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

(1) **THE CHEROKEE NATION**, Plaintiff, vs. (2) **S.M.R. JEWELL**, et al.; Defendants, and (5) **UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA**; et al., Intervenor–Defendants.	Case No. 14-CIV-428-RAW

INTERVENOR–DEFENDANTS' RESPONSE MERITS BRIEF

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INTRODUCTION

This case is novel, but not hard. Interior carefully considered and decided, legally and reasonably, to take into trust a 76-acre parcel (Community Services Parcel or Parcel)[1] for the United Keetoowah Band of Cherokees Corporation (UKB Corporation), upon an amended application (Application), AR 4024–34[2], by United Keetoowah Band of Cherokee Indians in Oklahoma (UKB). Plaintiff, Cherokee Nation of Oklahoma (CNO), holds the Department of the Interior's (Interior) decision to a higher standard of review than the Administrative Procedure Act (APA) allows. CNO has concocted a standard under which the May 24, 2011 decision (2011 Decision) of the Eastern Oklahoma Regional Director of the Bureau of Indian Affairs (Regional Director) not only must be legal to receive administrative deference, but also must be "measured, and consistent with best practices." Pl. Br. at 40. This baseless formula for APA review has never been used by this Court, the Tenth Circuit, or the Supreme Court and shows that CNO simply disagrees with Interior's lawful policy decision. CNO further distracts by narrating an irrelevant (and inaccurate) version of Cherokee history and making conclusory statements[3] without argument or support. Simply, CNO fails to meet its burden to show what is relevant under the APA—that the 2011 Decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The court should defer to Interior's expertise and affirm.

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[1] The Community Services Parcel is the cultural and political center of the Keetoowah Cherokee community, housing tribal programs, including the human services and elder dental and nutrition programs, the tribal roads department, and the tribal building and construction office. It also plays a significant cultural role as it is the location of the UKB's cultural grounds. AR 4-5.

[2] Intervenor-Defendants will coordinate with the other parties to provide a joint appendix as discussed during the Dec. 9, 2014 status and scheduling conference. Dkt. No. 48.

[3] Throughout its brief, CNO asserts placeholder arguments, by making conclusory assertions without argument or support. For example, CNO asserts that the 2011 Decision disregards or is contrary to federal precedent. Pl. Br. at 1-3. Whatever arguments CNO might try to preserve this way are waived. *See Harsco Corp. v. Renner*, 475 F.3d 1179, 1190 (10th Cir. 2007).

BACKGROUND

I. Historical Background

CNO opens with a long, skewed version of Cherokee history and an inaccurate picture of the UKB, a federally recognized tribal nation, as "a subsidiary band of the Cherokee Indians that was created in the mid-twentieth century." Pl. Br. at 1. CNO ignores and rewrites much of Cherokee history to suggest that the Cherokee people have always been statically and tightly unified, and that it is "the same entity as the original Cherokee nation." Pl. Br. at 8. This is hardly so.[4] It's also beside any legal question before this court. But, UKB will briefly show that Cherokee history is not as simple as CNO suggests, because not to do so would leave a glaring distraction from what is relevant – and as noted above, something that is quite simple – that the 2011 Decision comports with the APA.

Before European contact, the Cherokee lived in what is now the southeastern United States without a structured government. *United States v. Old Settlers*, 148 U.S. 427, 434 (1893). The Cherokee population was fluid and reflected migrations of Cherokee groups that occurred before and after Euro-American society's advent. Russell Thornton, The Cherokees: A Population History 8-9 (1990). Euro-American society's influence led to a cultural rift between those Cherokee who wished to maintain a traditional lifestyle and those who sought to embrace the newcomers' culture. *See* Treaty with the Cherokee, July 8, 1817, 7 Stat. 156. AR 2187-92.

[4] There are currently three different federally recognized Cherokee Indian tribal nations that all maintain separate relations with the United States: (1) the UKB, (2) CNO, and (3) the Eastern Band of the Cherokee. *See* Indian Entities Recognized and Eligible to Receive Services From the U. S. Bureau of Indian Affairs, 80 Fed. Reg. 1,942 (Jan. 14, 2015). Moreover, Interior found in 2009 that distinct political and legal differences exist between CNO and the historic Cherokee Nation that was terminated in 1905. AR 1555. An Oklahoma federal court has also recognized that CNO is not the same as the historic Cherokee Nation, describing CNO as the "new Cherokee Nation," who lays claim to the former Cherokee reservation "as a successor in interest to the Cherokee Tribe," *United Keetoowah Band v. Sec. of the Interior*, No. 90-C-608-B (May 31, 1991), and again in *Buzzard v. Oklahoma Tax Comm'n*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992), where the court noted: "Another descendant of the old Cherokee tribe" is CNO.

The Treaty of 1817 identified the traditional Cherokee group as the "Western Cherokees," because it was via this treaty that the traditional Cherokee ceded their land in the east and moved into what would become Indian territory. *See id.* at arts. 1, 2 and 5; *see also United States v. 'Old Settlers'*, 148 U.S. 427, 472 (1893). The Cherokees who remained in the East were known as the "Eastern Cherokees." *United States v. Cherokee Nation*, 202 U.S. 101, 129 (1906).

Population growth in the original Cherokee homeland led the United States to extinguish Indian title to lands there and resulted in the Treaty of New Echota. *See* Preamble, Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478 (Treaty of New Echota). AR 2202-11. This treaty required the Eastern Cherokee to cede all remaining Cherokee lands in the East and remove to land held by the Western Cherokee under the Treaty of 1817. *See* Arts. 1, 2, and 16, Treaty of New Echota. Eastern Cherokee relocation to lands previously set aside for and occupied by the Western Cherokee resulted in a political struggle between the two groups, s*ee Cherokee Nation v. United States*, 40 Ct. Cl. 252, 274-75 (Ct. Cl. 1905), that persists to this day. The United States attempted to unify and recognize the two Cherokee groups as one but these attempts failed. *See* Preamble and Art. 2, Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 871. AR 2235-39. Tensions between the two groups persisted and the lesser-numbered but traditional Western Cherokee endured under a government dominated by the non-traditional Eastern Cherokee majority. *See Cherokee Nation*, 40 Ct. Cl. at 274-75. The "Keetoowah Society" pledged in its first constitution, dated April 29, 1859, to honor traditional culture, to maintain relations with the United States, and to preserve a separate identity from the Eastern Cherokee majority. AR 2240–57. Following the Civil War, the United States entered into a single treaty with both parts of the Cherokee Nation. *See* Treaty with the Cherokee, July 27, 1866, 14 Stat. 799. The Treaty of 1866 required the Cherokee to cede certain lands the Western Cherokee had received through

the Treaty of 1828, and established the final bounds of the historic Cherokee Reservation. *Id.*

The Indian Appropriation Act of 1894 began the allotment of the Five Civilized Tribes' landholdings. Indian Appropriation Act 1894, ch. 206, 27 Stat. 612 (1893). The Keetoowah Society opposed allotment, but in 1902 Congress required the allotment of Cherokee lands and terminated the historic Cherokee Nation government as of March 4, 1906. *See* AR 1555, 2293–95; *see also* Act of July 1, 1902, Pub. L. No. 57–241. Faced with the mandated end of the historic Cherokee Nation government, the Keetoowah Society adopted a new constitution in 1905 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 . . . ." AR 2308–19.

In 1946, Congress formally recognized the UKB as a Band entitled to organize under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501–510 (OIWA), at the recommendation of Interior Secretary Abe Fortas.[5] Secretary Fortas 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. The Secretary approved the UKB Constitution and Bylaws and the UKB Corporate Charter on May 8, 1950 and the UKB ratified them on October 3, 1950. AR 19-31.[6]

II. Procedural History

A few additions to CNO's recitation of the procedural history are useful. On February 14, 2008, Interior's Associate Solicitor, Kaush Arha, wrote to the Assistant Secretary–Indian

[5] *See* Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976.

[6] In addition to historical background discussed herein, the Administrative Record includes more detailed historical information that may be helpful to the Court. *See* AR 543-46, 2212–32."

Affairs (ASIA), concluding that the Regional Director (Region) based his April 7, 2006 denial of the Application (2006 Decision) on faulty conclusions. AR 787–89 (Arha Memo). The Arha Memo informed the ASIA's April 5, 2008 directive, *see* AR 790–91 (2008 Directive), to the Region to reconsider the 2006 Decision. AR 672–77. Nevertheless, on August 6, 2008, the Region denied the Application on largely the same grounds. AR 1337–47 (2008 Decision). On September 5, 2008, the ASIA assumed jurisdiction over the IBIA appeal. AR 1395.

On June 24, 2009, after the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), the ASIA partially reversed the 2008 Decision and asked the parties to brief *Carcieri*'s effect, if any, on Interior's ability to take the Parcel into trust under the Indian Reorganization Act (IRA). Act of June 18, 1934, ch. 576, 48 Stat. 984. AR 1553–63 (2009 Decision). On September 10, 2010, the ASIA listed alternative statutory authorities available to him for taking the Parcel into trust for UKB. AR 2557–60 (2010 Decision). On October 5, 2010, UKB submitted the Application as amended, AR 4024–34, which the Region approved in its 2011 Decision.[7] AR 3071–81.

STANDARD OF REVIEW

Under the APA, a court reviewing final agency action can "hold unlawful and set aside agency action, findings, and conclusions" only if they are "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). Federal courts "must accord considerable deference to agencies interpreting ambiguities in

[7] CNO incorrectly states that the ASIA issued "four decisions involving the [Community Services Parcel] over an 18-month time period." Pl. Br. at 10. The July 30, 2009 "decision" (1) denied CNO's request to reconsider and withdraw the 2009 Decision; (2) clarified that the 2009 Decision was not a final ruling on the ASIA's authority to take land into trust for UKB; and (3) set a briefing schedule. *See* AR 1685–87. The 2011 Letter to UKB clarified the 2010 Decision. *See* AR 3007–08. These four documents are part of the reasoning incorporated into the final agency action under review here—the 2011 Decision. AR 3072 ("The Assistant Secretary's April 5, 2008 Directive, his June 24, 2009, July 30, 2009, and September 10, 2010 Decisions, as well as his January 21, 2011 Letter are specifically incorporated in this decision by reference.").

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). Final agency action is neither arbitrary nor capricious if the agency gives a "satisfactory explanation[,] including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted). Finally, federal courts are "a reviewing body, not an independent decision maker. We do not substitute our judgment for the judgment of the agency simply because we might have decided matters differently." *Am. Min. Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

DISCUSSION

I. Congress requires consultation with CNO before lands may be taken into trust within the former Cherokee reservation, not CNO's consent.

CNO cites two sources for its erroneous assertion that its consent to acquisition of the Parcel in trust is required—28 C.F.R. § 151.8 and the 1866 Treaty. Both arguments fail.

A. Congress overrode 25 C.F.R. § 151.8's consent requirement with respect to lands within the former Cherokee 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." *Id.* The 2009 Decision, informed by the Arha Memo, explained that "Congress overrode this regulatory requirement with respect to the lands within the boundaries of the former Cherokee reservation by including in the Interior and Related Agencies Appropriations Act of 1999[8] the following language:

[U]ntil such time as legislation is enacted to the contrary, no funds shall be used

[8] Department of Interior and Related Agencies Appropriations Act, 1999 (1999 Act), Pub. L. No. 105–277, 112 Stat. 2681–232 (Oct. 21, 1998).

> to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation.

AR 1556. The ASIA concluded: "CNO does not need to consent to the acquisition in trust of the UKB's land. It is only necessary that the Department consult with the CNO." AR 1556–57. The 2011 Decision likewise concluded that § 151.8 did not apply and that the consultation requirement had been met.[9] *See* AR 3073.

CNO asserts that Interior's interpretation of the 1999 Act—as overriding the application of § 151.8 here—is contrary to law. According to CNO, the 1999 Act was merely "an exercise of Congressional fiscal power" that did not affect § 151.8. Pl. Br. at 16. CNO's interpretation is premised on its contentions that the 1999 Act (1) "does not state or imply that it affects or changes any other existing law or regulation," and (2) "did no more than substitute 'consultation' for 'consent' in the language of an earlier statute[10]" that dealt only with the use of "federal funds" in connection with trust acquisitions within the former Cherokee reservation. Pl. Br. at 14–15. Alternatively, CNO contends that if the 1999 Act does impact § 151.8, "it impacts only a narrow exception for lands purchased with federal funds appropriated for 'Operation of Indian Programs' . . . ." Pl. Br. at 15. CNO's conclusory arguments should be rejected.

Interior's interpretation of the 1999 Act is reviewed *de novo*. *Ass'n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590 (9th Cir. 2000) (*Silver Barons*). Here, however, because Congress clearly intended to override 25 C.F.R. § 151.8 with respect to lands within the boundaries of the former Cherokee reservation, reviewing the 1999 Act *de novo* or applying the *Chevron* standard to Interior's interpretation of

[9] Interior consulted with CNO several times. *See* AR 234-35, 335-466, 2592-96, 3049-57, 3059-61.

[10] Department of the Interior and Related Agencies Appropriations Act, 1992 (1992 Act), Pub. L. No. 102–154, 105 Stat. 990 (Nov. 13, 1991).

the 1999 Act yields the same result:[11] Congress requires consultation with CNO before such lands may be taken into trust, not CNO's consent.

Citing *United States v. Will*, 449 U.S. 200, 221 (1980), CNO argues that "[c]ourts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law. Pl. Br. at 15. Here, as it was in *Will*, Congress has been clear with its intention to amend substantive law. *See Will*, 449 U.S. at 221-222. There are two types of implied repeals—(1) where provisions in two laws irreconcilably conflict or (2) where the latter statute covers the whole subject of the earlier one and is clearly intended as a substitute. *Branch v. Smith*, 538 U.S. 254, 273 (2003). And while there is a presumption against implied repeals, the presumption is "hardly absolute," and implied repeals are "hardly unknown." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327–28 (2012). "There can be no doubt" that Congress can change substantive law through appropriations measures, impliedly or otherwise. *Will*, 449 U.S. at 222 (internal quotation marks omitted). Further, "an implicit repeal need not be absolute," *In re Glacier Bay*, 944 F.2d. 577, 582 (9th Cir. 1991). An implied repeal may *partially* repeal an earlier law. "The whole question depends on the intention of Congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883).

When interpreting a statute, courts begin with the statute's language. If it is clear and

[11] *Chevron* first asks whether "Congress has directly spoken to the precise question at issue;" if so, then a reviewing court must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The Tenth Circuit has similarly held that where an agency regulation conflicts with Congress' "clear intent," the regulation "cannot survive step one of the *Chevron* analysis." *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818 (10th Cir. 2012) (en banc). Because Congress spoke to the precise question at issue in the 1999 Act—i.e., that Interior need only consult with CNO before taking land into trust within the treaty territory, not get CNO's consent—*Chevron* deference to Interior's reasonable interpretation of the 1999 Act is unnecessary.

unambiguous, courts give effect to the statute's plain language, so long as the result is not absurd. *See Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013). The 1999 Act states, in relevant part:

> That until 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. at 2681–246. The plain language of the 1999 Act requires only "consultation" with CNO before Interior may take lands taken into trust within the former Cherokee reservation. This provision irreconcilably conflicts with § 151.8's consent requirement. Consultation and consent differ fundamentally. Consultation is "[t]he act of asking the advice or opinion of someone." Black's Law Dictionary (10th ed. 2014). Consent is a "voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose." *Id.* Consent implies the power to stop something, whereas consultation implies only the right to be heard on something. "[W]ith respect to lands within the boundaries of the former Cherokee reservation," AR 1556, CNO cannot have the power to halt land-into-trust acquisitions within the treaty territory by withholding consent when the 1999 Act requires only consultation with CNO. Because the 1999 Act and 25 C.F.R. § 151.8 irreconcilably conflict as to trust acquisitions within the former Cherokee reservation, the 1999 Act impliedly repeals Interior's regulatory consent requirement as to those lands.

Other courts have read appropriations legislation that limits agency fund uses to "express[] a clear intent to repeal" an agency's interpretation of the law. *Silver Barons*, 200 F.3d at 592. In *Silver Barons*, the labor agency read statutory provisions together to mean that union representatives could be paid as if they were at work while lobbying Congress. *See id.* However, a 1996 Department of Defense (DOD) Appropriations Act stated, in relevant part, that

"[n]one of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress." *Id.* (alterations in original) (internal citation omitted). Emphasizing the language "none" and "in any way, directly or indirectly," the court concluded that the language from the DOD Appropriations Act was "unambiguous" and impliedly repealed the labor agency's prior interpretation of two labor statutes it administered. *Id.*

Similarly, after a lengthy textual and structural analysis, the Eleventh Circuit held that part of the Omnibus Appropriations Act of 2009 effected a "general repeal"[12] of environmental statutes as to an Indian tribe's claims under those laws. *Miccosukee Tribe of Indians v. U.S. Army Corps of Eng'rs*, 619 F.3d 1289, 1300 (11th Cir. 2010). The language at issue there was specific to the tribe's legal claims. Notably, the Eleventh Circuit did not conclude that Congress impliedly repealed *all* of the National Environmental Protection Act and Endangered Species Act through an omnibus spending bill. Rather, the appropriations language affected a partial repeal of the laws "so as to deprive the federal courts of subject matter jurisdiction over the Tribe's suits." *Id.* The implied repeal was tribe- and situation- specific.

The legislative history here also supports Interior's interpretation. The 1999 Act expressly amended the language of the 1992 Act, which provided:

> That until such time as legislation is enacted to the contrary, none of the funds appropriated in this or any other Act for the benefit of Indians residing within the jurisdictional service area of the Cherokee Nation of Oklahoma *shall be expended by other than the Cherokee Nation*, nor shall any funds be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma *without the consent* of the Government Cherokee Nation:

105 Stat. 990 (emphasis added). The 1999 Act differs in two major ways from the 1992 Act.

[12] The Eleventh Circuit divided repeals into three categories: express, general, and implied. However, the court acknowledged the practical and theoretical difficulty of distinguishing between "general" and implied repeals, noting that in some cases, "general" repeals are effectively the same as implied repeals. *Miccosukee*, 619 F.3d at 1298 n.16.

First, the 1992 Act prohibited expenditure of funds appropriated for the benefit of Indians residing within the CNO's service area by anyone other than CNO. The 1999 Act entirely and purposefully omitted this funding restriction. The Conference Report accompanying the 1999 Act explains that the language "allows the Bureau of Indian Affairs to deal with the [UKB] . . . on issues of funding[.]" H.R. Rep. No. 105-825, at 1209 (1998) (Conf. Rep.). Second, the 1992 Act required CNO's *consent* for lands to be taken into trust within the former Cherokee reservation. The 1999 Act replaced the 1992 Act's consent requirement with a less onerous requirement of consultation. The Conference Report explains that the amended language "prevents [the UKB] from establishing trust holdings within the Cherokee's original boundaries without Cherokee consultation." *Id.; see also* AR 539-41, 555-56. If Congress intended § 151.8 to apply to here, it simply would have used the same language in the 1999 Act it had used in the 1992 Act. The plain language and history of the 1999 Act shows that Congress intended to require only consultation, not CNO's consent. CNO has not shown Interior's interpretation to be contrary to law.

Much of CNO's argument against Interior's interpretation of the 1999 Act is focused on the Act's "no funds shall be used" language and the related fact that 1999 Act was an appropriations bill. Pl. Br. at 14–16. CNO equates "funds" with money and argues that the 1999 Act merely imposes a limitation on Interior's ability to spend money. *Id.* CNO concludes that the 1999 Act is only implicated when appropriated money is spent to take land into trust. *Id.* Applying CNO's argument to other appropriations bills' funding limitations shows the argument's frivolity. For instance, every Treasury Department appropriations bill since 1992 has stated that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)." *Owen v.*

Magaw, 122 F.3d 1350, 1351 (10th Cir. 1997) (internal citation omitted). The Bureau of Alcohol, Tobacco and Firearms (ATF) interprets this language as impliedly repealing 18 U.S.C. § 925(c) and therefore refuses to process convicted felons' applications for restoration of firearms privileges. *See id.* at 1351–53. Following CNO's logic, however, the ATF should not process applications that require spending appropriated money, but should process the rest. However, Congress' purpose in enacting the limit was not monetary savings, but rather strategic use of human resources and worry over the consequences of ATF mistakenly arming a felon. *See U.S. v. McGill*, 74 F.3d 64, 67 (5th Cir. 1996) (discussing history of the measure). Nothing supports CNO's assertion that funding limits in appropriations bills only regulate how an agency can spend money. In fact, courts have held the opposite. *See National Treasury Employees Union v. Devine*, 577 F. Supp. 738, 749–50 (D.D.C. 1983) (explaining that expenditure of funds includes agency actions such as providing technical assistance available, reviewing performance appraisal systems adopted by other agencies, and enforcing veteran preferences.)

This Court should likewise reject CNO's "fatally overbroad" assertion that the 1999 Act was merely "an exercise of Congressional fiscal power," just as the Eleventh Circuit rejected a similar argument in *Miccosukee*. Pl. Br. at 16; *see Miccosukee*, 619 F.3d at 1300 (stating "[w]hile this argument has superficial appeal, its focus is fatally overbroad"). For an implied repeal analysis, it does not matter whether the 1999 Act expressly states that a "funding" limit affects existing law governing trust land acquisition procedures. *See* Pl. Br. at 15; *Miccosukee*, 619 F.3d at 1301 ("The cursory labels applied to a bill–'budget,' 'defense,' 'health care'–do not dictate the repeal analysis."). Indeed, in *Silver Barons*, the court emphasized the word "none" to determine that Congress repealed a prior agency determination, even though the word "none" modified "of the funds" in the DOD Appropriations Act in that case. Literally, "none of the

funds" (zero agency resources) could be used in a certain way. For repeal analysis purposes, that language was strong evidence that Congress clearly intended to substitute a no-lobbying-on-official-time policy for the labor agency's prior interpretation. Accordingly, what matters is whether Congress clearly intended that the 1999 Act's consultation requirement substitute for any previously existing consent requirements in the 1992 Act or 25 C.F.R. § 151.8 with respect to lands within the former Cherokee reservation.

Here, the 1999 Act states that "no funds shall be used," but that language in its fiscal sense does not dictate the repeal analysis. Rather, "no funds shall be used" shows that Congress clearly intended to loosen the conditions on taking lands into trust within the treaty territory, because the 1999 Act requires only consultation with CNO, not consent. The 1999 Act's legislative history also shows that Congress did not intend to limit the 1999 Act's consultation requirement to cash expenditures. *See* H.R. Rep. No. 105-825, at 1209 (1998) (Conf. Rep.) (explaining that the relevant language "prevents [the UKB] from establishing trust holdings within the Cherokee's original boundaries without Cherokee consultation."). The Report does not suggest that the language simply prevents that agency from spending appropriated funds on such acquisitions without CNO consultation. As with the repeal in *Miccosukee*, the 1999 Act is tribe- and situation-specific: The 1999 Act impliedly repealed Interior's regulatory consent requirement with respect to lands within the treaty territory.

Finally, in one of CNO's excessive footnotes, where many of CNO's arguments are found, CNO argues that Interior's interpretation of the 1999 Act is "absurd" because it grants concurrent jurisdiction over CNO's territory to "every other Tribe in the United States." Pl. Br. at 15 n.18. CNO's "absurd results" argument is illogical. It does not follow that the 1999 Act's limited repealing effect grants concurrent jurisdiction over the treaty territory "to every other

Tribe in the United States." *Id.* n.18. Concurrent jurisdiction is different from whether consultation or consent is required before lands within the former reservation may be taken into trust. The United States has a trust responsibility to all tribes. It is preposterous to assume that Interior would read not only § 151.8 but all of 25 C.F.R. Part 151 in a way that would allow any tribe in the country to have land within the treaty territory taken into trust. Nothing absurd results from giving effect to Congress' clear intent as expressed in the 1999 Act's plain language and as evidenced by its history.

B. The 1866 Treaty does not require CNO's consent.

CNO asserts that the 1866 Treaty also grants it a right to prohibit Interior from acquiring land in trust within the former Cherokee reservation without CNO's consent, and that Interior bears the burden to counter CNO's novel reading of the 1866 Treaty. Pl. Br. at 17-18. CNO's conclusory assertion regarding who bears the burden and its interpretation of the 1866 Treaty are erroneous. CNO has challenged the 2011 Decision. CNO bears the burden to show that the 2011 Decision must be set aside; Interior bears no burden to show that the 2011 Decision should stand. Otherwise, judicial review under the APA would be turned on its head. *See Council Tree Investors, Inc. v. F.C.C.*, 739 F.3d 544, 555 (10th Cir. 2014) ("A presumption of validity attaches to the agency action and *the burden of proof rests with the parties who challenge such action.*") (emphasis added) (internal quotation marks omitted). By doing nothing more than baldly asserting that its reading gives plain meaning to the 1866 Treaty, CNO fails to show that the 2011 Decision must be set aside.

The merits of CNO's contention that the 2011 Decision violates the 1866 Treaty rests on CNO's interpretation of Articles 15 and 26. Pl. Br. 17–18.

Article 15 states, in relevant part:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States . . . .

14 Stat. at 803. Article 26 states, in relevant part:

> The United States guarantee to the people of the Cherokee nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes . . . In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparations for the damages done.

Id. at 806.

Based on this select language, and despite acknowledging that UKB's members "consist of those Cherokees by blood who have enrolled as UKB members," CNO asserts that (1) the UKB "falls within the intent" of the 1866 Treaty's protection guarantees and (2) by expressing a desire to exercise jurisdiction over the Community Services Parcel, the relationship between CNO and UKB "is certainly a 'hostile' one." Pl. Br. at 18. CNO's argument is flawed in several respects. First, CNO neglects to account for the UKB's historical and shared interest in the former Cherokee reservation. Second, CNO assumes that the 1866 Treaty language meant to the 1866 Cherokee delegations as what CNO believes the language means now.

The Treaty of 1866 left intact all of the terms of Treaty of 1846 with the Cherokee, which in turn left intact prior treaties between the United States and the Western Cherokee, except where the Treaty of 1866 stated otherwise. Treaty of 1866, art. 31. The renegotiated terms of the Treaty of 1866 were applied to the reunited factions of the Cherokee Nation (*i.e.* the Eastern and Western Cherokee), and therefore applied to the "whole Cherokee people." CNO is simply wrong to infer that the Treaty of 1866 provides it with veto power over trust acquisitions benefitting the UKB. Rather, the Treaty of 1866 protects the "whole Cherokee people," as it refers back to prior active treaties and therefore provides protection to the UKB as well.

Article 15 does not give CNO veto power over the right of the UKB to settle in the treaty territory they already occupied, or even the United States' right to settle other Indians within the territory. The Article merely provides that the Cherokee may negotiate terms with the Indians that are to be settled within the treaty territory, but, even so, such negotiated terms were subject to the approval of the United States. Further, the acquisition of the Community Services Parcel in trust for the UKB Corporation cannot possibly be construed as an attempt by the United States to "settle" another tribe "on unoccupied lands," particularly when the Keetoowah Cherokee were "settled" on this land at the time of the 1866 Treaty, and had been "settled" there since their emigration there in the early 1800s. CNO has not shown that the Cherokee treaty delegations would have understood the term "settle" to mean the United States' conversion of tribally owed fee land into trust land, nor the term "unoccupied lands," to mean lands held in fee status by the very same putative tribal trust beneficiary. Nor has CNO shown that the treaty delegation would they have understood the Keetoowah Cherokee as not already "settled" in the territory. No court has strained the 1866 Treaty's language to mean that a federally recognized Indian tribe already physically located within the treaty territory becomes a "settling" tribe under Article 15 once the tribe applies to have land taken into trust. Article 15 created a system for *non-Cherokee* tribes that were removed from their own lands during Reconstruction to resettle peaceably in the Oklahoma area. Those tribes could choose whether to incorporate into the Cherokee Nation or preserve their own traditional and independent tribal identity. CNO fails to discuss this aspect of Article 15. *See* 14 Stat. at 803. Accepting CNO's reading of Article 15 does not interpret the 1866 Treaty as the 1866 Cherokee delegations would have interpreted it; accepting CNO's reading would rewrite the treaty, inserting a baseless right of consent for CNO.

CNO also warps Article 26 by suggesting that (1) the UKB's exercise of jurisdiction over

the Parcel creates a *hostile relationship* against which the 1866 Treaty protects, and (2) the United States is required to protect the CNO from this alleged hostile relationship by requiring CNO's consent for acquisition of the Parcel in trust for the UKB Corporation. Pl. Br. at 18. Article 26's plain language guarantees "quiet and peaceable" possession of land and protection "against domestic feuds and insurrections and against hostilities of other tribes." 14 Stat. at 803. Where hostilities among tribes are concerned, the United States agrees that it and any instigator will "make reparations for the damages done." *Id.* Among other things, the surrounding articles provide bounties to Cherokee volunteers that served in the army and give the United States the right to build military posts for the protection of United States citizens "lawfully residing therein and the Cherokees and other citizens of the Indian country." *Id.* at 805–06. Article 26 says nothing about *hostile relationships*. CNO's suggestion that UKB's desire to assert jurisdiction over the Community Services Parcel is a "hostility" coming within the protection of the 1866 Treaty misreads the document and ignores Article 26's relationship to the whole. CNO's suggestion is the logical fallacy of equivocation—the misleading use of a term with more than one meaning or sense, particularly by glossing over the meaning intended at a particular time. *See* David T. Edward, *Attacking Faulty Reasoning: A Practical Guide to Fallacy-free Arguments*, at 121 (6th ed. 2009). In 1866, "hostility" predominately meant acts of violence, especially in the nature of warfare or, as the plain language of Article 26 states, "domestic feuds and insurrections and . . . hostilities of other tribes."[13] It is unsurprising, then, that Interior has already concluded that contracting with the UKB under the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. 93-638, does not trigger Article 26's protection provisions, because "Congress, with its plenary power, implicitly found in 1946 that [UKB's]

[13] *See* Hostility, Oxford English Dictionary, available at http://www.oed.com/view/Entry/88772?redirectedFrom=hostility&.

reorganization was not a 'domestic feud' or 'insurrection.'" AR 566–67. The 1866 Treaty does not require CNO's consent before the Parcel may be taken into trust.

II. Interior properly determined that it could take the Parcel into trust for the UKB Corporation.

The 2011 Decision cites OIWA § 3 as authority to take the Parcel into trust for UKB's benefit. AR 22. It is CNO's burden to show that this decision is contrary to law or arbitrary and capricious. *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 691. CNO attempts to meet its burden by raising several arguments based on CNO's contention that *Carcieri* prevents the acquisition. CNO also asserts that the 2011 Decision is contrary to OIWA § 3, 25 C.F.R. § 151.2, 25 C.F.R. § 151.9, and Interior's fee-to-trust handbook. Finally, based on its speculation that the Decision was the product of a settlement of other litigation, CNO argues that the 2011 Decision was arbitrary and capricious. CNO has failed to meet its burden.

A. *Carcieri v. Salazar*

The only *Carcieri* question that Interior decided, and therefore the only *Carcieri* question before the Court, *see Hoyl v. Babbitt*, 129 F.3d 1377, 1385–86 (10th Cir. 1997), is whether *Carcieri* applies to an OIWA § 3 trust acquisition. Interior determined that *Carcieri* does not apply to the OIWA. AR 2557–61. CNO contends that *Carcieri* does apply. CNO also asserts that *Carcieri* precludes the UKB from acquiring trust land under the IRA, and that Interior has attempted to "circumvent" *Carcieri* by employing the OIWA rather than the IRA to acquire the Parcel in trust. Pl. Br. at 19-22, 24. However, as with its other placeholder arguments, CNO's *Carcieri* "arguments" are nothing more than single sentence references and conclusory statements. *See, e.g.*, Pl. Br. at 20, 24.

1. Interior correctly determined that *Carcieri* does not apply to trust acquisitions under OIWA § 3.

CNO asserts that *Carcieri* applies to the OIWA but does not explain its assertion. There are only two ways by which *Carcieri* would apply to the OIWA: (1) if *Carcieri's* holding expressly referenced the OIWA, which it did not, or (2) if the IRA definitional section that *Carcieri* interpreted is also found within OIWA § 3 or incorporated wholesale into that statute, which it is not.

At issue in *Carcieri* was whether the Narragansett tribe qualified for a trust acquisition under the IRA. *Carcieri*, 555 U.S. at 382. The question turned on whether the Narragansett tribe was an "Indian" tribe under the first definition of Indian under § 479 as it claimed.[14] *Id.* at 379. Whether the Narragansett met the IRA's first definition of "Indian" depended upon whether "now" modifying the phrase "under Federal jurisdiction" meant at the present time or at the time the IRA was enacted. *Id.* at 395. The Court narrowly construed the phrase and held that "now" means in 1934. *Id.* Consequently, in evaluating a tribe's application for trust land *under the IRA* following *Carcieri*, the Secretary must determine whether the applicant is an "Indian" tribe, and *if* the tribe is proceeding under the first definition of "Indian," the Secretary must also determine whether the tribe was "under Federal jurisdiction" in 1934. *See id.* at 379.

Nothing supports CNO's conclusion that *Carcieri* applies to the OIWA. *Carcieri* involved the narrow question of whether the Narragansett tribe qualified as an "Indian" tribe for purposes of the IRA. *Carcieri*, 555 U.S. at 382. The Court analyzed only the IRA. *Id.* at 385. *See* 25 U.S.C. §§ 501–510. Simply put, there was no reason for the Court to consider the OIWA when resolving a question that was completely confined to the IRA. Further, no court has ever held that *Carcieri* applies to the OIWA.

CNO implies that *Carcieri*'s interpretation of the IRA's first definition of "Indian" can

[14] The IRA defines "Indian" in three ways. The first is "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction[.]"

somehow be imputed to the OIWA. CNO does not argue that the IRA's definition of "Indian" is expressly included or incorporated in the OIWA. Rather, CNO seems to argue that by incorporating the IRA's rights and privileges into OIWA § 3, the definitional section was impliedly incorporated. However, CNO cites no legal authority for this proposition. The IRA's definition of "Indian" is necessary in the IRA because the substantive provisions of the IRA apply to "Indians" without qualification. *See* IRA §§ 465, 476(a), 477 (all using the term "Indian"). The IRA limits the IRA's provisions by defining "Indian," in part to include "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction." *Id.* § 479. Section 3 of the OIWA, in contrast, specifically defines covered entities as "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 503. Importing the IRA definition into OIWA § 3 would redundantly limit the statute's scope to a "recognized" tribe and would limit the rights and privileges authorized in the OIWA, passed in 1936, to tribes under federal jurisdiction in 1934, which would be absurd. Instead of wholesale incorporating limiting definitions into Section 3 of the OIWA, Congress permitted corporations incorporated under the OIWA all rights and privileges "secured to an Indian tribe under the [IRA]". 25 U.S.C. § 503. Congress' reference to the IRA in OIWA § 3 was necessary only to incorporate into the OIWA the rights and benefits generally afforded to tribes by the IRA.

Accordingly, once incorporated under the OIWA, the UKB is entitled to enjoy all "rights or privileges secured to an organized Indian tribe" under the IRA; it does not need to jump through additional hoops. And Congress could have chosen a different route. It could have applied the IRA's definition of "Indian" to OIWA § 3, if it had wanted to. *Compare* 25 U.S.C. § 503 with *id.* § 504. In OIWA § 4, Congress referenced the IRA's definition of Indian as one class of persons among others eligible to receive benefits defined there. But Congress did not do

the same thing in OIWA § 3. "Congress knows how" to import wholesale definitions from one statute into another. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013) (en banc) *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Congress knew how, but chose not, to import the IRA's definition into the OIWA wholesale, and it certainly did not do so with respect to OIWA § 3.

2. CNO misstates *Carcieri*'s holding to induce the Court to go beyond matters decided by Interior.

Because Interior determined that *Carcieri* does not limit OWIA trust acquisitions, it was not necessary for Interior to determine *Carcieri*'s impact on the UKB's ability to acquire trust land under the IRA, and the Court's review of the 2011 Decision is confined to only those matters the agency decided. *See Babbitt*, 129 F.3d at 1385–86. Nevertheless, CNO not only asks the Court to determine that Interior wrongly determined that *Carcieri* does not apply to the OIWA, but also asks the Court to go a step further and hold that, based upon *Carcieri*, the UKB is not eligible for trust land under the IRA. Pl. Br. at 2, 24, 40. This the Court cannot do.[15]

Although the law does not permit the Court to do what CNO asks, a rebuttal of CNO's assertion that "*Carcieri* clearly held that DOI cannot utilize Section 5 of the [IRA] to take land into trust for tribes, like the UKB, that were federally recognized after 1934[,]" Pl. Br. at 2; *see also* Pl. Br. at 20, 24, is nevertheless necessary to show the Court the disingenuousness and

[15] If the Court determines that the agency's interpretation of the OIWA as not being impacted by *Carcieri* was reasonable, which is all that is required by *Chevron*, the Court need not even consider CNO's additional *Carcieri* arguments as they are premised upon CNO's contention that Carcieri does apply to the OIWA. *If*, however, the Court determines that the agency erroneously determined that *Carcieri* does not apply to the OIWA, the Court must remand to the agency for its application of *Carcieri* and for development of a record on same. The Court may not, in the first instance, apply *Carcieri* to determine whether the UKB is eligible for trust land under the IRA.

unreliability of CNO's arguments.[16] Contrary to CNO's assertion, "[t]he *Carcieri* majority ma[de] no attempt to interpret what the word 'recognized' means, and instead concern[ed] itself solely with the interpretation with the phrase 'now under Federal jurisdiction." *Confederated Tribes, v. Jewell*, 75 F. Supp. 3d 387, 398 (D.D.C. 2014). In fact, "the only discussion of the term 'recognized' in *Carcieri* directly contradicts Plaintiffs' arguments." *Id.* In his concurrence, Justice Breyer explained that the concepts of "recognized" and "under Federal jurisdiction" in § 479 are distinct terms, and that the word "now" modifies "under Federal jurisdiction" but does not modify "recognized." *Carcieri*, 555 U.S. at 397–99. Consequently, Justice Breyer concluded that the IRA "imposes no time limit on recognition." *Id*. at 399. Justices Souter and Ginsberg acknowledged this reality as well. *Id.* at 400. "Had the *Carcieri* majority believed that an Indian tribe needed to be recognized as of 1934," the Court "could have easily said so and made that part of its holding." *Confederated Tribes*, F. Supp. 3d at 398. The majority plainly chose not to follow that course.

Further, neither Interior nor any court has ever concluded that the UKB (or any tribe) is ineligible for trust land under the IRA based solely upon the fact that the tribe obtained formal federal recognition under the OWIA after 1934. Indeed, following a thorough "process that involved extensive opportunities for public participation [that] resulted in a reasoned analysis of the statutory issue[,]" Interior issued a decision construing the phrase "under Federal jurisdiction" as entailing a two-part inquiry. *See Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-cv-0660, 2015 WL 1400384 at *7 (N.D.N.Y. Mar. 26, 2015). Neither part of the inquiry

[16]This Court has reprimanded CNO before for its unhelpful case analysis. *See* Order, *United Keetoowah Band of Cherokee Indians in Okla. v. State of Okla. et al.*, No. 04-340 at 13 n.10 (E.D. Okla. Jan. 26, 2006) (stating "While the Court generally welcomes helpful analysis . . . any analysis that completely disregards pertinent facts is not helpful. Indeed, the Cherokee Nation's first brief came dangerously close to affirmatively misrepresenting the law."

depends on a tribe's formal federal recognition date. Rather, the question is "whether the United States had taken an action or series of actions, for or on behalf of the tribe or in some instances, tribal members, that reflect federal obligations, duties, responsibility for or authority over the tribe." *Id.* (internal quotation marks omitted). Applying *Chevron* deference, the court in *Central New York*, upheld the agency's interpretation, noting that the "interpretation is well-reasoned and properly draws on BIA's expertise with Indian affairs." *Id.* Nothing supports CNO's misleading assertion that *Carcieri* "makes clear that the UKB has no right to have land taken into trust under section 5 of the IRA." Pl. Br. at 24.[17]

3. It was not arbitrary and capricious for Interior to rely on OIWA § 3 as an alternative to IRA § 5 following *Carcieri*.

CNO accuses Interior of having "developed this theory [employing OIWA § 3 as alternate authority] to circumvent" *Carcieri*, which, CNO claims would bar acquisition of land in trust for the UKB under IRA § 5. Pl. Br. at 20, 24. CNO asserts, without explanation or support, that it was arbitrary and capricious for Interior to rely on alternate statutory authority for the purpose of allowing the UKB "to avoid the requirements of *Carcieri* . . . ." Pl. Br. at 22. CNO's argument is flawed in several respects.[18]

First, either *Carcieri* applies to the OIWA or it does not. If *Carcieri* does not apply, then there was no circumvention (or even if there was, it matters not, because the bottom line is the agency has relied on authority not impacted by *Carcieri*). If *Carcieri* does apply to the OIWA,

[17] Consequently, there is no support for CNO's boot-strapped assertion that section 3 of the OIWA, which CNO claims "merely grants tribal corporations the same rights as the tribes themselves [have under the IRA,]" "does not and cannot create" a right to trust land for the UKB Corporation that the UKB is precluded from under the IRA. Pl. Br. at 24.

[18] CNO attempts to support its argument with a briefing paper that is not a part of the record in this case. In fact, a "similar 'briefing paper,'" Pl. Br. at 19 n.24, was excluded from the record over CNO's objection. Dkt. No. 60 at 4. CNO has attempted to circumvent the Court's order by attaching this extra-record document as an exhibit to its brief. The exhibit and all references to the document should be stricken. Pl. Br. at 19, 22, 31 n.40.

the 2011 Decision will be remanded to the agency. In either event, the Court has no need to consider CNO's circumvention argument. It is purely superfluous.

Second, CNO ascribes an ulterior motive to the ASIA's decision that is plainly contrary to the record. UKB's Application initially sought to have the Parcel taken into trust in pursuant to the Secretary's authority under IRA § 5. AR 6. During the Application's pendency, the Supreme Court decided *Carcieri*. *Carcieri* created uncertainty at Interior and dramatically changed the evaluation of IRA applications under IRA § 5. Accordingly, the ASIA, proceeding with appropriate caution, declined to determine his post-*Carcieri* authority under the IRA "until the Department has developed a more comprehensive understanding of *Carcieri* and its impact on tribes throughout the country." AR 1556. Thereafter, the ASIA issued the 2010 Decision, which did not substantively address *Carcieri*, but instead suggested three alternative approaches to invoking the Secretary's authority to acquire the Parcel in trust. AR 2557–60. The UKB, choosing the second alternative proposed by the ASIA, amended the Application to invoke the Secretary's authority under OIWA § 3. *See* AR 4024–34. The Record clearly reflects that Interior did not provide the UKB with alternate approaches to assist the UKB in slipping past *Carcieri*. Interior recognized that the "national implications" presented by *Carcieri* necessarily required Interior to proceed in a deliberate fashion. AR 1554. Thus, rather than sitting on the UKB's application for years while Interior "developed a more comprehensive understanding of *Carcieri*," *id.*, the ASIA reasonably offered alternative approaches to acquiring the Parcel in trust that would not require a *Carcieri* determination.[19] AR 2557–60. This was not Interior juking

[19] Indeed, not until February 19, 2014, nearly five years after *Carcieri* was decided, DID Interior opine on the import and application of *Carcieri* to IRA trust acquisitions and provided guidance for the Secretary regarding the same. *See* Amended Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe (February 19, 2014); *see also* M-Opinion 37029, *The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act*, (Mar. 12, 2014).

the Supreme Court; this was Interior taking a measured and reasonable approach. The decision to proceed under authority that did not implicate *Carcieri* was not motivated by a nefarious objective and was not arbitrary and capricious.

Further, nothing supports CNO's apparent contention that the government is constrained to a singular path when exercising its discretionary authority. Interior was under no obligation to proceed with the UKB's application under the IRA. Rather, Interior is duty bound, just as the Supreme Court considers itself to be when reviewing appeals at the highest level of the country's judiciary, to make legally sound policy decisions, including by way of searching for alternative authority. *See Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999) (concluding that federal legislation did not authorize a presidential order and noting afterward that "we must look elsewhere for a constitutional or statutory authorization for the order."). If the Supreme Court binds itself this way, it makes no sense that Interior is *prohibited* from investigating and using alternative sources of authority when processing trust applications.

B. The 2011 Decision is not contrary to OIWA § 3.

Section 3 of the OIWA provides that:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare . . . . The Secretary of the Interior may issue to any such organized group a charter of incorporation . . . . [that] may convey to the incorporated group . . . the right to . . . enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA].

25 U.S.C. § 503. Interior interpreted OIWA § 3 as implicitly providing power to take land into trust for the UKB. AR 2559. Interior supported its interpretation with the following chain of reason: (1) OIWA § 3 gives Interior the power to convey, through OIWA charters, rights and privileges to OIWA corporations; (2) among the rights/privileges that may be conveyed are those available to an Indian tribe under the IRA; (3) one of the rights/privileges available to Indian

tribes under the IRA is that of having land held in trust for the tribe's benefit; (4) that right/privilege may likewise be conveyed to an organized group under the OIWA through a corporate charter; (5) Interior granted this right/privilege to the UKB Corporation by authorizing it, in Section 3(r) of its Charter, to hold "property of every description, real or personal"; (6) OIWA § 3 is silent as to *how* Interior may effectuate that right/privilege for an OIWA corporation where its OIWA charter includes that right/privilege. *See* AR 2558–59. The ASIA concluded that because OIWA § 3 explicitly grants power to convey to OIWA corporations the right to enjoy all "rights or privileges secured to an organized Indian tribe under" the IRA, including the right/privilege to have land held in trust for the corporation's benefit, then the OIWA must also allow Interior to give meaningful effect to that right/privilege by actually acquiring land in trust for OIWA corporations. *Id.* at 2559.

CNO attempts to undermine Interior's conclusion by attacking the agency's chain of reason. First, CNO asserts that "[t]he only power conferred upon the Secretary under [OIWA § 3] is to issue the corporate charter requested by the organized group." Pl. Br. at 23. This assertion misreads and misapprehends the way OIWA § 3 incorporates IRA rights and privileges. However, the text of OIWA § 3 is clear—charter issuance is not the *only* power granted to Interior—e.g., OIWA § 3 allows Interior issue a charter that, in turn, "may convey to" an OIWA corporation, among other things, "the right . . . to enjoy any other rights or privileges secured to" an Indian tribe under the IRA. 25 U.S.C. § 503. An OIWA charter is simply a vehicle through which Interior grants to OIWA corporations the rights and privileges generally available to Indian tribes under the IRA.

Next, CNO argues that section 3(r) of the Charter does not expressly "state that the Secretary has authority to take land into trust for the Corporation. Pl. Br. at 24. Such language

is unnecessary. The Secretary's authority comes from the OIWA, not the Charter. The ASIA had determined that the Secretary "[t]hrough the UKB corporate charter, authorized the UKB Corporation" to hold trust land by virtue of the provision in "Section 3(r) '[t]o purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of *property of every description*, real or personal.'" AR 2559 (quoting UKB Charter) (emphasis added). Accordingly, the ASIA concluded that because the OIWA grants the authority to convey to the UKB Corporation a right to hold "property of every description," which the ASIA interpreted as including trust property, the OIWA must also convey the authority to take the land into trust. Further, the Charter, issued by the Secretary through an express delegation of authority from Congress, is akin to regulations similarly issued. Consequently, the Secretary has broad discretion in interpreting provisions of the Charter and the Secretary's interpretation is due *Auer* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating that an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the regulation).

Finally, ignoring the plain language of the statute, CNO asserts that OIWA § 3 authorizes to tribal corporations *only* those rights that would be available to the corporation's associated tribal governing entity under the IRA. Pl. Br. at 24. Under CNO's reading of the statute, a right that is not available to the UKB under the IRA would likewise be unavailable under OIWA § 3 to the UKB Corporation. CNO then baldly asserts that the UKB is ineligible for trust land acquisitions under the IRA pursuant to *Carcieri*, and based upon that assertion, concludes that the UKB Corporation cannot claim that right under the OIWA. CNO's argument requires the Court to read into OIWA § 3 a limit that is not there.

The OIWA neither expressly nor implicitly limits rights available to tribal corporations to rights a tribal corporation's associated governmental entity might receive 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, 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 Conn. Nat. Bank v. Germain*, 503 U. S. 249, 254 (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 CNO argues, 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* Indian tribe that organized under the IRA. 25 U.S.C. § 503.

Finally, CNO's arguments do not account for the great deference that courts must give to an agency's interpretation of a statute it administers. Agencies are expected to fills gaps in statutes they administer. *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1875 (2013); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1247 (10th Cir. 2008) ("[I]t is for agencies, not courts, to fill statutory gaps.") (internal quotation marks omitted). Interior did that here. The OIWA is clear that Interior may convey, through a tribal charter, all rights or privileges secured to an Indian tribe organized under the IRA. However, the OIWA is silent regarding *how* Interior effectuates such rights or privileges. Because the statute is silent on that point, and because Interior's interpretation of its authority to take land into trust for tribal corporations under OIWA § 3 is reasonable, *Chevron* deference applies and the agency's interpretation must be accepted. *Chevron*, 467 U.S. at 843. A reasonable statutory interpretation "must account for both the specific context in which . . . language is used and the broader context of the statute as a whole."

Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2442 (2014) (internal citations and quotation marks omitted). More generally, an agency's interpretation of a statute is permissible if it is "rational and consistent with the statute." *NLRB v. Food & Commercial Workers*, 484 U.S. 112, 123 (1987). Interior's interpretation, then, is reasonable under *Chevron* for the following reasons.

First, Interior's interpretation "account[s] for both the specific context in which [the 'rights or privileges'] language is used and the broader context of the statute as a whole." *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442. OIWA § 3 incorporates the "rights or privileges" secured to an Indian tribe organized under the IRA, including having the United States take land into trust for an OIWA corporation, but nowhere does the OIWA incorporate wholesale the IRA's definitions or other provisions that might limit Interior's power to take land into trust under the IRA. Second, the agency's interpretation is "rational and consistent with" the OIWA. *NLRB v. Food & Commercial Workers*, 484 U.S. at 123. Had Congress intended to limit OIWA corporations' rights, the statute, rather than incorporating all the rights secured to an organized Indian tribe under the IRA, could have simply incorporated only those rights available to the incorporated group's own tribal governmental entity under the IRA. But "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 254. Finally, OIWA § 3 would be meaningless if it allowed Interior to issue OIWA charters that grant the right/privilege to have land in trust, but then failed to give meaning to that right by not allowing Interior to acquire land in trust for OIWA corporations.

CNO nowhere argues that Interior's interpretation of OIWA § 3 is irrational or inconsistent with the statute, nor does CNO argue that Interior's interpretation is "inconsistent with the design and structure" of the OIWA as a whole. *Id.* Instead, CNO argues that because

the statute is silent with regard to the Secretary's authority to effectuate rights granted by the Secretary to tribal corporations under the statute, the statute "do[es] not permit" the Secretary to do so. Pl. Br. at 22–25. Thus, CNO argues that statutory silence must be viewed by the agency and courts as a Congressional prohibition of agency action on any issue not covered by the statute's express language. This argument defies *Chevron*. CNO fails to show that Interior's interpretation of OIWA § 3 should not receive *Chevron* deference.

C. The 2011 Decision is not contrary to Interior's regulations and policies.

1. 25 C.F.R. § 151.2(b).

CNO asserts that the 2011 Decision must be reversed because it is contrary to 25 C.F.R. § 151.2(b), which permits the acquisition of trust land for a federally chartered tribal corporation "only when *expressly* authorized by law." According to CNO because OIWA § 3 does not "expressly" authorize trust acquisitions for OIWA corporations, the acquisition is not permitted. Pl. Br. at 25–26. CNO is incorrect that the acquisition does not fall within the language of § 151.2(b)—the UKB Corporation is a tribe for purposes of trust acquisitions under OIWA § 3. Further, CNO's assertion that § 151.2(b) prohibits Interior from taking land into trust for an entity that is not a "tribe" under § 151.2(b) is incorrect. Even assuming *arguendo* that the UKB Corporation is not a "tribe" under § 151.2(b), this would not prevent Interior from taking the Parcel into trust.

Section 151.2(b) does not, as CNO asserts, require *express* statutory authority; it requires statutory authority that "specifically" authorizes such acquisitions:

> 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 [IRA] or section 3 of the [OIWA].

25 C.F.R. § 151.2(b). The distinction between "expressly" and "specifically" is important, because the ASIA interpreted OIWA § 3 as providing implicit, not express, authority for trust acquisitions for OIWA corporations to whom the Secretary has granted a Charter containing the right to hold trust land. The ASIA's reliance on the implicit authority of OIWA § 3 is not wholly inconsistent with the regulation because the terms "implicit" and "specific" are not mutually exclusive. The Tenth Circuit has recognized that something may be both specific and implicit. *See Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1232–33 (10th Cir. 2005). In *Qwest*, the plaintiffs challenged the FCC's interpretation of 47 U.S.C. § 254, a statute that requires states to have in place support mechanisms that are "specific, predictable and sufficient . . . ." to preserve and advance universal telecommunications service. *Id.* The FCC interpreted this statute as allowing states to rely on "implicit" support mechanisms. *Id.* The plaintiffs argued that the agency's interpretation was contrary to law because implicit support mechanisms are "inherently non-specific." The court rejected the plaintiffs' argument as "unavailing," explaining that neither the plain meaning of the statute's language nor the relevant statutory history supported plaintiffs' claims that something that is implicit is inherently non-specific. *Id.* at 1233. CNO's interpretation of §151.2(b) is similarly unavailing. OIWA § 3's grant of authority to take land into trust for tribal corporations is not "inherently non-specific" simply because it is implicit rather than explicit. Interior's reliance on the implicit authority of OIWA § 3 is not plainly inconsistent with the regulation.

CNO's interpretation of the regulation is also unreasonable because, an "agency cannot [prohibit] by regulation what is [permitted] under the statute." *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 615 (1983). CNO's interpretation of § 151.2(b) "would amount to an implausible repeal by agency regulation of a broad federal statute." *W.*

Chicago v. U.S. Nuclear Regulatory Comm'n, 547 F. Supp. 740, 745 (N.D. Ill. 1982). Administrative agencies are not permitted to frustrate Congress' intent by effectively repealing any portion of a statute by regulation. *See Am. Ass'n of Retired Persons v. EEOC*, 489 F.3d 558, 563 n.5 (3d Cir. 2007); *United States v. Shumway*, 199 F.3d 1093, 1107 (9th Cir. 1999). An agency's regulations must "carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Gen. Equip. Co. v. CIR*, 297 U.S. 129, 134 (1936). Accordingly, when interpreting a regulation, it should be read as harmonizing with the statute. It would be inappropriate to read § 151.2(b) as prohibiting that which Congress authorized by statute.

As shown above, the UKB Corporation is a tribe as defined by § 151.2(b). However even assuming *arguendo* that the UKB Corporation is not a "tribe" as defined in § 151.2(b), this would not prevent Interior from taking the Parcel in trust for the UKB Corporation. CNO's assertion that § 151.2(b) *prohibits* Interior from taking land into trust for an entity that is not a tribe under § 151.2(b) is unsupported and simply incorrect. The Land Acquisition Regulations, 25 C.F.R. Part 151, do not prohibit Interior from taking land into trust for OIWA corporations. These regulations simply "set 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. Section 151.2(b) defines "tribe" for 25 C.F.R. Part 151. However, even *if* the UKB Corporation was not a tribe as defined by § 151.2(b), Interior could still take land into trust for the UKB Corporation under OIWA § 3. In that instance, the Part 151 regulations would simply not apply to such an acquisition.

In the absence of an established regulatory procedure for taking land into trust for a group not covered by § 151.2(b), Interior must apply reasonable procedures of the Secretary's

discernment. *See Absentee Shawnee Tribe v. Anadarko Area Dir. Bureau of Indian Affairs*, 18 IBIA 156, 162 (1990) (holding, in the absence of applicable statutory or regulatory criteria, a BIA Area Director had discretionary authority to analyze a tribe's land acquisition and consolidation plan under reasonable criteria of the Director's own devising). Even *if* the UKB Corporation was not a "tribe" under § 151.2(b), the Regional Director applied reasonable procedures of his discernment to decide to take the Parcel into trust. *See Absentee Shawnee Tribe*, 18 IBIA at 162.

2. 25 C.F.R. § 151.9 and Interior's Fee-to-Trust Handbook

Nothing in § 151.9 requires that the applicant and the beneficiary of a land-into-trust application be identical. Rather, § 151.9 states that a land-into-trust request

> need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of [the Land Acquisition Regulations].

Id.

CNO argues that the agency abused its discretion by processing the Application, because UKB submitted it on behalf of the UKB Corporation. Pl. Br. at 29. CNO backs into its contention about § 151.9 by citing Interior's fee-to-trust handbook, specifically a checklist under Section 4.2.1.1, "On-Reservation Discretionary Trust Acquisitions," which directs the application's reviewer to check (1) "[t]he identity of the person (individual or tribe) submitting the written request" and (2) "[t]he bases for qualifying as an applicant." AR 4601; *see also* Pl. Br. at 28. However, again, nothing there requires that the applicant and the beneficiary of a land-into-trust application be identical.

It is no surprise, then, that another court rejected an argument similar to CNO's. In *Cnty. of Charles Mix v. U.S. Dep't of Interior*, the plaintiff argued that § 151.9 prohibited Interior from

considering an application submitted by the tribe's Business and Claims Committee requesting that land be taken into trust for the tribe. 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), *aff'd* 674 F.3d 898 (8th Cir. 2012). The court rejected the argument, noting that the regulation "states that a trust application 'need not be in any special form'" and that the regulation contains no "requirement that the Tribe, . . . as opposed to the Committee, be the entity requesting that land be taken into trust." *Id.*

Further, CNO fails to show that Interior's approach was "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted). CNO has only shown that it and Interior do not see eye to eye on trust acquisition policy in Oklahoma. However, "[w]hen considering agency action made pursuant to its own regulations, [courts] do 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." *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011) (internal quotation marks omitted).

When read together, § 151.9 and the Fee-to-Trust Handbook give Interior substantial latitude in determining how to ascertain whether there is a qualified beneficiary for the requested trust acquisition. In the 2010 Decision, the ASIA stated that the UKB could "amend its application to invoke [the ASIA's] authority under Section 3 of the OIWA and to have the land held in trust for the UKB Corporation." AR 2559. The ASIA could have required the UKB Corporation to submit an amended application or an entirely new one, but did neither. 25 C.F.R. § 151.9 and the Fee-to-Trust Handbook do not require either action, and the ASIA's action under both was reasonable. The ASIA reasonably suggested that UKB submit an amended application, because organic documents for both the UKB and the UKB Corporation, which were approved

by the Secretary, show that the applicant and beneficiary are legitimate entities that both are governed by the UKB Tribal Council. And the ASIA's suggestion to amend the application aligns with Interior's position that "[t]here are no strict guidelines regarding the form of fee-to-trust applications." *Chissoe v. Acting E. Okla. Reg'l Dir.*, 59 IBIA 304, 307 n.7 (2015). The Application's approval after it was submitted in accordance with the ASIA's guidance in the 2010 Decision shows that Interior's path in considering § 151.9 may be reasonably discerned and was not an abuse of discretion. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43.

D. The 2011 Decision was not the product of a litigation settlement.

CNO speculates that Interior's purported "sudden about-face" from the agency's supposed long-held positions about UKB's status has "one plausible explanation."[20] Pl. Br. at 30. After weaving together stray email remarks from within the agency, Pl. Br. at 31, CNO concludes that Interior "was not just reviewing [the Application]. It was settling litigation." Pl. Br. at 32. Based on this wild speculation, CNO asserts that the 2011 Decision was arbitrary and capricious. One court and the IBIA have already rejected CNO's contention as not based upon "any credible grounds" and "at best speculative." *See Cherokee Nation v. Jewell*, No. 12-493, 2013 WL 5329787 (N.D. Okla. Sept. 20, 2013) (opinion and order partially granting and partially denying Plaintiffs' motion to supplement the administrative record); *Cherokee Nation v.*

[20] Plaintiff alleges that the 2011 Decision is counter to Interior's "repeated recognition" of CNO's exclusive jurisdiction and UKB's lack of a reservation. Pl. Br. at 29; see also Pl. Br. at 1-3, 12-14, 26. As evidence of this so-called repeated recognition, Plaintiff cites the Secretary's 1987 Decision and a series of Regional Director letters and decisions. Pl. Br. at 29, n. 39. The 1987 Decision and Regional Director letters in no way represent the long line of precedent Plaintiff suggests. 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. Every decision by the ASIA on the UKB or UKB Corporation's ability to have trust land within the former historic Cherokee reservation has been counter to the 1987 Decision, which was issued before the 1999 Act and the amendments to § 476 of the IRA.

Acting E. Okla. Reg'l Dir., No. IBIA 11-122, at 10 (IBIA, Dec. 21, 2011) (order denying Appellant's motion to supplement the record).

Aside from it being pure conjecture, CNO's argument is flawed in several other respects. First, the very cases that CNO asserts were settled in exchange for the 2011 Decision were vigorously litigated by the UKB for several years after the issuance of the 2011 Decision. The UKB did not settle these cases in return for issuance of the 2011 Decision or any other trust decision. Second, the United States does not settle litigation the way CNO describes. A seminal United States Attorney General memorandum shows that the United States settles litigation according to procedures, not email threads that, at most, contemplate settlement. *See* Edwin Meese III, Att'y Gen'l Memo., *Department Policy Regarding Consent Decrees and Settlement Agreements* (Mar. 13, 1986). CNO fails to show that the 2011 Decision was arbitrary or capricious on these grounds.

III. Interior considered jurisdictional conflicts as required by 25 C.F.R. § 151.10(f).

When deciding whether to acquire land into trust, Interior must consider any "[j]urisdictional problems and conflicts of land use which may arise." 25 C.F.R. § 151.10(f). "The BIA fulfills its obligation under § 151.10(f) as long as it undertake[s] an evaluation of potential problems." *Charles Mix*, 799 F. Supp. 2d at 1046 (internal quotation marks omitted). CNO argues that the 2011 Decision's jurisdictional conflicts determination is arbitrary and capricious and contrary to law because "sufficient weight" was not given to evidence regarding jurisdiction conflicts. Pl. Br. at 33. 25 C.F.R. § 151.10(f) requires Interior to "*consider* potential jurisdictional problems or conflicts, it does not require [Interior] to *resolve* those problems or issues. *See S.D. v. Acting Great Plains Reg'l Dir.*, 49 IBIA 84, 108, 2009 WL 1356393, 17 (emphasis in original). Simply put, the Part 151 regulations "provide a list of objective criteria"

for Interior to consider but do not "provide guidance on how the Secretary is to 'weigh' or 'balance' the factors." *McApline v. U.S.*, 112 F.3d 1429, 1434 (10th Cir. 1997).

The record shows that Interior assessed CNO's concerns about jurisdictional conflicts multiple times. From 2005, when CNO first expressed concern about jurisdictional conflicts, until the 2011 Decision, Interior considered possible jurisdictional conflicts resulting from approval of the Application. *See* the 2006 Decision (AR 672–679); (2) the Arha Memo (AR 787–789); (3) the 2008 Directive (AR 790–791); (4) the 2008 Decision (AR 1337–47); (5) the June 2009 Decision, (AR 1553–67); and (6) the 2011 Decision (AR 3074–81).

Interior confronted the concern that both the UKB and CNO would attempt to exercise jurisdiction over the Parcel. AR 1558. The ASIA reviewed the UKB Corporate Charter, prior Interior pronouncements, relevant case law, and the 1946 Act and concluded that "UKB, like [CNO], possesses the authority to exercise territorial jurisdiction over its tribal lands." *Id.* Quite simply, the ASIA determined that while jurisdiction conflicts may arise, 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 never exercised jurisdiction. The June 2009 Decision cited numerous instances where federally recognized tribes have been able to avoid conflicts and rely upon shared jurisdictional arrangements. AR 1560 (listing tribes with shared jurisdiction over parcels held in trust on their behalf). The 2011 Decision incorporated the June 2009 Decision's consideration of 25 C.F.R. § 151.10(f) and the ASIA's conclusion that, "[t]he UKB and [CNO] should be able, as [] other tribes have done, to find a workable solution" to their jurisdictional dispute. AR 1560.

Further, Interior interpreted IRA §§ 476(f) and (g) and determined that the IRA "prohibits [Interior] from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction," and that "UKB, like [CNO], possesses the authority to exercise territorial jurisdiction over its tribal lands." AR 3077. Interior's interpretation is subject to *Chevron* deference. *See Chevron*, 467 U.S. at 842–43. CNO has not shown that the agency's interpretation was plainly inconsistent with the statue's plain language or purpose. Interior's interpretation is consistent with the express anti-discrimination principles in 25 U.S.C. § 476(f) and (g), and is further supported by the legislative history that explains that federally recognized tribes are to "stand on equal footing" and are all "entitled to the same privileges and immunities . . . ." 140 Cong. Rec. S6,147 (daily ed. May 19, 1994) (statement of Sen. Inouye); *See also* 140 Cong. Rec. H3,803 (daily ed. May 23, 1994) (statement of Rep. Richardson). Nevertheless, CNO would have this Court read the statute as only enabling a tribe to exercise rights to territorial jurisdiction over its own trust lands, to the extent that other tribes that purport to have superior jurisdiction over the area agree. Contrary to Congress' intent, CNO's interpretation of the statute would create a tribal caste system that Congress clearly intended to prevent and effectively put UKB in a unique class of tribes that possess tribal lands without the right to exercise territorial jurisdiction over their lands. That is contrary to the law.

The record shows that Interior considered jurisdictional conflicts that might arise if the Parcel were acquired in trust and satisfied 25 C.F.R. § 151.10(f).

IV. Interior considered whether the BIA is sufficiently equipped to discharge additional responsibilities that may result from taking the Parcel into trust.

Interior is required to consider "whether the [BIA] is equipped to discharge the additional responsibilities" flowing from a requested trust acquisition. 25 C.F.R. § 151.10(g). CNO argues that the 2011 Decision is arbitrary and capricious because the Region failed to consider *properly*

the BIA's ability to discharge additional responsibilities flowing from acquisition of the Parcel in trust.[21] Pl. Br. at 38. However, CNO reads into the regulation a standard that does not exist. The Part 151 regulations "[do] not provide guidance on how the Secretary is to 'weigh' or 'balance' the factors." *McAlpine*, 112 F.3d at 1434. As such, a review of Interior's consideration of 25 C.F.R. § 151.10(g) should only assess "whether the decision was based on a consideration of the relevant factors." *Id.*

Here, the record reflects that Interior considered this factor at multiple points. *See* the 2006 Decision, AR 676, the 2008 Directive, AR 791, the 2008 Decision, AR 1344-1345, and the June 2009 Decision, AR 1561; all of which were incorporated in the 2011 Decision. The 2011 Decision acknowledged that some federal functions had been transferred to CNO and recognized that additional duties associated with the Parcel "*may* increase the workload" of the Region. AR 3078 (emphasis added). Nonetheless, the 2011 Decision concluded that that the BIA could still discharge those duties. *Id.* The record also reflects that Interior contemplated whether the Region could directly administer any applicable duties, AR 1560, UKB's ability to contract with BIA to provide services through infrastructure at UKB, *id.*, and UKB's willingness to accept services provided indirectly by the BIA through CNO, AR 3078. No aspect of Interior's consideration of 25 C.F.R. § 151.10(g) resulted in a conclusion that the BIA is *incapable* of handling of any duties from the acquisition; they merely anticipate an increased workload.[22] CNO suggests that the Regional Director's failure to reach an opposite conclusion constituted "acquiescence" to the ASIA's view of the Region's capacity and was arbitrary and capricious but

[21] CNO refers to the "2012 Decision" as the basis for this argument but there is no "2012 Decision" to refer to in this case. Presumably, CNO refers to the 2011 Decision.

[22] The BIA did not consider whether the acquisition might affect funds appropriated to CNO, but such an analysis is not required under the Land Acquisition Regulations. *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).

CNO merely disagrees with the outcome of this consideration. Pl. Br. at 39. 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. The ASIA's review of 25 C.F.R. § 151.10(g) reflected a more nuanced consideration of the BIA's ability to discharge its duties and precluded an independent review by the Regional Director. *See Cherokee Nation v. Acting E. Okla. Reg'l Dir.*, 58 IBIA 153, 164, 2014 WL 264820, 9. Interior is structured so that the expertise of a senior official, such as the ASIA, can guide a region's review of issues where a particular office has failed to evaluate certain aspects of an issue. The 2011 Decision and the prior decisions incorporated therein reflect this calibrated process and are not arbitrary and capricious, an abuse of discretion, or contrary to law.

CONCLUSION

CNO has failed to bear its burden under the APA, which requires showing that Interior's approval of the Application must be set aside because the approval was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). Instead, CNO has skewed Cherokee history, misinterpreted Supreme Court precedent, called for absurd results by its reading of the 1999 Act, and peppered its brief with other arguments that strain credulity.[23] For all of its effort, CNO really has only shown that it does not agree with Interior's lawful policy position. But the APA does not give relief for policy disagreements. The court should defer to Interior's policy expertise and affirm.

[23] Plaintiff has also requested a declaratory judgment as to certain issues. Pl Br. at 39-40. The Court must have an independent source of jurisdiction in order to render declaratory judgment in an APA case, and Plaintiff has 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 above, certain issues on which Plaintiff seeks a declaratory judgment were not part of the 2011 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).

Respectfully submitted this 26th day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the parties entitled to receive such notice.

/s/Christina M. Vaughn