UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) THE CHEROKEE NATION, (2) CHEROKEE NATION ENTERTAINMENT, LLC, Plaintiff(s) vs. (3) KENNETH L. SALAZAR *in his official capacity as* Secretary of the Interior U.S. Department of the Interior (4) MICHAEL S. BLACK *in his official capacity as* Acting Assistant Secretary for Indian Affairs U.S. Department of the Interior Defendant(s) (5) UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, Intervenor Defendant.	)	Case No. 12-CV-493-GKF TLW

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Federal Rules

Federal Regulations

Other Authorities

INTRODUCTION

This action challenges the validity of the July 30, 2012 decision ("2012 Decision") of the Assistant Secretary of Indian Affairs ("ASIA") to accept land ("Gaming Tract") in trust for the United Keetoowah Band of Cherokee Indians federally chartered corporation ("UKB Corporation"). The Gaming Tract lies within the historical Treaty boundaries of the Cherokee Nation. The Cherokee Nation and Cherokee Nation Entertainment, LLC. ("Plaintiffs") seek a preliminary injunction prohibiting the Secretary of the Department of the Interior ("Secretary" or "DOI") from issuing a deed to the Gaming Tract in trust. The DOI and Intervenor United Keetoowah Band of Cherokee Indians ("UKB") (collectively "Defendants") filed objections to Plaintiffs' motion for injunctive relief, and the Plaintiffs now reply.

ARGUMENTS AND AUTHORITY

I. THE HEIGHTENED BURDEN FOR PRELIMINARY INJUNCTIONS DOES NOT APPLY.

A. Plaintiffs Are Not Required to Meet the Heightened Burden of Proof for Mandatory Injunctions and Injunctions Affording Substantially All Relief.

Defendants argue that Plaintiffs must "satisfy a heightened burden" because they seek an injunction which falls within one of the "disfavored categories" of preliminary injunction. Defendants are wrong.

First, Plaintiffs seek an injunction that is prohibitory, not mandatory. It would *prohibit* DOI from taking land within the Cherokee Nation treaty territory into trust for an entity other than the Nation. By contrast, a "mandatory injunction . . . alter[s] the status quo by commanding some positive act." *Tom Doherty Assocs. v. Saban Enter., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *see Acierno v. New Castle County*, 40 F.3d 645, 647 (3d Cir. 1994); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994); *Martinez v. Mathews*, 544 F.2d 1233, 1242-43 (5th Cir. 1976); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 978

(10th Cir. 2004) (en banc) (affirming preliminary injunction). As discussed in greater detail in Part I.B below, the preliminary injunction sought here will preserve, not alter, the status quo.

The heightened burden for injunctions that afford substantially "all the relief to which a plaintiff may be entitled" is inapplicable because the Cherokee Nation seeks much more than injunctive relief; it seeks relief that should finally end the UKB's attempts to encroach on its sovereign authority over its Treaty territory.[1] Further, if Defendants ultimately prevail on the merits, the effect of a preliminary injunction could be undone:

> [T]he term 'all the relief to which a plaintiff may be entitled' must be supplemented by a further requirement that the effect of the order, once complied with, cannot be undone. A heightened standard can thus be justified when the issuance of an injunction will render a trial on the merits largely or partly meaningless, either because of temporal concerns, say, a case involving the live televising of an event scheduled for the day on which preliminary relief is granted, or because of the nature of the subject of the litigation, say, a case involving the disclosure of confidential information.

O Centro 389 F.3d at 1003 (citations omitted). In this case, a prohibitory injunction preventing the DOI from taking land into trust now would not prevent the DOI from taking that action in the future if the DOI obtains a final judgment in its favor.

B. Plaintiffs Do Not Seek to Alter the Status Quo.

Defendants also argue that Plaintiffs must "satisfy a heightened burden" because they claim the Plaintiffs seek an injunction that would alter the status quo. Defendants argue that the status quo is the conduct of gaming on the Gaming Tract, "regardless of the uncertainty of its legality" (DOI Br. at 8), and "[e]ven *if* the Keetoowah Cherokee did not have the legal right to operate its facility" (UKB Br. at 3).

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[1] In addition to seeking injunctive relief, Plaintiffs seek declaratory judgment that the Cherokee Nation's treaty territory is not a "shared reservation" or "former reservation" of the UKB and that the Secretary's decision to take the land into trust is in violation of the treaties entered into between the Nation and United States. See Doc. 2, p. 35 (Prayer for Relief).

Defendants cite *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp*, 269 F.3d 1149, 1155 (10th Cir. 2001) for the proposition that "[i]n determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights." The reality in this case is that the Gaming Tract is not and never has been held in trust by the United States for the use and benefit of the UKB Corporation. The status quo in this case is that for more than 175 years, no Indian tribe, other than the Cherokee Nation, has exercised exclusive tribal jurisdiction over Indian country within the Nation's historical treaty boundaries.

Whether UKB can or cannot conduct gaming activities on the Gaming Tract is not an issue before this Court. The UKB had its opportunity to fully litigate that issue in *United Keetoowah Band v. Oklahoma*, E.D. Okla. No. 04-cv-340 ("Eastern District case"). Rather than litigate its position, the UKB entered into an agreement with the State requiring closure of the casino if the Gaming Tract was not "actually" in trust by July 30, 2013. Doc. 86-1 at 4. When it became clear that the land would not be in trust by that date, the UKB did not seek injunctive relief in that case. Rather, the UKB merely negotiated with the State for a one-time extension of the agreed closure order, changing the closing date deadline to August 30, 2013. Indeed, the UKB agreed that the order extending the closing date would be the final order entered in that case. The UKB thus had the appropriate action in which it could have argued that the "status quo" of UKB gaming should be preserved, and it chose not to do so.

Instead, Defendants attempt to manufacture a status quo in this action that involves the continuation of unlawful gaming by the UKB. In *Dominion Video Satellite*, the court cautioned against a situation where "any party opposing a preliminary injunction could create a new status quo immediately preceding the litigation merely by changing its conduct toward the adverse

party. To treat such a new status quo as the relationship which an injunction should not disturb would unilaterally empower the party opposing the injunction to impose a heightened burden on the party seeking the injunction." *Id.* at 1155.

As recognized by this Court, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Okla. v. Hobia*, 2012 WL 2995044 (N.D. Okla. July 20, 2012) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). The injunction sought would prevent DOI from taking land into trust during the remaining pendency of this action, preserving the present status of the land as fee land. The preservation of fee status would likewise preserve the status quo regarding the Cherokee Nation's sole tribal jurisdictional authority over trust lands within its treaty territory.

II. CHEROKEE PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

A. Cherokee Plaintiffs Are Likely to Succeed on the Merits.

1. The 2012 Decision that the OIWA Provides Statutory Authority for a Trust Acquisition by a Federal Charter Tribal Corporation Established After the Effective Date of the IRA Was a Clear Error of Judgment.

Despite DOI's claims that "the Assistant Secretary's reliance on OIWA was not an intentional effort to 'circumvent" the temporal limitations on Interior's authority to take land into trust under the IRA as established by the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009)" DOI Br. at 20, the Administrative Record shows otherwise. Doc. 35-4, AR 3237 (June 24, 2009 Decision deferring "final decision" regarding the 76-Acre Tract trust application on whether the Department had "authority to take this land into trust for the UKB" until it had "developed a more comprehensive understanding of *Carcieri* and its impact on tribes throughout the country"); Doc. 35-4, AR 3249 (July 30, 2009 ASIA request that the UKB, the Cherokee Nation and the Regional Director address "the issue of the import, if any, of the

Carcieri v. Salazar Decision"); Doc. 35-4, AR 3253-3254 (September 10, 2009 ASIA decision attempting to circumvent the *Carcieri* decision by offering the UKB three options[2] to secure the benefit of trust ownership, including "invoke my authority under Section 3 of the Oklahoma Indian Welfare Act (OIWA) and seek to have the land held in trust for the UKB Corporation"). The Secretary unquestionably determined that *Carcieri* prohibited the Department from acquiring the land into trust for the UKB.

The DOI asserts that "the Assistant Secretary determined that *OIWA provides him with statutory authority to acquire land in trust for tribes, including the UKB*, that were organized thereunder absent *Carcieri's* temporal limitation on trust acquisitions under the IRA, such that no *Carcieri* analysis was required." (DOI Br. at 21-22 (emphasis added).) However, that is not what the Secretary determined. The Secretary did not propose to take the land into trust for the UKB, but for the UKB Corporation.

Having devised a scenario to circumvent the Supreme Court decision, the Secretary still had to find the authority under Section 3 of the OIWA to take the land into trust for the UKB Corporation. In her brief, the Secretary states: "Interior's land acquisition regulations require that the statutory authority for a trust acquisition in the name of a tribal corporation must provide '*specific*' authority, 25 C.F.R. § 151.2(b), but not necessarily 'express' or 'explicit' authority for a trust acquisition on behalf of a tribal corporation." (DOI Br. at 23 (emphasis added).) The referenced §151.2(b) provides:

> *For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered* under section 17

[2] The options were first offered in the 76-Acre Tract trust application. See Doc. 35-4, AR 3253. These same options were available to the UKB in the Gaming Tract trust application. *See* July 30 Decision, Doc. 28-4, AR 22 ("reaffirming a decision that land could be taken into trust on the former Cherokee reservation for the UKB Corporation").

> of the Act of June 18, 1934 (48 Stat. 988, 25 U.S.C. 477) *or section 3 of the Act of June 26, 1936* (49 Stat. 1967; 25 U.S.C. 503). (Emphasis added.)

However, in the 2012 Decision, the Secretary stated "that Section 3 of the OIWA, 25 U.S.C. § 503, *implicitly* authorizes the Secretary to take land into trust for the UKB Corporation." According to the Merriam-Webster Online Dictionary, "implicit" means "capable of being understood from something else though unexpressed." "Specific" means "free from ambiguity." 25 C.F.R. § 151.2(b) does not confer upon the Secretary the "implicit" authority to take land into trust for a corporation chartered under Section 3 of the OIWA. The Secretary is exceeding her authority by taking such land into trust for the UKB Corporation.

2. The 2012 Decision that the Cherokee Nation's "Former Reservation" is Also the "Former Reservation of the UKB Under IGRA Was a Clear Error of Judgment and So Implausible That It Could Not Be Ascribed to A Difference in View or the Product of Agency Expertise.

DOI argues that the 2012 Decision was "reasonable," and therefore the Cherokee Nation has little likelihood of success on the merits. (DOI Br. at 16.) DOI asserts that the regulatory definition of "former reservation," 25 C.F.R. §292.2, is ambiguous, and that the "IGRA grants the Secretary broad authority" to define a tribe's "former reservation" boundaries. (*Id.* at 17.) However, there is no ambiguity in the regulatory definition. (*See* Pl. Br. at 11.) Furthermore, even if there were ambiguity, the ASIA misapplied the Indian canons of construction in the 2012 Decision, Doc. 28-4, AR20, which do not support the construction of a statute in cases where, as here, there are Indians on different sides of an issue and construing a statute in favor of some Indians will adversely impact other Indians. *See, e.g., Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995); *Cherokee Nation of Okla. v. Norton*, 241 F. Supp. 2d 1374, 1380 (N.D. Okla. 2002.

UKB appears to argue that the ASIA is not bound by the express regulatory reference to the establishment of a tribe's reservations by treaty, executive order or Secretarial order

contained in the regulatory definition of "former reservation," 25 C.F.R. § 292.2. DOI only references the 2012 Decision's summary conclusions about the relationship between the UKB and the Cherokee Nation and simply ignores the legal history of the Cherokee Nation. (DOI Br. at 17.) DOI ignores the Cherokee Nation's rights of self-government which predate the formation of the United States and which were guaranteed by the United States in its treaties with the Nation. *See Talton v. Mayes*, 163 U.S. 376, 380, 384 (1896). It ignores the fact that every federal treaty or law related to Indian Country within the Nation's historical boundaries recognizes the Cherokee Nation's exclusive tribal authority. (*See* Pl. Br. at 2-3.) It ignores the fact that the Cherokee Nation's treaties and its 1902 allotment act, which required issuance of deeds to Cherokee citizens by the Principal Chief, contain no references to the Keetoowah or the UKB.

In making its arguments, DOI also ignores that the UKB Constitution, adopted in 1950 pursuant to the OIWA, neither claims nor defines any geographic or territorial jurisdiction of the UKB. Doc. 45, AR1749-1758.[3] DOI further states that the ASIA "looked to the express affirmation by Congress of the UKB in the Act of August 10, 1946." (DOI Br. at 17.) DOI fails to note that the 1946 Act contains nothing more than an authorization of the UKB to organize under the OIWA, and fails to include any authorization of infringement on the territorial jurisdiction of the Cherokee Nation.

DOI argues that the ASIA's interpretation of the term "former reservation" as applied in this case is entitled to deference. (DOI Br. at 18.) Although DOI cites three cases involving groups seeking to obtain federal recognition of tribal status under 25 C.F.R. Part 83, none of these concern trust applications or interpretations of the definition of "former reservation" under

[3] In contrast, the Cherokee Nation's Constitutions have consistently referenced a territorial area. Second Declaration of Todd Hembree, Exs. B, C, and D.

IGRA. *Id*. The Department approved a regulatory definition of "former reservation" in 25 C.F.R. § 292.2, which does not authorize Secretarial determinations on a case-by-case basis with no reference to tribal treaty protections. DOI asserts that the ASIA had discretionary authority to decide that "the two tribes had previously 'occupied' the same reservation." (DOI Br. at 19.) The ASIA does not have discretionary authority to extinguish a tribe's treaty rights within its treaty territory or to ignore federal court decisions. The Cherokee Nation's treaty territory was established in 1838. No UKB ""tribe" occupied the Cherokee Nation's treaty territory. There was no UKB "tribe"" until 1950 when it organized under the OIWA.

DOI states that the three cases cited in Plaintiffs' Brief are not dispositive and do not "address the merits of the Cherokee Nation's claim of exclusive jurisdiction over the former reservation." (DOI Br. at 19, n.5.) The UKB, somewhat amazingly, characterizes the three decisions as the result of this Court's reliance "upon the Department's position" that the Cherokee Nation "has exclusive jurisdiction." Certainly that has been the position of DOI for many, many years. (*See* Pl. Br. at 14, n.12.) DOI and the UKB have utterly failed to demonstrate that DOI's startling shift to a concept of a shared reservation is supported by a well reasoned interpretation of a regulation or agency expertise, particularly when the change is contrary to decisions of this Court and more than 175 years of government-to-government relationship between the Cherokee Nation with the United States.

The 2012 Decision also violates regulatory consent requirements in 25 C.F.R. § 151.8. (Pl. Br. at 11.) DOI attempts to justify this by stating that the ASIA determined that a 1999 appropriations act, 112 Stat. 2681-246, superseded the consent requirement. (DOI Br. at 20, n.6.) In fact, there is no mention of the 1999 appropriations act in the 2012 Decision's reference to consultation. Doc. 28-4, AR21. Instead, discussion of the 1999 appropriations act was

provided in the ASIA's June 24, 2009 Decision concerning the 76-acre tract. Doc. 35-4, AR3237. This is yet another example of the manner in which DOI bootstrapped previous decisions as support for the 2012 Decision, without the full administrative record. The ASIA's interpretation of the 1999 appropriations act is also erroneous. The 1999 act provides: "[U]ntil such time as legislation is enacted to the contrary, *no funds shall be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma *without consultation* with the Cherokee Nation." Interior and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-246 (emphasis added). Doc. 35-4, AR3237-3238. There is a "'very strong presumption' that appropriations acts do not amend substantive law," and, as a result, appropriations language must be construed narrowly. *Calloway v. District of Columbia,* 216 F.3d 1, 9-10 (D.C. Cir. 2000).

ASIA additionally avoids disclosure that DOI is in effect implementing draft regulations proposed by the Department in 2000 that, if promulgated, would have made it unnecessary to obtain the consent of a tribe to the trust acquisition by another tribe on a "shared reservation." 66 F.R. 3452-01, 3462-01, 2001, WL 31920, proposed rule § 151.11(b) (stating that a tribe, including tribes in Oklahoma, may acquire land in trust on another tribe's reservation if the recognized tribe's governing body consents in writing, except that no consent is required if the proposed acquisition is inside a reservation "that is shared by two or more tribes, and the acquisition is for one of these tribes ..."). This application of a past draft regulation violates the APA, 5 U.S.C. § 553, which establishes procedures for the promulgation of rules that have not been followed. The conclusion that Cherokee Nation consent is not required under § 151.8 is contrary to the decision in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier,* 142 F.3d 1325 (10th Cir. 1998), as well as the Department's ruling in *Kialegee Tribal Town of*

Oklahoma v. Muskogee Area Director, 19 I.B.I.A. 296 (1991). Equally important, it is contrary to the Department's repeated rejections of the UKB's applications to take land into trust in the Cherokee Nation's treaty territory absent the Nation's consent. *See* Doc. 30-17, AR450-452, Ex.1.

B. The Cherokee Plaintiffs Will Suffer Irreparable Harm If a Trust Deed Is Issued Prior to Determination on the Merits.

1. Irreparable Harm Will Occur Because There Is No Statutory and Regulatory Authority for Revocation of a Trust Deed.

There is a significant risk of irreparable harm to the Plaintiffs if a trust deed to the Gaming Tract is issued to the UKB Corporation while this suit is pending, due to the potential irrevocability of the transfer. While purely speculative harm is not sufficient, "[a] plaintiff who can show a significant risk of irreparable harm has demonstrated that the harm is not speculative" and will be held to have satisfied that burden. *Crowe & Dunlevy, P.C.*, 609 F. Supp. 2d 1211, 1222 (N.D. Okla. 2009) (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)). Plaintiffs have met that burden. Defendants contend that the United States Supreme Court decision in *Patchak v. Salazar*, 132 S. Ct. 2199 (2012) means "there is no question that Interior can transfer title and remove the trust status" of the Gaming Tract should it be ordered to do so by this Court. (DOI Br. at 9.) Defendants further cite two 2013 decisions that purportedly support this position. *See Stand Up for Cal.! v. North Fork Rancheria of Mono Indians*, 2013 WL 324035 (D.D.C. Jan. 29, 2013) ("*North Fork*"); *Cachil Dehe Band of Wintun Indians v. Salazar*, 2013 WL 417813 (E.D. Cal. Jan. 30, 2013) ("*Cachil Dehe*"). In both cases, tribal sovereign immunity issues were satisfactorily addressed, and the issuance of trust deeds posed no imminent threat to the territorial jurisdiction of the tribes challenging the acquisitions. However, in both cases, the courts indicated they would be willing to reconsider entering

injunctive relief if the merits of the cases were not resolved before gaming commenced on the land. In *North Fork*, the court held:

> Despite the plaintiffs' insufficient showing of irreparable harm, the Court is mindful that, once the transfer occurs, the likelihood of irreparable harm will increase as this litigation continues. Therefore, the Court will require, during the pendency of this case, that the North Fork Tribe provide notice to the parties and the Court at least 120 days prior to any physical alteration of the land at the Maders Site. To be clear, "physical alteration" includes anything that could reasonably be considered construction activities, the breaking of any ground at the site, or the destruction of any structures that presently exist on the land.

2013 WL 324035, at *26. Likewise, in *Cachil Dehe*, the court concluded:

> While Colusa's concerns might support a finding of irreparable harm is construction and gaming were to occur without any notice, Enterprise and Defendants both represent that 30 days notice will be given before any activity commences at the Proposed Site. Given this promise, they are further ordered to provide such notice to this Court at least 30 days prior to commencing any activity on the Proposed Site. . .The Court has relied on Defendants and Enterprise's representations in determining that irreparable harm is not imminent . . .

2013 WL 417813 at *4. The irreparable harm to Plaintiffs here is evident and obvious. Gaming already is being conducted on the Gaming Tract and will continue upon its transfer into trust.[4] However, for the first time, that gaming will be conducted under the auspices of being located on Indian lands. The Gaming Tract land is located in the middle of the Cherokee Nation's Treaty Territory. It will be the first time in the history of the Cherokee Nation that a foreign Indian tribe will be allowed to take trust land within that Treaty Territory. The harm will be irreparable. Plaintiffs have met their burden on irreparable harm.

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[4] This is true even though any gaming that takes place will be conducted in violation of IGRA and the NIGC regulations. 25 C.F.R. § 559.2(a) requires that a tribe must submit a notice "that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or III gaming will occur." Further, 25 C.F.R. Parts 556 and 558 set out the requirements for licensing gaming facility employees which must be completed on each employee at the time the employee begins work at the facility. Additionally, because the land would be placed in trust for the UKB Corporation, if the UKB purports to continue operating the casino then it must have a business lease from the UKB Corporation authorizing it to conduct the gaming on UKB Corporation land. Such leases have to be approved by the Bureau of Indian Affairs. See 25 C.F.R. Part 162.

Defendants further argue that Plaintiffs have not met their burden of demonstrating irreparable harm because the UKB and the UKB Corporation have waived their sovereign immunity to the Court's enforcement of any order it may enter directing the Gaming Tract be removed from trust status. The purported waivers of sovereign immunity were filed as part of a declaration filed by UKB Chief George G. Wickliffe. The UKB resolution (Doc. 85-1, pp. 8-10) may waive the sovereign immunity of the UKB but the UKB will not have the trust interest in the Gaming Tract. The resolution of the UKB Corporation (Doc. 85-1, pp. 11-12) does not confer such a waiver of sovereign immunity. The UKB Corporate Charter provides that "the officers . . . of the incorporated Band shall be as provided in the said Constitution and Bylaws." The UKB Constitution (Art. V, Section 1) provides the supreme governing body of the Band shall be the Council of the UKB. Therefore, the members of the Council are the officers of the UKB Corporation. The officers of the UKB Corporation are the only ones who can waive the sovereign immunity of the corporation. Therefore, the waiver of sovereign immunity executed by the Corporate Advisory Board of the UKB Corporate waiver is not a valid waiver. Further, the UKB Corporation is not a party to this litigation and thus has not waived sovereign immunity by submitting to the jurisdiction of the court. In *North Fork*, the court recognized that "any waiver of a tribe's sovereign immunity, whether by Congress or by the tribe itself, 'cannot be implied but must be unequivocally expressed.'" 2013 WL 324035, at *25 (citations omitted). The UKB Corporation has not "unequivocally expressed" a waiver of immunity and is not a party to this action. Therefore, Plaintiffs have met their burden of irreparable harm and the Court should grant Plaintiffs' requested injunction.

2. Irreparable Harm will Occur Because the ASIA's Conclusion that the UKB Would Have Jurisdiction over the Gaming Tract Encroaches on the Cherokee Nation's Sovereign Authority Within its Treaty Territory and Will Cause Jurisdictional Conflicts.

DOI argues that the Cherokee Nation's expectation that UKB will interfere with its law enforcement authority on the Gaming Tract is speculation and is not actual and imminent harm. (*See* DOI Br. at 12.) UKB also asserts that the Nation's concerns about jurisdictional conflicts are speculation. (UKB Br. at 7.) DOI and UKB claim that DOI has already determined in the 2012 Decision and in the 2011 decision approving the UKB's 76-acre trust application that potential jurisdictional disputes may be resolved. (DOI Br. at 12; UKB Br. at 7.) These conclusions are based on one of the central DOI determinations that the Plaintiffs have challenged in this action: DOI's failure to properly address requirements in the trust acquisition regulations, 25 C.F.R. §151.10(f),[5] regarding jurisdictional conflicts. *See* Doc. 2, ¶¶79-85. Thus, the challenged findings in the 2012 Decision do not refute the Cherokee Nation's assertions that irreparable harm will result from jurisdictional conflicts that will occur if a trust deed is issued. This is particularly true where, as here, DOI has failed to file a complete administrative record.

DOI's and UKB's misplaced reliance on the 2012 Decision as support for their position is demonstrated by the part of the administrative record that DOI has filed. DOI cites a statement in the 2012 Decision that "while there may be jurisdictional disputes in the future, the Regional Director believes that there is adequate foundation for resolving them, and we concur." (DOI Br. at 12.) This characterization is not at all consistent with the Regional Director's detailed

[5] The Nation references §151.10(f) herein, not because it views this as an *on*-reservation application (which it does not), but because subsection (f) is incorporated by reference by 25 C.F.R. § 151.11, which governs *off*-reservation applications by tribes.

description of likely jurisdictional conflicts in her April 19, 2012 memorandum recommending acceptance of the gaming tract into trust. Doc.78-1 at 12-16. The Regional Director found that jurisdictional issues were "likely" and stated, as "the Bureau office closest to tribal affairs in northeastern Oklahoma," the Bureau "remains concerned that jurisdictional conflicts will arise between the UKB and the CN if property is placed into trust for the UKB within the former reservation boundaries of the CN." Doc.78-1 at 13, 14; See also Doc. 45, AR1997-2002, AR2206. The Regional Director, noting the constraints imposed by the ASIA's June 24, 2009 Decision, recommended approval of the trust application for the gaming tract, notwithstanding her concern. The Regional Director's memorandum does not mention an "adequate foundation," or any means at all, for resolving jurisdictional conflicts. Doc. 78-1 at 6-16.

DOI and UKB both characterize jurisdictional conflicts as an issue that can be resolved through cooperative law enforcement efforts. (DOI Br. at 12-13; UKB Br. at 9.) As an example of a "solutions" to jurisdictional conflicts, DOI asserts the ability of tribes to maintain separate law enforcement systems. DOI mentions the Hopi Reservation located within the Navajo Reservation and the shared Comanche, Kiowa, and Apache reservation lands. (DOI Br. at 12.) These examples are unpersuasive. DOI has not claimed or shown that there are any jurisdictional territorial disputes among those tribes. As noted by DOI, the Hopi reservation is a separate defined area within the Navajo reservation. The Comanche, Kiowa, and Apache lands were established by treaty. *See Treaty [of Medicine Lodge] With the Kiowa, Comanche, and Apache*, 16 Stat. 589 (Oct. 21, 1867). The inclusion of declarations by DOI and UKB concerning law enforcement solutions are equally unpersuasive, because they also do not address territorial jurisdictional disputes among tribes.

In their limited focus on the Nation's assertions that jurisdictional conflicts are certain to

occur, DOI and UKB either entirely miss the point, or intentionally try to obfuscate the imminent and irreparable damage to the Cherokee Nation's sovereign authority over Indian country within its treaty territory that will result if a trust deed is issued. The Regional Director succinctly described the Cherokee Nation's jurisdictional interests and the conflicting jurisdictional claims of the Cherokee Nation and the UKB as follows:

> . . . A tribe's territorial sovereignty extends to those areas recognized as being within the tribe's Indian country. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n. 1 (1998). . .
>
> . . . Both the UKB Corporation and the CN intend to assert jurisdiction over the subject property if it is taken into trust. The CN has enacted laws to regulate the activities of Indians occurring on Indian country within the CN Reservation. These include, for example, the Cherokee Nation's Gaming Ordinance, Tobacco License and Tobacco Tax Law, Motor Vehicle and Boat Licensing Act, and other civil and criminal laws . . .
>
> The CN states that if the property is accepted in trust, an immediate and continuing jurisdictional tension, and litigation, will result. The Region is also aware that it is very likely that jurisdictional conflicts between the CN and the UKB Corporation will exist over the assertion of jurisdictional authority by UKB over any trust land it is granted within the Cherokee Nation. . .

Doc. 78-1 at 13-14. The UKB suggests that the "simple solution to jurisdictional conflicts is "that the CNO will exercise jurisdiction over its trust lands, and the Keetoowah Cherokees will exercise jurisdiction over its trust lands." The UKB assumes that if the lands are placed into trust for the UKB Corporation, the UKB will have jurisdiction over the land. That is an essential portion of the 2012 Decision challenged by the Cherokee Plaintiffs. (Compl., Doc. 2, ¶¶ 58-70, 79-85, 101-109.) In fact, there is no legal authority for an assertion of jurisdiction over the Gaming Tract by the UKB in the event the deed is issued to the UKB Corporation.

Despite the United States' fiduciary, treaty, and trust duties to protect the Cherokee Nation within its boundaries, it is only the Cherokee Nation's actions in protecting itself which have kept the UKB from systematically consuming Indian Country within the Nation's

boundaries. UKB makes clear that it intends to continue acquiring trust properties within the jurisdictional boundaries of the Cherokee Nation (Doc 85-1, p.3).[6]

3. Irreparable Harm Will Occur Because There is a Significant Risk of Economic Damage for Which There Is No Adequate Remedy at Law.

Neither DOI nor the UKB disputes the fact that if CNE is damaged by the DOI's actions in taking the land into trust, CNE would be unable to recover any damages from either party. Nor do they deny that this would constitute "irreparable" injury for purposes of obtaining injunctive relief. Rather, they contend that CNE will suffer no harm at all as a result of the ***resumption*** of gaming at the UKB casino because—after the motion for preliminary injunction was filed—the UKB reached an agreement with the State that permits it to conduct gaming until August 30, 2013. The UKB further asserts that CNE cannot obtain injunctive relief to "eliminate lawful competition." (UKB Br. at 12.) Both arguments miss the point entirely.

First, the one-month extension is irrelevant. If the land is not taken into trust on August 14, then the State will require closure of the UKB casino on August 30. However, if it is taken into trust, gaming at the casino can continue until this case is resolved. Thus, under that scenario, CNE will have competition on August 31 that it would not have had ***but for*** DOI's actions.

Second, even if the land is taken into trust on August 14, this will ***not*** make the UKB's gaming operation lawful. Although the ASIA concluded that the UKB's gaming operation would be lawful if the tract were taken into trust, this conclusion was arbitrary and capricious and is squarely challenged in this action.

Finally, the UKB contends that a recent settlement offer made by the Cherokee Nation to

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[6] "[T]here is no question that we would have both parcels in trust, ***and likely more***." Id. at ¶ 8.

the UKB undercuts CNE's claim that it will suffer harm from UKB's unlawful competition. The letter itself clearly is marked as a "Settlement Communication under Fed. R. Evid. 408" (UKB Resp. Ex. 3) and thus is inadmissible "either to prove or disprove the validity or amount of a disputed claim." Fed. R. Evid. 408. The UKB's attempt to use the offer here evidences not only a disregard of the Federal Rules of Evidence, but also its own desperation.

Accordingly, CNE asks that the Court enter injunctive relief protecting CNE from unlawful competition within the territorial boundaries of the Cherokee Nation during the pendency of this action.

C. The Balance of Equities and Strong Public Interest Support Issuance of a Preliminary Injunction.

DOI and the UKB claim that the public interest would be harmed by a preliminary injunction. (DOI Br. at 23-25; UKB Br. at 16-18.) DOI asserts that an injunction prohibiting the issuance of a trust deed would undermine the public policy concerning the promotion of tribal self-government, "particularly given the uncertain length of the litigation." (DOI Br. at 24.) DOI's position is that UKB should be allowed to exercise self-government within another tribe's treaty territory, with no regard to the detrimental impact on that tribe. The Declaration of ASIA Kevin Washburn expresses this view without any discussion or consideration of the negative impact on the self-government of the Cherokee Nation. Doc. 86-1. As already discussed in Part II.B.2. of this brief, DOI's view ignores the injury that such action will cause the Cherokee Nation, contrary to its trust responsibility to the Nation and contrary to the public interest.

Furthermore, the cases cited by DOI and UKB, while recognizing that it is in the public interest to further Indian self-government, do not involve trust applications or one tribe's attempt to exercise jurisdiction within the jurisdictional area of another tribe. *Morton v. Mancari*, 417 U.S. 535 (1974) (unsuccessful challenge to BIA's Indian preference under IRA); *Prairie Band*

253 F.3d 1234 (10th Cir. 2001) (upheld preliminary injunction preventing state from enforcing state motor vehicle registration and titling laws with respect to an Indian tribe and its members); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709 (10th Cir. 1989) (upheld preliminary injunction against a pending state court suit in which the State of Oklahoma sought to enjoin operation of tribal bingo games, finding abstention doctrine inapplicable in light of federal nature of the issues and the absence of state court jurisdiction); *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) (preliminary injunction issued against state court proceedings involving internal tribal dispute to prevent infringement of Seneca Nation's right to self-government and exclusive authority over its internal political affairs, to preserve authority of Nation's courts, and to protect Nation's sovereignty). In fact, these cases ***support*** the position that DOI should be enjoined from taking action that would result in significant interference by the UKB with the Nation's self-government and its longstanding exercise of sovereign authority over Indian country within its treaty territory, which is the status quo.

DOI also argues that the issuance of a preliminary injunction would cause substantial harm to the local community in terms of "lost jobs and opportunities," including lost jobs for non-tribal members "if the gaming facility is closed for an indefinite period." (DOI Br. at 24-25.)[7] DOI is losing sight of the fact that the Cherokee Nation is not seeking an injunction to close the casino; it is seeking an injunction to prevent the issuance of a trust deed, which would have negative consequences far beyond gaming issues.

[7] The arguments of DOI and the UKB concerning employment and contributions to the community are baseless. (DOI Br. at 24-25; UKB Br. at 17-18.) Cherokee Nation law, which includes the Nation and CNE in the definition of an "employer," and requires such "employers" to apply an "Indian" employment preference, does not distinguish between Cherokee citizens and other members of federally recognized tribes. LA30-12, 40 C.N.C.A. §1004.K, §1004.M, §1021.

As required by IGRA, 25 U.S.C. § 2710(b), the UKB has a class II tribal gaming ordinance approved by NIGC in 1995. Doc. 45, AR1980-1981. The March 22, 1995 NIGC approval letter clearly stated that UKB was not authorized to conduct class II or class III gaming on the Gaming Tract while in fee status. Doc. 45, AR1980-1981. The UKB did not appeal that finding and, according to NIGC counsel, "it also was not followed – not by the UKB or the NIGC." See Second Declaration of Todd Hembree, Exhibit A. at 7. The UKB has continued to operate a casino on fee land for decades, notwithstanding NIGC's 1995, 2000, and 2011 determinations that the Gaming Tract does not constitute Indian lands subject to NIGC enforcement authority. Doc. 45, AR1973-1979.

The agreement in the Eastern District case is consistent with the State's interest in ensuring that all gaming authorized under IGRA only occurs on "Indian lands" over which the applicable Indian tribe has jurisdiction and exercises governmental power. It is also consistent with the State's interest in protecting its citizens and other tribes having legitimate gaming facilities on Indian lands under IGRA and a valid State Gaming Compact from unauthorized and inappropriate gaming operations, by ensuring that the UKB's gaming on the Gaming Tract does not serve as precedent for expanding casinos into areas where a tribe cannot satisfy the jurisdictional, governmental, and land status requirements of IGRA and, for purposes of class III gaming, the applicable Gaming Compact. 25 U.S.C. § 2710(d); 3A O.S. § 281, Parts 6 and 12.

It is astounding that a federal agency would take the position that it is in the public interest to reward a tribe which has conducted gaming in defiance of its own agency decisions. In its 2005 Fourth Amended Complaint in the Eastern District case, even the UKB admitted that its gaming activities had not been under "the regulation of and enforcement of federal law by the NIGC" since at least 2000. Doc. 45, AR1967, ¶ 16. Thus, since at least 2000, the UKB has not

been subject to IGRA's requirements that NIGC monitor tribal class II gaming on a continuing basis, inspect and examine all class II premises located on Indian lands, and "conduct or cause to be conducted such background investigations as may be necessary." 25 U.S.C. § 2706 (b). The UKB has operated the casino on fee land with no federal oversight, including NIGC's enforcement authority to examine audit records respecting class II gross gaming revenues, with the exception of audit reports submitted between 1991 and 1996. See Second Declaration of Todd Hembree, Exhibit A at 8. The UKB has also operated without being subject to NIGC's statutory authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, for any violation of IGRA, and to temporarily or permanently close a "game" under certain described procedures. 25 U.S.C. § 2713.

Although the UKB has been operating its casino by permission in the Eastern District case pending the outcome of that litigation, the fact remains that the UKB has wholly failed to comply with federal and state laws and regulations in the operation of its casino. The UKB would be rewarded for its longstanding and continuing violations of law if the motion for injunctive relief is denied and a trust deed is issued. This would signal to other tribes that they may also flaunt federal and state law by operating gaming on fee lands without any fear of repercussions. This would be a great disservice to the numerous tribes, such as the Cherokee Nation, who do comply with the law. Denial of a preliminary injunction would not be in the public interest.

CONCLUSION

Plaintiffs have met their burden to obtain the preliminary injunction, and a preliminary injunction should be issued prohibiting DOI from issuing a trust deed until final resolution of this action on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2013, I electronically transmitted the foregoing document to the Clerk of the U.S. District Court for the Northern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/William David McCullough
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