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, KANSAS; CITY OF MULVANE, KANSAS; SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA; and IOWA TRIBE OF KANSAS AND NEBRASKA,	)	
Plaintiffs,	)	
v.	)	Case No. 2:20-cv-2386
SCOTT DE LA VEGA, in his official capacity as Acting Secretary of the U.S. Department of the Interior; DARRYL LACOUNTE, in his official capacity as Director of the U.S. Bureau of Indian Affairs,	)	
Defendants.	)	

DEFENDANTS' RESPONSE BRIEF
IN SUPPORT OF THE DEPARTMENT OF
THE INTERIOR'S MAY 20, 2020 DECISION

Table of Contents

Table of Acronyms and Defined Terms

APA	Administrative Procedure Act
Assistant Secretary	Assistant Secretary—Indian Affairs
BIA	Bureau of Indian Affairs
GAAP	General Accepted Accounting Principles
General Fund	Monies from the Settlement Fund directed to the Tribal Business Committee for the benefit of the Nation
Gottlieb Report	State's submission from Gottlieb, Flekier, & Co. discussed in 2014 Denial Letter
IGRA	Indian Gaming Regulatory Act
Interior	United States Department of the Interior
IRA	Indian Reorganization Act of 1934
Land Acquisition Funds	Monies within the Settlement Fund set aside for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Nation
May 20 Decision	Assistant Secretary's May 20, 2020 decision finding that the Park City Parcel was eligible for mandatory trust acquisition
Nation	Wyandotte Nation
NIGC	National Indian Gaming Commission
OFM	Office of Financial Management
RSM Report	Analysis by the auditing firm RSM US, LLP
Secretary	The Secretary of Interior
Settlement Fund	Funds distributed to the Nation for land acquisition, government services, and other purposes

2014 Denial Letter	Assistant Secretary's 2014 decision denying the Nation's application

Defendants Scott de la Vega, in his official capacity as Acting Secretary of the U.S. Department of the Interior, and Darryl LaCounte, in his official capacity as Director of the U.S. Bureau of Indian Affairs, hereby respond to Plaintiffs' Opening Brief in Support of Reversal of Agency Action of May 20, 2020. As demonstrated below, Plaintiffs' motion is without merit and should be denied. The Court should uphold the Assistant Secretary's May 20 Decision because it was based on substantial evidence in the record and complies with all relevant federal laws.

INTRODUCTION AND SUMMARY OF THE CASE

The Wyandotte Nation ("Nation") requested that the United States Department of the Interior ("Interior") take land in Park City, Kansas into trust under the Wyandotte Settlement Act, Pub. L. No. 98-602, § 105, 98 Stat. at 3151. In this Act, Congress directed the "mandatory" acquisition of land if the Nation purchased it with statutory qualifying funds ("Land Acquisition Funds" or "602 Funds"). Based on a review of evidence and arguments submitted by the Nation and the State of Kansas, an independent assessment of the Nation's accounting of its Settlement Act funds, and a consultation with the Office of Financial Management ("OFM"), on May 20, 2020, then-Assistant Secretary—Indian Affairs ("Assistant Secretary") Tara Sweeney concluded that the Park City Parcel was eligible for mandatory trust acquisition under the Act. In that same decision, the Assistant Secretary stated that the Nation may conduct gaming on the Park City Parcel pursuant to the Indian Gaming Regulatory Act's ("IGRA") "settlement of a land claim" exception. 25 U.S.C. § 2719(b)(1)(B)(i). On May 28, 2020, Interior acquired the Park City Parcel in trust for the benefit of the Nation.

Plaintiffs challenge Interior's conclusions as arbitrary and capricious under the Administrative Procedure Act ("APA") based on accounting related to the Land Acquisition Funds and the eligibility for gaming under IGRA. These arguments lack merit. First, regarding

the accounting, the Nation submitted documentation, reviewed by the agency, which demonstrated that the Park City Parcel was purchased with Land Acquisition Funds. The Assistant Secretary's May 20 Decision followed a determination in 2014 by then-Assistant Secretary Kevin Washburn, that the Nation had not demonstrated there were sufficient Land Acquisition Funds to purchase both the Park City Parcel, at issue here, and the Shriner Tract, land previously acquired in trust by Interior pursuant to Pub. L. 98-602's mandatory acquisition directive. ("2014 Denial Letter"). As explained in the 2014 Denial Letter, the State of Kansas raised one relevant accounting issue regarding interest deductions for land purchased with the Land Acquisition Funds that the Nation did not adequately refute. The Nation was nonetheless invited to rebut the State's accounting issue in the future. The Nation did so in 2017 when it submitted additional account audits and a new independent analysis by the auditing firm RSM US, LLP ("the RSM Report"). The RSM Report analyzed the financial information regarding the Settlement Fund[1] and, as confirmed by OFM, rebutted the State's interest deduction concerns and adequately demonstrated that there were sufficient Land Acquisition Funds to cover both the Park City Parcel and Shriner Tract purchases.

Plaintiffs now argue that the Park City Parcel cannot be acquired into trust because the Shriner Tract trust acquisition exhausted the Land Acquisition Funds and Pub. L. 98-602's mandatory acquisition directive. Pub. L. 98-602 does not limit the Nation to one land purchase with the Land Acquisition Funds and Plaintiffs make no attempt to argue otherwise. Instead Plaintiffs rely on selected Interior officials' past statements to argue that through these statements, Interior established "departmental policy" that the Shriner Tract exhausted the mandatory acquisition directive in Pub. L. 98-602. None of the prior statements established

[1] Both the RSM Report and the annual audits that RSM analyzed refer to the Settlement Fund as the "Claim Money Fund." AR4020-29; AR4065-4136.

official agency policy. They reflected an evolving analysis, as additional facts relating to the Land Acquisition Funds became available to Interior. And even if such statements did establish an official policy, Interior explained its change in the 2014 Denial Letter, satisfying any requirement under federal law. Plaintiffs also argue that the Nation's investment of the Land Acquisition Funds should not restrict the investment income to land purchases. But this argument has long been resolved by Interior and/or prior court decisions. Their accounting-based arguments boil down to a disagreement with the Assistant Secretary's May 20 Decision, which is not a sufficient basis to invalidate her decision. At bottom, the Assistant Secretary's determination is supported by substantial evidence in the record.

Second, with respect to gaming eligibility, Interior relied on precedent from this Court, *Wyandotte Nation v. National Indian Gaming Commission*, 437 F. Supp. 2d 1193 (D. Kan. 2006), which analyzed IGRA's statutory text, the Nation's claims before the Indian Claims Commission ("ICC"), and the mandate in Pub. L. No. 98-602, and concluded that land purchased with qualifying Land Acquisition Funds is gaming eligible. Although Plaintiffs attempt to distinguish this holding, *Wyandotte Nation's* conclusion directly applies to the Park City Parcel. Plaintiffs rely heavily on their reading of Interior's regulations implementing IGRA, 25 C.F.R. Part 292, to argue that the Park City Parcel does not meet IGRA's "settlement of a land claim" exception. But Interior's regulations do not override the unambiguous text of a statute as interpreted by *Wyandotte Nation*; thus, it was not necessary for Interior to apply its Part 292 regulations. Applying the APA's deferential standard of review, the Court should reject Plaintiffs' arguments and enter judgment in favor of Defendants.

QUESTIONS PRESENTED

1. Whether the Assistant Secretary validly determined that the Park City Parcel was purchased with statutory qualifying funds such that Interior was mandated to take the land into trust under the Wyandotte Settlement Act, Pub. L. No. 98-602.

2. Whether Interior's recognition that the Park City Parcel is eligible for gaming under IGRA's "settlement of a land claim" exception, 25 U.S.C. § 2719(b)(1)(B)(i), is arbitrary or capricious.

BACKGROUND

I. Statutory and Regulatory Background

A. Wyandotte Settlement Act

In 1984, Congress enacted the Pub. L. 98-602 "providing for the appropriation and distribution of money in satisfaction of judgments awarded to the Wyandotte[] [Nation] by the Indian Claims Commission and the Court of Claims." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1255 (10th Cir. 2001); 98 Stat. 3149 (1984). The judgments "were compensation for lands in Ohio that the Wyandottes had ceded to the United States in the 1800s." *Id*. The Settlement Act appropriated approximately $4.7 million to the Nation. AR4483. Pub. L. 98-602 distributed 80% of the funds to the Nation's members, including the Absentee Wyandottes,[2] on a per capita basis and the other 20% went to the Nation for land acquisition, government services, and other purposes. Pub. L. 98-602 § 105; AR4484.[3] This 20%, equaled approximately $938,000 (referred to herein as the "Settlement Fund"). AR4484. $839,000 from the Settlement Fund was

[2] When the Nation entered into another treaty with the United States in 1855 that required their members to become United States citizens and divided their ceded lands amongst its members, the Absentee Wyandottes refused citizenship and thus did not receive a portion of the Nation's ceded lands. *Sac & Fox Nation of Mo.*, 240 F.3d at 1254.

[3] Defendants mirror Plaintiffs' citations to the record, shortened to AR__. *See* Opening Br. at 1, fn.2.

directed to the Tribal Business Committee for the benefit of the Nation (referred to herein as the "General Fund"). Pub. L. 98-602 § 105(b)(2); AR4484. The remaining $100,000 was set-aside for "the purchase of real property *which shall be held in trust by the Secretary for the benefit of such Tribe*" ("referred to herein as the "Land Acquisition Fund" and the monies therein as "Land Acquisition Funds"). Pub. L. 98-602 § 105(b)(1) (emphasis added); AR4484. The Tenth Circuit concluded that Congress in Section 105 of Pub. L. 98-602 unambiguously "imposed a nondiscretionary duty on the Secretary" to acquire land in trust for the Nation if purchased with Land Acquisition Funds. *Sac & Fox Nation of Mo.*, 240 F.3d at 1262.

B. The Secretary's Authority to Acquire Land in Trust for a Tribe

The Secretary of Interior ("Secretary") may only acquire land in trust for a tribe where Congress provides her statutory authority to do so. One such authority is the Indian Reorganization Act ("IRA") of 1934, which authorizes the Secretary to acquire, in her discretion, land in trust for Indian tribes and individual Indians. 25 U.S.C. § 5108.[4] In other instances, such as here, Congress imposes a mandatory duty on the Secretary to acquire land in trust for a tribe. Pub. L. No. 98-602.

Regulations implementing Section 5108, set forth in 25 C.F.R. Part 151, govern the trust acquisition process. Some of the regulations do not distinguish between discretionary and mandatory trust acquisitions. For example, 25 C.F.R. § 151.9 provides that any tribe wishing to have land taken into trust must file a written request with the Secretary. But the majority of the regulations, by their terms, apply only to non-mandatory acquisitions. *See id*. § 151.10; 151.11 (stating the regulations are only to be considered when "the acquisition is not mandated."). These provisions also state that "the Secretary will notify the state and local governments having

[4] Formerly codified at 25 U.S.C. § 465.

regulatory jurisdiction over the land to be acquired, *unless the acquisition is mandated by legislation*.") *Id*. §§ 151.10; 151.11(d) (emphasis added).

C. Indian Gaming Regulatory Act and Part 292 Regulations

IGRA regulates gaming operations by Indian tribes on "Indian lands," which include land held in trust by the United States for an Indian tribe. 25 U.S.C. § 2703(4). But IGRA prohibits gaming on trust land acquired after the date of its enactment (October 17, 1988) unless an exception applies. *Id.* § 2719. One exception applies to "lands [that] are taken into trust as part of—[]a settlement of a land claim." *Id.* § 2719(b)(1)(B)(i). In 2008, Interior promulgated regulations to explain how it would interpret the statutory exceptions to IGRA's general prohibition on gaming on after-acquired trust land. 73 Fed. Reg. 29,354 (May 20, 2008) (codified at 25 C.F.R. Part 292). The "settlement of a land claim" exception is addressed at 25 C.F.R. § 292.2 (definition of "land claim") and § 292.5 (criteria for meeting the "settlement of a land claim" exception").

IGRA tasks Interior with making certain determinations under the Act, *see, e.g.,* 25 U.S.C. § 2719(b)(1)(A); § 2710(d)(8). However, through the passage of IGRA, Congress established the National Indian Gaming Commission ("NIGC") and vested ultimate enforcement authority in the NIGC, not Interior, to oversee gaming activity relevant to this case, Class II gaming operations. *Id*. §§ 2704; 2706(1). The Chairman of the NIGC is authorized to impose civil penalties against an Indian gaming operation for violations of IGRA and its implementing regulations, including the authority to "levy and collect civil fines" and the "power to order temporary closure of an Indian game" for a substantial violation. *Id*. §§ 2713(b)(1); 2705(a)(2).

II. Summary of the Facts[5]

A. The Nation's Investment of Land Acquisition Funds and Purchase of Real Property

Following distribution of the $100,000 Land Acquisition Funds under Pub. L. No. 98-602 to the Nation, the Nation used between $95,000 to $100,000 of the Funds to purchase mortgage bonds in 1986. AR4058, 2813. The Nation kept the bonds in a separate account from its other investments and also kept the Land Acquisition Funds not used to purchase bonds in the same account as cash. AR2814. The Nation withdrew $25,199.67 from the account in November 29, 1991 to purchase the Park City Parcel, a tract of land located in Park City, Kansas. AR4060. But after withdrawing the funds, a title issue arose preventing the purchase, and the Nation re-deposited the $25,199.67 into its main investment account that same day. AR8491. On December 30, 1991, the Nation closed the bond account and transferred the remaining balance, valued at $131,707.14, to its main investment account, commingling the Land Acquisition Funds with its other investments. AR4058. After the title issue on the Park City Parcel was resolved through probate, the Nation purchased the property, a roughly ten acre parcel of land, on November 25, 1992 for $25,000. AR5195, 8491-92. The Nation submitted a request that Interior

[5] Plaintiffs' suit involves claims under the APA, 5 U.S.C. § 706. *See* Compl. ¶¶ 80-89. Under the APA, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "As all material facts are within the administrative record, no material issues of fact are in dispute." *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d 1137, 1154 (D. Kan. 2013) (quotation omitted). Further, D. Kan. Rule 83.7.1, governs judicial review of administrative agency decision-making and, given record review principles, does not require that statements of undisputed material facts accompany the parties' briefs. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579–80 (10th Cir. 1994) (prohibiting motion "for summary judgment, supported by a statement of 'undisputed facts'" in APA case); *Staso v. United States*, 538 F. Supp. 2d 1335, 1337 (D. Kan. 2008) (recognizing that the District of Kansas amended D. Kan. Rule 83.7 in compliance with *Olenhouse*) (citing *Olenhouse*, 42 F.3d at 1579–80). Despite this prohibition, Plaintiffs included a Statement of Undisputed Facts in their Opening Brief to which Defendants are not required to respond given this is an APA case. However, Defendants note that Plaintiffs' Statement of Undisputed Facts is riddled with inappropriate inferences and argument. *Leathers v. Leathers*, No. CIV.A. 08-1213-MLB, 2012 WL 5936281, at *2 (D. Kan. Nov. 27, 2012) ("Statements of uncontroverted fact and responses thereto shall cite *only* facts. Argument and the drawing of inferences shall be reserved for the authorities and argument section of the memorandum."). Defendants instead offer a summary of the facts with appropriate citations to the record.

acquire the Park City Parcel in trust for the Nation in 1993 but withdrew the application in 1995.[6] AR4944. In 1996, the Nation purchased the Shriner Tract, a tract of land in Kansas City, Kansas, for approximately $180,000. AR4485. The Nation used funds from its commingled account to purchase both the Shriner Tract and the Park City Parcel. AR4061.

B. Previous Litigation Involving the Shriner Tract Trust Acquisition Pursuant to Pub. L. 98-602

On January 29, 1996, the Wyandotte Nation filed an application with the Secretary to acquire in trust four tracts of lands in Kansas City, Kansas, indicating that the Nation planned to build a Class II and Class III gaming facility on the land. *Sac & Fox Nation of Mo.*, 240 F.3d at 1256. On February 13, 1996, the Associate Solicitor for the Division of Indian Affairs at the Department of Interior issued an opinion "that the provisions of Pub. L. 98-602 mandated the Secretary to acquire the tracts of land in trust on behalf of the Wyandottes." *Id*. In mid-April 1996, the Nation narrowed the scope of the request to what it termed the "Shriner Tract," located in Kansas City, Kansas. *Id*. After reviewing the Associate Solicitor's previous opinion, the Bureau of Indian Affairs recommended the Assistant Secretary acquire the Shriner Tract in trust, and the Assistant Secretary concurred in the recommendation. *Id*. Following publication of a notice of intent to acquire the land in trust in the Federal Register, *id*, several parties, including three plaintiffs in this action: the State of Kansas, the Sac and Fox Nation of Missouri in Kansas and Nebraska, and the Iowa Tribe of Kansas and Nebraska, filed suit in federal court challenging the determination to acquire the Shriner Tract in trust on several grounds.

[6] The reason for the withdrawal was due to Interior's Tulsa Field Solicitor's office providing a memorandum to the BIA "stating that Public Law 98-602 did not impose a mandatory duty on the Secretary to take the Park City Land into trust and that the monies awarded to the Nation under Public Law 98–602 were not in settlement of a land claim." *Wyandotte Nation v. Salazar*, 939 F. Supp. 2d at 1142–43. This Court has since determined that lands purchased with the Land Acquisition Funds fall with the plain meaning of IGRA's settlement of a land claim exception to IGRA's general prohibition on gaming for lands acquired in trust after 1988. *Wyandotte Nation*, 437 F. Supp. 2d at 1210.

What followed was over a decade of litigation and several opinions by the District Court for the District of Kansas and Tenth Circuit. In relevant part, the Tenth Circuit upheld the Secretary's conclusion that "his discretion regarding whether to acquire the Shriner Tract on behalf of the Wyandotte Tribe was curtailed by Pub. L. 98–602," *id*. at 1261, reasoning that "the Secretary's interpretation is easily affirmed under the first test set forth in *Chevron*, i.e., 'whether Congress has directly spoken to the precise question at issue,'" *id.* at 1262 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The Tenth Circuit also remanded to the Secretary "for further consideration of the question of whether Pub. L. 98–602 funds were used for the acquisition of the Shriner Tract." *Id*. at 1268.

On remand, the Nation submitted the KPMG Report to the Secretary. That Report traced the amount of available Land Acquisition Funds for the Shriner Tract purchase. KPMG Report AR4598-4609. The KPMG Report accounted for a prior $25,199.67 purchase in 1991 from the Land Acquisition Funds, for the Park City Parcel,[7] and concluded that there were sufficient Land Acquisition Funds, $212,170, to purchase the Shriner Tract for $180,000 in 1996. *Id*. The Secretary determined that the Nation used only the Land Acquisition Funds to purchase the Shriner Tract. Determination of Trust Land Acquisition, 67 Fed. Reg. 10926-01 (March 11, 2002). In publishing the decision in the Federal Register, the Secretary noted that upon receiving the Land Acquisition Funds, the Nation "purchased $100,000 of mortgage obligation bonds on May 14, 1986." *Id*. And while the earnings on the invested Land Acquisition Funds were

[7] As explained further below, during the Shriner Tract litigation, "all parties and the KPMG analysis had assumed that the Nation withdrew Land Acquisition Funds in November 1991 to purchase the Park City Parcel" but the Nation's supplemental documents demonstrated that "the Nation withdrew funds to buy the Park City Parcel *after* it had commingled its 602 Funds." AR4060; *see also* AR4142 (Interior official testifying in deposition "that the tribe had used $25,000 of the 100,000 to purchase in Park City" leaving $75,000 plus interest for the Shriner Tract purchase); *see also* AR4139 (Interior responding to interrogatory that "[t]o the best of our knowledge and belief, the Wyandotte [Nation] used $25,000.00 of the [Land Acquisition] funds to purchase lands in Park City, Kansas, and the remaining principal and interest to purchase the Shriner Tract in Kansas City, Kansas.").

commingled with the Nation's main investment account—based on submissions from the Nation analyzing the bank account statements and tracing the use of Land Acquisition Funds to purchase and sell securities—the Secretary concluded that at the time of disbursement of the $180,000 to purchase the Shriner Tract, "the remaining accumulated amount of section 602 funds and the dividends and interest of those funds, was $212,169.65." *Id*.

Several parties, including the State of Kansas, Sac and Fox Nation, and the Iowa Tribe of Kansas and Nebraska, sought reconsideration by the Assistant Secretary. After the Assistant Secretary upheld the BIA's determination, the parties filed a new suit in this Court challenging the Secretary's decision. *Governor of Kansas v. Norton,* 430 F. Supp. 2d 1204, 1209 (D. Kan. 2006). The *Norton* Court upheld the Secretary's determination that: (1) the Nation purchased the Shriner Tract with Land Acquisition Funds; and (2) the Nation was authorized to use investment income derived from the original $100,000 set aside pursuant to Pub. L. 98-602 to acquire the Shriner Tract. *Id*.

As the Court noted, the Shriner Tract dispute turned on the value of the Land Acquisition Funds, as set forth in two different forensic accounting approaches. *Id.* at 1223-25. The KPMG Report valued the total value of Land Acquisition Funds (principal plus interest) based on their face value, *i.e.*, the matured amount of the investment plus earnings. *Id.* at 1211-12, 1216-17. The KPMG Report restricted the Land Acquisition Funds (principal $100,000 plus earnings) by deducting only expenditures for land purchases and determined that there were sufficient Land Acquisition Funds to cover the $25,000 purchase for the Park City Parcel in 1991 and the $180,000 Shriner Tract purchase in 1996. AR4598-4609; *see also Norton*, 430 F. Supp. 2d. at 1211-12; *see also* AR4486; *see also* AR4058-59. The plaintiffs' rebuttal forensics accounting analysis offered an alternative methodology based on the market value of the Land Acquisition

Funds, which was insufficient to cover the Shriner Tract purchase. *Norton*, 430 F. Supp. 2d at 1223-25.

The Department's financial analyst, Thomas Hartman, agreed with the KPMG Report's methodology because there was no reason to believe that the invested Land Acquisition Funds "lost money." *Id.* at 1216-17, 1223-24. Based on the KPMG Report and Hartman's analysis, the Secretary determined that the Shriner Tract was purchased with Land Acquisition Funds. *Id.* at 1209. The Court deferred to Interior's reliance on the KPMG Report's methodology and rejected the plaintiffs' alternative methodology. *Id.* at 1225 ("The fact that plaintiffs harbor a difference in accounting analysis is insufficient to find the agency decision to be arbitrary and capricious, and the Court will not overturn the agency's decision on this basis.").

Further, the *Norton* Court rejected the plaintiffs' argument that Pub. L. 98-602 unambiguously only allows "$100,000 and $100,000 alone could be spent on the land acquired pursuant to Section 105(b)(1)." *Id*. at 1218. In doing so, the Court stated that Pub. L. 98-602 "does not clearly limit the Tribe to the purchase of a parcel with a price of $100,000 or less, nor does it clearly prohibit use of money resulting from the investment of that amount being applied to the purchase price of any property." *Id*. The Court further concluded that the Assistant Secretary's interpretation of Section 105(b)(1), concluding that Pub. L. 98-602 does not prevent the Nation from utilizing both the $100,000 set-aside funds and any interest accruing from investment thereof to purchase real property pursuant for Section 105(b)(1), "is entitled to deference and should be affirmed under *Chevron*." *Id*. at 1219-20.

On appeal, however, the Tenth Circuit vacated the district court's decision, holding that because the plaintiffs initiated suit after the land had been acquired in trust, the Quiet Title Act

barred plaintiffs' suit, and therefore the district court lacked jurisdiction to decide the case.[8] *Governor of Kansas v. Kempthorne*, 516 F.3d 833, 846 (10th Cir. 2008); *see also Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1238-39 (10th Cir. 2010) (upholding the district court's dismissal for lack of jurisdiction, after plaintiffs sought to reopen earlier case).

C. *Wyandotte Nation v. National Indian Gaming Commission*

In 2004, during the pendency of the above litigation, in response to the Nation's commencement of Class II gaming on the Shriner Tract and a request from the Nation to the NIGC to review and approve an amended gaming ordinance pursuant to 25 U.S.C. § 2710, the NIGC issued a decision that the Nation "may not lawfully game on the Shriner Tract, based on its determination that none of the exceptions to IGRA's general prohibition [on gaming on lands acquired after October 17, 1988] were applicable." *Wyandotte Nation*, 437 F. Supp. 2d at 1201. The Nation sued the NIGC, and the District of Kansas concluded that the NIGC's determination that the Shriner Tract did not qualify for gaming under the settlement of a land claim exception in IGRA was arbitrary and capricious. *Id*. at 1207-12. There, this Court noted that when the Nation, "along with other tribal signatories to the Treaty of Greenville," brought its case against the United States in the ICC, it "asserted claims for the tribal land cessions to the United States under the Treaty of Fort Industry of 1805 and the Treaty of September 29, 1817, respectively," including "(1) whether the tribes held recognized title to the property, and (2) if so, what percentage interest each tribe held." *Id.* at 1207. The Court also pointed to the fact that the ICC held that the Nation was granted recognized title to certain lands by virtue of the two treaties and

[8] The Supreme Court has since held the APA acts as a waiver of sovereign immunity, thus permitting parties to challenge decisions to acquire land in trust, even after the land has been acquired in trust by the Secretary, notwithstanding the Quiet Title Act. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012).

awarded damages. *Id*. In the ICC action, therefore, the Nation sought a monetary remedy for the loss of its lands. *Id.* at 1210.

The *Wyandotte Nation* Court analyzed IGRA's "settlement of a land claim" exception, concluding that the "plain language" of the exception does not preclude the type of claim brought by the Nation in the ICC. *Id*. at 1207. The Court also recognized "Congress mandated that $100,000 of the Tribe's ICC judgment funds be utilized to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's land claims." *Id*. at 1210. Therefore, the Court concluded that "the remedy for a land claim is monetary, rather than specific relief, is irrelevant where, as here, Congress mandated that the monetary remedy be utilized to purchase land to be held in trust for the benefit of the Tribe." *Id*. Following the Court's remand, the NIGC Chairman issued a letter on September 28, 2007, approving the amended gaming ordinance. ECF No. 19-1 at 5.

D. Trust Acquisition of the Park City Parcel

On April 13, 2006, the Nation submitted an application requesting that Interior acquire the Park City Parcel in trust for the Nation pursuant to the Secretary's discretionary authority under the IRA. AR2381. Two years later, the Nation revised its application, asserting that it purchased the Parcel with Land Acquisition Funds, and therefore requested that the Secretary acquire the land as a mandatory trust acquisition. AR1369-74.

1. The Assistant Secretary's 2014 Decision Denying the Nation's Application

On January 30, 2009, the Eastern Oklahoma Regional Director of the Bureau of Indian Affairs ("BIA"), transmitted a memorandum recommending that the Assistant Secretary acquire the Park City Parcel in trust for the Nation pursuant to the Settlement Act. AR1173-74. When the Assistant Secretary did not make a decision on the application by 2011, the Nation filed suit

against Interior in the District Court for the District of Columbia on July 26, 2011 seeking an order directing Interior to acquire the Parcel in trust and also alleging undue delay in making a decision. AR2498, 2500-01. After the D.C. District Court transferred the case to this Court, the Court declined to grant the relief sought but "retain[ed] jurisdiction over this case until the Secretary issues a final ruling on the Nation's application." *Wyandotte Nation*, 939 F. Supp. 2d at 1154.

On July 3, 2014, then-Assistant Secretary Washburn issued a decision on the Nation's application, determining that the Nation had not submitted sufficient documentation to demonstrate that the Park City Parcel was purchased with Land Acquisition Funds, and denying the application on that basis. AR4064. The Assistant Secretary, in making his decision, recognized that this Court in *Norton,* 430 F. Supp. 2d, 1217-20,[9] affirmed Interior's position that the "Nation could invest its 602 Funds and add the interest it earned from the 602 Funds to the principal $100,000 to purchase property for acquisition under the Act." AR4058. The Assistant Secretary therefore reasoned that in order for the mandatory trust provision to apply to the Park City Parcel, the Nation had to demonstrate sufficient Land Acquisition Funds, taking into account the principal of $100,000 and any accrued interest from investment of those funds, to purchase the Park City Parcel for $25,000 in 1992, and the Shriner Tract for $180,000 in 1996. *Id*.

The Assistant Secretary first looked to the expert accounting analysis provided by accounting firm KPMG, hired by the Nation, during the remand ordered by the Tenth Circuit in *Sac & Fox Nation of Missouri*, 240 F.3d at 1268, in the Shriner Tract litigation. *Id*. There, KPMG tracked the amount of investment earned on the Land Acquisition Funds during the ten-

[9] *Rev'd on other ground Governor of Kansas v. Kempthorne,* 816 F.3d 833 (10th Cir. 2008).

year period of investment following Pub. L. 98-602's appropriation of the $100,000 to the Nation in 1986. *Id*. He recognized that during the Shriner Tract litigation, "all parties and the KPMG analysis had assumed that the Nation withdrew Land Acquisition Funds in November 1991 to purchase the Park City Parcel" but the Nation's supplemental documents demonstrated that "the Nation withdrew funds to buy the Park City Parcel *after* it had commingled its 602 Funds." AR4060. Therefore, he reasoned that because the Park City Parcel was purchased on November 24, 1992 with commingled funds, "the Nation was required to demonstrate that it had enough 602 Funds in its commingled account to cover the Park City Parcel purchase so that [Interior] can consider the disbursement of assets on November 24, 1992 an expenditure of 602 Funds that triggers the mandatory acquisition authority under the Act." *Id*. The Assistant Secretary accepted that KPMG could only determine "the value of the 602 Funds by attributing a prorated share of the interest earned by the account overall to the 602 Funds," and he further recognized that "this showing is complicated by the later Shriner Tract acquisition, which the Nation, the Department, and the district court all have agreed was completed using wholly 602 Funds (plus interest)." Therefore, the Assistant Secretary concluded that the Nation must show it had sufficient Land Acquisition Funds to purchase both properties. AR4061.

Next, the Assistant Secretary turned to the State's arguments opposing the Nation's position that the Park City Parcel was purchased with Land Acquisition Funds. *Id*. He recognized that the State was attempting to re-visit issues resolved in the Shriner Tract litigation, such as the scope of the Secretary's authority under Pub. L. 98-602, the gaming eligibility on the Park City Parcel, and the sufficiency of the Shriner Tract accounting, and declined to do so. *Id*. He further rejected the State's argument that Interior officials understood that the Nation could only receive one mandatory trust acquisition pursuant to Pub. L. 98-602. *Id.* at n.37. The Assistant Secretary

explained that "[n]ot only does the Act not limit the number of acquisitions by its express terms, the statements the State identifies were made before the Department had the benefit of an accounting of the 602 Funds to know how much the 602 Funds had grown in value by July 1996." *Id*. at n.37.

The Assistant Secretary, however, reviewed the State's submission from, Gottlieb, Flekier, & Co. (the Gottlieb Report). *Id.* AR6061-62. Based on that review, the Assistant Secretary found (after consultation with Interior's Office of the Special Trustee for American Indians) that the Gottlieb Report was correct on one issue; the KPMG analysis "failed to account for certain interested related deductions applied against the Nation's commingled account[.]" *Id*. This error resulted in an overstatement of interest earned by the Land Acquisition Funds. *Id.* On this basis, while noting this was the first time the State raised this particular argument, the Assistant Secretary determined that the KPMG Report did not support a finding that there were sufficient Land Acquisition Funds to purchase both the Park City Parcel and Shriner Tract "given the new documentation before us regarding the timing of the Park City Parcel purchase and the Gottlieb Report concluding that KPMG overstated the amount of interest earned by the 602 Funds." AR4063. The Assistant Secretary, in denying the application, invited the Nation to submit a new application if it could adequately rebut the accounting issues raised by the State. *Id*.

2. The Assistant Secretary's May 20 Decision to Acquire the Park City Parcel in Trust for the Nation as a Mandatory Trust Acquisition Pursuant to Pub. L. 98-602

Three years later, on October 17, 2017, the Nation submitted a new application containing additional information addressing the accounting issues and a financial analysis submitted by an auditing firm, RSM US, LLP.[10] AR3981. In the application, the Nation

[10] The Nation submitted a previous application on December 3, 2015 but withdrew it on August 18, 2017. AR8682.

explained that that RSM Report relies on new data not previously analyzed by KPMG or Interior. *Id*. It also noted that as part of its investigation following the Assistant Secretary's 2014 Denial Letter, the Nation located "the annual audits of the Nation's PL-602 Claims Money Funds for the years 1986 thru 1996 (with the exception of the 1988 audits), and obtained information from the BIA [] on the distribution of the PL-602 Claims Money Funds between the Wyandotte Nation and the Absentee Wyandottes." *Id*.

The RSM Report analyzed the annual audits performed by Roy A. Ober (the Ober Audits AR4065-4136), the monthly account statements for the three investment funds that housed the Land Acquisition Funds, and the history and distribution of the Fund. AR4020-29. RSM utilized four assumptions: (1) income earned on the $100,000 initially appropriated by Congress may be considered additional Land Acquisition Funds for trust acquisitions under the Act; (2) the accounts from the annual financial audits relevant to the analysis were the Money Market, Investments: Mortgage Collateralized Bonds and Other, and Notes Payable (AG Edwards and Mercantile) on the Balance Sheet and the Income: Interest, Income: Dividends, and Expenditures: Interest on the Income Statement; (3) for the missing 1988 audit, RSM "averaged the known relevant income and interest expense amounts for the fiscal years ending in 1987 and 1989;" and (4) the "beginning point for the analysis" for the Settlement Fund was $938,706 from an annual audit ending in fiscal year July 11, 1986, which included the $100,000, Land Acquisition Funds for land acquisitions. AR4025.

From there, RSM "allocated relevant income earned each year" based upon the percentage of the beginning balance of the Land Acquisition Fund in relation to "the beginning balance of the total invested funds held by the Nation in the Claim Money Fund." *Id*. RSM then reduced the investment interest expense prior to allocating the funds between the Land

Acquisition Funds and the other investments for each year. *Id*. In the years the Nation purchased the Park City Parcel and Shriner Tract, 1992 and 1996 respectively, RSM "prorated the amount of the land purchase based on the properties purchase date and reduced the beginning balance of the 602 Land Acquisition Funds accordingly." *Id*. Based on this analysis, RSM concluded that in the beginning of fiscal year ending in August 1993, the Land Acquisition Funds were $173,647, and by the end of fiscal year August 1993, reducing the $25,000 paid for the Park City Parcel in November 1992, the Land Acquisition Funds totaled $162,967. AR4026. RSM further concluded by the beginning of fiscal year ending in September 30, 1996, the Land Acquisition Funds had a balance of $187,950, and by the end of that fiscal year, reducing the $180,000 paid for the Shriner Tract on July 12, 1996, the Fund had a remaining balance of $17,845. *Id*. Based on this, RSM concluded there were sufficient Land Acquisition Funds, taking into account interest earned, to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996. *Id*.

On May 20, 2020, then-Assistant Secretary Sweeney issued a decision on the Nation's new application to acquire the Park City Parcel pursuant to Pub. L. 98-602. AR4482. The Decision explicitly stated that "the sole remaining question after years of litigation is whether the Nation used Land Acquisition Funds alone to purchase the Park City Parcel." AR4483. The Assistant Secretary found that based on the RSM Report, the annual audits, submissions by the parties, and the record before her, "there were sufficient" Land Acquisition Funds "to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996," based on her review of the Land Acquisition Funds, past decisions by Interior and the federal courts, and the new evidence and expert analysis submitted by the Nation. AR4493.

Prior to making this determination, the Assistant Secretary consulted with OFM. AR4489. On February 26, 2020, OFM reviewed the RSM Report, which "deducted margin

interest-related costs before interest earned was attributed to the Land Acquisition Fund," therefore ensuring "the growth of the Land Acquisition Fund was not overstated" (addressing "the Gottlieb Report's critique of the KPMG Report"). AR3934. As a result, OFM concluded that the RSM Report's "methodology, calculations, and assumptions are consistent with industry standards and the RSM Report's conclusions are reliable under the consistency principle of General Accepted Accounting Principles (GAAP)." AR3932. The Assistant Secretary concluded based on OFM's analysis and the record, that "the Nation has rebutted the Gottlieb Report as well as the Department's previous conclusion that there was insufficient Land Acquisition Funds available to purchase the Park City Parcel." AR4493. Thus, she determined that Interior was mandated to acquire the Park City Parcel in trust for the Nation. *Id*.

The Assistant Secretary further determined that the Nation may conduct gaming on the Park City Parcel because based on the decision in *Wyandotte Nation*, 437 F. Supp. 2d 1193, "this acquisition qualifies 'as a settlement of a land claim' exception to IGRA Section 2719 prohibition on gaming on lands acquired after October 17, 1988." *Id*. at 12. Notice of the May 20 Decision was published in the Federal Register on June 3, 2020. 85 Fed. Reg. 34221 (June 3, 2020).

III. Procedural Background

On August 10, 2020, Plaintiffs filed suit against Defendants challenging the May 20 Decision. ECF No. 1. On October 26, 2020, Plaintiffs the State of Kansas, the Board of County Commissioners of the County of Sumner, Kansas, the City of Mulvane, Kansas, and the and Iowa Tribe of Kansas and Nebraska (through joinder) filed a preliminary injunction motion seeking to enjoin the Assistant Secretary's acknowledgment that the Nation may game on the Park City Parcel. ECF Nos. 13, 18. Defendants timely answered the complaint on October 27,

2020. ECF No. 20. The Court denied the preliminary injunction on November 23, 2020, concluding that Plaintiffs failed to show a likelihood of success on the merits or irreparable harm. ECF No. 22. On December 2, 2020, Defendants lodged the administrative record, ECF No. 25, and after leave of the Court, supplemented the administrative record on January 21, 2021, ECF No. 33. On February 5, 2021, Plaintiffs filed their Opening Brief, ECF No. 34. Appended to Plaintiffs' filing was an affidavit prepared by Jerrold Gottlieb, the State's expert, along with two exhibits, ECF No. 34-14, prepared for this litigation and not part of the administrative record for the May 20 Decision. On February 19, 2021, Defendants filed a motion the strike the Gottlieb Affidavit and exhibits as well as those portions of Plaintiffs' Opening Brief that relied on the Affidavit. ECF No. 35. Defendants further requested expedited briefing on the motion to strike and to stay the deadline for Defendants' response to Plaintiffs' Opening Brief. *Id*. The Court stated, *inter alia*, on February 24, 2021, that it "is disinclined to resolve the motion to strike at this stage, expedite its briefing, or stay the response deadline for Defendants' brief." ECF No. 37. Instead, the Court decided "that it will take up the motion to strike at the same time it resolves Plaintiffs' Opening Brief." *Id*.

STANDARD OF REVIEW

Plaintiffs seek judicial review of the May 20 Decision pursuant to the APA, 5 U.S.C. §§ 701-706. Section 706(2)(A) of the APA provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* § 706(2)(A). This standard "is a deferential one; administrative determinations may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency." *Utahns for Better Transp. v. U.S. Dep't of Transp*., 305 F.3d 1152, 1164 (10th Cir. 2002). "APA review is narrow," and a court

"presume[s] that an agency action is valid unless the party challenging the action proves otherwise." *Hays Med. Ctr. v. Azar*, 956 F.3d 1247, 1264 (10th Cir. 2020). The Court need not find that Interior's decision "is the only reasonable one, or even that it is the result [the court] would have reached." *Am. Paper Inst., Inc., v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 422 (1983). Interior's interpretation of the statutes that the agency is entrusted to administer is reviewed pursuant to the APA principles enunciated in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. Interior properly determined that the Nation purchased the Park City Parcel with statutory qualifying funds, thus triggering Congress' mandate that Interior acquire the land in trust for the Nation

The Assistant Secretary explained her decision that the Park City Parcel was purchased with Land Acquisition Funds and therefore qualified for mandatory trust acquisition based on an extensive review of the KPMG Report, the Gottlieb Report, the RSM Report, and the underlying financial records. Under the APA, all that is necessary is that there be a brief statement as why the agency "chose to do what it did." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (internal quotation omitted). The May 20 Decision far exceeded that requirement here. *See Nat. Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1042 (D.C. Cir. 2012) ("[C]ourts may not, under the guise of the APA's arbitrary-and-capricious review standard, impose procedural requirements that the APA[] . . . do[es] not impose."). In fact, Interior, at both the OFM and the Assistant Secretary levels, engaged in considerable analysis as to why and how the Park City Parcel could be taken into trust as a mandatory acquisition.

Interior relied on the KPMG Report when the Assistant Secretary determined that the Nation purchased the Shriner Tract with Land Acquisition Funds in her Opinion on

Reconsideration in 2003, AR4513-60, which was before this Court in *Norton*, 430 F. Supp. 2d 1204.[11] The KPMG Report traced the total value of Land Acquisition Funds (principal plus earnings) based on their face value, *i.e.*, the matured amount of the investment plus earnings. *Id.* at 1211-12, 1216-17. It also restricted the Land Acquisition Funds (principal plus earnings) by deducting only land purchases and determined that there were sufficient Land Acquisition Funds for the $25,000 purchase for the Park City Parcel in 1991[12] and the $180,000 Shriner Tract purchase in 1996. AR4598-4609; *see also Norton*, 430 F. Supp. 2d. at 1211-12; *see also* AR4486; *see also* AR4058-59.

In *Norton*, the Court noted that Interior's financial analyst agreed with the KPMG Report's methodology because there was no reason to believe that the invested Land Acquisition Funds "lost money." *Id.* at 1216-17, 1223-24. The Court rejected the alternative accounting methodology proposed by the State, deferring to Interior's reliance on the KPMG Report's methodology and rejected the plaintiffs' alternative methodology.[13] *Id.* at 1225 ("The fact that plaintiffs harbor a difference in accounting analysis is insufficient to find the agency decision to be arbitrary and capricious, and the Court will not overturn the agency's decision on this basis."). This Court, while vacated on other grounds, affirmed Interior's decision to acquire the Shriner Tract into trust, based on the KPMG Report, *id.*, and that Tract remains in trust.

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[11] Many of the same plaintiffs in *Norton* are Plaintiffs here: Kansas, Iowa Tribe of Kansas and Nebraska, Sac and Fox Nation of Missouri in Kansas.

[12] During the Shriner Tract litigation, "all parties and the KPMG analysis had assumed that the Nation withdrew Land Acquisition Funds in November 1991 to purchase the Park City Parcel" but the Nation's supplemental documents demonstrated that "the Nation withdrew funds to buy the Park City Parcel *after* it had commingled its 602 Funds." AR4060.

[13] As explained further below, Plaintiffs fail to acknowledge that the KPMG Report's methodology was accepted by Interior and upheld in *Norton*. While the *Norton* case was reversed on other grounds, it cannot be argued that any court has ever disagreed with Interior's acceptance of the forensic accounting methodology upheld in *Norton*. Additionally, Plaintiffs rely on *Norton* to support their arguments. Opening Br. at 44.

The Nation submitted the KPMG Report in support of the mandatory trust acquisition request for the Park City Parcel. AR4486. The State opposed the Nation's request and submitted to Interior several letters voicing their opposition. AR2218-30; AR37598-60. The State made many arguments based on their accountant's report, the Gottlieb Report, and all but one were expressly rejected in the 2014 Denial Letter because they were "raised and resolved in connection with the Shiner Tract ligation[.]" AR4061. There, then-Assistant Secretary Washburn found that only one issue in the Gottlieb Report—that the KPMG Report did not subtract interest-related deductions from the investment income—deserved further investigation. AR4061-62. Even though the Shriner Tract plaintiffs generally argued that the KPMG Report overstated the Land Acquisition Funds in the previous litigation, they did not specifically raise the interest-related deduction issue. *Id.*

The 2014 Denial Letter noted, but did not expressly accept, the Gottlieb Report's estimate, accounting for the $25,000 Park City purchase in 1992 and the interest-related deductions, that the result was a balance of $161,373.47, which was not enough to cover the $180,000 Shriner Tract purchase. AR3758-3809. The Assistant Secretary considered the Nation's response to the Gottlieb Report, AR8488-8527, but ultimately concluded that the Nation did not effectively address the interest-related deduction issue raised by the State. AR4062. Accordingly, Assistant Secretary Washburn was unable to conclude that there were sufficient funds to cover both purchases, but the Nation was invited to rebut the State's interest-related deduction issue in the future. AR4064. Thus, in 2020, the only remaining issue to be resolved was whether the Nation could demonstrate that there were sufficient Land Acquisition Funds to cover both the Park City and Shriner Tract purchases. Assistant Secretary Sweeney considered the foregoing and the Nation's 2017 submissions, including the RSM Report and

additional annual audits, and, after consultation with OFM, determined that there were sufficient Land Acquisition Funds for both purchases. The May 20 Decision is based on substantial evidence and is entitled to judicial deference.

Judicial deference to Interior's conclusion is particularly appropriate here because the issue presented involves analyses within the agency's area of expertise. When the resolution of a dispute primarily involves issues of fact, and analysis of the relevant information requires a high level of expertise, courts must defer to the informed discretion of the responsible federal agency. *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997). And Interior's expertise in Indian matters is indisputable. *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) ("It cannot be denied that [Interior] has special expertise and extensive experience in dealing with Indian affairs."); *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) (recognizing Interior's "broad power to carry out the federal government's unique responsibilities with respect to Indians"). *See* 25 U.S.C. §§ 2, 9 (delegating "the management of all Indian affairs" to the Secretary of the Interior). This expertise extends to consideration of accounting submissions and application of GAAP. This expertise is of course manifest within the OFM, and accounting principles are also routinely applied by the agency in various other contexts regarding tribal matters. *See, e.g., Great Am. Life Ins. Co. v. Principal Deputy Assistant Secretary-Indian Affairs*, 63 IBIA 98, 99, 2016 WL 3135593, at *1 (loan closure); *William C. Tuttle v. Acting W. Regional Director, Bureau of Indian Affairs*, 56 IBIA 53, 53, 2012 WL 8434355, at *1 (conformity with lease).

A. The Nation's 2017 submission rebutted the State's critique of the KPMG Report

In 2017, the Nation directly replied to the 2014 Denial Letter and rebutted the accounting issues raised by the State. AR4488. The Nation incorporated the record underlying the 2014

Denial Letter and provided annual audits for the Settlement Fund from 1986-1996, details regarding the initial distribution of the Settlement Funds, and a forensic accounting analysis of the Settlement Fund—the RSM Report. *Id.*; AR3980; AR4020-29; AR4065-4136. The RSM Report analyzed the Ober Audits, AR4065-4136, and monthly account statements for the three investment funds that included the Land Acquisition Funds. AR4020-29. Importantly, the RSM Report, unlike the prior forensic accounting analyses, analyzed actual audited financial statements in addition to the financial information analyzed in the KPMG and Gottlieb Reports. AR4488-89; AR4020-29. Based on this more complete and accurate financial record, the RSM Report subtracted the interest deductions from the earnings, ensuring that only the net earnings were allocated to Land Acquisition Funds. AR4020-29; AR4488-91; AR3932-34. In fact, the RSM Report went one step further than the Gottlieb Report, deducting an additional prorated amount in addition to both land purchases, so that those expenditures would not generate interest for the remainder of the fiscal year following the purchase dates. AR4020-29; AR4488-91; AR3932-34. Based on these calculations, the RSM Report concluded that there were sufficient Land Acquisition Funds (principal plus earnings) to cover both the Park City parcel purchase in 1992 and the Shriner Tract purchase in 1996. AR4026; AR3932-34; AR4488-91.

In 2018 Bruce Bush, a Senior Director at RSM, explained that the Land Acquisition Fund was pooled with the General Fund for investment purposes. AR3975. Thus, the RSM Report allocated the net investment income between the Land Acquisition Fund for land purchases and the General Fund that could be used for general purposes unrelated to land purchases. *Id.* For each year, the RSM Report allocated the net investment income between the two funds based on the "total dollar amount invested in interest and dividend earning assets at the beginning of the year." *Id.* The RSM Report identified the Money Market and Mortgage Collateralized Bonds as

interest and dividend earning assets. *Id.*; AR4024-25. In tracing the growth of the Land Acquisition Fund, the relevant investments from the Settlement Fund were the denominator and the Land Acquisition Fund was the numerator. AR3975; AR4028-29. The net income from the interest and earning assets was allocated to the Land Acquisition Fund based on its percentage of the total Settlement Fund. AR3975-76; AR4026-29. For example, the initial $100,000 Land Acquisition Fund (numerator) represented 10.65% of the initial $938,706 Settlement Fund balance (denominator). AR3975; AR4028-29. Then 10.65% of the net income of the relevant interest and dividend earning assets was allocated to the Land Acquisition Fund, amounting $8,661 for the first year. AR3975-76; AR4028-29. For the next year, the Land Acquisition Fund's beginning balance was $108,661 and each year thereafter the same calculations and allocation process was applied based on the Land Acquisition Fund's percentage of the total Settlement Fund. AR3975-76; AR4028-29.[14]

When the Nation purchased the Park City land on November 4, 1992, the Land Acquisition Fund comprised 19.17% of the total Settlement Fund and held a balance of $173,647. AR4026; AR3932-34; AR4488-91. The RSM Report deducted the $25,000 purchase and an additional prorated amount of $19,178 for the remaining days in the fiscal year, thereby ensuring that the $25,000 deduction was not earning interest during that time. AR3932-34; AR4488-91. After subtracting these deductions, the Land Acquisition Fund held a balance of $162,967. AR3932-34; AR4488-91. By the time the Shriner Tract was purchased some four years later, the Land Acquisition Fund had grown to $187,950 and accounted for 17.31% of the

[14] Plaintiffs imply that the Land Acquisition Fund's growth that leads to its larger percentage of the total Settlement Fund is somehow nefarious. However, the RSM Report is entirely transparent and is based on the assumption that the Land Acquisition Fund was used only for land purchases. AR4024. This underlying assumption was performed in the KPMG Report's tracing of the Land Acquisition Fund, accepted by Interior nearly twenty years ago, and affirmed by the *Norton* Court. AR4598-4609; *see also Norton*, 430 F. Supp. 2d. at 1211-12; *see also* AR4486; *see also* AR4058-59. Far from nefarious, the underlying assumption that the Land Acquisition Fund is restricted to land purchases is the accepted standard applied to forensic accounting of the Land Acquisition Fund.

Settlement Fund. AR3932-34; AR4488-91. The RSM Report deducted $180,000 and an additional prorated amount of $39,452 for the remaining days in the fiscal year, thereby ensuring that the $180,000 purchase was not earning interest during that time. AR3932-34; AR4488-91. After deducting the $180,000 and $39,452, the Land Acquisition Fund held a balance of $17,854 and the General Fund held $857,853. AR3932-34; AR4488-91.

OFM analyzed the RSM Report and underlying financial documents and concluded that the "RSM Report's methodology, calculations, and assumptions are consistent with industry standards and the RSM Report's conclusions are reliable under the consistency principle of General Accepted Accounting Principles (GAAP)." AR3932-34. OFM reasoned that "the RSM Report deducted margin interest-related costs before interest earned was attributed to the Land Acquisition Fund" to conclude that the "calculation addressed the Gottlieb Report's critique of the KPMG Report and ensured the growth of the Land Acquisition Fund was not overstated." AR3934. Assistant Secretary Sweeney found the RSM Report reliable (as informed by OFM's reliability determination) and concluded that the Nation adequately demonstrated that there were sufficient Land Acquisition Funds to cover both the Park City Parcel and Shriner Tract purchases. AR4491. As a result, the May 20 Decision, based on an independent review of prior submissions by the Nation and State as well as the Nation's rebuttal evidence, is supported by substantial evidence in the administrative record.

B. Plaintiffs fail to justify overturning the Trust Determination

Plaintiffs disagree with the outcome, but that disagreement, even if supported by their own calculations, cannot by itself justify overturning the decision. Interior "rationally explained its decision," and Plaintiffs failed to meet their burden by not showing that the decision "runs counter to the evidence before the agency" or "is so implausible that it could not be ascribed to a

difference in view or the product of agency expertise." *WildEarth Guardians v. EPA*, 770 F.3d 919, 927 (10th Cir. 2014). In fact, Plaintiffs' accounting-based arguments in effect rely on the same old arguments previously rejected by Interior and the courts.

Plaintiffs nonetheless repeatedly ask the Court to adopt their own accounting methodology, consider extra-record evidence and defer to Plaintiffs' judgment rather than that of Interior, contrary to black-letter principles of administrative law. As this Court is aware, Plaintiffs have attached and sought to incorporate an affidavit of their own accountant, the Gottlieb Affidavit, which is not in the record and is therefore irrelevant to the Court's analysis. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971). The Gottlieb Affidavit should be struck because it constitutes extra-record material not before the decisionmaker. *See Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) (limiting review of agency action to "the evidence and proceedings before the agency at the time it acted.").

But even if the Gottlieb Affidavit were properly before the Court, along with Plaintiffs' other accounting propositions and arguments, this, at most, amounts to a disagreement between a purported private "expert" and the expert agency. In such cases, a court must defer to the agency "even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *see also Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1271 n.14 (10th Cir. 2004) ("[t]he Corps is entitled to rely on its own experts even when their opinions conflict with those of other federal agencies"); *Custer Cnty Action Ass'n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001) ("agencies are entitled to rely on their own experts so long as their decisions are not arbitrary and capricious").

Consideration of the Gottlieb Affidavit would amount to no more than a battle of experts, "the resolution of which implicates substantial agency expertise." *Marsh*, 490 U.S. at 376.

Moreover, the Gottlieb Affidavit relies on the same flawed assumptions underlying Plaintiffs' other contentions about why Interior's conclusion is wrong. As long as Interior's decision is reasonable—and as demonstrated above, it is—there is no license to "substitute judgment for that of the agency," *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 718 (D.C. Cir. 2016) (quotation marks omitted); *see id*. ("Whether we would have done what the agency did is immaterial."). And deferring to Interior's judgment would accord with the Supreme Court's longstanding view that courts should defer to an agency's analysis of even "purely factual question[s]" in light of "the relevant agency's technical expertise and experience." *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 463 (1972).

Plaintiffs raise three arguments in support of their assertion that Assistant Secretary's determination that the Nation purchased the Park City Parcel with Land Acquisition Funds, the so-called "Trust Determination," is arbitrary and capricious. As discussed below, the arguments are based on Plaintiffs' efforts to undo what has already been decided, lack support in the record, and do not seriously dispute that there is substantial evidence to support the Trust Determination.

1. There was no "departmental policy" that Congress's intent for the mandatory trust provision was "exhausted" by the Shriner Tract purchase

Plaintiffs argue that the Shriner Tract litigation record "established departmental policy" that the Shriner Tract, purchased for $180,000 in 1996, was acquired in trust, exhausted all of the principal $100,000 in the Land Acquisition Fund and thereby exhausted the mandatory acquisition provision of Pub. L. 98-602. Opening Br. at 39. This argument fails. As an initial matter, no departmental policy was established preventing the Nation from seeking further trust acquisitions upon demonstrating additional land was purchased with the Land Acquisition Fund. Nor could Interior have done so, given that Congress itself placed no limits on the number of trust acquisitions that could be made. Pub. L. 602 § 105(b)(1). Plaintiffs rely on selected

statements made by Interior officials in the record underlying the Shriner Tract decision and inconsistently refer to the purported policy as a "condition" that was "agreed to" by the Nation. *Id.* at 41. To be sure, Interior at one point during the Shriner Tract acquisition process understood that the Shriner Tract purchase exhausted the Land Acquisition Fund, but as the Assistant Secretary explained in the 2014 Denial Letter, Pub. L. 98-602 contains no limitation on the number of trust acquisitions and the "statements the State identifies were made before the Department had the benefit of an accounting of the Land Acquisition Funds to know how much the 602 Funds had grown in value by July 1996." AR4061; *see also Sac & Fox Nation of Mo.*, 240 F.3d at 1262 ("[T]he Secretary shall have no discretion in deciding whether to take into trust a parcel of land purchased by the Wyandotte Tribe with Pub. L. 98-602 funds.").

Further, after determining that the interest-related deduction issue, not raised during the Shriner Tract litigation, raised questions regarding the amount of available Land Acquisition Funds stated by the KPMG Report, the 2014 Denial Letter expressly invited another application to take a second parcel into trust under the mandatory provision of Pub. L. 98-602 should the Nation adequately rebut the interest-related deduction issue. Additionally, leading up to the 2014 Denial Letter, the Associate Solicitor, Division of Indian Affairs confirmed that "[u]nder these [Pub. L. 98-602] provisions, the Tribe was provided $100,000 to purchase land, and *any real* property acquired by the Tribe with those funds is to be taken into trust by the Secretary." AR7250-7353 (emphasis added). And in any event, Plaintiffs fail to mention that Interior officials expressly acknowledged that the Park City Parcel was purchased with Land Acquisition Funds before the Shriner Tract. AR4142 (Interior official testifying in deposition "that the tribe had used $25,000 of the 100,000 to purchase in Park City" leaving $75,000 plus interest for the Shriner Tract); AR4139 (Interior responding to interrogatory that "the Wyandotte [Nation] used

$25,000.00 of the [Land Acquisition F]unds to purchase lands in Park City, Kansas, and the remaining principal and interest to purchase the Shriner Tract in Kansas City, Kansas."). Plaintiffs also ignore that the KPMG Report accounted for both purchases and revealed that the Land Acquisition Fund was not exhausted. AR4598-4609. Interior relied upon the KPMG Report to affirm the Shriner Tract acquisition and the *Norton* Court upheld Interior's decision and stated that the Park City Parcel was purchased with Land Acquisition Funds. *Norton*, 430 F. Supp. 2d at 1211-12. The inconsistent Interior statements relied on by Plaintiffs, therefore, are part of the record leading up to Interior's decision and are not stated in any final agency action.

To the extent Plaintiffs allege that some "change" in agency "policy" occurred that triggered an explanation requirement under *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), the sort of individualized statements or determinations relied upon by Plaintiffs do not constitute a "policy." Nor does an evolving analysis in an ongoing administrative process mark a "change" in policy. *E.g., Sierra Club v. BLM*, 786 F.3d 1219, 1226 (9th Cir. 2015) (agency's "evolving analysis was not a change in a published regulation or official policy" and even if it were, its "change of view" was adequately justified). *Compare Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2119, (2016) (challenge to the Department of Labor's "final rule" interpreting the Fair Labor Standards Act); *Renewable Fuels Ass'n v. United States Env't Prot. Agency*, 948 F.3d 1206, 1215, 1242 (10th Cir. 2020), *cert. granted sub nom. HollyFrontier Cheyenne v. Renewable Fuels Assn.*, No. 20-472, 2021 WL 77244 (U.S. Jan. 8, 2021) (challenge to the Environmental Protection Agency's final agency action granting extension petitions to small refineries); *with Sierra Club*, 786 F.3d at 1226.[15]

[15] Plaintiffs incorrectly state that *Bullion v. Fed. Deposit Ins. Corp.*, 881 F.2d 1368, 1379 (5th Cir. 1989) "held that it was arbitrary and capricious for the FDIC to discount or discredit certain financial statements in finding a violation but then accepting the discredited financial statements at face value for purposes of imposing a fine." Opening Br. at 38 (citing *Bullion*, 881 F.2d at 1379). The *Bullion* court did not hold that this inconsistent treatment

To the extent any inconsistency required an explanation, under *Fox*, all that is necessary is to "provide a reasoned explanation for the change." *Encino Motorcars*, 136 S. Ct. at 2125 (2016); *see also Fox*, 556 U.S. at 515. The 2014 Denial Letter satisfied this requirement by acknowledging Interior's prior statements and clarifying that its previous position was based on incomplete information on the accounting of available qualifying Land Acquisition Funds at the time of the Shriner Tract purchase. AR4061.

2. Judicial estoppel is not applicable here

Plaintiffs also mention the judicial estoppel doctrine and, without analysis, conclude that it applies here. The judicial estoppel doctrine applies "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Courts typically apply three factors to inform whether judicial estoppel should apply. *Id.* at 750. "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* "Second, courts regularly inquire whether the party 'has succeeded in persuading a court to accept that party's earlier position[.]'" *Id.* (citations omitted). If the party's position did not succeed in a prior proceeding, "a party's later inconsistent position introduces no 'risk of inconsistent court determinations' and thus poses little threat to judicial integrity." *Id.* at 751 (citations omitted). Third, courts consider whether the party "would derive an unfair

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of evidence was arbitrary or capricious. The court noted an inconsistency in FDIC Board's treatment of financial statements that were discredited for purposes of finding a violation but relied upon when assessing a fine. *Bullion*, 881 F.2d at 1379. The court held that this use of the statements was "possibly inappropriate" and "[t]he Board's harsh stance with Dazzio coupled with the Board's lenience with the FDIC's counsel in its failure to produce requested documents further sheds light on the *possible* arbitrariness and inconsistency of its decision." *Id.* (emphasis added). The court ordered a remand and directed the FDIC Board "to develop detailed findings that evince a thorough evaluation of all factors which under the statute must enter into the penalty which the Board assesses upon its reconsideration." *Id.* Aside from mischaracterizing the holding, Plaintiffs fail to explain how the *Bullion* case applies to the facts here.

advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (citations omitted). Additionally, the Supreme Court recognized that "the Government may not be estopped on the same terms as any other litigant[.]" *Id.* at 755.[16] None of these factors are satisfied here.

First, Plaintiffs fail to identify a prior legal proceeding where Interior successfully asserted an inconsistent position regarding the assurance that the Shriner Tract exhausted the Land Acquisition Fund. The initial Shriner Tract decision was remanded by the Tenth Circuit, after which Interior accepted the KPMG Report that demonstrated that the combined Shriner Tract and Park City purchases did not exhaust the Land Acquisition Fund. 4153-60; AR4598-4609. The *Norton* Court upheld Interior's decision and therein expressly acknowledged that the Park City Parcel was purchased with Land Acquisition Funds before the Shriner Tract purchase. 430 F. Supp. 2d. at 1211-12. Thus, by acknowledging that the Land Acquisition Funds were spent elsewhere, the *Norton* Court did not accept or rely upon prior statements that all of the Land Acquisition Funds would be spent on the Shriner Tract.

Because Interior never succeeded on this position, there is no risk that a later inconsistent position could result in inconsistent determinations by the courts. This situation is distinguishable from the holding in the sole judicial estoppel case cited by Plaintiffs, where Alabama was precluded from arguing against its prior accepted position. *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1268 (M.D. Ala. 2000) ("Similarly, this court finds that the doctrine of judicial estoppel precludes Alabama from arguing that the DAB erroneously accepted Alabama's federal share numbers. As in *Portela–Gonzalez,* Alabama cannot now be heard to complain that

[16] Plaintiffs conflate the standards for changes in official agency policy with the judicial estoppel doctrine and fail to explain how both could apply here even though the judicial estoppel doctrine does not apply when the shift in the government's position is the result of a "change in public policy[.]" *New Hampshire*, 532 U.S. at 755.

the DAB accepted its position."). Thus, unlike Alabama's argument against its prior accepted position in *Shalala*, Interior's position today poses no threat to judicial integrity and the judicial estoppel doctrine is inapplicable.

Second, even if Interior had successfully asserted an inconsistent position, Interior may (and should) consider changes in essential facts. The 2014 Denial Letter explained that Interior's prior "exhaustion" statements were made before Interior learned that the Land Acquisition Funds were not exhausted by the Shriner Tract purchase. And the Trust Determination challenged here relied on new and reliable information that was not before Interior during the Shriner Tract acquisition process. *See New Hampshire*, 532 U.S. at 755-56 (noting that the judicial estoppel doctrine does not apply to an inconsistent position that was the result of a change in facts essential to the prior judgment). The Trust Determination squarely meets this exception to judicial estoppel. Third and finally, Plaintiffs fail to identify how Interior, through the purported change in position, gained an unfair advantage over or imposed an unfair detriment on Plaintiffs. Interior gains no advantage by performing its non-discretionary duty under Pub. L. 98-602 and Plaintiffs do not suggest otherwise. And Plaintiffs repeatedly refer to the "exhaustion" assurance as an agreement between Interior and the Nation, which begs the question of why, under their own theory, Plaintiffs would be entitled to rely upon the agreement. Plaintiffs have failed to carry their burden to demonstrate that judicial estoppel applies to the Trust Determination.

3. The Pub. L. 98-602 mandate applies to any real property purchased with Land Acquisition Funds

Plaintiffs argue that Pub. L. 98-602's mandatory trust authority is only triggered by the principal $100,000 of the Land Acquisition Fund. Opening Br. at 41. Plaintiffs make many incorrect assertions to support their position, which are addressed in turn. First, while acknowledging that Congress "did not intend to restrict the earnings on the investment of the

$100,000 set-aside funds," Plaintiffs rely on Pub. L. 98-602 to argue that Congress intended to restrict Interior's mandatory duty to acquire land into trust to only lands purchased with the principal sum of $100,000. *Id.* at 41-42. Plaintiffs, however, point to no express statutory language or legislative history to support this argument. Nor can they, because Congress did not draw this distinction. Further, Plaintiffs ignore the *Norton* Court's conclusion that Pub. L. 98-602 does not "clearly prohibit use of money resulting from the investment of that [$100,000] being applied to the purchase price of any property." *Norton*, 430 F. Supp. 2d at 1218. Analyzing the statute in the *Chevron* framework, the Court deferred to the Assistant Secretary's robust statutory analysis of Pub. L. 98-602 § 105(b), which determined the Nation may "use interest and investment income earned on the $100,000." *Id.* at 1217-21; *see also* AR4154-60. And as previously stated, the Court upheld the KPMG Report's methodology that restricted the entire Land Acquisition Fund, including the principal $100,000 and its earnings, to land purchases. *Norton*, 430 F. Supp. 2d at 1211-12; *see also* AR4598-4609. Plaintiffs' argument, therefore, has already been resolved by the *Norton* Court.

Second, Plaintiffs argue it is "undisputed" that all of the principal $100,000 in the Land Acquisition Fund was intended to be spent on, and attributed to, the Shriner Tract land purchase. Opening Br. at 41-43. But Interior expressly acknowledged that the Park City Parcel was purchased with a quarter of the principal $100,000 and that the Shriner Tract was purchased with the remaining principal, plus interest. AR4139; AR4142. As a factual matter, Plaintiffs' argument that the Park City Parcel was not purchased with the principal of the Land Acquisition Fund is incorrect. And their similar "attribution" argument relies on their "policy" argument, which fails for the reasons stated above. *Supra* pp. 29-32.

Third, Plaintiffs argue that the RSM Report and the Trust Determination incorrectly concluded that neither Interior nor any court "has found that the earnings on the investment of the $100,000 set-aside funds were restricted to the purchase of land that then had to be acquired in trust." Opening Br. at 43. On the contrary, Interior and the *Norton* Court accepted the KPMG Report's methodology that restricted the earnings on the initial $100,000 Land Acquisition. *Norton*, 430 F. Supp. 2d at 1211-12; *see also* AR4598-4609. And the 2014 Denial Letter stated that sufficient total Land Acquisition Funds (principal plus interest) will "trigger, for both parcels, the mandatory acquisition authority provided by the [Pub. L. 98-602]." AR4058.

Finally, Plaintiffs conclude that the $100,000 earnings alone "cannot trigger a mandatory trust acquisition under PL 602." Opening Br. at 43. Even if that were true, the Trust Determination did not find that the Park City Parcel was purchased with only the earnings of the principal Land Acquisition Funds. Interior long ago accepted the forensic accounting methodology based on tracing the value of the Land Acquisition Fund because it was impossible to track every dollar in the Land Acquisition Fund. AR4598-4609; *see also Norton*, 430 F. Supp. 2d. at 1211-12; *see also* AR4486; *see also* AR4058-59. The only question left for resolution over the last ten years has been whether the Nation could demonstrate that there were sufficient Land Acquisition Funds in total to cover both purchases.[17]

4. The Park City Parcel was purchased with Land Acquisition Funds

Next Plaintiffs argue that the Park City Parcel was not purchased with only Land Acquisition Funds because there was not enough money to cover both purchases. Plaintiffs again

[17] Without a citation, Plaintiffs state that "the Department's long-standing policy is such that those [Land Acquisition Fund] earnings, used alone, cannot trigger a mandatory trust acquisition under Pub. L. 98-602. Opening Br. at 43. It is unclear whether Plaintiffs are implicating the purported "exhaustion" policy or some other policy. Regardless, Interior has consistently stated throughout the Park City Parcel acquisition process that it has a mandatory duty to acquire the Park City land into trust so long as there were sufficient Land Acquisition Funds to cover its purchase and the Shriner Tract purchase.

support their argument with many incorrect assertions that are addressed in turn below. Plaintiffs first characterize the Nation's prior statements made during the Shriner Tract litigation about the Park City Parcel.[18] Opening Br. at 44. As previously explained, at one time Interior sought an assurance from the Nation that all Land Acquisition Funds would be spent on the Shriner Tract purchase before learning of the Land Acquisition Fund's growth. AR4061. Second, Plaintiffs mischaracterize the Ober Audits as stating that the Park City land was not purchased Land Acquisition Funds. Opening Br. at 44 (citing Plaintiffs' SOF ¶ 65). Plaintiffs' SOF ¶ 65 incorrectly characterize the Ober Audits as stating "that the [Park City] land had not been acquired with funds from the Claim Money Fund." *Id.* at 23-24 ¶ 65. The pages of the administrative record cited by Plaintiffs, AR 4639, 4640, 4644, contain no such statement.

Third, Plaintiffs similarly mischaracterize the Nation's 2006 land-into-trust application for the Park City land as "reflecting" that the Park City land was not purchased with Land Acquisition Funds. *Id.* at 44. The 2006 application contains no such statement, *see* AR 2381-83, and the Nation's application cannot be construed as an admission against the Nation's subsequent application. As Plaintiffs are aware, the Nation's first land-into-trust application was for the Park City Parcel in 1993 under Pub. L. 98-602's mandatory authority. Plaintiffs' mischaracterization is based on the Nation's 2006 request that Interior acquire the Park City Parcel in trust under the Secretary's discretionary trust acquisition authority. There could be any number of reasons that the Nation's 2006 application requested the Secretary's discretionary authority, however. Regardless Pub. L. 98-602's mandate is triggered by the Nation's demonstration that it purchased the Park City Parcel with qualifying Land Acquisition Funds,

[18] Ironically, the Nation's prior statements responded to Plaintiffs' prior statements that the Park City land was purchased with Land Acquisition Funds. Opening Br. at 44 (citing Plaintiffs' SOF ¶¶48, 49)

which the Assistant Secretary concluded it had after thorough analysis of the record and submissions by the parties.

Plaintiffs' subsection a. argument merely restates the same "exhaustion" argument: "the PL 602 Bonds could not serve as the collateral for this margin loan since they would be devoted in their entirety in July to the Shriner Tract purchase." *Id.* at 45. Plaintiffs' subsection b. argues that of the entire Land Acquisition Fund, only $529.91 "of the cash and earnings" remained in 1991 and this amount could not have generated enough money for the Park City purchase in 1992. *Id.* at 45-46. Subsection c. includes the results discussed in the extra-record affidavit of Jerry Gottlieb, the Gottlieb Affidavit, of "the same calculation exactly as RSM did" if only the $529.91 "cash and earnings" is available for the Park City purchase at the end of 1991. *Id.* at 46. Unsurprisingly, this calculation reveals insufficient Land Acquisition Funds "***if*** the $25,000 in November 1992 came from the earnings on PL 602 Bonds." *Id.*

The arguments rely on Plaintiffs' flawed assumption that the value of the Land Acquisition Fund available for the Park City purchase is limited only to the "cash and earnings" on the balance of $529.91 out of the entire Land Acquisition Fund as of 1991. Indeed, Plaintiffs disregard the principal $100,000 of the Land Acquisition Fund based on their misplaced theory that the principal was "exhausted" four years later. *Id.* at 47 ("Obviously, none of the principal PL 602 Bonds were used for that [Park City] purchase."). Left with only the "cash and earnings," Plaintiffs then subtract "virtually all of the earnings." *Id.* at 46. Plaintiffs' unwillingness to attribute the $100,000 principal of the Land Acquisition Fund to the Park City Parcel purchase or restrict the earnings of the Land Acquisition Fund to land purchases fails to alter the RSM Report's veracity.

The $100,000 principal of the Land Acquisition Fund was not "exhausted" by the Shriner Tract purchase and the KPMG Report's methodology that restricted the total Land Acquisition Funds (principal plus earnings) to land purchases has been accepted by Interior and upheld in *Norton*. *Norton*, 430 F. Supp. 2d at 1211-12; *see also* AR4598-4609. From these settled premises, the sole remaining question was whether the total Land Acquisition Funds (principal plus interest) were sufficient to cover both purchases. Plaintiffs disagree with these settled principles and dedicate the vast majority of their brief attempting to undo them. Because Plaintiffs' calculations rely on their contrary assumptions, the results are irrelevant to whether there is substantial evidence supporting the Trust Determination.

Finally, Plaintiffs' subsection d. discusses the "Veres Investment" and implies that the RSM Report should have allocated the Veres loss "on a pro-rata basis to the earnings on the investment of the PL 602 set-aside funds, as was done in the Wyandotte financial Statements and the Ober Audits[.]" Opening Br. at 46. Plaintiffs' argument fails to explain why the loss on the Veres investment is relevant to the RSM Report.[19] As stated previously, the RSM Report

[19] Plaintiffs' argument section does not reference its Statement of Facts regarding the Veres investment and instead relies upon the Gottlieb Affidavit. Plaintiffs' Statement of Facts, however, contains improper argument and inferences regarding the Veres investment and passes it off as fact. "Statements of uncontroverted fact and responses thereto shall cite *only* facts. Argument and the drawing of inferences shall be reserved for the authorities and argument section of the memorandum." *Leathers*, 2012 WL 5936281, at *2 (D. Kan. Nov. 27, 2012). For example, Plaintiffs cite to the Ober Audits and argue that the RSM Report allocated income from "all of the bond portfolio" to the Land Acquisition Fund, including a zero coupon bond that was purchased to mitigate the Veres investment loss. SOF ¶ 79(a). However, the Veres investment and the zero coupon bond purchased to offset it are listed separately (Note F) from the relevant investment accounts in the RSM Report (Notes B and C). AR4089-91. Plaintiffs also argue that the "preponderance" of money for the Veres investment came from "the margin account in the Commingled Account" by speculating that the "margin debt" increase was due to the Veres investment. SOF ¶ 79(b). Plaintiffs cite to the Ober Audits, AR4083, 4087, to support their speculation. While these pages demonstrate an increase in financing, there is no mention of any margin debt increase "directly related to making the Veres Investment," as Plaintiffs conclude. *Id*. Next, Plaintiffs cite to the RSM Report's Exhibits A and B to conclude that "RSM allocated interest on the margin loan, which included debt used to pay for the Veres Investment, to the earnings on the investment of the $100,000 set-aside funds in the same manner that RSM allocated the interest and dividend incomes." SOF ¶ 79(c). Apparently, Plaintiffs believe that somewhere in the two Exhibits lies support for this assertion, but they are mistaken. The "loans" that Plaintiffs reference are the "Notes Payable – Mercantile and AG Edwards" in the RSM Exhibits AR4025, 4028-29. These Notes Payable factor into the calculation as liabilities, *i.e.*, as expenses, not income. *Id.* The RSM Report calculated the investment income from the Money Market Account and Mortgage Collateralized Bonds and Other assets. *Id.* Relying on their prior inferences and argument,

calculated the net interest income only from the relevant interest earning assets over the ten year period. The Veres investment was not one of the relevant interest earning assets, likely because it was only held as an investment asset for one year, and any income or losses on the investment were not calculated, just like the other irrelevant assets. Thus, it appears that Plaintiffs' Veres investment loss calculation relies on their disagreement with restricting the earnings on the Land Acquisition Funds to land purchases. Once again, Plaintiffs' disagreement with the long-accepted methodology does not justify overturning the Trust Determination. *Norton*, 430 F. Supp. 2d at 1225 ("The fact that plaintiffs harbor a difference in accounting analysis is insufficient to find the agency decision to be arbitrary and capricious, and the Court will not overturn the agency's decision on this basis."). Based on the foregoing, Plaintiffs fail to demonstrate that the Trust Determination was either arbitrary or capricious.

II. Interior's recognition that the Park City Parcel is eligible for gaming under IGRA's "settlement of a land claim" exception is neither arbitrary nor capricious

After concluding that the Nation purchased the Park City Parcel with Land Acquisition Funds, the May 20 Decision discussed the parcel's eligibility for gaming. AR4491; AR4493. According to Plaintiffs, Interior erred by relying on this Court's 2006 decision in *Wyandotte Nation*, 437 F. Supp. 2d 1193, to find that the Park City Parcel is eligible for gaming. Opening Br. at 7, 49-54, 59-62. Instead of relying on *Wyandotte Nation*, Plaintiffs contend that Interior should have applied the regulations it adopted in 2008 regarding IGRA's statutory exceptions. *Id.* at 49-59; 25 C.F.R. Part 292. But Plaintiffs' attempts to draw distinctions fall flat and the *Wyandotte Nation* Court's conclusion that the Shriner Tract satisfies the "settlement of a land claim" exception to IGRA applies equally to the Park City Parcel. Because the *Wyandotte Nation*

Plaintiffs then conclude that the RSM Report allocated earnings from the Veres investment but ignored the losses. SOF ¶ 80. Not only do Plaintiffs improperly make argument through their Statement of Facts, their arguments and inferences are incorrect.

Court held that the claims paid to the Nation in Pub. L. 98-602 were unambiguously "land claims" as defined by IGRA, it was unnecessary for Interior to ignore precedent and apply its regulations implementing IGRA. Accordingly, Plaintiffs fail to show that Interior's May 20 Decision was arbitrary or capricious.

A. Interior did not err in relying on the holding in the *Wyandotte Nation* finding the Shriner Tract eligible for gaming

Plaintiffs fail to show that Interior's reliance on precedent from this Court to recognize that the Park City Parcel, like the Shriner Tract, is eligible for gaming was arbitrary or capricious. A narrow and deferential standard of review is applied to Interior's determination. *See Hays Med. Ctr.*, 956 F.3d at 1264 ("the arbitrary-and-capricious standard 'is very deferential to the agency'" (quoting *W. Watersheds Project v. U.S. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013)). Plaintiffs challenge Interior's May 20 Decision pursuant to the APA. Compl.¶¶ 80-89; Opening Br. at 1. And Plaintiffs bear the burden of showing that Interior acted arbitrarily in concluding that the Nation may conduct gaming on the parcel pursuant to IGRA's "settlement of a land claim" exception. *Hays Med. Ctr.*, 956 F.3d at 1264. As stated above, to comply with the APA's requirements—"[n]othing more than a 'brief statement' is necessary, so long as the agency explains 'why it chose to do what it did.'" *Muwekma Ohlone Tribe v. Salazar*, 813 F. Supp. 2d 170, 190 (D.D.C. 2011) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)), *aff'd*, 708 F.3d 209 (D.C. Cir. 2013).

In the May 20 Decision, Interior relied on the *Wyandotte Nation* decision to recognize that gaming could occur on the Park City Parcel. AR4491; AR4493. In keeping with the holding in *Wyandotte Nation*, Interior stated that the Nation may conduct gaming on the Park City Parcel pursuant to IGRA's "settlement of a land claim" exception. *Id*. *Wyandotte Nation* held that the trust acquisition of the Shriner Tract met IGRA's "settlement of a land claim" exception, because

the land was purchased with Land Acquisition Funds. 437 F. Supp. 2d at 1207-10. In doing so, this Court overturned NIGC's initial determination that because Pub. L. 98-602 was enacted as a result of the Nation's claim for a monetary judgment, rather than seeking land as a remedy, the Shriner Tract was ineligible for gaming under IGRA. *Id*. at 1217-19.

Plaintiffs contend that *Wyandotte Nation* is "completely distinguishable," because the Park City Parcel was allegedly "purchased with funds over which [the Nation] had discretionary spending power—and not with the $100,000 set aside funds that PL 602 mandated to be used for the purchase of land that then had to be accepted into trust." Opening Br. at 59. But as the Court previously concluded, "there is no factual distinction to be drawn" between the Shriner Tract trust acquisition and the Park City Parcel acquisition. Order of Nov. 23, 2020, at 11; ECF No. 22. The Nation purchased both land parcels with Land Acquisition Funds (principal plus interest), which Congress mandated were to be used for acquiring trust land for the Nation. Although Plaintiffs do not accept the May 20 Decision's finding that there were sufficient Land Acquisition Funds to purchase both the Shriner Tract and the Park City Parcel, as detailed above, the administrative record demonstrates that Plaintiffs' position lacks merit. *Supra* pp. 21-40. Hence, the *Wyandotte Nation* Court's reasoning and holding that the Shriner Tract qualifies for IGRA's "settlement of a land claim" exception is similarly applicable to the Park City Parcel.

Plaintiffs' attempt to read a distinction into the *Wyandotte Nation* Court's reasoning is flawed. Opening Br. at 60-61. Plaintiffs rely on the *Wyandotte Nation* Court's statement that the "NIGC's focus on the ICC monetary judgment might pass muster if the Wyandotte had merely purchased the Shriner Tract with money received from a claim brought before the ICC." *Id*. at 60 (citing 437 F. Supp. 2d at 1210). But the *Wyandotte Nation* Court "distinguished that scenario" from the one that exists here—"purchases made with PL 602 funds." Order of Nov. 23, 2020, at

11. In that case, IGRA's "settlement of a land claim" exception applies and gaming is permitted. 437 F. Supp. 2d at 1210. Plaintiffs also criticize Interior's reliance on *Wyandotte Nation*, because the Court discussed an agency decision regarding Seneca Nation lands that later was overturned. Opening Br. at 61-62 (citing *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)). But this does little to help Plaintiffs: *Wyandotte Nation* found the NIGC's Shriner Tract decision conflicted with the Seneca Nation lands agency decision. 437 F. Supp. 2d at 1210-12. Moreover, this was not the only reason underlying *Wyandotte Nation's* finding that NIGC's decision was flawed. The *Wyandotte Nation* Court based its conclusion on a careful examination of the statutory text, the Nation's claims before the ICC, and the mandate in Pub. L. 98-602. *Id*. at 1207-10. The *Citizens Against Casino Gambling* decision regarding the Seneca Nation Settlement Act of 1990, 25 U.S.C. § 1774(b)(2), does not change that analysis.

Plaintiffs' repeated references to *Wyandotte Nation* as "distinguishable" and "distinct" do not make it so. The *Wyandotte Nation* Court held that lands, like the Park City Parcel, purchased with Land Acquisition Funds satisfy IGRA's "settlement of a land claim" exception, and Interior did not err in relying on this conclusion in its May 20 Decision.

B. *Wyandotte Nation* made it unnecessary for Interior to apply its regulations implementing IGRA

Despite the holding in *Wyandotte Nation*, Plaintiffs cite Interior's regulations implementing IGRA, 25 C.F.R. Part 292, to argue that the Park City Parcel does not meet IGRA's "settlement of a land claim" exception. Opening Br. at 49-59. Plaintiffs' arguments are unpersuasive because agency regulations cannot override the unambiguous text of a particular statute as interpreted by the courts.

An agency's interpretation of a statute that it is charged with administering is reviewed under *Chevron*'s two step-analysis. Employing "traditional tools of statutory construction," a court first determines whether "Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. The relationship between a prior judicial decision and an agency interpretation of the same statutory provision is explained in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In *Brand X*, the Supreme Court concluded that 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 the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id*. at 982. That is the case here.

Wyandotte Nation explicitly held that the claims paid to the Nation in Pub. L. 98-602 were "land claims" as defined by IGRA. 437 F. Supp. 2d at 1208. IGRA does not define the term "land claim," and the *Wyandotte Nation* Court, in interpreting the term, determined that the "plain meaning of 'land claim' does not limit such claim to one for the return of land, but rather, includes an assertion of an existing right to the land." *Id*. The Court further pointed out that "the word 'land' modifies the word 'claim,' not 'settlement,' and thus a 'land claim' means that the operative facts giving rise to a right arise from a dispute over land, not that the land claim be resolved by the return of land." *Id*. Accordingly, the *Wyandotte Nation* Court concluded that the "plain language" of the exception does not preclude the claims brought by the Nation before the ICC, which resulted in the passage of Pub. L. 98-602 and its mandate that $100,000 of the Tribe's ICC judgment funds be used to purchase land taken into trust. *Id*.

Plaintiffs attempt to create ambiguity where none exists. Plaintiffs contend that *Wyandotte Nation* only construed the meaning of "land claim," not the entire statutory phrase "settlement of a land claim" used in IGRA. Opening Br. at 52. This argument lacks merit and if it were to be adopted would contradict this Court's decision in *Wyandotte Nation*. A court's prior decision need not "say in so many magic words that its holding is the only permissible interpretation of the statute in order for that holding to be binding on an agency." *Exelon Wind 1, L.L.C. v. Nelson*, 776 F.3d 380, 398 (5th Cir. 2014) (quoting *Fernandez v. Keisler*, 502 F.3d 337, 347 (4th Cir. 2007)). The *Wyandotte Nation* Court made clear that trust acquisitions purchased with Pub. L. 98-602 funds satisfy IGRA's "settlement of a land claim" exception under the ordinary meaning of the statute. 437 F. Supp. 2d at 1208-9. Hence, there was no room for Interior to apply its regulations implementing IGRA. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012) ("In our view, [a prior decision] has already interpreted the statute, and there is no longer any different construction that is consistent with [that decision] and available for adoption by the agency."); *contra Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245 (10th Cir. 2008) (deferring to agency regulation interpreting statute because the "Supreme Court has twice explicitly found the statute to be ambiguous").

An example of a prior judicial decision that foreclosed any agency interpretation of an unambiguous statute can be seen in *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440 (5th Cir. 2019). Shortly after IGRA's enactment, the Fifth Circuit determined that a tribe-specific statute (the Restoration Act) and IGRA conflicted and that the Restoration Act governed the Alabama-Coushatta's gaming activities. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994). After the Supreme Court decided *Brand X*, the Fifth Circuit reexamined whether its prior precedent controlled or whether NIGC could interpret the question of what statute governed

differently. *Texas*, 918 F.3d at 446-49. Because the prior judicial decision did not find any ambiguity in the statutory text, the Fifth Circuit held that NIGC's interpretation did not control. *Id*. at 449. *See also Sierra Club v. Envt'l Prot. Agency*, 479 F.3d 875, 880-84 (D.C. Cir. 2007) (the agency "must obey the Clean Air Act as written by Congress and interpreted by this court").

Plaintiffs' discussion of other agency decisions and correspondence in which Interior has applied the Part 292 regulations offers little support for their claims. Opening Br. at 52-53; Ex. M-S. Plaintiffs overlook the critical fact that *Wyandotte Nation* was interpreting Pub. L. 98-602, which was not applicable in the other cases cited by Plaintiffs. Indeed, none of these examples involved judicial precedent that made it unnecessary, and potentially impermissible, for Interior to apply its Part 292 regulations. Here, the question of whether lands purchased with Land Acquisition Funds met IGRA's "settlement of a land claim" exception was settled in *Wyandotte Nation.* Thus, Interior's decision to rely on *Wyandotte Nation* to conclude that the Park City Parcel is eligible for gaming is neither arbitrary nor capricious.[20]

CONCLUSION

Interior's decision that the Park City Parcel was eligible for mandatory trust acquisition was based on a careful analysis of the evidence, a thorough assessment of the Nation's accounting of its Settlement Act funds, and a consultation with the Office of Financial Management. Plaintiffs do not seriously dispute that there is substantial evidence supporting Interior's Trust Determination and they fail to demonstrate that Interior's reliance on precedent from this Court to recognize that gaming could occur on the Park City Parcel was either arbitrary

[20] Plaintiffs argue at length that the Park City Parcel does not satisfy the regulatory criteria for the "settlement of a land claim" exception. Opening Br. at 54-59. That argument is based on Plaintiffs' unsupported interpretation of the regulations. If the Court concludes that Interior's decision to rely on *Wyandotte Nation* instead of the Part 292 regulations was arbitrary or capricious, the remedy should be a remand to Interior to make a new decision and determine in the first instance whether the regulatory criteria are satisfied. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978).

or capricious. Plaintiffs' extra-record materials amount to, at best, an expert disagreement with Interior, requiring deference to Interior, and should be stricken from the record. For the reasons above, Defendants respectfully ask that the Court to reject Plaintiffs' challenge and enter an order upholding the Assistant Secretary's May 20 Decision.

Respectfully submitted this 15th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2021, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ *Tyler J. Eastman*