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**

CHEROKEE NATION REPLY BRIEF

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I. INTRODUCTION

The Cherokee Nation ("Nation") challenges the Department of Interior's ("DOI") May 24, 2011 Decision[1] ("2011 Decision") to take a 76 acre tract of land ("Subject Tract") in trust for the United Keetoowah Band of Cherokee Indians, a federally-chartered corporation ("UKB Corp."). UKB Corp. and United Keetoowah Band of Cherokee Indians ("UKB") were both permitted to join this action as Intervenors (collectively, "UKB"). In Plaintiff's Merits Brief (the "Opening Brief") (Doc. 67), the Nation alleged that DOI abused its discretion and erred as a matter of law in concluding DOI could take the Subject Tract into trust for the UKB Corp.

DOI and the Intervenors filed responses to the Nation's Opening Brief. Under the Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-702, ("APA"), the Court is reviewing the actions of the DOI in reaching its conclusion. *See, Federal Defendants' Response Merits Brief* [Doc. 76], pp. 11-12 (the "DOI Br."); *Intervenor-Defendants' Response Merits Brief* [Doc. 77], pp. 5-6 (the "UKB Br."). The burden is on DOI, not the Intervenors, to demonstrate DOI's actions were not arbitrary and capricious or otherwise not an error as a matter of law. Except in extraordinary cases, an intervening party may not enlarge the scope of the case by presenting issues that were not raised by petitioners. *Arapahoe County Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1217-18 n.4 (10th Cir. 2001) The Intervenors have offered no evidence that such extraordinary circumstances exists. Therefore, insofar as the Intervenors' brief could be construed to present new arguments that were not previously raised by the DOI, the Court should decline to consider any such arguments. *See Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) ("'post hoc' rationalizations" are not part of the administrative review.)

For the reasons set forth in the Nation's Opening Brief and in the following reply, DOI's 2011 Decision must be set aside by this Court.

[1] Doc. 65, AR3071--AR3081. (hereinafter "AR__-__").

II. BACKGROUND

The DOI and Intervenors counterstatements to the Nation's factual background are inaccurate, biased and unsupported recitations. DOI states, and the Nation agrees, that "members of the UKB are descendants of the Cherokee people." (DOI Br. at 4.) DOI then goes on to claim, without any support, that the Keetoowahs "[r]epresented the most traditional portions of the Cherokee Indians and existed as an organization of Cherokee Indians since the 1800." DOI failed to provide any support for this recitation because there is simply no truth to the claim. Further, according to DOI, in 1859 "the leading members" of the Keetoowahs adopted a constitution and formed the Keetoowah Society, a "society" whose membership was "initially limited to full-blood Cherokees." (*Id.* at 4 (citing H.R. Rep. No. 77-447 at 2).) While there may be some truth to this statement, DOI fails to note that such "Society" was neither a federally recognized tribe nor band, nor did it have a government-to-government relationship with the United States. In fact, all parties agree that the United States did not recognize the UKB as a band until 1946. (*See* DOI Br. at 4 & UKB Br. at 4.)

DOI, along with Intervenors, imply incorrectly, that the Cherokee Nation ceased to exist in 1902. In support, DOI implies incorrectly that, unlike the "Keetoowahs" who unsuccessfully opposed allotment of the Cherokee lands, "as well as efforts to dissolve the governments of the Five Civilized Tribes, including the Cherokee," the Cherokee Nation leaders did nothing to oppose the allotment of the Cherokee lands. (DOI Br. at 5.) Intervenors perpetuate the "dissolution" myth by stating: "Faced with the mandated end of the 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 interests of the Cherokee people in their lands and funds.'" (UKB Br. at 4.) DOI acknowledges that in 1906 Congress passed the Five Tribes Act which continued the Five Tribes' government "until

otherwise authorized by law." *Act of April 26, 1906, 34 Stat. 137, § 28*. However, both the DOI and the UKB conveniently omit the fact that neither Congress, nor DOI, nor the courts have made a distinction between the Cherokee Nation at statehood and the current Cherokee Nation.

III. STANDARD OF REVIEW

DOI does not dispute the standard of review described by the Nation (Plf. Br. at 10-12), but strongly urges the Court to give "special deference" to the 2011 Decision.[2] Contrary to the DOI assertions, the Court should not lend it "special deference" because, as established the Opening Brief and below, the 2011 Decision is plainly erroneous, inconsistent with the DOI's own regulations and contrary to law.

IV. ARGUMENTS AND AUTHORITIES

A. Defendants fail to establish statutory or regulatory authority exists to take land into trust for UKB Corporation.

1. Section 3 of the OIWA Does Not Authorize the Trust Acquisition.

Section 3 of the OIWA establishes many rights, none of which include the authority for DOI to take land into trust for the UKB Corporation. And yet, DOI states that section 3 of the OIWA vested in tribal chartered corporations the right "to enjoy any other rights or privileges

[2] DOI argues the reviewing court must not substitute its judgment for that of the agency. (DOI Br. at 12 (citing *Colo. Wild v. USFS*, 435 F.3d 1204, 1213 (10th Cir. 2006).) It contends that the APA standard assumes "presumption of validity" to the agency's action (*Id.* (citing *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012).) DOI asserts that there is a strong presumption in favor of upholding decisions where agencies have acted within the scope of expertise. *Id.* (citing *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 376 (1989)). The Tenth Circuit acknowledged the *Marsh* presumption but held that "agency action may be overturned if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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." *The Ecology Center v. U.S. Forest Serv.*, 451 F.3d 1183, 1189 (10th Cir. 2006) (remanding to the district court with instructions for the court to enter an order vacating the Forest Service's approval of a project). S*ee also Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (when an agency has "failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action.").

secured to an organized Indian tribe" under the IRA. (DOI Br. at 14.) It further asserts that one of the "rights" provided is "the ability to petition the Secretary to take land into trust for the Tribe's benefit." *Id.* However, DOI incorrectly equates the "ability to petition" to have land taken into trust with a "right" to have land taken into trust. As the Nation sets out in its Opening Brief, DOI recognized that the IRA and the OIWA do not provide statutory authority for DOI to take land into trust for federal charter corporations. Plf. Br. at pp. 25-26.

Moreover, the administrative record clearly demonstrates DOI erred in determining that it had the statutory and regulatory authority to take the Subject Tract into trust for the UKB Corp. DOI sums up its position (DOI Br. at 14-15.) as follows:

> As Interior recognized, because a tribe incorporated under the OIWA has the right to petition for land to be held in trust, it necessarily follows that the Secretary has the corresponding authority to take the land in trust for an incorporated tribe. Thus, Interior reasonably determined that it had statutory authority to take land into trust for the UKB Corporation, a determination to which deference is due.

DOI cites *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (2013), for support that the Court should "defer[] to agency interpretation of statutory ambiguity concerning agency's jurisdiction." In *Arlington*, the central issue was whether the FCC had Congressional authority to exercise jurisdiction over the subject matter. That is not the issue here. The Nation is not challenging DOI's *jurisdiction* to take land into trust. Rather, the Nation asserts DOI lacked the *statutory and regulatory authority* to take land into trust for the UKB Corp.

2. DOI Intentionally Circumvented *Carcieri*[3] So It Could Acquire Land into Trust for UKB Corporation.

Remarkably, DOI argues that its decision to take the land into trust for the UKB Corp. was *not* an attempt to circumvent the U.S. Supreme Court's holding in *Carcieri* because *Carcieri* does not apply to tribes organized under the OIWA. (DOI Br. at 15) DOI's position then begs

[3] *Carcieri v. Salazar*, 555 U.S. 379 (2009).

the question: Why did DOI not take the land into trust for the UKB, which filed the original request? After all, it was DOI—not the Nation—that raised the *Carcieri* issue in this case.

In a June 24, 2009 Decision (AR 1553-1567), while considering the Subject Tract trust application, the ASIA issued a decision finding that "I have authority to take land into trust [for the UKB] pursuant to Section 5 of the IRA." AR 1556. Yet, in the same decision, the ASIA concluded "I must defer final decision on whether I have authority to take this land into trust for the UKB until the Department has developed a more comprehensive understanding of *Carcieri* and its impact on tribes throughout the country." *Id.* Just a month later, on July 30, 2009, the ASIA asked the UKB, the Cherokee Nation and the Regional Director to address "the issue of the import, if any, of the *Carcieri v. Salazar* Decision." AR 1685-1688. Less than two months later, on September 10, 2010, the ASIA issued a Decision (AR 2557-2561) that stated "[u]nder Section 5 of the IRA, I can take land in trust for "Indians"—but not for tribes. *Id*. at 2558. The ASIA had obviously determined that, under *Carcieri*, he lacked authority to take land into trust for the UKB. However, instead of denying the UKB applications on the Subject Tract, the ASIA immediately began formulating the scheme to circumvent the clear language of *Carcieri* as described by the Nation in its Opening Brief. (Plf. Br. at 19-22.) Indeed, it was the ASIA's own actions that support the logical conclusion that DOI intended to and did circumvent *Carcieri*.

Now, DOI asserts that "*Carcieri* does not pose an obstacle to having and taking land in trust for tribes federally recognized after 1934." (DOI Br. at 17.) Instead, it claims that the ASIA changed course post-*Carcieri* only to avoid the "complex analysis" required to determine whether a tribe was "under federal jurisdiction" in 1934. (DOI Br. at 18.) Even if one accepts DOI's assertion (which is not supported by the record, *see* Plf. Br. at 19-22), 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 Corp. The administrative record clearly shows DOI did decide *Carcieri* applied to the UKB and attempted to circumvent the impediment *Carcieri* placed in the UKB application.

3. DOI's Own Regulations Prohibit the Trust Acquisition.

(a) DOI's 2011 Decision Ignores 25 C.F.R. § 151.2.

DOI engages in what can, at best, be described as a circular argument to support its assertion that it complied with its own prohibition against a tribal corporation securing land into trust only when "specifically" authorized by statute. *See* 25 C.F.R. § 151.2(b). In support, DOI states that it may acquire land into trust for "a tribe" under 25 C.F.R. § 151.3. DOI Bf. at 18. DOI then cites its own regulations, 25 C.F.R. § 151.2 (b), which includes in the definition of "tribe", "'a corporation chartered under' the IRA or OIWA where 'statutory authority . . . specifically authorizes trust acquisition for such corporations.'" *Id.*

After recognizing that specific statutory authority is necessary to take land into trust for UKB Corp., DOI incorrectly concludes, because "Section 3 of the OIWA provides such specific authority by conferring on tribal corporations any rights or privileges secured to an organized tribe under the IRA . . . 'the Secretary *must possess* the actual authority to take the land in trust' for the UKB's tribal corporation chartered under the OIWA. 2010 Decision at 3." DOI Br. at 18-19 (emphasis in DOI Brief). But in the 2010 Decision, the ASIA states that "Section 3 does not explicitly authorize me to take land in trust. But that authority is implicit." AR 2559.

In the 2011 Decision, the ASIA stated "Section 3 of the OIWA, 25 U.S.C. § 503, *implicitly* authorizes the Secretary to take land into trust for the UKB Corporation."[4] AR 3072.

[4] In the 2010 Decision, the ASIA noted that section 3(r) of the UKB Corp.'s charter authorizes the UKB Corp. to acquire "[p]roperty of every description, real and personal," and interpreted

DOI now concedes "section 3 does not explicitly authorize the ASIA to take land in trust," but argues that such authority is "implicit." (DOI Br. at 15.) This conclusion directly contradicts DOI's own regulations that state a tribal corporation may secure land into trust only when "specifically" authorized by statute. 25 C.F.R. § 151.2 (b). No specific statutory authority exists here. "Implicit" authorization, even if presumed by the ASIA, is not sufficient. Plf. Br. at 19-23

But DOI purports to have an answer for that. "[T]he fact that authority is implicit does not mean it is not specific; to the contrary, it is well established that something may be both 'specific' and 'implicit'."[5] DOI Br. at 19. But this interpretation flies in the face of DOI's own comments to the final regulatory definition of "tribe" in 25 C.F.R. § 151.2 (b). There, DOI expressly acknowledges that the IRA and the OIWA *do not* provide statutory authority for trust acquisitions for federal chartered corporations where such statutory authority does not otherwise exist. *See* 45 Fed. Reg. 62034 (Sept. 18, 1980).

DOI failed to identify *specific statutory authority* for taking land into trust for UKB Corp. Therefore, the ASIA exceeded his authority by taking the land into trust for the UKB Corp.

(b) DOI's Decision ignores 25 C.F.R. § 151.1 & DOI's Own Handbook.

DOI states that it "does not matter that the UKB and the UKB Corporation are separate entities for purposes of considering UKB's application pursuant to the Part 151 regulations." DOI Bf. at 21. However, 25 C.F.R. § 151.9 requires that a "Tribe desiring to acquire land in

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that provision as authorization of the Secretary to take land into trust for UKB Corp. The ASIA fails to understand that the UKB Corp. charter alone cannot authorize trust acquisitions by the UKB Corp. unless such acquisitions are specifically authorized by law. (*See* DOI Br. at 28.)

[5] Merriam-Webster Online Dictionary states that "implicit" means "capable of being understood from something else though unexpressed." "Specific" means "free from ambiguity." The cases cited by DOI are not persuasive. 25 C.F.R. § 151.2 (b) does not confer upon the Secretary the "implicit" authority to take land into trust for an entity chartered under section 3 of the OIWA. Further, section 3 of the OIWA, as discussed above and in Nation's Opening Brief, does not confer authority, implicit or explicit, to the Secretary to take land into trust for the UKB Corp.

trust status shall file a written request for approval of such acquisition with the Secretary." DOI determined that it could not take land into trust for the UKB. It is not disputed that the UKB submitted the application at issue here *on behalf of* the UKB Corp. Thus, the purported "Tribe desiring to acquire land in trust status" did not itself file the written request for approval. DOI dismisses this as a mere technicality but cites no authority supporting its claim that the clear language of the regulation may be ignored. [6]

The ASIA clearly abused his discretion by processing the UKB application in a manner not in conformity with his own regulations and rules as set forth in 25 C.F.R. § 151.1, *et. seq* and the Handbook.[7] DOI says the "Handbook has no binding effect upon the Department; it is informal guidance material that lacks the force of law." DOI Br. at 22. But the DOI Handbook states that "[t]he Secretary bases his or her decision to make a trust acquisition on the evaluation of the criteria set forth in Title 25 Code of Federal Regulations (CFR) Part 151 and any applicable policy." AR 4586. The handbook "describes Bureau of Indian Affairs (BIA) procedures for the transfer of land in fee to land in trust or restricted status." *Id.* Because the

[6] DOI cites *County of Charles Mix v. U.S. Department of Interior*, 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), *aff'd* 674 F.3d 898 (8th Cir. 2012) as support for the proposition that the UKB could submit the application on behalf of the UKB Corp. In *County of Charles Mix*, the issue raised concerning § 151.9 was whether the regulation required "that the Tribe in a Tribal Council of all members, as opposed to the [Business and Claims] Committee [the nine member elected executive committee], be the entity requesting that land be taken into trust." The issue was not about which of two entities must make the application but rather which of two competing branches of government of the tribal entity had the right to bring the application *on behalf of* the tribe.

[7] The DOI's Fee to Trust Handbook can be found at AR4584-4678. *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) ("[T]he Secretary . . . was bound by the regulations which he himself had promulgated . . . ."); *Utahans for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (stating, with regard to the BIA, that "[a]n agency is required to follow its own regulations."); *A.D. Transport Express, Inc. v. U.S.*, 290 F.3d 761, 766 (6th Cir. 2002) ("When an agency promulgates regulations it is, however, bound by those regulations.").

procedures are based upon regulations in 25 C.F.R. § 151, DOI's failure to follow the Handbook procedures is a violation of § 151 regulations that are implemented by and apply to DOI.

Finally, DOI argues that "the fact UKB and UKB Corporation are separate entities is a distinction without a difference." DOI certainly recognized a distinction when issuing its June 2009 and September 2010 Decisions. In June 2009, the ASIA stated "I have authority to take land into trust for the UKB pursuant to Section 5 of the IRA." AR 1557. In September 2010, after being briefed on *Carcieri*, the ASIA stated he could (1) take land in trust for ***Indians*** under Section 5 but not for the UKB (AR 2557); (2) take land in trust for the ***UKB*** under Section 1 of the OIWA for agricultural purposes only (AR 2559); or (3) take land into trust for the ***UKB Corp.*** under Section 3 of the OIWA (AR 2559). The UKB Corp. is a separate entity and as such was required to submit an application in its own name. DOI's failure to require a separate application was violation of its own regulations.

(c) DOI's Decision ignores 25 C.F.R. § 151.8.

DOI failed to obtain the Nation's consent to take land into trust for the UKB Corporation, as required by 25 C.F.R. § 151.8. DOI correctly states that the "1999 appropriations act provid[es] that no appropriated funds may be used to acquire land into trust within the former Cherokee reservation without consulting the Cherokee Nation." DOI Br. at 23. DOI then offers in a footnote (*Id*. at n.10) that:

> On a preliminary note, Plaintiff's interpretation that the 1999 Act requiring Cherokee Nation consent only for trust lands purchased with appropriated funds is unduly narrow. The appropriation provision applies more broadly to "funds . . . used to take land into trust," which includes the Department's administrative costs for reviewing and approving a trust application.

By footnoting this statement and not addressing it again, DOI conveniently avoids its own administrative record which states that the Subject Tract "was purchased by the Band in

2000 using **tribal and federal funds**."[8] AR 04 (emphasis added). Intervenors do spend a portion of their brief attempting to cloud the clear reading of the 1999 Act. But, like DOI, Intervenors do not offer any citation to the administrative record or offer any other evidence that the Subject Tract was purchased with funds appropriated under the 1999 Act or any subsequent act, if such subsequent appropriations act would apply.

The Nation asserts that the 1999 Act requirement for mere "consultation" with the Cherokee Nation would apply, if at all, only to trust applications where the land was purchased with funds appropriated for "Operation of Indian Programs." Plf. Br. at 16-17. DOI and Intervenors object to this clear interpretation of the 1999 Act. But in their objections, they both highlight the correctness of the Nation's assertion. As Intervenors state: "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[.]'" UKB Br. at 11.[9]

The "funding" referenced by DOI and UKB is funding for the UKB. Not, as DOI asserts, funds allocated to the BIA to be used for approval of trust acquisitions. Thus, when the 1999 Act provides that *no funds shall be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma" (112 Stat. 2681-246), it refers to funding provided to the UKB—not general funds of the BIA used in administration of all its programs.

The Nation agrees with DOI that a court "'cannot ignore clear expressions of Congressional intent, regardless of whether the end product is an appropriations rider or a statute that has proceeded through the more typical avenues of deliberation.' *City of Chicago v. U.S.*

[8] 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.

[9] DOI cites the same Congressional Record provision in its brief. *See* DOI Br. at 26.

Dep't of Treasury, 423 F.3d 777, 782 (7th Cir. 2005)." DOI Br. at 26.[10] But DOI focuses on the "consent" versus "consultation" provisions in the two acts. Change in language has some consequences. However, the issue advanced by the Nation, which DOI addresses only in passing, is whether DOI can acquire land into trust for the UKB within the Nation's Treaty Territory when such lands have not been purchased with funds appropriated to the UKB under the 1999 Act. The answer to that question is NO.

Any limitation on the consent requirement in 25 C.F.R. Part 151 would apply only in those instances where the land to be taken into trust was purchased with funds allocated under the 1999 Act. DOI erred as a matter of law in determining that it could acquire the Subject Tract into trust for the UKB Corp. without the consent of the Cherokee Nation.

4. The Treaty of 1866 Prohibits the Trust Acquisition.

DOI's attempt to take the Subject Tract into trust for the UKB Corp. does violate Cherokee Treaty of 1866.[11] DOI asserts that "[i]f Congress believed taking land into trust for a different tribe violated Cherokee Nation's sovereignty and only the Cherokee Nation could assert sovereignty over land within the boundaries of the former reservation, it would not have left open the possibility of Interior acquiring land in trust for a tribe, not Cherokee, within the former reservation's boundaries." DOI Br. at 27-28. DOI's faulty logic is based upon its incorrect interpretation of the 1999 Appropriations Act.

As stated in Nation's Opening Brief (pp. 13-18) and in Section A.3 above, the 1999 Act establishes, if at all, only a narrow exception for lands purchased with federal funds appropriated

[10] However, there is no clear expression here and DOI's decision is not accorded deference. *See e.g. Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1149 (9th Cir. 2013) ("[T]he Secretary's interpretation warrants no deference because it rests on a mistaken conclusion that the language has a plain meaning.")

[11] "We do not afford any deference to the DOI's position on this issue because Congress did not give it the discretion to administer those treaties and agreements." *Cherokee Nation of Oklahoma v. Norton*, 389 F.3d 1074, 1079 (10th Cir. 2004).

for "Operation of Indian Programs" as defined in the 1999 Act. Neither the DOI nor the UKB or UKB Corp. have attempted to refute Nation's claim that the Subject Tract was not purchased with federal funds appropriated for the operation of Indian programs. Thus, Congress never engaged, as reflected in the congressional record citations set forth in DOI's brief, in any discussion about the impact of the 1999 Act on the 1866 Treaty.

The 1866 Treaty reconfirmed the Cherokee Nation's sovereign authority and rights of self-government—rights which were to be protected against the "intrusion" of all unauthorized citizens without Nation consent. These Treaties recognize the Nation's exclusive sovereign authority over trust lands within the boundaries of the Nation's treaty territory and its veto power over the entry of other tribes upon such lands. That is precisely what the Cherokees believed that they were receiving. Indian treaties are to be interpreted liberally in favor of the Indians. *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 675-76 (1979); *Choctaw Nation v. United States,* 318 U.S.423, 432 (1943). Any ambiguities are to be resolved in their favor, *Winters v. United States,* 207 U.S. 564, 576-577 (1908); *see also Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation,* 502 U.S. 251, 269 (1992). The ASIA's 2011 Decision violates the rights of the Cherokee Nation as confirmed in the 1866 Treaty.

5. UKB corporate charter does not grant DOI authority to take land into trust for the UKB Corp.

In a last-ditch effort, DOI turns erroneously to the UKB's corporate charter to justify the trust acquisition. As previously discussed, DOI claims that, because "Section 1(b) of UKB's charter identifies 'the acquisition of land' as one of the corporation's purposes," the Secretary "must possess" the authority to take land into trust for the UKB Corp. DOI Br. at 20.[12] Based upon this statement, DOI concludes that:

[12] DOI states the Nation "implies that it is significant that the UKB's constitution does not

> As Interior approved the UKB's constitution and charter in 1950, Interior ***at the time***[13] plainly understood that the IRA rights and benefits secured to the UKB by the 1946 Act and section 3 of the OIWA were to be exercised through the vehicle of the UKB Corporation. Accordingly, Interior reasonably concluded that the OIWA specifically authorized it to take land into trust for the UKB Corporation.

DOI Br. at 20-21. (emphasis added). This is irrelevant. Section 3 of the OIWA does nothing more than authorize the Secretary to issue a charter. See Plf. Bf. at 22-26. Any right or privileges in the charter are conveyed through the IRA—not through any action of the Secretary. There is no statutory authority.

The corporate charter does not specifically address trust property, and even if it did, it could not confer power on the Secretary to take land into trust for the corporation. Accordingly, the ASIA exceeded his authority by taking the Tract into trust for the UKB Corp.

B. Defendants fail to establish the 2011 Decision is Not Arbitrary and Capricious or Contrary to Law

1. It is arbitrary and capricious to ignore the jurisdiction conflicts between the Nation and the UKB.

DOI's decision to ignore jurisdictional conflicts and depart from its previous decisions was arbitrary and capricious. DOI shrugs off the issue of jurisdictional conflicts with the following: "Interior properly considered the jurisdictional concerns Plaintiff raised and rationally evaluated such concerns in light of the facts found." The Nation raised valid

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contain a claim of its territorial designation." DOI Br. at 20, fn. 9. The Nation made this fact known to the Court in the context of UKB authority to exercise any governmental authority within the Cherokee Nation's Treaty Territory. This is a central issue to DOI's claim that there are no potential conflicts between the Nation and the UKB as to the exercise of jurisdiction over the Subject Tract. DOI fails to advise the Court that, while OIWA may not require a tribe to list a geographic area in its constitution, 25 C.F.R. 151.2(f) states that in Oklahoma "Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary." The Subject Tract is in the Nation's Treaty Territory. UKB has no treaty territory.

[13] Actually, from 1950 (at that time) until 2009—almost 60 years—the DOI consistently held that it could not take land into trust for the UKB. The determination that it could take land into trust for the UKB or the UKB Corporation is a very recent determination overturning at least 60 years of decisions to the contrary. AR 1337-1347.

jurisdiction concerns that were not addressed by DOI. However, the jurisdictional concerns DOI ignored were concerns raised within its own department by the people who have dealt with these issues daily for decades.

After the Regional Director had consistently denied all UKB trust application for a myriad of reasons, DOI sent a memo to her demanding that she change her position on a number of issues including the issue of jurisdictional conflicts, or provide reasons for not doing so. See AR 790-794. In the 2011 Decision, the Regional Director stated (AR 3077-3078):

> 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 2009 Decision that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." ***The Assistant Secretary's findings and conclusions on this issue are binding on the Region.*** (emphasis added).

DOI directed the 2011 Decision over the protests of the people most closely involved in these matters—the Regional Director and her employees.

DOI next argues that the 2011 Decision finding of no jurisdictional conflicts was based upon a re-reading of the 1946 Act authorizing UKB to organize as a tribe under the OIWA. DOI Br. at 30. According to DOI, the 1946 Act "merely recognizes the UKB's sovereign authority, which extends "over both [its] members and [its] territories." *Id*. The quoted language is not from the 1946 Act—but rather from an unrelated case. There is no statutory language anywhere which recognizes any UKB "territories."

DOI next asserts that "even though both the UKB and the Cherokee Nation intended to assert jurisdiction over UKB's trust land, Interior could still take the land into trust for the UKB." DOI Br. at 30. DOI cites the 2011 Decision for support that "[t]he UKB and the Cherokee Nation should be able, as those other tribes have done, to find a workable solution to

shared jurisdiction." DOI Br. at 31. DOI attributes the quote to both its 2009 Decision and 2011 Decision. This is misleading. The quote is found in the 2009 Decision. The Regional Director's 2011 Decision does not have remotely similar language. In fact, the Regional Director stated that "the potential for jurisdictional problems between the Cherokee Nation and UKB is of utmost concern and weighed heavily against approval of the acquisition. However, in his 2009 Decision, as modified by his 2010 Decision, the Assistant Secretary concluded that the Cherokee Nation does not have exclusive jurisdiction within the former Cherokee reservation." AR 3077. The Regional Director adds that in a previous correspondence "the UKB did not deny the potential for jurisdictional conflicts." *Id*. But, despite these concerns, the Regional Director stated that the ASIA's directives in the 2009 Decision "are binding on the Region." AR 3078.

DOI ignored the evidence from DOI's own people regarding the seriousness of the jurisdictional issues between the Nation and the UKB. DOI has recognized and respected the seriousness these jurisdictional conflicts for decades. Yet, it mandated the 2011 Decision anyway. DOI's 2011 Decision is arbitrary and capricious.

2. It is arbitrary and capricious to ignore twenty years of case law developed in federal district and appellate courts.

DOI relies upon an opinion issued by an associate solicitor within the Department of Interior as basis for ignoring case law developed over a period of twenty years in Oklahoma federal courts and the Tenth Circuit Court of Appeals, and prior decisions of the Secretary of the Interior—all developed after the implementation of the 1946 Act. DOI Br. at 31-32. DOI asserts that the court opinions never addressed the exclusive jurisdiction of the Cherokee Nation over the Nation's Treaty Territory. *Id*. This is just not accurate. *See Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992) ("The Act of August 10, 1946 simply recognizes the UKB as a "band of Indians residing in Oklahoma"; *it does not set aside a*

reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation. Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the [Oklahoma Indian Welfare Act], *nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation*.") (emphasis added); *United Keetoowah Band v, Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993, *attached to and aff'd*, 2 F.3d 1161 (10th Cir. 1993), 1993 WL 307937 (The Court noted that it had "previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation," and that it had "previously determined . . . that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *Id.*).

DOI's reliance on a memorandum from an assistant solicitor as support for refusing to acknowledge prior precedents in the federal courts of Oklahoma is arbitrary and capricious and is not supported by the law.

3. It is arbitrary and capricious to take land into trust in an effort to settle ongoing litigation.

DOI's motive in approving the UKB Corporation trust application should be examined in light of ongoing litigation between the U.S. and the UKB because it supports the Nation's claim that the DOI's decision to take land into trust for UKB was arbitrary and capricious. DOI objects to the Nation's assertion that its actions in taking the Subject Tract into trust were motivated by on-going litigation. The Nation set forth the evidence in the record to support this conclusion. *See* Plf. Br. at 29-32. DOI's response that "the parties did not settle the case" (DOI Br. at 33) is true. UKB dismissed the case. However, UKB dismissed the actions only after the United States filed a motion for judgment on the pleadings. *See UKB v. U.S.*, 08-CV-1087. *See* Appendix 2, Tab 5. In the motion for judgment on the pleadings, the United States was seeking judgment that

(1) UKB has no treaty with the United States, (2) UKB has no claim to allotted lands or fee lands held by the Cherokee Nation and (3) Congress has continually recognized the Cherokee Nation and not the UKB. *Id.* A ruling on any of these claims by a federal court would not be in the interest of the DOI or the UKB in pursuing its claim that DOI can take the Subject Tract into trust for the UKB or the UKB Corp.

For the reasons set forth in Nation's Opening Brief, the resolution of litigation between the U.S. and the UKB was a factor in DOI's decision to take the Subject Tract into trust for the UKB Corp. Thus, the actions of DOI were arbitrary and capricious.

4. It is arbitrary and capricious to fail to adequately consider the administrative consequences of taking land into trust for the UKB.

DOI failed to properly consider whether the BIA is sufficiently equipped to discharge its responsibilities relating to the trust acquisition. The administrative record clearly shows the ASIA abused his discretion in failing to adequately consider all relevant facts 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." Noting that the Regional Director had previously denied UKB's trust application in part because of its finding that it could not sufficiently discharge its duties, DOI states that Regional Director was requested to "submit any evidence" to support he could not discharge his duties and "the Region did not." Again, this is not quite accurate.

In the 2011 Decision, the Regional Director stated: "The Region again expresses its concern that the Region will not have the necessary funds to discharge the duties that will arise as a result of this acquisition." AR 3078. Despite this concern, the Regional Director concluded that "consistent with the Assistant Secretary's 2008 Directive and 2009 Decision, the BIA can discharge its duties in connection with this acquisition." The ASIA's determination that the BIA

is equipped to discharge the additional responsibilities resulting for the acquisition of the Subject Tract into trust for the UKB Corp. is not supported by the record and was arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

5. DOI's interpretation of IRA section 476(g) is contrary to law.

DOI states its determination that the UKB Corp. may acquire land into trust in the Nation's Treaty Territory does not open the Treaty Territory to other tribes because the 2011 Decision "merely recognizes that two tribes may share a jurisdictional area." DOI Br. at 35.

Instead of explaining its interpretation of the 1994 amendments to §476, DOI makes the unsupported claim that DOI examined the "history" of the UKB and the Cherokee Nation and "found that they both had ties to the historic Cherokee territory." *Id.* The "historical summary" given by DOI and UKB is disingenuous in its omissions as well as the skewed recitation of actual events. UKB refer to the tortuous time of the Marshall trilogy, the defiance of Justice Marshall's orders by President Jackson and the State of Georgia, and the resulting Trail of Tears by stating: "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." UKB Br., p. 3.

Neither DOI nor UKB mention the July 12, 1839, Act of Union between the Eastern and Western Cherokees in their historical account. In that document (AR 2084), the framers clearly expound that:

> ….we, the People composing the Eastern and Western Cherokee Nation in National Convention assembled, by virtue of our original and undeniable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

Nor, do they mention the 1839 Cherokee Constitution, which was adopted on the heels of the Act of Union. The preamble to that Constitution (AR 1773) states:

> The Eastern and Western Cherokees having again re-united, and become one body politic, under the style and title of Cherokee Nation.

DOI concludes, somewhat nonsensically, that its interpretation of § 476 "merely recognizes that two tribes may share a jurisdictional area," again citing the June 2009 Decision, AR 1559-1560. (*Id.*) DOI has not even attempted, and has completely failed to respond to any possible significance of § 476(f) regarding its duty under 25 C.F.R. §151.10(f) to consider jurisdictional conflicts. (*See* Plf. Br. at 44-46.) Furthermore, DOI's position on shared reservation is contrary to the position taken by the United States in litigation with the UKB.

> [UKB] asserts a beneficial interest in the lands taken into trust for the Cherokee Nation…[UKB's] assertion lacks merit. [UKB] has no claim to those lands under the treaties because [UKB] was not a party to them…To the extent that [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. . .Additionally, the allotted lands at issue were lands that unequivocally belonged to the Cherokee Nation, not [UKB], before the allotment period. . . Indeed, by 1902, [UKB] had existed as a group for only forty years and was not recognized by Congress in the Act of July 1, 1902, or the Act of April 26, 1906, *that preserved the Cherokee Nation's tribal government and tribal lands.*

***See UKB v. U.S.*, 08-CV-1087. *See* Appendix** 2, Tab 5**.**

In fact, history shows that the only deviation from the consistent position of the United States, that the Cherokee Nation exercises exclusive jurisdiction over its Treaty Territory, is the DOI's determination that it may take the Subject Tract into trust for the UKB. The DOI's actions are arbitrary and capricious and do not find support in 25 U.S.C. 476(g).

C. Defendants fail to establish that the Nation's request for Declaratory Relief and for a Permanent Injunction should not be granted.

The Nation's request for declaratory relief and for a permanent injunction should be granted. DOI asserts that granting the Nation's request for permanent injunction is "drastic and extraordinary" relief. DOI Br. at 38-39. Regardless of how DOI chooses to characterize the injunctive relief, it should be granted in this case. DOI asserts that the 2011 Decision was based upon a determination that "section 3 of the OIWA permitted Interior to acquire land in trust for

the UKB Corporation" only. *Id*. at 39. DOI argues that the issue of whether DOI could acquire land into trust for the UKB or the UKB Corp. was not decided after performing a *Carcieri* analysis. *Id*.

First, DOI states it has not performed a *Carcieri* analysis. As argued in Nation's Opening Brief and again discussed in Section IV.A.2 above, DOI did perform a *Carcieri* analysis. In June 2009 it determined it could acquire the Subject Tract in trust for the UKB under Section 5 of the IRA. In September 2010, it stated it could acquire the land in trust for Indians (but not the UKB) under Section 5 of the IRA or for the UKB Corp. under Section 3 of the OIWA.[14]

Second, and more importantly, *Carcieri* is a smoke screen. DOI's decision, whether it be taking land into trust for UKB or UKB Corp., relies upon its interpretation of the 1999 Appropriations Act and other statutory and regulatory provisions as they apply UKB and the Cherokee Nation sharing jurisdiction over the lands within to the Nation's Treaty Territory. Should this Court find, as the Nation asserts it must, that the UKB has no claim to the Nation's Treaty Territory and that the consent of the Nation is required before DOI can acquire any land into trust for the UKB or any other tribe, then the Nation is entitled to a permanent injunction. That is not drastic relief; it is restoring the status quo as it has been for more than 190 years.

V. CONCLUSION

For the reasons set forth in Nation's Opening Brief and herein, this Court should grant Nation's request for declaratory judgment and injunctive relief as sought in its Complaint.

[14] It also found it could take land into trust for UKB under Section 1 of the OIWA for the UKB but that section limits trust acquisitions to land acquired for agriculture purposes—and it would have invoked *Carcieri* which DOI had decided it needed to avoid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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
William David McCullough

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