UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHEROKEE NATION, and CHEROKEE NATION ENTERTAINMENT, LLC,	)	
Plaintiffs,	)	
v.	)	Case No. 12-CV-493 GKF TLW
S.M.R. JEWELL, et al.,	)	
Defendants,	)	
And	)	
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,	)	
Intervenor-Defendant.	)	

INTERVENOR-DEFENDANTS' RESPONSE BRIEF

James C. McMillin, OBA No. 17206
211 North Robinson
Oklahoma City, Oklahoma 73102-7103
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
james.mcmillin@mcafeetaft.com

Christina M. Vaughn, OBA # 21390
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3104
christina.vaughn@mcafeetaft.com

Jessica John-Bowman, OBA No. 30388
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3146
jessica.johnbowman@mcafeetaft.com

Attorney General, United Keetoowah Band of Cherokee Indians in Oklahoma

Dated this 3rd day of January, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

TREATISES

RULES

OTHER AUTHORITIES

INTRODUCTION

This case concerns the July 30, 2012 Decision ("2012 Decision") by the Department of the Interior ("Department" or "DOI") to acquire 2.03 acres in Tahlequah, Oklahoma (the "Parcel") in trust for the federally chartered corporation of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB Corporation"), and to allow gaming, which has been ongoing there by the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") since 1986. Plaintiffs Cherokee Nation of Oklahoma ("CNO") and Cherokee Nation Entertainment, LLC challenge the 2012 Decision under the APA as being contrary to law and arbitrary and capricious.[1] Contrary to Plaintiffs' view, as the Assistant Secretary for Indian Affairs ("ASIA") was well aware, the 2012 Decision simply allows two federally recognized Indian tribes to govern their respective members on their respective lands. [AR 17-26].

Plaintiffs parrot an oversimplified version of a complex history, which spans over two hundred years, in a way that mocks the ASIA's plain desire to correct an historic wrong at a time and in a manner that neither abrogates nor complicates treaty obligations with either Indian tribe or their respective members. Further, the 2012 Decision, together with the substantive decisions from June 24, 2009 on that are embodied within it, honors treaty obligations by ending their misapplication and allowing people, who live together peaceably in a very small community, to govern themselves on their respective lands. [AR 17-26, 3586-3590, 3631-3643, 5106-5109].

[1] Plaintiffs have also requested a declaratory judgment as to certain issues. Plfs' Br. at 47-48. As an initial matter, the Court must have an independent source of jurisdiction in order to render declaratory judgment in an APA case, and Plaintiffs have cited none. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S. Ct. 876, 879, 94 L. Ed. 1194 (1950); See also, 5 U.S.C. § 703. Moreover, as discussed below, many of the issues on which Plaintiffs seek a declaratory judgment were not part of the 2012 Decision and are not properly before the Court. To award declaratory relief upon such non-justiciable claims would violate Article III's prohibition of advisory opinions. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 325, 56 S. Ct. 466, 473 (1936).

HISTORICAL BACKGROUND

A. Complex Treaty History of the Cherokee

At the time of original European settlement, the Cherokee lived, sans centralized government, in the southeastern portion of the United States. United States v. Old Settlers, 148 U.S. 427, 434, 13 S. Ct. 650, 654 (1893). By the early 1800s, the Cherokee had split into two groups: those who embraced Euro-American civilization and those who wished to maintain a traditional Cherokee lifestyle. See TREATY WITH THE CHEROKEE, July 8, 1817, 7 Stat. 156. In 1817, the traditional Cherokee group, labeled as the "Western Cherokees" or "Old Settlers," entered into a treaty with the United States in which the United States ceded lands on the Arkansas and White Rivers to the group in exchange for a portion of the lands they occupied in the East. See id. at Articles 1, 2 and 5; see also, United States v. 'Old Settlers', 148 U.S. 429, 13 S. Ct. 650, 651, 37 L. Ed. 509 (1893). The Cherokees who remained in the East were known as the "Eastern Cherokees." United States v. Cherokee Nation, 202 U.S. 101, 129, 26 S. Ct. 588, 600 (1906). The 1817 Treaty was the first official recognition of these two groups as separate but related nations, stating: "that the treaties heretofore between the Cherokee nation and the United States are to continue in full force with *both parts* of the nation, and *both parts* thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties . . . ." TREATY WITH THE CHEROKEE, July 8, 1817, 7 Stat. 156 (emphasis added).

In 1828, the Western Cherokees entered into a treaty with the United States to move even further west, away from encroaching white settlers. See Preamble, TREATY WITH THE WESTERN CHEROKEE, May 6, 1828, 7 Stat. 311. The 1828 Treaty granted the Western Cherokees seven

million acres of land and guaranteed "a perpetual outlet, West, and a free unmolested use of all the Country lying West of the Western boundary . . . ." Id. at Article 2.[2]

During the early 1830s, pressure from the southeastern states that encompassed the original Cherokee homeland on the United States to evict the Eastern Cherokees and extinguish Indian title to all lands within those states resulted in the TREATY OF NEW ECHOTA. See Preamble, TREATY WITH THE CHEROKEE (TREATY OF NEW ECHOTA), Dec. 29, 1835, 7 Stat. 478. The Treaty of New Echota required the Eastern Cherokees to cede all remaining Cherokee lands in the east and provided for their removal to the land then held by the Western Cherokees.[3] See Articles 1, 2, and 16, TREATY OF NEW ECHOTA.

Forcing the Eastern Cherokees onto land guaranteed to the Western Cherokees resulted in a political struggle that has persisted to present day. See Cherokee Nation v. United States, 1904 WL 872, *16. The United States attempted to resolve these disputes through the Treaty of 1846, which reaffirmed that both parts of the Cherokee Nation were one body politic and made the Eastern and Western Cherokees, together, party to the terms of the 1835 Treaty. See Preamble, TREATY WITH THE CHEROKEE, Aug. 6, 1846, 9 Stat. 871, and Art. 2. The 1846 Treaty emphasized that the lands of the "Cherokee Nation" were to be held in common for all Cherokee people. Id. at Art. 1. Notwithstanding the 1846 Treaty's intent to unify, tensions persisted, as

[2] In 1833, the Western Cherokees and the United States entered a treaty "to be considered supplementary" to the 1828 Treaty, again conveying seven million acres of land and a perpetual outlet west while somewhat shifting the 1828 boundary. See Articles 1, 5, TREATY WITH THE WESTERN CHEROKEE, Feb. 14, 1833, 7 Stat. 414. The 1828 and 1833 treaties represent the initial reservation and guarantee of these lands to the Cherokee people.

[3] The Treaty of New Echota provided that the lands ceded to the Cherokees by the 1828, 1833, and 1835 Treaties, "shall all be included in one patent executed to the Cherokee Nation of Indians . . . ." See Article 3, TREATY OF NEW ECHOTA, Dec. 29, 1835, 7 Stat. 478. The Western Cherokees objected to the Treaty, stating that the signers were not authorized representatives of the whole Cherokee people. See Western or Old Settler Cherokees v. United States, 82 Ct. Cl. 566, 570 (1936). Regardless of the protests, the Eastern Cherokee were removed onto the lands of the Western Cherokees. See, e.g., Old Settlers, 148 U.S. 428. (describing forced military removal of Eastern Cherokees).

the traditional Western Cherokees (the minority faction) were forced to live under a government dominated by the non-traditional Eastern Cherokee majority. See Cherokee Nation v. United States, 1904 WL 872, *16.

B. The Keetoowah Society

Organized by traditional Western Cherokees whose culture was long endangered by non-Indian encroachment and who faced a new threat from the impending Civil War, the "Keetoowah Society" was formed in 1859. [AR 1546]. In their 1859 Constitution, the Keetoowah pledged to honor their traditional culture, to maintain relations with the United States, and to preserve a separate identity from the Eastern Cherokee majority. KEETOOWAH CONST. of 1859, attached as Ex. 1, pursuant to LCvR7.2(d). Following the Civil War, the United States entered into another treaty with the Cherokee Nation. See TREATY WITH THE CHEROKEE, July 27, 1866, 14 Stat. 799. The Treaty of 1866 required the Cherokee Nation to give back certain lands that the Western Cherokee had received through the Treaty of 1828, and established the final bounds of what is now known as the historic Cherokee Reservation. Id.

In 1893 Congress passed the Indian Appropriation Act of 1894. Indian Appropriation Act 1894, ch. 206, 27 Stat. 612 (1893). This Act authorized a commission to negotiate individual land allotments with members of the Five Civilized Tribes, thereby reducing the collective land holding of those entities. Id. The Keetoowah Society opposed allotment because its members believed that all lands occupied by the Cherokee people were "the common property of the Cherokees who purchased them from the United States under the treaties of 1828, 1833, and 1835 ***and their descendants***." See Resolution of the Keetoowah or Fullblood Cherokees, at 1 (Nov. 28, 1900), attached as Ex. 2, pursuant to LCvR7.2(d). In 1902, notwithstanding the Keetoowah Society's objection, Congress enacted legislation requiring the allotment of

Cherokee lands and terminating the Cherokee Nation government as of March 4, 1906. See Act of July 1, 1902, Pub. L. No. 57-241. Faced with the mandated end of the Cherokee Nation government, the Keetoowah Society, in 1905, adopted a new constitution and secured a federal charter so they could continue to "provide a means for the protection of the rights and interest of the Cherokee people in their lands and funds . . . ." See Resolution No. 1, Constitution of the Keetoowah Society, 1905; Certification of Incorporation of the Keetoowah Society, Sept. 30, 1905, attached as Exs. 3 and 4, respectively, pursuant to LCvR7.2(d).

C. Federal Recognition of the UKB as an OIWA Band

In 1945, upon the recommendation of DOI Secretary Abe Fortas that the Keetoowah Cherokees deserved federal recognition to "enable these Indians to secure any benefits, which under the [OIWA], are available to other bands or tribes," Congress formally recognized the UKB as a Band under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501, et seq. ("OIWA"). See Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976 (with attached correspondence from Secretary Fortas). Secretary Fortas further explained:

> The purpose of the bill is to recognize the Indians who belong to the Keetoowah Society, as a separate band or organization of the Cherokee Indians, so that it may organize under section 3 of the [OIWA]
>
> ***
>
> When legislation was pending in Congress in 1905 to dissolve the tribal governments of the Five Civilized Tribes, the Keetoowahs applied for and received a charter of incorporation through the United States district court. The intention in this, as in all courses followed by the Keetoowah group, was that of keeping alive Cherokee institutions and the tribal entity.

Id.

DOI recognized that the Keetoowah Cherokees' efforts to organize were "indicative of a *general desire of a large number of the Cherokee people* to join together in some kind of effort

to protect the lands of members of the group, to try to do something about the *education*, the *health* of the neglected areas and, as then Chief of the Keetoowah Cherokees stated, to help the Indian Service 'to reach out and get to the Indians who need help.'" [AR 1609-1610] (quoting Nov. 10, 1947 letter to W. Zimmerman, Jr., Acting Commissioner of Indian Affairs, from W.O. Roberts, Superintendent of the Department of the Interior Office of Indian Affairs, Field Service). DOI also recognized the benefit of having the Keetoowah Cherokees lead the organizational efforts of the whole Cherokee people: "Inasmuch as the Keetoowah organization has not only the benefit of law, but of several years effort it, of course, would seem to me that we should revive and bring up to date the Indians' interest in this organization." [AR 1610] (quoting Letter from W.C. Roberts, Superintendent Muskogee Field Service, to William Zimmerman, Jr., Acting Commissioner of Indian Affairs (November 10, 1947)).

It was even suggested that the Cherokee tribe be dissolved in the event that the Keetoowah Cherokees organize:

> I feel sure that this present Government organized Executive Committee of the Enrolled Cherokees will recommend that the Keetoowahs be recognized. I, for one, would be willing to go a step farther and *recommend that* the present Executive group be dissolved and *the Keetoowah organization be the sole representative with the Government of the Cherokees of Oklahoma.*

[AR 1611] (quoting Letter of W.W. Keeler to L. Gritts, Mar. 10, 1949).[4]

[4] At the time, W.W. Keeler was Vice Chairman of the Executive Committee of the Cherokee Nation. See [AR 1611] (quoting Letter from E.B. Pierce to W.O. Roberts, Mar. 21, 1949 urging Keetoowah Cherokees participation in the Executive Committee of the Cherokee Nation "for after all, they are full-blood Cherokees and are keenly interested in the development of any program calculated to solve their problems"). W.W. Keeler later became Principal Chief of the Cherokee Nation and, as such, recognized that the primary objective of the Executive Committee of the Cherokee Nation needed to focus on rehabilitating the full-blood Cherokees. [AR 1611] (citing Letter from W.W. Keeler to Executive Committee of Cherokee Nation, Feb. 28, 1950).

The Secretary approved the UKB Constitution and Bylaws on May 8, 1950 and the UKB ratified them on October 3, 1950. [AR 18]. Those Cherokees not enrolled or unable to enroll with the UKB, but who desired to re-establish a regime of self-governance, re-organized and in June 1976 adopted the Constitution of the CNO. As the ASIA recognized, the CNO is distinct from the historic Cherokee Nation as, evidenced by "significant political differences in governmental organization between this historical CN and the CNO which render the CNO a new political organization." [AR 508].[5]

It was never intended that the UKB would conflict, jurisdictionally or otherwise, with any future organization of the Cherokee tribe:

> With respect to your question as to what effect the election of a chief of the Keetoowahs would have on the position occupied by the principal Chief of the Cherokee Tribe, I do not see that there would be any necessary connection.

[AR 1612] (quoting Letter from W. Zimmerman to W.O. Roberts, Dec. 8, 1947). There is no indication that the UKB organized under the impression, knowledge, or intention that doing so would relinquish Keetoowah rights in the lands of the former Cherokee reservation or their rights as Cherokee Indians, given that its members would be of the highest blood quantum. Nor is there any evidence that, at the time of the UKB's formal federal recognition, either the DOI or Congress intended that such re-organization would result in the forfeiture of its rights in the lands of the former Cherokee reservation or any of its rights as Cherokee Indians.

STANDARD OF REVIEW

[5] Plaintiffs are correct in their assertion that although the ASIA withdrew his conclusion that that UKB is a successor-in-interest, he did so only because he concluded that it was unnecessary to render a final agency decision and apparently to avoid a concession to the UKB in unrelated pending breach of trust cases, none of which is tantamount to a renunciation of the correctness of the findings made in 2009 by the ASIA, final agency decision or not. See Plfs' Br. at 27-28; [AR 3249]; [AR 3256].

Neither the Indian Reorganization Act, 25 U.S.C. §§ 461, et seq. ("IRA") nor the OIWA provide for judicial review of agency decisions regarding trust acquisitions. Given the Secretary's discretion to take land into trust for the benefit of Indian tribes, the proper standard of review to apply in this case is the "contrary to law" or "arbitrary and capricious" standard under the APA. See 5 U.S.C. §§ 701-706.

The United States Supreme Court has set forth general principles that federal courts are to apply when undertaking APA review of an agency's decision:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–843, 104 S. Ct. 2778, 2781-2782, 81 L. Ed. 2d 694 (1984). When determining whether an agency's construction of a statute is permissible, a court will ascertain whether it is "rational and consistent with the statute." NLRB v. Food & Commercial Workers, 484 U.S. 112, 123, 108 S. Ct. 413, 421 (1987); see also Sullivan v. Everhart, 494 U.S. 83, 110 S. Ct. 960 (1990).

Federal courts "must accord considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care," Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145 (10th Cir. 2010) (en banc), especially "when an agency's interpretation of a statute rests upon its considered judgment, a product of its unique expertise." Qwest Commc'n Int'l, Inc. v. FCC, 398 F.3d 1222, 1230 (10th Cir. 2005). Further, when considering agency action made pursuant to an agency's own regulations, federal courts should not "decide which among several

competing interpretations best serves the regulatory purpose," but rather "give substantial deference to an agency's interpretation of its own regulations." Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 684 (10th Cir. 2010). The agency's interpretation will control "unless 'plainly erroneous or inconsistent with the regulation.'" Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n, 519 F.3d 1176, 1192 (10th Cir. 2008) (quoting Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997)).

"Arbitrary and capricious" review involves the least amount of judicial scrutiny, short of unreviewability, and requires "only that the Court reach the negative conclusion that the agency's decision is not implausible under the circumstances; it need not confirm the decision in any real sense." As the Supreme Court has succinctly stated, "arbitrary and capricious" review is deferential, and courts shall not vacate an agency's decision unless the agency has done one of four things in making its decision:

> [1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658, 127 S. Ct. 2518, 2529-30, 168 L. Ed. 2d 467 (2007). Notwithstanding the four reasons listed above for vacating an agency's decision under the "arbitrary and capricious" standard, a court nevertheless shall "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Id. (quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974)).

ARGUMENT AND AUTHORITIES

I. THE ALLEGED PRECEDENT ON WHICH PLAINTIFFS RELY IS NOT CONTROLLING.

Plaintiffs' repeatedly rely on a so-called long line of precedent that was allegedly ignored in the 2012 Decision. However, this "precedent" is neither controlling nor as extensive as represented. Following passage of the IRA and OIWA, the Keetoowah Society began seeking the ability to reorganize under the OIWA. [AR 4915]. As a result of these efforts, the Acting Solicitor issued a memorandum concluding that the Keetoowah Society was not eligible to organize under the OIWA because it allegedly bore only a "cultural and mystical" relationship to the ancient Keetoowah and lacked certain traits of a political band. [AR 4915].[6] Despite DOI's desire to administratively recognize the Keetoowah as a band, the memorandum effectively prevented it from doing so. Consequently, Secretary Fortas assisted the UKB in gaining formal federal recognition as a separate and distinct Band of Cherokee Indians, which was accomplished pursuant to the Act of August 10, 1946, Pub. L. No. 79-715, 60 Stat. 976 (1946) ("1946 Act").

In 1985, the UKB sought to acquire a parcel of land located within the bounds of the historic Cherokee reservation in trust, and in a 1987 decision the Secretary declined the request for lack of CNO's consent ("1987 Decision"). [AR 450]. The 1987 Decision relied solely upon the 1937 Solicitor's memorandum, which had been superseded by the 1946 Act. [AR 450]. See also, 1946 Act. The 1987 Decision was **the first and only** Secretarial decision declining to acquire land in trust for the UKB. In the early 2000s, the UKB again sought to have land acquired in trust on its behalf [AR 506], resulting in a series of Secretarial determinations in 2009 and 2010 [AR 3234-3246; AR 3253-3257; and AR 17-26] that culminated in a regional decision in 2011 approving the acquisition of 76 acres in trust for the UKB Corporation ("2011

[6] This memorandum was based entirely upon a report prepared by anthropologist Charles Wisdom [AR 4915]. The erroneous conclusions of this one individual, which were accepted without question by the Acting Solicitor and thereby forced upon the DOI, essentially buried the true history of the Keetoowah people and are almost exclusively responsible for the inequitable treatment of the UKB since the late 1930s.

Decision") (currently on appeal to the IBIA) [AR 2176-2186]. The 2012 Decision relies upon the Secretary's 2009 and 2010 Decisions. [AR 22]. On certain overlapping issues, these Decisions depart from the 1987 Decision. However, such a departure does not subject the 2012 Decision to a more searching review. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514; 129 S. Ct. 1800, 1810 (2009) In this regard, the Supreme Court has explained:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing positions. An agency may not, for example, depart form a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy. **But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one**; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.

Fox Television Stations, Inc., 556 U.S. at 515 (citations omitted) (emphasis added). The 2012 Decision addresses past policy and federal case law. [AR 17-18]. Relying on the reasoning supplied in the 2009 and 2010 Decisions, the 2012 Decision cites changes in law as the basis for a change in Departmental policy, thus providing "good reason" for the new policy. [AR 17-26]. Aside from the lone 1987 Decision, the long line of Departmental precedent that exists is a series of decisions that, in adherence to current law, approve trust acquisitions for the UKB and acknowledge the UKB's jurisdiction.

Plaintiffs also rely on three post-1987 court cases from the District Court for the Northern District of Oklahoma. As recognized by the Secretary, these cases (collectively, the "Buzzard Cases") do not control here. [AR 3234-3246 ("But the decisions she cites, . . . were both decided before Congress passed section 476(g) and are based on the Department's view at that time that CNO had exclusive jurisdiction.")]. The first is United Keetoowah Band v. Sec. of the Interior, No. 90-C-608-B (May 31, 1991) ("UKB v. Sec."), in which the UKB sought APA review of the

1987 Decision. The case never reached the merits as it was dismissed for lack of an indispensable party, the CNO, based upon CNO's "claim to the former Cherokee reservation as a successor in interest to the Cherokee Tribe." [AR 467]. Because the court did not review the merits of the 1987 Decision, it is clear that CNO's claim that the court "agreed with DOI's then-position that the subject lands of the 'old' Cherokee Reservation are under the jurisdiction of one sovereign, the Cherokee Nation, not the UKB," is an absolute misrepresentation. See Plfs' Br. at 29.

Perhaps more importantly, the court acknowledged that the CNO is the "new Cherokee Nation," who lays claim to the former Cherokee reservation "as a successor in interest to the Cherokee Tribe." [AR 463]. In other words, the CNO does not hold an interest in the historic Cherokee Reservation by way of a treaty between it and the United States, but rather, as a successor in interest to the "old" Cherokee Tribe, whose 1866 Treaty created the reservation. By the court's own reasoning, the UKB, as either a direct successor to the old Cherokee Tribe, or, as explained in the 2012 Decision, as a tribe formed, with express congressional authorization, from the Cherokee Nation, holds rights in the old Cherokee reservation coterminous to those of CNO.

The next allegedly violated precedential case cited by Plaintiffs is Buzzard v. Oklahoma Tax Comm'n, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992).[7] The very narrow issue in Buzzard was whether certain lands owned in fee by the UKB were located in Indian Country. [AR 1259]. Ultimately, the court determined that neither of the two statutes cited by the UKB (the 1946 Act and the OIWA) established UKB fee lands as Indian Country. [AR 1264]. The 2012 Decision does not run afoul of the holding in this case, which was limited to the court's determination that neither the 1946 Act nor the OIWA expressly establish a reservation for the UKB or expressly

[7] CNO, who the court described as "*[a]nother* descendant of the old Cherokee tribe" appeared as amicus.

create a claim to the historic Cherokee reservation. [AR 1264]. The 2012 Decision does not rely upon either of these statutes as creating a reservation for the UKB or setting forth a UKB claim to the historic reservation. Further, although Buzzard was not an APA case, the court deferred to DOI's expertise in the subject matter by relying on the findings of the 1987 Decision. [AR 1263-1264]. The same deference to the agency is due here.

The final "precedential" case cited by Plaintiffs is United Keetoowah Band v. Mankiller, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993), which, like UKB v. Sec., never reached the merits and was dismissed for lack of an indispensable party, the CNO. The court concluded that its previous decisions in UKB v. Sec. and Buzzard mandated a dismissal under Rule 19.[8] [AR 530]. Accordingly, there are three Secretarial decisions addressing the issue of a tribe other than the CNO acquiring trust land within the former Cherokee reservation: the 1987 Decision, which declined to acquire trust land within the former Cherokee reservation for the UKB without CNO's consent, and the 2010 and 2012 Decisions, both of which approved trust acquisitions for the UKB Corporation within the former Cherokee reservation without the consent of CNO. [AR 17-26, 450-452, 3253-3257]. A 2-to-1 split of decisions is certainly not demonstrative of a long departmental history in favor of CNO on the issues before the Court. For the reasons discussed above, the same is true of the Buzzard Cases.

II. THE STATUTORY AUTHORITY DETERMINATION IS NOT CONTRARY TO LAW.

[8] Citing UKB v. Sec. and Buzzard, the court stated that it "has previously determined in prior cases that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian County." [AR 528]. However, this determination was not made in either of the cited prior cases. As discussed above, the court in UKB v. Sec. simply determined that the CNO laid claim to the former Cherokee reservation and was therefore an indispensable party to the case, and in Buzzard, the court, while noting that the Secretary had previously determined that CNO had a superior claim to the former Cherokee reservation, did not itself make this holding. Rather, the Buzzard holding was premised entirely on the court's belief that the UKB did not cite any statutory authority that expressly established a reservation for the UKB or created a claim in the UKB to the former Cherokee reservation.

The Land Acquisition Regulations provide that trust land may be acquired where a statute(s) authorizes such acquisitions. 25 C.F.R. §§ 151.3 & 151.10 (a). The 2012 Decision demonstrates compliance with this requirement; citing section 3 of the OIWA as authorizing the Secretary to acquire the Parcel in trust for the UKB Corporation. [AR 22]. It is Plaintiffs' burden to show that this decision is contrary to law. Morris, 598 F.3d at 691. Despite the narrow scope of review, Plaintiffs devote the first section of their "statutory authority" argument to impugning the ASIA's character by alleging an ulterior motive for employing his authority under OIWA section 3. Plfs' Br. at 15-17. Following this bizarre invective, Plaintiffs finally assert that the ASIA's statutory authority determination was contrary to law, arguing that the Secretary's determination is contrary to (i) the statute itself, (ii) 25 C.F.R. §§ 151.2 and 151.9, and (iii) DOI's fee-to-trust handbook. Plfs' Br. at 17-22. CNO has failed to meet its burden. The agency decision is not contrary to law.

A. THE ASIA DID NOT CIRCUMVENT CARCIERI.

1. The ASIA Correctly Determined that Carcieri Does Not Apply to OIWA Trust Acquisitions.

Central to much of Plaintiffs' argument regarding the ASIA's statutory authority determination is Plaintiffs' contention that Carcieri v. Salazar bars the Secretary from acquiring land in trust for the UKB under the IRA. See Carcieri v. Salazar, 555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009). In Carcieri, the Court was asked "to interpret the statutory phrase 'now under Federal jurisdiction'" *found in the IRA's definition* of "Indians" at § 479. Carcieri, 129 S.Ct. at 1061.[9] The Court held that the term "now" referred to 1934, when the IRA was

[9] The IRA authorizes the Secretary "to acquire . . . any interest in land . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. The IRA defines "Indians" as "persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction." 25 U.S.C. § 479.

enacted. Id. at 1068. Thus, *for purposes of trust acquisitions under the IRA*, Carcieri limits the Secretary's authority to acquire land in trust to tribes that were under federal jurisdiction in 1934. Id. at 1061, 1068.

The 2012 Decision is premised upon the Secretary's authority to acquire land in trust for a tribal corporation under section 3 of the OIWA, not the IRA. [AR 22]. In making the 2012 Decision, the ASIA considered the general applicability of Carcieri to trust acquisitions under the OIWA, and correctly determined that, as a general matter, Carcieri was not implicated by trust acquisitions under the OIWA. [AR 21-22]. Because the ASIA determined that OWIA trust acquisitions are not limited by Carcieri, it was not necessary for the ASIA to determine Carcieri's specific impact on the UKB's ability to acquire trust land under the IRA.

Plaintiffs' argument that the ASIA relied on the OIWA, rather than the IRA, as a means of circumventing Carcieri is premised upon Plaintiffs' belief that the UKB was not "under federal jurisdiction" for purposes of the IRA in 1934.[10] Plaintiffs assert that the ASIA knew that "Carcieri makes clear that the UKB has no right to have the land taken into trust under section 5 of the IRA[.]" Plfs' Br. at 15-17. Plaintiffs' argument is flawed in two respects. First, it improperly conflates "under federal jurisdiction" with "formal federal recognition," and/or "formal organization."[11] Nothing indicates that DOI has ever concluded that the UKB (or any tribe for that matter) is ineligible for trust land under the IRA based solely upon the fact that the tribe obtained formal federal recognition or that it formally organized under the OWIA after

[10] The UKB was formally federally recognized as a Band in 1946 and was formally re-organized under the OIWA in 1950. See UKB Oct. 3, 1950 Constitution [AR 1749-1751] and Corporate Charter [AR 1751-1758].

[11] This distinction was recognized by Justice Breyer in his concurrence to the Supreme Court's opinion in Caricieri, where he acknowledged that "under federal jurisdiction" included those tribes that were counted by the DOI at the time of the Indian Reorganization Act in 1934 and those tribes that were under federal jurisdiction but were left off DOI's 1934 list. Carcieri, 129 S. Ct. at 1069-1070 (Breyer, S., concurring).

1934. Rather, it is clear that the ASIA declined to reach such a conclusion, opting instead to wait "until the Department has developed a more comprehensive understanding of Carcieri . . ." before concluding, for the first time, that a tribe must be formally recognized or organized in order to be subject to the jurisdiction of the federal government for purposes of the IRA. [AR 3237].

Second, nothing indicates that the ASIA knew, considered, or determined Carcieri's impact on the UKB's *specific* ability to acquire trust land under the IRA; such consideration was unnecessary for the 2012 Decision. Plaintiffs rely on a DOI "briefing paper" that notes that the 2012 Decision and the 2011 Decision are the "first to find authority to acquire land in trust pursuant to section 3 of the OIWA." Based on this language, Plaintiffs assert that "*Clearly*, even the ASIA recognizes that the decision . . . deviates from established federal law, court decisions, and the Department's own policies and regulations." Plfs' Br. at 15 (emphasis added). But the mere fact that the 2011 and 2012 Decisions were the first to find such authority does not render these decisions contrary to established law. There was no precedent as to the Secretary's authority to acquire trust land under § 3 prior to the 2011/2012 Decisions because the issue was one of first impression.[12] That these decisions were the first of their kind does not axiomatically mean that they are counter to precedent.

2. Plaintiffs Have Failed to Challenge the ASIA's Carcieri Determination.

Plaintiffs assume, without analysis, that Carcieri, which concerned only the DOI's ability to acquire land under the IRA, also constrains the DOI's authority under the OIWA. This assumption is erroneous. The OIWA is a distinct statute with distinct language, purpose, and history. Based upon this erroneous assumption, Plaintiffs argue that the 2012 Decision was

[12] Additionally, neither Carcieri nor any other established authority has applied the Carcieri limitation specifically to the UKB.

contrary to law because Carcieri bars the Secretary from taking land into trust for the UKB and, by extension, the UKB Corporation. However, the question of whether Carcieri applies specifically to the UKB to bar the Secretary from acquiring land in trust for the UKB (or UKB Corporation) is altogether different from whether Carcieri applies, generally, to OIWA trust acquisitions. The ASIA, deciding only the latter question, correctly determined that the plainly circumscribed issue and holding in Carcieri does not implicate his authority under the OIWA. [AR 3253]. Based upon this determination, the ASIA did not consider, and was not required to consider, whether Carcieri, as specifically applied to the UKB, would prohibit his acquisition of land in trust for the UKB under the IRA or the UKB Corporation under the OIWA.

In an APA challenge, only those things actually considered and decided by the agency are subject to review. See Hoyl v. Babbitt, 129 F.3d 1377, 1385-86 (10th Cir. 1997). Plaintiffs have asserted that the 2012 Decision is contrary to law because Carcieri bars trust acquisitions for the UKB, but this issue was not decided by the ASIA and is therefore not before the Court. See Babbitt, 129 F.3d at 1385-86. As to the Carcieri issue that *was* decided by the ASIA, *i.e.*, that Carcieri is not implicated by trust acquisitions under the OIWA, Plaintiffs have failed to point to any law that requires the application of Carcieri to the OIWA, a statute not considered by the Supreme Court in that case. Indeed, Plaintiffs have failed to present any argument that the ASIA's determination, that Carcieri does not impact OIWA acquisitions, is contrary to law. Because Plaintiffs failed to make this argument, it has been waived and may not be asserted for the first time in their reply. See Rural Water Dist. No. 5 of Wagoner Cnty. v. City of Coweta, No. 08-CV-252-JED-FHM, 2013 WL 2557607, at *7 (N.D. Okla. June 11, 2013) (holding that argument and supporting evidence raised for the first time in the reply brief were waived);

Moody v. Okla. Dep't of Corr., 879 F. Supp. 2d 1275, 1292 & n.102 (N.D. Okla. 2012) ("[A]rguments raised in a reply brief are generally waived . . . .").

B. THE STATUTORY AUTHORITY DETERMINATION IS NOT CONTRARY TO THE OIWA.

In 1936, two years after the enactment of the IRA, Congress enacted the OIWA. Pursuant to section 3 of the OIWA, the Secretary may convey to groups incorporated under the OIWA "any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 503. This provision incorporates by reference and makes available to tribal corporations under the OIWA the rights and privileges available to all tribes that organize under the IRA. Ignoring the plain language of the statute, Plaintiffs assert that OIWA section 3 authorizes to tribal corporations *only* those rights that would be available to the corporation's associated tribal governing entity under the IRA. Plfs' Br. at 18 (arguing that the OIWA "merely grants tribal corporations the same rights as the tribes themselves . . . .").

Under Plaintiffs' reading of the statute, a right that is not available to the UKB under the IRA would likewise be unavailable under section 3 of the OIWA. Thus, Plaintiffs contend that the UKB Corporation may receive trust land under OIWA section 3 only if the UKB may receive trust land under section 5 of the IRA. Plaintiffs then baldly assert that the UKB is not eligible for trust land acquisitions under the IRA pursuant to Carcieri,[13] and based upon that assertion, conclude that the UKB Corporation cannot claim that right under the OIWA. Plaintiffs' argument requires the Court to read into section 3 of the OIWA a requirement that is plainly not present.

[13] As discussed above, the ASIA did not decide whether, following Carcieri, the UKB would be eligible for trust land under the IRA. Consequently, that question is not within the Court's APA review of the 2012 Decision. See Babbitt, 129 F.3d at 1385-86.

The OIWA does not expressly or implicitly limit the rights available to tribal corporations to only those rights the tribal corporation's associated governmental entity would be entitled to under the IRA. Indeed, the OIWA is unambiguous in making available to tribal corporations organized under the OIWA the same collection of rights available generically to "*an* organized Indian tribe under the [IRA]." 25 U.S.C. § 503 (emphasis added). Had Congress intended to limit OIWA rights, as argued by Plaintiffs, the statute, rather than incorporating all the rights of "an organized Indian tribe," would simply have incorporated only those rights available to the incorporated group's own tribal governmental entity under the IRA. See Connecticut Nat. Bank v. Germain, 503 U. S. 249, 254, 112 S. Ct. 1146, 1149 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Thus, the correct measure of what rights the Secretary is authorized to convey to the UKB Corporation under the OIWA is not, as Plaintiffs argue, determined by what rights, if any, the UKB would be eligible to receive were it organized under the IRA, but rather, by what rights are available to *any* tribe that organizes under the IRA. 25 U.S.C. § 503.

The rights available to tribes organized under the IRA include the right to trust land acquisitions. 25 U.S.C. § 465. Because the right to trust land acquisitions is available to "*an* organized Indian tribe under the [IRA]," the right is likewise available to incorporated groups, such as the UKB Corporation, under the OIWA. 25 U.S.C. § 503. On this basis, the ASIA correctly concluded that section 3 of the OIWA provides statutory authority for his acquisition of the Parcel in trust for the UKB Corporation. [AR 22]. Plaintiffs have not met their burden of showing that the ASIA's statutory authority determination was contrary to the OIWA.[14]

[14] The UKB Defendants strenuously dispute Plaintiffs' contention that Carcieri prevents the Secretary from acquiring land in trust for the UKB as the UKB was "under federal jurisdiction" in 1934. However, because the 2012 Decision does not reach this issue, it is not before the Court and is

C. THE STATUTORY AUTHORITY DETERMINATION IS NOT CONTRARY TO THE LAND ACQUISITION REGULATIONS.

1. The 2012 Decision Is Not Contrary to 25 C.F.R. § 151.2(b).

Pursuant to the definitional section at 25 C.F.R. § 151.2(b), an OIWA corporation is considered a tribe "for purposes of acquisitions made under the authority of 25 U.S.C. §§ 488 & 489, or *other statutory authority which specifically authorizes trust acquisitions for such corporations*." 25 C.F.R. § 151.2(b) (emphasis added). Reading into the regulation language that is not present, Plaintiffs assert that the regulation "establish[es] the Department's recognition that a federally chartered tribal corporation may acquire trust property only when *expressly* authorized by law." Plfs' Br. at 20. Plaintiffs then contend that the 2012 Decision is contrary to the regulation because the statute relied upon by the ASIA as authority for the acquisition, does not "expressly" authorize trust acquisitions for OIWA corporations. Plfs' Br. at 19. However, the regulation does not require that the statute "expressly" authorize such trust acquisitions. Rather, the regulation requires statutory authority that "specifically" authorizes such acquisitions. 25 C.F.R. § 151.2(b). The ASIA correctly concluded that the OIWA provides such authorization. 25 U.S.C. § 503.

As discussed above, section 3 of the OIWA, grants to tribal corporations all rights and privileges granted to "an organized Indian tribe under the IRA." 25 U.S.C. § 503. Congress' incorporation of all IRA rights and privileges into the OIWA by reference, rather than through a complete re-listing of those rights and privileges, is in no way inconsistent with a grant of specific authority. Indeed, the statute specifically authorizes the Secretary to convey to a tribal corporation any right or privilege available to a tribe under the IRA. Id. Thus, although the right to trust land acquisitions is not individually re-listed in OIWA § 3, the specific authority granted

---

not a proper subject of argument by either Plaintiffs or Defendants. See Babbitt, 129 F.3d at 1385-86.

to the Secretary by OIWA § 3 to convey to tribal corporations "any other rights or privileges secured to an organized Indian tribe under the [IRA]" undeniably includes the right to have land acquired in trust as found in section 5 of the IRA. Id.[15]

Plaintiffs may disagree with the ASIA's interpretation of the regulatory definition, but they cannot demonstrate that the interpretation is contrary to law. When considering agency action made pursuant to the agency's own regulations, courts defer to an agency's interpretation of its own regulations. Morris, 598 F.3d at 684. DOI's interpretation controls '"unless 'plainly erroneous or inconsistent with the regulation.'" See Id. DOI's interpretation of the phrase "other statutory authority which specifically authorizes trust acquisitions" to include § 3 of the OIWA is not plainly erroneous or inconsistent with the regulation. The ASIA's description of the specific authority under § 3 as implicit where the statute does not individually itemize the list of rights the Secretary may convey, but nevertheless specifically grants the authority to convey the right at issue by incorporating that right by reference is also not plainly erroneous or inconsistent with the regulation. As such, the determination is entitled to substantial deference.

Finally, DOI's interpretation of its regulation is not, as Plaintiffs claim, a departure from a prior interpretation of a statute that it is charged with implementing. Plfs' Br. at 20. Notably, Plaintiffs cite no prior interpretation from which DOI has allegedly departed. Nor can they: Because this was a matter of first impression for the agency, there is no prior interpretation from which the agency could depart. When addressing a matter of first impression, the agency must, as it did here, lawfully use its expertise to make a reasoned decision.

2. The 2012 Decision Is Not Contrary to 25 C.F.R. § 151.9.

[15] Indeed, Plaintiffs do not disagree that the right to have land acquired in trust is provided by section 5 of the IRA, nor do Plaintiffs disagree that the rights and privileges available under section 3 of the OIWA are the same as those available under section 5 of the IRA. Plfs' Br. At 19. Notwithstanding this acknowledgment, Plaintiffs argue that section 3 of the OIWA does not comport with the regulation because it does not "expressly" authorize trust acquisitions.

The process to have land acquired in trust begins with the filing of a written application with the Secretary. 25 C.F.R. § 151.9 (providing that a "Tribe desiring to acquire land in trust shall file a written request for approval of such acquisition with the Secretary."). In 2006, the UKB filed such a request with the Secretary seeking to have the Parcel acquired in trust for the UKB. [AR 1650-1661]. In 2011, the UKB and the UKB Corporation jointly filed the Amended Application, requesting that the Parcel be placed in trust for the UKB pursuant to section 5 of the IRA, or in the alternative, for the UKB Corporation under section 3 of the OIWA. [AR 3048-3060].

Arguing form over substance, Plaintiffs assert that the 2012 Decision is contrary to 25 C.F.R. § 151.9 "[b]ecause the UKB and UKB Corporation are separate and distinct entities[16], [and] the ASIA should have required that the UKB Corporation submit the application for acceptance of the land into trust for its benefit." Plfs' Br. at 22. While Defendants disagree that the regulation prohibits the ASIA from considering an application submitted solely by a tribe requesting the placement of land in trust for its federally-chartered corporation (and Plaintiffs have pointed to none), this is not an issue the ASIA had to address nor is it an issue before the Court. See Babbitt, 129 F.3d at 1385-86. The Amended Application was not submitted solely by the UKB. [AR 3049].

In arguing that the ASIA should have required the UKB Corporation to submit the application, Plaintiffs erroneously contend that the Amended Application was submitted solely

[16] Plaintiffs cite numerous authorities for the proposition that a tribe and its federally-chartered corporation are separate entities: a proposition with which the UKB Defendants do not disagree. However, none of these cases suggest that the two entities cannot or do not act jointly, especially when, as here, the tribe and its corporation are governed by the same group of elected officials. See Plfs' Br. at 21, n. 27 (citing Okla. Ex rel. Okla Tax Comm'n v. Thlopthlocco Tribal Town, 839 P.2d 180, 183 (Okla. 1992). Indeed, the cases recognize that the distinction is often so fine that it is difficult to discern with which entity a party was dealing. Id.

by the UKB. Plfs' Br. at 22 ("The UKB, not the UKB Corporation, submitted the trust application for both tracts."). However, the Amended Application, beginning thusly, plainly demonstrates that it was submitted jointly by the UKB and UKB Corporation:

> Dear Acting Director Head:
>
> On behalf of the United Keetoowah Band of Cherokee Indians in Oklahoma, a federally recognized Indian Tribe, and the United Keetoowah Band of Cherokee Indians in Oklahoma, a federally-chartered corporation, this letter amends the April 12, 2006 application ("2006 Trust Application") . . . .

[AR 3049]. The Resolution submitted with the Amended Application further demonstrates the *joint* action of the UKB and UKB Corporation; reciting that the UKB is a federally recognized Band of Indians, that the UKB is separately organized under a Federal Corporation Charter, and that the trust acquisition request is made in conformity with the UKB Constitution and the UKB Charter, and finally, by resolving "to fulfill the aforesaid objectives of its Constitution and Federal Charter . . ." via the amended request for trust land. [AR 3069-3070].

It is amply clear that the Amended Application was filed jointly by the UKB and the UKB Corporation. Thus, even under Plaintiffs' overly-restrictive interpretation of the regulation, which would require the UKB Corporation to submit an application, the regulation was not violated and the ASIA did not act contrary to law. Finally, because Plaintiffs' argument is premised upon their apparent belief that the Amended Application was submitted solely by the UKB rather than by the UKB and UKB Corporation jointly, it is unknown whether Plaintiffs would have argued that even a joint application is contrary to 25 C.F.R. § 151.9. However, having failed to raise this argument in their opening brief, Plaintiffs cannot raise it in their reply. See Rural Water Dist. No. 5 of Wagoner Cnty., 2013 WL 2557607 at *7 (N.D. Okla. June 11, 2013); Moody, 879 F. Supp. 2d at 1292 & n.102 (N.D. Okla. 2012). In any event, such an

argument would be the height of form over substance, and would in no way be supported by the language or the purpose of the regulation.

D. THE STATUTORY AUTHORITY DETERMINATION IS NOT CONTRARY TO DOI'S FEE-TO-TRUST HANDBOOK, WHICH IS NOT LAW.

Plaintiffs finally assert that the 2012 Decision is contrary is the Department's Fee-to-Trust Handbook ("Handbook"). Plaintiffs' argument suffers from two obvious flaws. First, in performing an APA review of an agency decision, a court may only reverse the decision if the plaintiff demonstrates that the decision is "contrary to law." 5 U.S.C. § 706 (2). The Handbook is not law. To have the "force and effect of law, an agency handbook must" (1) prescribe substantive rules—*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and, (2) conform to certain procedural requirements" including promulgation "pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." Western Radio Services Company, Inc v. Espy, 79 F.3d 896, 901 (9th Cir. 1996); see also Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271-72 (10th Cir. 2007). The Handbook does not have the force and effect of law because it merely "describes Bureaus of Indian Affairs (BIA) standard procedures" for processing fee-to-trust applications. [AR 4987-88].

The second flaw in Plaintiffs' argument that the 2012 Decision is "contrary to law," as established in the Handbook, is the same as that discussed in section II(c)(2) above (*i.e.* Plaintiffs' erroneous contention that the Amended Application was filed solely by the UKB). Defendants disagree that the Handbook prohibits the ASIA from considering an application submitted solely by a tribe requesting the placement of land in trust for its federally-chartered corporation; however, this is not an issue the ASIA had to address nor is it an issue before the Court because the Amended Application was not submitted solely by the UKB. [AR 3049].

Further, the Handbook demonstrates that jointly submitted applications are contemplated. [AR 4987-88] (stating that fee-to-trust applications must contain "Identification of applicant(s)"). However, having failed to argue in their opening brief that consideration of a joint application is contrary to the Handbook, Plaintiffs cannot raise it in their reply. See Rural Water Dist. No. 5 of Wagoner Cnty., 2013 WL 2557607 at *7 (N.D. Okla. June 11, 2013).

III. THE "FORMER RESERVATION" DETERMINATION WAS NEITHER CONTRARY TO LAW NOR ARBITRARY AND CAPRICIOUS.

A. THE 2012 DECISION IS NOT CONTRARY TO IGRA'S REQUIREMENTS FOR TRIBAL GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988.

Section 2719 of IGRA limits tribal gaming on land placed in trust after October 17, 1988. 25 U.S.C. § 2719. However, these limitations do not apply if the tribe has no reservation, and the land is in Oklahoma "within the boundaries of the Indian tribe's former reservation, as defined by the Secretary . . . ." 25 U.S.C. § 2719 (a)(2)(A)(i). As distinct from defining the boundaries of a specific tribe's former reservation, the term "former reservation" has been defined generally as the "last reservation that was established by treaty, Executive Order, or Secretarial for an Oklahoma tribe." 25 C.F.R. § 292.2. For purposes of the UKB conducting gaming on the Parcel, the ASIA determined that IGRA's § 2719 limitations do not apply because the Parcel is as required by § 292.2located within the bounds of the historic Cherokee reservation, established by the Treaty of 1866, which is shared by the UKB and CNO (the "Former Reservation Determination").[17] [AR 18].

[17] Contrary to Plaintiffs' erroneous assumption, the UKB is not avoiding more stringent special requirements for taking land into trust for gaming purposes. See Plfs' Br., at 23. Plaintiffs would have the UKB forever trapped in no-mans land by relegating it without status under IGRA contrary to the intention of the special Oklahoma rule that the State would not be left without some regulation regarding where gaming could occur vis-à-vis where Oklahoma tribes are known to live. Indeed, as a 1986 Senate Report remarked about 25 U.S.C. § 2719 (b)(1)(A), that section "treats Oklahoma tribes the same as all other Indian tribes." S. Rep. No. 99-493, at 10 (1986). Consistent with the purpose of IGRA, then, the most appropriate gaming locations for the UKB would be, for example,

Plaintiffs argue that the ASIA's Former Reservation Determination is contrary to 25 U.S.C. § 2719 (a)(2)(A)(i) and 25 C.F.R. § 292.2.[18] As to the former, Plaintiffs contend that IGRA does not provide any discretion to the ASIA to determine whether land is within a tribe's "former reservation." According to Plaintiffs, the statute simply authorizes the Secretary to generally define the term "former reservation," and because the term has been defined, the Secretary has no further discretion. See Plfs' Br. at 24. As an initial matter, Plaintiffs argument is illogical considering that the Secretary does not require specific authorization from Congress to define a term in a statute the agency is charged with implementing.[19] Cf. Knebel v. Hein, 429 U.S. 288, 293, 97 S. Ct. 549, 552-53, 50 L. Ed. 2d 485 (1977) (allowing the Secretary of Agriculture to define terms by regulation, even without specific statutory authority to provide such term definitions). Furthermore, Plaintiffs' interpretation of the statute is too narrow and contrary to the statute's delegation of authority to the Secretary to define the boundaries of specific tribal gaming applicants' reservation boundaries. 25 U.S.C. § 2719 (a)(2)(A)(i) (Secretary may define "the boundaries of *the* Indian tribe's former reservation"). Thus, the statute provides the Secretary discretion to define (*i.e.* determine) what lands are the former reservation of the UKB for purposes of administering IGRA. However, because the Secretary

---

the 2.03-acre parcel, which is located within the UKB's traditional lands within Oklahoma. But cf. Plfs' Br. at 34 (confirming that Plaintiffs' real issue with UKB gaming is that it might bust a CNO gaming monopoly); Id. at 45 (agreeing that UKB should "have an equal opportunity to acquire trust lands"); [AR 3627 (conceding that, "as an abstract proposition of law" perhaps the UKB can acquire off-reservation land for gaming purposes)].

[18] To support their argument, Plaintiffs rely in part on the Court's findings at the Preliminary Injunction hearings of August 9 and August 12, 203. However, the Court specifically cautioned the parties to "[b]ear in mind [the preliminary injunction holding] is not a final holding, but I am concluding this for purposes of deciding the likelihood of success on the merits and obviously it's not a final decision of this court." Doc. 92, at 12, lns. 17-20.

[19] Indeed, at least one federal court has confirmed that the Secretary has the authority to make the "former reservation" determination. See Apache Tribe of OK v. United States, CIV.04 1184 R, 2007 WL 2071874 (W.D. Okla. 2007) (stating that the Secretary could not curtail its role under IGRA by refusing to acknowledge its *duty* to make the "former reservation" determination).

has promulgated a regulation *generally* defining the term "former reservation," the ASIA's specific determination of the UKB's former reservation must not be inconsistent with the regulation. The Former Reservation Determination is not inconsistent with the general regulatory definition.

Plaintiffs assert that, contrary to law, the ASIA allegedly "bypassed" the "former reservation" definition in 25 C.F.R. § 292.2, and instead adopted a case-by-case approach to defining the term that is inconsistent with the regulation. See Plfs' Br. at 23-24. What Plaintiffs appear to misunderstand, fundamentally, is that the ASIA did not purport to abolish and rewrite 25 C.F.R. § 292.2; rather, he applied the regulation while acknowledging the regulation's ambiguity as applied to this case. [AR 20-21]. Pursuant to 25 C.F.R. § 292.2, the term "former reservation" is defined generally as the "last reservation that was established by treaty, Executive Order, or Secretarial for an Oklahoma tribe." The ASIA found this regulatory definition satisfied through his application of the highly unique facts presented, noting that the UKB is a Band comprised of Cherokee Indians, which was reorganized and separately recognized by Congress and DOI, with a tribal headquarters in the same town where the Parcel is located. [AR 2021]. The ASIA further explained that "[t]here is no question that the UKB occupied the former Cherokee reservation nor that the Keetoowah Society of Oklahoma Cherokees was formed out of the Cherokee Nation of Oklahoma." Id.

According to the ASIA, these facts precluded a simple black and white application of the former reservation definition because neither IGRA nor regulations implementing IGRA address the situation presented, *i.e.* "whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other, can share the same former reservation for purposes of qualifying for the 'former reservation' exception." [AR 20].

Consequently, the ASIA employed agency expertise and discretion to find that the UKB and CNO share the former Cherokee reservation established pursuant to the Treaty of 1866 for the historic Cherokee Nation and to determine that the 25 U.S.C. § 2719 (a)(2)(A)(i) exception applies to such a situation. This determination, which involved the interpretation of a statute the agency is charged with implementing and the agency's own regulation, is entitled to "considerable deference," is not plainly erroneous, and should be upheld. Hydro Res., Inc., 608 F.3d at 1145; Qwest Commc'n Int'l, Inc., 398 F.3d at 1230; Morris, 598 F.3d at 684.

B. THE 2012 DECISION IS NOT CONTRARY TO IGRA'S "INDIAN LANDS" AND TRIBAL JURISDICTION REQUIREMENTS.

The NIGC has already opined that *because* the 2.03-acre parcel is not held in trust, the UKB does not currently exercise the requisite jurisdiction over the Parcel for it to qualify as "Indian lands" under IGRA.[20] [AR 5094]. The UKB has never wavered in its disagreement on that point but does rely upon the view held jointly by the NIGC and the DOI that once the lands are taken into trust, the jurisdictional issue will be resolved. Id. The 2012 Decision cannot be inconsistent with IGRA's jurisdiction requirement if it is precisely the 2012 Decision that will satisfy IGRA's jurisdiction requirement. CNO's argument to the contrary is circular, confused, and fails as a result.

Plaintiffs also contend that the otherwise unremarkable fact that neither the UKB Constitution nor the UKB Corporation Charter contains specific magic words of territorial jurisdiction establishes that the UKB does not have jurisdiction. See Plfs' Br. at 9. Plaintiffs impliedly give false significance to specific phrases like "Territorial Jurisdiction" in tribal

[20] It is not CNO, but instead the federal government that may exert some measure of power over the UKB. See, e.g., United States v. Lara, 541 U.S. 193, 200, 124 S. Ct. 1628, 1633, 158 L. Ed. 2d 420 (2004)("the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"). It matters not, then, whether CNO's laws authorize UKB action.

constitutions when highlighting the absence of such language in UKB's Constitution, but cite to no law or case that requires such language. See Id. Indeed, several OIWA tribes have land in trust on their behalf despite their respective constitutions having no provisions that specifically address territorial jurisdiction.[21] Moreover, as with the UKB's Constitution, the Thlopthlocco Tribal Town's Constitution contains an Article titled "Headquarters," which is the sole reference to the tribe's geographical location. See THLOPTHLOCCO TRIBAL TOWN, CONST. art. 3, attached as Ex. 9, pursuant to LCvR7.2(d). Thlopthlocco Tribal Town nevertheless has land held in trust on its behalf. [AR 513]. Finally, the Governing Resolutions of the Wichita and Affiliated Bands and the Quapaw Tribe, both federally-recognized tribes that have specifically declined to organize under a Constitution, contain no language specifically referencing the tribe's capacity as beneficiary to trust land. See Gov. Res. of Wichita and Affiliated Bands (1992); Gov. Res. of the Quapaw Tribe (1957), attached as Exs. 10 and 11, respectively, pursuant to LCvR7.2(d). Nevertheless, the United States holds land in trust on behalf of the Wichita and Affiliated Bands and the Quapaw, and the tribes exercise several aspects of jurisdiction over the land. [AR 513]. The UKB Defendants have found no style guide to constitutional writing, let alone controlling legal authority, that suggests such strict language regarding territorial jurisdiction is necessary. Plaintiffs' unsupported argument otherwise does not demonstrate that the ASIA's Former Reservation Determination is contrary to law.

C. THE 2012 DECISION IS NOT CONTRARY TO ANY LAW ESTABLISHED BY CONTROLLING JUDICIAL PRECEDENT.

Plaintiffs argue that the Former Reservation Determination is contrary to the Buzzard Cases, and that the Court should apply its rationale and ruling in Oklahoma v. Hobia, 2012 WL

[21] See SENECA-CAYUGA TRIBE OF OKLAHOMA CONST. (1937); OTTAWA TRIBE OF OKLAHOMA CONST. (1938); CADDO TRIBE OF OKLAHOMA CONST. (1938); MODOC TRIBE CONST. (1990), attached as Exs. 5-8, pursuant to LCvR7.2(d).

2995044 (N.D. Okla. July 20, 2012) here.[22] Plaintiffs seem to recognize that Oklahoma v. Hobia is not controlling precedent to which the 2012 Decision can be adjudged "contrary" in the context of an APA review, but nevertheless raise it in an attempt to analogize the UKB to the Kialegee Tribal Town (the "Kialegee"). Plaintiffs' analogy fails to account for the legal and historical distinctions between the two entities. Plfs' Br. at 31-33.

Kialegee is one of several "tribal towns" that comprised political units within the historic Creek Nation. Hobia, 2012 WL 2995044 at *7. The historic Creek Nation was a confederacy of semi-autonomous tribal towns, each with its own political organization and leadership. Harjo v. Andrus, 581 F.2d 949, 951 n.7 (D.C. Cir. 1978). The tribal towns would, from time to time, convene as a National Council to attend to Creek Nation affairs and to take actions on behalf of the entire Creek Nation. Felix Cohen, Handbook of Federal Indian Law, §4.04[2] (Nell Jessup et al. eds., 2005). In political organizational terms, tribal towns, such as Kialegee, formed the basic Creek political unit while the Creek Nation represented the tribal towns in foreign affairs, such as treaty making, until the United States' rendered the Creek National Council functionally irrelevant through the Act of June 28, 1898, 30 Stat. 495, and the subsequent "Creek Agreement" of 1901, Act of March 1, 1901, 31 Stat. 861. Harjo v. Kleppe, 420 F.Supp. 1110, 1119-1122 (D.D.C. 1976).

Despite the Creek Nation's role as a national political body that governed Kialegee until the early twentieth century, traditional tribal towns remained vital and began to achieve federal recognition in the wake left by the Creek Nation's dismantling in the early 1900s. Kialegee organized under the OIWA. Hobia, 2012 WL 2995044 at *1. Significantly the Kialegee's own constitution refers to itself as "one of the former several Tribal Towns of the Creek Indian Nation." CONSTITUTION AND BYLAWS OF THE KIALEGEE TRIBAL TOWN, OKLAHOMA, PREAMBLE

[22] See section I, supra, addressing Plaintiffs claim that the Buzzard Cases are controlling precedent.

(1941) , attached as Ex. 12, pursuant to LCvR7.2(d). The Muscogee (Creek) Nation subsequently organized pursuant to the OIWA in 1979 and established itself as the political successor-in-interest to the historic Creek Nation. Hobia, 2012 WL 2995044 at *8. The inherently subordinate political status of Kialegee relative to the historic Creek Nation has since complicated Kialegee's attempts to conduct gaming.[23]

The historic and well documented political association between Kialegee, the historic Creek Nation, and the Muscogee (Creek) Nation stands in stark contrast to that of the UKB and the CNO. Unlike Kialegee, which understood itself to be a political subset within the historic Creek Nation, as is evidenced in its 1941 Constitution, and did not seek separate political status until the historic Creek Nation was rendered politically obsolete by the United States, the UKB was never a political entity that was politically subservient to the historic Cherokee Nation. In fact, the Keetoowah Cherokees first established a constitution in 1859 as an entity separate and apart from the historic Cherokee Nation well before its dismantling by the United States at the turn of the twentieth century. See Ex. 1, Keetoowah Society Const., chap. 11, § 6 (1860). The Keetoowah Cherokees not only recognized that the dismantling of the historic Cherokee Nation was not applicable to it but followed suit by adopting a new constitution and federal charter to

[23] For the past several years, Kialegee has sought to operate a gaming facility on restricted fee lands leased from the descendants of a Creek allottee, both of whom are enrolled citizens of the Muscogee (Creek) Nation. Hobia, 2012 WL 2995044 at *9. The allotment in question was not made to a Kialegee citizen or even to an individual who lived within the geographic boundaries of the Kialegee Tribal Town but is located seventy miles from Kialegee's headquarters in Wetumka. Id. On July 20, 2013, this Court granted an order to preliminarily enjoin the construction of Kialegee's proposed gaming facility and stated that, "[a]ll Creek tribal towns are subset groups or "bands" of the Muscogee (Creek) Nation." Id. at 18 (citing 1 Op. Sol. On Indian Affairs 478, Solicitor's Opinion M-27796 (Nov. 7, 1934). Importantly, this Court refrained from deciding whether Kialegee could "share jurisdiction with the Muscogee (Creek) Nation over other restricted allotments which were originally allotted to members of the Creek Nation who were also members of the Kialegee Tribal Town." Id. at 18.

ensure that it could assume the role of the historic Cherokee Nation. See Act of July 1, 1902, Pub. L. No. 57-241; Ex. 3, Resolution No. 1, Const. of the Keetoowah Society, 1905.

Plaintiffs' assertion that the Keetoowah Cherokees are legally analogous to a Creek tribal town, which, by definition, is a political "subset" of what is now the Muscogee (Creek) Nation, not only fails to account for the organization of the historic Creek Nation but also the tortured history that has resulted from the Keetoowah Cherokees intense desire to be separate from the CNO. In any event, the question of whether the ASIA's Former Reservation Determination is contrary to law is not implicated by Hobia.

D. APPLICATION OF THE INDIAN CANON OF CONSTRUCTION SHOULD BE COMMITTED TO DOI'S DISCRETION.

Plaintiffs argue that the ASIA's application of the Indian canon of construction was arbitrary and capricious and contrary to law because the Indian canon does not apply where, as here, competing tribal interests are involved.[24] See Plfs' Br. at 33. Plaintiffs cite State of Utah v. Babbitt, 53 F.3d 1145 (10th Cir. 1995) and Cherokee Nation of Okla. v. Norton, 241 F. Supp. 2d. 1374 (N.D. Okla. 2002) and suggest that the cases represent settled law on the matter. They do not.

As recently as 2009, the Tenth Circuit reversed the Eastern District of Oklahoma where the latter held that Babbitt controls and the Indian canon does not apply where competing tribal interests are involved. See United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't of Hous. & Urban Dev., 567 F.3d 1235 (10th Cir. 2009) (reversing the lower court's Jan. 9, 2008 decision). In that case, the UKB argued that the Indian canon ought to *override* agency discretion. The district court disagreed. On appeal, the Tenth Circuit did not expressly address

[24] Plaintiffs again attempt to support their argument with findings from the Preliminary Injunction hearings of August 9 and August 12, 2013. Defendants refer the Court to their response in Section III.A to Plaintiffs' similar attempts to rely on findings made at stages of this proceeding that do not control here.

the UKB's argument, but nevertheless reversed the district court, demonstrating that the Tenth Circuit does not believe Babbitt is as settled as the lower court believed. See id. at 1246, 1251 n. 6, n. 12.

The Department increasingly encounters competing tribal interests. Given this reality, it would be a judicial usurpation of agency discretion to nullify the decisions where the Department applied the Indian canon amid competing tribal interests. In Gila River Indian Community v. United States, the Ninth Circuit acknowledged the new normal where the Department must use its agency expertise because "application of the Indian canon [where competing tribal interests are involved] is unsettled" thus making its application best left to the Secretary, since "[t]he Secretary is best positioned to take stock initially of whether and how to weigh the competing interests." 729 F.3d 1139, 1151 n. 12 (9th Cir. 2013), as amended (July 9, 2013).

In a world of increasing tribal competition, the ASIA's application of the Indian canon should be committed to agency discretion given the agency's expertise in dealing with competing tribal interests, and judicial review should not nullify an agency's weighing of competing interests through a bright-line rule barring agency application of the Indian canon where competing tribal interests are present. Even if the Court believes the Indian canon ought not apply when competing tribal interests are involved, that alone cannot render the entire 2012 Decision arbitrary, capricious and contrary to law.

E. THE FORMER RESERVATION DETERMINATION IS NOT ARBITRARY AND CAPRICIOUS.

Plaintiffs contend that the ASIA's Former Reservation Determination is arbitrary and capricious for two related reasons. First, Plaintiffs assert that the ASIA departed from prior agency interpretation of IGRA without justifying the change with reasoned analysis. Plfs' Br. at 35. Second, Plaintiffs claim that "[u]ntil recently, DOI has consistently recognized" that the

CNO has exclusive jurisdiction over Indian country within the bounds of the historic Cherokee reservation, and that the 2012 Decision is therefore implausible. Plfs' Br. at 35. Neither of these assertions are true.

With respect to Plaintiffs' claim that the Former Reservation Determination represents a departure "from a prior interpretation of a *statute* [DOI] is charged with implementing," Plaintiffs have failed to state what statute was previously interpreted by DOI, to cite to the decisions allegedly containing the prior interpretation, or to describe how the statutory interpretation here, leading to the Former Reservation Determination, is a departure from these alleged prior interpretations. Plfs' Br. at 35 (emphasis added). Indeed, Plaintiffs are simply incorrect that such a departure of statutory interpretation has occurred. The 2012 Decision is DOI's first decision concerning an interpretation of IGRA § 2719 (a)(2)(A)(i) as relates to the UKB. While it is true that DOI has *once* before, in the 1987 Decision, found that the UKB could not acquire land in trust within the historic Cherokee reservation without CNO consent, that Decision did not involve interpretation of IGRA, nor did it consider the question of whether the UKB has a shared reservation with CNO. [AR 450-452]. Thus, the 2012 Decision cannot be arbitrary and capricious for failing to justify a change in statutory interpretation, as there is no prior statutory interpretation from which to depart.

Relatedly, Plaintiffs allege that the 2012 Decision is arbitrary and capricious because it is counter to DOI's alleged "repeated recognition" of CNO's exclusive jurisdiction and UKB's lack of a reservation. Plfs' Br. at 35. As evidence of DOI's alleged repeated recognition of these ideas, Plaintiffs cite the Secretary's 1987 Decision and a series of Regional Director letters and decisions. Plfs' Br. at 36, n. 39. The 1987 Decision and Regional Director letters in no way represent the long line of precedent Plaintiffs suggest. Rather, they demonstrate *one* final agency

decision followed by the mandatory acceptance of that decision by subordinate agency officials, a fact demonstrated in the letters by their repeated citation to and reliance upon the 1987 Decision. Indeed, Plaintiffs recognize as much by arguing that the Regional Director's findings regarding jurisdiction conflicts in the Regional Director's April 19, 2012 Decision were made "under the constraints imposed by the ASIA's June 2009 Decision . . . ." Plfs' Br. at 41-42. Accordingly, the Department has not "repeatedly recognized" that the UKB lacks a reservation or that CNO has exclusive jurisdiction; at most, it has made such findings once, and has since, through two decisions decided that the UKB shares the historic Cherokee reservation with CNO and that the CNO does not have exclusive jurisdiction over Indian country therein.

IV. THE CONSENT DETERMINATION WAS NOT CONTRARY TO LAW.

Plaintiffs argue that the ASIA's determination that CNO consent was not a necessary predicate to the acquisition of the Parcel in trust for the UKB Corporation ("Consent Determination") is contrary to DOI's regulation at 25 C.F.R. § 151.8 and to certain treaty rights of CNO. Plfs' Br. at 36-40. In making the 2012 Decision, the ASIA properly concluded that CNO consent is not required by either under the circumstances presented. [AR 21].

A. 25 C.F.R. § 151.8 DOES NOT APPLY TO THE 2012 DECISION.

1. By its Plain Language, § 151.8 Applies Only to a Trust Acquisition on a Reservation other than the Applicant's Own Reservation.

25 C.F.R. § 151.8 provides that a tribe may acquire land in trust "on a reservation *other than its own* only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition . . . ." Because of the unique and complex history of Oklahoma that cannot be overlooked here, effectively rendering it without present day reservations, an Indian reservation in Oklahoma is "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f). Therefore, under the

plain language of both regulations: (1) the Secretary is authorized to determine what constitutes a tribe's former reservation in Oklahoma for application of the Part 151 regulations, and (2) consent of a tribe to a trust acquisition for another tribe is necessary only when the land to be acquired is outside the acquiring tribe's reservation. See 25 C.F.R. §§ 151.2(f), 151.8.

Pursuant to 25 C.F.R. § 151.2(f), the Eastern Oklahoma Region of the Bureau of Indian Affairs determined that the area of land constituting the former reservation of the UKB is the land that once constituted the historic Cherokee reservation. [AR 5098]. Having determined that the Parcel is within the boundaries of the UKB's former reservation—and not on a "reservation other than its own"—the Eastern Oklahoma Region concluded that the § 151.8 consent requirement was not applicable to the acquisition at issue. Id. The 2012 Decision, which adopts this conclusion, is not contrary to either of these regulations.

2. Congress Has Expressed that 25 C.F.R. § 151.8 Does Not Apply Here.

Not only does § 151.8, by its plain language, not apply here, it is equally notable that Congress has expressed its intention that the Department not apply the regulation to a circumstance such as that presented here. See Department of the Interior and Related Agencies Appropriations Act, 1999, Pub .L. No. 105-277, Sec. 101(e) ("1999 Act"). In 1980, the Department promulgated 25 C.F.R. § 151.8, requiring the consent of a tribal government who exercises jurisdiction over an area in which another tribe is seeking to take land into trust. At that time, and at the time of the Secretary's 1987 Decision, Congress likewise required CNO consent for trust acquisitions by another tribe within the bounds of the historic Cherokee reservation. See Pub. L. No. 102-154, 105 Stat. 990 (1991); [AR 450-452]. However, in 1999, Congress replaced the consent requirement in favor of a consultation requirement for trust acquisitions within the historic Cherokee reservation. See 1999 Act. The 1999 Act did not

repeal § 151.8, but simply overruled department policy with respect to trust acquisitions within the former Cherokee reservation, as follows:

> [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.

1999 Act, Pub. L. No. 105-277, Sec. 101(e). The Secretary's 1987 Decision and the Buzzard Cases[25], which deferred to the 1987 Decision, all predate passage of the 1999 Act. Accordingly, the Secretary's refusal in 1987 to acquire land in trust for the UKB without the consent of the CNO is perfectly reconcilable with the 2012 Decision. [AR 450-452].

Any questions as to whether the CNO's consent was required for trust acquisitions within the former Cherokee reservation pursuant to 25 C.F.R. §151.8 were resolved by the 1999 Act. Nevertheless, Plaintiffs make two inconsistent claims about the 1999 Act. First, they claim that the Act's use of the word "consult" simply adds a consultation requirement to the previous "consent" requirement. Second, Plaintiffs claim that, in any event, the provision has no legal effect. Plfs' Br. at 38. These claims are not only mutually-inconsistent; they are insupportable.

As to a consultation-consent requirement, consent assumes consultation. Replacing "consent" with "consultation" in the 1999 Act shows Congress' clear, unambiguous intent that, with respect to UKB trust acquisitions within the historic Cherokee reservation, the Department should discontinue its policy of requiring consent, and utilize the less deferential form of tribal input, consultation. Cf., Executive Order 13,175, Consultation and Coordination With Indian Tribal Governments, November 6, 2000.

---

[25] In these decisions, the court did not second guess the 1987 Decision, but suggested that the UKB seek a political solution. That political solution came in 1999 when Congress passed Prior to the 1999 Act, the statute required the consent of rather than consultation with the CNO. The accompanying Conference Report expressly stated that the modification in this policy was meant to allow the Bureau of Indian Affairs to address the status of the UKB. H.R. Conf. Rep. No. 105-825, 105th Cong., 2d Sess. (1998).

Separately, the Supreme Court has long recognized that Congress can effect substantive policy change through appropriations law, and the Tenth Circuit follows this precedent. See, e.g., United States v. Dickerson, 310 U.S. 554, 555, 60 S. Ct. 1034, 1035, 84 L. Ed. 1356 (1940) (citing numerous Supreme Court cases holding the same); Republic Airlines, Inc. v. U.S. Dep't of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988); Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (stating that "[a]ppropriation acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or to modify prior Acts of Congress.").

Plaintiffs misapply Supreme Court authority to suggest that a presumption against policy change in appropriations riders controls here; it does not. In U.S. v. Will, the Supreme Court recognized that "when Congress desires to suspend or repeal a statute in force, there can be no doubt that it could accomplish its purpose by an amendment to an appropriation bill." U.S. v. Will, 449 U.S. 200, 222, 101 S. Ct. 471, 484, 66 L. Ed. 2d 392 (1980) (quoting United States v. Dickerson, 310 U.S. at 555)(internal quotations omitted). The Court also reiterated a canon of statutory construction it had followed for years, namely that "repeals by implication are not favored." U.S. v. Will, 449 U.S. at 221 (quoting Posadas v. National City Bank, 296 U.S. 497, 503, 56 S. Ct. 349, 352, 80 L.Ed. 351 (1936)). No implied repeal occurred in the 1999 Act. Congress deleted "consent" and inserted "consult." The two verbs have two meanings, one less demanding than the other. Congress, using its long-regarded ability to effect substantive policy change through appropriations law, chose the less demanding verb and repealed the other.

As the UKB has repeatedly argued, and the Office of the Solicitor for the Department confirms, Congress has overturned any law that previously required CNO consent.

> As we previously advised you in our memorandum of January 31, 2008 (copy attached), we believe the 1999 appropriation rider controls and the Department

> may not take land into trust without *consulting* with the CNO. **The consent of the CNO is not required.**

[AR 4934] (emphasis added) (citations omitted) The ASIA subsequently confirmed this policy. [AR4931-4932].

The Associate Solicitor's position on this issue is sound. It is well established that the Federal government has plenary authority over both acquisition of federal property and Indian affairs. U.S. v. Nevada, 221 F.Supp.2d 1241 (D.Nev. 2002) (citing U.S. Const. Art. IV § 3 cl. 2) ("the Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). Furthermore, it is well settled that Congress can acquire land for Indians and impose federal regulations without the consent of a sovereign. Sioux Tribe Of Indians v. United States, 316 U.S. 371, 62 S. Ct. 1179 (1942) (imposing federal regulation of land without the consent of a sovereign state government). Thus, to the extent prior application of a regulation is in conflict with a more recent pronouncement of Congress, that prior application would be inapplicable.

B. CNO'S TREATY RIGHTS DO NOT PREVENT THE UNITED STATES FROM PLACING LAND IN TRUST FOR THE UKB CORPORATION.

Plaintiffs claim that the Treaty of 1866 is the source of its right to withhold consent to any applications for trust land within the boundaries of the former Cherokee reservation. Plfs' Br. at 2, 38. Under Plaintiffs' interpretation of the Treaty of 1866, it may withhold consent to the acquisition of trust land on behalf of the UKB because:

> [t]he United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied land east of 96˚, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the United States.

Treaty of 1866, art. XV. Plaintiffs further claim that the approved trust acquisition violates CNO's right to "the quiet and peaceful possession of their country and protection . . . against

hostilities of other tribes." Id. at art. XXVI. These arguments neglect to account for the UKB's historical and shared interest in the former Cherokee reservation.

The Treaty of 1866 leaves intact all of the terms of Treaty of 1846 between the United States and the Western Cherokee, a/k/a Keetoowah Cherokee, establishing a reservation for the Western Cherokees, except where the Treaty of 1866 stated otherwise. Treaty of 1866, art. 31. The renegotiated terms of the Treaty of 1866 were applicable to the reunited factions of the Cherokee Nation (*i.e.* the Eastern Cherokee and the Western Cherokee), and therefore applicable to the "whole Cherokee people." The CNO is simply wrong to infer that the Treaty of 1866 serves to provide the CNO with veto power over the sovereign UKB. To the contrary, the Treaty of 1866 provides protection to the "whole Cherokee people," as it refers back to prior active treaties and therefore provides protection to the UKB as well.

Plaintiffs' argument under Article XV of the Treaty of 1866 must also fail because the trust acquisition of a 2.03 acre parcel cannot possibly be construed as an attempt by the United States to "settle" another tribe, particularly when the Keetoowah Cherokees were "settled" on this land at the time of the 1866 Treaty, and had been "settled" there since their first emigration there in the early 1800s. When interpreting Indian treaties, the language must be construed in the manner in which the words would be understood by the Indians. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999). There is no indication that the Indians would have understood the term "settle" to mean to acquire trust land by the sovereign authority of the United States, nor the term "unoccupied lands," to mean lands held in fee status by the very same putative tribal trust beneficiary. Nor would they have understood the Keetoowah Cherokees as not already "settled" in the territory (particularly since the territory was in fact first inhabited by their Western Cherokee ancestors beginning in the early 1800s). Rather, Article XV was

intended to establish a system in which contemporary non-Cherokee tribes, being removed from their own lands by the United States, could resettle peaceably in Oklahoma Indian country. Under this system, the resettling tribe's choice would have been to either incorporate into the Cherokee Nation or choose to preserve its own independent tribal identity.[26] Putting Articles XV and XXVI in historical context reveals the absurdity of the Plaintiffs' argument.

Plaintiffs misapply the Treaty by using it against other Cherokee peoples, and pervert the purpose of Articles XV and XXVI. The Keetoowah Cherokee people are not a tribe being "settled" on the lands of the Cherokee. Nor is it a "hostile" tribal action to share a reservation.

V. THE ASIA CONSIDERED THE PART 151.10(f) AND 151.10(g) FACTORS.

Pursuant to 25 C.F.R. § 151.10, the Secretary must "consider" a list of eight criteria. 25 C.F.R. § 151.10 (a)-(h) . Plaintiffs argue that with regard to the factors at § 151.10(f), and (g), the Secretary's decision "is arbitrary, capricious, and an abuse of discretion under the APA."[27] Plfs' Br. at 41-47. The critical question in determining whether an agency's discretionary decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." McAlpine v. U.S. Bureau of Indian Affairs, 112 F.3d 1429, 1436 (10th Cir. 1997) (quoting 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 16 (1971)).

The 2012 Decision demonstrates that the Secretary considered the relevant criteria as required. [AR 21-25] (discussing each of the relevant § 151.10 factors). Indeed, Plaintiffs do not

[26] See, e.g. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 75-79 (1977) (assessing Delaware Indians' options to ceded land and become citizens or relocate to Indian country and live with the Cherokees).

[27] Plaintiffs' Complaint also raises claims as to the ASIA's consideration of 25 C.F.R. § 151.10 (b) and (e), the "need" and "tax roll" factors. [Dkt. No 2 at p. 23]. However, Plaintiffs have failed to argue these factor in their brief and have therefore waived them. See Rural Water Dist. No. 5 of Wagoner Cnty., 2013 WL 2557607 at *7 (N.D. Okla. June 11, 2013).

argue that the Secretary failed to consider the relevant criteria. Rather, they argue that in considering the factors, the ASIA "failed to give sufficient weight to evidence" and failed to "properly" consider factors. Plfs' Br. at 41-47. This is not enough to reverse an agency decision. Because there is no dispute that the ASIA considered the relevant factors, the 2012 Decision can only be overturned if there has been a clear error of judgment in view of the overall analysis of the § 151.10 factors. McAlpine, 112 F.3d at 1436. Although the inquiry is to be "searching and careful, the ultimate standard of review is a narrow one." McAlpine, 112 F.3d at 1436. The court may not substitute its judgment for that of the agency. Id. Plaintiffs have not demonstrated that there has been a clear error of judgment in view of the overall analysis of the § 151.10 factors.

A. THE ASIA CONSIDERED THE POTENTIAL FOR JURISDICTIONAL CONFLICTS.

Plaintiffs argue that the ASIA's determination regarding jurisdictional conflicts is arbitrary and capricious and contrary to law because the ASIA "failed to give sufficient weight" to evidence regarding jurisdiction conflicts. Plfs' Br. at 41. Plaintiffs' argument sets up a standard that is not required by the regulations or the APA. 25 C.F.R. § 151.10(f) requires the Department to *consider* "jurisdictional problems and potential conflicts of land use which may arise" from a proposed trust acquisition. 25 C.F.R. § 151.10(f). "The BIA fulfills its obligation under Section 151.10(f) as long as it "undertake[s] an evaluation of potential problems." Cnty. of Charles Mix v. U.S. Dep't of Interior, 799 F. Supp. 2d 1027, 1046 (D.S.D. 2011) aff'd, 674 F.3d 898 (8th Cir. 2012) (quoting South Dakota I, 314 F.Supp.2d 935, 945 (D.S.D. April 19, 2004)). This requires the ASIA "to *consider* jurisdictional problems or potential conflicts; it does not require [him] to *resolve* those problems or issues." State of South Dakota v. Acting Great Plains

Reg. Dir., 49 IBIA 84, 108, 2009 WL 1356393, 17. Undoubtedly the ASIA considered this factor as required.

In its December 1, 2011 comments to the UKB's Amended Trust Application, CNO claimed that "placement of land into trust will most certainly trigger jurisdictional conflicts." [AR 441]. Specifically, CNO commented that based upon its right to exclusive jurisdiction over trust lands within the historic Cherokee Reservation, its law would apply to activities on the Parcel were it placed into trust, and that the UKB's refusal to comply with CNO law would create jurisdictional conflicts. [AR 441-42]. The ASIA, citing to the 2009 Decision, addressed CNO's concern, explaining that "the UKB, like CN, possesses the authority to exercise jurisdiction over its tribal lands." [AR 24].[28] Quite simply, the ASIA determined that while jurisdiction conflicts may arise in the future, those conflicts could be minimized by CNO exercising jurisdiction over lands held in trust for CNO and the UKB likewise exercising jurisdiction over its trust lands. Id. Accordingly, jurisdictional conflicts would arise between the UKB and CNO only if CNO attempted to exercise jurisdiction over a parcel of land over which it does not now, nor has it ever, exercised jurisdiction. The ASIA is free to expect reasonable conduct by the respective sovereigns. Indeed, as the Secretary's 2009 Decision demonstrates, there are many tribes in Oklahoma that share jurisdiction who are likely not always in agreement on all issues, but whom nevertheless can share jurisdiction under federal law. [AR 3241] (listing tribes with shared jurisdiction over parcels held in trust on their behalf). There is no legal requirement that the ASIA give a certain weight to any particular concern or issue raised by a

[28] Plaintiffs complain that the ASIA improperly relied upon 25 U.S.C. § 476 (g) to "avoid consideration of jurisdictional conflicts[.]" Plfs' Br. at 44. The ASIA clearly did not fail or avoid to consider jurisdictional conflicts. Rather, the ASIA acknowledged that conflicts may occur, but that such conflicts would not justify a finding that the UKB lacked jurisdiction. [AR 24]. The ASIA's citation to § 476 (g) demonstrates the ASIA's acknowledgment that past Departmental decisions finding otherwise could not longer be relied upon.

commenting party, nor does that law require the ASIA to resolve the concerns. Rather, the law requires the ASIA to consider the issue. This was clearly done here.

Plaintiffs also incorrectly argue that the ASIA failed to consider the casino building's encroachment on an adjacent parcel owned in fee by the UKB as grounds for a potential jurisdictional conflict. Plfs' Br. at 43. Although several feet of the modular building that housed the Keetoowah Cherokee Casino and which is the subject of the Amended Application did overlap with fee land owned by the UKB at time of submission, as noted in the 2012 Decision, this overlap has been corrected by the UKB Tribal Council passing a Resolution to the satisfaction of the ASIA as part of his title review. [AR 203]. Further, nothing indicates that state jurisdiction on lands not held in trust would cause a jurisdictional conflict. The ASIA's consideration of this factor was not arbitrary and capricious or contrary to law.

B. THE ASIA CONSIDERED BIA'S ABILITY TO DISCHARGE ADDITIONAL RESPONSIBILITIES.

The Land Acquisition Regulations require the Secretary to consider "whether [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition. . . ." 25 C.F.R. § 151.10(g). Plaintiffs contend that the ASIA failed to "properly" consider this factor, but appear simply to argue that they disagree with the outcome of the ASIA's consideration of this factor. Plfs' Br. at 46-47. The 2012 Decision demonstrates that the ASIA considered this factor as required. [AR 24-25]. The ASIA first discussed that certain ISDEAA program functions along with the funding therefore had been transferred to the CNO. Id. The ASIA also acknowledged that the UKB would likely insist that the BIA provide direct services with regard to the Parcel "as it has done in the past with respect to other BIA services." Id. Finally, the ASIA recognized that while the additional duties *may increase the workload* of the Region, the

Region is capable of providing additional services resulting from the acquisition of the Parcel. See id.

Despite what seems to be Plaintiffs' contention otherwise, the ASIA was not required to find that the acquisition would not increase the BIA's workload or that funds are available to ensure that such an increase in workload does not occur.[29] The regulation requires the ASIA to consider whether BIA is capable of discharging additional responsibilities. Neither the Regional Office nor Plaintiffs indicate that the BIA is *incapable* of handling whatever additional responsibilities are associated with the acquisition of a 2.03 acre parcel of land in trust; they simply argue that the acquisition "may" increase BIA's workload if additional funds are not appropriated. An increase in workload does not render BIA incapable of administering any additional responsibilities associated with the acquisition. The ASIA's consideration of this factor was not arbitrary and capricious or contrary to law.

CONCLUSION

The UKB and UKB Corporation respectfully request that the Court enter judgment affirming the 2012 Decision and denying Plaintiffs' request for declaratory relief and for permanent injunction.

[29] Plaintiffs also argue, without support, that the ASIA was arbitrary and capricious in not considering the impact on funds appropriated to CNO. Such consideration is not required by the regulation, which by its plain terms requires the ASIA to consider only the ability of BIA to administer is obligations. See Shawano County, Wisconsin, Bd. of Supervisors v. Midwest Reg'l Dir., 40 IBIA 241, 249, 2005 WL 640907, 7 (explaining that plain language of regulation controls).

Respectfully submitted,

McAfee & Taft, A Professional Corporation

s/ Christina M. Vaughn
Christina M. Vaughn, OBA # 21390
Jessica John-Bowman, OBA # 30388
1717 South Boulder Avenue, Ste. 900
Tulsa, Oklahoma 74119
Telephone: (918) 587-0000
Facsimile: (918) 574-3104
christina.vaughn@mcafeetaft.com
jessica.johnbowman@mcafeetaft.com

And

James C. McMillin, OBA # 17206
Tenth Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102-7103
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
james.mcmillin@mcafeetaft.com

Attorneys for the United Keetoowah Band of Cherokee Indians and United Keetoowah Band of Cherokee Indians Corporation

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2014, 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 all ECF registrants.

s/*Christina M. Vaughn*
Christina M. Vaughn