IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

(1) **THE CHEROKEE NATION**, Plaintiff(s) vs. (2) **S.M.R. JEWELL, *in her official capacity as* Secretary of the Interior, U.S. Department of the Interior**, and (3) **KEVIN WASHBURN, *in his official capacity as* Acting Assistant Secretary for Indian Affairs U.S. Department of the Interior**, and (4) **ROBERT IMPSON, *in his official capacity as* Eastern Oklahoma Regional Director, Bureau of Indian Affairs**, Defendant(s) and **(5) UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and** **(6) UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,** Intervenors/Defendants.	)	Case No. 14-cv-428-RAW

PLAINTIFF'S MERITS BRIEF

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INTRODUCTION

In a decision rendered on May 24, 2011[1] ("2011 Decision"), the Eastern Oklahoma Regional Director of the Bureau of Indian Affairs ("Regional Director") for the United States Department of the Interior ("Department" or "DOI") found that a subsidiary band of the Cherokee Indians that was created in the mid-twentieth century has legal and governmental rights within the jurisdictional area of the Cherokee Nation that are equal to the authority of the Cherokee Nation itself. Through legal convolutions, logical contortions and conjecture, the 2011 Decision disregards and seeks to uproot 150 years of Treaty obligations, the Department's own prior decisions, the clear precedent of the federal district courts and the Tenth Circuit Court of Appeals, and the United States Supreme Court's holding in *Carcieri v. Salazar*, 555 U.S. 379 (2009).

This action challenges the final agency decision rendered by the Regional Director who approved an amended application of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") to take a 76 acre tract located in Cherokee County ("Subject Tract") into trust for the use and benefit of United Keetoowah Band of Cherokee Indians in Oklahoma Corporation ("UKB Corporation"). The Subject Tract is located within the Cherokee Nation's historic boundaries established by treaties in the early 1800s ("Treaty Territory").

In the 2011 Decision, based on directives from the Assistant Secretary for Indian Affairs ("ASIA"), the Regional Director determined that DOI had the statutory authority to take the Subject Tract into trust for the UKB Corporation, despite the fact that (1) the

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[1] Doc. 65, AR3071--AR3081. (hereinafter "AR__-__"). The most pertinent portions of the administrative record cited in this brief are contained in the Appendix to this brief for convenience of the Court.

Supreme Court in *Carcieri* clearly held that DOI cannot utilize Section 5 of the Indian Reorganization Act[2] ("IRA") to take land into trust for tribes, like the UKB, that were federally recognized after 1934, and that (2) Section 3 of the Oklahoma Indian Welfare Act[3] ("OIWA") (*i.e.* the statutory provision under which the Assistant Secretary purported to take the land into trust for the UKB Corporation in order to avoid the impact of *Carcieri*) contains no express grant of authority to take land into trust and, prior to the 2011 Decision, has never been construed to contain such implicit authority. Because the Regional Director and the DOI would exceed its statutory authority by taking the Subject Tract into trust, the Court should reject the 2011 Decision and prevent its implementation.

Moreover, the Regional Director and DOI also utilized a novel finding in a Congressional appropriations bill to bypass the Department's own regulations that clearly require the UKB to obtain the Cherokee Nation's consent for acquisition of any land within the Nation's jurisdiction. Until recently, DOI had consistently enforced this consent requirement in considering any application by the UKB regarding land within Cherokee Nation jurisdiction. The federal courts also recognized the applicability of the consent requirement to UKB trust applications relating to Cherokee land. Thus, the ASIA's cursory conclusion that the requirement no longer applies despite the Cherokee Nation's continued and undisputed jurisdiction over the land is arbitrary and capricious and must be rejected.

In short, the Regional Director's decision to take the subject tract into trust for the UKB exceeded his and the Department's statutory authority, was arbitrary and capricious, constituted an abuse of discretion, and violates the Administrative Procedures Act.

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[2] Act of June 18, 1934, 48 Stat. 988, 25 U.S.C. §§ 461 *et seq.*

[3] Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. §§ 501, *et seq*.

Plaintiff Cherokee Nation ("Nation") timely appealed the Regional Director's 2011 Decision in the Interior Board of Indian Appeals ("IBIA"). *Cherokee Nation v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs*, Docket No. IBIA 11-122.

On January 6, 2014, the IBIA entered an Order dismissing the Cherokee Nation appeal. *See* Order Dismissing Appeal, 58 IBIA 153. Doc. 6, pp. 4-21. On January 13, 2014, the Nation filed this present action seeking to enjoin the Regional Director and DOI from taking the Subject Tract into trust for the UKB Corporation. On January 31, the Defendants agreed that no action would be taken to place the Subject Tract into trust until this Court has issued an opinion on the merits. Doc. 18, p. 5.

If allowed to stand, the 2011 Decision would uproot 150 years of treaty obligations, contrary to direct Federal court rulings and numerous prior DOI determinations.

HISTORICAL BACKGROUND

Cherokee Nation Government and Treaty Territory

The Cherokee Nation, a federally recognized Indian tribe, is "a distinct organization capable of governing itself, consistent with its existence even prior to the signing of treaties with the United States." *Wheeler v. U.S. Dep't of the Interior, Bureau of Indian Affairs*, 811 F.2d 549, 551 (10th Cir. 1987) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)). The United States historically recognized the Nation's governmental authority in its treaty relations with the Nation, particularly in the 1835 and 1866 treaties which expressly protected the Nation's governmental authority[4] within its Treaty

[4] The Treaty of New Echota, Treaty of December 29, 1835, 7 Stat. 478 (Proclamation, May 23, 1836) ("1835 Treaty"), art 5, expressly guaranteed the Nation the right to self-government within its treaty territory, so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. This guarantee was protected by the Treaty of July 19, 1866, 14

Territory.[5] Consistent with its treaty rights, the Nation has exercised its governmental authority through its 1827, 1839, 1976, and 2003 Constitutions, each of which was adopted and implemented under the Nation's inherent sovereign authority. These constitutions have defined the Treaty Territory over which the Cherokee Nation exercises governmental jurisdiction.[6] The 1976 Constitution, approved pursuant to a referendum called by the Secretary of the Interior, specifically states the "provisions of this Constitution overrule and supersede the provisions of the Cherokee Nation constitution enacted the 6th day of September 1839." *1976 Cherokee Nation Constitution, art. XVI.* The 2003 Constitution also expressly supersedes the provisions of its predecessor Constitutions. *2003 Cherokee Nation Constitution, art. XVI.* None of the Nation's Constitutions establish or recognize that any clan, organization, town, group, society, or other entity may exercise any *governmental authority* within the Nation's Treaty Territory.

The Cherokee Nation government has withstood enormous pressures. The Cherokee

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Stat. 799 (Proclamation August 11, 1866) ("1866 Treaty"), art 13, which reaffirmed and declared in full force all provisions of prior treaties not inconsistent with the provisions of the 1866 Treaty. The 1835 treaty protection of self-government was not inconsistent with the 1866 treaty.

[5] The Nation acquired fee patent title to its lands in 1838 as required by the 1835 Treaty. The Nation's jurisdictional boundaries were later reduced to the present 14-county area in what is now northeastern Oklahoma, due to cessions of lands in western Indian Territory under the 1866 Treaty and cessions of the Nation's Cherokee Outlet lands under an agreement ratified by Act of March 3, 1893, ch. 209, 27 Stat. 612, 640, § 10.

[6] The 1839 Cherokee Nation Constitution, art. I, sec. 1, defined the Nation's boundaries by reference to the 1833 Cherokee Nation Treaty, Act of Feb. 14, 1833, 7 Stat., 414 (Proclamation, Apr. 12, 1834), which contains the same legal description as the description in the 1835 treaty, art. 2. AR 1773-1783. The 1976 Constitution, art.VI, sec. 2, references "the historic boundaries of the Cherokee Nation" in its residency requirement for the office of Principal Chief. AR 1717-1733. The 2003 Constitution defines the Nation's boundaries in article II, entitled "Territorial Jurisdiction," as follows: **"**The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893." The 1976 Constitution, art. XVII, and the 2003 Constitution, art. XVII, established the seat of government of the Cherokee Nation at Tahlequah, Oklahoma.

people inhabited large portions of Southeastern United States prior to removal to their Indian Territory in the 1830s. After Congress passed the Indian Removal Act in 1830, the Nation ceded its lands east of the Mississippi River and was removed to its present Treaty Territory. In 1887, Congress passed the Dawes Act, also called the General Allotment Act. *Act of February 8, 1887, 24 Stat. 388, codified at 25 U.S.C. §§ 331, et seq*. The Dawes Act provided for the allotment of tribal lands to individual members of most tribes nationwide, but excluded the "Five Civilized Tribes" (Cherokee, Choctaw, Chickasaw, Muscogee (Creek) and Seminole Nations) ("Five Tribes") from the Act. *25 U.S.C. § 339.*

In 1893, Congress created the Dawes Commission and empowered it to seek allotment of the lands of the Five Tribes. Their resulting individual allotment acts reflected a Congressional plan to dissolve the governments of the Five Tribes by 1906. *See e.g.*, *Cherokee Nation Allotment Act of July 1, 1902, 32 Stat. 716, § 63* (stating that the "tribal government of the Cherokee Nation shall not continue longer than" March 4, 1906). However, that plan was halted two days before the deadline for dissolution when Congress approved a joint resolution[7] continuing the Five Tribes' existence and governments until completion of allotment. The following month, Congress enacted the Five Tribes Act, which continued the Five Tribes' government "until otherwise authorized by law."[8] There

[7] The joint resolution provides: "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes or Nations or Indians in the Indian Territory are hereby continued *in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes* unless hereafter otherwise provided by law." *Jnt. Res. No. 7, March 2, 1906, 34 Stat. 822* (emphasis added).

[8] In contrast to the joint resolution, the Five Tribes Act simply provides: "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and

have been no Congressional enactments discontinuing the Five Tribes' governments since that time, and the federal courts have recognized that the governments of the Five Tribes were never terminated. *See Cherokee Nation v. Okla.*, 461 F.2d 674, 678 (10th Cir. 1972);[9] *Harjo v. Kleppe*, 420 F. Supp. 1110, 1129 (D.D.C. 1976), *aff'd sub nom*, *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

The Cherokee Nation further withstood the pressure of the DOI's persistent "bureaucratic imperialism" in DOI's dealings with the Five Tribes following Oklahoma statehood,[10] and continued to exercise governmental authority even before its adoption of its new constitution in 1976. For example, in the early 1970s, the Cherokee Nation, with the Choctaw and Chickasaw Nations, successfully litigated claims concerning the Arkansas Riverbed. *Choctaw Nation v. Okla.*, 397 U.S. 620 (1970); *Cherokee Nation v. Oklahoma*, 461 F.2d 675 (10th Cir. 1972).

Congress also recognized the Nation's identity and government in its enactment of various laws after Oklahoma statehood. One of these laws, the Indian Reorganization Act

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Seminole tribes or nations are hereby continued *in full force and effect for all purposes authorized by law*, until otherwise provided by law." *Act of April 26, 1906, 34 Stat. 137, § 28.*

[9] "The Supreme Court has said that 'when Congress has once established a [Indian] reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.' There has been no separation here*; the tribal governments still exist*; and Oklahoma was admitted to the Union in 1907 upon compliance with the Enabling Act of June 16, 1906, 34 Stat. 267, which required a disclaimer of title to all lands owned "by any Indian or Indian tribes." *Cherokee Nation v. Okla.*, 461 F.2d at 678 (emphasis added) (citation omitted).

[10] "The available evidence clearly reveals a pattern of action [following statehood] on the part of the Department and its Bureau of Indian Affairs designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress. This attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act." *Harjo*, 420 F. Supp. at 1130. This interference is continuing in DOI's present efforts to debilitate the Cherokee Nation's government by attempting to enable a band to encroach on the Nation's territorial jurisdiction.

of 1934, acknowledged the existence of the Cherokee Nation by naming it as one of a number of tribes excluded from five of its sections. 25 U.S.C. § 473.[11]

Consistent with the Nation's sovereign status, the Nation and the United States have maintained a continuous government-to-government relationship. The Nation's government, like those of many other tribes, was strengthened by the Indian Self-Determination and Education Assistance Act ("ISDEAA") of 1975.[12] The Cherokee Nation was one of a small group of tribes nationwide selected to participate when Congress amended the ISDEAA to authorize a self-governance demonstration project in 1988.[13]

Significantly, in its findings in the 2002 Cherokee, Choctaw, and Chickasaw Claims Settlement Act, Congress expressly recognized the Cherokee Nation's "most recent" 1976 constitution and the Nation's relationship with the United States, as follows:

> The Cherokee Nation, a federally recognized Indian tribe with its present tribal headquarters south of Tahlequah, Oklahoma, having adopted *its most recent constitution* on June 26, 1976, and *having entered into various treaties with the United States*, including but not limited to the Treaty at Hopewell, executed on November 28, 1785 (7 Stat. 18), and the Treaty at Washington, D.C., executed on July 19, 1866 (14 Stat. 799), *has maintained a continuous government-to-government relationship with the United States since the earliest years of the Union.*
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> 25 U.S.C. § 1779(3) (emphasis added).

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[11] ". . . *Provided*, That *sections 4, 7, 16, 17, and 18 of this Act [25 U.S.C.A. §§ 464, 467, 476, 477, 478] shall not apply to the following-named Indian tribes*, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, *Cherokee*, Chickasaw, Choctaw, Creek, and Seminole." 25 U.S.C. § 473. (Emphasis added.)

[12] Act of January 4, 1975, Pub. L. No. 96-638, 88 Stat. 2203, codified as amended at 25 U.S.C. §§ 450-450n, 455-458e, 458aa-458hh, 458aaa-458aaa-1.

[13] Act of Oct. 5, 1988, Pub. L. 100-472, 102 Stat. 2296; Cherokee Nation LA 06-90 (Aug. 11, 1990 Council approval of self-governance compact).

The present-day Cherokee Nation is the same entity as the original Cherokee Nation.

Status of UKB

In contrast to the Cherokee Nation's sovereign status, the UKB never maintained a treaty relationship with the United States14 and never held title to the lands owned in fee by the Cherokee Nation.[15]

In 1937, a group identified as the Keetoowah Society sought permission to organize under Section 3 of the OIWA. That same year, the DOI Solicitor determined that the Keetoowah Society was a voluntary society and could not be considered a "recognized band" under section 3 of the OIWA:

> The primary distinction between a band and a society is that a band is a political body. In other words, a band has functions and powers of government. It is generally the historic unit of government in those tribes where bands exist. . . .
>
> This essential character is not possessed by the Keetoowah Society nor any of its factions. It is neither historically nor actually a governing unit of the Cherokee Nation, but a society of citizens within the Nation with common beliefs and aspirations.
>
> Op. of July 29, 1937. AR 4378.

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[14] "[UKB] was not a party to any of the treaties [between the United States and the Cherokee Nation]." This statement of fact was made by the U.S. Justice Department on behalf of DOI in a motion for judgment on the pleadings filed in defense of an action brought by the UKB against DOI. See *UKB v. United States*, Case No. 08-cv-1087 (D.D.C. Dkt. No. 74-1, p. 27). The statement was specifically addressing the Treaty of 1817 and the Treaty of 1846 which were at issue in that case. However, the DOI concluded that "the treaties were signed and ratified before [UKB] existed as an entity and long before [UKB] was recognized by the United States. As a result, [UKB] has no actionable rights under the treaty." Id.

[15] "To the extent that the [UKB] contests the present ownership interests in lands that were held in fee by the Cherokee Nation and then allotted, [UKB] cites nothing that would support [UKB]'s claim to those lands. The Cherokee Nation's lands were granted in fee under Articles 1 and 4 of the Treaty of 1846. . . . [The UKB] was not a party to the Treaty of 1846 but rather came into existence and was formally recognized long after the treaty." Id. at 30-31.

On March 24, 1945 the Acting Secretary of the Interior informed Congress that DOI again declined the UKB's request to organize under the OIWA because DOI could not make a positive finding that the society was a tribe or band within the meaning of the OIWA. H.R. Rep. No. 79-447, at 2 (1945); S. Rep. No. 79-978, at 3 (1946). The next year Congress approved the Act of August 10, 1946, Pub. L. No. 79-715, § 1, 60 Stat. 976 ("1946 Act"): "That the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936." AR 3911. There is nothing in the 1946 Act conferring any territorial jurisdiction on the UKB. In contrast, section 2 of the same 1946 Act "set aside for the use and benefit of the Indians of the Cheyenne and Arapaho Reservation in Oklahoma" a specified school reserve tract. *Id*.

The UKB organized in 1950 under section 3 of the OIWA, 25 U.S.C. § 503, with a federally approved constitution. AR19-23. The UKB Corporation was approved at the same election under authority of section 3 of the OIWA. AR24-31. The UKB and the UKB Corporation are separate and distinct legal entities. The UKB Constitution and the UKB Corporation Charter do not claim that the UKB has authority to exercise governmental authority within the Cherokee Nation's Treaty Territory or in any other defined geographic area. AR19-31. The UKB make no claims to any geographic or territorial jurisdiction anywhere.

TRUST APPLICATION PROCEDURAL HISTORY

On June 9, 2004, the UKB submitted an application to DOI requesting that the Subject Tract be taken into trust. AR01-18. The Regional Director issued a decision on April 7, 2006 ("2006 Decision") denying the UKB's request. AR672-679. The UKB

appealed the 2006 Decision to the IBIA. AR680-685.

On April 5, 2008, the ASIA directed the Regional Director to request remand from the IBIA and to reconsider the 2006 Decision ("2008 Directive"). AR790-794. The IBIA remanded the matter for reconsideration on June 4, 2008. *United Keetoowah Band v. E. Okla. Reg'l Dir.*, 47 IBIA 87 (2008), AR962-968. On August 6, 2008, the Regional Director issued a second decision ("the 2008 Decision"), again denying the UKB's application. AR1337-1362. The UKB appealed the 2008 Decision to the IBIA. AR1363-1389.

On September 4, 2008, before an IBIA decision, the ASIA informed the IBIA that DOI was taking jurisdiction over the appeal pursuant to 25 C.F.R. § 2.20(c). AR1393-1394. The IBIA transferred the appeal to the ASIA. AR1395-1397. Following transfer of the appeal, the ASIA issued four decisions involving the Subject Tract over an 18-month time period, dated June 24, 2009, AR1553-1567 ("June 2009 Decision"); July 30, 2009, AR1685-1688 ("July 2009 Decision"); September 10, 2010, AR2557-2561 ("2010 Decision""); and January 21, 2011, AR3007-3008 ("January 2011 Decision").

On October 5, 2010, the UKB amended its application by requesting that the Subject Tract be taken into trust for the UKB Corporation. AR4023-4034. On May 24, 2011, the Regional Director, under the constraints of the four decisions issued by the ASIA in 2009, 2010, and 2011, issued the 2011 Decision determining that the Subject Tract would be taken into trust for the UKB Corporation.

STANDARD OF REVIEW

The 2011 Decision is subject to reversal under the Administrative Procedures Act, 5 U.S.C. § 706(2) ("APA"), because it includes a number of conclusions that are not in accordance with the law, exceeds statutory authority, and fails to observe procedural

requirements, including the 2011 Decision's improper determinations that: (1) consent of the Cherokee Nation for the taking of the Subject Tract is not required; (2) land can be placed into trust under section 3 of the OIWA on behalf of a federally chartered corporation upon request by the tribe affiliated with that corporation, rendering *Carcieri* inapplicable; (3) the UKB may acquire land in trust within the Nation's Treaty Territory under requirements concerning either on-reservation or off-reservation lands, thereby diminishing the Nation's Treaty Territory; (4) jurisdictional conflicts would not arise between the Cherokee Nation and the UKB; and (5) the 1994 amendment of section 476 of the IRA prohibits the Department from complying with regulations requiring consideration of jurisdictional conflicts.

The 2011 Decision is also arbitrary and capricious under the APA, § 707(2). Agency action is "arbitrary and capricious" under the APA if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment. *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers,* 702 F.3d 1156, 1165 (10th Cir. 2012) (citing *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 704 (10th Cir. 2009)).

Agency action shall be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 414 (1971). **"**The critical question in answering this inquiry is 'whether the decision was based on a consideration of the relevant factors and whether there has been a

clear error of judgment.'" *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1131 (10th Cir. 2009) (citing *McAlpine v. United States*, 112 F.3d 1429, 1436 (10th Cir. 1997) (quoting *Overton Park*, 401 U.S. at 416)). As will be discussed below, the 2011 Decision must be set aside because it is arbitrary and capricious under the APA, not in accordance with the law, and exceeds the statutory and regulatory authority of the Assistant Secretary.

ARGUMENTS AND AUTHORITIES

I. THE 2011 DECISION'S APPROVAL OF THE UKB TRUST APPLICATION WITHOUT CHEROKEE NATION CONSENT IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.

To be clear, DOI regulations provide that an Indian tribe "may acquire land in trust status 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*." (emphasis added) 25 C.F.R. § 151.8. In Oklahoma, the term "Indian reservation" means "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f). "The UKB property is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota [citation omitted] and the 1866 treaty between the Cherokee Nation and the United States [citation omitted]." AR3073. As a result, the Regional Director and the Department had consistently refused to take land into trust for the UKB within the boundaries "because the subject lands fall within the Cherokee Nation's former reservation, [and] their consent is required under 25 CFR 151.8." April 17, 1987 letter from ASIA to UKB Chief, AR1349-1350.

However, DOI attempts to evade the applicability of the consent requirement in § 151.8 to the UKB trust application based on a 1999 appropriations rider. *See* AR 793 (February 14, 2008 Memorandum from Associate Solicitor to ASIA discussing 1999

Appropriations Act and referencing January 31, 2008 memorandum reaching same conclusion); AR791 (April 5, 2008 Memorandum from the ASIA to the Regional Director discussing 1999 appropriations act); AR1338-1339 (Aug. 6, 2008 letter from the Regional Director to the UKB Chief, referencing the 1999 appropriations act). Consistent with this new theory, the ASIA determined in the June 2009 Decision that "Congress overrode" the prohibition in 25 C.F.R. § 151.8 against approval of the UKB's trust applications absent Cherokee Nation consent, by enactment of the Interior and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681-246 ("1999 Act").

The 1999 Act does not negate the requirement that DOI obtain the consent of the Cherokee Nation before placing the Subject Tract into trust. The Department's determination that consent was not required is contrary to law and must be reversed.

Furthermore, DOI's interpretation diminishes the Nation's right, guaranteed by article 15 of its 1866 treaty, to veto entry of other tribes in its Treaty Territory and is contrary to the requirement that there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the Treaty." *United States v. Dion*, 476 U.S. 734, 739–40 (1986). Nothing in the language of the 1999 Act even mentions the consent requirement of Article 15 of the 1866 Treaty, much less explicitly and expressly abrogates it.

A. Congress did not override the consent requirement in 25 C.F.R. 151.8 with the passage of the 1999 Act.

The 2011 Decision acknowledges 25 C.F.R. Part 151 and its application to Cherokee Nation Treaty Territory. "The Department has consistently found the former treaty lands of the Five Civilized Tribes to be 'former reservations'." AR3073. Despite the long line

of decisions requiring consent by the Cherokee Nation for any land to be taken into trust within the Nation's Treaty Territory, the Regional Director found that the "Assistant Secretary's 2009 Decision concluded that the Congress [in the 1999 Act] overrode 25 C.F.R. § 151.8 with respect to lands within the boundaries of the former Cherokee reservation." AR3073.

The 1999 Act contains the following language: "[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." 112 Stat. 2681-246 (emphasis added).

The ASIA concluded in his June 2009 Decision that, under the 1999 Act, DOI was only required to consult with the Cherokee Nation, rather than obtain the Nation's consent as required by the 25 C.F.R. § 151.8. AR1556-1557. The 2011 Decision regarding the Subject Tract specifically relied on the June 2009 Decision's interpretation of the 1999 Act and concluded that the requirement for the consultation with the Cherokee Nation was met when the Region solicited comments from the Nation in 2005 in connection with the UKB's initial application for the Subject Tract.[16] AR3073-3074.

The DOI's interpretation of the 1999 Act was contrary to law. The 1999 Act does not state or imply that it affects or changes any other existing law or regulation, including the tribal consent requirements in 25 C.F.R. § 151.8. The 1999 Act did no more than substitute "consultation"

[16] The record does not reflect such consultation. The plain wording of the appropriations act merely imposed a consultation requirement, in addition to the consent requirement under 25 C.F.R. § 151.8, upon the use of federal funds in trust acquisitions. However, as will be shown hereafter, the 2011 Decision that the DOI need only consult with the Cherokee Nation on this trust application represents a misinterpretation of the 1999 Act.

for "consent" in the language of an earlier statute, the Interior Appropriations Act for FY 1992,[17] which required Cherokee Nation "consent" in connection with the use of any "federal funds" for trust land acquisitions within the boundaries of the Nation's Treaty Territory. Nowhere in the text of the 1999 Act does Congress state that this limitation on the use of federal funds otherwise affects any existing law that defines the conditions and procedures by which trust land acquisitions are to be considered on their merits.

The Department's interpretation would mean that the appropriations act was a *de facto* repeal of the Department's regulation. Courts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law. *United States v. Will*, 449 U.S. 200, 221 (1980). There is a "'very strong presumption' that appropriations acts do not amend substantive law," and, as a result, appropriations language must be construed narrowly. *Calloway v. Dist. of Columbia*, 216 F.3d 1, 9-10 (D.C. Cir. 2000) (citing *TVA v. Hill*, 437 U.S. 153, 190, 195 (1978)).

The substantive law here, as DOI recognizes in 25 C.F.R. § 151.8, is that tribal consent is required when one Tribe seeks to acquire land into trust on a former reservation other than its own. To the extent the 1999 Act impacts Section 151.8 at all, it impacts only a narrow exception for lands purchased with federal funds appropriated for "Operation of Indian Programs" as defined in the 1999 Act.[18] AR 1556-1557. Thus, the ASIA was incorrect in the June 2009 Decision when he stated that "Congress overrode" Section 151.8

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[17] Pub. L. No. 102-154, 105 Stat. 990 (1991).

[18] Any other conclusion would be an absolute diminishment of the Cherokee Nation sovereignty. On its face, the 1999 Act is not tribe-specific to the UKB. Following DOI's interpretation, Congress granted concurrent jurisdiction over the Cherokee Nation Treaty Territory to every other Tribe in the United States. Such a reading of the 1999 Act would be absurd.

in the 1999 Act and the Cherokee Nation "does not need to consent to the acquisition in trust of the UKB's land." AR 1556-1557. In short, the 1999 Act was an exercise of Congressional fiscal power, not a diminishment of the rights of the Cherokee Nation under 25 C.F.R. § 151.8.

In considering the consent requirement of Section 151.8, the Regional Director relied upon the ASIA's 2009 Decision.[19] See AR 3073. The Regional Director made no independent determination that the Subject Tract was purchased with funds appropriated to the UKB pursuant to the 1999 Act. Absent such a determination, the Regional Director's determination that the consent requirement of Section 151.8 was not applicable, was arbitrary and capricious and contrary to law.

The administrative record clearly shows the Subject Tract was not purchased with funds appropriated under the 1999 Act or any subsequent appropriation acts. In its original trust application, the UKB states the Subject Tract "was purchased by the Band in 2000 using **tribal and federal funds**."[20] AR 04 (emphasis added). Thus, on the face of the trust application, the Subject Tract could not have been purchased with funds appropriated for "Operation of Indian Programs". AR 1556-1557. The requirement for mere "consultation" with the Cherokee Nation would have applied, if at all, only to trust applications where the

[19] In originally denying the UKB's trust application, the Regional Director found that consent by the Cherokee Nation was required. AR 673. When considering the issue on remand, the Regional Director relied upon the ASIA's determination that the 1999 Act no longer required consent of the Cherokee Nation. AR 1338-1339

[20] The Subject Tract was purchased for $120,000.00. AR 2767. The warranty deed conveying the land to the UKB was filed February 18, 2000. AR2591.

land was purchased with funds appropriated for "Operation of Indian Programs."[21] The DOI must process all other trust applications consistent with the consent requirements in Section 151.8. The DOI's determination that consent was not required, followed by the Regional Director in the 2011 Decision,[22] is therefore contrary to law and must be overturned.

B. The 2011 Decision Violates Treaties Protecting the Nation's Governmental Authority within its Treaty Territory.

The 2011 Decision's position that the Cherokee Nation's consent to the UKB trust acquisition is not necessary and that UKB can exercise territorial jurisdiction over the Tract if placed into trust for the UKB Corporation, violates Cherokee Nation treaties that recognize the Nation's exclusive sovereign authority over trust lands within its Treaty Territory and that grant the Nation veto power over the entry of other tribes upon such

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[21] The United States Constitution (Article 1, Section 9, Clause 7) states that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In approving the Fiscal Year 1999 Appropriations Budget, Congress stated that "the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1999, and for other purposes." 112 Stat. 2681-1. Congress went on to state in the 1999 Act that it was an act "Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1999." 112 Stat. 2681-232. Finally, in addressing the Operations of Indian Programs budget (which contains the language relied upon by the DOI), the section begins: "For expenses necessary for the operation of Indian programs, as authorized by law. . ." 112 Stat. 2681-277.

[22] The Regional Director never concluded that consent of the Cherokee Nation was not required. On April 5, 2008, the ASIA sent a letter to the Regional Director directing the Regional Director to reconsider her decision to not take the Subject Tract into trust for the UKB. *See* AR791-792. In the letter the ASIA stated: "I am advised by the Associate Solicitor that the 1999 appropriations rider controls and that the Department must consult with the [Cherokee Nation] before acquiring land in trust, it is not required to get the consent of the [Cherokee Nation]." Id. In response to the directive, the Regional Director recognized the Regional Office's consistent position that Cherokee Nation consent was required under Section 151.8 but stated in 2011 Decision that "The Assistant Secretary's Decisions and determinations in connection with this application are binding on the Region." AR 3073.

lands.[23]

Article 15 of the 1866 Treaty specifically recognizes the need for the Cherokee Nation's agreement prior to settling within its boundaries "any civilized Indians, friendly with the Cherokees . . . on such terms as may be agreed upon by any such tribe and the Cherokees." Additionally, article 26 of the 1866 Treaty protects the Cherokee Nation's right to "the quiet and peaceful possession of their country and protection . . . against hostilities of other tribes." Although the UKB's members consist of those Cherokees by blood who have enrolled as UKB members, the UKB falls within the intent of treaty protections of the Cherokee Nation from hostilities of "other tribes" threatening the "quiet and peaceful possession" of the Nation's Treaty Territory. The UKB has expressed its intent to "exercise sole jurisdiction over the land rather than allow the Cherokee Nation to continue its jurisdiction over Indian lands" within the Nation's Treaty Territory. AR1344. This relationship is certainly a "hostile" one. If the Department believes that the Cherokee Indians who signed the Treaty in 1866 would not have understood the language of article 26 to protect them from such "hostilities of other tribes," the burden is on the Department to show some different contemporaneous understanding of the treaty language than its plain meaning then, and today.

[23] As previously discussed, article 5 of the 1835 Treaty expressly protected the Cherokee Nation's right to self-government within its treaty territory. The 1866 Treaty, article 31, reaffirmed the promises made by the United States to the Cherokee Nation in all prior treaties, including that promise.

II. THE 2011 DECISION THAT THE DEPARTMENT POSSESSES STATUTORY AUTHORITY TO PLACE THE SUBJECT TRACT INTO TRUST ON BEHALF OF THE UKB CORPORATION IS CONTRARY TO LAW AND THE DEPARTMENT'S OWN POLICIES AND REGULATIONS.

A. The Department Relied on the OIWA as Statutory Authority for a Trust Acquisition for the UKB Corporation in an Attempt to Circumvent the Supreme Court's Ruling in *Carcieri v. Salazar*.

After the Regional Director issued his 2011 Decision, the Department issued a 2012 decision to take another tract of land into trust for the UKB Corporation. In the course of making that determination, the Department circulated a "briefing paper" that identified "Noteworthy Issues" associated with the trust acquisition:

> This decision and the one already made on the 76-acres [Subject Tract] are the *first* to find authority to acquire land in trust pursuant to section 3 of the OIWA. These decisions marks *[sic]* the *first* trust acquisitions approved for a tribal corporation of a tribe first recognized after 1934.

Cherokee Nation et al. v. S.M.R. Jewell, et al., case number 12-cv-493 (N.D.OK), (Doc. 62, p. 2) (emphasis added) ("Briefing Paper").[24] (Attached hereto as Exhibit 1) Clearly, even DOI recognized its decision that section 3 of the OIWA authorizes a trust acquisition for the UKB

[24] A similar "briefing paper" was apparently drafted for the Subject Tract. *See* Privilege Log dated June 18, 2015 (Doc. 66, p. 2) (March 10, 2010 "email chain forwarding briefing memo and revisions to it" which DOI claims is privilege because "Description of Deputy Solicitor's edits to briefing paper.") Part of the email chain, without the briefing paper, is in the administrative record. *See* AR3682 ("We have tried to use the opening of the footnote 6 in Carcieri and the rather unique language of the OIWA with regard to OIWA corporations to fashion a unique decision. We think it works.") Footnote 6 to *Carcieri* states:

> The regulations that govern the tribal *recognition process*, 25 CFR § 83 *et seq.* (2008), were promulgated pursuant to the President's general mandate established in the early 1830's to manage "all Indian affairs and ... all matters arising out of Indian relations," 25 U.S.C. § 2, and to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," § 9. Thus, contrary to the argument pressed by the Governor of Rhode Island before this Court, see Reply Brief for Petitioner Carcieri 9, the requirement that a tribe be federally recognized before it is eligible for trust land does not stem from the IRA.

The OIWA section regarding OIWA corporations is discussed in Sections II.B. and C., infra. As is evident from that discussion, the ASIA's "unique decision" definitely does not work and is in conflict with federal law.

Corporation deviates from established federal law, court decisions and its own policies and regulations. This decision is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

The Department developed this theory to circumvent the Supreme Court's *Carcieri* ruling which was decided while the Subject Tract trust application was pending. In *Carcieri*, the Court held that DOI cannot accept land into trust under section 5 of the IRA for any Indian tribe that was not "under federal jurisdiction" in 1934. 555 S.Ct. at 382-83. The 2011 Decision, which is the subject of this litigation, contains not one reference or citation to the *Carcieri* decision. The 2011 Decision stated the UKB was organized in 1950, but did not address *Carcieri*[25] because "The Assistant Secretary's 2010 Decision, as clarified by the Assistant Secretary's January 21, 2011 Letter to the UKB, concluded that Section 3 of the OIWA, 25 U.S.C. § 503, ***implicitly*** authorizes the Secretary to take land into trust for the UKB Corporation. The Assistant Secretary's Decision and Letter are binding on the Region and preclude further consideration of this issue by the Region." [26] AR 3072 (emphasis added).

In his June 2009 Decision, the ASIA said he had "authority to take land into trust

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[25] There is not one mention of Carcieri in the 2011 Decision. It is not surprising that 2011 Decision deferred to the ASIA on this issue because on March 24, 2009, the Regional Director had concluded "the United Keetoowah Band of Cherokee Indians was not under federal jurisdiction . . . [and] [t]herefore, based upon the decision issued by the United States Supreme Court in *Carcieri v. Salazar*, the statutory authority to accept property in Trust for the UKB does not exist." AR1532.

[26] "There is, therefore, no reason for the Regional Director to question his authority to take the [Subject Tract] into trust for the [UKB]'s corporation. He has that authority under Section 3 of the OIWA. Carcieri does not apply to this acquisition." January 21, 2011 Letter from ASIA to UKB Chief, AR3007-3008.

pursuant to section 5 of the IRA."[27] AR3072. However, the ASIA deferred final decision on his authority to take land into trust for the UKB "until the Department has developed a more comprehensive understanding of *Carcieri*," and invited the parties to address the *Carcieri* issue. AR1556. Notwithstanding that invitation, the ASIA acknowledged in the 2010 Decision that the UKB was organized in 1950 under authorization of the 1946 Act (implying that *Carcieri* would preclude approval of the trust applications under authority of section 5 of the IRA) and presented the UKB with three options designed to circumvent the *Carcieri* decision:

> 1) continue to invoke my authority under Section 5 of the Indian Reorganization Act but seek to have the land taken in trust for one or more half-blood members who could later transfer their interest to the UKB;[28]
>
> 2) invoke my authority under Section 3 of the Oklahoma Indian Welfare Act (OIWA) and seek to have the land held in trust for the UKB Corporation;[29] or,

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[27] Section 5 of the IRA states in pertinent part: "Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955, as amended shall be taken in the name of the United States in trust for the *Indian tribe* or *individual Indian* for which the land is acquired, and such lands or rights shall be exempt from State and local taxation. 25 U.S.C. § 465 (emphasis added).

[28] This first option was not viable because the UKB had used federal funds to construct a child care facility on the property, as evidenced by a 'Notice of Federal Interest'." (February 23, 2011 Letter from Regional Director to UKB) AR3045-3048. The Federal Interest Notice provides, consistent with federal law and regulations, that "the property may not be sold or otherwise transferred to another party without the prior written consent of federal agency." AR 2589-2590. The transfer of the property to individuals would have resulted in the UKB having to return some of the federal monies to the U.S. government. Interestingly, DOI redacted this information from the administrative record, but did not claim a privilege. *See* AR3030-3033. However, the redacted portion is available to the public at the Department Health and Human Services on-line website and it references the federal regulations applicable to the sale of the land.

[29] Only this second option was a potentially useful rationale for purposes of the Subject Tract trust application. *See* 2011 Decision, AR3072. ("The Assistant Secretary's 2010 Decision. . . concluded that Section 3 of the OIWA, 25 U.S.C. § 503, implicitly authorizes the Secretary to take land into trust for the UKB Corporation.").

> 3) invoke my authority under Section 1 of the OIWA and supplement the record with evidence to show that the parcel satisfies the conditions.[30]

AR2557.

According to the ASIA's January 21, 2011 Decision, clarifying the 2010 Decision, *Carcieri* did not apply to trust acquisitions for a tribal corporation under section 3 of the OIWA. AR3007. As the Briefing Paper stated, "the Assistant Secretary determined that he could acquire land in trust for the UKB Corporation under the OIWA so the temporal limitation on acquiring land in the IRA that the Supreme Court found in the *Carcieri* decision did not apply."[31] *See* Briefing Paper (Exhibit 1, p. 2). Thus, the second option, which offered to avoid the requirements of *Carcieri* (utilizing section 3 of the OIWA), was ultimately relied upon for the Subject Tract trust application. AR3072.

B. Section 3 of the OIWA and the Land Acquisition Regulations Do Not Permit Tribal Corporations Such as the UKB Corporation to Acquire Trust Land, Except Under Limited Circumstances, Not Applicable in this Case.

Section 3 of the OIWA states in part:

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[30]This third option was not viable for the Subject Tract trust application. Section 1 of the OIWA authorizes the Secretary to acquire land into trust provided "such lands shall be agricultural and grazing lands." The Subject Tract trust application states the property "houses the majority of the Band's social services programs and the UKB's Tribal Council chambers." AR0004. The UKB is obviously not seeking to have the land placed into trust for agricultural purposes. However, the UKB did not did not see this as an impediment. "While the [UKB] admittedly do not presently intend to use these lands as 'agricultural' or 'grazing' lands, that is not the pertinent question. Rather the property *could* be used as 'agricultural' or 'grazing' lands, and therefore meets the directive of Congress in § 1 of the OIWA." AR1547 (emphasis in original). This appears to be a creative reading of § 1 which states "such lands **shall** be agricultural and grazing lands." (emphasis added).

[31] This begs the question: If *Carcieri* did not apply, then why did the ASIA not take the land into trust for the UKB instead of requiring that the land be taken into trust for the UKB Corporation? The simple truth is that after *Carcieri* was decided, the ASIA opted not to take the land into trust for the UKB. Thus, the decision under review in this case is the ASIA's arbitrary and erroneous finding that section 3 of the OIWA authorized the Department to take land into trust for the UKB Corporation.

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: . . . Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.].

The only power conferred upon the Secretary under Section 3 is to issue the corporate charter requested by the organized group. The charter must then be ratified by the organized group before becoming effective. Section 3 provides that charters issued by the Secretary of the Interior "may convey to the incorporated group . . . any other rights or privileges secured to an organized Indian tribe" under the IRA. 25 U.S.C. § 503. The Regional Director erred as a matter of law in the 2011 Decision by relying on section 3 as statutory authority for the acquisition, based on his finding that this provision "*implicitly* authorizes the Secretary to take land into trust for the UKB Corporation." AR3072 (emphasis added). Section 3 does nothing more than authorize the Secretary to issue the charter. Any right or privileges in the charter are conveyed through the IRA—not through any action of the Secretary. Rather than explaining where this "implicit" authority can be found in the Section 3, the Regional Director simply cited the ASIA's 2010 Decision, stating "the Assistant Secretary's Decision and Letter are binding on the Region and preclude further consideration of this issue by the Region." *Id*. In the 2010 Decision, the ASIA noted that section 3(r) of the 1950 UKB Charter authorizes the UKB Corporation to acquire "property of every description, real and personal." But section 3(r) of the Corporate Charter states that "The United Keetoowah Band of Cherokee Indians in Oklahoma, subject

to any restrictions contained in the Constitution and laws of the United States or in the Constitution and Bylaws of the Band, and subject to the limitations of sections 4 and 5 of this Charter, shall have the following powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936. . ." AR0026.

Nowhere in Section 3(r) of the UKB Corporation's Corporate Charter does it state that the Secretary has authority to take land into trust for the Corporation. In reaching the conclusion that he had that authority, the ASIA improperly relied on the theory that trust acquisitions are "rights or privileges secured to an organized Indian tribe under [the IRA]." AR2559. However, the OIWA provides that charters approved by the Secretary "may convey to the incorporated group . . . any other rights or privileges secured to an organized Indian tribe" under the IRA. 25 U.S.C. § 503. Thus, it merely grants tribal corporations the same rights as the tribes themselves—not greater rights. Because *Carcieri* makes clear the UKB has no right to have the land taken into trust under section 5 of the IRA, section 3 of the OIWA does not and cannot create such a right for the benefit of the UKB Corporation.

In reaching the conclusion that land may be placed in trust for the benefit of the UKB Corporation, the Regional Director and the ASIA failed to apply DOI's own trust acquisition regulations, which expressly acknowledge limitations on trust acquisitions for federal chartered tribal corporations.[32] These limitations are contained in the following

[32] The 2011 Decision purportedly approved the UKB's application to accept land into trust under 25 C.F.R. Part 151, which sets forth the "authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes." 25 C.F.R. § 151.1. The 2011 Decision states: "The request was evaluated in accordance with the regulations contained in Title *25*, Code of Federal Regulations, *Part 151* – Land Acquisitions, and in accordance with the Assistant Secretary's June 24, 2009, July 30, 2009, and

regulatory definition of "tribe:"

> For purposes of acquisitions made *under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations,* "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988, 25 U.S.C. 477*) or section 3 of the Act of June 26, 1936* (49 Stat. 1967; 25 U.S.C. 503).

25 C.F.R. 151.2(b) (emphasis added).[33] "The failure of an agency to follow its own regulations is challengeable under the APA." *City of Colo. Springs,* 589 F.3d at 1129 (quoting *Thomas Brooks Chartered v. Burnett,* 920 F.2d 634, 642 (10th Cir. 1990)).

These specific limitations on the ASIA's authority to acquire land in trust for a chartered tribal corporation establish DOI's recognition that a federal chartered tribal corporation may acquire trust property only when *expressly* authorized by law. Section 5 of the IRA expressly authorizes trust acquisitions only for tribes—not for tribal corporations. Section 3 of the OIWA contains no authorization for any trust acquisitions and only references section 5 of the IRA. The Department's recognition that the IRA and the OIWA do not provide statutory authority for trust acquisitions for tribal corporations is addressed succinctly in the 1980 comment accompanying the final regulatory definition of "tribe" in 25 C.F.R. § 151.2(b) as follows:

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

September 10, 2010 Decisions, as well as his January 21, 2011 Letter." AR3072 (emphasis added).

[33] The two statutes cited as providing express statutory authority for federal chartered tribal corporations involve land acquired with a Farmers Home Administration (FHA) Direct Loan Account loan under the terms specified in 25 U.S.C. § 488.

45 Fed. Reg. 62034 (Sept. 18, 1980).

It is significant that the Department did not interpret the "other rights or privileges" provisions in section 3 of the OIWA as authorizing trust acquisitions by corporations chartered under section 3; otherwise, the references in § 151.2(b) to specific authorizing statutes would have included section 3. "After all, '[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius,* suggests that the specification of [one provision] implies' the exclusion of others." *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012) (citing *Ariz. v. United States,* __ U.S.__, 132 S.Ct. 2492, 2520 (2012)).

The Regional Director's and ASIA's finding that section 3 of the OIWA "implicitly authorizes" a trust acquisition for a federally chartered tribal corporation is contrary to the legally binding land acquisition regulations which have governed trust acquisitions for more than 30 years. "When an agency departs from a prior interpretation of a statute that it is charged with implementing, the agency must justify the change of interpretation with a 'reasoned analysis.'" *Public Lands Council v. Babbitt,* 167 F.3d 1287, 1306 (10th Cir. 1999) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm,* 264 U.S. 29, 42 (1983)). There is no reasoned analysis here. The regulation, 25 C.F.R. § 151.2(b), authorizes the Secretary to take land into trust for a chartered corporation only if a statute specifically authorizes such action. The 2011 Decision only cites "implicit" statutory authority under section 3 of the OIWA to take land into trust for the UKB Corporation. As such, the 2011 Decision is contrary to his authority under the law and regulations.

Put simply, the DOI is permitted to acquire land in trust only for "an individual Indian or [a] tribe" under 25 C.F.R. §151.3, and the UKB Corporation does not meet the definition of "tribe" in § 151.2(b). Thus, the law and implementing regulations do not

permit the DOI to take land into trust for the UKB Corporation.

C. The ASIA Did Not Follow the Department's Own Regulations and Policies in Approving the UKB's Application to Place the Subject Tract in Trust for the UKB Corporation, Which Is a Separate Entity.

The UKB, not the UKB Corporation, submitted the trust application for the Subject Tract. The UKB submitted a resolution in support of the amended Subject Tract trust application, asking "that the Secretary of the Department of the Interior acquire the [Subject Tract] in trust for the benefit of the Federal Corporation held by the United Keetoowah Band of Cherokee Indians in Oklahoma and authorizes the Chief of the Band to submit any such applications and materials to the Secretary of the Department of the Interior on behalf of the Band that may be necessary in the assisting the Secretary in acquiring such lands in trust." AR2564. The Regional Director chose to approve the UKB application on behalf of the UKB Corporation as trust beneficiary, contrary to the Department's own policies and procedures.[34]

The UKB and the UKB Corporation are separate and distinct legal entities. Indian tribes were authorized to organize as governmental entities under section 16 of the IRA, 25 U.S.C. § 476, and as business entities under section 17 of the IRA, 25 U.S.C. § 477. These entities organized under the IRA are considered to be separate and distinct.[35] Section 3 of the OIWA authorized Oklahoma tribes to adopt a constitution and bylaws and authorized

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[34] "The entity requesting that the land be placed in trust ***is not the UKB Corporation, it is the UKB***." 2011 Decision, AR3074 (emphasis added).

[35] *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) (tribe's "constitutional and corporate entities [are] separate and distinct"); *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982) (noting the "distinctness" of a tribe from a tribal corporation); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1059 (N.D. Okla. 2007) ("The constitutional entity created pursuant to § 476 and the corporate entity created pursuant to § 477 are considered separate and distinct entities.").

the Secretary to "issue to any such organized group a charter of incorporation." 25 U.S.C. § 503. These entities organized under the OIWA are also considered to be separate and distinct.[36]

The DOI recognized this distinction in the 2010 Decision:

> Within the UKB tribal structure are the tribal government and the tribal corporation. *They are separate entities*. Solicitor's Opinion, 65 I.D. 483 (1958), 2 *Op. Sol. on Indian Affairs* 1846, (U.S.D.I. 1979). The UKB Government represents the UKB in its governmental affairs. And the UKB Corporation represents the UKB in its business affairs.

AR2559, fn. 1 (emphasis added).

The land acquisition regulations require that a "Tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary." 25 C.F.R. § 151.9. DOI's fee-to-trust handbook[37] requires that when the Regional Director receives a written request to have land taken into trust, it must "check if the written request includes the following: [1] The identity of the person (individual or tribe) submitting the written request and [2] The bases for qualifying as an applicant." AR 4601.[38]

The Regional Director clearly understood that the trust application was submitted by

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[36] *See Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 918 (6th Cir. 2009) (Chickasaw Nation Industries, Inc., a "federally chartered tribal corporation" under section 503 of the OIWA, "is wholly owned by the Chickasaw Nation tribe but is an entity separate and distinct from the Chickasaw Nation."); *Okla. ex rel. Okla. Tax Comm' n v. Thlopthlocco Tribal Town*, 839 P.2d 180, 183-184 (Okla. 1992) ("Congress authorized the tribes to organize two separate entities: a political governing body to exercise preexisting powers of self-government pursuant to section 16 of the Act, and a new tribal corporation to engage in business transactions pursuant to section 17.").

[37] The Department's Fee to Trust Handbook can be found at AR4584-4678. Cherokee Nation will include in the Appendix only the specific pages of the Handbook cited in this brief.

[38] This provision is taken directly from the regulatory requirement that the applicant in a fee-to-trust application must be the same legal entity as the proposed trust beneficiary. 25 C.F.R. § 151.9. Here, the UKB was the applicant, but the UKB Corporation is the beneficiary, a conflation of legally separate and distinct parties not permitted by the regulations.

the UKB. As stated in the 2011 Decision:

> By correspondence dated June 9, 2004, the UKB submitted a written request and accompanying documentation for the acquisition of the [Subject Tract] to be held in trust by the United States Government for its benefit. On October 5, 2010, the UKB submitted an amended fee-to-trust application requesting the property be taken in trust for the UKB under Section 3 of the OIWA. The assistant Secretary determined in his 2009 Decision that the UKB satisfied this requirement by submitting a written request and supporting materials on June 9, 2004, to have the parcel placed in trust. Additionally, the Region finds that the amended fee-to-trust application dated October 5, 2010, by the UKB requesting the property be placed in trust for the UKB Corporation satisfied this requirement.

AR3074.

Because the UKB and UKB Corporation are separate and distinct legal entities, the Regional Director should have required that the UKB Corporation submit the Subject Tract trust application. The Regional Director abused his discretion in processing the UKB application in a manner not in conformity with his own regulations and rules as set forth in 25 C.F.R. Part 151 and the Fee-to-Trust Handbook.

D. The 2011 Decision Is Arbitrary and Capricious.

The 2011 Decision is implausible in light of the Department's repeated recognition that the UKB never had a reservation and its findings that the Cherokee Nation possesses jurisdiction exclusive of any other tribe over Indian country within its Treaty Territory.[39]

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[39] *See* AR361-363 (1987 ASIA decision finding that the 1946 Act did not create a reservation for the UKB or purport to give the UKB any authority to assert jurisdiction, that the UKB "has never had a reservation in Oklahoma, that the Band has never exercised independent governing authority over any of the Cherokee Nation's reservation lands," and that the UKB could not take land into trust without Cherokee Nation consent); AR364-365 (1988 and 1989 letters from Regional Director reiterating that conclusion); AR421 (2002 Regional Director letter stating that the "UKB is not the Cherokee Nation nor does the UKB have any claim as a successor or have interest as an entity of the Cherokee Nation"); AR422-425, 426-430, 431-433 (2002 and 2003 letters from Department declining to approve UKB proposal to enter into a PL 638 contract for law enforcement, realty, and tribal court programs, and including statements that the "UKB lacks a jurisdictional land base over which it can exercise territorial jurisdiction;" [AR433] and that the

In his 2008 Decision, the Regional Director stated: "The UKB does not have a 'former reservation' of its own. . . There are no treaties, statutes or Executive Orders that set aside lands for the UKB." AR1339. The 2011 Decision provided no explanation at all as to how it can be harmonized with the 2008 Decisions and all the other decisions cited.

Further, there is no explanation how the 2011 Decision can be harmonized with the position the Department took in the litigation with the UKB wherein it stated:

> As stated by statute, "[t]he Cherokee Nation, a federally recognized Indian tribe with its present tribal headquarters south of Tahlequah, Oklahoma, having adopted its most recent constitution on June 26, 1976, and having entered into various treaties with United States, . . . *has maintained a continuous government-to-government relationship with the United States since the earliest years of the Union.*" 25 U.S.C. § 1779(3) (emphasis added). The use of the name "Cherokee Tribe of Oklahoma" (instead of "Cherokee Nation") in the deeds does not confer any rights on [UKB] or create any ambiguities. Congress has long recognized the Cherokee Nation and the Cherokee Tribe as one and the same. [citations omitted] . . . The Cherokee Nation possesses an inherent right of limited sovereignty that has never been extinguished. (citations omitted).

UKB v. U.S., 08-CV-1087, pp. 32-34.

But there is one plausible explanation for the sudden about-face. Before the Subject Tract trust application was filed with DOI, the UKB had a pending claims suit against the United States under the Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act, 25 U.S.C. §§ 1779-1779g. *See United Keetoowah Band of Cherokee Indians of Okla. v. United States*, Case No. 03-1433L, U.S. Fed. Cl., Doc. 117. ("UKB Claims Court") The

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Secretary "has consistently opined that the Cherokee Nation exercise exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries" [AR428]). *See also* Sept. 21, 1993 Indian Lands Opinion for Cherokee Nation by Sharon Blackwell, Tulsa Field Solicitor at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx ("With little exception, the exterior boundaries of the present Cherokee Nation were agreed to by the terms of the [1835] Treaty of New Echota. . . .Historically, the Cherokee Nation has exercised governmental authority over the fourteen county area."). All the citations in this footnote are found in The Cherokee Nation's comments, with attachments, on the UKB's fee-to-trust application. AR335-466. Only the portions cited in this footnote are included in the Appendix.

UKB complaint was filed on July 10, 2003. On December 16, 2003 the following email was circulated in the DOI solicitor's office with the subject matter described as "UKB MEETING IS NOT ON WEDNESDAY":

> I will get copies of the settlement proposal made for you and Angela. . .The main issue that appears to be implicated is law enforcement and other jurisdiction (for land owned by UKB within Cherokee lands that we would take in trust under proposal).

AR4186.

An email generated earlier that day from the Tulsa solicitor's office to DOI stated: "I would like to talk about this settlement sometime—I have some concerns." AR 4187.

Approximately six months later, the UKB filed the original Subject Tract trust application. Of course, a trust application had to be filed for DOI to take land into trust, even as part of a settlement agreement. The next eight years were focused on resolving the UKB Arkansas River bed litigation by a settlement which reversed more than 150 years of recognition of Cherokee Nation sovereignty by giving the UKB trust land within the Cherokee Nation Treaty Territory.[40]

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[40] A series of scheduling reports were compiled thereafter that reflect ongoing settlement discussions.[40] *See* UKB Claims Court, Amended Joint Status Reports, Doc. 119, ¶¶ 5-8, Doc. 121, Doc. 123, Doc. 125, Doc. 130, Doc. 139, Doc. 145, p. 7-9. *See also* AR3173-3182 (email chain with attached proposed scheduling order and notation that "We need to file the attached amended joint status report by Monday cob. It references February 8, 2010 as the date by which the ASIA will make his decision. Are you okay with that?"). Clearly, approval of the trust application and settlement of the Riverbed litigation were extrinsically tied together. This is further evidenced in a March 4, 2010 email exchange between Scott Keep and Pilar Thomas in the solicitor's office when discussing the "briefing paper" that "conclude[s] that the Secretary can take land in trust for the UKB corporation." AR3682. "Note that UKB must file its motion for summary judgment in the Arkansas River bed case on April 5 so if the acquisition of land in trust is to help us or the Band avoid unnecessary briefing in CFC, we need to move this alon[g] [sic] smartly." *Id*. Finally, in discussing a proposed scheduling notice filed after the September 2010 Decision Scott Keep again contacts Pilar Thomas stating: "Note that the proposed status reports [sic] states: 'action under the September 10, 2010 Decision is expected to be taken on an

DOI was not just reviewing a trust application. It was settling litigation. See *Sokaogon Chippewa Cmty. Mole Lake Band of Lake Superior Chippewa v. Babbitt*, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996) (the Department's review of an application to take land in trust is subject to the due process clause and must be unbiased). The unbiased review took place at the office of the Regional Director. It is beyond challenge that, if left to his own accord, the Regional Director would have denied the Subject Tract trust application as he had each time in the past. On numerous occasions in his 2011 Decision, the Regional Director set forth facts which would have precluded the taking of land into trust for the UKB Corporation but he was forced to approve the trust application because he was directed to do so by ASIA directive. AR3072 (151.3—ASIA decision "binding on Region and preclude further consideration" by Region."); AR3073 (151.5.—"Assistant Secretary concluded…authority exists to take land in trust for the UKB Corporation under Section 3 of the OIWA. Therefore the Bureau finds that this section of the regulations is not applicable to this request"); AR3073 (151.8—ASIA concludes Cherokee Nation consent is not required and "determinations in connection with this application are binding on Region."); AR3075 (151.10(b)—ASIA "Decision is binding on the Region."); AR3076-3078 (151.10(f)—ASIA concluded that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application" and the ASIA's "findings and conclusions on this issue are binding on the Region."); AR3078

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expedited basis;' Counsel for the UKB has already expressed some concern after an initial contact the tribe had with the Region. He was concerned that the Region seemed to think that everything had to be done over again when I believe the only thing necessary for the amended application is to bring the environmental work up to date.". The ASIA responded to those concerns in his January 21, 2011 Letter. AR 3007-3008

(151.10(g)—The Region expressed its concern but ASIA "has previously rejected this concern as unsubstantiated and insignificant.")[41] DOI's interest in this trust application was not unbiased. Its interest and intent was direct—to settle separate UKB litigation against the United States. For these reasons, the findings and conclusions in the 2011 Decision were arbitrary and capricious.

III. THE 2011 DECISION CONCERNING JURISDICTIONAL CONFLICTS IS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.

A. The ASIA Failed to Give Sufficient Weight to Evidence Regarding Jurisdictional Conflicts that Will Occur If the Tract is Placed in Trust.

Departmental regulations require that "jurisdictional problems and potential conflicts of land use which may arise" be considered for any proposed trust acquisition whether it be for on-reservation or off-reservation land. 25 C.F.R. § 151.10(f).[42] Here, the potential for conflict is very real as the Regional Director stated in the 2011 Decision.

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[41] After instructing the Regional Director to approve the trust application in spite of his reservations, the ASIA released a statement to DOI staff the morning the 2011 Decision was issued referring all inquiries to the Regional Director so that he could defend the indefensible:

> Today the Acting Regional Director. . . announced his intention to acquire land into trust for the United Keetoowah Band of Cherokee Indians (UKB) ***[note that it did not refer to the UKB Corporation]***. . .The Director's decision complies with his authority to review an applicant tribe's requests according to the regulations at 25 CFR Part 151…Also under the regulations, any decision must rely on proper statutory authority to place land into trust. Here the Acting Regional Director determined that the [OIWA] Section 503 provides proper statutory authority. The BIA Eastern Oklahoma Regional office can address any questions or comments. . ." AR4297

[42] The 2011 Decision expressly applied 25 C.F.R. § 151.10, which establishes requirements for *on*-reservation trust acquisitions for both individual Indians and for tribes and 25 C.F.R. § 151.11 for *off*-reservation trust acquisitions. AR 3079. The Nation discusses the requirements of § 151.10(a), (b), (f) and (g) in this brief – not because it views this as an *on*-reservation application (which it does not), but because those subsections are incorporated by reference in 25 C.F.R. § 151.11.

> The [Eastern Oklahoma] Region twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition.

AR3077.

However, the Regional Director, under the constraints imposed by the ASIA's June 2009 Decision, recommended approval of the trust application for the Subject Tract in spite of his detailed description of potential jurisdictional conflicts.[43] In doing so, the Regional Director stated that the June 2009 Decision had concluded that the "UKB, like [the Nation], possesses the authority to exercise territorial jurisdiction over its tribal lands" (AR3077) and the "Assistant Secretary's findings and conclusions on this issue [jurisdictional conflicts] are binding on the Region." Doc. AR 3078.

The Regional Director found that jurisdictional issues were "likely" and stated, as "the Bureau office closest to tribal affairs in northeastern Oklahoma," the Bureau "remains concerned that jurisdictional conflicts will arise between the UKB and the [Nation] if property is placed into trust for the UKB within the former reservation boundaries of the [Nation]." AR3077.

Two of the many jurisdictional problems likely to arise involve taxing and law enforcement regulation. The federal courts have previously determined that Indian country within the Nation's boundaries, albeit "owned" by UKB members, is properly under the taxing and regulatory control of the Cherokee Nation Tax Commission. *See United*

[43]This description was consistent with earlier findings regarding jurisdictional conflicts. *See* AR675-676 (2006 Decision denying the Subject Tract application, finding that the Cherokee Nation "exercises exclusive jurisdiction" over trust lands within its treaty territory and that "jurisdictional problems and significant land use issues exist"); AR1344 (2008 Regional Director decision denying Subject Tract application, stating that the "Region finds that the potential for jurisdictional problems is of utmost concern and weighs heavily against approval of this acquisition at this time.").

Keetoowah Band v. Mankiller, 1993 WL 307937, at *2, 4 (10th Cir. 1993). Another pivotal jurisdictional conflict involves law enforcement services. As specifically noted by the Regional Director in 2008, but not addressed in the 2011 Decision because of the ASIA's binding June 2009 Decision, the UKB, which does not provide law enforcement services and has only a security force that works with the Cherokee County law enforcement officials, plans to exercise "sole jurisdiction" if its lands are placed in trust. AR1344. Also as noted by the Regional Director in the 2008 Decision but not in 2011, the Cherokee Nation Marshal Service performs law enforcement responsibilities on trust lands in its Treaty Territory and would undertake those responsibilities with respect to the Subject Tract if placed in trust. AR1347. The Nation has a cross-deputization agreement with the State of Oklahoma, agreed to by the Bureau of Indian Affairs, relating to sharing resources with state and federal officials for law enforcement within the Nation's geographical boundaries.[44] If the Subject Tract is placed in trust and becomes Indian Country, law enforcement conflicts are certain to occur.[45]

Nothing in the Regional Director's 2011 Decision or elsewhere in the record finds that there are adequate means to address the jurisdictional conflicts. While the 2011 Decision expresses the same concerns presented in the 2008 Decision it concludes:

> As the Bureau office closest to tribal affairs in northeastern Oklahoma, the Eastern Oklahoma Region remains concerned that jurisdictional conflicts will arise between the UKB and the CN if property is placed into trust for the UKB within the former reservation boundaries of the Cherokee Nation. However, the Assistant Secretary concluded in his June 2009 Decision that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I

[44] ICA No. 93-0019, "Cross-Deputization Agreement between the Cherokee Nation, the State of Oklahoma, and the U.S. Government," filed Oct. 10, 1994, Oklahoma Secretary of State.

[45] As the Regional Director noted: "the UKB did not deny the potential for jurisdictional conflicts." AR3077.

> should deny the UKB's application." The Assistant Secretary's findings and conclusions on this issue are binding on the Region.

AR3077-3078.

This conclusion of potential jurisdictional problems in the 2011 Decision wholly fails to follow the dictates of 25 C.F.R. § 151.10(f), as incorporated into 25 C.F.R. § 151.11. This is particularly obvious when compared to the level of consideration upheld in *South Dakota v. Department of Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005). There, the Director reviewed intergovernmental agreements entered into by the tribe involved and local officials to address such needs as law enforcement and fire protection, and considered land use and zoning issues. The Director responded in detail to concerns of every local government that voiced objections to the trust determination. The determination here is devoid of any such considerations and is arbitrary and capricious. An Assistant Secretary's directive to the Regional Director that he is not to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of the APA, 5 U.S.C. § 706. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co,* 463 U.S. 29, 43 (1983); *Comcast Corp. v. FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009).

B. The ASIA's Interpretation of IRA §476(g) Is Contrary to Law.

The Regional Director also avoided consideration of jurisdictional conflicts in the 2011 Decision by relying upon the June 2009 and 2010 Decisions misinterpreting a 1994 amendment of the IRA, 25 U.S.C. § 476. Citing the June 2009 Decision, the Regional Director found that section 476(g) of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction," and that "the UKB, like [the Nation], possesses the authority to exercise territorial jurisdiction over its tribal lands." AR3077. This ASIA determination and the Regional Director's

reliance on the 1994 amendment is contrary to the plain wording of the amendment, which added new subsections (f) and (g) to section 476 of the IRA. Subsection (f) prohibits the issuance of certain types of discriminatory regulations and decisions *after* the effective date of the amendment. Subsection (g) applies to exactly the same types of discriminatory regulations and decisions that were *already in effect* at the time of the amendment, as follows:

> (g) Privileges and immunities of Indian tribes; existing regulations
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes *the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes* shall have no force or effect.

25 U.S.C. § 476(f) (emphasis added).

The 1994 amendment of § 476 simply articulates a principle of administrative equality and non-discrimination that extends to all federally recognized tribes. As one co-sponsor of the amendment explained, the "amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law." *See,* 140 Cong. Rec. 11,235 (1994) (statement of Sen. McCain). The ASIA's interpretation of sub-section (g) as authorizing a tribe to acquire trust lands within the territory of another tribe is much more expansive than its plain wording. Although the Cherokee Nation does not dispute that any federally recognized tribe, including the UKB, should have an equal opportunity to acquire trust lands, this does not mean that any federally recognized tribe should be allowed to acquire trust lands in *another tribe's* jurisdictional area. Such an extreme interpretation could negatively impact tribes nationwide, because it means that any tribe could acquire

trust land in the jurisdictional area of any other tribe, wherever that land might be located.

IV. THE 2012 DECISION FAILED TO PROPERLY CONSIDER WHETHER THE BIA IS SUFFICIENTLY EQUIPPED TO DISCHARGE THE ADDITIONAL RESPONSIBILITIES THAT WOULD RESULT FROM THE TRUST ACQUISITION AND IS ARBITRARY AND CAPRICIOUS.

In examining the administrative record, the court must determine "whether the decision was based on a consideration of the relevant factors. *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548, 551 (8th Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)). The Regional Director abused his discretion in failing to adequately consider all relevant factors with regard to 25 C.F.R. § 151.10(g), which requires consideration of "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status." In fact, the Regional Director's conclusion is not supported in the administrative record at all, as reflected in his findings that (1) the proposed UKB Subject Tract trust acquisition is within the Nation's Treaty Territory and that "the lands within the former treaty boundaries of the Cherokee Nation are the Cherokee Nation's service area for purposes of administering [BIA] programs;" (2) the Cherokee Nation, through a self-governance compact, administers "the program functions associated with the management of trust lands" that were previously provided by the BIA; (3) all funds previously spent by the BIA to provide these services have been "transferred to the Cherokee Nation Compact" and as a consequence the Tahlequah BIA Regional Office (which previously administered such programs) has been closed; and (4) "[t]here are no remaining direct service funds in the Region that have not been previously provided to the Cherokee Nation in its Self-Governing Compact." AR3078.

In the 2011 Decision, the Regional Director "express[ed] its concern that additional

duties associated with the newly acquired trust land may increase the workload of the BIA, and that" the Region will not have the necessary funds to discharge the duties that will arise as a result of this [Subject Tract] acquisition. AR3078. However, the Regional Director concluded that:

> **the Assistant Secretary has previously rejected this concern as unsubstantiated and insignificant**. In this 2009 Decision, the Assistant Secretary stated: "Because the [former] Assistant Secretary found [in his 2008 Decision that] the BIA could discharge the duties associated with this trust acquisition and because the Regional Director has not substantiated her decision, the [former] Assistant Secretary's finding stands." **Therefore, consistent with the Assistant Secretary's 2008 Directive and 2009 Decision, the BIA can discharge its duties in connection with this acquisition**.

AR3078 (all brackets in original) (emphasis added in bold)

Despite all his concerns arising from his day-to-day interactions with the Nation and the UKB, the Regional Director had no choice but to acquiesce to the ASIA's determination that the BIA can discharge all its duties in relation to this acquisition.

The Regional Director and the ASIA also failed to consider whether federal funds obtained by UKB would diminish the funds currently provided to the Cherokee Nation, thereby degrading the Nation's ability to provide services within its Treaty Territory. DOI's failure to consider the impact of the proposed trust acquisition on the Nation and on its continued ability to receive funds and provide services to Indians within the Nation's Treaty Territory under its self-governance compact pursuant to the ISDEA, 25 U.S.C. §§ 458aa-458hh, was arbitrary and capricious, an abuse of discretion and contrary to law.

CONCLUSION

The Cherokee Nation respectfully requests that the Court enter judgment reversing the 2011 Decision and finding that it was arbitrary and capricious and in violation of the law, including a declaratory judgment that: (1) federal law and regulations do not

authorize to accept the Subject Tract into trust for the UKB Corporation, and *Carcieri* precluded the approval of the Tract because the UKB was organized in 1950, after the effective dates of the IRA and the OIWA; (2) the Subject Tract cannot be placed into trust absent the Cherokee Nation's consent, which has not been granted; (3) the acceptance of the Subject Tract into trust would diminish the Nation's Treaty Territory in violation of federal laws, treaties and regulations; (4) the jurisdictional conflicts between the Cherokee Nation and UKB preclude taking the land into trust; and (5) the 1994 amendment of section 476 of the IRA does not prohibit DOI from complying with regulations requiring consideration of jurisdictional conflicts.

Administrative deference is properly granted to agency action that is lawful, measured, and consistent with best practices. The Regional Director's 2011 Decision and the actions of DOI in the numerous decisions cited by the Regional Director were none of those, and deserve no deference. The Cherokee Nation respectfully requests that this Court so hold, granting the relief above, and any other relief to which the Nation may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I electronically transmitted the foregoing document to the Clerk of the U.S. District Court for the Eastern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/William David McCullough
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