

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

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

Plaintiffs, )

v. )

Civil Action No. 2:20-cv-02386

SCOTT de la VEGA<sup>1</sup>, in his official )  
capacity as Acting Secretary of the United )  
States Department of the Interior; and )  
TARA SWEENEY, in her official )  
capacity as Assistant Secretary- )  
Indian Affairs of the U.S. Department )  
of the Interior, Bureau of Indian Affairs )

Defendants. )

**PLAINTIFFS REQUEST  
ORAL ARGUMENT**

**PLAINTIFFS' OPENING BRIEF  
IN SUPPORT OF REVERSAL  
OF AGENCY ACTION OF MAY 20, 2020**

---

<sup>1</sup> Scott de la Vega is the acting Secretary of the Interior. He is substituted for Defendant Bernhardt pursuant to rule 25(d), Fed. R. Civ. P.

## TABLE OF CONTENTS

INTRODUCTION .....	1
QUESTIONS PRESENTED .....	2
SUMMARY OF THE CASE .....	3
STATEMENT OF FACTS .....	8
A. Administrative and Legal Record for the Shriner Tract and the Park City Trust Acquisitions .....	8
1. PL 602 – adoption and language .....	8
2. Use of the \$100,000 set-aside funds to purchase mortgage obligation bonds .....	9
3. Park City land purchase in 1992 .....	10
4. 1993 Park City trust application ultimately invoking the Secretary’s discretionary authority and not PL 602’s mandatory provision .....	10
B. The Shriner Tract Administrative Record: Use of \$100, 000 Set-Aside Funds, Fulfillment of the Congressional Mandate of PL 602, Non-Restricted Nature of the Earnings on the Investment of the \$100,000 Set-Aside Funds and Wyandotte Applications for Discretionary Trust Acquisition of the Park City Land .....	11
C. Shriner Tract Litigation Record Affirmed What the Administrative Record Established .....	14
D. Remand Proceedings Before the Secretary on the Issue of Whether the Shriner Tract was Purchased with Only Set-Aside Funds .....	17
E. The Wyandotte’s Pre-2017 Applications to Have the Park City Land Acquired in Trust and Statements About the Source of Funds Used to Purchase the Park City Land .....	20
F. 2017 Wyandotte Fee-to-Trust Application to Have the Park City Land Acquired in Trust Under Mandatory Provision of PL 602 .....	21
1. The State of Kansas was a known and interested party .....	21
2. 2017 Application .....	21

3. Wyandotte submitted annual audits of financial statements for the aggregate PL 602 funds and 2017 RSM analysis with 2017 application .....	22
a. Ober Audits – methodology .....	22
b. RSM 2017 Report – assumption relied upon .....	24
c. 2017 RSM Analysis and consistency or inconsistency .....	26
G. The “Land Taken Into Trust as Part of a Settlement of Land Claim” Exception Under IGRA .....	28
1. The 2008 Department Interior regulations defining “land claim” and “criteria for when gaming can occur on newly acquired lands under a settlement of a land claim” .....	28
2. Wyandotte claims before the ICC resulted in money judgments that were fully satisfied before passage of PL 602 .....	29
3. PL 602 fulfilled the congressional duty under the Indian Tribal Judgment Funds Use or Distribution Act .....	31
4. The Wyandotte claims in docket nos. 139, 141, 212 and 213 compared to land claims defined in 25 C.F.R. § 292.2 and the criteria for when land considered to have been taken into trust as part of a “settlement of a land claim” pursuant to 25 C.F.R. § 292.5 .....	32
H. Defendants’ May 20, 2020 Gaming Decision .....	33
ARGUMENT AND AUTHORITY .....	34
A. Standard of Review Under the Administrative Procedures Act .....	34
1. Arbitrary and capricious standard .....	34
2. Agencies must comply with their own regulations .....	37
3. Agencies must provide a reasonable explanation for a change of position or policy .....	38
B. The Trust Determination Should Be Set Aside As Arbitrary and Capricious, in Violation of Department Policy, Unlawful and an Abuse of Discretion .....	39

1. The record from the Shriner Tract trust acquisition established departmental policy that since land worth \$100,000 or more was acquired in trust that was purchased with all of the \$100,000 set-aside by PL 602 for the purchase of land to be taken into trust, the “shall” of the law and congressional intent of PL 602 was fulfilled such that no further trust acquisitions can be predicated on the mandatory trust acquisition provision of PL 602 .....	39
2. Land purchased with only earnings from the investment of the \$100,000 set aside by PL 602 for the purchase of land to be acquired in trust, but none of the principal funds, does not trigger the mandatory trust acquisition provision of PL 602 .....	41
3. The Park City land was not purchased with only PL 602 funds and is not eligible to be acquired in trust under the mandatory provision of PL 602 .....	44
C. The Gaming Determination Should be Reversed: the 2008 Department Regulations Defining “Land Claims” and the “Criteria for When Gaming Can Occur on Newly Acquired Lands Under a Settlement of a Land Claim” Govern the Gaming Determination and Compel a Reversal of that Decision .....	47
1. The <i>Wyandotte Nation v. NIGC</i> Decision .....	47
2. <i>Chevron</i> and <i>Brand X</i> : The subsequent Agency Regulations at 25 C.F.R. §§ 292.2 and 292.5 trump the <i>Wyandotte Nation v. NIGC</i> Decision .....	49
3. PL 602 – properly characterized-fails to satisfy the criteria for the “settlement of a land claim” in 25 C.F.R. §§ 292.2 and 292.5 .....	54
4. PL 602 is not a “land claim” nor is it a Congressional Enactment that involved a settlement of land claim as defined in 25 C.F.R. §§ 292.2 and 292.5 .....	57
5. Even if the <i>Wyandotte Nation v. NIGC</i> Decision were not trumped by 25 C.F.R. §§ 292.2 and 292.5, it is completely distinguishable and not authority for applying the “land taken into trust as part of the settlement of a land claim” exception to the Park City land .....	59
a. The Park City land was purchased with funds over which the Wyandotte had discretionary spending power-and not with the \$100,000 set-aside funds that PL 602 mandated to be used for the purchase of land that then had to be accepted into trust .....	59

- b. Defendants fail to address the fact that the “conflicting”  
Department decision involving the Seneca Nation relied on in  
*Wyandotte Nation v. NIGC* was later set aside as arbitrary and  
capricious .....61

CONCLUSION .....63

**PLAINTIFFS' OPENING BRIEF IN SUPPORT OF REVERSAL  
OF AGENCY ACTION OF MAY 20, 2020**

COME NOW Plaintiffs, by and through their respective counsel, and set forth the following as their Opening Brief in Support of Reversal of Agency Action:

**INTRODUCTION**

On May 20, 2020, Defendant Tara Sweeney, Assistant Secretary-Indian Affairs, Department of the Interior (“Defendant Sweeney”) issued a decision (hereinafter the “Decision”) concluding that a tract of land in Park City, Kansas (“Park City land”), owned by the Wyandotte Nation (the “Wyandotte” or “Nation”) had to be accepted into trust under the mandatory provision of Public Law 98-602, 98 Stat. 3149 (1984) (“PL 602”). (2020AR\_0003967-3972.)<sup>2</sup> This part of the Decision is referred to herein as the “Trust Determination.”

Defendant Sweeney also determined that once in trust, the Park City land qualified for gaming under a singular exception set forth in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (“IGRA”). This is referred to herein as the “Gaming Determination.”

The Decision is final agency action. The Complaint filed in this action challenges the Decision as arbitrary and capricious, wrongly decided and otherwise subject to reversal on multiple grounds pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.* Plaintiffs challenge the Trust Determination on the grounds that PL 602 did not mandate that the Park City land be accepted into trust for a number of reasons. The materials presented by the Wyandotte in 2017, including the additional accounting materials, failed to change this conclusion. Independent of the challenge to the Trust Determination, Plaintiffs also challenge the Gaming Determination for the reason that the Park City land was placed in trust after October 17, 1988, and the land was not

---

<sup>2</sup> The citation to the documents referenced in the administrative record or otherwise lodged in the record in this case that are referenced throughout this Opening Brief will hereinafter be identified as “AR-1.....”.

taken into trust “as part of the settlement of a land claim” pursuant to 25 U.S.C. 2719(b)(1)(B)(i) and 25 C.F.R. §§ 292.2 and 292.5.

### **QUESTIONS PRESENTED**

A. Whether the Trust Determination accepting the Park City land into trust on a mandatory basis under PL 602 should be reversed and set aside? Plaintiffs contend such relief should issue because the Trust Determination is fatally flawed for the following reasons:

- (1) Once land in Kansas City, Kansas (the “Shriner Tract”), was taken into trust by the Secretary of the Interior (“Secretary”) for the Wyandotte in July 1996, under the mandatory provision of PL 602, the Congressional mandate of PL 602 was fulfilled and no further mandatory trust acquisitions could be predicated on PL 602.
- (2) All of the \$100,000 set aside by PL 602 for the purchase of land that had to be taken into trust by the Secretary was used and/or attributed to the purchase of the Shriner Tract such that the mandatory trust acquisition provision of PL 602 cannot be invoked for the Park City land since it was not purchased with any of the \$100,000 set-aside principal funds;
- (3) The Decision improperly invoked the mandatory trust provision of PL 602 because the Park City land was purchased with funds other than just earnings from the \$100,000 set-aside funds.

B. Whether the Gaming Determination that the Wyandotte may engage in gaming on the Park City land under IGRA on the grounds that the “land was taken into trust as part of the settlement of a land claim” pursuant to 25 U.S.C. § 2719(b)(1)(B)(i) should be reversed and set aside? Plaintiffs contend it should be for the following reasons:

- (1) Department regulations adopted in 2008 at 25 C.F.R. §§ 292.2 and 292.5 control the Gaming Determination and compel the opposite conclusion – the Park City land, even if acquired in trust, was not taken into trust as part of the settlement of a land claim.
- (2) The Gaming Determination failed to address, let alone mention, the 2008 Department Regulations and its sole reliance, without analysis, on *Wyandotte Nation v. National Indian Gaming Commission*, 437 F. Supp. 2d 1193 (D. Kan. 2006) to support the Gaming Determination without analysis was misplaced.

### SUMMARY OF THE CASE

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

Defendants are Scott de la Vega (“Defendant de la Vega”), who is sued in his official capacity as the Acting Secretary of the Department, and Tara Sweeney, who is sued in her official capacity as the Assistant Secretary-Indian Affairs.

In the 1950s, the Wyandotte (then known as the Wyandotte Tribe) brought a number of claims against the United States before the Indian Claims Commission (“ICC”) seeking monetary compensation for land it ceded and relinquished title to by treaties with the United States in the 1800s.

The Wyandotte’s claims before the ICC resulted in money judgments in the late 1970s and early 1980s against the United States. Specifically, the Wyandotte, together with the Absentee Wyandottes were awarded judgments in the ICC claims in the amount of \$561,424.41 in Docket 139, \$2,348,679.60 in Docket 141 and \$200,000 in Docket Nos. 212 and 213. The bulk of the judgments were satisfied when the funds were appropriated and paid into accounts for the Wyandotte in or around 1979. Once the ICC judgments were fully satisfied, and after the Secretary failed to devise a distribution plan, Congress performed its statutory duty under the Indian Tribal Judgment Funds Use or Distribution Act and enacted a distribution scheme for the distribution of the previously paid judgment funds from the ICC judgments awarded the Wyandotte. That distribution scheme was initially codified by enactment of PL97-371 in 1982 and was later revised and codified in PL 602 in 1984, which is at the heart of this litigation.



Section 105(a) of PL 602 provided that 80% of the judgment funds were to be distributed to members of the Tribe. Section 105(b)(1) of PL 602 provided that of the remaining 20% of the funds (approximately \$939,000) “a sum of \$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the tribe.” This is the so-called “mandatory trust” provision of PL 602 that is at issue in this case. It is the only sum of money that PL 602 required to be used to purchase land that was subject to the mandatory trust provision of PL 602. This principal sum of money (the \$100,000) is referred to as the “\$100,000 set-aside funds” or the “set-aside funds.”

The \$100,000 set-aside funds were disbursed to the Wyandotte along with the balance of the remaining funds (approximately \$839,000). In May 1986, instead of buying land with the \$100,000 set-aside funds, the Wyandotte chose to use those funds to purchase mortgage obligation bonds that were deposited into a segregated investment account where they remained until the end of November 1991 (the “Segregated Account”). That account was closed at end of November 1991. At that time, the assets in the Segregated Account were deposited and commingled into another investment account of the Wyandotte that held the balance of the disbursed PL 602 funds (the “Commingled Account”).

In November 1992, the Wyandotte bought approximately 10 acres of land in Park City, Kansas - the Park City land. On January 21, 1993, it submitted a request that the Secretary acquire the Park City land in trust under PL 602’s mandatory provision. One month later, the Wyandotte abandoned that request and instead asked that the Secretary acquire the Park City land in trust pursuant to the Secretary’s normal discretionary authority under 25 U.S.C. § 465, (now codified at 25 U.S.C. §5108).<sup>3</sup>

---

<sup>3</sup> There are regulatory procedures outlined in 25 C.F.R. §§151.10 and 11 that govern the discretionary trust acquisition process by the Secretary, including for land that is not within an applicant’s reservation. These procedures were not

In late 1995, the Wyandotte withdrew the Park City application altogether and instead petitioned the Secretary to have land in Kansas City, Kansas, known as the Shriner Tract, taken into trust under PL 602's mandatory provisions. In July 1996, after the Wyandotte purchased the Shriner Tract from proceeds from an \$180,000 margin loan, the Secretary placed the Shriner Tract in trust under the mandatory provision of PL 602. Fourteen years of litigation ensued that challenged the trust acquisition under PL 602 and whether the Wyandotte could game on the land under IGRA.

The administrative and legal record resulting from the Shriner Tract trust acquisition and litigation that ensued established the following regarding the set-aside funds from PL 602 and the fulfillment and exhaustion of mandatory trust provision of PL 602:

1. The mandatory trust acquisition provision of PL 602 could be invoked only if the land to be placed in trust was purchased with only set-aside funds.
2. The Wyandotte used *all* of the principal \$100,000 PL 602 set-aside funds for the purchase of the Shriner Tract, which cost and was worth more than \$100,000.
3. Once the Shriner Tract was acquired in trust under PL 602 with the principal \$100,000 set-aside funds, PL 602's mandatory trust acquisition provision was deemed fulfilled, and the Department made it clear to the Wyandotte that no additional trust acquisitions could be predicated on the mandatory trust provision. The Department and the Wyandotte knew, understood and agreed to this, before and after the Shriner Tract trust acquisition.
4. The earnings on the investment of the \$100,000 set-aside funds could be spent at the Wyandotte's discretion – only the principal \$100,000 set-aside funds had to be used to purchase land to be taken into trust.

On April 13, 2006, the Wyandotte submitted a new application to the Department to acquire the Park City land in trust. This application also invoked the discretionary authority of the

---

followed because Defendant Sweeney determined that the trust acquisition for the Park City land was mandated by PL 602. (AR 4483). The Tenth Circuit had previously determined that if the trust acquisition was mandated by PL 602, the normal discretionary trust acquisition procedures of the Secretary do not apply. (*Sac and Fox Nation*, 240 F. 3d 1250, 1262 (10<sup>th</sup> Cir. 2001)).

Secretary under 25 U.S.C. § 465. Two years later, the Wyandotte wrote a letter to the Department and asserted for the first time in 15 years that the Park City land was purchased with the PL 602 set-aside funds and therefore must be taken into trust under the mandatory provisions of PL 602. The Wyandotte also asserted that the Park City land was eligible for gaming under the “land taken into trust as part of the settlement of a land claim” exception in IGRA.

This began the Wyandotte’s effort to try to re-write the administrative and legal record established in the Shriner Tract trust acquisition proceedings. By seeking to invoke the mandatory trust provision of PL 602 a second time, the Wyandotte sought to ignore the fact that it had been established that the mandate of PL 602 had been fulfilled with the Shriner Tract trust acquisition such that it could not be invoked a second time. It also ignored that all of the principal \$100,000 set-aside funds had been expended on the Shriner Tract and that the Park City land was not purchased with only earnings from the investment of the principal \$100,000 set-aside funds.

This effort was ultimately rejected on July 3, 2014, when Kevin Washburn, Assistant Secretary-Indian Affairs, issued a decision finding that the Wyandotte could not have used the set-aside funds alone to acquire the Park City land and refused to accept the Park City land into trust under PL 602. He did not address the gaming eligibility issue requested by the Wyandotte in its 2006 application.

In or about October 2017, the Wyandotte submitted a new application to have the Park City land placed into trust under PL 602. At the same time, it sought a determination that it could game on the land pursuant to IGRA’s “land taken into trust as part of a settlement of a land claim” exception. With this new application, the Wyandotte submitted annual audited financial statements for the period from July 1986 through September 1996 that accounted for the aggregate of the approximately \$939,000 in PL 602 funds distributed to the Wyandotte as one “pooled”

fund.<sup>4</sup> The Wyandotte also submitted a financial analysis by RSM US LLP (“RSM”) dated September 29, 2017.

However, without explanation, the State was not notified of or involved in any of the proceedings at the Department involving the Wyandotte’s efforts to have the Park City land acquired in trust under the mandatory provision of PL 602 after the issuance of the July 3, 2014 letter by Assistant Secretary Washburn.

Defendant Sweeney concluded in the Trust Determination that the Park City land qualified for a second mandatory trust acquisition under PL 602. In doing so, she did not address the prior administrative record involving the Shriner Tract trust acquisition or the legal record generated by the litigation challenging that trust acquisition.

Defendant Sweeney’s single paragraph Gaming Determination was based entirely on the decision in *Wyandotte Nation v. National Indian Gaming Commission*, 437 F. Supp. 2d 1193 (D. Kan. 2006). She did not address the Department’s 2008 regulations that should have governed the Gaming Determination. 25 C.F.R. § 292.2 specifically defines what a “land claim” is, and 25 C.F.R. § 292.5 expressly identifies the criteria “[w]hen gaming can occur on newly acquired lands under a settlement of a land claim”.

The *Wyandotte Nation* case was decided two years before the Department adopted the regulations referenced above. In addition to the Plaintiffs’ contention that the Department’s regulations govern the Gaming Determination, Plaintiffs also assert that there are material factual and legal distinctions between the Shriner Tract trust acquisition involved in the *Wyandotte Nation* case and the Park City land acquisition that compel the opposite result from that reached by Defendant Sweeney in the Gaming Determination.

---

<sup>4</sup> For two of the years during this time span, only compilation reports were submitted-not audited financial statements.

The section below details the facts upon which Plaintiffs rely to support their contention that the Defendants acted in excess of their authority and ignored and failed to apply their own regulations, acted unlawfully, abused their discretion, and acted arbitrarily and capriciously by deciding that the Park City land had to be taken into trust utilizing the mandatory provisions of PL 602 for a second time, and that the Park City land was eligible for gaming under 25 U.S.C. § 2719(b)(1)(B)(i) and 25 C.F.R. §§ 292.2 and 292.5.

### **STATEMENT OF FACTS**

#### **A. Administrative and Legal Record for the Shriner Tract and the Park City Trust Acquisitions**

##### **1. PL 602 – adoption and language**

1. Congress passed PL 602 in 1984 to distribute funds the United States had previously paid to satisfy judgments in favor of the Wyandotte for claims for money damages that Wyandotte had asserted before the ICC. (AR 4612-4616.)

2. Congress passed PL 602 because the Secretary had failed to devise a distribution formula for the funds within 180 days of their appropriation by Congress, as then required by 25 U.S.C. § 1402. The Secretary submitted proposed legislation for use and disposition of the funds. (AR 4312.)

3. PL 602 was adopted on October 30, 1984, and it repealed Public Law 97-371, which was a predecessor to PL 602. (AR 3967-3972.) PL 602 provided a distribution scheme for the funds that Congress several years earlier had appropriated in satisfaction of the ICC judgments. (4312; 4612-4616.)

4. The funds were to be distributed pursuant to PL 602 as follows:

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

- b. Section 105(b)(1) provided that of the remaining 20% (approximately \$938,000 (AR 4314)), “a sum of \$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the Tribe.”
- c. Section 105(b)(2) directed that the funds in excess of the \$100,000 set aside for “the purchase of real property” described in Section 105(b)(1) were to be held in trust by the Tribe’s Tribal Business Committee.
- d. Section 105(b)(3) provided that any “interest or investment income accruing on the funds described in paragraph (2) may be used by the Tribal Business Committee for any of the following purposes: [listing 8 items, including land purchases]”.

(AR 3969.)

## **2. Use of the \$100,000 set-aside funds to purchase mortgage obligation bonds**

5. In May 1986, the Wyandotte used \$95,000 of the \$100,000 set-aside funds to purchase mortgage obligation bonds (the “PL 602 Bonds”). (AR 2815, 2832.)

6. The PL 602 Bonds and remaining cash were deposited into the Segregated Account in May 1986, which also had \$33,794 in cash in it at the time. (AR 2832.)

7. The Wyandotte closed the Segregated Account at the end of November 1991. The PL 602 Bonds and existing cash balance (\$529.91) in the Segregated Account at that time were transferred and commingled into the Commingled Account that held the other PL 602 funds originally distributed to the Wyandotte in the approximate sum of \$839,000. (AR 2812-2814; 3032-3033.) There was only \$529.61 in cash in the Segregated Account when that account was closed in November 1991 because the Wyandotte had by that time withdrawn the rest of the cash and earnings on the PL 602 Bonds in the account. (AR 3932, 2814, 2810-3033.)

### 3. Park City land purchase in 1992

8. In November 1992, the Wyandotte borrowed \$25,000 in the form of a margin loan from the Commingled Account, stating it used those proceeds to purchase the Park City land that month. (AR 1581; 1587.)<sup>5</sup>

9. In November 1992, the commingled account had only approximately \$3,200 in cash in it, plus the PL 602 Bonds and the other non-restricted PL 602 assets. (AR 1583.)

### 4. 1993 Park City trust application ultimately invoking the Secretary's discretionary authority and not PL 602's mandatory provision

10. In January 1993, the Wyandotte applied to have the Secretary accept the Park City land into trust under PL 602. (AR 2259-2260; 2280-2281.)

11. One 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, not the mandatory provisions of PL 602. (AR 2270-2271; *Wyandotte Nation v. Salazar*, 839 F. Supp. 2d at 1142-43).

12. Through November 1995, the Wyandotte continued to pursue the Park City land application as a discretionary application. (AR 1371; 2283-2289.)

13. In December 1995, the Wyandotte withdrew its application to have the Park City land taken in trust. Instead it shifted its focus to having the Shriner Tract taken into trust-but under the mandatory provisions of PL 602. (AR 2252; 2291-2295.)

---

<sup>5</sup> In 2002 the Wyandotte erroneously reported that the Park City land had been purchased in November 1991, with a cash withdrawal of \$25,191.67 from the Segregated Account. (AR 2813.) KPMG reported the same thing. (AR 2824.) While cash was actually withdrawn in that amount on that date in November 1991, the Wyandotte revealed to the Department in August 2009, that the Park City land was not bought until a year later. (AR 1581-1588.) The cash was not redeposited back into the Segregated Account from which it came – it was used that same month to pay down a margin loan in the investment account that at the time housed only the other PL 602 funds that had been distributed to the Tribe. (AR 8518.) As such, everything the State said during the Shriner Tract litigation about the money used to acquire the Park City land was the result of this misinformation by the Wyandotte. The purchase occurring in November 1992 through the use of a margin loan from the Commingled Account instead of a cash withdrawal from the Segregated Account a year earlier significantly changed the analysis as to what funds were actually used to purchase the Park City land. (*Wyandotte Nation*)



14. On April 13, 2006, the Wyandotte submitted an application to have the Park City land taken into trust for gaming purposes under the Secretary's discretionary authority pursuant to 25 U.S.C. § 465 and not under the mandatory provision of PL 602. (AR 2381-2384.) The Wyandotte included with that application a tribal resolution that reflected the purchase of the Park City land and the desire to have it placed in trust. This resolution did not claim that the money used to buy the Park City land came from the PL 602 funds.

**B. The Shriner Tract Administrative Record: Use of \$100,000 Set-Aside Funds, Fulfillment of the Congressional Mandate of PL 602, Non-Restricted Nature of the Earnings on the Investment of the \$100,000 Set-Aside Funds and Wyandotte Applications for Discretionary Trust Acquisition of the Park City Land**

15. In January 1996, the Wyandotte formally applied to have the Shriner Tract put into trust pursuant to the mandatory provisions of PL 602. (AR 2298-2310; 2312-2313.) The Wyandotte stated that the land was to be purchased with the initial \$100,000 set-aside funds from PL 602 plus any interest that had accrued since the award. (*Id.*; AR 2315-2326.)

16. On February 13, 1996, Assistant Solicitor Robert Anderson issued a memorandum addressing the "trust acquisition of land in Kansas City, Kansas," and stating that the "Tribe has submitted a fee-to-trust acquisition application indicating that four parcels of land in Kansas City will be purchased using P.L. 98-602 funds, *which include the initial \$100,000 plus any interest that has accrued since the award.*" (AR 2315-2317, emphasis added.)

17. On April 19, 1996, Wyandotte Chief Leaford Bearskin wrote George Skibine, Director, Indian Gaming Management, and restated Assistant Solicitor Anderson's (February 13, 1996) position that "the Secretary lacked any discretion and must accept land in trust which the Wyandotte purchases *with the \$100,000 allocated under P.L. 98-602 for trust acquisition 'plus any interest that has accrued since the award.'*" He then advised that the Wyandotte will be



purchasing the Shriner land for \$100,000 and the building for \$80,000. (AR 2312-2313; 8290-8291, emphasis added.)

18. On April 19, 1996, Department financial analyst Tom Hartman sent a memorandum to Mr. Skibine regarding the Department's obligations under PL 602 with respect to the Wyandotte's Shriner Tract trust application. (AR 2320.)

19. In that memorandum, Mr. Hartman reviewed the statutory language from § 105(b)(1) and (3) of PL 602 and concluded that while "the tribe may spend the accrued interest, *only* the sum of \$100,000 must be spent on trust lands. *Therefore, assurances that all of the \$100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law.*" (AR 2320, emphasis added.) The Wyandotte was fully aware of the Department's position. (*See*, ¶ 34, 41 below.)

20. Mr. Hartman also noted that the Wyandotte's application suggested that the Shriner Tract will be purchased with "a portion" of the set-aside funds. He commented to Mr. Skibine that if "the purchase price of the Shriner Tract exceeds \$100,000 (which it did) then the Department should state clearly that the [set-aside] funds have been expended in accordance with the law, and that *no funds remain to implement further the 'shall' of the law*". (AR 2320, emphasis added.)

21. On June 5, 1996, Mr. Skibine sent a memorandum to Ada Deer, Assistant Secretary-Indian Affairs, addressing the Wyandotte's fee-to-trust application for the Shriner Tract. (AR 2322-2326.) In that memorandum, he noted that the Wyandotte had indicated in its April 19, 1996 letter that it will purchase the Shriner tract and building located thereon for \$180,000 *derived from the original \$100,000 provided for land acquisition under Pub. L. 98-602, plus accrued interest.*" (AR 2325, emphasis added.)

22. In this same memorandum, Mr. Skibine advised that one of the requirements of the trust acquisition of the Shriner Tract under PL 602 was that the Muskogee Area Office (“MAO”) “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.*” (AR 2326, emphasis added.)

23. On June 6, 1996, Ms. Deer wrote a memorandum to the MAO Director, *with a copy sent to Chief Bearskin*, regarding the Wyandotte’s application for the Shriner Tract (AR 2328-2329, emphasis added) and specifically confirmed that the “Tribe will purchase the Shriner Tract for \$180,000 *using \$100,000 plus accrued interest derived from Pub. L. 98-602 funds.*” (AR 2329, emphasis added.)

24. Further, Ms. Deer instructed the MAO Director and Chief Bearskin that upon “transfer of the property in trust for the Tribe, you must inform the Tribe that this trust acquisition fulfills the Secretary’s mandatory obligation to take land in trust pursuant to Pub. L. 98-602, *and that subsequent trust acquisitions must be made under a different statutory authority.*” (AR 2329, emphasis added.)

25. On the same day, Ms. Deer gave notice that was subsequently published in the Federal Register that the Secretary “shall acquire title in the name of the United States in trust for the Wyandotte Tribe for one tract of land (the Shriner Tract).” (AR 2331-2335.)

26. The Wyandotte purchased the Shriner Tract in July 1996 with the proceeds from a margin loan from its investment account. (AR 3070-3075.) *See also Governor of Kan. v. Norton*, 430 F. Supp. 2d 1204, 1212 (D. Kan. 2006), *judgment vacated on Quiet Title Act grounds*, *Governor of Kan. v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008)(noting that the funds for the

Shriner Tract purchase came from a loan against the account in which the PL 602 Funds were held as investments, and not the liquidation of any corporate bonds purchased with PL 602 funds).

27. The District Court in *Governor of Kansas*, in upholding the Secretary's remand decision that the Shriner Tract was purchased with only PL 602 funds, noted that the Secretary had reasonably relied on the conclusions of Tom Hartman, the Department's financial expert, that "it was reasonable and acceptable for the Tribe to pay for the Shriner Tract with a margin account loan secured by the bonds that remained in the investment account." 430 F. Supp. 2d at 1223.

28. On July 12, 1996, Mr. Anderson wrote to John Leshy, Edward Cohen and Heather Sibbison at the Department addressing a request that the taking of the Shriner Tract into trust be delayed. (AR 2337.) Mr. Anderson recommended against any delay because "the seller is expected to substantially raise the price (of the Shriner Tract) and could remove from the Tribe the benefit of the statutory provision that *requires that the Secretary take land in trust if property worth \$100,000 is taken in trust...*". (AR 2337, emphasis added.)

### **C. Shriner Tract Litigation Record Affirmed What The Administrative Record Established**

29. 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 and secured a Temporary Restraining Order ("TRO") from the District Court ("TRO") preventing the Department from taking the Shriner Tract into trust. *Sac & Fox Nation v. Norton*, 240 F. 3d 1250, 1257-58 (10<sup>th</sup> Cir. 2001). The Wyandotte asked the Tenth Circuit to dissolve the TRO. (AR 2340-2346.)

30. In successfully urging the Tenth Circuit to stay the TRO and allow the Shriner Tract to go into trust under the mandatory provisions of PL 602, the Wyandotte told the Tenth Circuit that the "United States' acceptance of title to the subject land, once completed, would *finally*

*satisfy* the Congressional purpose of the 1984 Judgment Act (PL 602)... .” (AR 2342-2343, emphasis added.) The Tenth Circuit dissolved the TRO while attempting 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 1258.

31. In his January 15, 1998 deposition, Mr. Skibine, when asked about the April 19, 1996 Tom Hartman memorandum referred to in paragraphs 18-20 above, explained that the intent was that “we wanted to make sure that this was not going to go on (subsequent trust acquisitions beyond the Shriner Tract) so we wanted assurance that, once the land is purchased...and the purchase price was over \$100,000, then it would exhaust the fund and ***there would be no mandatory obligation to take any land in trust – to take any additional land in trust besides the Shriner tract.***” (AR 2348-2349, emphasis added.)

32. In her October 30, 1998 deposition, Department official Heather Sibbison, when asked if she recalled how the issue of the PL 602 set-aside funds was resolved (the issue relating to the potential of the Wyandotte parceling out the \$100,000 set aside to make multiple land purchases), she testified that her “admittedly fuzzy recollection is that the Tribe agreed to spend the \$100,000 in one place...we didn’t have to continue to parse the statute out to make it function the way we thought it should function because ***the Tribe agreed to spend the entire amount in one place.***” (AR 2351, 2356, emphasis added.)

33. In January 1999, in its brief to the District Court, the Wyandotte told the Court that the funds used to purchase the Park City land should ***not*** be characterized as PL 602 funds. (AR 2251-2252.)

34. In this same brief, the Wyandotte acknowledged that all of the \$100,000 set-aside funds, plus accrued interest, were used to buy the Shriner Tract and that it understood that meant

that the “shall of the law” was fulfilled such that no further trust acquisitions could be predicated on the mandatory provision of PL 602. After reciting the concerns Mr. Hartman articulated in his April 1996 memorandum that the Wyandotte tribal resolution suggested the Kansas City property would be purchased with a “portion” of the PL 602 set-aside funds and the Warranty Deed reflected a purchase price of “\$1.00” for the Shriner Tract, the Wyandotte explained to the District Court that it understood the Department’s position as follows:

The requirement proposed by the agency in its April 19, 1996 statement was that “While the Tribe may spend the accrued interest, only the \$100,000 must be spent on trust land. Therefore, assurances that all of the \$100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law.” (citation to Hartman memo omitted).

The agency had already determined that the \$100,000 plus all accrued interest from 1982 could be used to purchase land under P.L. 98-602. See Anderson’s February 13, 1996 memorandum. (citation to Anderson’s memo omitted).

The record fully supports that P.L. 98-602 funds were used to purchase the Shriner’s Tract and that *the Secretary intended that all of the principal 98-602 funds were to be allocated to the purchase price of the land. This was intended so that the Wyandotte could make no more land purchases under P.L. 98-602....*

(AR 2255-2256, emphasis added.)

35. The District Court’s ruling in the Shriner Tract litigation was appealed to the Tenth Circuit. In its September 2000 brief to the Tenth Circuit, the Wyandotte re-affirmed its admission that the money used to buy the Park City land was *not* PL 602 set-aside funds. (AR 2359.)

36. In this same brief, the Wyandotte repeated to the Tenth Circuit that the “Secretary intended that all of the principal 98-602 funds were to be allocated to the purchase price of the land (the Shriner Tract).” (AR 2360-2363.)

37. In September 2000, then Secretary Bruce Babbitt, told the Tenth Circuit that “the Assistant Secretary of Indian Affairs required the Area Director to inform the Wyandotte that ‘this trust acquisition fulfills the Secretary’s obligation to take land into trust pursuant to (PL 602), and

that *subsequent trust acquisitions* must be made under different statutory authority’.... There is no reason to believe that the money used to purchase the Shriner Tract was anything other than money available under (PL 602) and, in any event, the administrative record demonstrates that this acquisition *exhausts* the funds available to the Tribe under section 105(b)(1) of that statute.” (AR 2266-2267, emphasis added.)

38. In a brief the Wyandotte submitted to the Tenth Circuit for a panel rehearing, the Wyandotte once again admitted that it was fully aware that all of the \$100,000 set-aside funds were used to purchase the Shriner Tract, plus interest, and that as such, the acquisition of the Shriner Tract into trust under the mandatory provision of PL 602 meant all obligations under this provision had been fulfilled and no further trust acquisitions could be predicated on PL 602. After reciting the concerns of Mr. Hartman expressed in his April 1996 memorandum, Mr. Skibine’s and Ms. Sibbison’s deposition testimony referenced above, the Wyandotte concluded:

The record fully supports that P.L. 98-602 funds were used to purchase the Shriner’s Tract and that *the Secretary intended that all of the principal 98-602 funds were to be allocated to the purchase price of the land. This was intended so that the Wyandotte could make no more land purchases under P.L. 98-602.* Because the record supports the Agency decision, it should not be disturbed by this Court.

(AA 4526-4529, emphasis added.)

**D. Remand Proceedings Before the Secretary on the Issue of Whether the Shriner Tract was Purchased With Only Set-Aside Funds**

39. The Tenth Circuit remanded a part of the Shriner Tract case for the Secretary to determine if the Shriner Tract was purchased with “only” PL 602 funds which was a condition of invoking the mandatory trust provisions of PL 602. (*Sac & Fox Nation v. Norton*, 240 F. 3d at 1263-64; *Governor of Kansas v. Norton*, 430 F. Supp. 2d at 1209).

40. In September 2002, the Wyandotte submitted its brief to the Secretary on the remand noting that:

The Secretary, and the record clearly reflects, looked at this issue from the bottom up. Once the Secretary determined that Pub. L. 98-602 mandated that land taken into purchase with the funds had to be taken into trust, the United States was faced with the issue of how to limit the Wyandotte from purchasing hundreds, if not thousands of parcels of land with Pub. L. 98-602 funds. Once it is clear the direction taken by the United States in its thought process, it is easy to understand why the record is not replete with notations about the cost of the Shriner's Tract and why such notations were not necessary.

(AR 2369-2370.)

41. The Wyandotte's brief to the Secretary once again readily acknowledged that the Wyandotte had used all of the \$100,000 set-aside funds, plus earnings, to purchase the Shriner Tract and that the mandatory trust acquisition of the Shriner Tract under PL 602 fulfilled the shall of that law such that no further trust acquisitions could be predicated on mandatory provisions of PL 602:

The requirement proposed by the agency in its April 19, 1996 statement was that "While the Tribe may spend the accrued interest, only the \$100,000 must be spent on trust land. *Therefore, assurances that all of the \$100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law.*" *Id.*

*The agency had already determined that the \$100,000 plus all accrued interest from 1982 could be used to purchase land under P.L. 602. See Anderson's February 13, 1996 memorandum. A.Ap. 321.*

On June 6, 1996, George Skibine, Director, Indian Gaming Management Staff, sent a memo to Assistant Secretary-Indian Affairs Ada Deer recommending the Wyandotte trust application be approved. In the memo, Skibine stated "the Tribe indicates that *it will purchase the Shriner tract and building located thereon [SIC] for \$180,000 derived from the original \$100,000 provided for land acquisition under Pub. L. 98-602, plus accrued interest.*" A.R. at 0337. Skibine concluded "[t]he Shriner tract will be purchased by the Tribe for \$180,000 using Pub. L. 98-602 funds." *Id.* Assistant Secretary Deer concurred in the IGMS recommendations and caused notice of taking land in trust to be published in the Federal Register. (Emphasis added).



(AR 2370-2371, emphasis added.)

42. In her Opinion on Reconsideration on the remand issue, the Assistant Secretary-Indian Affairs specifically found that the “*Shriner Tract was purchased with the \$100,000 set aside by P.L. 98-602 plus interest and investment income derived from that principal.*” (AR 2378, emphasis added.) Although, as noted above, the Shriner Tract was purchased with the proceeds from an \$180,000 margin loan from the Wyandotte’s investment account, she relied on Department financial analyst Tom Hartman’s conclusions that “it was reasonable and acceptable for the Tribe to pay for the Shriner Tract with a margin account loan secured by the bonds that remained in the investment account.” *Governor of Kansas*, 430 F. Supp. 2d at 1223.

43. The decision of the Assistant Secretary on remand was challenged in District Court. Judge Robinson upheld the Assistant Secretary’s determination that “there was no language in the statute triggering the defeat of the trust purchase if more than the \$100,000 is used to purchase the real estate, when the additional funds were derived from the original Pub. L. 98-602 award.” *Governor of the State of Kansas v. Norton*, 430 F. Supp. 2d at 1220. “[T]here was nothing (in PL 602) indicating Congress intended to preclude the addition of investment income to the original \$100,000.” *Id.*

44. In August 2016, Matthew Kelly of the Solicitor’s Office in the Department, explained that “Congress set aside \$100,000 for use by the Wyandotte to acquire land in trust. To qualify for the acquisition, the land must be purchased with only Land Funds, which can be combined with interest on the \$100,000.” (AR 6800.)

45. The May 20, 2020 Trust Determination did not address any of the foregoing administrative and legal record from the Shriner Tract in authorizing a second mandatory trust acquisition of land under PL 602. (AR 4482-4493.)



**E. The Wyandotte's Pre-2017 Applications to Have the Park City Land Acquired in Trust and Statements About the Source of Funds Used to Purchase the Park City Land**

46. In February 1993, the Wyandotte told the Department that the Park City land fee-to-trust application should be considered under the Secretary's discretionary authority. (AR 2270-2271).

47. The August 31, 1993 year ending audit of the Wyandotte's financial statements reported the Park City land was not acquired with money from the set-side funds and the Park City land was not thereafter listed an asset on the balance sheet for those funds. (AR 4639, 4640 and 4644.) On the other hand, the money used to acquire the Shriner Tact in July 1996 was reported to have come from the set-aside funds and the Shriner Tract (the land and building purchased with the set-aside funds) was listed as a fixed asset on the audited balance sheet for those funds. (AR 4668, 4671 and 4673.)

48. The Wyandotte told the District Court in January 1999 that the money used to buy the Park City land should not be characterized as PL 602 funds. (AR 2251-2252.)

49. The Wyandotte told the Tenth Circuit in 2000 that the money used to buy the Park City land should not be characterized as PL 602 funds. (AR 2359.)

50. On April 13, 2006, the Wyandotte submitted a new trust application to have the Park City land taken in trust for gaming purposes – again, under the Secretary's discretionary authority pursuant to 25 U.S.C. § 465. (AR 2381-2384.) The Wyandotte included with that application a tribal resolution that did not reflect that the money used to buy the Park City land came from the PL 602 set-aside funds. (AR 2381-2385.)

51. On July 3, 2014, Kevin Washburn issued a letter decision denying the acquisition of the Park City land pursuant to the mandatory provisions of PL 602 for the reason that the record

reflected that the land was not purchased with only PL 602 funds. He did not address the eligibility of the land for gaming as requested by the Wyandotte in its 2006 application. (AR 5249-5258.)

**F. 2017 Wyandotte Fee-to-Trust Application to Have Park City Land Acquired in Trust Under Mandatory Provisions of PL 602**

**1. The State of Kansas was a known and interested party**

52. In August 2014 and September 2014, a representative of Senator Robert Dole's office contacted the Department inquiring as to whether the Wyandotte had filed an application following the July 3, 2014 decision of Assistant Secretary Washburn. She was told that no application had been filed and Senator's Dole office would be kept updated. (AR 6910-6911.)

53. In 2016, the Department noted that the State of Kansas was an interested party in the Wyandotte's effort to have the Park City land placed into trust under PL 602. The Department noted that the State had participated before, had challenged the gaming eligibility of the Park City land and had hired an accountant to review the previous KPMG analysis and issue a report that it was insufficient and could not be relied on for the Park City land. (AR 6331.)

54. In a February 27, 2018 memorandum, the Department expressly recognized the acquisition of the Park City land into trust by the Secretary was "controversial" and that the State of Kansas will strongly care. (AR 3937.)

55. On February 28, 2020, the State was identified as an interested party that had participated in the proceedings leading up to the July 3, 2014 Washburn decision. (AR 8421.)

**2. 2017 Application**

56. The Wyandotte submitted a fee-to-trust application on December 3, 2015, for the Park City land to be acquired under PL 602 but withdrew it on August 18, 2017. (AR 8682.)

57. On October 20, 2017, the Wyandotte submitted a new application (the "2017 Application") once again asking that the Park City land be acquired in trust under PL 602's

mandatory provision and seeking a determination that that once taken into trust, it would be eligible for gaming under IGRA as “land acquired in trust as part of the settlement of a land claim.” (AR 3980-3986.) It was this application that was granted in the May 20, 2020 Decision. (AR 4020-4029; AR 4482.)

58. The Administrative Record in this case contains no notice by the Department from January 2015 through May 20, 2020 to the State informing the State of any developments relating to the Wyandotte’s request to take the Park City land into trust under PL 602.

**3. Wyandotte submit annual audits of financial statements for the aggregate PL 602 funds and 2017 RSM analysis with 2017 application**

**a. Ober Audits – methodology**

59. The Wyandotte’s 2017 application included the submission of annual audits (or for 2 years, compilations) of the Wyandotte’s financial statements and balance sheets for the aggregate PL 602 funds for the years 1986 through 1996 (the “Ober Audits”).<sup>6</sup> The Ober Audits referred to the aggregate PL 602 Funds as the “Claims Money Funds” – a term that when used herein is intended to refer to the same thing. (AR 4066-4136.)

60. The Wyandotte’s financial statements and balance sheets that were examined in the Ober Audits reflected a pooled approach in which the \$100,000 set-aside funds (even while in the Segregated Account) and the non-restricted \$839,000 balance of the funds distributed to the Wyandotte under PL 602 were all accounted for collectively as the Claims Money Fund. (AR 4066-4136.)

---

<sup>6</sup> While RSM and the Department’s financial analyst suggest that the Ober Audits are for each year between 1986 and 1996 with one year entirely missing, in reality that is not accurate. In 1988, a balance sheet compilation was submitted. (AR 4078-4079.) For the fiscal year ended August 31, 1991 and 1990, an “accountant’s compilation report” was presented. (AR 4092-4096.) However, these are all collectively referred to as the “Ober Audits”.

61. The Wyandotte created the financial statements and presented them to the CPA for examination. (AR 4067.) According to the Ober Audits, 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.)

62. Each of the Ober Audits note that of all the funds distributed to the Wyandotte under PL 602, only “the sum of \$100,000 shall be used for the purchase of real property which shall be held in trust by the Secretary of the Interior for the benefit of the Tribe.” (AR 4070, 4076, 4088, 4105, 4116, 4126, 4135.) No other restrictions on the balance of the funds was noted. (*Id.*)

63. The financial statements and balance sheets of the Wyandotte for the Claims Money Fund pooled all revenues from all sources and all expenditures of any kind without restriction as to any particular portion of the Claims Money Fund. This resulted in a net Claims Money Fund balance for each fiscal year. (AR 4066-4126.) A net loss in any given year reduced the amount of the Claims Money Fund as a whole and a net gain increased the amount of the Claims Money Fund as a whole. (*Id.*)

64. For example, in fiscal year August 31, 1990, the Wyandotte made an investment in a company named Veres International (“Veres Investment”). (AR 4083.) It was noted in the Ober Audit that the company closed down in October 1990, and the investment did not appear to be recoverable. (AR 4091.) By the next fiscal year (August 31, 1991), \$153,849.23 of the Veres Investment was booked as a loss. (AR 4094, 4096.) That loss reduced the entire Claims Money Fund balance for that fiscal year—not just a portion of it. (AR 4096.)

65. As noted above, the Ober Audit for the years ending August 31, 1993 and 1992 reported that the money used to purchase the Park City land in November 1992 was transferred *out* of the Claims Money Fund and that the land had not been acquired with funds from the Claims

Money Fund. Thereafter, the Park City land was not listed on the Claims Money Fund balance sheet as an asset of the Claims Money Fund. (AR 4639, 4640 and 4644, emphasis added.) This is consistent with the Wyandotte's fee-to-trust application for the Park City land the between 1993 and 1995, statements made to federal courts, and the Wyandotte's fee-to-trust application and tribal resolution in 2006 seeking to invoke the Secretary's discretionary authority as opposed to the mandatory provision under PL 602. (See ¶¶ 46-50 above.)

66. As also noted above, the Ober Audits reported the Wyandotte's accounting for Shriner Tract purchase differently. The \$180,000 used to purchase the Shriner Tract was reflected as coming out from the Claims Money Fund and the land and building purchased with the \$180,000 was listed as a fixed asset on the balance sheet of the Claims Money Fund. (AR 4668, 4671 and 4673.) This is consistent with the Wyandotte seeking the acquisition of the Shriner Tract in trust pursuant to the mandatory provision of PL 602.

**b. RSM 2017 Report – assumption relied upon**

67. In addition to the Ober Audits, the Wyandotte also included with its 2017 Application a September 29, 2017 review of the Ober Audits performed by RSM (the "2017 RSM Report"). (AR 3981.)

68. On February 26, 2020, Department Deputy Chief Financial Officer Tonya Johnson reviewed the 2017 RSM Report. (AR 3932-3934.) She reported that "RSM's methodology, calculations and assumptions are consistent with industry standards..." (*Id.*)

69. The assumption referred to by Ms. Johnson in the 2017 RSM Report was based on RSM's legal conclusion that "Public Law 98-602 *interpreted by the Department of the Interior and affirmed by litigation* allows the income earned on the \$100,000 or 602 Land Acquisition Funds to be considered as additional Land Acquisition Funds. It is our understanding that the

Nation intended to use the interest income and other earnings from the 602 Land Acquisition Funds for land purchases.” (AR 4023-4024, emphasis added.)

70. The term “Land Acquisition Funds” was defined by RSM to mean the “\$100,000 received by the Wyandotte through Public Law 98-602 that were restricted for the purchase of land.” (AR 4023.)

71. RSM cited to page 4 of the July 3, 2014 Kevin Washburn decision letter as the source for this legal conclusion. (AR 4023, n. 1; 4024, n. 4.) There, Mr. Washburn stated that the “Department’s position, which was later affirmed in litigation, was that the Nation **could** invest its 602 Funds *and add interest it earned from the 602 Funds to the principal* to purchase property for acquisition under the Act.” (AR 5252, emphasis added.)

72. Based on this legal conclusion, RSM assumed the earnings on the investment of the set-aside funds were “restricted” and could not be used for anything except land purchases. Accordingly, RSM ignored any actual expenditures of those earnings by the Wyandotte between May 1986 and July 31, 1996, from the Segregated Account as if those expenditures had not occurred. Instead it “grew” those earnings as if they had remained in the Segregated Account and had not been expended. (Compare AR 4028-4029-RSM’s chart for 7/11/1986 through 8/31/1991 with AR 2834, 2848, 2893, 2937, 2992, 3029, 3044, 3058, 3371 – the Segregated Account Statements for same year ending dates.)

73. In reality, the Wyandotte did not treat the earnings on the \$100,000 set-aside funds as restricted and in fact expended all of the cash and PL 602 Bond earnings in the Segregated Account by November 29, 1991, on non-land purchases, such that when that account was then closed and the assets transferred into the Commingled Account, all that remained to be transferred

was \$529.91 in such cash and \$109,000 in PL 602 Bonds. (AR 2814, 3032-3033, 3843-3845.) RSM simply ignored all of these expenditures. (AR 4021-4029)

74. The PL 602 Bonds that were in the Segregated Account at the time that account was closed at the end of November 1991 and its assets merged into the Commingled Account paid interest at rates between 8.5% and 9.5%, meaning that those bonds could not have generated \$25,000 in earnings by November, 1992. (AR 3032-3033; 3843-3845.)

**c. 2017 RSM Analysis and consistency or inconsistency**

75. The Department's review of the 2017 RSM Analysis also stated that RSM's "conclusions are reliable under the consistency principle of General Accepted Accounting Principles (GAAP)." (AR 3932.)

76. The RSM assumption about the "restricted" nature of the earnings on the PL 602 Bonds was not consistent with Wyandotte's use of those funds or how they were accounted for in the Ober Audits to reduce the amount of the Claims Money Fund. (AR 2832-3034; 3843; 3850-3855; 4066-4136.)

77. The 2017 RSM Analysis's finding that the \$25,000 for the purchase of the Park City land came from earnings on the PL 602 Bonds that were part of the Claims Money Fund is inconsistent with the Ober Audits that did not regard the Park City land as being acquired from any of the Claims Money Fund and was not listed as an acquired asset of that Fund. (AR 4100, 4103, 4107.)

78. RSM did not allocate any pro-rata portion of the Veres Investment loss to the earnings on the PL 602 Bonds. (AR 4028-4029.) The Ober Audits allocated the loss of



\$153,849.23 for the Veres Investment to the overall Claims Money Fund resulting in the overall amount of that fund getting reduced accordingly. (AR 4096.)<sup>7</sup>

79. In addition to deviating from the accounting method of the Wyandotte and the Ober Audits, not allocating a pro-rata portion of the Veres Investment loss to the earnings on the PL 602 Bonds was inconsistent with other aspects of RSM's accounting treatment of other aspects of that Veres Investment:

- a. For the year ending August 31, 1990, the Ober Audit noted that the Wyandotte "purchased a zero coupon bond to help offset the loss for this investment" (i.e., the Veres investment). (AR 4628.) In its 2017 Report, RSM allocated, on a percentage basis, the income from all of the bond portfolio to the earnings on the PL 602 funds to grow them, which would have included the bonds purchased to mitigate the Veres Investment loss. (AR 4025.)
- b. The preponderance of the money used to acquire the Veres Investment came from the margin account in the Commingled Account. During the year ended August 31, 1990, the Claims Money Fund increased its margin debt by \$144,546.58. (AR 4083.) During that same year, the investment portfolio (investments plus earnings reflected in the money market account) grew by only \$8,760.53 and the fund deficit for the year was only \$2,725.92. (AR 4083, 4087.) The margin debt increase was directly related to making the Veres Investment. (*Id.*)
- c. During 1990, the year of the Veres Investment, RSM allocated interest on the margin loan, which included debt used to pay for the Veres Investment, to the earnings on the investment of \$100,000 set-aside funds in the same manner that RSM allocated the interest and dividend income. (AR 4028-4029.)

80. As such, while RSM allocated no pro-rata portion of the Veres Investment loss to the earnings on the set-aside funds, it did allocate the earnings on bonds purchased to mitigate that Veres Investment loss proportionately to the set-aside funds and it charged the set-aside funds and

---

<sup>7</sup> In the 2017 RSM Report, the PL 602 Bonds and their earnings were expressed as a percentage of the overall Claims Money Funds (i.e., all of the money distributed to the Wyandotte by PL 602). (AR 4021-4029.) By not allocating any pro-rata portion of Veres Investment loss to the earnings on the PL 602 Bonds, RSM reduced the denominator (the total amount of the Claims Money Fund) disproportionately and increased the numerator (the amount of the PL 602 Bonds and earnings) disproportionately such that the PL 602 Bonds were thereafter expressed as a greater percentage of the whole. (AR 4021-4029.) This is also true for other expenditures that RSM ignored but the Ober Audits reported as reducing the Claims Money Fund as a whole. (AR 4021-4029; 4066-4136).



accumulated earnings proportionately for the margin interest that the Wyandotte incurred that was directly related to the borrowings to purchase the Veres Investment. (AR 4028-4029: *See* ¶¶ 78-79 above.)

**G. The “Land Taken Into Trust as Part of a Settlement of a Land Claim” Exception Under IGRA**

**1. The 2008 Department regulations defining “land claim” and “criteria for when gaming can occur on newly acquired lands under a settlement of a land claim”**

81. Effective June 19, 2008, the Department adopted new regulations at 25 C.F.R. Part 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.)

82. When 25 C.F.R. Part 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.)

83. 25 C.F.R. § 292.2 defines a land claim as follows:

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

- (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
- (2) *Is* in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
- (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

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

84. 25 C.F.R. § 292.5 contains the criteria for meeting the “settlement of a land claim” exception as follows:

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

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

- (a) Acquired under a settlement of a land claim that resolves or extinguishes the finality of the tribe’s land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, *in legislation enacted by Congress*; or
- (b) Acquired under a settlement of a land claim that:
  - (1) is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the return of land; or
  - (2) is not executed by the United States, but is entered as a final order by a court of competent jurisdiction whereas there was an enforceable agreement that neither case predates October 17, 1988, and resolves or extinguishes with finality the land claim at issue.

(Emphasis added.)

## **2. Wyandotte Claims before the ICC resulted in money judgments that were fully satisfied before passage of PL 602**

85. The Indian Claims Commission Act (the “Act”) was passed in 1946. (Exhibit A, 25 U.S.C. § 461 *et seq.*) The Act created the ICC and was a vehicle for Indian tribes to assert claims before the ICC for money damages against the United States for past perceived transgressions. The only remedy available to tribes bringing claims under the Act was a money judgment. (Exhibit A, Sec. 19.)<sup>8</sup> The Act set forth five categories of claims that could be brought, one of which involved “claims which would result if the treaties, contracts, and agreements between the United States

---

<sup>8</sup> The Exhibits referred to in this Opening Brief are being filed with this Opening Brief along with an index of same.

were revised on the ground of ...unconscionable consideration....” (Exhibit A, Sec. 2.)

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

a. The claim in Docket No. 139 was brought in July 1951 and claimed that the consideration paid for the cessation of certain land by Treaty of Fort Industry, July 4, 1805, was unconscionable. The Wyandotte was awarded a judgment of \$561,424 in docket 139. *Zane ex rel Wyandotte Tribe v. United States*, 618 F. 2d 121 (U.S. Ct. Cl. 1979); *Strong et al v. United States*, 42 Ind. Cl. Comm. 264 (August 10, 1978) (Exhibit B). Funds were appropriated, and this judgment was paid and fully satisfied in October 1978. House Report No. 98-1067 (AR 4612-4616 and Exhibit C) and Senate Report 98-609 (Exhibit D). *See also United States v. Dann*, 470 U.S. 39, 47-50 (1985)(holding that once final ICC or Court of Claims judgments are certified for payment, the funds are deemed appropriated and placed by the United States into an account in the Treasury, and the judgments are deemed fully satisfied thereby discharging the United States of all claims and demands that were the subject of the claims).

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

Senate Report 98-609 (Exhibit C and D); *United States v. Dann*, 470 U.S. 39 (1985).

c. The claims in Dockets 212 and 213 derived from claims for the unconscionable consideration received for lands ceded pursuant to treaties in 1818, 1832, 1836 and 1842 and from an accounting claim for the handling of tribal land monies by the United States. *Zane et al v. United States*, 38 Ind. Cl. Comm. 561 (Aug. 5, 1976). (Exhibit F). The Wyandotte was awarded a judgment of \$200,000 in Dockets 212 and 213. This judgment was appropriated and fully satisfied some time prior to 1984. (Exhibit D, Senate Report 98-609; AR 3967-3972, PL 602; 25 U.S.C. 1402, 1403; *United States v. Dann*, 470 U.S. 39 (1985). *See also Wyandotte Nation*, 437 F. Supp. 2d at 1207 (generally discussing the ICC claims brought by the Wyandotte).

### **3. PL 602 fulfilled the congressional duty under the Indian Tribal Judgment Funds Use or Distribution Act**

87. 25 U.S.C. §§ 1401 *et seq.* was originally enacted in 1973 and is known as the “Indian Tribal Judgment Funds Use or Distribution Act.” Its purpose was to create a process for the Secretary and/or Congress to prepare a plan “for the distribution of funds awarded to any Indian tribe by judgment of the Indian Claims Commission or Court of Claims” within a certain time frame “*after* appropriation of such funds.” (25 § U.S.C. 1402(a) (emphasis added); Exhibit G, House Report 93-377, p. 5, July 16, 1973).

88. Once the funds awarded to a tribe by a judgment of the ICC or Court of Claims had been appropriated, the judgment was satisfied and the United States fully discharged from the claims. *United States v. Dann*, 470 U.S. 39 (1985). As noted above, the ICC judgments in favor of the Wyandotte against the United States had been appropriated in 1979 and prior to 1984. (*See* ¶ 86(a)-(c) above.)

89. In 1982, after the appropriation and satisfaction of the judgments in Dockets 139 and 141, and pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, Congress

passed PL 97-371, in which Congress provided a formula for the distribution of the appropriated ICC judgment funds among the Wyandotte and the Absentee Wyandottes. (AR 3967; Exhibit H.)

90. However, shortly after passage of PL 97-371, the Wyandotte and the Department had concerns about the fairness of the distribution formula set forth in PL 97-371. (HR Report 98-1067, Exhibit C). As a result, Congress revisited the distribution formula and passed PL 602 in 1984, repealing the prior distribution formula of PL 97-371. (AR 3967-3972, PL 602.)

**4. The Wyandotte claims in docket nos. 139, 141, 212 and 213 compared to land claims defined in 25 C.F.R. § 292.2 and the criteria for when land considered to have been taken into trust as part of a “settlement of a land claim” pursuant to 25 C.F.R. § 292.5**

91. The claims in Dockets 139, 141, 212 and 213 did not contain allegations about “the impairment of title or other real property interest or loss of possession that...is “in conflict with the right, title or other real property interest claimed by an individual or entity (private, public or governmental) ....” 25 C.F.R. § 292.2. (¶¶ 85-86(a)-(c) above.)

92. PL 602 did not contain language that resolved or extinguished with finality any claim by the Wyandotte to land which resulted in alienation or loss of possession of some or all of the lands claimed by the Wyandotte – the Wyandotte claims had long ago been extinguished and it lost no possession of land nor was any alienated as a result of its passage. 25 C.F.R. § 292.5(a). (AR 3967-3972, PL 602.)

93. The land in Park City was not acquired under a settlement agreement relating to a land claim that was executed by the Wyandotte and the United States that returned to the Wyandotte all or part of the land claimed by the Wyandotte and that resolved or extinguished with finality any Wyandotte claim regarding returned land, nor was it acquired as part of a final order entered by a court or pursuant to an enforceable agreement that predates October 17, 1988, and which resolves or extinguishes with finality the land claim at issue. 25 C.F.R. §§ 292.5(b)(1)(2).

(AR 3967-3972, PL 602.)

#### **H. Defendants’ May 20, 2020 Gaming Decision**

94. In making her Gaming Decision that the Park City land qualified for gaming under the settlement of land claim exception in IGRA pursuant to 25 U.S.C. § 2719(b)(1)(B)(i), Defendant Sweeney did not mention 25 C.F.R. §§ 292.2 or 292.5. (AR 4482-4493.)

95. On May 16, 2014, the Kansas Attorney General’s office wrote then Secretary Jewell and noted that pursuant to 25 C.F.R. §§ 292.2 or 292.5, the Park City land, even if acquired in trust under the mandatory provisions of PL 602, did not qualify as land taken into trust as part of a “settlement of a land claim” under IGRA. (AR 8683-8687; 6846-6848.)

96. In making her Gaming Determination, Defendant Sweeney chose to rely solely on the 2006 decision *Wyandotte Nation v. Nat’l Indian Gaming Comm’n*, 437 F. Supp. 2d 1193 (D. Kan. 2006). (AR 4491.)

97. The *Wyandotte Nation* case involved the application of the “settlement of a land claim” exception in IGRA to the Shriner Tract trust acquisition. In finding that exception applicable to the Shriner Tract trust acquisition, the court in *Wyandotte Nation* emphasized that the Wyandotte had used all of the \$100,000 set-aside funds from PL 602 that were restricted to the purchase of land, plus earnings, to purchase the Shriner Tract which was then acquired in trust pursuant to the mandatory trust acquisition provisions of PL 602. (*Wyandotte Nation*, 437 F. Supp. 2d at 1210).

98. The Park City land was purchased with funds that were not restricted to the purchase of trust land under PL 602. (See ¶¶ 8-9 above; *see also* pp. 41-45 below.)

99. The court in *Wyandotte Nation v. NIGC* concluded that the term “land claim” as used in the statutory exception in IGRA was not limited to a claim “for the return of land but

rather, includes an assertion of an existing right to the land.” *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d at 1208.<sup>9</sup> The *Wyandotte Nation* court did not discuss the language in the statutory exception. *Id.* at 1207-12.

100. In *Wyandotte Nation*, the court also relied, in part, on a prior NIGC decision involving the Seneca Nation. (*Wyandotte Nation*, 437 F. Supp. 2d at 1207-12). Two years after the *Wyandotte Nation* decision, that NIGC decision was vacated as arbitrary and capricious. (*Citizens Against Casino Gambling v. Hogen*, No. 07-CV-04515, 2008 U.S. Dist. LEXIS 52395, \*203-05 (W.D. N.Y. July 8, 2008).

101. In January 2009, after the decision in *Citizens Against Casino Gaming*, former Defendant Bernhardt, then acting in the capacity as a solicitor in the Office of Solicitor for the Department, issued an opinion that lands acquired by the Seneca Nation with funds from the Seneca Nation Settlement Act (“SNSA”) qualified as land acquired in “settlement of a land claim” by applying the then recently adopted Department regulations found at 25 C.F.R. §§ 292.2 and 292.5 to the SNSA. (Exhibit I, January 18, 2009 opinion letter from David Bernhardt, Office of the Solicitor.)

102. The NIGC agreed with former Defendant Bernhardt’s application of 25 C.F.R. §§ 292.2 and 292.5 to the SNSA. (Exhibit J, NIGC letter of January 20, 2009, pp. 20-21.)

## **ARGUMENT AND AUTHORITY**

### **A. Standard of Review under the Administrative Procedures Act**

#### **1. Arbitrary and capricious standard**

Under the Administrative Procedure Act (“APA”), “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning

---

<sup>9</sup> This construction of the phrase “land claim” is not inconsistent with the definition of “land claim” in 25 C.F.R. § 292.2.



of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. §702.

The APA authorizes the reviewing court to “compel agency action unlawfully withheld” and 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, 1573-75 (10<sup>th</sup> Cir. 1994). The Tenth Circuit has identified the “essential function” of agency review as an analysis of the following: “(1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion.” *Olenhouse*, 42 F.3d at 1574 (citations omitted).

Although the APA’s arbitrary and capricious standard is ordinarily a deferential one, *Utahns for Better Transp. v. United States Dep’t of Transp.*, 305 F.3d 1152, 1164 (10<sup>th</sup> Cir. 2002), such deference is “not unfettered nor always due.” See *Cherokee National of Okla. v. Norton*, 389 F.3d 1074, 1078 (10<sup>th</sup> Cir. 2004) (citations omitted). Moreover, no deference is owed for a clearly wrong agency interpretation. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). In fact, the court is required to “engage in . . . a probing, in-depth review.” *Citizens to Preserve Overton Park*, 401 U.S. at 415.

An agency’s action is arbitrary and capricious if the agency has relied on factors that 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.

*Qwest Communs. Int’l, Inc. v. F.C.C.*, 398 F.3d 1222, 1229 (10<sup>th</sup> Cir. 2005) (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

“The duty of a court reviewing agency action under the ‘arbitrary or capricious’ standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.” *Cliffs Synfuel Corp. v. Norton*, 291 F.3d 1250,



1257 (10<sup>th</sup> Cir. 2002) (quoting *Olenhouse*, 42 F.3d at 1574 (footnote omitted)). The reviewing court must decide “whether the agency considered all relevant factors and whether there has been a clear error of judgment.” *Id.* (quoting *IMC Kalium Carlsbad, Inc. v. Interior Bd. Of Lands Appeals*, 206 F.3d 1003, 1012 (10<sup>th</sup> Cir. 2000)) (further quotation omitted). “Because the arbitrary and capricious standard focuses on the rationality of an agency’s decision making process rather than the rationality of the actual decision, ‘[i]t 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.” *Colorado Wild, Heartwood v. United States Forest Serv.*, 435 F.3d 1204, 1213 (10<sup>th</sup> Cir. 2006) (citing *Olenhouse*, 42 F.3d at 1575). “The agency must make plain its course of inquiry, its analysis and its reasoning.” *Id.* Courts “may not accept...counsel’s post hoc rationalizations for agency action...It is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (internal citation omitted). *See also Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1060 (10<sup>th</sup> Cir. 2014) (explaining that “[w]e will not ... accept appellate counsel’s post-hoc rationalizations for agency action—we must uphold the agency’s action ‘if at all, on the basis articulated by the agency itself’”) (citations omitted).

“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. United States Dep’t of Interior*, 377 F.3d 1147, 1156 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2003) (internal quotation omitted).

When an agency relies on incorrect or inaccurate data, its decision is arbitrary and capricious and should be overturned. *E.g. Resolute Forest Prods. v. U.S. Dep’t of Agriculture*, 187 F. Supp. 3d 100 (D.D.C. 2016) (finding that the Department of Agriculture’s reliance on an unsupported minimum quantity standard made its decision arbitrary and capricious); *see also Sierra Club v. United States EPA*, 671 F.3d 955 (9<sup>th</sup> Cir. 2011) (holding that the EPA’s reliance on older data, and failure to consider newer data, made its decision arbitrary and capricious).

Agency action that is found to be arbitrary and capricious and otherwise not in accordance with the law may be reversed and the matter remanded to the agency to conduct proceedings consistent with such findings. *Wyandotte Nation v. Nat’l Indian Gaming Comm’n*, 437 F. Supp. 2d 1193, 1219 (D. Kan. 2006).

## **2. Agencies Must Comply with Their Own Regulations**

The Administrative Procedures Act has been “interpreted ...to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations.” *Cherokee Nation of Okla. v. Norton*, 389 F. 3d 1074, 1078 (10<sup>th</sup>. Cir. 2004) (citing *Miami Nation of Indians of Ind. Inc. v. United States Dep’t of the Interior*, 255 F. 3d 342, 348 (7<sup>th</sup>. Cir. 2001); *Utahns v. United States Dep’t of Transp.*, 305 F. 3d 1152, 1165 (10<sup>th</sup>. Cir. 2002)). *See also, Cotton Petroleum Corp. v. United States Dep’t of Interior, Bureau of Indian Affairs*, 870 F. 2d 1515, 1527 (10<sup>th</sup>. Cir. 1989) (“[T]he failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct.” (citing *Simmons v. Block*, 782 F. 2d 1545, 1550 (11<sup>th</sup>. Cir. 1986))).

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

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

### **3. 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. *E.g. Encino Motorcars, L.L.C. v. Navarro*, 136 S.Ct. 2117 (2016); *Renewable Fuels Ass’n v. U.S. EPA*, 948 F.3d 1206 (10<sup>th</sup> Cir. 2020). “An agency must display awareness that it is changing its position and show that there are good reasons for the new policy.” *Renewable Fuels*, 948 F.3d at 1255 (citing *FCC v. Foxtail Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). An unexplained inconsistency in agency policy is a reason for holding an interpretation to be arbitrary and capricious. *Encino Motorcars*, 136 S.Ct. at 2126; *Renewable Fuels*, 948 F.3d at 1255.

Courts have previously prevented governmental entities from taking inconsistent positions with regard to accounting issues, finding such inconsistent positions to be arbitrary and capricious or prohibited by judicial estoppel. *See Bullion v. Federal Deposit Ins. Corp.*, 881 F.2d 1368 (5<sup>th</sup> Cir. 1989); *Alabama v. Shalala*, 124 F. Supp. 2d 1250 (M.D. Ala. 2000). In *Bullion*, the 5<sup>th</sup> Circuit held that it was arbitrary and capricious for the FDIC to discount or discredit certain financial statements in finding a violation but then accepting the discredited financial statements at face value for purposes of imposing a fine. 881 F.2d at 1379. Similarly, the district court in *Shalala* applied the doctrine of judicial estoppel to prevent the state from accepting and relying on an

accounting analysis of the federal share of certain funds in prior proceedings and then changing its position on that issue when the numbers were no longer beneficial. 124 F. Supp. 2d at 1265-68.

**B. The Trust Determination Should Be Set Aside As Arbitrary and Capricious, Violative of Department Policy, Unlawful and an Abuse of Discretion**

- 1. The record from the Shriner Tract trust acquisition established departmental policy that since land worth \$100,000 or more was acquired in trust that was purchased with all of the \$100,000 set-aside by PL 602 for the purchase of land to be taken into trust the “shall” of the law and congressional intent of PL 602 was fulfilled such that no further trust acquisitions can be predicated on the mandatory trust acquisition provisions of PL 602**

PL 602 provided that of the 20% of the funds distributed to the Wyandotte, “a sum of \$100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of the tribe.” This is the “mandatory trust” provision of PL 602 that is at issue in this case and which was invoked a second time for the Park City land pursuant to the May 20, 2020 Decision. (Statement of Fact “SOF” ¶ 94.) The \$100,000 was the only sum of money which PL 602 restricted to the purchase of land that then was subject to the mandatory trust acquisition provision of PL 602.

All of the \$100,000 set aside by PL 602 for the purchase of trust land was spent in 1996 by the Wyandotte to acquire the Shriner Tract. (SOF ¶¶ 16-44.) That purchase triggered the mandatory trust acquisition provision of PL 602.

In the course of the mandatory trust acquisition of the Shriner Tract, the Department established the policy condition that once land worth \$100,000 or more was purchased with the \$100,000 set aside funds and then acquired in trust under PL 602, that fulfilled the Congressional mandate of PL 602, the “shall of the law.” Once so fulfilled, the Department was clear that no future trust acquisitions could be predicated on the mandatory trust acquisition provision of PL 602. (SOF ¶¶ 17, 19, 22, 24, 30-32, 34, 37, 38, 40-41.) This condition was made known to the

Wyandotte, and the Wyandotte readily agreed to it. (SOF ¶¶ 23, 24, 30, 34, 37, 40-41.) This Departmental policy was affirmed and reaffirmed to the District Court and the Tenth Circuit by both the Department and the Wyandotte in the course of the litigation to affirm the legality of the mandatory trust acquisition of the Shriner Tract under PL 602.

Specifically, between February 1996 and July 1996, multiple Department officials articulated this Department policy in no uncertain terms. (SOF ¶¶ 19, 22, 24, 31, 32, 37.) The Wyandotte were made aware of the policy in April 1996, and again in June 1996. (SOF ¶¶ 17, 23-24.) In June 1996, Ms. Deer specifically made the Wyandotte aware that the Shriner Tract “trust acquisition fulfills the Secretary’s mandatory obligation to take land in trust pursuant to Pub. L. 98-602 and that subsequent trust acquisitions must be made under a different statutory authority.” (SOF ¶ 23-24.)

After the Shriner Tract was acquired in trust under the mandatory provisions of PL 602, litigation challenging the legality of that trust acquisition ensued. Both the Department and the Wyandotte approvingly recited this same Department policy from the administrative record to the District Court and to the Tenth Circuit Court in urging those courts to uphold the mandatory trust acquisition of the Shriner Tract under PL 602. (SOF ¶¶ 30, 34, 37-38.) The Wyandotte reminded the Department of this policy during the course of the remand proceedings. (SOF ¶ 41.)

This was not some unknown, obscure Department policy of which the Wyandotte had no notice or opportunity to be heard. It was an unequivocal statement of Department policy that was a specific condition of the Shriner Tract trust acquisition. It was understood and agreed to by the Wyandotte, and it was affirmed multiple times to various courts and to the Department itself for a number of years thereafter.

The Trust Determination fails to make mention of this long established Department policy which recognized that the mandatory provision of PL 602 was exhausted with the Shriner Tract trust acquisition and that it could not be invoked for a second trust acquisition. The complete departure from this Department policy is not addressed, much less explained, in the Trust Determination. As a result, the Trust Determination is arbitrary and capricious and/or the Defendants should be judicially estopped from changing its position as it did in the Trust Determination. *See Encino Motorcars, L.L.C. v. Navarro*, 136 S.Ct. 2117 (2016); *Renewable Fuels Ass'n v. U.S. EPA*, 948 F.3d 1206, 1255 (10<sup>th</sup> Cir. 2020) (citing *FCC v. Foxtail Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Bullion v. Federal Deposit Ins. Corp.*, 881 F.2d 1368, 1379 (5<sup>th</sup> Cir. 1989); *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1265-68 (M.D. Ala. 2000).

The Trust Determination should be reversed and the matter remanded with instructions that the Park City land be deeded out of trust. The Wyandotte Nation is certainly entitled to seek a discretionary trust acquisition for the Park City land if it wishes.

**2. Land purchased with only earnings from the investment of the \$100,000 set aside by PL 602 for the purchase of land to be acquired in trust but none of the principal funds does not trigger the mandatory trust acquisition provision of PL 602**

By its express language, PL 602 restricts only the principal sum of \$100,000 to the purchase of land that then had to be acquired in trust by the Secretary. (SOF ¶¶ 4.) Though Congress was capable of doing so, it did not restrict any other funds distributed by PL 602, or earnings from the investment of those funds, to the purchase of land that would then be required to be taken into trust by the Secretary. (SOF ¶¶ 4.)

Congress has shown that, in enacting a statutory distribution scheme for appropriated judgment funds to Indian tribes awarded as the result of ICC claims, it knows how to pass, and has in fact passed, legislation restricting the use of earnings from the investment of ICC judgment

funds to the purchase of land. (*See* Michigan Land Claims Settlement Act, Public Law 105-143, Section 107(a), 111 Stat. 2658 which is attached hereto as Exhibit K) (specifying that a certain portion of ICC judgment funds distributed to the Bay Mills Indian Community be deposited into a Land Trust with the earnings generated by investments of the funds in the Land Trust be used for enhancement of tribal landholdings through purchase or exchange and providing further that any land acquired with funds from the Land Trust shall be held as Indian lands are held).

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. “When one statute includes particular language, but a related statute omits that language, courts generally presume that Congress acted intentionally and purposefully by including the language in one provision and omitting it from another.” *United States v. Ganadonegro*, 854 F. Supp. 2d 1068, 1081 (D.N.M. 2012) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006)); *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); *National Railroad Passenger Corp. v. Interstate Commerce Com.*, 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).

It is without doubt that the Department and the Wyandotte intended that the Wyandotte use all of the \$100,000 set aside by PL 602 for the purchase of land on the Shriner Tract purchase – and the Wyandotte explicitly acknowledged this to the Department and the courts. (SOF ¶¶ 15, 16, 17, 19, 21, 23, 31, 32, 34, 38, 41.) This was done to make sure that the Congressional intent of PL 602 was fulfilled by assuring that land worth \$100,000 or more was taken into trust on behalf of the Wyandotte and to make sure a second trust acquisition could not be predicated on the mandatory trust provisions of that statute. (SOF ¶¶ 19, 22, 24, 31, 32.)



Moreover, even though the funds for the purchase of the Shriner Tract came from a margin account loan, the Shriner Tract was still treated as having been purchased with “only” PL 602 funds because the PL 602 Bonds were the collateral for that loan. (SOF ¶ 26-27.) In November 1992, the \$25,000 for the Park City land purchase was also raised from a margin account loan. (SOF ¶ 8.) The PL 602 Bonds could not have served as collateral for both margin account loans. Since the record is undisputed that the PL 602 Bonds were entirely attributed to the Shriner Tract purchase because the PL 602 Bonds were the collateral for the margin loan in July 1996, those PL 602 Bonds could not have been used as collateral for the Park City land purchase.<sup>10</sup>

Finally, the 2017 RSM Report, and in turn the Trust Determination, are simply wrong in concluding that the Department or any court has found that the earnings on the investment of the \$100,000 set-aside funds were restricted to the purchase of land that then had to be acquired in trust. (SOF ¶¶ 42-43.) The consistent Department (and Wyandotte) position has always been that while those earnings could be spent at the discretion of the Tribe – only the \$100,000 had to be spent on land that then had to be acquired in trust by the Secretary. (SOF ¶¶ 19, 34, 41.) No court has ever held otherwise.

In this regard, if earnings on the investment of the \$100,000 set-aside funds are not combined with the \$100,000 principal set-aside funds from PL 602 for the purchase of land, those earnings are no different from the any of the other earnings on the investment of the balance of the other non-restricted PL 602 funds distributed to the Tribe. The language of PL 602 and the Department’s long-standing policy is such that those earnings, used alone, cannot trigger a mandatory trust acquisition under PL 602. No court has ever so found to the contrary.

---

<sup>10</sup> No one has ever suggested that PL 602 allows the Wyandotte to repeatedly make margin loans to raise funds to buy land that has to be taken into trust by using the PL 602 Bonds over and over again as the collateral for each loan. That would be a perverse application of PL 602 and contrary to clearly established Department policy of which the Wyandotte were fully aware and to which it had agreed. (SOF ¶ 19, 22, 24, 31, 32).



Since the agency record is undisputed that the Wyandotte used all of the \$100,000 set-aside funds for the purchase of the Shriner tract in 1996, there were no other funds from PL 602 with which to invoke the mandatory trust acquisition provisions of PL 602 a second time. This is because the Park City land was not purchased with any of the principal \$100,000 set-aside funds from PL 602. As such, the Park City land is not eligible for a mandatory trust acquisition under the provision of PL 602. The Trust determination is arbitrary and capricious, violates prior Department policy, is unlawful and an abuse of discretion. It should be reversed.

**3. The Park City land was not purchased with only PL 602 funds and is not eligible to be acquired in trust under the mandatory provision of PL 602**

The law is clear in one regard: To invoke the mandatory trust provisions of PL 602, the land to be acquired in trust must have been purchased with *only* PL 602 funds. *Sac and Fox Nation v. Norton*, 240 F. 3d at 1263-64; *Governor of Kan. v. Norton*, 430 F. Supp. 2d at 1209.

Even if one were to assume that use of only the earnings on the investment of the \$100,000 set-side funds to purchase land could trigger the mandatory trust acquisition provision of PL 602, the Park City land purchase would still fail to qualify for such a trust acquisition because the source of the funds used to purchase the Park City lands was not only the earnings on the PL 602 Bonds.

First, this is exactly what the Wyandotte told the District Court and the Tenth Circuit at a time when it was arguing that the Shriner Tract was purchased with only PL 602 funds and, as such, was properly taken into trust under the mandatory trust acquisition provisions of PL 602. (SOF ¶¶ 48, 49.)

Second, this is exactly what the Wyandotte stated in its financial statements as reported in the Ober Audits. (SOF ¶¶ 65.)

Third, this is what the Wyandotte reflected in its 2006 land-in-trust application for the Park City land and in its Tribal resolution submitted at that time. (SOF ¶¶ 14.)

Fourth, this conclusion is also compelled for the following additional reasons:

a. At the time of the purchase of the Park City land in November 1992, there was only \$3,200 in cash in the Commingled Account. (SOF ¶¶ 9.) Thus, the Wyandotte had to resort to a margin loan from the Commingled Account to raise the \$25,000 to purchase the Park City land. (SOF ¶¶ 8.) A margin loan by definition is an “extension of credit collateralized exclusively by liquid and readily marketable debt or equity securities, or gold....” (12 C.F.R. § 3.2). As noted above, the PL 602 Bonds could not serve as the collateral for this margin loan since they would be devoted in their entirety in July 1996 to the Shriner Tract purchase.

The only way the margin loan of \$25,000 could have been made in November 1992, was by using non-restricted investment assets in the Commingled Account as the requisite collateral since the PL 602 Bonds cannot be used twice. Since the use of investment assets purchased with the \$100,000 set-aside funds (the PL 602 Bonds) as collateral for the \$180,000 margin loan in July 1996 was deemed the functional equivalent of actual use of those set-aside funds for the Shriner Tract purchase (SOF ¶¶ 26, 27), the same must hold true for the \$25,000 margin loan made in November 1992. The use of investment assets acquired with non-restricted funds as the collateral for that \$25,000 margin loan must be deemed the functional equivalent of actually using those non-restricted funds to purchase the Park City land.

Accordingly, it must be concluded that the Park City land was purchased with none of the PL 602 set-aside funds and instead was purchased with non-restricted funds that were used to acquire the investments assets that served as the collateral for that \$25,000 margin loan.

b. By the end of November 1991, the Wyandotte had withdrawn all but \$529.91 of the cash and earnings on the PL 602 Bonds from the Segregated Account. (SOF ¶¶ 7, 73.) The PL 602 Bonds could not have generated enough earnings between November 30, 1991, and the

purchase of the Park City land in November 1992 to generate \$25,000. (SOF ¶ 74; *See also*, Exhibit L, ¶ 6, Affidavit of CPA Jerrold L. Gottlieb, which is incorporated herein by this reference.) That is the reason the Wyandotte had to resort to a margin loan in the first place – they had spent virtually all of the earnings.

c. CPA Jerry Gottlieb reviewed the 2017 RSM Analysis and the Ober Audits, among other materials. (Exhibit L, ¶4 (a)-(f)). Mr. Gottlieb prepared two charts as demonstrative aids.<sup>11</sup> Exhibit 1 to Mr. Gottlieb’s Affidavit is a chart he prepared that reveals what happens if one uses the actual account balance in the Segregated Account on August 31, 1991, but thereafter performs all of the same calculations exactly as RSM did through the same time frame in 1996. The result is there would not have been enough money in July 1996 to purchase of the Shriner Tract for \$180,000 with the \$100,000 set-aside funds, plus earnings, *if* the \$25,000 in November 1992 came from the earnings on PL 602 Bonds. (Exhibit L, ¶ 9 and Exhibit 1 to Gottlieb Affidavit.)

d. Exhibit 2 to Mr. Gottlieb’s Affidavit reveals what happens if the Veres Investment loss had been allocated on a pro-rata basis to the earnings on the investment of the PL 602 set-aside funds, as was done in the Wyandotte financial Statements and the Ober Audits, and all other calculations are performed exactly as RSM performed them, including using the inflated “accumulated earnings” number for the earnings on the investment of the PL 602 Bonds. The result is there would not have been enough money in July 1996 to purchase the Shriner Tract for \$180,000 with the \$100,000 set-aside funds, plus earnings, *if* the \$25,000 in November 1992 came from the earnings on PL 602 Bonds. (Exhibit L, ¶ 10 and Exhibit 1 to Gottlieb Affidavit.)

---

<sup>11</sup> These Gottlieb materials would have been presented to the Department had the State been given the opportunity or even notified as an interested party. Here, they are in the nature of demonstrative aids and are supported by documents in the Administrative Record. While obviously the State was unable to present them to the Department for its consideration prior to May 20, 2020, they illustrate the deficiencies of the 2017 RSM report and the Department’s misplaced reliance on same.

The Department accepted or overlooked the flawed assumption made by RSM about the restricted nature of the earnings on the investment of the \$100,000 set-aside funds that controlled RSM's calculations. (*See* SOF ¶¶ 68). The Department accepted or overlooked the multiple inconsistent accounting maneuvers RSM engaged in its review of the Wyandotte's financial statements and balance sheets and the Ober Audits. (*See* SOF ¶¶ 75).

In reality, the record is clear the Park City land was not purchased with only the earnings on the PL 602 Bonds. Obviously, none of the principal PL 602 Bonds were used for that purchase. The Park City land was purchased with the proceeds of a margin loan in the amount of \$25,000 in November 1992. That loan could only have been made by using as collateral investment assets in the Commingled Account. Since the PL 602 Bonds could not have served as that collateral, the requisite collateral had to have been acquired with the other unrestricted funds distributed to the Wyandotte pursuant to PL 602.

As such, the Trust Determination that the Park City land was purchased with only PL 602 funds was arbitrary and capricious, was not supported by the facts in the record and lacks a reasoned basis. It should be reversed.

**C. The Gaming Determination Should be Reversed: the 2008 Department Regulations Defining "Land Claims" and the "Criteria for When Gaming Can Occur On Newly Acquired Lands Under A Settlement of a Land Claim" Govern the Gaming Determination and Compel a Reversal of that Decision**

**1. The *Wyandotte Nation v. NIGC* Decision**

To ascertain the plain meaning of a statute, courts look "to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Statutory interpretation "requires consideration of the entire statute, not an isolated provision or phrase. Statutory language should be given a meaning that is most in accord with the context and ordinary usage, and also most compatible with the

surrounding body of law.” *Citizens Against Casino Gaming*, 2008 U.S. LEXIS 52395 at \* 174 (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring)). Statutory language must not be considered in isolation, and the court must consider the “language and design of the statute as a whole.” *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (quoting *K-Mart Corp.*, 486 U.S. at 291). The Tenth Circuit has noted that it is a “fundamental rule of statutory construction that all parts of a statute must be read together.” *United States v. Lonedog*, No. 02-8065 2003, U.S. App. LEXIS 11678, \*552 (10<sup>th</sup> Cir. June 12, 2003) (quoting *United States v. Diaz*, 989 F. 2d 391, 392 (10<sup>th</sup> Cir. 1993)).

In determining whether a statute is ambiguous, “the Court employs traditional tools of statutory construction, including examination of the statute’s text, structure, purpose, history, and the relationship to other statutes.” *Barnes v. Akal Sec, Inc.*, No. 04-1380-WEB, 2005 U.S. Dist. LEXIS 12268, \*17 (D. Kan. June 20, 2005) (citations omitted). A statute is ambiguous when it is capable of being understood in two or more different senses. *Keller Tank Servs. II v. Comm’r*, 854 F. 3d 1178, 1197 (10<sup>th</sup> Cir. 2017) (agreeing with Tax Court that IRS regulation was ambiguous because it could be fairly be read to suggest two different possible meanings); *see also Abercrombie v. Aetna Health, Inc.*, 176 F. Supp. 3d 1202, 1207 (D. Colo. 2016).

The statutory language at issue in this case is contained in 25 U.S.C. § 2719(b)(1)(B)(i) and permits gaming on land acquired in trust after October 17, 1988, if the “lands are taken into trust as part of a settlement of a land claim.” This statutory phrase is not defined in IGRA, and Congress has not directly addressed the construction of the statutory language. The language of this exception can be fairly interpreted to apply to land taken into trust as part of an actual settlement of a land claim and not land that is taken into trust pursuant to a Congressionally mandated distribution of previously appropriated and paid judgment funds from ICC claims for

money damages that does not involve any settlement between the Wyandotte and the United States. The Department considered the statutory language in this IGRA exception sufficiently ambiguous that it saw fit in 2008 to promulgate the regulations found at 25 C.F.R. §§ 292.2 and 292.5. In doing so, the Department announced in 2008 that 25 C.F.R. Part 292 “contains procedures that the Department of the Interior will use to determine whether” the “settlement of a land claim” exception at 25 U.S.C. § 2719(b)(1)(B)(1) applies. (SOF ¶ 82.)

The court in *Wyandotte Nation v. NIGC* never found that the statutory language of this IGRA exception as a whole was unambiguous. At most, the court in *Wyandotte Nation v. NIGC* construed the term “land claim” (which is but a part of the entire statutory language at issue), 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 v. NIGC*, 437 F. Supp. 2d at 1208.<sup>12</sup> That is as far as the court went. The balance of the language in the statutory exception is not analyzed at all; it certainly was not declared to be unambiguous as a whole. *See id.* at 1207-12. The *Wyandotte Nation* decision determined 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 but not because of a finding of unambiguity in the whole of the language of the statutory exception. *Id.* at 1210.

## **2. *Chevron* and *Brand X*: The subsequent Agency Regulations at 25 C.F.R. §§ 292.2 and 292.5 trump the *Wyandotte Nation v. NIGC* Decision**

“When a court reviews an agency’s legal determination, it generally applies the analysis set out by the Supreme Court in *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837 (1984).” *Sinclair Wyo. Ref. Co. v. United States EPA*, 874 F. 3d 1159, 1163 (10<sup>th</sup> Cir. 2017). “*Chevron* applies

---

<sup>12</sup> It is respectfully submitted that this construction of the phrase “land claim” is not inconsistent with the definition of “land claim” in 25 C.F.R. § 292.2.

when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The regulations adopted by the Department in 25 C.F.R. §§ 292.2 and 292.5 meet this threshold requirement. *See also* 73 Fed. Reg. 29354, 29375-77 (providing the authority for issuance of the 2008 regulations.)

Under *Chevron*, the first step is to determine “whether Congress has directly spoken to the precise question at issue.” *Sinclair Wyo. Ref. Co.*, 874 F. 3d at 1163 (citing *Chevron*, 467 U.S. at 842-43). If “Congress has ‘not directly addressed the precise question at issue’-if ‘the statute is silent or ambiguous with respect to the specific issue’-the court must determine at *Chevron* step two ‘whether the agency’s answer is based on a permissible construction of the statute.’” *Id.* (citing *Chevron*, 467 U.S. at 843-44). The agency’s answer in the form of the regulations found at 25 U.S.C. §§ 292.2 and 292.5 are certainly a permissible construction of IGRA’s statutory exception at issue.

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



when a prior court decision (such as that in *Wyandotte Nation v. NIGC*) is in conflict with a subsequent agency construction such as those promulgated in 25 U.S.C. §§ 292.2 and 292.5:

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

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

The Supreme Court explained that a contrary rule

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

*Id.* at 983.

Finally, the Supreme Court noted that

*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's



holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes...The precedent has not been "reversed" by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law.

*Id.* at 983-84.

The Tenth Circuit has recognized and followed these basic principles. *See Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10<sup>th</sup> 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 *National Cable & Telecommunications Ass'n*, 545 U.S. at 982, emphasis added)).

As noted above, in *Wyandotte Nation*, the court construed only a portion ("land claim") of the operative statutory exception that as a whole reads that "[s]ubsection (a) (prohibiting gaming on land acquired in trust after October 17, 1988) will not apply when lands are taken into trust as part of a settlement of a land claim." The court in *Wyandotte Nation* construed only the term "land claim"—and it was construed to include a claim involving the assertion of an existing right to the land. (*Id.* at 1207-1210.) While the court thereafter went on to apply the "settlement of a land claim" exception to the Shriner Tract trust acquisition, it was not because of an analysis that concluded that the entire statutory exception language was unambiguous. (*Id.*)

As such, the holdings by the United States Supreme Court and the Tenth Circuit repudiate the conclusion made in the Gaming Determination that the *Wyandotte Nation v. NIGC* decision controls the Gaming Determination. That Determination should have been governed by 25 C.F.R. §§ 292.2 and 292.5, which were adopted two years after the *Wyandotte Nation* decision.

The suggestion that the provisions of 25 C.F.R. Part 292 control the Department's gaming decisions from and after the adoption of those regulations should come as no surprise. The

Department's Office of Indian Gaming states in its "Overview" website page that 25 C.F.R. Part 292 governs gaming on trust lands acquired after October 17, 1988 which involves the exceptions set forth in 25 U.S.C. § 2719. (Exhibit M.) The Department has consistently held to this position on many occasions:

a. In September 2015, the Department stated in its Record of Decision involving the Mashpee Wampanoag Tribe that the question of "whether the Mashpee and the Taunton Sites qualify as the Tribe's initial reservation for gaming purposes is ***governed*** by prior IGRA and the Department's implementing regulations at 25 C.F.R. Part 292." (Exhibit N, excerpts of September 15, 2015 Record of Decision, p. 53, emphasis added.) Later the Department stated in the same decision that because the Tribe had no proclaimed reservation on the effective date of Part 292, August 25, 2008, the Tribe must meet the requirements of Part 292.6(d). (*Id.* at p. 54);

b. On January 19, 2017, the Department stated in its decision letter to the Governor of Oklahoma with regard to the two-part determination exception in 25 U.S.C. 2719(b)(1)(A) in IGRA that the "Department's regulations at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20 of IGRA (25 U.S.C. § 2719). Subpart C of Part 292 ***governs*** the Secretarial Determination. (Exhibit O, excerpts from decision letter, p. 13, emphasis added.);

c. On October 7, 2019, the Department stated told the Tule Indian Tribe that the "Department's regulations at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20 of IGRA (25 U.S.C. § 2719). Subpart C of Part 292 ***governs*** the Secretarial Determination." (Exhibit P, excerpts from decision, p. 6, emphasis added.)

d. On March 12, 2020 in its decision letter to the Catawba Indian Nation addressing whether the Nation met the restored lands exception in IGRA, the Department noted that the Departments regulations at 25 C.F.R. Part 292 implemented Section 20 of IGRA. (Exhibit Q,

excerpts from Decision letter, p. 3.) The Department noted that the Section 20 restored lands exception applied “only when all of the exceptions in this section (Section 292.7) are met...”. *Id.* The Department went on in the decision to meticulously describe how a tribe must meet the requirements of Sections 292.8, 292.9, 292.11 and 292.12. (*Id.* at 4, 6 and 11).

e. On December 16, 2020, the Department told the Little River Band of Ottawa Indians that the “Department’s regulations at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20 of IGRA (25 U.S.C. § 2719). Subpart C of Part 292 *governs* the Secretarial Determination.” (Exhibit R, excerpts from decision, p. 7, emphasis added.)

f. On January 8, 2021, in connection with the two-part determination exception in IGRA involving the Tejon Indian Tribe, the Department stated that the “Department’s regulations at 25 C.F.R. Part 292 set forth the procedures for implementing Section 20 of IGRA (25 U.S.C. § 2719). Subpart C of Part 292 *governs* the Secretarial Determination.” (Exhibit S, excerpts from decision, p. 6, emphasis added).

### **3. PL 602 – properly characterized – fails to satisfy the criteria for the “settlement of a land claim” criteria in 25 C.F.R. §§ 292.2 and 292.5**

Though Defendant Sweeney refers to PL 602 as the “Settlement Act” in the Decision (AR 4482), this is a label of the Department’s origin and not from the congressional record or PL 602 itself. This moniker appears to have been selected to suggest that there was some form of “settlement” involved in PL 602 to make it seem as if it fits within the exception for “land taken into trust as part of the settlement of a land claim” in IGRA.<sup>13</sup> However, PL 602 reveals no language identifying any kind of settlement between the Wyandotte and the United States nor any of the other criteria set forth in 25 C.F.R. § 292.5. (SOF ¶ 4.)

---

<sup>13</sup> A similar approach seems to have been followed when referring to the earnings on the investment of the \$100,000 set-aside funds as the “Land Acquisition Funds” when PL 602 only designates the \$100,000 set-aside funds as funds that shall be used for the acquisition of land that then was required to be accepted into trust under PL 602. (AR 4482).

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, emphasis added.) The only instance that meets the criteria for this exception where Congress has not enacted a settlement into law involves a settlement of a land claim that is not executed by the United States, but “is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.” 25 C.F.R. § 292.5(b)(2).

PL 602 fails to meet any of the criteria in 25 C.F.R. § 292.5. PL 602 is not a Congressionally enacted settlement, i.e., “an agreement ending a dispute or a lawsuit.” *Black’s Law Dictionary* (11<sup>th</sup> Ed. 2019) (defining “settlement”). Lawsuits between the Wyandotte and the United States initiated before the ICC were all ended by *judgments* entered against the United States – not settlements.<sup>14</sup> (SOF ¶ 86(a)-(c).)<sup>15</sup> These judgments awarded money damages to the Wyandotte for what they claimed was unconscionable consideration for the cession of lands to the United States in the 1800’s. *Id.* This is not in dispute.

There are actual Indian land claim settlements that Congress has enacted into law that meet the criteria of 25 C.F.R. §§ 292.2 and 292.5. These Congressionally enacted settlement acts followed the adoption in 1966 of 28 U.S.C. § 1362, the Indian jurisdiction statute that gave federal courts original jurisdiction over civil claims by recognized Indian tribes arising under the Constitution, laws or treaties of the United States, without regard to amount in controversy. Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment*:

---

<sup>14</sup> However, many ICC claims did result in settlements – just none of the Wyandotte’s claims. “Out of the 94 final awards by 1966 for a total of \$194 million, settlement was negotiated in 38 for \$87 million. Thirty other compromise settlements had been reached on secondary considerations such as offsets.” United States Indian Claims Commission, Final Report, at 15 (Sept. 30, 1978) [https://www.narf.org/nill/documents/icc\\_final\\_report.pdf](https://www.narf.org/nill/documents/icc_final_report.pdf).

<sup>15</sup> A judgment is a “court’s final determination for the enforcement of the rights and obligations of the parties in a case.” *Black’s Law Dictionary* (11<sup>th</sup> Ed. 2019) (defining “judgment”).

*Changing the Balance of Power*, 39. Vill. L. Rev. 525, 528 (1994). After some initial success by the Oneida Indian Nation, Indian tribes filed numerous claims for lands in the Eastern United States and elsewhere. *Id.* at 546. Some were settled, and the settlements resulted in the passage by Congress of a number of land claim settlement acts. *Id.* at 547 n.127 (listing nine Indian land claim settlement acts passed by Congress as of 1994). A number of these settlement acts had been passed by Congress at or before the enactment of IGRA in October 17, 1988, which in its original form contained the “settlement of a land claim” exception at issue in the case at bar.

One of the Congressionally enacted settlement acts, the “Rhode Island Indian Claims Settlement Act”, 25 U.S.C. §§ 1701-1716, is attached as Exhibit T for illustration and contrast purposes. This Rhode Island Indian Land Claims Settlement Act contained the criteria listed in 25 C.F.R. §§ 292.2 and 292.5, including existing Indian claims to land, (25 U.S.C. § 1701), the entry into an actual settlement agreement (25 U.S.C. § 1701) and the “extinguishment of aboriginal title claimed” (25 U.S.C. § § 1705, 1712), among other items. One could fairly conclude that this is the type of “settlement of a land claim” Congress had in mind when adopting that exception in IGRA in October 1988.<sup>16</sup>

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

---

<sup>16</sup> The Rhode Island Indian Land Claim Settlement Act, along with the Maine Indian Settlement Act, were referenced in IGRA’s legislative history, evidencing Congress’ awareness of same at the time IGRA was passed. *See* Exhibit U, Senate Report 11-446, p. 12, Senate Select Committee on Indian Affairs, Aug. 3, 1988.

PL 602 did not effectuate the “appropriation” of money in satisfaction of judgments” awarded to the Wyandotte by the ICC or Court of Claims. (SOF ¶¶ 86(a)-(c); 88-90.); *Sac and Fox Nation of Missouri*, 240 F. 3d at 1255 n.7 (10<sup>th</sup> Cir. 2001). PL 602 contains absolutely no appropriation language. (AR 3967-3972.) This is undisputed as well.

The funds to satisfy the ICC judgments in favor of the Wyandotte were appropriated and paid years prior to passage of PL 602. Once the funds were so appropriated and paid (regardless of whether they had then been distributed), the judgments were deemed fully satisfied, and the ICC purported “land claims” against the United States were fully extinguished at that time. *United States v. Dann*, 470 U.S. 39, 47-50 (1985). That is how and when the purported “land claims” asserted by the Wyandotte against the United States were extinguished—not by any settlement and certainly not by anything set forth years later in the distribution scheme provided by Congress in PL 602.

**4. PL 602 is not a “land claim” nor is it a Congressional enactment that involved a settlement of a land claim as defined in 25 C.F.R. §§ 292.2 and 292.5**

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

First, although certain Congressional acts that are significantly and legally distinguishable from the provisions of PL 602 may in fact qualify as a settlement of a land claim where they enact and effectuate actual settlements (see e.g., 25 U.S.C. § 1701 *et seq.*), a Congressional act itself cannot be construed as a land claim because, among other things, it is not a claim brought by a Tribe.

Second, PL 602 cannot be construed as a settlement of a land claim because it did not involve a settlement. Unlike all actual Congressional land claim settlements, PL 602 does not mention or reference any settlement of a land claim. It could not do so because there never was a

settlement of the Wyandotte's claims for additional compensation for the lands it ceded to the United States. Although efforts were made to settle the claim (and in many other cases, the ICC accepted settlements and entered them as final orders), in this case, the settlement efforts were unsuccessful. As such, the ICC and the Court of Claims issued judgements on the Wyandotte's claims. No "settlement of a land claim" was ever "entered as a final order" by the ICC or the Court of Claims.

Third, PL 602 did not resolve or extinguish with finality the Wyandotte's purported land claims in whole or in part. Rather, it resolved a disagreement concerning Congress's prior formula for allocating between the Wyandotte and the Absentee Wyandottes the funds the ICC and the Court of Claims awarded to these groups for unconscionable compensation concerning the cession of their lands. All actual Congressional land claim settlements contain clear and express language extinguishing with finality the respective tribe's land claims. PL 602 contains no such language.

Fourth, PL 602 did not result in the alienation or loss of possession of some or all of the lands claimed by the Wyandotte because the Wyandotte's lands were expressly alienated and forever lost when it ceded its lands to the United States more than a hundred years prior in treaties between 1805 and 1842.

Fifth, therefore and 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 is in conflict with that claimed by an individual or entity (either in the ceded territory or elsewhere). PL 602 was merely the vehicle for payment of money judgments rendered by the ICC and the Court of Claims in favor of the Wyandotte and Absentee Wyandottes for land ceded to the United States in the 1800's for which they claimed to have received unconscionable compensation.



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

Neither the claims brought by the Wyandotte under the Indian Claims Commission Act (and the final orders rendered pursuant thereto), nor PL 602 (either individually or by some combination of the same) establish that the acquisition of the Park City tract in trust meets the Department's requirements of the "acquired under the settlement of a land claim" exception or any of the other IGRA exceptions. As such, the Wyandotte cannot lawfully engage in gaming on this land regardless of whether it was acquired in trust under PL 602 or not. The regulations govern the Gaming Determination. Defendant Sweeney failed to even address them – much less analyze them. As such, the Gaming Determination should be reversed because it is arbitrary and capricious, clearly wrong and contrary to the agency's own regulations.

**5. Even if the *Wyandotte Nation v. NIGC* decision were not trumped by 25 C.F.R. §§ 292.2 and 292.5, it is completely distinguishable and not authority for applying the "land taken into trust as part of the settlement of a land claim" exception to the Park City land**

**a. The Park City land was purchased with funds over which the Wyandotte had discretionary spending power – and not with the \$100,000 set-aside funds that PL 602 mandated to be used for the purchase of land that then had to be accepted into trust**

Much discussion has been made of the \$100,000 set-aside funds that are at the heart of this case. There is no dispute that PL 602 required \$100,000 to be set aside and used for the purchase of land, as distinguished from all of the other judgment funds previously paid by the United States



in satisfaction of the ICC judgments and distributed to the Wyandotte under PL 602. (SOF ¶ 4.) No doubt that \$100,000 had to be used for the purchase of land and, once so purchased, had to be taken into trust by the Secretary. (AR 3969.) However, if the Wyandotte chose to invest those \$100,000 set-aside funds before purchasing land with the funds, they could spend the earnings as they wished – only the \$100,000 set-aside funds were required to be used for the purchase of land. (SOF ¶¶ 19, 34, 41.)

This is not a novel concept. This was long ago settled by the Department. Indeed, the Wyandotte were fully aware and in agreement. As early as April 1996, in conjunction with the Shriner Tract acquisition, the Department made it clear that “the Tribe *may* spend the accrued interest, [but] *only the \$100,000 must be spent on trust land*.” Therefore, assurances that all of the \$100,000 is expended on the Shriner Tract should be sufficient to ensure that future acquisitions are not covered by this public law.” (SOF ¶¶ 18-20, emphasis added.) The Wyandotte had approvingly relied on this pronouncement by the Department in briefing to the Department, the District Court and the Tenth Circuit. (SOF ¶¶ 30, 34, 38, 40, 41.)

In *Wyandotte Nation*, in deciding whether the Shriner Tract qualified for gaming under the “settlement of a land claim” exception, the court observed there was a material distinction between the use of the \$100,000 set-aside funds that had to be and were used for the purchase of land (the Shriner Tract) and the use of other funds from the ICC money judgments distributed by PL 602 to the Wyandotte over which they exercised spending discretion – such as the earnings on the investment of \$100,000 set-aside funds. In that regard, the court specifically noted:

The NIGC’s focus on the ICC money judgment might pass muster if the Wyandotte had merely purchased the Shriner Tract with money received from a claim brought before the ICC. That is not the case, however, because Congress mandated that the \$100,000 of the Wyandotte’s ICC judgment funds be utilized to purchase land to be taken into trust for the benefit of the Wyandotte as a means of effectuating a judgment that resolved the Wyandotte’s land claims. The Wyandotte used funds

appropriated by Congress in satisfaction of the ICC judgment to acquire the Shriner Tract, and the Secretary, based on the mandate of Pub. L. 98-602, accepted title to the Shriner Tract in trust for the Tribe.

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

There is no dispute that all of the \$100,000 set-aside funds from PL 602 were used for the purchase of the Shriner Tract as noted in *Wyandotte Nation*. (SOF ¶¶ 26-27.) There is no dispute that the Wyandotte used funds *other* than the \$100,000 set-aside funds to purchase the Park City land-funds over which they exercised discretionary spending authority. (SOF ¶¶ 7-9, 26-27, 74; *See also* p. 41-45 above.) According to the court in *Wyandotte Nation*, this could very well be a game changer in application of the “settlement of a land claim” exception to the Park City land trust acquisition according to that Court’s analysis. But it is not mentioned in the Gaming Determination.

The use of these discretionary funds from PL 602 to purchase the Park City land goes *not only* to whether PL 602 can even be invoked as a basis for a second mandatory trust acquisition, but it *also* goes to whether the “settlement of a land claim” exception can be invoked since none of the mandatory \$100,000 set-aside funds were used to acquire the Park City land. The court in *Wyandotte Nation* recognized this important, outcome determinative distinction. Defendants ignored it. This alone renders Defendants’ decision making arbitrary and capricious and not the product of rational decision making.

**b. Defendants fail to address the fact that the “conflicting” Department decision involving the Seneca Nation relied on in *Wyandotte Nation v. NIGC* was later set aside as arbitrary and capricious**

The decision in *Wyandotte Nation* was also based, in part, on the fact that the NIGC’s decision at issue in that case was thought by the court to be in conflict with a prior NIGC decision involving the Seneca Nation. (*Wyandotte Nation*, 437 F. Supp. 2d at 1210-12). This prior

conflicting NIGC decision involved an earlier determination that lands acquired from funds from the SNSA qualified as lands taken into trust under the “settlement of a land claim” exception. *Id.* at 1210. However, the Gaming Determination fails to address the fact that two years after the decision in *Wyandotte Nation*, that conflicting NIGC decision was vacated as arbitrary and capricious. *Citizens Against Casino Gambling v. Hogen*, No. 07-CV-04515, 2008 U.S. Dist. LEXIS 52395, \* 203-05 (W.D. N.Y. July 8, 2008).

Moreover, the aftermath following the decision in *Citizens Against Casino Gaming* is particularly enlightening. In January 2009, former Defendant Bernhardt, then acting in the capacity as a solicitor in the Office of Solicitor for the Department, issued an opinion that lands acquired by the Seneca Nation with funds from the SNSA qualified for the “settlement of a land claim” exception by analyzing the SNSA in accordance with then recently adopted Department regulations found at 25 C.F.R. §§ 292.2 and 292.5. Those are the very same regulations Defendants ignored in their Gaming Determination. (SOF ¶ 94.) The NIGC adopted and agreed with former Defendant Bernhardt’s analysis of 25 C.F.R. §§ 292.2 and 292.5 as applied to the SNSA. (SOF ¶ 102.)

Conversely, a review of PL 602 reveals it fails to contain any of the criteria required by 25 C.F.R. § 292.5. As such, land acquired in trust pursuant to PL 602, and certainly to the extent the land was not purchased with any of the \$100,000 set-aside funds from PL 602, does not meet the “land taken into trust as part of the settlement of a land claim” exception.

For these reasons as well, the Gaming Determination should be reversed as arbitrary and capricious, clearly wrong and not the product of reasoned decision making.

### CONCLUSION

Based on all of the above and foregoing reasons, it is respectfully submitted that the Decision, including the Trust Determination and the Gaming Determination, together and independent of each other, should be reversed and set aside and the Department should be directed to take the Park City land out of trust and to otherwise remand these proceedings for decision making consistent with such a determination.

Respectfully submitted,

PAYNE & JONES, CHARTERED

By: /s/ Mark S. Gunnison

Mark S. Gunnison, KS #11090

Christopher J. Sherman, KS #20379

11000 King Street

Overland Park, KS 66225

(913) 469-4100/(913) 469-0132 Facsimile

mgunnison@paynejones.com

csherman@paynejones.com

OFFICE OF KANSAS ATTORNEY

GENERAL DEREK SCHMIDT

By: /s/ Stephen Phillips

Jeffrey A. Chanay, KS #12056

Stephen Phillips, KS #14130

Brant M. Laue, KS #16857

120 SW 10th Avenue, 2<sup>nd</sup> FL

Topeka, KS 66612-1597

Phone: (785) 296-2215/Fax: (785) 291-3767

jeff.chanay@ag.ks.gov

steve.phillips@ag.ks.gov

brant.laue@ag.ks.gov

*ATTORNEYS FOR PLAINTIFF*

*STATE OF KANSAS*

FISHER PATTERSON SAYLER & SMITH, LLP  
By: David R. Cooper  
David R. Cooper, KS #16690  
3550 SW 5<sup>th</sup> Street  
P.O. Box 949  
Topeka, KS 66601  
(785) 232-7761/(785) 232-6604  
dcooper@fpsslaw.com

*ATTORNEYS FOR PLAINTIFF  
BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF SUMNER, KANSAS*

TRIPLETT WOOLF GARRETSON, LLC  
By: James A. Walker  
James A. Walker, KS #9037  
Tyler E. Heffron, KS #22115  
2959 N. Rock Road, Suite 300  
Wichita, KS 67226  
(316) 630-8100/(316) 630-8101 Fax  
jawalker@twgfirm.com  
theffron@twgfirm.com  
*ATTORNEYS FOR PLAINTIFF  
CITY OF MULVANE, KANSAS*

HALBERT LAW, L.L.C.  
By: Christopher C. Halbert  
Christopher C. Halbert, KS #24328  
112 S. 7<sup>th</sup> Street  
P.O. Box 183  
Hiawatha, Kansas 66434-0183  
(785) 742-7101  
(785) 742-7103 Fax  
halbert@halblaw.com

*ATTORNEYS FOR PLAINTIFF  
SAC AND FOX NATION OF MISSOURI IN  
KANSAS AND NEBRASKA*

PAYNE & JONES, CHARTERED

By: Stephen D. McGiffert

Stephen D. McGiffert, KS #08763

Anna E. Wolf, KS #25810

11000 King Street

P.O. Box 25625

Overland Park, Kansas 66225-5625

(913) 469-4100

F: (913) 469-0132

smcgiffert@paynejones.com

awolf@paynejones.com

*ATTORNEY FOR PLAINTIFF*

*IOWA TRIBE OF KANSAS AND NEBRASKA*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2021, I electronically filed the foregoing with the clerk of the court by using the CM/ECF management system which will send notice of electronic filing to the counsel of record.

/s/ Mark S. Gunnison

Mark S. Gunnison