UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 12-cv-493 GKF TLW**
	)	
	)	**Judge: Gregory K. Frizzell**
S.M.R. JEWELL, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, et al.,	)	
	)	
Defendant-Intervenors.	)	

FEDERAL DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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In compliance with the Court's Order of July 25, 2014 (*see* July 25, 2014, Transcript of Motion Hearing ("July 25 Hr'g Tr."), 180:22-23; 183:20-23 and Minute Sheet (ECF No. 146)), Federal Defendants respectfully submit the following proposed Findings of Fact and Conclusions of the Law based on the administrative record before the agency.[1]

PROPOSED FINDINGS OF FACT RELATED TO THE ASSISTANT SECRETARY'S 2012 DECISION TO ACCEPT LAND INTO TRUST FOR THE BENEFIT OF THE UKB CORPORATION

I. STATUTORY AND REGULATORY BACKGROUND

A. The Indian Reorganization Act of 1934.

1. In 1934, Congress passed the Indian Reorganization Act ("IRA"), Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.*). The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating the tribes' acquisition of additional acreage and repurchase of former tribal domains." Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, § 1.05 (2012 ed.).
2. The IRA "authorized the acquisition of lands for Indians, exempting these lands from taxation, promulgated conservation regulations, and declared the newly acquired lands to be Indian reservations or added to existing reservations." *Id.*
3. The IRA provided for tribal self-government pursuant to tribally adopted constitutions. 25 U.S.C. § 476. And it permitted Indian tribes to organize for economic purposes

[1] In reviewing the agency actions at issue, this Court is not to find facts or create a *de novo* record, but to review the decision made by the agency in light of the administrative record relied upon by the agency. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1564 (10th Cir. 1994). Federal Defendants submit that the facts outlined herein are those established by the administrative record.

pursuant to corporate charters, which could "convey to the incorporated tribe" the power to acquire or otherwise hold "property of every description." *Id.* § 477.

4. The "capstone" of the IRA is section 465, which authorized the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing lands for Indians." *Id.* § 465; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012) ("*Patchak*") (recognizing that "[l]and forms the basis of [tribal] economic life, providing the foundation for tourism, manufacturing, mining, logging . . . and gaming") (internal quotation marks and citations omitted).
5. The IRA, however, excluded named Oklahoma tribes, their members, and affiliates – including the Cherokee Nation – from various provisions, including the opportunity to organize and set up a corporation under section 477. 25 U.S.C. § 473.
6. The IRA's provisions apply to "Indians." The statute defines "Indian" to include, in part, "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479.
7. Until recently, the Department of the Interior ("Department" or "Interior") had long interpreted the definition of "Indian" to apply to Indians that are under federal jurisdiction at the time when a relevant provision of the IRA is invoked. In 2009, however, the Supreme Court interpreted the first definition of "Indian" in the IRA to be limited to members of tribes under Federal jurisdiction when the IRA was enacted in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 388-91 (2009). Thus, while prior to *Carcieri*, Interior generally invoked section 465 as authority for acquiring land in trust for any federally recognized tribe, after *Carcieri*, Interior invokes the first definition of "Indian" contained in section 479 after determining that a tribe was "under federal jurisdiction" in

1934. Alternatively, Interior may identify other authority for acquiring land in trust for the tribe.

B. The Oklahoma Indian Welfare Act of 1936.

8. In 1936, two years after the enactment of the IRA, Congress enacted the Oklahoma Indian Welfare Act ("OIWA"), ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (1982)), to extend more of the benefits of the IRA to the Oklahoma tribes.

9. Section 3 of the OIWA provides that "[a]ny 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 . . . . The Secretary of the Interior may issue to any such organized group a charter of incorporation . . . . 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) [IRA.]" 25 U.S.C. § 503.

10. Under the OIWA, tribes draft a constitution, by-laws, and charter, which set out how the tribe is organized and governed. These documents may be drafted simultaneously in order that the respective provisions may be adjusted to one another, and the organization of the tribe treated as one process.

C. The 1946 Keetoowah Recognition Act.

11. On August 10, 1946, Congress recognized "the Keetoowah Indians of the Cherokee Nation of Oklahoma . . . as a band of Indians residing in Oklahoma within the meaning of section 3" of the OIWA. Pub. L. No. 79-715, 60 Stat. 976 (1946) ("1946 Act"). The legislation was intended "to secure any benefits, which, under the Oklahoma Indian

Welfare Act, are available to other Indian bands or tribes." H. R. Rep. No. 79-447, at 2 (1945) (statement of Abe Fortas, Acting Secretary of the Interior).

D. The Indian Gaming Regulatory Act.

12. Gaming on Indian lands is governed by the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721. IGRA was enacted to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA governs gaming by federally recognized tribes on "Indian lands," which include "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B).

13. IGRA generally prohibits gaming activities on "lands acquired by the Secretary [of the Interior] in trust for the benefit of an Indian tribe after October 17, 1988." *Id.* § 2719(a). The Act makes several exceptions to this prohibition, including exceptions specifically for Oklahoma tribes.

14. The relevant exception at issue in this case permits gaming on lands taken into trust after October 17, 1988, if (1) "the Indian tribe has no reservation on October 17, 1988"; (2) "such lands are located in Oklahoma"; and (3) "are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary." *Id.* § 2719(a)(2)(A)(i).

15. Interior has promulgated regulations regarding several aspects of IGRA at 25 C.F.R. Part 292. These regulations define "former reservation" as used in IGRA to mean "lands in Oklahoma that are within the exterior boundaries of the last reservation that was

established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." 25 C.F.R. § 292.2.

II. FACTUAL BACKGROUND.

A. The United Keetoowah Band of Cherokee Indians in Oklahoma.

16. Members of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") are descendants of the Cherokee people who originally occupied the southeast United States. H.R. Rep. No. 447 at 1, AR00. The word "Keetoowah" was the name of the principal towns or seats of authority before the removal to Indian Territory. *Id.* at 2.

17. Since the 1800s, the Keetoowah Society of Oklahoma Cherokees existed as an organization of Cherokee Indians in Oklahoma. 2012 Decision at 2, AR000018. In 1859, the leading members of the Keetoowahs adopted a constitution and formed the Keetoowah Society, a group within the Cherokee Nation, whose objectives included opposition to slavery. The society's membership was initially limited to full-blood Cherokees. Its overall intent was to keep alive Cherokee institutions and tribal identity. H.R. Rep. No. 447 at 2.

18. Through a series of treaties with the United States spanning the period from approximately 1817 to 1906, the Cherokee Indians, including the Keetoowah members, were granted lands including what is now the state of Oklahoma and were relocated to those lands. *Id.* The Five Civilized Tribes, including the Cherokees, were given fee title to their land within the Indian Territory. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, § 4.07[1][a]-[c] (2012 ed.).

19. At the end of the 19th Century, Congress moved to break up the Indian reservations by allotting land to individual Indians. The Keetoowahs unsuccessfully opposed allotment

of the Cherokee lands, as well as efforts to dissolve the governments of the Five Civilized Tribes, including the Cherokee. In 1905, when the deadline for dissolution was drawing to a close, the Keetoowahs applied for and received a charter of incorporation through the United States district court. "The intention in . . . all courses followed by the Keetoowah group, was that of keeping alive Cherokee institutions and the tribal entity." H.R. Rep. 447 at 2. In 1906, Congress passed the Five Tribes Act, which addressed allotment and other matters comprehensively for the tribes. Cohen, § 4.07[1][a]. Also enacted that year was the Oklahoma Enabling Act, which provided for the admission of Indian Territory and Oklahoma Territory as the state of Oklahoma. *Id.* Oklahoma officially became a state in 1907. *Id.*

20. After passage of the IRA and then the OIWA, the Keetoowahs sought federal recognition in the 1930s in order to organize as a separate band under the OIWA. 2012 Decision at 2, AR000018. In an opinion dated July 29, 1937, the Solicitor found that the Keetoowahs were a society of full-bloods organized nearly a century before for the preservation of Indian culture and traditions. *Id.* He found that the Keetoowahs did not constitute a band of Cherokee Indians within the meaning of the OIWA and therefore, were not eligible to reorganize under it. *Id.*

21. Congress granted the Keetoowahs federal recognition by enacting the Keetoowah Recognition Act on August 10, 1946. 2012 Decision at 2, AR000018. The UKB then had almost 3,700 members, representing nearly half of the Cherokees with one-half or more Indian blood residing within the former Cherokee reservation. Attached to and made part of Senate Report No. 79-978, the Keetoowah Recognition Act, was a letter from the Secretary of the Interior dated March 24, 1945. *See* H.R. Rep. No. 79-447, at 1.

In the letter, the Secretary stated that the purpose of the bill was to recognize the Indians who belong to the Keetoowah Society as a separate band or organization of Cherokee Indians so that it may organize under section 3 of the OIWA. *Id.* The Keetoowah's efforts in the years between founding and recognition was to keep "alive Cherokee institutions." *Id.* at 2. The Secretary stated that the 1937 request to organize was denied because it "seemed impossible to make a positive finding that the Keetoowah Indians were and are a tribe or band within the meaning of the [OIWA]." *Id.* The Secretary, however, noted that there was a recorded membership of 3,687 members who resided in the territory known as the former Cherokee reservation. *Id.*

22. In 1950, Interior approved the UKB's constitution and corporate charter pursuant to the 1946 Act and the OIWA. 2012 Decision at 2, AR000018. The UKB Corporation is the corporate arm of the UKB.

B. The UKB Gaming Facility and IGRA.

23. In 1986, the UKB began operating a gaming facility on the Parcel that is the subject of this lawsuit. 2012 Decision at 2, AR000018. The land is located in Tahlequah, Oklahoma and is owned in fee by the UKB. *Id.* The UKB believed that the parcel on which the gaming facility is located was "Indian lands" because, *inter alia*, its corporate charter restricts the tribe from alienating its lands. *See, e.g.*, Notice of Reconsideration and Final Agency Action, *UKB v. Oklahoma*, No. 04-cv-340 (E.D. Okla. filed July 23, 2004), ECF No. 145-2 at 16 (docket references from this case hereinafter will be "E.D. ECF No.").

24. The National Indian Gaming Commission ("NIGC") – the federal agency that regulates Indian gaming – became involved with the UKB's gaming facility in 1991, but the legal

status of the Parcel, and hence the gaming facility, was not finally determined until 2011. Throughout the 1990s, the NIGC regulated the facility, requiring the UKB to make payments and reports pursuant to IGRA. July 18, 2011, NIGC Mem. at 6-8, AR005083-85. In 2000, the NIGC's general counsel sent a letter to the UKB finding that the lands on which the UKB was conducting gaming were not Indian lands over which the UKB had jurisdiction. *Id.* at 9, AR005086.

25. Under threat of enforcement from the State of Oklahoma, the UKB brought suit in the U.S. District Court for the Eastern District of Oklahoma. *See* E.D. ECF No. 14. The Eastern District rejected and remanded NIGC's 2000 determination in 2006; in 2011, the NIGC issued a final decision finding that the land on which the facility is located is not "Indian lands" because the restriction on alienation was imposed by the UKB, not the United States. E.D. ECF No. 145.

26. In August 2011, the UKB and the UKB Corporation submitted to Interior an application (amended from a prior 2006 application) to take the Parcel in trust on behalf of the UKB or on behalf of the UKB Corporation. UKB Trust Application 2.03 Acre Parcel dated Aug. 15, 2011, AR003048-3551.

27. While the Eastern District litigation was underway, the Eastern District granted the UKB an injunction allowing continued operation of the facility during the pendency of the action. E.D. ECF. No. 129. Following the NIGC's 2011 decision, however, the State threatened enforcement against the facility. Thus, in May 2012, the UKB entered into a settlement agreement with the State, agreeing that effective July 30, 2012, the UKB would cease gaming on the Parcel pending a favorable trust decision. E.D. ECF. Nos. 150, 151. Because Interior issued its decision on July 30, 2012, the UKB did not have to

close its facility at that time. However, the State required that the UKB cease gaming if the trust acquisition was not completed by July 30, 2013 (later extended to August 30, 2013). *Id.*

C. Interior's 2012 Land-Into-Trust Decision.

28. On July 30, 2012, Interior approved UKB's trust application to take land into trust for the benefit of the UKB Corporation ("2012 Decision"). AR000017-26.

29. Interior first determined that the Parcel would constitute "Indian lands" under IGRA. 2012 Decision at 4, AR000020. Interior concluded that, although the Parcel would be taken in trust after IGRA's effective date, it would fall within the statutory exception that applies where the Indian tribe has no reservation, the land is in Oklahoma, and the land is within the boundaries of the tribe's former reservation as defined by the Secretary. *Id.*

30. Interior determined that the term "former reservation" in IGRA and as defined by Interior's regulations is "ambiguous as applied to the facts at hand." *Id.* Specifically, Interior noted that "[t]here is no question that the UKB occupied the former Cherokee reservation nor that the Keetoowah Society of Oklahoma Cherokees was formed out of the Cherokee Nation of Oklahoma." *Id.* Interior found that neither the statute nor the regulation "address the question of whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other can share the same reservation for the purposes of qualifying for the 'former reservation' exception in 25 U.S.C. § 2719(a)(2)(A)(i)." *Id.* Interior recognized that the express statutory language makes clear "that the determination of whether the land is within the boundaries of a tribe's former reservation is a determination for the Secretary to make." *Id.* In sum, Interior concluded that, "[i]n view of the origins of the Band as composed of

Cherokee Indians, reorganized and separately recognized under express authorization from Congress, and a constitution approved by the Assistant Secretary of the Interior expressly establishing its tribal headquarters in Tahlequah, Oklahoma, within the historic reservation boundaries . . . the former reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i)." *Id.*

31. Interior additionally relied on analysis in a June 24, 2009, decision pertaining to a different, non-gaming parcel (referred to as the "76-acre Community Services Parcel") to support its conclusion that the two tribes could avail themselves of the same former reservation for IGRA purposes.

32. The June 24, 2009, decision, as clarified by a July 30, 2009, decision, found that any alleged jurisdictional conflicts between the UKB and the Cherokee Nation would not prevent Interior from taking land into trust for the UKB Corporation to be governed by the UKB on the former reservation. *Id.* at 8 (AR000024); *see* June 24, 2009, Decision, AR003631-43. Interior further relied on analysis contained in a September 10, 2010, decision reaffirming a decision that the 76-acre Community Services Parcel could be taken into trust on the former Cherokee Reservation for the UKB Corporation. *Id.* at 6 (AR000022).

33. The June 24, 2009, decision ("June 2009 Decision") reversed the Regional Director's August 8, 2008, decision denying the UKB's application to have the 76-acre Community Services Parcel taken in trust, and remanded the UKB's application to the Regional Director to apply the categorical exception checklist, directing that if the Regional Director found that the application satisfied the checklist, she should hold the application

pending resolution of the Assistant Secretary's determination of authority to take the land in trust under section 5 of the IRA. *Id.*, AR003634.

34. In discussing the analysis under 25 C.F.R. Part 151, Interior considered the jurisdictional problems and potential conflicts of land use that may arise and explained in detail its position. June 2009 Decision at 6-8, AR003636-38. Interior stated that the Regional Director's conclusion that there would be problematic conflicts of jurisdiction between the Cherokee Nation and the UKB was premised on the conclusion that the Cherokee Nation has exclusive jurisdiction over its former reservation, which conclusion was in turn premised on a narrow reading that the 1946 Act authorizing the Keetoowahs to organize as a band under the OIWA withheld from the tribe any territorial jurisdiction. Interior held that such a narrow reading was incorrect. *Id.*

35. Interior found that the 1946 Act was silent as to the authorities that the UKB would have. On its face, the 1946 Act imposes no limitations on the UKB's authority. It merely recognizes the UKB's sovereign authority, which extends "over both [its] members and [its] territory." June 2009 Decision at 6 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)), AR003636. Interior stated that there was no reason, on the face of the 1946 Act, that the UKB would have less authority than any other band or tribe. *Id.*

36. Interior then considered the following statutory directive found in section 476(f) of the IRA:

> Departments or agencies of the United States shall not . . . make 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. § 476(f). Interior explained its view that this section prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction. The UKB, like the Cherokee Nation, possesses the authority to exercise territorial jurisdiction over its tribal lands. *Id.*

37. Similarly, Interior explained and refuted prior departmental positions on the exclusivity of the Cherokee Nation within the former Cherokee treaty boundaries. June 2009 Decision at 6, AR003636. Interior noted that the Regional Director relied on letters from an Acting Assistant Secretary, the Office of Law Enforcement Services, and two Regional directors to state that "[t]he Secretary has consistently opined that the [CNO] exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee boundaries." *Id.* Interior found that the letter from the Acting Assistant Secretary was written in 1987, before Congress prohibited the Department from making distinctions as to the privileges and immunities of tribes. *Id.* Interior held that three letters from the Office of Law Enforcement Services and a Regional Director were not binding. *Id.* Moreover, Interior found their conclusions suspect because they did not discuss their analysis and basis, and failed to address section 476(f). *Id.*

38. Interior likewise held that previous federal court decisions, *United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla.) Order May 31, 1991, and Order & Judgment, *United Keetoowah Band v. Mankiller*, 2 F.3d 1161 (10th Cir. 1993) (No. 92-C-585 B), were not binding. *Id.* Interior noted that the decisions were decided before Congress passed section 476(f) and were based on the Department's position at that time that the Cherokee Nation had exclusive jurisdiction. *Id.*

39. Interior had previously analyzed the impact of these court opinions in a February 14, 2008, Memorandum from the Associate Solicitor to the Assistant Secretary. AR004933-34. This memorandum was provided to the Regional Director as an attachment to the Assistant Secretary's April 5, 2008, memorandum directing the Regional Director to further substantiate the basis of her decision concerning whether to take the 76-acre community services parcel in trust or to arrive at a different conclusion. AR004931-32. In his analysis, the Associate Solicitor stated that the federal court opinions did not in fact determine authoritatively that the CNO had exclusive jurisdiction over the former Cherokee reservation. He noted that one of the opinions merely stated that Interior's position was that the Cherokee Nation had exclusive jurisdiction (*United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. May 31, 1991). AR004933. The Associate Solicitor noted that the opinion in *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993) was affirmed on different grounds. *Id.* Finally, the Associate Solicitor noted that the final opinion, *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993), *aff'd* 2 F.3d 1161 (10th Cir. 1993), was based on the *Buzzard* district court opinion and was decided prior to the appeal in that case, which affirmed the decision on different grounds. AR004934. The Associate Solicitor concluded that the issue remained unsettled. *Id.*

40. In the June 2009 Decision, Interior also concluded that the conclusion that the Cherokee Nation does not enjoy exclusive jurisdiction over the former Cherokee reservation is consistent with the 1998 appropriations rider which provides that no appropriated funds shall be used to acquire land into trust within the former Cherokee reservation without consulting with the CNO. *Id.* at 7, AR003637. Interior noted that if the Cherokee Nation

had exclusive jurisdiction over the former Cherokee reservation, Congress would have required consent of the Cherokee Nation, as the Department's land acquisition regulations, 25 C.F.R. Part 151, provide. *Id.*

41. Interior concluded that the fact that the UKB's charter, approved by the Assistant Secretary in 1950, authorizes the UKB to hold land for tribal purposes weighs heavily in favor of finding that the UKB Corporation can have land taken into trust. June 2009 Decision at 6, AR003636. Section 1(b) of the charter identifies "the acquisition of land" as one of the corporation's purposes. Interior found that in stating that the charter did not override the Department's previous position or court rulings, the Regional Director had "misperceived the relative significance of the charter approval and the more recent statements by acting and subordinate officials." *Id.* Interior noted that the approval statement signed by the Assistant Secretary on May 8, 1950, states in pertinent part:

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

Id. As Interior explained, "[i]t is beyond dispute that when the UKB organized in 1950, the Band and the Assistant Secretary, in approving the charter, anticipated that the UKB would hold tribal trust property. It is the statements of the acting and subordinate officials that can't be given weight over the approval of the corporate charter." *Id.*

42. In the June 2009 Decision, Interior held that even though both the UKB and the Cherokee Nation intended to assert jurisdiction over UKB's trust land, Interior could still take the land in trust for the UKB. AR003637. The UKB would have exclusive jurisdiction over land that the United States holds in trust for the UKB. *Id.* But even if the UKB had to share jurisdiction with the Cherokee Nation, such shared jurisdiction did not preclude Interior from taking the land into trust. "Shared jurisdiction is unusual; but it is not unheard of." *Id.* In fact, Interior anticipated that there would be situations in which two tribes would share jurisdiction, Solicitor's Opinion, M-27796 (November 7, 1934); 1 Op. Sol. on Indian Affairs 478 (U.S.D.I. 1979), and in a April 12, 2009, memorandum the Regional Director reported that several tribes within the Eastern Oklahoma Region share jurisdiction over parcels held in trust. *Id.* at 7-8, AR003636-37. These tribes include the Eastern Shawnee Tribe of Oklahoma, the Miami Tribe of Oklahoma, the Modoc Tribe of Oklahoma, the Ottawa Tribe of Oklahoma, the Peoria Tribe of Indians of Oklahoma, the Quapaw Tribe of Indians of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, and the Wyandotte Nation, who all share a 40.5 acre trust parcel. *Id.* at 8, AR003637. Those same tribes, with the exception of the Modoc Tribe, also share a 114 acre parcel. *Id.* Interior found that in a situation directly analogous to the UKB, the Thlopthlocco Creek Tribal Town has 19 parcels of trust land within the former Creek reservation. *Id.* Interior noted that "[t]he UKB and the Cherokee Nation should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.*

43. The July 30, 2009, decision responded to a motion filed by the Cherokee Nation after the June 24, 2009, decision, for reconsideration and withdrawal of the June 24 decision. *See* AR003248-51. In the July 30 decision, the Assistant Secretary declined to suspend the

June 24 decision and directed the Regional Director to proceed with application of the Department's checklist for a categorical exclusion under NEPA. The Assistant Secretary further held that suspension of the June 24 decision was not necessary because UKB's request to acquire land in trust was specifically not decided and was reserved for further consideration in light of the recent *Carcieri* opinion. The Assistant Secretary noted that the June 24 decision did not render a finding on whether UKB was a successor-in-interest and did not make any binding findings regarding the status of the historic Cherokee Tribe. The Assistant Secretary stated, "[a]s such, my June 24th decision was a partial ruling that did not make any finding of law or fact regarding my authority to take the land into trust on behalf of the UKB under any particular theory." AR003249.

44. Second, Interior determined that it had the statutory authority to take the Parcel in trust for the UKB Corporation pursuant to the 1946 Act and OIWA § 503. 2012 Decision at 6, AR000021.

45. To explain this conclusion, Interior incorporated by reference the September 10, 2010, decision ("2010 Decision") pertaining to the 76-acre Community Services Parcel. 2012 Decision at 6, AR000022; *see* 2010 Decision, AR003587-88. Interior noted that the 1946 Act applied OIWA § 503 to the UKB and was intended to secure to the UKB "any benefits . . . available to other Indian bands or tribes" under the OIWA. 2010 Decision at 2, AR003587. Interior concluded that "Congress clearly intended to afford the Keetoowah band all of the benefits and rights as other tribes under the OIWA, which necessarily include the benefit of having land placed into trust under Section 1 or Section 3" of the OIWA. *Id.* Interior further noted that section 503 of the OIWA authorizes the Secretary to charter corporations that may convey to the incorporated group "any other

rights or privileges" secured to an organized Indian tribe under the IRA. *Id.* Interior noted that its 1950 approval of the UKB Corporation's charter, which authorized it to accept and hold "property of every description," including land in trust, demonstrated the Department's understanding that holding land in trust was one of the "rights" secured under the IRA to an organized tribe that was incorporated into the OIWA. *Id.* at 3, AR003588. Interior found that section 3 does not explicitly authorize the AS-IA to take land in trust, but that authority is implicit. *Id.* A necessary corollary, Interior concluded, was that "the Secretary must possess actual authority [under section 503 of the OIWA] to take the land in trust." *Id.*

46. Third, Interior found that the regulatory factors to be considered in deciding whether to take the land into trust, *see* 25 C.F.R. Part 151, supported the trust acquisition. 2012 Decision at 5-7, AR0021-23. Interior found that the UKB "has an urgent need" to have the property acquired in trust, as the gaming facility in 2010 provided more than $1.2 million for tribal programs including human services, emergency funds, housing rehabilitation, family services, education, clothing voucher, and elder assistance. *Id.* at 6, AR000022. Interior recognized that jurisdictional disputes could occur in the future but believed there is adequate foundation for resolving them. *Id.* at 6, 8, AR000022, 24. This conclusion is consistent with, and supported by, the findings made by Interior in the 2009 Decision and incorporated into the 2012 Decision. *See* 2009 Decision at 7-8, AR003637-38. This conclusion is also consistent with the findings made by the Regional Director in her April 19, 2012, recommendation to approve the UKB's fee-to-trust application. AR005101-02.

III. PROCEDURAL HISTORY.

47. Plaintiffs filed their Complaint for declaratory and injunctive relief seeking to enjoin the 2012 Decision in Case No. 14CV-019 GKF-FHM on August 29, 2012. ECF No. 2.

48. In their Complaint, Plaintiffs allege that in its 2012 Decision, Interior (1) improperly invoked the Secretary's discretionary authority for the trust acquisition under the IRA by failing to apply the holding in *Carcieri* limiting that authority to trust acquisitions for tribes that were "under federal jurisdiction" when the IRA was enacted in 1934; (2) lacked authority to take the land into trust for the benefit of the UKB Corporation; (3) violated IGRA by determining that the "former reservation" exception applied to UKB's ongoing gaming operations; (4) violated the Cherokee Nation's treaty rights under the 1866 Treaty; and (5) violated Interior's regulatory requirements. ECF No. 2, ¶¶ 2-6.

49. On September 5, 2012, Interior voluntarily stayed the trust acquisition, reserving its right to re-evaluate and terminate the self-stay with notice provided to the Cherokee Nation.

50. As the parties were aware, the State of Oklahoma conditioned its stay of enforcement proceedings on the United States actually transferring title by July 30, 2013.

51. On May 20, 2013, Interior requested that the State extend the deadline for enforcement proceedings pending a decision on the merits of this case, which the State denied.

52. On July 15, 2013, Interior provided notice to the Cherokee Nation that it intended to complete the trust acquisition within 30 days to avoid the closure of the gaming facility due to the approaching expiration of the agreement between the UKB and the State of Oklahoma.

53. On July 23, 2013, Plaintiffs filed their motion for a preliminary injunction seeking to enjoin Interior from effectuating the trust acquisition. ECF Nos. 77-79.

54. The State, in response to a request from the UKB, agreed to a limited extension of its non-enforcement period to August 30, 2013.

55. On August 12, 2013, after expedited briefing and hearing, the Court provided its oral opinion granting Plaintiffs' motion for preliminary injunction and denying the UKB's oral request for a stay pending appeal. ECF No. 91.

56. Federal Defendants and the UKB filed timely notices of appeal with the United States Court of Appeals for the Tenth Circuit on August 14 and 20, 2013, ECF Nos. 93, 102, and requested a stay of the Court's ruling until decision was issued on appeal.

57. On August 26, 2013, the Tenth Circuit denied the request to stay the preliminary injunction ruling. ECF No. 106.

58. On November 25, 2013, Federal Defendants and the UKB dismissed their appeal on the basis of an agreement among the parties to seek an expedited merits briefing schedule from the Court. ECF No. 128.

59. On July 25, 2014, oral argument on the merits was conducted before this Court.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO STANDARD OF REVIEW

60. Judicial review of the 2012 Decision must be conducted under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

61. Judicial review of agency decisions under the APA is limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

62. Although this inquiry is thorough, the standard of review is narrow and highly deferential to the agency. *Id.* The reviewing court must not "substitute [its] judgment for that of the agency." *Colo. Wild v. USFS*, 435 F.3d 1204, 1213 (10th Cir. 2006).

63. This standard presumes the validity of agency action, and the burden of demonstrating otherwise falls on the plaintiff. *Colorado Health Care Ass'n v. Colorado Dep't of Soc. Serv.*, 842 F.2d 1158, 1164 (10th Cir. 1988). There is a strong presumption in favor of upholding decisions where agencies have acted within the scope of their expertise. *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 376, 378 (1989). Courts will grant considerable leeway to an agency's interpretation of statutes it is charged with administering and to its implementation of its own regulations. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (Secretary's interpretation of own regulations are controlling unless "plainly erroneous or inconsistent with regulation.") (citations omitted) (quotation marks omitted).

64. An agency decision will be considered arbitrary and capricious only if "the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for the 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH REGARD TO THE MERITS OF PLAINTIFFS' CLAIM THAT THE 2012 DECISION WAS ARBITRARY AND CAPRICIOUS

Interior reasonably determined that the Parcel is within the UKB's "Former Reservation" under IGRA.

65. The Court finds that Interior reasonably determined that the Parcel is within the UKB's "former reservation" for purposes of applying IGRA's exceptions to the bar against gaming on trust lands acquired after 1988.

66. Interior, in addressing whether the Parcel is within the "former reservation" of the UKB, recognized that it was dealing with a unique and complex situation, where one federally recognized tribe composed of Cherokee Indians, the UKB, was formed out of another federally recognized tribe of Cherokee Indians, the Cherokee Nation. 2012 Decision at 4, AR000020.

67. Interior further recognized that the UKB was organized and separately recognized by Congress in the 1946 Act, and that the Secretary had approved the UKB's constitution, which established the tribal headquarters in Tahlequah, Oklahoma, within the historic Cherokee reservation boundaries. *Id.*

68. Based on the unique nature of the facts at issue in this case, Interior found that the term "former reservation" was ambiguous as applied to the facts. At that point, Interior could interpret the term in a manner that would allow it to accept the Parcel into trust or in a manner that would not allow the acquisition. Faced with these two competing Interpretations, Interior interpreted the term "former reservation" in a manner that would best effectuate IGRA's purpose of acquiring land into trust for a tribe for the purposes of self-governance and self-sufficiency.

69. Because the decision at issue here involves interpretation of a federal statute, the Court's review is guided by the principles announced in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first question "always, is . . . whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "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." *Id.* at 842-43 (footnote omitted). But if the statute is silent or ambiguous, the Court is generally required to defer to the agency's interpretation if it "is based on a permissible construction of the statute." *Id.* at 843. More specifically, if the Court finds "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation[,]" it must accept the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44 (footnote omitted). Alternatively, if the Court does not find an express delegation by Congress, but nevertheless perceives an implicit delegation to the agency on the particular question, it must accept a "reasonable interpretation made by the administrator of [the] agency." *Id.* at 844 (footnote omitted).

70. Plaintiffs contend that Interior violated the APA by finding an ambiguity in the definition of "former reservation" and resolving that ambiguity in a manner that allowed it to apply to the UKB for purposes of the statutory former reservation exception to IGRA's prohibition on gaming on Indian lands accepted by the Secretary into trust for the benefit of an Indian tribe after October 17, 1988.

71. In matters of tribal recognition and sovereign-to-sovereign relationships, Interior has special expertise to which courts give substantial deference. *See, e.g., United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001) (determinations about tribal matters "should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations.") (citations omitted).

72. Congress has assigned "the management of all Indian affairs and of all matters arising out of Indian relations[,]" to Interior, 25 U.S.C. § 2, and tasked Interior with promulgating regulations to effect provisions of statutes relating to Indian Affairs, *see* 43 U.S.C. § 1457. *See James v. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987); *see also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1029 (E.D. Cal. 2012) (citing *James*, 824 F.2d at 1137-38) ("Congress delegated to the Department of the Interior the authority to adopt regulations to administer Indian affairs and to clarify department authority by regulation . . . .").

73. Against this statutory backdrop and applying its special expertise in matters of Indian affairs and relationships, the Court finds that Interior, based upon the record before it, reasonably determined that IGRA and Interior's regulations were ambiguous as applied to the facts in this case. Specifically, Interior reasonably concluded that the definition of "former reservation" was ambiguous, and the Court defers to the agency's interpretation, which was based on a permissible construction of the statute. The Court finds that Congress expressly delegated to Interior the authority to adopt regulations and to clarify specific provisions of the statute by regulation. Therefore, the Court, under *Chevron*, must accept Interior's interpretation, which was not arbitrary, capricious, or manifestly contrary to the statute. The Court finds Interior reasonably relied on the relevant statutory language and congressional intent to interpret an ambiguous provision, and that interpretation is entitled to deference.

74. Interior noted that the Parcel is within the historic boundaries of the last reservation for the Cherokees, "an Oklahoma tribe;" the only question is whether the UKB, given its unique history, may claim the same area as its former reservation. As Interior

recognized, nothing in IGRA, which provides for the existence of a former reservation to be "determined by the Secretary," or the regulations, which require only that the last reservation be for "an Oklahoma tribe," addresses whether two federally recognized tribes, one formed under express congressional authorization from the citizens of another, and both occupying the same lands for nearly two centuries, can share the same former reservation under IGRA. 2012 Decision at 4, AR000020.

75. The IGRA exceptions to the bar against gaming on trust lands acquired after 1988 demonstrate a concern for limiting gaming to locations within, abutting, or otherwise related to current or historic Indian lands in order to limit interference with state sovereignty. Absent a connection to such Indian lands, gaming may occur on trust lands acquired after 1988 only if the state governor and Interior concur that gaming would not be detrimental to the surrounding community. *See* 25 U.S.C. §§ 2719(a) & (b). The "former reservation" exception is not intended to limit tribal competition but to allow tribes to use their historic territories in furtherance of IGRA's purposes of tribal self-sufficiency and economic development. The Court finds that Interior reasonably considered the congressional intent behind the statute in its decision-making process.

76. Section 2719's bar against gaming on trust land acquired after 1988 is to be construed narrowly, and the exceptions broadly, to further IGRA's purposes. *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney For W. Dist. of Mich.*, 369 F.3d 960, 971-72 (6th Cir. 2004); *see also City of Roseville v. Norton*, 348 F.3d 1020, 1030-32 (D.C. Cir. 2003) (holding that the "restoration of lands" exception should be interpreted broadly because IGRA's exceptions "embody policies counseling for a

broader reading" due to the statute's general purpose of promoting tribal economic development and self-sufficiency).

77. Under IGRA and its regulations, the Secretary is given the authority to define and determine what constitutes a "former reservation." *See* 25 U.S.C. § 2719(a)(2)(A)(i). The Secretary's determination must not be inconsistent with the general regulatory definition found at 25 C.F.R. § 292.2, and it must not be arbitrary and capricious.

78. The Court finds that the Secretary's determination is not inconsistent with the statutory and regulatory definitions nor is it arbitrary and capricious.

79. Interior's regulatory definition of "former reservation," which it found to be an ambiguous term here, is due deference under *Chevron*, 467 U.S. 837. And Interior's interpretation of its regulatory definition is due deference under *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013), because it is not plainly erroneous or inconsistent with regulations. *See also Auer*, 519 U.S. at 461 (Court held that Labor Secretary's interpretation of regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'") (citations omitted).

80. The Court finds that both the statute and the regulation assign to the Secretary the determination of the existence of a former reservation. *See also* Section 134 of Public Law No. 107-63, 115 Stat. 442-443 (2001) (Congress reaffirmed that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of [IGRA] was delegated to the Secretary of the Interior on October 17, 1988."). The complex circumstances involving the congressional recognition of one tribe that developed from another and the interwoven history and co-existence of the two tribes within the same geographic area particularly implicate Interior's special expertise in Indian affairs and it

was not arbitrary and capricious or an abuse of discretion for Interior to determine that the former historic reservation of the Cherokee was also the former reservation of the UKB for purposes of applying the IGRA exception.

Interior Reasonably Reconciled the 2012 Decision with Previous Departmental Positions and Court Holdings and the Doctrines of Claim Preclusion and Issue Preclusion Do Not Operate to Preclude Interior's Determination of "Former Reservation" in this Case.

81. The Court finds that Interior adequately explained its 2012 Decision rationale and reconciled it with previous positions taken by Departmental officials and court holdings. The Court further finds that the doctrines of issue preclusion and claim preclusion do not operate as a bar to Interior's determination that the Cherokee historic former reservation is also the former reservation of the UKB for purposes of Interior's IGRA analysis.

82. The Court first finds that Interior considered previous Departmental positions and adequately explained its rationale for its 2012 Decision.

83. As the Supreme Court has held, when an agency changes position, such a decision is not subjected to a more searching review under the APA. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009). All that is required is that the agency provide a reasoned explanation for its action and display awareness that it is changing position. *Id.* at 1811. But the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one[;] [i]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 1811.

84. Here, in its June 2009 Decision, which was incorporated into its 2012 Decision, Interior considered the Regional Director's determination that "[t]he Secretary has consistently

opined that the [CNO] exercises exclusive jurisdiction over trust and restricted lands within the former Cherokee reservation boundaries." June 2009 Decision at 6, AR003636. The Regional Director, in making this statement, relied on letters from an Acting Assistant Secretary, the Office of Law Enforcement Services, and two Regional Directors. *Id.*

85. Interior found that as to a letter written by the Acting Assistant Secretary, the determination was made in 1987 before Congress prohibited the Department from making distinctions as to the privileges and immunities of tribes. *Id.* Thus, Interior cited to a specific change in the law as directed by Congress as a reason for its position and as support that its determination is permissible under the statute. *See Fox Television,* 129 S. Ct. at 1811.

86. Interior next found that the letters from the Office of Law Enforcement Services and Regional Directors were not binding on the Assistant Secretary, whom the Secretary of the Interior has delegated the ultimate authority over determinations of accepting land into trust. June 2009 Decision at 6, AR003636. Moreover, Interior found that the conclusions reached by the Office of Law Enforcement and the Regional Directors were suspect because there was no accompanying analysis and basis explaining their position and they failed to address section 476(f), which holds that Interior can not make a decision "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." *Id.*

87. Finally, Interior distinguished the two court opinions cited by the Regional Director: (1) *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla. 1993), *aff'd* 2 F.3d

1161 (10th Cir. 1993) ("*Mankiller*"); and (2) *United Keetoowah Band v. Sec'y of the Interior*, No. 90-C-608-B (N.D. Okla. May 31, 1991) ("*UKB v. Sec'y*"), finding that these decisions were decided before Congress passed section 476(f) and were based on the Department's position at that time that the Cherokee Nation had exclusive jurisdiction. June 2009 Decision at 6, AR003636. *See also* 2012 Decision at 5, AR000021 (noting that "[a]lthough we have concluded that the former Cherokee reservation is also the former reservation of the UKB within the meaning of IGRA, historically, the Cherokee Nation of Oklahoma has been recognized as the 'primary' Cherokee tribe. *See, e.g.*, Judge Brett's Amended Order in *Buzzard, supra*. . . . . [N] ow that we have determined that the former reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of applying that exception under 25 U.S.C. § 2719(a)(2)(A)(i), the regulatory requirement for consent of the Cherokee Nation is no longer applicable.").

88. An agency is not bound by its prior decisions. As courts recognize, change is not forbidden and an agency is not bound by its prior decisions. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1327 (10th Cir. 2007). "The law does not require an agency to stand by its initial policy decisions in all circumstances." *Id.* (quoting *Exxon Corp. v. Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992)). Changes in policy can be upheld when such change is explained with a reasoned analysis. *See id.*; *Fox Television*, 129 S. Ct. at 1810-11. And in evaluating whether the analysis is reasoned, courts must defer to the agency's expertise. *See Wyoming v. United States*, 279 F.3d 1214, 1240 (10th Cir. 2002); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001).

89. In the past, Interior has changed its determination on whether a tribe was eligible to have land taken into trust. *See Carcieri*, 555 U.S. at 398. In his concurrence, Justice Breyer

noted that the Department did not recognize the Stillaguamish Tribe until 1976, but reasoned that it had treaty rights against the United States since 1855. *Id.* Therefore, the Department reconsidered its initial denial to take land into trust. *Id.* (citing Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for Stillaguamish Tribe (Oct. 1, 1980)). Justice Breyer cites to two additional examples where Interior reversed its position involving the Grand Traverse Band of Ottawa and Chippewa Indians and the Mole Lake Tribe. *Id.* at 398-99. A year and a half after the Solicitor's July 1937 opinion on the UKB, he issued an opinion on the Miami and Peoria Tribes of Oklahoma that concluded that they could not, based on the facts in the file, be considered "recognized" tribes as that term was used in the OIWA. 1 Opinions of the Solicitor on Indian Affairs 864. Yet both tribes were allowed to adopt constitutions under the OIWA and they were approved a year later in late 1939. *See* Haas, Table B, page 28.

90. Based on Interior's consideration and discussion of the previous positions taken by various Departmental officials, the Court finds that Interior has provided a reasoned explanation for its decision, that its policy is permissible under the statutes and regulations, that there are good reasons for it, and that Interior finds its decision to be the better decision. Therefore, the Court finds that Interior adequately explained its decision and it was not arbitrary or capricious or otherwise not in accordance with the law.

91. Plaintiffs now argue that the two decisions discussed in the June 2009 Decision, *UKB v. Sec'y*, and *Mankiller*, in addition to the decision reached in *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992) ("*Buzzard*") preclude Interior's interpretation and application of "former reservation" under IGRA and its regulations to

hold that the former reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i) under the doctrines of claim preclusion and issue preclusion.

92. The Court finds that the doctrines of issue preclusion and claim preclusion do not preclude Interior's determinations in this case.

93. The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) operate to preclude relitigation of claims or issues in a subsequent action between the same parties or those in privity with them. Moore's Federal Practice, ¶ 0.045[1], at 178 (2d ed. 1984).[2]

The Decisions Reached in *Buzzard, Mankiller*, and *UKB v. Sec'y*.

94. The Court first discusses the claims and issues raised in the *Buzzard*, *Mankiller*, and *UKB v. Sec'y* decisions.

95. In the *Buzzard* case, the UKB, the United Keetoowah Smokeshop Association, and individual smoke shop managers and licensees (UKB, at the time of the decision, was the only remaining plaintiff) brought suit against the Oklahoma Tax Commission and other State and County officials. Plaintiffs and Federal Defendants were not parties to the litigation. In this case, the UKB brought suit seeking injunctive relief prohibiting the enforcement of Oklahoma's tobacco taxing statute in smoke shops allegedly owned and licensed by the UKB and located within the boundaries of the former historic Cherokee

[2] "The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "These terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as 'merger' and 'bar,' while issue preclusion encompasses the doctrines once known as 'collateral estoppel' and 'direct estoppel.'" *Id.* at 892 n.5 (citing *Migra v. Warren City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 77 n.1 (1984) (noting that "[t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years")).

reservation. AR001257. On summary judgment, the UKB asserted that the smoke shops, located on unallotted lands within the boundaries of the former historic Cherokee reservation, should be considered Indian Country because (1) they are reservation lands and that the UKB is heir to these unallotted lands within the limits of the original Cherokee Indian Reservation; and (2) when the UKB purchased them in fee subject to a restraint on alienation, it made them similar to "trust lands.". AR001262. The court denied both assertions and granted the State and County defendants' motions for summary judgment. The Court first found that the UKB offered no authority to support its claim that it is heir to the original Cherokee Indian Reservation. AR001263. The court then found that the UKB's restriction upon alienation was self-imposed and could not itself transform fee simple land to trust land. AR001268.

96. In *Mankiller*, the UKB appealed from an order of the District Court for the Northern District of Oklahoma dismissing the UKB's complaint against Cherokee Nation officials and United States officials on the ground that the Cherokee Nation was an indispensable party and that any action against the Cherokee Nation would be barred by its sovereign immunity. AR000526. The genesis of the lawsuit was the Cherokee Nation's enforcement of its tobacco sales tax code on two UKB members who operated smoke shops on restricted Cherokee allotments. *Id.* In its lawsuit, the UKB sought declaratory and injunctive relief regarding its exercise of governmental powers over its members and their respective allotments. *Id.* The UKB also sought a declaration concerning the responsibilities of the Secretary of the Interior. The district court granted the Cherokee Nation's motion to dismiss on the grounds that (1) the Cherokee Nation was an indispensable party and joinder was not feasible; and (2) the court had previously

determined that Cherokee Nation's jurisdiction over Cherokee Indian allotments is superior to that of the UKB, and therefore the principles of *res judicata* and collateral estoppel applied to the UKB. AR000527, 530. The UKB limited its appeal to whether the Cherokee Nation's immunity should be set aside. AR000527. The Tenth Circuit affirmed the district court's holding that the doctrine of sovereign immunity serves as a bar to joining the Cherokee Nation. *Id.*

97. In *UKB v. Sec'y*, the UKB filed suit against the Secretary of the Interior alleging four claims for relief: (1) the Secretary of the Interior failed to enter into Indian Self-Determination Act ("ISDA") grants and contracts with it; (2) such refusal adversely impacted the UKB's ability to enter into contracts with other federal agencies; (3) the Secretary holds title to land in the former Cherokee reservation for further conveyance to Indians, such as the UKB, pursuant to the OIWA and has refused to permit the UKB to use and exercise its rights as to those lands; and (4) the Secretary arbitrarily refused to approve the UKB's acquisition request for trust lands in the former Cherokee reservation without the consent of third parties. AR000458-459. The UKB sought injunctive and mandatory relief requiring the Secretary to grant the UKB contracts and grants under the ISDA, advise other federal agencies that the UKB is eligible for federal funding, convey land to it under the OIWA as "an organization of Cherokee Indians organized pursuant to the [OIWA]," and consider its applications to have land taken into trust on the same basis as other recognized Indian tribes within their respective reservations. *Id.* The district court denied the UKB's first two claims for failure to exhaust administrative remedies. AR000461. As to the UKB's third and fourth claims, the district court granted the Secretary's motion to dismiss for failure to join a party under Rule 19. AR000467-468.

The Secretary had asserted that the subject lands of the historic Cherokee Nation reservation were under the jurisdiction of the Cherokee Nation and not the UKB. AR000463-465. The district court found that the record before it made clear that the Cherokee Nation had an interest in the litigation and was an indispensable party. AR000468.

The Doctrine of Claim Preclusion Does Not Apply to Federal Defendants.

98. The Court first addresses the application of the doctrine of claim preclusion to the claims raised in this case as to Federal Defendants.

99. The doctrine of res judicata, or claim preclusion, protects the finality of judicial judgments. "The general principle . . . is that a final, valid judgment on the merits precludes any further litigation between the same parties on the same cause of action." *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 78 (D.C. Cir. 1997) (footnote); *accord Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *Comm'r of IRS v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted). Res judicata embodies the "fundamental precept of common-law adjudication . . . that a 'right . . . distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . .'" *Montana*, 440 U.S. at 153 (quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48–49 (1897)) (third and fourth alterations in original). The doctrine "plays a central role in advancing the 'purpose for which civil courts have been established, the conclusive resolution of disputes within

their jurisdictions.'" *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C.Cir.2004) (quoting *Montana*, 440 U.S. at 153); *accord Sunnen*, 333 U.S. at 597 (explaining that res judicata "rests upon . . . public policy favoring the establishment of certainty in legal relations[]"). *See also Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002).

100. The Court finds that the doctrine of claim preclusion does not apply to Interior's decision in this case. Courts will apply the common-law doctrine of claim preclusion to those determinations of administrative bodies that have attained finality where the "administrative body is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . ." *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)). An agency acts in a judicial capacity in situations where it conducts an administrative proceeding, such as when a contractor files a dispute with the Atomic Energy Commission's adjustment board, which then makes administrative findings on the contractor's claims as a judicial body. *See Utah Constr.*, 384 U.S. at 421-423.

101. In this case, Interior has not acted in a judicial capacity. Rather, it performed its congressionally-delegated duty to manage Indian affairs and matters arising out of Indian relations and promulgated regulations to effect the provisions of statutes relating to Indian Affairs. *See James*, 824 F.2d at 1138. Interior made a decision on an application for taking land into trust. The Court finds that this type of decision is not one made by Interior in a judicial capacity. Therefore, the Court finds that the determinations Interior made as a part of that decision are not foreclosed by the doctrine of claim preclusion.

102. However, to the extent that Interior's interpretation of the term "former reservation" to allow it to take land into trust for the UKB Corporation is one that may be considered "judicial," the Court finds that the previous court decisions do not preclude Interior from making its determination under the doctrine of claim preclusion.

103. "To apply the doctrine of *res judicata*, three elements must exist: (1) a final judgment on the merits to an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Wilkes*, 314 F.3d at 504 (internal quotation marks and alterations omitted).

104. The Court first looks to the *Buzzard* decision. The United States and its departments were not parties to the *Buzzard* litigation. Therefore, the Court must determine if Federal Defendants were in privity with parties to that decision. The Court finds that they were not.

105. "Privity is essentially the concept of legal similarity – who are the parties and whether they are legally identical." *Yankton Sioux Tribe v. Gambler's Supply, Inc.*, 925 F. Supp. 658, 664 (D.S.D. 1996). In the Tenth Circuit, the issue of whether privity exists is a question of fact. *Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989).

106. "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing that the parties in the two actions are really and substantially in interest the same." *Id.* at 1275.

107. The Supreme Court has stated that "to bind the United States when it is not formally a party, it must have had a laboring oar in a controversy." *Drummond v. United States*, 324

U.S. 316, 318 (1945); *see also A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 (9th Cir. 1986) (quotations omitted) ("[A] person technically not a party to the prior action may be bound by the prior decision only 'if his interests are so similar to a party's that the party was his 'virtual' representation' in the prior action.'"(citation omitted)).

108. The United States has such a "laboring oar" when it "assume[s] control over litigation." *Montana*, 440 U.S. at 154. In *Montana*, such control was demonstrated by the fact the United States had: "(1) required the [ ] lawsuit be filed; (2) reviewed and approved the complaint; (3) paid the attorneys' fees and costs; (4) directed the appeal from the State District Court to the Montana Supreme Court; (5) appeared and submitted a brief as *amicus* in the Montana Supreme Court; (6) directed the filing of a notice of appeal to this Court; and (7) effectuated [the] abandonment of that appeal on the advice of the Solicitor General." *Id.* at 155 (citation omitted).

109. The Court finds that the United States was not in privity with either the State and County defendants or the UKB in the *Buzzard* litigation. As to the State and County defendants, in general, state and federal governments are separate parties for claim preclusion purposes so that litigation by one does not bind another. *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1240 (10th Cir. 2002) (quoting 18 Charles Alan Wright, et al., *Federal Practice and Procedure*, § 4458, at 503). The Court finds that the *Buzzard* State and County defendants and Federal Defendants' interests are not substantially in interest the same.

110. As to the UKB, the Court determines that the United States did not have a "laboring oar" and assumed no control over the litigation. Therefore, because the United States was not

in privity with any of the parties to the *Buzzard* litigation, the Court's inquiry stops there and the Court holds that the doctrine of claim preclusion does not apply to any of the claims raised in *Buzzard*.

111. Furthermore, in examining the other factors necessary for claim preclusion to apply, the Court finds that there was not an identity of claims between those raised in the *Buzzard* litigation and the claims made in this case. The Tenth Circuit has adopted the transactional approach of the Restatement (Second) of Judgments for determining what constitutes a cause of action. *See Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir. 1988). Under the transactional approach, a final judgment on the merits extinguishes the plaintiff's claim, including "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions, out of which the action arose." *Id.* at 1335. Whether certain facts constitute a "transaction" or a "series of connected transactions" is to be determined pragmatically, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* (quoting Restatement (Second) of Judgments § 24).

112. In the *Buzzard* litigation, the UKB claimed that its fee lands constituted Indian Country for purposes of foreclosing state taxation because it claimed that (1) unallotted land within the boundaries of the original Cherokee Indian Reservation that it purchased in fee constitutes reservation land because it is an heir to the unallotted lands, and (2) the land transforms into Indian Country upon the UKB's purchase in fee because of restrictions on

alienation contained in its corporate charter. AR001262; 1266. Whereas, in this case, the claim at issue is whether Interior reasonably interpreted the definition of "former reservation" as contained in IGRA and its regulations to find that the former historic reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of taking the land into trust. The Court finds that the claim presented in this litigation does not arise out of the transaction at issue in *Buzzard* nor are they related. It would not have been expected that the UKB's challenge to the State and County's taxing authority would later bar Interior from making a wholly separate determination as to the applicability of the IGRA exception to Indian gaming on lands acquired after October 17, 1988. The current claims could not have been brought in the previous action. Therefore, the Court finds that the *Buzzard* litigation has no preclusive effect on the current case.

113. Interior was a party to the *Mankiller* and *UKB v. Sec'y* litigation. Therefore the Court examines the other factors to determine if claim preclusion applies.

114. The Court first considers whether there was a final judgment on the merits in *Mankiller* and *UKB v. Sec'y*. "A judgment on the merits in a prior suit is required to bar a second suit based on the same cause of action under the doctrine of claim preclusion." *Trujillo v. Trujillo v. Colorado*, 649 F.2d 823, 825 (10th Cir. 1981) (citing *Parklane*, 439 U.S. at 326 n.5).

115. *Mankiller* was not decided on the merits. In *Mankiller*, the UKB appealed the portion of the district court's order dismissing its lawsuit on the basis that the Cherokee Nation was an indispensable party under Fed. R. Civ. P. Rule 19(b). A dismissal for failure to join an indispensable party is not a final adjudication on the merits. *Trujillo*, 649 F. 2d at 825

(dismissal for failure to join necessary parties was not a judgment on the merits for application of *res judicata*).

116. To the extent that the inclusion of the district court's January 27, 1993, order and its discussion that the Cherokee Nation's jurisdiction over Cherokee Indian allotments is superior to that of the UKB in the *Mankiller* decision may be viewed as a decision on the merits, the Court also finds that the doctrine of claim preclusion does not apply. The decision by the district court was on the UKB's request for declaratory judgment (1) setting forth its rights, privileges and immunities with respect to the exercise of its governmental powers over its members and their restricted allotments, and (2) concerning the responsibilities of the Secretary of the Interior. AR000528-29. For declaratory actions, however, there is a preclusive effect only for the matters actually declared. *See Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co.*, 600 F.3d 190 (2d Cir. 2010) ("the preclusive effect of a declaratory judgment action applies only to the 'matters declared' and to 'any issues actually litigated . . . and determined in the action.'" (quoting Restatement (Second) of Judgments § 33; *see also* 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4446, at 313 (2d ed. 2002) (noting that the effects on claim preclusion resulting from a declaratory judgment are "shrouded in miserable obscurity"))). Since the district court declined to issue a declaratory judgment, and instead granted Cherokee Nation's motion to dismiss, no matters were actually declared and therefore, preclusion does not apply.

117. The Court finds that the *UKB v. Sec'y* litigation does not preclude the claims raised in this case. As to the claims concerning the UKB's ability to receive ISDA and other federal funds, the district court granted Interior's motion to dismiss on the basis that the

UKB failed to exhaust its administrative remedies. Because these claims are not at issue in this case, the Court need not consider them further.

118. The claims relevant to this case are the claims concerning the UKB's request for land to be taken into trust. As to these claims, the Court granted Interior's motion to dismiss on the basis that the Cherokee Nation of Oklahoma was an indispensable party under Fed. R. Civ. P. 19(b) and could not be joined because of its sovereign immunity. *Id.* at 10-12. Therefore, because the district court dismissed the action for failure to join an indispensable party, there has not been a final adjudication on the merits. *See Trujillo*, 649 F. 2d at 825. The doctrine of claim preclusion does not apply.

119. Further, to the extent that the Court considers the district court's discussion of Interior's position in that lawsuit that the Cherokee Nation has jurisdiction over the former historic reservation and not the UKB, the Court finds that Interior's position taken in litigation, as discussed in dicta, cannot later preclude Interior from revising its policy. As courts recognize, change is not forbidden and an agency is not bound by its prior decisions. *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1327 (10th Cir. 2007). "'The law does not require an agency to stand by its initial policy decisions in all circumstances.'" *Id.* (quoting *Exxon Corp. v. Lujan*, 970 F.2d 757, 762 n.4 (10th Cir. 1992)). Changes in policy can be upheld when such change is explained with a reasoned analysis. *See id.* And in evaluating whether the analysis is reasoned, courts must defer to the agency's expertise. *See Wyoming v. United States*, 279 F.3d 1214, 1240 (10th Cir. 2002); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001).

The Doctrine of Issue Preclusion Does Not Apply to Federal Defendants.

120. Issue preclusion (or collateral estoppel) "applies to a decision on the merits of an issue of fact or law that the parties actually litigated." *In re Zwanziger*, 741 F.3d 74, 77 (10th Cir. 2014) (citations omitted). Issue preclusion applies when

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Park Lakes Res. Ltd. Liab. v. U.S. Dep't of Agr., 378 F.3d 1132, 1136 (10th Cir. 2004) (internal quotation marks and citation omitted); *accord United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("Under the judicially-developed doctrine of collateral estoppel [issue preclusion], once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." (citation omitted)).

121. While issue preclusion may in some cases be available to estop a party to a prior proceeding from denying what was there judicially determined, such a judgment cannot be pleaded offensively against a non-party to the prior action by one who was a party. 1B J. Moore, J. Lucas & T. Currier, MOORE'S FEDERAL PRACTICE ¶ 0.045[1], at 387 (ed. 2010).

122. In this case, Plaintiffs were not parties to *Buzzard*, *Mankiller*, or *UKB v. Sec'y* and the previous litigation and mutuality of the parties is lacking. This particular variation on collateral estoppel is called offensive nonmutual collateral estoppel, which prevents a

party from relitigating an issue that it has "previously litigated unsuccessfully in an action with another party." *Parklane*, 439 U.S. at 326 n.4.

123. In *Mendoza*, 464 U.S. at 158, the Supreme Court held that the doctrine of nonmutual offensive collateral estoppel cannot be applied against the United States. Recognizing that the government is not in the same position as an ordinary civil litigant, the Supreme Court stated that it is beneficial to require the government to litigate multiple cases involving the same legal issue. Litigation against the government frequently requires the resolution of important constitutional issues and offensive nonmutual collateral estoppel, if applied against the government, has the strong potential to freeze the development of constitutional law. The Supreme Court was clear that collateral estoppel can be applied against the government only when the same parties are involved in two separate lawsuits. *Id.* at 163.

124. Under the rule stated in *Mendoza*, this Court finds that Plaintiffs cannot rely on collateral estoppel to prevent Federal Defendants from defending Interior's determination that the former historic reservation of the Cherokee Nation is also the former reservation of the UKB and allowing the land to be placed into trust without the Cherokee Nation's consent.

125. While offensive nonmutual collateral estoppel can be used in some cases, *Mendoza* prevents the Court from applying this doctrine against Federal Defendants.

126. Therefore, issue preclusion does not apply, and this doctrine does not prevent Federal Defendants from defending Interior's determination that the historic Cherokee reservation is also the former reservation of the UKB for purposes of Interior's IGRA analysis.

Interior Reasonably Determined that It Had Statutory and Regulatory Authority to Take Land Into Trust for the UKB Corporation.

127. The Court finds that Interior, in considering the record before it, reasonably determined that it had the statutory and regulatory authority to take land into trust for the UKB Corporation.

The Trust Acquisition Is Authorized by Section 3 of the OIWA.

128. The Court finds that Interior reasonably determined that the trust acquisition for the UKB Corporation is authorized by section 3 of the OIWA, 25 U.S.C. § 503.

129. In the 1946 Act, Congress recognized the UKB as a band of Indians within the meaning of the OIWA, "to secure any benefits which, under the Oklahoma Indian Welfare Act, are available to other Indian bands or tribes." 60 Stat. 976; H.R. Rep. No. 79-447, at 2 (1945). The OIWA, in turn, authorizes Interior to issue a charter of incorporation to the recognized band of Indians, which may convey to the incorporated group the right to "enjoy any other rights or privileges secured to an organized Indian tribe" under the IRA. 25 U.S.C. § 503. "One of the rights" conferred in the "bundle of Federal benefits" provided by the IRA is "the ability to petition the Secretary to take land into trust for the Tribe's benefit . . . ." *Carcieri*, 555 U.S. at 403-04 (Stevens, J., dissenting).

130. Because a tribe incorporated under the OIWA has the right to petition for land to be held in trust, it necessarily follows that the Secretary has the corresponding authority to take the land in trust for an incorporated tribe. Thus, Interior reasonably determined that it had statutory authority to take land into trust for the UKB Corporation, a determination to which deference is due. *See City of Arlington*, 133 S. Ct. at 1868 (court defers to agency interpretation of statutory ambiguity concerning agency's jurisdiction).

131. The Court finds that the Supreme Court's decision in *Carcieri* does not compel a contrary reading. Plaintiffs argue that Interior's decision is an attempt to circumvent the holding in *Carcieri*, that the UKB has no right to have land taken into trust under the IRA, and that the OIWA could not create greater rights in the UKB Corporation than those held by the tribe. *See* Pls.' Br. at 15-17. The Court disagrees and finds that Plaintiffs' argument is premised on a misreading of the OIWA's statutory language. Congress itself described the OIWA as "permit[ting] the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]," H.R. Rep. No. 478, without suggesting that those rights pertained only to Oklahoma Indians who were members of Indian tribes under federal jurisdiction in 1934. Rather, the OIWA confers "rights or privileges secured to *an* organized tribe" under the IRA. The OIWA thus confers to tribes incorporated under the OIWA the IRA rights generally; it does not differentiate between tribes organized before or after 1934, which would make little sense in a 1936 statute authorizing tribes to reorganize. Indeed, as the UKB had no right to organize under the IRA, from which Oklahoma tribes were specifically excluded from those sections – it is only by virtue of the OIWA that these rights and privileges available under the IRA are made applicable to Oklahoma tribes including the UKB.

132. Plaintiffs' argument also fails because it has the effect of importing the IRA's statutory definition of "Indian" into the OIWA. The IRA's definition of "Indian" is necessary in the IRA because the substantive provisions of the IRA apply to "Indians" without qualification. For example, the IRA authorizes the Secretary to acquire land "for the purpose of providing land for Indians[,]" 25 U.S.C. § 465, provides the right to organize

"any Indian tribe," *id.* § 476(a), and authorizes the Secretary to issue a charter of incorporation to an Indian "tribe," *id.* § 477. Yet Congress expressly chose to limit the application of the IRA to certain groups and individuals, and effectuated this limitation by defining "Indian," in part, to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479; *see also* To Grant to Indians Living under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., at 264–66 (May 17, 1934) (discussing how to exclude "Indians" who had abandoned tribal relations). Section 3 of the OIWA, in contrast, itself specifically defines to whom it applies: "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 503. Importing the IRA definition into section 3 of the OIWA would redundantly limit the statute's scope to a "recognized" tribe, which is unnecessary, and would limit the rights and privileges authorized in the 1936 OIWA to tribes under federal jurisdiction in 1934, which is inexplicable. That limitation is even more absurd when applied to the 1946 Act, which expressly "recognize[s]" the UKB "as a band of Indians residing within Oklahoma" within the meaning of the OIWA.

133. The Court finds that if Congress had wanted to limit the OIWA to tribes under federal jurisdiction in 1934, it would have said so. Where the words of a later statute differ from those of a previous one on the same or related subject, Congress must have intended them to have a different meaning. *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970). The legislative history of the two statutes demonstrates that the concerns that Congress had about an overly broad application of the IRA did not exist with respect to

the OIWA. In considering the IRA, Congress was concerned about extending the benefits of the statute to all self-identified Indians. *See Carcieri v. Kempthorne*, 497 F.3d 15, 28 (1st Cir. 2007), *rev'd on other grounds Carcieri v. Salazar*, 555 U.S. 379 (2009). With respect to the OIWA, however, Congress understood specifically to whom the statute would apply, noting that it would "affect the welfare of approximately 125,000 Indians representing about 30 different tribes." H.R. 2408, 74th Cong. (2d Sess. 1936).

134. Congress's reference to the IRA in section 3 of the OIWA was necessary only to incorporate the benefits and rights generally afforded to tribes by the IRA into the OIWA. The IRA, as amended throughout the years, is the repository of most of the major benefits provided to federally recognized tribes, and Congress subsequently has incorporated the benefits of the IRA by reference in numerous tribal recognition statutes enacted decades after the IRA. *See, e.g.*, 25 U.S.C. § 1300f (1978); 25 U.S.C. § 762 (1980); 25 U.S.C. § 715(a) (1989). *Carcieri* itself recognizes that Congress has repeatedly enacted statutes extending the benefits of the IRA to "Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth" in the IRA. 555 U.S. at 392 (footnote omitted). Congress, in recognizing the UKB under the OIWA – which made portions of the IRA applicable to recognized tribes thereunder – extended such benefits to the UKB.

135. The Court also finds that *Carcieri* does not pose an obstacle to having and taking land in trust for tribes federally recognized after 1934. While the definition of "Indian" in the IRA places a time constraint based on when a tribe was "under federal *jurisdiction*," the statute "imposes no time limit upon *recognition* . . . ." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring) (emphasis added). Nor is the time when a tribe was "organized" pertinent to the scope of the IRA. Rather, determining whether a tribe was "under federal

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

The Trust Acquisition Is Consistent with Interior's Regulations.

136. The Court finds that Interior properly applied its regulations, providing that Interior may acquire land in trust status when authorized by Congress for "an individual Indian or a tribe[,]" to the acquisition. *See* 25 C.F.R. § 151.3.

137. Interior's regulations, in turn, define "tribe" to mean "a corporation chartered under" the IRA or OIWA where "statutory authority . . . specifically authorizes trust acquisitions for such corporations . . . ." *Id.* § 151.2(b). Section 3 of the OIWA provides such specific authority by conferring on tribal corporations any rights or privileges secured to an organized tribe under the IRA. As established above, the right to petition for land to be held in trust is one of the specific, essential rights in the IRA; thus Interior reasonably concluded that "the Secretary *must possess* the actual authority to take the land in trust"

[3] Interior would need to conduct a *Carcieri* analysis if the decision were remanded and Interior invoked its authority under the first definition of "Indian" in the IRA as it pertains to acquiring land in trust. For the reasons explained herein, such a determination is not necessary under section 3 of the OIWA.

for the UKB's tribal corporation chartered under the OIWA. AR003588 (emphasis added).

138. The Court rejects Plaintiffs' argument that because Interior stated that the OIWA "implicitly" authorized trust acquisitions, the OIWA did not provide the requisite "specific" authorization. *See* Pls.' Br. at 18-20 (ECF No. 132). The fact that authority is implicit does not mean it is not specific; to the contrary, it is well established that something may be both "specific" and "implicit." *See, e.g.*, *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1151 (9th Cir. 2004) (Contract Clause analysis "subject[s] only state statute that impair a *specific (explicit or implicit)* contractual provision to constitutional scrutiny.") (emphasis added) (footnote omitted); *United States v. Cotto*, 347 F.3d 441, 447 (2d Cir. 2003) (declining to reach question whether defendant could demonstrate coercion "even in the absence of a *specific explicit or implicit* threat[]") (emphasis added); *United States v. Wright Contracting Co.*, 728 F.2d 648, 651 (4th Cir. 1984) (noting "the more *specific limitations explicit and implicit*" in certain enumerated conditions) (emphasis added); *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) ("Congress engages not only in express, but also in *implicit*, delegation of *specific* interpretive authority[.]") (emphasis added). Indeed, here, while the authority to take land in trust is implicit – in that it is not expressly stated – it is implied from the very specific and express grants of the rights and privileges available under the IRA. Thus, Interior correctly concluded that the OIWA implicitly but specifically authorizes the Secretary to take land in trust for corporations chartered under OIWA § 503.

139. A court must defer to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation. *Auer*, 519 U.S. at 462. Here, Interior's

interpretation is not inconsistent with the statutory language. Moreover, in the unique context of the OIWA, Interior's interpretation is eminently reasonable. The OIWA departed from the IRA by providing the "rights and privileges of an organized tribe" under the IRA to an "incorporated group" under the OIWA. The OIWA provides tribal corporations with the governmental powers set forth in the IRA. Thus, for example, while IRA section 476 providing for organization of Indian tribes requires tribal constitutions to vest the tribe with the power to employ legal counsel, prevent the disposition of tribal assets without the tribe's consent, and negotiate with federal, state, and local governments, these and virtually all other powers that the UKB may exercise are set forth not in the UKB's constitution, but in its corporate charter. As Interior approved the UKB's constitution and charter in 1950, Interior at the time plainly understood that the IRA rights and benefits secured to the UKB by the 1946 Act and section 3 of the OIWA were to be exercised through the vehicle of the UKB Corporation. Accordingly, the Court finds that Interior reasonably concluded that the OIWA specifically authorized the Secretary to take land into trust for the UKB Corporation.

140. The Court also finds that it does not matter that the UKB and the UKB Corporation are separate entities for purposes of considering UKB's application pursuant to the Part 151 regulations. Interior did not violate its regulations in considering an application submitted by the UKB to take land into trust for the benefit of the UKB Corporation.

141. As an initial matter, it appears to the Court that the UKB and the UKB Corporation submitted the application jointly, in which case the applicant did submit the application on its behalf. The application states that "On behalf of the [UKB], a federally recognized tribe, and the [UKB Corporation], a federally-chartered corporation, this letter amends

the April 12, 2006 application . . . [and] respectfully requests that the Secretary accept the Gaming Parcel into trust for either the Tribe . . . or the Tribe's federally-chartered corporation." AR003049. In the amended resolution submitted in support of the application, the Tribe notes that Article V, Section 1 of its Constitution provides that the supreme governing body of the Band shall be the Council of the UKB, which also manages the tribal corporation. AR000223-24; *see also* UKB Corporate Charter, Section 2. Through the resolution, the Council requests that the Secretary acquire the Parcel in trust for the benefit of the tribal corporation held by the UKB and authorizes the Chief of the UKB to submit any such applications and materials to the Secretary as may be necessary. AR000223-24

142. To the extent the resolution can be read as the UKB submitting the application to have the land taken in trust for the UKB Corporation, the Court finds that Interior can consider an application submitted by a group seeking to have land taken into trust for another entity. The regulations do not require that an entity may only submit an application on its behalf. Section 151.9, the regulation concerning requests for approval of trust applications, states that a trust application "need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9. The regulation makes no mention of any prohibition that a tribe cannot submit an application on its behalf and for its tribal corporation, or requirements regarding whether a tribe and its tribal corporation may submit an application for an acquisition for either. *See Cnty. Of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), *aff'd* 674 F.3d 898 (8th Cir. 2012) (court found that a

resolution submitted by a tribe's Business and Claims Committee requesting that the BIA take land into trust for the tribe did not violate Interior's regulations because there was no requirement that the tribe be the entity requesting that land be taken into trust).

143. Nor does the Department's Fee-to-Trust Handbook, Version II ("Handbook") make any such requirement. The Handbook is an internal guidance document issued to all BIA Regional Directors to assist in preparing acquisition packages, including gaming and gaming-related fee-to-trust acquisitions. The Handbook explains each step of the fee-to-trust application process, including acknowledging receipt of applications and defining time frames for gathering information to complete those applications. It also includes a checklist of those documents that must be transmitted to decision-making officials regarding fee-to-trust decisions and provides step-by-step procedures for considering trust acquisitions. *See* Handbook, AR004979-5076. The Handbook has no binding effect upon the Department; it is informal guidance material that lacks the force of law. *See N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 779 (9th Cir. 2011) (citations omitted) (FWS handbook on permit processing was guidance material and not binding). The Handbook imposes no discernible rights or obligations. It does not constrain the Secretary's discretion. It is not published in the Federal Register or Code of Federal Regulations. *See Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 28-29 & n.3 (D.C. Cir. 2008) (2005 Checklist for Gaming Acquisitions was non-binding). Nevertheless, Plaintiffs argue that the Handbook requires that the Secretary should have required the UKB Corporation to submit its own application because it uses the word "applicant" in discussing the procedure for considering an application. The Court finds, however, that nothing in the Handbook suggests that this direction reflects an interpretation of any

regulation, nor have Plaintiffs identified anything that would suggest as much. The Handbook's reference to an applicant is non-binding; it does not constrain the Department from considering the application submitted by the UKB and the UKB Corporation.

144. The Court also finds that the fact that UKB and UKB Corporation are separate entities is a distinction without a difference. Interior recognized that the UKB's tribal government and tribal corporation are separate entities. September 2010 Decision at 3 n.1 (citing Solicitors Opinion, 65 I.D. 483 (1958), 2 *Op. Sol. on Indian Affairs* 1846, (U.S.D.I. 1979)). It went on to note that the UKB government represents the UKB in its governmental affairs and that the UKB Corporation represents the UKB in its business affairs. *Id.* Interior discussed a Internal Revenue Service's ("IRS") ruling directly pertinent to the matter, noting that the IRS recognized the tribal character of the corporation in holding that tribal corporations, as a form of the tribe, are not taxable entities: "[t]he question of tax immunity cannot be made to turn on the particular form in which the tribe chooses to conduct its business." *Id.* (quoting Rev. Rul. 81-295; 1981-2 C.B. 15; 1981 IRB LEXIS 95). As Interior noted, "[t]he UKB Corporation is merely the tribe organized as a corporation." *Id.* Its property is tribal property. Tribal property is subject to the governing authority of the UKB government. Interior concluded that thus, "any land placed into trust for the UKB Corporation would necessarily be under the governmental jurisdiction of the UKB government." *Id.* *See also* AR003588, n.1 ("The UKB Corporation is merely the tribe organized as a corporation.").

145. The Court finds that the Corporate Charter of the UKB contemplated that the UKB Corporation would act as the UKB's corporate arm and is the vehicle by which much of the UKB's business is conducted, including the ability to have land held in trust.

146. The UKB Corporation's corporate powers as enumerated in its Charter and as provided by section 3 of the OIWA include (1) entering "into any obligations or contracts essential to the transaction of its ordinary affairs or for the corporate purposes above set forth" (Sec. 3(e)); (2) borrowing money (Sec. 3(f)); depositing funds (Sec. 3(g)); (3) negotiating "with Federal, State, or local governments and to advise or consult with the representatives of the Interior Department on all activities of the Department that may affect the [UKB]" (Sec. 3(h)); (4) preventing "any disposition, lease or encumbrance of land belonging to the Band, interest in lane, or other Band assets (Sec. 3(j)); (5) making "assignments of land belonging to the Band to members of the Band, and to regulate the use and disposition of such assignments (Sec. 3(l)); (6) appropriating "corporate funds for expenses of administering the affairs of the corporation and for other purposes of benefit to the [UKB]" (Sec. 3(m)); (7) regulating how the UKB holds elections (Sec. 3(n)); (8) regulating "the procedure of the officers and membership and all other Band committees and officers" (Sec. 3(o)); and (9) " to purchase, take by gift, bequest, or otherwise own, hold, manage, operate, and dispose of property of every description, real or personal (Sec. 3(r)). *See* UKB Corporate Charter, AR001753-55.

147. The Court finds that by the powers granted to it through the Corporate Charter, the UKB Corporation is authorized to hold land and to have land held in trust in its behalf. The Court also finds that Interior's decision to not consider the acquisition as an off-reservation application in its 2012 Decision was not arbitrary and capricious. Although

Interior considered the requirements of 25 C.F.R. § 151.11 (regulations applicable to off-reservation acquisitions) in the context of the 76-acres Community Services Parcel, the Assistant Secretary stated it was not necessary to decide whether the application was for an on- or off-reservation acquisition because the result would be the same under both analyses. 2009 Decision at 5, AR003635. Nevertheless, the Regional Director considered the application of section 151.11 in her final recommendation, finding that the request met the requirements of the on-reservation regulations and of the off-reservation regulations. April 19, 2012, Regional Director Mem., AR005104. In the decision at issue, however, Interior determined that the two tribes shared a former reservation, thereby clarifying that it considered the factors contained in 25 C.F.R. § 151.10, "On-reservation Acquisition" to be applicable. 2012 Decision at 5, AR000021. The Court finds that this determination was reasonable and not arbitrary and capricious.

Interior Reasonably Concluded that the Cherokee Nation Does Not Have Exclusive Jurisdiction Over the Former Historic Cherokee Reservation and that Its Consent Was Not Necessary for the Trust Acquisition.

148. The Court finds that the administrative record supports Interior's determination that the consent of the Cherokee Nation was not required for the trust acquisition. In making this determination, Interior considered both the import of its determination that the former historic Cherokee reservation is also the former reservation for the UKB, and Congress's direction in its amendment of Interior appropriations changing the requirement that, in acquiring land into trust, Interior must consult with the Cherokee Nation.

149. In the 2012 Decision, Interior stated that:

> Although we have concluded that the former Cherokee reservation is also the former reservation of the UKB within the meaning of IGRA, historically, the Cherokee Nation of Oklahoma has been recognized as

> the "primary" Cherokee tribe. *See*, *e.g.*, Judge Brett's Amended Order in *Buzzard*, *supra*. The Department's regulations at 25 C.F.R. § 151.8 provide that an Indian tribe 'may acquire land in trust status on a reservation other than its own only when the government body of the tribe having jurisdiction over such reservation consents in writing to the acquisition.' Consistent with this regulatory provision, the Secretary has previously declined to take any lands in trust for the UKB within the boundaries of the former Cherokee reservation without the consent of the Cherokee Nation. The Cherokee Nation has consistently refused to grant its consent. (There is an extensive administrative record related to these matters.) However, now that we have determined the former reservation of the Cherokee Nation is also the former reservation of the UKB for purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i), the regulatory requirement for consent of the Cherokee Nation is no longer applicable. By receiving and considering the comments of the Cherokee Nation on the instant acquisition, as well as in the case of the recent acquisition of the community services parcel, the Department has satisfied any requirements to consult with the Cherokee Nation.

2012 Decision at 5, AR000021.

150. The Court finds that Interior reasonably explained its position on whether it was necessary to obtain the consent of the Cherokee Nation. An agency is permitted to change its position so long as it offers a reasoned explanation. *See South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 800 (8th Cir. 2005) (holding that the Department was not required to "exhaustively analyze every factor, but must base its determination 'upon factors listed in the [Part 151] regulations' and that the plaintiff "must present evidence that the [Department] did not consider a particular factor; it may not simply point to the end result and argue generally that it is incorrect.") (internal quotations omitted); *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1124-26 (D. Ore. 2002) (finding that while the Department is required to consider all of the factors set forth in Part 151, it did not have to remedy every potential impact or conflict that could result from the trust acquisition).

151. The court further finds that Interior reasonably relied upon Congress' modification of the language used in a 1999 Appropriations Act requiring only the consultation with the Cherokee Nation as guidance in deciding that, because the Assistant Secretary had found that the former reservation of the Cherokee Nation was also the former reservation of the UKB, Interior did not need the Cherokee Nation's consent to the trust acquisition, and was only required to consult.

152. Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriation Act of 1999, which included a rider stating that "until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation." Pub. L. No. 105-277, 112 Stat. 2681-246 (1998).

153. This provision supersedes language contained in the Department's 1992 Appropriations Act, which provided "[t]hat 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." 105 Stat. 1002, 1004. This language appeared only in the 1992 appropriations and was not repeated in later appropriations.

154. As a general proposition, Congress is presumed to know the terms of published regulations adopted with notice and public comments, such as Part 151. Interior previously had found that the consultation language adopted by Congress in 1999, after the promulgation of regulations requiring consent, was controlling. *See* January 31, 2008

Memorandum from Associate Solicitor to Assistant Secretary ("January 2008 Memorandum"), AR004244.

155. Interior then determined that the appropriations rider applied beyond the year in which it was passed. *Id.* Congress can create permanent legislation through an appropriations act if it "clearly expresses its intention to create permanent law or if the nature of the provision would make any other interpretation unreasonable." *Id.* (citing *Atl. Fish Spotters Assoc. v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003). Courts have recognized that when Congress intends a provision in an appropriations bill to have permanent effect, it uses words of permanency or futurity (such as "to apply in all years hereafter"). January 2008 Memorandum at 2, AR004244 (citing *Building & Constr. Trades Dep't, AFL-CIO v. Martin* 961 F.2d 269, 274 (D.C. Cir. 1992) (citations omitted)).

156. In this case, the Associate Solicitor found that the language "until legislation is enacted to the contrary," indicates that the language providing for consultation with the Cherokee Nation applied beyond the 1999 fiscal year because (1) the definition of until means "up to the time of," which plain meaning implies future application, and (2) the 1999 appropriations rider amended the 1992 appropriations rider that contained the same phrase, which the Associate Solicitor interpreted to mean that Congress amended the 1992 rider because it was still in effect. January 2008 Memorandum at 2, AR004244.

157. The Court finds that Interior reasonably considered the matter and provided a reasoned explanation for its conclusion that if the Cherokee Nation has exclusive jurisdiction over the former Cherokee reservation, then the appropriations rider would have been a nullity. As Interior found, Congress did not need to require the Cherokee Nation's consent

because the Part 151 land acquisition regulations already would have required that consent. June 2009 Decision at 7, AR003637.

The 2012 Decision Does Not Violate the 1866 Cherokee Treaty.

158. The Courts finds that the determination in the 2012 Decision that Interior need not obtain the consent of the Cherokee Nation does not violate the Cherokee Nation Treaty of July 19, 1866, 14 Stat. 799 ("1866 Treaty").

159. Plaintiffs allege that the 1866 Treaty provides the Cherokee Nation with a separate and enforceable right to approve or disapprove the UKB's application to have land acquired into trust for the benefit of the UKB Corporation. Specifically, Plaintiffs allege that the 2012 Decision violates three provisions of the 1866 Treaty, Article 15, Article 26, and Article 8.

160. Article 15 of the 1866 Treaty provides:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions . . . . 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.
>
> * * *
>
> But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national

> council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve the tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.
>
> 1866 Treaty, Art. 15.

161. The Court finds that a plain reading of Article 15 of the 1866 Treaty does not support Plaintiffs' assertion that the 2012 Decision is a violation of the 1866 Treaty. First, Article 15 is not applicable to this case. The Unites States has not settled any Indians on unoccupied lands. The parcel at issue in this case is owned by the UKB in fee. (2012 Decision at 3, AR000019).

162. Second, the Court finds that even if the acceptance of fee land into trust may be considered as settling on unoccupied lands, which the Court disagrees, the language of Article 15 does not support Plaintiffs' expansive reading. Article 15 does not provide the Cherokee Nation with absolute consent over the settlement of other Tribes "east of the 96° of longitude." Any consent provided to the Cherokee Nation is qualified and limited. Per the 1866 Treaty's terms, the Cherokee Nation may object but 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." 1866 Treaty, Art. 15. Thus, the Cherokee Nation's right to obtain consent is limited and not absolute.

163. Article 26 of the 1866 Treaty provides:

> The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against

> domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against inter[r]uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done.
>
> 1866 Treaty, Art. 26.

164. The Court finds that Article 26 of the 1866 Treaty does not reinforce the principle that Cherokee Nation consent is required before Interior may acquire the land in trust and that Article 26's plain language does not support Plaintiffs' challenge to the 2012 Decision.

165. First, the case at issue is not one where unauthorized citizens are seeking to settle or reside in Cherokee territory. The UKB owns the parcel in fee and Interior is acquiring it into trust.

166. Second, the case at issue does not involve hostilities from another tribe. Black's Law Dictionary defines "hostility" as "a state of enmity between individuals or nations, and act or series of acts displaying antagonism, acts of war." Black's Law Dictionary (9th ed. 2009). The action of which Plaintiffs' complain, acquiring fee land owned by the UKB in trust for the benefit of the UKB's corporate arm, simply is not an act displaying antagonism or an act of war.

167. Finally, the plain language of Article 8 of the 1866 Treaty does not support Plaintiffs' argument that acquiring UKB fee land in trust violates the 1866 Treaty. Article 8 provides that "[n]o license to trade in goods, wares, or 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." 1866 Treaty, Art. 8. The 2012 Decision to acquire land in trust is not the granting of a license to trade and is thus not applicable to this case.

Interior Properly Considered Under 25 C.F.R. § 151.10(f) Whether Jurisdictional Problems and Potential Conflicts of Land Use May Arise.

168. The Court finds that the record supports that the Assistant Secretary reasonably considered the potential jurisdictional conflicts that may arise should the land be acquired in trust and reasonably concluded that there is adequate foundation for resolving them.

169. In the 2012 Decision, Interior noted that the Regional Director expressed concern that jurisdictional conflicts will arise between the UKB and the Cherokee Nation if property is placed into trust for the UKB within the former reservation boundaries of the Cherokee Nation. 2012 Decision at 8, AR000024. Interior went on to note that the Assistant Secretary had previously stated in the June 2009 Decision that 25 U.S.C. § 476(f) mandates that the "department or agencies of the United States shall not . . . make 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." *Id.* (citing June 2009 Decision at 6, AR003636 (quoting 25 U.S.C. § 476(f) but mistakenly citing it as 25 U.S.C. § 476(g)). Interior further notes that the Assistant Secretary found that this section of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction" and "the UKB, like the CN, possess the authority to exercise territorial jurisdiction over its tribal lands." 2012 Decision at 8, AR000024 (quoting 2009 Decision at 6, AR003636).

170. The Court finds that Interior's interpretation of section 476(f) is not unduly expansive and does not allow any federally recognized tribe to acquire lands in another tribe's jurisdictional area. Interior did not find that section 476(f) allows or requires Interior to recognize any federally recognized tribe's attempt to acquire land in another's jurisdictional area. Rather, Interior examined the history of the UKB and the Cherokee Nation and found that they both had ties to the historic Cherokee territory. 2012 Decision at 4, AR000020. Second, Interior re-considered the language of the 1946 Act and found that it placed no limitations on UKB's authority; the 1946 Act merely recognized the UKB's sovereign authority. *Id.* at 6, AR000022; 2009 Decision at 6-7, AR003636-37. Based on these findings, Interior determined that the UKB possesses the authority to exercise territorial jurisdiction, just as other tribes do. 2009 Decision at 6, AR003636. The Court finds that this determination is far from an interpretation that section 476(f) allows any tribe to acquire trust property and exercise jurisdiction in any other tribe's jurisdictional area regardless of specific history and ties to the land. Instead, it merely recognizes that two tribes may share a jurisdictional area. *See* 2009 Decision at 7-8, AR0037-38 ("Indeed, the Department recognized that there would be situations in which two tribes must share jurisdiction.").

171. Interior addressed the Regional Director's identification of a potential jurisdictional issue on the property. 2012 Decision at 8, AR000024. Specifically, a portion of the casino building encroaches onto a separate tract of property owned in fee by the UKB ("parking lot tract"). *Id.* To address any concerns, the UKB provided a tribal resolution stating its intention to make an application in the near future to place the parking lot tract into trust and that, in the meantime, no gaming activities would take place on the portion

of the property that lies outside the Parcel at issue in this case. *Id.* The Court agrees with Interior that any potential jurisdictional issues arising out of the parking lot have been adequately addressed.

172. Interior also discussed the provision of services to the Parcel. It noted that fire, water, ambulance, and sanitation services for the Parcel are currently provided by the City of Tahlequah. *Id.* Law enforcement services for the Parcel are currently provided by an informal agreement with the City of Tahlequah and Cherokee County law enforcement agencies whereby the Keetoowah Lighthorse, the UKB's security force, monitors tribally-owned land and reports any suspicious activities immediately to the City and County law enforcement agencies so that those agencies can respond accordingly. *Id.* Plaintiffs have argued that law enforcement will be an issue and alleges that it expects that the UKB will interfere with its cross-deputization agreement with Oklahoma and obstruct the Cherokee Nation Marshal's exercise of police authority. It would be counterintuitive, based on the findings made by Interior on the record about UKB's law enforcement cooperation, that the UKB would not want effective law enforcement and there is no evidence on the record that supports any lack of cooperation by the UKB. Plaintiff itself is a party to 50 cross-deputization agreements. *See* Brian A. Reeves, U.S. DEP'T OF JUSTICE, TRIBAL LAW ENFORCEMENT, 2008, 2 (2011). There is no evidence why any such agreement could not occur here.

173. Furthermore, the Court finds that Interior's consideration of the potential jurisdictional issues between Plaintiffs and the UKB was reasonable, as was its conclusion that any jurisdictional issues were not so significant as to deny the UKB's application. 2009 Decision at 7, AR003637. Interior found that even though both the UKB and the

Cherokee Nation intended to assert jurisdiction over UKB's trust land if taken into trust, Interior could still take the land into trust for the UKB. *Id.* The UKB would have exclusive jurisdiction over land that the United States holds in trust for the UKB. *Id.* But even if the UKB had to share jurisdiction with the Cherokee Nation, Interior noted that "[s]hared jurisdiction is unusual; but it is not unheard of." *Id.* In fact, Interior anticipated that there would be situations in which two tribes would share jurisdiction and the 2009 Decision discussed the fact that several tries within the Eastern Oklahoma Region share jurisdiction over parcels held in trust. *Id.* Interior held that "[t]he UKB and the Cherokee Nation should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.* In its 2012 Decision, based on the record before it, Interior concluded that "[w]hile there may be jurisdictional disputes in the future, the Regional Director believes that there is adequate foundation for resolving them, and we concur." The Court finds that Interior provided a reasonable explanation of its position and adequately considered whether potential jurisdictional problems and potential conflicts of land use may arise. Although it foresaw that issues may arise, the Court finds that Interior's conclusion, based upon the record, that such conflicts could be worked out, was not arbitrary and capricious.

Interior Properly Considered Whether the BIA Is Sufficiently Equipped to Discharge Its Responsibilities Relating to the Trust Acquisition.

174. The Court finds that the record supports that the Assistant Secretary reasonably considered and found that the BIA is sufficiently equipped to discharge its duties relating to the trust acquisition.

175. Interior's land into trust regulations require that the Secretary consider that "[i]f the land to be acquired is in fee status, whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g).

176. Plaintiffs bear the burden of proving that the Assistant Secretary's analysis of this factor was arbitrary and capricious. *South Dakota*, 423 F.3d at 800 (citation omitted). To meet this burden of proof, Plaintiffs must "[p]resent evidence that [Interior] did not consider a particular factor; [they] may not simply point to the end result and argue generally that it is incorrect." *Id.*

177. The Court finds that Plaintiffs have not met their burden and that the record shows that the Assistant Secretary considered this factor.

178. The Assistant Secretary first considered the issue of the BIA's ability to discharge its duties in his June 24, 2009, Decision regarding the acquisition of the 76-acre parcel, which was referenced by the 2012 Decision and is also part of the administrative record for the 2012 Decision. AR003638 and AR000022. In the 2009 Decision, the Assistant Secretary referred back to his April 5, 2008, Memorandum to the Regional Director directing her to further substantiate her decision that the BIA was not equipped to discharge its duties as to the 76-acre Community Services Parcel or arrive at a different conclusion based on the evidence before her. AR004931. In the 2008 Memorandum, the Assistant Secretary disagreed that the BIA was not equipped to discharge the additional responsibilities, stating that the parcel at issue was a small parcel of land and it did not appear that supervision needed to be extensive. AR004932. The Assistant Secretary noted that the Regional Director had already found that the UKB, Cherokee County, and

the Cherokee Nation provide law enforcement services within the proposed acquisition area and that it did not appear from the record that there was sufficient evidence to substantiate a denial on these grounds. *Id.*

179. In his 2009 Decision, the Assistant Secretary noted that the Regional Director maintained that the BIA was not sufficiently equipped because the duties of the Tahlequah Agency had been contracted to the Cherokee Nation and the BIA office had been shuttered. AR003638. The Regional Director also wrote that there were no additional funds for providing services to the 76-acre trust acquisition. *Id.* In disagreeing with the Regional Director's findings, the Assistant Secretary held that the Regional Director failed to substantiate her decision and failed to identify specific duties that the BIA would incur. *Id.* The Assistant Secretary further found that the Regional Director did not substantiate the issues that would arise with the trust parcel and did not refute that they could not effectively be administered by the Region or contracted to the UKB. *Id.* The Assistant Secretary reversed the Regional Director's decision as to the BIA's inability to administer the trust parcel. AR003632.

180. The Regional Director next considered whether the BIA was sufficiently equipped to handle the duties of the trust acquisition specifically as to the gaming parcel in her April 12, 2012, Memorandum recommending that the property be taken into trust. AR005103. In her recommendation, the Regional Director considered the availability of funds for the Region and whether the UKB would accept service from Cherokee Nation employees or would request that the Region provide Bureau direct services. *Id.* The Regional Director found that the additional services may be a hardship to the Region unless additional appropriations or budget allocations are obtained, but that, nevertheless, the Region is

capable of providing these services. *Id.* The Assistant Secretary concurred with the Regional Director's analysis and incorporated it into the 2012 Decision. AR000024-25.

181. The Court finds that the Assistant Secretary was entitled to use his discretion in examining the issue of the Region's ability to discharge its responsibilities related to the trust acquisition, and that the record for this decision shows that it was a factor that was thoroughly considered throughout the decision-making process. The Assistant Secretary was aware of the resources available to the BIA (personnel and funds) that would have to be allocated for management of post-transfer gaming oversight. Although the Regional Director stated that the additional duties from the trust acquisition "may" be a hardship on the Region unless additional funds were obtained, AR005103, both the Regional Director and the Assistant Secretary did not consider this to mean that the BIA was not adequately equipped to discharge its responsibilities. 2012 Decision at 8-9, AR000024-25. This Court finds that Interior adequately considered this factor. *See South Dakota*, 423 F.3d at 800. Interior, as demonstrated by the record, articulated a rational connection between the facts and the choice it made. *See South Dakota v. Ubbelohde*, 330 F.3d 1014, 1031 (8th Cir. 2003); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 (1974). Plaintiffs have not shown that Interior did not consider this factor' Plaintiffs merely find fault with Interior's final determination. This is not enough. The Court finds that Plaintiffs have not met their burden of proving that Interior's consideration of this factor was inadequate.

Interior Was Not Required to Consider Plaintiffs' Exclusive Reliance on Offering Gaming Within the Former Reservation Boundaries.

182. The Assistant Secretary was not required to consider whether Plaintiffs' claimed an exclusive reliance on providing gaming services within the historic reservation boundaries. *See* Merit Hr'g Tr. 61-62. Plaintiffs argue that their reliance on Interior's previous position that the Cherokee Nation had exclusive jurisdiction over the former reservation, which reliance Plaintiffs' based their decisions on how to manage their gaming enterprises – such as the decision to construct a number of casino-related building projects – had to have been considered by the Assistant Secretary in the 2012 Decision. *See* Merit Hr'g Tr. 61:21-25; 62:1-10, 24-25; 63: 6-24.

183. In *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), the Supreme Court held that when an agency's decision to change a policy is not subject to a "more searching review" under the APA. *Id.* at 1810. The agency is only required to provide a reasoned explanation, which should display awareness that it is changing position. *Id.* at 1811. Citing two examples – a policy change resting upon factual findings contradicting the findings underlying prior policy and a policy change that changes a prior policy that "has engendered serious reliance interests that must be taken into account[]" – the Supreme Court found that it would be arbitrary and capricious to ignore such matters and that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. *Id.* (citation omitted).

184. Here, the Assistant Secretary did provide a reasoned basis for the change in holding that the former historic Cherokee reservation is also the former reservation for the UKB. The Assistant Secretary was not, however, required to consider the specific reliance interests

of Plaintiffs in exclusive gaming in the area because contrary to Plaintiffs' assertions, Plaintiffs do not have a legally protectable reliance interest in exclusive gaming. *See* Merit Hr'g Tr. 65:8-25 ("But you're right, as to facilities, structures, people involved in gaming within the 14-county Cherokee Nation territory, yes, there is a monopoly and there's a very good reason for it. That's necessary to support the Cherokee Nation . . .").

185. Tribes under the IGRA, do not have the right to be free from competition and do not have a property interest in gaming, *i.e.*, tribes do not have a reliance interest on gaming. *See Artichoke Joe's Cali. Grand Casino v. Norton*, 353 F.3d 712, 727-28, 735 (9th Cir. 2003). Gaming is a business and is subject to regulation and to competition. There is no guarantee of exclusivity.

186. Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, nothing in that provision suggests that there is an affirmative right for nearby tribes to be free from economic competition. *Sokaogan Chippewa Cmty. v. Babbit*, 214 F.3d 941, (7th Cir. 2000). Therefore, the Court finds that Interior did not act arbitrary or capriciously in not considering as part of its 2012 Decision Cherokee Nation Entertainment's reliance on being the sole gaming enterprise within the boundaries of the historic Cherokee reservation.

PROPOSED CONCLUSIONS OF LAW REGARDING REMEDY

Should the Court find any legal error in the 2012 Decision, Federal Defendants provide the following proposed Findings of Fact and Conclusions of Law with regard to remedy. Federal Defendants first provide conclusions of law setting forth the legal standard applicable to both vacatur and injunctive relief. Federal Defendants then provide conclusions of law and findings

of fact in support of a ruling remanding the 2012 Decision to the Agency and denying additional injunctive relief.

I. Conclusions of Law Regarding Standards of Vacatur and Injunctive Relief

187. This suit seeks judicial review of an agency action under the APA. Under the APA, this Court retains its full equitable authority to craft the appropriate remedy. 5 U.S.C. § 702 ("[n]othing herein . . . affects . . . the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground").

188. Equitable relief is neither presumed nor automatic. Upon consideration of the equities, the courts have the discretion to determine that equitable relief should not issue despite a legal violation. *See, e.g., Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008) (finding public interest outweighed injunction even assuming irreparable harm to plaintiffs).

A. Vacatur

189. Vacatur is a form of equitable relief. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1132 (10th Cir. 2010). The case law makes clear that courts are not mechanically obligated to vacate an agency decision that they find invalid. *See, e.g., California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989 (9th Cir. 2012); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, it is not required to set aside every unlawful agency action."); *W. Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("[G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect.").

190. In determining whether to vacate an agency decision or to remand it to the agency without vacatur, courts consider a two-part test articulated by the D.C. Circuit in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. 1993). Under *Allied-Signal*, the decision whether to vacate an agency decision depends on "[1] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [2] the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51. *See also Ctr. For Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1242 (D. Colo. 2011) (applying *Allied-Signal* factors).

B. Permanent Injunctive Relief

191. Injunctive relief is a "drastic and extraordinary remedy" that does not automatically issue upon finding a violation of law. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010). To obtain injunctive relief, a plaintiff bears the burden of demonstrating:

> That it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay Inc. v. MercExchange, 547 U.S. 388, 391 (2006).

192. A court may determine that the balance of equities favors leaving an agency's decision in place notwithstanding a legal deficiency in the decision-making process. *See, e.g., N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007) (leaving Resource Management Plans in place and allowing development to proceed while the agency remedied the deficiencies in the plans); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 822 (9th Cir. 2002) (allowing grazing to continue despite finding that permits were issued

in violation of NEPA). In fact, the Supreme Court has held that the public interest can support leaving a flawed decision in place even where doing so means plaintiffs will suffer irreparable harm. *See Winter*, 555 U.S. at 22-23 (holding the public interest counseled against injunctive relief even assuming legal violation and assuming irreparable injury).

II. Proposed Findings of Fact and Conclusions of Law in Support of Remand Without Vacatur

193. As set forth below, the Court finds that the proper remedy is to remand this matter to Interior to address any legal deficiencies found in the 2012 Decision and to leave the 2012 Decision in place during the interim.

194. This Court first considers "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)." *Allied-Signal*, 988 F.2d at 150. This factor turns in part on whether there is "at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Id.*

195. Under the first *Allied-Signal* factor, the Court concludes that the procedural deficiencies in the issuance of the 2012 Decision can be readily addressed on remand and do not suggest that the merits of the 2012 Decision cannot be substantiated on remand. *See, e.g.*, *Back Country Horsemen of America v. Johanns*, 424 F. Supp. 2d 89 (D.D.C. 2006) (remanding without vacating Forest Service decision issued without required public notice and comment). Under the second *Allied-Signal* factor, the Court finds that vacatur of the 2012 Decision would be extremely disruptive. The UKB has closed down its gaming facility and has lost its sole source of revenue. The Court finds that allowing the UKB to continue with its gaming operations while Interior addresses any deficiencies in

the 2012 Decision allows for recognition of the important federal interests and policy of tribes being able to develop independent sources of income and self-government and providing for its members' welfare.

196. Vacating the 2012 Decision would create more uncertainty for the UKB and its ability to govern its members and maintain its self-sufficiency.

197. Leaving the 2012 Decision in place, without vacatur, would minimize any further disruption to the UKB and its ability to generate revenue for the purposes of self-governance and economic independence. Leaving the 2012 Decision in place would also protect the public's interest and the strong federal policy favoring tribal self-government and tribal self-sufficiency. Plaintiffs would suffer no harm from the agency taking the land into trust because Plaintiffs will be able to challenge any future decision and if Plaintiffs successfully challenge any future land into trust decision, Interior will comply with a final court order and any judicial remedy that is imposed. 78 Fed. Reg. 67928, 67934; *see also Stand Up for California v. US Department of the Interior*, 919 F.Supp.2d 51, 82 (D.D.C. 2013).

198. The Court thus concludes that the appropriate remedy in this case is remand without vacatur.

III. Proposed Findings of Fact and Conclusions of Law in Support of an Order Vacating the 2012 Decision Without Additional Injunctive Relief

Should the Court determine that vacatur of the 2012 Decision is warranted, Federal Defendants submit the following findings of fact and conclusions of law in support of a ruling vacating the 2012 Decision but denying injunctive relief prohibiting Interior from acquiring the land into trust for the benefit of the UKB or the UKB Corporation.

199. For the reasons set forth above, the Court concludes that vacatur of the 2012 Decision is appropriate.

200. The Court concludes that because vacatur of the 2012 Decision is sufficient to remedy Plaintiffs' injury, an overlapping injunction prohibiting the agency from taking the land into trust for the UKB or the UKB Corporation because such an acquisition is barred by the holding in *Carcieri* and under the IRA and OIWA is unnecessary and inappropriate. *See Monsanto*, 130 S. Ct. at 2761 (holding that where vacatur "was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted").

201. Plaintiffs' request for an injunction barring Interior from taking the land into trust for the UKB or the UKB Corporation because the Supreme Court's decision in *Carcieri* prevents such an acquisition or under the IRA or the OIWA is therefore denied.

202. Plaintiffs' request for injunctive relief must be analyzed under the traditional four-factor inquiry. *eBay*, 547 U.S. at 391. These factors include:

> (1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id.; *Monsanto*, 560 U.S. at 2745.

203. Under the first step of the injunction inquiry, Plaintiffs' request for a blanket injunction fails because Plaintiffs have not identified any irreparable injury stemming from decisions that Interior had not yet made. In the absence of a demonstrated irreparable

injury, the "drastic and extraordinary remedy" of injunctive relief is inappropriate. *Monsanto*, 130 S. Ct. at 2743.

204. Plaintiffs' request also fails the second step because Plaintiffs have not demonstrated that other remedies at law are inadequate to compensate for its injury. *eBay*, 547 U.S. at 391. When, and if, Interior issues a final agency decision that includes a determination that the decision in *Carcieri* does not preclude it from accepting land into trust for the benefit of the UKB or that it may accept land into trust for the benefit of the UKB or the UKB Corporation under the IRA or the OIWA, then Plaintiffs may challenge that decision. The availability of this case-specific resolution provides Plaintiffs with an adequate remedy at law. *See, e.g., United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) (finding that a full and fair opportunity to litigate claims in a separate suit constitutes an adequate remedy at law, thereby undercutting "the existence of irreparable injury").

205. Finally, the Court concludes that the balance of hardships and the public interest mitigate against the broad injunctive relief that Plaintiffs seek. Congress has determined that the establishment of a tribal land base and economic self-sufficiency are important public interests. Here, the parcel provides the UKB's sole source of revenue and allows it to maintain its independence and self-sufficiency. The agency action at issue serves the long-recognized policy of "further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see Prairie Band*, 253 F.3d at 1253 (finding that "tribal self-government may be a matter of public interest"); *Seneca-Cayuga Tribe of Okla.v. Okla.*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming grant of injunction where "injunction promotes the paramount federal policy that Indians develop independent sources of

income and strong self-government"); *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995) (finding "the public's interests and the interests of [an Indian tribe] coincide" insofar as "there is a strong federal policy favoring tribal self-government [and] tribal self-sufficiency.").

206. The Court finds that an issuance of such an overly broad and final injunction would undermine the public policies concerning the promotion of tribal self-governance and self-determination. Rather, the agency must be able to make any determination on the propriety of a potential future application on the merits of that application. It is not for the Court to foreclose a decision from an agency before the agency has had an opportunity to consider a matter expressly delegated to it by Congress.

Respectfully submitted this 8th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filings to the parties entitled to receive notice.

/s/ Jody H. Schwarz