EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 14-cv-428-RAW**
	)	
	)	
S.M.R. JEWELL, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, et al.,	)	
	)	
Defendant-Intervenors.	)	

FEDERAL DEFENDANTS' RESPONSE MERITS BRIEF

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I. INTRODUCTION

In 2011, the Bureau of Indian Affairs Acting Regional Director for the Eastern Oklahoma Region ("Regional Director") approved the United Keetoowah Band of Cherokee Indian in Oklahoma's ("UKB") amended fee to trust application to acquire 76 acres in trust for its federally-chartered corporation, the UKB Corporation. This decision was made after approximately seven years of consideration and review. In making this decision, the administrative record shows that many factors were analyzed, including the authority for taking the land into trust, trust eligibility requirements, Supreme Court precedent, and the history between the UKB, the Cherokee Nation, and the land at issue. After thorough and careful consideration, the Department of the Interior determined that it possessed the authority under the Oklahoma Indian Welfare Act to acquire the land in trust for the benefit of the UKB Corporation.

The 2011 Decision was not arbitrary, capricious, an abuse of discretion, nor otherwise violative of any laws as reviewed under the APA. The Regional Director explicitly considered Interior's regulatory factors for acquiring land in trust and offered a reasoned explanation for the finding that the trust application satisfied these regulations. The 2011 Decision involved policy and factual determinations for which the Department of the Interior is uniquely qualified to make. The Court should uphold the deference owed to the Departmental consideration of its regulations for acquiring land in trust. Additionally, to the extent the Regional Director departed from positions previously held, the Department of the Interior is entitled to change its position as long as it offers a sufficient explanation for doing so. Here, the Regional Director, relying on determinations made by the Assistant Secretary, satisfied this standard by analyzing the prior position and providing explanation for the 2011 Decision. The 2011 Decision was made after

consideration of all the relevant factors and is entitled to substantial deference. The Court should uphold the decision.

II. BACKGROUND

A. Statutes Pertaining to the Organization of Indian Tribes in Oklahoma: The IRA, the OIWA, and the 1946 Act.

Three statutes pertaining to the organization of Indian tribes are relevant to this case: the Indian Reorganization Act of 1934, the Oklahoma Indian Welfare Act of 1936, and the 1946 Keetoowah Recognition Act. Each is discussed below.

The Indian Reorganization Act of 1934: In 1934, Congress passed the Indian Reorganization Act ("IRA"), Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*). The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains." Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, § 1.05, at 81 (2012 ed.). It authorized the acquisition of land for Indians, promulgated conservation regulations, and declared newly acquired lands to be Indian reservations or added to existing reservations. *Id.* at 82. The Act provided for tribal self-government pursuant to tribally adopted constitutions. 25 U.S.C. § 476. And it permitted Indian tribes to organize for economic purposes pursuant to corporate charters, which could "convey to the incorporated tribe" the power to acquire or otherwise hold "property of every description." *Id.* § 477. The "capstone" of the IRA is section 465, which authorized the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." *Id.* § 465; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak* ("*Patchak*"), 132 S. Ct. 2199, 2211 (2012) (recognizing that "[l]and forms the basis of [tribal] economic life, providing the foundation for tourism, manufacturing, mining, logging, . . . and gaming") (internal quotation marks and

citations omitted). The IRA, however, excluded named Oklahoma tribes, their members, and affiliates – including the Cherokee – from various provisions, including the opportunity to organize and set up a corporation under section 477. 25 U.S.C. § 473.

Plaintiff places the IRA's definition of the term "Indian" at issue here. The statute defines "Indian" to include, in part, "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479. Until recently, Interior had long interpreted this definition to apply to Indians that are under federal jurisdiction at the time when a relevant provision of the IRA is invoked. In 2009, however, the Supreme Court interpreted the definition of "Indian" in the IRA to be limited to members of tribes under Federal jurisdiction when the IRA was enacted in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 388-91 (2009). Thus, while prior to *Carcieri*, Interior generally invoked section 465 as authority for acquiring land in trust for a federally recognized tribe, after *Carcieri*, Interior may invoke the first definition of "Indian" contained in section 465 only after it determines that a recognized tribe was "under federal jurisdiction" in 1934. Alternatively, Interior may identify other authority for acquiring land in trust for the tribe.

The Oklahoma Indian Welfare Act of 1936: In 1936, two years after the enactment of the IRA, Congress enacted the Oklahoma Indian Welfare Act ("OIWA"), ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (1982)), to extend similar benefits of the IRA to the Oklahoma tribes. It applied to all tribes within the state, and unlike the IRA, there was no opportunity to reject it. While the IRA applied to "reservations," *see* 25 U.S.C. §§ 476, 479, Pertinent here is section 3 of the OIWA, which authorizes "[a]ny recognized tribe or band of Indians residing in Oklahoma" to organize by adopting a constitution; and to obtain from the Secretary a corporate charter conveying, *inter alia*, "the right . . . to enjoy any other rights or privileges secured to an

organized Indian tribe" under the IRA. 25 U.S.C. § 503.

The 1946 Keetoowah Recognition Act: On August 6, 1946, Congress authorized "the Keetoowah Indians of the Cherokee Nation of Oklahoma to reorganize as a band of Indians residing in Oklahoma within the meaning of § 3" of the OIWA. 60 Stat. 976 (1946). The legislation was intended "to secure any benefits, which, under the Oklahoma Indian Welfare Act, are available to other Indian bands or tribes." H. R. Rep. No. 79-447, at 2 (1945) (statement of Abe Fortas, Acting Secretary of the Interior).

B. Factual Background.

1. The UKB.

The UKB is a federally-recognized Indian tribe. At present, the Federal Government does not hold any land in trust for its benefit. 2011 Decision at 2, AR3072.[1] Members of the UKB are descendants of the Cherokee people who originally occupied the southeast United States. H.R. Rep. No. 79-447 at 1. The Cherokee Indians identifying themselves as Keetoowahs represented the most traditional portion of the Cherokee Indians and existed as an organization of Cherokee Indians since the 1800s. In 1859, the leading members of the Keetoowahs adopted a constitution and formed the Keetoowah Society, a group within the Cherokee Nation, whose objectives included opposition to slavery. The society's membership was initially limited to full-blood Cherokees. Its overall intent was to keep alive Cherokee institutions and tribal identity. H.R. Rep. No. 79-447 at 2.

Through a series of treaties with the United States spanning the period from approximately 1817 to 1906, the Cherokee Indians, including the Keetoowah members, were

[1] Federal Defendants are coordinating with the other parties to provide the Court with a joint appendix as discussed during the December 9, 2014, status and scheduling conference. ECF No. 48.

granted lands including lands in what is now the state of Oklahoma and were relocated to those lands. *Id.* The Five Civilized Tribes, including the Cherokees, were given fee title to their land within the Indian Territory and were treated differently from other tribes in other respects. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, § 4.07[1][a]-[c] (2012 ed.).

At the end of the 19th Century, Congress moved to break up the Indian reservations by allotting land to individual Indians. The Keetoowahs unsuccessfully opposed allotment of the Cherokee lands, as well as efforts to dissolve the governments of the Five Civilized Tribes, including the Cherokee. H.R. Rep. No. 79-447 at 2. In 1905, when the deadline for dissolution was drawing close, the Keetoowahs applied for and received a charter of incorporation through the United States district court. "The intention in . . . all courses followed by the Keetoowah group, was that of keeping alive Cherokee institutions and the tribal entity." H.R. Rep. No. 79-447 at 2. In 1906, Congress passed the Five Tribes Act, which addressed allotment and other matters comprehensively for the tribes. Cohen, § 4.07[1][a], at 290.

After passage of the IRA and then the OIWA, the Keetoowahs sought in the 1930s to reorganize as a separate band of Cherokee Indians under the OIWA. H.R. Rep. No. 79-447 at 2; July 29, 1937 Solicitor's Opinion, AR4378. In the 1937 opinion, the Solicitor found that the Keetoowahs were a society of full-blood Cherokee Indians organized nearly a century earlier for the preservation of Indian culture and traditions. AR4378. He found, however, that the Keetoowahs did not constitute a band of Cherokee Indians within the meaning of the OIWA and therefore, were not eligible to reorganize under it. *Id.* In response, Congress clarified the Keetoowahs eligibility to reorganize as a band by passing the 1946 Act. The UKB then had almost 3,700 members, representing nearly half of the Cherokees with one-half or more Indian blood residing within the former Cherokee reservation. *See* H.R. Rep. No. 79-447, at 2. In

1950, Interior approved the UKB's constitution and corporate charter pursuant to the 1946 Act and the OIWA. Constitution and By-Laws of the United Keetoowah Band of Cherokee Indians Oklahoma, AR19-23. Under authority of these documents, the UKB's tribal structure consists of a governing body (UKB), possessed with full governmental powers under the OIWA, and a corporate entity (UKB Corporation), which is empowered to act as the UKB's corporate arm.

2. The 2011 Decision.

On May 24, 2011, the Regional Director approved the UKB's amended application to accept 76 acres of land (the "Property") in trust for the benefit of the UKB Corporation. The decision was made in exercise of discretionary authority that is vested in the Secretary and delegated to the Regional Director. 2011 Decision at 2, AR3072. The 2011 Decision relied upon and incorporated a series of earlier decisions issued by the Assistant Secretary – Indian Affairs ("Assistant Secretary"), as discussed below.

In 2004, the UKB requested that the Bureau of Indian Affairs ("BIA") acquire the Property in trust pursuant to section 5 of the IRA. AR1-18. The Regional Director denied the request on April 7, 2006, based on concerns of potential jurisdictional disputes, the ability of BIA to discharge its responsibilities, and that a categorical exclusion did not apply under the National Environmental Policy Act ("NEPA"). AR672-79. The UKB appealed this decision to the Indian Board of Indian Appeals ("IBIA"), an appellate review body that exercises the delegated authority of the Secretary to issue final decisions for Interior in appeals involving Indian matters. AR680-85. While this appeal was pending, the Assistant Secretary instructed the Regional Director to request a remand, and the IBIA granted the remand and vacated the decision. AR962-68. On remand in 2008, the Regional Director denied the application on principally the same grounds as before. AR4409-34. When the UKB appealed that decision to

the IBIA, the Assistant Secretary assumed jurisdiction of the appeal under 25 C.F.R. § 2.20(c). AR1393-94.

On June 24, 2009, the Assistant Secretary issued his first decision on the application. ("2009 Decision") AR1553-67. The 2009 Decision, as clarified by a July 30, 2009, Decision, AR1685-88 ("July 2009 Decision")[2], reversed the Regional Director's August 8, 2008, decision denying the UKB's application to have the Property taken in trust and remanded the UKB's application to the Regional Director to apply the NEPA categorical exclusion checklist, directing that if the Regional Director found that the application satisfied the checklist, she should hold the application pending resolution of the Assistant Secretary's determination of authority to take the land in trust under section 5 of the IRA. *Id.* In discussing the analysis under 25 C.F.R. Part 151, the Assistant Secretary considered the jurisdictional problems and potential conflicts of land use that may arise and explained in detail his position.[3] 2009 Decision at 6-8, AR1558-60. The Assistant Secretary found that the Regional Director's conclusion that there would be problematic conflicts of jurisdiction between the Cherokee Nation and the UKB was premised on the conclusion that the Cherokee Nation has exclusive jurisdiction over its former reservation, which in turn was premised on a narrow reading that the 1946 Act authorizing the Keetoowahs to reorganize withheld from the tribe any territorial jurisdiction. The Assistant Secretary held that such a narrow reading was incorrect.

The Assistant Secretary then considered the statutory directive found in section 476(f) of the IRA. The Assistant Secretary explained his view that this section prohibited him from

[2] In the July 2009 Decision, the Assistant Secretary stated that the 2009 Decision "was a partial ruling" that "did not . . . render a final ruling on my authority to take the land into trust generally." AR1686. The Assistant Secretary then requested additional briefing from the parties "on the import, if any," of the *Carcieri* decision. *Id.*

[3] The Part 151 regulations implement the various trust land acquisition authorities given to the Secretary.

finding that the UKB lacks territorial jurisdiction while other tribes had it. *Id.* The UKB, like the Cherokee Nation, possesses the authority to exercise territorial jurisdiction over its tribal lands. 2009 Decision at 6, AR1558.

Similarly, the Assistant Secretary explained and refuted prior positions of departmental subordinates on the exclusivity of the Cherokee Nation within the former Cherokee treaty boundaries. *Id.* The Assistant Secretary determined that three letters from the Office of Law Enforcement Services and a Regional Director were not binding and had not provided any analysis for their position. *Id.* The Assistant Secretary likewise found that previous federal court decisions, Order, *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. filed May 31, 1991), and Order & Judgment, *United Keetoowah Band v. Mankiller*, 2 F.3d 1161 (10th Cir. 1993) (No. 92-C-585 B) (unpublished decision), were not binding on the issue of exclusive jurisdiction. *Id.* The Assistant Secretary also found that his latest determination was consistent with a 1999 appropriations act, which provided that no appropriated funds shall be used to acquire land into trust within the former Cherokee reservation without consulting with the Cherokee Nation. *Id.* at 7, AR1559.

The Assistant Secretary found that the fact that the UKB's charter authorizing the UKB to hold land for tribal purposes weighed heavily in favor of finding that the UKB Corporation can have land taken into trust. *Id.* The Assistant Secretary found that in stating that the charter did not override the department's previous position or court rulings, the Regional Director had "misperceived the relative significance of the charter approval and the more recent statements by acting and subordinate officials." *Id.*

In the 2009 Decision, the Assistant Secretary held 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 in trust for the UKB. The UKB would have exclusive jurisdiction over land that the United States holds in trust for the UKB. *Id.* But even if the UKB had to share jurisdiction with the Cherokee Nation, such shared jurisdiction did not preclude Interior from taking the land into trust because there are situations in which tribes share jurisdiction. *Id.*

In the 2009 Decision, the Assistant Secretary left open the question of his authority to acquire the Property in trust pending further consideration of *Carcieri*'s impact. *Id.* at 2, AR1554. On September 10, 2010 ("2010 Decision"), the Assistant Secretary issued his third decision concluding that he did not have to address the impact of *Carcieri* and listed three options for the UKB to submit an amended application. 2010 Decision at 1, AR2557. Relevant to this litigation, the Assistant Secretary instructed that the Regional Director to allow the UKB to amend its application to invoke the Assistant Secretary's authority under Section 3 of the OIWA and seek to have the land held in trust for the UKB Corporation. 2010 Decision at 2, AR2558.

On October 5, 2010, the UKB amended its application requesting that the Property be taken into trust for the UKB Corporation under section 3 of the OIWA. UKB Tribal Resolution No. 10-UKB-47, Sept. 29, 2010, at 2-3, AR2563-64. On January 21, 2011, the Assistant Secretary clarified in a letter to the UKB that the Regional Director has authority under section 3 of the OIWA to take the Property in trust for the UKB Corporation and the amended application did not invoke Interior's authority under section 5 of the IRA. AR3007-08.

In the 2011 Decision, the Regional Director, in addition to recognizing the Assistant Secretary's previous decisions, addressed the regulatory criteria for acquiring land into trust in 25 C.F.R. Part 151. After noting that the 2009 Decision found that the UKB's original application satisfied section 151.9 ("Requests for approval of acquisitions"), the Regional

Director found that UKB's amended application on behalf of the UKB Corporation also satisfied that requirement. 2011 Decision at 4, AR3074. In analyzing section 151.3 ("Land acquisition policy"), which requires that there be statutory authority in order to take land in trust for a tribe, and section 151.10(a) (existence of statutory authority and any limitations contained in such authority), the Regional Director stated that 2010 Decision, as clarified by the 2011 Letter, concluded that section 3 of the OIWA provides implicit statutory authority for the Secretary to take land into trust for the UKB Corporation, and that both the 2010 Decision and the 2011 Letter "are binding on the Region and preclude further consideration of this issue." 2011 Decision at 2, AR3072. The Regional Director concluded, after summarizing the Assistant Secretary's decisions, that "there is statutory and regulatory authority to take the [Property] into trust for the UKB Corporation." *Id.*

Next addressing section 151.8 ("Tribal consent for nonmember acquisitions"), the Regional Director found that the Assistant Secretary's 2009 Decision determined that the Cherokee Nation's consent to the acquisition was not required, and that the Department only needed to consult with the Cherokee Nation pursuant to the 1999 Act. *Id.* at 3, AR3073. The Regional Director further found that the July 2009 Decision and the 2011 Letter conclusively determined that the requirement for consultation was met when the Regional Director solicited comments from the Cherokee Nation in 2005 on UKB's initial application. *Id.* at 4, AR3074.

The Regional Director considered section 151.10(b) (the need of the tribe for additional land), and found that the Assistant Secretary's 2009 Decision, which concluded that the UKB has no land in trust and that the tribe has a need for the Property to be taken into trust, "is binding on the Region." *Id.* at 5, AR3075.

Although the Regional Director expressed concern, in analyzing sections 151.10(f) and

(g) – that jurisdictional conflicts would arise between UKB and the Cherokee Nation, and that the Regional Office would not have the necessary funds to discharge the duties that would arise as a result of the acquisition – the Regional Director concluded that, based on the 2009 Decision, those concerns did not provide a sufficient basis to deny the application. *Id.* at 7-8, AR3075-76.

3. Plaintiff's Complaint.

Plaintiff initially sought review of the 2011 Decision before the IBIA. On January 6, 2014, the IBIA issued its order dismissing Plaintiff's appeal for lack of jurisdiction and on the ground of abstention. *Cherokee Nation v. Acting E. Okla. Reg'l Dir.*, 58 IBIA 153, 2014 WL 264820 (2014). Following Departmental regulations, Interior initiated final steps to complete the acquisition. On January 13, 2014, Plaintiff filed its suit for declaratory and injunctive relief seeking to enjoin the 2011 Decision. ECF No. 1. On January 22, 2014, Plaintiff filed its injunction motion seeking to enjoin transfer of the Property into trust until the Court scheduled a hearing on its preliminary injunction request. ECF Nos. 7-8. On the same day, the Court granted Plaintiff's request to enjoin Interior from taking the Property in trust until a February 3, 2014, hearing on Plaintiff's request for a preliminary injunction. Prior to the February hearing, Federal Defendants agreed that they would take no action to acquire the Property into trust pending the Court's decision on the merits. ECF No. 18.

III. STANDARD OF REVIEW

In determining whether agency action was arbitrary and capricious, the Court must apply the highly deferential standard of review applicable to agency action under the Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559, 701-706 ("APA"). The Court must sustain Interior's decision to take land into trust for the UKB Corporation unless the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.

§ 706(2)(A). That standard "is narrow" and the reviewing court must not "substitute [its] judgment for that of the agency." *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006) (citation omitted); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). Rather, the Court reviews the decision to ensure that it was based on the relevant factors and was not a "clear error of judgment." *Id.* "A presumption of validity attaches to the agency action and the burden of proof rests with the parties who challenge such action." *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1165 (10th Cir. 2012) (quotation omitted).

There is a strong presumption in favor of upholding decisions where agencies have acted within their scope of expertise. *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 376, 378 (1989). Courts will grant considerable leeway to an agency's interpretation of statutes it is charged with administering and to its implementation of its own regulations. *See City of Arlington v. Fed. Commc'ns Comm'n*, 133 S. Ct. 1863 (2013); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary's interpretation of own regulations are controlling unless "plainly erroneous or inconsistent with the regulation.") (citation omitted). For tribal matters, Interior has special expertise to which courts give substantial deference. *See, e.g., United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (Determinations about tribal matters "should be made in the first instance by [Interior] since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations." (citing 25 U.S.C. §§ 2, 9)). Congress has assigned "the management of all Indian affairs and of all matters arising out of Indian relations," to Interior, 25 U.S.C. § 2, and tasked Interior with promulgating regulations to effect statutory provisions relating to Indian Affairs, *see* 25 U.S.C. § 9. *See James v. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

IV. ARGUMENT

Interior reasonably determined that it has the statutory authority to take land into trust for the UKB Corporation and complied with all regulatory and statutory requirements in determining to acquire land in trust for the UKB Corporation. Interior's decision was based on a consideration of the relevant factors and there was no clear error of judgment. Plaintiff raises two main challenges to the 2011 Decision. Plaintiff's first broad challenge is that Interior lacked statutory and regulatory authority for the trust acquisition. Plaintiff specifically alleges that: (1) the OIWA cannot provide the necessary statutory authority; (2) Interior cannot acquire land in trust for a tribal corporation; (3) the Assistant Secretary failed to follow Interior regulations by acquiring land in trust for an entity that is not the applicant; (4) Plaintiff's consent is required; and (5) the acquisition violates Plaintiff's 1886 treaty with the United States. Plaintiff's second challenge is that the 2011 Decision is itself arbitrary and capricious because (1) Interior failed to reconcile it with past decisions denying UKB requests to acquire land in trust; (2) Interior failed to adequately consider jurisdictional conflicts; (3) Interior's interpretation of IRA section 476(g) is contrary to law; and (4) Interior failed to adequately consider whether the BIA is equipped to discharge its duties if the land is acquired in trust.

Plaintiff's assertions are without merit. Interior extensively considered and reasonably concluded that the OIWA provided the necessary statutory authority to acquire the Property in trust and that it was not required to obtain Plaintiff's consent. The 2011 Decision does not violate Plaintiff's treaty. Finally, the 2011 Decision is not arbitrary and capricious because Interior adequately analyzed the Part 151 factors and its previous determinations, concluding that they did not present a reason to deny UKB's application. Plaintiff fails to overcome the presumption of validity afforded to Interior's action, and does not overcome the substantial

deference afforded to Interior's interpretation of statutory and regulatory provisions in its exercise of discretion over Indian matters.

A. Interior reasonably determined that it had statutory and regulatory authority to acquire the Property in trust for the UKB Corporation.

Interior, considering the record before it and the applicable statutes and regulations, reasonably determined that it had the statutory and regulatory authority to take land into trust for the UKB Corporation. Plaintiff's arguments to the contrary are unavailing.

1. The Trust Acquisition is authorized by Section 3 of the OIWA.

Interior reasonably determined that the trust acquisition for the UKB Corporation is authorized by section 3 of the OIWA, 25 U.S.C. § 503. As Interior explained in the 2009 Decision, in the 1946 Act, Congress recognized the UKB as a band of Indians within the meaning of the OIWA, "to secure any benefits which, under the Oklahoma Indian Welfare Act, are available to other Indian bands or tribes." 60 Stat. 976; H.R. Rep. No. 79-447, at 2.[4] The OIWA, in turn, authorizes Interior to issue a charter of incorporation to the recognized band of Indians, which 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. "One of the rights" conferred in the "bundle of Federal benefits" provided by the IRA is "the ability to petition the Secretary to take land into trust for the Tribe's benefit." *Carcieri*, 555 U.S. at 403-04 (Stevens, J., dissenting). 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.

[4] Similar to the 1946 Act, Congress has authorized parts of other tribes to reorganize as a separate tribal entity. *See* Act of Sept. 8, 1988 (102 Stat. 1577) (authorizing the Lac Vieux Desert Band to reorganize as a distinct entity from the Keweenaw Bay Indian Community); *see also* Act of Jan. 8, 1983 (96 Stat. 2269) (authorizing the Texas Band of Kickapoos to reorganize separate from the Kickapoo Tribe of Oklahoma).

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. *See City of Arlington*, 133 S. Ct. 1863 (court defers to agency interpretation of statutory ambiguity concerning agency's jurisdiction).

Plaintiff argues that Interior's decision is an attempt to circumvent the holding in *Carcieri*, that the UKB has no right to have land taken into trust under the IRA, and that the OIWA could not create greater rights in the UKB Corporation than those held by the tribe. Plaintiff's Merits Brief ("Pl.'s Br.") at 19-27, ECF No. 67. This assertion is incorrect and is based on a misreading of the OIWA's statutory language and unfounded assumptions about the impact of *Carcieri* on the UKB. Congress itself described the OIWA as "permit[ting] the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]," H.R. Rep. No. 74-2408, at 3 (1936), without suggesting that those rights pertained only to Oklahoma Indians who were members of Indian tribes under federal jurisdiction in 1934. Rather, the OIWA confers "rights or privileges secured to *an* organized Indian tribe" under the IRA. 25 U.S.C. § 503. The OIWA thus confers to tribes incorporated under the OIWA the IRA rights generally; it does not differentiate between tribes organized before or after 1934, which would make little sense in a 1936 statute authorizing tribes to reorganize. Indeed, as the UKB had no right to organize under the IRA – in which Oklahoma tribes were specifically excluded from those sections – it is only by virtue of the OIWA that these rights and privileges available under the IRA are made applicable to Oklahoma tribes including the UKB. Plaintiff's assertion is untenable.

Plaintiff's argument also fails because it has the effect of importing the IRA's statutory definition of "Indian" into the OIWA, which is clearly wrong. The IRA's definition of "Indian"

is necessary in the IRA because the substantive provisions of the IRA apply to "Indians" without qualification. For example, the IRA authorizes the Secretary to acquire land "for the purpose of providing land for Indians," 25 U.S.C. § 465, provides "[a]ny Indian tribe" the right to organize, *id.* § 476(a), and authorizes the Secretary to issue a charter of incorporation to an Indian "tribe," *id.* § 477. The IRA limits these 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, itself specifically defines to whom it applies: "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 503. Importing the IRA definition into section 3 of the OIWA would redundantly limit the statute's scope to a "recognized" tribe, which is unnecessary, and would limit the rights and privileges authorized in the 1936 OIWA to tribes under federal jurisdiction in 1934, which is inexplicable. That limitation is even more unavailing when applied to the 1946 Act, which expressly authorized the reorganization of the Cherokee Indians of the UKB "as a band of Indians residing in Oklahoma" within the meaning of the OIWA. 60 Stat. 976.

If Congress had wanted to limit the OIWA to tribes under federal jurisdiction in 1934, it would have said so. Where the words of a later statute differ from those of a previous one on the same or related subject, Congress must have intended them to have a different meaning. *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970). The legislative history of the two statutes demonstrates that the concerns that Congress had about an overly broad application of the IRA did not exist with respect to the OIWA. In considering the IRA, Congress was concerned about extending the benefits of the statute to all self-identified Indians. *See Carcieri v. Kempthorne*, 497 F.3d 15, 28 (1st Cir. 2007) (en banc), *rev'd on other grounds Carcieri v. Salazar*, 555 U.S. 379 (2009). With respect to the OIWA, however, Congress understood

specifically to whom the statute would apply, noting that it would "affect the welfare of approximately 125,000 Indians representing about 30 different tribes." H.R. Rep. No. 74-2408, at 3 (1936).

Congress's reference to the IRA in section 3 of the OIWA was necessary only to incorporate the benefits and rights generally afforded to tribes by the IRA into the OIWA. The IRA, as amended throughout the years, supports tribal determination and self-governance policies, and Congress subsequently has incorporated the benefits of the IRA by reference in numerous tribal recognition statutes enacted decades after the IRA. *See, e.g.*, 25 U.S.C. § 1300f (1978); 25 U.S.C. § 762 (1980); 25 U.S.C. § 1300b-14(a) (1983). *Carcieri* itself recognizes that Congress has repeatedly enacted statutes extending the benefits of the IRA to "Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth" in the IRA. 555 U.S. at 392. Congress, in recognizing the UKB under the OIWA – which made portions of the IRA applicable to recognized tribes thereunder – extended such benefits to the UKB.

Finally, *Carcieri* does not pose an obstacle to having and taking land in trust for tribes federally recognized after 1934. Pl.'s Br at 20.[5] While the first definition of "Indian" in the IRA places a time constraint based on when a tribe was "under federal *jurisdiction*," the statute "imposes no time limit upon *recognition*." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring) (emphasis added). Nor is the time when a tribe was "organized" pertinent to the scope of the IRA; indeed it was the IRA itself that first allowed tribes to formally organize. Rather,

[5] Federal Defendants note that Plaintiff sometimes confuses the holding of *Carcieri* to prohibit trust acquisitions for a tribe that was "federally recognized after 1934," Pl.'s Br. at 2, with the actual holding, which requires that a tribe be "under federal jurisdiction" as of the date the IRA was passed. These two terms are not synonymous and it is possible that a tribe may not have been federally recognized in 1934 but may have been under federal jurisdiction. *See* Office of the Solicitor, M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of Indian Reorganization Act (Mar. 12, 2014), at 23-25.

determining whether a tribe was "under federal jurisdiction" in 1934 requires an often complex analysis, one that Interior has not yet undertaken with respect to the UKB.[6] Rather, as it did for a number of tribes that had trust applications pending when *Carcieri* was decided, Interior determined to examine whether other statutory authority existed allowing it to acquire land in trust for the UKB without determining whether the tribe satisfied the time constraints of the IRA. Based on this examination, Interior identified several other possible statutory bases for trust acquisition for the UKB, including section 3 of the OIWA, which, as demonstrated here, authorized the trust acquisition by conferring on the UKB Corporation the "rights" secured to tribes under the IRA.

2. The trust acquisition is consistent with Interior's regulations.

Interior properly applied its regulations to the acquisition, which provide that Interior may acquire land in trust status when authorized by Congress for "an individual Indian or a tribe." 25 C.F.R. § 151.3. The regulations, in turn, define "tribe" to mean "a corporation chartered under" the IRA or OIWA where "statutory authority . . . specifically authorizes trust acquisitions for such corporations." *Id.* § 151.2(b). 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. As established above, the right to petition for land to be held in

[6] Plaintiff cites to the Regional Director's two sentence brief stating that UKB was not under federal jurisdiction as of June 18, 1934, for support that the 2011 Decision is arbitrary because Interior could not possess the authority to take land into trust for the Tribe under the IRA. Pl.'s Br. at 20 n.25. The brief offers no such support. Interior has not undertaken an analysis to determine whether the UKB was "under federal jurisdiction" at the time of the IRA's passage. Without undertaking such an analysis, Interior cannot take a position on whether the UKB was under federal jurisdiction at the time of the IRA's passage. *See* M-37029 at 19 (Interior must conduct a two-part inquiry to consider whether a tribe was under federal jurisdiction). Interior would need to conduct a *Carcieri* analysis if the decision was remanded and Interior invoked its authority under the first definition of "Indian" in the IRA as it pertains to acquiring land in trust. For the reasons explained herein, such a determination is not necessary under section 3 of the OIWA.

trust is one of the specific, essential rights in the IRA; thus Interior reasonably concluded that "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, AR2559 (emphasis added).

Plaintiff argues that the OIWA does not expressly authorize the acquisition and thus cannot provide the requisite "specific" authorization. Pl.'s Br. at 20, 23. But the 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." *See, e.g.*, *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1151 (9th Cir. 2004) (Contract Clause analysis "subject[s] only state statutes that impair a specific (*explicit or implicit*) contractual provision to constitutional scrutiny") (emphasis added); *United States v. Cotto*, 347 F.3d 441, 447 (2d Cir. 2003) (declining to reach question whether defendant could demonstrate coercion "even in the absence of *a specific explicit or implicit* threat") (emphasis added). Here, while the authority to take land in trust is implicit – in that it is not expressly stated – it is implied from the very specific and express grants of the rights and privileges available under the IRA. Thus, Interior correctly concluded that the OIWA implicitly but specifically authorizes the Secretary to take land in trust for corporations chartered under OIWA section 503.

A court must defer to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation. *Auer*, 519 U.S. at 462. Here, as demonstrated above, Interior's interpretation is not inconsistent with the statutory language. Moreover, in the unique context of the OIWA, Interior's interpretation is eminently reasonable. The OIWA departed from the IRA by providing the "rights and privileges of an organized tribe" under the IRA to an "incorporated group" under the OIWA. The OIWA provides tribal corporations with the governmental powers set forth in the IRA. Thus, for example, while IRA section 476,

providing for organization of Indian tribes, requires tribal constitutions to vest the tribe with the power to employ legal counsel, prevent the disposition of tribal assets without the tribe's consent, and negotiate with federal, state, and local governments, these and virtually all other powers that the UKB may exercise are set forth not in the UKB's constitution, but in its corporate charter.[7]

Section 1(b) of UKB's charter identifies "the acquisition of land" as one of the corporation's purposes.[8] The Assistant Secretary found that in stating that the charter did not override the Department's previous position or court rulings, the Regional Director had "misperceived the relative significance of the charter approval and the more recent statements by acting and subordinate officials." 2009 Decision at 6, AR1558. The Assistant Secretary noted that the approval signed by the Assistant Secretary on May 8, 1950, states in pertinent part:

> Upon ratification of this Charter all rules and regulations heretofore promulgated by the Interior Department or by the Bureau of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Charter and the Constitution and Bylaws will be inapplicable to this Band from and after the date of their ratification thereof [October 3, 1950].
>
> All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and Bylaws, and the Charter.

Id. As Interior approved the UKB's constitution and charter in 1950, Interior at the time plainly understood that the IRA rights and benefits secured to the UKB by the 1946 Act and section 3 of

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[7] Plaintiff implies that it is significant that the UKB's constitution does not contain a claim of its territorial designation. Pl.'s Br. at 9. It is not. The OIWA does not require that a tribe list a geographical area in its constitution. In contrast, section 16 of the IRA as originally enacted (Pub. L. 383, 48 Stat. 984) required a reservation in order for a tribe to reorganize under its authority and adopt a constitution. IRA constitutions, therefore, typically include a description of the tribe's territory in their early articles.

[8] Governing documents under the OIWA differ in structure from those commonly adopted under the IRA in that most of the enumerations of powers were contained in the OIWA corporate charter. *See* Instructions for reorganizing under the OIWA, www.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/1936-12-18-Original-OIWA-regulations.pdf

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.

It also 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. *See* Pl.'s Br. at 27-29. Plaintiff argues that Interior's decision was arbitrary and capricious because Interior violated its regulations in considering an application submitted by the UKB to take land into trust for the benefit of the UKB Corporation. Plaintiff argues that Interior could only consider an application submitted by the group seeking to have land taken into trust for its own behalf, not for another entity. *Id.* The regulations have no such requirement. Section 151.9, the regulation concerning requests for approval of trust applications, states that a trust application "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 this part." 25 C.F.R. § 151.9. The regulation makes no mention of any requirement that prohibits a tribe from submitting an application on its behalf and for its tribal corporation, or, as discussed below, whether a tribe and its tribal corporation may submit an application for an acquisition for either. *See Cty. of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), *aff'd*, 674 F.3d 898 (8th Cir. 2012) (court found that a resolution submitted by a tribe's Business and Claims Committee requesting that the BIA take land into trust for the tribe did not violate Interior's regulations because there was no requirement that the tribe be the entity requesting that land be taken into trust).

Nor does the Department's Fee-to-Trust Handbook ("Handbook") have any such requirement. *See* Pl.'s Br. at 28. The Handbook is an internal guidance document issued to all

BIA Regional Directors to assist in preparing acquisition packages and includes a checklist of those documents that must be transmitted to decision-making officials regarding fee-to-trust decisions and provides step-by-step procedures for considering trust acquisitions. *See* Handbook, AR4584-678. The Handbook has no binding effect upon the Department; it is informal guidance material that lacks the force of law. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 779 (9th Cir. 2011) (citations omitted) (FWS handbook on permit processing was guidance material and not binding). The Handbook imposes no discernible rights or obligations. It does not constrain the Secretary's discretion. It is not published in the Federal Register or Code of Federal Regulations. Nevertheless, Plaintiff argues that the Handbook requires that the Secretary should have required the UKB Corporation to submit its own application because it uses the word "applicant" in discussing the procedure for considering an application. Pl.'s Br. at 28 n.38. But nothing in the Handbook suggests that this direction reflects an interpretation of any regulation, nor has Plaintiff identified anything that would suggest as much. The Handbook's reference to an applicant is non-binding; it does not constrain the Department from considering the application submitted by the UKB and the UKB Corporation.

Additionally, the fact that UKB and UKB Corporation are separate entities is a distinction without a difference. Interior recognized that the UKB's tribal government and tribal corporation are separate entities. 2010 Decision at 3 n.1 (citing Solic. Op., 65 Interior Dec. 483 (1958), 2 *Op. Solic. on Indian Affairs* 1846, (U.S.D.I. 1979)) AR2559. It went on to note that the UKB government represents the UKB in its governmental affairs and that the UKB Corporation represents the UKB in its business affairs. *Id.* Interior discussed a Internal Revenue Service's ("IRS") ruling directly pertinent to the matter, noting that the IRS recognized the tribal character of the corporation in holding that tribal corporations, as a form of the tribe, are not taxable

entities: "the question of tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct its business." *Id.* (quoting Rev. Rul. 81-295; 1981-2 C.B. 15; 1981 IRB LEXIS 95). As Interior noted, "[t]he UKB Corporation is merely the tribe organized as a corporation." *Id.* Its property is tribal property. Tribal property is subject to the governing authority of the UKB government. Interior concluded that thus, "any land placed into trust for the UKB Corporation would necessarily be under the governmental jurisdiction of the UKB government." *Id. See also* AR2559, n.1 ("The UKB Corporation is merely the tribe organized as a corporation.").[9]

3. Interior properly determined that Plaintiff's consent was not required.

Interior properly found that Plaintiff's consent was not necessary and was consistent with a 1999 appropriations act providing that no appropriated funds may be used to acquire land into trust within the former Cherokee reservation without consulting with the Cherokee Nation – subsequent, superseding legislation that amended the original 1992 appropriations act that, in contrast, required the Cherokee Nation's consent to such trust acquisitions.[10] 2011 Decision at 3, AR3073. In making this determination, the 2011 Decision analyzed the issue under the Part 151 Regulations and its considerations. *Id.*

The Regional Director considered the issue under the Part 151 factors, specifically

[9] In the amended resolution submitted in support of the application, the tribe notes that Article V, Section 1 of its Constitution provides that the supreme governing body of the Band shall be the Council of the UKB, which also manages the tribal corporation. AR2562; *see also* UKB Corporate Charter, Section 2. Through the resolution, the Council requests that the Secretary acquire the Parcel in trust for the benefit of the tribal corporation held by the UKB and authorizes the Chief of the UKB to submit any such applications and materials to the Secretary as may be necessary. AR2564.

[10] 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.

section 151.8, which addresses when tribal consent may be necessary for non-member acquisitions of land. Under section 151.8, a tribe "may acquire land in trust status on a reservation other than its own only when the governing body of the Tribe having jurisdiction over such reservation consents in writing to the acquisition." *Id.* (citing 25 C.F.R. § 151.2(f)). Interior consistently has found the former treaty lands of the Five Civilized Tribes, including the Cherokee Nation, to be "former reservations." *Id.* The Property is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota, 7 Stat. 478 (Dec. 29, 1835) and the 1866 treaty between the Cherokee Nation and the United States, 14 Stat. 799 (July 19, 1866). *Id.* The 2011 Decision then noted that the Assistant Secretary had considered this issue in the 2009 Decision and concluded that Congress overrode section 151.8 with respect to lands within the boundaries of the former Cherokee reservation when it passed subsequent, superseding legislation, the Interior and Related Agencies Appropriations Act of 1999 ("1999 Act"). *Id.*; *see* 2009 Decision at 4, AR1556. The Assistant Secretary's conclusion was informed by Interior's Associate Solicitor's analysis of the regulation and statute. 2008 Memo at 2, AR790.

The predecessor of the 1999 Act, Department of the Interior and Related Agencies Appropriations Act of 1992 ("1992 Act"), Pub. L. No. 102-154, 105 Stat. 990 (1991), provided in part:

> 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 Cherokee Nation . . . .

Id. at 1004. The 1992 Act, however, was the final language accepted after a series of amendments concerning the former reservation of the Cherokee Nation and the UKB. H.R. Rep.

No. 102-116, 1991 WL 124697 (June 19, 1991), which accompanied the original House Report 2686, stated:

> There is also a decrease of $100,000 for the [UKB]. While a 1946 Act of Congress may have permitted the [UKB] to organize as a band of Cherokees within the Cherokee Nation, the Congress never intended to create a duplicative or competing Cherokee tribal government, or to supplant the Cherokee Nation's governance. Therefore, the Committee believes it is inappropriate for the Federal Government to appropriate funds for the [UKB] as long as the Cherokee Nation continues to provide services to the members within its jurisdiction.

Id. at 58. The accompanying Senate Report, however, stated:

> With respect to the [UKB], the Committee understands that the authorizing committees intend to address the 1946 act. Until the Congress has taken action toward clarifying this issue, the Committee expects the Bureau to hold the proposed funds in reserve. Bill language is included to authorize the Bureau to fulfill this direction.

S. Rep. 102-122, at 56 (July 25, 1991). After the Committee on Appropriations noted the technical disagreement, the House concurred in the Senate's amendment with the following amendment, which became the 1992 Act:

> In lieu of the matter inserted by said amendment, insert the following: *Provided further, 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 Cherokee Nation.*

H.R. Rep. No. 102-256, at 44, Amend. No. 86 (Oct. 17, 1991) (Conf. Rep.). The Senate concurred in the House amendment, stating:

> The managers have agreed to delete funding for the [UKB], and have included language providing that until such time as Congress enacts contrary legislation, Federal funds should not be provided to any group other than the Cherokee Nation, within the jurisdictional area of the Cherokee Nation.

Id. Congress, at the time it enacted the 1992 Act, was aware of the jurisdictional issues between the UKB and Plaintiff and intended to address them. Congress specifically provided that it could

later pass legislation that would allow funds to be used for taking land into trust on the former Cherokee reservation for another group of Indians residing within the jurisdictional area of the Cherokee Nation, like the UKB.

With the passage of the 1999 Act, Congress superseded the 1992 Act and the Part 151 regulations as applied to land within the former Cherokee reservation boundaries. 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 . . . .

Pub. L. No. 105-277, 112 Stat. 2681-246 (1998). This language is more than a word change from consent to consult. It entirely amended the 1992 Act. It was an acknowledgement that the UKB could seek to have trust land acquired for it within the boundaries of the former Cherokee reservation and that it was no longer constrained by having to seek Plaintiff's consent. This acknowledgment is confirmed by the Conference Report accompanying H.R. 4328, which became the 1999 Act, explaining the change:

> The Committees have included language that allows the Bureau of Indian Affairs to deal with the [UKB] and the Delaware Band of Indians on issues of funding, but prevents these tribes from establishing trust holdings within the Cherokee's original boundaries without Cherokee consultation.

H.R. Rep. No. 105-825, at 1209 (Oct. 19, 1998). Plaintiff argues that Congress' change in the 1999 Act cannot effect a change in the law because it would be a de facto repeal of section 151.8 by an appropriations act. Pl.'s Br. at 15. But Congress can supersede legislation by means of an appropriations act. 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. Dep't of Treasury*, 423 F.3d 777, 782 (7th Cir. 2005) (finding that Congress intended to use amendment to appropriations act to

preclude city action); *see Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) ("Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 578 n.29, (1990) ("Appropriations Acts, like any other laws, are binding because they are 'passe[d][by] both Houses . . . and signed by the President.'" (citations omitted)), *vacated on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Here, Congress made its intent clear. It is contrary to common sense to read the language of the second act as incorporating the precise limitations of the earlier act. *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970) (Where the words of a later statute differ from those of a previous one on the same or related subject, Congress must have intended them to have a different meaning). Although it previously required Cherokee Nation's consent before Interior could take lands into trust, it passed the 1999 Act to supersede the consent requirement of its previous act and the Part 151 regulations by requiring that Interior only consult with Plaintiff, which it has done.[11]

4. The 2011 Decision does not violate the Cherokee Treaty of 1866.

Interior's decision to take the Property into trust does not violate the Cherokee Nation's treaty. *See* Pl.'s Br. at 17-18. First, Plaintiff ignores the 1999 Act, which provides that no appropriated funds shall be used to acquire land in trust within the former Cherokee reservation without *consulting* the Cherokee Nation. *See* 2009 Decision at 7, AR1559. If 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

[11] Although Plaintiff argues that it was not consulted, the record provides otherwise. *See* 2011 Decision at 3, AR3073 ("The Department satisfied this requirement when it solicited comments from the CN."); 2009 Decision at 5 n.3, AR1557 (citing Feb. 28, 2005, letter, AR234-35).

tribe, not Cherokee, within the former reservation's boundaries. *See id.*

Further, Plaintiff misreads the 1866 Treaty provisions. Article 15 of the treaty provides:

> 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, which shall be consistent with the following provisions . . .
>
> * * *
>
> But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

1866 Treaty, Art. 15, 14 Stat. at 803-04. This provision is simply inapplicable in this situation and the plain language does not support Plaintiff's assertion. The United States has not settled any Indians on unoccupied lands. The Property at issue is owned by the UKB in fee. 2011 Decision at 2, AR3072.

The plain language of Article 26 of the 1866 Treaty does not support Plaintiff's assertions either. Article 26 provides:

> 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. They shall also be protected against inter[r]uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. 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 reparation for the damages done.

1866 Treaty, Art. 26, 14 Stat. at 806. The current situation is not one in which unauthorized

citizens are seeking to settle or reside. The UKB owns the Property in fee. Nor is this a situation of hostilities from another tribe. Black's Law Dictionary defines "hostility" as "[a] state of enmity between individuals or countries," or "an act or series of acts displaying antagonism, acts of war." Black's Law Dictionary (10th ed. 2014). The action of which Plaintiff complains, the UKB seeking to have its fee land taken into trust, simply is not a series of acts displaying antagonism that amount to an act of war. *See* "act of hostility . . . An event that may be considered an adequate cause for war." *Id.* The 2011 Decision to acquire land in trust does not violate the 1866 Treaty provisions that Plaintiff cites.

B. The 2011 Decision is not arbitrary and capricious.

The 2011 Decision is not arbitrary and capricious. Interior adequately reviewed the Part 151 factors and determined that any potential jurisdictional conflicts did not preclude the trust acquisition and that BIA was equipped to discharge its duties. Further, Interior provided an adequate explanation for its departure from previous determinations. The 2011 Decision was not an attempt to settle litigation, which continued after the decision was made, as Plaintiff was aware. Nor is Interior's interpretation of section 476(g) contrary to law. Plaintiff, therefore, fails to establish that the 2011 Decision is arbitrary and capricious.

1. Interior adequately considered the jurisdictional conflicts and explained its rationale for departing from previous decisions.

In discussing the analysis under 25 C.F.R. Part 151, Interior considered the jurisdictional problems and potential conflicts of land use that may arise and explained in detail its position. 2011 Decision at 6-9, AR3076-79; June 2009 Decision at 6-8, AR1558-60. Section 151.10(f) only requires Interior to consider potential jurisdictional and land use conflicts; it does not mandate an outcome minimizing jurisdictional problems. *South Dakota v. U.S. Dep't of Interior*, 401 F. Supp. 2d 1000, 1009 (D.S.D. 2005) (citing *South Dakota v. U.S. Dep't of Interior*, 314 F.

Supp. 2d 935, 945 (D.S.D. 2004)). The Court considers whether Interior considered the Part 151 factors and drew a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Ind. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983). Plaintiff has the burden to prove that Interior acted arbitrarily and must present evidence that Interior did not consider a particular factor. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 800 (8th Cir. 2005) (citation omitted). "[I]t may not simply point to the end result and argue generally that it is incorrect." *Id.* Here, Interior properly considered the jurisdictional concerns Plaintiff raised and rationally evaluated such concerns in light of the facts found.

Interior found that a previous conclusion that there would be problematic conflicts of jurisdiction between the Cherokee Nation and the UKB was premised on a narrow reading of the 1946 Act. Interior found that the narrow reading, which withheld from UKB any territorial jurisdiction, was incorrect. *Id*. Interior found that the 1946 Act was silent as to the authorities that the UKB would have. On its face, the 1946 Act imposes no limitations on the UKB's authority. It merely recognizes the UKB's sovereign authority, which extends "over both [its] members and [its] territory." June 2009 Decision at 6 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)), AR1558. Interior stated that there was no reason, on the face of the 1946 Act, that the UKB would have less authority than any other band or tribe. *Id.*

Interior also found 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 in trust for the UKB. 2011 Decision at 7, AR3077; 2009 Decision at 7, AR1559. The UKB would have exclusive jurisdiction over land that the United States holds in trust for the UKB. *Id.* But even if the UKB had to share jurisdiction with the Cherokee Nation, such shared jurisdiction did not preclude Interior from taking the land into trust. "Shared jurisdiction is unusual; but it is not unheard of."

Id. In fact, Interior anticipated that there would be situations in which two tribes would share jurisdiction, Solicitor's Opinion, M-27796 (November 7, 1934); 1 Op. Solic. on Indian Affairs 478 (U.S.D.I. 1979), and in an April 12, 2009, memorandum, the Regional Director reported that several tribes within the Eastern Oklahoma Region share jurisdiction over parcels held in trust. 2009 Decision at 7-8, AR1559-60. Interior found that in a situation directly analogous to the UKB, the Thlopthlocco Creek Tribal Town has 19 parcels of trust land within the former Creek reservation. *Id.* Interior noted that "[t]he UKB and the Cherokee Nation should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.*; 2011 Decision at 7, AR3077.

Similarly, Interior fully addressed prior departmental positions and court holdings on the exclusivity of the Cherokee Nation within the former Cherokee treaty boundaries. June 2009 Decision at 6, AR1558. The prior court holdings, *UKB v. Secretary of the Interior*, No 90-C-608-B (N.D. Okla. May 31, 1991); *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992); and *UKB v. Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993), *aff'd*, 2 F.3d 1161 (10th Cir. 1993) (unpublished disposition), are not inconsistent with Interior's decision and, in any event, Interior did consider these decisions and readily distinguished them. The 1991 *UKB* decision held that the Cherokee Nation was an indispensable party to the UKB's claims to a statutory right to certain Indian lands within the historic reservation to which the Cherokee Nation held title, and that holding is irrelevant to the Property here, which is owned by the UKB. *Buzzard* held that the prohibition against alienation in UKB's charter did not make the UKB's land "Indian Country" – an analysis with which Interior agrees and that necessitates the UKB's land-into-trust application here. *Mankiller* simply relied on the analysis in the *Buzzard* decision before the appeal and was dismissed on sovereign immunity grounds.

Interior's determination of the case law was guided by previous department analysis and consideration. Specifically, in a February 14, 2008, memorandum to the Assistant Secretary, the Associate Solicitor for Indian Affairs analyzed the Regional Director's 2006 denial. AR787-89. As part of her 2006 decision, the Regional Director stated that it was the position of the Secretary and the courts that the Cherokee Nation possessed exclusive jurisdiction over the former Cherokee reservation. The Associate Solicitor found that this position was not well-established. *Id.* at 2, AR789. The Associate Solicitor noted that the "consistent opinion of the Secretary" was in fact only two statements from the Regional Director and one statement from an Acting Assistant Secretary. These statements were not accompanied or supported by any analysis. *Id.* Moreover, the Associate Solicitor found that the statements were based on a questionable legal assumption that the 1946 Act precluded the UKB from acquiring land in trust because the Act did not provide any land for the UKB. *Id.* Further, the Associate Solicitor found that the federal court opinions did not in fact determine authoritatively that the Cherokee Nation had exclusive jurisdiction and had not addressed the merits of whether the Cherokee Nation has exclusive jurisdiction over the former Cherokee reservation, and the issue remained unsettled. *Id.*

In the June 2009 Decision, Interior further found that the conclusion that the Cherokee Nation does not enjoy exclusive jurisdiction over the former Cherokee reservation is consistent with the 1999 Act. *Id.* at 7, AR1559. Interior noted that if the Cherokee Nation had exclusive jurisdiction over the former Cherokee reservation, Congress would have required consent of the Cherokee Nation, as the Department's land acquisition regulations, 25 C.F.R. Part 151, provide. *Id.*

Plaintiff, despite Interior's detailed explanation and justification, attempts to paint the 2011 Decision as arbitrary and capricious because Plaintiff now alleges that the decision was

made to effectuate a settlement of a United States Court of Federal Claims lawsuit filed by the UKB, *United Keetoowah Band of Cherokee Indians in Oklahoma v. United States*, No. 03-1433L (Fed. Cl. filed June 10, 2003) ("*UKB Litigation*").[12] Pl.'s Br. at 30-31. Plaintiff is wrong. The United States and the UKB did not settle that litigation, and certainly did not use the 2011 Decision as a means to do so.

UKB filed the lawsuit in 2003 alleging that it claimed right, title, and interest in the Arkansas Riverbed. Although, as the administrative record shows, Interior discussed possible ways to settle the litigation, the parties did not settle that case. After issuance of the 2011 Decision, the Court stayed the *UKB Litigation* while the United States and the UKB engaged in settlement talks. The parties, however did not reach resolution and requested that the Court reinstate litigation, which it did. *UKB Litigation*, Jt. Status Rpt. (Oct. 31, 2014), ECF No. 159; Scheduling Order (Dec. 19, 2013), ECF No. 160. The parties again attempted to settle the *UKB Litigation* along with other cases filed by the UKB; *United Keetoowah Band of Cherokee Indians in Oklahoma v. United States*, No. 1:08-cv-01087-TFH (D.D.C. filed June 24, 2008) and *United Keetoowah Band of Cherokee Indians in Oklahoma v. United States*, No. 06-936L (Fed. Cl. filed Dec. 29, 2006). The parties were unable to agree upon a viable resolution without the need for further litigation, and the Court reinstated litigation, setting a briefing schedule for summary judgment motions. *UKB Litigation*, Scheduling Order (Nov. 3, 2014) ECF No. 166. Plaintiff was well aware that the litigation had not been settled by the 2011 Decision because it sought to

[12] Plaintiff also argues that the 2011 Decision is arbitrary and capricious because a draft briefing paper, not part of the record, noted it was the first such decision. Pl.'s Br. at 19 n.24 (Ex. 1). Federal Defendants object to Plaintiff's use of a document not in the record and request that the Court disregard it. Plaintiff had the opportunity seek to include this document in the record; indeed, Plaintiff filed a motion to supplement. ECF No. 53. Plaintiff did not include this document and the Court should not consider it now. *See The Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114-15 (D.C. Cir. 2009) (denying use of extra-record documents because only done in highly exceptional circumstances).

participate as an amicus curiae in the *UKB Litigation*. *See Id.* Notice of Intent of Cherokee Nation to Participate in Summ. J. Proceedings as Amicus Curiae (Nov. 21, 2014), ECF No. 167. The parties stipulated to dismissal of the case in December 2014, without having reached any settlement. *Id.*, Stipulation of Dismissal, ECF No. 168.

In the 2011 Decision Interior provided its explanation and justified the reasons for departing from previous conclusions. That is all that is required. As the Supreme Court has recognized, all that Interior must do in discussing a departure from a previous decision is supply a "reasoned explanation" for agency action and that explanation must "display awareness that it *is* changing position" and provide an adequate explanation for its departure from its established precedent. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But, "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* Instead, it suffices if "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* Interior adequately considered Plaintiff's jurisdictional concerns and rationally evaluated them, and explained its departure from previous decisions. *See Cty. Of Charles Mix*, 799 F. Supp. at 1046 ("[DOI] fulfills its obligation under section 151.10(f) as long as it 'undertake[s] an evaluation of the potential problems'") (quoting *South Dakota*, 314 F. Supp. 2d at 945).

2. The Assistant Secretary's interpretation of IRA section 476(g) is not contrary to law.

Plaintiff further argues that Interior's interpretation of 25 U.S.C. § 476(g) is unduly expansive and that it allows "any federally recognized tribe" to "acquire trust lands in *another tribe's* jurisdictional area." *See* Pl.'s Br. at 37 (emphasis in original). Plaintiff misstates Interior's interpretation. Interior did not find that section 476(g) allows or requires Interior to recognize any federally recognized tribe's attempt to acquire land in another's jurisdictional area.

Rather, Interior examined the history of the UKB and the Cherokee Nation and found that they both had ties to the historic Cherokee territory. 2009 Decision at 6-7, AR1558-59. Second, Interior re-considered the language of the 1946 Act and found that it placed no limitations on UKB's authority; the 1946 Act merely recognized the UKB's sovereign authority. *Id.* Based on these findings, Interior determined that the UKB possesses the authority to exercise territorial jurisdiction, just as other tribes do. 2009 Decision at 6, AR1558. This consideration is far from an interpretation that section 476(g) allows any tribe to acquire trust property and exercise jurisdiction in any other tribe's jurisdictional area regardless of specific history and ties to the land. Instead, it merely recognizes that two tribes may share a jurisdictional area. *See* 2009 Decision at 7-8, AR1559-60 ("Indeed, the Department recognized that there would be situations in which two tribes must share jurisdiction.").

Interior further noted that the conclusion that the Cherokee Nation does not have exclusive jurisdiction over the former reservation was consistent with the 1999 Act providing that no appropriated funds may be used to acquire land into trust within the former Cherokee reservation without consulting with the Cherokee Nation – a provision that superseded the 1992 Act, which, in contrast, required the Cherokee Nation's *consent* to such trust acquisitions. *Id.* Interior explained that opinions of certain Interior officials, which were issued prior to the 1994 IRA amendment or issued by subordinate officials, were not binding and could not be given weight over Interior's 1950 approval of the UKB Corporation's charter, which expressly identifies "the acquisition of land" as one of its purposes. *Id.*

3. Interior properly considered whether BIA is sufficiently equipped to discharge its responsibilities relating to the trust acquisition.

Interior reasonably considered and found that the BIA is sufficiently equipped to discharge its duties relating to the trust acquisition for the UKB Corporation. Although Plaintiff

argues that Interior did not reasonably consider whether BIA could discharge its responsibilities, the record reflects otherwise. *See* Pl.'s Br. at 38. Plaintiff fails to meet its burden of proof that Interior's analysis of this factor was arbitrary and capricious. *South Dakota*, 423 F.3d at 800.

Interior's deliberations regarding the implications for the agency if the Property were taken into trust considered the relevant factors.[13] 25 C.F.R. section 151.10(g) requires that the Secretary consider that "[i]f the land to be acquired is in fee status, whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g). The Regional Director noted the issues facing BIA in the 2011 Decision, specifically that the UKB would likely reject the authority of Cherokee Nation employees and insist that the Region provide Bureau direct services as it has done in the past with respect to other Bureau Services. 2011 Decision at 8, AR3078. The Regional Director noted that Tahlequah Bureau Agency was closed and the funds used to operate that office along with Regional Office funds utilized for direct services to the Cherokee Nation were transferred to the Cherokee Nation through its compact. *Id.* The 2011 Decision noted that there may be a need for funds in its budget to discharge its duties that may arise as a result of the acquisition. *Id.* But, the 2011 Decision also noted that the Assistant Secretary had found that the duties associated with this trust acquisition would not be significant. *Id.* In his April 5, 2008, Memorandum ("2008 Memo") directing the Regional Director to reconsider her determination that BIA lacked sufficient resources to supervise the trust acquisition, the Assistant Secretary found that the proposed trust acquisition was a small parcel of land with a community program

[13] Plaintiff indicates its disagreement that the acquisition was analyzed, in part, as an on-reservation acquisition. *See* Pl.'s Br. at 33 n.42. Although Interior considered the requirements of 25 C.F.R. § 151.11 (regulations applicable to off-reservation acquisitions) and 25 C.F.R. § 151.10 (regulations applicable to on-reservation acquisitions) in the 2011 Decision, the Assistant Secretary stated that it was not necessary to decide whether the application was for an on- or off-reservation acquisition because the result would be the same under both analyses.

building and a dance ground. 2008 Memo at 2, AR790. The Assistant Secretary noted that it did not appear that supervision needs to be extensive, and that the UKB, Cherokee County, and the Cherokee Nation already provide law enforcement services within the proposed area. *Id.* The Assistant Secretary requested that the Region submit any evidence to the contrary. *Id.* The Region did not. Therefore, in his 2009 Decision, the Assistant Secretary again considered the issue and, based on the totality of the record, concluded that there was not a reason why the BIA could not effectively administer the Property or why any duties could not be contracted to the UKB. 2009 Decision at 8, AR1560. The Assistant Secretary was entitled to use his discretion to examine the matter and assess the purposes for which the Property would be acquired into trust. The Assistant Secretary is aware of what resources the Department has (in terms of BIA personnel and funds) and which resources have to be allocated for providing any services post-transfer. Therefore, the Regional Director reasonably found, on the basis of the Assistant Secretary's determinations, that BIA could discharge its duties in connection with this acquisition. 2011 Decision at 8, AR3078.

C. Plaintiffs' Request for Declaratory Relief and for a Permanent Injunction should be denied.

The Court should deny Plaintiff's sweeping request for declaratory relief and should decline to permanently enjoin Interior from acquiring the land into trust for the benefit of the UKB Corporation. Specifically, Plaintiff seeks a declaration that (1) federal law and regulations do not provide authorization for acquiring the Property in trust for the UKB Corporation and that *Carcieri* precludes approval of any trust application because the UKB was organized in 1950 after the effective dates of the IRA and OIWA; (2) that Interior cannot acquire the Property in trust absent Plaintiff's consent; (3) the trust acquisition diminishes Plaintiff's Treaty Territory in violation of federal laws, treaties, and regulations; (4) the jurisdictional conflicts between

Plaintiff and the UKB preclude acquiring the land in trust; and (5) the 1994 amendment of IRA section 476 does not prohibit Interior from complying with regulations requiring consideration of jurisdictional conflicts. Pl.'s Br. at 39-40. Plaintiff's request, however, is overbroad and unsupported by the law and facts as already shown. Furthermore, in regard to Interior's statutory authority, Plaintiff's request is based on an erroneous reading of the Supreme Court's decision, *Carcieri*, 555 U.S. 379.

In *Carcieri*, the Supreme Court was "asked to interpret the statutory phrase 'now under Federal jurisdiction'" in the first definition of "Indian" (members of any recognized Indian tribe now under Federal jurisdiction) contained in section 479 of the IRA. 555 U.S. at 382. The Supreme Court held that "[section] 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* In its decision, the Supreme Court noted that section 479 has three discrete definitions of the term "Indian." *Id.* at 391-92. The Supreme Court's *Carcieri* decision clarified the temporal requirement in the first definition that the Secretary may only acquire lands into trust for the benefit of Indians who are members of tribes that were "under Federal jurisdiction" in 1934. The decision left open what it means to have been "under Federal jurisdiction" in 1934. The *Carcieri* opinion provided no analysis of the OIWA. As Justice Breyer explained in his concurrence discussing the relationship between the two terms "Federal recognition" and "under Federal jurisdiction," the word "now" in the IRA modifies "under Federal jurisdiction" not "recognition," and therefore Justice Breyer concluded that the IRA "imposes no time limit upon recognition." *Id.* at 397-398 (Breyer, J., concurring). Moreover, Justice Breyer noted that "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." *Id.* at 397. Plaintiff merely

alleges that the Assistant Secretary "impl[ied] that *Carcieri* would preclude approval of the trust applications under authority of section 5 of the IRA." Pl.'s Br. at 21. This attribution of implication is not a finding. The Assistant Secretary, in fact, did not ultimately decide the issue, instead finding that section 3 of the OIWA permitted Interior to acquire land in trust for the UKB Corporation. Because of that finding, the Assistant Secretary did not engage in an analysis of the implications of *Carcieri*. Plaintiff cannot now seek a declaration on a matter that was not considered by Interior.

Further, Plaintiff fails to meet its burden to show entitlement to the drastic and extraordinary remedy of permanent injunctive relief. As the Supreme Court has repeatedly held, "an injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 142 (2010); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). Plaintiffs seeking a permanent injunction are required to demonstrate: that they've suffered an irreparable injury, that available remedies at law are inadequate, that the balance of hardships weighs in their favor, and that a permanent injunction is in the public's interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Monsanto*, 561 U.S. at 141. The proper inquiry is not "to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test." *Monsanto*, 561 U.S. at 158. Indeed, where, as here, the Court's jurisdiction is based on the APA, vacatur is the presumptive remedy. *See* 5 U.S.C. § 706(2)(C) ("The reviewing court shall . . . hold unlawful and set aside agency . . . action found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case.").

Here, should the Court find that the 2011 Decision was arbitrary and capricious, the proper remedy would be to set aside the decision and remand the case to Interior. Plaintiff wholly fails to demonstrate the necessity of a permanent injunction.

V. CONCLUSION

The 2011 Decision involved no legal convolutions, logical contortions or conjecture as Plaintiff alleges. The 2011 Decision is the result of Interior's careful and thorough analysis of its statutory and regulatory authority to take the land into trust. Interior considered its authority to acquire land into trust for the benefit of the UKB Corporation and after careful consideration, determined that it possessed the authority under section 3 of the OIWA, that it was not necessary to secure the consent of the Cherokee Nation, that any potential jurisdictional conflicts did not weigh in favor of denying the application, and that the BIA is equipped to handle any additional duties as a result of the acquisition. Further, Federal Defendants have also shown that the 2011 Decision does not violate the 1866 Treaty with the Cherokee Nation, is not prevented by the *Carcieri* decision, nor is it contrary to any law.

The Department has special expertise and its decision is presumed to be valid; Plaintiff has shown no reason for the Court to deviate from this presumption. Rather, the Court should uphold the 2011 Decision and find that it was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and was based upon consideration of the relevant factors and is entitled to due deference. The Court should deny Plaintiff's declaratory request and immediately dissolve the preliminary injunction. Federal Defendants further request any other relief as may be just.

Dated: October 26, 2015

Respectfully submitted,

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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 notice.

s/ Jody H. Schwarz