte before the ICC resulted in money judgments in the late 1970's against the United States and in favor of the Wyandotte, some of which were affirmed by the Court of Claims. Specifically, the Wyandotte were awarded $561,424.41 in Docket 139, $2,348,679.60 in Docket 141 and $200,000 in Docket Nos. 212 and 213. The judgments in Dockets 139 and 141 were satisfied when the funds were appropriated and paid into accounts for the Tribe. Accordingly, by this time, the United States was fully discharged of any claims related thereto.

Once the ICC judgments were appropriated, paid and therefore, fully satisfied, Congress, pursuant to its statutory duty under the Indian Tribal Judgment Funds Use or Distribution Act, enacted a distribution scheme for the distribution of the previously paid judgment funds from the ICC judgments awarded the Wyandotte. That distribution scheme was PL 602, which is at the heart of this litigation. It was enacted in 1984. It was actually Congress' second effort at a distribution formula for the judgment funds. PL 602 did not represent or effectuate a settlement of any kind; it contained no appropriations language and was merely the vehicle to direct the distribution of previously paid judgment funds to the Wyandotte that had long ago been awarded in ICC or Court of Claims judgments and had long been appropriated and paid by the United

States.

Section 105(a) of PL 602 provided that 80% of the judgment funds were to be distributed to members of the Tribe. Section 105(b)(1) of PL 602 (just as the previous Congressional effort had done) 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." This is the so-called "mandatory trust" provision of PL 602 at issue in this case, and it is the only sum of money subject to the mandatory trust provisions of PL 602. That sum of money (the $100,000) is often referred to throughout this Memorandum as the "$100,000 set-aside funds" or just the "set-aside funds".

After PL 602 was enacted, the $100,000 set-aside funds were disbursed to the Nation in or about 1986. However, instead of buying land with the $100,000 set-aside funds, the Nation chose to invest those funds in mortgage obligation bonds.

The Wyandotte bought 10.53 acres of land in Park City, Kansas (hereinafter referred to as "Park City" or "Park City tract") in November 1992. On January 21, 1993, it submitted a request that the Secretary acquire the Park City Parcel in trust. The Nation withdrew the Park City Parcel application in 1995 after a Field Solicitor issued an opinion concluding that the property was ineligible for gaming. In 1996 the Wyandotte purchased a parcel of property, known as the Shriner property, located in Kansas City, Kansas, which was thereafter placed in trust in July 1996. Fourteen (14) years of litigation ensued. The administrative and legal record in the Shriner Tract litigation undisputedly established that the Wyandotte purchased the Shriner Tract with ***all*** of the $100,000 set-aside funds and had the land placed in trust under the mandatory trust provisions of PL 602. (See, e.g., *Sac and Fox Nation v. Norton,* 240 F. 3d 1250 (10th Cir. 2001); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n,* 437 F. Supp. 2d 1193 (D. Kan. 2006)

("*Wyandotte Nation*"). That same record also established that the Park City tract (the tract that is the subject of this litigation and Plaintiffs' motion) was ***NOT*** purchased with PL 602 funds.

On April 13, 2006 the Nation submitted another application to acquire the 10.53 acres in Park City, invoking the discretionary authority of the Secretary under 25 U.S.C. § 465. The application was amended two years later to assert that the Park City tract was purchased solely with PL 602 set-aside funds, thereby attempting to invoke the mandatory trust provisions of PL 602 a second time. On July 3, 2014, Kevin K. Washburn, Assistant Secretary-Indian Affairs issued a decision in which he found that the Wyandotte could not have used 602 Funds alone to acquire the Park City Parcel and refused to accept the Park City tract into trust. **(Exhibit 1).**

In the May 20, 2020 Decision, Defendant Sweeney concluded the Defendants were under a mandatory duty under PL 602 to accept the Park City tract into trust for the Wyandotte and did so in early June 2020. **(Exhibit 2**).

The major decisional difference this time around was that instead of continuing to allow an open exchange of information from all parties, including the Wyandotte and the State of Kansas, as Assistant Secretary Kevin Washburn had done between 2010 and 2014, the Defendants inexplicably systematically excluded the State (and any of the other Plaintiffs) from the entire process. No notice was even provided to the State that a second process, which began in or around October 2017, was even underway. Plaintiffs were denied any opportunity to participate or provide input. The only party allowed to provide input in this process was the Wyandotte. In fact, the first the State learned of this process was in news stories after the land was placed in trust. (**Exhibit C**, August 10, 2020 News Release). In footnote 1 of the Decision, Defendant Sweeney doubled down on the secrecy of the process by taking the unprecedented step of advising the pubic that many of the records she relied on to make her decision would not

be released, even if requested under the Freedom of Information Act.

Defendant Sweeney also concluded in the Decision that the Park City tract qualified for gaming under an IGRA exception to the general prohibition of gaming on land acquired in trust after October 17, 1988, without addressing, much less analyzing, the effect of the critical undisputed administrative and legal record from the Shriner Tract case, which revealed that ***all*** of the $100,000 principal set-aside funds from PL 602 had been used by the Wyandotte to purchase the Shriner Tract. This meant that the Park City tract, at best, necessarily had to have been bought with non set-aside funds from PL 602 over which the Wyandotte exercised discretionary authority. Those funds were not mandated by PL 602 to be used for the purchase of land.

The exception that the Defendants applied in the Gaming Decision was that the Park City tract was acquired in trust as part of the settlement of a land claim pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). In addition to failing to address or analyze the matters set forth immediately above, a more glaring analytical omission is that Defendants made this Gaming Decision without mentioning, much less analyzing, the Department's own 2008 agency regulations, which should have governed the Gaming Decision: 25 C.F.R. § 292.2 (defining what a "land claim" is) and 25 C.F.R § 292.5 (identifying the criteria "[w]hen gaming can occur on newly acquired lands under a settlement of a land claim.")

Instead of addressing and analyzing the critical items mentioned above, Defendants completely relied on the 2006 decision in *Wyandotte Nation,* 437 F. Supp. 2d 1193. As discussed in more detail below, this decision was issued two years before promulgation of the Agency regulations that have occupied the field since 2008. Moreover, in *Wyandotte Nation,* this Court determined that gaming on the Shriner Tract was permitted under the "land into trust as part of the settlement of a land claim" exception due in large part to the fact that the Shriner Tract had

been purchased with ***all*** of the $100,000 set-aside funds from PL 602. Had it been otherwise, the Court noted the decision might have been different. *Id.* at 1210. The Defendants paid no attention to this in their three sentence Gaming Decision.

These two primary analytical omissions frame the argument that there is a substantial likelihood of Plaintiffs prevailing on the merits of the challenges to the Gaming Decision and support Plaintiff's requested injunction. Plaintiffs seek injunctive relief to preserve the status quo by staying the implementation or legal effect of the Gaming Decision until a final decision is made on the merits. The last, peaceable status existing between the parties to this litigation was immediately prior to issuance of the May 20, 2020 Decision. *Free the Nipple-Fort Collins v. City of Ft. Collins, Colo.*, 916 F.3d 792, 798 n. 3 (10th Cir. 2019)(citing 11A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2948 (3d ed. & Nov. 2018 update))("defining the status quo as 'the last peaceable uncontested status existing between the parties before the dispute developed'---which, in this case, would be the status existing before Fort Collins enacted the challenged public-nudity ordinance." *See also, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 342 F. 3d 1170, 1177-78 (10th Cir. 2003).

The Wyandotte announced that it intends to open up a temporary gaming facility as early as November 2020 with 500 machines and a permanent casino facility in 2021 with between 800-1200 machines. (**Exhibits D and E,** respectively). In fact, it was reported on October 9, 2020, that the Wyandotte already opened a small casino in a trailer on the Park City tract. **(Exhibit F).** These gaming activities will cause significant, irreparable harm to the Plaintiffs State of Kansas, Sumner County and the City of Mulvane, all as detailed below.

What follows below are the facts upon which Plaintiffs rely to establish that there is a substantial likelihood that Plaintiffs will prevail on the claim that the Defendants acted in excess

of their authority, ignored and failed to apply their own regulations, acted unlawfully, violated the IGRA, abused their discretion, and acted arbitrarily and capriciously by deciding that the land in Park City, Kansas was eligible for gaming under 25 U.S.C. § 2719(b)(1)(B)(i).

FACTUAL, ADMINISTRATIVE AND LEGAL BACKGROUND

The 2008 Department of the Interior Regulations Defining "Land Claim" and "Criteria for When Gaming Can Occur on Newly Acquired Lands Under a Settlement of a Land Claim"

1. Effective June 19, 2008, the Department of Interior adopted new regulations that define what was meant by the term "land claim" and set forth the criteria for determining when gaming can occur on land newly taken in trust as part of a settlement of a land claim pursuant to 25 U.S.C. 2719(b)(1)(B)(i). In that regard, 25 C.F.R. § 292.2 defined, and continues to define, 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.

(Emphasis added to demonstrate the use of present tense).

2. 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).

3. When adopted, the Department explained: that

"[These] regulations implement section 2719 of IGRA by articulating standards that the Department ***will*** follow in interpreting the various exceptions to the gaming prohibition on after-acquired trust lands contained in section 2719 of IGRA. Subpart A of the regulations define key terms contained in section 2719. Subpart B delineates how the Department ***will*** interpret the "settlement of a land claim" exception contained in section 2719(b)(1)(B)(i) of IGRA." 73 FR 29354, * 29354. This subpart clarifies that, in almost all instances, Congress must enact the settlement into law before land can qualify under the exception." (Emphasis added).

Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29354 (May 20, 2008)(emphasis added). It is these Regulations that were ignored in the Gaming Decision and caused the misapplication of PL 602 not only to the trust acquisition but to the Gaming Decision. To understand that, one has to understand how the Wyandotte came to have money paid to it by the United States from judgments rendered and satisfied in the 1970's by the ICC and Court of Claims that was distributed under PL 602 many years later.

Wyandotte Claims Under the Indian Claims Commission Act Resulted in Money Judgments That Were Appropriated and Fully Satisfied Before Passage of PL 602

4. The Indian Claims Commission Act (the "Act") was passed in 1946. (**Exhibit G,**

25 U.S.C. § 461 *et seq*). The Act created the ICC and was a vehicle for Indian tribes to assert claims before the ICC for money damages against the United States for past perceived transgressions. The only remedy available to tribes bringing claims under the Act was a money judgment. **(Exhibit G,** Sec. 19). The Act set forth five categories of claims that could be brought, one of which involved "claims which would result if the treaties, contracts, and agreements between the United States were revised on the ground of …unconscionable consideration…." **(Exhibit G,** Sec. 2).

5. In the 1950's the Wyandotte brought a number of claims against the United States before the ICC seeking monetary compensation for land it ceded by treaties (or relinquished title to) with the United States in the 1800s. The Wyandotte did not claim in any of these cases that it was entitled to recover possession or title to any land nor did it assert a claim for any then present impairment of title or other real property interest or loss of possession. The Wyandotte did not claim that any such impairment "is …in conflict with the right, title or other real property interest claimed by an individual or entity (private, public or governmental)." The United States did not assert any counterclaims to the claims brought by the Wyandotte and did not make any claim of right, title or other real property interest in conflict with present claims of the same nature of the Wyandotte. The Wyandotte's sole claim in each of the cases was that the compensation it received for ceding the lands was "unconscionable".

6. The Wyandotte were successful in four of the claims for additional compensation before the ICC that resulted in money judgments in its favor against the United States. All such claims were resolved by judgments although the parties attempted to settle the claims for compensation (*Zane et al v. United States,* 618. F. 2d 121 (U.S. Ct. Cl. 1979)) no settlement was ever reached or entered into with the United States. The judgments in these four claims were as

follows:

a. The claim in Docket No. 139 was brought in July 1951 and claimed that the consideration paid for the cessation of certain land by Treaty of Fort Industry, July 4, 1805 was unconscionable. The Tribe was awarded a judgment of $561,424 in docket 139. *Zane ex rel Wyandotte Tribe v. United States,* 618 F. 2d 121 (U.S. Ct. Cl. 1979); Strong *et al v. United States,* 42 Ind. Cl. Comm. 264 (August 10, 1978); **(Exhibit H).** Funds were appropriated, and this judgment was paid and fully satisfied in October 1978. House Report No. 98-1067 and Senate Report 98-609 **(Exhibit I and J)**. *See also United States v. Dann,* 470 U.S. 39, 47-50 (1985)(holding that once final ICC or Court of Claims judgments are certified for payment, the funds are deemed appropriated and placed by the United States into an account in the Treasury, and the judgments are deemed fully satisfied thereby discharging the United States of all claims and demands that were the subject of the claims.)

b. The claim in Docket No. 141 was brought in July 1951 and claimed that the consideration paid for the cessation of certain land by Treaty of September 29, 1817 was unconscionable. The Tribe was awarded a judgment of $2,348,679.60 in docket 141. *Zane ex rel Wyandotte Tribe v. United States,* 618 F. 2d 121 (U.S. Ct. Cl. 1979); *Strong et al v. United States,* 43 Ind. Cl. Comm. 311 (August 10, 1978). **(Exhibit K)**. Funds to cover this award were appropriated and the judgment was fully satisfied in March, 1979. House Report No. 98-1067 and Senate Report 98-609 **(Exhibit I and J);** *United States v. Dann,* 470 U.S. 39 (1985).

c. The claims in Dockets 212 and 213 derived from claims for the unconscionable consideration received for lands ceded pursuant to treaties in 1818, 1832, 1836 and 1842 and from an accounting claim for the handling of tribal land monies by the United States. *Zane et al v. United States,* 38 Ind. Cl. Comm. 561 (Aug. 5, 1976). **(Exhibit L)**. The Tribe was awarded a judgment of $200,000 in Dockets 212 and 213. This judgment was appropriated and fully satisfied some time prior to 1984. **(Exhibit J,** Senate Report 98-609**; Exhibit 3,** PL 602; 25 U.S.C. 1402, 1403; *United States v. Dann,* 470 U.S. 39 (1985).

See also, *Wyandotte Nation,* 437 F. Supp. 2d at 1207(generally discussing the ICC claims brought by the Wyandotte).

Pl 602 Was Merely The Fulfillment Of A Congressional Duty Under The Indian Tribal Judgment Funds Use Or Distribution Act

7. 25 U.S.C. §§ 1401 *et seq.* was originally enacted in 1973 and is known as the "Indian Tribal Judgment Funds Use or Distribution Act." Its purpose was to create a process for the Secretary of Interior and/or Congress to prepare a plan "for the distribution of funds awarded

to any Indian tribe by judgment of the Indian Claims Commission or Court of Claims" within a certain time frame "***after*** appropriation of such funds." (25 U.S.C. 1402(a) (emphasis added); **Exhibit M,** House Report 93-377, p. 5, July 16, 1973).

8. Once the funds awarded to a tribe by a judgment of the ICC or Court of Claims had been appropriated, the judgment was deemed satisfied and the United States fully discharged. *United States v. Dann,* 470 U.S. 39 (1985)(holding that once final ICC or Court of Claims judgments are certified for payment, the funds are deemed appropriated and placed by the United States into an account in the Treasury and the judgments are deemed fully satisfied, thereby discharging the United States of all claims and demands that were the subject of the claims.)

9. In 1982, well after the satisfaction of the judgments in Dockets 139 and 141, and pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, Congress passed Public Law 97-371, 96 Stat. 1813 (1982) ("PL 97-371"), providing a formula for the distribution of the appropriated ICC judgment funds among the Wyandotte and the Absentee Wyandottes. (**Exhibit N**).

10. However, shortly after passage of PL 97-371, the Tribe and the Department of the Interior had concerns about the fairness of the distribution formula set forth in PL 97-371. (HR Report 98-1067, **Exhibit I).** As a result, Congress revisited the distribution formula and passed PL 602 in 1984, repealing the prior distribution formula of PL 97-371. (**Exhibit 3,** PL 602).

11. PL 602 established a distribution plan for the funds previously paid that satisfied the ICC or Court of Claims judgments rendered in Dockets 139, 141, 212 and 213. The plan included the following:

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." These are the so-called "set-aside funds" at issue in this case and the previous Shriner Tract cases (this provision was also in 97-371);

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, PL 602**).**

The Wyandotte Claims In ICC Docket Nos. 139, 141, 212 And 213 Were Not Land Claims Pursuant To 25 C.F.R. § 292.2 And Neither Those Claims Nor PL 602 Satisfied The "Acquired Under A Settlement Of A Land Claim" Criteria In 25 C.F.R. § 292.5

12. The claims in Dockets 139, 141, 212 and 213 did not include claims by the Wyandotte alleging "the impairment of title or other real property interest or loss of possession that…is "in conflict with the right, title or other real property interest claimed by an individual or entity (private, public or governmental) ...". 25 C.F.R. § 292.2.

13. PL 602 was not legislation enacted by Congress that resolved or extinguished with finality any claim by the Wyandotte to land which resulted in alienation or loss of possession of some or all of the lands claimed by the Wyandotte. 25 C.F.R. § 292.5(a).

14. 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 (or anyone else for that matter) 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 entered 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. 25 C.F.R. §§ 292.5(b)(1)(2).

Wyandotte Invested The $100,000 Set-Aside Funds And Later Spent All Of The $100,000 To Purchase The Shriner Tract In Kansas City, Kansas-Use Of Earnings On The Investment Of The $100,000 Set Aside Funds Is Discretionary

15. Following the distribution of the judgment funds pursuant to PL 602, in May 1986, the Tribe invested the $100,000 set-aside funds by purchasing mortgage obligation bonds. **(Exhibit 4**; **Exhibit 5).** The bonds representing the PL 602 set-aside funds 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**).

16. There is nothing in PL 602 that required the Wyandotte to use any of the earnings from the investment of the $100,000 set-aside funds for the purchase of land, as opposed to the principal $100,000 funds that had to be used for the purchase of land. **(Exhibit 3).** The Department of the Interior long ago concluded that the earnings from the investment of the PL 602 set-aside funds could be used at the discretion of the Wyandotte. **(Exhibit 3, 18 and 27**).

17. In 2001, the Wyandotte admitted to the Tenth Circuit Court of Appeals its unequivocal awareness of the difference between the permissive or discretionary use of the earnings on the investment of the principal $100,000 set-aside funds from PL 602, as opposed to the mandatory use of the principal $100,000 set-aside funds for the purchase land. In that brief, the Wyandotte agreed with the statement by the Department of the Interior 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.***" **(Exhibit 27, p. 10, citing Exhibit 18,** April 19, 1996 Department of the Interior Memo**)** (emphasis added).

18. When the Wyandotte purchased the Shriner Tract in July 1996 and it was

accepted into trust on a mandatory basis under PL 602, there was no dispute that the Tribe used all of the $100,000 set-aside funds from PL 602 for that purchase, plus additional interest and earnings purportedly gained from the investment of those $100,000 set-aside funds. This is what the Wyandotte and the Department of the Interior intended, understood and confirmed had occurred. (**Exhibit 7**, pp. 60-62; **Exhibit 27**, pp. 7-10; **Exhibit. 28**, pp. 18-19; **Exhibit 29**, p. 7). *See also Wyandotte Nation,* 437 F. Supp. 2d at 1210 (noting that the Shriner Tract was purchased with all of the $100,000 set-aside funds from PL 602).[3]

1992 Park City Land Acquisition and 1993 Fee-to-Trust Application-PL 602 Funds Not Used for the Purchase

19. By November 30, 1991, the Tribe's net withdrawals of money from the segregated account in the investment assets purchased with the PL 602 $100,000 set-aside funds (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**).

20. 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. (**Exhibit 4; Exhibit O,** December, 1991 Wyandotte account statement).

21. In November 1992, the Tribe withdrew $25,000 from the cash portion of the

[3] Since it is without question that all of the $100,000 set aside funds from PL 602 were expended on the Shriner Tract, that means that, at most, the Park City tract was purchased with only earnings from the investment of those set-aside funds, earnings the Department long ago acknowledged the Tribe could spend at its discretion. The Department of the Interior has never considered or decided if use of such discretionary funds from PL 602 can invoke the mandatory trust provisions of PL 602. Nor has any court. It is respectfully submitted it cannot.

general investment account and claims it used those funds to purchase the Park City land. (**Exhibit 6,** McCullough letter.) However, none of the PL 602 bonds were liquidated to raise the $25,000. This fact allowed the Tribe to assure the Department of the Interior some 3-4 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. (See ¶¶ 17 and 18 above and exhibits referred to therein). This also allowed the Tribe to admit in federal district court that the money used to purchase the land in Park City was ***not*** PL 602 funds and repeat the same admission to the Tenth Circuit. (**Exhibit 7,** p. 11-12; **Exhibit 26, p. 5**).

22. None of the principal $100,000 set-aside funds from PL 602 were used for the Park City purchase in 1992. In fact, the Wyandotte assured the Department of the Interior 3-4 years later and then subsequently the Tenth Circuit that it was using and fully attributing all of the $100,000 set-aside funds from PL 602 for the purchase of the Shriner Tract. (¶¶ 17-18 above; **Exhibit 27**, pp. 10).

23. The Department of the Interior came to this same conclusion way back in 2003 after it engaged in a remand inquiry directed by the Tenth Circuit to determine if the Shriner Tract was purchased with "only" PL 602 funds. *Sac and Fox Nation of Missouri,* 240 F. 3d at 1268. On remand, the Assistant Secretary specifically found 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." (**Exhibit 29,** p. 7).

24. Given the amount of cash and the value and coupon rate of the PL 602 bonds in the segregated PL 602 account in November 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. (**Exhibit 30 and 31A**).

25. Furthermore, the Wyandotte admitted as long ago as January 1999 that the Park City land was ***NOT*** purchased with PL 602 funds, an admission entirely consistent with the November 1992 account statement. (**Exhibit 7, p. 11-12**, Wyandotte Intervenor Brief in Shriner Tract case where the Tribe specifically stated that the funds used to purchase the Park City land should ***not*** be characterized as PL 602 funds).

26. In September 2000 the Wyandotte made this exact same admission to the Tenth Circuit where it unequivocally admitted that the funds used to purchase the Park City property in 1992 should ***NOT*** be characterized as PL 602 funds. (**Exhibit 26, p. 5**, Wyandotte Tenth Circuit Brief).

27. The Administrative Record that was generated during the course of the Department of the 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 establish:

a. that 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. that 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. 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

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

(See Complaint, pp. 15-21 and exhibits cited therein).

In 1993 A Field Solicitor For The Department Of The Interior Found That The Park City Land Did Not Qualify For The Settlement Of a Land Claim Exception

28. In 1993, in conjunction with the effort of the Wyandotte to have the Park City tract acquired in trust under PL 602, the Field Solicitor for the Department of Interior in Tulsa concluded that the Park City land did ***not*** qualify for gaming under IGRA. (**Exhibit 10**, February 19, 1993 Opinion of M. Sharon Blackwell). The Wyandotte thereafter withdrew the application it had filed to have the Park City land accepted into trust. (**Exhibit 7**, p. 11-12).

2006 Park City Fee to Trust Application

29. 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. It argued that gaming should be permitted on the Park City tract---but not under the settlement of a land claim exception. (**Exhibit 32**).

30. 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, 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. The Tribe also argued that the land qualified for gaming under the "settlement of a land claim' exception. (**Exhibit 33**).

Defendants' May 20, 2020 Gaming Decision Is Fatally Flawed

31. Following Assistant Secretary Washburn's July§ 2014 decision, the Wyandotte submitted a new application to the Department of the Interior that spurred the issuance of the Decision. (**Exhibit 2,** p. 7). In making her Gaming Decision that the Park City land qualified for gaming under the settlement of land claim exception in IGRA pursuant to 25 U.S.C. §

2719(b)(1)(B)(i), the Defendants completely relied, without analysis or explanation, on *Wyandotte Nation,* 437 F. Supp. 2d 1193. (**Exhibit 2**, p. 10). In the Decision, Defendant Sweeney never mentions or addresses the distinguishing fact that the Park City tract was not purchased with any of the principal $100,000 set-aside funds from PL 602 and, at most, it was purchased with discretionary funds in the form of earnings on the investment of that $100,000. (See ¶¶ 16-18 above). This was a critical fact distinction noted in the *Wyandotte Nation* case. See, *Wyandotte Nation,* 437 F. Supp. 2d at 1211.

32. Moreover, Defendant Sweeney never mentions, much less analyzes, in her Decision the 2008 Department Regulations defining what the term "land claim" means and the required criteria that must be considered to determine when gaming can occur on newly acquired lands under settlement of a land claim pursuant to 25 U.S.C. 2719 § (b)(1)(B)(i). (**Exhibit 2, p. 10).**

Wyandotte ICC Claims Were Not Land Claims Under 25 C.F.R. § 292.2 and PL 602 Fails to Meet the Criteria for "Settlement of a Land Claim" under 25 C.F.R. § 292.5

33. The claims asserted by the Wyandotte before the ICC and Court of Claims are not "land claim(s)" as defined in 25 C.F.R. § 292.2 because the claims did not concern a present impairment of title or other real property; nor did the claims concern the loss of possession. The claims asserted before the ICC and Court of Claims were claims against the United States for additional compensation to the Wyandotte 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 present title and/or interest to real property. Nor did the Tribe claim that it was illegally dispossessed 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 Act. (See ¶ 5-6(a)-(c) above).

34. Also, the claims asserted by the Wyandotte before the ICC and Court of Claims are not "land claim(s)" as defined in 25 C.F.R. § 292.2 because the claims for additional compensation were not "in conflict with the right, title or other real property interest claimed by an individual or entity (private, public or governmental)". The United States did not claim any right, title or other real property interest in or to the ceded lands. The claims simply did not concern a temporal conflict over any right or title or other real property interest as required to qualify as a "land claim" under 25 C.F.R. § 292.2.

35. Even if the Wyandotte ICC claims could 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 ICC and Court of Claims, including the Park City land, which was placed into trust over 40 years after the final orders were issued. The final orders did not mention, nor contemplate, the acquisition of land; rather, they simply awarded money judgments. The Act did not allow for the award of land to claimant tribes. As such, the Tribe cannot look to the ICC judgments for the position that the Park City land was "acquired" under the settlement of a "land claim" pursuant to 25 C.F.R § 292.5(b)(2).

36. Similarly, PL 602 is not a "land claim" nor is it a Congressional enactment that involved a settlement of a land claim as defined in 25 C.F.R. § 292.2 and 25 C.F.R § 292.5, including for the following reasons:

> 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 where they enact and effectuate actual settlements (see e.g., 25 U.S.C. § 1701 *et seq.*), 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 cannot be construed as a settlement of a land claim because it did

not involve a settlement. Unlike all actual Congressional land claim settlements, PL 602 does not mention or reference any settlement of a land claim. It could not do so because there never was a settlement of the Tribe's claims for additional compensation for the lands it ceded to the United States. Although efforts were made to settle the claim (and in many other cases, the ICC accepted settlements and entered them as final orders), in this case, the settlement efforts were unsuccessful. As such, the ICC and the Court of Claims issued judgements on the Tribe's claims. No "settlement of a land claim" was ever "entered as a final order" by the ICC or the Court of Claims.

Third, 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 ICC and the Court of Claims awarded to these groups for unconscionable compensation concerning the cession of their lands. All actual Congressional land claim settlements contain clear and express language extinguishing with finality the respective tribe's land claims. PL 602 contains no such language.

Fourth, 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 more than a hundred years prior in treaties between 1805 and 1842.

Fifth, therefore and not surprisingly, PL 602 does not concern – in fact does not mention—a claim by the Tribe concerning the impairment of title or other real property interest or loss of possession that is in conflict with that claimed by an individual or entity (either in the ceded territory or elsewhere).PL 602 was merely the vehicle for payment of money judgments rendered by the ICC 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.

37. PL 602 was merely the means by which Congress fulfilled its statutory duty by providing a distribution formula (as between the Wyandotte and the Absentee Wyandottes) for the funds appropriated and paid years earlier in satisfaction of judgments rendered years earlier by the ICC and Court of Claims against the United States in favor of the Wyandotte, which resolved the Wyandotte claims for additional compensation for its long ago ceded lands to which they were not making present claims of title or right to possession.

38. Neither the claims brought by the Tribe under the Indian Claims Commission Act, and 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 tract in trust meets the Department's requirements of the "acquired under 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.

39. The Wyandotte have announced plans to open up a temporary casino with 500 machines by November 2020 and to expand it into a permanent facility in 2021 with approximately 800-1200 machines. (**Exhibits D and E**). On or about October 9, 2020, the Tribe commenced limited gaming at the Park City site in a temporary trailer. (**Exhibit F**).

40. If the Gaming Decision is not stayed pending a final decision on the merits, the State (and Sumner County and the City of Mulvane), among others, will sustain irreparable harm in two ways:

a. The State presently is entitled to receive 22% of the gross revenues from the Kansas Star Casino, which is located within 25 miles of the Park City tract. Local governments, including Plaintiffs Sumner County and the City of Mulvane, along with Sedgwick County, receive 3%. The State will lose approximately $1,524,072 annually if the Wyandotte open a temporary facility with 500 machines, and the local governments, including Plaintiffs Sumner County and the City of Mulvane, along with Sedgwick County, will lose $207,828 collectively. If the Wyandotte open a permanent facility with 800-1200 machines, the expected annual losses will be $6,825,192 to the State and $962,462 to the local governments. This is due to the expected impact of the Wyandotte gaming facility on the gross revenues of the Kansas Star Casino. (**Exhibit P**, ¶¶ 6-15 Affidavit of Will Cummings). The State and the local governments cannot recover such losses from the Defendants (or from the Wyandotte for that matter) due to the sovereign immunity of those respective parties.

b. The Department will have usurped the State's statutory right under IGRA to consent to the Wyandotte engaging in gaming in Kansas, because its concurrence is required to permit gaming by the Wyandotte in Kansas under the two-part determination under IGRA, 25 U.S.C. § 2719(b)(1)(A). That is the only legal path to lawful gaming by the Wyandotte in Kansas.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)); *Kansas v. United States* 249 F.3d 1213, 1227 (10th Cir. 2001)(upholding the district court's granting injunctive relief staying further action relating to Indian gaming on the land at issue during the pending litigation).

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* "A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. *Id.* (internal citations omitted).

Plaintiffs meet each of the requirements for issuance of temporary and preliminary injunctive relief in that (1) Plaintiffs will suffer irreparable injury unless the injunction issues; (2)

the threatened injury that Plaintiffs will sustain outweighs whatever harm the proposed injunction may cause the Defendants; (3) the injunction would not be adverse to the public interest; and (4) there is a substantial likelihood of success by Plaintiffs on the merits of its claim.

1. **Plaintiffs Will Suffer Irreparable Injury Unless the Injunction Issues**

If injunctive relief does not issue, the State, through its Governor, will be deprived of the right to approve gaming in Kansas pursuant to 25 U.S.C. § 2719(b)(1)(a). The Wyandotte announced the intention to open a gaming facility on the Park City land during the pendency of this litigation. In fact, the Wyandotte have already opened a temporary casino facility in a trailer at the Park City site. If the Gaming Decision is not stayed pending a decision on the merits in this case, Defendants will have usurped the State's right to approve gaming, by placing the Park City land in trust and declaring that the land qualifies for gaming.

Moreover, Plaintiffs Kansas, Sumner County and Mulvane will lose substantial income during the pendency of this litigation if the Park City land is to go into trust for the purpose of gaming. The Nation has announced its intention to open a temporary Class 2 gaming casino in November 2020 with 500 machines and will expand that with a permanent casino containing 800-1200 machines on the property in 2021. The Park City land is within 25 miles of the Kansas Star casino from which the State receives annually 22% of the gross revenues and the local governments, including Sumner County and Mulvane, share in 3% of such gross revenues. The projected losses if the Wyandotte open a temporary facility and later a permanent facility as it has announced it intends to do are set forth in ¶ 39(a) above. The losses will be substantial.

Plaintiffs will not be able to recover those funds even if they prevail in this litigation at a later date because the State of Kansas, Sumner County and Mulvane do not have any adequate remedy at law due to the Wyandotte's sovereign immunity. *See, e.g., Oklahoma Tax Com'n v.*

Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509-510 (1991) (recognizing that "[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation") (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) ("Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority") (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). Sovereign immunity provides similar protection to Defendants. *See, F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (recognizing that "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit")(citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940)). While the United States has partially waived its sovereign immunity under the APA, it has done so only with regard to claims for non-monetary relief. *See* 5 U.S.C. § 702. Because neither the United States nor the Wyandotte have waived their sovereign immunity as to any monetary damages claims by the State of Kansas, Sumner County and City of Mulvane for damages arising out of the Decision or Gaming Decision, the substantial financial losses that these Plaintiffs will predictably suffer are unquestionably irreparable.

2. <u>An Injunction Will Not Harm Defendants</u>

An injunction pending litigation of the issues raised in the Complaint will not harm Defendants. It is respectfully submitted that Defendants cannot argue that they will suffer undue hardship given the history of the Shriner Tract acquisition and the facts and circumstances set forth in the Verified Complaint. Moreover, any alleged harm to the Federal Defendants is outweighed by the threatened injury to the Plaintiffs/Movants if the preliminary injunction does not issue. *Kansas v. United States,* 249 F. 3d at 1228.

3. <u>An Injunction Will Not Be Adverse to the Public Interest</u>

There is no substantial public interest adversely affected by maintaining the status quo for the duration of the pending litigation. *See Kansas v. United States*, 249 F.3d at 1227 (upholding a preliminary injunction staying further action relating to gaming on the land at issue during the pending litigation and stating that "[w]e are unaware of any substantial public interest which maintaining[the status quo], at least for a short while longer, might adversely affect"). Certainly, no public interest supports the immediate development of a gaming casino in Park City, Kansas, by an Oklahoma tribe, in violation of federal and Kansas law. Nor is there any public interest in the unlawful acquisition of trust land in Park City, Kansas, pursuant to a statute that has been fully enacted and a mandate that no longer exists.

On the other hand, the public has an immediate and vital interest in ensuring that all federal trust laws and Indian gaming laws are observed. If the acquisition in question were properly treated as a discretionary trust acquisition, the State of Kansas would have been afforded its statutory right under IGRA to consent to the Wyandotte engaging in gaming in Kansas since its concurrence is required to permit gaming by the Wyandotte in Kansas under the two-part determination in IGRA, 25 U.S.C. § 2719(b)(1)(A). Likewise, if the acquisition were properly treated as a discretionary trust acquisition, an environmental impact analysis would have to be performed, as required by the National Environmental Policy Act ("NEPA"), furthering the public interest in that regard. Issuance of an injunction will also serve the public interest as manifested by the voting results of the majority of Sedgwick County citizens, who voted to reject gaming in that County in 2007. (**Exhibit Q,** Certificate of Canvass). The Park City land that is the subject of this litigation is located in Sedgwick County.

4. <u>There is a Substantial Likelihood that Plaintiff Will Prevail on the Merits of the Gaming Decision</u>

For purposes of this Motion for Temporary and Preliminary Injunctive Relief and Stay of Agency Action, it is respectfully submitted that Plaintiffs have demonstrated that there is a substantial likelihood that they will prevail on the merits of their claim. Specifically, there is a substantial likelihood that Plaintiffs will establish that Defendants acted arbitrarily and capriciously, and failed to follow their own regulations, when they decided that the Park City tract qualifies for gaming under IGRA as land taken into trust as part of the settlement of a land claim. Such a finding would require a remand, if not outright reversal, of the Gaming Decision. 5 U.S.C. § 706 (a reviewing court "shall … (2) hold unlawful and set aside agency action, findings and conclusions found to be (A) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law").

There is a substantial likelihood that the court will find the Gaming Decision of Defendant Sweeney to have been unlawful such that it should be set aside for the following reasons:

a. The Decision fails to mention or address the agency's own regulations that are directly on point, namely 25 C.F.R. §§ 292.2 and 292.5 and instead relies on a court case decided two years before adoption of such regulations—a court case that involves materially different facts. (Ex. 2, p. 10 to Complaint, relying on *Wyandotte Nation,* 437 F. Supp. 2d 1193. The Administrative Procedures Act has been "interpreted …to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations." *Cherokee Nation of Okla. v. Norton,* 389 F. 3d 1074, 1078 (10th. Cir. 2004) (citing *Miami Nation of Indians of Ind. Inc. v. United States Dep't of the Interior,* 255 F. 3d 342, 348 (7th. Cir. 2001); *Utahns v. United States Dep't of Transp.,* 305 F. 3d 1152, 1165 (10th. Cir. 2002)). *See also, Cotton Petroleum Corp. v. United States Dep't of Interior, Bureau of Indian Affairs,* 870 F. 2d

1515, 1527 (10th. Cir. 1989)(citing *Simmons v. Block,* 782 F. 2d 1545, 1550 (11th. Cir. 1986))("the failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.")

b. The Gaming Decision fails to address the significant, material fact that the Park City tract could not have been purchased with any of the principal $100,000 set aside by PL 602 for the purchase of land. Judge Robinson found it critical to her determination that the Shriner Tract was purchased with all of the $100,000 set aside by PL 602 for the purchase of land - as opposed to funds that were derived from an ICC judgment paid by the United States over which the Wyandotte could exercise their discretion, including the money used to purchase the Park City tract. *Wyandotte Nation,* 437 F. Supp. 2d at 1210. If the land had been purchased with funds over which the Wyandotte exercised discretion, as with the Park City tract, Judge Robinson acknowledges the outcome could have been different. *Id.*

No deference is owed for a clearly wrong agency interpretation. *See id.* at 1202; *Gen. Dynamics Land Sys. v. Cline,* 540 U.S. 581, 600 (2004). "Under the arbitrary and capricious standard, a court must ascertain 'whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.'" *Wyoming v. United States DOI,* 136 F. Supp. 3d 1317, 1328 (D. Wyo. 2015)(citing *Olenhouse v. Commodity Credit Corp.,* 42 F. 3d 1560, 1573-4 (10th Cir. 1994)). "The agency must provide a reasoned basis for its action and the action must be supported by the facts in the record." *Id.* (citing *Olenhouse,* 42 F. 3d at 1575).

Moreover, in "order to survive judicial review…an agency action must be supported by 'reasoned decision-making'". *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco Firearms and Explosives,* 437 F.3d 75, 77 (D.C Cir. 2006). The "result must be logical and rational," *id*, as

well as "adequately explained." *Fox v. Clinton,* 684 F. 3d 67, 75 (D.C Cir. 2012).

Defendants failed to engage in reasoned decision-making as they failed to provide any explanation for its blind reliance on the 2006 *Wyandotte Nation* case, much less one that is logical and rational. This conclusion is compelled given the significant and material factual differences between the Shriner Tract acquisition and the Park City Tract acquisition as shown above, including the pivotal fact that the Shriner tract was purchased with all of the $100,000 set-aside funds and the Park City tract was purchased with none of those funds.

Based upon all of the above and foregoing, it is respectfully submitted that Plaintiffs have demonstrated that there is a substantial likelihood that the Gaming Decision was the product of a wrong agency decision-making process and determination. There is precedent in Kansas for issuance of the relief sought by Plaintiffs. In *Kansas ex. rel. Graves v. United States,* 86 F. Supp. 2d 1094 (D. Kan. 2000), *aff'd* 249 F.3d 1213, 1227 (10th Cir. 2001), after citing 5 U.S.C. § 705, the District Court issued a stay of an NIGC decision that a tract of land in Kansas qualified as Indian land under IGRA pending review of the entire record. *Id.* at 1101. Likewise, Plaintiffs seek a stay of the Gaming Decision made by the Defendants pending review of the entire record.

CONCLUSION

For the above reasons stated, it is respectfully submitted that the Court should stay the Gaming Decision Agency action and grant a temporary restraining order and preliminary injunction and stay of agency action as requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I electronically filed the foregoing with the clerk of the court by using the CM/ECF management system which will send notice of electronic filing to the counsel of record.

/s/ *Mark S. Gunnison*
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