UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.*, Derek Schmidt, Attorney General, *et al.*	)	
Plaintiffs,	)	
v.	)	Civil Action No. 2:20-cv-02386
DAVID BERNHARDT, *et al.*	)	**PLAINTIFFS REQUEST ORAL ARGUMENT**
Defendants.	)	

REPLY 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 Reply Memorandum in Support of Motion for Temporary and Preliminary Injunctive Relief and/or Stay of Administrative Action:

INTRODUCTION

The Motion for Temporary and Preliminary Injunctive Relief and/or Stay of Administrative Action seeks to preliminarily enjoin or stay the determination made by Defendants on May 20, 2020, that the Wyandotte Nation may lawfully engage in gaming on a tract of land in Park City, Kansas ("Park City tract") pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq* ("IGRA"). This determination (hereinafter referred to as the "Gaming Determination") was made at the same time that Defendants decided that the United States was mandatorily required to accept the Park City tract into trust pursuant to the provisions of Public Law 98-602, 98 Stat. 3149 (1984) ("PL 602"). Recognizing the general rule in IGRA that prohibits gaming on land acquired in trust after October 17, 1988, Defendants determined that the Park City tract qualified for an exception

to this general rule by determining that the Park City tract was "taken into trust as part of a settlement of a land claim" pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). This Gaming Determination was made without any explanation other than to say it was "consistent with the Department's acquisition of the Shriner Tract as upheld by the court in 2006 in *Wyandotte Nation v. the National Indian Gaming Commission,* 437 F. Supp. 2d at 1211 (D. Kan. 2006) (no appeal taken)."[1] The court in the *Wyandotte Nation* case applied this same IGRA exception to a different tract of land in Kansas City, Kansas, purchased by the Wyandotte Nation at a separate time than the Park City tract, which was purchased from a different basket of funds. Hence, one is rendered more than curious as to just where the "consistency" lay.

In reaching the Gaming Determination, Defendants completely ignored their own regulations that were adopted in 2008, approximately two years after the *Wyandotte Nation* decision. These regulations (25 C.F.R. §§ 292.2 and 292.5) mandate precisely the opposite result from that reached by Defendants in their Gaming Determination--something Defendants seemingly concede despite the *post hoc* argumentative gymnastics of counsel in Defendants' Opposition to the Plaintiffs' Motion for Temporary and Preliminary Injunctive Relief and/or Stay of Administrative Action (Doc. # 14, hereinafter "Opposition Brief").

In their Opposition Brief, Defendants skirt many of the issues presented, materially misstate and/or fail to understand certain others, and simply get wrong the fundamental aspects of the grounds upon which the entitlement to such injunctive relief is predicated. Defendants' basic argument is that they made no Gaming Determination, but if they did, it was not a determination, it was just some kind of superfluous, unnecessary acknowledgment that the issue of gaming on the

[1] This statement is nonsensical because the Department's acquisition of the Shriner Tract was not at issue in the *Wyandotte Nation v. NIGC* case. The court in that case upheld nothing related to a land acquisition. Rather, all that was at issue in that case was the eligibility of the Shriner Tract for gaming under IGRA. *Wyandotte Nation v. NIGC,* 437 F. Supp. 2d at 1193.

Park City tract was somehow governed and controlled by the 2006 *Wyandotte Nation* decision despite the fact that Defendants themselves stated no such thing in their May 20, 2020 Decision letter. This myopic thinking led Defendants to argue to this Court that there was no room to consider the 2008 Department of Interior regulations in making the Gaming Determination. This is the essence of Defendants' argument that Plaintiffs cannot demonstrate a substantial likelihood of success on the merits. Defendants are wrong.

Defendants also claim that Plaintiffs have failed to make an adequate showing on the element of irreparable harm. They get there by misstating the nature of the relief sought, by ignoring one significant aspect of Plaintiffs' irreparable harm showing, by misconstruing the law and by mischaracterizing what Plaintiffs have put forth as proof that they will sustain if preliminary injunctive relief is not granted. Defendants' mantra here appears to be "say it loud and say it often, and it may make it so." But it is not so. Plaintiffs have amply demonstrated that they will sustain irreparable harm in two significant instances if the injunctive relief is not granted.

Finally, Defendants pay passing lip service to the balancing of interests element of preliminary injunctive relief. However, as with the rest of their opposition, they fall far short of the mark.

Before addressing the arguments in Defendants' Opposition Brief, it is first necessary to correct certain missteps, misstatements, and/or mischaracterizations Defendants make along the way. Thereafter, the decisional stage is set by illuminating basic rules of statutory construction and the scope of administrative review that are at the heart of this matter. Following that is Plaintiffs' reply to the remaining arguments advanced by Defendants' in opposing the injunctive relief sought.

When it is all said and done, it is respectfully submitted that Plaintiffs have overwhelmingly

demonstrated that they have met the elements for issuance of the injunctive relief they seek.

CORRECTING THE RECORD

1. PL 602-Properly Characterized

Early on in their Opposition Brief, Defendants resort to the ploy of calling PL 602 the "Wyandotte Settlement Act". (Opposition Brief, p. 4). This label is of Defendants' own imagination, not a title from the congressional record. This ploy is no accident--it is intended to persuade the reader that there was some form of "settlement" involved in PL 602 to make it sound like something that fits within the exception for "land taken into trust as part of the settlement of a land claim" pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). However, PL 602 does not reflect any settlement between the Wyandotte Nation and the United States. PL 602 reveals no settlement between the Wyandotte Nation and the United States nor any of the other criteria set forth in 25 C.F.R. § 292.5. (*See* Doc. # 14, Plaintiffs' Memorandum in Support of Motion for Temporary and Preliminary Injunctive Relief and/or Stay of Administrative Action (hereinafter "Plaintiff's Memorandum"), pp. 12-14, ¶ 7-14). These regulations were adopted in 2008 and specifically delineate "how the Department will interpret the 'settlement of a land claim' exception contained in Section 2719(b)(1)(B)(i) of IGRA." (Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29354 (May 20, 2008)). In "almost all instances, Congress ***must*** enact ***the settlement*** into law before land can qualify under the exception." *Id.* (Emphasis added). The only instance that meets the criteria for this exception where Congress has not enacted a settlement into law involves a settlement of a land claim that is not executed by the United States, but "is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue." 25 C.F.R. § 292.5(b)(2).

PL 602 fails to meet any of the criteria in 25 C.F.R. § 292.5. PL 602 is not a Congressionally enacted settlement, i.e., "an agreement ending a dispute or a lawsuit." *Black's Law Dictionary,* (11th Ed. 2019) (defining "settlement"). As noted in Plaintiff's Memorandum, lawsuits between the Wyandotte Nation and the United States initiated before the Indian Claims Commission ("ICC") were all ended by ***judgments*** entered against the United States–not settlements.[2] (Plaintiff's Memorandum, pp. 10-12, ¶¶ 4-6 (a)-(c).)[3] These judgments awarded money damages to the Wyandotte Nation for what they claimed was unconscionable consideration for the cession of lands to the United States in the 1800's. *Id.* Defendants do not and cannot dispute this.

There are actual Indian land claim settlements that Congress has enacted into law and which meet the criteria of 25 C.F.R. §§ 292.2 and 292.5. These Congressionally enacted settlement acts followed the adoption in 1966 of 28 U.S.C. § 1362, the Indian jurisdiction statute that gave federal courts original jurisdiction over civil claims by recognized Indian tribes arising under the Constitution, laws or treaties of the United States, without regard to amount in controversy. Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power,* 39. Vill. L. Rev. 525, 528 (1994). After some initial success by the Oneida Indian Nation, Indian tribes filed numerous claims for lands in the Eastern United States and elsewhere. *Id.* at 546. Some were settled and the settlements resulted in the passage by Congress of a number of land claim settlement acts. *Id.* at 547, n.127 (listing nine Indian land claim settlement acts passed by Congress as of 1994). A number of these settlement acts had been passed by Congress at or before the enactment of IGRA in October 17, 1988 which in its original

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[2] However, many ICC claims did result in settlements-just none of the Wyandotte Nation's claims. "Out of the 94 final awards by 1966 for a total of $194 million, settlement was negotiated in 38 for $87 million. Thirty other compromise settlements had been reached on secondary considerations such as offsets." United States Indian Claims Commission, Final Report, at 15 (Sept. 30, 1978) https://www.narf.org/nill/documents/icc_final_report.pdf.

[3] A judgment is a "court's final determination for the enforcement of the rights and obligations of the parties in a case." Black's Law Dictionary (11th. Ed. 2019) (defining "judgment").

form contained the "settlement of a land claims" exception at issue in the case at bar.

One of those Congressionally enacted Settlement Acts, the "Rhode Island Indian Claims Settlement Act", 25 U.S.C. §§ 1701-1716, is attached here to as **Exhibit R** for illustration and contrast purposes. This Rhode Island Indian Land Claims Settlement Act contained the criteria listed in 25 C.F.R. §§ 292.2 and 292.5, including existing Indian claims to land, (25 U.S.C. § 1701), the entry into an actual settlement agreement (25 U.S.C. § 1701) and the "extinguishment of aboriginal title claimed" (25 U.S.C. § § 1705, 1712), among other items. One could fairly conclude that this is the type of "settlement of a land claim" Congress had in mind when adopting that exception in IGRA in October 1988.[4]

By contrast, PL 602 contains none of these criteria. Most importantly, it involved no settlement, much less one enacted in legislation by Congress, and did not resolve or extinguish with finality any Wyandotte Nation land claims because, as seen immediately below, those land claims had long ago been resolved and extinguished by the ***judgments*** of the ICC or Court of Claims (not settlements) that were paid and satisfied years before Congress adopted PL 602 in 1984.

Defendants are wrong when they state that PL 602 provided for the "appropriation" of money in satisfaction of judgments awarded to the Wyandotte Nation by the ICC or Court of Claims. (Opposition Brief, p. 4, quoting *Sac and Fox Nation of Missouri v. Norton,* 240 F. 3d 1250, 1255 (10th Cir. 2001)[5] and 98 Stat. 3149 (1984) (PL 602)). PL 602 contains absolutely no appropriation language. (*See,* Doc. # 1, Plaintiff's Complaint (hereinafter referred to as

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[4] The Rhode Island Indian Land Claim Settlement Act, along with the Maine Indian Settlement Act, were referenced in IGRA's legislative history, evidencing Congress' awareness of same at the time IGRA was passed. *See* **Exhibit S**, Senate Report 11-446, p. 12, Senate Select Committee on Indian Affairs, Aug. 3, 1988.

[5] In this same passage, the Tenth Circuit actually recognized that the judgment funds awarded the Wyandotte Nation from the ICC and Court of Claims had been appropriated long before PL 602 was enacted. *See, Sac and Fox Nation of Missouri,* 240 F. 3d at 1255, n. 7).

"Complaint"), Exhibit 3). Defendants offer nothing to dispute any of this.

The funds to satisfy the ICC judgments in favor of the Wyandotte Nation were appropriated and paid years prior to passage of PL 602. (Plaintiff's Memorandum, pp. 11-12, ¶ 6(a)-(c) and Exhibits H, I, J, K and L referenced therein). Once the funds were so appropriated and paid, (regardless of whether they had then been distributed) the judgments were deemed fully satisfied and the ICC "land claims" against the United States were fully extinguished at that time. *United States v. Dann,* 470 U.S. 39, 47-50 (1985). That is how and when the "land claims" asserted by the Wyandotte Nation against the United States were extinguished—not by any settlement and certainly not by anything set forth years later in the distribution scheme provided by Congress in PL 602.

2. The Defendants Made a Gaming Determination That is at Issue

Defendants brazenly state that Plaintiffs "fail to recognize that the Assistant Secretary did not make an independent determination as to whether the Park City Parcel met IGRA's exception on gaming on newly acquired trust land after October 17, 1988." (Opposition Memorandum, pp. 22-23). Rather than take Defendants' word for it, here is a passage from the May 20, 2020 Decision letter:

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

(Complaint, Ex. 2, p. 10) (footnote omitted) (emphasis added).

Sure sounds like a Gaming Determination-because that is exactly what it was. The reason

it was made is because this gaming determination was specifically requested by the Wyandotte Nation in its April, 2006 Park City application in which it applied to have the Park City tract taken into trust for gaming purposes. (Complaint, Ex. 32). Two years later, the Wyandotte Nation argued for a positive gaming determination in its May, 2008 letter to the Department (Complaint, Ex. 33). A gaming determination was specifically refused in Assistant Secretary-Indian Affairs Kevin Washburn's July 2014 denial letter (Complaint, Ex. 1), something Defendant Sweeney acknowledged in her May 20, 2020 Decision letter. (Complaint Ex. 2, p. 10).

The issuance of the Gaming Determination was precisely in accord with the Department's regulations. *See* 25 C.F.R. § 292.3(b) (providing that if "a tribe seeks to game on newly acquired lands that require a land-into trust application…the tribe must submit a request for an opinion to the Office of Indian Gaming."). This is exactly what happened.

Defendants imply that somehow issuance of the Gaming Determination was outside the purview of Defendants' departmental authority. (Defendants' Opposition, pp. 7, 21). However, Defendant Sweeney, as Assistant Secretary-Indian Affairs, routinely makes gaming determinations. These gaming decisions are published on the Department of Interior-Indian Affairs, Office of Indian Gaming website under the banner "Departmental Gaming Decisions". The listing of gaming decisions on this website includes the precise Gaming Determination at issue in this case. (*See,* **Exhibit T**, Nov. 1, 2020 listing of Gaming Decisions).

Finally, Defendants caused the publication of a notice in the Federal Register on June 3, 2020 that announced the Park City tract trust acquisition, stated as an acquisition for "***gaming*** and other purposes". (**Exhibit U**) (emphasis added). The claim that Defendants made no Gaming Determination is ludicrous.

3. **Defendants Fail to Address and/or Ignore Significant Issues Raised in *Wyandotte Nation v. NIGC* that Represent Material Differences Between the Park City and**

Shriner Tract Acquisitions

Much discussion has been made of the $100,000 set-aside funds that are at the heart of this case. There is no dispute that PL 602 required $100,000 to be set aside from the judgment funds previously paid by the United States in satisfaction of the ICC judgments. That $100,000 had to be used for the purchase of land and, once so purchased, had to be taken into trust by the Secretary of Interior. (Complaint, Ex. 3, PL 602, Section 105(b)(1)). However, if the Wyandotte Nation chose to invest those $100,000 set-aside funds before purchasing land with the funds, there is nothing in PL 602 that required the Wyandotte Nation to use any of the earnings from such an investment for the purchase of land. By the express terms of PL 602, only the $100,000 set-aside funds were required to be used for the purchase of land. This is not a novel concept. This was long ago settled by the Department of Interior. In April 1996, in conjunction with the Shriner Tract acquisition, the Department noted 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.***" (Complaint, Exhibit 18) (emphasis added).[6]

The Wyandotte Nation has always known this. As far back as 2001, the Wyandotte Nation made the Tenth Circuit aware that it agreed with the position of the Department. (Plaintiffs' Memorandum, Exhibit 27, p. 10, approvingly citing Exhibit 18.)

In *Wyandotte Nation v. NIGC,* Judge Robinson noted the significant difference between the use of the $100,000 set-aside funds that had to be and were used for the land (the Shriner Tract) and the use of other funds from the ICC money judgments distributed by PL 602 to the Wyandotte

[6] This admonition long ago issued by the Department, acknowledged and agreed to by the Wyandotte Nation, is but one of the numerous arguments why the mandatory trust acquisition decision by the Defendants in the May 20, 2020 Decision letter is arbitrary and capricious decision-making and should be set aside.

Nation over which they exercised spending discretion (including the earnings on the investment of $100,000 set-aside funds purportedly used for the purchase of the Park City Tract). In that regard, the court specifically noted:

> The NIGC's focus on the ICC money judgment might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ICC. That is not the case, however, because Congress mandated that the $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 claims. The Wyandotte used funds appropriated by Congress in satisfaction of the ICC judgment to acquire the Shriner Tract, and the Secretary, based on the mandate of Pub. L. 98-602, accepted title to the Shriner Tract in trust for the Tribe.

Wyandotte Nation v. NIGC, 437 F. Supp. 2d at 1210.

As such, there is no dispute that all of the $100,000 set-aside funds from PL 602 were used for the purchase of the Shriner Tract as Judge Robinson noted in *Wyandotte Nation v. NIGC.* Defendants do not seriously suggest that somehow this $100,000 could magically be used twice for two different property acquisitions at two different points in time. Rather than confront the consequences of this significant factual difference between the Shriner Tract and Park City tract acquisitions, Defendants duck the issue by generically stating that the Wyandotte Nation purchased the Park City tract with "statutory qualifying funds". (Defendants' Opposition, p. 2). Defendants well know this merely begs the question. Wordsmithing aside, there is no question that the Wyandotte Nation used funds ***other*** than the $100,000 set-aside funds to purchase the Park City tract-funds over which they exercised discretionary spending authority. According to the court in *Wyandotte Nation v. NIGC,* this could very well be a game changer in application of the "settlement of a land claim" exception to the Park City tract trust acquisition.

Yet, Defendants claim Plaintiffs are confusing the issue on this point. (Defendants' Memorandum, p. 26). Plaintiffs are not confusing anything. The use of discretionary funds from

PL 602 to purchase the Park City tract goes ***not only*** to whether PL 602 can even be invoked as a basis for a second mandatory trust acquisition, but it ***also*** goes to whether the "settlement of a land claim" exception can be invoked since none of the mandatory $100,000 set-aside funds were used to acquire the Park City tract. The court in *Wyandotte Nation v. NIGC* recognized this important outcome determinative distinction. Defendants ignored it. This alone renders Defendants' decision-making arbitrary and capricious.[7]

4. Defendants Fail to Note that the "Conflicting" Department Decision in the Seneca Case Cited in *Wyandotte Nation v. NIGC* Was Later Set Aside as Arbitrary and Capricious

Defendants correctly note that the court in *Wyandotte Nation v. NIGC* found the NIGC's gaming determination at issue in that case was arbitrary and capricious, in part, because the court concluded it was in conflict with a prior NIGC decision. (Defendants' Opposition, p. 10, citing *Wyandotte Nation v. NIGC,* 437 F. Supp. at 1207-12). This prior conflicting NIGC decision involved an earlier determination that lands the Seneca Nation would acquire from funds from the Seneca Nation Lands Claim Settlement Act ("SNSA") qualified as lands taken into trust as part of the settlement of a land claim. *Id.* at 1210. However, what Defendants fail to mention is that two years after the decision in *Wyandotte Nation v. NIGC*, that conflicting NIGC decision was vacated as arbitrary and capricious. *Citizens Against Casino Gambling v. Hogen,* No. 07-CV-04515, 2008 U.S. Dist. LEXIS 52395, * 203-05 (W.D. N.Y. July 8, 2008). Twelve years later, the impact of the reversal of the previously conflicting NIGC decision on the rationale underlying the decision

[7] Indeed, nowhere in the May 20, 2020 Decision letter is there any discussion of whether PL 602 can even be invoked a second time for a mandatory trust acquisition if the only funds used to purchase the Park City tract were, at the very most, earnings from the investment of the $100,000 set-aside funds but none of the actual $100,000 funds themselves. Moreover, the suggestion that the Park City tract was purchased with only earnings on the $100,000 set-aside funds from PL 602 is seriously suspect given the cash in hand in Nov. 1991 and Nov. 1992 when the Park City tract was purchased and the earning power of the $100,000 set aside funds during that time frame. (Complaint, Ex. 30, p. 1, Nov. 1991 account statement; Plaintiffs' Memorandum, Ex. O, Dec. 1991 account statement; Complaint, Ex. 6, pp. 1 and 4 of Nov. 1992 account statement reflecting beginning and end cash balances).

in *Wyandotte Nation v. NIGC* was not considered in the May 20, 2020 Decision letter.

Moreover, the aftermath following the decision in *Citizens Against Casino Gaming* is particularly enlightening. In January 2009, Defendant Bernhardt, then acting in the capacity as a solicitor in the Office of Solicitor for the Department of Interior, issued an opinion that lands acquired by the Seneca Nation with funds from the SNSA qualified for the "settlement of a land claim" exception by analyzing the SNSA in accordance with then recently adopted Department regulations found at 25 C.F.R §§ 292.2 and 292.5. Those are the very same regulations Defendants ignored in their Gaming Determination. (**Exhibit V,** January 18, 2009 opinion letter from David Bernhardt, Office of the Solicitor). Yet NIGC adopted and agreed with Defendant Bernhardt's analysis of 25 C.F.R §§ 292.2 and 292.5 as to the SNSA. (**Exhibit W**, NIGC letter of January 20, 2019, pp. 20-21).

A review of the SNSA appears to confirm that Defendant Bernhardt and the NIGC were correct in determining that lands acquired by the Seneca Nation with SNSA funds qualified for the "land in settlement of a land claim" exception pursuant to the criteria they applied from 25 C.F.R §§ 292.2 and 292.5. (**Exhibit X**, Seneca Nation Land Claims Settlement).

Conversely, a review of PL 602 reveals it fails to contain any of the criteria required by 25 C.F.R § 292.5. As such, land acquired in trust pursuant to PL 602, at least to the extent the land was not purchased with any of the $100,000 set-aside funds from PL 602, does not meet the "land taken into trust as part of the settlement of a land claim" exception. Given their silence and all-out effort to avoid any consideration of their own binding regulations, it must be concluded that Defendants concede this point. The excuses provided in the Opposition Brief for not considering 25 C.F.R §§ 292.2 and 292.5 in the Gaming Determination are nothing but *post hoc* rationalizations by counsel for Defendants—rationalizations that nonetheless fail to hold water against the cascade

of facts and law presented to this Court.

STATUTORY CONSTRUCTION AND SCOPE OF REVIEW PRINCIPLES GOVERNING CONSIDERATON OF PLAINTIFFS' MOTION

1. Statutory Construction

To ascertain the plain meaning of a statute, courts look "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp v. Cartier, Inc.,* 486 U.S. 281, 291 (1988). Statutory interpretation "requires consideration of the entire statute, not an isolated provision or phrase. Statutory language should be given a meaning that is most in accord with the context and ordinary usage, and also most compatible with the surrounding body of law." *Citizens Against Casino Gaming,* 2008 U.S. LEXIS 52395 at * 174 (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring)). Statutory language must not be considered in isolation and the court must consider the "language and design of the statute as a whole." *McCarthy v. Bronson,* 500 U.S. 136, 139 (1991) (quoting *K-Mart Corp.,* 486 U.S. at 291). The Tenth Circuit has noted that it is a "fundamental rule of statutory construction that all parts of a statute must be read together." *United States v. Lonedog,* No. 02-8065 2003, U.S. App. LEXIS 11678, *552 (10th. Cir. June 12, 2003) (quoting *United States v. Diaz,* 989 F. 2d 391, 392 (10th. Cir. 1993)).

In determining whether a statute is ambiguous, "the Court employs traditional tools of statutory construction, including examination of the statute's text, structure, purpose, history, and the relationship to other statutes." *Barnes v. Akal Sec, Inc.,* No. 04-1380-WEB, 2005 U.S. Dist. LEXIS 12268, *17 (D. Kan. June 20, 2005) (citations omitted). A statute is ambiguous when it is capable of being understood in two or more different senses. *Keller Tank Servs. II v. Comm'r,* 854 F. 3d 1178, 1197 (10th Cir. 2017) (agreeing with Tax Court that IRS regulation was ambiguous because it could be fairly be read to suggest two different possible meanings);

See also Abercrombie v. Aetna Health, Inc., 176 F. Supp. 3d 1202, 1207 (D. Colo. 2016).

The statutory language at issue in this case is contained in 25 U.S.C. §2719(b)(1)(B)(i) that permits gaming on land acquired in trust after October 17, 1988, if the "lands are taken into trust as part of a settlement of a land claim." This statutory phrase is not defined in IGRA, and Congress has not directly addressed the construction of the statutory language. The language of this exception can be fairly interpreted to apply to land taken into trust as part of an actual settlement of a land claim and not land that is taken into trust pursuant to a Congressionally mandated distribution of previously appropriated and paid judgment funds that does not involve any settlement between the Wyandotte Nation and the United States. The Department of Interior considered the statutory language in this IGRA exception sufficiently ambiguous that saw fit in 2008 to promulgate the regulations found at 25 C.F.R. §§ 292.2 and 292.5.

The court in *Wyandotte Nation v. NIGC* never declared that the statutory language of this IGRA exception as a whole was unambiguous--and Defendants do not suggest this. (Defendants' Opposition, p. 11). At most, the court in *Wyandotte Nation v. NIGC* construed that the term "land claim" (which is but a part of the entire statutory language at issue), according to its plain meaning, was not limited to a claim "for the return of land but rather, includes an assertion of an existing right to the land." *Wyandotte Nation v. NIGC,* 437 F. Supp. 2d at 1208.[8] That is as far as the court went. The balance of the language in the statutory exception is not analyzed at all. *Id.* at 1207-12. The most that can be said for that decision is that the court determined the Shriner Tract qualified for the "settlement of a land claim exception" because of the mandate surrounding the mandatory use of the $100,000 set-aside funds but not because of a finding of unambiguity in the language of the statutory exception as

[8] This construction of the phrase "land claim" is not inconsistent with the definition of "land claim" in 25 C.F.R. § 292.2.

a whole.

2. Scope of Review

"When a court reviews an agency's legal determination, it generally applies the analysis set out by the Supreme Court in *Chevron U.S.A. Inc. v. N.R.D.C,* 467 U.S. 837 (1984)." *Sinclair Wyo. Ref. Co. v. United States EPA,* 874 F. 3d 1159, 1163 (10th Cir. 2017). "*Chevron* applies when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001). There is nothing offered by Defendants suggesting that the regulations adopted by the Department of Interior in 25 C.F.R. §§ 292.2 and 292.5 fail to meet this threshold requirement. *See also,* Federal Register, 29353, *29354 (providing the authority for issuance of the 2008 regulations).

Under *Chevron*, the first step is to determine "whether Congress has directly spoken to the precise question at issue." *Sinclair Wyo. Ref. Co.,* 874 F. 3d at 1163, citing *Chevron,* 467 U.S. at 842-43. If "Congress has 'not directly addressed the precise question at issue'-if 'the statute is silent or ambiguous with respect to the specific issue'-the court must determine at *Chevron* step two 'whether the agency's answer is based on a permissible construction of the statute.'" *Id.* citing *Chevron,* 467 U.S. at 843-44. The agency's answer in the form of the regulations found at 25 U.S.C. §§ 292.2 and 292.5 are certainly a permissible construction of IGRA's statutory exception at issue. Again, Defendants do not suggest otherwise. Indeed, they have ignored the 2008 regulations completely and have banked their entire opposition on the fictitious notion that Defendants did not make a gaming determination, but if they did, they were compelled to reach the same result as in *Wyandotte Nation v. NIGC* despite material factual dissimilarities between the two situations and the adoption two years later by the

Department of regulations that require the opposite result form that reached in the Gaming Determination.

In *Chevron*, the Supreme Court held that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts." *National Cable & Telecommunications Association, v. Brand X Internet Services*, 545 U.S. 967, 980 (2005), citing *Chevron,* 467 U. S., at 865-66. "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* (citing *Chevron,* 467 U.S. at 843-44. The Supreme Court went on to explain the proper approach when a prior court decision (such as that in *Wyandotte Nation v. NIGC)* is in conflict with a subsequent agency construction such as those promulgated in 25 U.S.C. §§ 292.2 and 292.5:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.,* 517 U.S. 735, 740-41 ((1996). Yet allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute…would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps. See *Chevron,* 467 U.S. at 843-44. The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

National Cable & Telecommunications Ass'n, 545 U.S. at 982-83.

The Supreme Court explained that a contrary rule

> would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," *Mead Corp.,* 533 U. S., at 247 (Scalia, J., dissenting), by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results."

Id. 545 U.S. at 983.

Finally, the Supreme Court noted that

> *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes...The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law.

National Cable & Telecommunications Ass'n, 545 U.S. at 983-984.

The Tenth Circuit has recognized and followed these basic principles. *See, Hernandez-Carrera*, 547 F.3d 1237, 1244 (10th. Cir. 2008) (noting the Supreme Court in *National Cable &* that a "prior judicial construction of a statute trumps [a subsequent] agency construction otherwise entitled to *Chevron* deference ***only*** if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." (emphasis added) (quoting *National Cable & Telecommunications Ass'n,* 545 U.S. at 982.)).

At most, *Wyandotte Nation v. NIGC* construed only a portion ("land claim") of the operative statutory phrase "taken into trust as part of… a settlement of a land claim" to plainly include an assertion of an existing right to the land. The court in that case never held that the

operative phrase itself was unambiguous---as such, the 2008 regulations govern.

These holdings by the United States Supreme Court and the Tenth Circuit eviscerate Defendants insistence in their Opposition Brief that the *Wyandotte Nation v. NIGC* decision controls the Gaming Determination, especially in light of the 2008 adoption of 25 C.F.R. §§ 292.2 and 292.5. This is because agencies "are under an obligation to follow their own regulations, procedures and precedents, or provide a rational explanation for their departure. *Utahns v. United States DOT*, 305 F.3d 1152, 1165 (10th Cir. 2002). One court explained it like this:

> Importantly, "[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Big Horn Coal Co. v Temple,* 793 F.2d 1165, 1169 (10th Cir. 1986) (quoting *Nat'l Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959, 200 U.S. App. D.C. 89 (D.C. Cir 1979)); accord *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536, 254 U.S. App. D.C. 242 (D.C. Cir. 1986)("It is axiomatic that an agency must adhere to its own regulations."); *Sierra Club v. Flowers*, 526 F.3d 1353, 1368 (11th Cir. 2008) ("[A]n agency's failure to follow its own regulations and procedures is arbitrary and capricious.").

Peper v. Dep't of Agric. of the United States, No. 04-CV-01382-ZLW-KLM, 2010 U.S. Dist. LEXIS 142416 * 16 (D. Co. Dec, 8, 2010).

Finally, courts "may not accept…counsel's post hoc rationalizations for agency action… It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.,* 463 U.S. 29, 50 (1983) (internal citation omitted). *See also Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1060 (10th Cir. 2014) (explaining that "[w]e will not … accept appellate counsel's post-hoc rationalizations for agency action—we must uphold the agency's action 'if at all, on the basis articulated by the agency itself'") (citations omitted).

Not only did the Department fail to follow its own regulations as it has otherwise done since 2008, it provided no explanation---rational or otherwise---for its departure. The only explanations provided are *post hoc* rationalizations by Defendants' counsel.

Having addressed the analytical framework within which to evaluate Plaintiffs' request for preliminary injunctive relief and Defendants' opposition, the balance of this brief addresses the remaining arguments of Defendants not disposed of by the preceding discussion.

PLAINTIFFS HAVE DEMONSTRATED ALL OF THE ELEMENTS TO ENTITLE THEM TO THE PRELIMINARY INJUNCTIVE RELIEF REQUESTED

1. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits of Establishing that the Gaming Determination Should Be Vacated as Arbitrary and Capricious

Plaintiffs have provided the substantive basis above for rejecting Defendants' claim that Plaintiffs have not established a substantial likelihood of success on the merits that the Gaming Determination should be vacated because it is arbitrary and capricious, is in direct conflict with the agency's own regulations and because it lacks any reasoned decision-making. Defendants argue no gaming determination was made. That has been shown above to be nonsense. (*See infra,* pp. 7-9) As noted, Defendants made the Gaming Determination because the Wyandotte requested it in their land-to-trust application in April 1996, argued for it in their May, 2008 letter, it was withheld in July, 2014 because the land-in-trust application was denied by the Department and it was made by the Defendants on May 20, 2020--green lighting gaming on the Park City tract. The making of the Gaming Determination was consistent with the Department's own regulation codified at 25 C.F.R. § 292.3. The Gaming Determination was published on the website of the Office of Indian Gaming as exactly that--and it was identified in the Federal Register filing in June, 2020 as an acquisition of land in trust for gaming and other purposes. (*See infra*, pp. 8-9). Certainly, if Defendants had concluded in the Gaming Determination that gaming could not be conducted on the Park City tract, there would be no gaming at that site. The Gaming Determination was a pivotal and critical aspect of the May 20, 2020 Decision letter, which the Wyandotte Nation had specifically sought.

The decision in *Wyandotte Nation v. NIGC* is not binding precedent for the Gaming Determination, nor is it "consistent" for a number of reasons, none of which Defendants bothered to mention, much less analyze, in the Gaming Determination. First, it is not precedent or even "consistent" for the reason that the court pointed out in *Wyandotte Nation v. NIGC*: the Shriner Tract was purchased with all of the $100,000 set aside by PL 602 for the purchase of land that, once purchased, was required to be taken into trust. The Park City tract was purchased using none of those funds. Despite Judge Robinson illuminating the significance of that distinction in *Wyandotte Nation v. NIGC,* Defendants ignored it in their Gaming Determination. Instead, Defendants now twist this very significant and material fact distinction and suggest that "Plaintiffs attempt to confuse the issue". (Opposition Brief, p. 26).

Second, while the court in *Wyandotte Nation v. NIGC* construed the "plain meaning' of the term "land claim" from the statutory exception at issue to include "assertions of an existing right to the land", the court did not declare the entire statutory language to be unambiguous. Thus, the court did not foreclose the Department's determined need to promulgate gap-filling, definitional criteria to ensure that the "settlement of a land claim" exception is properly construed and applied--otherwise, the exception may unwittingly swallow the rule. *See Wyandotte Nation v. NIGC,* 437 F. Supp. at 1207-12.

Accordingly, the Department's 2008 regulations found at 25 C.F.R. §§ 292.2 and 292.5 trump the court's construction in *Wyandotte Nation v. NIGC,* even if the court's decision is inconsistent with or differs from the Department's interpretation codified in the later regulations. *National Cable & Telecommunications Ass'n,* 545 U.S. at 982-983. Defendants do not bother to mention their own regulations or if and how the acquisition of the Park City tract into trust satisfied the criteria of 25 C.F.R. § 292.5. Likely, this failure was due to a recognition that the Park City

tract trust acquisition obviously could not satisfy any of that criteria--so Defendants resorted to the "end run" of suggesting, without explanation, that the Gaming Determination was "consistent" with the decision in *Wyandotte Nation v. NIGC.* Clearly, it was not. Counsel for Defendants take this argument further by now arguing Defendants had "no discretion" and were bound to follow the decision in *Wyandotte Nation v. NIGC.* (Opposition Brief, p, 25). These *post hoc* arguments or rationalizations of counsel should be rejected.

It is for these reasons that Plaintiffs' maintain that they have shown a very substantial likelihood of success on the merits such that the Gaming Determination should be enjoined or stayed pending a decision on the merits.

2. Plaintiffs are Not Seeking to Alter the Status Quo or a Mandatory Injunction

Defendants claim that Plaintiffs are seeking to alter the status quo or are seeking some kind of mandatory injunction in their request for the preliminary injunction. Defendants advance this assertion without support and without any mention of the cases cited by Plaintiffs that establish that Plaintiffs merely seek to preserve the status quo through such preliminary injunctive relief. (Plaintiffs' Memorandum, p. 8). To be certain, Plaintiffs are seeking to preserve the status quo by staying implementation of the legal effect of the Gaming Determination until a final decision is made on the merits. The status quo is the last peaceable, uncontested status existing between the parties. *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)); *See also, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 342 F. 3d 1170, 1177-78 (10th Cir. 2003).

In the case at bar, the last peaceable, uncontested status existing between the parties is that which existed after the July 3, 2014 Denial letter of Assistant Secretary-Indian Affairs Kevin

Washburn and before issuance of the May 20, 2020 Decision letter at issue in this case. Defendants offer nothing to dispute this status. Plaintiffs' requested injunctive relief merely seeks to preserve this status quo and does not seek mandatory relief.

3. Plaintiffs Have Demonstrated Irreparable Harm in Two Distinct Ways

A. The Gaming Determination Has Deprived the State of its Sovereign Right to Permit or Deny Gaming at the Park City Tract

It has been demonstrated above that there are serious, substantial issues that compel the conclusion that the Gaming Determination permitting gaming on the Park City tract pursuant to the "settlement of a land claim" exception was arbitrary and capricious and should be vacated. As such, the only actual path for the Wyandotte to lawfully game on this land is 25 U.S.C. § 2719(b)(1), which is the so-called Two Part Determination. Under the Two Part Determination, gaming can only occur if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination that a gaming establishment "would be in the best interests of the Indian tribe and its members, and would not be detrimental to the surrounding community". *Id.*

By skirting the Department's 2008 regulations and incorrectly determining that gaming can occur on the Park City tract because of misperceptions as to the "consistency" between the Park City tract acquisition and the acquisition involved in *Wyandotte Nation v. NIGC*, Defendants have usurped the State of Kansas' sovereign right, through its Governor, to approve or not approve gaming on the Park City, Kansas site pursuant to 25 U.S.C. § 2719(b)(1). Somehow, Defendants have confused this obvious affront to the State's sovereign rights granted it in IGRA to some improper effort by the State to attempt to "regulate tribal gaming on Indian Lands under IGRA." (Opposition Brief, p. 17, n.4). As with most everything else, Defendants just get this wrong.

In *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001), the

court, in upholding a preliminary injunction preventing the state from enforcing state motor vehicle registration and titling laws against the tribe, said:

> Second, the injury to the tribe was irreparable because it could not be adequately compensated for in the form of monetary damages. Not only is harm to tribal self-government not easily subject to valuation but also, and perhaps more important, monetary relief might not be available to the tribe because of the state's sovereign immunity. *See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir.1994) (noting that "plaintiffs had established harm—a legally cognizable injury to them resulting from noncompliance with the Boren Amendment" and that the "plaintiffs' injury was irreparable" because "the Eleventh Amendment bars a legal remedy in damages").

Pierce is relevant because Defendants' Gaming Determination infringes on Kansas' sovereign right to authorize gaming on this tract of land within the state pursuant to 29 U.S.C. § 2719(b)(1), and said right is not subject to valuation. This alone establishes the requisite showing of irreparable harm to support the injunctive relief sought.

B. Plaintiffs Have Demonstrated That They Will Suffer Irreparable Economic Harm if Injunctive Relief is Not Granted

Plaintiffs have shown that at the Park City tract, the Wyandotte have recently opened a temporary gaming facility, intend to open a gaming facility with 500 machines as early as November 2020 and a permanent facility in 2021 with between 800-1200 machines. (Plaintiffs' Memorandum, ¶ 39 and Exhibits D, E and F). Defendants do not dispute this.

Currently, the State is entitled to receive 22% of the gross revenues from the Kansas Star Casino which is within 25 miles of the Park City tract. Plaintiffs Sumner County and the City of Mulvane, along with Sedgwick County, receive 3% of those gross revenues. (Plaintiffs' Memorandum, ¶ 40(a) and Exhibit P).[9] Defendants do not dispute that.

Finally, Plaintiffs have shown that the State will lose the sum of $1,524,072 annually and

[9] Plaintiffs are not relying on a conclusory or speculative affidavit suggesting mere possibilities to prove this aspect of the irreparable harm element of the preliminary injunctive relief sought. The affidavit is based on hard data and reports and precise methodology and findings. *See* Plaintiffs' Memorandum, Exhibit P.

Sumner County and the City of Mulvane, along with Sedgwick County, will lose $207,828 annually due to the presence of a temporary 500 machine gaming facility on the Park City tract. The losses to the State will be $6,825,192 annually and $962,462 annually to Sumner County and the City of Mulvane, along with Sedgwick County, once the permanent facility with 800-1200 machines is up and operating. (Plaintiffs' Memorandum, ¶ 40(a) and Exhibit P). Defendants only response to this is to say that Plaintiffs "assert no actual projected economic impact from the Nation's gaming operation, current or projected, on the Park City Parcel. *See* ECF No. 14 at 25." (Opposition Brief, p. 17).[10] Baffling as that statement is--it simply and completely misses the mark. Plaintiffs have quantified the size and portion of the impact attributable to the Gaming Determination. Defendants offer nothing of substance to dispute this.

Plaintiffs have clearly shown that that the specific economic loss is irreparable due to the sovereign immunity of both the United States and the Wyandotte Nation. Defendants do not dispute the existence of such sovereign immunity as a complete bar to any monetary damage claims. Rather, they suggest the bar of sovereign immunity to the recovery of monetary damages is not a basis to claim irreparable harm. (Opposition Brief, p. 19). But the cases cited by Defendants say precisely the opposite. Defendants cite *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536 (10th Cir. 1994). (Opposition Brief, p. 20). That case notes that an "Eleventh Amendment bar [to money damages]… indicates irreparability…" *Id.* at 1543-44. The Tenth Circuit has followed its rule that the Eleventh Amendment (or sovereign immunity) bar to damages constitutes irreparable harm in other cases. In *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010), the court said:

> We conclude that the Chambers will likely suffer irreparable harm absent a preliminary injunction. Imposition of monetary damages that cannot later be

[10] Page 25 of Plaintiffs' Memorandum made specific reference to the projected economic losses projected by the expert-but it referred to ¶ 39 and should have referred to ¶ 40.

> recovered for reasons such as sovereign immunity constitutes irreparable injury. *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994*); see also Ohio Oil Co. v. Conway*, 279 U.S. 813, 814, 49 S. Ct. 256, 73 L. Ed. 972 (1929) (holding that paying an allegedly unconstitutional tax when state law did not provide a remedy for its return constituted irreparable injury in the event that the statute were ultimately adjudged invalid); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir.2003) ("An irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." (quotation and emphasis omitted)). If forced to comply with the Oklahoma Act, the Chambers' members will face a significant risk of suffering financial harm as described in Part II. Yet, because Oklahoma and its officers are immune from suit for retrospective relief, *Edelman*, 415 U.S. at 667–68, 94 S.Ct. 1347, these financial injuries cannot be remedied. Should the Chambers' members decline to comply with the Act, they face investigation and other consequences for having engaged in a discriminatory practice under Section 7(C) and liability under Section 9 for having failed to verify the work authorization of independent contractors. I would further note that they face debarment from public contracts under Section 7(B). These consequences, in and of themselves, demonstrate a likelihood of irreparable harm.

See also, Prairie Band of Potawatomi Indians. 253 F.3d at 1251.

Defendants suggest that because there has been some kind of delay in the filing of the Motion for Injunctive Relief that somehow suggests the absence of irreparable harm. (Opposition Brief, p. 20). In *Kan. Health Care Ass'n,* 31 F.3d at 1543-44, the Tenth Circuit had the following to say about this claim of undue delay:

> Defendants argue that plaintiffs' delay in seeking injunctive relief undermines their claim of irreparable injury. While delay can undermine a claim of irreparable harm, we hold that it does not in this case. "As a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury." *Gibbs,* 838 F.Supp. at 928; *see also Lydo Enters., Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213 (9th Cir.1984). However, the district court found that "[t]he evidence proves that plaintiffs attempted through December 1992 to reach a negotiated settlement of this matter." *Kansas Health Care Ass'n,* 822 F. Supp. at 699. Within three months of having failed to reach such a settlement plaintiffs commenced this action. Under those circumstances, we are reluctant to hold that plaintiffs' delay should be fatal to their claim of irreparable injury. . . We are reluctant to criticize plaintiffs for awaiting specific and concrete documentation of the adequacy of their Medicaid reimbursement rates. Without such documentation, they run the risk of having their claimed injury be deemed speculative.

Id. at 1543-44.

Plaintiffs are in exactly the same situation. Plaintiffs took action when there was specific, concrete evidence that the Wyandotte Nation intended to start gaming. Merely starting construction wasn't enough to warrant injunctive relief. The land was originally their land, and they were free to build on it. Once it was in trust (a status that is also challenged in this case), they were no longer subject to local zoning and building codes, and they could have been building anything from a restaurant to a retirement center. Any request by Plaintiffs for injunctive relief would have been deemed too speculative. *See Stand Up for Cal. v. U.S. Dep't of the Interior,* 919 F. Supp. 2d 51, 83 (D.D.C. 2013) (denying a request for preliminary injunction in part because it was speculative as to whether the tribe would build a casino).

On page 20, Defendants also cite *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) ("Delay… undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."). *Williams* was a trademark infringement case in which the movant not only showed no likelihood of confusion in the use of the name, but showed that the defendant had been using the name for eight years, and the plaintiff had actually known of defendant's use for at least three years. In the present situation, Plaintiffs sought an injunction immediately after learning that gaming commenced.

Defendants cite a number of older district court cases saying that a number of months may be too much delay. In *Kan. Health Care Ass'n,* the Tenth Circuit held that a three month delay was not too much. But more importantly, there was no delay in this case. Plaintiffs in the present case sought a preliminary injunction immediately after gaming commenced. Had Plaintiffs sought a preliminary injunction sooner, in all likelihood the Defendants would have opposed it as too speculative. No harm has occurred to anyone due to Plaintiffs waiting until a request for preliminary relief was ripe. As had previously been noted, Plaintiffs advised the Wyandotte Nation

early on of this case and invited them to participate. (Plaintiffs Memorandum, p. 3, Ex. B.) Instead, the Wyandotte chose to commence gaming, assuming the risk of an adverse decision by the Court.

Finally, Defendants suggest that the requested injunction would not ameliorate Plaintiffs' irreparable harm. This argument is predicated on the same arguments dispelled above--that the Gaming Determination was never made, but if one was, it was governed by the *Wyandotte Nation v. NIGC* decision. This contention lacks merit. (*See infra,* pp. 7-9).

Enjoining the Gaming Determination would mean there is no lawful determination in effect that the Park City tract is eligible for gaming, a determination the Wyandotte Nation specifically sought. 25 U.S.C. § 2713(b)(1) and 25 C.F.R. § 573.4(a)(13) empowers the Chairman of the National Indian Gaming Commission to order temporary closure of a gaming facility that operates on Indian Lands not eligible for gaming under IGRA , which would be the case if the preliminary injunction issues.

C. The Equities Weigh in Favor of an Injunction.

In section three (3) of the Argument portion of Defendants' response, Defendants raise four arguments pertaining to the equities of issuing injunction. Specifically, Defendants contend that: (1) Plaintiffs failed to rebut a presumption that government action is taken in public interest; (2) Plaintiffs' requested injunction will not maintain the *status quo*; (3) Plaintiffs' requested injunction may harm the Wyandotte Nation; and (4) the requested injunction would frustrate the federal interest in "furthering Indian self-government." None of these arguments are compelling.

Defendants cite *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006), for the proposition that in determining whether an injunction is injurious to the public interest, all government action taken pursuant to a statutory scheme is deemed to have been taken in the public

interest. *Aid for Women* does not stand for that broad proposition. Instead, the case merely applies the *Heideman* rule, which states that when a preliminary injunction seeks to stay government action taken in the public interest pursuant to a statutory scheme, the "less rigorous fair-ground-for-litigation standard should not be applied." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Plaintiffs here have not asked the court to apply a "fair-ground-for-litigation standard," and have demonstrated a likelihood of success on the merits. *Aid for Women* and *Heideman* are thus inapplicable. In other words, Defendants are arguing against a standard that Plaintiffs have never claimed is applicable.

Defendants also argue that Plaintiffs' requested injunction disrupts the *status quo* and/or constitutes mandatory injunctive relief. Plaintiffs have addressed this argument. (*See infra,* p. 22). Suffice it to say, Plaintiffs' requested injunction preserves the *status quo*, and does not seek mandatory relief.

With regard to balancing of hardships, Defendants argue that Plaintiffs have the burden of establishing that "the threatened injury to the movant outweighs the injury to the other **party**" (Defendants' Opposition, p. 27) (emphasis added). Without citing any authority to the effect that interests of non-parties are relevant to this inquiry, Defendants claim that Plaintiffs' requested injunction could "potentially" harm the Wyandotte Nation. The Wyandotte Nation is not a party to this case, although the State of Kansas specifically invited the Tribe to participate in the case and to make whatever arguments it may have in response to Plaintiffs' claims. The Tribe chose not to do so, and any argument about the potential that the Tribe may suffer harm from the injunction is speculative and irrelevant. Nevertheless, even if harm to the Wyandotte Nation can be taken into consideration, the harm associated with a potential delay in opening its gaming facility, under the circumstances of this case, in reliance on a clearly arbitrary and capricious

gaming decision, pales in comparison to the irreparable injury that Plaintiffs will suffer if the injunction is not granted.

Defendants' reliance on *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) to suggest that the balance of harm weighs against Plaintiffs is misplaced. In that case, the State could not have any established economic loss or harm that it would suffer if the injunction was granted against it since the revenues to the State did not come into existence until a number of years later. Here, as is set forth above and in Plaintiffs' Memorandum, the Plaintiffs will suffer substantial and irreparable harm if the requested injunction is not granted, including lost revenue from the Kansas Star Casino.

Defendants' "furtherance of Indian self-government" argument is also unavailing. Not one of the cases cited by Defendants stands for the proposition that it is in the public's interest to allow gaming to occur pursuant to an arbitrary capricious gaming decision that is inconsistent with the Department's own regulations. Issuance of the injunction will not adversely impact the tribe's self-governance.

Defendants also contend that "in appropriate circumstances" tribes must be given the opportunity to pursue economic self-sufficiency and strong tribal government through gaming. While that may be true under "appropriate circumstances," appropriate circumstances do not exist for gaming on the Park City tract. *Stand Up for Cal. v. U.S. Dep't of the Interior*, 919 F.Supp. 2d at 85, does not support Defendants' argument on this point. While the court in *Stand Up for Cal.* did ultimately deny the injunction at issue, it did so because the movant failed to establish a likelihood of success on the merits. *Id* at 81. In discussing the public interest factor, the court noted that, due to the lack of the likelihood of success on the merits, enjoining the agency action would not be in the public interest. *Id* at 85. Because Plaintiffs here have demonstrated a

likelihood of success on the merits, *Stand Up for Cal.* does not provide any support for Defendants' position.

CONCLUSION

For the above reasons stated, it is respectfully submitted that the Court should stay the Gaming Determination 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 November 5, 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 counsel of record.

/s/ Mark S. Gunnison
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