UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHEROKEE NATION, and CHEROKEE NATION ENTERTAINMENT, LLC,	)	
Plaintiffs,	)	
v.	)	Case No. 12-CV-493 GKF TLW
S.M.R. JEWELL, et al.,	)	
Defendants,	)	
And	)	
UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,	)	
Intervenor-Defendants.	)	

INTERVENOR-DEFENDANTS' PROPOSED RECORD FACTS AND CONCLUSIONS OF LAW[1]

Intervenor-Defendants United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") and United Keetoowah Band of Cherokee Indians in Oklahoma Corporation ("UKB Corporation") respectfully submit the following proposed record facts and conclusions of law based upon the administrative record before the agency as directed by the Court's Order of July 30, 2014. [Dkt. No. 147 at 184].

[1] In reviewing the agency decision at issue, the Court is not to find facts, create a *de novo* record, or consider documents not party of the Administrative Record, but is to review the decision in light of the administrative record relied upon by the agency. See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1564 (10th Cir. 1994). Intervenor-Defendants submit that the facts outlined herein are those from the administrative record relied upon by the agency in reaching the decision at issue as well as those from legal authorities, upon which the Court may also rely.

I. INTRODUCTION

This case comes before the Court on the merits, based upon a challenge to the July 30, 2012 Decision by the Department of the Interior ("DOI") to acquire 2.03 acres in Tahlequah, Oklahoma in trust on behalf of the United States of America for the benefit of the UKB Corporation (the "2012 Decision" or "Decision"). The Decision also permitted Indian gaming on the land in question, which had been ongoing there by the UKB since 1986. Plaintiffs, Cherokee Nation of Oklahoma ("CNO") and Cherokee Nation Entertainment, LLC ("CNE") challenge the 2012 Decision under the APA as being contrary to law and arbitrary and capricious. The historical relationship between the tribal governments and the federal government is longstanding and has at various points in history been contentious. However, by issuing the 2012 Decision and the precursor decisions issued between 2009 and 2011, the Assistant Secretary for Indian Affairs ("AS-IA") intended to provide the legal and political framework that would allow two federally recognized Indian tribes, the UKB and CNO, to govern their respective members, on their respective lands, and to work out their differences as equals under the law. [AR 17-26, 3586-3590, 3631-3643, 5106-5109].

II. RECORD FACTS SUPPORTING THE 2012 DECISION

A. UKB Historical Connection to Historic Cherokee Reservation

1. Prior to first contact with Europeans, the Cherokee Indians lived in the southeastern portion of the United States without a centralized government. See United States v. Old Settlers, 148 U.S. 427, 434 (1893).

2. By the early 1800's, the Cherokee were divided into two groups: those who embraced Euro-American civilization and those who wished to maintain a traditional Cherokee lifestyle. See TREATY WITH THE CHEROKEE, July 8, 1817, 7 Stat. 156 ("1817 Treaty"); [AR

1541-1542].

3. In 1817, Keetoowah Cherokees, the traditional Cherokee group, labeled by the United States as the "Western Cherokees" or "Old Settlers," entered into a treaty with the United States in which the United States ceded lands on the Arkansas and White Rivers to the group in exchange for a portion of the lands occupied by the Western Cherokee in the East. See 1817 Treaty at Art. 1, 2 and 5; see also, United States v. 'Old Settlers', 148 U.S. 427, 429 (1983); [AR 1541-1542, 1763, 3579].

4. The Cherokees who remained in the East were known as the "Eastern Cherokees." United States v. Cherokee Nation, 202 U.S. 101, 103 (1906).

5. The 1817 Treaty was the first official recognition of these two Cherokee groups as separate, but related nations, stating: "that the treaties heretofore between the Cherokee nation and the United States are to continue in full force with *both parts* of the nation, and *both parts* thereof entitled to all the immunities and privilege which the *old nation* enjoyed under the aforesaid treaties . . . ." 1817 Treaty, at Art. 5 (emphasis added).

6. In 1828, the Western Cherokee entered into another treaty with the United States to move even further west, away from encroaching white settlers. See Preamble, TREATY WITH THE WESTERN CHEROKEE, May 6, 1828, 7 Stat. 311 ("1828 Treaty"); [AR 1543].

7. The 1828 Treaty granted the Western Cherokees seven million acres of land and guaranteed a "perpetual outlet, West, and a free unmolested use of all the Country lying West of the Western Boundary . . . ." 1828 Treaty at Art. 2; [AR 1543].

8. "Historically, the Keetoowah Cherokee moved into Indian Territory from Arkansas under the Treaty of Washington of 1828, and to Arkansas Territory by Treaty of 1817. At this time, they were known as the "Old Settlers" or "Western Cherokee" as they had migrated

from aboriginal homelands in the Southeast (North Carolina, Tennessee, Georgia) to Arkansas Territory due to European encroachment.". [AR 3579].

9. During the early 1830's, the southeastern states that encompassed the original Cherokee homeland pressured the United States from to evict the Eastern Cherokees and extinguish Indian title to all lands within those states resulting in the TREATY OF NEW ECHOTA. See TREATY WITH THE CHEROKEE (TREATY OF NEW ECHOTA), Dec. 29. 1835, 7 Stat. 478, at Preamble; [AR 1544]. The Treaty of New Echota required the Eastern Cherokees to cede all remaining Cherokee lands in the east and provided for their removal to the land then held by the Western Cherokees. See TREATY OF NEW ECHOTA at Art. 1, 2, and 16; [AR 1544].

10. Forcing the Eastern Cherokees onto land guaranteed to the Western Cherokees resulted in a political struggle that has persisted to the present day. See Cherokee Nation v. United States, 40 Ct.Cl. 252, 274-75 (1905), aff'd 202 U.S. 101 (1906); [AR 1544-45].

11. The United States attempted to resolve these disputes through the Treaty of 1846, which reaffirmed that both parts of the Cherokee Nation were one body politic and made the Eastern and Western Cherokees, together, party to the terms of the 1835 Treaty. See TREATY WITH THE CHEROKEE, Aug. 6, 1846, 9 Stat. 871 ("1846 Treaty") at Preamble and Art. 2; [AR 1554-1558]. The 1846 Treaty emphasized that the lands of the "Cherokee Nation" were to be held in common for all Cherokee people. Id. at Art. 1.

12. However, tensions persisted as the minority Western Cherokees, who had their own government prior to the arrival of the Eastern Cherokee, were forced to live under a government now dominated by the majority Eastern Cherokee. [AR 1604].

13. In 1859, the Western Cherokees, whose traditional culture was long endangered by non-Indian encroachment and who faced a new threat from the impending Civil War, formed

the "Keetoowah Society." [AR 1546]. In their 1859 Constitution, the Keetoowah pledged to honor their traditional culture, to maintain relations with the United States, and to preserve a separate identity from the Eastern Cherokee majority. [AR 1605].

14. Following the Civil War, the United States entered into another treaty with the Cherokee Nation. See TREATY WITH THE CHEROKEE, July 27, 1866, 14 Stat. 799 ("1866 Treaty"). The 1866 Treaty required the Cherokee Nation to cede to the United States certain lands that the Western Cherokee had received through the Treaty of 1828, and established the final bounds of what is now known as the historic Cherokee Reservation. See id.

15. In 1893, Congress passed the Indian Appropriation Act of 1894. See Indian Appropriation Act 1894, ch. 206, 27 Stat. 612 (1893). This Act authorized a commission to negotiate individual land allotments with members of the Five Civilized Tribes, thereby reducing the collective land holding of those entities. See id.

16. The Keetoowah Society opposed allotment because its members believed that all lands occupied by the Cherokee people were "the common property of the Cherokees who purchased them from the United States under the treaties of 1828, 1833, and 1835 ***and their descendants***." [AR 1605].

17. In 1902, notwithstanding the Keetoowah Society's objection, Congress enacted legislation requiring the allotment of Cherokee lands and terminating the Cherokee Nation government as of March 4, 1906. See Act of July 1, 1902, Pub. L. No. 57-241.

18. Faced with the mandated end of the Cherokee Nation government, the Keetoowah Society, in 1905, adopted a new constitution and secured a federal charter so they could continue to "provide a means for the protection of the rights and interest of the Cherokee people in their lands and funds . . . ." [AR 1605-1606].

19. Following passage of the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461, et seq., and the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501, et seq., the Keetoowah Society began seeking the ability to reorganize under the OIWA. [AR 4915].

20. In 1945, upon the recommendation of DOI Secretary Abe Fortas that the Keetoowah Cherokees deserved federal recognition to "enable these Indians to secure any benefits, which under the [OIWA], are available to other bands or tribes," Congress formally recognized the UKB as a Band under the OIWA and effectively overruled a prior determination by the Solicitor that the Keetoowah Society did not qualify for Band status. See Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976 (with attached correspondence from Secretary Fortas). Secretary Fortas further explained:

> The purpose of the bill is to recognize the Indians who belong to the Keetoowah Society, as a separate band or organization of the Cherokee Indians, so that it may organize under section 3 of the [OIWA].
>
> ***
>
> When legislation was pending in Congress in 1905 to dissolve the tribal governments of the Five Civilized Tribes, the Keetoowahs applied for and received a charter of incorporation through the United States district court. The intention in this, as in all courses followed by the Keetoowah group, was that of keeping alive Cherokee institutions and the tribal entity.

Id.

21. DOI recognized that the Keetoowah Cherokees' efforts to organize under the OIWA were "indicative of a *general desire of a large number of the Cherokee people* to join together in some kind of effort *to protect the lands* of members of the group, to try to do something about the *education*, the *health* of the neglected areas and, as then Chief of the Keetoowah Cherokees stated, to help the Indian Service 'to reach out and get to the Indians who need help.'" [AR 1609-1610].

22. DOI further stated: "Inasmuch as the Keetoowah organization has not only the benefit of law, but of several years effort it, of course, would seem to me that we should revive and bring up to date the Indians' interest in this organization." [AR 1610].

23. It was even suggested that the Cherokee tribe be dissolved in the event that the Keetoowah Cherokees organize:

> The more I think of it, the more I am convinced that the Keetoowahs are the proper ones to help the Cherokees. . . . I, for one, would be willing to go a step farther and recommend that the present Executive group be dissolved and the Keetoowah organization be the sole representative with the Government of the Cherokees of Oklahoma.

[AR 1550].

24. The Secretary approved the UKB Constitution and Bylaws on May 8, 1950 and the UKB ratified them on October 3, 1950. [AR 18]. The UKB Constitution and Bylaws establish UKB headquarters in Tahlequah, Oklahoma, within the historic Cherokee Reservation. [AR 1749]. Pursuant to its Constitution, individuals must have a minimum of ¼ Cherokee blood quantum to be eligible for membership. [AR 1656]. Like many other tribal organizing documents of tribes that are recognized as having territorial jurisdiction, the Constitution and Bylaws do not specify the UKB's geographic territory, but do establish the UKB headquarters in Tahlequah, Oklahoma. See SENECA-CAYUGA TRIBE OF OKLAHOMA CONST. (1937); OTTAWA TRIBE OF OKLAHOMA CONST. (1938); CADDO TRIBE OF OKLAHOMA CONST. (1938); MODOC TRIBE CONST. (1990); [AR 1656].

25. The 1946 Act is silent as to the UKB's status vis-à-vis the historic Cherokee reservation, neither affirming nor prohibiting a claim of a shared reservation. See Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976

26. The Keetoowah Cherokee have had an enduring relationship with the United

States government, both unilaterally through the Western Cherokee/Old Settlers and the Keetwoowah Society and as part of the historic Cherokee Nation, and have uninterruptedly resided in the area now encompassing the historic reservation since the early 1800s. [AR 1541-1548, 1601-1617, 1763, 3579].

27. The record contains no evidence indicating that the UKB organized under the impression, knowledge, or intention that doing so would relinquish its members' rights in the lands of the former Cherokee reservation or their rights as Cherokee Indians. Nor is there any evidence in the record that, at the time of the UKB's formal federal recognition, either the DOI or Congress intended that such re-organization would result in the forfeiture of the UKB's rights in the lands of the former Cherokee reservation or any of its members' rights as Cherokee Indians.

28. The Plaintiffs have included in their briefing a detailed history of the CNO and the Administrative Record contains some information in this regard. See [Dkt. No. 132 at 2-7]. However, that historical recitation neither supports nor impugns the 2012 Decision and thus need not be repeated here.

B. The Department's Decision Not to Review UKB's 1985 Trust Application without CNO Consent

29. In 1985, the UKB sought to acquire a parcel of land located within the bounds of the historic Cherokee reservation in trust. [AR 450].

30. In a 1987 decision, the Secretary declined to acquire land in trust for the UKB based upon lack of CNO's consent ("1987 Decision"). [AR 450].

31. The 1987 Decision was the first and only Secretarial decision declining to acquire land in trust for the UKB.

C. The Department's Decision to Acquire the 76-Acre Non-Gaming Parcel in Trust on Behalf of the UKB Corporation

32. On June 9, 2004, the UKB applied to the Regional Director of the Eastern Oklahoma Region of the Bureau of Indian Affairs ("BIA") to have a 76-acre "Community Services Parcel" taken into trust ("Community Services Parcel Application") for non-gaming purposes. [AR 2176].

33. The Regional Director denied the Community Services Parcel Application in a decision issued on April 7, 2006 ("2006 Decision"). . [AR 3909-3914].

34. The UKB appealed the 2006 Decision to the Interior Board of Indian Appeals ("IBIA") in July 2006. [AR 2176].

35. On February 14, 2008, the Associate Solicitor, Indian Affairs wrote to AS-IA Carl Artman stating:

> I have reviewed the April 7, 2006, decision of the Director, Eastern Oklahoma of the Bureau of Indian Affairs (BIA) to deny the United Keetoowah Band's (UKB) application to take a 76-acre parcel in trust under 25 C.F.R. Part 151. In that decision, she indicated that she denied the application because of jurisdictional conflicts that will arise between the UKB and the Cherokee Nation of Oklahoma (CNO), the inability of the BIA to discharge additional responsibilities resulting from the acquisition of the land in trust status, and the need for additional environmental documentation. We believe that her decisions on the first two grounds are mistaken. In addition, the Director should inform the UKB of the additional environmental evaluation that needs to occur in order for the application to be approved.

[AR 4933].

36. On April 5, 2008, AS-IA Artman ordered the Regional Director to request a remand from the IBIA so that the Region could reconsider its 2006 Decision regarding the Community Services Parcel Application. [AR 4931-4932]. AS-IA Artman stated that the "UKB charter, approved by the Secretary in 1950, contemplates the UKB holding land for tribal

purposes[,]" and noted that the position in the April 7, 2006 decision "vitiates those charter provisions . . . ." [AR 4931]. AS-IA Artman also commented on the Regional Director's conclusion regarding the ability of the BIA to discharge the additional responsibilities that would result from the acquisition of the 76-acre parcel in trust:

> The proposed trust land is a small parcel of land with community program buildings and a dance ground on it. It would not appear that supervision needs to be extensive . . . . It does not appear from the record there is sufficient evidence to substantiate a denial on these grounds.

[AR 4932]. Finally AS-IA Artman noted that the Associate Solicitor had advised that "the 1999 appropriations rider controls and that while the Department must consult with the CNO before acquiring land in trust, it is not required to get the consent of CNO." [AR 4932].

37. The IBIA subsequently vacated the 2006 Decision and remanded the Community Services Parcel Application to the BIA on June 4, 2008. United Keetoowah Band v. E. Okla. Reg'l Dir., 47 IBIA 87 (2008); [AR 4946].

38. On August 6, 2008, the Regional Director again denied the Community Services Parcel Application citing perceived jurisdictional conflicts with CNO, the inability of BIA to discharge its additional responsibilities associated with having the land in trust, and the failure of the parcel to qualify for a categorical exclusion under the National Environmental Policy Act. [AR 4946-4956].

39. The UKB appealed this decision to the IBIA, but Acting AS-IA George T. Skibine took jurisdiction of the appeal pursuant to 25 C.F.R. § 2.20(c) on September 4, 2008. [AR 4972].

40. On February 24, 2009, the United States Supreme Court issued its decision in Carcieri v. Salazar, 555 U.S. 349 (2009), concluding that a tribe seeking to qualify for trust lands

under the first definition of "Indian" found in 25 U.S.C. § 479 must have been under federal jurisdiction in 1934, when the IRA was enacted. Id. at 382-83. Carcieri did not address the alternate defintions of "Indian" under which a tribe could seek to qualify.

41. As a part of the AS-IA's ongoing review of Community Services Parcel Application, the AS-IA requested briefing on the effect, if any, of Carcieri on the pending application. [AR 3632].

42. On June 24, 2009, AS-IA Larry Echo Hawk issued an order reversing the Regional Director's 2008 decision "as to the perceived jurisdictional conflicts with the CNO, the BIA's inability to administer the trust parcel, and the failure of the proposed fee-to-trust acquisition to qualify for a categorical exclusion." (the "June 2009 Decision"). [AR 2207]. However, "because [the] appeal raise[d] issues with national implications which the Department need[ed] to study further," AS-IA Echo Hawk declined to determine his authority under the IRA, "until the Department has developed a more comprehensive understanding of Carcieri and its impact on tribes throughout the country." [AR 2207-2209].

43. With regard to the Regional Director's conclusion that there would be problematic jurisdictional conflicts should the land be acquired in trust for the UKB, the AS-IA noted that the Regional Director's conclusion was based upon an erroneous determination that the CNO has exclusive jurisdiction over the historic Cherokee reservation. The Regional Director's determination was based upon a narrow and incorrect reading of the 1946 Act as authorizing the Keetoowahs to organize under the OIWA and withholding any territorial jurisdiction from the tribe. [AR 2211]. The AS-IA explained that

> The 1946 Act is silent as to the authorities that the Band would have[,]" and "[o]n its face, it imposes no limitations on the Band's authority. It merely recognizes the Band's sovereign authority. That authority extends 'over both [its] members and [its] territory.'

> There is no reason, on the face of the Act, that the Keetoowah Band would have less authority than any other band or tribe.

[AR 2211].

The AS-IA also noted that previous DOI decisions, as well as the decisions in United Keetoowah Band v. Sec. of the Interior, No. 90-C-608-B (May 31, 1991) ("UKB v. Secretary"), Buzzard v. Oklahoma Tax Comm'n, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992), and United Keetoowah Band v. Mankiller, No. 92-C-585-B (N.D. Okla. Jan. 27, 1993) (collectively, the "Buzzard Cases"), occurred prior to Congress' amendment of section 476 of the IRA, and that as amended, § 476 of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction. [AR 2211]. The AS-IA further noted that:

> The conclusion that the CNO does not enjoy exclusive jurisdiction over the former Cherokee reservation is consistent with the 1998 (sic) appropriations rider which provided that no appropriated funds shall be used to acquire land into trust within the former Cherokee reservation without consulting the CNO. If CNO had exclusive jurisdiction over the former Cherokee reservation, Congress would have required consent of CNO . . . .

[AR 2012].

44. In rejecting CNO's claim that its consent is necessary for land to be acquired in trust within the former Cherokee Reservation, AS-IA Echo Hawk explained that

> Congress overrode this regulatory requirement [25 C.F.R. § 151.8] with respect to lands within the boundaries of the former Cherokee reservation by including in the Interior and Related Agencies Appropriations Act of 1999 the following language: 'until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation.'

[AR 2209-2210].

45. On July 30, 2009, the AS-IA issued an order to clarify the June 24, 2009 decision (the "July 2009 Decision"). [AR 2219-2222, 5106-5109]. The July 2009 Decision stipulated that the AS-IA had made no previous findings of law or fact regarding the Department's authority "to take land into trust on behalf of the UKB under any particular theory." [AR 2220, 5107]. As such, the AS-IA requested additional briefing from UKB and the CNO "on the issue of the import, if any, of the Carcieri v. Salazar decision[]" on AS-IA's authority to acquire trust lands on behalf of the UKB. [AR 2220, 5107].

46. The CNO, UKB, and the BIA's Regional Director for the Eastern Oklahoma Regional Office completed their briefing on the relevance of Carcieri to the UKB's trust application in September 2009. [AR 3586].

47. One year later, on September 10, 2010, AS-IA Echo Hawk issued a decision directing the Regional Director to allow the UKB to amend its application to invoke the Secretary's authority under: (1) Section 5 of the IRA for one or more half-blood UKB members who could then transfer their interest to the UKB; (2) Section 3 of OIWA for the UKB Corporation; or (3) Section 1 of the OIWA (the "2010 Decision"). [AR 2224]. The AS-IA did not determine his authority to acquire land in trust for the UKB under the IRA in this decision. [AR 2224-2226].

48. Discussing the import of Congressional recognition of the Keetoowahs as a band under the OIWA, the 2010 Decision states 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]." [AR 2225].

49. On October 5, 2010, the UKB submitted an amended application to request that the Department accept the Community Services Parcel into trust either on behalf of the UKB under the IRA or on behalf of the UKB Corporation under section 3 of the OIWA (the "Amended Community Services Application"). [AR 2176].

50. In a January 21, 2011 letter from the AS-IA to UKB Chief George Wickliffe, the AS-IA confirmed the 2010 Decision, stating that the Regional Director has authority under Section 3 of the OIWA to acquire the Community Services Parcel in trust for the UKB Corporation, and that "Carcieri does not apply to this acquisition" (the "2011 AS-IA Correspondence"). [AR 2229].

51. The Regional Director issued a decision approving the Amended Community Services Application on May 24, 2011. [AR 2176-2186].

D. The Department's Decision to Acquire the 2.03 Acre Parcel in Trust on Behalf of the UKB Corporation

52. The 2.03 acre parcel at issue in this action (the "Parcel") is located in the City of Tahlequah, Oklahoma and is encompassed within the last treaty boundaries of the Cherokee as defined by the terms of the 1866 Treaty. [AR 5095].

53. In 1986, the UKB entered into a contract for the purchase of the Parcel, by installment payments. The UKB obtained fee simple title to the Parcel in 1990. [AR 1759].

54. Like many federally recognized Indian tribes in Oklahoma, the UKB began conducting gaming on the Parcel prior to enactment of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq. [AR 18]. See also, e.g., Seneca-Cayuga Tribe of Oklahoma v. Okl. ex rel. Thompson, 874 F.2d 709, 710 (10th Cir. 1989); Indian Country, U.S.A., Inc. v. Okl. ex rel. Oklahoma Tax Comm'n, 829 F.2d 967, 983 (10th Cir. 1987).

55. By regulating and operating a gaming facility on the Parcel, the UKB exercised

the fullest extent tis governmental authority over the Parcel, which was limited due to the Parcel not having trust status.

56. In 2000, the National Indian Gaming Commission ("NIGC") determined that the Parcel was not Indian Country for the purpose of operating a gaming facility under IGRA ("2000 NIGC Opinion"). [AR 1974-1979].

57. In 2004, the UKB filed a federal suit seeking injunctive relief in response to efforts by the State of Oklahoma to stop gaming activities on the Parcel. United Keetoowah Band of Cherokee Indians v. Oklahoma, No. 04-340, 2006 U.S. Dist. LEXIS 97268 (E.D. Oka. Jan. 26, 2006).

58. On January 26, 2006, the Eastern District of Oklahoma Court found that the 2000 NIGC Opinion failed to consider important aspects of the UKB's gaming operations and remanded the opinion to the NIGC while also allowing the UKB gaming facility to continue operations under a preliminary injunction. See id.

59. On April 12, 2006, the UKB submitted an application to DOI to have the Parcel placed in trust for the benefit of the UKB for the purpose of operating a gaming facility. [AR 1444-1458]. This was the first request the UKB had ever submitted to DOI requesting an approval for gaming under IGRA.

60. On July 21, 2011, the NIGC issued an Indian lands decision concluding that the Parcel is "not currently Indian land eligible for gaming under IGRA," but noted that "[i]f and when the Gaming Site is taken into trust, this decision can be revisited." [AR 557-558].

61. On August 15, 2011, the UKB and the UKB Corporation submitted an amended application to the BIA Eastern Oklahoma Regional Office to have the Parcel acquired into trust either on behalf of the UKB under the IRA or on behalf of the UKB Corporation under Section 3

of the OIWA (the "Amended Trust Application"). [AR 3048-3355].

62. On November 4, 2011, the Regional Office sent a letter to the CNO inviting comments and information pertaining to the Amended Trust Application. [AR 575-577]. On December 1, 2011, the CNO made a 139-page submission to the Regional Office, including comments and attachments, objecting to the Amended Trust Application. [AR 426-564].

63. On July 30, 2012, Acting AS-IA Michael Black issued a decision approving the Amended Trust Application to have the Parcel placed into trust on behalf of the UKB Corporation for gaming purposes. ("2012 Decision"). [AR 17-26]. As this was the first such request made by the UKB Corporation, the 2012 Decision is the first to find that the UKB shares the historic Cherokee reservation for purposes of gaming under IGRA.

64. The 2012 Decision relies upon the Secretary's 2009 and 2010 Decisions [AR 22], in which the UKB sought to have land acquired in trust on its behalf. [AR 506]. These decisions resulted in a series of Secretarial determinations in 2009 and 2010 [AR 3234-3246, 3253-3257] that culminated in a regional decision in 2011 that approved the acquisition of 76 acres in trust for the UKB Corporation ("2011 Decision"). [AR 2176-2186].

III. CONCLUSIONS OF LAW

A. Res Judicata and Collateral Estoppel

1. Res Judicata and Collateral Estoppel Have Been Waived by Plaintiffs

1. The doctrines of res judicata and collateral estoppel must be affirmatively pleaded and established by their proponent. See Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997) (citing Fed. R. Civ. P. 8(c)); Kenai Oil and Gas, Inc. v. Dep't of Interior, 671 F.2d 383, 388 (10th Cir. 1982) (holding that Interior was not bound by collateral estoppel because it was not raised below). Plaintiffs failed to assert these doctrines before the

agency; the AS-IA was therefore under no obligation to address res judicata or collateral estoppel in rendering the 2012 Decision.

2. "It is a well-known axiom of administrative law that 'if a petitioner wishes to preserve an issue for appeal, he must first raise it in the proper administrative forum.'" Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772, 783 (10th Cir. 2006) (quoting Barron v. Ashcroft, 358 F.3d 674, 677 (9th Cir. 2004)); see also N.M. Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 835 (10th Cir. 1986) (holding that an issue was waived because it was not raised before the agency); Municipal Resale Service Customers v. Federal Energy Regulatory Comm'n, 43 F.3d 1046, 1052, n.4 (6th Cir. 1995) (declining to impose res judicata and collateral estoppel because plaintiff did not assert the doctrines before the agency) (citing SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). Plaintiffs did not raise res judicata and collateral estoppel before the agency and have therefore waived the doctrines. Silverton Snowmobile Club, 433 F.3d at 783. [AR 426-448].

3. Res judicata and collateral estoppel were also not pleaded in the Plaintiffs' Complaint and are therefore doubly waived in this court. See Nwosun, 124 F.3d at 1257; Fed. R. Civ. P. 8(c).

2. Res Judicata and Collateral Estoppel Cannot Apply in Light of Material Changes to the Law

4. In any event, because the legal landscape has changed materially since 1993, res judicata and collateral estoppel do not apply. Collateral estoppel and res judicata

> apply only in cases where controlling facts and law remain unchanged. Consequently, res judicata and collateral estoppel are inapplicable where, between the first and second suits, an intervening change in the law or modification of significant facts create new legal conditions.

Spradling v. City of Tulsa, 198 F.3d 1219, 1222-23 (10th Cir. 2000) (citing Commissioner v. Sunnen, 333 U.S. 591, 599–600 (1948)); accord Community Hosp. v. Sullivan, 986 F.2d 357, 360 (10th Cir. 1993) (upholding administrative ruling where facts and law had changed from prior determination). Neither res judicata nor collateral estoppel can apply here because the Buzzard Cases precede two statutory changes that fundamentally altered the statutory framework the Secretary was required to follow.

5. The first such change was Congress' amendment of § 476 of the IRA to add subsections (f) and (g) ("1994 IRA Amendment"). May 31, 1994, Pub.L. 103-263, § 5(b), 108 Stat. 709.

6. Subsection (f) provides that

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

25 U.S.C. § 476(f).

7. Subsection (g) provides that

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

25 U.S.C. § 476(f).

8. According to its legislative history, the 1994 IRA Amendment

> makes it clear that it is and has always been Federal law and policy

> that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government. That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes . . . . Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authority.

140 CONG. REC. S6,147 (daily ed. May 19, 1994) (statement of Sen. Inouye); See also 140 CONG. REC. H3,803 (daily ed. May 23, 1994) (statement of Rep. Richardson).

9. DOI has interpreted this amendment as "prohibit[ing] the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction," and "the UKB, like CN, possesses the authority to exercise territorial jurisdiction over its tribal land." [AR 3636].

10. The agency's interpretation of the amendment is not contrary to law. Rather, it is consistent with the language of the amendment and with the intent expressed in the legislative history. Consideration of the 1994 IRA Amendment was required as part of the 2012 Decision, which necessarily recognized that any past Departmental decision relegating the UKB to a lesser legal status, such as the 1987 Decision from which the Buzzard Cases draw, was no longer sound. [AR 24].

11. The second change was the enactment of the Department of the Interior and Related Agencies Appropriations Act, 1999, Pub.L. No. 105-277, Sec. 101(e) ("1999 Act"), which provided that the CNO's consent for trust acquisitions such as that at issue here is not required so long as the CNO is consulted. From the time of the Secretary's 1987 Decision and the Buzzard Cases until enactment of the 1999 Act, Congress required CNO's consent for trust acquisitions within the bounds of the historic Cherokee reservation. See 25 C.F.R. § 151.8; see also, Pub. L. No. 102-154, 105 Stat. 990 (1991). However, the 1999 Act, which provided that

"no funds shall be used to take lands into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation," had the practical effect of reversing DOI policy with regard to application of the consent requirement of 25 C.F.R. § 151.8 for trust acquisitions within the former Cherokee reservation.

12. Through the 1999 Act, "Congress overrode this regulation requirement [25 C.F.R. § 151.8] with respect to lands within the boundaries of the former Cherokee reservation," [AR 2209-2210], and did so for the express purpose of allowing the BIA to address the status of the UKB. See H.R. Conf. Rep. No. 105-825, 105th Cong., 2d Sess. (1998). DOI applied this policy change not only in the 2012 Decision but also on prior occasions based on the conclusion that "the 1999 appropriations rider controls and that while the Department must consult with the CNO before acquiring land in trust, it is not required to get the consent of CNO." [AR 4932; 2209-2210]. Therefore, the regulatory basis for the 1987 Decision, failure to receive CNO's consent pursuant to 25 C.F.R. § 151.8 prior to acquiring land in trust for the UKB within the historic Cherokee reservation, was fundamentally altered by the 1999 Act and removed any precedential effect that cases relying upon that decision could have in the instant action.

3. Plaintiffs Have Failed to Meet Their Burden to Plead and Establish the Necessary Elements of Res Judicata or Collateral Estoppel

13. Plaintiffs also failed to plead or establish that either res judicata or claim preclusion apply in this matter.

14. In the Tenth Circuit, "[c]laim preclusion requires: (1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." Mitchell v. City of Moore, Oklahoma, 218 F.3d 1190, 1202 (10th Cir. 2000) (quoting Yapp v. Excel Corp., 186 F.3d 1222, 1226 (10th Cir.1999)).

15. Collateral estoppel requires the satisfaction of four elements: "(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." Moss v. Kopp, 559 F.3d 1155, 1161 (10th Cir. 2009).

16. Plaintiffs did not identify or argue these elements in merits briefing. Rather, they argued only that the Buzzard Cases, are precedential—that they are "[c]ontrolling [r]ulings." [Dkt. No. 132 at 38]. Plaintiffs argued that due to the "controlling" nature of these decisions, the UKB and DOI "are precluded from challenging the Cherokee Nation's exclusive tribal governmental authority over Indian county . . . within its Treaty Territory[]." [Dkt. No. 132 at 38].

17. Controlling precedential effect is not equivalent to res judicata or collateral estoppel. See Bristow Battery Co. v. Board of Com'rs of Rogers Co. Okla., 38 F.2d 562 (10th Cir. 1930) (providing that stare decisis operates differently than estoppel under res judicata). A glancing, ambiguous reference to preclusion at the end of argument on precedential effect is not adequate to sustain the burden of pleading and establishing the elements of res judicata or collateral estoppel. Plaintiffs did not cite or address the legal standards setting out the necessary elements for either res judicata or collateral estoppel in their briefs or at oral argument.

4. Plaintiffs Cannot Establish the Necessary Elements of Res Judicata

18. A prior suit has res judicata effect only if it was resolved by a judgment on the merits. Mitchell, 218 F.3d at 1226. UKB v. Secretary and Mankiller were not resolved on the merits and therefore cannot serve as res judicata for the instant case. Id. In both cases, the

United States filed a motion to dismiss under Fed. R. Civ. P. 19(a) based upon failure to join an indispensable party – the CNO. UKB v. Secretary, No. 90-C-608-B, at 1; [AR 458]; Mankiller, 1993 WL 307937, *4. [AR 529]. In UKB v. Secretary, the court found that CNO "has an interest in the subject lands" sufficient to implicate Rule 19 because it "lays claim to the former Cherokee Reservation as successor in interest to the Cherokee Tribe." UKB v. Secretary, No. 90-C-608-B, at 10. [AR 467]. In finding Rule 19(a) satisfied, the court dismissed the action. Id. at 12; [AR 469]. Citing back to its holding in UKB v. Sec., the court in Mankiller likewise found that the case must be dismissed under Rule 19(a) for failure to join the CNO. Mankiller, 1993 WL 307937, at *5; [AR 530]. In the alternative, the district court in Mankiller found dismissal appropriate on the basis of res judicata and collateral estoppel, and stated that it "previously determined the Cherokee Nation jurisdiction over [UKB owned fee lands] is superior to that of the UKB in Buzzard . . . and [UKB v. Secretary]." Id. However, this statement cannot be construed more broadly than the holding of those cases, neither of which resolved whether the Secretary lacks the authority to acquire trust land for the UKB under all circumstances or the specific issues raised here under IGRA and the OIWA. Mankiller itself, then, cannot be preclusive simply because it references earlier decisions and does not decide the case on the merits.

19. A prior suit has res judicata effect only if the parties are identical to or in privity with the parties to the suit to be precluded. Mitchell, 218 F.3d at 1226. As demonstrated by the table below, the parties in the Buzzard Cases are not identical to those in the instant case.

Instant Case	UKB v. Secretary	Buzzard	Mankiller
CNO	NO	NO	NO (CNO officials were parties)
CNE	NO	NO	NO
DOI	YES	NO	YES
UKB	YES	YES	YES
UKB Corporation	NO	NO	NO

20. Because the parties in the Buzzard Cases are not identical to those here, the Buzzard Cases may have res judicata effect only if the parties here were in privity with the parties in the Buzzard Cases. See Mitchell, 218 F.3d at 1226.

21. Privity of parties exists where there is a pre-existing significant legal relationship between the person to be bound and a party to the judgment, or where the nonparty was adequately represented by the entity with the same interests as the nonparty. See Taylor v. Sturgell, 553 U.S. 880, 894 (2008). "Significant legal relationships" that would give rise to privity include preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. Id. A nonparty may be bound by a judgment and thus be found to be in privity with a party to prior litigation where the prior suit was a class action, or the suit is among trustees, guardians, or other fiduciaries. Id.

22. The relationship between the UKB, who was a party to the Buzzard Cases, and UKB Corporation, who was not a party to the Buzzard Cases, is not legally significant for purposes of establishing privity because, as Plaintiffs point out, the two are "separate and distinct legal entities." [Dkt. No. 132 at 21]. The UKB is a federally recognized political Band of Indians, whereas the UKB Corporation is a federally chartered corporation. They are legally

distinct and serve different purposes, one corporate and the other governmental. Indeed, the AS-IA recognized this very distinction in the 2010 Decision when he stated that, "[t]he UKB Government represents the UKB in its government affairs. And the UKB Corporation represents the UKB in its business affairs." [AR 3588 (citing Solicitor's Opinion, 65 I.D. 483 (1958) and 2 Op. Sol. On Indian Affairs 1846 (U.S.D.I. 1979)]. The legal relationship between the UKB Corporation and the UKB is fundamentally unlike the relationship that exists between a trustee and beneficiary, a bailee or bailor, or successive owners of property.

23. Further, the UKB Corporation could not have been adequately represented by the UKB because they protect distinct and separate UKB interests. Just as the CNE felt it necessary to participate in the instant action to protect distinct and separate economic interests to which the CNO could not speak, the business interests of UKB Corporation were not represented by the UKB in the Buzzard Cases. The Court reached the same conclusion in this matter when it allowed the UKB Corporation to intervene over Plaintiffs' objection that the Corporation's interests were adequately represented by the UKB. See [Dkt. No. 124 at 5]. Thus, the Court finds that the UKB Corporation was not in privity with the UKB during the Buzzard Cases.

24. Likewise, neither CNO nor CNE were in privity with any party to UKB v. Secretary, a case between the UKB and the United States, or Buzzard, a case between the UKB and the State of Oklahoma. UKB v. Sec, No. 90-C-608-B; (May 31, 1991) [AR 458-469]; Buzzard, No. 90-C-848-B; (N.D. Okla. Feb. 24, 1992) [AR 1256-1269]. And CNE was not in privity with any party in Mankiller. Mankiller, No. 92-C-585-B; (N.D. Okla. Jan. 27, 1993). [AR 526-531].

25. Finally, the Unites States was not a party to or in privity with any party to Buzzard. Buzzard, No. 90-C-848-B; (N.D. Okla. Feb. 24, 1992). [AR 1256-1269]. The United

States is the primary defendant in this action, defending its 2012 Decision. The United States is not acting as the trustee or representative of the UKB or UKB Corporation, nor was the UKB asserting the United States' interests in Buzzard.

26. A prior suit has res judicata effect only if it is based on the same cause of action of as that to be precluded. Mitchell, 218 F.3d at 1226. The Tenth Circuit employs the Restatement (Second) of Judgments' transactional approach to determine whether the claims raised in the first lawsuit share an identity with the claims raised in the second. Id. This test precludes claims "arising out of the same 'transaction, or series of connected transactions' as a previous suit." Id. (quoting Restatement (Second) of Judgments § 24 (1982)). A pragmatic approach is employed to determine what constitutes the same transaction "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 (1982)).

27. The claims in the Buzzard Cases do not arise out of the same transaction that gave rise to the instant case. The transaction giving rise to the claims in the instant case is the DOI's 2012 Decision approving the Amended Trust Application. See [Dkt. No. 2 at ¶ 1] (stating that Plaintiffs bring this action "seeking declaratory and injunctive relief from the Department's July 30, 2012, administrative agency decision (the '2012 Decision')."). Conversely, the cause of action in UKB v. Secretary arose twenty-five years earlier from (i) DOI's refusal to enter into ISDA grants and contracts with the UKB, (ii) DOI's refusal to permit the UKB from using and exercising its rights to the unalloted lands held in trust by the United States, and (iii) DOI's refusal to consider the UKB's request for trust lands within the historic Cherokee reservation

without the consent of CNO. [AR 458-459]. The transaction giving rise to the claims in Buzzard, which arose over two decades prior to the instant case's claims, was the State of Oklahoma's enforcement of its tobacco taxing statutes in smokeshops owned and licensed by the UKB within the former Cherokee reservation. [AR 1257]. Finally, the transaction giving rise to the claims in Mankiller, which also arose over two decades before the instant action, was the CNO's entry upon restricted Cherokee allotments and its seizure of unstamped tobacco products in smokeshops operated by two UKB members. [AR 526]. The cause of action here was not a cause of action in any of the Buzzard Cases. And Plaintiffs do not argue, nor could they show, that the cause of action here, challenging the AS-IA's Decision to take land into trust for the UKB Corporation for the purpose of gaming was raised or could have been raised in any of the previous actions.

5. Plaintiffs Cannot Establish the Necessary Elements of Collateral Estoppel (Issue Preclusion)

a. Collateral Estoppel Does Not Apply to the United States

28. Plaintiffs were not parties nor in privity with a party to UKB v. Secretary or Buzzard and therefore can only assert a version of collateral estoppel known as nonmutual offensive collateral estoppel as to those cases. See Community Hosp. v. Sullivan, 986 F.2d 357, 360 (10th Cir. 1993).

29. However, nonmutual offensive collateral estoppel does not lie against the United States. See Sullivan, 986 F.2d at 360 (citing United States v. Mendoza, 464 U.S. 154, 162 (1984)). The United States cannot be estopped from changing its position on matters where the Secretary exercises discretion. See Kenai, 671 F.2d at 388 ("Appellants argue that they have relied on a longstanding BIA practice of approving communization agreements, and thus the Government is estopped from changing that practice. To accept this argument would effectively

nullify the Superintendent's discretion, and would require the BIA to rubber-stamp approval of any proposal submitted.").

b. Collateral Estoppel Does Not Apply to Any of the Issues in this Case Because There Are No Issues Identical to the Previous Litigation

30. For collateral estoppel to apply, "the issue previously decided [must be] identical with the one presented in the action in question." Kopp, 559 F.3d at 1161. None of the issues in this case are identical to any issues previously decided in the Buzzard Cases. None of those cases resolved the Secretary's authority to take lands into trust for UKB Corporation under 25 U.S.C. § 503. None of those cases resolved whether lands within the historic Cherokee reservation could constitute UKB's former reservation under 25 U.S.C. § 2719(a)(2)(A)(i). None of those cases resolved whether CNO's consent was a prerequisite to the Secretary acquiring land in trust for the UKB Corporation within the historic Cherokee Reservation. None addressed DOI's application of the Land Acquisition Regulations to a trust acquisition for the UKB Corporation. And contrary to Plaintiffs' belated argument, none of those cases held that "the Cherokee [Nation has] *exclusive* tribal governmental authority over Indian country—*whether that be restricted allotments or trust lands*—within its Treaty Territory," [Dkt. No. 132 at 31], because (1) there was never a holding by the court regarding exclusivity, and (2) none of the cases purported to analyze the Secretary's authority to affirmatively take land into trust for UKB.

31. At oral argument Plaintiffs conceded that UKB v. Secretary does not have any preclusive effect here. [Dkt. No. 147 at 70] (conceding that the only issue decided in that case was "that the Cherokee Nation was necessary and indispensable," and stating "I'm not urging that [the case] has some res judicata or collateral estoppel effect necessarily . . . .").

32. In any event, UKB v. Secretary cannot support preclusion here because it did not decide any issue identical to an issue in this case and it was not "finally adjudicated on the merits." Kopp, 559 F.3d at 1161.

33. In UKB v. Secretary, UKB sought an order requiring the United States to transfer to UKB lands in the United States' possession, and it sought to overturn as arbitrary the Secretary's refusal to take into trust "lands in the old Cherokee reservation without the consent of third parties." UKB v. Sec., No. 90-C-608-B at 10; [AR 467].

34. In response to a motion to dismiss filed by the United States under Fed. R. Civ. P. 19(a) for failure to join an indispensable party—CNO, the court analyzed whether the CNO "claim[ed] an interest relating to the subject of the action." Id. at 2. The court held that it did, finding that CNO "has an interest in the subject lands" sufficient to implicate Rule 19 because it "lays claim to the former Cherokee Reservation as successor in interest to the Cherokee Tribe." Id. It also noted that CNO could claim an interest because "the federal government has long recognized the special interests" of CNO in the former Cherokee Reservation by "defining [CNO's] tribal service territory as including the entire former reservation." Id. at 10. Although the court also noted that "the Secretary has recognized one sovereign [CNO] over another [UKB]," the court did not rule on whether the Secretary's position was correct. Id. It instead noted a "legal conundrum" of "competing sovereigns" that could not be resolved due to Rule 19. Id. at 6.

35. In finding Rule 19(a) satisfied, the court did not hold that UKB *lacked* an interest in the historic Cherokee Reservation, did not hold that UKB was barred from seeking trust lands within the former Cherokee Reservation, and did not hold that CNO possessed exclusive jurisdiction over or the sole interest in the historic reservation. To the contrary, the court noted

the competing claims would remain unresolved due to Rule 19, noted the potential unjust effects of Rule 19 leaving UKB "without a *present judicial* remedy," id. at 6, and pointed out that in light of Rule 19, "[u]nder the *present* state of the law, it appears that the UKB's remedy is to convince the Secretary of the Interior . . . by political persuasion or seek a congressional enactment permitting UKB to maintain a suit against the sovereign New Cherokee Nation or seek congressional relief." Id. at 11, n.2. It dismissed the action "without prejudice." Id. at 12.

36. Buzzard likewise cannot support issue preclusion here because it did not decide any issue identical to an issue in this case. "[T]he only issue before the Court [was] whether the subject smokeshops [were] located in Indian country." Id. at 4.

37. In Buzzard, UKB sought an injunction against the Oklahoma Tax Commission and various state officials to prohibit enforcement of Oklahoma's tobacco taxing statutes in smokeshops on certain lands within the former Cherokee Reservation. Buzzard, No. 90-C-848-B; [AR 1256-1269]. The UKB claimed that any lands purchased in fee within the former Cherokee Reservation automatically become its reservation lands, without action by the Secretary to take lands into trust. Id. at 7; [AR 1262]. That is, UKB argued that it was "heir to these unallotted lands within the limits of the original Cherokee Indian Reservation," which the court understood to mean that UKB "claim[ed] that the unallotted land within the boundaries of the original Cherokee Indian Reservation which it has purchased in fee *is reservation land*." Id. at 7, n.4 (emphasis added). "The UKB, in essence, argues that the smokeshop sites which are unallotted lands located within the boundaries of the original Cherokee Indian Reservation *transform into Indian Country upon the UKB's purchase in fee*." Id. at 7 (emphasis added). The court rejected this argument, because UKB "offer[ed] no authority to support its claim that it is heir" to the lands such that they would "transform" to reservation lands upon purchase in fee,

without Secretarial action. Id. at 7-8. In rejecting the claim, the court held only that UKB did not have an *inherited* right to *automatic* reservation status for lands purchased in fee; it *did not* hold UKB could *never* have lands taken in trust by the Secretary. The court also rejected the similar argument that restraints on alienation transformed fee land to reservation land. No such issues are raised in this case.

38. The court in Buzzard *did not hold* that UKB could *never* have lands within the former Cherokee Reservation taken into trust by the Secretary—in fact it specifically reasoned to the contrary. It noted that before land could be taken into trust, CNO consent was required due to the Secretary's position under existing law. Id. at 9; [AR 1264].

39. The court in Buzzard did not address whether the Secretary could recognize any form of shared jurisdiction or recognize the former Cherokee Reservation as the former Reservation of more than one tribe for purposes of IGRA.

40. Buzzard did not establish that CNO possessed exclusive jurisdiction over the former reservation or that it was the only tribe who could show an interest in the former reservation. Instead, the court in Buzzard again went out of its way to note the UKB's "untenable position of being a recognized Indian tribe without land over which to assert tribal sovereignty," and stated again that "[u]nder *the present state of the law*, it appears that the UKB's only remedy is a political one." Id. at 14, n.8. The statutory changes since that time and the evolution of the Secretary's position are precisely the kinds of remedies to which the court was referring.

41. Mankiller also cannot support preclusion because it did not decide any issue identical to an issue in this case and it was not "finally adjudicated on the merits." Kopp, 559 F.3d at 1161. Mankiller was an action by UKB against individual tribal officials of CNO and

individual officers of the DOI and the BIA, with respect to lands that were restricted allotments of the historic Cherokee Reservation held in trust for UKB members. Mankiller, No. 92-C-585-B, attached to and aff'd, 2 F.3d 1161 (10th Cir. 1993), 1993 WL 307937, [AR 526-531]. The UKB sought declaratory and injunctive relief regarding the UKB's governmental authority over the lands in question. Id. at *1 [AR 526]. The court reiterated its Rule 19 holding from *Buzzard*. Id. at *5 [AR 530].

42. In the alternative, the court also applied res judicata and collateral estoppel to bar the claim that UKB possessed governmental authority over such lands *without* first having the lands taken into trust for the tribe by the Secretary. Id. at *5; [AR 530]. In so holding, it stated that "[t]he court has previously determined the Cherokee Nation jurisdiction over said lands is superior to that of the UKB in [Buzzard] and [UKB v. Secretary]." Id. This statement cannot be read any more broadly than the cases on which it was based—both of which involved the court "determin[ing]" *the Secretary's* position without reviewing it. Nor can it be read more broadly than the situation presented in Mankiller, which involved the authority to tax smokeshops on restricted allotments—not a decision by the Secretary to take lands into trust.

43. Mankiller did not hold that the UKB could never have lands within the historic Cherokee Reservation taken into trust by the Secretary, or that such lands could never constitute the former reservation of UKB for purposes of IGRA.

c. Collateral Estoppel Does Not Apply Because UKB Did Not Previously Have a Full and Fair Opportunity to Litigate Any of the Issues Here

44. Collateral estoppel applies if the party against whom either doctrine is raised did not have "a full and fair opportunity to litigate the issue in the prior action." Kopp, 559 F.3d at 1161-1162. The factors to consider in that analysis are "whether there were significant

procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683, 689 (10th Cir. 1992). Even if there had been any identical issues in the prior litigation, and there were not, UKB did not have a full and fair opportunity to litigate any of the issues against Plaintiffs because Plaintiffs were not, and could not be compelled to be, a party to any of the three actions. The UKB therefore did not have a fair opportunity to establish in any comprehensive manner its rights to have lands taken into trust over the Plaintiffs' current objections.

B. Merits

1. Standard of Review and Burden of Proof

45. Neither the IRA nor the OIWA provide for judicial review of agency decisions regarding trust acquisitions. Thus, judicial review of the 2012 Decision must be conducted under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

46. 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).

47. "Arbitrary and capricious" review is deferential, and courts shall not vacate an agency's decision unless the agency has done one of four things in making its decision:

> [1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007).

48. Although the inquiry should be thorough, the standard of review is narrow and highly deferential to the agency. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Federal courts must defer to the agency's interpretation of its own regulation unless that interpretation is plainly erroneous. Morris, 598 F.3d at 684.

49. Additionally, Federal courts "must accord considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care," Hydro Res., Inc. v. EPA, 608 F.3d 1131, 1145 (10th Cir. 2010) (en banc), especially "when an agency's interpretation of a statute rests upon its considered judgment, a product of its unique expertise." Qwest Commc'n Int'l, Inc. v. FCC, 398 F.3d 1222, 1230 (10th Cir. 2005).

50. Where the precise question at issue has not been directly addressed by Congress, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–843 (1984).

51. When considering agency action made pursuant to an agency's own regulations, federal courts should not "decide which among several competing interpretations best serves the regulatory purpose," but rather "give substantial deference to an agency's interpretation of its own regulations." Morris, 598 F.3d at 684.

52. The agency's interpretation will control "unless 'plainly erroneous or inconsistent with the regulation.'" Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n, 519 F.3d 1176, 1192 (10th Cir. 2008) (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

53. The APA 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).

54. Finally, federal courts are "a reviewing body, not an independent decision maker. We do not substitute our judgment for the judgment of the agency simply because we might have decided matters differently. Am. Min. Cong. v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985).

2. Statutory Authority Determination

55. Section 3 of the OIWA provides that the Secretary may issue a charter of incorporation to any recognized tribe or band of Indians residing in Oklahoma that grants to the organized group, among other things, "any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.] . . . ." 25 U.S.C. § 503.

56. In its 2010 Decision, DOI interpreted § 503 as providing authority for the Secretary to (i) issue a charter of incorporation to the UKB Corporation granting the UKB Corporation the right/privilege to have the Secretary hold trust land for its benefit as "one of the rights or privileges secure (sic) to an organized Indian tribe under [the IRA]," which the Secretary did in 1950, and (ii) to effectuate the right so granted by acquiring land in trust for the UKB Corporation. [AR 2226].

57. The agency reasoned that because § 503 explicitly grants the Secretary the authority to convey to OIWA corporations any "rights or privileges secured to an organized Indian tribe under [the IRA]," one of which being the right to have the Secretary hold trust land for its benefit, it must also authorize the Secretary to acquire land in trust for OIWA corporations. [AR 2226].

58. DOI also concluded in its 2010 Decision, and restated in the 2011 AS-IA Correspondence, that Carcieri did not impact the Secretary's authority to acquire land in trust for the UKB Corporation under § 503. [AR 2224-26, 2229].

59. In the 2012 Decision, the AS-IA, incorporating the DOI's prior reasoning and interpretation of § 503, likewise determined that § 503 provides authority for the Secretary to take land into trust for the UKB Corporation (the "Statutory Authority Determination"). [AR 22 (citing 2010 Decision, AR 2224-2227 and 2011 AS-IA Correspondence, AR 2229-2230)].

60. Citing the following, Plaintiffs contend that Statutory Authority Determination is contrary to law:

a. Carcieri v. Salazar, 555 U.S. 379 (2009);

b. 25 U.S.C. § 503;

c. 25 C.F.R. 151.2(b);

d. 25 C.F.R. 151.9; and

e. Department of Interior Fee-to-Trust Handbook.

[Dkt. No. 132 at 15-22].

a. Carcieri v. Salazar, 555 U.S. 379 (2009).

61. In order for a tribe to qualify for rights and privileges under the IRA, it must meet one of the definitions of "Indian" set forth in 25 U.S.C. § 479. See 25 U.S.C. § 479; see also, e.g., Carcieri, 555 U.S. 379. A tribe that meets the definition is an Indian tribe under the IRA and is eligible for various rights and privileges under the IRA, including trust land acquisitions under 25 U.S.C. § 465. See 25 U.S.C. §§ 471, *et. seq.*; see also, e.g., Carcieri, 555 U.S. 379.

62. Thus, a tribe seeking to acquire land in trust under the IRA must demonstrate, and the Secretary must determine, that the tribe is an "Indian" tribe (*i.e.* is a tribe that meets one of

the definitions of "Indian") under the IRA. See 25 U.S.C. § 479; see also, e.g., Carcieri, 555 U.S. 379.

63. In relevant part, the IRA defines "Indian" as

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.

25 U.S.C. § 479.

64. At issue in Carcieri was whether the Narragansett tribe was an "Indian" tribe under the IRA and therefore eligible for trust land under § 456. Carcieri, 555 U.S. at 382. The Narragansett claimed to be an Indian tribe under the first definition of Indian under § 479. Id. Because the Narragansett had been under state, rather than federal jurisdiction in 1934, when the IRA was enacted, the determination of whether the Narragansett met the first definition depended upon whether the statutory phrase "now under Federal jurisdiction" means under federal jurisdiction at the time the land is to be acquired in trust or at the time the IRA was enacted. Id. at 395. Employing a strict statutory construction analysis, the Supreme Court held that "now" means in 1934, when the IRA was enacted. Id. Because the record demonstrated that the Narragansett was not under federal jurisdiction in 1934, the Court concluded that the Secretary did not have authority under § 465 to acquire land in trust for the Narragansett. Id.

65. Consequently, in evaluating a tribe's application for trust land under the IRA, the Secretary must make a determination of whether the tribe is an "Indian" tribe, and *if* the tribe is proceeding under the first definition of "Indian," the Secretary must also determine whether the tribe was "under Federal jurisdiction" in 1934, as required by Carcieri. See Carcieri, 555 U.S. 379.

66. The acquisition at issue here was approved under the OIWA, not under the IRA. [AR 22]. Unlike the IRA, the rights and privileges available under section 3 of the OIWA are not expressly limited to only those groups that meet the IRA definition of Indian. See 25 U.S.C. § 503. Rather, the rights and privileges under section 3 of the OIWA are available to "[a]ny recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 503.

67. A group that meets the OIWA eligibly criteria is entitled to a federal charter of incorporation that grants to the incorporated group the same set of rights and privileges that may be enjoyed under the IRA by "an organized Indian tribe under [the IRA]." 25 U.S.C. § 503. In other words, all of the rights and privileges available under the IRA to any tribe that meets the IRA's eligibility requirement (*i.e.* is an "Indian" tribe as defined by § 479) are incorporated into the OIWA and made available to tribal corporations whose associated tribal governing entities meet the OIWA's eligibility requirement.

68. The AS-IA determined that the UKB, as a recognized band of Indians residing in Oklahoma, met the eligibility requirement of § 503, and consequently the UKB Corporation is entitled to enjoy any "rights or privileges secured to an organized Indian tribe under [the IRA]." 25 U.S.C. § 503; [AR 22, 2226].

69. The AS-IA further determined that Carcieri's application is limited to trust acquisitions under the IRA, where eligibility is tied to the definition of "Indian," and does not extend to trust acquisitions under the OIWA. [AR 2229]. As a result, the AS-IA did not analyze whether the UKB or the UKB Corporation met the IRA definition of 'Indian tribe.'

70. Plaintiffs disagree with the AS-IA's determination but have not shown it to be plainly inconsistent with Carcieri, the OIWA, or with any other law.

b. 25 U.S.C. § 503

71. As discussed above, section 3 of the OIWA provides that the Secretary may issue a charter of incorporation to any recognized tribe or band of Indians residing in Oklahoma that grants to the organized group, among other things, "any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.] . . . ." 25 U.S.C. § 503.

72. DOI has interpreted § 503 as providing authority for the Secretary to issue a charter of incorporation to the UKB Corporation granting the UKB Corporation the right/privilege of having the Secretary hold trust land on its behalf and to effectuate the right so granted by acquiring land in trust for the UKB Corporation. [AR 22, 2226, 3586-3588].

73. The agency reasoned that because § 503 explicitly grants the Secretary the authority to convey to OIWA corporations any "rights or privileges secured to an organized Indian tribe under [the IRA]," one of which being the right to have the Secretary hold trust land on its behalf, it must also authorize the Secretary to acquire land in trust for OIWA corporations. [AR 22, 2226].

74. DOI's interpretation comports with the rule of statutory construction that provisions in a statute should not be construed in such a way that "renders words or phrases meaningless, redundant, or superfluous." Bridger Coal Co./Pac. Minerals, Inc. v. Dir., Office of Workers' Compensation Programs, 927 F.2d 1150, 1154 (10th Cir. 1991); see also New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv., 248 F.3d 1277, 1285 (10th Cir. 2001). The provision of the statute at issue would be rendered meaningless if it authorized the Secretary to grant to corporations the right to have the Secretary hold trust land on their behalf,

but did not give meaning to that right by authorizing the Secretary to acquire land in trust for the corporations.

75. Plaintiffs do not disagree with the AS-IA's determination that one of the rights and privileges available to "an organized Indian tribe under [the IRA]" is to have trust land acquired by the Secretary on behalf of an Indian tribe. [Dkt. No. 132 at 26]. Rather, Plaintiffs contend that the Statutory Authority Determination is contrary to law because, although the right to enjoy trust land is generally available to an organized Indian tribe under the IRA, that right is not available to the UKB under the IRA and is therefore not available to the UKB Corporation under the OIWA. [Dkt. No. 132 at 18].

76. To reach this conclusion, Plaintiffs assert that § 503 does not grant to tribal corporations all the rights and privileges available generally to "an organized Indian tribe under [the IRA]," but rather grants to tribal corporations only those rights and privileges to which the tribal corporation's associated tribal governing entity would be entitled under the IRA. [Dkt. No. 132 at 25]. In other words, the UKB Corporation would be entitled to enjoy trust land under the OIWA only if the UKB was eligible for trust land under the IRA. And, according to Plaintiffs, the Supreme Court's decision in Carcieri "makes clear" that the UKB is not eligible for trust land under the IRA because the UKB was not "recognized" until 1950. Id. Plaintiffs' argument is flawed in several respects.

77. First, Plaintiffs bear the burden of establishing that the Statutory Authority Determination is contrary to law. Colorado Health Care Ass'n v. Colorado Dep't of Soc. Serv., 842 F.2d 1158, 1164 (10th Cir. 1988). To meet their burden, Plaintiffs must overcome the considerable deference due to an agency's interpretation of a statute that has been delegated to its care by demonstrating that the agency's interpretation is based upon an entirely impermissible

construction of the statute. See Hydro Res., 608 F.3d at 1145; see also Chevron, 467 U.S. at 842–843. Plaintiffs cannot meet this burden simply by advancing their own interpretation of § 503 as being the correct interpretation, as they have done here, because the Court is not authorized to choose between competing interpretations. See Morris v. U.S. Nuclear Regulatory Comm'n, 598 F.3d 677, 684 (10th Cir. 2010). The agency's interpretation must be upheld unless it is plainly inconsistent with the law. Morris, 598 F.3d at 684.

78. Second, Plaintiffs' conclusion requires the Court to read into § 503 a limitation that is not present on the face of the statute and to ignore Congress' use of the indefinite article "an" before the phrase "organized Indian tribe under [the IRA]." Section 503 does not contain any language limiting the rights and privileges of an OIWA tribal corporation to only those rights and privileges available to the tribal corporation's associated tribal governing entity under the IRA. See 25 U.S.C. § 503. Indeed, the opposite is true. Congress chose to modify the phrase "organized Indian tribe under [the IRA]" with the indefinite article "an." Id. The indefinite article "points to a non-specific object, thing, or person that is not distinguished from the other members of a class." United States v. Thompson, 402 F. App'x 378, 384 (10th Cir. 2010)(quoting Bryan A. Garner, Garner's Modern American Usage (3rd ed. 2009)). Congress' use of the indefinite article "an" before the phrase "organized Indian tribe under [the IRA]" demonstrates Congress' intent, as recognized by the AS-IA, that the Secretary may convey to OIWA corporations a charter granting to the corporation any of the rights and privileges available generally to "an" (*i.e.* one or any unspecified) "organized Indian tribe under [the IRA]." 25 U.S.C. § 503; Thompson, 402 F. App'x at 384.

79. Third, Plaintiffs' conclusion not only requires the Court hold that the agency's determination that Carcieri does not apply to an OIWA trust acquisition is contrary to law,

(which, as discussed above, the Court does not hold), but also requires the Court to go beyond what the agency considered and actually apply Carcieri. The Court cannot go beyond that which is contained within the record and Decision. See 5 U.S.C. § 706; see also Kappos v. Hyatt, 132 S.Ct. 1690, 1697 (2012) ("Under the APA, judicial review of an agency decision is typically limited to the administrative record"); see also, Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1028 n.1 (10th Cir. 2001) ("Judicial review of an agency decision is generally limited to review of the administrative record.") (citing Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); accord Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426, 433 n.7 (10th Cir.1996)).

80. Even if the Court agreed with Plaintiffs' contention that Carcieri applies to a trust acquisition under the OIWA, Carcieri would only need be applied if the UKB did not meet one of the other definitions of "Indian" under § 479. And the Court does not have the authority to undertake the initial analysis of whether the UKB meets any of the IRA definitions of "Indian." See Mickeviciute v. I.N.S., 327 F.3d 1159, 1164-65 (10th Cir. 2003) (holding that "'A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'") (quoting Immigration and Naturalization Serv. v. Ventura, 537 U.S. 12, 16 (2002)). Rather, the Court would be required to remand the Decision to the agency so that it could undertake the analysis. See Mickeviciute, 327 F.3d at 1164-65 (holding that '"the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."') (quoting Ventura, 537 U.S. at 16). As recognized by the Tenth Circuit, the BIA

> should have the first opportunity to "bring its expertise to bear upon the matter; [ ] evaluate the evidence; [ ] make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its

decision exceeds the leeway that the law provides.

Mickeviciute, 327 F.3d at 1164-65 (quoting Ventura, 537 U.S. 12 at 17). However, as discussed above, a remand on this issue is unnecessary because the Plaintiffs have not established that the agency's determination not to apply Carcieri is contrary to law.

81. Finally, Plaintiffs' assertion that Carcieri "makes clear" that the UKB is not eligible for trust land under the IRA because it was not federally recognized until 1950 expands the holding in Carcieri to matters plainly not addressed by the majority. At issue in Carcieri was whether the Narragansett Tribe met the first definition of Indian under § 479. Carcieri, 555 U.S. at 382. That determination depended upon the interpretation of the statutory phrase "now under Federal jurisdiction." Id. The Court held that "now" means in 1934, when the IRA was enacted. Id. at 395. The majority opinion in Carcieri does not address the term "recognized" let alone hold that a tribe must have been "recognized" in 1934 to be eligible for trust land under the IRA as asserted by Plaintiffs. Id. at 379-396. Indeed, in his concurrence, Justice Breyer, who also joined the majority opinion, explained that the concepts of "recognized" and "under Federal jurisdiction" in § 479 are distinct terms, and that the word "now" modifies "under Federal jurisdiction" but does not modify "recognized." Consequently, Justice Breyer concluded that the IRA "imposes no time limit on recognition." Id. at 397-399 (Breyer, J., concurreing). Justices Souter and Ginsberg acknowledged this reality as well. Id. at 400 (Souter, J. and Ginsberg, J., concurring in part and dissenting in part).

82. Plaintiffs also suggest that the 2012 Decision is *per se* contrary to law and arbitrary and capricious based upon it and the July 2009 Decision being the first time the DOI has found authority to acquire land in trust under § 503. [Dkt. No. 132 at 15]. While the Record does support the conclusion that the 2012 Decision was only the second time the DOI had so

found, the Record does not contain evidence that DOI had ever before reviewed a request by a tribal corporation to have land acquired under § 503. There is nothing in the Record to suggest that DOI has ever determined that § 503 does not provide authority for trust acquisitions for OIWA corporations. Moreover, Plaintiffs point to no law that supports its proposition that an agency determination is contrary to law and arbitrary and capricious simply because it the first such determination by the agency.

83. Plaintiffs have failed to demonstrate that the AS-IA's interpretation of § 503, which is entitled to considerable deference, is based upon an entirely impermissible construction of the statute.

c. 25 C.F.R. § 151.2(b) – Definition of "Tribe"

84. The Land Acquisition Regulations, 25 C.F.R. §§ 151.1, *et seq.*, apply to "the acquisition of land by the United States in trust status *for individual Indians and tribes*." 25 C.F.R. §§151.1 (emphasis added).

85. Section 151.2(b) of the Land Acquisition Regulations defines "tribe" to include OIWA tribal corporations "for purposes of acquisitions made under . . . statutory authority which specifically authorizes trust acquisitions for such corporations," thus making the Land Acquisition Regulations applicable to OIWA corporations meeting this definition. 25 C.F.R. § 151.2(b).

86. Plaintiffs contend that this definitional section circumscribes the Secretary's authority to acquire land in trust for an OIWA corporation. In essence, Plaintiffs assert that, notwithstanding a statutory grant of authority, § 151.2(b) bars the Secretary from acquiring land in trust for an OIWA corporation in the absence of statutory authority that "specially authorizes" such an acquisition. Plaintiffs conclude that the Statutory Authority Determination is contrary to

law because § 3 of the OIWA does not specifically authorize trust acquisitions for OIWA corporations. [Dkt. No. 132 at 18].

87. As discussed above, DOI has interpreted § 503 as providing authority for the Secretary to convey to OIWA corporations any "rights or privileges secured to an organized Indian tribe under [the IRA]," one of which being the right to have trust land held on its behalf by the Secretary. [AR 22, 2226, 3586-3588]. Reasoning that Congress would not grant the Secretary the authority to convey a right without also granting the Secretary the power to effectuate the right, DOI has interpreted § 503 as also providing the Secretary implicit authority to acquire land in trust for a tribal corporation, such as the UKB Corporation, to whom the Secretary has conveyed the right to have trust land held by the Secretary. [AR 22, 2226].

88. Plaintiffs contend that the authority described by the AS-IA as implicit, cannot also be specific so as to fall within the definition of § 151.2(b). In other words, implicit and specific are mutually exclusive. [Dkt. No. 132 at 20]. Plaintiffs further contend that "'[s]pecific means 'free from ambiguity.'" [Dkt. No. 139 at 10].

89. However, the federal courts have recognized that something may be both specific and implicit. See, e.g., United States v. Mead Corp., 533 U.S. 218, 219 (2001) (noting that "Congress engages not only in express, but also in implicit, delegation of specific interpretive authority,"); RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1151 (9th Cir. 2004) (Contract Clause analysis "subject[s] only state statute that impairs a specific (explicit or implicit) contractual provision to constitutional scrutiny"); United States v. Wright Contracting Co., 728 F.2d 648, 651 (4th Cir. 1984) (noting the "more specific limitations explicit and implicit in the later enumerated conditions involving the payment of sums of money-as fines, as restitution or reparation, or as legally obligated support.").

90. Here, the authority to take land in trust under § 503 is implicit – in that it is not expressly stated – but rather, as recognized by the AS-IA, is implied from the very specific and express grant of authority to the Secretary to convey all the rights and privileges available under the IRA. Section 503 is not ambiguous. It provides a specific grant of authority to confer rights to tribal corporations. Contained within that grant must be the authority actually carry out the powers delegated by Congress.

91. The Court must defer to the agency's interpretation of its own regulation unless that interpretation is plainly erroneous. See Morris, 598 F.3d at 684. Plaintiffs have not demonstrated that the AS-IA's interpretation is plainly erroneous.

92. Moreover, section 151.2(b), as a definitional section, simply provides meaning for the term defined—tribe—as used in other sections of the regulations. See 25 C.F.R. § 151.2(b). Neither § 151.2(b) nor any other section of the Land Acquisition Regulations contains language prohibiting the Secretary from acquiring land in trust for OIWA tribal corporations under the OIWA or that expressly countermands the authority granted to the Secretary by the OIWA.

93. Thus, if 25 U.S.C. § 503 does not "specifically authorize[] trust acquisitions for [OIWA] corporations," as alleged by Plaintiffs, then the UKB Corporation, for purposes of the approved acquisition, would not fit the definition of "tribe" set forth in § 151.2(b). This, however, would not result in the Secretary being prohibited from acquiring land in trust for the UKB Corporation under § 503. Rather, the Land Acquisition Regulations, which govern trust acquisitions for "tribes," would simply not apply to an acquisition of land in trust for the UKB Corporation under § 503.

94. In the absence of an established regulatory procedure for acquiring land in trust for a group not covered by the Land Acquisition Regulations (*i.e.* a group that does not meet the

§ 151.2(b) definition of tribe), the Secretary would be required to apply reasonable procedures of the Secretary's discernment. See Absentee Shawnee Tribe v. Anadarko Area Dir. Bureau of Indian Affairs, 18 IBIA 156, 162 (1990) (holding that in the absence of statutory or regulatory criteria, a BIA Area Director had the discretionary authority to analyze the Tribe's Land Consolidation and Acquisition Plan under reasonable criteria of his own devising).

95. Here, the AS-IA applied the criteria prescribed by the Land Acquisition Regulations. Although application of the Land Acquisition Regulations would not be mandatory in the event that the acquisition under § 503 for the UKB Corporation did not fall within the purview of those regulations, the AS-IA would not be prohibited from employing those criteria unless to do so would be unreasonable. See Absentee Shawnee Tribe, 18 IBIA at 162. The Court holds that such application would not be unreasonable.

d. 25 C.F.R. § 151.9

96. 25 C.F.R. § 151.9 provides that a "Tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary."

97. Plaintiffs assert that this provision sets forth a requirement that the fee-to-trust applicant and the proposed trust beneficiary be the same legal entity, and contend that the AS-IA violated this regulation by granting an application filed *solely* by the UKB, a legally distinct entity from the UKB Corporation, to have land taken into trust for the UKB Corporation. [Dkt. No. 132 at 22].

98. Plaintiffs' argument is premised on the erroneous assertion that the UKB alone filed the Amended Trust Application. As demonstrated by its opening paragraph, the Amended Trust Application was submitted jointly by the UKB and UKB Corporation:

> Dear Acting Director Head:
>
> On behalf of the United Keetoowah Band of Cherokee Indians in Oklahoma, a federally recognized Indian Tribe, **and** the United Keetoowah Band of Cherokee Indians in Oklahoma, a federally-chartered corporation, this letter amends the April 12, 2006 application ("2006 Trust Application") . . . .

[AR 3049 (emphasis added)].

99. In any event, § 151.9 does not expressly prohibit a tribe from submitting an application on its behalf and for its tribal corporation. See Cnty. Of Charles Mix v. U.S. Dept. of Interior, 799 F. Supp. 2d 1027, 1041 (D.S.D. 2011), aff'd 674 F.3d 898 (8th Cir. 2012) (holding 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).

100. The AS-IA does not interpret § 151.9 as requiring the applicant and the beneficiary to be the same entity. The AS-IA's interpretation is due considerable deference and cannot be reversed unless it is plainly inconsistent with the regulation. See Morris, 598 F.3d at 684. Plaintiffs' have not demonstrated that the AS-IA's interpretation is plainly inconsistent with the regulation.

e. DOI Fee-to-Trust Handbook

101. Plaintiffs contend that the DOI Fee-to-Trust Handbook ("DOI Handbook") also contains a requirement that the fee-to-trust applicant and the proposed trust beneficiary be the same legal entity, and assert that the AS-IA acted contrary to this "law" by granting an application filed solely by the UKB. [Dkt. No. 132 at 22].

102. As discussed above, Plaintiffs' argument is premised on the erroneous assertion that the UKB alone filed the Amended Trust Application. The Amended Trust Application, on

its face, demonstrates that it was not filed by the UKB alone, but was submitted jointly by the UKB and the UKB Corporation. [AR 3049].

103. Further, in performing an APA review of an agency decision, a court may only reverse the decision if the plaintiff demonstrates that the decision is "contrary to law." 5 U.S.C. § 706 (2). Plaintiffs cite the DOI Handbook as the "law" to which the AS-IA acted contrarily.

104. To have the "force and effect of law, an agency handbook must (1) prescribe substantive rules—*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and, (2) conform to certain procedural requirements" including promulgation "pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." Western Radio Services Company, Inc v. Espy, 79 F.3d 896, 901 (9th Cir. 1996); see also Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271-72 (10th Cir. 2007).

105. The Handbook does not have the force and effect of law because it merely "describes Bureaus of Indian Affairs ('BIA') standard procedures" for processing fee-to-trust applications. [AR 4987-88]. It has no binding effect upon DOI; 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) (FWS handbook on permit processing was guidance material and not binding).

106. Finally, while Plaintiffs interpret the DOI Handbook as requiring the trust applicant and beneficiary to be the same entity, the Handbook does not expressly state such a requirement. DOI does not interpret its Handbook as setting forth such a requirement. DOI's interpretation is entitled to deference. See Newton v. F.A.A., 457 F.3d 1133, 1136-37 (holding that to the extent an agency handbook interprets a statute "it is entitled to deference to the extent

it is persuasive and it is entitled to great deference insofar as it is interpreting the agency's own regulations") (quoting United States v. Mead, 533 U.S. at 226-27).

2. Former Reservation Determination

107. Section 2719 of IGRA limits tribal gaming on land placed in trust after October 17, 1998, unless the land falls within certain statutory exceptions. 25 U.S.C. § 2719. The former reservation exception allows land to be placed in trust after October 17, 1998 when the Tribe has no reservation, and the land is in Oklahoma "within the boundaries of the Indian tribe's former reservation, as defined by the Secretary…" 25 U.S.C. § 2719(a)(2)(A)(i).

108. Pursuant to the former reservation exception, IGRA delegates authority to the Secretary to define the boundaries of specific tribal gaming applicants' former reservation boundaries. 25 U.S.C. § 2719(a)(2)(A)(i).

109. In the 2012 Decision, the AS-IA employed the authority delegated by IGRA to define the boundaries of the former reservation of the UKB. [AR 20]. In particular, the AS-IA determined that:

> In 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, I believe 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 "Former Reservation Determination"). [AR 20].

110. The Secretary's authority to define an individual tribe's former reservation for purposes of the IGRA former reservation exception is constrained in two relevant respects. First, the determination must not be inconsistent with the general regulatory definition of "former

reservation" found in the IGRA implementing regulations at 25 C.F.R. § 292.2. Second, the determination must not be arbitrary and capricious. See 5 U.S.C. § 706(2)(A). Plaintiffs contend that the Former Reservation Determination is contrary to 25 C.F.R. § 292.2 and is arbitrary and capricious.

111. Section 292.2 generally defines the term "former reservation" as the "last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." 25 C.F.R. § 292.2.

112. Plaintiffs argue that the AS-IA's determination is contrary to law because the UKB does not have a last reservation established by treaty, Executive Order, or Secretarial Order. [Dkt. No. 132 at 23-25]. Plaintiffs' interpretations of IGRA's former reservation exception and the general regulatory definition of "former reservation" are not consistent with plain language of either and reads into the statute and regulation, a requirement that is not expressed.

113. By its plain language IGRA refers to "the boundaries of *the* Indian tribe's former reservation, as defined by the Secretary." 25 U.S.C. § 2719 (a)(2)(A)(i) (emphasis added). Congress' use of the definite article "the" indicates its intent to grant the Secretary authority to determine the former reservation boundaries of each specific tribal applicant seeking to utilize IGRA's former reservation exception. See Colorado v. Sunoco, Inc., 337 F.3d 1233, 1241 (10th Cir. 2003) (The Court interpreted provisions of a federal statute that used the definite article "the" to modify the phrases "removal action" and "remedial action," as suggesting there will be but a single "removal action" and a single "remedial action" per site, and that Congress would have used the indefinite article "a" if it intended for a broader application) (citing United States v. Aguilar, 515 U.S. 593, 608 (1995) (Stevens, J., concurring and dissenting) (construing

statutory use of definite article "the" in a similar fashion) and Freytag v. CIR, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (same)); see also, Thompson, 402 F. App'x at 384.

114. In contrast, the plain language of the regulatory definition of "former reservation," refers generally to lands identified as the "last reservation that was established by treaty, Executive Order, or Secretarial Order for *an* Oklahoma tribe." 25 C.F.R. § 292.2 (emphasis added). The agency's use of the indefinite article "an" indicates its intent to identify a general, non tribe specific, group of lands that collectively are former reservation lands in Oklahoma. See Sunoco, 337 F.3d at 1241 (internal citations omitted); see also, Thompson, 402 F. App'x at 384.

115. To comply with § 2719 (a)(2)(A)(i) and § 292.2, the land determined by the Secretary to be a specific tribe's former reservation for purposes of applying IGRA's former reservation exception must be within the lands in Oklahoma that are identified by § 292.2.

116. In this case, the lands identified by the AS-IA as the former reservation of the UKB for purposes of applying IGRA's former reservation exception are within the lands identified by § 292.2—the Parcel is within the historic Cherokee reservation, a last reservation established by treaty for an Oklahoma tribe. [AR 18]. Accordingly, the AS-IA's determination that IGRA's former reservation exception applies to the Parcel is not contrary to § 2719 (a)(2)(A)(i) or to § 292.2.

117. Plaintiffs' next complain that the agency's invocation of the Indian canon of construction in support of its conclusion that the historic Cherokee reservation is the former reservation of the UKB for purposes of applying the IGRA former reservation exception is contrary to law. Plaintiffs contend that the Indian canon of construction does not apply where competing tribal interests are involved. [Dkt. No. 132 at 34].

118. The cases cited by Plaintiffs in support of their contention, Utah v. Babbitt, 53 F. 3d 1145, 1150 (10th Cir. 1995), and Cherokee Nation of Oklahom v. Norton, 241 F. Supp. 2d 1374, 1380 (N.D. Okla. 2002), do not stand for the proposition that an agency, in interpreting a statute delegated to its care, is prohibited from considering the Indian canon of statutory construction in reaching a reasonable interpretation of a statute where competing tribal interests are involved. Rather, these cases stand for the proposition that a federal court reviewing agency action cannot invoke the Indian canon of construction to overcome Chevron deference where competing tribal interests are involved. Babbitt, 53 F. 3d at 1150 (noting that the court's ability to invoke the Indian canon of construction overcome the deference otherwise accorded an agency under Chevron does not apply to *judicial review* of agency action where competing Indian interests are involved), and Norton, 241 F. Supp. 2d at 1380 (same). Under these circumstances, it is proper for the Court to defer to DOI's expertise for a consideration of whether the Indian canon should apply. See Gila River Indian Community v. United States, 729 F.3d 1139, 1151, n.12 (9th Cir. 2013). Here, "the Secretary is best positioned [] to weigh the competing interests" because the Indian canon of construction is rooted in the unique trust relationship between the United States and Indian tribes, and responsibility for administering this relationship has been delegated to DOI. Id. (quoting Oneida Co. v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

119. Neither is the determination arbitrary and capricious. The AS-IA found the term "former reservation" in IGRA to be ambiguous as applied to the unique facts involving UKB occupying the former Cherokee reservation and being formed out of the CNO. In support of his determination, the AS-IA pointed to the UKB's historic connection to the land, its ties to the historic Cherokee tribe, and the establishment and maintenance of UKB tribal headquarters in the

historic Cherokee reservation. [AR 20]. Indeed, the UKB has a significant historical connection to the land—its ancestors, the traditional Western Cherokee, being the first Cherokee group to actually occupy the land as a result of their Treaty with the United States in 1817. [AR 1541-42, 1763, 3579]. And this Court has previously recognized that the UKB, like the CNO, is a descendant of the "old" Cherokee Nation. UKB v. Secretary, No 90-C-608-B (N.D. Okla., May 31, 1991); Mankiller, No 92-C-585-B (N.D. Okla., January 27, 1993), aff'd 2 F.3d 1161 (10th Cir. 1993).

120. "Arbitrary and capricious" review is deferential, and courts shall not vacate an agency's decision unless the agency has done one of four things in making its decision:

> [1] relied on factors which Congress had not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007).

121. Federal courts "must accord considerable deference to agencies interpreting ambiguities in statutes that Congress has delegated to their care," Hydro Res., Inc., 608 F.3d at 1145, especially "when an agency's interpretation of a statute rests upon its considered judgment, a product of its unique expertise." Qwest Commc'n Int'l, Inc., 398 F.3d at 1230. The agency's interpretation will control "unless 'plainly erroneous or inconsistent with the regulation.'" Plateau Mining Corp., 519 F.3d at 1192 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

122. Plaintiffs do not challenge the agency's reasoning, but rather argue that the determination is "implausible in light of the Department's repeated recognition that the UKB never had a reservation and findings that the Cherokee Nation possesses [exclusive jurisdiction] . . . ." [Dkt. No. 132 at 35].

123. The Record documents cited by CNO do not demonstrate the DOI's repeated recognition of CNO's superior status. Rather, the cited documents evidence one final agency decision in 1987 that refused to consider the UKB's request to have land taken into trust without CNO's consent. [AR 450-452]. The remaining documents cited by Plaintiffs originate from DOI officials subordinate to the Secretary who were required to follow the 1987 decision. [AR 533, 535-538, 540-544, 454, 456, 546-548, 4697, 4953].

124. Moreover, an agency does not, as Plaintiffs suggest, act arbitrarily *per se* simply by changing its position. An agency is free to change its position, but a change in position must be accompanied by an acknowledgement of the prior position and identification of reasons for the change. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (Interior must supply the usual "reasoned explanation" for agency action and that explanation must "display awareness that it is changing position and provide an adequate explanation for its departure from its established precedent."); Utahans for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure."). An agency is not required "to stand by its initial policy decision in all circumstances" and may lawfully change policy where the change is "explained with a reasoned analysis." Center for Native Ecosystems v. Cables, 509 F.3d 1310, 1327 (10th Cir. 2007) (quoting Exxon Corp v. Lujan, 970 F.2d 757, 762 n.4 (10th Cir. 1992)). Indeed, as noted in Justice Breyer's Carcieri concurrence, there are many examples of DOI reversing earlier erroneous positions regarding the status of tribes. See Carcieri, 555 U.S. at 398-399 (Breyer, J., concurring).

125. The 2012 Decision meets this requirement. The AS-IA acknowledged the DOI's prior position that "historically, the [CNO] has been recognized as the 'primary' Cherokee tribe,"

[AR 21] and explained that as a result of the 1994 amendment to § 476 of the IRA the agency can no longer no longer hold a position that the CNO, one descendant of the historic Cherokee Nation, has rights greater than those of the UKB, another descendant of the historic Cherokee Nation. [AR 24].

126. IGRA also provides that an Indian tribe may engage in gaming on "Indian lands" which must be "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1), (d)(1). "Indian lands" includes "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(B).

127. NIGC regulations further clarify the definition of "Indian lands" with respect to trust lands as follows: "Land over which an Indian tribe exercises governmental power and that is . . . [h]eld in trust by the United States for the benefit of any Indian tribe or individual . . . ." 25 C.F.R. § 502.12(b)(1).

128. The exercise of governmental power can be established through several factors, including: (i) whether the land developed, (ii) whether tribal members reside in the area, (iii) whether governmental services are provided; (iv) whether the tribe or some other entity provides law enforcement on the land, and (v) other idicia as to who exercises governmental authority over the land.

129. The land at issue here is developed—it houses a gaming operation. [AR 19]. Tribal members reside in the area. [AR 21]. Governmental services are, at this time, generally provided by the City of Tahlequah [AR 24], but law enforcement is provided by a combination of the UKB, through its Lighthorse Police, and Tahlequah City and County. [AR 24]. Finally,

that the UKB operated a gaming facility on the Parcel for well over two decades is provides indicia of the Tribe's exercise of authority over the Parcel.

130. The NIGC has opined that *because* the 2.03-acre parcel is not held in trust, the UKB does not currently exercise the requisite jurisdiction over the Parcel for it to qualify as "Indian lands" under IGRA. [AR 5094]. However, the NIGC and the DOI both hold the view that once the lands are taken into trust, the jurisdictional issue will be resolved. Id.

131. The 2012 Decision is not inconsistent with IGRA's jurisdiction requirement because the 2012 Decision will satisfy IGRA's jurisdiction requirement.

3. Consent Determination

a. 25 C.F.R. § 151.8 – Consent Regulation

132. Plaintiffs contend that the Department's approval of the UKB Corporation's fee-to-trust application must be set aside because the CNO did not give its consent, as it maintains is required pursuant to 25 C.F.R. § 151.8 and the 1866 Treaty. [Dkt. No. 132 at 36-40].

133. 25 CFR § 151.8 provides that an Indian tribe "may acquire land in trust *on a reservation other than its own* only when the governing body of the tribe having jurisdiction over such reservation consent in writing to the acquisition." 25 CFR § 151.8 (emphasis added). Thus, this regulation applies only when a tribe is seeking to acquire land in trust on a reservation other than its own reservation.

134. The Land Acquisition Regulations define "Indian reservation" in Oklahoma as "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 CFR § 151.2(f).

135. Unlike the IGRA regulation (25 C.F.R. § 292.2), the trust acquisition regulations do not provide a general definition of "former reservation." Rather, the Secretary has discretion

under § 151.2(f) to identify an area of land that constitutes the former reservation of a tribe seeking to have land placed in trust, and to determine whether the parcel to be placed in trust is within that area identified.

136. Utilizing this discretion, the AS-IA determined that the area of land constituting the former reservation of the UKB is the area that comprises the historic Cherokee reservation based upon the UKB's historic connection to and occupation of the historic Cherokee Reservation, its connection to the historic Cherokee Nation, and its formation under express congressional authorization from the citizens of the Cherokee Nation. [AR 20].

137. Plaintiffs argue that the AS-IA's former reservation determination under the Land Acquisition regulations is contrary to law for the same reason that the AS-IA's IGRA Former Reservation Determination was contrary to law—because it does not comply with the regulatory definition of "former reservation" found within the IGRA implementing regulations at § 292.2. However, the AS-IA's former reservation determination under the Land Acquisition Regulations, is not limited by § 292.2.

138. Having concluded that the Parcel is within the UKB's former reservation and is not on a "reservation other than its own" the AS-IA adhered to the plain language of 25 C.F.R. § 151.8 and properly concluded that CNO's consent was not necessary to approve the acquisition at hand. [AR 21].

139. In addition, in the June 2009 Decision, the DOI determined that CNO consent to trust acquisitions within the historic Cherokee reservation is no longer required as a result of the enactment of the Department of the Interior and Related Agencies Appropriations Act, 1999, Pub.L. No. 105-277, Sec. 101(e) ("1999 Act"); [AR 2209-2210]. The 2012 Decision relies on the June 2009 Decision. [AR 24].

140. The 1999 Act provides that

> until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation.

Pub .L. No. 105-277, Sec. 101(e).[2] [AR 2209].

141. Based on this statutory language, DOI determined that "Congress overrode this regulatory requirement [25 C.F.R. § 151.8] with respect to lands within the boundaries of the former Cherokee reservation . . . ." [AR 2209-2210].

142. Plaintiffs contend that this language applied only to funds appropriated under that specific Act in 1999. [Dkt. No. 147 at 57]. This argument ignores the 1999 Act's express directive that the consultation requirement will remain in place "[u]ntil such time as legislation is enacted to the contrary." To hold otherwise would impermissibly narrow the effect of the 1999 Act and contravene Congressional intent.

143. In briefing, Plaintiffs also contended that because the 1999 Act was an appropriations act it could not have repealed § 151.8. [Dkt. No. 132 at 32]. However, at oral argument, CNO not only conceded that an appropriations act can amend substantive law, but also provided an example of just such a situation. [Dkt. No. 147 at 52] ("I know the transportation act, like the riders in those acts, suddenly took away the tribe's Clean Air Act several years ago, the application of the Clean Air Act of the tribe.").

144. The 1999 Act did not repeal or amend the consent requirement at 25 C.F.R. § 151.8; it merely overruled Departmental policy with regard to trust acquisitions within the historic Cherokee reservation and replaced consent with consultation. This shift in policy is

[2] Prior to the 1999 Act (and at the time of the Secretary's 1987 Decision), Congress required CNO consent for trust acquisitions within the bounds of the historic Cherokee reservation. See Pub. L. No. 102-154, 105 Stat. 990 (1991); [AR 450-452].

clear from the plain language and legislative history of the 1999 Act. The Conference Report that accompanied the 1999 Act expressly stated that the modification was meant to allow the BIA to address the status of the UKB. See H.R. Conf. Rep. No. 105-825, 105th Cong., 2d Sess. (1998).

145. Support for the conclusion that the 1999 Act altered Department policy as to trust acquisitions within the historic Cherokee reservation is found in Supreme Court precedent. The Supreme Court has long recognized that Congress can effect substantive policy change through appropriations law and the Tenth Circuit follows this precedent. See, e.g., United States v. Dickerson, 310 U.S. 554, 555 (1940) (citing numerous Supreme Court cases holding the same); Republic Airlines, Inc. v. U.S. Dep't of Transp., 849 F.2d 1315, 1320 (10th Cir. 1988); Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (stating that "[a]ppropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject. An appropriation act may be used to suspend or to modify prior Acts of Congress.").

146. In United States v. Will, the Supreme Court held that "when Congress desires to suspend or repeal a statute in force, there can be no doubt that it could accomplish its purpose by an amendment to an appropriation bill." 449 U.S. 200, 222 (1980) (quoting United States v. Dickerson, 310 U.S. at 555) (internal quotations omitted). To explain the practical impact of this statement, the Court reiterated the bedrock canon of statutory construction that "repeals *by implication* are not favored." Will, 449 U.S. at 221 (emphasis added) (quoting Pasadena v. National City Bank, 296 U.S. 497, 503 (1936).

147. The DOI's interpretation of the impact of the 1999 Act on the application of § 151.8 for trust acquisitions within the historic Cherokee reservation does not run afoul of that rule of statutory construction. There was no implied repeal in the 1999 Act. Congress deleted

"consent" and inserted "consult." These two verbs have different meanings, the latter imposing a less stringent requirement. This was Congress' clearly expressed intention, as the Department's Office of the Solicitor confirmed:

> A]s we previously advised you in our memorandum of January 31, 2008 (copy attached), we believe that the 1999 appropriations rider controls and the Department may not take any land into trust without *consulting* with the CNO. The consent of the CNO is not required.

[AR 4934] (emphasis added) (citations omitted).

148. The Associate Solicitor's opinion is consistent with the federal government's well-established plenary authority over both federal acquisitions and Indian affairs. United States v. Nevada, 221 F. Supp. 2d 1241 (D.Nev. 2002) (citing U.S. Const. Art. IV § 3 cl. 2).

149. To comply with its obligation to consult with the CNO, the Department solicited and the CNO submitted comments regarding the trust acquisition on several occasions. [AR 4948, 426-446]. The Department rightfully concluded that it met its obligation to consult with the CNO. [AR 4948].

b. The 1866 Treaty

150. Plaintiffs also contend that the CNO has an independent and enforceable right to approve or disapprove of the UKB Corporation's fee-to-trust application under Articles 15 and 26 of the 1866 Treaty between the United States and the Cherokee Nation, 14 Stat. 799 (July 19, 1866) ("1866 Treaty"). [Dkt. No. 132 at 40].

151. In determining whether the AS-IA's consent determination violates the 1866 Treaty, the Court must review the treaty language in the context in which the Indians would have understood it at the time of the treaty. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

152. The Treaty of 1866, except as otherwise provided, left intact all of the terms of the prior treaties between the United States and the Cherokee, including the Treaty of 1846 between the United States, the Western Cherokee (the predecessor to the UKB), and the Eastern Cherokee that established a reservation for the "whole Cherokee people, [the Western Cherokee] included." 1846 Treaty at Art. 4.

153. The terms of the 1866 Treaty were applicable to the reunited factions of the Cherokee Nation and were expressly applicable to the "whole Cherokee people." 1866 Treaty at Art. 31. Considering the broad unifying language of the 1866 Treaty, the United States as well as both factions of the Cherokee Nation would have understood that the protections and guarantees of the 1866 Treaty applied to all Cherokee people. The Indians would not have understood that one Cherokee group could use the 1866 Treaty as a sword against the other.

154. Plaintiffs' contention that the 1866 Treaty grants it an irrevocable veto power over all Federal trust acquisitions within the former Cherokee reservation rests primary upon Plaintiffs interpretation of Article 15 and Article 26 of the Treaty. [Dkt. No. 132 at 40-41].

155. Article 15 provides that

> [t]he United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied land east of 96˚, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the United States.

1866 Treaty at Art. 15.

156. Article 26 provides for "the quiet and peaceful possession of their country and protection . . . against hostilities of other tribes." 1866 Treaty at Art. 26.

157. CNO's contention that these Articles prohibits the United States from acquiring land in trust for the Keetoowah in the historic Cherokee reservation without CNO consent is insupportable.

158. First, Article 15 does not give the CNO veto power over the United States' right to settle other civilized Indians within the treaty territory as CNO claims. Indeed, the only allowance this Article provides to the Cherokee is that they may negotiate with the Indians that are to be settled within the treaty territory the terms on which the settlement will occur. However, even the negotiated terms were subject to the approval of the United States. 1866 Treaty, at Art. 15.

159. Second, Article 15 addresses the United States' right to move friendly Indians into the unoccupied portion of the treaty territory. 1866 Treaty at Art. 15. As the Keetoowah Cherokees were already "settled" in and occupying the treaty territory, and indeed were the first Cherokees to be settled in the treaty territory, Article 15 clearly cannot provide CNO a legal basis to prevent a trust acquisition for the UKB Corporation in the treaty territory. For the same reason, it cannot be contended that the promise of "quiet and peaceful possession of their country" in Article 26 would prohibit a trust acquisition for the UKB Corporation in the treaty territory.

160. Finally, as the concept of trust acquisitions did not exist in 1866 when the Treaty was entered, the Cherokee could not have understood the term "settle" in Article 15 or the promise of protection "against hostilities of other tribes" in Article 26 to relate to the conversion of fee title to trust title. 1866 Treaty at Art. 15, 26.

161. The AS-IA's determination that CNO consent is not a prerequisite to a trust acquisition for the UKB Corporation is not plainly inconsistent with either the treaty as a whole or the specific treaty provision cited by Plaintiffs.

4. 25 C.F.R. § 151.10(f) – Consideration of Jurisdictional Conflicts

162. The Land Acquisition Regulations require the Secretary to consider "[j]urisdictional problems and potential conflicts of land use which may arise[.]" 25 C.F.R. § 151.10(f).

163. In its December 1, 2011 comments to the Amended Trust Application, CNO claimed that "placement of land into trust will most certainly trigger jurisdictional conflicts." [AR 441]. According to CNO, jurisdictional conflicts would arise if the land was placed in trust because the UKB would refuse to comply with CNO law, which CNO asserted would be applicable to the Parcel due to CNO having exclusive jurisdiction over trust lands within the historic Cherokee Reservation.[3] [AR 441-42].

164. In response to an identical claim made by the CNO and the Regional Director in response to the Community Services Parcel Application, the AS-IA, in his June 2009 Decision noted that the claim was based upon an erroneous determination that the CNO has exclusive jurisdiction over the historic Cherokee reservation, which was in turn based upon a narrow and incorrect reading of the 1946 Act authorizing the Keetoowahs to organize under the OIWA as having withheld any territorial jurisdiction from the tribe. [AR 2211]. The AS-IA explained that

[3] At oral argument, CNE asserted that in the event the land is taken into trust and the UKB resumes gaming activities, CNO will attempt to assert regulatory and other jurisdiction over the UKB gaming enterprise, which will be rebuffed by the UKB, thus creating jurisdictional conflicts. [Dkt. No. 147 at 79-83]. The past is the best indicator of what to expect in the future, and the Court notes that the UKB and CNO had for many years, until 2013, each operated gaming facilities in the Tahlequah area, and the Record contains no evidence that the scenario envisioned by CNE ever occurred. See, e.g., Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 95, n. 120 (D.C. Cir. 1976) (noting that "[p]oets and politicians concur: 'All our past acclaims our future' (Swinburne); 'I know no way of judging of the future but by the past' (Patrick Henry)").

"[t]he 1946 Act is silent as to the authorities that the Band would have," and

> [o]n its face, it imposes no limitations on the Band's authority. It merely recognizes the Band's sovereign authority. That authority extends 'over both [its] members and [its] territory.' There is no reason, on the face of the Act, that the Keetoowah Band would have less authority than any other band or tribe.

[AR 2211].

165. The AS-IA also noted that prior DOI decisions as well as the Buzzard Cases occurred prior to Congress' amendment of § 476 of the IRA, and that, as amended, § 476 of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction." [AR 2211]. The AS-IA further noted that:

> The conclusion that the CNO does not enjoy exclusive jurisdiction over the former Cherokee reservation is consistent with the 1998 (sic) appropriations rider which provided that no appropriated funds shall be used to acquire land into trust within the former Cherokee reservation without consulting the CNO. If CNO had exclusive jurisdiction over the former Cherokee reservation, Congress would have required consent of CNO . . . .

[AR 2012].

166. In the 2012 Decision, the AS-IA, citing to the June 2009 Decision, addressed the concerns expressed by the Regional Director and CNO, explaining that because IRA § 476 prohibited the agency from classifying CNO as a tribe having rights superior or additional to those of the UKB, "the UKB, like CN, possesses the authority to exercise territorial jurisdiction over its tribal lands." [AR 24]. In other words, the AS-IA determined that while jurisdictional conflicts may arise in the future, those conflicts could be minimized by CNO exercising jurisdiction over lands held in trust for CNO and the UKB likewise exercising jurisdiction over its trust lands. Id. Finally, the Assistant Secretary determined that the possibility of jurisdictional conflicts was an insufficient basis to deny the Amended Trust Application. Id.

167. Plaintiffs contend, erroneously, that the AS-IA's determination as to § 151.10(f) is arbitrary, capricious, and an abuse of discretion.[4] [Dkt. No. 132 at 41].

168. The critical question in determining whether an agency's discretionary decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment" in light of the Part 151 factors. See McAlpine v. U.S. Bureau of Indian Affairs, 112 F.3d 1429, 1436 (10th Cir. 1997) (quoting 5 U.S.C. § 706 (2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

169. Plaintiffs have not argued that the AS-IA made a clear error of judgment in light of these factors. Rather, Plaintiffs claim that the AS-IA "failed to give sufficient weight" to evidence regarding jurisdictional conflicts. [Dkt. No. 132 at 41]. However, neither the Part 151 regulations nor the APA sets forth a weighing-of-evidence standard.

170. 25 C.F.R. § 151.10(f) requires the Department to "*consider*" "jurisdictional problems and potential conflicts of land use which may arise" from a proposed trust acquisition. 25 C.F.R. § 151.10(f) (emphasis added).

171. "The BIA fulfills its obligation under Section 151.10(f) as long as it "undertake[s] an evaluation of potential problems." Cnty. of Charles Mix v. U.S. Dep't of Interior, 799 F. Supp. 2d 1027, 1046 (D.S.D. 2011) aff'd, 674 F.3d 898 (8th Cir. 2012) (internal citations omitted).

[4] Plaintiffs' Complaint also raises claims as to the Assistant Secretary's consideration of 25 C.F.R. § 151.10 (b) and (e), the "need" and "tax roll" factors. [Dkt. No. 2 at 23]. However, Plaintiffs failed to argue these factors in their Merits Brief [Dkt. No. 132] and have therefore waived them. See Rural Water Dist. No. 5 of Wagoner Cnty., 2013 WL 2557607 at *7 (N.D. Okla. June 11, 2013).

172. The standard requires the AS-IA "to *consider* jurisdictional problems or potential conflicts; it does not require [him] to *resolve* those problems or issues." State of South Dakota v. Acting Great Plains Reg. Dir., 49 IBIA 84, 108 (2009).

173. The 2012 Decision demonstrates that the AS-IA considered the relevant criteria as required.[5] [AR 21-25] (discussing the relevant § 151.10 factors).

174. While Plaintiffs may disagree with the AS-IA's determination, Plaintiffs have not established that the AS-IA's determination is arbitrary and capricious.

5. 25 C.F.R. § 151.10(g) - Consideration of BIA Ability to Administer Additional Duties

175. The Land Acquisition Regulations also require the Secretary to *consider* "whether [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition. . . ." 25 C.F.R. § 151.10(g).

176. The 2012 Decision demonstrates that the AS-IA considered this factor as required. [AR 24-25].

177. The AS-IA first discussed that certain ISDEAA program functions along with the funding had been transferred to the CNO, and acknowledged that the UKB would likely insist that the BIA, not CNO, provide direct services with regard to the Parcel "as it has done in the past with respect to other BIA services." [AR 24-25]. Finally, the AS-IA recognized that while the additional duties related to the Parcel may increase the workload of the Region, the Region is capable of providing additional services resulting from the acquisition of the Parcel. [AR 24-25].

[5] In addition to addressing CNO's comments regarding expected jurisdiction conflicts between it and the UKB, the AS-IA also addressed a concern raised by the Regional Directed related to the encroachment of the casino building on a separate tract of property (a parking lot) owned in fee by the UKB. The AS-IA explained that the UKB's ownership of the property in fee satisfies the DOI requirement that no legal liabilities will result from the encroachment, and that the UKB would remedy the issue by seeking to have the parking lot tract placed into trust and in the meantime would not conduct gaming on the portion of the property that is outside the Parcel. [AR 24-25].

178. Plaintiffs argue that the AS-IA failed to "properly" consider § 151.10(g). However, as discussed above, the Court can reverse the agency only where the agency entirely failed to consider the relevant factors or where there has been a clear error of judgment" in light of the overall Part 151 factors. McAlpine, 112 F.3d at 1436.

179. The AS-IA was not required to find that the acquisition would not increase the BIA's workload or that funds are available to ensure that such an increase in workload does not occur. Rather, the regulation requires the AS-IA to consider whether BIA is capable of discharging "the additional responsibilities resulting from the acquisition of land in trust status." 25 C.F.R. § 151.10(g).

180. Neither the Regional Office nor Plaintiffs indicate that the BIA is incapable of handling whatever additional responsibilities are associated with the acquisition of the Parcel; they simply argue that the acquisition "may" increase BIA's workload if additional funds are not appropriated. An increase in workload does not render BIA incapable of administering additional responsibilities associated with the acquisition.

181. In its December, 2011 comments on this factor, Plaintiffs expressed concern that if the Parcel was taken into trust for UKB, "UKB would seek additional funds from the BIA, IHS, the Department of Justice and other federal agencies to provide services to Indian people who are otherwise eligible for services" from CNO, which could result in a reduction of funds provided to CNO. [AR 443]. The AS-IA did not address this concern in the 2012 Decision.

182. Plaintiffs argue that the AS-IA was arbitrary and capricious in not considering the impact on federal funds appropriated to CNO in the future. However, such consideration is not required by the regulation, which by its plain terms requires the AS-IA to consider only the ability of BIA to administer is obligations. See Shawano County, Wisconsin, Bd. of Supervisors v. Midwest

Reg'l Dir., 40 IBIA 241, 249, 2005 WL 640907, 7 (2005) (explaining that plain language of regulation controls).

183. Plaintiffs have failed to establish that the Assistant Secretary's consideration of this factor was arbitrary and capricious or contrary to law.

6. Reliance

184. Plaintiffs allege that they "invested millions of dollars to build, operate, and promote its gaming venues" in reliance on their belief that CNO possessed "the exclusive right to conduct gaming within the" historic Cherokee reservation, and that the 2012 Decision "unfairly and unlawfully" exposes Plaintiffs to "legal gaming competition throughout the Nation's own Treaty Territory."[6] [Dkt. No. 2 at. 32-33].

185. In oral argument, CNE asserted that the AS-IA's 2012 Decision made "no mention of the Cherokee Nation or CNE's long-standing interest and investments which were made in reliance upon a long history of decisions." [Dkt. No. 147 at 64]. CNE argued that the AS-IA's failure to provide "enhanced justification and the apparent decision to ignore the [Tribe's] reliance interest…is arbitrary and capricious," consistent with the Supreme Court's decision in FCC v. Fox, 556 U.S. 502 (2009). Id.

186. Plaintiffs failed to raise their reliance argument before DOI and are therefore barred from raising it now on appeal. "It is a well-known axiom of administrative law" that a petitioner must raise an issue in an administrative forum if it is to be preserved for appeal. Silverton Snowmobile Club, 433 F.3d at 783 (quoting Barron v. Ashcroft, 358 F.3d 674, 677 (9th Cir. 2004)); see also N.M. Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 835 (10th Cir. 1986) (holding that an issue was waived because it was not raised before the agency). The

[6] The Administrative Record contains no support for Plaintiffs' claims that Plaintiffs invested millions of dollars in their gaming operations in reliance on prior agency determinations.

Administrative Record illustrates that CNO submitted comments in opposition to the trust acquisition of the Parcel on two separate occasions. [AR 426-448, 1195-1346]. CNO's two voluminous submissions to DOI raised a multitude of claims, but reliance was not one of them. [AR 426-448, 1195-1346]. CNE did not join CNO's comments nor did it submit its own.

187. Plaintiffs' alleged reliance on prior DOI decisions that they understood to confirm CNO's exclusive jurisdiction to game within the historic Cherokee reservation was not before the AS-IA and cannot now be used to attack the Decision. The Court can only judge the action based on the grounds invoked by DOI and will only consider "those rationales that were specifically articulated in the administrative record as a basis for denying a claim." Spradley, 686 F.3d at 1140-1141. Because both CNO and CNE failed to assert their reliance on a purportedly exclusive right to game before DOI, this argument is not part of the Administrative Record and Decision, and cannot be considered by this Court.

188. The Court's examination of Plaintiffs' reliance argument could end here, but there are several additional reasons why the AS-IA was not arbitrary and capricious in not deferring to Plaintiffs' purported reliance interest.

189. First, the case law Plaintiffs cite is not applicable to the facts at hand. In FCC v. Fox, the Supreme Court dealt with an altogether different issue. 566 U.S. 502 (2009). The case involved an FCC regulation that provided for enforcement action or punishment of an organization that used explicit activities in programming. See Id. at 506. Under the earlier regulation, repeated uses of banned words could result in the imposition of a penalty, but under the new regulation, a banned word only needed to be used once in order for a fine to be imposed. See Id. at 507-508. In dicta, the court reasoned that penalizing such actions in a retroactive manner commanded the consideration of an organization's reliance on the first policy, in order to

act in the second instance. See Id. at 515.

190. Unlike Fox, the instant action does not involve a matter of *ex post facto* punishment; in fact, CNO has had the opportunity to participate—and has participated—in every way possible. No deeds are being punished without fair notice. And no now-criminal conduct was engendered by a regulation that is no longer in force. Fox, the only case cited by Plaintiffs in support of their reliance argument, simply does not support the proposition that the agency was arbitrary and capricious in failing to provide an "enhanced justification" for the alleged change in policy.

191. Fox also made clear that there is "no basis in the Administrative Procedure Act or in [its] opinions for a requirement that all agency change be subjected to more searching review." Fox, 556 U.S. at 514. An agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," but rather the agency merely must show that "there are good reasons for the new policy." Id. at 515; See United States v. Nixon, 418 U.S. 683, 696 (1974). The 2012 Decision meets this requirement. The AS-IA acknowledged the DOI's prior position that "historically, the [CNO] has been recognized as the "primary" Cherokee tribe," [AR 21] and explained that as a result of the 1994 amendment to § 476 of the IRA the agency can no longer no longer hold a position that the CNO, one descendant of the historic Cherokee Nation, has rights greater than those of the UKB, another descendant of the historic Cherokee Nation. [AR 24].

192. Second, under IGRA, tribes do not have the right to be free from competition because "IGRA [is] a statute that is intended to maintain a competitive balance between Indian and non-Indian gaming interests. . ." Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 723 (9th Cir. 2003). Simply put, tribes' possess no property interest in gaming, but

rather a legislative grant from the federal government to negotiate Class III gaming compacts with the State. Id. at 717. By extension, tribes do not have a reliance interest in maintaining monopolies over their gaming interests.

193. Third, in Sokaogan Chippewa Comm. v. Babbitt, the Seventh Circuit discussed that "although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities," the Court found nothing in the statute to suggest "an affirmative right for nearby tribes to be free from economic competition." 214 F.3d 941, 947 (7th Cir. 2000). In Sokaogan, the St. Croix Tribe sought to intervene in the Lake Superior Chippewa's challenge of the DOI's denial of their application under IGRA to acquire land in trust for an off-reservation casino. Id. at 943-945. The court was not persuaded by St. Croix's argument to protect its financial interest, noting that, "[St. Croix's] interest, however, does not resemble any that the law normally protects." Id. at 947.

194. Even if Plaintiffs relied on a previous decision that it possessed exclusive jurisdiction over the lands of the historic Cherokee reservation, this Court finds Plaintiffs' argument unpersuasive. Indian gaming is a business market that is subject to regulation and competition. There is no guarantee of exclusivity and thus, Plaintiffs could not reasonably invoke a reliance theory to maintain its recently acquired, exclusive gaming area. This conclusion is bolstered by the fact that CNO made business decisions regarding the gaming enterprise at the same time that UKB was gaming on the shared reservation. CNO could not have reasonably relied on a gaming monopoly when it did not have one at the time it made business decisions.

7. Requested Remedies

a. Declaratory Relief

195. In their prayer for relief, Plaintiffs request the following declarations from the Court:

a. That the historic Cherokee reservation is not a shared reservation or the former reservation of the UKB;

b. That the 2012 Decision violates the 1866 Treaty;

c. That the 2012 Decision is arbitrary, capricious, an abuse of discretion and contrary to law; and

d. That the DOI would act in excess of its legal and regulatory authority if it took the Parcel in trust.

[Dkt. No. 2 at 35].

196. Because the Court holds that the 2012 Decision is not contrary to law, an abuse of discretion, or arbitrary and capricious, as discussed fully above, the Court denies these prayers for relief.

197. In addition, the Court denies Plaintiffs' first and last requested declarations because they seek declarations that go beyond the Administrative Record and Decision that are subject to the Court's review. In an APA action, federal courts are "a reviewing body, not an independent decision maker. We do not substitute our judgment for the judgment of the agency simply because we might have decided matters differently." Am. Min. Cong. v. Thomas, 772 F.2d 617, 626 (10th Cir. 1985). The Court may not "simply impose its construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is

whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 842–843.

198. These authorities compel denial of CNO's first requested remedy. The broad question of whether the historic Cherokee reservation is a shared reservation or the former reservation of the UKB is not before the Court. Rather, the questions before the Court regarding the "former reservation" issue are (i) whether the agency's determination that the historic Cherokee reservation is the former reservation of the UKB for purposes of applying the IGRA former reservation exception is contrary to law or arbitrary and capricious, and (ii) whether the agency's determination that the historic Cherokee reservation is the former reservation of the UKB for purposes of considering the consent requirement of 25 C.F.R. § 151.8 is contrary to law or arbitrary and capricious. *If* the Court found that the agency's interpretation of the relevant statute and regulations upon which the agency's former reservation determinations were based were contrary to law, or if the Court found that the determinations were arbitrary and capricious, the Court could issue a ruling so holding. Because the Court's review under the APA is "necessarily narrow" and is confined to the Administrative Record and the 2012 Decision, the Court does not have authority under the APA to go a step further and make a universal declaration that the historic Cherokee reservation is not a shared reservation or the former reservation of the UKB. See Qwest Comm'n Intern, Inc., 398 F.3d at 1230. Second, as discussed above, Plaintiffs have failed to demonstrate that the agency's former reservation determinations are contrary to law, or if the Court found that the determinations were arbitrary and capricious. Plaintiffs' first prayer for relief is denied.

199. To the extent Plaintiffs' final declaration request seeks a declaration that the agency may never acquire the Parcel in trust without exceeding its authority, the request is

beyond this Court's review authority. The Court has not reviewed the full expanse of authority the agency may have to acquire the Parcel in trust. Rather, the Court has reviewed only the agency's authority determination in the 2012 Decision, and has concluded that the determination is not contrary to law.

200. Regardless of the remedies sought by Plaintiffs, the question properly before the Court in an APA action such as this is whether the Decision is based on a permissible construction of the statutes and regulations at issue and is supported by the Administrative Record. See Chevron U.S.A. Inc., 467 U.S. at 842–843. The Court will not issue declarations that exceed its review authority.

b. Permanent Injunction

201. Plaintiffs' request for a permanent injunction barring the United States from acquiring the Parcel in trust on behalf of the UKB Corporation must also be denied. Like Plaintiffs declaratory relief requests, Plaintiffs injunctive request is overly broad—seeking an injunction permanently barring the United States from ever taking the Parcel into trust for the UKB Corporation. Clearly such a request goes beyond the decision that is before the Court. An appropriate permanent injunctive request would seek an order barring the United States from implementing the 2012 Decision. But, such a request, while appropriately limited to the matter within the Court's reviewing authority, would also be denied because, for the reasons set forth herein, the Plaintiffs' have failed to meet their burden to prove each of their APA claims.

202. Even if Plaintiffs' had met their burden on any of the presented claims, remand is the preferred remedy to allow for additional agency investigation or explanation where Congress has placed primary responsibility for a particular issue in that agency's hands. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Sosa-Valenzuela v. Holder, 692 F.3d

1103, 1115 (10th Cir. 2012) (citing INS v. Ventura, 537 U.S. 12, 16, 123 S.Ct. 353 (2002)). However, for the reasons set forth herein, a remand is unnecessary.

c. Attorney Fees

203. Plaintiffs request for attorney fees is also denied. Even if Plaintiffs had prevailed on the merits, Plaintiffs failed to provide any authority under which the Court could award attorney fees in this action.

WHEREFORE, Intervenor-Defendants United Keetoowah Band of Cherokee Indians in Oklahoma and United Keetoowah Band of Cherokee Indians in Oklahoma Corporation respectfully request that the Court adopt and enter the above and foregoing proposed Record Facts and Conclusions of Law and enter judgment in their favor and against Plaintiffs Cherokee Nation of Oklahoma and Cherokee Nation Entertainment, LLC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/*Christina M. Vaughn*
Christina M. Vaughn