No. 13-5106, 13-5109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEROKEE NATION, AND CHEROKEE NATION ENTERTAINMENT, LLC,

APPELLEES/PLAINTIFFS,

v.

S.M.R. JEWELL, ET AL,

APPELLANTS/ DEFENDANTS,

AND

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

INTERVENOR DEFENDANT/APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA,
CASE NO. 12-CV-493-GKF-TLW, THE HONORABLE GREGORY K. FRIZZELL PRESIDING

APPELLEES CHEROKEE NATION AND CHEROKEE NATION ENTERTAINMENT, LLC'S COMBINED RESPONSE TO UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA'S EMERGENCY MOTION TO STAY ENFORCEMENT OF INJUNCTION AND BRIEF IN SUPPORT, AND MOTION OF THE FEDERAL DEFENDANTS-APPELLANTS FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

In this action, the Cherokee Nation and Cherokee Nation Entertainment (collectively the "Cherokee Appellees") challenge a July 30, 2012 decision of the Assistant Secretary – Indian Affairs ("ASIA") for the United States Department of the Interior ("Department" or "DOI"). In that decision (the "2012 Decision"), the ASIA announced his intent to take into trust for gaming purposes a 2.03 acre tract of land located in Cherokee County (the "Tract"). Although the Tract is located within the Cherokee Nation's historical treaty territory, the proposed trust beneficiary is the United Keetoowah Band of Oklahoma Corporation ("UKB Corporation").

The United Keetoowah Band of Cherokee Indians ("UKB") has conducted gaming on the Tract (which was and remains fee land) since 1986. In 2004, after the State of Oklahoma sought to close the facility for violation of state gaming laws, the UKB filed a federal suit seeking injunctive relief. *United Keetoowah Band v. Oklahoma*, Case No. 04-CV-340 in the United States District Court for the Eastern District of Oklahoma (the "Eastern District Case"). The Cherokee Nation is ***not*** a party to that case. In July 2012, the Eastern District court entered an Agreed Order requiring the UKB to close its casino on July 30, 2013 if the Gaming Tract was not held in trust by the United States on that date. Eastern District Case, Dkt. 148.

Although the DOI initially agreed not to take the land into trust during the pendency of this action, it gave notice to the Cherokee Nation on July 15, 2013 of its intent to complete the trust acquisition on August 14, 2013. According to the notice, this decision was based on DOI's desire to prevent the closure of the UKB casino. The UKB

then negotiated with the State a one-month extension of its closing deadline, requiring the closure of the UKB casino on August 30, 2013, if the land is not held in trust at that time. On July 27, 2013, the UKB and the State filed a joint motion in the Eastern District Case reflecting that agreement [Eastern District Case Dkt. 150], which was granted by the Eastern District court by minute order [Dkt. 151]. These are ***the only actions*** taken in the Eastern District case regarding any extension of the closure deadline.

The Cherokee Nation filed its Motion for Preliminary Injunction on July 23, 2013, asking the District Court to enjoin the DOI from taking the Tract into trust during the pendency of this action. After the motion was fully briefed by the parties, the District Court held a lengthy hearing on the motion on Friday, August 9, 2013. Then on Monday, August 12, 2013, the District Court issued a detailed and thorough opinion from the bench, granting the Preliminary Injunction.

The UKB filed a Notice of Appeal on August 14, 2013, and DOI followed suit on August 20, 2013. Also on August 20 – eight days after the District Court entered the Preliminary Injunction and ten days before the August 30 deadline - UKB and DOI parties filed Motions to Stay the Preliminary Injunction Pending Appeal (the "Motions").

Both Motions are baseless. The District Court cited numerous infirmities in the 2012 Decision that made that decision arbitrary and capricious, including the fact that – without explanation – the 2012 Decision flatly contradicts numerous prior decisions of the DOI, the District Court, and this Court. Thus, the District Court's decision that the Cherokee Nation has made a "strong showing" that it is likely to prevail in its challenge to the 2012 Decision does not constitute an abuse of discretion.

Moreover, neither DOI nor the UKB has articulated the type of irreparable harm necessary to warrant a stay under Fed. R. App. P. 8. The DOI has not even attempted to argue that ***it*** will suffer ***any*** harm as a result of the injunction. Moreover, the alleged harm identified by the UKB ***does not*** necessarily flow from the Preliminary Injunction itself. Contrary to the suggestions of Appellants, the Preliminary Injunction ***does not require*** the closing of the UKB casino. It merely prevents the DOI from taking into trust the land on which that casino stands. Although having the land taken into trust was one avenue for keeping the casino open, it was not – and is not – the only avenue. But it is the only avenue that the District Court has found would cause irreparable harm to the Cherokee Nation. Therefore, it was properly enjoined, and the Motions to Stay should be denied.

The DOI was prepared to take the land into trust for the UKB Corporation on August 14 and apparently remains ready to do so prior to the August 30 closing deadline. Thus, if the Preliminary Injunction is stayed pending appeal, the land will almost certainly be transferred into trust well before there is a resolution of this appeal. Thus, unlike many cases in which a stay is granted to preserve the status quo pending appeal, a stay here would permit DOI to alter the status quo almost immediately and take into trust for another group of Indians land over which the Cherokee Nation alone has exercised sovereignty for centuries. To be clear, a stay of the Preliminary Injunction, under the facts of this case, is effectively a ***reversal*** of the District Court and a denial of both the Cherokee Nation's right to injunctive relief and its sovereignty.

HISTORICAL BACKGROUND

A. Cherokee Nation Government and Treaty Territory

The Cherokee Nation is a federally recognized Indian tribe with a constitutional form of government dating back to 1827 and a long history of treaty relations with the United States. The Cherokee Nation has maintained a continuous government-to-government relationship with the United States and has exercised governmental functions since the earliest history of the United States. In 1835 and 1866 the United States entered into treaties expressly protecting the Nation's governmental authority over the Nation's territorial area defined in its treaties and owned in fee by the Nation in Indian Territory.[1] DOI recognized these treaty protections in a 1993 "Indian lands opinion" issued by the Tulsa Field Solicitor : "With little exception, the exterior boundaries of the present Cherokee Nation were agreed to by the terms of the [1835] Treaty of New Echota. . . ." (Ex. 1). The 1993 opinion concluded: "Historically, the Cherokee Nation has exercised governmental authority over the fourteen county area. . . ." (Ex. 1).

In its brief, DOI makes a veiled representation that the Cherokee Nation ceased to exist in 1906 when the tribal lands were allotted. DOI Br. at 2. Federal allotment legislation applicable only to the Five Tribes (Cherokee, Choctaw, Chickasaw, Muscogee (Creek) and Seminole Nations) indicated that the governments of the Five Tribes would be dissolved in 1906. However, in 1906 Congress enacted the Five Tribes Act. *See* Act of April 26, 1906, 34 Stat. 137. Section 28 of the Act provided "That the tribal existence

[1] Treaty of December 29, 1835, 7 Stat. 478 ("1835 Treaty"), art 5; Treaty of July 19, 1866, 14 Stat. 799 (Proclamation August 11, 1866) ("1866 Treaty"), art 13. The Nation acquired fee patent title to its new lands in 1838 as required by the 1835 Treaty

and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law. . .” The federal courts have consistently found that the Five Tribes were never terminated. *See Creek Nation v. United States*, 318 U.S. 629, 638 (1943)); *See also Harjo v. Kleppe*, 420 F.Supp. 1110, 1129 (D.D.C. 1976). The Nation has continuously maintained its sovereign status.

B. The UKB and the UKB Corporation

In contrast with the Cherokee Nation’s sovereign status, the UKB never maintained a treaty relationship with the United States and never held title to the lands owned in fee by the Cherokee Nation.

In 1937, a group identified as the Keetoowah Society sought permission to organize under Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936 (“OIWA”). The Solicitor of DOI held in 1937 that the Keetoowah Society was a voluntary society and could not be considered a “recognized band” under Section 3 of the OIWA, in 1 Op. Sol. on Indian Affairs 774 (U.S.D.I.) (1979), which states.

> The primary distinction between a band and a society is that a band is a political body. In other words, a band has functions and powers of government. It is generally the historic unit of government in those tribes where bands exist. . . .
>
> This essential character is not possessed by the Keetoowah Society nor any of its factions. It is neither historically nor actually a governing unit of the Cherokee Nation, but a society of citizens within the Nation with common beliefs and aspirations.

In 1945 the Acting Secretary of the Interior informed Congress that DOI again declined the UKB’s request to organize under the OIWA because DOI could not make a

positive finding that they were a tribe or band within the meaning of the OIWA. Letter of March 24, 1945 from the Acting Secretary to Chairman Jackson, Committee on Indian Affairs, reprinted in H.R. Rep. No. 79-447, at 2 (1945) and S. Rep. No. 79-978, at 3 (1946). The next year Congress approved the Act of August 10, 1946, Pub. L. No. 79-715, § 1, 60 Stat. 976 ("1946 Act"), which simply provides: "That the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936." The UKB organized under section 3 of the OIWA, 25 U.S.C. § 503, in 1950, with a federally approved constitution. (Ex. 2). The UKB Corporation was approved at the same election under authority of section 3 of the OIWA. *Id*. The UKB and the UKB Corporation are separate and distinct legal entities. The UKB Constitution and the UKB Corporation's charter make no claims to any geographic or territorial jurisdiction.

C. The UKB's Illegal Gaming Operations

The UKB has conducted gaming on the Tract since 1986 in violation of federal and state law, including the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Oklahoma State-Tribal Gaming Act, 3A O.S. §§261-282. (Ex. 3 at 2).

DOI states that the "National Indian Gaming Commission ("NIGC") became involved with the UKB's gaming facility in 1991, but until recently, the legal status of the Property, and hence the gaming facility, has been unclear." DOI Br. at 4. This is not an accurate statement. As DOI knows well, the UKB gaming facility has been operating outside the law since its inception. In 1995, the UKB obtained NIGC approval of a tribal

gaming ordinance. The NIGC approval letter clearly stated that UKB was not authorized to conduct gaming on the Subject Property while in fee status. (Ex. 4). The UKB did not appeal that finding and, according to NIGC counsel, "it also was not followed – not by the UKB or the NIGC." (Ex. 5 at 7).

In 2000, the NIGC determined that the Tract was not Indian country, did not constitute "Indian lands" under IGRA, and the gaming activity thereon was not subject to IGRA. (Ex. 6) In 2004, the UKB filed the Eastern District Case. In January 2006, that Court set aside the NIGC's 2000 decision and remanded the matter to the NIGC. (Ex. 7 at 2).

On July 21, 2011, the NIGC issued an opinion, again finding that the non-trust gaming site is not "Indian land" eligible for gaming under IGRA. (Ex. 7).

STANDARD OF APPELLATE REVIEW

In order to obtain a stay or an injunction pending appeal, Tenth Cir. R. 8.1 requires the movant to show (1) the likelihood of success on appeal, (2) the threat of irreparable harm if the stay or injunction is not granted, (3) the absence of harm to opposing parties if the stay or injunction is granted, and (4) any risk of harm to the public interest. See *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). These elements must be demonstrated against the backdrop that a district court's issuance of a preliminary injunction is reviewed for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004); *Homans*, 264 F.3d at 1243. Abuse of discretion is a deferential standard of review, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001), and a district court's preliminary factual findings (which include irreparable harm)

will not be reversed unless they are clearly erroneous. *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). The movants carry a heavy burden of demonstrating under FRAP 8 that they are entitled to a stay of the injunction pending appeal, particularly when such an injunction would alter the status quo.

ARGUMENTS AND AUTHORITY

I. THE APPLICATION FOR STAY DOES NOT MEET THE REQUIREMENTS OF RULE 8.

As an initial matter, neither motion meets the requirements of Fed. R. App. P. 8 for the granting of a stay by a circuit court. Rule 8(a)(1) provides that a party must ordinarily move first in the district court for an order suspending an injunction while an appeal is pending. Rule 8(a)(2)(A) then provides that a motion for the relief mentioned in Rule 8(a)(1) "must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action." *See also Chem. Weapons Working Group (CWWG) v. Dep't of Army*, 101 F.3d 1360, 1361 (10th Cir. 1996).

DOI *never* moved for a stay in the District Court, and its motion here does not make the required showing that such a motion was not practicable. Rather, DOI only reference the District Court's denial of *UKB's* oral motion for a stay pending appeal. *See* DOI Br. at 7 ("The District Court denied the UKB's motion for stay pending appeal. Dkt. 92 at 30-32").

DOI cannot simply piggyback onto UKB's oral motion. No injunction was entered against the UKB, only against the DOI. As noted above, the preliminary injunction does

not prohibit the UKB from gaming on the land; indeed, that issue was not even before the District Court in this case, and is not before the Court here. The injunction provides only that the DOI shall not put the land into trust pending resolution of the case on the merits. Because only the DOI can put the land into trust, the preliminary injunction can only be against the DOI.

Additionally, the "motion" in the District Court, made only by the UKB, was perfunctory at best. The motion was oral, with counsel for UKB stating simply: "We would ask that you agree to stay your injunction and your opinion pending appeal of this matter." Transcript at 30. That was the sum total of the motion – no argument, no reasoning, and no legal authority. The District Court then stated: "Well, that's problematic because if I were to stay it, technically the Secretary could put the land into Trust in two days. Your thoughts?" Although the District Court invited argument, UKB's counsel merely stated: "Well, my thoughts are, Your Honor, that I'm obligated to ask you to stay your hand." *Id.* Throughout this entire colloquy, counsel for DOI said nothing.

Under Fed. R. Civ. P. 62(c) a district court may grant a stay of its injunction pending an appeal. A district court's decision on whether to grant a stay is reviewed for an abuse of discretion. *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1225 (10th Cir. 2002). The District Court in this case could not have abused its discretion in refusing to grant a stay, when neither the UKB nor the DOI offered any argument, reasoning, or legal authority supporting such a stay, even after being invited to do so by the District Court?

To be sure, this Court has held that application for a stay from the district court first can be excused "[w]hen the District Court's order demonstrates commitment to a particular resolution," because application for a stay from the same court "may be futile and hence impracticable." *CWWG*, 101 F.3d at 1362 (citing *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996)). But DOI does not argue that application to the District Court would be futile or impractical.

Finally, in determining whether this Court should grant emergency relief under Rule 8, it is crucial to understand, as the District Court clearly did, that any perceived "emergency" is purely of the UKB's and DOI's own making. The UKB has known since July 2012, when the Agreed Order was entered in the Eastern District case, about the initial closure deadline.

The District Court entered a Scheduling Order on January 3, 2013, setting a hearing on the merits for ***August 16***, 2013, *i.e.*, 17 days after the July 30 deadline. [Dkt. No. 26.] Almost ***six weeks later***, on February 12, the UKB filed a motion asking the District Court to accelerate its hearing date and to rule on the merits prior to the UKB's July 30, 2013 deadline. [Dkt. No. 50.] The UKB argued:

> Under the current briefing and hearing schedule, the one year period described above will expire before this matter is resolved. This would be particularly devastating in the event that the Court affirms the Assistant Secretary's decision to accept the Subject Property into trust.
>
> To avoid the irreparable harm that would come to the Keetoowah Cherokee by virtue of having to discontinue operations at its Gaming Facility pending the resolution of this matter, the Keetoowah Cherokee requests that the hearing currently scheduled for August 16, 2013, be rescheduled for a date following the close of briefing, but sufficiently prior to July 30, 2013, to allow the Court an opportunity to consider and rule on this matter prior to

July 30, 2013.

[Dkt. No. 50 at 2-3.] The next day, the District Court denied the UKB's motion, noting that:

> The UKB would like a decision by July 30, 2013 because provisions of a settlement agreement between the State of Oklahoma and the UKB will permit the state to take legal action to seek cessation of gaming at the Keetoowah's Tahlequah casino if the United States has not taken the land into trust by that date.

[Dkt. No. 51 at 1.] The District Court stated:

> The size of the administrative record, the briefing schedule, and the Court's other commitments will not permit adequate preparation for a hearing only two weeks following the close of briefing. And this case will likely require production of a detailed written order involving novel and unsettled issues of Indian law, which cannot be accomplished prior to July 30, 2013. Moreover, whatever ruling this Court renders will likely be appealed to the Tenth Circuit, which could further delay placement of the land into trust. Finally, even if the Court would be in a position to issue an oral decision from the bench in mid-July, it would be highly unlikely the land could be placed into trust by July 30, 2013.

[*Id*. at 1-2.] Then, in a prescient statement, the District Court added: "The State of Oklahoma and the UKB are, of course, free to renegotiate their agreed deadline, but that is not an issue for this Court." [*Id.*]

Therefore, as of February 13, 2013, the UKB knew with certainty that there would be no District Court resolution of this case prior to the July 30 deadline in the Eastern District case. Yet the UKB sought no relief from this Court at that time, nor did it take any action in the Eastern District action to obtain a further extension, other than the one-month extension.

The District Court cited the likely reason for the UKB's inaction: the UKB has attempted to create its own status quo in this case. [Hr'g Tr. at 20-21.] The UKB made a

conscious decision to use the threat of shutting down its casino to attempt to convince the District Court to allow the land to be put into trust. Thus, neither the UKB nor the DOI can demonstrate an entitlement to "emergency" relief from this Court when the UKB has done ***nothing*** to protect its interests in the very court that has been presiding – for the last nine years – over the precise issue of whether the UKB casino should remain open.[2] This Court should dismiss the Motions on the basis of Appellant's failure to comply with Rule 8. The UKB made a perfunctory request of the District Court in this case, and made no effort to secure relief from the Eastern District court that actually imposed the deadline that allegedly has prompted these Motions. The DOI made no request from either Court. The District Court saw this issue coming in February, and suggested the avenue for the UKB to pursue to avoid the circumstances in which it now finds itself. The District Court and Cherokee Appellees noted at the August 9 hearing that the UKB could seek relief in the Eastern District. Yet, for whatever reason, the UKB and the DOI chose not to avail themselves of this obvious and, indeed, primary avenue of relief. Thus, it should

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[2] The Fifth Circuit has denied emergency relief in a similar case. In *In re Montes*, 77 F.2d 415 (5th Cir. 1982), a sheriff sought relief from the Fifth Circuit under the All Writs Act, 28 U.S.C. § 1651. The Fifth Circuit noted that the relief sought by the sheriff was the suspension of an injunction, and no application had been made to the district court as required by FRAP 8. The sheriff argued that "it would have been vain to do so" because of action taken by another federal district court in Texas. The Fifth Circuit held that was not an adequate reason for non-compliance with Rule 8, stating:

> The Sheriff has made no effort to secure relief from either of the trial courts involved, and it is, therefore, patent that there is at least a possibility that he might obtain an adequate remedy if appropriate application were made and if he is in fact entitled to such relief.

Id. at 416. Because the Sheriff could not demonstrate he had no other adequate remedy, the Fifth Circuit dismissed his application for a writ of prohibition.

not be permitted to seek "emergency" relief in this Court from its own decision not to pursue relief in that court, especially where the relief would come at the clear expense of the Cherokee Nation.

II. THE UKB AND DOI CANNOT DEMONSTRATE THEY ARE LIKELY TO SUCCEED ON THE MERITS.

To succeed on the merits, the UKB and DOI have to show the District Court abused its discretion in issuing the preliminary injunction. Neither the UKB nor the DOI can show they are likely to succeed on the merits in order to obtain an emergency stay of the injunction pending appeal.

A. The Cherokee Appellees Established Likelihood of Success on the Merits.

1. The ASIA's Determination That DOI Has the Authority to Accept the Tract in Trust for the UKB Corporation Is Contrary to Law.

The District Court ruled that the DOI's finding that section 3 of the OIWA implicitly authorizes a trust acquisition for a federal chartered tribal corporation is clearly erroneous and contrary to law. The Court noted that section 3 of the OIWA allows recognized tribes or bands of Indians residing in Oklahoma to form tribal corporations and that charters approved by the Secretary may convey to the incorporated group "any rights or privileges secured to the organized Indian tribe" under the IRA. Preliminary Injunction Order (hereinafter "PI") at 9, 13. The Court further determined:

> The assistant secretary found this statute implicitly authorizes the secretary to take land into trust for the UKB Corporation. In support of this finding, he cited a series of decisions made in a separate application by the UKB to the Department of Interior to take the 76-acre community services parcel

> into trust.[3] In those decision, the assistant secretary requested additional briefing on the impact of *Carcieri* and *offered the UKB three options to secure the benefit of trust ownership, one of which was to have the secretary take the land in trust for the UKB Corporation as opposed to the UKB tribe*. Ultimately, in the 76-acre tract matter, he determined land could be taken into trust for the UKB Corporation under Section 3 of the Oklahoma Indian Welfare Act.

PI at 10. (emphasis added) The District Court found that section 3 "merely grants tribal corporations the same rights as the tribes themselves, not greater rights." The Court further found that *Carcieri v. Salazari*, 555 U.S. 379 (2009), made it clear that the UKB has no right to have the land taken into trust under section 5 of the IRA, and that section 3 of the OIWA cannot create such a right for the benefit of the UKB Corporation. PI at 13.

In challenging the Court's decision, DOI correctly explains that the *Carcier*i ruling was based on the definition of "Indian" in section 19 of the IRA, 25 U.S.C. §479. Section 19 defined "Indian" as "all persons of Indian descent *who are members of any recognized Indian tribe now under Federal jurisdiction."* *Id.* In *Carcieri*, the Supreme Court determined that "now under Federal jurisdiction" meant a tribe under Federal jurisdiction on June 24, 1934, when the IRA was enacted, and concluded that only tribes meeting that requirement can acquire lands in trust under section 5 of the IRA, 25 U.S.C. 465. *Carcieri* 555 U.S. at 382. DOI claims that the UKB's status under the IRA "is not implicated here," and characterizes the District Court's ruling as a wrong "assumption that Congress imported the IRA's definition of 'Indian' into the OIWA." DOI Br. at 15-16. The District Court made no wrong assumption. The IRA, 25 U.S.C. § 473, only

[3] The referenced June 24, 2009 (Ex. 8), July 30, 2009 (Ex. 9), September 10, 2010 ("2010 Decision") (Ex. 10) and January 21, 2011 (Ex. 11)Decisions were provided to the District Court.

expressly excluded Oklahoma tribes from applicability of certain specified IRA sections. Section 19 of the IRA was not one of them; therefore it applies to Oklahoma tribes and bands. Accordingly, the OIWA contains no separate definition of "Indian."

DOI argues that section 3 of the OIWA "defines who is covered by § 3 of the OIWA." DOI Br. at 16. Section 3 states that "[a]ny recognized tribe or band of Indians residing in Oklahoma" may adopt constitutions and obtain federal charters under section 3's provisions. Section 3 does not "define" tribes or Indians who are eligible to acquire trust lands under the OIWA or the IRA. Eligibility to acquire agricultural lands is governed by section 1 of the OIWA.[4] Eligibility to acquire other types of lands is governed by section 5 of the IRA, along with the temporal limitations established in *Carcieri*.[5] The UKB's similar argument is equally without weight. UKB Br. at 7-8.

DOI also asserts that issues involving *Carcieri* were not briefed at the District Court level and that DOI "has not made a determination whether or not the UKB was 'under federal jurisdiction' in 1934 so that §5 of the IRA could be applied here." DOI Br. at 15, n. 2. Although DOI did not expressly find that the UKB, which organized in 1950, was not "under federal jurisdiction" in 1934, there is no other plausible explanation

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[4] Section 1 of the OIWA authorizes acquisition of agricultural lands for Indians and tribes in Oklahoma, and provides that "[t]itle to all lands so acquired shall be taken in the name of the United States, in trust for the *tribe*, *band*, *group*, *or individual Indian* for whose benefit such land is so acquired." 25 U.S.C. §501 (emphasis added).

[5] Section 5 of the IRA authorizes acquisition of lands without limitation as to the type of land and provides that such lands "shall be taken in the name of the United States in trust for the *Indian tribe or individual Indian* for which the land is acquired." 25 U.S.C. § 465 (emphasis added).

for DOI's advice to the UKB that it had the option of seeking a trust acquisition on behalf of the UKB Corporation under section 3 of the OIWA. The District Court did not abuse its discretion in finding that *Carcieri* presented problems for an acquisition by the UKB and that DOI's decision to approve an application on behalf of the UKB Corporation was clearly erroneous and contrary to law.

The District Court also found that the 2012 Decision to approve a trust application for the benefit of the UKB Corporation was contrary to DOI's own trust acquisition regulations. PI at 13. Those regulations include the following definition of "tribe" for purposes of trust acquisitions in 25 C.F.R. § 151(b), which 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 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).

The Court correctly ruled that § 151.2(b) of those regulations authorizes tribal corporations to be considered tribes under limited circumstances where there is a statute that "specifically" authorizes trust acquisitions for such corporations. The Court held that the UKB Corporation does not meet the definition of "tribe" in §151.2(b). PI at 13.

Appellants contend that the District Court's interpretation was wrong, because the Court "relied on a requirement that land may be taken into trust for tribal corporations only where a statute "specifically" authorizes such acquisitions." DOI Br. at 16. 25 U.S.C. 488 authorizes the Secretary of Agriculture to make a loan to any "*tribal corporation* established pursuant to the" IRA. (Emphasis added.) 25 U.S.C. 489

authorizes that land acquired by a loan made pursuant to Section 488 may "be taken by the United States in trust for the tribe or *tribal corporation*." (Emphasis added.)

Section 3 of the OIWA does not mention trust acquisitions at all, either for a tribe or a tribal corporation, but instead generally cross-references the IRA. Section 5 of the IRA authorizes trust acquisitions for tribes but not for tribal corporations. DOI's recognition that the IRA and the OIWA do not provide statutory authority for trust acquisitions for federal chartered tribal corporations is addressed succinctly in the 1980 comment accompanying the final regulatory definition of "tribe" in 25 C.F.R. § 151.2(b):

> Another criticism of this definition was its failure to include tribal corporations. Tribal corporations were not included because the acquisition authority in the Indian Reorganization Act is limited to an "Indian tribe or individual Indian"; however, it has been pointed out that other statutory authority does provide for the acquisition of land in trust for tribal corporations; namely section 2 of Public Law 91-229 (84 Stat. 120; 25 U.S.C. § 489). *In view of this, the definition has been changed to include corporations for limited purposes*."

45 Fed. Reg. 62034 (Sept. 18, 1980) (emphasis added). It is significant that the DOI did not interpret the "other rights or privileges" provisions in section 3 of the OIWA as authorizing trust acquisitions by corporations chartered under section 3 when it promulgated its regulations; otherwise, the references in §151.2(b) to specific authorizing statutes would have included section 3.[6]

The ASIA's determination that section 3 "implicitly authorizes" a trust acquisition

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[6] After all, '[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius,* suggests that the specification of [one provision] implies' the exclusion of others." *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012), (quoting *Arizona v. United States,* __ U.S.__, 132 S.Ct. 2492, 2520 (2012).

for a federal chartered tribal corporation is contrary to the legally binding land acquisition regulations governing trust acquisitions for more than 30 years. "When an agency departs from a prior interpretation of a statute that it is charged with implementing, the agency must justify the change of interpretation with a 'reasoned analysis'." *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n*, 264 U.S. at 42.) There was no reasoned analysis here.

Finally, UKB argues that the District Court's decision "suggests the preposterous result that had 'implicitly' been absent from the 2012 Decision, it would not have been contrary to law." UKB Br. at 7. This is simply not true. The Decision would have still been contrary to the law and DOI's regulations. Section 5 of the IRA authorizes trust acquisitions for tribes, but not for tribal corporations. 25 C.F.R. § 151.2(b) recognizes that tribal corporations may be considered a tribe for Section 5 of the IRA when there exists "statutory authority which specifically authorizes trust acquisitions for such corporations." Section 3 of the OIWA does not provide specific statutory authority for taking land into trust for a tribal corporation. Therefore, the ASIA's attempt to take land into trust for a tribal corporation under Section 3 of the OIWA is contrary to law.

2. The ASIA's Determination that the Cherokee Nation's "Former Reservation" is Shared by the UKB Is So Implausible It Cannot Be Ascribed to a Difference in View or Agency Expertise.

As noted by the District Court, one of the issues the ASIA had to decide in evaluating whether to take the Tract into trust was whether gaming on the Tract would be legal under IGRA, which prohibits gaming on Indian lands accepted into trust for the

benefit of an Indian tribe after October 17, 1988, unless the lands fall within certain exceptions. PI at 7. The Court stated that in the 2012 Decision, the ASIA determined that gaming on the tract would be permissible under one of those exceptions, which allows gaming on after-acquired land located in Oklahoma within the boundaries of the Indian tribe's former reservation as defined by the Secretary. PI at 8; 25 U.S.C. §2719(a)(2)(A)(i). The Court discussed the ASIA's reasoning, including the ASIA's views that the term "former reservation" is ambiguous and that IGRA and the regulatory definition of "former reservation" in 25 C.F.R. § 292 did not address the question of whether two federally recognized tribes can share the same former reservation for purposes of qualifying for IGRA's former reservation exception. PI at 8.

The District Court was correct in determining the ASIA's anomalous decision that the Cherokee Nation's "former reservation" is also the former reservation of the UKB under IGRA is arbitrary and capricious in light of the regulatory definition of that term in 25 C.F.R. § 292.2: "lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." PI at 14. The Court correctly found that the UKB has no last reservation established by a treaty, by an executive order, or by a secretarial order. *Id*.

DOI claims that the ASIA was dealing with a "unique and complex" situation, "where one federally recognized tribe composed of Cherokee Indians, the UKB, was formed out of another federally recognized tribe of Cherokee Indians, the Cherokee Nation, both of which have co-existed on the former Cherokee reservation since the early 1800s." DOI Br. at 10. This is a misstatement of the 2012 Decision. The 2012 Decision

states that since the 1800s, "the Keetoowah *Society* of Oklahoma Cherokees [not UKB] existed as an *organization* [not a band or tribe] of Cherokee Indians in Oklahoma." (emphasis added). Furthermore, the UKB was not a "federally recognized tribe" prior to its organization in 1950 under the 1946 Act, and so it could not have "co-existed" with the Cherokee Nation in the Nation's treaty territory in the eighteenth century as implied by DOI. The ASIA explained his decision in this "unique and complex situation" with only a one page "analysis" that was based on unsupported and incorrect legal conclusions. The ASIA suggested that the federal approval of the UKB Constitution's placement of UKB headquarters in Tahlequah somehow conferred territorial jurisdiction over the Nation's treaty territory. This is such a frivolous argument that it warrants no response. The ASIA also implied that the 1946 Act conferred territorial jurisdiction on the UKB. Contrary to that position, the Act contains no such statement and is unambiguous in its simple authorization of the UKB to organize as a band under the OIWA.[7]

In discussing "former reservation" in the 2012 Decision, the ASIA tried to justify a desired end result by stating that using the Indian canons of construction to interpret IGRA "to the benefit of the Band would *permit* the gaming parcel to be taken into trust." (Ex. 3 at 4) (emphasis added). The District Court correctly held that the ASIA erred in applying the Indian canons of construction in favor of the UKB, because such canons are inapplicable in cases such as this, where an Indian tribe and a band of Indians are on

[7] In contrast, section 2 of the same 1946 Act expressly "set aside for the use and benefit of the Indians of the Cheyenne and Arapaho Reservation in Oklahoma" a specified school reserve tract.

different sides of an issue and construing statutes in favor of one group of Indians will adversely impact another group. PI at 14 (citing *Utah v. Babbitt*, 53 F.3d 1145, 1150 (10th Cir. 1995)). This ruling was not an abuse of discretion.

DOI states that the District Court provided no explanation for its conclusion that the UKB has no last reservation established by a treaty, by an executive order, or by a secretarial order. DOI Br. at 10. The answer to that is simple: the 2012 Decision cited no UKB treaty, executive order, or secretarial order ever establishing any reservation for the UKB. None exists. DOI further claims that the regulatory definition of "former reservation" only requires that the reservation be for "an Oklahoma tribe" – an interpretation suggesting that any tribe in Oklahoma can claim that it shares a "former reservation" with any other tribe in Oklahoma. Such an interpretation is contrary to IGRA's requirements that a tribe is authorized to conduct gaming only on "Indian lands" subject to that tribe's jurisdiction and over which that tribe exercises governmental power. 25 U.S.C. §§ 2703(B), 2710(b)(1),(d)(1).

DOI also argues that the District Court should have deferred to the ASIA's interpretation of IGRA, even though, as found by the District Court, the 2012 Decision ignored DOI's "own previous decisions, case law, and the legal history of the Cherokee Nation, including its treaty rights." PI at 14. The 2012 Decision recognized the existence of those rulings[8] and disposed of them by simply stating that it was necessary to discuss

[8] Contrary to the UKB's arguments, the fact that the 2012 Decision "acknowledged" those prior decisions is not sufficient justification of the ASIA's new approach. UKB Br. at 9.

"only the background relevant to the limited question of whether the parcel is within the former reservation of the UKB within the meaning of Indian Gaming Regulatory Act (IGRA) and DOI's regulations at Parts 151 and 292." (Ex. 3 at 1.) This approach reflects a total disconnect from the well-reasoned prior opinions and decisions recognizing the treaty rights of the Cherokee Nation and finding that the UKB has no claim to territorial jurisdiction within the Nation's treaty territory.

The UKB has exhibited a similar approach by its desperate assertions that if the Court was correct in determining that the UKB has no "former reservation," then the "CNO" also has no "former reservation." UKB Br. at 10. The UKB bases this statement on its assertions that the Cherokee Nation treaties were between the historical Cherokee Nation, "not the CNO or the [UKB] Tribe," and that the "CNO" "did not exist until 1976." There is nothing in the 2012 Decision indicating that it was based on such a novel theory, and Appellants did not make such an argument before the District Court.

The District Court did not abuse its discretion in recognizing that the "shared reservation" finding in the 2012 decision is contrary to three District Court decisions, all of which were discussed by Cherokee Appellees in their brief in support of the motion for preliminary injunction. The District Court did not abuse its discretion in refusing to grant administrative deference to DOI's attempt to reduce federal court decisions to mere procedural issues or to DOI's claimed superior agency expertise in deciding this question of law. DOI Br. at 12. *C.f., Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

In *United Keetoowah Band v. Secretary of the Interior*, No. 90-C-608-B (N.D. Okla. May 31, 1991), (Ex. 12), the court ruled that: (1) the BIA "has determined that the subject lands of the old Cherokee Reservation are under the jurisdiction of the new Cherokee Nation, not the UKB;" (2) "[a]s to the old Cherokee Reservation lands, the ASIA has recognized one sovereign (Cherokee Nation of Oklahoma) over another (UKB);" and (3) "[p]rior case law indicates that neither Congress, the Secretary of the Interior, nor the courts have made a distinction between the Cherokee Nation at the time of Oklahoma statehood and the current Cherokee Nation of Oklahoma."

The court reached the same conclusions in *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992), (Ex. 13), *aff'd*, 992 F.2d 1073 (10th Cir. 1993).

> *The UKB . . . offers no authority to support its claim that it is heir to the original Cherokee Indian Reservation.* The Act of August 10, 1946 simply recognizes the UKB as a "band of Indians residing in Oklahoma"; *it does not set aside a reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation.* Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the [Oklahoma Indian Welfare Act], *nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation*.

(Ex. 13 at 8) (emphasis added).

Again, in *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993), (Ex. 14), *attached to and aff'd*, 2 F.3d 1161 (10th Cir. 1993), 1993 WL 307937, the Court held that the UKB's claim that its smoke shops were not subject to the Nation's authority "directly attack[ed] the sovereignty of the Cherokee Nation over the

subject land . . ." (Ex. 14 at 4). The court noted that it had "previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation," and that it had "previously determined . . . that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *Id.*

As recognized by the District Court, the 2012 Decision is not only contrary to law, it is also constitutes a complete – and unexplained – about-face for DOI, which, until recently, consistently recognized that the Cherokee Nation possesses jurisdiction exclusive of any other tribe over Indian country within its treaty territory. *See Buzzard*, (Ex. 13 at 7-8).[9] DOI tries to explain the 2012 Decision's failure to even attempt to harmonize its "former reservation" decision with previous DOI decisions by claiming that the June 24, 2009 Decision contained sufficient analysis and was incorporated into the 2012 Decision. However, the June 24 Decision *did not* find that the UKB shared the Cherokee Nation's "former reservation." Instead, it found that CN and UKB were both successors in interest to the historical CN. DOI subsequently withdrew that finding. (Exs. 9 and 10).

It was not until issuance of the 2012 Decision that DOI, for the first time, found that the UKB shared the Nation's "former reservation." DOI's argument that it provided a sufficient analysis is simply not supported by the record. As recognized by the District

[9] The District Court was provided with extensive citations to the record reflecting DOI's past positions – relied upon in the case law cited above – that the 1945 Act did not create a reservation for the UKB or purport to give the UKB any authority to assert jurisdiction, and that Congress never intended to create a duplicative Cherokee tribal government.

Court, when an agency departs from prior interpretation of a statute it is charged with implementing, the agency must justify the change of interpretation with a reasoned analysis. PI at 12 (citing *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999)).

For the first time, DOI argues in its Motion that a 1998 appropriations rider supports its argument that the Cherokee Nation does not have exclusive tribal jurisdiction over Indian lands within its "former reservation." DOI Br. at 13. The 2012 Decision contains no discussion of an appropriations rider. DOI nonetheless argues that the June 24, 2009 Decision's reference to a 1998 appropriations rider (without citation) provides support for the "former reservation" finding in the 2012 Decision. DOI has never asserted that a 1998 or a 1999 appropriations rider alone provides authority for a determination of "former reservation" status, nor was such position taken in the 2012 Decision.[10] Thus, this new argument provides no basis for challenging the District Court's decision. *See Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003*, 715 F.3d 1231, 1234 n.1 (10th Cir. 2013) (noting that the Court will not consider arguments raised for the first time on appeal).

Similarly, DOI is also precluded from arguing for the first time here that the 1994

[10] 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). (Ex. 8 t 4-5). 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. Dist. of Columbia*, 216 F.3d 1, 9-10 (D.C. Cir. 2000).

amendment of the IRA supports the 2012 Decision. Although the 2012 Decision contains a brief discussion of that amendment, codified at 25 U.S.C. § 476(f), neither DOI nor UKB raised it as an argument before the District Court. As noted above, DOI cannot argue that the District Court abused its discretion on the basis of an argument that was never presented to the District Court. *See, e.g.*, *Brecek*, 715 F.3d at 1234 n.1.[11]

B. The Plaintiffs Will Suffer Irreparable Harm If The Injunction is Stayed.

If title is transferred to the United States in trust for the UKB Corporation, the Cherokee Nation will suffer irreparable harm. "A plaintiff satisfies the irreparable harm requirement by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages'." *Crowe & Dunlevy, P.C. v. Stidham*, 609 F.Supp.2d 1211, 1222 (N.D. Okla. 2009) (*quoting RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009)). The District Court found that the Cherokee Nation would suffer irreparable harm based on three separate grounds, any one of which is sufficient to satisfy the irreparable harm requirement for a preliminary injunction:

First, the District Court found that there is an unquantifiable but significant risk of irreparable harm to the Cherokee Nation because DOI would violate the Cherokee

[11] Even if it were properly before this Court, DOI's argument is without merit. It contends that § 476(f) prohibits it from finding that the UKB lacks territorial jurisdiction within the Cherokee Nation because other tribes have territorial jurisdiction. DOI's interpretation would lead to the absurd conclusion that any tribe, anywhere, can acquire trust land and assert jurisdiction within any other tribe's reservation. There is nothing in § 476(f) leading to such an illogical conclusion.

Nation's sovereignty if it takes property within the Nation's historic boundaries into trust for the UKB without specific authority from Congress. PI at 15-16 (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F. 3d 1234, 1250 (10th Cir. 2001). In that case, this Court found that a "significant interference with tribal self-government constitutes irreparable harm," *citing Seneca-Cayuga Tribe v. State of Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming the grant of preliminary injunction).

DOI offers no arguments that this finding was an abuse of discretion and therefore cannot prevail on this factor. The UKB also cannot prevail on this factor because its limited arguments are not sufficient to demonstrate an abuse of discretion. UKB astoundingly asserts that the UKB exercises jurisdiction over the Tract, "for instance, regulating gaming since 1986," even though that "regulation" was conducted on fee land without compliance with IGRA. UKB Br. at 13-14. UKB also argues that the Cherokee Nation "has never exercised jurisdiction" over the Tract, notwithstanding the fact that the Cherokee Nation once owned and exercised governmental authority over that land, along with the rest of its treaty territory, for decades. These arguments fail to refute that irreparable harm to the Cherokee Nation will occur if UKB is permitted, for the first time, to exercise governmental authority over trust lands within the Nation's treaty territory.

Second, citing the Muskogee Area Office Regional Director, the District Court's found the requisite irreparable harm based on the "strong likelihood that issuance of a trust deed will cause jurisdictional conflicts between the Cherokee Nation and the UKB." PI at 17-18. DOI makes no arguments that this finding by the Court was an abuse of discretion, and therefore cannot prevail on this factor. UKB also cannot prevail on this

issue because its arguments do not demonstrate abuse of discretion. The UKB claims that the District Court ignored the 2012 Decision's explanation about jurisdictional conflicts. UKB br. at 14. The 2012 Decision's "explanation" was a simple statement 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." UKB Br. at 14. This statement in the 2012 Decision misrepresented the Regional Director's detailed description of likely jurisdictional conflicts in her April 19, 2012 memorandum, which was part of the record submitted to the District Court. (Ex. 15 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." (Ex. 15 at 13-14). The Regional Director's memorandum does not mention an "adequate foundation," or any means at all, for resolving jurisdictional conflicts. (Ex. 15 at 6-16).

Finally, the District Court found a strong likelihood of irreparable harm based on its finding that "there is no legal certainty that the Department could return the gaming tract to fee status after the issuance of a trust deed to the UKB Corporation." PI at 15. The Court noted that 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.

DOI contends that the "inescapable result of the decision" in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), "is that, if a

court rules that Interior violated the APA in such a circumstance, the land must revert to non-trust status." DOI Br. at 18. DOI cites two 2013 decisions that purportedly support this position.[12] However, tribal sovereign immunity issues were satisfactorily addressed in each of those cases. The District Court expressly found that such issues were not satisfactorily addressed in this case herein:

> . . . The UKB corporation is not a party to this litigation, it has not waived sovereign immunity by fully submitting to the jurisdiction of this Court, and the limited waiver approved by only two of the members does not appear to be a valid waiver of sovereign immunity. Thus, the UKB Corporation could assert objections and defenses to the return of the gaming tract to fee status which could delay or prevent an unwinding of the trust acquisition.

PI at 15-16.

DOI contends the court erred as a matter of law because "[e]ven if a sovereign immunity waiver is necessary, the UKB Corporation, wholly owned and controlled by the tribe, is subject to the UKB's broad immunity waiver." DOI Br. at 19. This is simply not true.[13] In support of this proposition, DOI cites to a footnote in its September 2010 Decision (Ex. 10). But the footnote states that "[w]ithin the UKB tribal structure are the

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[12] *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*").

[13] The UKB Corporation is not "owned and controlled" by the UKB. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (tribe's "constitutional and corporate entities [are] separate and distinct"); *Ramey Constr. Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (noting the "distinctness" of a tribe from a tribal corporation); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1059 (N.D. Ok. 2007) ("The constitutional entity created pursuant to § 476 and the corporate entity created pursuant to § 477 are considered separate and distinct entities.")

tribal government and the tribal corporation. They are separate entities." This was precisely what the District Court found in holding the UKB Corporation was not before the district court and had not waived its sovereign immunity. DOI also cited *Ninigret Dev. Corp. v. Naragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) for the same proposition that the tribal waiver of sovereign immunity was broad enough to cover the UKB Corporation. However, the housing authority in that case was an entity created by tribal ordinance. *Id*. The UKB Corporation is a separate entity and must execute its own waiver of sovereign immunity—which it has not done.

The UKB argues that the UKB Corporation resolution attached as Exhibit 8 to its motion effectively grants a waiver of sovereign immunity. The UKB asserts that the "Corporation's Resolution recites that the Tribe, exercising its authority under the Constitution, established the Corporate Authority Board to transact business for the Corporation and that a quorum of the Board was present and voted to approve the resolution." UKB Br. at 12. Even if true, it still does not grant a waiver of sovereign immunity by the UKB Corporation. The officers of the UKB Corporation are the only ones who can waive the sovereign immunity of the corporation. Under the Corporate Charter and the Constitution, the members of the Council are the officers of the UKB Corporation. Therefore, the waiver of sovereign immunity executed by the Corporate Advisory Board of the UKB Corporate waiver is not a valid waiver. Furthermore, the UKB Corporation is not a party to this litigation. Its contested motion to intervene, filed after issuance of the preliminary injunction, is still pending. The District Court's determination of irreparable harm is supported in the facts and law.

Each of the Court's three separate findings regarding irreparable harm is supported by the law and the record before the District Court. The Cherokee Appellees' right to injunctive relief was "clear and unequivocal." *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n. 6 (10th Cir. 2006).

C. The Balancing of Harms Weighs in Favor of the Plaintiffs.

"After determining the harm that would be suffered by the moving party if the preliminary injunction is not granted, the court must then weigh that harm against the harm to the defendant if the injunction is granted." *Crowe*, 609 F.Supp.2d at 1224. As the District Court determined "a preliminary injunction would not destroy the UKB's desire to have the parcel taken into trust. It would merely enjoin the secretary from doing so until such time as this legal dispute has been resolved in the UKB's favor." PI at 22.

The UKB contends the District Court "engaged in an analysis of the status quo, while discounting the actual and substantial harms that would result from the issuance of a preliminary injunction." UKB Br. at 15. However, a critical element in the evaluation of the weighing of harms is to determine what is the status quo currently existing between the parties. "[T]he status quo is 'the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.'" *Schrier v. University of Colorado*, 427 F. 3d 1253, 1260 (10th Cir. 2005) (emphasis added) (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F. 3d 1149, 1155 (10th Cir. 2001) (citations omitted). It is also described as the '"last peaceable uncontested status existing between the parties before the dispute developed."'. "In 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." *Schrier*, 427 F. 3d at 1260.

Appellants contend the status quo is that gaming has been conducted on the fee land for more than 25 years and the taking of the land into trust would continue that gaming activity. See UKB Br. at 15; DOI Br. at 20. The District Court correctly rejected Appellants' status quo argument, finding that:

> [W]hether the UKB can or cannot conduct gaming activities on the gaming tract is not an issue before this court and the UKB had its opportunity to fully litigate that issue in UKB v. Oklahoma in the Eastern District of Oklahoma, Case No. 04-cv-340. Originally, the UKB and the state had entered into an agreement for a one-year grace period until July 30, 2013, before the state would enforce its gaming laws. It became clear by May or June of 2013 that the gaming tract would not be taken into trust by July 30, 2013. Rather than seek an injunction or extension in the Eastern District case and litigate its position against the state, the UKB instead negotiated with the state for a one-time extension of the agreed closure date from July 30, 2013 to August, 30, 2013.

PI at 19-20. The Tract is fee land and subject to laws of the state of Oklahoma as it has been for more than 25 years. The only entity impacted by the injunction is UKB who may no longer be allowed to operate a casino on the Tract as it has been doing in violation of state and federal law for the past 25 years. *See U.S. v. Rx Depot, Inc*., 290 F.Supp.2d 1238, 1247 (N.D. Okla. 2003) ("preserving the 'status quo' as defendants define it would mean protecting illegal activity.").

The status quo is that the land is in fee status; a foreign Indian tribe has never, in the more than 175 years since the Cherokee Nation acquired its treaty territory in Oklahoma, been authorized by the United States government to exercise jurisdiction over land within the Cherokee historical jurisdictional boundaries; and that the Nation is the

only Indian tribe exercising governmental jurisdiction over trust lands within the Nation's historical jurisdictional boundaries.

The District Court concluded that these actual harms to the Cherokee Nation outweigh the harm to Appellants, finding:

> Plaintiffs have made a strong showing of likelihood of prevailing on the merits. The uncertainty attendant to unwinding a trust transaction, the very real threat to the Cherokee Nation's sovereignty, and the potential for serious jurisdictional conflict are, while not financial in nature, significant factors which must be considered. Further, the conundrum in which the UKB finds itself is largely due to decisions it has made in the Eastern District of Oklahoma case . . .The court, therefore, concludes that the balancing of harms in this case tips in favor of the plaintiffs.

PI at 21-22. The District Court's decision is supported by the law and the facts of the case.

D. The Preliminary Injunction Serves the Public Interest.

"The public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F.Supp. 2d 7, 21 (D.D.C. 2009). Thus, the District Court was correct in concluding that "the public's interest in having executive agencies comply with their obligations under the APA is best served by entering the preliminary injunction staying the Department of Interior from taking the land into trust." PI at 25

DOI asserts "the public interest is served by the continuing operation of the UKB's casino, which employs and provides economic benefits to many non-UKB members." DOI Br. at 19-20. DOI further asserts that "allowing beneficial acts to continue pending a final merits determination, even though postponement of relief may harm the plaintiff." *Id*. The UKB argues that the "Court entirely ignored the un-refuted

economic harm that would befall the community, instead focusing solely on the public's interest in having agencies comply with their obligations. UKB Br. at 17. However, the District Court clearly considered both these arguments. See PI at 24. ("The defendants assert that the public interest is best served by promoting the economic development and self-sufficiency of the UKB.") The District Court then concluded that "congressional intent to promote tribal economic development and self-sufficiency is a neutral factor in this case because both Indian entities, the Cherokee tribe and the United Keetoowah Band, contend its own economic development should be protected." *Id*.

The public interest cannot be served by Defendants' failure to comply with the IRA, the OIWA and the IGRA as Appellants argued in the case below. The District Court property gave "great weight to the fact that Congress already declared the public's interest and created a regulatory and enforcement framework. *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 760 (8th Cir. 2003).

III. APPELLANTS FAIL TO DEMONSTRATE LIKELIHOOD THAT THEY WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.

DOI does not and cannot argue that it would be harmed if not permitted to take the Tract into trust now. Rather, it relies only on alleged harm to the UKB from the closing of the UKB casino. This entire argument is a red herring because the PI does not require closure of the casino. Again, the UKB had the opportunity to seek relief in the Eastern District, and it chose not to do so. Even if the order ***did*** require closure of the casino, UKB has not shown that closure would constitute irreparable harm. Any lost gaming revenues and lost wages to casino employees are capable of calculation, and UKB does

not argue they could never be repaid. Rather, UKB contends that the closure would "have immediate and devastating impacts on the Tribe" and would "caus[e] the cessation of most governmental operations, programs, and services." UKB Br. at 18. In support of this claim, UKB cites only the self-serving declaration of its Chief, who did not testify at the hearing and was not subject to cross-examination.

UKB's argument that its citizens may be forced to give up their UKB citizenship to gain employment with the Cherokee Nation (UKB Br. at 18) is even more specious. The Cherokee Nation's "Indian" employment preference does not distinguish between Cherokee citizens and members of other federally recognized tribes. 40 C.N.C.A. §§ 1004.K, 1004.M, 1021. Appellants have not satisfied their burden of showing that irreparable harm will occur if the PI is not stayed.

CONCLUSION

Appellants have failed to carry their burden under FRAP 8 for an injunction pending appeal. The District Court's decision was not an abuse of discretion. It is supported by the law and the facts of the case. The motion to stay the preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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