No. 21-3097

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF KANSAS, *ex rel.* Derek Schmidt, Attorney General; BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SUMNER, KS; CITY OF MULVANE, KANSAS; SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA; and IOWA TRIBE OF KANSAS AND NEBRASKA,

Plaintiffs-Appellants,

v.

DEB HAALAND, in her official capacity as Secretary of the United States Department of the Interior; and DARRYL LACOUNTE, in his official capacity as Director of the U.S. Bureau of Indian Affairs

Defendants-Appellees.

On Appeal from the United States District Court for the District of Kansas
(No. 2:20-cv-02386)
Honorable Holly L. Teeter, United States District Judge

JOINT BRIEF OF APPELLANTS
Oral Argument is Requested

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TABLE OF AUTHORITIES

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GLOSSARY OF TERMS/ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
AS Sweeney	Assistant Secretary-Indian Affairs Tara Sweeney
AS Washburn	Assistant Secretary-Indian Affairs Kevin Washburn
BIA	Bureau of Indian Affairs
Claims Money Fund	Funds distributed to Wyandotte by PL 602 reported in Ober Audits and in Wyandotte financial statements
Commingled Account	Wyandotte investment account that held all other funds distributed to Wyandotte by PL 602 other than the $100,000 Set Aside Funds (or PL 602 Bonds) until November 1991 when the PL 602 bonds and remaining cash were commingled into this Wyandotte investment account
2020 Sweeney Decision	May 20, 2020, Decision issued by AS Sweeney
2014 Washburn Decision	July 3, 2014, Decision issued by AS Washburn
Department	United States Department of the Interior
Department Policy	Department determination made during Shriner Tract Trust acquisition that once land worth $100,000 or more is purchased with all the $100,000 Set Aside Funds from PL 602 and such land is acquired in trust under PL 602, that fulfills the Department's obligation under PL 602 and any future trust acquisitions must be predicated on other statutory authority
GAAP	Generally Accepted Accounting Principles

Gaming Determination	May 20, 2020 decision determining land eligible for gaming under IGRA
Gottlieb Affidavit	2021 Affidavit of Jerold Gottlieb, CPA
Gottlieb Report	2012 Report of Jerold Gottlieb, CPA
ICC	Indian Claims Commission
IGRA	Indian Gaming Regulation Act
IRA	Indian Reorganization Act of 1934
Kansas Parties	Appellants collectively
Mandatory Trust Obligation	Provision in PL 602 mandating that the Secretary acquire land in trust purchased with the $100,000 Set Aside Funds
Mulvane	Appellant, City of Mulvane, Kansas
Ober Audits	Wyandotte financial statements between 1986 and 1996
Park City Land	Tract of land in Park City, Kansas at issue
PL 602	Public Law 98-602
PL 602 Bonds	Securities purchased with the $100,000 Set Aside Funds from PL 602
RSM	Accounting firm RSM US LLP
RSM Report	RSM US LLP accounting firm's September 29, 2017, analysis
Secretary	The Secretary of the Department of the Interior
Segregated Account	Wyandotte investment account that held only the PL 602 bonds purchased in 1986 with the $100,000 Set Aside

	Funds and cash until the account closed in November 1991
Shriner Tract	Tract of Land in Kansas City, Kansas purchased by the Wyandotte Nation in July 1996 and acquired in trust pursuant to PL 602
Shriner Tract Litigation	Litigation in federal court generated by the July 1996 mandatory acquisition of the Shriner Tract in trust under PL 602
$100,000 Set Aside Funds	$100,000 set-aside in Section 105(b)(1) of PL 602 for the purchase of land that when so expended, the Secretary was mandated to take into trust
Sumner County	Appellant, Board of County Commissioners of the County of Sumner, KS
Trust Determination	May 20, 2020, decision determining land to be eligible to be taken into trust
The Act	Indian Claims Commission Act passed in 1946
The State	The State of Kansas
Veres Investment	Wyandotte investment in Veres International
Wyandotte	Wyandotte Nation (f/k/a Wyandotte Tribe)

PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

Jurisdiction of this action was proper in the District Court. 28 U.S.C. § 1331 (federal question); Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* ("APA"). The Department of the Interior's ("Department") May 20, 2020, decision (the "2020 Sweeney Decision") contained two determinations that are in issue in this case. The Department decided to place land in Park City, Kansas ("Park City Land") in trust (the "Trust Determination") on behalf of the Wyandotte Nation ("Wyandotte") pursuant to Public Law 98-602 ("PL 602"). The Department also determined that such land was eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA") (the "Gaming Determination"). Each of these determinations constitutes final agency action reviewable under the APA. *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997).

This Court has jurisdiction of this appeal from the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1291, 28 U.S.C. § 1331, and the APA.

The district court's Final Memorandum and Order was dated May 5, 2021. (Add. 1-33.)[1] The Appellants ("Kansas Parties") timely filed their Notice of Appeal on June 3, 2021, which was within 60 days of May 5, 2021. (App. Vol. IV: 148-52.)[2] Fed. R. App. P. 4(a)(1)(B). This appeal is from the final order and judgment of the district court dated May 5, 2021, that disposed of all parties' claims.

ISSUES PRESENTED FOR REVIEW

Trust Determination

A. Should the Department's Trust Determination be set aside because the Park City Land was not purchased with any of the $100,000 set aside for the purchase of land and did not trigger the mandatory trust acquisition provision under PL 602.

B. Should the Department's Trust Determination be set aside because it violated established Department policy and the Department failed to provide a reasoned explanation for the policy change.

C. Should the Department's Trust Determination be set aside because it relied on an arbitrary and inconsistent accounting analysis, such that the substantial evidence in the record does not establish that the Park City Land was purchased with

[1] References to documents attached to this brief in the addendum shall be to the addendum and page number (e.g., Add. 3).
[2] References to documents in the Kansas Parties' appendices that accompany this brief will be to the volume and page number of the appendix (e.g., App. Vol. III: 35.)

only the $100,000 Set Aside Funds.

Gaming Determination

D. Should the Department's Gaming Determination that the Park City Land was taken into trust as part of a settlement of a land claim be set aside because the Department failed to consider and apply its 2008 regulations that control the Gaming Determination.

E. Should the Department's Gaming Determination be set aside because it relied exclusively on *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193 (D. Kan. 2006), a decision that was incorrectly decided, does not control the Gaming Determination for the Park City Land, and is distinguishable.

STATEMENT OF THE CASE

The Kansas Parties filed an action under the APA challenging the 2020 Sweeney Decision of Assistant Secretary-Indian Affairs Tara Sweeney ("AS Sweeney"), who concluded that: (1) the Department was required to take the Park City Land in trust on behalf of the Wyandotte pursuant to the mandatory trust acquisition provision of PL 602; and (2) once in trust, the land was eligible for gaming under IGRA on the grounds that the Park City Land was taken into trust as

part of a settlement of a land claim.[3]

Ultimately, the district court rejected the Kansas Parties' arguments and upheld the Trust Determination and the Gaming Determination made in the 2020 Sweeney Decision. (Add. 1-33.) The Kansas Parties appealed.

Background to Passage of PL 98-602: Claims Filed by the Wyandotte with the Indian Claims Commission Resulting in Judgments Against the United States

The Wyandotte was awarded money judgments against the United States on four claims filed with the Indian Claims Commission ("ICC") in the 1950's. The Wyandotte's claims before the ICC were that it was entitled to additional compensation for lands it had ceded to the United States in the 1800's for unconscionable consideration. The parties attempted but failed to settle one or more of the claims, no settlements were achieved, and judgments were ultimately rendered. *Zane ex rel. Wyandot Tribe v. United States*, 618 F.2d 121 (Cl. Ct. April 27, 1979); *Zane ex rel. Wyandot Tribe v. United States*, 618 F.2d 121 (Cl. Ct. May 11, 1979).

The Wyandotte was awarded a judgment in the amount of $561,424 in docket 139. *Zane ex rel. Wyandot Tribe v. United States*, 618 F.2d 121 (Cl. Ct. April 27, 1979); *Strong v. United States*, 42 Ind. Cl. Comm'n 264 (Aug. 10, 1978) (App. Vol.

[3] Pursuant to 25 U.S.C. § 2719(a)(1) gaming cannot be conducted on lands acquired in trust by the Department after October 17, 1988, unless one of the exceptions enumerated in 25 U.S.C. § 2719(a)(1) or (b) apply. At issue in this case is the exception for lands that are taken into trust as part of a settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i).

III: 83-99.) The Wyandotte was awarded a judgment of $2,348,679 in docket 141. *Zane ex rel. Wyandot Tribe v. United States*, 618 F.2d 121 (Cl. Ct. May 11, 1979); *Strong v. United States*, 43 Ind. Cl. Comm'n 311 (Sept. 22, 1978) (App. Vol. III: 114-31.)

The judgments in dockets 139 and 141 were paid and fully satisfied in October 1978 and March 1979, respectively, and the United States was discharged from further obligations under the judgments. H.R. Rep. No. 98-1067, at 1–2 (1984) (Add. 87-88); S. Rep. 98-609, at 3 (1984) (App. Vol. III: 108; Add. 82); *Wyandotte Nation*, 437 F. Supp. 2d at 1198, n.16; *See also United States v. Dann*, 470 U.S. 39, 47–50 (1985).

The Wyandotte was awarded a judgment of $200,000 in Dockets 212 and 213. This judgment was paid and fully satisfied some time prior to 1984. *Zane v. United States*, 38 Ind. Cl. Comm'n 561 (Aug. 5, 1976) (App. Vol. III: 156-87;) S. Rep. No. 98-609, at 3 (1984) (App. Vol. III: 108; Add. 82;) PL 602 (Add. 35.)

Congress Passed PL 602 to Distribute Funds Paid by the United States in Satisfaction of the Four ICC Judgments Awarded to the Wyandotte

In 1984, Congress passed PL 602 to provide for the distribution of the judgment funds previously paid by the United States to satisfy the ICC judgments. (Add. 35-40.)

PL 602 directed 80% of the judgment funds to be distributed to Wyandotte tribal members. PL-602, § 105(a). (Add. 37.) The remaining 20% was to be

distributed as follows:

a. Section 105(b)(1) provided that a "sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of" the Wyandotte (the $100,000 Set Aside Funds).[4]

b. Section 105(b)(2) provided that funds in excess of the $100,000 Set Aside Funds described in Section 105(b)(1) be held in trust by the Wyandotte Tribal Business Committee.

c. Section 105(b)(3) provided that any "interest or investment income accruing on the funds described in paragraph (2) [Section 105(b)(2)] may be used by the Tribal Business Committee . . . for any of the following purposes: [listing eight items, including land purchases, but with no accompanying obligation of the Department to take any such land so purchased into trust]."

(*Id.*)

Wyandotte Invested the $100,000 Set Aside Funds Instead of Buying Land with the Money

In May 1986, the Wyandotte invested the $100,000 Set Aside Funds in mortgage obligation bonds ("PL 602 Bonds"). (App. Vol. VI: 4-5, 23.) The PL 602 Bonds and approximately $5,000 in remaining cash, were deposited into a separate investment account of the Wyandotte (the "Segregated Account"). (*Id.*) The Wyandotte closed the Segregated Account at the end of November 1991. The PL 602 Bonds and a cash balance of $529.91 that remained in the Segregated Account

[4] This provision created the so-called mandatory trust acquisition obligation of the Secretary of the Department, in lieu of the typical discretionary trust acquisition procedures the Secretary employs pursuant to 25 U.S.C. § 465.

at that time were commingled into the Wyandotte's general investment account (the "Commingled Account"). (*Id.* at 5, 223-24.) Prior to this, the Commingled Account held the assets acquired with the remaining 20% of the judgment funds (i.e., everything other than the $100,000 Set Aside Funds) originally distributed to the Wyandotte pursuant to PL 602. (App. Vol. VI: 3-5, 202.)

Wyandotte Purchased Land in Park City, Kansas in 1992

In November 1992, the Wyandotte borrowed $25,000 from the Commingled Account in the form of a margin loan and used those proceeds to purchase the Park City Land. (App. Vol. VII: 25, 31.) At that time, the Commingled Account had about $3,200 in cash, the PL 602 Bonds, and the other investment assets acquired with the remaining funds distributed by PL 602. (*Id.* at 27.)

Wyandotte Financial Statements: Disclosures Made Regarding the Park City Land Purchase

Between 1986 and 1996, the Wyandotte generated financial statements to account for the funds distributed to it pursuant to PL 602. It employed a CPA firm to produce annual reports based on the financial statements. ("Ober Audits.") (App. Vol. V: 1-71.) The funds distributed to the Wyandotte by PL 602 (including the $100,000 Set Aside Funds that were invested in the PL 602 Bonds) were collectively referred to as the "Claims Money Fund" in the Ober Audits. The Ober Audits reported that the funds used to purchase the Park City Land were transferred ***out*** of the Claims Money Fund and that the Park City Land was ***not*** acquired with funds

from the Claims Money Fund. (*Id.* at 37, 42.) After the Wyandotte purchased the Park City Land, the Ober Audits never listed that land as an asset on the Claims Money Fund balance sheets. (*Id.* at 32-71.)[5] By contrast, the Ober Audits listed the Shriner Tract as a Claims Money Fund asset after it was purchased. (*Id.* at 66, 69.)

Wyandotte Park City Land Trust Application - 1993

In January 1993, the Wyandotte applied to have the Secretary accept the Park City Land in trust under PL 602. (App. Vol. VIII: 42-43, 63-64.) A month later, the Wyandotte advised the Department that it was invoking the Secretary's discretionary fee-to-trust authority under 25 U.S.C. § 465. (*Id.* at 46-47, n. 10, 53-54.) In December 1995, the Wyandotte withdrew its Park City Land application and shifted its focus to having land in Kansas City, Kansas (the "Shriner Tract") taken in trust under the mandatory provision of PL 602. (*Id.* at 34-35, 74-78.)

The 1996 Shriner Tract Purchase and Trust Acquisition - the Department Fulfilled the Mandatory Trust Acquisition Obligation of PL 602

On June 6, 1996, the Department published its notice of intent to acquire the Shriner Tract in trust for the Wyandotte. (App. Vol. V: 117-21.) In the

[5] Years later, the Wyandotte represented the same thing to the federal courts - that the funds used to purchase the Park City Land should ***not*** be characterized as PL 602 funds. (App. Vol. V: 162; VIII: 34-5; 143-46.) In 2014, Assistant Secretary Kevin Washburn ("AS Washburn") noted the same thing in his July 3, 2014, Decision (the "2014 Washburn Decision") when he observed that the Wyandotte "purchased the Park City Parcel in 1992, ***before it had expended any 602 Funds*** and several years before it purchased" the Shriner Tract, . . . (Add. 46.) (Emphasis added.)

administrative proceedings leading up to the decision to publish this notice, the Wyandotte told the Department it would expend all the $100,000 Set Aside Funds on the Shriner Tract purchase. (*Id.* at 90, 95, 100, 104, 106, 109, 111, 116.)

In these administrative proceedings, the Department determined that while the Wyandotte could discretionarily spend the "accumulated earnings" on the PL 602 Bonds, only the $100,000 Set Aside Funds must be spent on trust lands under PL 602. (*Id.* at 105-09.) Because the purchase price of the Shriner Tract exceeded $100,000, the Department concluded that once the Shriner Tract was purchased using the $100,000 Set Aside Funds and the land was acquired in trust under PL 602, the Department will have fulfilled its mandatory trust obligation under PL 602 and future trust acquisitions had to be made under some other statutory authority. This is referred to as the "Department Policy." (*Id.* at 105-09, 114, 116.)

The Department Policy was developed in a series of departmental memoranda that culminated in a June 6, 1996, letter from Assistant Secretary-Indian Affairs Ada Deer that was sent to Chief Bearskin of the Wyandotte. (*Id.* at 105-09, 110-14, 115-16.) Assistant Secretary Deer clearly communicated to the Wyandotte that after the Shriner Tract trust acquisition, the Department had no further mandatory trust obligations under PL 602, and any future trust acquisitions on behalf of the Wyandotte had to be predicated on statutory authority ***other*** than PL 602. (*Id.* at 116.) (Emphasis added.)

Litigation over the Department's Mandatory Trust Acquisition of the Shriner Tract

In July 1996, the State of Kansas and the four federally recognized tribes in Kansas filed suit challenging the trust acquisition of the Shriner Tract under PL 602 (the "Shriner Tract Litigation") and secured a temporary restraining order from the district court preventing the Department from taking the Shriner Tract into trust. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1257–58 (10th Cir. 2001). The Tenth Circuit dissolved the TRO and allowed the Shriner Tract to be acquired in trust but attempted to preserve the parties' right to seek judicial review of all issues that had been raised in the complaint. *Sac & Fox Nation*, 240 F.3d at 1257.[6]

Throughout the Shriner Tract Litigation, the Department steadfastly championed the Department Policy. Department official George Skibine testified in his deposition that "once the land is purchased . . . and the purchase price was over $100,000, then it would exhaust the fund and ***there would be no mandatory obligation to take any land in trust – to take any additional land in trust besides the Shriner tract.***" (App. Vol. V: 134-35.) (Emphasis added.)

Secretary of the Interior Bruce Babbitt told the Tenth Circuit that the Shriner Tract administrative record ("AR") demonstrated "that this acquisition exhausts the

[6] In the end, this attempt failed. *Governor of Kan. v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008); *Iowa Tribe v. Salazar*, 607 F.3d 1225 (10th Cir. 2010). As a result, the Tenth Circuit never addressed the underlying merits of any of the challenges to the Shriner Tract trust acquisition after 2001.

funds available to the Tribe under section 105(b)(1) of [PL 602]." (*Id.* at 174-75.) Earlier in the same brief, he noted that "the Assistant Secretary of Indian Affairs required the Area Director to inform the Wyandotte that 'this trust acquisition fulfills the Secretary's obligation to take land into trust pursuant to (PL 602), and that ***subsequent trust acquisitions*** must be made under different statutory authority . . .'" (*Id.*)

The Wyandotte consistently acknowledged the Department Policy. As discussed in more detail below, the Wyandotte recognized that it had exhausted all the $100,000 Set Aside Funds on the Shriner Tract purchase and that the acquisition of the Shriner Tract in trust fulfilled the Department's mandatory trust acquisition obligation under PL 602. (*Id.* at 95, 104, 163-65, 175, 184, 191-92; Vol IX: 271.)

Department Remand Proceedings: Department Found That All the $100,000 Set Aside Funds Were Used on the Shriner Tract Purchase

The Tenth Circuit remanded a part of the Shriner Tract case to the Department to determine if the Shriner Tract was purchased with "only" PL 602 funds to properly invoke the mandatory trust acquisition provision of PL 602. *Sac & Fox Nation*, 240 F.3d at 1263–64; *See also Governor of Kan. v. Norton,* 430 F. Supp. 2d 1204, 1209, (D. Kan. 2006), *vacated*, 516 F.3d 833 (10th Cir. 2008).

In its briefing to the Department on remand, the Wyandotte acknowledged that it used the $100,000 Set Aside Funds and imputed earnings to purchase the Shriner Tract. Likewise, it readily admitted its understanding that the mandatory

trust acquisition of the Shriner Tract under PL 602 fulfilled the "shall of the law" such that no further trust acquisitions could be predicated on that mandatory trust acquisition provision. (App. Vol. VII: 1-4.)

In its Opinion on Reconsideration, the Department found that the "Shriner Tract was purchased with the $100,000 set aside by P.L. 98-602, plus interest and investment income derived from that principal." (*Id.* at 10.) On this basis, the Department answered the remand issue by finding that the Shriner Tract had been acquired with only PL 602 funds. (*Id.*)

Shriner Tract Purchased in July 1996 with Proceeds from a Margin Loan - PL 602 Bonds Served as Collateral

The Wyandotte purchased the Shriner Tract in July 1996, with proceeds from a margin loan that was acquired from the Commingled Account. (App. Vol. VI: 262, 265.) *See also Governor of Kan.,* 430 F. Supp. 2d at 1211–12. That margin loan transaction was challenged in the remand proceedings before the Department. The Department determined it did not matter if the actual $100,000 Set Aside Funds were used to purchase the Shriner Tract or if they were used as collateral (in the form of the PL 602 Bonds) to generate the margin loan that was used to purchase the land. (*Id.* at 1223.) In either case, the Department found that all the $100,000 Set Aside Funds were used on the purchase of the Shriner Tract. (App. Vol. VII: 10-11.)

Wyandotte 2006 Application for Mandatory Trust Acquisition of the Park City Land Under PL 602 and State of Kansas Objections

In April 2006, the Wyandotte submitted another application to have the Park City Land taken in trust for gaming purposes. This application was made under the Secretary's discretionary authority pursuant to 25 U.S.C. § 465. (App. Vol. VII: 12-15.) Two years later, the Wyandotte changed course and claimed that PL 602 mandated the acquisition of the Park City Land in trust. (*Id.* at 17-22.)

Between September 2010 and May 2014, the State of Kansas ("the State") sent a series of letters to the Department objecting to the acquisition of the Park City Land in trust under the mandatory provision of PL 602. (App. Vol. VII: 37-210; Vol. VIII: 1-168; 190-241; Vol. IX: 1-62, 103-255, 256-78; Vol. X: 1-5.) The State's arguments included: (1) from an accounting standpoint, there was not enough money from the PL 602 Bonds and imputed earnings to allow for purchasing both the Shriner Tract for $180,000 and the Park City Land for $25,000 (App. Vol. VIII: 190-241; Vol. IX: 1-62.); (2) the mandatory trust acquisition provision of PL 602 could not be invoked for the Park City Land because all the $100,000 Set Aside Funds had been fully expended on the purchase of the Shriner Tract (*Id.*; App. Vol. VII: 37-38); (3) a purchase of land using, at most, imputed earnings on the investment of the PL 602 bonds cannot trigger the mandatory trust acquisition provision of PL 602 (App. Vol. VIII: 10, 191-92.); and (4) the Department had long ago determined that it had fulfilled its obligation under PL 602 by acquiring the Shriner Tract in trust and

that any future trust acquisitions had to be predicated on some other statutory authority. (App. Vol. V: 105-09, 114, 116, 134-35, 174-75; Vol. VIII: 3-13; Vol. IX: 104-05, 256-78.)

Accounting Issues Addressed in 2014 Washburn Decision Resulting in Denial of the Park City Land Trust Application

During the remand proceedings in the Shriner Tract Litigation, the Wyandotte submitted an accounting analysis by KPMG to suggest that the Wyandotte had purchased the Shriner Tract with only the $100,000 Set Aside Funds. (App. Vol. VI: 1-266; VII: 6-11; Add. 44.) The Wyandotte relied on that same KPMG accounting analysis in connection with the 2006 Park City Land application. (Add. 49.)

The KPMG analysis purported to track the value of the earnings on the PL 602 Bonds while they were in the Segregated Account. Once that account was closed in November 1991, and the commingling occurred, KPMG could no longer directly track the value of the PL 602 Bonds separately. For the post-commingling period, "KPMG determined the amount of interest earned by the (Commingled) account overall, and then attributed a pro-rated portion of that interest" to the PL 602 Bonds. (Add. 45.)

The Department noted that the earnings generated in the Commingled Account between 1991 and July 1996 were, at least in part, generated by assets acquired through margin loans acquired from the Commingled Account. These

margin loans carried interest charges that were deducted monthly from the Commingled Account and those deductions reduced the amount of the overall earnings accordingly. (Add. 47-48.) The KPMG analysis failed to account for those interest charges. (Add. 48.)

Kansas presented an accounting report prepared in 2012 by Jerry Gottlieb ("Gottlieb Report"). (App. Vol. VIII: 190-241; Vol. IX: 1-62; Add. 47-50.) The Gottlieb Report demonstrated that the KPMG accounting analysis overstated the earnings on the PL Bonds 602 by failing to factor in deductions for margin loan interest charges for loans used to purchase investments in the Commingled Account. (Add. 47-48.) Once those deductions were factored in, the Gottlieb Report revealed that the value of the $100,000 Set Aside Funds and imputed earnings was insufficient to allow for the purchase of both the Shriner Tract and the Park City Land. (*Id.*)

The Department agreed, concluding "that these deductions did reduce the amount of interest earned by the account…and that [the Wyandotte's accounting] overstated the amount of interest earned by the 602 Funds." (*Id.* at 48.) Because the Department had already determined that the Shriner Tract was purchased for $180,000 in July 1996, which consisted of the $100,000 Set Aside Funds and $80,000 in imputed earnings, the Department concluded that "the Nation could not have used the 602 funds exclusively to purchase Park City Parcel." (Add. 50.) The application to acquire the Park City Land in trust under PL 602 was rejected on that

basis in the 2014 Washburn Decision. (*Id.*)

2017 Park City Land Application and Accounting Issues

1. RSM assumption

In 2015, the Wyandotte submitted another application to have the Park City Land acquired in trust under the mandatory provision of PL 602 but withdrew it in August 2017. (App. Vol. X: 25.) A new application was submitted in October 2017. (App. Vol. X: 48-54.) In connection with this 2017 application, the Wyandotte submitted a new financial analysis of the "imputed" earnings on the PL 602 bonds that was performed by RSM US LLP ("RSM") and reflected in a report dated September 29, 2017 ("RSM Report"). (App. Vol. X: 38-47.) Along with the RSM Report, the Ober Audits were provided to the Department for the first time. (Add. 49, 51.) The Ober Audits were specifically based on the Wyandotte's financial statements. (App. Vol. V: 1-71.) The Ober Audits covered the time frame from 1986 through September 1996. The Ober Audits were restricted to accounting for the funds distributed to the Wyandotte by PL 602, which were collectively referred to as the "Claims Money Fund." (*Id.*) The Ober Audits made no reference to any restriction on the Wyandotte's use of earnings on the investment of the $100,000 Set Aside Funds. (*Id.*) The Ober Audits did not differentiate in its accounting of the $100,000 Set Aside Funds and the balance of the PL 602 funds that had been distributed to the Wyandotte by PL 602. (*Id.*) The Ober Audits reported the

investment and other activity on the Claims Money Fund as one single, combined fund. (*Id.*) A net loss in a fiscal year reduced the Claims Money Fund and a net gain increased it. (*Id.*) The Ober Audits did not insulate the earnings on the investment of the $100,000 Set Aside Funds from investment losses. (*Id.*)

The RSM Report relied primarily on the Ober Audits. (App. Vol. X: 42.) To arrive at its pro-rated imputed value of the earnings on the PL 602 Bonds, RSM considered only what it selected as "relevant" entries on the Balance Sheet and Income Statements of the Ober Audits. (*Id.* at 42-43.)[7] RSM utilized only those entries to determine the annual net value of the overall Claims Money Fund account and the amount of annual net earnings (interest and dividend interest less margin interest charges) generated by the Claims Money Fund accounts, and then imputed a pro-rated portion of that net account value and earnings to the PL 602 Bonds on an annual basis. (*Id.* at 42-44.)

RSM charted the imputed pro-rated earnings annually from 1986 through year-ending September 1996, to conclude that there were enough funds to accomplish the purchase of both the Shriner Tract in July 1996, for $180,000 and the earlier November 1992, Park City purchase for $25,000 using only the $100,000 Set Aside Funds (PL 602 Bonds) plus the imputed earnings. (*Id* at 44.)

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[7] RSM ignored all other expenses and losses reported by the Ober Audits that impacted the Claims Money Fund, including the Veres International investment loss discussed below. (App. Vol. V: 18, 26, 29, 31; Vol. X: 42-47.)

RSM's Report included an unsupported assumption that during the Shriner Tract administrative proceedings and litigation, the Department and the courts had determined that the imputed earnings on the investment of the $100,000 Set Aside Funds were "restricted" and could not be used for anything other than the purchase of land that was to be acquired in trust. (*Id.* at 41-42.) This assumption allowed RSM to ignore the fact that between 1986 and the end of November 1991, the Wyandotte had spent all the earnings on the PL 602 Bonds in the Segregated Account other than $529.61. (App. Vol. VI: 5; 223-24; Vol. IX: 1, 43-46.) RSM also ignored the fact that the Ober Audits contained no such "restriction" on the earnings and did not account for any such "restriction." (App. Vol. V: 5, 11-12, 23-25, 40-41, 51-53, 61-62, 70-71.)

Due to this earnings restriction assumption, RSM reported higher dollar values for the imputed earnings on the PL 602 Bonds as of the end of November 1991, than the investment account statement or Ober Audits reflected existed for that month. (App. Vol. X: 46-47; Vol. VI: 223-24.) RSM used those higher imputed earnings in its chart of imputed earnings growth on the $100,000 Set Aside Funds to reach its overall conclusions. (App. Vol. X: 46-47.)

The RSM Report also failed to address that the Ober Audits specifically reported that the Park City Land was not purchased with the Claims Money Fund or that after it was purchased, it was never listed as an asset of the Claims Money Fund.

(App. Vol. X: 38-47; Vol. V: 35, 37, 38, 42, 43-71.)

2. RSM ignored the Veres International Investment loss

The Ober Audits disclosed that in 1990, the Wyandotte invested $161,429.50 in Veres International ("Veres Investment"). (App. Vol. V: 18, 21, 26.) This investment was funded primarily from a margin loan from the Claims Money Fund investment account. (App. Vol. V: 21-22.) The Ober Audits did not segregate the Veres Investment from the bond investments in the Claims Money Fund - it was treated as a "cash outflow" just like the bond investments were. (App. Vol. V: 21.) By the next fiscal year, the Ober Audits booked a loss of $153,849.23 on the Veres Investment. (App. Vol. V: 29, 31.) The Veres Investment loss reduced the entire Claims Money Fund by $153,849.23. (*Id.*) The Ober Audits reported that the Wyandotte purchased a zero-coupon bond to offset this loss. (App. Vol. V: 26.)

The RSM Report ignored the Veres Investment loss which resulted in overvaluing the performance of the investments in the Claims Money Fund, including the imputed earnings on the investment of the $100,000 Set Aside Funds. (App. Vol. V: 31; Vol. X: 46-47.) The RSM analysis was not consistent with how the Ober Audits accounted for the exact same investment activity.

Still, RSM allocated the interest charged for the Veres Investment margin loan (along with all the margin loan interest) on a pro-rata basis to the imputed earnings on the PL 602 Bonds. (App. Vol. X: 42-43, 46-47.) Likewise, RSM allocated on a

pro-rata basis the earnings generated by the zero-coupon bond the Wyandotte purchased in connection with the Veres Investment, just as it did with all other earnings on investments. (App. Vol. X: 42-43.) It simply did not account for the investment loss that was booked in the Ober Audits.

The Department financial officer who reviewed the RSM Report appeared to accept RSM's assumption about the claimed restricted use the Wyandotte could make of the imputed earnings on the PL 602 Bonds. (App. Vol. X: 125-127.) The Department made no mention of the statements in the Ober Audit that the Park City Land was not purchased with proceeds from the Claims Money Fund. (*Id.*) Nor did the Department mention the exclusion of the Veres Investment loss from the RSM Report. Despite all this, the Department stated that the conclusions reached in the RSM Report were "reliable under the consistency principle of General Accepted Accounting Practices "GAAP". (*Id.*)

2020 Sweeney Decision

AS Sweeney relied on the RSM Report in making the Trust Determination. (Add. 51-59.) She did so because the RSM Report relied on the Ober Audits which she found to be "valid and reasonable." (Add. 60.) In doing so, she never mentioned any of the non-accounting arguments the State had advanced to the Department between 2010 and 2014 nor did she mention the inconsistencies between the RSM Report and the Ober Audits. (Add. 51-62.)

For the Gaming Determination, AS Sweeney relied exclusively on the Kansas District Court's 2006 decision in *Wyandotte Nation*. AS Sweeney never mentioned the Department's own regulations in 25 C.F.R. §§ 292.2 and 292.5, which were adopted in 2008 and defined the circumstances under which the Department considers land to have been acquired in settlement of a land claim to meet that exception in IGRA. (*Id.* at 61.)

District Court Upheld the Department's May 20, 2020, Trust and Gaming Determinations

Although the Kansas Parties were not notified of the 2017 application, they challenged the 2020 Sweeney Decision as arbitrary and capricious and in violation of law under the APA. (App. Vol. I: 51-255.) In their briefing to the district court, the Kansas Parties argued, *inter alia*, that the Trust Determination should be set aside because: (1) the Park City Land was not purchased with any of the $100,000 Set Aside Funds (App. Vol. III: 46-49.); (2) the Park City Land was purchased with proceeds of a margin loan, and none of the collateral required to make that loan could have been the PL 602 bonds (*Id.* at 49-52.); (3) the 2020 Sweeney Decision failed to recognize the Department Policy adopted during the Shriner Tract administrative proceedings and confirmed in the Shriner Tract Litigation, and offered no explanation for changing that policy (*Id.* at 44-45); and (4) reliance on the RSM Report was arbitrary and capricious. (*Id.* at 29-33, 50-52.)

The Kansas Parties also argued that the Gaming Determination should be set aside because it failed to address the Department's regulations adopted in 2008, which established that the Park City Land did not meet the "land taken into trust as part of a settlement of a land claim" exception in IGRA. They argued that reliance was misplaced on the 2006 *Wyandotte Nation* decision because it was wrongly decided (*Id.* at 59-64; Vol. IV: 107), the 2008 Department regulations trumped the decision, and in any event, *Wyandotte Nation* was distinguishable. (Vol. III 52-59; 64-67.)

The district court rejected all the Kansas Parties' arguments and upheld both the Trust and Gaming Determinations. (Add. 1-33.) In doing so, the district court acknowledged that the Department never addressed whether a purchase of land with only earnings from the investment of the $100,000 could trigger the mandatory trust acquisition provision of PL 602. (*Id.* at 20.) The district court suggested that the Shriner Tract proceedings did not reveal that all the $100,000 Set Aside funds were expended on (or attributed to) the Shriner Tract purchase. (*Id.* at 21-22). The court further disputed that a Department Policy existed. (*Id.* at 17.) Even if it did, the court found that the 2020 Sweeney Decision need not address it because it was supposedly disposed of in the 2014 Washburn Decision. (*Id.* at 19-20.)

The district court rejected the Kansas Parties' accounting challenges and struck an affidavit of CPA Jerry Gottlieb (the "Gottlieb Affidavit") that the Kansas

Parties offered in their Opening Brief to demonstrate the mathematical impact on the RSM analysis of the imputed earnings on the $100,000 Set Aside Funds if the Veres Investment loss had been proportionally applied to the imputed earnings on the PL 602 Bonds. (*Id.* at 16, 24-25; App. Vol. III: 51-52, 244-251; Add. 63-70.)

Finally, the district court upheld the Gaming Determination, finding that it was not arbitrary and capricious because *Wyandotte Nation* was correctly decided, was not distinguishable, and occupied the field to the exclusion of the 2008 Department regulations. (Add. 27-32.)

SUMMARY OF THE ARGUMENT

Although the history and accounting matters involved in this appeal may be complicated, the central issues for the Court to decide are simple and straightforward. PL 602 provided that if the Wyandotte were to purchase land(s) with the $100,000 Set Aside Funds, the Department would have to take those land(s) into trust under PL 602. Once that happened, the Department would have fulfilled its mandatory trust obligations because the $100,000 Set Aside Funds were fully expended on land worth $100,000 or more, and PL 602 mandated no further trust acquisitions.

Even though this Department Policy was championed by the Department and the Wyandotte throughout the Shriner Tract Litigation, the Department's Trust Determination permitted the Wyandotte to invoke the mandatory trust provision of

PL 602 again to have the Park City Land taken in trust even though the $100,000 Set Aside Funds had all been expended on the Shriner Tract purchase. The Department compounded this error by determining that the Park City Land was eligible for gaming under the settlement of a land claim exception set forth in 25 U.S.C. § 2719(b)(1)(B)(i), even though no settlement existed, and no land was acquired in trust as part of the settlement of a land claim.

The Trust Determination was arbitrary and capricious for several reasons. First, the mandatory trust acquisition provision of PL 602 cannot be invoked because all the $100,000 Set Aside Funds (or PL 602 Bonds) were expended on the purchase of the Shriner Tract. Accordingly, the Park City Land could not have been purchased with any of the $100,000 Set Aside Funds, or the PL 602 Bonds. As such, the purchase of that land could not have triggered the mandatory trust acquisition obligation of PL 602.

Second, the established Department Policy was that the Shriner Tract trust acquisition fulfilled the Department's mandatory trust acquisition obligation under PL 602 because land worth $100,000 or more was purchased with all the $100,000 Set Aside Funds and that land was acquired in trust under the mandate of PL 602. The Trust Determination failed to recognize this policy, failed to display awareness that it was the Department's policy, and failed to provide a reasoned explanation for changing the policy.

Third, the Department's reliance on the RSM Report to determine that the Wyandotte had qualifying funds available for a mandatory trust acquisition under PL 602 was arbitrary and capricious. That report is based on a faulty assumption, contradicts the Ober Audits, and arbitrarily ignores an investment loss that negatively impacted the value of the Claims Money Fund, thus arbitrarily insulating the imputed earnings on the PL 602 Bonds from the impact of that loss. This overstated the amount of the imputed earnings on the PL 602 Bonds. The Department failed to consider any of these matters in its review of the Ober Audits and the RSM Report.

The Department's Gaming Determination was likewise arbitrary and capricious. That determination failed to consider the Department's 2008 regulations at 25 C.F.R. §§ 292.2 and 292.5, which should have controlled the Gaming Determination. Moreover, even if the Wyandotte's ICC claims can be construed to be "land claims" under the IGRA statutory exception, land acquired in trust under PL 602 is not "land taken into trust as part of a settlement" of a land claim, including as defined in 25 C.F.R. § 292.5. The 2020 Sweeney Decision's failure to apply, much less even mention, the controlling 2008 Department regulations is grounds to set aside the Gaming Determination.

Finally, the Gaming Determination's reliance on *Wyandotte Nation* was misplaced because that decision was not correctly decided, is distinguishable on its

facts, and did not occupy the field such that the Department was justified in relying on it and not addressing its own 2008 regulations.

STANDARD OF REVIEW

District Court Decision

Since this case was brought under the APA, the Tenth Circuit owes no deference to the district court decision, which is subject to *de novo* review. *Sac & Fox Nation*, 240 F.3d at 1260; *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 793 (10th Cir. 2010).

Review of Agency Decisions

The APA authorizes the reviewing court to "hold unlawful and set aside agency actions, findings, and conclusions" that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1), (2)(A); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

Although the APA's arbitrary and capricious standard is ordinarily a deferential one, *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1164 (10th Cir. 2002), no deference is owed for a clearly wrong agency interpretation. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). The Court is required to "engage in . . . a probing, in-depth review." *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 415 (1971). Agency action is arbitrary

and capricious "if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that 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." *Copar Pumice Co.*, 603 F.3d at 793 (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"Because the arbitrary and capricious standard focuses on the rationality of an agency's decision-making process rather than on the rationality of the actual decision, 'it is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Olenhouse*, 42 F.3d at 1575 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50). Thus, "the grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (citing *Olenhouse*, 42 F.3d at 1575). Courts "may not accept…counsel's *post hoc* rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 (emphasis in original).

"In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record." *Olenhouse*, 42 F.3d at 1575. Thus, agency action will be set aside as arbitrary unless it is supported by "substantial evidence" in the administrative record. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1156 (10th Cir. 2004)

(citing *Olenhouse*, 42 F.3d at 1575). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003) (internal quotation omitted).

Agencies Must Comply With Their Own Regulations

The APA has been "interpreted …to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations." *Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1078 (10th Cir. 2004) (quoting *Miami Nation of Indians of Ind., Inc. v. U.S. DOI*, 255 F.3d 342, 348 (7th Cir. 2001 and citing *Utahns for Better Transp.*, 305 F.3d at 1165). "[A]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Big Horn Coal Co. v Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986) (per curiam) (quoting *Nat'l Conservative Pol. Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1979) (per curiam)).

Agencies Must Provide a Reasonable Explanation for a Change of Position or Policy

Agencies must provide a reasonable explanation for a change in agency policy or position. *Encino Motorcars, L.L.C. v. Navarro*, 136 S.Ct. 2117, 2125–26 (2016). An agency must "display awareness that it is changing position and show that there are good reasons for the new policy." *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)). "[A]n '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be . . . arbitrary and capricious.'" *Encino*

Motorcars, 136 S.Ct. at 2126 (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 981 (2005)).

ARGUMENT

A. The Department's Trust Determination Should be Set Aside Because None of the $100,000 Set Aside Funds for the Purchase of Land Were Used for the Purchase of the Park City Land

1. Shriner Tract record

In the Shriner Tract remand proceedings, the Department specifically found that all the $100,000 Set Aside Funds (or PL 602 Bonds) were fully expended on and/or fully attributed to the purchase of the Shriner Tract. (App. Vol. VII: 10; *Governor of Kan.,* 430 F. Supp. 2d at 1215, 1217–21.) Because all the $100,000 Set Aside Funds were used to purchase the Shriner Tract, this meant that the Park City Land had to have been purchased with, at most, only "imputed earnings" from the PL 602 Bonds. AS Sweeney never addressed "whether that would be legally permissible." (Add. 20.)

On its own, the district court suggested the conclusion that the $100,000 Set Aside Funds were expended on the Shriner Tract was "not sustainable given the history of the Shriner Tract litigation." (Add. 21.) Yet, the Department made that exact finding. (App. Vol. VII: 10.) The Wyandotte repeatedly acknowledged it was expending all the $100,000 Set Aside Funds, plus earnings, to purchase the Shriner Tract. (App. Vol. V: 90, 95, 100, 104, 106, 109, 111, 113, 116.) The Department

recognized that while the earnings on the PL 602 bonds may be spent by the Wyandotte at its will, it was the $100,000 Set Aside Funds that "must be spent on trust lands." (App. Vol. V: 105-09.)

The Wyandotte and the Department repeatedly told the courts that the Wyandotte had expended all the $100,000 Set Aside Funds on the Shriner Tract. (App. Vol. VIII: 48-50, 143-45; Vol. V: 134-35, 174-75, 187-92.) The Department noted on remand that the Congress intended that interest or investment income accrued from the $100,000 Set Aside Funds could be ***added*** to those funds for the purchase of land that then had to be acquired in trust. (App. Vol. VII: 10.) The Department concluded there was no language in PL 602 "triggering the defeat of the trust purchase if more than $100,000 is used to purchase real estate, when the ***additional funds*** were derived from the original" $100,000 Set Aside Funds. (*Id.*) (Emphasis added.) *See also, Governor of Kansas,* 430 F. Supp. 2d at 1220; *Wyandotte Nation,* 437 F. Supp. 2d at 1210 (finding that "Congress mandated that $100,000 of the Tribe's ICC judgment funds be utilized to purchase land to be taken into trust…The Wyandotte used the funds appropriated by Congress . . . to acquire the Shriner Tract.").

Finally, in 2014, AS Washburn noted that the Department's position that was affirmed in the Shriner Tract litigation "was 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." (Add. 44.) (Emphasis added.)

There is no doubt that the history of the Shriner Tract Litigation establishes that the $100,000 Set Aside Funds (or PL 602 Bonds) were fully expended on or attributed to the purchase of the Shriner Tract. As such, those funds could not have been used for the purchase of the Park City Land. The Department and the courts determined long ago that the plain language of PL 602 requires the $100,000 Set Aside Funds (directly or as collateral in the form of the PL 602 Bonds) must be used on land purchase(s) to trigger the mandatory trust acquisition provision of PL 602. Those are the only funds distributed to the Wyandotte under PL 602 that were restricted to the purchase of land that then had to be acquired in trust under PL 602. Even if there were enough "imputed earnings" to cover the purchase price of the Park City Land, PL 602 contains no language suggesting that such imputed earnings ***alone*** can trigger the mandatory trust acquisition provision of PL 602.[8] The Department completely failed to consider this issue. The Trust Determination was arbitrary and capricious.

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[8] Congress has shown that it knows how to pass legislation restricting the use of earnings from the investment of ICC judgment funds to the purchase of land. *See* Michigan Land Claims Settlement Act, Pub. L. 105–143, Section 107(a), 111 Stat. 2658. (App. Vol. III, 226-42.) *See also United States v. Freeman*, 44 U.S. 556, 564-65 (1845) (holding that a subsequent statute may be used to interpret an earlier statute); *Nat'l R.R. Passenger Corp. v. Interstate Com. Comm'n*, 610 F.2d 865, 873-74 (D.C. Cir. 1979) (applying *Freeman and* utilizing a 1978 statute to determine the meaning of a 1973 statute).

2. The Department determined in the Shriner Tract Litigation that use of a margin loan for the purchase of land is the same as expending the $100,000 Set Aside Funds on the land

The district court also suggested the origin of the funds used to purchase the Shriner Tract was in doubt because the Shriner Tract (like the Park City Land) was purchased using a margin account loan. Based on this, the district court suggested no conclusion can be drawn that the $100,000 Set Aside Funds (or PL 602 Bonds) were used on or attributed to that purchase. (Add. 21-22.)

However, the Department addressed and resolved that issue during the Shriner Tract remand proceedings. *Governor of Kansas,* 430 F. Supp. 2d at 1223. During the remand proceedings, the argument was advanced that none of the $100,000 Set Aside Funds (or PL 602 Bonds) were used to purchase the Shriner Tract because the purchase was accomplished with funds raised through a margin account loan. *Id.* at 1222. The Department rejected the argument. *Id.* at 1223.

In doing so, the Department found that the PL 602 Bonds served as collateral for the Shriner Tract margin loan. Department financial analyst Tom Hartman concluded that it was "reasonable and acceptable for the Tribe to pay for the Shriner Tract with a margin account loan secured by the [PL 602] bonds that remained in the investment account," in part because there was no evidence to suggest that the (PL 602) bonds would be redeemed prematurely or that any loan against the "Pub. L. 98-602 funds would not be paid at full face value." *Id.* at 1223-24. Accordingly,

the Department concluded that the PL 602 Bonds did not have to be liquidated for the purchase of the Shriner Tract but could be used as collateral for the margin loan for the purchase of the Shriner Tract and still trigger the mandatory trust acquisition provision of PL 602. *Id.* at 1223. On that basis, the Department found that the Shriner Tract was purchased with the $100,000 Set Aside Funds. (App. Vol. VII: 10.)

In short, the Shriner Tract administrative proceedings demonstrated that the Department considered the use of the PL 602 Bonds as collateral for a margin loan to purchase the Shriner Tract to be the same as directly using the $100,000 Set Aside Funds for that purchase. It did not change the finding the Department made in the remand proceedings that the $100,000 Set Aside Funds were expended on the Shriner Tract purchase.

3. The collateral for the Park City Land margin loan had to have been investment assets besides the PL 602 Bonds

Since it was use of the PL 602 Bonds as the collateral for the Shriner Tract margin loan that triggered the mandatory trust acquisition provision of PL 602, those same PL 602 Bonds could not have been used several years earlier as collateral for the November 1992, $25,000 Park City Land margin loan. No one has suggested the Wyandotte could repeatedly pledge the PL 602 Bonds over and over for multiple loans to purchase land that then must be acquired in trust under PL 602.

Moreover, there had to have been collateral used to secure the Park City Land margin loan since a margin loan is an "extension of credit ***collateralized*** exclusively by liquid and readily marketable debt or equities, or gold." 12 C.F.R. § 3.2 (emphasis added). *(See also,* App. Vol. X: 57.) The collateral that secured the Park City Land margin loan could not have been the PL 602 Bonds. As such, the funds used to acquire collateral for the Park City Land margin loan could not have been the $100,000 Set Aside Funds. On this basis alone, one cannot conclude that the Park City Land was purchased with only PL 602 funds that trigger a mandatory trust acquisition.

The Trust Determination should be set aside because none of the $100,000 Set Aside Funds (or PL 602 Bonds) could have been used on the purchase of the Park City Land. The mandatory trust acquisition provision of PL 602 should not have been invoked.

B. The Department's Trust Determination Should be Set Aside Because it Violated Established Department Policy and the Department Failed to Provide a Reasoned Explanation for the Policy Change

1. The Department failed to recognize its own policy and explain why it deviated from it

The Department recognized that it was the use of the $100,000 Set Aside Funds on the purchase of the Shriner Tract that triggered the mandatory trust acquisition provision of PL 602. (App. Vol. V: 105-09, 111, 113-114, 116.) While

earnings on the investment of those funds could be spent at the discretion of the Wyandotte, only the $100,000 Set Aside Funds had to be spent on trust land. (*Id.* at 105-109.) The Department clearly communicated to the Wyandotte that once the $100,000 Set Aside Funds were fully expended on land that was then placed in trust, that fulfilled the Department's trust acquisition obligation under PL 602 and no further trust acquisitions could be predicated on PL 602. (*Id.* at 116.) The Shriner Tract was acquired in trust based on this Department Policy.

Thereafter, the Department and the Wyandotte advanced the Department Policy to convince the courts that only the $100,000 Set Aside Funds were used to purchase the Shriner Tract, that the trust acquisition should not be disturbed, and that the acquisition of that land into trust under PL 602 fulfilled the Department's obligation under PL 602. (*Id.* at 95, 104, 134-35, 163-65, 174-75, 184, 191-92; Vol. IX: 271.)

The Trust Determination failed to recognize the existence of this policy or provide any explanation for deviating from it. (App. 51-59.) Although an agency has the power to change its existing policies, in doing so the agency must at least "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, 136 S.Ct. at 2125–26 (quoting *Fox Television Stations, Inc.*, 556 U.S. at 515).

This rule is "not limited to formal rules or official policies and applies equally to practices implied from agency conduct." *Saget v. Trump*, 375 F. Supp. 3d 280, 355 (E.D.N.Y. 2019); *UnitedHealthcare Ins. Co. v. Azar*, 330 F. Supp. 3d 173, 189 (D.D.C. 2018) (quoting *Republic Airline Inc. v. U.S. DOT*, 669 F.3d 296 (D.C. Cir. 2012) ("[a]gency policies and practices may take many forms and still be sufficiently established so that any change in policy must be explained"); *see also NRDC v. U.S. EPA*, 438 F. Supp. 3d 220, 232 (S.D.N.Y. 2020) (requiring reasoned explanation for change in a policy that was established in a "peer review handbook"); *ABA v. U.S. Dep't of Educ.*, 370 F. Supp. 3d 1, 33 (D.D.C. 2019) (requiring reasoned explanation for change in a policy that was established in letters sent to applicants informing them that their employment qualified for student loan forgiveness).

The Department's obligation to either follow its policy, or at the very least provide a reasoned explanation for deviating from it, is especially important given the serious reliance interests that were engendered by the Department Policy. *E.g.*, *Fox Television Stations, Inc.*, 556 U.S. at 515. The Kansas Parties had every right to rely on the Department Policy that the entire $100,000 Set Aside Funds were expended to purchase the Shriner Tract, that the Shriner Tract acquisition in trust under PL 602 fulfilled the Department's obligation under PL 602, and that no further trust acquisitions could be predicated on that statute. Further, the Kansas Parties had every right to rely on the Department to follow its own policy, especially when

selecting sites for casinos and investing funds to open them in Kansas. Despite the existence of the Department Policy for almost 25 years, the Department reversed course in the Trust Determination without any acknowledgement or explanation. Its decision to do so was arbitrary and capricious.

2. 2014 Washburn Decision

The district court offered that even if the Department Policy existed, no discussion about it was required in the 2020 Sweeney Decision because that matter had allegedly been addressed in the 2014 Washburn Decision. (Add. 19.)[9] The district court's position on this issue is simply not tenable.

Prior to the issuance of the 2014 Washburn Decision, the State had advanced arguments to the Department that the use of, at most, imputed earnings on the PL 602 Bonds alone to acquire the Park City Land cannot trigger the mandatory trust acquisition provision of PL 602. (App. Vol. VII: 37-38; Vol. VIII: 10, 191-92.) The State also argued that the Department determined long ago that all the $100,000 Set

[9] The Kansas Parties did not discuss this aspect of the 2014 Washburn Decision in their Opening Brief because the 2020 Sweeney Decision did not suggest AS Washburn addressed these matters in July 2014. (Add. 51-62.) The Defendants first suggested that AS Washburn had addressed these issues in his July 3, 2014, Decision. (App. Vol. IV: 60-63, 65.) The Kansas Parties responded to this in their Reply Brief. (App. Vol. IV: 94-97.) The district court suggested it was procedurally improper for the Kansas Parties to respond to the Defendants' assertions in a reply brief. (Add. 18-19.) However, "where appellee raises argument not addressed by appellant in an opening brief, appellant may respond in reply brief." *Sadeghi v. INS*, 40 F.3d 1139, 1143 (10th Cir. 1994), citing *In re Wildman*, 859 F.2d 553, 555 n.4 (7th Cir. 1988).

Aside Funds were expended on the Shriner Tract, and after the Shriner Tract was acquired in trust under PL 602 no further funds remained with which to fulfill the "shall of the law" such that no further trust acquisitions could be predicated on PL 602. (App. Vol. VII: 37-43; Vol. VIII: 3-13, 191-92; Vol. IX: 104-05, 256-78.)

The purported "explanation" in the 2014 Washburn Decision that supposedly dispensed with the need in May 2020 for the Department to address the Department Policy or other issues raised by the State of Kansas is purportedly found on page 7 and footnote 37 of the 2014 Washburn Decision. (Add. 7, 19-20.)

The district court's reliance on this passage from AS Washburn's decision was misplaced for several reasons. First, AS Washburn specifically stated that he was ***not*** addressing the State's arguments "because it [wa]s unnecessary to do so in light of the Department's decision to deny the Nation's application." (Add. 47.) Everything that followed that was pure dicta as "statements and comments . . . concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *Tokoph v. United States*, 774 F.3d 1300, 1303 (10th Cir. 2014) (quoting *United States v. Villarreal-Ortiz*, 553 F.3d 1326, 1328 n.3 (10th Cir. 2009).[10]

[10] The district court suggested that the Kansas Parties' may now be foreclosed from challenging the reliance on these passages from the 2014 Washburn Decision because the State failed to timely seek review of the 2014 Washburn Decision that denied the Wyandotte Park City Land application. However, it is unclear how an APA review could be mounted as to matters AS Washburn specifically stated he was ***not*** addressing.

Second, after confirming that he was not addressing the State's other arguments, AS Washburn stated, "we have reviewed the Shriner Tract litigation record and confirmed that, except for the issue discussed below, the State's ***accounting arguments*** were raised and resolved in connection with the Shriner Tract litigation." (Add. 47.) (Emphasis added.) While the State did raise accounting issues, the other issues raised between 2010 and July 2014, were not accounting issues and, as such, were not considered in the 2014 Washburn Decision.

Third, footnote 37 misconstrues the positions that the State of Kansas advanced to the Department between 2010 and July 2014. AS Washburn suggested that "the State contends that Department officials understood that only one acquisition was permitted by the Act when it approved the Shriner Tract acquisition in 1996." (Add. 47, n. 37.) But that was ***never*** the position advanced by the State. The State never claimed that only one acquisition was permitted by PL 602 and neither did the Department. Rather, it claimed then, as it claims now, that the Department had determined that once land worth $100,000 or more was purchased with the $100,000 Set Aside Funds and once that land was acquired in trust under the mandatory provisions of PL 602, that fulfilled the mandate of that statute. Accordingly, any future trust acquisitions had to be predicated on some other statutory authority. (App. Vol. V: 105-09, 114, 116, 174-75.) The $100,000 could have been spent on several parcels - but the Wyandotte chose to spend it all on the

Shriner Tract. The 2014 Washburn Decision did not address this issue.

Fourth, footnote 37 suggests that statements made by the Department that revealed the Department Policy were made "before the Department had the benefit of the accounting of the 602 Funds to know how much the 602 Funds had grown in value by July 1996." (Add. 47, n. 37.) But that imputed "growth" (theoretical as it was because the Wyandotte had spent all but $529.61 of the actual earnings in the account by November 1991) had nothing to do with the development of the Department Policy in the Shriner Tract trust acquisition. That policy focused on the plain language of PL 602 regarding the use the $100,000 Set Aside Funds to purchase lands. The Department recognized that once the $100,000 Set Aside Funds were used to purchase land, the Department was required to place such land in trust under PL 602. Once that happened and the $100,000 Set Aside Funds were fully expended on the land purchase(s), the mandate to take land in trust under PL 602 was deemed fulfilled - regardless of whether imputed earnings remained thereafter.[11] (App. Vol. V: 105-09, 114, 116, 174-75.) When the Department Policy was established by July 1996, the Department was fully aware of the investment and the

[11] It cannot escape mentioning that if this is not the Department Policy, and imputed earnings alone can trigger the mandatory trust obligation if used to purchase land even after the $100,000 Set Aside Funds have already been expended, then the Wyandotte can keep going back to the well over and over as one can only imagine how much the "remaining" imputed earnings have purportedly grown in the 25 years since July 1996. (*See* App. Vol. X: 47.)

supposed "accumulation" of earnings on the $100,000 Set Aside Funds. (App. Vol. V: 100-02, 103-04, 105-109, 111, 114, 116.)

While an agency does not have to demonstrate that the reasons for a new policy are better than the reasons for the old one, there must at least be "good reasons for it (the new policy) and the agency ***believes*** it to be better…" (Add. 20, citing *Fox Television Stations, Inc.*, 556 U.S. at 515 (emphasis in original). The 2020 Sweeney Decision fails to supply any reason, much less a good one for its policy deviation. The 2014 Washburn Decision also fails to do so. For this reason alone, the Trust Determination should be set aside.

C. The Department's Trust Determination Should be Set Aside Because it Relied on Arbitrary and Inconsistent Accounting Analysis such that the Substantial Evidence in the Record does not Establish that the Park City Land was Purchased with Only the $100,000 Set Aside Funds

1. The Department failed to recognize that the RSM Report was not consistent with the Ober Audits but still relied on it

The 2014 Washburn Decision made it clear that the Department required that the earnings imputed to the $100,000 Set Aside Funds be reduced by the pro-rata share of monthly margin loan interest charges imposed on the account. (Add. 42-48.) This was because the earnings generated in the Commingled Account were, at least in part, generated by assets acquired through margin loans acquired from the Commingled Account. (*Id.*) Ignoring margin loan interest charges would result in overstating the value of the imputed funds. (*Id.*)

RSM claims that it used the balances in the Claims Money Fund to calculate its imputed earnings on the PL 602 Bonds. (App. Vol. X: 43.) The earnings generated in the Claims Money Fund between 1986 and 1996 were, at least in part, generated by investments acquired through margin loans throughout that time frame. (App. Vol. V: 1-71.) The Department reviewed the RSM Report and concluded its "methodology, calculations, and assumptions [we]re consistent with industry standards and the RSM Report's conclusions [we]re reliable under the consistency principle of " GAAP. (App. Vol. X: 125-27.) However, the Department makes no mention of the fact that RSM completely ignored the Veres Investment loss that the Ober Audits reported in 1991 that reduced the balance of the Claims Money Fund. (App. Vol. X: 38-47, 125-27; Vol. V: 31.)

Even though it ignored the loss on the Veres Investment, RSM accounted for the other elements of it such as interest on the margin loan for the Veres Investment which was allocated on a pro-rata basis to reduce the interest or earnings on the PL 602 Bonds. (App. Vol. X: 42-43.) Earnings on the zero-coupon bond the Wyandotte purchased to offset the Veres Investment loss were allocated on a pro-rata basis to increase the imputed earnings on the PL 602 Bonds along with the earnings on the other investment assets acquired in the investment accounts of the Claims Money Fund. (*Id.*)

Notwithstanding RSM's curious definition of what it considered relevant, the

inclusion of the Veres Investment, whether it made money or lost money, was necessary for a consistent application of the pooling approach that RSM used for the Claims Money Fund in the RSM Report. The Ober Audits accounted for the loss booked in 1991 on the Veres Investment that reduced the value of the Claims Money Fund. (App. Vol. V: 21, 26, 31.) RSM and the Department failed to consider this important aspect of the matter.

The Department relied on the RSM Report to conclude that the Park City Land was purchased with the $100,000 Set Aside Funds, and imputed earnings, all of which were part of the Claims Money Fund. Yet, the Ober Audits state precisely ***the opposite***. (App. Vol. V: 37, 42, 43-71.) Further, AS Sweeney specifically noted that the "RSM Report was based on the" Ober Audits and that those audits "appear to be valid and reasonable." (Add. 60.) This critical inconsistency is not addressed anywhere in RSM Report or by the Department in its review.

The conclusion the Department drew from the RSM Report that there was enough money in the $100,000 Set Aside Funds and imputed earnings to accomplish both the Shriner Tract and the Park City Land acquisitions cannot withstand the appropriate level of scrutiny given these inconsistencies and the failure of the Department to consider such important aspects of the matter.

2. The District Court erred in striking the Gottlieb Affidavit

The Kansas Parties offered paragraph 10 and Exhibit 2 of the Gottlieb

Affidavit to mathematically illustrate the impact of allocating the Veres Investment loss on a pro-rata basis to the imputed earnings on the PL 602 Bonds. (App. Vol. III: 51-52; Add. 63-70.) It reveals that if that loss had been proportionately applied to the Claims Money Fund, and everything else calculated just as RSM did, there would not have been enough imputed earnings on the PL 602 Bonds for the Park City Land purchase. (Add. 66, 69-70.)

The district court struck the Gottlieb Affidavit and exhibits. (Add. 16.) The Kansas parties respectfully submit that the district court erred in striking paragraph 10 and Exhibit 2 of the Gottlieb Affidavit because it was appropriate background information and aided in determining "whether the agency considered all relevant factors including evidence contrary to the agency's position." *State ex rel. Sec'y of Soc. & Rehab. Servs. v. Shalala*, 859 F. Supp. 484, 488 (D. Kan. 1994) (citing *Thompson v. U.S. DOL*, 885 F.2d 551, 555 (9th Cir. 1988). The Gottlieb Affidavit concerning the Veres Investment loss does not substitute Mr. Gottlieb's judgment for the agency's judgment, and it does not introduce facts outside the AR. Rather, it provides calculations based on data already contained in the AR to provide a better understanding of same and was appropriate for the district court to consider. *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1161–62 (9th Cir. 2006), *abrogated on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008); *Lab'y Corp. of Am. Holdings v. United States*, 116 Fed. Cl. 386, 389 (2014) (allowing

party to supplement record for "effective judicial review"); *Firstline Transp. Sec., Inc. v. United States*, 116 Fed. Cl. 324, 327 (2014) (same); *Colo. Wild v. Vilsack,* 713 F. Supp. 2d 1235, 1241–42 (D. Colo. 2010) (finding analysis "wholly lacking from the record" and "admissible for purposes of supplementing the record.").

D. The Department's Gaming Determination Should be Set Aside Because the Department Failed to Consider and Apply its Own Regulations Adopted in 2008 that Control the Gaming Determination

1. The 2008 Department Regulations defined "land claim" and "criteria for when gaming can occur on newly acquired lands under a settlement of a land claim"

Effective June 19, 2008, the Department adopted regulations at 25 C.F.R. § 292 that defined what was meant by the term "land claim" and set forth the criteria for determining when gaming can occur on land newly taken in trust as part of a settlement of a land claim pursuant to 25 U.S.C. § 2719(b)(1)(B)(i). 25 C.F.R. §§ 292.2 and 292.5. (Add. 71-74.) When 25 C.F.R. § 292 was adopted, the purpose of the part was explained as follows:

> The Indian Gaming Regulatory Act of 1988 (IGRA) contains several exceptions under which Class II or Class III gaming may occur on lands acquired by the United States in trust for an Indian tribe after October 17, 1988, if other applicable requirements are met. ***This part contains procedures that the Department of Interior will use to determine whether these exceptions apply.***

(25 C.F.R. § 292.1) (emphasis added).

The criteria in Section 292.5 for meeting the "settlement of a land claim" in every instance involves a "settlement." In in every instance, the settlement is one

"that resolves or extinguishes with finality" the tribe's land claim, in whole or in part. (Add. 73.)

In "almost all instances, Congress must enact the settlement into law before land can qualify under the exception." 73 Fed. Reg. 29354 (May 20, 2008). The only instance that meets the criteria for this exception where Congress has not enacted a settlement into law is not applicable in this case and involves a settlement of a land claim that is not executed by the United States, but "is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue." 25 C.F.R. § 292.5(b)(2) (Add. 73.)

2. 25 U.S.C. § 2719(b)(1)(B)(i) does not apply because PL 602 did not involve a settlement

The plain meaning of 25 U.S.C. § 2719(b)(1)(B)(i) clearly reflects that it applies only in the context of a "settlement" of a land claim. Because no settlement exists in this case, 25 U.S.C. § 2719(b)(1)(B)(i) is inapplicable. The Gaming Determination was arbitrary and capricious for that reason alone.

To ascertain the plain meaning of a statute, courts look "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403–05 (1988) and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220–01 (1986)); *United States v. Lonedog*, No. 02-

8065, 67 Fed. Appx. 543, at *552 (10th Cir. June 12, 2003) (quoting *United States v. Diaz*, 989 F.2d 391, 392 (10th Cir. 1993) (stating "it is a 'fundamental rule of statutory construction that all parts of a statute must be read together.'").

Reasonable "statutory interpretation must account for both 'the specific context in which … language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Group v. EPA,* 573 U.S. 302, 321 (2014), citing *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997). Statutory language should be given a meaning that is "most in accord with the context and ordinary usage" and "most compatible with the surrounding body of law into which the provision must be integrated…." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). Statutory language must not be considered in isolation, and the court must consider the "language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (quoting *KMart Corp.*, 486 U.S. at 291). The Tenth Circuit has noted that in determining whether a statute is ambiguous, "the Court employs traditional tools of statutory construction, including examination of the statute's text, structure, purpose, history, and the relationship to other statutes." *Barnes v. Akal Sec., Inc.*, No. 04-1380-WEB, 2005 U.S. Dist. LEXIS 12268, at *17 (D. Kan. June 20, 2005) (citations omitted). A statute is ambiguous when it is capable of being understood in two or more different senses. *Keller Tank Servs. II v. Comm'r*, 854 F.3d 1178, 1197 (10th Cir.

2017).

Applying these canons of construction reveals that PL 602 is not a Congressionally enacted "settlement" and involves no "settlement" of any kind. A settlement is "an agreement ending a dispute or a lawsuit." *Black's Law Dictionary* (11th Ed. 2019). A judgment, on the other hand, is a "court's final determination for the enforcement of the rights and obligations of the parties in a case." *Id.*

PL 602 did not involve any settlement and did not resolve or extinguish with finality any Wyandotte land claims. The claims for additional compensation were resolved and extinguished by the ***judgments*** rendered by the ICC or Court of Claims which were paid and satisfied years before Congress adopted PL 602 in 1984. (Add. 35, 82, 87-88.) It is true that many ICC claims of other tribes did result in settlements. In fact, "[o]ut of the 94 final awards by 1966 for a total of $194 million, settlement was negotiated in 38 for $87 million. Thirty other compromise settlements had been reached on secondary considerations such as offsets." United States Indian Claims Commission, *Final Report*, at 15 (Sept. 30, 1978) https://www.narf.org/nill/documents/icc_final_report.pdf (last visited August 5, 2021). However, the Wyandotte's claims were resolved by judgments, not settlements. This fact cannot be overlooked in determining whether the Wyandotte can conduct gaming under the "settlement" of a land claim exception.

PL 602 simply cannot be construed as a "settlement of a land claim"

enactment because it did not involve a settlement. Unlike all actual Congressional land claim settlements, PL 602 does not mention or reference any settlement of a land claim, because there never was a settlement of the Wyandotte's claims. *Cf.*, Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1716. (Add. 75-80.) The *Wyandotte Nation* case was wrongly decided in this regard. The fact that Congress chose to restrict $100,000 of the funds distributed to the Wyandotte to the purchase of land that then had to be acquired in trust did not convert PL 602 into a Congressionally mandated settlement act within the context of 25 U.S.C. § 2719(b)(1)(B)(i).

3. 25 U.S.C. § 2719(b)(1)(B)(i) does not apply because PL 602 did not extinguish land claims with finality

For 25 USC § 2719(b)(1)(B)(i) to apply, 25 C.F.R. § 292.5(a)(b) provides that the settlement at issue must finally resolve or extinguish land claims in whole or in part. PL 602 did not resolve or extinguish with finality the Wyandotte's purported land claims in whole or in part. Rather, it resolved a disagreement concerning Congress' prior formula for allocating between the Wyandotte and the Absentee Wyandotte the ICC and Court of Claims judgment funds that the United States had previously paid. (Add. 35, 88.) PL 602 contains no language extinguishing with finality the Wyandotte's land claims because they had long ago been resolved. PL 602 did not alienate or dispossess the Wyandotte of any land it claimed because the Wyandotte expressly alienated and forever lost such land by ceding it to the United

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

Unsurprisingly, PL 602 does not concern – in fact does not mention – a claim by the Wyandotte concerning the impairment of title or other real property interest or loss of possession that conflicts with that claimed by an individual or entity (either in the ceded territory or elsewhere). PL 602 was merely the vehicle for distribution of awards previously paid and satisfied by the United States for judgments rendered by the ICC and the Court of Claims.

25 C.F.R. § 292.5 sets forth the circumstances in which gaming can occur on newly acquired lands under a "settlement" of a land claim. That regulation should have been considered and applied in this case, and the failure to do so renders the Gaming Determination arbitrary and capricious. [12]

E. The Department's Gaming Determination Should be Set Aside Because it Relied Exclusively on *Wyandotte Nation*, Which did not Control the Gaming Determination for the Park City Land and is Distinguishable

1. *Chevron* and *Brand X:* the subsequent agency regulations at 25 C.F.R. § 292.5 trump *Wyandotte Nation*

Although the 2020 Sweeney Decision did not mention the Department's 2008 regulations or explain why they were not considered or applied, the district court concluded that was not necessary because of its view that *Wyandotte Nation*

[12] This remains true even if PL 602 could be seen as involving a land claim-the requirements of 25 C.F.R. § 292.5 would still apply, and PL 602 does not meet the required criteria for application of the "settlement of a land claim" exception.

occupied the field, leaving no room for the application of the agency's construction two years later in the form of its regulations on the subject matter. (Add. 28-31.)

The Supreme Court explained the proper approach when a prior court decision (such as *Wyandotte Nation*) conflicts with a subsequent agency construction (such as those promulgated in 25 C.F.R. §§ 292.2 and 292.5):

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference ***only*** if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion…..The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

Brand X, 545 U.S. at 982–83 (emphasis added).

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

Here, the district court apparently believed that the *Wyandotte Nation* court determined that the entirety of the "settlement of a land claim" exception was unambiguous. But that is not the case. *Wyandotte Nation* only construed the

singular phrase "land claim" but not the rest of the statutory language that requires that land must be "taken into trust as part of a settlement" of a "land claim." This limited analysis in *Wyandotte Nation* is made clear in the beginning of its statutory construction discussion. There, the court stated that the "***initial*** question to be addressed is whether the Tribe's ICC claims were 'land claims' within the meaning of section 2719(b)(1)(B)(i), which does not define the term." *Wyandotte Nation*, 437 F. Supp. 2d at 1208 (emphasis added). The court concluded its discussion by stating that "[t]hus, the plain language of section 2719(b)(1)(B)(i) does not preclude the land claim before the ICC in this case from falling within the exception." *Id.* at 1208.

The court in *Wyandotte Nation* never analyzed the balance of the statutory language of this IGRA exception and certainly never found it to be unambiguous. The court construed the term "land claim" in isolation according to its plain meaning and found that term was not limited to a claim "for the return of land but rather, includes an assertion of an existing right to the land." *Wyandotte Nation*, 437 F. Supp. 2d at 1208. That is as far as the court went. The balance of the language in the statutory exception is not analyzed at all. *Id.* at 1207-12. Instead, the *Wyandotte Nation* court decided that the Shriner Tract qualified for the "settlement of a land claim exception" because of the mandate flowing from the mandatory use of the $100,000 set-aside funds, *not* because of a finding of

unambiguity in the balance of the language Congress employed in the statutory exception. *Id.* at 1210.[13]

Accordingly, the *Wyandotte Nation* court's construction of the term "land claim" did not foreclose application of the Department's 2008 interpretative regulation found at 25 C.F.R. § 292.5. *Wyandotte Nation* never concluded that Congress unambiguously set forth when, and under what circumstances, land is to be considered to have been taken into trust "as part of a settlement" of a land claim, even if the term "land claim" was unambiguous.

The district court below speculated that "had that phrase been viewed as ambiguous at all, it's unlikely that it would have gone undiscussed" in *Wyandotte Nation.* (Add. 31.) Of course, such speculation is not entitled to any deference. But, if one were to speculate, perhaps the court in *Wyandotte Nation* was persuaded by the Wyandotte's mischaracterization of PL 602 when it told the court that the "Shriner Tract was taken into trust as part of the settlement of a land claim because the Wyandotte acquired the land pursuant to a settlement of its title claims against the United States, filed with the ICC." *Wyandotte Nation*, 437 F. Supp. at 1207. That is simply not true. The Wyandotte did not acquire the Shriner Tract pursuant

[13] Moreover, the issue in this regard has to do with more than the interpretation of the solitary word "settlement" in isolation as the district court suggests. (Add. 30.) The issue concerns when land is considered to have been "taken into trust as part of a settlement" of a land claim pursuant to 25 U.S.C. § 2719(b)(1)(B)(i).

to a "settlement of its title claims."

The district court relies on *Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440 (5th Cir. 2019). (Add. 30.) In *Texas* the court noted that a court should not defer to an agency interpretation of a statute if a "judicial precedent hold[s] that the statute unambiguously forecloses the agency's interpretation." 918 F.3d at 449 (citing *Brand X*, 545 U.S. at 982–83). However, that case did not involve the interpretation of subsequent agency regulations following a court decision, nor did it involve the isolated application of the traditional rules of statutory interpretation to but one phrase of the overall statutory language, without applying those same canons of construction to the balance of the statutory language at issue. Instead, *Texas* involved the NIGC's interpretation of two statutes (IGRA and the Yselta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act) in a manner that contradicted a prior federal court opinion on the same subject matter. (*Id.* at 449.) The Court in *Texas*, after applying "*Chevron* step one to a prior judicial interpretation," had to "determine whether that court employed traditional tools of statutory interpretation and found that Congress spoke to the precise issue." *Id.* In that case, it found that the NIGC interpretation of the same statutes at issue in the prior judicial precedent did not displace that precedent. *Id.*

In *Wyandotte Nation,* the court employed the "traditional tools of statutory construction" to only the term "land claim" but not to the balance of the language

set forth in the statutory exception. That decision did not, and does not, displace application of the Department's 2008 regulation at 25 C.F.R. § 292.5 defining when land is deemed to have been "taken into trust as part of a settlement" of a "land claim."

The district court also appears to be concerned that the application of the 2008 Regulations would contradict the court's decision in *Wyandotte Nation* when it suggested that the Secretary "was considering the exact same funds" as involved in *Wyandotte Nation*. (Add. 28.)[14] However, concern that application of later regulations would contradict a prior court decision is not a legitimate concern, as the Supreme Court has noted. An agency's "decision to construe [a] statute differently from a court does not say that the court's holding is legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Brand X,* 545 U.S. at 983.

2. The *Wyandotte Nation* case is distinguishable from the trust acquisition for the Park City Land

The court in *Wyandotte Nation* specifically noted that the "NIGC's focus on the ICC money judgment might pass muster if the Tribe had merely purchased the Shriner Tract with money received from a claim brought before the ICC. That is not

[14] It is respectfully submitted that this is not an accurate statement as discussed in the section immediately following.

the case, however, because Congress mandated that $100,000 of the Tribe's ICC judgment funds be utilized to purchase land to be taken into trust for the benefit of the Tribe as a means of effectuating a judgment that resolved the Tribe's claims." *Wyandotte Nation,* 437 F. Supp. 2d at 1210.

As has been demonstrated above, the Department long ago determined that all the $100,000 Set Aside Funds described in *Wyandotte Nation* were fully expended on the Shriner Tract. (App. Vol. VII: 10.) As such, none of those funds could have been used to purchase the Park City Land.[15]

Furthermore, even if the purchase of the Park City Land somehow involved the use of imputed earnings from the investment of the $100,000 Set Aside Funds, the Department had long ago recognized that those earnings (or imputed earnings) on the investment of the $100,000 Set Aside Funds could be spent at the discretion of the Wyandotte. (App. Vol. V: 105-09.) Those are precisely the type of funds that the court in *Wyandotte Nation* was referring to: funds paid as the result of a judgment rendered on a claim brought before the ICC that the Wyandotte could spend at its discretion that were not restricted by PL 602 to the purchase of land that then had to be taken in trust.

The district court's attempt to suggest otherwise, respectfully, misses the

[15] AS Washburn noted the same thing in 2014 when he stated that the Wyandotte purchased the Park City Parcel "before it had expended any 602 Funds…" (Add. 46.)

mark. (Add. 31-32.) The court in *Wyandotte Nation* was very clear that what distinguished the Shriner Tract case was that 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..." *Id.* at 1210. The court in *Wyandotte Nation* was not distinguishing "land claims" generally from other judgments arising from constitutional, tort, or moral claims that might be brought before the ICC.

As such, the *Wyandotte Nation* case is distinguishable and does not displace application of the Department's regulations adopted two years after that decision. The Gaming Determination should be reversed because the Department failed to consider and apply its own regulations and the decision was contrary to those regulations.

STATEMENT REGARDING ORAL ARGUMENT

Because of the procedural and factual complexity of this case, including the relationship of this case to the administrative and legal proceedings involved in the Shriner Tract trust acquisition, the Kansas Parties believe oral argument may prove helpful to the Court.

CONCLUSION

The Trust Determination and the Gaming Determination were arbitrary and capricious and contrary to law and should be set aside, and this case should be remanded back to the Secretary for proceedings consistent with such a conclusion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 14,355 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 365.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 365.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August 2021, I electronically filed the foregoing Brief of Appellants with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven hard copies to be delivered to the Clerk's Office by Federal Express within two business days of this filing.

Dated: August 18, 2021 s/ *Mark S. Gunnison*

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KANSAS, STATE OF, et al., **Plaintiffs,** **v.** **UNITED STATES DEPARTMENT OF INTERIOR, et al.,** **Defendants.**	**Case No. 2:20-cv-02386-HLT-GEB**

MEMORANDUM AND ORDER

This is an Administrative Procedures Act ("APA") case brought by Plaintiffs, who are governmental entities in Kansas and two Indian tribes. They are appealing the May 20, 2020 decision of the Secretary of the Department of the Interior ("Secretary") and Assistant Secretary for the Bureau of Indian Affairs (collectively, "Defendant") to acquire property known as the Park City Parcel in trust for the benefit of the Wyandotte Nation and to allow the Wyandotte Nation to conduct gaming on the land. Plaintiffs argue that both the Secretary's trust determination and gaming determination were arbitrary and capricious. For the reasons explained below, the Court affirms both the trust and gaming determinations.

I. BACKGROUND

A. Wyandotte Nation and PL 602

Beginning in the 1700s, the Wyandot (now known and referred to here as the "Wyandotte Nation") were relocated and removed several times from Canada, Michigan, Ohio, and Kansas. In 1855, they were finally moved to Oklahoma. Many of these moves involved treaties in which the Wyandotte Nation ceded or relinquished land to the United States.

In the 1970s, the Wyandotte Nation brought four claims before the Indian Claims Commission ("ICC") seeking compensation for the land ceded under those treaties. These claims resulted in money judgments against the United States and in favor of the Wyandotte Nation.

In 1984, Congress passed Public Law 98-602—referred to here as PL 602—"[t]o provide for the use and distribution of certain funds awarded the Wyandotte Tribe of Oklahoma." PL 602 provided for the distribution of approximately $4.7 million awarded as part of the ICC claims. Eighty percent of the money went to individual members of the Wyandotte Nation. The remaining 20%—approximately $939,000—was allocated to the Wyandotte Nation itself, with the caveat that $100,000 of those funds were to "be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of [the Wyandotte Nation]." AR 3969. This is known as the "mandatory trust" provision of PL 602. These funds are referred to as "land-acquisition funds."[1]

The Wyandotte Nation initially held the land-acquisition funds separately from its general fund and invested the land-acquisition funds in mortgage bonds in the late 1980s. But in 1991, the Wyandotte Nation merged its land-acquisition funds with its general fund into a commingled account. Tracking the value and use of the land-acquisition funds since that time has been the subject of litigation since the 1990s. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1249 (10th Cir. 2006) ("This long battle has produced a procedural history as complex as a random maze.").

B. Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, was enacted to regulate Indian gaming. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d

[1] At different parts of the record, the land-acquisition funds are referred to as simply the PL 602 funds. But as used here, the land-acquisition funds are a subset of the overall funds distributed in PL 602.

1193, 1199 (D. Kan. 2006). IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA also established the National Indian Gaming Commission ("NIGC"). *Id.* at § 2704. IGRA generally prohibits gaming on lands acquired in trust by the United States for the benefit of an Indian tribe after October 17, 1988. *Id.* at § 2719(a). There are some exceptions to that general rule. Relevant here is the exception that gaming is permitted on lands taken into trust as part of a "settlement of a land claim." *Id.* at § 2719(b)(1)(B)(i). If an exception does not apply, gaming is permitted only after consultation with the Secretary, the tribe, nearby tribes, and state and local officials, and if the governor of the state in question agrees that gaming is in the best interest of all involved. *Id.* at § 2719(b)(1)(A).

C. Shriner Tract Litigation

For 14 years, many of the same parties in this case litigated the use of land-acquisition funds for the purchase of a piece of land in Kansas City, Kansas, known as the Shriner Tract. The Wyandotte Nation purchased the Shriner Tract in 1996 for $180,000. After acquiring the Shriner Tract, the Wyandotte Nation requested that it be taken into trust under the mandatory-trust provision in PL 602. The Secretary concluded it should be taken into trust. But the state and other tribes sued the Secretary to stop the acquisition. The Shriner Tract litigation that resulted includes several rulings that impact the current dispute.

In the first relevant case, the Tenth Circuit found that the Secretary is required to take lands purchased with land-acquisition funds into trust for the Wyandotte Nation. *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001). Although the decision to take land into trust is generally discretionary under federal law, PL 602's plain language that land purchased with land-acquisition funds "shall be held in trust by the Secretary for the benefit of [the Wyandotte

Nation]" leaves the Secretary no discretion. *Id.* at 1261-62. But even though land purchased with land-acquisition funds are subject to mandatory-trust status, in the case of the Shriner Tract specifically, the Tenth Circuit found that there was no substantial evidence to support a determination that the Wyandotte Nation used only land-acquisition funds to purchase the Shriner Tract. Accordingly, it remanded the Secretary's initial decision to take the Shriner Tract into trust for further consideration. *Id.* at 1263-64.

On remand, the Secretary subsequently issued a decision that concluded that the Wyandotte Nation used land-acquisition funds to purchase the Shriner Tract and that it was entitled to mandatory-trust status. *See Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204, 1209 (D. Kan. 2006) (referred to throughout this order as "*Norton*"). The agency decision was based in part on a report by KPMG Peat Marwick ("KPMG Report"), which concluded that the land-acquisition funds had grown to $212,170 at the time the Shriner Tract was purchased for $180,000. *Id.* at 1215-16.

After that agency decision was again appealed to the district court, Judge Julie Robinson, in *Norton*, affirmed the Secretary's decision. In particular, Judge Robinson found that PL 602 did not preclude the addition of investment earnings to the originally allocated $100,000 in land-acquisition funds. *Id.* 1220-21. In other words, the Wyandotte Nation could use the $100,000, along with any interest and earnings it generated, to purchase land that qualifies for mandatory-trust status in PL 602. *Id.*[2]

[2] *Norton* was subsequently vacated by the Tenth Circuit after it concluded the district court lacked jurisdiction. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 846 (10th Cir. 2008). The Supreme Court has since held that the APA provides a waiver of sovereign immunity against the United States for suits challenging a decision to take land into trust for an Indian tribe. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

Finally, in a separate but related case, Judge Robinson reviewed a decision of the NIGC that the Wyandotte Nation could not lawfully conduct gaming on the Shriner Tract. *See Wyandotte Nation*, 437 F. Supp. 2d at 1196. Among the issues in that case was whether the Shriner Tract was eligible for gaming under the "settlement of a land claim" provision in IGRA. *Id.* at 1207-12. Judge Robinson concluded that lands purchased with land-acquisition funds were eligible for gaming under IGRA's "settlement of a land claim" exception. *See id.* at 1210. Specifically, Judge Robinson found that the claims ultimately paid in PL 602 were "land claims" within the meaning of IGRA. *Id.* at 1207-09. This was because the "plain meaning" of "land claim" is not limited to a claim "for the return of land, but rather, includes an assertion of an existing right to the land." *Id.* at 1208. And it included the claims brought before the ICC that gave rise to PL 602. *See id.* Accordingly, *Wyandotte Nation* ultimately held that because the Shriner Tract was purchased with land-acquisition funds, it qualified for IGRA's "settlement of a land claim" exception. *Id.* at 1210.

D. Park City Parcel

In 1992, before the purchase of the Shriner Tract, the Wyandotte Nation purchased the Park City Parcel for $25,000. The Park City Parcel is approximately 10 acres of land near Park City in Sedgwick County, Kansas. Shortly after purchasing the Park City Parcel, the Wyandotte Nation sought trust status for it, but they later withdrew that application. But in 2008, the Wyandotte Nation resubmitted a trust application for the Park City Parcel based on the assertion that the land was, like the Shriner Tract, purchased with land-acquisition funds. The dispute over the Park City Parcel has largely focused on whether the land-acquisition funds plus interest were sufficient to purchase both the Park City Parcel and the Shriner Tract.

1. 2014 Denial

On July 3, 2014, the Secretary denied the Wyandotte Nation's request to acquire the Park City Parcel in trust because the record at the time suggested that there were not sufficient land-acquisition funds (which included the principal $100,000 and any earnings or interest) to buy both it and the Shriner Tract ("2014 Denial"). AR5249-58.

As part of the Park City Parcel application, the Wyandotte Nation submitted documentation showing that the Park City Parcel was purchased in November 1992, after the land-acquisition funds were commingled in the general account. AR1581. It had previously been assumed that the Wyandotte Nation bought the Park City Parcel in November 1991 with funds withdrawn directly from the account holding the land-acquisition funds, before the accounts were commingled. But a title dispute in 1991 delayed the purchase, and that money was immediately deposited into the Wyandotte Nation's general fund. Then, after the Wyandotte Nation combined its accounts, it withdrew $25,000 from the commingled account to purchase the Park City Parcel in November 1992. AR5254.

As the Secretary noted in the 2014 Denial, the new information about the actual timing of the Park City Parcel purchase, which came after the commingling of the accounts, is why the issue in this case turns on a forensic accounting determination of whether there were sufficient land-acquisition funds in the commingled account to cover the purchase of the Park City Parcel and the Shriner Tract. *Id.* In other words, the payment for the Park City Parcel did not come from an account holding just land-acquisition funds. It came from an account holding both land-acquisition funds and other funds. And because the Shriner Tract had already been determined to have been purchased using land-acquisition funds at the time of 2014 Denial, the Secretary had to consider

whether there were sufficient land-acquisition funds in the commingled account to cover both the Park City Parcel and the Shriner Tract. AR5254-55.

In answering that question, the Secretary concluded that the evidence presented by the state called into question whether there were sufficient land-acquisition funds to purchase both properties. The Secretary noted that the state made several arguments "regarding the scope of the Secretary's authority under the Act, the gaming eligibility of the Park City Parcel, and the sufficiency of the Shriner Tract accounting." AR5255. The Secretary went on to note:

> We do not address each of the State's arguments in this decision, in part because it is unnecessary to do so in light of our decision to deny the Nation's application. In addition, we have reviewed the Shriner Tract litigation record and confirmed that, except for the issue discussed below, the State's accounting arguments were raised and resolved in connection with the Shriner Tract litigation, and therefore, we decline to revisit those issues now.

Id. The 2014 Denial specifically noted that the state raised several objections to the KPMG Report in the context of the Park City Parcel, as it had with regard to the Shriner Tract, which were addressed and resolved in the course of the Shriner Tract litigation. *Id.* at n.37. The Secretary also rejected the state's argument that Department of Interior officials understood that PL 602 only permitted one acquisition of land when it approved the purchase of the Shriner Tract. *Id.*

But the Secretary did consider one argument not addressed by the Shriner Tract litigation. It was based on an accounting report submitted by Gottlieb, Flekier & Co ("Gottlieb Report"), which the state commissioned to evaluate the KPMG Report. The Gottlieb Report focused on the Wyandotte Nation's use of margin loans and the associated interest-related deductions of these loans. Although these deductions appeared on the financial statements, the KPMG Report did not factor them into its analysis, which caused it to overstate the value of the land-acquisition funds. *See* AR3821. The Gottlieb Report concluded that, after factoring in the interest-related deductions,

there were enough funds to purchase the Shriner Tract or the Park City Parcel, but not both. AR5256-58; AR3822.[3] The Secretary found this evidence "compelling," especially in light of the new information about the timing of the Park City Parcel purchase. AR5256. Accordingly, the Secretary concluded that the Wyandotte Nation could not have purchased the Park City Parcel using just land-acquisition funds and denied the trust application. *Id.*

Although the Secretary relied on the Gottlieb Report, the 2014 Denial noted the report was based on incomplete records. AR3817. Specifically, the Gottlieb Report noted that certain other records would be needed "for purposes of complete documentation," but "[i]f no other documents are furnished, those conclusions are sound and accurate." AR3818. The Wyandotte Nation was given a chance to rebut the Gottlieb Report but opted to stand on the KPMG Report. AR5257. Because this didn't address the issues raised by the Gottlieb Report and the new information about the timing of the Park City Parcel purchase, the Secretary concluded that he could not conclude that the Park City Parcel was a mandatory trust acquisition under PL 602. AR5258. But the Secretary did note that the Wyandotte Nation "would be free to submit a new application" if it was able to rebut the issues raised by the state. *Id.*

2. May 2020 Decision

In October 2017, the Wyandotte Nation supplemented its application for the Park City Parcel ("2017 Supplement"). AR3980-84. As part of the 2017 Supplement, the Wyandotte Nation submitted newly retrieved annual audits ("Ober Audits") and a financial analysis prepared by the auditing firm RSM US, LLP ("RSM Report"). AR4482; AR3981.

[3] Although the Wyandotte Nation purchased the Shriner Tract after the Park City Parcel, at the time of the 2014 Denial regarding the Park City Parcel, the Shriner Tract acquisition and trust status was a settled issue. AR5255.

In the 2017 Supplement, the Wyandotte Nation explained it was submitting the RSM Report to address the accounting issues discussed in the 2014 Denial. AR3981. The RSM Report was based on the Ober Audits for the PL 602 funds for the years 1986 through 1996, with the exception of 1988.[4] *Id.*; AR4023-24. The Ober Audits were obtained from the Bureau of Indian Affairs. They traced all the PL 602 funds allocated to the Wyandotte Nation itself (as opposed to the individual members), including the $100,000 land-acquisition funds and other funds allocated for general use. AR4023. From this information, the RSM Report was able to allocate a percentage of the investment earnings to the land-acquisition funds. AR4025. But it also accounted for the interest expenses on the margin account. AR3983; AR4025. The RSM Report also discounted interest income for the years that the Park City Parcel and Shriner Tract were purchased to account for the days in the fiscal year that the purchases would have reduced the income earned. AR4025.

Ultimately, the RSM Report concluded that the land-acquisition funds showed relatively constant growth. At the beginning of the fiscal year in which the Park City Parcel was purchased, the land-acquisition funds had a balance of $173,647, which was enough to cover the $25,000 cost of the property. AR4026. Even accounting for the Park City Parcel purchase, at the beginning of the fiscal year in which the Shriner Tract was purchased, the land-acquisition funds had a balance of $187,950, which was enough to cover its $180,000 cost. *Id.*; *see also* AR4029, AR3933. Accordingly, the RSM Report concluded that there were sufficient land-acquisition funds, which included principal plus earnings, to purchase both the Park City Parcel in 1992 and the Shriner Tract in 1996. AR4026.

[4] A separate audit report for all the Wyandotte Nation's funds from 1988 was included, and from that report, RSM was able to identify accounts related to the land-acquisition funds. AR4024. Interest, dividend income, and interest expenses for 1988 were derived from the known income and interest expenses for 1987 and 1989. AR4025.

a. Park City Parcel Trust Determination

The Secretary considered these additional materials in addressing what was deemed to be the "sole remaining question after years of litigation": whether the Wyandotte Nation used land-acquisition funds alone to purchase the Park City Parcel. AR4483. On May 20, 2020, the Secretary issued its decision on this issue ("May 2020 Decision").

The May 2020 Decision recounted the history of the Wyandotte Nation's land disputes involving the Shriner Tract and the 2014 Denial regarding the Park City Parcel. AR4483-88. The Secretary then considered the 2017 Supplement and the RSM Report. The RSM Report deducted margin interest costs before the interest earned was added to the land-acquisition funds, which addressed the Gottlieb Report's prime critique of the KPMG Report. AR4488-89.

The May 2020 Decision also noted that the Office of Financial Management ("OFM") reviewed the RSM Report and the underlying documents. AR4489; *see also* AR3932-34. It noted that the OFM "concluded the RSM Report's methodology, calculations, and assumptions are consistent with industry standards and the RSM Report's conclusions are reliable." AR4490; *see also* AR3932 (memorandum from the OFM). The OFM concluded that the "RSM Report deducted margin interest-related costs before interest earned was attributed to the Land Acquisition Fund" and "addressed the Gottlieb Report's critique of the KPMG Report and ensured the growth of the Land Acquisition Fund was not overstated." AR3934.

Based on the new information provided and the opinion of the OFM, the Secretary found the "2017 Supplement and rebuttal of the Gottlieb Report to be convincing and reliable." AR4491. The May 2020 Decision adopted the conclusion of the RSM Report that there were sufficient land-acquisition funds to purchase both the Park City Parcel and the Shriner Tract. *Id.* Because the Park

City Parcel was purchased with land-acquisition funds, the Secretary was "mandated to acquire the Park City Parcel in trust." AR4492-93.

b. Park City Parcel Gaming Determination

The May 2020 Decision also addressed the eligibility of the Park City Parcel for gaming. Having determined that the Park City Parcel was acquired with land-acquisition funds, the Secretary concluded "that the [Wyandotte] Nation may conduct gaming pursuant to the 'settlement of a land claim' exception to Section 2719 of IGRA . . . consistent with the Department's acquisition of the Shriner Tract as upheld by the court in 2006 in *Wyandotte Nation v. [T]he National Indian Gaming Commission*." AR4491.

E. 2008 Regulations

Also relevant to this dispute are some regulations promulgated in 2008 by the Department of the Interior ("2008 Regulations). The 2008 Regulations address IGRA's "settlement of a land claim" exception. They define "Land claim," *see* 25 C.F.R. § 292.2, and set forth "criteria for meeting the requirements of 25 U.S.C. [§] 2719(b)(1)(B)(i), known as the 'settlement of a land claim' exception," 25 C.F.R. § 292.5. The May 2020 Decision did not address or apply the 2008 Regulations.[5]

F. Appeal of May 2020 Decision

Plaintiffs appealed the May 2020 Decision to this Court a few months after it was issued. The Court previously denied a preliminary-injunction motion that sought an injunction of the

[5] The Wyandotte Nation applied for trust status for the Park City Parcel before these regulations were enacted, but the May 2020 Decision was issued after their enactment. A separate regulation states that "[t]hese regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. [§] 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions." 25 C.F.R. § 292.26. Although the parties dispute whether it was improper for the Secretary not to consider these regulations, neither party argues that they were inapplicable because of the timing of their enactment.

gaming determination only because Plaintiffs had not demonstrated a likelihood of success on the merits or irreparable harm. Doc. 22 at 1. Plaintiffs now substantively challenge both the trust determination and the gaming determination as arbitrary and capricious. They seek reversal of the May 2020 Decision and an order that the Secretary take the Park City Parcel out of trust. Doc. 34 at 68. Defendant has filed a brief in opposition, Doc. 40, and Plaintiffs have replied. Doc. 41.[6]

II. STANDARD

A party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" may seek judicial review. 5 U.S.C. § 702. The focus of judicial review is determining (1) whether the agency acted within its authority; (2) whether prescribed procedures were followed; and (3) whether the agency action is otherwise arbitrary, capricious, or an abuse of discretion. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994); *see also* 5 U.S.C. § 706(2). The arbitrary-and-capricious standard requires a court to give an agency's decision "substantial deference." *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1173 (10th Cir. 2002). 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).

"Arbitrary and capricious" is a narrow standard. *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). Courts review "whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made." *Id.* Courts consider whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to

[6] Plaintiffs' brief includes a request for oral argument. The Court has determined that oral argument is not necessary and that this matter can be resolved on the briefs.

consider an important aspect of the problem, offered an explanation for its decision that 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." *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But even if an agency decision reflects "less than ideal clarity," it should be upheld if the "agency's path may reasonably be discerned." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). A court is not permitted to substitute its judgment for that of an agency. *Id.* at 513.

Although an agency's decision "is entitled to a presumption of regularity," that does not obviate the need for a thorough review. *Olenhouse*, 42 F.3d at 1574. To this end, an agency decision must be supported by substantial evidence in the administrative record to avoid being arbitrary and capricious. *Colo. Wild*, 435 F.3d at 1213. Substantial evidence is more than a scintilla but less than the weight of the evidence. *Id.* An agency's decision can be upheld only on the basis articulated by the agency. *Olenhouse*, 42 F.3d at 1575.

Ultimately, a court considers "whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Colo. Wild*, 435 F.3d at 1213. Courts do not substitute their judgment for that of an agency and will "typically defer to the reasonable opinions of agency experts in matters implicating conflicting expert opinions." *Id.* at 1213-14 (internal quotation and citation omitted).

III. ANALYSIS

There are three issues before the Court. First, Defendant moves to strike an exhibit attached to Plaintiffs' brief as extra-record material not properly before the Court. Doc. 35. The Court

previously indicated it would take up the motion to strike when it considered Plaintiffs' opening brief. Doc. 37.

Second, Plaintiffs challenge the trust determination made in the May 2020 Decision. Plaintiffs argue it should be set aside as arbitrary and capricious, violative of department policy, unlawful, and an abuse of discretion. Specifically, they argue the May 2020 Decision (1) failed to address a departmental policy developed during the Shriner Tract litigation that no further mandatory-trust acquisitions could be based on PL 602 after the full $100,000 was spent on the Shriner Tract; (2) wrongfully accepted the Park City Parcel into trust even though it was purchased with only earnings on the $100,000, and none of the principal, which does not trigger the mandatory-trust provision of PL 602; and (3) wrongfully accepted the Park City Parcel into trust even though it was not purchased with land-acquisition funds.

Third, Plaintiffs challenge the gaming determination in the May 2020 Decision. They make three arguments: (1) the 2008 Regulations control whether the Park City Parcel is eligible for gaming and those regulations dictate that PL 602 is not a "settlement of a land claim," (2) the *Wyandotte Nation* decision relied on by the Secretary is not applicable because the Park City Parcel was not purchased with the land-acquisition funds but only with the interest earned by those funds, and (3) the Secretary failed to address that a case relied on by *Wyandotte Nation* was later reversed.

A. Motion to Strike Extra-Record Material

The Court first addresses Defendant's motion to strike an exhibit attached to Plaintiffs' brief that challenges the calculations in the RSM Report . Plaintiffs attached to their opening brief a newly created affidavit by Jerry Gottlieb, which includes two exhibits (collectively, "Gottlieb Affidavit"). Doc. 34-14. Plaintiffs rely on the Gottlieb Affidavit to challenge the RSM Report's treatment of certain account balances and its exclusion of the Veres Investment from consideration.

The Gottlieb Affidavit is distinct from the Gottlieb Report, which is part of the administrative record. Defendant moves to strike the Gottlieb Affidavit as improper extra-record evidence. Doc. 35.

Judicial review of an administrative action is generally limited to the record that existed before the agency. *Citizens for Alts. to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007). There are "extremely limited" exceptions. *Id.* (quoting *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004)). These include where the agency ignored relevant factors, considered factors not in the formal record, or where there is a showing of bad faith or improper behavior. *See id.* The Tenth Circuit has also permitted extra-record evidence if the record fails to disclose the factors considered by the agency, where necessary for background information or determining whether all relevant factors were considered, or as needed to explain technical or complex subject matter. *Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision*, 934 F.2d 1127, 1137-38 (10th Cir. 1991). Whether to include or exclude extra-record evidence is within the discretion of the district court. *Citizens for Alts. to Radioactive Dumping*, 485 F.3d at 1096. Designation of the administrative record is also entitled to a presumption of regularity. *Id.* at 1097.

The Gottlieb Affidavit generally takes issue with some of the factual assumptions relied on by the RSM Report. It includes two exhibits in the form of "illustrative charts" that calculate the amount of available land-acquisition funds had the RSM Report used a different account balance before the investment accounts were commingled and had it allocated the Veres Investment differently. *See generally* Doc. 34-14.

Plaintiffs contend this is not extra-record material because it is based on documents in the record. Doc. 36 at 2. On this point, the Court disagrees. While the underlying documents relied on

may be part of the administrative record, the conclusions drawn in the affidavit and its exhibits are new.

To the extent the Gottlieb Affidavit is extra-record material, Plaintiffs maintain it should nevertheless be considered because it would "not shift the focal point of judicial review" and would "allow the Court to better understand information that is already in the administrative record and illustrate the arguments Plaintiffs are making from the administrative record." *Id.* at 15. The Court disagrees that this is sufficient grounds to expand the scope of review beyond the existing administrative record. As explained above, the Secretary was concerned in the May 2020 Decision with whether there were sufficient land-acquisition funds if certain interest-related deductions were considered. What the Court is concerned with now is whether there is substantial evidence to support the May 2020 Decision and whether it was arbitrary and capricious. What Plaintiffs have proposed is essentially new expert material that would introduce new conclusions on these issues. This is not proper at this stage. Nor does the Gottlieb Affidavit satisfy any the exceptions for considering extra-record evidence.[7]

Accordingly, the Court grants Defendant's motion to strike to the extent it seeks to strike the Gottlieb Affidavit.[8] The Gottlieb Affidavit will not be considered.

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[7] The Court acknowledges Plaintiffs' complaint that they were not notified of the 2017 Supplement and thus did not present evidence in advance of the May 2020 Decision. But they have not presented any arguments or authorities suggesting their participation was required or that the May 2020 Decision was procedurally flawed in this respect, nor do they allege bad faith necessitates consideration of the Gottlieb Affidavit.

[8] Defendant's motion to strike seeks other relief, including requesting a stay of the briefing, striking portions of Plaintiffs' opening brief, and extension of the response deadline. Doc. 35 at 5-6. The Court previously declined to act on several of these requests. Doc. 37. To the extent the motion to strike seeks relief beyond striking the Gottlieb Affidavit, the Court denies the motion.

B. Trust Determination

1. The May 2020 Decision was not arbitrary and capricious for not addressing the department policy because that argument was addressed and rejected in the 2014 Denial.

Plaintiffs first argue that the May 2020 Decision should be set aside as arbitrary and capricious because it fails to mention, address, or explain a departure from a so-called department policy that the PL 602 mandatory-trust provision was exhausted with the Shriner Tract. Doc. 34 at 44-46. To establish the department policy, Plaintiffs primarily rely on three Department of Interior memos. First is a memo from Tom Hartman[9] commenting that, "[i]f the purchase price of the Shriner Tract exceeds $100,000, then the Department should state clearly that the settlement funds have been expended in accordance with the law, and that no funds remain to implement further the 'shall' of the law." AR2320. Second is a June 1996 memo from George Skibine, Director of the Indian Gaming Management Staff, stating that the Muskogee Area Office "must inform the Tribe that the acceptance in trust of the Shriner tract exhausts the land acquisition authority of Pub. L. 98-602, and that subsequent trust acquisitions for the Tribe must be made under other statutory authority." AR2326. Third is a June 1996 memo from Ada Deer, Assistant Secretary for Indian Affairs, stating that transfer of the Shriner Tract into trust "fulfills the Secretary's obligation to take land in trust pursuant to Pub. L. 98-602, and that subsequent trust acquisitions must be made under a different statutory authority." AR2328-29. Plaintiffs also point to similar statements in depositions and briefs in the Shriner Tract litigation.

As a preliminary matter, the Court harbors some doubts that any such binding department policy was created based on the statements cited by Plaintiffs. Plaintiffs don't point to anything in

[9] This document itself does not establish that it is a memo from Tom Hartman, but a handwritten note at the bottom suggests it is, and that is what Plaintiffs represent it to be. Doc. 41 at 7-8.

any final agency decision about the Shriner Tract that placed such a limitation on the Wyandotte Nation. Plaintiffs likewise have not made persuasive arguments that statements in memos create a binding policy on subsequent agency action. The Court nonetheless finds that, even if there once was such a policy, the May 2020 Decision was not arbitrary and capricious for failing to address it.

The arbitrary-and-capricious standard requires a rational and satisfactory explanation for a decision that is supported by substantial evidence. *See Colo. Wild*, 435 F.3d at 1213. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). But this is not a heightened standard. *F.C.C.*, 556 U.S. at 514. All that's required is "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16.

In this case, that explanation came in the 2014 Denial. There, the Secretary, albeit in a footnote, stated:

> The State also contends that Department officials understood that only one acquisition was permitted by the Act when it approved the Shriner Tract acquisition in 1996. . . . Not 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.

AR5255. As explained above, the Secretary went on to deny the trust application for the Park City Parcel based on issues identified in the Gottlieb Report about interest-related deductions, which called into question whether there sufficient land-acquisition funds (principal plus interest) to purchase both the Park City Parcel and the Shriner Tract. AR5258. But that decision was made

with the explicit caveat that the Wyandotte Nation could submit a new application if it could find additional records that would address the interest-related deductions. *Id.*

That is what the Wyandotte Nation did when it submitted the 2017 Supplement that led to the May 2020 Decision. AR4482-83, AR4488. The additional materials submitted accounted for the interest-related deductions and showed that the land-acquisition funds were sufficient to cover both the Park City Parcel and the Shriner Tract. AR44889-91. Based on holdings in the Shriner Tract litigation, the Secretary determined that this conclusion mandated acquisition of the Park City Parcel in trust. AR4492-93.

To the extent the Secretary "fail[ed] to make mention of [the] long established Department policy" in the May 2020 Decision, as Plaintiffs allege, Doc. 34 at 46, there was no reason for the Secretary to address it in the May 2020 Decision because the issue had already been addressed in the 2014 Denial. In that 2014 Denial, which it doesn't appear that Plaintiffs ever timely sought review of, the Secretary rejected application of the so-called policy because PL 602 itself does not limit the number of properties that can be acquired, and because the statements at issue were made before additional information about the land-acquisition funds had come to light. The Court does not find the May 2020 Decision arbitrary and capricious for not addressing an issue that had already been addressed and rejected. In other words, there was no departure from policy in the May 2020 Decision—any such policy had already been rejected given its conflict with the statute and a change in facts and circumstances.[10]

In the reply brief, Plaintiffs challenge the explanation given in the 2014 Denial. Doc. 41 at 14-16. But the Court does not adopt this challenge for three reasons. First, it was raised for the first

[10] Plaintiffs also suggest, in half a sentence, that the Secretary should be judicially estopped from changing its position. Doc. 34 at 46. This argument is not adequately developed in Plaintiffs' opening brief. *Phillips v. Calhoun*, 956 F.2d 949, 954 (10th Cir. 1992). Nor does it address the fact that the Plaintiffs failed to challenge the 2014 Denial, where the change in position allegedly occurred.

time in the reply brief, which is procedurally improper. Second, Plaintiffs are challenging the May 2020 Decision, not the 2014 Denial. Doc. 1 at 35-36. Third, an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices . . . that there are good reasons for it, and that the agency believes it to be better . . . ." *F.C.C.*, 556 U.S. at 515 (emphasis in original). As explained above, the 2014 Denial rejected the Plaintiffs' argument on this point because any such policy was not consistent with the plain language of PL 602 and new facts about the growth of the land-acquisition funds had come to light. This is a sufficiently reasoned explanation.

2. Plaintiffs' argument that the Park City Parcel was purchased with only the earnings on the land-acquisition funds does not demonstrate that the May 2020 Decision was arbitrary and capricious.

Plaintiffs' second argument is that the trust determination was arbitrary and capricious because the Secretary applied the mandatory-trust provision of PL 602 to the Park City Parcel even though the land was purchased with only the earnings on the land-acquisition funds and none of the principal. Doc. 34 at 46-48. This argument is based on Plaintiffs' beliefs, as discussed above, that the full $100,000 principal was exhausted in the Shriner Tract purchase, and that land purchased with only interest earned on those funds is not eligible for mandatory-trust status under PL 602. The Court finds this argument fails to establish that the trust determination was arbitrary and capricious.

As a preliminary matter, Plaintiffs' arguments are aimed not at what the Secretary actually concluded in the May 2020 Decision, but on their interpretation of that decision. The Secretary did not determine that the Park City Parcel was purchased with only the earnings on the land-acquisition funds or address whether that would be legally permissible. As explained above, the May 2020 Decision focused on whether there was sufficient value in the investments purchased

with the land-acquisition funds to cover both the Shriner Tract and Park City Parcel if properly accounting for interest-related deductions. AR4489. This was accomplished by tracking the growth of the investments purchased with the land-acquisition funds and deducting the interest-related costs attributable to margin loans. AR4489-91. The amount left was sufficient to cover the purchases of both properties. The Secretary thus concluded that the Park City Parcel was entitled to mandatory-trust status just as the Shriner Tract had been.

Rather than challenging this decision directly, Plaintiffs argue that the history of the Shriner Tract litigation and the language of PL 602 demonstrate that the Secretary effectively—but wrongly—permitted the Park City Parcel to be taken into to trust under PL 602 even though it was purchased with only interest on the land-acquisition funds. This is based on two arguments. But the Court disagrees that either demonstrates that the May 2020 Decision was arbitrary and capricious.

First, Plaintiffs contend that the $100,000 that composed the principal of the land acquisition funds was specifically spent in the Shriner Tract purchase. But this position is not sustainable given the history of the Shriner Tract litigation. As Judge Robinson explained, the Shriner Tract was purchased with funds drawn from the Wyandotte Nation's investment account, in the form of a margin account loan against the account that held, in part, investments purchased with the land-acquisition funds. *Norton*, 430 F. Supp. 2d at 1216. The land-acquisition funds were originally invested in bonds, and those bonds were never liquidated to purchase the Shriner Tract. *Id.* at 1212. Rather, the "margin account loan [used for the Shriner Tract] was made against the

market value of the holdings in the account," which included the investments purchased with the land-acquisition funds "plus accumulated interest." *Id.* (emphasis added).[11]

The Court understands Plaintiffs' position that the full $100,000 that composes the principal of the land-acquisition funds should, for lack of a better word, be allocated entirely to the Shriner Tract purchase based on statements made during that administrative process. The Court disagrees. It's simply not reflective of how either the Shriner Tract or the Park City Parcel was purchased. Both were purchased using margin account loans against the value of the investments, including interest and earnings, purchased with the land-acquisition funds.

Second, Plaintiffs base this argument on their belief that PL 602, by omission, does not restrict the use of the earnings on land-acquisition funds to land acquisition, and therefore purchases with earnings only do not qualify for mandatory-trust status under PL 602. Doc. 34 at 46-47 ("The fact that Congress did not include such a restriction in PL 602 demonstrates that it did not intend to restrict the use of earnings on the investment of the $100,000 set-aside funds.").[12] In support of this contention, Plaintiffs point to the Michigan Land Claims Settlement Act as an example of a statute that limited the use of earnings. *Id.* That statute was passed in 1997. Plaintiffs claim that where one statute includes language but a "related statute" omits it, that is evidence that Congress acted intentionally. *Id.* Even to the extent that general proposition is true, Plaintiffs make no attempt to demonstrate how these statutes are related, or how the inclusion of certain language in a statute 11 years after the passage of PL 602 necessarily informs on Congress's intentions in

[11] During the Shriner Tract litigation, which included several of the same plaintiffs as in this case, the plaintiffs, argued that the use of margin loans was actually evidence that none of the land-acquisition funds were used to purchase the Shriner Tract. *Norton*, 430 F. Supp. 2d at 1222.

[12] Plaintiffs also argue that both the May 2020 Decision and the RSM Report wrongly concluded that earnings on land acquisition funds are restricted. Doc. 34 at 48. But the statements of fact they cite in support only discuss an agency decision in the Shriner Tract litigation and Judge Robinson's decision in *Norton*. *Id.* at 24 (paragraphs 42 and 43).

passing PL 602, especially given *Norton*'s conclusion that PL 602 is silent on the issue of earnings. *Norton*, 430 F. Supp. 2d at 1218.

Further, it was established in the Shriner Tract litigation that interest and earnings derived from the original $100,000 could be used to purchase lands for purposes of the mandatory-trust provision. *Id.* at 1220-21. In *Norton*, Judge Robinson specifically considered that the objective of Congress in implementing PL 602 was to benefit the Wyandotte Nation "by funding the purchase of land to be taken into trust by the Secretary . . . with little or no interference from the Secretary." *Id.* at 1220. Judge Robinson noted that PL 602 does not "clearly prohibit use of money resulting from the investment of that amount being applied to the purchase price of any property." *Id.* at 1218 (applying the *Chevron* framework and finding that the Secretary's conclusion that earnings could be applied was based on a reasonable interpretation of the statute). She concluded that "there was nothing indicating Congress intended to preclude the addition of investment income to the original $100,000, either in the legislative history or the record of the case." *Id.* at 1220. The Secretary specifically cited and relied on several rulings from the Shriner Tract litigation in making the trust determination in the May 2020 Decision, including Judge Robinson's ruling in *Norton*. AR4485.

As explained above, the May 2020 Decision continued with the analysis that began in the Shriner Tract litigation: whether the value of the investments purchased with the land-acquisition funds were sufficient to cover the purchase of both properties. Even if the Court were to accept Plaintiffs' argument that PL 602 would not consider earnings alone to be land-acquisition funds, this would not demonstrate that the Secretary's decision was arbitrary and capricious because that was not the decision made. Rather, the decision was based on the holding in *Norton* that the value of the land-acquisition funds could include the interest earnings, *Norton*, 430 F. Supp. 2d at 1220-

21;[13] AR4485, and on the RSM Report's conclusion that there were sufficient funds to cover both purchases. The record adequately supports this conclusion.

3. Substantial evidence supports the determination that the Park City Parcel was purchased with land-acquisition funds.

Plaintiffs' third challenge of the trust determination is that the Park City Parcel was not purchased with only land-acquisition funds and is therefore not eligible for mandatory-trust status. Doc. 34 at 49-52. Many of Plaintiffs' arguments repeat the same arguments addressed above, including past representations about the purchase of the Park City Parcel and the claim that the land-acquisition funds were used to purchase the Shriner Tract. The Court has already addressed these arguments and finds they do not demonstrate the May 2020 Decision was arbitrary and capricious. Plaintiffs also point to parts of the record that they contend call into question the May 2020 Decision, including the treatment of the Park City Parcel in the Ober Audits and accounting deficiencies in the RSM Report. In support of these argument, they rely in part on the Gottlieb Affidavit.

As explained above, the Court finds that the Gottlieb Affidavit is not part of the administrative record and should not be considered. But even if the Court did consider it, the Court is not persuaded that Plaintiffs have demonstrated that the May 2020 Decision was arbitrary and capricious. As explained above, following the 2014 Denial, the Wyandotte Nation supplemented its application with a new accounting report from RSM that was based, in part, on the Ober Audits. The RSM Report was able to track the value of the total PL 602 funds overall and allocate appropriate proportions of interest growth to the land-acquisition funds. It also deducted the

[13] As explained above, *Norton* was vacated for jurisdictional reasons that no longer control, leaving the underlying agency decision in place. *See supra* Note 2. Beyond that procedural history, the Court discerns no overt challenge to *Norton*'s substantive rulings. To the extent any party challenges that ruling, the Court has carefully considered it and finds *Norton*'s substantive rulings to be persuasive.

interest costs associated with the margin loans—the issue highlighted by the 2014 Denial. The RSM Report concluded that, based on those calculations, there were sufficient land-acquisition funds to cover the purchase of both the Park City Parcel and the Shriner Tract. The OFM reviewed the RSM Report and found that its "methodology, calculations, and assumptions are consistent with industry standards and the RSM Report's conclusions are reliable." AR4490; *Colo. Wild*, 435 F.3d at 1213-14 (noting that courts typically defer to the "reasonable opinions" of agency experts in the face of conflicting expert reports). Based on that, the Secretary concluded that the Wyandotte Nation had sufficient land-acquisition funds to purchase the Park City Parcel in 1992 and the Shriner Tract in 1996. AR4491. The Secretary was therefore mandated to take the property into trust. AR4492; *see also See Sac & Fox Nation*, 240 F.3d at 1262.

There is substantial evidence backing up the Secretary's conclusions, and the agency articulated a satisfactory and rational explanation for its decision. *See Colo. Wild*, 435 F.3d at 1213. Given this, the Court cannot conclude that the trust determination was arbitrary and capricious. To be sure, Plaintiffs have pointed to evidence that could support a different outcome. But "the mere presence of contradictory evidence does not invalidate the Agencies' actions or decisions." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1241 (10th Cir. 2000). As Judge Robinson concluded in *Norton*, "[t]he 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." *Norton*, 430 F. Supp. 2d at 1226.

Accordingly, the Court affirms the trust determination in the May 2020 Decision.

C. Gaming Determination

After concluding the Park City Parcel was entitled to mandatory-trust status, the May 2020 Decision determined that the Wyandotte Nation could conduct gaming on it under the "settlement

of a land claim" exception to IGRA, 25 U.S.C. § 2719(b)(1)(B)(i), as held in *Wyandotte Nation v. National Indian Gaming Commission*. AR4491. The May 2020 Decision specifically cited that case as holding "that land purchased with Land Acquisition Funds and taken in trust pursuant to [PL 602] meet criteria for [IGRA's] 'settlement of a land claim' exception, and, thus the Nation may conduct gaming on those lands." AR4485 (citing *Wyandotte Nation*, 437 F. Supp. 2d at 1211).

In *Wyandotte Nation* Judge Robinson concluded that lands purchased with land-acquisition funds were eligible for gaming under IGRA's "settlement of a land claim" exception. *See Wyandotte Nation*, 437 F. Supp. 2d at 1210.[14] Specifically, the claims paid in PL 602 were "land claims" within the meaning of IGRA. *Id.* at 1207-09. This was because the "plain meaning" of "land claim" is not limited to a claim "for the return of land, but rather, includes an assertion of an existing right to the land." *Id.* at 1208. And that definition includes the claims brought before the ICC that gave rise to PL 602. *See id.* Accordingly, Judge Robinson concluded that, because the Shriner Tract was purchased with land-acquisition funds distributed in PL 602, it qualified for IGRA's "settlement of a land claim" exception. *Id.* at 1210.

After the decision in Wyandotte Nation, the Secretary enacted regulations in 2008. The 2008 Regulations define "Land claim," *see* 25 C.F.R. § 292.2, and set forth "criteria for meeting the requirements of 25 U.S.C. [§] 2719(b)(1)(B)(i), known as the 'settlement of a land claim' exception," 25 C.F.R. § 292.5. The May 2020 Decision did not address or apply these regulations.

[14] As explained above, IGRA generally prohibits gaming on lands acquired in trust by the United States for the benefit of an Indian tribe after October 17, 1988. 25 U.S.C. § 2719(a). But there is an exception for lands taken into trust as part of a "settlement of a land claim." *Id.* at § 2719(b)(1)(B)(i).

1. The Secretary's reliance on *Wyandotte Nation* was not arbitrary and capricious as that case addressed the precise question before the agency.

Plaintiffs argue that the 2008 Regulations control over Judge Robinson's conclusion in *Wyandotte Nation* because the court decision was not based on a finding that the full statutory language ("settlement of a land claim") was unambiguous, and that under the 2008 Regulations, PL 602 is not a "settlement of a land claim." Doc. 34 at 52-64. Thus, according to Plaintiffs, the gaming determination was arbitrary and capricious.

As a preliminary matter, Plaintiffs dedicate much of their brief arguing that the Park City Parcel would not be eligible for gaming under the 2008 Regulations. But this is not the issue currently before the Court. Rather, the issue is whether the Secretary should have considered the regulations in making the gaming determination instead of relying on *Wyandotte Nation*—not what that substantive outcome ought to be under those regulations. In considering this issue, the Court finds Plaintiffs' arguments unpersuasive for two reasons.

First, the Court is currently tasked with determining whether the agency's decision was arbitrary and capricious because it relied on *Wyandotte Nation* instead of the 2008 Regulations. The arbitrary-and-capricious standard generally asks "whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made." *See Colo. Wild*, 435 F.3d at 1213. "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp.*, 305 F.3d at 1165.

As explained above, the May 2020 Decision specifically noted that several holdings from the Shriner Tract litigation were applicable to the Park City Parcel, including *Wyandotte Nation*. The Secretary found that *Wyandotte Nation* "held that land purchased with Land Acquisition Funds

and taken in trust pursuant to [PL 602] meet the criteria for [IGRA's] 'settlement of a land claim' exception, and, thus, the Nation may conduct gaming on those lands." AR4485. Once the Secretary determined that the Park City Parcel had been purchased with land-acquisition funds (the trust determination), it followed that the Wyandotte Nation "may conduct gaming pursuant to the 'settlement of a land claim' exception to Section 2719 of IGRA . . . consistent with the Department's acquisition of the Shriner Tract as upheld by the court in 2006 in [*Wyandotte Nation*]." AR4491.

Given the unique history of this litigation, including the history of the Shriner Tract, the Court cannot conclude that this reasoning is so irrational as to be arbitrary and capricious. The Secretary was considering the exact same funds considered in *Wyandotte Nation*.[15] Indeed, had the Secretary ignored the *Wyandotte Nation* decision, it would likely face a challenge that the decision was arbitrary and capricious because it would have "entirely failed to consider an important aspect of the problem." *Hays Med. Ctr.*, 956 F.3d at 1263 (internal quotation and citation omitted). *Wyandotte Nation*, and indeed the Shriner Tract litigation as a whole, is certainly directly relevant to the Park City Parcel's trust application and gaming eligibility as both pieces of land were bought with the same pot of money allocated under PL 602. Reaching divergent conclusions on the gaming eligibility of each piece of land would certainly raise questions given that the agency concluded in the trust determination that the same funds were used to purchase both properties, and the eligibility for gaming turns on the source of the funds.

Second, Plaintiffs have not convinced the Court that the 2008 Regulations necessarily superseded the decision in *Wyandotte Nation* under the rule announced in *National Cable &*

[15] The Court acknowledges that Plaintiffs continue to contend that the funds used to purchase the Park City Parcel were distinct from those used to purchase the Shriner Tract. As explained above, the trust determination does not support this.

Telecommunications Association v. Brand X Internet Services. *See Hays Med. Ctr.*, 956 F.3d at, 1264 (stating that courts "presume[s] that an agency action is valid unless the party challenging the action proves otherwise"). Agency interpretation of statutes is generally governed by *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Where statutory language is clear, the unambiguously expressed intent of Congress must control, for both courts and agencies. But if a statute is silent or ambiguous, courts will generally defer to an agency's interpretation if it is based on a permissible construction of the statute. *Sac & Fox Nation*, 240 F.3d at 1260-61. However, the Supreme Court has held that "prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Where a court "tentatively resolves an ambiguity," that resolution is authoritative until the agency offers a definitive interpretation. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1246 (10th Cir. 2008). But this "does not make judicial decisions subject to reversal by executive officers." *Id.*

In *United States v. Home Concrete & Supply, LLC*, the Supreme Court considered statutory language that that an earlier decision had determined was not "unambiguous" against a contrary and later-enacted regulation. 566 U.S. 478, 486-87 (2012). The government argued that the subsequent regulation must control under *Brand X*. But a plurality[16] of the Supreme Court disagreed, stating that "[t]here is no reason to believe that the linguistic ambiguity noted by [the prior case decided before *Chevron*] reflects a post-*Chevron* conclusion that Congress had

[16] Justice Scalia did not join in this portion of the decision. But in doing so he advocated that "the Court should abandon the opinion that produces these contortions, *Brand X*." *Home Concrete & Supply*, 566 U.S. at 496 (Scalia, J., concurring in part). Justice Scalia instead joined in the judgment because "it is indisputable that [the prior case] resolved the construction of the statutory language at issue here, and that construction must therefore control." *Id.*

delegated gap-filling power to the agency," in particular because the prior decision effectively demonstrated that it discerned no such gap left for the agency to fill with regulations. *Id.* at 488-90. "And there being no gap to fill, the Government's gap-filling regulation cannot change [the prior case's] interpretation of the statute." *Id.* at 490; *see also Texas v. Alabama-Coushatta Tribe of Tex.*, 918 F.3d 440, 448 (5th 2019) ("Instead of requiring the prior decision to have called the relevant statute 'unambiguous,' reviewing courts have looked for the contrary—whether the decision called the statute 'ambiguous.'").

In *Wyandotte Nation*, Judge Robinson focused on the meaning of "land claim" in the IGRA exception, finding that it was unambiguous. Plaintiffs claim that because she did not also specifically deem the word "settlement" as unambiguous, then *Wyandotte Nation*'s holding that the land-acquisition funds qualified as a "settlement of a land claim" must be set aside and the 2008 Regulations must control. But the Court disagrees that the lack of a specific determination that the word "settlement" is unambiguous renders *Wyandotte Nation* wholly overruled by the 2008 Regulations.[17] *See Texas*, 918 F.3d at 447 ("Consequently, a prior judicial 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." (internal quotation and citation omitted)). Further, the Court discerns nothing in *Wyandotte Nation* that suggests there was any gap that needed to be filled with regulations. *See Home Concrete Supply*, 466 U.S. at 490 ("And there being no gap to fill, the Government's gap-filling regulation cannot change [the prior case's] interpretation of the statute."). Although the focus of the arguments was on the phrase "land claim,"

[17] Although Plaintiffs contend that a different gaming determination would result if the 2008 Regulations applied, the Court notes that it is not clear that the 2008 Regulations and *Wyandotte Nation* are even in conflict, or that application of the 2008 Regulations would necessarily result in a different outcome. But though the Court harbors some doubts about Plaintiffs' application of the 2008 Regulations to PL 602, as explained above, this is not the question currently before the Court.

nothing in *Wyandotte Nation* suggests that the overall "settlement of a land claim" exception carried any ambiguity. Certainly, had that phrase been viewed as ambiguous at all, it's unlikely that it would have gone undiscussed. Rather, Judge Robinson concluded that "the plain language of section 2719(b)(1)(B)(i) does not preclude the land claim brought before the ICC in this case from falling within that exception." *Wyandotte Nation*, 437 F. Supp. 2d at 1208 (emphasis added). Given these considerations, the Court cannot conclude that the Secretary's reliance on *Wyandotte Nation* was arbitrary and capricious.[18]

2. Plaintiffs' attempts to distinguish *Wyandotte Nation*'s applicability to the Park City Parcel ignores the trust determination.

Plaintiffs alternatively argue that, even if *Wyandotte Nation* was not superseded by the 2008 Regulations, it is distinguishable because the Park City Parcel was not purchased with the principal of the land-acquisition funds but only with the interest thereon. Doc. 34 at 64-66. But as explained above regarding the trust determination, this is based on a premise that is not in line with what the Secretary actually found, namely that the value of the land-acquisition funds had grown enough to cover both the Park City Parcel and the Shriner Tract.

Plaintiffs also overstate the distinction drawn by *Wyandotte Nation* on the use of land-acquisition funds and the use of other funds from ordinary ICC judgments. Doc. 34 at 65-66; Doc. 41 at 30. It's clear from the context that *Wyandotte Nation* was not drawing a distinction between funds over which the Wyandotte Nation exercises any discretion (let alone suggesting that interest on the land-acquisition funds falls into this category) and funds over which it has no discretion.

[18] The Court is mindful that it should only "affirm agency action, if at all, on grounds articulated by the agency itself." *Utahns for Better Transp.*, 305 F.3d at 1165. The May 2020 Decision did not specifically discuss whether the 2008 Regulations superseded *Wyandotte Nation*, and thus the Court does not affirm the gaming determination based on any conclusion to that effect. Rather, it affirms based on the Secretary's reliance on *Wyandotte Nation*, and includes the discussion of the *Brand X* rule to conclude that Plaintiffs have not demonstrated that such reliance was arbitrary and capricious.

Rather, the court was distinguishing ICC judgments awarded on "land claims" versus other judgments arising from constitutional, tort, or moral claims. *Wyandotte Nation*, 437 F. Supp. 2d at 1210 n.124. For that reason, the Court cannot find that it was arbitrary and capricious for the Secretary to not distinguish *Wyandotte Nation* as it applied to the Park City Parcel.

3. The Secretary's failure to address a case discussed in *Wyandotte Nation* does not demonstrate that the gaming determination was arbitrary and capricious.

Plaintiffs finally argue that the May 2020 Decision failed to address that a case cited by *Wyandotte Nation* was later vacated and, on remand, applied the 2008 Regulations.[19] Doc. 34 at 66-67. The Court finds that this does not render the May 2020 Decision arbitrary and capricious. *Wyandotte Nation*'s analysis was based primarily on the language of IGRA, which both parties contended was unambiguous. *Wyandotte Nation*, 437 F. Supp. 2d at 1207-10. Although the court also found that the underlying agency decision conflicted with another NIGC decision, this was simply additional support for the holding. The Court discerns no requirement that an agency track down all cases cited in prior judicial precedent relied upon and specifically address the procedural history of those cases.

Accordingly, the Court affirms the gaming determination in the May 2020 Decision.

IV. CONCLUSION

THE COURT THEREFORE ORDERS that Secretary's May 2020 Decision is AFFIRMED.

THE COURT FURTHER ORDERS that Defendant's motion to strike (Doc. 35) is GRANTED IN PART AND DENIED IN PART. The motion is granted to the extent it seeks to

[19] The reversal in that case was not based on a failure to apply the 2008 Regulations in the first instance, but because the agency "engaged in a one-sentence analysis that makes an uncited reference to legislative history" and failed to account for several case-specific facts. *See Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, 2008 WL 2746566, at *61 (W.D.N.Y. 2008).

strike the Gottlieb Affidavit. The Gottlieb Affidavit (Doc. 34-14) is STRICKEN. All other requests in the motion to strike are denied.

IT IS SO ORDERED.

Dated: May 5, 2021

/s/ Holly L. Teeter
HOLLY L. TEETER
UNITED STATES DISTRICT JUDGE

United States District Court

---------- DISTRICT OF KANSAS----------

STATE OF KANSAS, THE SUMNER COUNTY, KANSAS BOARD OF COMMISSIONERS, CITY OF MULVANE, KANSAS, SAC AND FOX NATION OF MISSOURI IN KANSAS AND NEBRASKA, AND IOWA TRIBE OF KANSAS AND NEBRASKA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR AND UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS,

Defendants.

Case No. 2:20-CV-2386-HLT-GEB

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Memorandum and Order (Doc. 42), Secretary's May 2020 Decision is affirmed. This case is closed.

IT IS SO ORDERED.

TIMOTHY O'BRIEN
CLERK OF THE COURT

Dated: May 5, 2021

/s/ *M. Deaton*
By Deputy Clerk

Public Law 98-602
98th Congress

An Act

To provide for the use and distribution of certain funds awarded the Wyandotte Tribe of Oklahoma and to restore certain mineral rights to the Three Affiliated Tribes of the Fort Berthold Reservation.

Oct. 30, 1984
[H.R. 6221]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WYANDOTTE TRIBE OF OKLAHOMA

ABROGATION OF PRIOR PLAN; REPEAL OF PRIOR DISTRIBUTION OF JUDGMENT FUNDS ACT

SEC. 101. (a) Notwithstanding the Act entitled "An Act to provide for the use and distribution of funds appropriated in satisfaction of certain judgments of the Indian Claims Commission and the United States Court of Claims, and for other purposes." and approved October 19, 1973 (25 U.S.C. 1401, et seq.), or any other regulation or plan promulgated by the Secretary pursuant to such Act, the funds appropriated in satisfaction of the judgments awarded to the Wyandotte Tribe of Oklahoma in—

(1) docket numbered 139 before the Indian Claims Commission,

(2) docket numbered 141 before the United States Court of Claims, and

(3) dockets numbered 212 and 213 before the United States Claims Court,

(other than funds appropriated for the payment of attorney fees or litigation expenses) and any interest or investment income accrued or accruing (on or before the date of the allocation of funds pursuant to section 103(b)) on the amount of such judgments shall be used and distributed as provided in this title.

(b) The Act entitled "An Act to provide for the use and distribution of funds to the Wyandotte Tribe of Indians in docket 139 before the Indian Claims Commission and docket 141 before the United States Court of Claims, and for other purposes." and approved December 20, 1982, is hereby repealed.

Repeal.
96 Stat. 1813.

PREPARATION OF THE ROLL OF MEMBERS OF THE WYANDOTTE TRIBE OF OKLAHOMA AND THE ROLL OF ABSENTEE WYANDOTTES

SEC. 102. (a) In accordance with such procedures as may be adopted by the tribal governing body of the Wyandotte Tribe of Oklahoma and approved by the Secretary of the Interior (hereinafter in this Act referred to as the "Secretary"), such tribal governing body shall take such steps as may be necessary to ensure that the roll of members of such tribe includes all members of the tribe born on or before the date of the enactment of this Act.

(b)(1) The Secretary shall prepare a roll of all individuals who—

(A) were born on or before the date of the enactment of this Act,

(B) are alive on the date of the enactment of this Act, and

(C) are listed in, or are lineal descendants of individuals listed in, the compilation entitled "Census of Absentee or Citizen Wyandotte Indians" compiled by Joel T. Olive and dated November 18, 1896 (as corrected by W.A. Richards, Commissioner of the General Land Office, in a circular dated October 28, 1904).

(2) Applications for enrollment of individuals under paragraph (1) may be filed with the Secretary (in such manner as the Secretary shall prescribe) before the end of the 90-day period beginning on the date of the enactment of this Act.

(3)(A) The Secretary shall determine whether an individual who filed an application under paragraph (2) is eligible to be enrolled under paragraph (1). The initial determination of the Secretary with respect to the enrollment of any such individual shall be made before the end of the 180-day period beginning on the date of the enactment of this Act. The final determination of the Secretary with respect to the enrollment of any such individual shall not be reviewable in any court.

(B) Any review by the Secretary of an initial determination of the Secretary with respect to the enrollment of any individual under paragraph (1) shall not delay the allocation of funds pursuant to section 103(b) or any distribution of funds under section 104 or 105.

Federal Register, publication.

(4) The Secretary shall publish, in the Federal Register and in such local media as the Secretary may determine to be appropriate, notice of—

(A) the provisions of this title that provide for a per capita distribution to Absentee Wyandottes and their descendants,

(B) the preparation of the roll described in paragraph (1), and

(C) the procedures established pursuant to paragraph (2) for filing applications for enrollment on such roll and the final date on which such applications may be filed with the Secretary.

ALLOCATION OF FUNDS TO THE WYANDOTTE TRIBE OF OKLAHOMA AND THE ABSENTEE WYANDOTTES

SEC. 103. (a) Before the end of the 90-day period beginning on the later of—

(1) the date by which any action required under section 102(a) relating to the roll of members of the tribe is completed, or

(2) the date on which the roll prepared by the Secretary pursuant to section 102(b) is completed,

the Secretary shall divide the funds described in section 101 between the Wyandotte Tribe of Oklahoma and the Absentee Wyandottes (as a group) in the manner provided in subsection (b).

(b) The Secretary shall allocate to the Wyandotte Tribe and to the Absentee Wyandottes an amount which bears the same proportion to the total amount of the funds described in section 101 as the number of individuals listed on the roll referred to in subsection (a)(1) or (a)(2), as the case may be, who are living on the date of the enactment of this Act bears to the sum of the numbers of individuals on each such roll who are living on such date.

DISTRIBUTION TO ABSENTEE WYANDOTTES

SEC. 104. The funds allocated to the Absentee Wyandottes and their descendants pursuant to section 103(b) shall be distributed in the form of per capita payments, in sums as equal as possible, to each individual listed on the roll prepared by the Secretary pursuant to section 102(b).

DISTRIBUTION TO WYANDOTTE TRIBE OF OKLAHOMA

SEC. 105. (a) Eighty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 103(b) shall be distributed in the form of per capita payments, in sums as equal as possible, to each member of such Tribe who—

(1) was born on or before the date of the enactment of this Act, and

(2) is living on such date.

(b) Twenty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 103(b) shall be used and distributed in accordance with the following general plan:

(1) A sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

(2) The amount of such funds in excess of $100,000 shall be held in trust by the Tribal Business Committee of such Tribe for the benefit of such Tribe.

(3) Any interest or investment income accruing on the funds described in paragraph (2) may be used by the Tribal Business Committee of such Tribe for any of the following purposes:

(A) Education of the members of such Tribe (including grants-in-aid or scholarships).

(B) Medical or health needs of the members of such Tribe (including prosthetics).

(C) Economic development for the benefit of such Tribe.

(D) Land purchases for the use and benefit of such Tribe.

(E) Investments for the benefit of such Tribe.

(F) Tribal cemetery maintenance.

(G) Tribal building maintenance.

(H) Tribal administration.

(c)(1) Except as provided in paragraph (2) and notwithstanding any other provision of law, the approval of the Secretary for any payment or distribution by the Wyandotte Tribe of Oklahoma of any funds described in subsection (b) (on or after the date such funds are allocated pursuant to section 103(b)) shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds.

(2) The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of this title.

MANNER OF PER CAPITA DISTRIBUTION; TREATMENT OF AMOUNTS PAID OR DISTRIBUTED

SEC. 106. (a) Any payment of a per capita share of funds to which a living, competent adult is entitled under this title shall be paid directly to such adult.

(b) Any per capita share of funds to which a deceased individual is entitled under this title shall be paid, and the beneficiaries thereof determined, under regulations prescribed by the Secretary.

(c) Any per capita share of funds to which a legally incompetent individual or a minor is entitled under this Act shall be paid in accordance with the requirements of section 3(b)(3) of the Act entitled "An Act to provide for the use and distribution of funds appropriated in satisfaction of certain judgments of the Indian Claims Commission and the United States Court of Claims, and for other purposes." and approved October 19, 1973 (25 U.S.C. 1401, et seq.).

25 USC 1403.

(d) None of the funds distributed per capita under this title or made available under this title for any tribal program shall be—

(1) subject to Federal, State, or local income taxes, or

(2) considered as income or resources in determining either eligibility for, or the amount of assistance under—

(A) the Social Security Act, or

(B) in the case of any per capita share of $2,000 or less, any other Federal, State, or local programs.

TITLE II—FORT BERTHOLD RESERVATION MINERAL RESTORATION

Fort Berthold Reservation Mineral Restoration Act.
Public lands.

SEC. 201. This title may be cited as the "Fort Berthold Reservation Mineral Restoration Act".

SEC. 202. (a) Subject to the provisions of this title, all mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which—

(1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project, and

(2) are not described in subsection (b),

are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.

(b) The provisions of subsection (a) shall not apply with respect to—

(1) lands located in township 152 north or township 151 north of range 93 west of the 5th principal meridian which lie east of the former Missouri River, and

(2) lands located in any of the following townships: township 152 north and township 151 north of range 92 west of the 5th principal meridian; township 152 north and township 151 north of range 91 west of the 5th principal meridian; township 152 north and township 151 north of range 90 west of the 5th principal meridian; township 152 north, township 151 north, township 150 north, and township 149 north of range 89 west of the 5th principal meridian; township 152 north, township 151 north, township 150 north, and township 149 north of range 88 west of the 5th principal meridian; and township 152 north, township 151 north, township 150 north, and township 149 north of range 87 west of the 5th principal meridian.

SEC. 203. Any exploration, development, production, or extraction of minerals conducted with respect to any mineral interest described in section 202(a) shall be conducted in accordance with such regulations as the Secretary of the Army shall prescribe in order to—

(1) protect the Garrison Dam and Reservoir, or

(2) carry out the purposes of the Garrison Dam and Reservoir Project.

SEC. 204. (a) Nothing in this title shall deprive any person (other than the United States) of any right, interest, or claim which such person may have in any minerals prior to the enactment of this Act.

(b) The United States may renew or extend any lease, license, permit, or contract with respect to any mineral interest described in section 202(a) after the date of enactment of this Act only if—

(1) the governing body of the Three Affiliated Tribes of the Fort Berthold Reservation approves of such renewal or extension, or

(2) the holder of such lease, license, or permit or a party to such contract (other than the United States) had the right to renew or extend such lease, license, permit, or contract prior to the date of enactment of this Act and such holder or party exercises such right of renewal or extension.

(c) All rentals, royalties, and other payments with respect to any mineral interest described in section 202(a) accruing to the United States after the date of enactment of this Act shall be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.

SEC. 205. Public Law 87-695 is amended— 76 Stat. 594.

(1) by striking out "such former Indian land" and inserting in lieu thereof "such land",

(2) by striking out "Subject" in the first sentence and inserting in lieu thereof "That (a) subject", and

(3) by adding at the end thereof the following new subsection:

"(b) Subsection (a) shall not apply with respect to any lands described in section 202(b) of the Fort Berthold Reservation Mineral Restoration Act.". *Ante*, p. 3152.

SEC. 206. (a) The Secretary of the Army and the Secretary of the Interior may enter into agreements for the transfer to the United States of any land located near the Garrison Dam and Reservoir Project which is held in trust for the benefit of the Three Affiliated Tribes of the Fort Berthold Reservation or any individual Indian if such agreement is approved—

(1) in the case of land held for the benefit of such tribes, by the governing body of such tribes, or

(2) in the case of land held for the benefit of any individual Indian, by the individual or individuals holding a majority of the beneficial interest in such land.

Any land transferred to the United States under the preceding sentence shall be treated as land acquired for the operation and maintenance of the Garrison Dam and Reservoir Project.

(b) The Secretary of the Army and the Secretary of the Interior may enter into agreements under which any land within the exterior boundaries of the reservation acquired by the United States for the construction, maintenance, or operation of the Garrison Dam and Reservoir Project that is no longer needed for such purposes is declared to be held by the United States in trust for the benefit of the Three Affiliated Tribes of the Fort Berthold Reservation.

SEC. 207. The provisions of this title, and of any agreement entered into under section 206, shall not be taken into account under section 2 of title I of the Second Deficiency Appropriation Act, fiscal year 1935 (25 U.S.C. 475a) or section 2 of the Act of August 13, 1946 (60 Stat. 1050) for purposes of determining any offset or counterclaim. 25 USC 70 note.

SEC. 208. To the extent that there are net proceeds from the development of any mineral interests described in section 202(a) of this Act, in excess of $300,000 the Three Affiliated Tribes of the Fort Berthold Reservation shall reimburse the United States the fixed sum of $300,000 from such proceeds. This reimbursement shall be deemed full reimbursement for any and all payments from the United States that the Three Affiliated Tribes received for the mineral estate, or any portion thereof, described in section 202(a) of this Act.

Approved October 30, 1984.

LEGISLATIVE HISTORY—H.R. 6221 (S. 2824):

HOUSE REPORT No. 98-1067 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 98-609 accompanying S. 2824 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 130 (1984):
Sept. 24, considered and passed House.
Oct. 2, considered and passed Senate, amended.
Oct. 4, House concurred in Senate amendments.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 03 2014

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

Dear Chief Friend:

On April 13, 2006, the Wyandotte Nation (Nation) submitted to the Bureau of Indian Affairs an application to acquire 10.53 acres of land located in Park City, Sedgwick County, Kansas (Park City Parcel), in trust.[1] In 2008, the Nation revised its application to assert that it purchased the Park City Parcel with funds awarded to it pursuant to special legislation enacted to pay the Nation for judgments it received from the Indian Claims Commission (Settlement Act, or Act).[2] Out of this payment, a "sum of $100,000...shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of [the Nation]."[3] The Nation's application states that it used funds awarded from the Settlement Act (602 Funds) to purchase the Park City Parcel, and thus, the Secretary must acquire it in trust under the Act.

We have completed our review of the Nation's application and supporting documentation, submissions by the State of Kansas, the recommendation from the Eastern Oklahoma Regional Office (EORO), and accounting-related materials from prior litigation involving the Act. I regret to inform you that I am denying the Nation's trust acquisition application for the Park City Parcel. We are forced to conclude, based on the record before the Department, that the Nation could not have used 602 Funds alone to acquire the Park City Parcel.

PROCEDURAL BACKGROUND

By memorandum dated January 30, 2009, the EORO Regional Director transmitted to the Assistant Secretary – Indian Affairs, along with the Nation's request and supporting documentation, her recommendation that the Park City Parcel be accepted into trust pursuant

[1] The land proposed for acquisition is described as follows:
A tract of land in Coliseum Center, an Addition to Park City, Sedgwick County, Kansas described as follows: Beginning at a point on the South line and 50 feet West of the Southeast corner of Lot 3, Block 1, in said Coliseum Center Addition; thence along the South line of said Lot 3 bearing North 89°39'26", West a distance of 250.00 feet to the Southwest corner of said Lot 3; thence bearing North 90°00'00" West across Athens Court, a distance of 70.00 feet to the Southeast corner of Lot 1 in Block 1; thence along the South line of Lot 1 bearing North 89°40'18" West, a distance of 180.00 feet; thence bearing South 0°00'00" East, a distance of 917.75 feet to a point in the South line of Lot 6 in said Block 1; thence along said South line bearing South 89°42'56" East, a distance of 500.00 feet; thence bearing North 0°00'00" East, a distance of 917.70 feet to the point of beginning; EXCEPT that portion of Athens Court (cul-de-sac) within the above described tract of land.

[2] Pub. L. No. 98-602, 98 Stat. 3149 (1984) (Settlement Act).

[3] Settlement Act, 98 Stat. 3151, § 105(b)(1).

to the Act. Since that time, the Office of the Assistant Secretary – Indian Affairs, the Office of Indian Gaming, and the Office of the Solicitor have been reviewing the Nation's application and the ample comments submitted by the Nation and the State.

On July 26, 2011, the Nation sued the Department seeking to compel the Secretary to issue a favorable decision on the application and acquire the Park City Parcel in trust. On April 10, 2013, following merits briefing and oral argument in the case, the court denied the Nation's claims, but retained jurisdiction over the undue delay claim to monitor the Department's progress on the application.[4] The Department has worked diligently to finalize its review of the Nation's application, taking into consideration materials submitted by both the Nation and the State of Kansas. This decision reflects the culmination of that effort.

COMPLIANCE WITH THE SETTLEMENT ACT

The Settlement Act provides that the Nation, independent of the United States, manages the monies it receives under the Act, including the 602 Funds.[5] If the Nation uses 602 Funds to acquire property, such expenditure triggers the mandatory obligation of the Secretary under the Act to acquire such property in trust.[6] Thus, to trigger the Department's mandatory acquisition of the Park City Parcel under the Act, the Nation must prove its assertion that it used 602 Funds to acquire the property.

The question of whether the Park City Parcel was purchased solely with 602 Funds is not a simple matter. In a series of letters sent to the Department, the State of Kansas contends that the Nation did not use 602 Funds to purchase the Park City Parcel and thus the property cannot be acquired in trust under the Act. One such letter, dated October 24, 2012, included an accounting analysis of the 602 Funds. We met with the Nation on April 22, 2013, to discuss this analysis and other submissions from the State of Kansas. At that meeting, the Nation stated that it would provide a response to the State's comments. On June 12, 2013, we sent a letter to the Nation asking whether it intended to provide a response, as none had been received by that date. The Nation then requested a meeting with the Department to discuss its response in person. A meeting was held between the Office of Indian Gaming and the Nation on September 16, 2013.

At the meeting of September 16, 2013, the Nation provided a written response to the State's comments and also summarized its position on the issue of whether it used 602 Funds to acquire the Park City Parcel. The Nation contends that the litigation stemming from the Department's

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[4] The court directed the Department to submit quarterly status reports detailing our work on the Nation's application, and the Department submitted such reports on July 9, 2013, October 25, 2013, January 24, 2014, and April 24, 2014.

[5] Settlement Act, 98 Stat. 3151, § 105(c)(1) (stating that, except for circumstances not relevant here, "the approval of the Secretary for any payment or distribution by the [Nation] of any funds described in subsection (b) [the 602 Funds provision] . . . shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds").

[6] *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001) (holding that acquisitions were mandatory if the Nation used 602 funds to purchase the property) *cert. denied*, 534 U.S. 1078 (2002). For mandatory acquisitions, the Department need not comply with all of the regulatory requirements of 25 C.F.R. Part 151. *See* Bureau of Indian Affairs, *Acquisition of Title to Land Held in fee or Restricted Fee Status (Fee-to-Trust Handbook)* (June 6, 2014) (setting forth the requirements for processing all fee-to-trust applications, including mandatory acquisition applications) *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf.

1996 decision to acquire a different parcel of land under the Act, located in Kansas City, Kansas (Shriner Tract), addressed and resolved the question of whether the Nation used 602 Funds to purchase the Park City Parcel. We disagree.

While the Shriner Tract litigation resolved some of the issues posed by the Nation's application to acquire the Park City Parcel, the materials before the Department that pertain to the Nation's pending application pose questions that were not answered by the courts in the Shriner Tract litigation. Our detailed review of the Shriner Tract litigation record, and the materials we received in connection with the present application, summarized below, leads us to conclude that the Nation could not have used 602 Funds alone to purchase the Park City Parcel.

Decision to Acquire Shriner Tract and Related Litigation

The Nation purchased the Park City Parcel on November 25, 1992. On January 21, 1993, it submitted a request that the Secretary acquire the Park City Parcel in trust pursuant to the Settlement Act. The Nation withdrew the Park City Parcel application in 1995, however, after the Twin Cities Field Solicitor issued an opinion concluding that the property was ineligible for gaming. The Nation then completed the purchase of Shriner Tract in 1996, and in that same year, the Secretary both approved the Shriner Tract application as a mandatory acquisition under the Act and acquired that property in trust.

The State of Kansas and several Indian tribes[7] sued the Department challenging the Shriner Tract acquisition. During the course of the litigation, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) agreed with the Department that acquisitions made pursuant to the Act were mandatory, and as such, compliance with the National Environmental Policy Act, 43 U.S.C. §§ 4321 *et seq.* and the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* was not required.[8] The district court also held that acquisitions made pursuant to the Act were eligible for gaming under the "settlement of a land claim" exception to the Indian Gaming Regulatory Act's prohibition against gaming on lands acquired in trust after October 17, 1988.[9]

Accounting Analysis of 602 Funds for the Shriner Tract Acquisition

At one stage of the Shriner Tract litigation, the Tenth Circuit remanded the acquisition decision to the district court after concluding the Department's administrative record did not support a finding that the Nation used 602 Funds to acquire the property.[10] The district court then remanded the decision back to the Department to "reconsider whether [602 Funds] alone were used to purchase the Shriner Tract."[11]

[7] The tribal plaintiffs were Sac and Fox Nation of Missouri in Kansas and Nebraska, Iowa Tribe of Kansas and Nebraska, Prairie Band Potawatomi Nation, and Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas.
[8] *Sac and Fox Nation*, 240 F.3d at 1262-63.
[9] *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1211 (D. Kan. 2006) (no appeal taken).
[10] *Sac and Fox Nation*, 240 F.3d at 1263-64.
[11] This was an unpublished order issued in *Sac and Fox Nation v. Norton*, No. 96-4129 (D. Kan. Aug. 22, 2001), which was quoted and discussed in *Gov. of Kan. v. Norton*, 2005 U.S. Dist. LEXIS 15299, *7-8 (D. Kan. July 27, 2005).

Responding to this directive, the Nation hired the accounting firm KPMG to prepare an analysis that tracked the amount of interest earned from the 602 Funds during the 10 year period of its investment. The Department's position, which was later affirmed in litigation, was 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.[12] It is only through the combination of the principal 602 Funds ($100,000) and sufficient interest earnings that the Nation would have been able to purchase both Shriner Tract (for $180,000) and the Park City Parcel (for $25,000) with 602 Funds and thus trigger, for both parcels, the mandatory acquisition authority provided by the Act.

In its analysis of interest earned by the 602 Funds, KPMG treated a withdrawal of $25,199.67 in 1991[13] as a withdrawal of 602 Funds for the purchase of the Park City Parcel. After this deduction, KPMG then concluded that by 1996, when the Nation acquired Shriner Tract, the value of any remaining 602 Funds had grown to $212,169.65.[14] KPMG's analysis also provided the following information:

- In May 1986, the Nation purchased several mortgage bonds with all (or nearly all) of its 602 Funds.[15] The Nation kept these bonds in a separate account from its main bank account through November 1991.[16] Using financial statements provided by the Nation, KPMG traced the interest earned on the bonds between May 1986 and November 1991.[17] KPMG concluded that the value of the 602 Funds had grown to $156,906.81 by the November 1991 accounting period.[18]

- The Nation's November 1991 financial statement showed a withdrawal from the bond account in the amount of $25,199.67.[19] KPMG treated this withdrawal as a withdrawal of 602 Funds by the Nation to buy the Park City Parcel.[20] Accordingly, KPMG reduced the value of the 602 Funds by the amount of the withdrawal to conclude that by the close of November 1991, the value of the 602 Funds was $131,707.14.[21]

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

[13] As discussed below, we now know that the Nation re-deposited this amount into its main bank account in 1991, and then withdrew $25,000 from its main bank account in 1992 to purchase the Park City Parcel. *See* Letter from David McCullough to Candace Beck (Aug. 18, 2009).

[14] Letter from John Gruttadaurio to George Skibine at 1 (Dec. 5, 2001) (Gruttadaurio Letter) (enclosing KPMG's annual summary of 602 Fund value from May 1986 to July, 1996 (KPMG Report)).

[15] *Id.* at 2-3; *See also* Letter from David McCullough to Secretary Sally Jewell at 2 (Sept. 16, 2013) (quoting from the Gruttadaurio letter).

[16] Gruttadaurio Letter at 2-3; Letter from David McCullough to Secretary Sally Jewell at 3. *See also* 67 Fed. Reg. 10926 (Mar. 11, 2002) (summarizing investment history).

[17] Gruttadaurio Letter at 2-3; Letter from KPMG to John Gruttadaurio at 1 (Nov. 26, 2011); Letter from David McCullough to Secretary Sally Jewell at 3.

[18] AR003310. Citations beginning with "AR" refer to documents in the administrative record for the lawsuit the Nation filed against the Department in connection with its pending application, *Wyandotte Nation v. Salazar ex rel. Schmidt*, No. 11-2656 (D. Kan.). The KPMG Report appears in the administrative record for such case at AR003110-AR003375.

[19] *Id.*; AR003332-33 (monthly financial statement for the period ending Nov. 29, 1991).

[20] AR003311 (KPMG's notations concerning its analysis of 1991 accounting data).

[21] AR003310 (summarizing 1991 earnings).

- On December 30, 1991, the Nation closed the bond account and transferred the 602 Funds (valued at $131,707.14 at the time) into its main account, which contained cash, bonds, and other assets totaling $634,848.93 (net) at the time.[22] This commingling meant that KPMG could no longer directly track the value of the 602 Funds; instead, KPMG determined the amount of interest earned by the account overall and then attributed a pro-rated portion of that interest to the 602 Funds.[23]

- To determine what portion of the interest earned on the main account was attributable to the 602 Funds, KPMG compared the net value of the account ($634,848.93) to the value of 602 Funds in December 1991 (131,707.14) and concluded that the 602 Funds represented approximately 20-21 percent of the main account.[24] KPMG then, on a monthly basis, attributed approximately 20-21 percent of the interest earned on the main account to the 602 Funds to conclude that by July 1996 – the date on which the Nation purchased the Shriner Tract – the value of the 602 Funds had grown to $212,169.65.[25]

- The Nation was unable to provide KPMG with all of its financial statements for 1992 and 1993; as a result, KPMG used estimated interest rates to calculate earnings on 602 Funds when it did not have copies of certain monthly statements.[26] Approximately 22 monthly statements from the 1992-1993 period were not provided to KPMG for its analysis.[27]

The Department accepted KPMG's analysis and affirmed its decision to acquire Shriner Tract on the results of the KPMG report.[28] The parties litigated the sufficiency of KPMG's analysis and the district court upheld the Department's reliance on such analysis.[29] The Tenth Circuit later vacated the entire lawsuit, however, after the Department raised the Quiet Title Act as a defense to suit.[30] This vacatur ended the challenge to the Shriner Tract acquisition, and the United States continues to hold the Shriner Tract in trust for the Nation to the present day.

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[22] *Id.*; AR003334 (monthly financial statement for the period ending December 31, 1991).
[23] Gruttadaurio Letter at 3.
[24] *Id.*; AR003336 (showing the portion of interest KPMG attributed to the 602 Funds for the 1994 period).
[25] *See E.g.*, AR003336 (showing the portion of interest KPMG attributed to the 602 Funds for the 1994 period); AR003349 (same, but for the 1995 period); AR003363 (same, but for the 1996 period). *See also* Gruttadaurio Letter at 1.
[26] Gruttadaurio Letter at 3; *see* AR003334-36 (providing copies of statements from 1991 and 1994 but not statements from the 1992-1993 period).
[27] *Id.*
[28] 67 Fed. Reg. 10926 (Mar. 11, 2002). A subsequent notice was published in the *Federal Register* to correct a typographical error in the March 11, 2002 notice and to clarify that the Department had not yet made a determination regarding the gaming eligibility of the Shriner Tract. 67 Fed. Reg. 30953 (May 8, 2002).
[29] *Gov. of Kansas v. Norton*, 430 F. Supp. 2d at 1215-17, 1222-25 (D. Kan. 2006) (discussing KPMG Report and analysis by Office of Indian Gaming staff and concluding that Department was not arbitrary and capricious in its decision to accept the findings of the KPMG Report).
[30] *Gov. of Kansas v. Kempthorne*, 516 F.3d 833, 846 (10th Cir. 2008). The Quiet Title Act, 28 U.S.C. § 2409a(a), waives the United States' sovereign immunity from suits concerning "disputed title to real property in which the United States claims an interest." "[T]rust or restricted Indian lands" are excluded from this waiver, and such exclusion was, at the time, understood to mean that once land was acquired in trust by the United States, it was no longer subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq. See, e.g.*, *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004). The United States Supreme Court has since held that unless the plaintiff claims a property interest in the land at issue, this Indian lands exception does not bar challenges to fee-to-trust decisions for land already held in trust if such decisions are

Materials Provided to the Department in Connection with the Pending Application

As part of its pending application for the Park City Parcel, and after the conclusion of the Shriner Tract litigation, the Nation provided documentation to the Department demonstrating that it had purchased the Park City Parcel on November 24, 1992, not on November 29, 1991.[31] Prior to this time, all parties and the KPMG analysis had assumed that the Nation withdrew 602 Funds in November 1991 to purchase the Park City Parcel. Because, as stated above, the parties did not have copies of most of the statements for 1992 and 1993, it was unknown at the time that the withdrawal of funds actually occurred in 1992.

The Nation's supplemental documentation demonstrates that after it withdrew $25,199.67 from its segregated bond account on November 29, 1991, the Nation re-deposited that amount into its main bank account on the same day.[32] The Nation explained that after withdrawing the funds to acquire the property in 1991, a title issue arose that prevented the purchase.[33] The title issue was resolved, one year later in November 1992, after the Nation had transferred the 602 Funds into its main bank account and commingled such funds with its other assets. On November 24, 1992, the Nation withdrew $25,000 from its commingled account to buy the Park City Parcel.[34]

The fact that the Nation withdrew funds to buy the Park City Parcel *after* it had commingled its 602 Funds is significant. While the Nation purchased the Park City Parcel in 1992, before it had expended any 602 Funds and several years before it purchased Shriner Tract, the timing of the Nation's purchase of the Park City Parcel does not end the inquiry. As discussed above, once the Nation commingled the 602 Funds with its other assets, the value of the 602 Funds could not be directly tracked, as they had become incorporated into the Nation's larger account. Following such commingling, KPMG could determine only the value of the 602 Funds by attributing a pro-rated share of the interest earned by the account overall to the 602 Funds.

The Nation's commingled account consisted of a mix of assets including cash, bonds, and mutual fund investments.[35] The Nation provided the Department with a copy of its November 1992 Mercantile statement, which shows that it was issued a disbursement of non-cash assets in the amount of $25,000 on November 24, 1992.[36] Because the account was commingled, we, like KPMG before us, are unable to determine whether the dollars disbursed were actually 602 Fund dollars. Thus, the Nation must demonstrate to the Department that it had enough 602 Funds in its commingled account to cover the Park City Parcel purchase so that we can consider the disbursement of assets on November 24, 1992 an expenditure of 602 Funds that triggers the mandatory acquisition authority under the Act.

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otherwise reviewable under the Administrative Procedure Act. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2209-2210 (2012).

[31] Letter from David McCullough to Secretary Jewell at 4-5.

[32] *Id.*

[33] *Id.* at 4.

[34] *Id.* at 5.

[35] *See, e.g., id.* at Exhibit 3 (enclosing a copy of the November 1992 Mercantile statement).

[36] *Id.*

But 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). Because the Nation now states that it purchased the Park City Parcel, like the Shriner Tract, from the commingled account, the Park City Parcel can be a mandatory acquisition under the Act only if the Nation had sufficient 602 Funds in the commingled account to acquire both the Park City Parcel and Shriner Tract.

One of the State's arguments, discussed below, calls into question whether the Nation could have earned sufficient interest on the 602 Funds to complete both acquisitions.

Submissions from the State of Kansas

The State of Kansas has submitted multiple letters to the Department stating its opposition to the acquisition of the Park City Parcel. The State's comments include arguments regarding the scope of the Secretary's authority under the Act, the gaming eligibility of the Park City Parcel, and the sufficiency of the Shriner Tract accounting. We do not address each of the State's arguments in this decision, in part because it is unnecessary to do so in light of our decision to deny the Nation's application. In addition, we have reviewed the Shriner Tract litigation record and confirmed that, except for the issue discussed below, the State's accounting arguments were raised and resolved in connection with the Shriner Tract litigation,[37] and therefore, we decline to revisit those issues now.

The State has raised one argument, however, that was not addressed in the Shriner Tract litigation and after our consideration of it in connection with the Park City Parcel application, leads to our decision today. The State hired the accounting firm, Gottlieb, Flekier & Co., to review KPMG's analysis and prepare a report evaluating the sufficiency of KPMG's conclusions (Gottlieb Report).[38] Based on the conclusions reached in the Gottlieb Report, the State contends that KPMG failed to account for certain interest-related deductions applied against the Nation's commingled account, and by not factoring these deductions into its analysis, KPMG overstated both the amount of interest earned by the account overall as well as the amount of interest earned by the 602 Funds.[39] These deductions, which relate to the Nation's use of margin interest loans to purchase securities and to the interest the Nation owed in connection with the purchase of various bonds, appear as deductions for "margin account interest" and "accrued interest

[37] For example, the State raises several of the same objections to the KPMG Report that it raised during the Shriner Tract litigation, which the Department considered and resolved. *Compare, e.g.*, Letter from Mark Gunnison to Secretary Kenneth Salazar (Oct. 24, 2012) *with Governor of Kansas*, 430 F. Supp. 2d at 1215-17, 1222-25 (discussing the State's objections to the KPMG Report, the Department's response to them, and affirming the Department's reliance on the KPMG Report). The State also contends that Department officials understood that only one acquisition was permitted by the Act when it approved the Shriner Tract acquisition in 1996. *See, e.g.*, Letter from Stephen N. Six, Attorney General, to Larry Echo Hawk, Assistant Secretary – Indian Affairs (Sept. 13, 2010); Letter from Mark Gunnison, Special Assistant Attorney General, to Secretary Sally Jewell (Feb. 12, 2014). Not 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.

[38] Letter from Mark Gunnison to Secretary Kenneth Salazar at 6 (Oct. 24, 2012). *See also id.* at Exhibit E of the Gottlieb, Flekier & Co. Report (Gottlieb Report) (enclosed with the October 24, 2012 letter).

[39] *Id.*

purchased" on the Nation's financial statements.[40] We consulted with accountants in the Department's Office of the Special Trustee to assist us in our review of the issue of interest-related deductions. Following such consultation, we concluded that these deductions did reduce the amount of interest earned by the account, and because KPMG appears not to have factored these deductions into its analysis, it overstated the amount of interest earned by the 602 Funds. While the Gottlieb Report demonstrates that there were sufficient 602 Funds for either the purchase of Shriner Tract or the Park City Parcel, it further shows that there were not enough 602 Funds for both properties.

DECISION

The Department accepted and relied on KPMG's accounting analysis in connection with the Shriner Tract acquisition, and we do not revisit our determination that the Nation used $180,000 of its commingled 602 Funds to acquire that property.[41] The Nation contends that, despite having withdrawn funds to purchase the Park City Parcel after it commingled the 602 Funds with its other assets, and after not resolving whether KPMG overstated interest earnings by not accounting for interest-related deductions that were applied against the Nation's account, the Nation used 602 Funds exclusively to buy the Park City Parcel. The Nation asks us to rely again on KPMG's accounting analysis to approve its application, but such analysis did not account for the new information we have before us today. Accordingly, we are unable to conclude that the Nation used 602 Funds exclusively to purchase the Park City Parcel.

The documentation provided by the Nation showing that it purchased the Park City Parcel in 1992 after it commingled its 602 Funds makes it possible that the Nation withdrew other non-602 assets from its commingled account at that time, unless the Nation had sufficient 602 Funds (including interest) in its commingled account over time to buy both the Park City Parcel and Shriner Tract. The Nation and the Department have already attributed 602 Funds from the commingled account as being the source for the Shriner Tract purchase. So, if there were not sufficient 602 Funds to acquire both properties, the Nation must have used, at least in part, non-602 Funds to acquire the Park City Parcel.

A finding that the Nation used 602 Funds to acquire both Shriner Tract and the Park City Parcel is precluded, however, by the State's identification of issues surrounding interest-related deductions applied against the Nation's commingled account. We find the State's submissions compelling and, without information that is contrary to or effectively rebuts the arguments presented by the State, we must conclude that the Nation could not have purchased the Park City Parcel using only 602 Funds.

The State's argument, which is supported by the findings of the Gottlieb Report, is that KPMG should have factored into its analysis the interest-related deductions charged against the Nation's account before attributing interest earnings to the 602 Funds, and that absent such approach,

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[40] *See, e.g.*, Letter from David McCullough to Secretary Jewell at Exhibit 3 (enclosing a copy of the Nation's November 1992 Mercantile account statement.

[41] As noted *infra* n. 46, the State's analysis supports the conclusion that the Nation had sufficient 602 Funds to purchase Shriner Tract in 1996 if the $25,000 is added back to the 602 Fund balance. *See* Exhibit E of the Gottlieb Report at 28.

KPMG overstated the interest earnings.[42] The Gottlieb Report took KPMG's report of monthly interest earnings, deducted these interest-related deductions from the figures, and concluded – after further reducing the value of the 602 Funds by $25,000 to account for the Park City Parcel purchase, which we now know to have occurred after the funds were commingled – that the value of the 602 Funds was $161,373.47 in July 1996, not $212,169.65 as estimated by KPMG.[43] According to the State, if the Nation's withdrawal of $25,000 in 1992 was a withdrawal of 602 Funds, the Nation would not have had sufficient 602 Funds left in 1996 to purchase Shriner Tract. Thus, according to the State's submissions, either the Park City Parcel or the Shriner Tract could have been purchased with wholly 602 Funds, but not both.

After an extensive review of the Shriner Tract litigation record, it appears that although the State made the general argument that KPMG overstated the value of the 602 Funds,[44] the State did not raise, and the Department did not consider, whether interest-related deductions charged against the Nation's account should have been factored into KPMG's analysis, and if they did, whether KPMG's report overstated the amount of interest earned by the 602 Funds. Now that we know that the Nation purchased the Park City Parcel in 1992 after it had commingled the 602 Funds with its other assets, new considerations concerning the sufficiency of KPMG's accounting analysis are directly relevant to our review of the Nation's application for the Park City Parcel. Approving the Nation's application requires us to confirm that the 602 Funds earned enough interest over time to cover the acquisitions of both the Park City Parcel and Shriner Tract. The KPMG report does not support this finding, 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.

In a meeting with the Nation's representatives on April 22, 2013, the Nation was provided the opportunity to address the issues the State raised in its October 24, 2012 letter. As discussed above, the Nation's September 16 response did not specifically address whether, in light of the documentation showing that the Nation withdrew assets to purchase the Park City Parcel in 1992 after it had commingled its 602 Funds, KPMG's methodology concerning interest-related deductions was appropriate, or whether KPMG may have overstated the amount of interest earned by the 602 Funds.[45] Instead, the Nation stated that because the Department accepted KPMG's analysis in connection with Shriner Tract, it must again accept the analysis in connection with the Park City Parcel.[46] But the Shriner Tract litigation did not address or

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[42] *Id.* at 6.

[43] *Id.* at 28. Notably, the State's accounting analysis supports the conclusion that the Nation had sufficient 602 Funds to purchase Shriner Tract in July 1996. If the $25,000 withdrawal from the commingled account was not considered a withdrawal of 602 Funds, then the overall balance of 602 Funds would not be reduced by this amount. If the $25,000 (plus interest) is not treated as an expenditure of 602 Funds (but is a withdrawal of other assets) and is added to the $161,373.47 figure, the value of 602 Funds by July 1996 would exceed the amount the Nation needed to purchase Shriner Tract ($180,000).

[44] *See, e.g., In Re Shriner Tract Determination*, Reply Brief of Kansas Governor and Tribes on P.L. 602 Funds at 1-3 (Oct. 1, 2002) (stating that KPMG used a "fictional interest rate...to grow [the 602 Funds] so that the ending number equals or exceeds what the [Nation] needs it to be") (submitted to the Department in connection with an administrative rehearing of the Department's determination, announced in the Federal Register on March 11, 2002, 67 Fed. Reg. 10926, that it was reaffirming the decision to acquire Shriner Tract on the basis of the KPMG Report).

[45] Letter from David McCullough to Secretary Sally Jewell (Sept. 16, 2013).

[46] *Id.* at 6.

resolve the issues raised by the State, which are significant, in light of the now-known fact that the Nation purchased the Park City Parcel using commingled funds.

At a minimum, the State's submission concerning interest-related deductions poses significant questions regarding the value of the 602 Funds. As the Nation is aware, the Department does not control the 602 Funds. Thus, to date, we have relied on analyses of the Nation's information and accounting reports as the bases for our decisionmaking concerning the Nation's trust acquisition applications under the Act. The Nation, however, has not articulated KPMG's rationale for not factoring into its analysis the interest-related deductions that appear to have reduced the amount of interest earned by the commingled account. The information provided from the State leads us to conclude that the Nation could not have used 602 Funds exclusively to purchase the Park City Parcel. Should the Nation later be able to address the accounting issues raised by the State, it would be free to submit a new application. But unless and until the Nation adequately rebuts the accounting issues raised by the State in a manner that satisfies the Department that the Nation used 602 Funds exclusively to purchase the Park City Parcel, the Department cannot determine that the acquisition of the property into trust is mandatory under the Act.

Accordingly, I regretfully must deny the Nation's application to acquire the Park City Parcel pursuant to the Act.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 20 2020

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

Dear Chief Friend:

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

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

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

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

[3] 2014 Denial Letter at 10.

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

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

Decision

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

Background

Removal 1795 – 1855

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

Indian Claims Commission

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

The Settlement Act

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

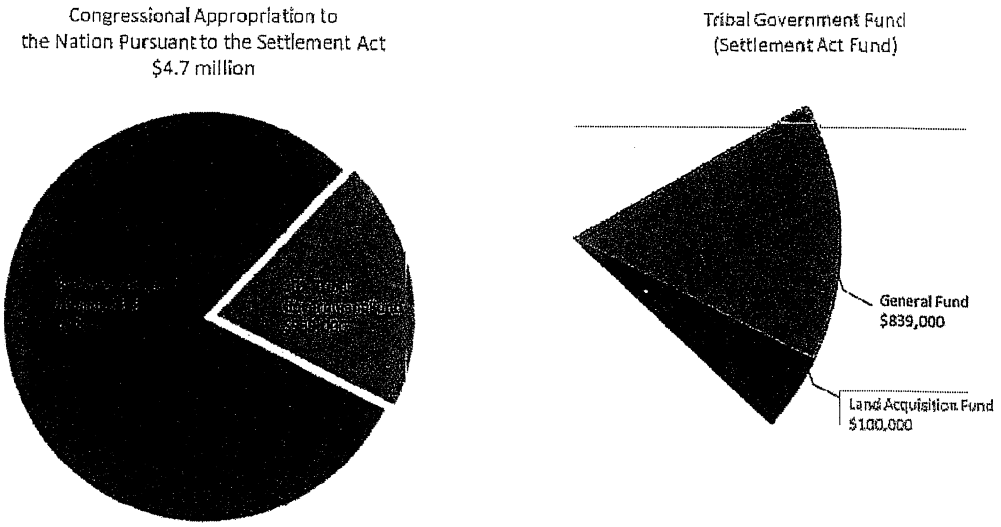
[5] *See e.g.* James Strong, et al. v. United States 30 Ind. Cl. Comm. 337 (May 23, 1973) Doc. No. 141; Lawrence Zane, on behalf of the Wyandotte Tribe and Nation v. United States 38 Ind. Cl. Comm. 561 (Aug. 5, 1976) Doc. No. 212 and 213; and Wyandotte Tribe and Nation v. United States 43 Ind. Cl. Comm.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

[6] Preamble to Settlement Act.

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

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

Wyandotte Settlement Act Funds



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

Settlement Fund Chronology

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

[8] Settlement Act § 105; *see also* Settlement Act Fund Annual Audits at 4.

[9] Settlement Act § 105(b)(1).

[10] Settlement Act § 105(b)(2). Per Section 105(b)(2), the remaining 20%, minus the $100,000 Land Acquisition Funds, was distributed to the Wyandotte Tribal Business Committee to be used for education, health, economic development, land purchases, investments, cemetery maintenance, building maintenance, and administration. We refer to the funds identified in § 105(b)(2) as the General Fund. *See also* Settlement Act Fund Annual Audits at 4. According to the audit for the fiscal year ended July 11, 1986, the General Fund total was $838,706.04. We rounded this number to the nearest $1,000 for ease of reference.

[11] 2014 Denial Letter at 3. *See also* 2017 Supplement, Exhibit 1 *1992 Park City Purchase Deed.*

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

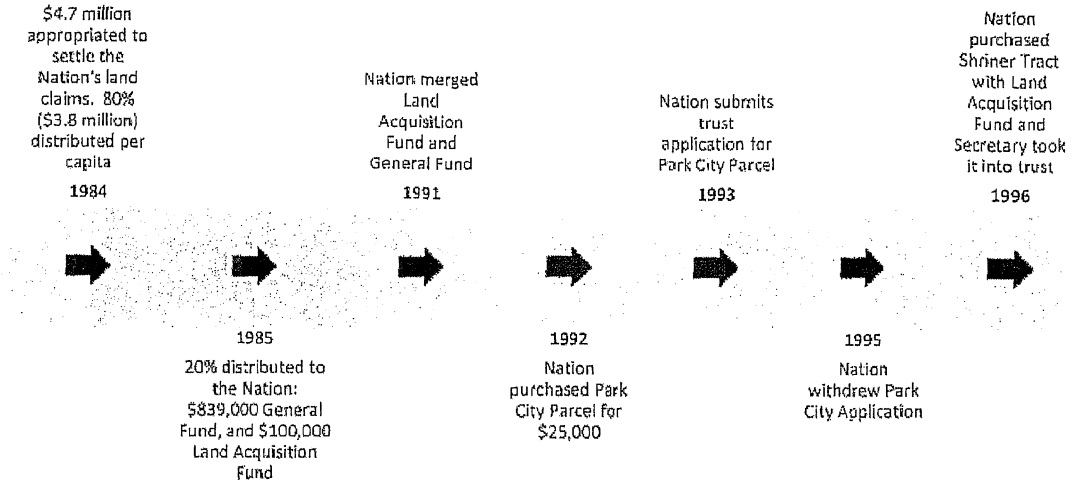


Figure 1 Wyandotte Timeline 1984-1996

Shriner Tract Litigation

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

- In *Governor of Kansas v. Norton*, the United States District Court for the District of Kansas ruled that the Nation could invest the Land Acquisition Fund and add the interest it earned into the Land Acquisition Fund to purchase property for acquisition under the Settlement Act.[12]

- In *Sac & Fox Nation v. Norton*, the United States Court of Appeals for the Tenth Circuit held that the Settlement Act mandated the Secretary to acquire in trust land purchased with Land Acquisition Funds.[13]

- In *Wyandotte Nation v. the National Indian Gaming Commission*, the United States District Court for the District of Kansas held that land purchased with Land Acquisition Funds and taken in trust pursuant to the Settlement Act meet the criteria for the Indian Gaming Regulatory Act's (IGRA) "settlement of a land claim" exception, and, thus, the Nation may conduct gaming on those lands.[14]

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

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

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

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

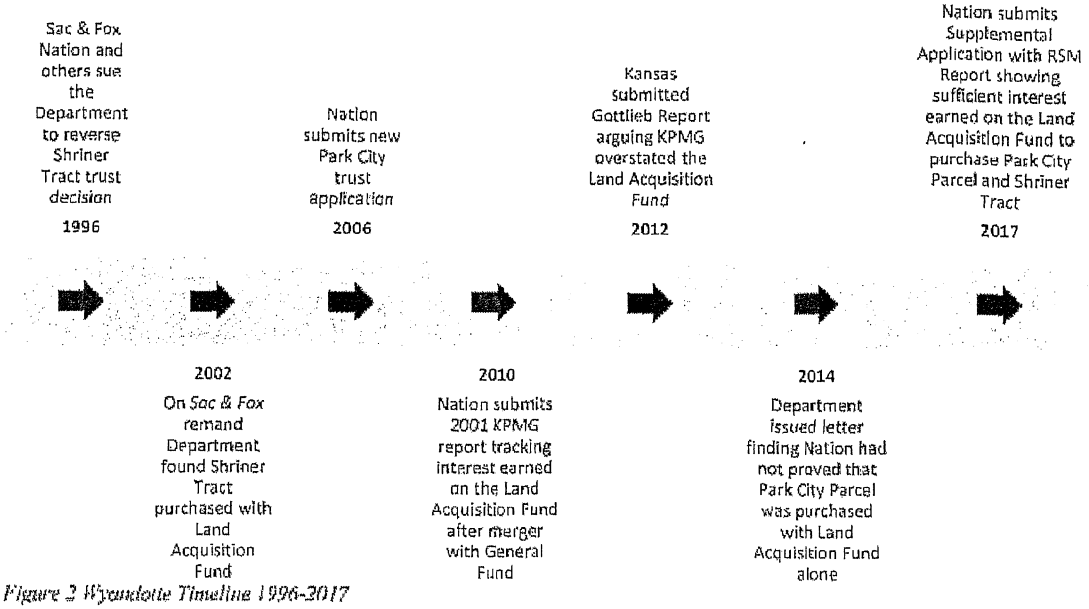

Figure 2 Wyandotte Timeline 1996-2017

Park City Trust Application Procedural History

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

2001 KPMG Report

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

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

2012 Submission from the State of Kansas

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

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

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

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

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

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

[19] Gottlieb Report at 3.

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

2014 Denial Letter

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

Nation's 2017 Response to the 2014 Denial Letter

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

RSM Report

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

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[20] Gottlieb Report at 3.

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

[22] 2017 Supplement.

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

[24] 2017 Supplement, Exhibit 6 at 4 (RSM Report).

[25] RSM Report at 6.

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

Analysis

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

Consultation with the Office of Financial Management

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

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

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

[27] 2017 Supplement.

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

[29] RSM Report at Exhibit B.

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

Available Funds for the Park City Purchase

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

Available Funds for the Shriner Tract Purchase

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

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

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[30] 2017 Supplement, Exhibit 1 *1992 Park City Purchase Deed. See also* RSM Report at 6.

[31] RSM Report at 6.

[32] Bush Letter at 2.

[33] RSM Report Exhibit B.

[34] *Id.*

[35] Bush Letter at 2.

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

[37] PFM Memorandum.

Conclusion

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

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

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

Eligibility to Conduct Gaming

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

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[38] RSM Report Exhibit B.

[39] *Id.*

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

Acquisition of the Park City Parcel in Trust

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

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

Legal Description and Title to the Property

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

Environmental Due Diligence

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

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

[42] *See* 25 C.F.R. § 151.10 and § 151.11.

[43] *See* Echo Hawk Memorandum, in *Fee-To-Trust Handbook* at 56 – 60.

[44] 2017 Supplement, Exhibits 1 and 19.

[45] 2017 Supplement, Exhibit 3.

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

[47] *Fee-to-Trust Handbook* § 3.1.3 at 34.

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

September 19, 2017, which found no evidence of hazardous materials.[49] The Eastern Oklahoma Regional Office will complete a final site inspection prior to the acquisition of the Park City Parcel in trust. This satisfies the due diligence requirements of 602 DM 2.

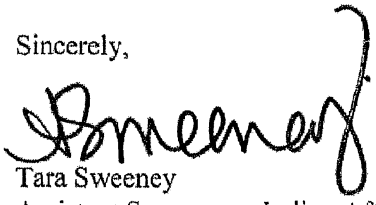
Conclusion

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

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

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

Sincerely,



Tara Sweeney
Assistant Secretary – Indian Affairs

[49] 2017 Supplement, Exhibit 20.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STATE OF KANSAS, *ex rel.*, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 2:20-cv-02386
	)	
DAVID BERNHARDT, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JERROLD L. GOTTLIEB

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

COMES NOW Jerrold L. Gottlieb and for his affidavit, states and avers as follows:

1. My name is Jerry Gottlieb, I am over the age of 18 years and I have personal knowledge of the matters set forth below.

2. I am a Certified Public Accountant licensed in the State of Kansas. I have practiced accounting since 1972 after I graduated from the University of Kansas with a Bachelor of Science Degree in Business Administration with a concentration in accounting. I had my own practice for over 30 years and then joined the firm of Clifton, Larson, Allen, LLP until I left in 2020.

3. For over 40 years I have been preparing valuations for mergers and acquisitions, stock redemptions, litigation support and various other purposes. I have provided these services over a 100 times and I have frequently served as an expert witness; testifying in both federal and state courts.

4. For this matter, I have reviewed the following:

a. My Report on Value of Wyandotte Tribe of Oklahoma Section 602 Funds as of July 12, 1996 that was finalized on September, 18, 2012 with some corrections October 23, 2012 (hereinafter the "2012 Gottlieb Report"). (AR 3762-3809 3814-3871.) References in the remainder of this Affidavit are to the corrected report at AR 3814-3871;

b. The materials identified on p. 2-3 of my letter of September 18, 2012 that is part of that 2012 Report (AR 3817.) (My September 18, 2012 letter reproduced with the corrected report (AR 3814-3871) but page 1 appears to have been omitted. It was identical to page 1 of my letter of September 18, 2012. (AR 3765.);

c. September 16, 2013 letter of David McCullough with attachments (AR 8488-8527.);

d. The Ober Audits and Compilations of what is referred to as the Wyandotte Tribe's "Claims Money Funds" (AR 4066-4136). The Ober Audits examined the Tribe's financial statements for the "Claims Money Fund" which consisted of all of the approximate $939,000 distributed to the Tribe pursuant to PL 602. (AR 4066-4136). According to the auditor's report, it clear that the financial statements are the responsibility of the Tribe where it was stated "These financial statements are the responsibility of the Company's (Tribe) management. Our (the auditor) responsibility is to express an opinion on these financial statements based on our audit." (AR 4082; 4099; 4110; 4120; 4130.);

e. RSM US, LLP's various financial analysis reports that are in the administrative record in this case but in particular the Report of RSM US LLP dated September 29, 2017 (AR 4020-4029.);

f. The May 20, 2020 decision letter of Assistant Secretary-Indian Affairs (AR 4482-4493.)

5. On or about November 29, 1991, just before the account that held what has been referred to as the PL 602 bonds was closed (that account is referred to as the "Segregated Account"), there was a total of $529.91 in cash in the account and bonds with a face value of $109,000 for a total account value of $109,529.91. (AR 3843, Ex. D to 2012 Gottlieb Report; AR 3032-3033.) That account value was then transferred to the Wyandotte Tribe's investment account that held the other funds that had been distributed to the Tribe under PL 602 (hereinafter called the "Commingled Account"). (AR 2814.)

6. Given the coupon or interest earnings rate of the PL 602 bonds in the Segregated account on November 29, 1991 paid, it was impossible for those bonds to have produced enough earnings between November 29, 1991 and November, 24 1992, to generate $25,000 by November 24, 1992 to be used to purchase the land that has been referred to as the Park City Land. (AR 8509, AR 3843.)

7. The reason that only $529.91 in cash was in the Segregated Account by November 29, 1991, despite the fact that the PL 602 bonds had been generating earnings since May, 1986 based on their coupon rate, was because the Wyandotte Tribe's withdrawals from the Segregated Account between May, 1986 and November 29, 1991 exceeded the amount cash, earnings and other deposits into that account during that time frame to the extent that only $529.91 in cash was left in the Segregated Account on November 29, 1991 when it was closed and the account proceeds transferred to the Commingled Account. This activity is detailed in Exhibit F to the 2012 Gottlieb Report which information came from the Segregated Account statements during that time frame. (AR 3850-3855; 2810-3033.)

8. The Wyandotte withdrew $25,199.67 from the Segregated Account on November, 21, 1991 but it did not return those funds to the Segregated Account. (AR 3033; 8513.) Instead, it used those funds in November of 1991 to pay down its margin loan indebtedness in the Commingled Account. (AR 8518.) The margin account was only in the Commingled Account. (AR 8512-8513; 8515-8520.)

9. I prepared two illustrative charts to demonstrate certain matters. Exhibit 1 to this Affidavit is a chart I prepared that reflects what happens if one uses the actual account balance in the Segregated Account on August 31, 1991 but otherwise performs all of the same calculations thereafter exactly as RSM did in its 2017 Report. I used the August 31, 1991 date to correlate with

the columns in Exhibit B to the RSM 2017 Report. (AR 4028-4029.) Exhibit 1 reveals that if one uses the actual account balance in the Segregated Account on August 31, 1991 instead of the RSM figure, the $100,000 set-aside by PL 602 for the purchase of trust land and earnings on the investment of that $100,000 (hereinafter referred to as the "PL 602 Funds") do not amount to $180,000 in July 1996 needed for the purchase of the Shriner Tract ***if*** the $25,000 in November, 1992 is deemed to have also come from the PL 602 Funds. (Exhibit 1 to Gottlieb Affidavit).

10. Exhibit 2 to my Affidavit is another illustrative chart I prepared. This chart reflects what happens if RSM had allocated the Veres International investment loss (AR 4091; 4096) on a pro-rata basis to the earnings on the PL 602 Funds with all other calculations done exactly as RSM did them. This includes using RSM's figures for the PL 602 bond earnings and not the actual numbers shown on the account statements. Exhibit 2 reflects there would not have been $180,000 in PL 602 Funds in July, 1996 to allow for the Shriner Tract purchase if the $25,000 for Park City purchase also came out of the PL 602 Funds. (Gottlieb Affidavit, Exhibit 2 attached thereto).

FURTHER AFFIANT SAYETH NOT.

Jerrold L Gottlieb

Subscribed and sworn to before me this 3rd day of February, 2021.

NOTARY PUBLIC STATE OF KANSAS NOREEN M. PUHALA My Appt. Exp. 5/8/24

Notary Public

My Commission Expires:

EXHIBIT 1

THE OBER AUDITS "CLAIMS MONEY FUND"
COMPUTATION OF THE SURPLUS (DEFICIT) FUNDS AVAILABLETO PURCHASE THE SHRINER TRACT IN JULY, 1996 WITH $180,000 IN PL 602 SET-ASIDE FUNDS, PLUS EARNINGS IF IT IS ASSUMED THAT THE $25,000 USED TO PURCHASE THE PARK CITY LAND ALSO CAME FROM THE EARNINGS ON THE PL 602 BONDS
EXHIBIT 1

ASSUMPTION:

SINCE ACCOUNTS WERE SEGREGATED THROUGH THE AUGUST 31, 1991 YEAR END, THE BEGINNING BALANCE USED IS THE ACTUAL BALANCE IN THE SEGREGATED ACCOUNT BEGINNING SEPTEMBER 1, 1991 TO ALLOCATE INCOME AND MARGIN INTEREST EXPENSE; ALL OTHER COMPUTATIONS THEREAFTER ARE THE SAME AS RSM THROUGH YEAR ENDED SEPTEMBER 30, 1996

	ACTUAL YEAR ENDED AUGUST 31, 1992	YEAR ENDED AUGUST 31, 1993	YEAR ENDED SPTEMBER 30, 1994	YEAR ENDED SPTEMBER 30, 1995	YEAR ENDED SPTEMBER 30, 1996
BEGINNING OF PERIOD SEE NOTE	$ 130,971	$ 141,608	$ 127,959	$ 137,301	$ 147,574
LAND PURCHASE - PARK CITY		25,000			
LAND PURCHASE SHRINERS					180,000
DATE OF PURCHASE		11/24/1992			7/12/1996
DAYS FROM PURCHASE TO END OF PERIOD		280			80
LESS PRORATED COST OF LAND	-	19,178	-	-	39,452
602 LAND ACQUISITION FUNDS- BALANCE AT BEGINNING OF PERIOD LESS:PRORATED COST OF LAND ACQUIRED	$ 130,971	$ 122,430	$ 127,959	$ 137,301	$ 108,122
TOTAL INVESTMENT-BALANCE AT BEGINNING OF PERIOD					
MONEY MARKET	$ 21,971	$ 2,667	$ 2,952	19,425	3,615
INVESTMENTS	1,031,145	803,091	987,945	870,446	854,238
TOTAL INVESTMENTS- BEGINNING OF PERIOD	$ 1,053,116	$ 805,758	$ 990,897	$ 889,871	$ 857,853
602 LAND ACQUISITION FUNDS AS A % OF TOTAL INVESTMENTS	12.44%	15.19%	12.91%	15.43%	12.60%
INVESTMENT INCOME					
INTEREST	$ 81,469	$ 70,414	$ 64,676	$ 59,183	$ 55,448
DIVIDENDS	17,033	14,455	14,559	15,180	12,900
TOTAL INCOME	98,501	84,869	79,235	74,363	68,348
LESS INTEREST EXPENSE	(12,967)	(10,171)	(6,890)	(7,778)	(11,133)
INCOME NET OF INTEREST EXPENSE	$ 85,534	$ 74,699	$ 72,345	$ 66,585	$ 57,216
					PER RSM
602 LAND ACQUISITION FUNDS-INCOME ALLOCATION	$ 10,637	$ 11,350	$ 9,342	$ 10,274	$ 7,211
602 GENERAL FUND- INVESTMENT INCOME ACQUISITION	74,897	63,349	63,003	56,312	50,004
TOTAL INCOME ALLOCATED	$ 85,534	$ 74,699	$ 72,345	$ 66,585	$ 57,216
602 LAND ACQUISITION FUND BALANCE					
BEGINNING BALANCE	$ 130,971	$ 141,608	$ 127,959	$ 137,301	$ 147,574
INCOME ALLOCATION	10,637	11,350	$ 9,342	10,274	7,211
LESS LAND PURCHASE	-	(25,000)	-	-	(180,000)
LESS EXPENDITURE ALLOCATION	-	-	-	-	
602 LAND ACQUISITIONS ENDING BALANCE	$ 141,608	$ 127,959	$ 137,301	$ 147,574	$ (25,214)

NOTE:

BEGINNING OF PERIOD	CALCULATED AS FACE AMOUNT OF BONDS OWNED PLUS ACCOUNT CASH	
AUGUST 31, 1991	MERCANTILE ACCOUNT NUMBER 7750	
CASH		$ 21,971
FACE VALUE OF BONDS		109,000
TOTAL		$ 130,971

EXHIBIT 2

THE OBER AUDITS "CLAIMS MONEY FUND"
COMPUTATION OF THE SURPLUS (DEFICIT) FUNDS AVAILABLETO PURCHASE THE SHRINER TRACT IN JULY, 1996 WITH $180,000 IN PL 602 SET-ASIDE FUNDS, PLUS EARNINGS
IF IT IS ASSUMED THAT THE $25,000 USED TO PURCHASE THE PARK CITY LAND ALSO CAME FROM THE EARNINGS ON THE PL 602 BONDS
EXHIBIT 2

ASSUMPTIONS:

ALLOCATE A PRO-RATA % OF THE VERES INTERNATIONAL INVESTMENT LOSS TO THE EARNINGS ON THE PL 602 BONDS; ALL COMPUTATIONS THEREAFTER ARE THE SAME AS RSM THROUGH THE YEAR ENDING SEPTEMBER 30, 1996, INCLUDING USING RSM'S PL 602 BOND EARNINGS FIGURES AND IGNORING, AS RSM DID, THE EXPENDITURES FROM THE SEGREGATED ACCOUNT

	PERIOD ENDED JULY 11, 1986	PERIOD ENDED JULY 11, 1987	PERIOD ENDED DEC 31, 1988	PERIOD ENDED AUGUST 31, 1989	PERIOD ENDED AUGUST 31, 1990	PERIOD ENDED AUGUST 31, 1991	PERIOD ENDED AUGUST 31, 1992	PERIOD ENDED AUGUST 31, 1993	PERIOD ENDED SPTEMBER 30, 1994	PERIOD ENDED SPTEMBER 30, 1995	PERIOD ENDED SPTEMBER 30, 1996
BEGINNING OF PERIOD	$ 100,000	$ 108,661	$ 118,268	$ 128,487	$ 139,524	$ 150,136	$ 139,319	$ 150,634	$ 137,821	$ 147,883	$ 158,949
LAND PURCHASE - PARK CITY	-	-	-	-	-	-	-	25,000	-	-	
LAND PURCHASE SHRINERS	-	-	-	-	-	-	-	-	-	-	180,000
DATE OF PURCHASE NOVEMBER 24, 1992 AND JULY 12, 1996	-	-	-	-	-	-	-	-	-	-	-
DAYS FROM PURCHASE TO END OF PERIOD	-	-	-	-	-	-	-	280	-	-	80
LESS PRORATED COST OF LAND	-	-	-	-	-	-	-	19,178	-	-	39,452
602 LAND ACQUISITION FUNDS- BALANCE AT BEGINNING OF PERIOD LESS:PRORATED COST OF LAND ACQUIRED	$ 100,000	$ 108,661	$ 118,268	$ 128,487	$ 139,524	$ 150,136	$ 139,319	$ 131,456	$ 137,821	$ 147,883	$ 119,496
TOTAL INVESTMENT-BALANCE AT BEGINNING OF PERIOD											
MONEY MARKET		$ 46,389	$ 61,803	$ 2,578	$ 27,356	$ 10,918	$ 21,971	$ 2,667	$ 2,952	$ 19,425	$ 3,615
INVESTMENTS		945,500	927,785	967,341	967,084	992,283	1,031,145	803,091	987,945	870,446	854,238
VERES INTERNATIONAL						161,430	-				
TOTAL INVESTMENTS- BEGINNING OF PERIOD	938,706	991,889	989,588	969,919	994,440	1,164,630	1,053,116	805,758	990,897	889,871	857,853
	PER RSM										
602 LAND ACQUISITION FUNDS AS A % OF TOTAL INVESTMENTS	10.65%	10.96%	11.95%	13.25%	14.03%	12.89%	13.23%	16.31%	13.91%	16.62%	13.93%
INVESTMENT INCOME											
INTEREST	77,558	93,411		95,133	95,695	93,255	81,469	70,414	64,676	59,183	55,448
DIVIDENDS	4,655	2,395		858	293	2,508	17,033	14,455	14,559	15,180	12,900
LOSS ON VERES INTERNATIONAL						(153,849)	-	-	-	-	-
TOTAL INCOME	82,213	95,806		96,001	95,988	(58,087)	98,501	84,869	79,235	74,363	68,348
LESS INTEREST EXPENSE	(907)	(8,114)		(12,686)	(20,352)	(25,822)	(12,967)	(10,171)	(6,890)	(7,778)	(11,133)
INCOME NET OF INTEREST EXPENSE	$ 81,306	$ 87,692	$ 85,503	$ 83,314	$ 75,636	$ (83,909)	$ 85,534	$ 74,699	$ 72,345	$ 66,585	$ 57,216
			PER RSM								PER RSM
602 LAND ACQUISITION FUNDS-INCOME ALLOCATION	$ 8,661.50	$ 9,606.61	$ 10,218.68	$ 11,036.78	$ 10,611.98	$ (10,817)	$ 11,315.45	$ 12,186.78	$ 10,062.25	$ 11,065.47	$ 7,969.96
602 GENERAL FUND- INVESTMENT INCOME ACQUISITION	72,645	78,085	75,284	72,277	65,024	(73,092)	74,219	62,512	62,283	55,520	49,246
TOTAL INCOME ALLOCATED	$ 81,306	$ 87,692	$ 85,503	$ 83,314	$ 75,636	$ (83,909)	$ 85,534	$ 74,699	$ 72,345	$ 66,585	$ 57,216
602 LAND ACQUISITION FUND BALANCE											
BEGINNING BALANCE	$ 100,000	$ 108,661	$ 118,268	$ 128,487	$ 139,524	$ 150,136	$ 139,319	$ 150,634	$ 137,821	$ 147,883	$ 158,949
INCOME ALLOCATION	8,661	9,607	10,219	11,037	10,612	(10,817)	11,315	12,187	10,062	11,065	7,970
LESS LAND PURCHASE	-					-	-	(25,000)	-	-	(180,000)
LESS EXPENDITURE ALLOCATION	-					-	-	-	-	-	-
602 LAND ACQUISITIONS ENDING BALANCE	$ 108,661	$ 118,268	$ 128,487	$ 139,524	$ 150,136	$ 139,319	$ 150,634	$ 137,821	$ 147,883	$ 158,949	$ (13,082)

25 CFR 292.2

This document is current through the August 11, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 38928, 86 FR 44233, 86 FR 44255, and 86 FR 44249.

Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart A — General Provisions

§ 292.2 How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701-2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a-1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary-Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

25 CFR 292.2

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

Statutory Authority

Authority Note Applicable to 25 CFR Ch. I, Subch. N, Pt. 292

History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

Annotations

Notes

[EFFECTIVE DATE NOTE:

73 FR 29354, 29375, May 20, 2008, added Part 292, effective June 19, 2008; *73 FR 35579*, June 24, 2008, provides the effective date of the amendment appearing at *73 FR 29354* is stayed until Aug. 25, 2008.]

Notes to Decisions

Governments: Native Americans: Indian Gaming Regulatory Act

25 CFR 292.5

This document is current through the August 11, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 38928, 86 FR 44233, 86 FR 44255, and 86 FR 44249.

Code of Federal Regulations > Title 25 Indians > Chapter I — Bureau of Indian Affairs, Department of the Interior > Subchapter N — Economic Enterprises > Part 292 — Gaming on Trust Lands Acquired After October 17, 1988 > Subpart B — Exceptions to Prohibitions on Gaming on Newly Acquired Lands > "SETTLEMENT OF A — Land Claim" Exception

§ 292.5 When can gaming occur on newly acquired lands under a settlement of a land claim?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the "settlement of a land claim" exception. Gaming may occur on newly acquired lands if the land at issue is either:

(a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or

(b) Acquired under a settlement of a land claim that:

(1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

Statutory Authority

Authority Note Applicable to 25 CFR Ch. I, Subch. N, Pt. 292

History

[*73 FR 29354*, 29375, May 20, 2008, as corrected at *73 FR 35579*, June 24, 2008]

Annotations

Notes

[EFFECTIVE DATE NOTE:

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Research References & Practice Aids

Hierarchy Notes:

25 CFR

25 CFR Ch. I

25 CFR Ch. I, Subch. N, Pt. 292

End of Document

Public Law 95-395
95th Congress

An Act

To settle Indian land claims within the State of Rhode Island and Providence Plantations, and for other purposes.

Sept. 30, 1978
[H.R. 12860]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Rhode Island Indian Claims Settlement Act".

Rhode Island Indian Claims Settlement Act.
25 USC 1701 note.

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. Congress finds and declares that— 25 USC 1701.

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

DEFINITIONS

SEC. 3. For the purposes of this Act, the term— 25 USC 1702.

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75-0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75-0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 5 and 8 of this Act;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 7 of this Act;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 7 of this Act; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

RHODE ISLAND INDIAN CLAIMS SETTLEMENT FUND

25 USC 1703.

SEC. 4. There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 11 of this Act.

OPTION AGREEMENTS TO PURCHASE PRIVATE SETTLEMENT LANDS

25 USC 1704.

SEC. 5. (a) The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided*, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 4. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Payment for any option entered into pursuant to subsection (a) shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 4 of this Act.

(c) The total amount of the option fees paid pursuant to subsection (b) shall not exceed $175,000.

(d) The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

APPROVAL OF PRIOR TRANSFERS AND EXTINGUISHMENT OF CLAIMS AND ABORIGINAL TITLE INVOLVING THE NARRAGANSETT TRIBE AND THE TOWN OF CHARLESTOWN, RHODE ISLAND

SEC. 6. (a) If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 7 of this Act, he shall publish such findings in the Federal Register and upon such publication— Publication in Federal Register. 25 USC 1705.

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to section 6, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such

action, the remedy shall be limited to a right of possession of the settlement lands.

FINDINGS BY THE SECRETARY

25 USC 1706.

SEC. 7. Section 6 of this Act shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

Regulations.

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

PURCHASE AND TRANSFER OF PRIVATE SETTLEMENT LANDS

25 USC 1707.

SEC. 8. (a) When the Secretary determines that the State Corporation described in section 7(a) has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 5 of this Act and assign the private settlement lands thereby purchased to the State Corporation.

(b) Any moneys remaining in the fund established by section 4 of this Act after the purchase described in subsection (a) shall be returned to the general Treasury of the United States.

(c) Upon the discharge of the Secretary's duties under sections 5, 6, 7, and 8 of this Act, the United States shall have no further duties or liabilities under the Act with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this Act shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

APPLICABILITY OF STATE LAW

SEC. 9. Except as otherwise provided in this Act, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. 25 USC 1708.

FEDERAL BENEFITS PRESERVED

SEC. 10. Nothing contained in this Act or in any legislation enacted by the State of Rhode Island as described in section 7 of this Act shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669–669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777–777(k)). 25 USC 1709.

AUTHORIZATION OF FUNDS

SEC. 11. There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this Act. 25 USC 1710.

LIMITATION OF ACTIONS

SEC. 12. Notwithstanding any other provision of law, any action to contest the constitutionality of this Act shall be barred unless the complaint is filed within one hundred and eighty days of the date of enactment of this Act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island. 25 USC 1711.

APPROVAL OF PRIOR TRANSFERS AND EXTINGUISHMENT OF CLAIMS AND ABORIGINAL TITLE OUTSIDE THE TOWN OF CHARLESTOWN, RHODE ISLAND AND INVOLVING OTHER INDIANS IN RHODE ISLAND

SEC. 13. (a) Except as provided in subsection (b)— 25 USC 1712.

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 6 of this Act), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United

States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

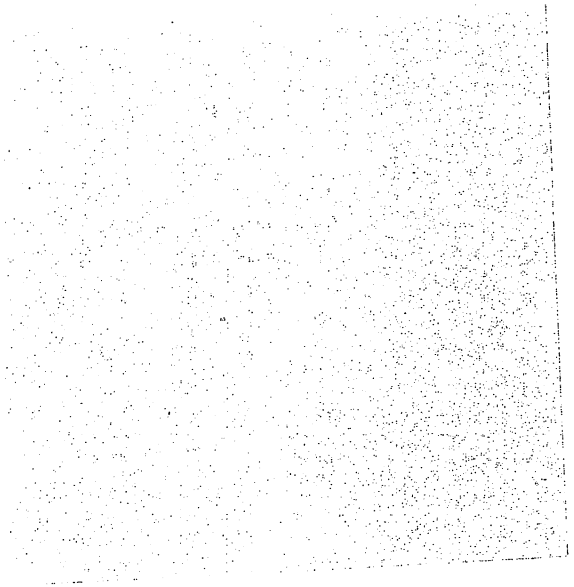
(b) This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of the date of enactment of this Act: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

Notice.

Approved September 30, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1453 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 95-972 accompanying S. 3153 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 124 (1978):
July 21, S. 3153 considered and passed Senate.
Sept. 12, considered and passed House.
Sept. 15, considered and passed Senate.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 14, No. 40:
Oct. 2, Presidential statement.



Calendar No. 1190

98TH CONGRESS 2d Session	SENATE	REPORT 98-609

PROVIDING FOR THE USE AND DISTRIBUTION OF THE WYANDOTTE TRIBE JUDGMENT FUNDS IN DOCKET 139 OF THE INDIAN CLAIMS COMMISSION, DOCKET 141 OF THE U.S. COURT OF CLAIMS, AND DOCKETS 212 AND 213 OF THE UNITED STATES CLAIMS COURT

SEPTEMBER 18 (legislative day, SEPTEMBER 17) 1984.—Ordered to be printed

Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2824]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2824) to provide for the use and distribution of the Wyandotte Tribe judgment funds in docket 139 of the Indian Claims Commission, docket 141 of the U.S. Court of Claims, and dockets 212 and 213 of the U.S. Claims Court, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

1. On page 3, strike all of line 1 after numeral (2) through line 4, and in lieu thereof insert the following:

> The Secretary shall complete the roll or individuals under section 2(b)(1) by no later than the date which is 180 days after the date of enactment of this Act. In the event the deadline date falls on a holiday or weekend, the deadline date shall be the next working day.

2. On page 3, strike all of line 5 through line 13.

3. On page 3, line 14, strike numeral "(4)" and redesignate as numeral "(3)."

4. On page 3, line 19, strike all of the line after the word "roll" through line 20, and insert in lieu thereof "of Absentee Wyandottes as provided in section 2(B)(1), and".

5. On page 3, line 23, strike the word "may" and insert in lieu thereof the word "must" and add the following sentence at the end of the sentence in line 23, "Applications shall not be furnished to persons requesting same after the deadline date."

6. On page 5, after the word "Tribe" at the end of line 10, insert the following:

Provided, That the Tribal Business Committee has—

(a) adopted a Tribal Financial Ordinance and Investment Plan for the use of the Fund, and

(b) the Tribal Business Committee has submitted to the Secretary a waiver of liability on the part of the United States for any loss which may result from the investment of such funds.

(c) the Secretary has approved such Tribal Financial Ordinance and Investment Plan.

7. On page 5, strike all of line 11, and insert the following:

(3) The Secretary shall consider and approve the Tribal Financial Ordinance and Investment Plan within sixty days from the receipt of such ordinance and plan from the Tribal Business Committee. In the event the Secretary cannot approve such ordinance and plan, the Secretary shall submit to the Tribal Business Committee, in writing, the reasons for such disapproval, and acceptable alternatives to such provisions. Such subsequent consideration and approval periods shall not exceed forty-five days. In the event the deadline date in this paragraph falls on a holiday or weekend, the deadline shall be the next working day.

(4) After such time as the Secretary has transferred such Fund to the Tribal Business Committee for its administration, under no circumstances shall any portion of the principal of such Fund be distributed to any member of the tribe.

(5) The Secretary may take such action as he may determine to be necessary and appropriate to enforce the requirements of this Act.

8. On page 6, line 12, redesignate numeral "(3)" as numeral "(6)."

9. On page 6, strike line 13, after the section numeral "7" through line 24, and insert in lieu thereof the following:

None of the funds distributed per capita or held in trust under this Act for programming shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or, except for per capita share in excess of $2,000, and Federal or federally assisted programs.

PURPOSE

The purpose of S. 2824 is to provide for the use and distribution of judgment funds awarded to the Wyandotte Tribe. These judgments were awarded in Docket No. 139 of the Indian Claims Commission on August 17, 1978 in the amount of $561,424.21; in docket No. 141 of the Indian Claims Commission on January 19, 1979, in the amount of $[illegible] of the Court of Claims on January 19, 1979, in the amount of $[illegible] of the U.S. Claims Court on

January 20, 1983, in the amount of $200,000. Funds were subsequently appropriated in satisfaction of these awards. However, distribution of funds under Public Law 97-371 (December 20, 1982) incorporating dockets 139 and 141 has not taken place because of subsequent questions regarding the equity of the distribution formula.

BACKGROUND AND NEED

The Wyandottes, earlier known as Hurons, began ceding their lands through various treaties with the United States as far back as 1795, after the defeat of Little Turtle at the Battle of Fallen Timbers. In 1842, at the Treaty of Upper Sandusky, the Wyandottes agreed to move to a reservation west of the Mississippi. Whereupon, in 1843, the Wyandottes settled on a reservation in eastern Kansas on land they purchased from the Delaware Tribe.

In 1855, at the treaty of Washington, a majority of the Wyandottes agreed to allot their lands in severalty and become citizens of the United States. The remainder of the members maintained their tribal status. The great tide of migration into Kansas and the pre-Civil War strife which accompanied it resulted in many of the Wyandottes losing their allotments. To escape this situation a band of 200 Wyandottes moved in 1857 to the Indian territory and lived among the Seneca. Because of the Civil War, the Wyandotte and the Seneca retreated to Kansas where they remained until 1865. Then, pursuant to the Omnibus Treaty of 1867, the Wyandotte received their own reservation in Indian territory. That reservation was allotted in 1893.

Pursuant to the provisions of the Oklahoma Indian Welfare Act of 1936, the Wyandotte Tribe of Oklahoma adopted a constitution and bylaws, which was ratified on July 24, 1937. Due to the "termination" policy of the 1950's, Federal supervision and responsibility for the Wyandotte Tribe of Oklahoma was ended under the act of August 1, 1956 (70 Stat. 893). The tribe regained its Federal status pursuant to the act of May 14, 1978 (92 Stat. 246).

The Wyandottes who took land allotments in Kansas under the Treaty of January 31, 1855, came to be known as the citizen or Absentee Wyandotte Indians. Owing to the often violent atmosphere and the increased settlement in the Kansas area many of these people lost their land and drifted toward the Quapaw Agency to join the other members of the tribe. Approximately 200 applied to the Quapaw Agency too late to participate in the allotment of the Wyandotte lands in that area. The act of August 15, 1894 (28 Stat. 286, 301), contained a provision for them to be allotted elsewhere in the Indian territory. The act of June 10, 1896 (29 Stat. 321), specified that lands of the Choctaw and Chickasaw Nations were to be used. Under its provisions a roll of the eligible Absentee Wyandottes was prepared by Special Agent Joel T. Olive.

For a number of reasons, the Absentee Wyandottes were not able to secure allotments of the Choctaw and Chickasaw lands per the 1896 act. To rectify this situation, the act of April 28, 1904 (33 Stat. 519), provided that those persons on the Olive Roll be allowed to choose 80-acre allotments from the public domain. The result of this act is that the Absentee Wyandottes took allotments on the public lands throughout the United States and ceased to maintain any tribal affiliation.

The judgment awards in these dockets will benefit the organized Wyandotte Tribe of Oklahoma and the Wyandotte descendant group also known as Absentee Wyandottes. The act of December 20, 1982 (Public Law 97-371) divides the funds in docket 139 and 141 in terms of 308/510th to the Wyandotte Tribe of Oklahoma and 202/510th to the Wyandotte descendant group. This division was based on the respective numbers of tribal members and the absentee Wyandottes as of the making of the census rolls for both groups in 1896. The act reflects the recommendations regarding the division made by the Secretary of the Interior at the time the awards in these two dockets were being undertaken.

It was assumed that the beneficiary entities of dockets 212 and 213 would be the same as those in the earlier awards (dockets 139 and 141); however, further research by the Bureau of Indian Affairs has cast doubt on the equity of the division formula. After the act of December 20, 1982, and before the distribution of those funds, the Wyandotte Tribe also began expressing similar concerns about the division formula developed by the Bureau for dockets 139 and 141. Because of the serious concerns of both the Bureau and the tribe, the distribution of the awards under these dockets was halted. Then, late in 1983, the Wyandotte Tribe found that the tribal membership totaled about 2,757 while the numbers of known descendants did not appear to be greater than 535. The latter figure had been based primarily on names and addresses mailed to the Miami, Oklahoma Agency of the Bureau of Indian Affairs and the estimates of knowledgeable staff of the Miami and Muskogee agencies. It became clear to the Bureau of Indian Affairs that the division found in the 1982 act would result in a disproportionate payment so large to the descendants that it was impossible for them to overlook. It is now the position of the Bureau of Indian Affairs that a more equitable division can be made based upon current rolls. S. 2824, in section 3, provides for the division of the funds on the basis of current rolls for the two beneficiary entities; and section 8 provides for the repeal of Public Law 97-371.

The committee notes that it is clearly within Congress' power to revise a distribution scheme, without offending the due process clause of the 5th amendment particularly where (1) the distribution has not yet occurred, and (2) the legislation can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. (See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1976).

S. 2824, section 5(b) provides that 20 percent of the tribal share is to be utilized for programming purposes, and administered by the tribal business committee, rather than by the Secretary of the Interior as trustee.

LEGISLATIVE HISTORY

S. 2824 was introduced by Senator Nickles on June 28 (legislative day, June 25), 1984. Senator Boren is a cosponsor. The bill was subsequently referred to the Select Committee on Indian Affairs for consideration. A hearing was held, on August 6, 1984, to receive testimony from tribal and administration witnesses. The committee held a business meeting on September 11, 1984, at which time it ordered the bill reported favorably, with amendments.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 11, 1984, with a quorum present recommends by a unanimous vote that the Senate pass S. 2824 as amended.

AMENDMENTS

The Select Committee on Indian Affairs, at its business session on September 11, 1984, ordered S. 2824 be reported with amendments. These amendments are set forth in full at the beginning of this report. Its purposes are explained in the section-by-section analysis that follows.

SECTION-BY-SECTION ANALYSIS

Section 1: Authorizes the distribution of awards in dockets No. 139, 141, 212, and 213.

Section 2: Provides that the funds referred to in section 1 shall be divided on the basis of the population of the organized Wyandotte Tribe of Oklahoma and the Absentee Wyandottes. Procedures for the preparation of the final rolls of both groups are provided in this section.

Section 3: Provides for the allocation of the funds referred to in section 1, by the Secretary, to the organized Wyandotte Tribe of Oklahoma and the Absentee Wyandottes in proportion to the number of individuals listed on each groups respective rolls who were born on, or prior to the date of enactment of this act, and are alive on such date.

Section 4: Provides that the funds allocated to the absentee Wyandottes and their descendants under section 3 shall be distributed in the form of per capita payments to each individual listed on the roll prepared under section 2 (b).

Section 5: Provides that 80 percent of the funds allocated to the Wyandotte Tribe of Oklahoma under section 3 shall be distributed in the form of per capita payments to each member of the tribe who was born on, or prior to the date of enactment of this act, and is alive on such date. It further provides that 20 percent of the funds allocated to the Wyandotte Tribe of Oklahoma under section 3 shall be used for tribal program purposes. The Secretary shall hold $100,000 of such funds in trust for the tribe to purchase real property; the portion of such funds in excess of $100,000 shall be held in trust by the tribal business committee for the benefit of the tribe; and the interest and investment accruing on the portion of such funds in access of the $100,000 shall be used for educational scholarships and grants, medical and health needs for tribal members, economic development, land purchases, investments, tribal cemetery maintenance, tribal building maintenance, and tribal administration. At markup, this section was amended to require the adoption of a tribal ordinance and investment plan governing the use of the fund, secretarial approval of such ordinance and plan, and a submission to the Secretary a waiver of liability on the part of the tribal business committee for any loss which may result from the investment of such funds.

Section 5: Provides for per capita payments to be paid directly to competent adult members entitled to such payments under the act. And any per capita payments to which a deceased individual is entitled under this act shall be paid to such individual's beneficiaries, under regulations established by the Secretary. And any per capita share of funds to which a legally incompetent individual or a minor is entitled under this act will be paid in accordance with the provisions of section 3(h)(3) of Public Law 93-134.

Section 7: Provides that none of the funds distributed per capita under this act will be subject to Federal, State, or local income taxes, or be considered as income or resources in determining eligibility for assistance under the Social Security Act, or in the case of any per capita share of $2,000 or less, any other Federal or federally assisted programs.

Section 8: Repeals Public Law 97-371, the prior distribution act of December 20, 1982.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2824, as amended, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 14, 1984.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2824, a bill to provide for the use and distribution of certain funds awarded to the Wyandotte Indian Tribe, as ordered reported by the Senate Select Committee on Indian Affairs, September 11, 1984.

Based on this review, it is expected that no additional cost to the Federal Government or to State or local governments would be incurred as a result of enactment of this legislation. The bill would provide for the distribution of approximately $6.1 million for previous awards, plus interest, made to the Wyandotte Indian Tribe by the Indian Claims Commission and the U.S. Court of Claims.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES BLUM
(For Rudolph G. Penner).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The committee believes that S. 2824 will have a minimal impact on regulatory and paperwork requirements.

EXECUTIVE COMMUNICATIONS

The legislative report on S. 2824 was not received from the Department of Interior by the committee before the filing of this report. However, the following testimony was presented by the Department of Interior at the hearing on the bill held on August 6, 1984.

STATEMENT OF JOHN W. FRITZ, DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, BEFORE THE SELECT COMMITTEE ON INDIAN AFFAIRS, U.S. SENATE, ON S. 2824, A BILL TO PROVIDE FOR THE USE AND DISTRIBUTION OF CERTAIN FUNDS AWARDED THE WYANDOTTE TRIBE, AUGUST 6, 1984

Mr. Chairman and members of the committee, I am pleased to appear before this committee to present the views of the Department of the Interior on S. 2824, a bill to provide for the use and distribution of certain funds awarded the Wyandotte Tribe.

We recommend enactment of the bill if amended as suggested.

S. 2824 provides for the division of judgment funds between the organized Wyandotte Tribe of Oklahoma and the Wyandotte descendant group also known as Absentee Wyandottes. The bill seeks to repeal a 1982 act for the disposition of earlier Wyandotte awards on the grounds that the formula for the division of the funds, as contained in that act, is inequitable. S. 2824 also provides for the utilization of the tribal share and the descendant share.

Pertinent historical background

Beginning in 1795, after the defeat of Little Turtle at the battle of Fallen Timbers, the Wyandottes, earlier known as Hurons, began ceding their lands in various treaties with the United States. In 1842, when they ceded their last lands at the Treaty of Upper Sandusky, the Wyandottes agreed to move to a reservation west of the Mississippi. In 1843, pursuant to this agreement, the Wyandottes settled on a reservation in eastern Kansas on land they had purchased from the Delaware Tribe.

In 1855, at the Treaty of Washington, a majority of the Wyandottes agreed to allot their lands in severalty and become citizens of the United States. The remainder of the members maintained their tribal status. The great tide of migration into Kansas and the pre-Civil War strife which accompanied it resulted in many of the Wyandottes losing their allotments. To escape this situation a band of 200 Wyandottes moved in 1857 to the Indian territory and lived among the Seneca. The Civil War caused both the Wyandotte and the Seneca to retreat to Kansas where they remained until 1865. In 1867, after returning to the Indian territory, by the terms of the Omnibus Treaty of that year the Wyandotte received their own reservation. That reservation was allotted in 1893.

The Wyandotte Tribe of Oklahoma adopted a constitution and by laws, pursuant to the provisions of the Oklahoma Indian Welfare Act of 1936, which was ratified on July 24, 1937. As a result of the "termination" policy, Federal supervision over the Wyandotte Tribe of Oklahoma was ended under the act of August 1, 1956 (70 Stat. 893). The

tribe was restored to Federal status by the act of May 14, 1978 (92 Stat. 246).

The Wyandottes who took land allotments in Kansas under the provisions of the treaty of January 31, 1855, became known as the Citizen or Absentee Wyandotte Indians. Owing to the often violent atmosphere and the increased settlement in the Kansas area many of these people lost their lands and drifted toward the Quapaw Agency to join the other members of the tribe.

Many of these, about two hundred, applied to the Quapaw Agency too late to participate in the allotment of the Wyandotte lands there. The act of August 16, 1894 (28 Stat. 266, 301), contained a provision for them to be allotted elsewhere in the Indian territory. The act of June 10, 1896 (29 Stat. 321), specified that lands of the Choctaw and Chickasaw Nations were to be used. Under the provisions of that act a roll of the eligible Absentee Wyandottes was prepared by Special Agent Joel T. Olive.

For various reasons, the Absentee Wyandottes were not able to secure allotments on the Choctaw and Chickasaw lands per the 1896 Act. To rectify this situation, the act of April 28, 1904 (33 Stat. 519), provided that those persons on the Olive Roll be allowed to choose 80-acre allotments from the public domain. The result of this act is that the Absentee Wyandottes took allotments on the public lands throughout the United States and ceased to maintain any tribal affiliation.

Background of the awards

On August 17, 1978, the Indian Claims Commission in docket 139 awarded $561,424.21 to the Wyandotte Tribe as it was constituted in 1805. This award represents the Wyandotte share of the additional compensation made to 5 tribes who ceded about 3 million acres in north central Ohio under the Fort Industry Treaty of July 4, 1805 (7 Stat. 67). Funds to cover this award were appropriated on October 31, 1978. On January 19, 1979, the U.S. Court of Claims in docket 141 awarded $2,348,679.60 to the Wyandotte Tribe as it was constituted on January 4, 1819, as additional compensation for 2,032,233 acres of land in northwestern Ohio ceded under the treaties of September 29, 1817 (7 Stat. 160), and September 17, 1818 (7 Stat. 178). The funds to cover this award were appropriated on March 2, 1979. The act of December 20, 1982 (Public Law 97-371) provides for the division and use and distribution of the funds in docket 139 and 141.

On January 20, 1983, a new Wyandotte award totaling $200,000 was appropriated in dockets 212 and 213. The award derives from a claim for the fair market value of lands ceded under the treaties of 1832, 1836, and 1842; and from an accounting claim for the handling of tribal lands and monies.

S. 2824 provides for the division and use and distribution of all of the above awards and repeals the act of December 20, 1982.

Recommendations

The act of December 20, 1982 (Public Law 97-317) divides the funds in dockets 139 and 141 in terms of 308/510ths to the Wyandotte Tribe and 202/510ths to the descendant group. This division is based on the respective numbers of tribal members and the Absentee Wyandottes as of the making of census rolls for both groups in 1896.

The act reflects the recommendations regarding division made by the Secretary of the Interior at the time the awards were being handled.

It was clear that the beneficiary entities of dockets 212 and 213 would be the same as those in the earlier awards; however, our continuing research began to cast doubt on the equity of the division formula and resulting fractions or percentages. At about that time, meaning late last year, the Wyandotte Tribe began expressing similar concerns and found, as we did, that the tribal membership totaled about 2,757 while the numbers of known descendants did not appear to be greater than 535. The latter figure has been largely based on names and addresses mailed to the Miami, OK, Agency of the Bureau of Indian Affairs and the estimates of knowledgeable staff in Muskogee and Miami. It became clear, therefore, that the division found in the act would result in disproportionately large payments to the descendents, an inequity concerning which we could not remain silent. It is now our position, in fact, that whether or not the respective figures became known we would have been advised to propose a division based on current rolls.

S. 2824, in section 3, provides for the division of the funds on the basis of current rolls for the two beneficiary entities; and in section 8 provides for the repeal of Public Law 97-371. We strongly support both provisions.

The bill does, however, pose a problem in section 5(b) concerning the disposition of programing funds of the Wyandotte Tribe of Oklahoma. Twenty percent of the tribal share is to be utilized for programing purposes; however, it is not provided that such funds be held in trust by the Secretary. While this section of S. 2824 generally conforms with a tribal resolution for the disposition of the funds (resolution No. 020484A of February 4, 1984), the provision is in conflict with our obligation to protect and enhance such funds until they are actually expended for programing purposes. S. 2824 would remove the programing funds from trust status in that the bill substitutes the tribal business committee for the Secretary of the Interior as trustee.

The bill contains some language concerning the preparation of rolls, or concerning enrollment insofar as the division of the funds is affected, that is ambiguous or otherwise unclear. These problems are found in section 2 and section 7 to clarify or correct such situations we offer following amendments:

Proposed amendments

Concerning the handling of the tribal programing funds we recommend that section 5(b) be amended by inserting in line 3 after the term "shall" the following: "be invested by the Secretary and utilized by the Tribal Business Committee on an annual budgetary basis, subject to the appproval of the Secretary, and * * *".

We recommend that section 5(b) (2) and (3) be combined as a new section 5(b)(2) to read:

> the portion of such funds in excess of $100,000 shall be utilized for (A) higher education, including grants-in-aid and scholarships; (B) medical and health needs, including prosthetics; (C) economic development programs; (D) land acquisition; (E) tribal investment program; (F) tribal reme-

tary maintenance; (G) tribal building maintenance; and (H) tribal administration.

Regarding enrollment provisions we recommend that the following sentence be added to section 2(b)(2): "In the event the deadline date falls on a holiday or weekend; the deadline date shall be the next working day."

Section 2(b)(3)(A) is unclear as to whether rejected applicants may appeal, and if so whether the Secretary's decision would be final. We recommend the deletion of this subsection. The following subparagraph (B) appears to defeat the division approach found in S. 2824 in that it is impossible to allocate tribal and descendant shares in an equitable manner until the respective rolls are finalized. We recommend the deletion of this subsection.

Section 2(b)(4)(B), to avoid confusion, should be amended to read: "the preparation of the roll of Absentee Wyandottes as provided in section 2(B)(1), and."

In section 2(b)(4)(c) we recommend that the term "may" be changed to "must" and that the following be added: "Applications shall not be furnished to persons requesting same after the deadline date."

In order to make section 7 of S. 2824 consistent with provisions of the Indian Judgment Funds Act, we recommend that it be amended to read:

> SEC. 7. None of the funds distributed per capita or held in trust under this Act for programming shall be subject to Federal or State income taxes, nor shall such funds nor their availability be considered as income or resources nor otherwise utilized as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled under the Social Security Act or, except for per capita shares in excess of $2,000, and Federal or federally assisted programs.

This concludes my prepared statement. I will be pleased to answer any questions you or members of the committee may have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the committee states as follows: It is the opinion of the committee that it is necessary to dispense with the requirements of this subsection to expedite the business of the Senate.

○

(4) There are authorized to be appropriated for the purpose of conducting the studies of the river named in subparagraphs (28) through (56) such sums as may be necessary, but not more than $4,000,000. There are authorized to be appropriated for the purpose of conducting the studies of the rivers named in subparagraphs (59) through (76) such sums as may be necessary. *There are authorized to be appropriated for the purpose of conducting the study of the river named in paragraph (99) such sums as may be necessary.*

[(41)] *(5)* The studies of the rivers in paragraphs (77) through (88) shall be completed and reports transmitted thereon not later than three full fiscal years from date of enactment of this paragraph. For the rivers listed in paragraphs (77), (78), and (79) the studies prepared and transmitted to the Congress pursuant to section 105(c) of the Naval Petroleum Reserves Porduction Act of 1976 (Public Law 94-258) [42 USCS § 6505] shall satisfy the reequirements of this section.

[(5)] *(6)* Studies of rivers listed in paragraphs (80) and (81) shall be completed, and reports submitted within and not later than the time when the Bristol Bay Cooperative Region Plan is submitted to Congress in accordance with section 1204 of the Alaska National Interest Lands Conservation Act.

○

98TH CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPORT 98-1067

COPY

PROVIDING FOR THE USE AND DISTRIBUTION OF CERTAIN FUNDS AWARDED TO THE WYANDOTTE TRIBE OF OKLAHOMA

SEPTEMBER 24, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 6221]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 6221) to provide for the use and distribution of certain funds awarded to the Wyandotte Tribe of Oklahoma, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 6221 is to provide for the use and distribution of funds awarded to the Wyandotte Indian Tribe by the Indian Claims Commission and the Court of Claims in dockets numbered 139, 141, 212 and 213. H.R. 6221 also repeals a previous law, enacted in 1982 which provided for the use and distribution of funds awarded in dockets Nos. 139 and 141.

BACKGROUND

The awards were made to the Tribe in the four dockets as follows:

(1) $561,424.21 was awarded in docket 139 to the Wyandotte Tribe by the Indian Claims Commission in 1978 as additional compensation for 3,000,000 acres in north central Ohio which the Tribe ceded to the United States under the Fort Industry Treaty of 1805. The Tribe has shared these lands with four

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other Tribes. Funds to cover this award were appropriated on October 31, 1978.

(2) $2,348,679.60 was awarded to the Tribe in docket 141 by the Court of Claims as additional compensation for 2,032,233 acres of land in northwestern Ohio ceded by the Tribe under two treaties with the United States in 1817 and 1818. Funds to cover this award were appropriated on March 2, 1979.

(3) $200,000 was awarded to the Tribe in dockets 212 and 213. The award derives from a claim for the fair market value of lands ceded under the treaties of 1832, 1836 and 1842; and from an accounting claim for the handling of tribal lands and monies by the United States.

The judgment awards in these dockets will benefit the Wyandotte Tribe of Oklahoma and a group of Wyandotte descendants also known as the Absentee Wyandottes. This Absentee group is made up of persons who are on a roll or who are descendants of persons on a roll dated November 18, 1896 and corrected October 28, 1904. This roll, also known as the Olive Roll, was compiled by Joel T. Olive in order to register those Wyandottes who had failed to register at the Quapaw Agency with the rest of the Tribe and who were subsequently given 80 acre allotments from the public domain. This had the effect of dispersing them throughout the United States.

P.L. 97-371, which was enacted in 1982 is being repealed because the formula used to divide the funds between the Wyandotte Tribe of Oklahoma and the Absentee Wyandotte group would have resulted in some inequities. The formula divided these funds as follows: 308/510th to the Wyandotte Tribe of Oklahoma and 202/510th to the Wyandotte descendent group. This division was based on the respective numbers of tribal members and absentee Wyandottes as of the making of the census rolls for both groups in 1895.

After the Act was passed, both the Department of the Interior and the Tribe began to express serious concern about the formula used in dividing the awards. In 1983, the Wyandotte Tribe found that its tribal membership exceeded some 2,757 individuals while the descendant group appeared to be no greater than 535 individuals. Therefore, it became clear that the division used in the 1982 Act would result in disproportionate payments to the descendants.

It is now the position of the Bureau of Indian Affairs that a more equitable division can be made based on current rolls. H.R. 6221 divides the funds between the two groups along current population in the two groups.

Although P.L. 97-371, which provides for the distribution of funds in dockets numbered 139 and 141 was enacted in 1982, its repeal by H.R. 6221 will not create any administrative problems as none of the funds has yet been distributed by the Department of the Interior.

Section-by-Section Analysis

Section 1 provides that notwithstanding the Act of October 19, 1973 (25 U.S.C. 1401, et seq.) as amended, the funds awarded to the Wyandotte Tribe by the Indian Claims Commission and the Court

of Claims in dockets numbered 139, 141, 212 and 213 shall be used and distributed as provided in this Act. The section also repeals the Act of December 20, 1982 which provided for the distribution of funds awarded to the Wyandotte Tribe in dockets numbered 139 and 141.

Section 2(a) provides for the preparation of a roll of all members of the Wyandotte Tribe of Oklahoma who were born on or before the date of enactment of this Act.

Subsection (b) provides for a preparation by the Secretary of the Interior of a roll of all individuals who were born on or before the date of the enactment of this Act and were alive when this Act was enacted and are listed in or are descendants of individuals listed on a roll compiled by Joel T. Olive, dated November 18, 1896 and entitled "Census of Absentee or Citizen Wyandotte Indians". Individuals have until 90 days after passage of this Act to submit application for enrollment to the Secretary. The determination of the Secretary with respect to enrollment of such individuals once finalized shall not be reviewable in any court.

The Secretary shall publish in the Federal Register and in any such local media he deems appropriate the provisions of this Act and an explanation of this legislation.

Section 3 provides that within 90 days after the rolls required in section 2 have been completed, the Secretary shall divide the funds described in section 1 between the Wyandotte Tribe and the Absentee Wyandottes. The allocation of the funds between the two groups shall be based on the respective number of individuals contained in the two rolls compiled according to section 2 of this bill. Each group shall receive an amount which bears the same proportion to the total amount of the funds as the number of individuals listed on its roll bears to the sum of all individuals listed on both rolls.

Section 4 provides that funds allocated to the Absentee Wyandottes and their descendants shall be distributed in the form of per capita payments.

Section 5 provides for the distribution of the funds allocated to the Wyandotte Tribe. Eighty percent of such funds shall be distributed in the form of per capita payments to the members of the tribe and twenty percent shall be used and distributed for tribal programs. The approval of the Secretary of the Interior shall not be required before the funds are distributed by the Tribe under this Act and the Secretary shall have no further trust responsibilities towards these funds provided that he may take such actions as are appropriate to enforce the requirements of this Act.

Section 6 provides for the payments of the per capita share to (1) competent adult individuals directly to them, (2) deceased individuals to such beneficiaries as determined under regulations prescribed by the Secretary and (3) incompetent individuals and minors according to the Act of October 19, 1973, as amended.

The section also provides that none of the funds distributed or made available under this Act shall be subject to Federal, State or local income taxes nor shall they be considered as income in determining eligibility or assistance under the Social Security Act. Funds allocated under this Act to distribute per capita share of

$2,000 or less shall not be considered as income for determining eligibility or assistance under any Federal, State or local progam.

COST AND BUDGET ACT COMPLIANCE

There are no expenditures authorized in this legislation. Funds to cover these awards have already been appropriated. The cost analysis prepared by the Congressional Budget Office, which the Committee adopts as its own, follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 19, 1984.

Hon. MORRIS K. UDALL,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Longworth House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 6221, a bill to provide for the use and distribution of certain funds awarded to the Wyandotte Tribe of Oklahoma, as ordered reported by the House Committee on Interior and Insular Affairs, September 19, 1984.

Based on this review, we expect that no additional costs to the federal government or to state or local governments would be incurred as a result of the enactment of this legislation. The bill would provide for the distribution of approximately $6.1 million for previous awards, plus interest, made to the Wyandotte Indian Tribe by the Indian Claims Commission and the U.S. Court of Claims.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 6221 will have no inflationary impact.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to Rule X, Clause 2(b)2.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs, by voice vote, approved the bill and recommends its enactment by the House.

DEPARTMENTAL REPORT

Although the Committee did not receive any Departmental Report on the bill, it notes that witnesses for the Administration testified in favor of the bill during hearings held by the Senate Select Committee on Indian Affairs on a similar bill, S. 2824.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF DECEMBER 20, 1982 (96 STAT. 1813)

[*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding any other provision of law, the funds appropriated on October 31, 1978, and March 2, 1979, in accordance with section 1302 of the Supplemental Appropriation Act (31 U.S.C. 724A), in satisfaction of judgments granted to the Wyandot (hereinafter "Wyandotte") Tribe in docket 139 by the Indian Claims Commission and in docket 141 by the United States Court of Claims, less attorney fees and litigation expenses, including all interest and investment income accrued, shall be used and distributed as herein provided.

SEC. 2. The Secretary of the Interior (hereinafter "Secretary") shall divide the funds between the Wyandotte Tribe of Oklahoma and the absentee Wyandotte descendants as follows:

308/510ths to the Wyandotte Tribe of Oklahoma; and
202/510ths to the absentee Wyandotte descendants.

SEC. 3. The Wyandotte Tribe of Oklahoma's share shall be distributed as follows:

(a) A roll shall be prepared, in accordance with the procedures enacted by the tribal government body and approved by the Secretary, of all members of the Wyandotte Tribe of Oklahoma who were born on or prior to and living on the date of this Act. Subsequent to the preparation of this roll, the Secretary shall make a per capital distribution of 80 per centum of the Wyandotte Tribe of Oklahoma's share of the funds, in a sum as equal as possible, to all persons listed on this roll. Any amount remaining after the per capital payment shall be utilized as provided in section 3(b)(2)(iii) of this Act.

(b) The remaining 20 per centum shall be utilized as follows:

(1) A sum of $100,000 shall be utilized to purchase land for the tribe to be held in trust status by the Secretary.

(2) The balance shall be invested by the Secretary, pursuant to the Act of June 24, 1938 (25 U.S.C. 162a). The interest and investment income accrued shall be immediately available to the Wyandotte Tribe of Oklahoma upon the approval of the Secretary of the tribe's plan of operation and budget as set forth in Wyandotte Tribe of Oklahoma Resolution Numbered 9479, adopted September 4, 1979, as follows:

(i) 33⅓ per centum shall be utilized toward the upkeep and maintenance of the Wyandotte Cultural Center and other sites as may in the future be developed by the tribe.

(ii) 33⅓ per centum shall be utilized for the upkeep and maintenance of the Wyandotte Tribal Cemetery at Wyandotte, Oklahoma.

(iii) 33⅓ per centum shall be placed in the custody of the secretary/treasurer of the tribe and, with the approval of the Business Committee of the Wyandotte Tribe of Oklahoma, utilized for the administration of the tribe: *Provided*, That none of these funds be expended for salaries.

SEC. 4. A roll shall be prepared by the Secretary of persons: not members of the Wyandotte Tribe of Oklahoma, on, or lineally descended from persons on, the "Census of Absentee or Citizen Wyandotté Indians" compiled by Joel T. Olive, dated November 18, 1896, as corrected in circular of October 28, 1904, by W. A. Richards, Commissioner of the General Land Office; and born on or prior to and living on the date of this Act. The Secretary's determination concerning eligibility for inclusion on this roll shall be final. Subsequent to the preparation of this roll, the Secretary shall make a per capita distribution, of the absentee Wyandotte's shares, in a sum as equal as possible, to all persons listed on this roll.

SEC. 5. The per capita shares of living competent adults shall be paid directly to them. Per capita shares of deceased individual beneficiaries shall be determined as distributed pursuant to regulations prescribed by the Secretary. Per capita shares of legal incompetants and per capita shares of individuals under age eighteen shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary determines to be necessary to protect the interest of such individuals.

SEC. 6. None of the funds distributed under this Act shall be subject to Federal or State income taxes or be considered income or resources in determining eligibility for or the amount of assistance under the Social Security Act.

SEC. 7. The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of this Act.]

ABROGATION OF PRIOR PLAN; REPEAL OF PRIOR DISTRIBUTION OF JUDGMENT FUNDS ACT

SECTION 1. (a) Notwithstanding the Act entitled "An Act to provide for the use and distribution of funds appropriated in satisfaction of certain judgments of the Indian Claims Commission and the United States Court of Claims, and for other purposes." and approved October 19, 1973 (25 U.S.C. 1401, et seq.), or any other regulation or plan promulgated by the Secretary pursuant to such Act, the funds appropriated in satisfaction of the judgments awarded to the Wyandotte Tribe of Oklahoma in—

(1) docket numbered 139 before the Indian Claims Commission,

(2) docket numbered 141 before the United States Court of Claims, and

(3) dockets numbered 212 and 213 before the United States Claims Court,

(other than funds appropriated for the payment of attorney fees or litigation expenses) and any interest or investment income accrued or accruing (on or before the date of the allocation of funds pursuant to section 3(b)) on the amount of such judgments shall be used and distributed as provided in this Act.

(b) The Act entitled "An Act to provide for the use and distribution of funds to the Wyandot Tribe of Indians in docket 139 before the Indian Claims Commission and docket 141 before the United States Court of Claims, and for other purposes." and approved December 20, 1982, is hereby repealed.

PREPARATION OF THE ROLL OF MEMBERS OF THE WYANDOTTE TRIBE OF OKLAHOMA AND THE ROLL OF ABSENTEE WYANDOTTES

SEC. 2. (a) In accordance with such procedures as may be adopted by the tribal governing body of the Wyandotte Tribe of Oklahoma and approved by the Secretary of the Interior (hereinafter in this Act referred to as the "Secretary"), such tribal governing body shall take such steps as may be necessary to ensure that the roll of members of such tribe includes all members of the tribe born on or before the date of the enactment of this Act.

(b)(1) The Secretary shall prepare a roll of all individuals who—

(A) were born on or before the date of the enactment of this Act,

(B) are alive on the date of the enactment of this Act, and

(C) are listed in, or are lineal descendants of individuals listed in, the compilation entitled "Census of Absentee or Citizen Wyandotte Indians" compiled by Joel T. Olive and dated November 18, 1896 (as corrected by W. A. Richards, Commissioner of the General Land Office, in a circular dated October 28, 1904).

(2) Applications for enrollment of individuals under paragraph (1) may be filed with the Secretary (in such manner as the Secretary shall prescribe) before the end of the 90-day period beginning on the date of the enactment of this Act.

(3)(A) The Secretary shall determine whether an individual who filed an application under paragraph (2) is eligible to be enrolled under paragraph (1). The initial determination of the Secretary with respect to the enrollment of any such individual shall be made before the end of the 180-day period beginning on the date of the enactment of this Act. The final determination of the Secretary with respect to the enrollment of any such individual shall not be reviewable in any court.

(B) Any review by the Secretary of an initial determination of the Secretary with respect to the enrollment of any individual under paragraph (1) shall not delay the allocation of funds pursuant to section 3(b) or any distribution of funds under section 4 or 5.

(4) The Secretary shall publish, in the Federal Register and in such local media as the Secretary may determine to be appropriate, notice of—

(A) the provisions of this Act that provide for a per capita distribution to Absentee Wyandottes and their descendants,

(B) the preparation of the roll described in paragraph (1), and

(C) the procedures established pursuant to paragraph (2) for filing applications for enrollment on such roll and the final date on which such applications may be filed with the Secretary.

ALLOCATION OF FUNDS TO THE WYANDOTTE TRIBE OF OKLAHOMA AND THE ABSENTEE WYANDOTTES

SEC. 3. (a) Before the end of the 90-day period beginning on the later of—

(1) the date by which any action required under section 2(a) relating to the roll of members of the tribe is completed, or

(2) the date on which the roll prepard by the Secretary pursuant to section 2(b) is completed,

the Secretary shall divide the funds described in section 1 between the Wyandotte Tribe of Oklahoma and the Absentee Wyandottes (as a group) in the manner provided in subsection (b).

(b) The Secretary shall allocate to the Wyandotte Tribe and to the Absentee Wyandottes an amount which bears the same proportion to the total amount of the funds described in section 1 as the number of individuals listed on the roll referred to in subsection (a)(1) or (a)(2), as the case may be, who are living on the date of the enactment of this Act bears to the sum of the numbers of individuals on each such roll who are living on such date.

DISTRIBUTION TO ABSENTEE WYANDOTTES

SEC. 4. The funds allocated to the Absentee Wyandottes and their descendants pursuant to section 3(b) shall be distributed in the form of per capita payments, in sums as equal as possible, to each individual listed on the roll prepared by the Secretary pursuant to section 2(b).

DISTRIBUTION TO WYANDOTTE TRIBE OF OKLAHOMA

SEC. 5. (a) Eighty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 3(b) shall be distributed in the form of per capita payments, in sums as equal as possible, to each member of such Tribe who—

(1) was born on or before the date of the enactment of this Act, and

(2) is living on such date.

(b) Twenty percent of the funds allocated to the Wyandotte Tribe of Oklahoma pursuant to section 3(b) shall be used and distributed in accordance with the following general plan:

(1) A sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

(2) The amount of such funds in excess of $100,000 shall be held in trust by the Tribal Business Committee of such Tribe for the benefit of such Tribe.

(3) Any interest or investment income accruing on the funds described in paragraph (2) may be used by the Tribal Business Committee of such Tribe for any of the following purposes:

(A) Education of the members of such Tribe (including grants-in-aid or scholarships).

(B) Medical or health needs of the members of such Tribe (including prosthetics).

(C) Economic development for the benefit of such Tribe.

(D) Land purchases for the use and benefit of such Tribe.

(E) Investments for the benefit of such Tribe.

(F) Tribal cemetery maintenance.

(G) Tribal building maintenance.

(H) Tribal administration.

(c)(1) Except as provided in paragraph (2) and notwithstanding any other provision of law, the approval of the Secretary for any payment or distribution by the Wyandotte Tribe of Oklahoma of any funds described in subsection (b) (on or after the date such funds are allocated pursuant to section 3(b)) shall not be required and the Secretary shall have no further trust responsibility for the investment, supervision, administration, or expenditure of such funds.

(2) The Secretary may take such action as the Secretary may determine to be necessary and appropriate to enforce the requirements of this Act.

MANNER OF PER CAPITA DISTRIBUTION; TREATMENT OF AMOUNTS PAID OR DISTRIBUTED

SEC. 6. (a) Any payment of a per capita share of funds to which a living, competent adult is entitled under this Act shall be paid directly to such adult.

(b) Any per capita share of funds to which a deceased individual is entitled under this Act shall be paid, and the beneficiaries thereof determined, under regulations prescribed by the Secretary.

(c) Any per capita share of funds to which a legally incompetent individual or a minor is entitled under this Act shall be paid in accordance with the requirements of section 3(b)(3) of the Act entitled "An Act to provide for the use and distribution of funds appropriated in satisfaction of certain judgments of the Indian Claims Commission and the United States Court of Claims, and for other purposes." and approved October 19, 1973 (25 U.S.C 1401, et seq.).

(d) None of the funds distributed per capita under this Act or made available under this Act for any tribal program shall be—

(1) subject to Federal, State, or local income taxes, or

(2) considered as income or resources in determining either eligibility for, or the amount of assistance under—

(A) the Social Security Act, or

(B) in the case of any per capita share of $2,000 or less, any other Federal, State, or local programs.

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