APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

Nos. 17-7042,
17-7044

The CHEROKEE NATION,

Plaintiff-Appellee,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior; EDDIE STREATER, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs,

Defendants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEEE INDIANS IN OKLAHOMA CORPORATION,

Intervenors Defendants-Appellants.

THE CHEROKEE NATION,

Plaintiff-Appellee,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior; EDDIE STREATER, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs,

Defendants-Appellants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEEE INDIANS IN OKLAHOMA CORPORATION,

Intervenors-Defendants.

Filed September 5, 2019

OPINION

EID, *Circuit Judge.*

Intervenor-Appellant the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) is a federally recognized Indian tribe located in eastern Oklahoma. The UKB are descended from the historical Cherokee Indian tribe. In 2000, the UKB purchased an undeveloped 76-acre parcel of land near Tahlequah, Oklahoma, with the intention of developing it into a tribal and cultural center (Subject Tract, or Subject Parcel). The

Subject Parcel sits entirely within the boundaries of the former reservation of Appellees the Cherokee Nation of Oklahoma (Nation). In 2004, the UKB submitted an application to the Department of the Interior's Bureau of Indian Affairs (BIA), requesting the BIA take the Subject Parcel into trust, thereby formally establishing a UKB tribal land base. The Nation opposed the application. After seven years of review, the BIA approved the UKB's application.

The Nation sued Department of the Interior and BIA officials, with the UKB intervening as defendants, challenging the BIA's decision on several fronts. The district court found in favor of the Nation, determining that the BIA's decision to take the Subject Parcel into trust was "arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law." Op. at 19. Among other holdings, the district court concluded that: (1) the BIA must obtain Nation consent before taking the Subject Parcel into trust; (2) the BIA's analysis of two of its regulations as applied to the UKB application was arbitrary and capricious; and (3) the BIA must consider whether the UKB meets the Indian Reorganization Act (IRA)'s definition of "Indian" in light of the Supreme Court case *Carcieri v. Salazar*, 555 U.S. 379, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). Op. at 19. Accordingly, the district court enjoined the Secretary of the Interior from accepting the Subject Parcel into trust.

Because the district court's order was a final decision, we have jurisdiction over this appeal, pursuant to 28 U.S.C. § 1291.We hold that the Secretary of the Interior has authority to take the Subject Parcel into trust under section 3 of the Oklahoma Indian Welfare

Act of 1936 (OIWA), 25 U.S.C. § 5203.[1] The BIA was therefore not required to consider whether the UKB meets the IRA's definition of "Indian." Nor was the BIA required to obtain the Nation's consent before taking the land into trust. We also hold that the BIA's application of its regulations was not arbitrary and capricious. Accordingly, we reverse the district court and vacate the injunction preventing the Secretary from taking the Subject Parcel into trust.

I.

A.

The subject of this litigation is the UKB's 2004 application to the BIA, Eastern Oklahoma Region (Region) to acquire the Subject Tract into trust.[2] The application's road to eventual acceptance featured many twists and turns, which we outline here. First, the Region denied the application in April 2006. Aplt. App. 159. The UKB appealed that decision to the Interior Board of Indian Appeals (IBIA). On April 5, 2008 the Assistant Secretary for Indian Affairs (Assistant Secretary) directed the Region to request a remand from the IBIA to reconsider the application in light of findings made

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[1] This section was located at 25 U.S.C. § 503 during the BIA's consideration of the UKB Corporation's application. For clarity's sake, all references will be to the statute's current location.

[2] Acquiring land into trust "is one of the most important functions [the Department of the] Interior undertakes on behalf of the tribes," and "is essential to tribal self-determination." U.S. Department of the Interior, Indian Affairs, *Fee To Trust*, https://www.bia.gov/bia/ots/fee-to-trust (last visited August 22, 2019). The UKB intends to turn the Subject Parcel into a tribal land base, and asserts that "it is essential for such a land base to be held in trust so that tribal governmental and self-determination activities can be guaranteed for future Keetoowah members." Aplt. App. 63 (UKB Land Into Trust Application).

by the Assistant Secretary (2008 Directive). Aplt. App. 171. The Region requested the remand and the IBIA complied, vacating the Region's 2006 denial of the application.

After reconsideration, the Region denied the application a second time on August 6, 2008. Aplt. App. 310. Again, the UKB appealed the decision to the IBIA. At this juncture, the Assistant Secretary assumed jurisdiction over the appeal pursuant to 25 C.F.R. § 2.20(c). The Assistant Secretary issued three decisions, dated June 24, 2009 (June 2009 Decision), July 30, 2009 (July 2009 Decision), and September 10, 2010 (2010 Decision), explaining why he found the Region's reasoning to be flawed. Aplt. App. 214, 229, and 270. The effect of the three decisions was to vacate the Region's denial of the application and remand to the Region for reconsideration consistent with the Assistant Secretary's findings.

In the 2010 Decision, the Assistant Secretary determined that the UKB should be allowed to amend its application to invoke alternative authority for the acquisition of the Subject Parcel into trust. Aplt. App. 272. Accordingly, the UKB amended its application to request that the Subject Parcel be taken into trust: (1) for the UKB Corporation, rather than the UKB tribe; and (2) pursuant to section 3 of OIWA, 25 U.S.C. § 5203, rather than section 5 of the IRA, 25 U.S.C. § 5108.[3] Aplt. App. 291. The Assistant Secretary sent a letter dated January 21, 2011 to the UKB clarifying additional matters pertaining to the application (2011 Letter). Aplt. App. 289.

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[3] This section was previously located at 25 U.S.C. § 465. Again, we cite to the current location.

B.

On May 21, 2011, the Region issued its decision granting the UKB's amended application (2011 Decision). Aplt. App. 291. The 2011 Decision incorporated by reference the Assistant Secretary's 2008 Directive, June 2009 Decision, July 2009 Decision, 2010 Decision, and 2011 Letter. Aplt. App. 292. The BIA's relevant findings were as follows.[4]

The BIA found that statutory and regulatory authority permitted the Secretary to take land into trust for the UKB. 25 C.F.R. § 151.3(a) permits the Secretary to take land into trust if the application satisfies one of three listed criteria.[5] The BIA determined that section

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[4] Some clarification of the agency relationships may be in order before describing the 2011 Decision. The Regional offices (in this case, the Eastern Oklahoma Region) conduct the initial review and adjudication of land-into-trust applications in their jurisdictions. When, as here, the Assistant Secretary assumes jurisdiction over the appeal of the Region's decision, the Assistant Secretary is authorized to make findings that are binding on the Region on remand. *See* 25 C.F.R. § 2.20(c). In the 2011 Decision, the Region often expressed disagreement with the Assistant Secretary's findings, while acknowledging that it was bound by those findings. Therefore, we ascribe the holdings of the 2011 Decision to the BIA as a whole, not the Region.

[5] The regulation provides:

> Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.
>
> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

151.3(a)(2) applied because the UKB owned the Subject Tract in fee; and section 151.3(a)(3) applied because the Assistant Secretary found that the UKB had a need for the Subject Tract to be taken into trust so that the UKB may exercise jurisdiction over it, thus facilitating tribal self-determination. Aplt. App. 292. Additionally, the BIA found that "Section 3 of the OIWA . . . implicitly authorizes the Secretary to take land into trust for the UKB Corporation." *Id.* The BIA found this implicit authority in the following language of OIWA: "Such charter [of incorporation] may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right . . . *to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA].*" 25 U.S.C. § 5203 (emphasis added). Because section 5 of the IRA authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 5108, OIWA's reference to the IRA implicitly grants the Secretary authority to take land into trust for incorporated Oklahoma tribal groups (like the UKB).

Next, the BIA determined that consultation with, rather than the consent of, the Nation is required before the Secretary may take land into trust for the

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> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
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> (2) When the tribe already owns an interest in the land; or
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> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

UKB Corporation. BIA regulations stipulate that an Indian tribe "may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation *consents in writing* to the acquisition . . . ." 25 C.F.R. § 151.8 (emphasis added). It is undisputed that the Subject Tract is entirely within the former reservation of the Nation. But the BIA concluded that Congress overrode the consent requirement of section 151.8 with respect to lands within the boundaries of the former Cherokee reservation when it passed the Interior and Related Agencies Appropriations Act of 1999[6] (1999 Appropriations Act). The 1999 Appropriations Act provides: "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." 112 Stat. 2681–246 (emphasis added). The BIA determined that the 1999 Appropriations Act replaced the consent requirement with a consultation requirement in these circumstances, and the consultation requirement was satisfied when it solicited comments from the Nation in 2005 in connection with the UKB's initial application. Aplt. App. 293.

The BIA next evaluated whether the application satisfied the criteria established by 25 C.F.R. § 151.10.[7]

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

[7] The Secretary considers the following criteria when deciding whether to take land into trust:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
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> (b) The need of the individual Indian or the tribe for additional land;

At issue in this appeal are the BIA's findings regarding subsections (f) and (g). Subsection (f) concerns whether jurisdictional problems may arise if the application were granted. The Region concluded that "it is clear that both the UKB and the [Nation] would assert jurisdiction over the subject property if it were taken in trust." Aplt. App. at 297. The Region noted that it had "twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition." *Id.* In contrast, the Assistant Secretary had determined that: (1) the Nation did not have exclusive jurisdiction over the Subject Tract; (2) the UKB had a right to assert jurisdiction over its tribal lands; and (3) that "the perceived jurisdictional conflicts between the UKB and the [Nation] are not so significant that I should deny the UKB's application." *Id.* at 297–98. The

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

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

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

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

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

25 C.F.R. § 151.10.

Subsection (h) requires the applicant to provide information that allows the Secretary to comply with environmental standards. *Id*.

Region remained concerned, but acknowledged that the Assistant Secretary's decisions were binding. *Id.* at 298.

Subsection (g) concerns whether the BIA is equipped to discharge additional responsibilities resulting from a land-into-trust acquisition. The Region noted that the Nation currently administers programs for the Subject Parcel, such as real estate, tribal court, and law enforcement services. *Id.* The Region was concerned that if the Subject Tract were placed into trust for the UKB, the UKB would likely reject the authority of the Nation and insist that the Region provide direct services. *Id.* Despite the Region's worries that it did not have the funds necessary to provide those services, the Assistant Secretary "rejected this concern as unsubstantiated and insignificant." *Id.* Again, the Assistant Secretary's findings were binding on the Region.

Accordingly, the BIA approved the UKB's land-into-trust application. *Id.* at 300. The Nation appealed the 2011 Decision to the IBIA, which dismissed the appeal for lack of jurisdiction and on the grounds of abstention. *Cherokee Nation v. Acting E. Okla. Reg'l Dir.*, 58 IBIA 153, 2014 WL 264820 (2014).

C.

The Nation sued the BIA in federal district court challenging the 2011 Decision. The UKB and the UKB Corporation intervened as defendants. The Nation argued that the BIA could not acquire the Subject Parcel under section 3 of OIWA and, even if it could, the IRA's definition of the term "Indian" excludes the UKB. The Nation also contended that the BIA failed to comply with the regulatory requirement that it obtain Nation consent for the land-into-trust acquisi-

tion. And the Nation argued that the BIA's analysis of the 25 C.F.R. § 151.10 regulatory criteria—specifically the administrative-burden and jurisdictional-conflicts criteria—was arbitrary and capricious. The Nation asked for injunctive and declaratory relief.

In 2017, the district court entered a decision enjoining the BIA from acquiring the Subject Tract. The court determined that the BIA may generally acquire the Subject Parcel under Section 3 of OIWA, but the BIA must consider how the Supreme Court's decision in *Carcieri* affects the BIA's right to acquire the parcel for the UKB in particular. Op. at 12, 14. In *Carcieri*, the Supreme Court held that the phrase "now under Federal jurisdiction" in the IRA's definition of "Indian" refers to "a tribe that was under federal jurisdiction at the time of the statute's enactment." 555 U.S. at 382, 129 S.Ct. 1058. The Court reasoned that this definition "limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* The UKB achieved federal recognition in 1946. *See* Act of August 10, 1946, ch. 947, 60 Stat. 976. The Assistant Secretary believed that *Carcieri* was not implicated in the 2011 Decision because the UKB amended its application to request land-into-trust pursuant to OIWA, not the IRA. Aplt. App. at 272. The district court disagreed that *Carcieri* was not implicated and held that before the BIA could take any land into trust for the UKB, the BIA must consider the IRA's definition of "Indian" in light of *Carcieri*. Op. at 19.

The district court also held that the Nation must consent to the acquisition for two reasons: (1) an 1866 treaty between the United States and the Nation guarantees protection for the Nation against "domes-

tic feuds and insurrections" and "hostilities of other tribes,"[8] which could describe the current dispute with the UKB; and (2) the 1999 Appropriations Act does not override the regulatory consent requirement of 25 C.F.R. § 151.8. Op. at 16–17. And the court held that the BIA's analysis of jurisdictional conflicts and the administrative burden under 25 C.F.R. § 151.10 was arbitrary and capricious. *Id.* at 18-19.

The court "remand[ed] this action to the Region." *Id.* at 19. It enjoined the BIA from taking the land into trust without: (1) obtaining the Nation's consent; (2) reconsidering the section 151.10 criteria; and (3) considering the effect of *Carcieri* on the acquisition. *Id.* Department of Interior officials and the UKB brought this appeal.

II.

As an initial matter, we must determine whether we have jurisdiction over this appeal. *See W. Energy All. v. Salazar*, 709 F.3d 1040, 1046 (10th Cir. 2013) ("'[J]urisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it.'" (quoting *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002))).

This court has jurisdiction "over all final decisions of federal district courts under 28 U.S.C. § 1291." *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1137 (10th Cir. 2011). But "it is well settled law that the remand by a district court to an administrative agency for further proceedings is ordinarily not appealable because it is not a final decision." *W. Energy All.*, 709 F.3d at 1047 (quotation and brackets omit-

[8] Treaty with the Cherokees, art. 26, July 19, 1866, 14 Stat. 799, 803 ("1866 Treaty" or "Treaty").

ted). "This general principle has been called the 'administrative-remand rule.'" *Id.* "In determining whether the district court's order was a final decision," this court considers "'the nature of the agency action as well as the nature of the district court's order.'" *Id.* (quoting *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 697 (10th Cir. 2009)). "Generally, to be final and appealable, the district court's judgment must end the litigation and leave nothing to be done except execute the judgment." *Bender v. Clark*, 744 F.2d 1424, 1426 (10th Cir. 1984) (quotation and brackets omitted). A district court's order is more likely an administrative remand when it "square[s] with the traditional notion of a 'remand,' wherein the reviewing court returns an action to a lower court for further proceedings." *New Mexico*, 565 F.3d at 698. "[A] district court's label for its own action carries little weight in determining the nature of that action on appeal[.]" *Id.* n.15.

The district court characterized its holding as a remand to the agency. It held:

> [T]he court finds in favor of the Cherokee Nation and remands this action to the Region. Furthermore, in accordance with the court's findings herein, the Secretary is enjoined from taking the Subject Tract into trust without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts and the resulting administrative burdens the acquisition would place on the Region. Before taking *any* land into trust for the UKB or the UKB Corporation, the Region shall consider the effect of Carcieri on such acquisition.

Op. at 19 (italics and underlining in original). The language of the court's order appears to call for an administrative remand because it instructs the Secretary to

reconsider the application in light of its holdings regarding Nation consent, the section 151.10 factors, and the applicability of *Carcieri*.

Viewing the district court's order "practically rather than technically," *Bender*, 744 F.2d at 1427, though, we conclude that the order was final, and therefore appealable. The district court's injunction preventing the Secretary from taking the Subject Parcel into trust without the Nation's consent essentially ends the proceedings in this case. No further action can be taken on the UKB's application without Nation consent, and the Nation has steadfastly withheld that consent throughout the fourteen years of the application's pendency. Accordingly, the district court's judgment "end[ed] the litigation" and "leave[s] nothing to be done except execute the judgment." *Id.* at 1426.

Moreover, "the nature of the district court's order . . . does not square with the traditional notion of a 'remand,' wherein the reviewing court returns an action to a lower court for further proceedings." *New Mexico*, 565 F.3d at 698. In *New Mexico*, the district court enjoined the Bureau of Land Management from approving development leases without conducting more stringent environmental analyses. *Id.* We noted that "[t]he [district] court's order did not require BLM to recommence a proceeding, or indeed to take any action at all—it simply enjoined BLM from further [environmental] violations." *Id.* Similarly, the other holdings by the district court—that the BIA's analysis of the section 151.10 factors was arbitrary, and that its consideration of *Carcieri* was insufficient—do not mandate further proceedings. Because the UKB's application will not move forward until Nation consent is granted, there will be no occasion for the BIA to

reconsider the application in light of the court's holdings.

Accordingly, we conclude that the district court's order was not an administrative remand, but rather a final order that we have jurisdiction to review under section 1291.[9]

III.

In reaching its decision, the district court interpreted federal statutes—the IRA, the OIWA, and the 1999 Appropriations Act—and the 1866 Treaty. This court reviews those interpretations de novo. *Par. Oil Co. v. Dillon Cos., Inc.*, 523 F.3d 1244, 1248 (10th Cir. 2008) (statutes); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 988 (10th Cir. 2004) (treaties).

Agency action shall be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (quotation omitted). An action is arbitrary and capricious if

> the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed

[9] Incidentally, we note that, while we cannot assume jurisdiction over a case simply because the parties consent to it, *see Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951), counsel for the Nation agreed at oral argument that the district court's order was a final decision. *See* Oral Argument at 27:46.

> to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment.

Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers, 702 F.3d 1156, 1165 (10th Cir. 2012) (quoting *New Mexico*, 565 F.3d at 704).

This court will "uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (quotation omitted).

IV.

A.

Our analysis starts with the district court's holding that the BIA inadequately considered the effects of *Carcieri* when it authorized taking land into trust for the UKB Corporation.

Land may only be taken into trust for an Indian tribe when the acquisition is authorized by an act of Congress. 25 C.F.R. § 151.3. The UKB's 2004 application pointed to section 5 of the IRA as providing such Congressional authority.[10] Aplt. App. 65. In 2009,

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[10] Section 5 of the IRA provides:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> . . .
>
> Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the

however, the Supreme Court issued *Carcieri*, which construed section 5129 of the IRA.[11] Section 5129 provides the following definition of "Indian":

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

25 U.S.C. § 5129. The Supreme Court held that "the term 'now under Federal jurisdiction' in § [5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri*, 555 U.S. at 395, 129 S.Ct. 1058. The UKB was not federally recognized until 1946.

The Assistant Secretary grappled with the implications of *Carcieri* in his June 2009, July 2009, and July 2010 decisions. Aplt. App. 215, 229, 270. The Assistant Secretary ultimately concluded that the UKB should be allowed to amend its application to invoke different statutory authority: section 3 of OIWA.[12] Aplt. App.

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land is acquired, and such lands or rights shall be exempt from State and local taxation. 25 U.S.C. § 5108.

[11] At the time *Carcieri* was decided, this provision was codified at 25 U.S.C. § 479.

[12] Section 3 of OIWA provides:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such orga-

270. Section 3 of OIWA provides that a properly chartered Oklahoma Indian group "enjoy[s] any other rights or privileges secured to an organized Indian tribe under the [IRA.]" 25 U.S.C. § 5203. Because one of the rights or privileges in the IRA is to have land taken into trust, the Assistant Secretary reasoned, OIWA extends that right to properly incorporated Oklahoma Indian groups, like the UKB. Accordingly, the Assistant Secretary was satisfied that, by allowing the UKB to amend the application to invoke OIWA and not the IRA, the *Carcieri* holding did not apply.[13]

The district court agreed that using OIWA and the IRA in tandem provided authority for land-into-trust acquisitions for Oklahoma Indian corporations. Op. at 12. But it disagreed that this statutory formulation rendered the definition of "Indian" in the IRA inapplicable. The court reasoned that "[t]o allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides." *Id.* The district

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> nized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the [Indian Reorganization] Act of June 18, 1934 (48 Stat. 984)[.]

25 U.S.C. § 5203 (emphasis in original).

[13] The UKB also amended the application to take the Subject Tract into trust for the UKB Corporation, not the UKB tribe.

court therefore concluded that the UKB Corporation must still satisfy the IRA's definition of "Indian," as construed by the Supreme Court in *Carcieri*. *Id.* at 13. Accordingly, the court enjoined the acquisition until the BIA "reach[es] the question of how any acquisition for the UKB or the UKB Corporation is affected by *Carcieri*." *Id.* at 14.

Appellants do not argue on appeal that the UKB Corporation meets the definition of "Indian" under the IRA; rather, they assert that the IRA's definition does not apply under these circumstances. We agree.

As the Supreme Court noted in *Carcieri*, Congress may choose "to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of 'Indian' set forth in § [5129]." *Carcieri*, 555 U.S. at 392, 129 S.Ct. 1058 (footnote omitted). That is precisely what Congress did when it enacted OIWA. By its terms, OIWA extends to properly incorporated Oklahoma Indian groups "the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203. OIWA contemplated that "recognized tribe[s] or band[s] of Indians residing in Oklahoma" would take advantage of the right to incorporate and therefore have access to the "rights or privileges" provided by the IRA. *Id.* It would be strange for Congress to purport to extend the benefits of the IRA to new groups only to have that extension immediately nullified if the group does not satisfy the IRA's definition of "Indian." We therefore conclude that section 3 of OIWA was not meant to be constrained by the definition of "Indian" in the IRA.

Accordingly, it was not necessary for the BIA to consider whether the UKB Corporation met the IRA's definition of "Indian," and the *Carcieri* ruling was not

implicated. We reverse the district court's contrary holding. Because it is undisputed that the UKB is a "recognized tribe or band of Indians residing in Oklahoma," *id.*, that has incorporated pursuant to OIWA, *see* Aplt. App. 79, the BIA properly concluded that statutory authority exists for the Secretary to take the Subject Parcel into trust for the UKB Corporation.

B.

We turn now to the district court's holding that Nation consent is required before the BIA may take the Subject Parcel into trust for the UKB. The court found two independent bases for the consent requirement: BIA regulations and the 1866 Treaty. We conclude that neither the regulations nor the 1866 Treaty applies in these circumstances, and therefore reverse.

1.

BIA regulations provide: "An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition[.]" 25 C.F.R. § 151.8. Because the Subject Tract is entirely within the former Nation reservation, section 151.8 seemingly mandates Nation consent before the UKB application may be granted. Congress also weighed in on the issue, including the following proviso in the "Interior and Related Agencies Appropriations Act of 1992"[14] (1992 Appropriations Act): "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

[14] Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990 (1991).

original Cherokee territory in Oklahoma without the *consent* of the Cherokee Nation." 105 Stat. 990 (emphasis added).

But the BIA concluded that Congress overrode the 1992 Appropriations Act and section 151.8 when Congress passed the 1999 Appropriations Act. Aplt. App. 293. The Act provides:

> [T]he sixth proviso under [the 1992 Appropriations Act] is hereby amended to read as follows: "*Provided further*, That until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation* with the Cherokee Nation."

112 Stat. 2681–246 (second italics added).

Because the only substantive change to the proviso was to change the word "consent" to "consultation," the BIA construed the 1999 Appropriations Act proviso as replacing the "consent requirement" with a "consultation requirement."[15]

The district court held that while the 1999 Appropriations Act may have amended the 1992 Appropriations Act, it did not abrogate the consent requirement of section 151.8. The court concluded that the Act applies only to *funding* land-into-trust acquisition (noting the "no funds shall be used" language), while not overriding section 151.8, which applies to the *general process* of land-into-trust acquisitions (regardless of funding source). Op. at 16. The district court found further support for its position in the fact that Con-

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[15] The BIA determined that it satisfied the consultation requirement when it solicited comments from the Nation in connection with the UKB's initial application. Aplt. App. 293.

gress "revisited" the BIA regulations in 2001 (i.e. after the 1999 Appropriations Act) and did not alter the consent requirement. *Id.*

We interpret the 1999 Appropriations Act as overriding the consent requirement of section 151.8 with respect to lands within the original Cherokee territory in Oklahoma. The 1999 Appropriations Act provides explicitly that it amends the 1992 Appropriations Act, *see* 112 Stat. 2681–246, and the substance of the amendment is to require Nation consultation, instead of consent, when using funds to take lands into trust within the boundaries of the original Cherokee territory in Oklahoma. *Id*. While the 1999 Appropriations Act does not specifically state that it overrides section 151.8, when a statute and a regulation are in conflict, the statute "renders the regulation which is in conflict with it void and unenforceable."[16] *Enfield v. Kleppe*, 566 F.2d 1139, 1142 (10th Cir. 1977).

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[16] The Nation argues that "[c]ourts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law." Aple. Br. at 35 (citing *United States v. Will*, 449 U.S. 200, 221, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)). Although appropriations acts "have the limited and specific purpose of providing funds for authorized programs," "both substantive enactments and appropriations measures are 'Acts of Congress[.]'" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). We have recognized that "if Congress so intends, it can amend the provisions of a statute through the use of an appropriations act." *United States v. Burton*, 888 F.2d 682, 685 (10th Cir. 1989); *see also Will*, 449 U.S. at 222, 101 S.Ct. 471 ("[W]hen 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 appropriations bill, or otherwise." (quotation marks, brackets, and ellipsis omitted)). "The whole question depends on the intention of Congress as expressed in the statutes." *Will*, 449 U.S. at

Nor do we share the district court's concern that the 1999 Appropriations Act amounts to a "repeal by implication," a generally disfavored practice. *See Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 68 L.Ed.2d 80 (1981) ("The intention of the legislature to repeal must be clear and manifest."). Rather, the 1999 Appropriations Act carves out an exception to section 151.8. Section 151.8 deals with trust acquisitions in general; the 1999 Appropriations Act singles out land located on the original Cherokee territory in Oklahoma. Accordingly, there is not an "irreconcilable conflict" between the enactments; "the more recent and specific statute will be determined to modify or super[s]ede an earlier, more general statute only to the extent necessary to avoid the irreconcilable conflict or inconsistency." *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1247 (10th Cir. 2010) (quoting *Duncan v. Oklahoma Dept. of Corr.*, 95 P.3d 1076, 1079 (Okla. 2004)).[17]

222, 101 S.Ct. 471 (quoting *United States v. Mitchell*, 109 U.S. 146, 150, 3 S.Ct. 151, 27 L.Ed. 887 (1883)).

In this case, Congress's intent to modify the law is clear. As noted above, the 1999 Appropriations Act explicitly provides that it amends the 1992 Appropriations Act. 112 Stat. 2681–246. The 1999 Act replaced the consent requirement contained in the 1992 Act with a consultation requirement when taking lands into trust within the boundaries of the original Cherokee territory in Oklahoma. Congress clearly intended the 1999 Appropriations Act to enact a substantive change in the requirements for taking lands within the original boundaries of the Cherokee territory into trust.

[17] The 1999 Appropriations Act's specificity perhaps also explains why Congress chose not to alter section 151.8 when it "revisited" the regulations in 2001. *See* Op. at 15–16. Congress was not purporting to alter section 151.8 generally; it was merely codifying a narrow exception to the general rule.

We are also unconvinced by the district court's reasoning that the 1999 Appropriations Act is confined only to funding, and not land-into-trust acquisitions in general. There is no practical difference between "acquir[ing] land in trust" (section 151.8's language) and "us[ing funds] to take land into trust" (the Act's language). The operative action is taking lands into trust. All land-into-trust acquisitions require the expenditure of BIA funds, regardless of whether the BIA purchases the land or, as here, acquires the land from a tribe that already owns it in fee.

The Nation argues that the 1999 Appropriations Act is not tribe-specific to the UKB, and overriding the consent requirement would "open [the Nation's territory] to every other Tribe in the United States." Aple. Br. at 33. The Nation asserts that Congress could not have intended such an absurd result. We think these concerns unfounded. As this case has demonstrated, the application process for taking land into trust is exacting. The BIA must still consider other regulatory criteria, like the "existence of statutory authority for the acquisition and any limitations contained in such authority," the tribe's "need . . . for additional land," the "purposes for which the land will be used," and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10 *et seq*. A tribe seeking trust lands on Nation territory must convince the BIA that it satisfies the regulatory criteria. And federal court review is available should the BIA abuse its discretion.

For these reasons, we conclude that the 1999 Appropriations Act overrides the consent requirement of section 151.8.

2.

Apart from the BIA regulations, the district court found a consent requirement in the 1866 Treaty as well. Article 26 of the Treaty provides: "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty, art. 26, July 19, 1866, 14 Stat. 799, 803. The district court concluded that

> [t]he members of the UKB are also Cherokee; thus, this could be considered a 'domestic feud or insurrection.' The UKB is also an independent tribe; thus, this could be considered 'hostility of another tribe,' as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.

Op. at 17.

The court determined that even if it was wrong about the 1999 Appropriations Act overriding section 151.8, Congress did not intend to override the Treaty, and Nation consent was still required. *Id.*

The district court's analysis was sparse. In fact, it did not render a true ruling, noting only that the UKB's application "*could* be considered a 'domestic feud or insurrection,'" or "*could* be considered 'hostility of another tribe[.]'" *Id.* (emphasis added). We do not read the Treaty's terms as prohibiting the UKB's application without Nation consent.

When analyzing the meaning of a treaty's language, courts "look beyond the written words to the larger

context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943)). But "[t]reaty analysis begins with the text." *Herrera v. Wyoming*, —— U.S.——, 139 S. Ct. 1686, 1701, 203 L.Ed.2d 846 (2019). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985) (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)) (citation omitted). Treaties are "construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington*, 443 U.S. at 676, 99 S.Ct. 3055.

The "plain language" of article 26 of the 1866 Treaty does not support the Nation's claim that it may veto the UKB's land-into-trust application. *See Klamath Indian Tribe*, 473 U.S. at 774, 105 S.Ct. 3420. We note that the Nation seems to reject the district court's finding that the UKB's application "could be considered a 'domestic feud or insurrection.'" Op. at 17. The Nation asserts that "[t]he UKB is another tribe" and argues solely that the application constitutes a "hostility of another tribe." Aple. Br. at 42–43. We agree that the "domestic feud or insurrection" clause does not apply. "Domestic" was understood in the 1860s to mean "of, or pertaining to, one's country; not foreign[.]" *Worcester's Dictionary* 436 (1860). A "feud" meant at

the time of the Treaty's signing a "quarrel; a contention; . . . particularly a deadly quarrel between families or clans, or a quarrel not to be satisfied but with blood." *Id.* at 550. We doubt that the current litigation between the Nation and the UKB constitutes a "feud" within the meaning of article 26 because this dispute is not a "deadly quarrel" to be satisfied only "with blood." Regardless, because the UKB achieved federal recognition as a separate tribe from the Cherokee Nation in 1946, *see* 60 Stat. 976, any feud between the UKB and the Nation would not be "domestic."[18]

The "hostilities of other tribes" clause does not pertain to the UKB application either. "Hostility," in 1860s usage, meant "the practice of an open enemy; opposition in war; war; warfare." *Worcester's Dictionary* 697; *see also Burrill's Law Dictionary* 31 (1867) (defining "hostility" as "[a] state of open war . . . . An act of open war."). The context of the "hostilities" clause confirms that the treaty contemplated warlike hostilities, not mere civil disagreements. Under the Treaty, the United States promised the Nation "quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty, art. 26, July 19, 1866, 14 Stat. 799, 803. Placing "hostilities" in a group with other words suggesting violent conflict—"feuds" and "insurrections"—and contrasting those events to "peaceable possession" demonstrates that the Treaty would have been understood to protect the Nation from warlike aggression.

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[18] Nor can the UKB's application be categorized as an "insurrection," which was defined as "[a] seditious rising against government; a rebellion; a revolt; a sedition." *Worcester's Dictionary* 764.

While the relationship of the UKB and the Nation does not appear friendly, they are neither open enemies nor engaged in warfare. The Nation asserts that the relationship is "hostile" because the UKB has "separated from the Nation, prohibits its members from also maintaining citizenship in the Nation, and seeks to usurp the territorial jurisdiction of the government of the Nation[.]" Aple. Br. at 42. We disagree with the Nation's argument that the UKB establishing a separate identity, an action which was ratified by act of Congress, constitutes hostility. Neither does maintaining strict membership standards. In any event, those actions precede and are unrelated to the controversy at issue; that is, the UKB's application for the BIA to take land into trust. And while there may be jurisdictional disputes resulting from taking the land into trust, *see infra*, those potential conflicts would be of an administrative character. In short, no "hostilities," as contemplated in the 1866 Treaty, attach to the UKB's land-into-trust application.

The 1866 Treaty does not grant the Nation the power to veto the UKB's land-into-trust application. And, as regards land on the original Cherokee territory in Oklahoma, Congress overrode the consent requirement of section 151.8 when it passed the 1999 Appropriations Act. Accordingly, Nation consent is not required for the BIA to take the Subject Parcel into trust for the UKB.

C.

Finally, we review the district court's ruling that the BIA abused its discretion when it considered the regulatory criteria for land-into-trust acquisitions. BIA regulations provide that the agency will "consider" several "criteria in evaluating requests for the acquisition of land in trust status." 25 C.F.R. § 151.10.

Specifically, the district court held that the BIA's analysis of two of the criteria—"jurisdictional problems and potential conflicts of land use which may arise," and whether the BIA is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status," *id.* at (f) and (g)—was arbitrary and capricious. Op. at 18–19. We conclude that the BIA's analysis of the regulatory criteria was adequate, so we reverse the district court.

We review the BIA's consideration of the regulatory factors "to determine whether the agency acted in a manner that was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *McAlpine v. United States*, 112 F.3d 1429, 1436 (10th Cir. 1997) (citing 5 U.S.C. § 706(2)(A)). "The critical question in answering this inquiry is 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Overton Park*, 401 U.S. at 416, 91 S.Ct. 814). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* This court's "task is to assess whether the agency considered all of the relevant factors contained at 25 C.F.R. § 151.10 in evaluating" the BIA's consideration of a land-into-trust application. *Id.*

1.

We start with the district court's holding that the BIA's consideration of the jurisdictional-conflicts criterion, 25 C.F.R. § 151.10(f), was arbitrary and capricious. The court noted the disagreements between the Region and the Assistant Secretary about the significance of potential jurisdictional conflicts. The Region twice denied the UKB application—in 2006 and 2008—

in large part because it was convinced that both the Nation and the UKB would assert jurisdiction over the Subject Parcel if it were taken into trust. *See* Aplt. App. 162–63; 314–17. In his June 2009 Decision, the Assistant Secretary responded to the Region's concerns by finding that (1) the UKB would exercise exclusive jurisdiction over the Subject Parcel, and (2) even if both the Nation and the UKB asserted jurisdiction, shared-jurisdiction trust lands have been approved in the past. *Id.* at 219–21. The Region reiterated in the 2011 Decision that its concerns were not assuaged, but it acknowledged that the Assistant Secretary's findings were binding on it, preventing it from denying the application on jurisdictional grounds. *Id.* at 296–98.

The district court credited the Region's arguments while giving short shrift to those of the Assistant Secretary. We note the intra-agency difference of opinion, but our task is not to decide which side has the better argument. Instead, we must review the agency's ultimate disposition of the issue (in this case, the Assistant Secretary's findings that jurisdictional problems are not insurmountable) for an abuse of discretion. *See Overton Park*, 401 U.S. at 416, 91 S.Ct. 814 (reviewing courts must discern "whether *the decision* was based on a consideration of the relevant factors and whether there has been a clear error of judgment." (emphasis added)). We conclude that the BIA "consider[ed] . . . the relevant factors" and did not make a "clear error of judgment" in its jurisdictional-conflicts analysis. *Id.*

The Assistant Secretary explained his reasoning in the June 2009 Decision, which was incorporated by reference into the 2011 Decision. First, the Assistant Secretary responded to the Region's finding that the

Nation possessed exclusive jurisdiction over the former historic Cherokee reservation. The Assistant Secretary pointed to the 1946 Congressional Act recognizing the UKB "as a band of Indians residing in Oklahoma within the meaning of section 3 of the [OIWA]." *See* 60 Stat. 976 (1946 Act). The Assistant Secretary reasoned that the 1946 Act "imposes no limitations on the [UKB]'s authority," and "[t]here is no reason, on the face of the Act, that the Keetoowah Band would have less authority than any other band or tribe." Aplt. App. 219. To further support this conclusion, the Assistant Secretary referenced section 476(f),[19] an amendment to the IRA enacted in 1994, which provides that the government shall not "classif[y], enhance[ ], or diminish[ ] the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes[.]" *Id.* (quoting 25 U.S.C. § 5123(f) (IRA Amendment)). The Assistant Secretary reasoned that this provision prohibited the BIA from finding the UKB lacks territorial jurisdiction while other tribes possess it, and justified a departure from BIA precedent holding that the Nation exercised exclusive jurisdiction within the former Cherokee reservation.[20] *Id.* And the Assistant Secretary cited the

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[19] Now located at 25 U.S.C. § 5123(f).

[20] The precedents the Region cited consist of unpublished orders from the Northern District of Oklahoma. *See United Keetoowah Band v. Secretary*, No. 90-C-608-B (N.D. Okla. Order May 31, 1991) ("[T]he Secretary of the Interior, or his designee, has determined that the subject lands of the old Cherokee Reservation are under the jurisdiction of the new Cherokee Nation, not the UKB."); *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Order Feb. 24, 1992); *United Keetoowah Band v. Mankiller*, No. 92-C-585-B (N.D. Okla. Order Jan. 27, 1993) ("This court has previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation." (citing *UKB v. Secretary*).

1999 Appropriations Act, discussed *supra*, as further indication of Congressional intent that trust lands may be established on the former Cherokee reservation for tribes other than the Nation. *Id.* at 220.

Second, the Assistant Secretary concluded that "even if the UKB had to share jurisdiction with the [Nation], such shared jurisdiction would not preclude me from taking the land into trust." *Id.* The Assistant Secretary then referenced other instances of tribes sharing jurisdiction over trust lands. *Id.* at 220–221. "The UKB and the [Nation] should be able, as these other tribes have done, to find a workable solution to shared jurisdiction." *Id.* at 221.

We find the Assistant Secretary's analysis sufficient to withstand the "narrow" standard of arbitrary and capricious review. *McAlpine*, 112 F.3d at 1436. The Assistant Secretary was justified in relying on the 1994 IRA Amendment and the 1999 Appropriations Act as bases for changing the BIA's stance on the exclusivity of Nation jurisdiction over former Cherokee reservation land.[21] "[T]he fact that an agency had a

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The Assistant Secretary justified departing from those court pronouncements because (1) they predated the 1994 IRA Amendment and the 1999 Appropriations Act, and (2) they were "based on the Department [of the Interior's] position at that time," which has since been disavowed. Aplt. App. 219.

[21] The Nation appears to argue that the Assistant Secretary misconstrued the IRA Amendment as "mandat[ing] that the Secretary grant [a land-into-trust] application." Aple. Br. at 47–48. This is a mischaracterization of the Assistant Secretary's position. The Assistant Secretary relied on the IRA Amendment to support the proposition that the UKB share the "privileges and immunities available" to other Indian tribes; in this case, the right to assert jurisdiction over its tribal lands. *See* Aplt. App. 219. The Assistant Secretary never claimed he was mandated to

prior stance does not alone prevent it from changing its view or create a higher hurdle for doing so." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). And neither the district court nor the Region confronted the Assistant Secretary's alternative theory that a shared-jurisdiction arrangement could be implemented.[22] Accordingly, we reverse the district court's holding that the BIA abused its discretion in its consideration of the jurisdictional-conflicts criterion.

2.

The district court held that the BIA's consideration of 25 C.F.R. § 151.10(g)—which requires the Secretary to consider "whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status"—was arbitrary and capricious. Op. at 19. As with the jurisdictional-conflicts criterion, the Region and the Assistant Secretary disputed whether the administrative-burden criterion should defeat the UKB application. The district court sided with the Region. Again, we reverse.

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approve a land-into-trust application, only that he cannot privilege or diminish one tribe over another.

[22] The Nation argues that the "examples of shared jurisdiction given by the Secretary are not on point." Aple. Br. at 50. The Nation asserts that in every case but one, "the tribes involved share ownership of the land and thus have economic and political incentives to cooperate." *Id.* No such supposed incentives exist here because the UKB owns the Subject Tract in fee. In the remaining example, the Nation claims that the tribes sharing jurisdiction "are in constant conflict." *Id.* (referencing disputes between the Creek Nation and Thlopthlocco Tribal Town). We find the Nation's arguments speculative in nature and insufficient to demonstrate that the BIA abused its discretion.

In response to the Region's initial denial of the UKB application in 2006, the Assistant Secretary requested the Region to reconsider the application and more fully explain its reasoning regarding the administrative-burden criterion. Aplt. App. 172 (2008 Directive). The Assistant Secretary noted that the "proposed trust land is a small parcel of land" and that "[i]t would not appear that supervision needs to be extensive[.]" *Id.* In its 2008 denial of the UKB application, the Region explained that the local Bureau agency responsible for providing services in the area had closed, and those services were contracted to the Nation.[23] Aplt. App. 318. The Region was concerned that the UKB would reject the provision of services by the Nation and insist that the Region provide the services instead. *Id.* The Region concluded that it lacked the resources to provide the services. *Id.*

The Assistant Secretary was unpersuaded. In his June 2009 Decision, he stated that the Region "failed to substantiate [its] decision" and "fail[ed] to identify specific duties that the BIA will incur." Aplt. App. 221. The Assistant Secretary found that the Region failed to demonstrate which services the BIA would be required to provide for the Subject Parcel, and did not explain why the services could not be administered by the Region or contracted to the UKB. *Id.* Accordingly, the Assistant Secretary reiterated his stance from the 2008 Directive: the burden of providing administrative services would be negligible. *Id.* As with the jurisdictional-conflicts criterion, the Region was bound by the Assistant Secretary's findings.

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[23] Such services include realty, tribal court, and law enforcement. Aplt. App. 318.

Again, we conclude that the BIA considered the relevant factors and did not make a clear error of judgment. *Overton Park*, 401 U.S. at 416, 91 S.Ct. 814. The relatively small size of the Subject Parcel and the fact that BIA services have been provided in the past suggest that any additional administrative burden will not be unreasonable. We have considered the Region's counterarguments, but we conclude that the Assistant Secretary's position is not "so implausible that it could not be ascribed to a difference in view[.]" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Therefore, the BIA's consideration of the administrative-burden criterion was not arbitrary and capricious.

V.

We reverse the district court's order holding that the 2011 Decision approving the UKB's land-into-trust application was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. We hold that (1) the BIA need not consider the definition of "Indian" under the IRA when taking land into trust pursuant to OIWA; (2) Nation consent is not required for the BIA to take the Subject Parcel into trust; and (3) the BIA's consideration of the section 151.10 regulatory factors was not arbitrary and capricious. Consequently, we vacate the district court's injunction preventing the Secretary from taking the Subject Parcel into trust.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. OKLAHOMA

Case No. CIV–14–428–RAW

The CHEROKEE NATION,

Plaintiff,

v.

S.M.R. JEWELL, in her official capacity as Secretary of the Interior, U.S. Department of the Interior, KEVIN WASHBURN, in his official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, and ROBERT IMPSON, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs,

Defendants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,

Intervenor/Defendants.

Signed 05/31/2017

ORDER[1]

RONALD A. WHITE *United States District Judge Eastern District of Oklahoma*

On May 24, 2011, the Bureau of Indian Affairs ("BIA"), Eastern Oklahoma Region ("Region") for the United States Department of the Interior ("DOI") issued a Decision ("2011 Decision") approving an amended application of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") to take a 76 acre tract located in Cherokee County ("Subject Tract") into trust for the use and benefit of the UKB Corporation. The UKB owns the Subject Tract in fee. The Subject Tract is also located within the former reservation of the Cherokee Nation.

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

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

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

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

History of the UKB Application

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

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

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

The Assistant Secretary concluded in his 2010 Decision that the UKB should be allowed to amend its application to invoke alternative authority for the acquisition of the land into trust. The UKB amended its application on October 5, 2010, requesting that the Subject Tract be taken into trust for the UKB Corporation rather than the UKB and pursuant to Section 3 of the Oklahoma Indian Welfare Act of June 26, 1936 ("OIWA"), 25 U.S.C. § 503,[5] rather than pursuant to Section 5 of the Indian Reorganization Act of June 18, 1934 ("IRA"), 25 U.S.C. § 465. The Assistant Secretary sent a letter dated January 21, 2011 to the UKB further clarifying matters pertaining to the application ("2011 Letter").

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

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

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

2011 Decision Findings[6]

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

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

1. 25 C.F.R. § 151.3 & OIWA

The Region found that 25 C.F.R. § 151.3(a)[7] authorizes the Secretary to take land into trust for the UKB

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

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

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> > (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
> >
> > (2) When the tribe already owns an interest in the land; or

Corporation. 2011 Decision, Docket No. 67–5, at 46 and 53. Section 151.3(a)(2) applies because the UKB owns the Subject Tract in fee. Section 151.3(a)(3) applies because the Secretary found that the UKB has a need for the Subject Tract to be taken into trust so that the UKB may exercise jurisdiction over it, thus facilitating tribal self-determination. *Id*. at 46.

The Region further found that "Section 3 of the OIWA, 25 U.S.C. § 503[8], implicitly authorizes the Secretary to take land into trust for the UKB Corporation." *Id*. at 46 and 53. Pertinent to the Region's finding is the following language: "Such charter may convey to the incorporated group, in addition to any

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> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

[8] Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter. 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503) (emphasis in original).

powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503).

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

The Region determined that consultation with, rather than the consent of, the Cherokee Nation is required before the Secretary may take land into trust for the UKB Corporation. The Subject Tract is located within the former reservation[9] of the Cherokee Nation. Specifically, it "is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota . . . and the 1866 treaty between the Cherokee Nation and the United States . . . ." 2011 Decision, Docket No. 67–5, at 47. An Indian tribe[10] "may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation *consents in writing* to the acquisition . . . ." 25 C.F.R. § 151.8 (emphasis added).

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

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

The Region concluded, however, that Congress overrode the consent requirement of 25 C.F.R. § 151.8 with respect to lands within the boundaries of the former Cherokee reservation by including in the "Interior and Related Agencies Appropriations Act of 1999"[11] ("1999 Appropriations Act") the following language: "until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation with* the Cherokee Nation." 1999 Appropriations Act, 112 Stat. 2681–246 (emphasis added). The Region consulted with the Cherokee Nation.[12]

3. 25 C.F.R. § 151.9—The Application

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

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

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

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

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

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

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[14] The Secretary considers the following criteria:

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

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

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

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

> (a) As noted above, the Region found statutory authority in Section 3 of the OIWA, 25 U.S.C. § 503.
>
> (b) As noted above, the Region determined that the UKB, having no land in trust, has a need for this land to be taken into trust to facilitate tribal self-determination.
>
> (c) The Region found that the UKB's stated uses for the Subject Tract—for the operation of programs that provide services to its tribal members—are permissible. The Subject Tract holds community program buildings and a dance ground. 2008 Directive, Docket No. 67–2, at 185. The UKB's application did not identify any expected changes in the intended use of the property.
>
> (d) As the application is not for an individual, this section did not apply.
>
> (e) The Region found that the impact on the state and local governments resulting from the removal of the Subject Tract from the tax rolls would be insignificant.
>
> (f) As noted above, the Subject Tract is located within the treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota and the 1866 treaty between the Cherokee Nation and the United States. The BIA has consistently recognized this area as the 'former reservation' of the Cherokee Nation. 2011

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

Decision, Docket No. 67–5, at 50. The Region "twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition." 2011 Decision, Docket No. 67–5, at 51. The Region noted that it has been recognized in federal courts that the Cherokee Nation is the only tribal entity with jurisdictional authority within its former reservation. The Region further noted that if the Subject Tract is placed into trust for the UKB, both the UKB and the Cherokee Nation would assert jurisdiction over the property. The Assistant Secretary, however, found that the Cherokee Nation does not have exclusive jurisdiction within its former reservation[17] and that the UKB would have exclusive jurisdiction over land taken into trust for it.[18] The Assistant Secretary further found that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." 2011 Decision, Docket No. 67–5, at 51–52. The Region remains concerned that jurisdictional conflicts will arise between the UKB and the Cherokee Nation if the Subject Tract is placed into trust for

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

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

the UKB. Nevertheless, the Assistant Secretary's findings are binding on the Region.

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

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

STANDARD OF REVIEW

When a final agency action[19] is challenged, the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions,[20]

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

[20] When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

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

An agency's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *United Keetoowah Band of Cherokee Indians of Okla. v. United States Dept. of Housing and Urban Dev.*, 567 F.3d 1235, 1239 (10th Cir. 2009) (citation omitted). The standard of review is narrow, and the court may not substitute its judgment for that of the agency. *Id*. Nevertheless, the court must "engage in a substantial inquiry" and conduct a "thorough, probing, in-depth review." *Id*.

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must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

ANALYSIS

Statutory Authority

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

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

Section 465[21] of the IRA authorizes the Secretary to take land into trust "for the purpose of providing lands

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

* * *

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

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

Moreover, this court "construes statutes 'so that effect is given to all its provisions, so that no part will

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

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

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

be inoperative or superfluous, void or insignificant.'" *In re Mallo*, 774 F.3d 1313, 1317 (10th Cir. 2014) (citation omitted). The court reads "statutes as a whole, with no section interpreted 'in isolation from the context of the whole Act.'" *United States v. Al Kassar*, 660 F.3d 108, 124 (2d Cir. 2011) (citation omitted). *See also Samantar v. Yousuf*, 560 U.S. 305, 319 (2010).

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

The Impact of *Carcieri*

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

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

25 U.S.C.A. § 5129 (West) (formerly cited as 25 U.S.C. § 479) (emphasis added).[24] The OIWA does not contain

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

[24] The regulations setting forth the authorities, policies, and procedures governing acquisitions of land in trust for individual Indians and tribes include a definition of the term that is similar to the one provided in the IRA. The regulations define an

a definition of the term "Indian." The Federal Defendants argue that the OIWA applies to "[a]ny recognized tribe or band of Indians residing in Oklahoma," and thus a definition of "Indian" was not necessary. The court disagrees. Moreover, as the OIWA points to the IRA, the definition of the term "Indian" therein is applicable to any acquisition thereunder. Section 465 provides the right to have land taken into trust "for the purpose of providing land for Indians." Section 479 defines "Indians." "There is simply no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479." *Carcieri*, 555 U.S. at 393.

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

While the Assistant Secretary mentions the *Carcieri* holding in his 2009 and 2010 Decisions and invites briefing from the Cherokee Nation and the UKB, he does not provide an opinion as to how it might affect the UKB's proposed acquisition. The Assistant Secretary suggests taking the Subject Tract into trust pursuant to Section 3 of the OIWA rather than pursuant to the IRA and appears to believe that this avenue circumvents the need to consider the *Carcieri*

"Individual Indian" as: (1) Any person who is an enrolled member of a tribe; (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation; (3) Any other person possessing a total of one-half or more degree Indian blood of a tribe . . . ." 25 C.F.R. § 151.2(c).

ruling. The Region, therefore, does not discuss *Carcieri* in the 2011 Decision. As the *Carcieri* ruling is so narrow, it may not prevent the Secretary from taking land into trust for the UKB or the UKB Corporation. Nevertheless, the court will not opine on the issue in the first instance. Upon remand, before taking any land into trust for the UKB or the UKB Corporation, the Region shall reach the question of how any acquisition for the UKB or the UKB Corporation is affected by *Carcieri*.

The Application

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

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

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

Cherokee Nation Consent

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

The regulations at 25 C.F.R. § 151.1, *et seq*. govern the acquisition of land in trust for individual Indians and tribes. Section 151.8 provides that an individual Indian or tribe "may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation *consents in writing* to the acquisition." 25 C.F.R. § 151.8 (emphasis added). This section was revisited in 2001. *Id*. Congress did not remove the consent requirement from trust acquisitions within the former reservation of the Cherokee Nation.

The 1999 Appropriations Act provides that "until such time as legislation is enacted to the contrary, *no funds shall be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without *consultation with* the Cherokee Nation." 1999 Appropriations Act, 112 Stat. 2681–246 (emphasis added). The court understands the confusion. As the Federal Defendants and the UKB argue, words have meaning. The fact that Congress changed "consent" in the 1992 Appropriations Act to "consultation" in the 1999 Appropriations Act seems to support their argument.

The 1999 Appropriations Act, however, applies to funding. It does not override the land acquisitions regulations. It is well established that "repeals by impli-

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

Treaties, Precedent and Jurisdictional Conflicts

The court agrees with the Cherokee Nation's arguments that taking land into trust within the Cherokee Nation's former reservation without its consent violates its treaties, is contrary to precedent, and ignores the jurisdictional conflicts. The 1866 Treaty with the Cherokee Nation provides: "The United States guarantee to the people of the Cherokee Nation the quiet

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

[26] The Assistant Secretary noted that 25 U.S.C. § 476(g) (now § 5123(g)) "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction." 2009 Decision, Docket No. 67–3, at 88. Even if this conclusion is correct, it does not follow that land may be taken from one tribe's jurisdiction without its consent and placed into trust for another tribe.

and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty with the Cherokee Nation, art. 26, July 19, 1866, 14 Stat. 799. The members of the UKB are also Cherokee; thus, this could be considered a "domestic feud or insurrection." The UKB is also an independent tribe; thus, this could be considered "hostility of another tribe," as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.

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

Additionally, the BIA has consistently recognized the Subject Tract as being within the 'former reservation' of the Cherokee Nation. 2011 Decision, Docket No. 67–5, at 50. The Cherokee Nation is the only Indian tribe with trust land within its former reservation. The BIA has never taken land into trust for the UKB or any Indian tribe other than the Cherokee Nation within the former reservation of the Cherokee Nation. The Assistant Secretary dismissed this precedent spanning well over a century, however, citing his opinion that the 1999 Appropriations Act negated the Cherokee Nation's exclusive jurisdiction within its

former reservation. "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." *Utahns for Better Transp. v. U.S. Department of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002). The Assistant Secretary did not follow the BIA's precedent and did not provide an adequate rational explanation for his departure.

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

BIA Additional Responsibilities

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

CONCLUSION

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

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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 8, 2019]

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No. 17-7042

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THE CHEROKEE NATION,
Plaintiff-Appellee,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior, *et al*.,
Defendants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, *et al*.,
Intervenors Defendants-Appellants.

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No. 17-7044

———

THE CHEROKEE NATION,
Plaintiff-Appellee,

v.

DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior, *et al*.,
Defendants-Appellants,

and

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

Intervenors Defendants-Appellants.

ORDER

Before MATHESON, McHUGH, and EID, *Circuit Judges*.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS INVOLVED

INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (Excerpts)

25 U.S.C. § 5107. Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations

Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: *Provided*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: *Provided further*, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108-374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: *Provided further*, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of

the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

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

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

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

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

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe

or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5110. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. § 5118. Application generally

The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 shall apply to the Territory of Alaska: *Provided,* That sections 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

25 U.S.C. § 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

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

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

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

(b) Revocation

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

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

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

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

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

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

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

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

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

(d) Approval or disapproval by Secretary; enforcement

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

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the

provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of pre-submitted budget estimates

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

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

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

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

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994,

and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act—

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

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

25 U.S.C. § 5124. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted

lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

25 U.S.C. § 5125. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 5129. Definitions

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

OKLAHOMA INDIAN WELFARE ACT OF JUNE 26, 1936 (Excerpt)

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

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

Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990 (1991) (Excerpt)

* * *

Provided further, That until such time as legislation is enacted to the contrary, none of the funds appropriated in this or any other Act for the benefit of Indians residing within the jurisdictional service area of the Cherokee Nation of Oklahoma shall be expended by other than the Cherokee Nation, nor shall any funds be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the consent of the Cherokee Nation[.]

* * *

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (Excerpt)

* * *

Provided further, That the sixth proviso under Operation of Indian Programs in Public Law 102–154, for the fiscal year ending September 30, 1992 (105 Stat. 1004), is hereby amended to read as follows: "*Provided further,* That until such time as legislation is enacted to the contrary, no funds shall be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation[.]"

* * *

TRUST ACQUISITION REGULATIONS
(Excerpts)

25 C.F.R. § 151.2 Definitions.

* * *

(b) Tribe means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

* * *

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

* * *

25 C.F.R. § 151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

APPENDIX E

TREATIES INVOLVED

TREATY WITH THE CHEROKEE, 1866. (Excerpts)

Treaty between the United States of America and the Cherokee Nation of Indians; Concluded July 19, 1866; Ratification advised, with Amendments, July 27, 1866; Amendments accepted July 31, 1866; Proclaimed August 11, 1866.

July 19, 1866.

WHEREAS a Treaty was made and concluded at the city of Washington, in the District of Columbia, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, by and between Dennis N. Cooley and Elijah Sells, Commissioners, on the part of the United States, and Smith Christie, White Catcher, James McDaniel, S. H. Benge, Daniel H. Ross, and J. B. Jones, delegates of the Cherokee nation, appointed by resolution of the national council, on the part of said Cherokee nation, which treaty is in the words and figures following, to wit:—

ARTICLES OF AGREEMENT AND CONVENTION at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian affairs, [and] Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross-John Ross,

principal chief of the Cherokees, being too unwell to join in these negotiations.

PREAMBLE.

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

* * *

ARTICLE XIII.

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

* * *

ARTICLE XV.

The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then

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

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United

States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude.

ARTICLE XVI.

The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.

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

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

* * *

ARTICLE XXVI.

The United States guarantee to the people of the Cherokee nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections and against hostilities of other tribes. They shall also be protected against

inter[r]uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done.

ARTICLE XXVII.

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

* * *

ARTICLE XXXI.

All provisions of treaties, heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby reaffirmed and declared to be in full force; and nothing herein shall be construed as an

acknowledgment by the United States, or as a relinquishment by the Cherokee nation of any claims or demands under the guaranties of former treaties, except as herein expressly provided.

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

D. N. COOLEY, *Com'r Ind. Affairs*.
ELIJAH SELLS, *Sup't Ind. Affs*.
SMITH CHRISTIE,
WHITE CATCHER,
JAMES McDANIEL,
S. H. BENGE,
DANL. H. ROSS,
J. B. JONES.

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

In presence of—

W. H. WATSON,
J. W. WRIGHT.

Signatures witnessed by the following-named persons, the following interlineations being made before signing: On page 1st the word "the" interlined, on page 11 the word "the" struck out, and to said page 11 a sheet attached requiring publication of laws; and on page 34th the word "ceded" struck out and the words "neutral lands" inserted. Page 47½ added relating to expenses of treaty.

THOMAS EWING, JR.,
WM. A. PHILLIPS,
J. W. WRIGHT.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-seventh day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 27, 1866.

Resolved, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made at the city of Washington, on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States and the Cherokee nation of Indians, with the following

* * *

AMENDMENTS, to wit:—

* * *

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-seventh of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty with the amendments as aforesaid.

In testimony whereof I have signed my name hereto, and have caused the seal of the United States to be affixed.

Done at the city of Washington, this eleventh day of August, in the year of our Lord one thousand eight hundred and sixty-six and of the Independence of the United States of America the ninety-first.

[SEAL.]

ANDREW JOHNSON.

By the President:

HENRY STANBERY, Acting Secretary of State.

TREATY WITH THE CHEROKEE, 1846. (Excerpts)

Articles of a Treaty made and concluded at Washington, in the District of Columbia, between the United States of America, by three Commissioners, Edmund Burke, William Armstrong, and Albion K. Parris; and John Ross, principal Chief of the Cherokee Nation, David Vann, William S. Coody, Richard Taylor, T. H. Walker, Clement V. McNair, Stephen Foreman, John Drew, and Richard Field, Delegates duly appointed by the regularly constituted Authorities of the Cherokee Nation; George W. Adair, John A. Bell, Stand Watie, Joseph M. Lynch, John Huss, and Brice Martin, a Delegation appointed by, and representing, that Portion of the Cherokee Tribe of Indians known and recognized as the "Treaty Party;" John Brown, Captain Dutch, John L. McCoy, Richard Drew, and Ellis Phillips, Delegates appointed by, and representing, that Portion of the Cherokee Tribe of Indians known and recognized as "Western Cherokees," or "Old Settlers."

August 6, 1846.
Consent of Senate, Aug. 8, 1846.
Proclamation, Aug. 17, 1846.

WHEREAS serious difficulties have, for a considerable time past, existed between the different portions of the people constituting and recognized as the Cherokee nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them: and whereas certain claims

exist on the part of the Cherokee nation, and portions of the Cherokee people, against the United States; therefore, with a view to the final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz:—

ARTICLE I.

That the lands now occupied by the Cherokee nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will caùse a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

* * *

ARTICLE XIII.

This treaty, after the same shall be ratified by the President and Senate of the United States, shall be obligatory on the contracting parties.

In testimony whereof, the said Edmund Burke, William Armstrong, and Albion K. Parris, Commissioners

as aforesaid, and the several delegations aforesaid, and the Cherokee nation and people, have hereunto set their hands and seals, at Washington aforesaid, this sixth day of August, in the year of our Lord one thousand eight hundred and forty-six.

EDMUND BURKE.
WM. ARMSTRONG.
ALBION K. PARRIS.

Delegation of the Government Party.

Jno. Ross,
W. S. Coody,
R. Taylor,
C. V. McNair,
Stephen Foreman,
John Drew,
Richard Fields.

Delegation of the Treaty Party.

Geo. W. Adair,
J. A. Bell,
S. Watie,
Joseph M. Lynch,
John Huss,
Brice Martin
(By J. M. Lynch, his attorney.)

Delegation of the Old Settlers.

Jno. Brown,
Wm. Dutch,
John L. McCoy,
Richard Drew,
Ellis F. Phillips.

[To each of the names of the Indians a seal is affixed.]

In presence of—

Joseph Bryan, *of Alabama*.
Geo. W. Paschal.
John P. Wolf, (Secretary of Board.)
W.S. Adair.
Jno. F. Wheeler.

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, August 8, 1846.

Resolved, (*two thirds of the Senators present concurring*,) That Senate advise and consent to the ratification of the articles of a treaty made and concluded at Washington, in the District of Columbia, the sixth day of August, in the year of our Lord one thousand eight hundred and forty-six, between the United States of America, by three Commissioners, Edmund Burke, William Armstrong, and Albion K. Parris, and John Ross, principal Chief of the Cherokee Nation, David Vann, William S. Coody, Richard Taylor, T. H. Walker, Clement F. McNair, Stephen Foreman, John Drew, and Richard Field, Delegates duly appointed by the regularly constituted authorities of the Cherokee Nation; Geo. W. Adair, John A. Bell, Stand Watie, Joseph M. Lynch, John Huss, and Brice Martin, a delegation appointed by and representing that portion of the Cherokee tribe of Indians known and recognized as the "Treaty Party;" John Brown, Captain Dutch, John L. McCoy, Richard Drew, and Ellis Phillips, Delegates appointed by and representing that portion of the Cherokee tribe of Indians known and recognized as "Western Cherokees," or "Old Settlers," with the following

* * *

AMENDMENTS.

Strike out of the fifth article the following words: "First deducting therefrom the sum of fifty thousand dollars, to be paid to the delegation of that portion of the Cherokee people who are parties to the treaty, to defray the expenses of prosecuting their claims against the government of the United States, including the late Captain John Rogers."

Strike out the twelfth article of the treaty.

Attest: ASBURY DICKENS, *Secretary*.

We, John Ross, principal Chief of the Cherokee nation, David Vann, Wm. S. Coody, Richard Taylor, T. H. Walker, Clement F. McNair, Stephen Foreman, John Drew, and Richard Field, Delegates duly appointed by the regularly constituted authorities of the Cherokee nation; George W. Adair, John A. Bell, Stand Watie, Joseph M. Lynch, John Huss, and Brice Martin, a delegation appointed by and representing that portion of the Cherokee tribe of Indians known and recognized as the "Treaty Party;" John Brown, Captain Dutch, John L. McCoy, Richard Drew, and Ellis Phillips, Delegates appointed by and representing that portion of the Cherokee tribe of Indians known and recognized as "Western Cherokees," or "Old Settlers," do hereby give our free and voluntary assent to the foregoing amendments made by the Senate of the United States, on the eighth day of August, one thousand eight hundred and forty-six, to the treaty concluded by us with Edmund Burke, William Armstrong, and Albion K. Parris, Commissioners acting for and on behalf of the United States, on the sixth day of August, one thousand eight hundred and forty-six, the same having been submitted and fully explained to us by the Secretary of War and Commissioner of Indian Affairs, on the part of the United States.

In testimony whereof, we have hereunto set our hands and affixed our seals, respectively, at Washington, District of Columbia, the thirteenth day of August, one thousand eight hundred and forty-six.

Jno. Ross,	Stephen Foreman,	Stand Watie,	Jno. Brown,
David Vann,	(By John Ross.)	J. M. Lynch,	Wm. Dutch,
W. S. Coodey,	John Drew,	Jno. Huss,	John L. McCoy,
R. Taylor,	Richard Fields,	Brice Martin,	Richard Drew,
T. Walker,	Geo. W. Adair,	(By J. M. Lynch)	Ellis F. Phillips
C. V. McNair,	John A. Bell,		

[To each of the names of the Indians a seal is affixed.]

Witnesses present,

Spencer Jarnagin, *U. S. S.*	N. Quackenbush,
H. Miller,	W. Medill.

TREATY WITH THE CHEROKEE, 1835.
(Excerpts)

ARTICLES OF A TREATY, *Concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.*

December 29, 1835.
Proclamation, May 23, 1836.

WHEREAS the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Governments may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views,

habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the Government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the Senate of the United States themselves and to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge Elias Boudinot Archilla Smith S. W. Bell John West Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United

States which were to be submitted to their nation for their final action and determination:

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioner then present, at that place or elsewhere and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington city, with a view to close negotiations there, as stated by them notwithstanding they were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was made it must be done here in the nation, where the delegation at Washington last winter urged that it should be done for the purpose of promoting peace and harmony among the people; and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious uncertain and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the

part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in council according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Dec. 1835.

ARTICLE 1.

The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoilations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles But as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five

millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoilations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoilations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2.

Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri;

thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation

beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a pro rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3.

The United States also agree that the lands above ceded by the treaty of Feb. 14 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

ARTICLE 4.

The United States also stipulate and agree to extinguish for the benefit of the Cherokees the titles to the reservations within their country made in the Osage treaty of 1825 to certain half-breeds and for this purpose they hereby agree to pay to the persons to whom the same belong or have been assigned or to their agents or guardians whenever they shall execute after the ratification of this treaty a satisfactory conveyance for the same, to the United States, the sum of fifteen thousand dollars according to a schedule accompanying this treaty of the relative value of the several reservations.

And whereas by the several treaties between the United States and the Osage Indians the Union and Harmony Missionary reservations which were established for their benefit are now situated within the country ceded by them to the United States; the former being situated in the Cherokee country and the latter in the State of Missouri. It is therefore agreed that the United States shall pay the American Board of Commissioners for Foreign Missions for the improvements on the same what they shall be appraised at by Capt. Geo. Vashon Cherokee sub-agent Abraham Redfield and A.P. Chouteau or such persons as the President of the United States shall appoint and the money allowed for the same shall be expended in schools among the Osages and improving their condition. It is understood that the United States are to pay the amount allowed for the reservations in this article and not the Cherokees.

ARTICLE 5.

The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the forgoing

article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6.

Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7.

The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

* * *

ARTICLE 14.

It is also agreed on the part of the United States that such warriors of the Cherokee nation as were engaged on the side of the United States in the late war with Great Britain and the southern tribes of Indians, and who were wounded in such service shall be entitled to such pensions as shall be allowed them by the Congress of the United States to commence from the period of their disability.

* * *

ARTICLE 16.

It is hereby stipulated and agreed by the Cherokees that they shall remove to their new homes within two years from the ratification of this treaty and that during such time the United States shall protect and defend them in their possessions and property and free use and occupation of the same and such persons as have been dispossessed of their improvements and houses; and for which no grant has actually issued

previously to the enactment of the law of the State of Georgia, of December 1835 to regulate Indian occupancy shall be again put in possession and placed in the same situation and condition, in reference to the laws of the State of Georgia, as the Indians that have not been dispossessed; and if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof. And it is also stipulated and agreed that the public buildings and improvements on which they are situated at New Echota for which no grant has been actually made previous to the passage of the above recited act if not occupied by the Cherokee people shall be reserved for the public and free use of the United States and the Cherokee Indians for the purpose of settling and closing all the Indian business arising under this treaty between the commissioners of claims and the Indians.

The United States, and the several States interested in the Cherokee lands, shall immediately proceed to survey the lands ceded by this treaty; but it is expressly agreed and understood between the parties that the agency buildings and that tract of land surveyed and laid off for the use of Colonel R. J. Meigs Indian agent or heretofore enjoyed and occupied by his successors in office shall continue subject to the use and occupancy of the United States, or such agent as may be engaged specially superintending the removal of the tribe.

* * *

ARTICLE 19.

This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20.

(Supplemental article. Stricken out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

WM. CARROLL,
J. F. SCHERMERHORN.

Major Ridge,	Te-gah-e-ske,
James Foster,	Robert Rogers,
Tesa-ta-esky,	John Gunter,
Charles Moore,	John A. Bell,
George Chambers,	Charles F. Foreman,
Tah-yeske,	William Rogers,
Archilla Smith,	George W. Adair,
Andrew Ross,	Elias Boudinot,
William Lassley,	James Starr,
Cae-te-hee,	Jesse Half-breed.

Signed and sealed in presence of Western B. Thomas, Secry. Ben. F. Currey, Special Agent. M. Wolfe Bateman, 1st Lt. 6th U. S. A. inf., Disbg. Agent. Jno. L. Hooper, Lt. 4th inf. C. M. Hitchcock, M. D. Assist. Surg. U. S. A. G. W. Currey. Wm. H. Underwood. Cornelius D. Terhune. John W. H. Underwood.

To the Indian names are subjoined a mark and seal.

In compliance with instructions of the council at New Echota we sign this treaty.

STAND WATIE,
JOHN RIDGE.

March 1, 1836.

WITNESSES.—Elbert Herring. Alexander H. Everett. John Robb. D. Kurtz. Wm. Y. Hansell. Samuel J. Potts. Jno. Litle. S. Rockwell.

* * *

Whereas the western Cherokees have appointed a delegation to visit the eastern Cherokees to assure them of the friendly disposition of their people and their desire that the nation should again be united as one people and to urge upon them the expediency of accepting the overtures of the Government; and that, on their removal they may be assured of a hearty welcome and an equal participation with them in all the benefits and privileges of the Cherokee country west and the undersigned two of said delegation being the only delegates in the eastern nation from the west at the signing and sealing of the treaty lately concluded at New Echota between their eastern brethren and the United States; and having fully understood the provisions of the same they agree to it in behalf of the western Cherokees. But it is expressly understood that nothing in this treaty shall affect any claims of the western Cherokees on the United States.

In testimony whereof, we have, this 31st day of December, 1835, hereunto set our hands and seals.

JAMES ROGERS,
JOHN SMITH,
Delegates from the western Cherokees.

Test: Ben. F. Currey, Special Agent. M. W. Bateman, First Lieut. 6th Infantry. Jno. L. Hooper, Lieut. 4th Infy. Elias Boudinot.

Schedule and estimated value of the Osage half-breed reservations within the territory ceded to the Cherokees west of the Mississippi, (*referred to in article 5 on the foregoing treaty,*) *viz:*

Augustus	Clamont	one	section	.....	$6,000
James	"	"	"	.....	1,000
Paul	"	"	"	.....	1,300
Henry	"	"	"	.....	800
Anthony	"	"	"	.....	1,800
Rosalie	"	"	"	.....	1,800
Emilia D, of Mihanga				.....	1,000
Emilia D, of Shemianga				.....	1,300
					$15,000

I hereby certify that the above schedule is the estimated value of the Osage reservations; as made out and agreed upon with Col. A. P. Choteau who represented himself as the agent or guardian of the above reservees.

J. F. SCHERMERHORN.

March 14, 1835.

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