



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 03 2014

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

Dear Chief Friend:

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

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

PROCEDURAL BACKGROUND

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

¹ The land proposed for acquisition is described as follows:

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

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

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

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

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

COMPLIANCE WITH THE SETTLEMENT ACT

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

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

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

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

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

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

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

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

Decision to Acquire Shriner Tract and Related Litigation

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

The State of Kansas and several Indian tribes⁷ sued the Department challenging the Shriner Tract acquisition. During the course of the litigation, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) agreed with the Department that acquisitions made pursuant to the Act were mandatory, and as such, compliance with the National Environmental Policy Act, 43 U.S.C. §§ 4321 *et seq.* and the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* was not required.⁸ The district court also held that acquisitions made pursuant to the Act were eligible for gaming under the "settlement of a land claim" exception to the Indian Gaming Regulatory Act's prohibition against gaming on lands acquired in trust after October 17, 1988.⁹

Accounting Analysis of 602 Funds for the Shriner Tract Acquisition

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

⁷ The tribal plaintiffs were Sac and Fox Nation of Missouri in Kansas and Nebraska, Iowa Tribe of Kansas and Nebraska, Prairie Band Potawatomi Nation, and Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas.

⁸ *Sac and Fox Nation*, 240 F.3d at 1262-63.

⁹ *Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1211 (D. Kan. 2006) (no appeal taken).

¹⁰ *Sac and Fox Nation*, 240 F.3d at 1263-64.

¹¹ This was an unpublished order issued in *Sac and Fox Nation v. Norton*, No. 96-4129 (D. Kan. Aug. 22, 2001), which was quoted and discussed in *Gov. of Kan. v. Norton*, 2005 U.S. Dist. LEXIS 15299, *7-8 (D. Kan. July 27, 2005).

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

In its analysis of interest earned by the 602 Funds, KPMG treated a withdrawal of \$25,199.67 in 1991¹³ as a withdrawal of 602 Funds for the purchase of the Park City Parcel. After this deduction, KPMG then concluded that by 1996, when the Nation acquired Shriner Tract, the value of any remaining 602 Funds had grown to \$212,169.65.¹⁴ KPMG's analysis also provided the following information:

- In May 1986, the Nation purchased several mortgage bonds with all (or nearly all) of its 602 Funds.¹⁵ The Nation kept these bonds in a separate account from its main bank account through November 1991.¹⁶ Using financial statements provided by the Nation, KPMG traced the interest earned on the bonds between May 1986 and November 1991.¹⁷ KPMG concluded that the value of the 602 Funds had grown to \$156,906.81 by the November 1991 accounting period.¹⁸
- The Nation's November 1991 financial statement showed a withdrawal from the bond account in the amount of \$25,199.67.¹⁹ KPMG treated this withdrawal as a withdrawal of 602 Funds by the Nation to buy the Park City Parcel.²⁰ Accordingly, KPMG reduced the value of the 602 Funds by the amount of the withdrawal to conclude that by the close of November 1991, the value of the 602 Funds was \$131,707.14.²¹

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

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

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

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

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

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

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

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

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

²¹ AR003310 (summarizing 1991 earnings).

- On December 30, 1991, the Nation closed the bond account and transferred the 602 Funds (valued at \$131,707.14 at the time) into its main account, which contained cash, bonds, and other assets totaling \$634,848.93 (net) at the time.²² This commingling meant that KPMG could no longer directly track the value of the 602 Funds; instead, KPMG determined the amount of interest earned by the account overall and then attributed a pro-rated portion of that interest to the 602 Funds.²³
- To determine what portion of the interest earned on the main account was attributable to the 602 Funds, KPMG compared the net value of the account (\$634,848.93) to the value of 602 Funds in December 1991 (131,707.14) and concluded that the 602 Funds represented approximately 20-21 percent of the main account.²⁴ KPMG then, on a monthly basis, attributed approximately 20-21 percent of the interest earned on the main account to the 602 Funds to conclude that by July 1996 – the date on which the Nation purchased the Shriner Tract – the value of the 602 Funds had grown to \$212,169.65.²⁵
- The Nation was unable to provide KPMG with all of its financial statements for 1992 and 1993; as a result, KPMG used estimated interest rates to calculate earnings on 602 Funds when it did not have copies of certain monthly statements.²⁶ Approximately 22 monthly statements from the 1992-1993 period were not provided to KPMG for its analysis.²⁷

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

²² *Id.*; AR003334 (monthly financial statement for the period ending December 31, 1991).

²³ Gruttadaurio Letter at 3.

²⁴ *Id.*; AR003336 (showing the portion of interest KPMG attributed to the 602 Funds for the 1994 period).

²⁵ *See E.g.*, AR003336 (showing the portion of interest KPMG attributed to the 602 Funds for the 1994 period); AR003349 (same, but for the 1995 period); AR003363 (same, but for the 1996 period). *See also* Gruttadaurio Letter at 1.

²⁶ Gruttadaurio Letter at 3; *see* AR003334-36 (providing copies of statements from 1991 and 1994 but not statements from the 1992-1993 period).

²⁷ *Id.*

²⁸ 67 Fed. Reg. 10926 (Mar. 11, 2002). A subsequent notice was published in the *Federal Register* to correct a typographical error in the March 11, 2002 notice and to clarify that the Department had not yet made a determination regarding the gaming eligibility of the Shriner Tract. 67 Fed. Reg. 30953 (May 8, 2002).

²⁹ *Gov. of Kansas v. Norton*, 430 F. Supp. 2d at 1215-17, 1222-25 (D. Kan. 2006) (discussing KPMG Report and analysis by Office of Indian Gaming staff and concluding that Department was not arbitrary and capricious in its decision to accept the findings of the KPMG Report).

³⁰ *Gov. of Kansas v. Kempthorne*, 516 F.3d 833, 846 (10th Cir. 2008). The Quiet Title Act, 28 U.S.C. § 2409a(a), waives the United States' sovereign immunity from suits concerning "disputed title to real property in which the United States claims an interest." "[T]rust or restricted Indian lands" are excluded from this waiver, and such exclusion was, at the time, understood to mean that once land was acquired in trust by the United States, it was no longer subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *See, e.g., Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956, 961-962 (10th Cir. 2004). The United States Supreme Court has since held that unless the plaintiff claims a property interest in the land at issue, this Indian lands exception does not bar challenges to fee-to-trust decisions for land already held in trust if such decisions are

Materials Provided to the Department in Connection with the Pending Application

As part of its pending application for the Park City Parcel, and after the conclusion of the Shriner Tract litigation, the Nation provided documentation to the Department demonstrating that it had purchased the Park City Parcel on November 24, 1992, not on November 29, 1991.³¹ Prior to this time, all parties and the KPMG analysis had assumed that the Nation withdrew 602 Funds in November 1991 to purchase the Park City Parcel. Because, as stated above, the parties did not have copies of most of the statements for 1992 and 1993, it was unknown at the time that the withdrawal of funds actually occurred in 1992.

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

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

The Nation's commingled account consisted of a mix of assets including cash, bonds, and mutual fund investments.³⁵ The Nation provided the Department with a copy of its November 1992 Mercantile statement, which shows that it was issued a disbursement of non-cash assets in the amount of \$25,000 on November 24, 1992.³⁶ Because the account was commingled, we, like KPMG before us, are unable to determine whether the dollars disbursed were actually 602 Fund dollars. Thus, the Nation must demonstrate to the Department that it had enough 602 Funds in its commingled account to cover the Park City Parcel purchase so that we can consider the disbursement of assets on November 24, 1992 an expenditure of 602 Funds that triggers the mandatory acquisition authority under the Act.

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

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

³² *Id.*

³³ *Id.* at 4.

³⁴ *Id.* at 5.

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

³⁶ *Id.*

But this showing is complicated by the later Shriner Tract acquisition, which the Nation, the Department, and the district court all have agreed was completed using wholly 602 Funds (plus interest). Because the Nation now states that it purchased the Park City Parcel, like the Shriner Tract, from the commingled account, the Park City Parcel can be a mandatory acquisition under the Act only if the Nation had sufficient 602 Funds in the commingled account to acquire both the Park City Parcel and Shriner Tract.

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

Submissions from the State of Kansas

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

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

³⁷ For example, the State raises several of the same objections to the KPMG Report that it raised during the Shriner Tract litigation, which the Department considered and resolved. *Compare, e.g.*, Letter from Mark Gunnison to Secretary Kenneth Salazar (Oct. 24, 2012) *with Governor of Kansas*, 430 F. Supp. 2d at 1215-17, 1222-25 (discussing the State's objections to the KPMG Report, the Department's response to them, and affirming the Department's reliance on the KPMG Report). The State also contends that Department officials understood that only one acquisition was permitted by the Act when it approved the Shriner Tract acquisition in 1996. *See, e.g.*, Letter from Stephen N. Six, Attorney General, to Larry Echo Hawk, Assistant Secretary – Indian Affairs (Sept. 13, 2010); Letter from Mark Gunnison, Special Assistant Attorney General, to Secretary Sally Jewell (Feb. 12, 2014). Not only does the Act not limit the number of acquisitions by its express terms, the statements the State identifies were made before the Department had the benefit of an accounting of the 602 Funds to know how much the 602 Funds had grown in value by July 1996.

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

³⁹ *Id.*

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

DECISION

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

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

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

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

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

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

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

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

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

⁴² *Id.* at 6.

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

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

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

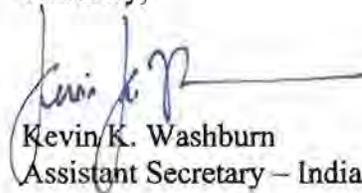
⁴⁶ *Id.* at 6.

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

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

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin K. Washburn", with a horizontal line extending to the right from the end of the signature.

Kevin K. Washburn
Assistant Secretary – Indian Affairs