No. 17-7044 (consolidated with No. 17-7042)
ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THE CHEROKEE NATION,

Plaintiff-Appellee.

v.

RYAN ZINKE, in his official capacity, *et al.*,

Defendants-Appellants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, *et al.*,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
Case No. 6:14-cv-428 (Hon. Ronald A. White)

OPENING BRIEF FOR THE FEDERAL APPELLANTS

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STATEMENT OF RELATED CASES

This appeal has been consolidated with an appeal from the same district-court judgment, docketed as 10th Cir. No. 17-7042, filed by Intervenor-Defendants-Appellants United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB"), and United Keetoowah Band of Cherokee Indians in Oklahoma Corporation ("UKB Corporation").

GLOSSARY

BIA	Bureau of Indian Affairs
CNO	Cherokee Nation of Oklahoma
IRA	Indian Reorganization Act
OIWA	Oklahoma Indian Welfare Act
UKB	United Keetoowah Band of Cherokee Indians in Oklahoma

INTRODUCTION

The UKB is a federally recognized tribe of Indians in eastern Oklahoma with more than 9,200 members who descend from the historical Cherokee Nation. In 2000, the UKB purchased an undeveloped 76-acre parcel of land two miles from its governmental headquarters in Tahlequah, Oklahoma. Since then, the UKB has transformed the parcel into a cultural hub, a wellness center, and cultural grounds. In 2011, after seven years of review, the Department of the Interior's Bureau of Indian Affairs ("BIA") granted the UKB's application for the United States to take title to the parcel for the benefit of the UKB, i.e., to take the parcel "into trust" for the UKB.

The Cherokee Nation of Oklahoma ("CNO") is a large Indian tribe in eastern Oklahoma for whom the United States holds tens of thousands of acres of land in trust and whose members likewise descend from the historical Cherokee Nation. The CNO sued Interior officials (collectively referred to herein as "BIA") to stop the UKB trust acquisition. The district court issued an order precluding the BIA from acquiring the UKB parcel without the consent of the CNO and without reconsideration of certain regulatory criteria. The order not only prevents the BIA from acquiring *this* parcel in trust for the UKB but also effectively gives the CNO the power to block the BIA from acquiring *any future* trust land for the UKB.

As explained herein, the district court's order failed to defer to the BIA's controlling analysis of the regulatory criteria that it considers when evaluating trust-acquisition applications. Instead, the court inserted itself into the BIA's internal

administrative process and impermissibly sided with a subordinate officer over the deciding official. Accordingly, the judgment of the district court should be reversed.

STATEMENT OF JURISDICTION

The CNO sued the BIA asserting claims under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Its claims relate to two statutes—the Oklahoma Indian Welfare Act of 1936 ("OIWA"), 25 U.S.C. § 5201 *et seq.*, and the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 ("1999 Appropriations Act"), Pub. L. No. 105-277, 112 Stat. 2681 (1998)—and to regulations, 25 C.F.R. § 151.1 *et seq.*—that governed the BIA's decision to take the UKB's land into trust. The district court therefore had jurisdiction over the CNO's claims under 28 U.S.C. § 1331.

The district court entered an order and a final judgment on May 31, 2017. Aplt. App. 53–54. The BIA filed a timely notice of appeal on July 31, 2017. *Id.* at 57–59. This Court has appellate jurisdiction under 28 U.S.C. § 1291. Alternatively, this Court has appellate jurisdiction to review the district court's order under the so-called "practical-finality rule," *see Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1140 (10th Cir. 2011), because the district court's order forecloses the BIA from obtaining appellate review of legal issues that are decisive in the trust-acquisition process. *See infra* Part I.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the district court's order under either 28 U.S.C. § 1291 or the practical-finality rule.

2. Whether the definition of "Indian" under the IRA applies to land-into-trust acquisitions under the OIWA.

3. Whether the CNO must consent for the BIA to take into trust a UKB-owned parcel within the former Cherokee reservation.

4. Whether, in granting an application to take land into trust, the BIA reasonably considered (i) potential jurisdictional problems between the UKB and the CNO; and (ii) the administrative burden of the acquisition.

STATEMENT OF THE CASE

A. Legal Background

1. 1866 Treaty with the Cherokees

By the mid-nineteenth century, most Cherokees had migrated or been forcibly removed to the Indian Territory in what is now eastern Oklahoma. *Cohen's Handbook of Federal Indian Law* 288–89 (Nell Jessup Newton et al. eds., 2012).[1] In 1865, as the Civil War drew to a close, the United States sought to restore political relations with

[1] *Cohen's Handbook* has undergone several editions, most recently in 2012. The original edition, compiled by Felix S. Cohen in 1942 with contributions from senior Interior officials, is still frequently cited because it contains commentary not repeated in later editions and is considered authoritative for matters related to the IRA and the OIWA. This brief cites both the 1942 and 2012 editions.

tribes that had aligned with the Confederacy. *Id.* at 67–69. To that end, the United States sent treaty commissioners to meet with the Cherokees and other tribes to negotiate new treaties. *Id.* at 67–69. Two separate Cherokee delegations attended the negotiations—the southern Cherokees, who had aligned with the Confederacy throughout the Civil War, and the northern Cherokees, who had broken ties with the Confederacy and realigned with the Union. U.S. Dep't of the Interior, Report of the Commissioner of Indian Affairs for the Year 1865, at 284–85, 305 (1865) (hereinafter 1865 Report), *available at* http://digital.library.wisc.edu/1711.dl/History.AnnRep65a. One of "[f]our principal points" that "came up for settlement" was "[t]he proper and just method of adjusting affairs between the loyal and disloyal, this point applying especially to the Cherokees." U.S. Dep't of the Interior, Report of the Commissioner of Indian Affairs for the Year 1866, at 8 (1866) (hereinafter 1866 Report), *available at* http://digital.library.wisc.edu/1711.dl/History.AnnRep66. Despite the United States' goal of uniting them under a single treaty, the northern and southern Cherokees negotiated separately with the treaty commissioners. *Id.* at 11–12. The southern Cherokees insisted on separate territories and governments for the two factions. *Id.* at 12.

In June 1866, the United States treaty commissioners entered into a treaty with the northern Cherokees that continued the tribe "under one constitution and government." *Id.* at 12. The treaty commissioners partially addressed the southern faction's desire for a separate territory by granting the Cherokees "who resided in the

Cherokee Nation" before the Civil War "the right to settle in and occupy" the southern portion of the Cherokee territory. Treaty with the Cherokees ("1866 treaty") art. 4, July 19, 1866, 14 Stat. 799, 800; *see also* 1866 Report at 12.

The United States treaty negotiators also sought to include provisions for the resettlement in Cherokee territory of several tribes that were residing in Kansas. 1866 Report at 8. Thus, Article 15 of the 1866 treaty permitted the United States to settle Indians "friendly with the Cherokees and adjacent tribes . . . within the Cherokee country." 14 Stat. at 803. Article 26 of the 1866 treaty "guarantee[d] 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." *Id.* at 803.

2. The Indian Reorganization Act and the Oklahoma Indian Welfare Act

Allotment of tribal lands to individual Indians became the dominant federal policy on Indian property rights in 1887. *See generally Cohen's Handbook* 74–75 (2012). Congress enacted several statutes that allotted Cherokee reservation lands. *See, e.g.*, Act of July 1, 1902, ch. 1375, 32 Stat. 716. By the 1930s, the federal government recognized that allotment had created a "disastrous condition" for the Indians whereby individuals were "stripped of their property" and "pushed to a lower social level," and tribes had become "disorganized." *Cohen's Handbook* 216 (1942) (quoting

statement of Commissioner of Indian Affairs John Collier); *Babbitt v. Youpee*, 519 U.S. 234, 237–38 (1997).

In 1934, Congress enacted the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C § 5101 *et seq.*), to "conserve and develop Indian lands and resources." 48 Stat. at 984. Among other things, the IRA ended the allotment system, provided for the federal government's acquisition of tribal lands into trust, and "establish[ed] machinery whereby Indian tribes would be able to assume a greater degree of self-government." *Morton v. Mancari*, 417 U.S. 535, 542 (1974); *see also Cohen's Handbook* 84 (1942). Section 5 of the IRA authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. As used in the IRA, the term "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 5129.

Although the IRA as originally introduced applied to Oklahoma, it was amended at the suggestion of Oklahoma Senator Elmer Thomas to make certain provisions inapplicable to Oklahoma tribes. *Cohen's Handbook* 455 (1942). Thomas believed that Congress enacted the IRA "having in view the large Indian reservations located in the western and southwestern States," in contrast with the Oklahoma Indians who had "made progress beyond the reservation plan" and whom the government should discourage from "return[ing] to reservation life." S. Rep. No. 74-1232, at 6 (1935) (Rep. of Sen. Elmer Thomas, Chairman, S. Comm. on Indian

Affairs). Thus, as enacted, the provisions of the IRA that limit alienation of restricted land, authorize the establishment of new reservations, and provide for tribal organization are inapplicable to tribes in Oklahoma. 25 U.S.C. § 5118; *see also Cohen's Handbook* 455 (1942).

Two years after it passed the IRA, however, Congress enacted the OIWA, which "extended" these provisions to Oklahoma "with some modifications to fit the peculiarities of the local legal situation." *Cohen's Handbook* 455 (1942). Section 3 of the OIWA authorizes "[a]ny recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. § 5203, to "adopt a constitution and bylaws and accordingly be acknowledged by a federal charter of incorporation," *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1230 (10th Cir. 2014). A tribal charter of incorporation "may convey to the incorporated group" the "rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203. In 1946, Congress enacted a statute that formally "recognized" the "Keetoowah Indians of the Cherokee Nation in Oklahoma . . . as a band of Indians residing in Oklahoma within the meaning of section 3 of the [OIWA]." Act of August 10, 1946, ch. 947, 60 Stat. 976. The statute was intended to "secure" for the UKB "any benefits, which under the [OIWA], are available to other Indian bands or tribes." H.R. Rep. No. 79-978, at 2–3 (1946) (statement of Abe Fortas, Acting Secretary of the Interior).

In 1994, Congress amended the IRA "[t]o make certain technical corrections." Act of May 31, 1994, Pub. L. No. 108-263, 108 Stat. 707 ("1994 IRA amendment").

The 1994 IRA amendment includes a provision that prohibits federal agencies from "mak[ing] any decision or determination pursuant to the [IRA] or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 5123(f). Further, "[a]ny regulation or administrative decision or determination" then in effect "that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect." *Id.* § 5123(g).

The Senate added those provisions in its concurrence with the House amendments to the original Senate bill. 140 Cong. Rec. S11,232, S11,232–33 (May 19, 1994). According to the Senator who introduced the provisions, their purpose is to ensure that "Indian tribes recognized by the Federal Government stand on an equal footing to each other." *Id.* at S11,235 (statement of Sen. Inouye). "[W]ithout regard to the manner in which the Indian tribe became recognized by the United States," the provisions entitle "[e]ach federally recognized Indian tribe . . . to the same privileges and immunities as other federally recognized tribes" and "the right to exercise the same inherent and delegated authorities." *Id.* at S11,235.

BIA regulations promulgated in 1980 contain the "procedures governing the acquisition of land by the United States in trust status" for Indian tribes. 25 C.F.R.

§ 151.1. Under those regulations, a tribe with "jurisdiction over" a reservation generally must "consent" before the BIA can acquire trust land on that reservation for a different tribe. *Id.* § 151.8. An "Indian reservation" includes, in Oklahoma, "that area of land constituting the former reservation of the tribe as defined by the Secretary." *Id.* § 151.2(f). For both on- and off-reservation acquisitions, the BIA must "consider" several "criteria in evaluating requests for the acquisition of land in trust status." *Id.* § 151.10; *see also id.* § 151.11(a). As relevant here, those criteria include "[j]urisdictional problems and potential conflicts of land use which may arise," and whether the BIA is "equipped to discharge the additional responsibilities resulting from the acquisition." *Id.* § 151.10(f), (g).

3. 1999 Appropriations Act

A rider in Interior's fiscal year 1992 appropriation limited the use of BIA funds "for the benefit of Indians residing within the jurisdictional service area of the Cherokee Nation of Oklahoma." Department of the Interior and Related Agencies Appropriations Act, 1992 ("1992 Appropriations Act"), Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991). Until "legislation is enacted to the contrary," no funds could 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 (emphasis added). A rider in the 1999 Appropriations Act expressly repealed the "consent" requirement by amending the 1992 Appropriations Act rider to read: Until "legislation is enacted to the contrary, no funds shall be used to take land into trust

within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation." 112 Stat. at 2681-246 (emphasis added).

B. Factual Background

1. The United Keetoowah Band of Cherokee Indians in Oklahoma

The UKB traces to the Keetoowah Society, a group of Cherokees in the Indian Territory that in 1859, troubled by Cherokee political alignment with the South, adopted a convention to "bind ourselves together," "abide by our laws," and "assist one another." Aplt. App. 253; *see also* H.R. Rep. No. 79-978, at 2–3. In the late nineteenth century, the Keetoowah Society opposed the United States' policy of dividing tribal lands into allotments for individual tribal members. H.R. Rep. No. 79-978, at 3. In 1899, when the Cherokees voted "by a comparatively slim margin" to ratify an agreement with the United States to allot Cherokee tribal lands, the Keetoowah Society counseled its followers to abstain from the vote. *Id.* at 3. Six years later, with legislation pending in Congress to "dissolve" the Cherokee tribal government, the Keetoowah Society sought and obtained a federal charter of incorporation in order to "keep[] alive Cherokee institutions and the tribal entity." *Id.* at 3.

As stated above, Congress in 1946 formally "recognized" the "Keetoowah Indians of the Cherokee Nation in Oklahoma . . . as a band of Indians residing in Oklahoma within the meaning of section 3 of the [OIWA]." 60 Stat. at 976. In a

letter supporting recognition, the Acting Secretary of the Interior stated that the "Keetoowah Indians" are "interested in maintaining their identity, individually and as a group, as Cherokee Indians." H.R. Rep. No. 79-978, at 3. Soon after such recognition, Interior approved the UKB's constitution and a corporate charter for the UKB Corporation. The charter's list of "corporate purposes" includes "the acquisition of land," and its list of "corporate powers" includes the power to "purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of property of every description." Aplt. App. 84–85, 87.

Today, the UKB has more than 9,200 members. *Id.* at 62. It is one of three recognized Cherokee tribes, along with the CNO and the Eastern Band of Cherokee Indians. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4916, 4919 (Jan. 17, 2017). The United States has never held land in trust for the UKB. Aplt. App. 292.

2. The UKB land-into-trust application

In 2000, the UKB purchased an undeveloped 76-acre parcel two miles from its headquarters in Tahlequah, Oklahoma. *Id.* at 63. The UKB has transformed the parcel into a cultural hub. It now houses "a community services building, a wellness center, and cultural grounds," and it hosts the UKB's annual celebration of tribal recognition. *Id.* at 66. At the community-services building, the UKB provides welfare services including daily meals for elderly members, financial assistance for basic necessities, dental and vision care, and emergency medical transportation. *Id.* at 66–

67. The parcel sits within the boundaries of the original Cherokee territory in Oklahoma. *Id.* at 66, 68.

In 2004, the UKB submitted an application for the BIA to acquire the parcel into trust under Section 5 of the IRA "so that such land can be protected for the use by future generations." *Id.* at 63. In evaluating the UKB's application, the BIA's Eastern Oklahoma Region solicited and received comments from Cherokee County officials and the CNO. *Id.* at 162. In its comments to the Region, the CNO stated that the UKB application "must be denied" because the CNO "does not consent" to the acquisition. *Id.* at 91. In 2006, the Region denied the application due in part to concerns about a possible jurisdictional conflict between the UKB and the CNO and concerns about the BIA's ability to discharge its trust responsibilities if the parcel were acquired into trust. *Id.* at 161, 164. In particular, the Region found that the CNO "exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee treaty boundaries." *Id.* at 162. The Region also found that it "ha[d] limited resources to allow close supervision" of the UKB parcel because of a "self governance compact" whereby the CNO "administers the program functions associated with the management of trust lands" in the Region's service area. *Id.* at 163. The UKB appealed the Region's decision to the Interior Board of Indian Appeals ("IBIA").

In 2008, with the IBIA appeal pending, Interior's Assistant Secretary–Indian Affairs instructed the Region to request a remand in order to further substantiate its

decision. *Id.* at 171–72. The Assistant Secretary questioned the Region's finding that the BIA could not discharge the responsibilities of acquiring the parcel: the "proposed trust land is a small parcel of land with community program buildings and a dance ground"; it does not necessitate "extensive" supervision; and the UKB, Cherokee County, and the CNO "already provide law enforcement services within the proposed acquisition area." *Id.* at 172. The Assistant Secretary also asked whether the Region had "additional evidence to substantiate the need for additional supervision." *Id.* at 172. On remand, the Region denied the application on the same grounds as it had in 2006. *See id.* at 310–20. The UKB appealed the Region's 2008 decision to the IBIA, but the Assistant Secretary exercised his express regulatory authority to assume jurisdiction over the appeal. *See* 25 C.F.R. § 2.20(c).

Between 2009 and 2011, the Assistant Secretary, in a written dialogue with the Region, issued several decisions that embody the BIA's controlling analysis of the issues in this appeal. *See* Dep't of the Interior, Department Manual pt. 209, ch. 8 (2003), *available at* https://elips.doi.gov/ELIPS/DocView.aspx?id=802&dbid=0 (discussing delegation to the Assistant Secretary). The Assistant Secretary found that due to the "consultation" rider in the 1999 Appropriations Act, the "CNO does not need to consent to the acquisition in trust of the UKB's land" and "[i]t is only necessary that the [BIA] consult with the CNO." Aplt. App. 217–18. The BIA satisfied the consultation requirement "when it solicited comments from the CNO." *Id.* at 218; *see also id.* at 163.

The Assistant Secretary considered the factors set forth in 25 C.F.R. § 151.10 for on-reservation acquisitions and concluded that they weighed in favor of acquiring the UKB parcel into trust. Aplt. App. 218–22. As relevant here, the Assistant Secretary reaffirmed his 2008 finding that the BIA "is equipped to discharge the additional responsibilities resulting from the acquisition," 25 C.F.R. § 151.10(g), because the Region had provided no additional evidence as to why it could not fulfill its trust duties and had "fail[ed] to identify specific duties that the BIA will incur." Aplt. App. 221. Nor had the Region explained why it could not fulfill duties that do arise or contract those duties to the UKB. *Id.* at 221.

The Assistant Secretary also concluded that no "[j]urisdictional problems and potential conflicts of land," 25 C.F.R. § 151.10(f), precluded the acquisition. The statute recognizing the UKB as an Oklahoma Indian tribe within the meaning of Section 3 of the OIWA as well as the UKB Corporation's charter demonstrate that the UKB has "the authority to exercise territorial jurisdiction over its tribal lands." Aplt. App. 219. To find that only the CNO could exercise territorial jurisdiction over the UKB's tribal lands would contravene the 1994 IRA amendment, which instructs agencies not to make "distinctions as to the privileges and immunities of tribes." *Id.* at 219. The Assistant Secretary reasoned that BIA letters and unpublished district-court orders on which the Region had relied in finding that the CNO possesses exclusive jurisdiction within the former Cherokee reservation either predated the 1994 IRA amendment or failed to explain their bases. *Id.* at 219. The 1999 Appropriations

Act "consultation" rider also supports the "conclusion that the CNO does not enjoy exclusive jurisdiction" because Congress contemplated trust acquisitions for the UKB within the former Cherokee reservation. *Id.* at 220. Therefore, the Assistant Secretary found that either the UKB would hold exclusive jurisdiction over the parcel or, like others tribes in the Region that share jurisdiction over trust land, the UKB and the CNO could "find a workable solution to shared jurisdiction." *Id.* at 221.

The Assistant Secretary found it unnecessary to address the impact of the then-recent Supreme Court decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), because the UKB application invoked the Secretary's authority under the OIWA, not the IRA. Aplt. App. 289. As used in the IRA, the term "Indian" includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. *Carcieri* held that "now under Federal jurisdiction" means "under federal jurisdiction when the IRA was enacted in June 1934." 555 U.S. at 382. Section 3 of the OIWA, by contrast, extends the IRA's "rights or privileges" to the "incorporated group" of "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203. Since the OIWA extends the benefits of the IRA to Oklahoma Indian tribes such as the UKB, and the UKB Corporation is the incorporated group of the UKB, the Assistant Secretary concluded that the BIA could acquire the parcel into trust for the UKB Corporation. Aplt. App. 270–73. Accordingly, the UKB amended its application to invoke the BIA's authority under Section 3 of the OIWA. *Id.* at 289–90.

The Region subsequently approved the UKB application in a 2011 decision that incorporated the Assistant Secretary's earlier decisions by reference. *Id.* at 292. For the same reasons as explained in its earlier decisions, the Region continued to voice disagreement with the Assistant Secretary regarding potential jurisdictional problems and the BIA's ability to discharge its trust responsibilities. *Id.* at 296–98. However, the Assistant Secretary's "findings and conclusions . . . are binding on the Region." *Id.* at 298. The CNO appealed the Region's 2011 decision to the IBIA, which dismissed the 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).

C. Procedural Background

In 2014, the CNO brought suit against the BIA challenging the Region's 2011 decision. The CNO alleged, among other things, that the BIA could not acquire the parcel under Section 3 of the OIWA and, even if it could, the IRA's definition of the term "Indian" applies to OIWA trust acquisitions; that the BIA failed to comply with the 1980 regulatory requirement that it obtain CNO consent for the acquisition; and that the BIA's analysis of the administrative burden of the acquisition and potential jurisdictional problems under 25 C.F.R. § 151.10 was arbitrary.[2] The CNO sought

[2] The CNO also alleged that the BIA's consideration of the "need of . . . the tribe for additional land," 25 C.F.R. § 151.10(b), was arbitrary. Aplt. App. 27. The CNO did not brief that issue in the district court.

injunctive and declaratory relief. The UKB and the UKB Corporation intervened as defendants.

In 2017, the district court issued an order precluding the BIA from acquiring the disputed parcel without the consent of the CNO and without reconsideration of the jurisdictional-conflicts and administrative-burden criteria. It determined, in a holding that the CNO does not challenge on appeal, that the BIA may generally acquire the parcel under Section 3 of the OIWA. Aplt. App. 46 (Op. 12 & n.22). However, the district court also concluded that the BIA must consider *Carcieri* before acquiring the UKB parcel. Section 3 of the OIWA extends to Oklahoma Indian tribes the "rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203. The district court ruled that the IRA's first definition of "Indian," which *Carcieri* interpreted, circumscribes those rights or privileges. *See* Aplt. App. 46 ("To allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides.").

The district court also held that the CNO must consent to the acquisition for two reasons: the 1866 treaty guarantees protection for the Cherokees against "domestic feud or insurrection" and "hostilities of other tribes," and the 1999 Appropriations Act rider does not "override" the regulatory consent requirement of 25 C.F.R. § 151.8. Aplt. App. 49. Finally, the court held that the BIA's analysis of jurisdictional problems and administrative burden under 25 C.F.R. § 151.10 was

arbitrary. Aplt. App. 52–53. The court's order "remand[ed] this action" to the Region. *Id.* at 53. The district court entered judgment in favor of the CNO. *Id.* at 54.

SUMMARY OF ARGUMENT

This Court has jurisdiction over this appeal. This appeal does not implicate the administrative-remand rule because the district court issued a final decision. Its order resolved the suit, granted relief to the CNO, and did not instruct the BIA to resume its review of the UKB trust application. Alternatively, if the decision is not final, this Court has appellate jurisdiction under the practical-finality rule because BIA will otherwise be foreclosed from obtaining appellate review of the district court's holdings directing it to apply specific legal standards to future tribal trust applications.

Oklahoma tribes for whom the BIA acquires trust land under Section 3 of the OIWA need not meet the IRA's separate definition of "Indian" because, as a plain-language reading makes clear, the OIWA extended the IRA's "rights or privileges" to the "incorporated group" of "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203. Furthermore, it is unlikely that Congress silently included a requirement that incorporated Oklahoma tribes meet the IRA's definition of "Indian" when it expressly adopted that term into a different OIWA provision. The BIA's interpretation also finds support in the OIWA's legislative history.

The BIA did not need the consent of the CNO to acquire the parcel. The BIA acquires trust land pursuant to Section 3 of the OIWA through its authority under Section 5 of the IRA, which gives the BIA "discretion . . . to acquire . . . any interest"

in tribal land. 25 U.S.C. § 5108. Through a 1999 Appropriations Act rider, Congress provided that the CNO's role in the trust-acquisition process within the original Cherokee territory is "consultati[ve]." The rider expressly repealed a 1992 Appropriations Act rider that had required CNO "consent" for such acquisitions. The "consultation" requirement supersedes (within the original Cherokee territory) a 1980 Interior regulation that conditions certain tribal trust acquisitions on the consent of other tribes. Additionally, Article 26 of the 1866 treaty has no bearing on trust acquisitions, let alone requires the consent of one tribe that descends from the Cherokees to take into trust a parcel owned in fee by another. Rather, as the history, purpose, and negotiations of the 1866 treaty demonstrate, Article 26 contains the United States' guarantee to protect the historical Cherokee government from factional conflict and the Cherokee people from "hostilities" of other tribes being resettled in the region. Furthermore, the ordinary, contemporary meaning of its language does not support the view that Article 26 pertains to trust acquisitions.

Finally, the BIA's decision that the 25 C.F.R. § 151.10 trust-acquisition criteria weigh in favor of acquiring the UKB parcel was reasonable. The BIA's analysis of jurisdictional conflicts and potential conflicts of land use relied on controlling legal authorities, rationally distinguished decisions that predated those authorities, and looked to comparable tribal land-use arrangements as precedent. In analyzing the potential administrative burden, the BIA explained that the parcel will not require

extensive supervision and reasonably concluded that the BIA could fulfill any additional duties that arise.

The judgment of the district court should be reversed.

STANDARD OF REVIEW

In reaching its decision, the district court interpreted three federal statutes—the IRA, the OIWA, and the 1999 Appropriations Act—and the 1866 treaty. This Court reviews all of these interpretations de novo. *Par. Oil Co. v. Dillon Cos.*, 523 F.3d 1244, 1248 (10th Cir. 2008) (statutes); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 988 (10th Cir. 2004) (treaties with Indian tribes). An agency's interpretation of its own regulation governs unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The CNO challenged the BIA's consideration of two of the trust-acquisition criteria in 25 C.F.R. § 151.10 under the Administrative Procedure Act as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court's "review under this standard is narrow and highly deferential to the agency." *Compass Envtl., Inc. v. OSHRC*, 663 F.3d 1164, 1167 (10th Cir. 2011). "Under this standard," moreover, this Court "will not disturb an agency action unless the agency '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.'"

WildEarth Guardians v. United States EPA, 770 F.3d 919, 927 (10th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This Court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (quoting *Slingluff v. OSHRC*, 425 F.3d 861, 866 (10th Cir. 2005)).

ARGUMENT

I. This Court has jurisdiction over this appeal

In an order entered on August 15, 2017, the Clerk of Court "ordered that the parties shall specifically address in their briefs the issue of whether the administrative remand rule is implicated." As elaborated below, that rule is *not* implicated because the district court issued a final decision without remanding to the BIA. But even if the rule were implicated (and the decision were not final), this Court has jurisdiction under the "practical finality" exception to the administrative-remand rule.

In this Circuit, it "is well settled law that '[t]he remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision.'" *Western Energy Alliance v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013) (quoting *Bender v. Clark*, 744 F.2d 1424, 1426–27 (10th Cir. 1984)). To determine whether a remand has occurred in a given case, this Court will "consider the nature of the agency action as well as the nature of the district court's order." *New Mexico ex rel. Richardson v. BLM (New Mexico)*, 565 F.3d 683, 697 (10th Cir. 2009). "Typically, a 'remand' from a district court to an agency occurs when an agency has

acted in an adjudicative capacity" and "the district court instructs the agency to conduct further proceedings." *Id.* at 697. A "district court's label for its own action carries little weight in determining the nature of that action on appeal." *Id.* at 698 n.15.

In *New Mexico*, for example, this Court found that the administrative-remand rule did not bar appellate review of a district-court opinion instructing the Bureau of Land Management ("BLM") to conduct site-specific environmental review before auctioning oil and gas leases. *Id.* at 695–96. The order had "all requisite components of a final order: It resolved all issues and granted the plaintiffs relief, enjoining issuance" of the leases until BLM completed the analysis. *Id.* at 697. Furthermore, the district court's order was "wholly unlike a traditional remand" because it "did not require BLM to recommence a proceeding, or indeed to take any action at all." *Id.* at 698.

Here too, the district court's order was a final decision, not an administrative remand. The district court entered judgment in favor of the CNO. Aplt. App. 54. The accompanying order resolved all issues in the case, granted relief to the CNO, and precluded the BIA from acquiring the disputed parcel without the consent of the CNO and without reconsideration of the jurisdictional-conflicts and administrative-burden criteria. *Id.* at 53. As in *New Mexico*, the order here did not instruct the BIA to recommence administrative consideration of the UKB application. Rather, it simply precluded the BIA from taking the parcel into trust without "full consideration" of

two of the regulatory trust-acquisition criteria and without the consent of a third party that has opposed the acquisition and that has given no indication that its opposition will change. Thus, the district court's decision was final for purposes of 28 U.S.C. § 1291.

Even if the district court's order were not a final decision under Section 1291, this Court should review it pursuant to the practical-finality rule. That rule "operates as an important caveat to the general limitation on appeals from an administrative-remand order." *Miami Tribe*, 656 F.3d at 1139. The rule helps to "ensure" that this Court "can review important legal questions which a remand may make effectively unreviewable." *Id.* at 1140 (quoting *Graham v. Hartford Life & Accident Ins. Co.*, 501 F.3d 1153, 1158 (10th Cir. 2007)). Of central concern is to avoid situations in which "the agency likely would be foreclosed from future appellate review." *Id.* at 1158.

Here, unless this Court exercises its appellate jurisdiction, the BIA will be foreclosed from obtaining judicial review of important legal questions. The district court's order held that the BIA must analyze whether the UKB falls within the IRA's definition of the term "Indian" before acquiring trust land for the tribe under the OIWA. Aplt. App. 53. It further held that the BIA must obtain CNO consent for any UKB trust acquisition within the original Cherokee territory in Oklahoma. *Id.* at 53. But all of the UKB's tribal lands lie within the original Cherokee territory and the CNO is opposed to UKB trust acquisitions. Since the BIA must comply with the district court's order in evaluating future land-into-trust application, it will be

foreclosed from obtaining appellate review of these rulings, which are decisive in the trust-acquisition process. Therefore, even if the district court's order is not final, this Court should conduct interlocutory review pursuant to the practical-finality rule.

II. The IRA's separate definition of "Indian" does not circumscribe the IRA's "rights or privileges," which the OIWA extended to Oklahoma tribes

The district court held that "the definition of the term 'Indian' [in the IRA] is applicable to any acquisition" under the OIWA. Aplt. App. 48. That holding is wrong as a matter of law because it lacks support in the text of the OIWA and contravenes Congress's understanding of the statute.

The CNO does not dispute that Congress has recognized the UKB as a tribe in Oklahoma "within the meaning of section 3" of the OIWA, 60 Stat. at 976, and the UKB Corporation is "a corporation formed under the OIWA," Aplt. App. 46. Section 3 permits "[a]ny recognized tribe or band of Indians residing in Oklahoma" to seek a charter of incorporation that conveys "to the incorporated group" the "rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203. As the district court held, Aplt. App. 46, those rights or privileges include the right to petition the BIA to take land into trust. *See* 25 U.S.C. § 5108. Interior approved the UKB Corporation's charter, which states that the UKB Corporation will "own, hold, manage, operate, and dispose of property" for the tribe. Aplt. App. 87. Thus, the UKB Corporation, as the "incorporated group" of a "recognized tribe or band of

Indians residing in Oklahoma" under Section 3 of the OIWA, has the right to petition the BIA to acquire land in trust.

By enacting the OIWA, Congress simply "chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in [the IRA]," *Carcieri*, 555 U.S. at 392—in this case, "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203; *see also, e.g.*, 25 U.S.C. § 1041e(a) ("The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to section [5108] of this title . . . ."); *id.* § 5119 ("Sections . . . 5108 . . . and 5129 of this title shall after May 1, 1936, apply to the Territory of Alaska . . . .").

The term "Indian" under the IRA does not inform the substance of the rights or privileges that the statute bestows. Nor does the term bear on the question of the persons to whom Congress extended those rights or privileges under the OIWA, which clearly includes the "incorporated group" of "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203. Thus, the district court erred when it "look[ed] to the IRA as a whole to determine whether the [BIA] may take land into trust for the UKB." Aplt. App. 47. That reading mistakenly conflates the IRA's *benefits*—"rights or privileges" that the OIWA extended to Oklahoma tribes regardless whether those tribes are "necessarily encompassed within" the IRA's definitions of "Indian," *Carcieri*, 555 U.S. at 392—with the IRA's *beneficiaries*, namely, any "Indian" as defined under the IRA. Consequently, permitting recognized Oklahoma tribes like

the UKB to apply for trust land does not "provide [them] more rights and privileges than the IRA provides." Aplt. App. 46.

Moreover, where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). Section 4 of the OIWA permits Indians "who reside within the State of Oklahoma in convenient proximity to each other" to charter as a "local cooperative association" for "purposes" of "[c]redit administration, production, marketing, consumers' protection, or land management." 25 U.S.C. § 5204. To obtain such a charter, the group must consist of "ten or more Indians, as determined by the official tribal rolls, or Indian descendants of such enrolled members, or Indians as defined in the [IRA]." *Id.* § 5204. Since Congress *expressly* adopted "Indians as defined in the IRA" as part of the definition of "Indians" for the purpose of forming a cooperative association under Section 4, it is unlikely that Congress also *silently* included "Indians as defined in the IRA" as part of the definition of "rights or privileges" under Section 3.

The OIWA's legislative history also supports a plain-language reading of Section 3. The House Committee on Indian Affairs report accompanying the bill explained that Section 3 "permit[s] 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. 74-2408, at 3 (1936). As that statement makes clear, Congress viewed the IRA's "rights or privileges" separate and distinct from the "Indians outside of Oklahoma" to whom it extended those benefits through the OIWA. Thus, the IRA's definition of "Indian" does not delineate the content of the IRA "rights or privileges." Rather, the OIWA permits "any recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. § 5203, which includes the UKB, to enjoy "the same rights and privileges as those granted to Indians outside of Oklahoma" through the IRA. H.R. Rep. 74-2408, at 3.

The district court also erred in suggesting without elaboration, Aplt. App. 47 ("a definition of 'Indian' [under the OIWA] was . . . necessary"), that the meaning of "recognized tribe or band of Indians" under Section 3 is at issue. As pointed out, the UKB has been "recognized" by Congress since 1946 and the UKB Corporation's charter has long been approved by Interior. The text of the OIWA makes clear that Congress extended to "the incorporated group[s]" of recognized Oklahoma Indian tribes (like the UKB) the ability to obtain charters (like that of the UKB Corporation) that convey "the right . . . to enjoy any . . . rights or privileges secured" to non-Oklahoma Indians through the IRA, including petitioning for land into trust. 25 U.S.C. § 5203.

For these reasons, the BIA's approval of the UKB Corporation's land-into-trust application comported with the requirements of the OIWA without regard to the IRA's definition of "Indian."

III. The BIA did not need CNO consent to acquire the parcel

The district court held that taking the UKB parcel into trust required CNO consent. Aplt. App. 49–52. In offering two independent bases for that holding, the court misconstrued both the 1999 Appropriations Act and the 1866 treaty.

A. Congress has mandated CNO consultation—not consent—for trust acquisitions in the former Cherokee reservation

Congress made clear in the 1999 Appropriations Act that the BIA need only *consult* the CNO before acquiring trust land within the former Cherokee reservation in Oklahoma. Until "legislation is enacted to the contrary," a rider in the 1999 Appropriations Act instructed the BIA, "no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation." 112 Stat. at 2681-246 (emphasis added). That directive "amended" an earlier rider from the 1992 Appropriations Act, substituting "consultation" for "consent" (and removing another clause). *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 332–33 (2012) ("express repeal" includes "language expressly stating that the prior provision is no longer operative" such as "'amended to read as follows'"). Therefore, the BIA correctly determined that acquiring the UKB parcel into trust requires only consultation with the CNO.

Contrary to the district court's holding, the "consultation" requirement supersedes (within "the Cherokee's original boundaries") an Interior regulation that

otherwise conditions a tribe's acquisition of "land in trust status on a reservation other than its own" on the consent of "the tribe having jurisdiction over such reservation." 25 C.F.R. § 151.8.[3] It is a basic principle of administrative law that agency regulations yield to statutory commands. As this Court recognized four decades ago, when there is a conflict between a statute and a regulation, the statute "renders the regulation which is in conflict with it void and unenforceable." *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977). Moreover, this Court has recognized that "[a]ppropriation acts are just as effective a way to legislate as are ordinary bills relating to a particular subject." *Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973).

The district court opined that allowing the 1999 Appropriations Act rider to "override" Section 151.8 would amount to a "repeal[] by implication" of that regulation. Aplt. App. 50 (quoting *United States v. Will*, 449 U.S. 200, 221 (1980)). That is nonsensical: the "cardinal rule . . . that repeals by implication are not favored," is a canon for construing "two *acts* upon the same subject." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (emphasis added); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (repeal by implication requires that "there be an 'irreconcilable conflict' between the two federal *statutes* at issue") (emphasis added).

[3] The following discussion assumes, for purposes of argument, that the former Cherokee reservation is not also the UKB's "own" reservation. This question is unsettled. The UKB, like the CNO, descend from the Cherokees who lived in the original Cherokee territory in Oklahoma. *See supra* p. 10. Here, to determine the impact of the 1999 Appropriations Act rider, the BIA assumed without deciding that 25 C.F.R. § 151.8 would otherwise apply to the UKB's land-into-trust application.

Equally nonsensical is the district court's statement that if "Congress intended to remove the consent requirement . . . , it could have explicitly stated so within the regulations when it revisited those regulations." Aplt. App. 50.

The district court also erred in distinguishing the reach of Section 151.8 from that of the 1999 Appropriations Act rider: "Section 151.8 applies to trust acquisitions, while the [rider] applies only to funding." *Id.* at 50 n.25. Yet there is no practical difference between "acquir[ing] land in trust status" within the meaning of Section 151.8 and "us[ing funds] to take land into trust," 112 Stat. at 2681-246. All land-into-trust acquisitions require the BIA to expend agency funds regardless of whether it purchases the land or, as here, acquires the land directly from the tribe. Furthermore, it is a "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). The district court's reading of the rider deprives it of any independent meaning. If, as the court posited, Section 151.8 requires the BIA to obtain the consent of the CNO before taking the parcel into trust, then the statutory requirement to consult with the CNO before using agency funds to take the parcel into trust has no effect. This Court should avoid a reading that renders the statutory "consultation" requirement superfluous.

Finally, the legislative history of the 1999 Appropriations Act supports construing the statute as having replaced the 1992 "consent" requirement with a "consultation" requirement. In the "Justification of Proposed Language Changes" section of its "Budget Justification and Annual Performance Plan FY 1999," the BIA warned the House Appropriations Committee that the 1992 rider "could be interpreted" to "preclude the [UKB from] achieving self governance or economic self sufficiency." Department of the Interior and Related Agencies Appropriations for 1999: Hearing Before a Subcommittee of the H. Comm. on Appropriations, Part 2: Justification of Budget Estimates, 105th Cong., 2d Sess. 838 (1998). The conference report for the enacted House bill later explained that as amended, the rider permits the BIA "to deal with the [UKB] . . . on issues of funding" and "prevents [the UKB] from establishing trust holdings within the Cherokee's original boundaries without Cherokee *consultation*." H.R. Rep. No. 105-825, at 1209 (1998) (emphasis added).

Thus, Congress envisioned that the rider operate as the BIA applied it here: to require only "consultation" with the CNO before the BIA acquires land in trust for the UKB within the original Cherokee territory.

B. The 1866 treaty does not pertain to—much less require CNO consent for—land-into-trust acquisitions

The district court concluded that "taking land into trust within the Cherokee Nation's former reservation without its consent violates" Article 26 of the 1866 treaty. Aplt. App. 51. That conclusion is incorrect as a matter of law.

Article 26 "guarantee[s] 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." 14 Stat. at 806. Indian treaties are "construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians," *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)), and "in accordance with the tenor of the treaty," *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). But a court "may not . . . ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (quoting *Wash. State Commercial*, 443 U.S. at 675). Nor can Indian treaties "be re-written or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).

History and purpose. This Court must interpret Article 26 with reference to the "history, purpose, and negotiations" of the 1866 treaty. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Unsurprisingly, Article 26 does not reference trust acquisitions under the IRA, which the 1866 treaty predates by seventy years. Rather, it guarantees the Cherokees "protection against domestic feuds and insurrections, and against hostilities of other tribes." 14 Stat. at 806.

Protection from "domestic feuds and insurrections" was intended to quell the ongoing strife between the Cherokee factions that had aligned with the Union and the Confederacy. *See supra* pp. 4–5. The United States treaty commissioners wanted to devise a "proper and just method of adjusting affairs between the loyal and disloyal" Cherokees. 1866 Report at 8. Although they failed to unite the factions (and eventually negotiated exclusively with the northern Cherokees), the commissioners included a treaty provision intended to placate the southern faction, which had called for separate territories and governments. *See supra* pp. 4–5. Article 4 permitted the southern faction to "settle in and occupy" land southwest of the Arkansas River. 14 Stat. at 800. Like Article 4, the "protection against domestic feuds and insurrections" clause of Article 26 was an attempt to devise a "proper and just method of adjusting affairs" between the adverse factions. Therefore, the "domestic feuds and insurrection" clause is properly understood as the United States' guarantee to protect the Cherokee government with whom it had entered into the 1866 treaty from factional conflict.

Likewise, the "hostilities of other tribes" clause of Article 26 is rooted in one of the treaty commissioners' central goals: the "[c]ession of lands" by the Cherokees "to be used for the settlement thereon of Indians whom it [wa]s in contemplation to remove from Kansas." 1866 Report at 8. The commissioners accomplished that goal through Article 15, which permitted the United States to settle Indians "friendly with the Cherokees and adjacent tribes . . . within the Cherokee country." 14 Stat. at 803.

Article 26 is therefore properly understood as assuaging Cherokee concerns about the resettlement of those Kansas tribes within Cherokee territory. Its guarantee of United States protection to the Cherokees if such Kansas tribes proved "hostile" cannot be "expanded beyond th[ose] clear terms." *Choctaw Nation*, 318 U.S. at 432.

Plain language. "[V]iewed in historical context," the "plain language" of the 1866 treaty "runs counter" to the CNO's claims, *Klamath Indian Tribe*, 473 U.S. at 774, and therefore belies the district court's view that acquiring the UKB parcel into trust violates the 1866 treaty.

First, the "hostilities of other tribes" clause cannot be read to pertain to land-into-trust acquisitions. The UKB's members, like those of the CNO, descend from the historical Cherokee Nation that entered into the 1866 treaty. Indeed, as the district court acknowledged, "the UKB are also Cherokee." *Id.* at 51. Therefore, *both* the UKB and the CNO are protected by Article 26. The guarantee to protect against the "hostilities of *other* tribes" does not apply to this dispute, which involves two Cherokee governments both of whose members descend from the historical Cherokee Nation.

Even putting that aside, the meaning of the term "hostilities" is unambiguous and cannot be read to pertain to administrative actions taken by the BIA pursuant to statutory authority. Rather, "hostilities" refers to acts of "warfare" carried out by tribes resettled in the Cherokee territory. *Worcester's Dictionary* 227 (1860) (defining "hostility" as "Open war; the practice of war; warfare; hatred; animosity; enmity");

accord Webster's Dictionary 640 (1864) (defining "hostility," "especially in the plural," as "acts of warfare; attacks of an enemy"); *cf. Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1084 (10th Cir. 2004) (citing contemporary dictionary definitions of terms in 1867 intertribal agreement).

Contemporaneous usages with which the Cherokees would have been familiar also support that interpretation of the term "hostilities." After the Civil War, the United States, represented by military officers, entered into treaties promising peaceful relations with Confederacy-aligned tribes. *Cohen's Handbook* 67–69 (2012). The tribes agreed to "cease all hostilities against the persons and property of [United States] citizens" and "to use their influence, and, if necessary, physical force, to prevent other . . . tribes, from making hostile demonstrations against" the United States. Treaty with the Two Kettles Indians art. 1, Oct. 18, 1865, 14 Stat. 723, 723; *accord, e.g.*, Treaty with the Blackfeet Indians art. 1, Oct. 18, 1865, 14 Stat. 727, 727. An 1865 report of the Secretary of the Interior, which updated Congress on "Indian Affairs," used "hostilities" in the same vein. It described tribes, including the Cherokees, which "united early in 1861" and allied with the Confederacy "for hostile operations against the United States." Cong. Globe, 39th Cong., 1st Sess., App'x 28–29 (1865). When the Confederate forces surrendered, the tribes' "[h]ostilities were then suspended." *Id.* at 29.

The Cherokees would have "naturally . . . understood" the term "hostilities" along those same lines. *Wash. State Commercial*, 443 U.S. at 676. In a statement

submitted during the 1865 treaty negotiations, the southern Cherokees narrated an earlier "hostility" between the two Cherokee political factions that resulted in "murders and assassinations," and "bloodshed." 1865 Report at 340. In the southern faction's recounting, President Polk had "recommended" dividing Cherokee territory between the "hostile" factions. *Id.* at 340. Thus, contemporaneous usages of "hostilities"—including by the Cherokees themselves—suggest that "hostilities" in Article 26 refers to armed intertribal conflicts, not to the federal government's acquisition of tribal land into trust.

Second, the Cherokees would have understood the "domestic feuds and insurrections" clause to carry its plain-language meaning, referring to the United States' guarantee to protect the historical Cherokee government from resistance against its authority. The narrative of the southern Cherokees during 1865 treaty negotiation referred to "bitter feuds" then dividing the Cherokees politically. *Id.* at 349. Thus, the Cherokees would have understood the "domestic feuds" clause in accordance with its contemporary usage, as a guarantee to protect the Cherokee government from the ongoing "deadly quarrel" between Cherokee political factions. *Worcester's Dictionary* 188 (italicization omitted) (defining "feud"); *see also Webster's Dictionary* 508 (defining "feud" as a deep-rooted "strife between families, clans, or parties in a state").

Similarly, the plain meaning of the term "insurrections" in Article 26 does not support the district court's view that the clause pertains to trust acquisitions. Rather,

it refers to "a rising against civil or political authority" in order "to prevent the execution of law *by force of arms*." *Webster's Dictionary* 702 (emphasis added); *see also Worcester's Dictionary* 246 (defining "insurrection" as a "seditious rising up against civil government"). That reading also finds support in Section 3 of the Fourteenth Amendment, which was submitted by Congress to the States a month before the Senate ratified the 1866 treaty. The aim of Section 3 was to disenfranchise Confederate officers by prohibiting the election or appointment to federal or state office of those who, after swearing to support the Constitution as federal or state officials, "engaged in insurrection or rebellion against the same." U.S. Const. amend. XIV, § 3. A guarantee to protect the Cherokees from "insurrection," therefore, does not prevent the BIA from taking into trust a parcel that the UKB already owns.

Moreover, even if land-into-trust acquisitions were implicated in the requirement to protect the historical Cherokee Nation against "domestic feuds" under Article 26, the district court's interpretation of the clause would run afoul of its "guarantee" by requiring the BIA, without clear direction from Congress, to favor one Cherokee government over another. The district court's interpretation would give the CNO the authority to veto UKB's land-into-trust applications. Giving one Cherokee government the power to reject the trust applications of another would violate Article 26's guarantee to protect the Cherokees from "domestic feuds." Thus, the 1866 treaty does not pertain to trust acquisitions.

For that reason, and because Congress has mandated only "consultation" with the CNO for land-into-trust acquisitions in the former Cherokee reservation, the BIA did not need the consent of the CNO to acquire the parcel.

IV. The BIA's consideration of the trust-acquisition criteria was reasonable

The BIA's regulations provide that the agency will "consider" several "criteria in evaluating requests for the acquisition of land in trust status." 25 C.F.R. § 151.10. As long as the BIA "*considers* all the relevant factors, this court cannot second-guess the weight, if any, to be given any factor." *McAlpine v. United States*, 112 F.3d 1429, 1434 (10th Cir. 1997) (quoting *Turri v. INS*, 997 F.2d 1306, 1308–09 (10th Cir.1993) (per curiam)) (emphasis added). Moreover, the touchstone of this Court's review of the BIA's resulting decision "is to determine only 'whether the decision was based on a *consideration* of the relevant factors.'" *Id.* at 1434 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)) (emphasis added).

The district court held that the BIA's analysis of two of those criteria—"[j]urisdictional problems and potential conflicts of land use which may arise," and whether the BIA is "equipped to discharge the additional responsibilities resulting from the acquisition," 25 C.F.R. § 151.10(f), (g)—was arbitrary. Aplt. App. 52–53. In so holding, the court failed to defer to the Assistant Secretary's well-reasoned analysis. Instead, it impermissibly "substitute[d] its judgment for that of the agency." *State Farm*, 463 U.S. at 43.

A. The BIA's jurisdictional-problems inquiry was based on reasoned legal analysis and consideration of analogous circumstances

In evaluating the UKB application, the BIA considered "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10(f). The BIA provided a detailed explanation, in the Assistant Secretary's 2009 decision, for why the factor does not weigh against acquiring the parcel for the UKB.

The Assistant Secretary found no congressional limitations on the UKB's authority to assert jurisdiction over its tribal lands. The 1946 statute in which Congress recognized the UKB, 60 Stat. at 976, "is silent as to the authorities that the [UKB] would have," so "[t]here is no reason, on the face of the Act, that the [UKB] would have less authority than any other band or tribe." Aplt. App. 219. The UKB Corporation's charter, which Interior approved soon after Congress recognized the UKB, "authorizes the UKB to hold land for tribal purposes," which "weighs heavily in favor of finding that the UKB can have land taken into trust." *Id.* at 220. The Assistant Secretary also found that Congress affirmatively contemplated that the UKB would assert jurisdiction over tribal lands. For example, "[i]f CNO had exclusive jurisdiction over the former Cherokee Reservation, Congress would have required *consent* of CNO," not merely "consultation," as the 1999 Appropriations Act rider provides. *Id.* at 220 (emphasis added).

The Assistant Secretary also looked to the 1994 IRA amendment, which instructs agencies not to "make any decision" regarding an Indian tribe that

"diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes," 25 U.S.C. § 5123(f), and establishes that regulations and administrative decisions that previously did so "have no force or effect," *id.* § 5123(g). In the Assistant Secretary's view, because the authority to assert "territorial jurisdiction" over tribal lands is a "privilege[] . . . available to the Indian tribes," *id.* § 5123(f), the 1994 IRA amendment precludes Interior from finding that the CNO possesses jurisdiction, to the exclusion of the UKB, over tribal lands that are also part of the UKB's tribal homeland. Aplt. App. 219. That comports with the understanding of the Senator who introduced the provisions. As explained in a statement accompanying the provisions as amendments to the House concurrence with the original Senate bill, the goal was for "[e]ach federally recognized Indian tribe" to enjoy "the same privileges and immunities as other federally recognized tribes" and "the right to exercise the same inherent and delegated authorities." 140 Cong. Rec. at S11,235.

The Assistant Secretary also addressed the Region's earlier finding that the CNO "exercises exclusive jurisdiction over trust . . . lands within the former Cherokee treaty boundaries." Aplt. App. 162. As the Assistant Secretary explained, the Region's reliance on several earlier BIA documents that had found that the CNO possesses exclusive territorial jurisdiction over tribal lands within the former Cherokee reservation was misplaced. A 1987 decision letter of the Acting Assistant Secretary predated the 1994 IRA amendment. *Id.* at 219. Additionally, letters from the BIA's

Office of Law Enforcement Services and two Regional Directors were "not binding" on the Assistant Secretary, "do not reveal their analysis and basis, and fail to address" the 1994 IRA amendment. *Id.* at 219.

The Region had also cited several unpublished district-court orders that predate the 1994 IRA amendment and "are based on [Interior's] position at that time."[4] *Id.* at 219. As the Assistant Secretary explained, Interior's view on tribal jurisdiction within the former Cherokee reservation changed as a result of the 1994 IRA amendment, the 1999 Appropriations Act rider, as well as close analyses of the statute recognizing the UKB as an Oklahoma tribe and of the UKB Corporation's charter. *Id.* at 219. The Assistant Secretary therefore reasonably concluded that no legal authority precluded a finding that the UKB "would have exclusive jurisdiction over land that the United States holds in trust for [it]." *Id.* at 220.

[4] In addition to lacking precedential force, none of the unpublished orders actually decide the issue of CNO jurisdiction. In *United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of Interior*, No. 90-C-608-B (N.D. Okla. May 31, 1991), the district court dismissed the UKB's grant and contract claims because it found that the CNO was an indispensable party with immunity from suit. Aplt. App. 133–44. The court considered the CNO's "interest" in the dispute but did not decide whether the CNO had exclusive jurisdiction over the original Cherokee territory. *Id.* at 142. Further, like the Region's initial decision here, that order relied on now-obsolete BIA pronouncements regarding territorial jurisdiction over tribal lands within the former Cherokee reservation. *Id.* at 136–38. The other unpublished orders, which reference CNO jurisdiction only in dicta, rely exclusively on outdated BIA statements and the order in *UKB v. Secretary*. *See United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.3d 1161, at *2 (10th Cir. 1993) (table) (containing *United Keetoowah Band of Cherokee Indians in Okla. v. Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27 1993)); *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B, at Aplt. App. 152–53 (N.D. Okla. Feb. 24, 1992).

Finally, the Assistant Secretary reasoned that, if necessary, the UKB and the CNO could exercise "shared jurisdiction" over the parcel. That finding was based on Interior's long-held position that tribes may share jurisdiction over certain parcels. *Id.* at 220 (citing Memorandum from Nathan R. Margold, Solicitor, to the Secretary of the Interior (Nov. 7, 1934), *available at* http://thorpe.ou.edu/sol_opinions/p476-500.html). It was also based on a recent report compiled by the Region, which showed that "several tribes within the Eastern Oklahoma Region share jurisdiction over parcels held in trust." *Id.* at 220–21. The Assistant Secretary provided examples on which the UKB and the CNO could model an agreement to jointly exercise territorial jurisdiction. The BIA holds several parcels in trust for multiple tribes and, in a "directly analogous" situation, the BIA holds a parcel for the Thlopthlocco Creek Tribal Town within the former Creek reservation. *Id.* at 221. The Assistant Secretary therefore concluded that if a conflict over land use were to arise, the "UKB and the CNO should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.* at 221. The BIA's position that it could manage any jurisdictional dispute between the UKB and the CNO is uniquely within the BIA's cognizance, and merits deference.

The district court did not confront the Assistant Secretary's analysis. Rather, it reasoned that since the CNO is currently the only tribe with trust land within the former Cherokee reservation, the "Assistant Secretary did not follow the BIA's precedent and did not provide an adequate rational explanation for his departure." *Id.*

at 52. However, "the fact that an agency had a prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). Although it did not cite specific "precedent," the district court was presumably referring to the BIA documents cited by the Region that either predate the 1994 IRA amendment and the 1999 Appropriations Act rider, or that are not binding on the Assistant Secretary and fail to explain their reasoning. As the Assistant Secretary explained, Interior's "position at that time that CNO had exclusive jurisdiction" over all tribal lands within the original Cherokee territory changed in response to further review, changes in the law, and close readings of the statute recognizing the UKB and the UKB Corporation's charter. Aplt. App. 219. Since the BIA's decision was based on a rational reading of intervening legislation and existing legal authorities, any departure from agency "precedent" was reasonable. *See, e.g.*, *City of Colorado Springs v. Solis*, 589 F.3d 1121, 1132 (10th Cir. 2009).

The district court had only one other basis for holding that the BIA's consideration was arbitrary: its finding that "the Region has twice concluded and remains concerned" about potential jurisdictional problems between the CNO and the UKB. Aplt. App. 52. In so finding, the district court inserted itself into the BIA's internal administrative process and took the side of a subordinate office over the deciding official—rather than deferring to the Assistant Secretary's controlling analysis as the Administrative Procedure Act requires, *Wolfe*, 446 F.3d at 1100. The Supreme Court has recognized that an intra-agency "difference in view" during the

deliberative process is routine and does not demonstrate lack of adequate foundation for a final decision. *State Farm*, 463 U.S. at 43. Here, the multiyear dialogue between the Region and Assistant Secretary is evidence only of measured study and healthy internal exchange in the course of reaching a final decision. The Assistant Secretary's legal analysis and consideration of analogous circumstances provided a "satisfactory explanation" for the BIA's determination that the jurisdictional-conflicts factor does not weigh against acquiring the parcel. *Id.* at 43.

B. The BIA's administrative-burden analysis was based on the evidence available—and the district court's order does not suggest otherwise

The BIA also analyzed its ability to "discharge the additional responsibilities resulting from the acquisition of the land in trust status" and reasonably concluded that the factor does not weigh against acquiring the parcel. 25 C.F.R. § 151.10(g). In its 2008 remand letter, the Assistant Secretary questioned the Region's initial finding that the BIA could not discharge the responsibilities resulting from the acquisition. He reasoned that "[t]he proposed trust land is a small parcel . . . with community program buildings and a dance ground," which does not require "extensive" "supervision," and that "the UKB, Cherokee County, and the CNO already provide law enforcement services within the proposed acquisition area." Aplt. App. 172. The Assistant Secretary consequently asked the Region to produce "additional evidence to substantiate the need for additional supervision." *Id.* at 172.

The Assistant Secretary evaluated the Region's response and ultimately concluded that the administrative-burden factor does not weigh against acquiring the UKB parcel. The Region had claimed that "it is not well equipped to discharge . . . additional responsibilities" because, generally speaking, the responsibilities of trust administration "range from . . . trespass issues to agricultural issues to wildlife management to lease compliance." *Id.* at 318. The Region also noted that it had decided to compact all of its administrative functions to the CNO. *Id.* at 318; *see also id.* at 298 ("There are no remaining direct service funds in the Region . . . .").

Yet the BIA has authority to "expend" appropriated funds "for the benefit, care and assistance of the Indians," including for administration of Indian property and for incidental expenses connected to the administration of Indian affairs. 25 U.S.C. § 13. Within a given appropriation, the Assistant Secretary has broad authority to "reprogram" BIA resources in order to support administrative duties that arise. *See* Bureau of Indian Affairs, Indian Affairs Manual pt. 26, paras. 5.3, 5.5 (2001) (All . . . allocation . . . holders are authorized to request reprogrammings," which are defined as "the movement of funds from one program class to another."), *available at* https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc-000390.pdf. The Assistant Secretary found that the Region had not shown that the administrative issues it had highlighted "will arise with [the UKB] trust parcel," and he further found that the BIA had funds available to "effectively administer[]" or "contract[]" to the UKB any administrative duties that do arise with respect to the parcel. Aplt. App.

221. In its 2011 decision, the Region acknowledged that, notwithstanding the Region's self-governance compact with the CNO, it "can discharge its duties in connection with this acquisition" because the Assistant Secretary had determined that the BIA can fund potential administrative duties that arise. *Id.* at 298. Therefore, the Assistant Secretary's conclusion that the administrative-burden factor does not weigh against acquiring the UKB parcel was reasonable.

The district court did not defer to, much less confront, that analysis. As with the jurisdictional-conflicts factor, the district court's order did not consider whether the BIA "articulate[d] a satisfactory explanation" for its conclusion on the administrative-burden factor. *State Farm*, 463 U.S. at 43. Rather, the district court inserted itself into the BIA's internal administrative process and impermissibly sided with a subordinate office over the deciding official. *See* Aplt. App. 53 ("The Region . . . remains concerned that this trust acquisition would create a need for [direct services] and that the Region does not have funds in its budget to provide them. Nevertheless, the Assistant Secretary dismissed these concerns . . . ."). But the Assistant Secretary did not "fail to consider" the Region's "concerns." *Id.* at 53. Rather, he reasonably found that there was no evidence that issues related to trust-property administration (e.g. lease compliance, trespass, agricultural concerns, wildlife management) would arise on the UKB's small, community-services parcel, and that in the unlikely event that they did, the Region or the UKB could effectively administer such duties. *Id.* at 221.

For both of the relevant criteria, then, the BIA's decision undoubtedly "was based on a consideration of the relevant factors." *McAlpine*, 112 F.3d at 1434. Because this Court "must uphold the [BIA's] action if it has articulated a rational basis for the decision and has considered relevant factors," *Wolfe*, 446 F.3d at 1100, this Court cannot sustain the district court's conclusion that the BIA's action was arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The BIA respectfully requests oral argument. This appeal concerns the BIA's ability to acquire trust land for the UKB, and interpretative questions of first impression regarding the OIWA, the 1999 Appropriations Act, and the 1866 treaty with the Cherokees. The BIA believes that oral argument may be helpful to the Court in resolving the issues on appeal.

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **11,988 words**, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), according to the count of Microsoft Word.

s/ Avi Kupfer
AVI KUPFER

FORM CERTIFICATIONS

I hereby certify that:

- There is no information in this brief subject to the privacy redaction requirements of 10th Circuit Rule 25.5; and
- The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and
- This brief was scanned with System Center Endpoint Protection, version 1.257.1248.0, updated December 1, 2017, and according to the program the brief is free of viruses.

s/ Avi Kupfer
AVI KUPFER

STATUTORY AND REGULATORY ADDENDUM

TREATIES:

STATUTES:

CODE OF FEDERAL REGULATIONS:

1866 WL 18776(Trty.)
(TREATY)

TREATY WITH THE CHEROKEE, 1866.

July 19, 1866.

Articles of agreement and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, (and) Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee Nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross - - John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations. [FNA][FNB]

PREAMBLE.

Whereas existing treaties between the United States and the Cherokee Nation are deemed to be insufficient, the said contracting parties agree as follows, viz:

ARTICLE 1

The pretended treaty made with the so-called Confederate States by the Cherokee Nation on the seventh day of October, eighteen hundred and sixty-one, and repudiated by the national council of the Cherokee Nation on the eighteenth day of February, eighteen hundred and sixty-three, is hereby declared to be void. [FNC]

ARTICLE 2

Amnesty is hereby declared by the United States and the Cherokee Nation for all crimes and misdemeanors committed by one Cherokee on the person or property of another Cherokee, or of a citizen of the United States, prior to the fourth day of July, eighteen hundred and sixty-six; and no right of action arising out of wrongs committed in aid or in the suppression of the rebellion shall be prosecuted or maintained in the courts of the United States or in the courts of the Cherokee Nation. [FND]

But the Cherokee Nation stipulate and agree to deliver up to the United States, or their duly authorized agent, any or all public property, particularly ordnance, ordnance stores, arms of all kinds, and quartermaster's stores, in their possession or control, which belonged to the United States or the so-called Confederate States, without any reservation.

ARTICLE 3

The confiscation laws of the Cherokee Nation shall be repealed, and the same, and all sales of farms, and improvements on real estate, made or pretended to be made in pursuance thereof, are hereby agreed and declared to be null and void, and the former owners of such property so sold, their heirs or assigns, shall have the right peaceably to re-occupy their homes, and the purchaser under the confiscation laws, or his heirs or assigns, shall be repaid by the treasurer of the Cherokee Nation from the national funds, the money paid for said property and the cost of permanent improvements on such real estate, made thereon since the confiscation sale; the cost of such improvements to be fixed by a commission, to be composed of one person designated by the Secretary of the Interior and one by the principal chief of the nation, which two may appoint a third in cases of disagreement, which cost so fixed shall be refunded to the national treasurer by the returning Cherokees within three years from the ratification hereof.[FNE][FNF]

ARTICLE 4

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River, and bounded on the southeast by Grand River and west by the Creek reservation to the northeast corner thereof; from thence west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-described in this article: Provided, That that part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article. [FNG][FNH]

ARTICLE 5

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; Provided, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty; Provided also, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void. [FNI][FNJ][FNK]

ARTICLE 6

The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds as between the people of this and of every other district in said nation. [FNL][FNM]

ARTICLE 7

The United States court to be created in the Indian Territory; and until such court is created therein, the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, and all process issued in said district by any officer of the Cherokee Nation, to be executed on an inhabitant residing outside of said district, and all process issued by any officer of the Cherokee Nation outside of said district, to be executed on an inhabitant residing in said district, shall be to all intents and purposes null and void, unless indorsed by the district judge for the district where such process is to be served, and said person, so arrested, shall be held in custody by the officer so arresting him, until he shall be delivered over to the United States marshal, or consent to be tried by the Cherokee court: Provided, That any or all the provisions of this treaty, which make any distinction in rights and remedies between the citizens of any district and the citizens of the rest of the nation, shall be

abrogated whenever the President shall have ascertained, by an election duly ordered by him, that a majority of the voters of such district desire them to be abrogated, and he shall have declared such abrogation: And provided further, That no law or regulation, to be hereafter enacted within said Cherokee Nation or any district thereof, prescribing a penalty for its violation, shall take effect or be enforced until after ninety days from the date of its promulgation, either by publication in one or more newspapers of general circulation in said Cherokee Nation, or by posting up copies thereof in the Cherokee and English languages in each district where the same is to take effect, at the usual place of holding district courts. [FNN][FNO][FNP][FNQ]

ARTICLE 8

No license to trade in goods, wares, or merchandise merchandise shall be granted by the United States to trade in the Cherokee Nation, unless approved by the Cherokee national council, except in the Canadian district, and such other district north of Arkansas River and west of Grand River occupied by the so-called southern Cherokees, as provided in Article 4 of this treaty. [FNR]

ARTICLE 9

The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated. [FNS][FNT][FNU]

ARTICLE 10

Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory. [FNV]

ARTICLE 11

The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through, the Cherokee Nation. Said company or corporation, and their employees and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation.[FNW]

ARTICLE 12

The Cherokees agree that a general council, consisting of delegates elected by each nation or tribe lawfully residing within the Indian Territory, may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as hereinafter prescribed. [FNX]

First. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said Territory shall be taken under the direction of the Commissioner of Indian Affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States. [FNY]

Second. The first general council shall consist of one member from each tribe, and an additional member for each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said Territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council; and if none should be thus formally selected by any nation or tribe so assenting, the said nation or tribe shall be represented in said general council by the chief or chiefs and headmen of said tribes, to be taken in the order of their rank as recognized in tribal usage, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the superintendent of Indian affairs shall publish and declare to each tribe assenting to the establishment of such council the number of members of such council to which they shall be entitled under the provisions of this article, and the persons entitled to represent said tribes shall meet at such time and place as he shall approve; but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days: And provided, That special sessions of said council may be called by the Secretary of the Interior whenever in his judgment the interest of said tribes shall require such special session.[FNZ][FNAA][FNBB][FNCC]

Third. Said general council shall have power to legislate upon matters pertaining to the intercourse and relations of the Indian tribes and nations and colonies of freedmen resident in said Territory; the arrest and extradition of criminals and offenders escaping from one tribe to another, or into any community of freedmen; the administration of[FNDD] justice between members of different tribes of said Territory and persons other than Indians and members of said tribes or nations; and the common defence and safety of the nations of said Territory.

All laws enacted by such council shall take effect at such time as may therein be provided, unless suspended by direction of the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States. Nor shall said council legislate upon matters other than those above indicated: Provided, however, That the legislative power of such general council may be enlarged by the consent of the national council of each nation or tribe assenting to its establishment, with the approval of the President of the United States. [FNEE][FNFF]

Fourth. Said council shall be presided over by such person as may be designated by the Secretary of the Interior. [FNGG]

Fifth. The council shall elect a secretary, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the presiding officer of such council, to the Secretary of the Interior, and to each tribe or nation represented in said council, immediately after the sessions of said council shall terminate. He shall be paid out of the Treasury of the United States an annual salary of five hundred dollars. [FNHH][FNII]

Sixth. The members of said council shall be paid by the United States the sum of four dollars per diem during the term actually in attendance on the sessions of said council, and at the rate of four dollars for every twenty miles necessarily traveled by them in going from and returning to their homes, respectively, from said council, to be certified by the secretary and president of the said council. [FNJJ]

ARTICLE 13

The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty. [FNKK]

ARTICLE 14

The right to the use and occupancy of a quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions in one body, and to include their improvements, and not including the improvements of any member of the Cherokee Nation, is hereby granted to every society or denomination which has erected, or which with the consent of the national council may hereafter erect, buildings within the Cherokee country for missionary or educational purposes. But no land thus granted, nor buildings which have been or may be erected thereon, shall ever be sold or (o)therwise disposed of except with the consent and approval of the Cherokee national council and the Secretary of the Interior. And whenever any such lands or buildings shall be sold or disposed of, the proceeds thereof shall be applied by said society or societies for like purposes within said nation, subject to the approval of the Secretary of the Interior. [FNLL][FNMM][FNNN]

ARTICLE 15

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 degrees, 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, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national[FNOO] fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.[FNPP] [FNQQ]

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. 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 degrees 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 the tribal organizations shall be permitted to settle, as herein provided, east of the 96 degrees 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 degrees of longitude. [FNRR][FNSS]

ARTICLE 16

The United States may settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be

settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty as the United States may decide. [FNTT] [FNUU]

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 degrees of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied. [FNVV]

ARTICLE 17

The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land-Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, and, in case of disagreement,[FNWW][FNXX] by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

And the Secretary of the Interior shall, from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: Provided, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: Provided, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre. [FNYY][FNZZ][FNAAA]

ARTICLE 18

That any lands owned by the Cherokees in the State of Arkansas and in States east of the Mississippi may be sold by the Cherokee Nation in such manner as their national council may prescribe, all such sales being first approved by the Secretary of the Interior.[FNBBB]

ARTICLE 19

All Cherokees being heads of families residing at the date of the ratification of this treaty on any of the lands herein ceded, or authorized to be sold, and desiring to remove to the reserved country, shall be paid by the purchasers of said lands the value of such improvements, to be ascertained and appraised by the commissioners who appraise the lands, subject to the approval of the Secretary of the Interior; and if he shall elect to remain on the land now occupied by him,

shall be entitled to receive a patent from the United States in fee-simple for three hundred and twenty acres of land to include his improvements, and thereupon he and his family shall cease to be members of the nation. [FNCCC]

And the Secretary of the Interior shall also be authorized to pay the reasonable costs and expenses of the delegates of the southern Cherokees.

The moneys to be paid under this article shall be paid out of the proceeds of the sales of the national lands in Kansas.

ARTICLE 20

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States. [FNDDD]

ARTICLE 21

It being difficult to learn the precise boundary line between the Cherokee country and the States of Arkansas, Missouri, and Kansas, it is agreed that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council. [FNEEE]

ARTICLE 22

The Cherokee national council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the Government of the United States at such time as they may see proper, and to continue or discharge[FNFFF] such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge.

ARTICLE 23

All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States, as hereinbefore provided for, shall be invested in the United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common-schools of the nation and educational purposes; fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the nation, on the order of the national council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee Nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars. [FNGGG][FNHHH]

ARTICLE 24

As a slight testimony for the useful and arduous services of the Rev. Evan Jones, for forty years a missionary in the Cherokee Nation, now a cripple, old and poor, it is agreed that the sum of three thousand dollars be paid to him, under the direction of the Secretary of the Interior, out of any Cherokee fund in or to come into his hands not otherwise appropriated. [FNIII]

ARTICLE 25

A large number of the Cherokees who served in the Army of the United States having died, leaving no heirs entitled to receive bounties and arrears of pay on account of such service, it is agreed that all bounties and arrears for service in the regiments of Indian United States volunteers which shall remain unclaimed by any person legally entitled to receive the same for two years from the ratification of this treaty, shall be paid as the national council may direct, to be applied to the foundation and support of an asylum for the education of orphan children, which asylum shall be under the control of the national council, or of such benevolent society as said council may designate, subject to the approval of the Secretary of the Interior. [FNJJJ]

ARTICLE 26

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. [FNKKK]

ARTICLE 27

The United States shall have the right to establish one or more military posts or stations in the Cherokee Nation, as may be deemed necessary for the proper protection of the citizens of the United States lawfully residing therein and the Cherokee and other citizens of the Indian country. But no sutler or other person connected therewith, either in or out of the military organization, shall be permitted to introduce any spirit(u)ous, vinous, or malt liquors into the Cherokee Nation, except the medical department proper, and by them only for strictly medical purposes. And all persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation, or remaining in the same, except as herein otherwise provided; and[FNLLL][FNMMM][FNNNN] it is the duty of the United States Indian agent for the Cherokees to have such persons, not lawfully residing or sojourning therein, removed from the nation, as they now are, or hereafter may be, required by the Indian intercourse laws of the United States.

ARTICLE 28

The United States hereby agree to pay for provisions and clothing furnished the army under Appotholehala in the winter of 1861 and 1862, not to exceed the sum of ten thousand dollars, the accounts to be ascertained and settled by the Secretary of the Interior. [FNOOO]

ARTICLE 29

The sum of ten thousand dollars or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the Government to visit Washington for the purposes of making this treaty, shall be paid by the United States on the ratification of this treaty. [FNPPP]

ARTICLE 30

The United States agree to pay to the proper claimants all losses of property by missionaries or missionary societies, resulting from their being ordered or driven from the country by united States agents, and from their property being taken and occupied or destroyed by by United States troops, not exceeding in the aggregate twenty thousand dollars, to be ascertained by the Secretary of the Interior. [FNQQQ]

ARTICLE 31

All provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby re-affirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties, except as herein expressly provided.[FNRRR]

In testimony whereof, the said commissioners on the part of the United States, and the said delegation on the part of the Cherokee Nation, have hereunto set their hands and seals at the city of Washington, this ninth (nineteenth) day of July, A.D. one thousand eight hundred and sixty-six. [FNSSS]

D. N. Cooley, Commissioner of Indian Affairs.

Elijah Sells, Superintendent of Indian Affairs.

Smith Christie,

White Catcher,

James McDaniel,

S. H. Benge,

Danl. H. Ross,

J. B. Jones.

Delegates of the Cherokee Nation, appointed by Resolution of the National Council.

In presence of - -

W. H. Watson,

J. W. Wright.

Signatures witnessed by the following-named persons, the following interlineations being made before signing: On page 1st the word “the” underlined, on page 11 the word “the” struck out, and to said page 11 sheet attached requiring publication of laws; and on page 34th the word “ceded” struck out and the words “neutral lands” inserted. Page 47/1/2 added relating to expenses of treaty.

Thomas Ewing, jr.

Wm. A. Phillips,

J. W. Wright.

Footnotes

A Ratified July 27, 1866.
FNB Proclaimed Aug. 11, 1866.
FNC Pretended treaty declared void.
FND Amnesty.
FNE Confiscation laws repealed and former owners restored to their rights.
FNF Improvements.
FNG Cherokees, freed persons, and free negroes may elect to reside where.
FNH Proviso.
FNI Those so electing to reside there may elect local officers, judges, etc.
FNJ Proviso.
FNK Proviso.
FNL Representation in national council.
FNM Unequal laws.
FNN Courts.
FNO Process.
FNP Proviso.
FNQ Proviso.
FNR Licenses to trade not to be granted unless, etc.
FNS Slavery, etc., not to exist.
FNT Freedmen.
FNU No pay for emancipated slaves.
FNV Farm products may be sold, etc.
FNW Right of way of railroads.
FNX General council.
FNY Census.
FNZ First general council; how composed.
FNAA Time and place of first meeting.
FNBB Session not to exceed thirty days.
FNCC Special sessions.
FNDD Powers of general council.
FNEE Laws, when to take effect.
FNFF Legislative power may be enlarged.
FNGG President of council.
FNHH Secretary of council.
FNII Pay.
FNJJ Pay of members of council.
FNKK Courts.
FNLL Lands for missionary or educational purposes.
FNMM Not to be sold except for.
FNNN Proceeds of sale.
FNOO The United States may settle civilized Indians in the Cherokee country.
FNPP How may be made part of Cherokee Nation.
FNQQ Those wishing to preserve tribal organization to have land set off to them.
FNRR To pay sum into national fund.
FNSS Limits of places of settlement
FNTT Where the United States may settle friendly Indians.
FNUU Lands.
FNVV Cession of lands to the United States in trust.
FNWW Cession of lands to the United States in trust.
FNXX Lands to be surveyed and Appraised.
FNYY May be sold to highest bidder.
FNZZ Improvements.
FNAAA Proviso.

FNBBB Sales by Cherokee of lands in Arkansas.
FNCCC Heads of families.
FNDDD Lands preserved to be surveyed and allotted.
FNEEE Boundary line to be run and marked.
FNFFF Agent of Cherokees to examine accounts, books, etc.
FNGGG Funds, how to be invested.
FNHHH Interest, how to be paid.
FNIII Payment to Rev. Evan Jones.
FNJJJ Bounties and arrears for services as Indian volunteers; how to be paid.
FNKKK Possession and protection guaranteed.
FNLLL Military posts in Cherokee Nation.
FNMMM Spirituous, etc., liquors forbidden except, ect.
FNNNN Certain persons prohibited from coming into the nation.
FNOOO Payment for certain provisions and clothing.
FNPPP Expenses of Cherokee delegations.
FNQQQ Payment of certain losses by missionaries, etc.
FNRRR Inconsistent treaty provisions annulled.
FNSSS Execution.

End of Document

Public Law 102-154
102d Congress

An Act

Nov. 13, 1991
[H.R. 2686]

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1992, and for other purposes.

Department of the Interior and Related Agencies Appropriations Act, 1992.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1992, and for other purposes, namely:

TITLE I—DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau of Land Management, $538,940,000 of which the following amounts shall remain available until expended: not to exceed $1,400,000 to be derived from the special receipt account established by section 4 of the Land and Water Conservation Fund Act of 1965, as amended (16 U.S.C. 460l-6a(i)), and $23,500,000 for the Automated Land and Mineral Record System Project: *Provided,* That appropriations herein made shall not be available for the destruction of healthy, unadopted, wild horses and burros in the care of the Bureau of Land Management or its contractors.

Notwithstanding any other provision of law, none of the funds in this or any other Act shall be available before October 1, 1992, to accept or process applications for patent for any oil shale mining claim located pursuant to the general mining laws or to issue a patent for any such oil shale mining claim, unless the holder of a valid oil shale mining claim has received first half final certificate for patent by date of enactment of this Act.

FIREFIGHTING

For necessary expenses for fire management, emergency rehabilitation, firefighting, fire presuppression, and other related emergency actions by the Department of the Interior, $122,010,000, to remain available until expended: *Provided,* That such funds also are to be available for repayment of advances to other appropriation accounts from which funds were previously transferred for such purposes.

ABANDONED MINE RECLAMATION FUND

For necessary expenses to carry out the provisions of title IV of the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, as amended, including the purchase of not more than 22 passenger motor vehicles, of which 16 shall be for replacement only, $190,200,000 to be derived from receipts of the Abandoned Mine Reclamation Fund and to remain available until expended: *Provided,* That of the funds herein provided up to $22,000,000 may be used for the emergency program authorized by section 410 of Public Law 95-87, as amended, of which no more than 20 per centum shall be used for emergency reclamation projects in any one State and funds for Federally-administered emergency reclamation projects under this proviso shall not exceed $15,000,000: *Provided further,* That 23 full-time equivalent positions are to be maintained in the Anthracite Reclamation Program at the Wilkes-Barre Field Office: *Provided further,* That pursuant to Public Law 97-365, the Department of the Interior is authorized to utilize up to 20 per centum from the recovery of the delinquent debt owed to the United States Government to pay for contracts to collect these debts: *Provided further,* That of the funds made available to the States to contract for reclamation projects authorized in section 406(a) of Public Law 95-87, administrative expenses may not exceed 15 per centum: *Provided further,* That the Secretary of the Interior may deny 50 per centum of an Abandoned Mine Reclamation Fund grant, available to a State pursuant to title IV of Public Law 95-87, in accordance with the procedures set forth in section 521(b) of the Act, when the Secretary determines that a State is systematically failing to administer adequately the enforcement provisions of the approved State regulatory program. Funds will be denied until such time as the State and Office of Surface Mining Reclamation and Enforcement have agreed upon an explicit plan of action for correcting the enforcement deficiency. A State may enter into such agreement without admission of culpability. If a State enters into such agreement, the Secretary shall take no action pursuant to section 521(b) of the Act as long as the State is complying with the terms of the agreement.

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs, including payment of irrigation assessments and charges; acquisition of water rights; advances for Indian industrial and business enterprises; operation of Indian arts and crafts shops and museums; development of Indian arts and crafts, as authorized by law; for the general administration of the Bureau of Indian Affairs, including such expenses in field offices, $1,236,078,000, including $248,152,000 for school operations costs of Bureau-funded schools

and other education programs which shall become available for obligation on July 1, 1992, and shall remain available for obligation until June 30, 1993, and of which, funds obligated as grants to schools pursuant to Public Law 100-297 shall be made on July 1 and December 1 in lieu of the payments authorized to be made on October 1 and January 1 of each calendar year, and of which not to exceed $75,912,000 for higher education scholarships, adult vocational training, and assistance to public schools under the Act of April 16, 1934 (48 Stat. 596), as amended (25 U.S.C. 452 et seq.), shall remain available for obligation until September 30, 1993; and the funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1992 as authorized by the Indian Self-Determination Act of 1975 (88 Stat. 2203; 25 U.S.C. 450 et seq.), or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee; and of which $2,021,000 for litigation support shall remain available until expended, $5,000,000 for self-governance tribal compacts shall be made available on completion and submission of such compacts to the Congress, and shall remain available until expended; and of which $1,139,000 for expenses necessary to carry out the provisions of section 19(a) of Public Law 93-531 (25 U.S.C. 640d-18(a)), shall remain available until expended: *Provided,* That none of the funds appropriated to the Bureau of Indian Affairs shall be expended as matching funds for programs funded under section 103(b)(2) of the Carl D. Perkins Vocational Education Act: *Provided further,* That $200,000 of the funds made available in this Act shall be available for cyclical maintenance of tribally owned fish hatcheries and related facilities: *Provided further,* That none of the funds in this Act shall be used by the Bureau of Indian Affairs to transfer funds under a contract with any third party for the management of tribal or individual Indian trust funds until the funds held in trust for all such tribes or individuals have been audited and reconciled to the earliest possible date, the results of such reconciliation have been certified by an independent party as the most complete reconciliation of such funds possible, and the affected tribe or individual has been provided with an accounting of such funds: *Provided further,* That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds from which the beneficiary can determine whether there has been a loss: *Provided further,* That $300,000 of the amounts provided for education program management shall be available for a grant to the Close Up Foundation: *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: *Provided further,* That the Task Force on Bureau of Indian Affairs Reorganization shall continue activities under its charter as adopted and amended on April 17, 1991: *Provided further,* That any reorganization proposal shall not be implemented until the Task Force has reviewed it and recommended its implementation to the Secretary and such proposal has been submitted to and

Claims.

Government organization.

approved by the Committees on Appropriations, except that the Bureau may submit a reorganization proposal related only to management improvements, along with Task Force comments or recommendations to the Committees on Appropriations for review and disposition by the Committees: *Provided further,* That to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than one year may be reprogrammed to one year availability but shall remain available within the Compact until expended: *Provided further,* That within available funds $100,000 is available to lease space in a facility to be constructed by the Nez Perce Tribe in Lapwai, Idaho: *Provided further,* That the Bureau of Indian Affairs will incorporate General Services Administration Market Survey findings into the final lease agreement: *Provided further,* That notwithstanding any other provision of law, $150,000 shall be provided to the Blackfeet Tribe for a model trust department pilot program.

CONSTRUCTION

(INCLUDING RESCISSION)

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities, including architectural and engineering services by contract; acquisition of lands and interests in lands; preparation of lands for farming; maintenance of Indian reservation roads as defined in section 101 of title 23, United States Code; and construction, repair, and improvement of Indian housing, $213,163,000, to remain available until expended: *Provided,* That of the funds previously provided under this head for construction contract support, $7,000,000 is hereby rescinded: *Provided further,* That $1,000,000 of the funds made available in this Act shall be available for rehabilitation of tribally owned fish hatcheries and related facilities: *Provided further,* That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation: *Provided further,* That not to exceed 6 per centum of contract authority available to the Bureau of Indian Affairs from the Federal Highway Trust Fund may be used to cover the road program management costs of the Bureau of Indian Affairs: *Provided further,* That none of the funds available to the Bureau of Indian Affairs in this or any other Act shall be used to transfer, through agreement, memorandum of understanding, demonstration project or other method, the Safety of Dams program of the Bureau of Indian Affairs to the Bureau of Reclamation: *Provided further,* That nothing herein shall prevent the Bureau of Indian Affairs or tribes from using, on a case-by-case basis, the technical expertise of the Bureau of Reclamation: *Provided further,* That none of the funds provided for the Safety of Dams program are available for transfer pursuant to sections 101 and 102 of this Act.

MISCELLANEOUS PAYMENTS TO INDIANS

For miscellaneous payments to Indian tribes and individuals pursuant to Public Laws 98-500, 99-264, 100-580, 101-618, 101-602, 101-628, 101-486, and 100-585, including funds for necessary administrative expenses, $87,617,000, to remain available until expended: *Provided,* That income earned on funds appropriated by Public Law 101-121, October 23, 1989, 103 Stat. 701, 715 for the 25 USC 1773d note.

*Public Law 105–277
105th Congress

An Act

Making omnibus consolidated and emergency appropriations for the fiscal year ending September 30, 1999, and for other purposes.

Oct. 21, 1998
[H.R. 4328]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.

DIVISION A—OMNIBUS CONSOLIDATED APPROPRIATIONS

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1999, and for other purposes, namely:

SEC. 101. (a) For programs, projects or activities in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

AN ACT Making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 1999, and for other purposes.

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999.

TITLE I

AGRICULTURAL PROGRAMS

PRODUCTION, PROCESSING, AND MARKETING

OFFICE OF THE SECRETARY

(INCLUDING TRANSFERS OF FUNDS)

For necessary expenses of the Office of the Secretary of Agriculture, and not to exceed $75,000 for employment under 5 U.S.C. 3109, $2,836,000: *Provided*, That not to exceed $11,000 of this amount, along with any unobligated balances of representation funds in the Foreign Agricultural Service, shall be available for official reception and representation expenses, not otherwise provided for, as determined by the Secretary: *Provided further*, That none of the funds appropriated or otherwise made available by this Act may be used to pay the salaries and expenses of personnel of the Department of Agriculture to carry out section 793(c)(1)(C) of Public Law 104–127: *Provided further*, That none of the funds made available by this Act may be used to enforce section 793(d) of Public Law 104–127.

*Note: This is a typeset print of the original hand enrollment as signed by the President on October 21, 1998. The text is printed without corrections.

for the purpose of environmental restoration related to treatment or abatement of acid mine drainage from abandoned mines: *Provided further,* That such projects must be consistent with the purposes and priorities of the Surface Mining Control and Reclamation Act: *Provided further,* That the State of Maryland may set aside the greater of $1,000,000 or 10 percent of the total of the grants made available to the State under title IV of the Surface Mining Control and Reclamation Act of 1977, as amended (30 U.S.C. 1231 et seq.), if the amount set aside is deposited in an acid mine drainage abatement and treatment fund established under a State law, pursuant to which law the amount (together with all interest earned on the amount) is expended by the State to undertake acid mine drainage abatement and treatment projects, except that before any amounts greater than 10 percent of its title IV grants are deposited in an acid mine drainage abatement and treatment fund, the State of Maryland must first complete all Surface Mining Control and Reclamation Act priority one projects: *Provided further,*That hereafter, donations received to support projects under the Appalachian Clean Streams Initiative and under the Western Mine Lands Restoration Partnerships Initiative, pursuant to 30 U.S.C. 1231, shall be credited to this account and remain available until expended without further appropriation for projects sponsored under these initiatives, directly through agreements with other Federal agencies, or through grants to States, and funding to local governments, or tax exempt private entities.

30 USC 1231 note.

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For expenses necessary for the operation of Indian programs, as authorized by law, including the Snyder Act of November 2, 1921 (25 U.S.C. 13), the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450 et seq.), as amended, the Education Amendments of 1978 (25 U.S.C. 2001–2019), and the Tribally Controlled Schools Act of 1988 (25 U.S.C. 2501 et seq.), as amended, $1,584,124,000, to remain available until September 30, 2000 except as otherwise provided herein, of which not to exceed $94,010,000 shall be for welfare assistance payments and notwithstanding any other provision of law, including but not limited to the Indian Self-Determination Act of 1975, as amended, not to exceed $114,871,000 shall be available for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts, grants, compacts, or annual funding agreements entered into with the Bureau prior to or during fiscal year 1999, as authorized by such Act, except that tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, or compacts, or annual funding agreements and for unmet welfare assistance costs, and of which not to exceed $387,365,000 for school operations costs of Bureau-funded schools and other education programs shall become available on July 1, 1999, and shall remain available until September 30, 2000; and of which not to exceed $52,889,000 shall remain available until expended for housing improvement, road maintenance, attorney fees, litigation support, self-governance grants, the Indian Self-Determination Fund, land records improvement, the Navajo-Hopi Settlement Program: *Provided,* That notwithstanding any other provision of law, including but not limited to the Indian

Self-Determination Act of 1975, as amended, and 25 U.S.C. 2008, not to exceed $42,160,000 within and only from such amounts made available for school operations shall be available to tribes and tribal organizations for administrative cost grants associated with the operation of Bureau-funded schools: *Provided further*, That hereafter funds made available to tribes and tribal organizations through contracts, compact agreements, or grants, as authorized by the Indian Self-Determination Act of 1975 or grants authorized by the Indian Education Amendments of 1988 (25 U.S.C. 2001 and 2008A) shall remain available until expended by the contractor or grantee: *Provided further*, That hereafter, to provide funding uniformity within a Self-Governance Compact, any funds provided in this Act with availability for more than two years may be reprogrammed to two year availability but shall remain available within the Compact until expended: *Provided further*, That hereafter notwithstanding any other provision of law, Indian tribal governments may, by appropriate changes in eligibility criteria or by other means, change eligibility for general assistance or change the amount of general assistance payments for individuals within the service area of such tribe who are otherwise deemed eligible for general assistance payments so long as such changes are applied in a consistent manner to individuals similarly situated and, that any savings realized by such changes shall be available for use in meeting other priorities of the tribes and, that any net increase in costs to the Federal Government which result solely from tribally increased payment levels for general assistance shall be met exclusively from funds available to the tribe from within its tribal priority allocation: *Provided further*, That any forestry funds allocated to a tribe which remain unobligated as of September 30, 2000, may be transferred during fiscal year 2001 to an Indian forest land assistance account established for the benefit of such tribe within the tribe's trust fund account: *Provided further*, That any such unobligated balances not so transferred shall expire on September 30, 2001: *Provided further*, That hereafter tribes may use tribal priority allocations funds for the replacement and repair of school facilities in compliance with 25 U.S.C. 2005(a), so long as such replacement or repair is approved by the Secretary and completed with non-Federal tribal and/or tribal priority allocation funds: *Provided further,* That the sixth proviso under Operation of Indian Programs in Public Law 102–154, for the fiscal year ending September 30, 1992 (105 Stat. 1004), is hereby amended to read as follows: "*Provided further,* 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:".

25 USC 450j note.

25 USC 13d–3.

25 USC 2005 note.

CONSTRUCTION

For construction, repair, improvement, and maintenance of irrigation and power systems, buildings, utilities, and other facilities, including architectural and engineering services by contract; acquisition of lands, and interests in lands; and preparation of lands for farming, and for construction of the Navajo Indian Irrigation Project pursuant to Public Law 87–483, $123,421,000, to remain available until expended: *Provided*, That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation: *Provided*

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5108
Formerly cited as 25 USCA § 465

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Pub.L. 100-581, Title II, § 214, Nov. 1, 1988, 102 Stat. 2941.)

Notes of Decisions (166)

25 U.S.C.A. § 5108, 25 USCA § 5108
Current through P.L. 115-82

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5123
Formerly cited as 25 USCA § 476

§ 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

Currentness

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

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

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

CREDIT(S)

(June 18, 1934, c. 576, § 16, 48 Stat. 987; Pub.L. 100-581, Title I, § 101, Nov. 1, 1988, 102 Stat. 2938; Pub.L. 103-263, § 5(b), May 31, 1994, 108 Stat. 709; Pub.L. 106-179, § 3, Mar. 14, 2000, 114 Stat. 47; Pub.L. 108-204, Title I, § 103, Mar. 2, 2004, 118 Stat. 543.)

Notes of Decisions (162)

25 U.S.C.A. § 5123, 25 USCA § 5123
Current through P.L. 115-82

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5129
Formerly cited as 25 USCA § 479

§ 5129. Definitions

Currentness

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

CREDIT(S)

(June 18, 1934, c. 576, § 19, 48 Stat. 988.)

Notes of Decisions (36)

25 U.S.C.A. § 5129, 25 USCA § 5129
Current through P.L. 115-82

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45A. Oklahoma Indian Welfare (Refs & Annos)

25 U.S.C.A. § 5203
Formerly cited as 25 USCA § 503

§ 5203. Organization of tribes or bands; constitution; charter; right to participate in revolving credit fund

Currentness

Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

CREDIT(S)

(June 26, 1936, c. 831, § 3, 49 Stat. 1967.)

Notes of Decisions (9)

25 U.S.C.A. § 5203, 25 USCA § 5203
Current through P.L. 115-82

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45A. Oklahoma Indian Welfare (Refs & Annos)

25 U.S.C.A. § 5204
Formerly cited as 25 USCA § 504

§ 5204. Cooperative associations; charter; purposes; voting rights

Currentness

Any ten or more Indians, as determined by the official tribal rolls, or Indian descendants of such enrolled members, or Indians as defined in the Act of June 18, 1934 (48 Stat. 984), who reside within the State of Oklahoma in convenient proximity to each other may receive from the Secretary of the Interior a charter as a local cooperative association for any one or more of the following purposes: Credit administration, production, marketing, consumers' protection, or land management. The provisions of this chapter, the regulations of the Secretary of the Interior, and the charters of the cooperative associations issued pursuant thereto shall govern such cooperative associations: *Provided*, That in those matters not covered by this chapter, regulations, or charters, the laws of the State of Oklahoma, if applicable, shall govern. In any stock or nonstock cooperative association no one member shall have more than one vote, and membership therein shall be open to all Indians residing within the prescribed district.

CREDIT(S)

(June 26, 1936, c. 831, § 4, 49 Stat. 1967.)

25 U.S.C.A. § 5204, 25 USCA § 5204
Current through P.L. 115-82

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

25 C.F.R. § 151.8

§ 151.8 Tribal consent for nonmember acquisitions.

Currentness

An individual Indian or 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; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

Notes of Decisions (145)

Current through November 22, 2017; 82 FR 55526, with the exception of Title 30.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

25 C.F.R. § 151.10

§ 151.10 On-reservation acquisitions.

Currentness

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30–day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

Credits

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

Notes of Decisions (159)

Current through November 22, 2017; 82 FR 55526, with the exception of Title 30.

End of Document

DISTRICT COURT FINDINGS AND CONCLUSIONS

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

THE CHEROKEE NATION, Plaintiff, v. S.M.R. JEWELL, in her official capacity as Secretary of the Interior, U.S. Department of the Interior, KEVIN WASHBURN, in his official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, and ROBERT IMPSON, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs, Defendants, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION, Intervenor/Defendants.	Case No. CIV-14-428-RAW

ORDER[1]

On May 24, 2011, the Bureau of Indian Affairs ("BIA"), Eastern Oklahoma Region ("Region") for the United States Department of the Interior ("DOI") issued a Decision ("2011 Decision") approving an amended application of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") to take a 76 acre tract located in Cherokee County ("Subject

[1] For clarity and consistency herein, when the court cites to CM/ECF, it uses the pagination assigned by CM/ECF.

Tract") into trust for the use and benefit of the UKB Corporation. The UKB owns the Subject Tract in fee. The Subject Tract is also located within the former reservation of the Cherokee Nation.

The Cherokee Nation filed this action challenging the 2011 Decision, pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") and 25 U.S.C. § 465.[2] The Cherokee Nation argues that the 2011 Decision is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law because, *inter alia*, there is no statutory or regulatory authority to take land into trust for the UKB Corporation, the Cherokee Nation's consent is required to take the Subject Tract into trust, the 2011 Decision violates its treaties, and the 2011 Decision ignores precedent, the jurisdictional conflicts between the Cherokee Nation and the UKB, and the administrative burdens that would be created by the trust acquisition.

The Cherokee Nation urges this court to set aside the 2011 Decision and to enjoin the Secretary of the Interior ("Secretary") from accepting the Subject Tract into trust. Now before the court are the Administrative Record and the merits briefs submitted by the Cherokee Nation [Docket No. 67 and 78], by S.M.R. Jewell, Kevin Washburn, and Robert Impson ("Federal Defendants") [Docket No. 79-1], and by the UKB [Docket No. 77]. For the reasons set forth below, the court finds in favor of the Cherokee Nation, remands this action to the Region, and enjoins the Secretary from taking the Subject Land into trust for the UKB or the UKB Corporation without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts between the Cherokee Nation and the UKB and the resulting administrative burdens the acquisition would place on the Region.

[2] This section has been transferred to 25 U.S.C. § 5108. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "465" in the text.

History of the UKB Application

Following is the history of the UKB fee-to-trust application provided in the 2011 Decision. The UKB initially submitted its application to acquire the Subject Tract[3] into trust on June 9, 2004. On April 7, 2006, the Region issued a decision declining to take the Subject Tract into trust ("2006 Decision"). The UKB appealed the 2006 Decision. On May 2, 2008, the Region requested a remand for reconsideration in response to a directive issued by the Assistant Secretary – Indian Affairs ("Assistant Secretary") on April 5, 2008 ("2008 Directive"). On June 4, 2008, the Interior Board of Indian Appeals ("IBIA") vacated the 2006 Decision and remanded the case to the Region for reconsideration.

On August 6, 2008, the Region again denied the UKB's application ("2008 Decision"). The UKB appealed the 2008 Decision to the IBIA. On September 4, 2008, the Acting Assistant Secretary informed the IBIA that he was taking jurisdiction of the appeal.[4] The Assistant Secretary then issued decisions dated June 24, 2009 ("2009 Decision"), July 30, 2009, and September 10, 2010 ("2010 Decision"), which vacated the 2008 Decision and remanded the application to the Region.

The Assistant Secretary concluded in his 2010 Decision that the UKB should be allowed to amend its application to invoke alternative authority for the acquisition of the land into trust. The UKB amended its application on October 5, 2010, requesting that the Subject Tract be taken into trust for the UKB Corporation rather than the UKB and pursuant to Section 3 of the

[3] More specifically defined, the subject tract is "76 acres located in Section 8, Township 16 North, Range 22 East, in Cherokee County, Oklahoma." 2011 Decision, Docket No. 67-5, at 45.

[4] The Region also noted that the authority to acquire property in trust is vested in the Secretary and delegated to the Region. 2011 Decision, Docket No. 67-5, at 46.

Oklahoma Indian Welfare Act of June 26, 1936 ("OIWA"), 25 U.S.C. § 503,[5] rather than pursuant to Section 5 of the Indian Reorganization Act of June 18, 1934 ("IRA"), 25 U.S.C. § 465. The Assistant Secretary sent a letter dated January 21, 2011 to the UKB further clarifying matters pertaining to the application ("2011 Letter").

The DOI does not presently hold and has not ever held any land in trust for the UKB or the UKB Corporation.

2011 Decision Findings[6]

In accordance with the Assistant Secretary's June 24, 2009, July 30, 2009 and September 10, 2010 Decisions, his June 21, 2011 Letter to the UKB, and the Region's review and evaluation of the UKB's amended application, the Region found that statutory authority for the acquisition of the Subject Tract in trust for the UKB Corporation exists in 25 C.F.R §§ 151.3(a)(2) and (3) and Section 3 of the OIWA, 25 U.S.C. § 503. 2011 Decision, Docket No. 67-5, at 53.

In the 2011 Decision, the Region made the following findings:

1. ***25 C.F.R. § 151.3 & OIWA***

The Region found that 25 C.F.R. § 151.3(a)[7] authorizes the Secretary to take land into trust for the UKB Corporation. 2011 Decision, Docket No. 67-5, at 46 and 53. Section

[5] This section has been transferred to 25 U.S.C. § 5203. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "503" in the text.

[6] Incorporated by reference in the 2011 Decision are the Assistant Secretary's April 5, 2008 Directive; his June 24, 2009, July 30, 2009 and September 10, 2010 Decisions; and his June 21, 2011 Letter to the UKB.

[7] Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

151.3(a)(2) applies because the UKB owns the Subject Tract in fee. Section 151.3(a)(3) applies because the Secretary found that the UKB has a need for the Subject Tract to be taken into trust so that the UKB may exercise jurisdiction over it, thus facilitating tribal self-determination. Id. at 46.

The Region further found that "Section 3 of the OIWA, 25 U.S.C. § 503[8], implicitly authorizes the Secretary to take land into trust for the UKB Corporation." Id. at 46 and 53. Pertinent to the Region's finding is the following language: "Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503).

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

[8] Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503) (emphasis in original).

2. 25 C.F.R. § 151.8 & 1999 Appropriations Act – Consent/Consultation

The Region determined that consultation with, rather than the consent of, the Cherokee Nation is required before the Secretary may take land into trust for the UKB Corporation. The Subject Tract is located within the former reservation[9] of the Cherokee Nation. Specifically, it "is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota . . . and the 1866 treaty between the Cherokee Nation and the United States . . . ." 2011 Decision, Docket No. 67-5, at 47. An Indian tribe[10] "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 . . . ." 25 C.F.R. § 151.8 (emphasis added).

The Region concluded, however, that Congress overrode the consent requirement of 25 C.F.R. § 151.8 with respect to lands within the boundaries of the former Cherokee reservation by including in the "Interior and Related Agencies Appropriations Act of 1999"[11] ("1999 Appropriations Act") the following language: "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." 1999

[9] A reservation is defined as "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f).

[10] "Tribe means any Indian tribe, band, nation, pueblo, community, Rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. *For purposes of* acquisitions made under the authority of 25 U.S.C. 188 and 489, or other *statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934*." 25 C.F.R. § 151.2(b) (emphasis added).

[11] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

Appropriations Act, 112 Stat. 2681-246 (emphasis added). The Region consulted with the Cherokee Nation.[12]

3. 25 C.F.R. § 151.9 – The Application

The Region found that the amended fee-to-trust application dated October 5, 2010 by the UKB requesting that the Subject Tract be placed in trust for the UKB Corporation satisfied the requirements of 25 C.F.R. § 151.9.[13]

4. 25 C.F.R. §§ 151.10 and 151.11 – Evaluating Criteria

Section 151.10 lists criteria the Secretary must consider when evaluating requests for acquisition of land in trust when the land is "on-reservation."[14] Section 151.11 lists the criteria to be considered for land that is "off-reservation."[15] The Assistant Secretary determined that he need not decide whether the Subject Tract is an on- or off-reservation acquisition, as the result is

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[12] Whether that consultation was sufficient is in dispute, but given the court's rulings herein, the court need not reach this question.

[13] "An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9.

[14] The Secretary considers the following criteria:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the individual Indian or the tribe for the additional land; (c) The purposes for which the land will be used; (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs; (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; and (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities from the acquisition of the land in trust status.

25 C.F.R. § 151.10. Subsection (h) requires the applicant to provide information that allows the Secretary to comply with environmental standards. Id.

[15] Section 151.11 states in part that the Secretary shall consider the "criteria listed in § 151.10 (a) through (c) and (e) through (h)." 25 C.F.R. § 151.11(a). After those considerations are addressed, the section addresses concerns regarding relations with state and local governments and anticipated economic benefits. 25 C.F.R. § 151.11(b)-(d).

the same under both analyses.[16] Following are the Region's findings as to each of the criteria listed in § 151.10:

(a) As noted above, the Region found statutory authority in Section 3 of the OIWA, 25 U.S.C. § 503.

(b) As noted above, the Region determined that the UKB, having no land in trust, has a need for this land to be taken into trust to facilitate tribal self-determination.

(c) The Region found that the UKB's stated uses for the Subject Tract – for the operation of programs that provide services to its tribal members – are permissible. The Subject Tract holds community program buildings and a dance ground. 2008 Directive, Docket No. 67-2, at 185. The UKB's application did not identify any expected changes in the intended use of the property.

(d) As the application is not for an individual, this section did not apply.

(e) The Region found that the impact on the state and local governments resulting from the removal of the Subject Tract from the tax rolls would be insignificant.

(f) As noted above, the Subject Tract is located within the treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota and the 1866 treaty between the Cherokee Nation and the United States. The BIA has consistently recognized this area as the 'former reservation' of the Cherokee Nation. 2011 Decision, Docket No. 67-5, at 50. The Region "twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition." 2011 Decision, Docket No. 67-5, at 51. The Region noted that it has been recognized in

[16] In his 2010 Decision, the Assistant Secretary also withdrew his former conclusion that the UKB is a successor in interest to the "historic Cherokee Nation."

federal courts that the Cherokee Nation is the only tribal entity with jurisdictional authority within its former reservation. The Region further noted that if the Subject Tract is placed into trust for the UKB, both the UKB and the Cherokee Nation would assert jurisdiction over the property. The Assistant Secretary, however, found that the Cherokee Nation does not have exclusive jurisdiction within its former reservation[17] and that the UKB would have exclusive jurisdiction over land taken into trust for it.[18] The Assistant Secretary further found that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." 2011 Decision, Docket No. 67-5, at 51-52. The Region remains concerned that jurisdictional conflicts will arise between the UKB and the Cherokee Nation if the Subject Tract is placed into trust for the UKB. Nevertheless, the Assistant Secretary's findings are binding on the Region.

(g) The Region found that the Cherokee Nation currently administers programs for the Subject Tract including, but not limited to, real estate services, tribal court services, and law enforcement services. The Region further found that if the Subject Tract is placed into trust for the UKB, the UKB would likely reject the authority of the Cherokee Nation and insist that the Region provide direct services. The Region previously determined and remains concerned that this trust acquisition would create a need for these programs and that the Region does not have funds in its budget to

[17] The Assistant Secretary noted that the conclusion that the Cherokee Nation does not have exclusive jurisdiction within its former reservation is consistent with the 1999 Appropriations Act's requirement of only the Cherokee Nation's consultation rather than consent before funds could be used to acquire land within its former reservation. 2009 Decision, Docket No. 67-3, at 89.

[18] The Assistant Secretary noted that even if the UKB and the Cherokee Nation had shared jurisdiction over the Subject Tract, they should be able to find a workable solution. 2009 Decision, Docket No. 67-3, at 89-90.

provide them. Nevertheless, the Assistant Secretary determined that the duties associated with this trust acquisition would not be significant. Again, the Assistant Secretary's determination is binding on the Region.

(h) The Region determined that there is no evidence to indicate that any change in land use is planned for the Subject Tract and no environmental assessment is necessary.

STANDARD OF REVIEW

When a final agency action[19] is challenged, the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions,[20] and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA further provides in pertinent part that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law; . . . ." 5 U.S.C. § 706(2).

An agency's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

[19] It is undisputed that the 2011 Decision is a final agency decision.

[20] When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

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." United Keetoowah Band of Cherokee Indians of Okla. v. United States Dept. of Housing and Urban Dev., 567 F.3d 1235, 1239 (10th Cir. 2009) (citation omitted). The standard of review is narrow, and the court may not substitute its judgment for that of the agency. Id. Nevertheless, the court must "engage in a substantial inquiry" and conduct a "thorough, probing, in-depth review." Id.

ANALYSIS

Statutory Authority

The Region found that statutory authority for the acquisition of the Subject Tract in trust for the UKB Corporation exists in 25 C.F.R §§ 151.3(a)(2) and (3) and Section 3 of the OIWA, 25 U.S.C. § 503. The Region is correct that sections 151.3(a)(2) and (3) are applicable, as the UKB owns the Subject Tract in fee and the Secretary has determined that acquisition of it in trust is necessary to facilitate tribal self-determination. Of course, as noted in section 151.3, the acquisition must be authorized by an act of Congress.

The Region found that Section 3 of the OIWA, 25 U.S.C. § 503 *implicitly* authorizes the acquisition. That section provides that the Secretary may issue a charter of incorporation to a recognized band of Indians in Oklahoma. Section 503 further provides that the corporation then has the right to "enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984)" – the IRA. 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503). The *explicit* authority, therefore, lies in the IRA.

Section 465[21] of the IRA authorizes the Secretary to take land into trust "for the purpose of providing lands for Indians." 25 U.S.C. § 5108 (West) (formerly cited as 25 U.S.C. § 465). As section 503 provides a corporation formed thereunder the same rights provided in the IRA, the Region is correct that statutory authority exists to take land into trust for the UKB Corporation. [22]

The next question, however, is whether section 503 provides a path to utilize one portion of the IRA without regard to its other provisions and definitions or whether the IRA must be taken as a whole. Section 503 does not extend to corporations formed thereunder the same rights and privileges provided in section 465; it provides them the same rights and privileges provided in the IRA. An Indian tribe or individual Indian under the IRA is subject to that statute as a whole. To allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides.

Moreover, this court "construes statutes 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" In re Mallo, 774 F.3d

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[21] The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108 (West) (formerly cited as 25 U.S.C. § 465).

[22] The Cherokee Nation argues that pursuant to 25 C.F.R. § 151.2(b), the Secretary may not take land into trust for a corporation chartered under OIWA unless the statutory authority *specifically* authorizes it. Without regard to "implicit" or "explicit" grants of authority, the court finds that section 503 *specifically* grants the rights that were granted in the IRA, including the right to have land taken into trust.

1313, 1317 (10th Cir. 2014) (citation omitted). The court reads "statutes as a whole, with no section interpreted 'in isolation from the context of the whole Act.'" United States v. Al Kassar, 660 F.3d 108, 124 (2d Cir. 2011) (citation omitted). See also Samantar v. Yousuf, 560 U.S. 305, 319 (2010).

Accordingly, the court must look to the IRA as a whole to determine whether the Secretary may take land into trust for the UKB Corporation pursuant to section 465. In 2009, the Supreme Court issued a decision interpreting a portion of the IRA. Carcieri v. Salazar, 555 U.S. 379 (2009). The parties disagree as to the import of that decision on the UKB's proposed acquisition.

The Impact of Carcieri

Section 479[23] of the IRA provides in pertinent part:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C.A. § 5129 (West) (formerly cited as 25 U.S.C. § 479) (emphasis added).[24] The OIWA does not contain a definition of the term "Indian." The Federal Defendants argue that the OIWA applies to "[a]ny recognized tribe or band of Indians residing in Oklahoma," and thus a definition of "Indian" was not necessary. The court disagrees. Moreover, as the OIWA points to the IRA,

[23] This section has been transferred to 25 U.S.C. § 5129. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "479" in the text.

[24] The regulations setting forth the authorities, policies, and procedures governing acquisitions of land in trust for individual Indians and tribes include a definition of the term that is similar to the one provided in the IRA. The regulations define an "Individual Indian" as: (1) Any person who is an enrolled member of a tribe; (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation; (3) Any other person possessing a total of one-half or more degree Indian blood of a tribe . . . ." 25 C.F.R. § 151.2(c).

the definition of the term "Indian" therein is applicable to any acquisition thereunder. Section 465 provides the right to have land taken into trust "for the purpose of providing land for Indians." Section 479 defines "Indians." "There is simply no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479." Carcieri, 555 U.S. at 393.

The Supreme Court in Carcieri held that "the term '*now* under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." Carcieri, 555 U.S. at 395 (emphasis added). This holding is very narrow, applying to only one of three of the definitions included in section 479.

While the Assistant Secretary mentions the Carcieri holding in his 2009 and 2010 Decisions and invites briefing from the Cherokee Nation and the UKB, he does not provide an opinion as to how it might affect the UKB's proposed acquisition. The Assistant Secretary suggests taking the Subject Tract into trust pursuant to Section 3 of the OIWA rather than pursuant to the IRA and appears to believe that this avenue circumvents the need to consider the Carcieri ruling. The Region, therefore, does not discuss Carcieri in the 2011 Decision. As the Carcieri ruling is so narrow, it may not prevent the Secretary from taking land into trust for the UKB or the UKB Corporation. Nevertheless, the court will not opine on the issue in the first instance. Upon remand, before taking any land into trust for the UKB or the UKB Corporation, the Region shall reach the question of how any acquisition for the UKB or the UKB Corporation is affected by Carcieri.

The Application

Citing the regulations, 25 C.F.R. § 151.1, *et seq.*, and the DOI Fee to Trust Handbook, the Cherokee Nation argues that the Assistant Secretary abused his discretion by processing an application filed by the UKB for the UKB Corporation. The Cherokee Nation argues that the DOI Handbook states that the Secretary shall base any decision to make a trust acquisition on the criteria set forth in the regulations. The regulations provide:

> An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

25 C.F.R. § 151.9. The court finds that the application by the UKB on behalf of the UKB Corporation satisfied the requirements.

Cherokee Nation Consent

The Region determined that Congress overrode the consent requirement in 25 C.F.R. 151.8 with the passage of the 1999 Appropriations Act. The Cherokee Nation argues that Congress did not override the consent requirement with the passage of the 1999 Appropriations Act. The court agrees with the Cherokee Nation.

The regulations at 25 C.F.R. § 151.1, *et seq*. govern the acquisition of land in trust for individual Indians and tribes. Section 151.8 provides that an individual Indian or 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." 25 C.F.R. § 151.8 (emphasis added). This section was revisited in 2001. Id. Congress did not

remove the consent requirement from trust acquisitions within the former reservation of the Cherokee Nation.

The 1999 Appropriations Act provides 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." 1999 Appropriations Act, 112 Stat. 2681-246 (emphasis added). The court understands the confusion. As the Federal Defendants and the UKB argue, words have meaning. The fact that Congress changed "consent" in the 1992 Appropriations Act to "consultation" in the 1999 Appropriations Act seems to support their argument.

The 1999 Appropriations Act, however, applies to funding. It does not override the land acquisitions regulations. It is well established that "repeals by implication are not favored." United States v. Will, 449 U.S. 200, 221 (1980) (citation omitted). If Congress intended to remove the consent requirement for trust acquisitions within the former reservation of the Cherokee Nation, it could have explicitly stated so within the regulations when it revisited those regulations.[25] The consent requirement for any acquisition of trust land on a reservation other than a tribe's own remains. The Cherokee Nation is correct that its consent is required before land may be taken into trust in its former reservation.[26]

[25] "It is a 'fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs.'" Shawnee Tribe v. United States, 423 F.3d 1204, 1213 (10th Cir. 2005) (citation omitted). Of course, "[s]uch determinations can frequently be flipped." Reames v. Oklahoma ex re. OK Health Care Auth., 411 F.3d 1164, 1172-73, n. 7 (10th Cir. 2005). In this case, the provisions are not conflicting. Section 151.8 applies to trust acquisitions, while the 1999 Appropriations Act applies only to funding.

[26] The Assistant Secretary noted that 25 U.S.C. § 476(g) (now § 5123(g)) "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction." 2009 Decision, Docket No. 67-3, at 88. Even if this conclusion is

Treaties, Precedent and Jurisdictional Conflicts

The court agrees with the Cherokee Nation's arguments that taking land into trust within the Cherokee Nation's former reservation without its consent violates its treaties, is contrary to precedent, and ignores the jurisdictional conflicts. The 1866 Treaty with the Cherokee Nation 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." 1866 Treaty with the Cherokee Nation, art. 26, July 19, 1866, 14 Stat. 799. The members of the UKB are also Cherokee; thus, this could be considered a "domestic feud or insurrection." The UKB is also an independent tribe; thus, this could be considered "hostility of another tribe," as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.

Even if the court erred in the previous section and Congress intended to override the consent requirement in 25 C.F.R. § 151.8, Congress did not override the United States treaties with the Cherokee Nation. To override a treaty, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 739-40 (1986). There is no evidence of such intent.

Additionally, the BIA has consistently recognized the Subject Tract as being within the 'former reservation' of the Cherokee Nation. 2011 Decision, Docket No. 67-5, at 50. The Cherokee Nation is the only Indian tribe with trust land within its former reservation. The BIA has never taken land into trust for the UKB or any Indian tribe other than the Cherokee Nation

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correct, it does not follow that land may be taken from one tribe's jurisdiction without its consent and placed into trust for another tribe.

within the former reservation of the Cherokee Nation. The Assistant Secretary dismissed this precedent spanning well over a century, however, citing his opinion that the 1999 Appropriations Act negated the Cherokee Nation's exclusive jurisdiction within its former reservation. "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." Utahns for Better Transp. v. U.S. Department of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002). The Assistant Secretary did not follow the BIA's precedent and did not provide an adequate rational explanation for his departure.

Furthermore, as the Cherokee Nation does not intend to relinquish exclusive jurisdiction and the UKB intends to assert exclusive jurisdiction over the Subject Tract if it is placed into trust, the Region has twice concluded and remains concerned "that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weigh[s] heavily against approval of the acquisition." 2011 Decision, Docket No. 67-5, at 51. The Region has also stated: "UKB's need to have *this* property taken into trust is outweighed by the potential for jurisdictional problems, conflicts of land use and the additional burdens that would be placed upon the Region were it to be taken into trust . . . ." 2008 Decision, Docket No. 67-3, at 10 (emphasis in original). There is no evidence of any change in the circumstances regarding the jurisdictional conflict. The Assistant Secretary, however, dismissed this concern, finding that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." 2011 Decision, Docket No. 67-5, at 51-52. The court finds this was arbitrary and capricious, as the Assistant Secretary entirely failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before him.

BIA Additional Responsibilities

The Region found that the Cherokee Nation currently administers programs for the Subject Tract including, but not limited to, real estate services, tribal court services, and law enforcement services. The Region further found that if the Subject Tract is placed into trust for the UKB or the UBK Corporation, the UKB would likely reject the authority of the Cherokee Nation and insist that the Region provide direct services. The Region previously determined and remains concerned that this trust acquisition would create a need for these programs and that the Region does not have funds in its budget to provide them. Nevertheless, the Assistant Secretary dismissed these concerns and found that the duties would not be significant. The court finds this was arbitrary and capricious, as the Assistant Secretary entirely failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before him.

CONCLUSION

The 2011 Decision was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. Accordingly, the court finds in favor of the Cherokee Nation and remands this action to the Region. Furthermore, in accordance with the court's findings herein, the Secretary is enjoined from taking the Subject Tract into trust without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts and the resulting administrative burdens the acquisition would place on the Region. Before taking *any* land into trust for the UKB or the UKB Corporation, the Region shall consider the effect of Carcieri on such acquisition.

IT IS SO ORDERED this 31st day of May, 2017.

Ronald A. White

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

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

THE CHEROKEE NATION, Plaintiff, v. S.M.R. JEWELL, in her official capacity as Secretary of the Interior, U.S. Department of the Interior, KEVIN WASHBURN, in his official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, and ROBERT IMPSON, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs, Defendants, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION, Intervenor/Defendants.	Case No. CIV-14-428-RAW

JUDGMENT

In accordance with the Order entered contemporaneously herewith and pursuant to Rule 58 of the Federal Rules of Civil Procedure, the court hereby enters this judgment in favor of the Cherokee Nation.

IT IS SO ORDERED this 31st day of May, 2017.

Ronald A. White

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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