UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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EXECUTIVE SECRETARIAT

(1) THE STATE OF OKLAHOMA,
E. Scott Pruitt
Attorney General

and

(2) DOMESTIC ENERGY PRODUCERS ALLIANCE,

Plaintiffs,

v.

(1) DEPARTMENT OF THE INTERIOR,

(2) SALLY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior,

(3) FISH & WILDLIFE SERVICE, a part of the Department of the Interior,

(4) DANIEL M. ASHE, in his official capacity as Director of the Fish & Wildlife Service, U.S. Department of the Interior,

(5) GARY FRAZER, in his official capacity as Assistant Director for Endangered Species at the Fish and Wildlife Service, U.S. Department of the Interior, and

(6) DIXIE PORTER, in her official capacity as the Field Supervisor, Oklahoma Ecological Services Field Office, Fish & Wildlife Service, Tulsa, OK,

Defendants.

No. 14-CV-123-TCK-PJC

SUMMONS IN A CIVIL ACTION

To: Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) – or 60 days if you are the United States or a United States Agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Attorneys for Plaintiff State of Oklahoma:

E. Scott Pruitt, Attorney General
Patrick R. Wyrick, Solicitor General
P. Clayton Eubanks, Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105

Attorneys for Plaintiff The Domestic Energy Producers Alliance:

Gerald L. Hilsher
Robert J. Joyce
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John C. Martin
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CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

David D. Freudenthal
CROWELL & MORING LLP
205 Storey Blvd.
Cheyenne, WY 82009

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Phil Lombardi, Clerk

Date: MAR 20 2014

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

August 23, 2013

The Honorable Sally Jewell
Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20420

Also mailed to:
U.S. Department of the Interior, Director (630)
Bureau of Land Management
Mail Stop 2134 LM
1849 C Street NW
Washington, D.C. 20240
Attention: 1004-AE26

And submitted via Regulations.Gov

RE: Comment From the Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia on Docket ID: BLM-2013-0002-0011 Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

Secretary Jewell,

The undersigned Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia write to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) recently re-proposed rule to regulate hydraulic fracturing operations on federal and Indian lands.

The states — and not the federal government — are best equipped to design, administer and enforce laws and regulations related to oil and gas development. State regulatory programs have been carefully designed to address state-specific issues and needs and are applied consistently, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the states have greater flexibility to respond to new information and modify or update their rules, as they have demonstrated in recent years.

The BLM has failed to justify the need for new federal regulations and requirements that will overlay the existing state programs in a burdensome and costly manner, beyond simply asserting that it has the authority to do so. Currently, state regulators employ highly

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trained staff that efficiently oversees operations on state, federal and fee lands within our borders and issues permits in a timely manner. This stands in stark contrast to a federal program that is notorious for frequent and prolonged delays and persistent staffing challenges. These will likely intensify once budget cuts are combined with onerous and unnecessary new federal rules and requirements.

While the newly proposed rule introduces a provision allowing the BLM to approve a "variance" when it determines that it would meet or exceed the effectiveness of the revised proposed federal rule, the "variance process" is unclear and has neither been adequately explained by the BLM nor analyzed by the states, industry or the public. We strongly urge that rather than undertake an unnecessarily complicated new approach, the BLM instead defer to the states on how best to address any health, environmental or safety issues arising from hydraulic fracturing and related operations on these lands.

Moreover, we question whether the BLM has the authority to administer procedures, reporting and engineering requirements for a range of well stimulation activities, including the regulation and management of water resources. The sole authority to regulate these activities and the protection and management of water resources resides with the states, and does not lie with the BLM.

The Supreme Court has long recognized that regulation of land and water use "is a quintessential state and local power."[1] Thus, "[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute."[2] Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations.

On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy. For example, the Clean Water Act (CWA) reflects the Congressional policy "to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use...of land and water resources[.][3] The statute further states that "[e]xcept as expressly provided in this chapter, nothing...shall...be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states."[4] Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement.[5]

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[1] Rapanos v. U.S., 547 U.S. 715, 738 (2006).
[2] Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). The statement in this opinion comes from parsing two quotes together from a previous Supreme Court case, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).
[3] 33 U.S.C.A. § 1251(b).
[4] *Id.* § 1370.
[5] 42 U.S.C.A. § 300(f) et. seq.

In fact, under the Clean Water Act, agencies like BLM are expressly required to comply with state water regulation—just as if they were private citizens.[6] Absent an express displacement of the Clean Water Act's requirement that BLM follow state water laws, BLM does not have the unilateral authority to set aside state regulations and impose its own preferred water pollution controls. Contrary to your agency's assertion, the Clean Water Act is not superseded by general language in the Federal Land Policy and Management Act (FLPMA),the Mineral Leasing Act, and the Mineral Leasing Act for Acquired Lands that directs BLM to preserve federal land. Such general language is insufficient to clearly override the more specific language of the Clean Water Act. Nor does such general language otherwise demonstrate a congressional intent to displace state water laws. BLM's proposed rules thus impermissibly interfere with state regulatory schemes and with the Clean Water Act.

Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources on BLM. In a 2011 resolution, the Western States Water Council underscored this point by stating that "any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states."

BLM rightfully recognizes that it does not have the state expertise or resources to regulate water resources. In fact, BLM's Water Policy states the following:

- States have primary authority and responsibility for the allocation and management of water resources within their boundaries, except as specified by Congress on a case-by-case basis.

- In order to implement the BLM water policy of state water resources primacy, Bureau personnel shall:

    - Cooperate with state governments under the umbrella of state law to protect all water uses identified for public land management purposes.

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[6] 33 U.S.C. § 1323 ("Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges."); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2010).

- Comply with applicable state law, except as otherwise specifically mandated by Congress, to appropriate water necessary to manage public lands for the purposes intended by Congress.

Despite the BLM's recognition of state primacy in this regard, the newly proposed hydraulic fracturing rule is supposedly predicated on the need for ground and surface water protections and imposes specific regulatory requirements concerning water resources. Yet the BLM has no authority to approve or disapprove well stimulation activities to regulate operators' use of water resources, or to require operators to mitigate impacts on water resources. Because BLM has no jurisdiction to regulate water resources, BLM cannot demand information about them. Indeed, BLM should eliminate all provisions that seek information about or impose regulations on the use, transport, disposal or other activities involving waters.

Water management is only one example of the unnecessary and inappropriate federal encroachment on state regulations and practices. We therefore request that the BLM:

- Identify any health, safety or environmental issues arising from hydraulic fracturing on public lands that are not currently being addressed by state regulators before taking any further action to finalize its rule.

- Carefully review the many state comments in response to the BLM's rule. Rather than force an unnecessary "one-size-fits-all" regulatory regime on top of carefully tailored state-specific programs, we further request that BLM instead defer to our state programs, on federal lands, where these regulatory programs already exist.

Beyond the fundamental question of who is better equipped to provide the best regulations, in light of the fiscal realities we face, and in view of current and future budget constraints, the BLM should partner with the states to the greatest extent possible, to leverage the existing state programs, resources and infrastructure.

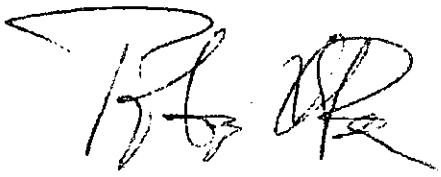
This is an extremely important matter to our states and we appreciate your serious consideration. Please contact us for any additional information or if you have any questions.

Sincerely,

Scott Pruitt

Luther Strange
Attorney General
State of Alabama

Michael C. Geraghty
Attorney General
State of Alaska



Tim Fox
Attorney General
State of Montana

Patrick Morrisey
Attorney General
State of West Virginia

cc: Tommy Beaudreau, Acting Assistant Secretary, Land and Minerals Management, DOI
Neil Kornze, Principal Deputy Director, BLM
Jamie Connect, Acting Deputy Director (Operations), BLM
Mike Nedd, Assistant Director, Minerals and Realty Management, BLM
Steven Wells, Division Chief, Fluid Minerals Division, BLM

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Washington, D.C. 20240
http://www.blm.gov

FEB 26 2014

The Honorable E. Scott Pruitt
Attorney General of Oklahoma
Oklahoma City, Oklahoma 73105

Dear Mr. Attorney General:

Thank you for your letter dated August 23, 2013, to Secretary of the Interior Sally Jewell regarding the Bureau of Land Management (BLM) proposed rule entitled "Oil and Gas: Hydraulic Fracturing on Federal and Indian Lands." Secretary Jewell asked the BLM to respond to your letter.

Your letter expresses your objection to the proposed rule and asserts that the states are equipped to regulate oil and gas development based on state-specific issues and needs. We value your input regarding appropriate regulation of oil and gas development. Coordination with stakeholders including the Western states and Tribes has been and continues to be a priority for the BLM in developing reasonable regulations.

In keeping with the BLM commitment to work closely with our state partners, the BLM held a meeting in Denver last August where the Principal Deputy Assistant Secretary for Land and Minerals Management Tommy Beaudreau and I had the opportunity to meet with representatives from several states to discuss current state standards and how the proposed hydraulic fracturing rule can complement state efforts. We proposed at the August meeting to host a follow-up meeting with the states once we have reviewed all of the 1.3 million comments received on the draft rule.

In the meantime, please feel free to contact me at 202-208-3801 if you would like to discuss this or other issues. A similar reply is being sent to the co-signers of your letter.

Sincerely,

Neil Kornze
Principal Deputy Director

E. Scott Pruitt
Attorney General

July 11, 2013

Kevin K. Washburn
Assistant Secretary - Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, DC 20240

Re: **Your request on behalf of the United Keetoowah Band of Cherokee Indians**

Dear Secretary Washburn:

For more than a decade a dispute has existed over the status of the United Keetoowah Band's Tahlequah gaming site, and whether the Keetoowahs can lawfully gamble on that land. As you know, after the National Indian Gaming Commission issued its 2011 Status of Land Opinion in which it concluded that the United Keetoowah Band's Tahlequah gaming site was not on Indian land, the State and the Keetoowah's entered into lengthy negotiations. The parties ultimately came to a settlement which served to accommodate both the interests of the State of Oklahoma and the United Keetoowah Band.

Part of that agreement resulted in the Federal District Court issuing an Order under which the temporary injunction prohibiting state officials from taking any action to enforce the gaming law violations was lifted effective July 30, 2012, unless a favorable land into trust decision was issued on the Keetoowah's Amended Trust Application by that date. Because a favorable decision to take the land into trust was reached prior to that date, under the Court's Order and our settlement agreement, the Keetoowahs had until July 30, 2013, to have the land actually placed into trust, and if the land was not actually taken into trust by that date, the Keetoowahs are required to cease gaming operations, until such time, if ever, that the land is actually taken into trust by the United States for the benefit of the Keetoowahs.

The Agreement and Order afforded the Keetoowahs an entire year to have the Secretary, or his designee, place the land into trust for the benefit of the Keetoowahs. In entering into this Agreement the parties were well aware that challenges might be made to the Secretary's ability to

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take the land into trust for the benefit of the Keetoowah Band. The State agreed to this one (1) year "grace period" as an accommodation to the Keetoowahs.

Recently, you wrote requesting that the State agree to extend this grace period until the conclusion of the litigation in which the Cherokee Nation is challenging the Secretary's ability to take the land into trust for the benefit of the Keetoowahs. In making that request, you brought to the State's attention the fact that the Department of Interior had agreed to "self stay" any action taking the land into trust during the pendency of the litigation, and that you further agreed to afford the Cherokee Nation advance notice prior to taking the land into trust. Thus, in a very real sense, the exigent circumstance which now exists is one of the Department of Interior's own making by virtue of its voluntary agreement to self stay any action on its part.

After reviewing the information you provided us both in writing and in our telephone conversation, and after discussing the matter with tribal representatives, I am **not** convinced that it is in the State's best interest to grant your request. In a very real sense your request asks us to enter into a bargain we were not willing to make a year ago. We will not now enter into such a bargain because the Department of Interior voluntarily self stayed acting on its decision to take the casino site into trust for the benefit of the Keetoowahs.

In negotiating with the United Keetoowahs, we worked hard to bring **finality** and **certainty** to a dispute that had been going on for many years. **We will not now, because of the exigencies caused by the Interior Department's self imposed stay, cast aside that finality and certainty by agreeing, for an indefinite period, to forgo our rights under the Court Order and our Settlement Agreement.**

As you mentioned in our telephone conversation, the Department of Interior has the power to lift the Department's self stay, give the Cherokee Nation and others the agreed to advance notice, then take the land into trust. **I believe this action by the Department best addresses the current situation.** While we both appreciate that the Cherokee Nation may attempt to enjoin such action by the Department, because the Department has been victorious in two recent, similar cases, your response to any request to enjoin the Department should not be an onerous task.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

ESP/ao

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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

June 5, 2013

Kevin K. Washburn
Assistant Secretary - Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, DC 20240

Jonodev Chaudhuri, Senior Counselor to the Assistant Secretary
United States Department of the Interior
Office of the Secretary
Washington, DC 20240

Re: **Your request on behalf of the United Keetoowah Band of Cherokee Indians**

Dear Secretary Washburn and Senior Counselor Chaudhuri:

My senior staff and I have met to discuss your recent request. You ask that the State consider agreeing to extend the deadline established in the State's settlement with the United Keetoowah Band. As you know, this settlement was approved and adopted by the United States Federal Court for the Eastern District of Oklahoma.

To aid us as we determine whether it is in the State's interest to favorably respond to your request, my staff and I need some additional information, and I write to request that information. First, we need a more detailed explanation of the nature of the claims being litigated, and an overview of what has been filed to date, including any scheduling orders, together with your best judgment of when the matter will be resolved in the District Court. Second, we need an explanation of why the Department voluntarily stayed taking the land into trust and further agreed to provide the Appellant Tribe with thirty (30) days advance notice before taking the land into trust during the pendency of the litigation.

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With this information, we will be in a better position to evaluate your request and determine whether it is in the best interest of the State to act in accordance with your request. Thank you for your attention to this matter.

Sincerely,

E. SCOTT PRUITT
Oklahoma Attorney General

ESP/ab

RAGA
REPUBLICAN ATTORNEYS GENERAL ASSOCIATION

RGA
REPUBLICAN GOVERNORS ASSOCIATION

July 10, 2012

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

The undersigned Governor of Virginia, Robert F. McDonnell, and Attorney General of Oklahoma, E. Scott Pruitt, write to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) proposal to regulate hydraulic fracturing operations on federal and Indian lands. The rule will have significant and destructive impacts within our state borders and we request to have the proposal withdrawn based on the following:

- The arbitrary and capricious nature of the proposal by the lack of justification, erroneous cost estimates, clearly overstated and unfounded benefits, and failure to take into account the strong objections of affected states;
- The economic harm that states will suffer, both by increased costs to its citizens and investors, and by lost revenues;
- The states, not the federal government, are best positioned to appropriately regulate hydraulic fracturing operations. Current state regulations already provide effective and efficient oversight that is specific to the needs of the states.

It is important to note that today's shale energy revolution has been accomplished with a superb environmental record under the regulatory oversight of oil and natural gas producing states. Most of the lands where BLM has jurisdiction are in the West and Rocky Mountain states. These states have a long history of oil and gas production and are well suited to regulate well stimulation activities. More than one million hydraulic fracture stimulation operations, which are necessary to produce oil and natural gas from shales and other "tight" formations, have been performed safely. In addition, exploration and production companies follow appropriate operating practices on all lands within a state. And, states receive 50 percent of federal land oil and gas bonus, rental and royalty revenues within their borders, amounting to more than $11 billion in 2011.

While the revolution has occurred primarily on private and state lands that have efficient permitting and regulatory compliance processes, some federal lands also produce energy from shale and have the potential to produce more. However, the BLM's proposed rule will only discourage exploration and production on federal and Indian lands, costing the federal government — and states that share in federal royalties — potentially billions of dollars in revenue. The BLM rule places sweeping new regulations on hydraulic fracturing and related operations — without any demonstrated problems that might need to be addressed. The BLM's proposal:

- Adds significant and unnecessary costs to the production of oil and natural gas without assuring additional environmental protection. Industry experts anticipate costs to the industry could reach more than $1.3 billion annually;

- Includes numerous expensive and time-delaying measures such as cement bond logs that do not guarantee additional safety or effectiveness. Furthermore, BLM does not provide any scientific data showing there are incidents or problems with hydraulic fracturing that justify the proposed rule;

- Includes complicated permitting requirements that would further delay federal permitting times, which may already be best measured in months or even years, compared with weeks for permits granted by states. This would discourage exploration and production on federal and Indian lands leading to significant lost investment and employment for states with federal lands;

- Grossly underestimates the investment and employment costs. Although it incorrectly states that there would be an insignificant cost, the agency has gone so far as to state a belief that employment will go up because of additional work that will be required to comply with the proposed new regulations;

- Must be based on sound science and proven engineering practices, acknowledging differences between regions based on geography, geologic formations, hydrology and historic conditions of the areas. Current state regulations already provide appropriate oversight that is specific to the needs of the states.

We request the White House, Office of Management and Budget and Department of Interior carefully review the many state comments in response to the BLM's rule and withdraw the proposal to regulate hydraulic fracturing operations on federal and Indian lands. The strong and efficient track record of states to regulate oil and natural gas production as well as the rule's significant and destructive impacts on our states should be taken into serious consideration.

Respectfully submitted,

E. Scott Pruitt
Oklahoma Attorney General
Chairman, RAGA

Robert F. McDonnell
Virginia Governor
Chairman, RGA

cc: Ken Salazar, Secretary, DOI
Mike Pool, Acting Director, BLM

RAGA
REPUBLICAN ATTORNEYS GENERAL ASSOCIATION

ES8323

RGA
REPUBLICAN GOVERNORS ASSOCIATION

December 17, 2012

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President,

In a letter dated July 10, 2012, Robert F. McDonnell, Governor of Virginia, and E. Scott Pruitt, Attorney General of Oklahoma, wrote to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) proposed rule to regulate hydraulic fracturing operations on federal and Indian lands. To date, we have not received a response to our letter, and we stand by our position that the proposed rule needs to be withdrawn.

The strong and efficient track record of states to regulate oil and natural gas production — as well as the rule's significant and destructive impacts on our states — should not be ignored, and needs to be taken into serious consideration. As stated in our July 10, 2012 letter, which is attached, we request the BLM withdraw the proposal based on the following:

- The arbitrary and capricious nature of the proposal by the lack of justification, erroneous cost estimates, clearly overstated and unfounded benefits, and failure to take into account the strong objections of affected states.

- The economic harm that states will suffer, both by increased costs to its citizens and investors, and by lost revenues.

- The states, not the federal government, are best positioned to appropriately regulate hydraulic fracturing operations. Current state regulations already provide effective and efficient oversight that is specific to the needs of the states.

The BLM's proposed rule only will discourage exploration and production on federal and Indian lands, potentially costing the federal government — and states that share in federal royalties — billions of dollars in revenue. The BLM rule places sweeping new regulations on hydraulic fracturing and related operations without any demonstrated problems that might need to be addressed. The BLM's proposal:

- Adds significant and unnecessary costs to the production of oil and natural gas without assuring additional environmental protection;

- Includes numerous expensive and time-delaying measures such as cement bond logs that do not guarantee additional safety or effectiveness;

- Creates cost impacts to the oil and natural gas industry that greatly exceed $100 million, rendering the BLM rule noncompliant with various federal orders and acts. In fact, the BLM and Office of Management and Budget (OMB) are in possession of third party comments and documentation of annual potential costs in excess of $1.4 billion;

- Includes complicated permitting requirements that would further delay federal permitting times, which already may be measured in months or even years, compared with weeks for permits granted by states. This would discourage exploration and production on federal and Indian lands, leading to significant lost investment and employment for states with federal lands;

- Grossly underestimates the investment and employment costs of implementation. The agency even has gone so far as to state, incorrectly, a belief that employment will go up because of additional work that will be required to comply with the proposed new regulations;

- Must be based on sound science and proven engineering practices, acknowledging differences between regions based on geography, geologic formations, hydrology and historic conditions of the areas. Current state regulations already provide appropriate oversight that is specific to the needs of the states.

We request that the White House, The Department of Interior (DOI) and OMB carefully review the many state comments in response to the proposed rule to regulate hydraulic fracturing operations on federal and Indian lands. We urge you to withdraw the proposal, and we look forward to your response.

Respectfully submitted,

E. Scott Pruitt
Oklahoma Attorney General
Chairman, RAGA

Bobby Jindal
Louisiana Governor
Chairman, RGA

cc: Ken Salazar, Secretary, DOI
Mike Pool, Acting Director, BLM
Jeffrey Zients, Deputy Director, OMB

E. Scott Pruitt
Attorney General of Oklahoma

August 22, 2012

United States Department of the Interior
Attention: Secretary Ken Salazar
1849 C Street, NW
Washington, D.C. 20240

Re: Farrell Cooper Mining Company v. U.S. Department of the Interior, *et al.*

Dear Secretary Salazar:

This letter is intended to make you aware of an ongoing disagreement between the Oklahoma Department of Mines (ODM) and the Office of Surface Mining Reclamation and Enforcement (OSM), Tulsa Field Office (TFO). Specifically, I want to inform you of recent developments related to TFO's proposed Approximate Original Contour (AOC) Action Plan (OK-2012-0001). As you know, the Surface Mining Control and Reclamation Act (SMCRA) of 1977 provides for a cooperative arrangement of federal and state authority for implementation of its provisions. Upon approval of a state program, SMCRA provides the states with the primary responsibility for developing, authorizing, issuing, and enforcing regulations for surface coal mining and reclamation operations, while ensuring that OSM maintains a limited oversight role. Recently, OSM has taken actions regarding the AOC Action Plan which fail to adequately respect Oklahoma's role as a primacy state. These recent actions by OSM are unauthorized under SMCRA.

In case you were unaware, this situation arose out of a disagreement over the rules and regulations regarding AOC in Oklahoma. Farrell-Cooper Mining Company was operating under permits issued by ODM in 2005 and 2009 under a state program approved by OSM. OSM issued Ten-Day Notices (TDNs) to ODM falsely asserting Farrell-Cooper was in violation of its permits. On November 29, 2011, Farrell-Cooper filed suit against OSM seeking declaratory and injunctive relief from OSM's use of TDNs to circumvent ODM's permitting procedures. ODM, represented by the Office of the Oklahoma Attorney General, was named as a party defendant by Farrell-Cooper Mining Company (plaintiff) on January 6, 2012. On January 31, 2012, ODM filed a cross-claim against OSM asserting OSM violated SMCRA by its issuance of TDNs.

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These notices are essentially a collateral attack on ODM's permitting procedures, which were previously approved by OSM under the Oklahoma program. On May 8, 2012, District Judge Frank Seay for the United States District Court for the Eastern District of Oklahoma issued an order granting OSM's motion to dismiss for lack of subject matter jurisdiction. On July 5, 2012, ODM filed a notice of appeal in the United States Court of Appeals for the Tenth Circuit.

As you are aware, under SMCRA, Oklahoma is a primacy state with an approved AOC plan in place. OSM contends that we are not regulating AOC in a manner that is satisfactory to OSM; however, this argument alone is not sufficient enough to overcome our primacy status. According to OSM's January 31, 2011, Directive REG-23, the field office (in this case TFO) is required to develop an action plan *in consultation with* the state. ODM agreed to work with OSM on a draft Action Plan, and submitted official comments on July 28, 2011, following receipt of the OSM's draft on June 20, 2011. ODM asked OSM/TFO for help in drafting guidelines for the final AOC Action Plan. OSM did not make any effort to meet with ODM to discuss and draft the final AOC Action Plan. Instead, ODM received a unilaterally created Action Plan from OSM, which OSM proposed as the final AOC Action Plan dated April 11, 2012. In addition, ODM received a letter from Alfred Clayborne, Director of TFO, dated June 25, 2012, which attacked ODM's arguments surrounding the implementation of a final AOC Action Plan and the proper implementation procedure outlined by Oklahoma's Administrative Procedure Act (state APA). Mary Ann Pritchard, Director of ODM, sent a reply to OSM on July 11, 2012.

ODM hopes to work jointly with OSM/TFO to create a final AOC Action Plan, which will comply with the state APA procedures ODM is bound to follow. ODM has submitted draft policies for the AOC Action Plan, which shows ODM's intent to meet the stated requirements and goals of OSM's Action Plan, but these policies were not incorporated into the final AOC Action Plan created by OSM. In addition, ODM seeks an agreement with OSM that allows for the State of Oklahoma to maintain its primacy status. ODM's desires and requests are not incorporated under the current AOC Action Plan set forth by OSM/TFO.

Oklahoma takes seriously its primacy role in the regulation of surface coal mining, reclamation and AOC plans. ODM simply cannot agree to an AOC Action Plan created by OSM that would force ODM to ignore proper state APA protocol in its implementation.

For your further review, please find two (2) enclosed documents: Mr. Clayborne's June 25, 2012 letter to ODM with the attached final AOC Action Plan; and Ms. Pritchard's July 11, 2012 response. Thank you for your attention to this matter. Anything you can do to facilitate working through these issues with OSM is greatly appreciated. If you have any questions or request additional information, please do not hesitate to contact me or one of my staff members working closely with this case: Tom Bates, Assistant Attorney General, (405) 522-1015; Clayton Eubanks, Assistant Attorney General, (405) 522-8992.

Sincerely,

E. Scott Pruitt
Attorney General

ESP:clb

Enclosures

cc: Senator Tom Coburn
172 Russell Senate Office Building
Washington, D.C. 20510

Senator James Inhofe
205 Russell Senate Office Building
Washington, D.C. 20510

MARY ANN PRITCHARD
DIRECTOR

MARY FALLIN
GOVERNOR

STATE OF OKLAHOMA
DEPARTMENT OF MINES

July 11, 2012

COPY

Mr. Alfred L. Clayborne, Director
Tulsa Field Office
Office of Surface Mining
1645 South 101st East Avenue, Ste. 145
Tulsa, OK 74128-4629

Re: AOC Action Plan – Response to OSM 6/25/12 Action Plan in Oklahoma

Dear Mr. Clayborne:

Thank you for your response to our draft Oklahoma Department of Mines (ODM) guidelines and policies for future evaluations of approximate original contour (AOC) on surface coal mining permit and revision applications. We submitted this draft AOC policy to satisfy a unilateral Action Plan (OSM's Action Plan) that, per your letter of April 11, 2012, "will become effective, jointly by ODM and OSM or unilaterally by OSM, on April 20, 2012".

We understand that OSM's position is that the OSM Action Plan was developed and made in accordance with OSM's latest (January 31, 2011) Directive REG-23. With all due respect, we must disagree with the characterization of the development of OSM's Action Plan. The procedures clearly outlined in REG-23 require that the field office director, *in consultation* with the state or tribe, will develop the Action Plan. ODM agreed to work with OSM on a draft Action Plan, and submitted our official comments on July 28, 2011, following our receipt of the draft on June 20, 2011. Despite repeated assurances by TFO of its intention to meet with ODM to discuss a *final* AOC Action Plan, no meetings were scheduled and TFO provided no responses to our draft for more than 8 months. The next correspondence received by ODM was OSM's Action Plan, received on April 11, 2012, prepared by the Midcontinent Regional Office. Despite the assertions in the first line of the April 11, 2012 OSM Action Plan that "this Action Plan was *jointly developed and agreed to* by the Oklahoma Department of Mines (ODM) in order to resolve Oklahoma Regulatory Program Approximate Original Contour (AOC) issues identified by OSM in the OSM's EY 2010 National Priority AOC Review report," nothing could be further from the truth. OSM's Action Plan was *not* jointly developed, *not* agreed to by ODM, and was created unilaterally by OSM in violation of the requirements of REG-23.

2915 N. CLASSEN, SUITE 213, OKLAHOMA CITY, OKLAHOMA 73106 TEL:405/427-3859 FAX: 405/427-9646

ODM has previously expressed its concerns to OSM's Action Plan in two documents:

1. A letter, dated April 20, 2012 – asking for more time to review the voluminous attachments to OSM's Action Plan, but stating a willingness by ODM to agree to all action items with the exception of one item (two issues: (1) the application of a new interpretation of AOC to previously issued permits and revisions and (2) ODM's need for a program amendment).

2. A letter, dated May 15, 2012, where we explained why the Oklahoma Administrative Procedures Act (APA), 75 O.S. §302 *et seq*., would require a rule change. Section 302 of Title 75 requires that "an agency shall not by internal policy, memorandum, or other form of action not authorized by the Administrative Procedures Act: (1) Amend, interpret, implement or repeal a statute or rule; (2) Expand upon or limit a rule; (3) Except as authorized by the Constitution of the United States, the Oklahoma Constitution or a statute, expand or limit a right guaranteed by the Constitution of the United States, the Oklahoma Constitution, a statute or rule. Any agency memorandum, internal policy or other form of action violative of the section or the spirit thereof is null, void, and unenforceable."

We will only add that Oklahoma agencies must comply with State law.

In our May 15, 2012 letter, we asked for help from OSM in drafting guidelines which we would submit as a program amendment because of the APA requirements. ODM has requested this assistance so that we can accomplish the goals that OSM has outlined in its Action Plan. Instead of an offer to assist, or work with us in achieving compliance with OSM's Action Plan, your letter of June 25, 2012, is nothing short of an argumentative document on why ODM's efforts to resolve OSM's Action Plan have no merit and are wrong. Your letter indicates that ODM need only issue CAMS to impose a different interpretation of existing rules and that a program amendment is not necessary or required.

In response, CAMS are *Coal Advisory Memorandums* and are currently used to clarify topics for operators. They are not used, nor have they ever been used, to justify enforcement actions. Any attempt by ODM to do so would undoubtedly lead to litigation and an unfavorable outcome based upon the APA.

ODM is puzzled by your insistence that a program amendment is unwarranted given our repeated explanations justifying our need for one. Setting aside the argument about whether one is required, ODM would remind OSM that State program amendments may be submitted on the "initiative" of the State Regulatory Authority pursuant to 30 CFR §732.17(a). The Federal Register has further reiterated that States with approved State programs may decide to amend their programs on their own initiative. Of course, OSM reserves the final approval of program amendments if they are found to be "no less effective" than the OSM regulatory program.

In short, the rules clearly provide for a State to initiate a program amendment if it believes one is necessary to help enforce its program and it is incumbent upon OSM to approve the amendment unless it finds the program amendment would make the State program "less effective" than the OSM regulatory program.

OSM's REG-23 also requires the Action Plan to be a detailed schedule of specific measures to be taken to resolve regulatory program problems identified during OSM's oversight. Our draft AOC guidelines and policies were created to meet the *five* OSM determined "action items" listed in OSM's Action Plan. In your June 25, 2012 response, surprisingly you dedicated only one sentence to our submitted ODM AOC Standards, Policies and Guidelines – the professed subject of OSM's Action Plan. You stated there were some deficiencies which you would be happy to discuss as to enforceability. These deficiencies need to be put in writing and submitted to ODM. Further, REG-23 states that the Action Plan will have "explicit" criteria for determining when complete resolution has been achieved. This criteria will need to be detailed in any Action Plan prior to ODM's signature.

Whether or not ODM signs OSM's Action Plan, the submittal of our draft AOC policies shows ODM's intent to meet the stated requirements and goals of OSM's Action Plan wherever legally possible and allow us to resolve OSM's Action Plan in a reasoned, rational manner. We look forward to receiving your list of deficiencies as to ODM's draft AOC guidelines and policies and the scheduling of a meeting to discuss the same. ODM always stands ready to meet with OSM in a good faith attempt to resolve any alleged program deficiency that OSM may identify.

Sincerely,

Mary Ann Pritchard
Director

/MP

cc: Mark Secrest, Chief Counsel - ODM
Rhonda Dossett, Coal Program Director - ODM
Douglas Schooley, Deputy Director – ODM
P. Clayton Eubanks, Assistant Attorney General

United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
1645 S. 101st East Avenue, Suite 145
Tulsa, Oklahoma 74128-4629

June 25, 2012

Mary Ann Pritchard, Director
Oklahoma Department of Mines
2915 N. Classen Blvd, Suite 213
Oklahoma City, Oklahoma 73106

Dear Ms. Pritchard,

The Office of Surface Mining (OSM), Tulsa Field Office (TFO) has received and reviewed your letters of May 15 and June 15, 2012, on the subject of the Approximate Original Contour (AOC) Action Plan (OK-2012-001). The AOC Action Plan was developed and made final in accordance with OSM's Directive REG-23, *Corrective Actions for Regulatory Program Problems and Action Plans*.

TFO understands your letter of May 15, 2012 to state that the Oklahoma Department of Mines (ODM) declines to become a signatory to the AOC Action Plan. ODM's reasons for not signing the AOC Action Plan have been historically presented to OSM in your responses to AOC Ten-Day Notices and Requests for Informal Reviews. OSM has, just as historically, found these arguments to be without justifiable basis and mischaracterizations of OSM's position.

TFO understands your letter of June 15, 2012 to provide (per the attachment thereto, *Oklahoma Department of Mines AOC Standards, Policies, Procedures, Processes and/or Guideline Implementation 6/15/2012*) ODM's proposed AOC guidelines and policies document for future evaluations of AOC. The letter also notes that you have not received a response from TFO in response to your May 15th request for assistance in drafting guidelines before the June 15th deadline contained in the first Timeline of the AOC Action Plan.

Each of your reasons for not signing the AOC Action Plan has been addressed in past correspondence:

- You state that OSM has new interpretations and views of how the AOC regulations should be implemented in Oklahoma.

OSM has stated that it has not changed its interpretation of AOC and has provided ODM with copies of Federal Registers, House and Senate Reports, and legal decisions that define OSM's interpretation of the AOC regulations. Some of this documentation dates back to the late-1970's, well before Oklahoma had an approved regulatory program. Indeed, this is documentation that OSM would have used for guidance to determine whether or not the proposed Oklahoma program was no less effective that the federal regulations. Some of the documentation are legal

decisions from an earlier instance where Oklahoma failed to properly administer its program with regard to AOC and OSM was forced to issue a Federal enforcement action for a "failure to achieve the approximate original contour due to a change in land form".
OSM's Mid-Continent Regional Director previously found in Informal Reviews that ODM was misstating OSM's position on AOC and is not correctly applying the AOC standards. Yet, ODM continues to incorrectly assert that OSM has changed its position regarding the interpretation of AOC.

AOC is site specific and must be addressed case-by-case. OSM has provided you with documentation to support its AOC interpretation of both the federal and state regulations. In response, ODM seems to rely on one reference; the 1997 Oklahoma Oversight Evaluation Report; Topic Specific Report; Approximate Original Contour and Postmining Land Uses. The review conducted as the basis for that report was performed on a single Federal Lands permit. The review was required by the Assistant Secretary, Land and Minerals Management of the Department of the Interior as a condition to the Federal Lands permit because of AOC concerns identified by the Office of the Solicitor in on-going litigation where Oklahoma had failed to enforce its AOC requirements. The report included three recommendations. Two recommendations from the report touch on the instant AOC issue, slopes and water resources.

- You state that ODM has to promulgate new regulations to reflect OSM's "new interpretations".

The federal and Oklahoma regulations defining AOC are the same. OSM's long standing interpretation of the Oklahoma program is derived from existing regulations that mirror the federal regulations. There is no "new interpretation", and there is no need to revise the state program to properly implement the Oklahoma program. Outstanding Federal enforcement actions are based on the current approved Oklahoma program and regulations.

The OSM Mid-Continent Regional Director has found that OSM approved the language of the Oklahoma AOC regulations because there is nothing in the administrative record that ODM provided to OSM that indicates your agency interprets the words used in the Oklahoma and federal AOC regulations in a manner that is different from the plain meaning of those words, and which would make the Oklahoma regulation less effective than the federal regulations.

- You state that ODM cannot enforce guidelines and policies unless they are promulgated as regulations.

Again, OSM does not agree that a program amendment to promulgate new regulations changing the Oklahoma AOC regulations is mandated or even needed.

ODM continues to posit conflicting positions that guidelines and policies on AOC are unenforceable, yet you have cited your use of proposed and issued Coal Advisory Memorandums as ways ODM has dealt with vague AOC issues. This, perhaps, caused TFO's lack of response to your May 15 letter. We did not interpret your letter as a request for assistance to develop guidelines and policies when, on the other hand, you aver that they would be unenforceable.

Your May 15th letter states that, "We will certainly need OSM's assistance in drafting these documents, because based on last year's denial of our proposed changes limiting impoundment size and slopes, we believe that any program amendment...will be denied by OSM unless OSM has a role in its development." TFO interpreted that as a request for assistance in developing an AOC program amendment, even though we have informed ODM that due to the mirror language, a program amendment is not necessary.
You then go on to state, "The June 15, 2012 date is fine for development of the policies and guidelines." You first posit that guidelines and policies are unenforceable unless they are regulations and that you will need to develop an AOC program amendment to correctly enforce AOC standards; even though you have a Coal Advisory Memorandums system in place that you reference as having used to address "vague" standards. Then, you go on to state that you will meet the deadline for development of policies and guidelines.

- ODM states that OSM is requiring ODM to "grandfather" these "new policies/guidelines" (OSM's AOC interpretation) onto previously issued permits or revisions.

Again, the federal and state regulations are the same. The permits previously issued have always been subject to these AOC regulations. The Oklahoma permits cited in Federal enforcement actions were issued after the points in time of the origination of the legal decisions and Federal Registers you have been provided. At issue is the historical repeated failure by ODM to properly administer the approved Oklahoma program is the issue.

ODM has continually rejected or mischaracterized OSM's positions regarding AOC. The instant AOC Action Plan was developed because OSM has found that ODM has failed to effectively implement, administer, enforce, or maintain its approved regulatory program with regard to AOC, as found in the 2010 AOC National Priority Review report. ODM has continued to reject the validity of this identified regulatory program.

Since the AOC National Priority Review was initiated in Oklahoma in early 2010, ODM has chosen to rely on an AOC interpretation that has been rejected by TFO, technical staff of the Mid-Continent Region, and the Mid-Continent Regional Director as being inconsistent with the approved Oklahoma program.

REG-23, Corrective *Actions for Regulatory Program Problems and Action Plans*, at Section 6(b), requires the implementation of an Action Plan for any Regulatory Program Problem that cannot be resolved within 180 days after its identification. After many months of unsuccessfully attempting to jointly develop such an Action Plan with ODM, on April 15, 2012, I sent you a signed Action Plan that was designed to correct the AOC issues identified in Oklahoma's program and which would to cause ODM to come into compliance with and properly administer its approved regulatory program. You declined to sign the AOC Action Plan.

ODM has not provided TFO with sufficient reason to change the substantive provisions of the AOC Action Plan previously provided on April 15th. In a further effort to satisfactorily resolve the identified problem ODM has with the administration of AOC in its regulatory program, I am again attaching two final, signed copies of the AOC Action Plan with revised implementation

dates; please sign both copies, return one fully executed document to me, and retain the other for your records.

Please be advised, in addition to the dictates of REG-23, the TFO is bound by OSM's Directives including REG-8, which requires the reporting of Regulatory Program Problems in the Annual Evaluation Report and the appending of uncompleted Action Plans to the Performance Agreement. The TFO will comply with existing directives. Our overriding preference is to work cooperatively with ODM to resolve this issue.

Lastly, the *Oklahoma Department of Mines AOC Standards, Policies, Procedures, Processes and/or Guideline Implementation* you submitted as an attachment to your June 15, 2012, letter has some deficiencies which we will be happy to discuss as to enforceability at your convenience.

I hope this letter provides additional clarification on the differences our agencies have on the regulatory interpretation of AOC.

Sincerely,

Alfred L. Clayborne, Director
Tulsa Field Office

Enclosure

Oklahoma Department of Mines
and
Office of Surface Mining Reclamation and Enforcement, Tulsa Field Office
Approximate Original Contour
Action Plan
OK-2012-0001

Purpose: This Action Plan was jointly developed and agreed to by the Oklahoma Department of Mines (ODM) and the Office of Surface Mining (OSM) in order to resolve Oklahoma Regulatory Program Approximate Original Contour (AOC) issues identified by OSM in the OSM's EY 2010 National Priority AOC Review report. The 2010 National Priority AOC Review report stated that "…In order to determine compliance the State needs to develop procedures, processes and/or guidance that will allow for reproducible and consistent interpretations of AOC." Successful implementation of the Action Items set forth below will allow ODM to consistently interpret and apply its AOC determinations in accordance with pertinent State and Federal statutes and regulations.

Action Items/Timelines:

1. ODM, with OSM assistance if requested, will develop a written AOC policy or guidance document that reflects:
    a. The definition of AOC, including the phrase "…the general surface configuration of the land prior to mining…" is interpreted to mean land prior to any mining even if the mining disturbance occurred prior to passage of the Surface Mining Control and Reclamation Act of 1977. This interpretation recognizes that abandoned mine land features in the permit area do not represent an original configuration to be used to develop backfilling and grading plans to achieve AOC. The characteristics of the abandoned mine land features are not a reclamation goal or the standard to which reclamation plans are reviewed;
    b. Existing unreclaimed spoil slopes, water bodies, rock dumps and other common abandoned mine land features are neither the topographic reclamation goal nor the foundation for establishing a reclaimed surface configuration that re-mine
    c. Permanent impoundments and AOC determinations are independent decisions, with both subject to meeting permitting and performance standard statutes and regulations. Permanent impoundments may be authorized after it is first determined that the mined area will be backfilled and graded to achieve AOC. This interpretation recognizes that approval of permanent impoundments is subject first to the finding that AOC will be achieved. It recognizes that permanent impoundments may not always be authorized and that permanent impoundment size, location, and features are limited by the permittee's requirement to first achieve AOC;
    d. The principles of reforestation as identified by the Appalachian Regional Reforestation Initiative are used to achieve a post-mining land use and are not principles used to define or establish a particular AOC.

    The written policy or guidance document will be completed **by July 15, 2012.**

2. ODM will implement the written policy or guidance document on AOC immediately after its completion, and apply the guidelines contained therein to all permits.

3. Tools and techniques using Carlson Mining and other applications will be used by ODM in evaluating mining permit applications, including revisions, for determining AOC compliance. ODM will identify standards, tools, procedures, and processes that will allow for reproducible and consistent interpretations of AOC on permits and revisions. ODM will provide its written methodology for these evaluations to OSM **by July 15, 2012.**

4. OSM will provide technical assistance and training on the tools identified for the use in determining AOC **within 60 days of a request by ODM.**

5. OSM will produce a report on AOC as outlined in the EY 2012- 2013 Performance Agreement with ODM upon completion of this Action Plan. **OSM will complete the report in the time frames identified for the annual and topic specific reports addressed in REG-8.**

Upon satisfactory completion of Action Items 1 -5 set forth above, the resolution of ODM's AOC interpretation and implementation deficiencies identified in the OSM's EY 2010 National Priority AOC Review report will be deemed completed and this Action Plan terminated.

AGREEMENT

All completion dates in this Action Plan are subject to change upon agreement in writing signed by both parties hereto. Completion of this action plan necessitates each party meeting respective deadlines. Failure of one party meeting a deadline may result in a failure of both parties to complete other parts of the action plan.

6-25-2012

Alfred L. Clayborne, Director Date
Tulsa Field Office
Office of Surface Mining Reclamation
And Enforcement

Mary Ann Pritchard, Director Date
Oklahoma Department of Mines

History of Events Leading to Action Plan Development

OSM's initial reviews of approved ODM permits for the 2010 National Priority Review (NPR) found ODM was capable of evaluating permits to ensure AOC, but indicated there was a breakdown in the ODM processes following initial permit approval. ODM expressed belief that its evaluation of permits and revisions is correct and disputed this finding in the 2010 NPR.

Of the five permits reviewed by OSM during the preparation of the national oversight report, three of the five were identified as originally having approved mine operations plans that met AOC. OSM found that the approved permit application on one of the five did not have sufficient information for OSM to determine if the approved permit met AOC. The permittee that was mining three of the five permits reviewed for the NPR-AOC report unilaterally and substantially altered the implementation of the mining and reclamation plans without prior ODM approval.

In these three cases, OSM determined that the mine operator submitted mining and reclamation plan revisions to ODM after mining and reclamation had largely been completed. ODM issued enforcement actions to the permittee, but the actions did not include abatement measures to cease operations until new mining and reclamation plans were approved by ODM. ODM later approved the revisions to the three permits, altering the general surface configuration such that they did not meet the AOC requirements of the Oklahoma statute and regulations. ODM disputed this finding in its response to the 2010 NPR.

OSM found, based upon field observations and measurements taken by OSM personnel during the initial and subsequent reviews of the three afore-mentioned sites that the accomplished backfilling and grading is not in compliance with the state's AOC requirements.

OSM's position regarding all three permits is that the process of substantially altering mine operations without prior permit approval has resulted in significant on-ground violations. In all three cases, mining was essentially completed before the revisions were approved. OSM determined that after-the-fact processing of permit revisions is problematic, not in compliance with the Oklahoma statute and regulations, and has resulted in the development of AOC violations at each permit. ODM believes that the approved revisions and resulting surface contours ultimately met the AOC requirements of the Oklahoma program.

OSM contends that three mines presently have an existing surface configuration that does not meet the requirements of Oklahoma's approved program. ODM believes otherwise and disputed these conclusions in its response to the 2010 NPR.

In the 2010 NPR, OSM stated its view that these three mines need extensive additional backfilling and grading in order to restore the surface to AOC and that substantial spoil is available adjacent to the final pits. OSM further stated that allowing operators to implement mine plans that the regulatory authority has not approved circumvents the public participation process of the Oklahoma program. This effectively allows an operator to continue mining without a plan to protect the safety of the public or a plan to protect the soil, air and water resources from the effects of surface coal mining, and altering mine operations without prior permit approval is a serious regulatory problem that results in significant on-ground violations. ODM believes that mining plans can and do change. OSM agrees with this position, with the additional clarification that the Oklahoma statutes and regulations require permittees to follow their approved permit requirements until ODM has reviewed and approved revised plans. When an operator deviates from the requirements of the approved permit, enforcement action is mandated. Permittees are expected to follow their permits and when they don't, enforcement actions are issued. Revisions are allowed by the approved Oklahoma program in order to abate violations. ODM believes that the approved revisions on these permits meet AOC requirements. OSM also believes that permit revisions are allowed as a part of the abatement process to address violations, but the Oklahoma statute and regulations do not allow an operator to implement changes to its approved permit without *first* obtaining an approved revision, and that an operator may not be allowed to continue to violate its approved permit even after an enforcement action has been issued. ODM's enforcement actions that do not require the operator to cease violating the terms and conditions of its approved permit and stop the unapproved activities, has, in part, led to these violations of the Oklahoma statute and regulations.

OSM via the NPR concluded that ODM approves many large final pit impoundments and that the approval of these large impoundments has created AOC violations. The final pit impoundments have resulted in significant volumes of spoil being stacked in piles as part of the post-mining land configuration. OSM believes permanent impoundments can be an important and often necessary part of

the post mining configuration; however, permanent impoundments are not grounds for a waiver from meeting AOC requirements. ODM disputes this finding, contending that final pit impoundments are allowed by the approved Oklahoma program, and that there is no size limitation in Oklahoma's statute and regulations, or in SMCRA.

OSM's position is that the NPR describes a pattern of AOC deficiencies in Oklahoma that indicates a critical need for ODM to reassess both its permitting and on-ground implementation of AOC. ODM needs to develop internal procedures, processes and/or guidance that will allow for reproducible and consistent application of AOC requirements to prevent further misinterpretations of AOC requirements that are less stringent than SMCRA. ODM believes that only through new regulations can new standards and limitations for AOC be implemented.

TFO wrote Ten-Day Notices (TDN) to ODM on two of the three sites found to be in violation of the AOC requirements. ODM submitted responses for both of the TDN's positing that the issuance of the TDNs was premature. TFO reviewed the ODM responses and determined both to be arbitrary, capricious, or an abuse of discretion. ODM appealed TFO's determination to OSM's Mid-Continent Region, Regional Director. The Regional Director upheld TFO's determination and ordered inspections on both of the mining operations.

TFO conducted the inspections as ordered by the Regional Director. A Federal Notice of Violation was issued on one site. The mining company initiated a complaint in the Federal District Court, Eastern Oklahoma, raising numerous legal and factual issues about AOC and Federal oversight of a state program. Trial is set for November 2012. The mining company then appealed the Federal Notice of Violation to the Department of the Interior's Office of Hearings and Appeals. A hearing is set for May 2012.

TFO is compiling evidence for a Federal Notice of Violation on the second site. TFO has not initiated the TDN process on the third site at this time.

Issue Resolution Activities:

OSM and ODM met to discuss resolution of the identified AOC issues on November 17, 2010. OSM and ODM agreed to work collaboratively to identify standards, tools, procedures, processes and/or guidance that comply with Oklahoma's statute and regulations regarding AOC and are at least as stringent as SMCRA, and that would allow for reproducible and consistent interpretations of AOC in future permit applications. To accomplish this, it was determined that a work plan would be developed that would establish definitive actions and milestones. These steps were to be completed no later than the last week of January 2011.

On November 17, 1010, OSM and ODM agreed to the formulation of a joint AOC Team, consisting of Darrel Shults (ODM), Jeff Zingo (OSM) and Randall Mills (OSM, later replaced by Kevin Garnett).

OSM believed that the team was created to identify and work through technical issues and recommend an AOC policy/guidance document that ODM could use to evaluate AOC in new permit applications.

ODM believed that the team was created to determine what "common ground" might be found between OSM and ODM's current views of AOC. The team's report would be considered by ODM in drafting a program amendment on AOC.

The Team activities consisted of both meeting in person and engaging in teleconferences to discuss AOC requirements and issues pertaining to AOC:

- December 1, 2010, Darrel Shults met with Jeff Zingo at the TFO, and gathered preamble to the AOC regulations legislative history describing AOC, and case law on AOC. See Attachment 1.

- December 17, 2010, Team discussed AOC and agreed to 1) review evidence used for the OSM's prior AOC case in Oklahoma, 2) record ODM's current AOC permitting and inspection procedures, and 3) develop any necessary standards, procedures and guidance to assist ODM's review of new permit application packages and AOC compliance inspections.

- January 18, 2011, Darrel Shults drafted and submitted to ODM's Director a proposed policy/guidance document that contained a proposed AOC regulation that establishes standards for evaluating AOC in future permit applications. This memo also contained a summary of other SRAs' AOC practices as ascertained by Mr. Shults. See Attachment 2.

- January 25, 2011, Team held a teleconference, wherein Darrell Shults stated that ODM would not accept a policy from the AOC Team, but ODM would draft a policy/guidance document for the AOC Team to review. It was determined that the AOC Team had completed its work until ODM proposed a policy/guidance document for the AOC Team to review. See Attachment 3.

ODM did not propose a policy/guidance document for the AOC Team to review; therefore no report was issued by the Team.

OSM developed a draft Action Plan (Attachment 4) that set forth four Issue Resolution Activities to be undertaken by ODM and OSM in order to address and resolve the AOC issues identified in Oklahoma. This document was provided to ODM on November 26, 2010.

On January 11, 2011 ODM rejected the draft Action Plan, among other things objecting to the characterization of the document as an Action Plan as defined by OSM REG-23 (rather than a work plan). The OSM TFO Field Office Director agreed that the plan was not an "Action Plan" and renamed the document as a Work Plan. Also, ODM indicated that until its responses to the AOC NPR were reviewed, it would not be known what should be in the "Action Plan", and therefore it was premature for any "Action Plan" to be developed. See Attachment 5.

On April 26, 2011, OSM and ODM met again, this time to specifically review and discuss each of the ODM responses to concerns identified by OSM in the NPR AOC report, as formally set forth in ODM's August 2, 2010, letter (see Attachment 6, a matrix developed to clearly identify issues/topics, ODM comments, and proposed resolutions discussed at the meeting). The determination was made at the meeting that OSM and ODM would develop the present Action Plan to resolve the AOC issues.

TFO conducted inspections on December 9, 2010, on two of the sites where AOC compliance issues were noted in the final NPR report. Ten-Day notices were written to ODM as a result of those inspections (see Attachments 7 and 8). ODM responded to the TDNs stating that it disagreed with the allegation of an AOC violation (see Attachments 9 and 10). TFO determined ODM's responses to both of the TDN's to be arbitrary, capricious, or an abuse of discretion (see Attachments 11 and 12). ODM

appealed the two determinations to the MCR Regional Director (see Attachments 13 and 14). The Regional Director issued decisions on the appeals on November 10 and December 2, 2011, that upheld TFO's determinations (See Attachments 15 and 16). TFO conducted an inspection and issued an NOV on one of the sites (See Attachment 17) and has started an inspection that may result in another NOV on another site. TFO has not yet conducted an inspection and issued a TDN on the third site that the NPR found to not meet the AOC requirements. The Regional Director's decisions on the two TDNs have been appealed by the operator in the U.S. Federal Court for the Eastern District of Oklahoma and in the Office of Hearings and Appeals. ODM has cross-claimed against OSM in the federal court case, asserting among other things that OSM should defer to its determinations of AOC as the primacy state.

On February 25, 2011, ODM submitted a proposed program amendment that included changes to Oklahoma's regulations regarding, among other things, AOC (see Attachment 18). The submittal was received at TFO on February 28, 2011. The amendment was given the State Amendment Tracking (SATS) number OK-033-FOR. Announcement of the amendment was published in the April 27, 2011, Federal Register (see Attachment 19). The detailed review of the amendment raised some concerns which were addressed in a letter from TFO to ODM dated October 21, 2011 (see Attachment 20). ODM responded to the concerns, via a letter dated November 18, 2011, by withdrawing the section that included the proposed changes to Oklahoma's AOC regulations (see Attachment 21).

Attachments:

1. Memorandum on a draft AOC schedule from Jeffrey Zingo, OSM to Darrell Shults, ODM, dated 12/2/10.

2. Memorandum proposing new AOC regulations from Darrell Shults, ODM to Mary Ann Pritchard and Rhonda Dossett, ODM.

3. Conference call summary on AOC Team work, dated 1/25/11.

4. Summary pages from 2010 AOC NPR concerning Oklahoma program issues.

5. Memorandum concerning Work Plan and Program Amendment from Mary Ann Pritchard, ODM to Alfred Clayborne, OSM, dated 1/11/11.

6. Table showing discussion points/comments from April 26, 2011 OSM/ODM meeting.

7. Ten Day Notice X10-030-246-001, dated January 10, 2011.

8. Ten Day Notice X10-030-370-001, dated January 12, 2011.

9. ODM Response to Ten Day Notice X10-030-246-001, dated January 19, 2011

10. ODM Response to Ten Day Notice X10-030-370-001, dated February 10, 2011.

11. TFO Response to ODM's January 19, 2011 letter, dated March 3, 2011.

12. TFO Response to ODM's February 10, 2011 letter, dated March 3, 2011.

13. ODM's Informal Appeal of Ten Day Notice X10-030-246-001to Mid-Continent Regional Director, dated March 9, 2011.

14. ODM's Informal Appeal of Ten Day Notice X10-030-370-001to Mid-Continent Regional Director, dated March 9, 2011.

15. Mid-Continent Regional Director's TDN X10-030-370-001 appeal finding dated November 10, 2011.

16. Mid-Continent Regional Director's TDN X10-030-246-001 appeal finding dated December 2, 2011.

17. OSM Notice of Violation N11-030-370-001, issued to Farrell-Cooper Mining Company on December 1, 2011.

18. ODM Formal Program Amendment submittal, DOC OK-033-FOR dated February 25, 2011.

19. Federal Register notice, 76 FR 23522, dated April 27, 2011 for DOC OK-033-FOR.

20. OSM OK-033-FOR Concerns Packet.

21. OK-033-FOR Program Amendment section withdrawal by ODM.

United States Department of the Interior

OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

JAN 7 2013

The Honorable E. Scott Pruitt
Attorney General of Oklahoma
3213 N.E. 21st Street
Oklahoma City, OK 73105

Dear Mr. Pruitt:

Thank you for your letter dated August 22, 2012, to Secretary Ken Salazar regarding the Approximate Original Contour (AOC) Action Plan for Farrell-Cooper Mining Company's (Farrell-Cooper's) Liberty Nos. 5 and 6 mines. Your letter has now been assigned to me to respond on behalf of Secretary Salazar. I apologize on behalf of the department for the delay in addressing your concerns.

I have reviewed the materials attached to your letter. Although I understand your concerns, I believe that OSM's Tulsa Field Office appropriately issued an Action Plan in order to address serious programmatic deficiencies that OSM has identified with regard to the Oklahoma Department of Mines' (ODM's) interpretation of SMCRA and the Oklahoma state laws and regulations that implement SMCRA in Oklahoma.

As you are no doubt aware, the issues surrounding ODM's application of SMCRA's AOC standard are not new. Some of the concerns you raise in your letter were made as early as 1993, when OSM first issued a Ten-Day Notice (TDN) to the state and subsequently issued citations for AOC non-compliance at another Farrell-Cooper mine (permit number 4028). At that time, Farrell-Cooper and OSM litigated virtually the same AOC issues you now raise in your letter. In that case, OSM prevailed before two administrative tribunals: the Hearings Division of the Department of the Interior's (the Department's) Office of Hearings and Appeals (OHA) (Docket Number DV94-6-r), and the Interior Board of Land Appeals (IBLA) (141 IBLA 72 (1997)). Following that IBLA decision, Farrell-Cooper appealed the IBLA decision to the United States District Court for the Eastern District of Oklahoma in 1997 (Civ. No. 97-668-B). The parties entered into a settlement agreement, in which Farrell-Cooper expressly agreed that OSM had properly cited it for violating the SMCRA performance standards for both AOC and changes in post-mining land uses.

SMCRA 35 YEARS
1977 - 2012

Despite this precedent, AOC problems at Farrell-Cooper mines have reappeared. OSM and the Department respect Oklahoma's primacy under SMCRA and agree with you that measures should be taken to ensure Oklahoma can maintain its primacy status. I understand that the circumstances surrounding the development of the Action Plan were difficult for both ODM and OSM. OSM has now issued an Action Plan to ODM, however, which is intended to correct the AOC problems in Oklahoma and bring ODM into full compliance with SMCRA.

OSM properly issued this Action Plan pursuant to OSM's authority under SMCRA, the regulations, and OSM Directive REG-23. The Action Plan is currently the guidance document for correcting the AOC issues in Oklahoma, and if completely implemented, it should prevent future misapplication of SMCRA's AOC requirement in Oklahoma. In addition, OSM is required to continue following the established process for addressing the ongoing AOC violations at Farrell-Cooper's Liberty Nos. 5 and 6 mines.

I understand that this issue has been raised in the context of pending litigation— *Farrell-Cooper Mining Company v. U.S. Department of the Interior*, No. 12-7045—which is currently on appeal to the Tenth Circuit. OSM intends to continue its vigorous defense of this case and of related administrative cases before OHA.

I am available to meet with you, your staff, and/or ODM if you believe it would be helpful to resolve the issues you raise regarding the Action Plan. If you would like copies of the past administrative decisions or the settlement agreement relating to AOC compliance in Oklahoma, I will provide them.

I appreciate you taking the time to explain your concerns with the Action Plan, and I assure you that the Department and OSM continue to respect Oklahoma's primacy program. I believe that both OSM and ODM strive to ensure that the citizens of Oklahoma and this Nation are not adversely impacted by surface coal mining and reclamation operations. I hope that both agencies can continue working together to achieve this goal.

Sincerely,

Joseph G. Pizarchik
Director

Attachment 1

Relevant decision of the
Interior Board of Land Appeals

Farrell-Cooper Mining Company v. OSM,
141 IBLA 72 (1997)

FARRELL-COOPER MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 96-430

Interior Board of Land Appeals

141 IBLA 72; 1997 IBLA LEXIS 165

October 28, 1997, Decided

[1]**

[*72] Appeal from a Decision by Administrative Law Judge David Torbett sustaining notice of violation No. 94-030-246-01. Hearings Division Docket No. DV 94-16-R.

Affirmed.

HEADNOTES:

1. Surface Mining Control and Reclamation Act of 1977: Generally – Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof

A Decision sustaining issuance of an NOV because reclamation did not achieve approximate original contour of land subjected to surface mining is affirmed in the absence of a showing of error therein.

APPEARANCES: John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Thomas J. McGeady, Esq., Vinita, Oklahoma, for Farrell-Cooper Mining Company.

OPINION BY: ARNESS

OPINION BY ADMINISTRATIVE JUDGE

Farrell-Cooper Mining Company (Farrell-Cooper) has appealed from a May 29, 1996, Decision by Administrative Law Judge David Torbett that sustained notice of violation (NOV) No. 94-030-246-01. The NOV was issued on September 8, 1994, by the Office of Surface Mining Reclamation and Enforcement (OSM) to Farrell-Cooper for failure to achieve approximate original **[**2]** contour (AOC) of lands disturbed by mining at the Red Oak Mine in Latimer County, Oklahoma, contrary to sections 515(b)(2) and (3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1265(B)(2) and (3) (1994), and implementing regulations at 30 C.F.R. §§ 816.102 and 816.133. Motions in the alternative for issuance of a stay of Judge Torbett's Decision or reinstatement of a temporary relief order issued in 1994 by Judge Torbett were denied by an order issued by this Board on October 7, 1996.

[*73] Reclamation by Farrell-Cooper of the site of a 70-acre pasture owned by Robert Brown that was included within the Red Oak mining operation remains an issue before us. The reclamation of this site is questioned by the NOV issued by OSM on September 8, 1994, as modified on September 21, 1994, that required Farrell-Cooper to eliminate a spoil pile left by mining on the Brown pasture by placing it into three adjacent pits, "water impoundments," and to backfill and grade the mined area so that the reclaimed land closely resembles the "general surface configuration of the land." The facts of this case, as found by Judge Torbett in his Decision, have not been challenged **[**3]** by Farrell-Cooper and are supported by the record developed at hearing. We approve and adopt the findings of fact made by Judge Torbett on May 29, 1996, and attach his Decision hereto as Appendix A.

In support of this appeal, Farrell-Cooper raises three issues: The first concerns whether OSM was barred by doctrines of issue preclusion from issuing the Federal NOV to Farrell-Cooper because Oklahoma had previously issued a State NOV covering the same activity; the second is whether OSM lacked authority to examine a State decision permitting the structures (spoil and pits) cited in the Federal NOV to be left by Farrell-Cooper; the third is whether OSM could issue a Federal NOV if conditions left by Farrell-Cooper met State AOC requirements. See Stay Petition at 2. As to the first two issues raised, Farrell-Cooper cannot prevail on appeal because these questions are not relevant to the authority of OSM to issue the Federal NOV in this case. The policy announced by SMCRA obviates reliance upon the preclusion doctrine when state enforcement proceedings have not abated violations of SMCRA. *See Ron Deaton v. OSM*, 126 IBLA 320, 326 (1993),

and cases cited therein. The jurisdiction [**4] of OSM to cite violations of SMCRA is not affected by the possibility that Oklahoma may have approved conditions left by Farrell-Cooper. Id. The authority of OSM to proceed in cases such as this depends entirely upon whether a 10-day notice of alleged violation was given in conformity to 30 C.F.R. §§ 842.11(b) and 843.12(a). *See Triple R Coal Co. v. OSM*, 126 IBLA 310, 317 (1993), and authority cited. Since Farrell-Cooper does not dispute that OSM took appropriate action under the cited regulation implementing SMCRA, there is no serious dispute in this case that OSM acted properly within the authority delegated by law to the agency. Id.

[1] Judge Torbett, see Appendix A, found that Farrell-Cooper was not properly authorized by the State to leave water impoundments of this size on Brown's pasture and also concluded that the 30-acre spoil pile left thereon was inconsistent with reclamation to AOC that was needed in order to restore the land to a condition suitable for pasture use. Id. at 6. Sustaining the NOV, he concluded that Farrell-Cooper left a spoil pile and a 23-acre water impoundment on the 70-acre Brown pasture, (Appendix A at 3), creating a condition that [**5] failed to conform to both State and Federal AOC criteria, (Appendix A at 5, 6). In so doing, he found that the State had failed to follow State regulations requiring notice to the landowner of proposed revisions to the reclamation plan (Appendix A at 5).

[*74] In an appeal brief filed July 19, 1996, Farrell-Cooper argues that evidence produced at the hearing before Judge Torbett shows "no more than [that] reasonable people might differ on the issue." (Brief at 10.) It is contended that the judgment of OSM may not be substituted for that of the State in such matters, but that the burden in this case rests with OSM to "demonstrate that [the State] arbitrarily or capriciously decided that Farrell-Cooper's mine plan met the requirements of AOC." (Brief at 9.) Agreeing that disagreements concerning pond "impoundment size" and "increased elevations" remain to be determined, *id.* at 13, Farrell-Cooper then takes the position that "a 20 foot deviation from pre-mining topography" does not violate AOC criteria and discusses authority indicating that some deviations from original contour are permissible. Id. at 14 through 17. The testimony of the landowner concerning the ability of [**6] the mined land to support planned after-mining pasture and hay crop uses is dismissed as "incompetent," *id.* at 17, while leaving 3 water impoundments covering 23 acres (instead of an approved 12-acre impoundment to which the landowner had consented after notice of the change in reclamation was provided) is defended as "suitable" given the size and nature of the field in question in relation to the overall

mining operation. *Id.* at 20, 21.

An answer to the Farrell-Cooper brief filed by OSM on August 13, 1996, points out that use of the 70-acre field before mining was for pasture, and that this use was planned to continue after mining was completed by all permits issued to Farrell-Cooper, including permits numbered 006, 2011, and 4028 (Answer at 6). The OSM Answer also frames the factual issue raised on appeal around the three impoundments and the spoil pile left in the 70-acre pasture, contending that their presence violates AOC and that the record establishes the State permitting authority failed to follow its own rules governing permit revisions when notice was not given to the landowner of a revision that allowed conditions incompatible with use of the land as pasture to **[**7]** remain after mining. (Answer at 1, 29, 30.)

This factual question was dealt with comprehensively by Judge Torbett; his Decision, based upon the record produced at hearing, finds that the spoil pile and pits left on the Brown pasture are contrary to State criteria governing such operations, and that permit revisions purporting to authorize such conditions were arbitrary, capricious, and an abuse of discretion. Farrell-Cooper has not shown any error in this finding, but instead repeats arguments raised before, but rejected by, Judge Torbett. In taking this approach, Farrell-Cooper mistakenly argues that OSM should be obliged to carry the burden of persuasion on appeal from Judge Torbett's Decision; the burden of persuasion in such cases, however, rests with the party seeking relief. *Roblee Coal Co. v. OSM*, 130 IBLA 268, 276 (1994). Because Farrell-Cooper has failed to show error in the findings announced by the Decision here under review, we adopt that Decision as our own and affirm the Decision issued by Judge Torbett. See Appendix A.

[*75] Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the **[**8]** Decision appealed from is affirmed.

Franklin D. Arness, Administrative Judge

I concur: Will A. Irwin, Administrative Judge

APPENDIX A:

[*76]

May 29, 1996

FARRELL-COOPER MINING CO.,
Applicant
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,
Respondent

Docket No. DV 94-16-R

Application for Review and Temporary Relief

Notice of Violation No. 94-030-246-001

DECISION

Appearances: Thomas J. McGeady, Logan & Lowry, Vinita, Oklahoma, for the Applicant

John S. Retrum, Office of the Field Solicitor, Denver, Colorado, for the Respondent

Before: Administrative Law Judge Torbett

Procedural History

On September 7, 1994, the Office of Surface Mining (OSM) issued Notice of Violation (1NOV) No. 94-3-246-01 to the Applicants for failure to achieve approximate original contour in violation of Oklahoma law and 30 C.F.R. § 816.102, 816.133, and 816.780 (1993).

Farrell-Cooper Mining made a timely petition for review of the NOV and for temporary relief. On November 15, 1994, the undersigned entered an order granting temporary relief.

A hearing on the petition for review was held on March 21-23, 1995, in Tulsa, Oklahoma, before the undersigned.

[*77] Facts of the Case

The Applicant [**9] owns Permit 4028 issued in 1984. The permit covers

several areas located in Latimer County, Oklahoma. Robert and Elizabeth Brown own 400 acres of pastureland in or near Latimer County, including 100 acres inside the area covered by the Applicant's permit (Tr. 32-33, 194-95).

The Applicant has disturbed 70 acres in the area of the Brown property. Before mining these 70 acres had a slope of 0.5%. The land sloped in the direction of Brazil Creek, a perennial stream. The Browns used their property to graze cattle and grow hay. It is located within an area classified by the Soil Conservation Service as prime farmland. No impoundments of water existed on the land prior to mining. Post-mining use will be grazing pasture land (Tr. 64-67, 84, 96, 131-32, 197-99, 221-24, 256-57, 413, 428-29).

In June of 1988 the Applicant sought to modify its permit through Proposed Revision number 808. This revision allowed six final cut impoundments; three on the Brown's property. The proposal showed that the area of the three impoundments would be 5.88, 3.81, and 2.43 acres for a total of twelve surface acres of water. The spoil map for 808 showed that a spoil pile would be located north of the impoundments **[**10]** (Tr. 89, 92-93, 135, 231, 364).

Along with the proposed revision the Applicant submitted a copy of its 1982 lease with the Browns and an affidavit signed by the Browns in 1988 (Tr. 96-98, 130-31; Exhibits R-14, R-15). The lease agreement required that all spoil banks be graded to fit the existing topography of the land and that one reservoir would be left in the strip pit area "as large and as deep as good engineering principles will permit. This is in the event approval can be secured from the State and/or Federal Governments for a water reservoir in the strip pit area." (Exhibit R-14 at 3).

The affidavit was in response to a letter written to landowners by Robert P. Cooper, a vice president for Farrell-Cooper. The letter to Brown states that the Applicant will replace a minimum of twelve inches of soil on the farmland and informs the Browns that the Oklahoma Department of Mines (ODOM) required the landowners to sign the enciosed affidavit. The letter does not disclose the Proposed Revision 808. One section of the document acknowledges that the Browns had requested that Farrell-Cooper leave final pit impoundments of water as large and deep as possible. The section also states that **[**11]** if mining ceased before reaching final cut number sixteen that the Browns approved leaving the final pit impoundment on the pit where mining ceased. The Browns also approved sharing an impoundment on their west boundary with the owners of the adjoining parcel (Exhibit R-15).

[*78] ODOM approved Revision 808 in 1988 (Tr. 84). The revision requires that old pit highwalls and spoil piles be eliminated and that deviations from approximate original contour will be limited to six impoundments. The ODOM reports also states that the landowner had approved a land use change of 32.5 acres from pastureland to developed water resources (Exhibit R-16 at 2, 13).

In May of 1990 the Applicant constructed impoundments numbered 12, 13, and 14 on Brown's property. The impoundments were twice the approved size and covered 23 acres rather than the approved 12. In December of 1990 the Applicant sought to modify its permit though Revision 1004 to allow the larger impoundments. ODOM denied Permit Revision 1004, saying that spoil existed on the site to reduce those impoundments. ODOM had not approved the size of the impoundments at the time of the hearing (Tr. 102, 104, 145 174, 378). The landowner estimates [**12] that he will require 0.23 acres of water to raise 50 mother cows and that Brazil Creek will more than supply his needs (Tr. 221-224).

The Applicant sought revision again in October of 1992. Proposed Revision 1145 addressed the contours of the spoil pile and sought approval of the final configuration and size of impoundments 12, 13, and 14 (Tr. 111-12, 365, 369). In 1992 landowner Brown voiced his objections to Revision 808 and Proposed Revision 1145 to the state agency by letter (Tr. 206, 378, 429; Exhibit R-20).

In response to Brown's letter ODOM agreed to change the status of the proposed revision from minor to major revision and to hold administrative proceedings to review the revision (Tr. 117, 133, 166).

OSM became aware of the approximate original contour issue on Brown's property in 1993 through both ODOM and the landowner. Brown requested a federal inspection of his property (Tr. 56-58, 69). Following the inspection conducted in September of 1993, OSM issued a Ten Day Notice (TDN) to the State saying that Farrell-Cooper had failed to achieve approximate original contour (AOC) (Tr. 58; Exhibit R-7).

ODOM responded to the TDN by stating that it would review the violations noted [**13] in the TDN at the close of the administrative proceedings brought by Brown (Tr. 61-62; Exhibit R-8).

On October 27, 1993, OSM conducted a follow-up inspection of the property and observed three large pit impoundments resulting in a spoil pile. The inspector discovered Revision 808 which he stated would leave "spoil out of the holes and holes in the ground . . ." (Tr. 71-72; Exhibit R-9). The slope of the spoil pile was a

7.4% grade compared with the pre-mining slope of 0.5%. The spoil pile covered 30 acres and raised the land twenty feet (Tr. 43, 70, 102, 161, 282).

[*79] In his report the OSM inspector noted that the federal government would not take any action until the ODOM director finalized Brown's appeal of Revision 1145. On December 8, 1993, ODOM recommended that Proposed Revision 1145 be approved over the landowners' objection (Tr. 80-81, 134, 166; Exhibit R-23).

In January of 1994 a hydrologist with OSM visited the site and reviewed permit documents. He determined that the size and configuration of the impoundments failed to support post-mining land use. He also determined that there were no plans in 1145 for constructing the three impoundments and that there was no approval **[**14]** for the size of the impoundments (Tr. 134, 254; Exhibits R-23, R-34).

The hydrologist estimated that 1.7 million cubic yards of spoil was removed from the three impoundments and that the spoil pile was approximately 1 million yards and large enough to fill two of the ponds (Tr. 163-64).

In February of 1994 OSM determined that ODOM's response to the TDN was inappropriate because Revision 1145 did not contain sufficient information to provide a basis for the approval. OSM determined that the revision had violated Oklahoma laws governing post-mining land use and disposal of excess spoil (Tr. 167; Exhibit R-20).

Oklahoma requested an informal review of OSM's decision in March of 1994. A few days later an OSM mining engineer visited the Brown property and could find no justification for leaving the impoundments and spoil as they were (Tr. 282; Exhibit R-41). In May of 1994 the deputy director of OSM upheld the decision to find Oklahoma's decision inappropriate (Tr. 170).

Farrell-Cooper ceased reclamation in the summer of 1994. In September of 1994 an OSM inspection found that the impoundments and spoil pile violated the AOC requirements of Oklahoma (Tr. 35, 39, 172; Exhibit R-2). The NOV, **[**15]** as modified, required the Applicant to backfill and grade the mined area so that the reclaimed area closely resembles the general configuration of the land prior to mining with spoil piles eliminated. The spoil pile must be utilized to fill the three impoundments located on Brown's property (Exhibit B).

Issues

The issue presented here is whether NOV No. 94-030-246-01 was appropriately issued and should be sustained.

[*80] Discussion and Conclusion

In review of § 521 Notices of Violation the Respondent has the burden of going forward to establish a prima facie case as to the validity of the notice. The ultimate burden of persuasion rests with the applicant for review. 43 C.F.R. § 4.1171 (1995). A prima facie case is shown when sufficient evidence is presented to establish sufficient facts which, if not contradicted, will justify a finding in favor of the party presenting the case. If evidence sufficient to present a prima facie case is not rebutted the violation will be sustained. S&M Coal Co., 79 IBLA 350 (1984).

The Applicant argues that the NOV should be vacated because Oklahoma is a primacy state and OSM had no jurisdiction over the permit site. OSM may make **[**16]** a federal inspection of mining sites when it has reason to believe that a violation of the Surface Mining Act exists. OSM may issue a Ten Day Notice to a state program for failure to take appropriate action on existing violations. A state's response which is not arbitrary, capricious, or an abuse of discretion shall be considered to be an appropriate action to cause the violation to be corrected or a good cause why the violation will not be corrected. The Applicant argues that Oklahoma has decided that the three impoundments and resultant spoil pile are not a violation and that this state decision was not arbitrary, capricious, or an abuse of discretion. 30 C.F.R. § 842.11 (1995).

The undersigned disagrees. Although Oklahoma law allows exceptions to the approximate original contour regulations, the evidence demonstrates that ODOM did not follow its own regulations.

Under the AOC regulations spoil piles must be eliminated. Permanent water impoundments may be permitted where ODOM determines that they comply with certain criteria. DOM/RR § 701.5 (1994).

Permanent impoundments such as those left on the Brown property must be of the size and configuration to be adequate for its intended **[**17]** purposes and the impoundment must be suitable for the intended postmining land use. DOM/RR § 816.49 (1994).

Section 816.133 of these regulations allows higher or better uses of the land only after approval by ODOM. ODOM must consult with the landowner, the proposed postmining uses must have a reasonable likelihood of achieving the use and the usage must not be impractical or inconsistent with land use policies. Id.

The evidence presented at the hearing shows that ODOM believed Brown desired three impoundments on his property and that he required 32.5 acres of

water resources. Brown was never directly contacted by ODOM officials. The documents tend to show that he originally approved one impoundment in the final pit cut. The **[*81]** Browns have never proposed a postmining land use other than the grazing of a few head of cattle or growing hay to feed cattle. The existing creek has always supplied adequate water for this task (Tr. 64-67, 102, 197-99, 221-24).

The Applicant left 23 out of 70 acres covered in water and a spoil pile which covers approximately 30 acres. Nothing in the state's documents indicated any rational basis for granting Revision 1145 on property which was intended **[**18]** to graze cattle and which enjoyed a perennial source of water. The Browns have never indicated that they planned to use the vast amounts of water present in the impoundments for stock ponds, catfish farming, fire protection, etc. The three impoundments and the resultant spoil pile serve no purpose and are highly impractical for the intended use of the land. They are not suitable for intended postmining land use. When ODOM granted the revisions allowing these impoundments contrary to its own regulations it abused its discretion and acted in an arbitrary manner. Therefore, OSM acted appropriately by finding Oklahoma's response inadequate and in issuing the NOV in question.

ORDER

Therefore, for the reasons set out above the undersigned hereby sustains NOV No. 94-030-246-01.

David Torbett, Administrative Law Judge

Distribution:

Thomas J. McGeady, Logan & Lowry, P.O. Box 558, Vinita, Oklahoma 74301-0558 (Certified Mail - Return Receipt Requested)

Office of the Field Solicitor, U.S. Department of the Interior, P.O. Box 25007 - (D105), Denver, CO 80225-0007 (Certified Mail-Return Receipt Requested)

Associate Solicitor, Division of Surface Mining, U.S. Department of the Interior, **[**19]** 18th & "C" Streets, NW, Room 6412, SOL-6411-MIB, Washington, DC 20240

OSM, U.S. Department of the Interior, 1999 Broadway, Suite 3320, Denver, CO 80202-5733 Attn: John Heider

Attachment 2

filed and executed copy
of the
settlement agreement
between OSM and Farrell-Cooper

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

FARRELL-COOPER MINING COMPANY, Plaintiff,	)	
V.	)	CIV 97-668-B
BRUCE BABBITT, Secretary of the Interior Defendant.	)	

SETTLEMENT AGREEMENT

The Secretary of the Interior ("Secretary" or "defendant"), and Farrell-Cooper Mining Co. ("FCMC" or "plaintiff"), have agreed to resolve all of the issues raised by FCMC's Application for Judicial Review, filed on or about December 3, 1997. That Application for Judicial Review seeks to overturn a decision of the Interior Board of Land Appeals ("IBLA" or "the Board") dated October 28, 1997, which sustained Notice of Violation ("NOV") 94-030-246-01 as issued by the Office of Surface Mining Reclamation and Enforcement ("OSM").

In order to fully resolve all issues now pending between the parties, FCMC and OSM agree and stipulate as follows:

I. Stipulations and Agreements Concerning the NOV

A. This Court has jurisdiction over the parties and over the subject matter of this case.

B. The Board's October 28, 1997, decision upholding OSM's issuance of NOV 94-030-246-01 is supported by the record made before the Secretary of the Interior.

C. OSM properly cited FCMC for violating the Act's performance standards which govern (1) approximate original contour ("AOC"); and (2) changes in postmining land uses.

D The Parties to this agreement are resolving a disputed matter. Neither party shall claim that this agreement sets a precedent which controls their future dealings or in any way over-rides the October 28, 1997, decision of the Interior Board of Land Appeals.

E. In order to abate the violations cited in NOV 94-030-246-01, (1) the post-mining land uses ("PMLU") of Permit 4028 must be properly changed; and (2) Permit 4028 must be returned to AOC such that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated.

F. Additionally, FCMC is required to redistribute all topsoil that was stockpiled during the subject mining operation, including all material which qualifies as a topsoil substitute under Revision 931 of Permit 4028. The failure to properly redistribute the topsoil and approved topsoil substitute will constitute a SMCRA violation which may be enforced by OSM or by the Oklahoma Department of Mines ("ODM").

G. FCMC has submitted Revision Application No. 1486 to ODM which seeks to address the portions of the NOV which deal with changes to the PMLU of a portion of Permit 4028 that is owned by Mr. And Mrs. Robert Brown. In order for this proposed revision to be valid, FCMC must obtain the consent of the Browns for the change in post-mining land use, and must comply with the federal regulations at 30 C.F.R. § 816.133 and the Oklahoma counterpart to those regulations.

H. In order to abate the violations cited in NOV 94-030-246-01, FCMC is required by the terms of this agreement to do the following —

(1) Obtain the consent of the Browns for the changes in PMLU, as set forth herein above;

(2) Obtain the approval of ODM for Revision Application 1486;

(3) Re-grade the property described in Revision 1486 in conformity with Permit 4028 as amended by Revision 1486;

(4) De-water the impoundments to at least the toe of the shallows that are to be constructed in accordance with Revision 1486 before construction of impoundments 12, 13 and 14 begins;

(5) Depict in Revision Application 1486 and construct in accordance with that revision shallows around the boundaries of impoundments 12, 13 and 14 which shall in aggregate cover five (5) acres or twenty percent (20%) of the total surface acreage of the impoundments, whichever is greater. The depth of the constructed shallows shall vary from one inch to ten feet, not to exceed 10 feet deep;

(6) Use spoil, not topsoil or subsoil, to fill the ditches, excavated by FCMC, on the south and east boundaries of the areas contained in NOV 94-30-246-1, NOV 95-30-246-1, and CO 96-30-246-1;

(7) Depict in Revision Application 1486 and construct impoundments 12, 13 and 14 with irregular shorelines, and with a minimum of six protrusions to provide wildlife habitat;

(8) Use spoil to fill the east/west drainage located on the northwest corner of the Brown property, to create positive drainage east of the north/south gas access road. Grade all spoils in a manner to establish contours as delineated on the contour map that accompanies Revision 1486, as approved by OSM at the time of closing.

(9) Reclaim pursuant to this Settlement Agreement and the revision application such that the highest post-mining contour that shall remain after final reclamation of the areas included in NOV 94-30-246-1, NOV 95-30-246-1, and CO 96-30-246-1 shall be at an elevation below 560 feet above sea level;

(10) Construct impoundments 12, 13 and 14 such that the total surface acres shall not increase from the size that existed during the FCMC/OSM on-site meeting on 8/13/99;

(11) Notify the ODM Inspector responsible for Permit 4028, and the OSM Authorized Representative who cited the previously mentioned NOV's and CO of the date when construction to abate the violations begins.

If FCMC completes these tasks in conformance with SMCRA, its implementing regulations and this Settlement Agreement, the authorized representative of the Secretary of the Interior shall cause NOV 94-030-246-01 to be terminated.

I. Reclamation of the areas contained in said NOV's shall be completed within 120 days of the execution of this Settlement Agreement.

J. Upon FCMC's full abatement and OSM's termination of the violations cited in NOV 94-030-246-01, OSM will forgive the civil penalties assessed in connection with NOV 94-30-246-1, NOV 95-30-246-1, and FTA CO 96-30-246-1. Furthermore, upon the full abatement and termination of the violations cited in NOV 94-030-246-01, OSM will waive its right to assess individual civil penalties against any owner, controller or agent of FCMC. If Farrell-Cooper is cited for any additional violations, it shall be FCMC's obligation to notify the appropriate civil penalty assessment officers in OSM's Mid-Continent Regional Coordinating Center in Alton, Illinois, of the existence of this

agreement. No liability shall attach to OSM for the failure to initially honor the portion of this Agreement dealing with the waiver of history points for these citations.

II. Reservation of Rights

K. If the conditions precedent for this agreement are not met, OSM reserves the right to (1) institute suit pursuant to § 521(c) of SMCRA against FCMC and its agents; (2) immediately institute actions to assess and collect individual civil penalties under § 518(f) of SMCRA; and (3) use the present violations in future calculations of history points.

L. OSM also reserves the right to address any SMCRA violation subsequently detected on Permit 4028 or any other FCMC permit.

III. No Reservation of Rights

M. FCMC understands that upon the dismissal of the instant Complaint for Judicial Review, FCMC has forever waived its right to contest the facts of the violations addressed in NOV 94-030-246-01.

IV. Judgment of the Court

N. It is the intention of the parties that the aforesaid stipulations be embodied in an appropriate judgment of this court. Nothing contained herein, however, shall compromise the right of the Secretary to institute suit pursuant to Section 521(c) of SMCRA, should FCMC fail to perform its obligations hereunder.

IN WITNESS OF THE ABOVE, the parties have executed this agreement as of the dates set forth below.

FARRELL COOPER MINING COMPANY, INC.

8/30/99
Date

By: Frank Farrell Jr
Its CEO

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

8/30/99
Date

By: Michael C. Wolfram
Its Field Office Director - Tulsa

CERTIFICATION OF APPROVAL

I certify that I received approval from the Department of Justice on the 28th day of ~~August~~ September 1999, to allow my client agency, the Office of Surface Mining, to enter into this Settlement Agreement. Executed this the 28th day of September 1999, in my capacity as Counsel for OSM.

JOHN AUSTIN
Counsel for OSM

Seen and Approved:

BRUCE GREEN
UNITED STATES ATTORNEY

By: Susan S. Brandon
SUSAN S. BRANDON
Assistant U.S. Attorney

Robert Brown
ROBERT BROWN

Pat Brown
PAT BROWN

OFFICE OF THE ATTORNEY GENERAL

FACSIMILE TRANSMITTAL COVER SHEET

Date: January 4, 2012

To: Larry Echo Hawk

Of: Office of Indian Affairs

Fax #: 202-501-1516

From: E. Scott Pruitt, Attorney General

Re: Kialegee Tribe Proposed gaming facility

Attention: Transmission consists of 2 page(s), including cover

CONFIDENTIALITY NOTE:

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501

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

January 4, 2012

Larry Echo Hawk, Assistant Secretary-IA
Office of Indian Affairs
United States Department of the Interior
1849 C Street, N.W., MS-3658-MIB
Washington, DC 20240

Tracie L. Stevens, Chair
National Indian Gaming Commission
1441 L St. N.W., Suite 9100
Washington, D.C. 20005

Re: Freedom of Information Act Request - Kialegee Tribe proposed gaming facility in Broken Arrow, Oklahoma

Dear Mr. Echo Hawk and Chairwoman Stevens:

As the State of Oklahoma's Attorney General, I am writing to request all documents and information submitted to the National Indian Gaming Commission related to Kialegee Tribal Town gaming license application for a proposed casino in Broken Arrow, Oklahoma.

Additionally, I am requesting all documentation and correspondence related to the site for the proposed casino and the Indian Lands determination by the Commission.

The purpose of my request is to enable my office to determine whether any state laws or compacts have been violated by any of the parties involved in this proposed casino.

I respectfully urge you to expedite this request as time is of the essence. Construction on the site has begun, and potential legal disputes have arisen, including a recent decision by a state district judge, who ruled the owner of the land could not transfer government jurisdiction of the property in question through the terms of a lease as has been proposed.

In accordance with FOIA requests to the Commission, please be advised that my office is accepting of all fees necessary to process this request in a timely fashion. Should you need more information about this request, please do not hesitate to contact Neal Leader, Senior Assistant Attorney General at 405-522-4393.

Sincerely,

E. SCOTT PRUITT
Attorney General of Oklahoma

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04 January 2012

Mr. Larry Echo Hawk, Assistant Secretary
Indian Affairs
MS-4141-MIB
1849 C Street, N.W.
Washington, D.C. 20240

RE: Proposed Casino in Broken Arrow, Oklahoma Family Neighborhood
Sent Via Fax: Telefax: (202) 208-5320

Dear Mr. Assistant Secretary:

I am writing to request you not approve the Kialegee Tribe's Red Rock Casino project at the corner of Florence and Olive Streets in Broken Arrow, Oklahoma. Their objective is to build a casino in a family neighborhood, directly across from the Tulsa Technology Center attended by high schoolers and very near two K4 elementary schools as well as houses of worship. This land is held in trust for the Creek Nation and it is my understanding that Principal Chief Ellis is opposed to this project due to the detrimental effect it would have on the neighborhood's families and homes, schools and churches adjacent to it.

My company, Access Optics—a medical device manufacturer—is located in Broken Arrow. My home is 2 miles from the proposed site of the casino. I am completely opposed to this casino project and believe that it is not a "sovereign nation" issue. The Kialegee tribe sovereign nation status is near Henryetta, OK...not Broken Arrow.

I am asking you to act quickly and take immediate action to deny this gaming project in our Broken Arrow neighborhood. Earthwork at the site is progressing rapidly and a stop work order needs to be issued as soon as possible. This or any other gaming project is just not the right project for this gentle & peaceful family neighborhood.

I sincerely beseech you, sir, to intervene on behalf of our children and families who would be impacted so negatively by a gaming facility in their backyards.

Thank you for your consideration of my plea to immedicately deny this casino project.

Sincerely,

Pamela J. Hogrefe
Vice President & General Manager

2001 North Willow Avenue
Broken Arrow, Oklahoma
74012 - 9109 USA
tel 918.294.1234
fax 918.294.1236
accessoptics.com

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

501735

May 17, 2011

Secretary Ken Salazar
United States Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Tracie L. Stevens, Chair
National Indian Gaming Commission
1441 L St. N.W., Suite 9100
Washington, D.C. 20005

Re: Long delay in "Indian lands" determination pending before the National Indian Gaming Commission regarding the United Keetoowah Band Gaming Operation.

Dear Secretary Salazar and Chairman Stevens:

As the State of Oklahoma's recently elected Attorney General, I am writing to express the State of Oklahoma's official concern that the National Indian Gaming Commission (NIGC) has taken an inordinate amount of time to make a determination upon an issue that it had previously visited. Pursuant to a 2006 federal court order, NIGC must determine once again whether the tract of fee land in Tahlequah, OK, upon which the United Keetoowah Band of Cherokee Indians (UKB) is conducting a substantial gaming operation, is "Indian lands" within the meaning of section 4 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2703(4).

Since the establishment of the facility in 1991, the State of Oklahoma and the federal government have lost hundreds of thousands of dollars in fees owed to our taxpayers for this operation. This has been particularly costly to the State, whose Class III gaming compacts with tribes provide that a percentage of tribal gaming revenue from Class III gaming be turned over to the State to fund education. Currently, the UKB casino generates up to $13 million annually and none of the operation's Class III gaming revenue helps our children reach their potential.

The records of the Commission will show that on September 29, 2000, the NIGC's General Counsel advised UKB by letter that the NIGC had concluded that the property upon which it was conducting gaming is **not** "Indian lands" as that term is defined by the IGRA, and that, accordingly, that Act does not authorize UKB's gaming.

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In subsequent litigation, the United States District Court determined that the General Counsel's letter constituted "final agency action" and then remanded the case to the NIGC for further consideration of the "Indian land" question. That action occurred on January 26, 2006 – over five years ago.

At the invitation of the NIGC, the State of Oklahoma, the UKB and the Cherokee Nation, as interested parties, have long since submitted documentary evidence and extensively briefed the UKB "Indian land" question. Given the fee simple status of the property and the fact that the NIGC long ago considered the same issue, a prompt decision ordinarily might be expected. The State cannot understand why that has not occurred here.

The extraordinary delay in the NIGC's decision-making process is not without serious consequences. In his January 26, 2006 Opinion, the District Court Judge also ratified a prior Restraining Order providing that, until a final decision is rendered, "state and local law enforcement are prohibited from enforcing any state laws on the property as set forth and described in [UKB's] petition." The State, therefore, for over five years, has been precluded either (1) from shutting down or otherwise protecting its citizens from what it considers an illegal gaming operation; or (2) in the unlikely event the operation is deemed on "Indian land," from obtaining substantial revenues from Class III gaming operations to be used for the education of our children.

Accordingly, please give this pressing matter your prompt attention and let the undersigned know when a decision can be expected.

I further request on behalf of the State of Oklahoma that should the Department of Interior favorably consider any requests by the United Keetoowah Tribe to take the land in question into trust, that the taking of land into trust be conditioned upon the Tribe making the State whole by paying all taxes that would have been due and any Class III revenue payments that would have been due under the Class III Gaming Compact with the State during the entire history of the Tribe's operation on the property. This request, however, should **not** be taken as the State's acquiescence to the taking of the land into trust.

Sincerely,

E. SCOTT PRUITT
Attorney General of Oklahoma

ESP/ab

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAY 20 2013

Mr. Scott Pruitt
Attorney General for the State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

Dear Attorney General Pruitt:

I am writing to urge you to consider extending the one-year grace period set forth in the settlement agreement between the United Keetoowah Band of Cherokee Indians (UKB) and the State of Oklahoma until the completion of the District Court litigation concerning the Department of the Interior's (Department) July 30, 2012, trust acquisition decision, or until such time as you find agreeable.

As you are aware, the UKB has been in the possession and operation of a gaming facility on a tract of land in the City of Tahlequah since 1986. The legal status of the Tahlequah parcel has been in dispute for much of this time, specifically whether the tract qualifies as "Indian land" for purposes of the Indian Gaming Regulatory Act and Federal regulatory jurisdiction. Pursuant to State court litigation concerning the UKB's legal authority to conduct gaming without State approval, the UKB and the State entered into a settlement agreement on June 8, 2012. The agreement provides that unless the Federal Government issued a decision to accept the Tahlequah parcel in trust on behalf of the UKB by July 30, 2012, the UKB would be required to cease all gaming activities at the Tahlequah casino as of that date. The settlement further provides that upon a decision to accept the land in trust, the UKB may conduct gaming operations unless the decision is withdrawn or reversed on appeal. In addition, the settlement provides a one-year grace period for the transfer of title to the United States. Therefore, if title has not been transferred on or before July 30, 2013, the UKB must cease gaming operations.

On July 30, 2012, the Department of the Interior issued a decision to acquire the Tahlequah parcel in trust for the UKB Corporation. The Department carefully considered its legal authority to make the acquisition, as well as the factual underpinnings of the application, primarily the critical role that the UKB casino serves in financing tribal government and providing employment for tribal members. Ultimately, the Department determined that the trust acquisition was necessary "[i]n order for the UKB to continue to sustain its programs and operations as a means to providing needed services and assistance to its members." This determination comports with the strong Federal policy behind the Indian Reorganization Act, incorporated by the Oklahoma Indian Welfare Act, of securing tribal homelands and advancing tribal self-determination.

On August 29, 2012, the Cherokee Nation of Oklahoma and its tribal corporation, Cherokee Nation Enterprises (collectively referred to as Cherokee Nation), filed a complaint in the United States District Court for the Northern District of Oklahoma challenging the Department's

July 30, 2012, decision. The Complaint alleges that the decision violates the Indian Reorganization Act, the Administrative Procedure Act, the Indian Gaming Regulatory Act, the Cherokee Nation treaties with the United States, and the Department's land acquisition regulations at 25 C.F.R. Part 151. Following receipt of Cherokee Nation's Complaint, the Department, in accordance with its general practice at the time, voluntarily stayed the trust acquisition and agreed to provide the Cherokee Nation with 30 days written notice in advance of taking the land into trust during the pendency of the litigation.

The Department believes that the interests of the parties in this unique context should be fully resolved by the District Court before it acts to accept title to the Tahlequah parcel. The Department further believes that resolving this issue is urgent in light of the UKB's reliance on this gaming operation to provide over $1,000,000 to tribal programs such as human services, emergency funds, housing rehabilitation, family services, education, clothing vouchers, and elder assistance. Accordingly, the Department has pursued this litigation with an underlying sense of urgency, particularly aware of the one-year grace period set forth in the settlement agreement with the State. The UKB, an intervening party, unsuccessfully filed an unopposed motion to expedite the summary judgment briefing schedule. Notwithstanding efforts to move the case forward, the District Court litigation will not be resolved until after the grace period expires on July 30, 2013.

The Department respectfully requests that the State of Oklahoma extend the grace period to allow for the conclusion of the District Court proceedings or until such time as the State finds appropriate. An extension would provide the necessary time to resolve the legal and factual issues associated with the Department's decision, while protecting the economic needs of the UKB tribal government and individual members. We welcome an opportunity to discuss this issue further and would be happy to organize a conference call with State officials, as well as the Department of Justice, and the UKB.

We appreciate your consideration of this request. If you have questions or would like to schedule a meeting to discuss the issue further, please contact Mr. Jonodev Chaudhuri, Senior Counselor to the Assistant Secretary, at (202) 208-7163.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs

cc: Neal Leader, Senior Assistant Attorney General
George G. Wickliffe, Chief, United Keetoowah Band of Cherokee Indians

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

JUN 21 2013

Mr. Scott Pruitt
Attorney General for the State of Oklahoma
313 NE 21st Street
Oklahoma City, OK 73105

Dear Attorney General Pruitt:

I appreciate your prompt response to my May 20, 2013, letter, particularly in light of the recent difficulties faced by the State of Oklahoma. Below is supplementary information to aid in your evaluation of my request to extend the 1-year grace period in the State's settlement with the United Keetoowah Band of Cherokee Indians (UKB). For your convenience, I have enclosed the complaint filed by the Cherokee Nation and Cherokee Nation Entertainment, L.L.C. (collectively referred to as the Cherokee Nation), which includes a copy of the Department's July 30, 2012 decision to acquire 2.03 acres of land in Tahlequah, Oklahoma (Tahlequah parcel) in trust on behalf of the UKB. Additional filings for the Cherokee Nation's District Court suit against the Department of the Interior (Department) are available electronically through the Court's Pacer system (case no. 12-cv-493-GKF-TLW).

In response to your first inquiry, the complaint raises a number of claims under Federal statutes, Departmental regulations governing trust acquisitions and Indian gaming, and the United States 1866 treaty with the Cherokee Nation, all relating to the Department's July 30, 2012, decision to acquire land in trust for the UKB. First, the Cherokee Nation claims that the Department was required to obtain its consent prior to deciding to take the Tahlequah parcel in trust and that the Department erred in finding that the parcel is located within the UKB's former reservation. Second, the Cherokee Nation argues that the Department unlawfully concluded that the UKB may conduct gaming on the parcel based on the Department's former reservation determination. Third, the Cherokee Nation also alleges that the Department lacked statutory authority to acquire land in trust for the benefit of a tribal corporation and that the land acquisition regulations do not authorize one entity to apply to have land taken into trust for another entity. Fourth, the Cherokee Nation claims that the Department improperly evaluated potential jurisdictional conflicts, the ability of the BIA to discharge additional responsibilities resulting from the acquisition, and the impact of the acquisition on local governments.

The Cherokee Nation also argues that the trust acquisition violates its 1866 treaty rights to the "peaceable possession" of its treaty territory and protection against "hostilities of other tribes," and intrusion by third parties. The Cherokee Nation may also be raising a claim based on the United States Supreme Court's decision in *Salazar v. Carcieri*, 555 U.S. 379 (2009), where the complaint alleges that "[s]ince the UKB was not federally recognized until 1946, the Secretary has no authority" to take the land into trust.

Thus far, the administrative record has been lodged with the Court and the Cherokee Nation has moved to supplement the record, which the Department has opposed. While the Court originally scheduled a merits briefing for May and June and the hearing for August 16 of this year, the Court has since issued a notice order striking the existing schedule. The Court will reset the schedule following its decision on the Cherokee Nation's motion to supplement the record. Although the Department believes that the matter is likely to be resolved in early 2014, the Court has not yet issued its revised briefing schedule. Therefore, the Department is not in a position to provide any certainty as to when the Court will issue its final decision.

In response to your second inquiry, the Department engages in a case-by-case determination on whether to voluntarily stay a trust acquisition when the underlying Departmental decision becomes the subject of litigation. This determination examines the likelihood that plaintiffs will seek emergency injunctive relief as well as the complexity and volume of the claims raised in the litigation. In the context of the UKB decision, the Department agreed to a self-stay of the acquisition to allow the parties to litigate on the merits as expeditiously as possible so that the Court could reach a final decision in the matter before the expiration of the 1-year grace period and the possible shutdown of UKB's gaming operations. Finalizing the trust acquisition prior to a final decision on the merits could prompt emergency injunctive motions from the Cherokee Nation, which would likely extend the litigation schedule and delay a final resolution of this case. Furthermore, the Department did not wish to address the merits of this suit in a truncated fashion – via injunctive motions practice – where the Cherokee Nation has raised a large number of claims, some of which involve complex legal and factual underpinnings. The commitment to provide 30 days advance notice before taking the land in trust was provided by the Department as a matter of courtesy to the Cherokee Nation.

I would like to arrange a conference call in order to more fully discuss the issues related to the settlement agreement and the pending litigation. Given the time-sensitive nature of this matter and its critical impact on the UKB's economy, the call should be scheduled as soon as practicable. Please contact Mr. Jonodev Chaudhuri, Senior Counselor to the Assistant Secretary, at (202) 208-7163 to inform us if you are willing to extend the grace period or participate on a conference call. I greatly appreciate your consideration of this matter and I look forward to receiving your response.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs

Enclosure

cc: Neal Leader, Senior Assistant Attorney General

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

(1) THE CHEROKEE NATION,
(2) CHEROKEE NATION ENTERTAINMENT, LLC,

Plaintiff(s)

vs.

(3) KENNETH L. SALAZAR
in his official capacity as
Secretary of the Interior
U.S. Department of the Interior

(4) MICHAEL S. BLACK
in his official capacity as
Acting Assistant Secretary for Indian Affairs
U.S. Department of the Interior

Defendant(s)

12 CV - 493 GKF TLW

Civil Action No. _____

COMPLAINT

(Declaratory and Injunctive Relief)

Plaintiffs, the Cherokee Nation (the "Nation") and Cherokee Nation Entertainment, L.L.C. ("CNE"), by and through their counsel, hereby allege as follows:

NATURE OF THE ACTION

1. The Nation, a federally recognized Indian Tribe, and CNE, a wholly owned subsidiary of a wholly owned subsidiary of the Nation, bring this action against Defendants, Secretary of the Department of the Interior and the purported Acting Assistant Secretary for Indian Affairs (collectively the "Department" or "Secretary"), seeking declaratory and injunctive relief from the Department's July 30, 2012, administrative agency decision (the "2012 Decision"). That decision found, *inter alia,* that "the former reservation of the [Nation] is also

the former reservation of the [United Keetoowah Band of Cherokee Indians of Oklahoma ("UKB")]" for purposes of applying the "former reservation" exception in the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(a)(2)(i). The 2012 Decision also found, based on its conclusion that the Cherokee Nation and United Keetoowah Band ("UKB") share a reservation, that the Nation's consent to UKB acquisition of trust land is not required under 25 C.F.R. § 151.8 *See* 2012 Decision Letter, p.4 (Exhibit 1 to the Complaint).

2. The Secretary's "former reservation" conclusion is contrary to an unbroken line of prior Departmental rulings and to a series of decisions by this Court. This conclusion, however, was the basis for the Department's unlawful decision to approve the acquisition of 2.03 acres of land (the "Subject Tract") located within the last treaty boundaries of the Nation (the "Nation's Treaty Territory") into trust under the federal Indian Gaming Regulatory Act (the "IGRA"), 25 U.S.C. § 2701 *et seq.* for the use and benefit of the United Keetoowah Band (the "UKB") Corporation.[1]

3. Further, the Department's conclusion that the Secretary possesses "implicit" general authority to acquire land in trust for a tribal corporation organized under section 3 of the Oklahoma Indian Welfare Act of 1936 ("OIWA"), 25 U.S.C. § 503, even though the OIWA's implementing regulations (which also implement the Indian Reorganization Act, 25 U.S.C. §461, et seq.) expressly prohibit the Secretary from acquiring land in trust for a corporation, except under circumstances not present here, is illegal.

4. The agency's decision is also contrary to section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465, which bars the Secretary from acquiring land in trust for

[1] The 2012 Decision purports to accept the Subject Tract into trust for the UKB. In the Notice of the 2012 Decision published in the Federal Register, the Secretary states he is accepting the Subject Tract in trust for the UKB Corporation

any entity that was not "under federal jurisdiction" at the time the IRA was enacted in 1934, see *Carcieri v. Salazar*, 555 U.S. 379 (2009).

5. Finally, regardless of whether the Secretary was accepting the Subject Tract in trust for the UKB or the UKB Corporation, the Secretary failed to follow the Department's own regulatory guidelines (25 C.F.R. §§ 151.1 et seq.) in violation of his duty as set forth in 25 U.S.C. § 465.

6. The Department's decision is unsupported by statutory or regulatory authority, was made without the consent and over the objection of the Cherokee Nation, and is in derogation of the Nation's Treaty-protected rights. For these and other reasons, this Court should issue an order declaring the Department's action to be arbitrary and capricious, an abuse of discretion, contrary to law, and, as such, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA").

7. The Secretary further gave notice on August 7, 2012, of the Department's intention to place the Subject Tract into trust after 30 days from the date of the published notice. *See* 77 Fed. Reg. 47089 (Exhibit 2 to the Complaint). The notice states the 30-day waiting period "is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land into trust for Indian tribes . . . before transfer of title to the property occurs." *Id.* Plaintiffs seek a temporary restraining order and preliminary injunction preventing the Secretary from taking the Subject Tract into trust pending litigation of the issues raised in this Complaint as required in 25 C.F.R. §151.12(b).

JURISDICTION AND VENUE

8. The Nation and CNE bring this action under the APA and 25 U.S.C. § 465. This Court has jurisdiction under 28 U.S.C. §1331, and may issue declaratory relief and reverse, delay, or postpone the Department's actions or otherwise issue an injunction under the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 and the APA §§ 701-706.

9. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e)(1). The claims of the Nation and CNE in this action arise from the improvident action and decision by the Department which threatens the sovereignty, authority and economic health of the Nation within and throughout the Nation's Treaty Territory. It also threatens the economic health of CNE, which has its principal place of business in Catoosa, Oklahoma and is thus a resident of this judicial district.

10. The Nation's Treaty Territory extends throughout eight of the eleven counties within the Northern District of Oklahoma.[2] The improvident action and decision of the Department threatens a devastating impact on the Nation's long-established sovereignty, jurisdiction and governance throughout the Nation's Treaty Territory.

PARTIES

11. The Nation is a federally recognized Indian Tribe. Although the Nation is sometimes referred to as the "Cherokee Nation of Oklahoma," under its Constitution its name is the "Cherokee Nation." The Cherokee Nation possesses jurisdiction exclusive of any other Indian tribe or band over all tribal trust lands situated within the boundaries of the Nation's Treaty Territory.

[2] The Nation's Treaty Territory includes land within Craig, Delaware, Mayes, Nowata, Ottawa, Rogers, Tulsa and Washington counties, all within the Northern District of Oklahoma.

12. CNE is a wholly owned subsidiary of a wholly owned subsidiary of the Nation which owns and operates the gaming and hospitality businesses of the Nation. It owns and operates a number of casinos throughout the Nation's Treaty Territory, including a large hotel and casino in Catoosa, Oklahoma.

13. Kenneth L. Salazar is the Secretary of the United States Department of the Interior and as such is responsible for its decisions and operations. He is named in his official capacity.

14. Michael S. Black is the Director of the Bureau of Indian Affairs (the "BIA") and was purportedly the Acting Assistant Secretary for Indian Affairs for the United States Department of the Interior when he authored and signed the 2012 Decision that is the subject of this action. He is named in his official capacity.

HISTORICAL FACTS

A. The Cherokee Nation Treaty Territory

15. The Nation possesses rights of self-government which predate the formation of the United States and which were guaranteed by the United States in its treaties with the Nation, including the Treaty of December 29, 1835, 7 Stat. 478 (Proclamation, May 23, 1836) ("Treaty of New Echota"), reprinted in KAPPLER'S INDIAN LAWS AND TREATIES, V. 2 at 439-449, and the Treaty of July 19, 1866, 14 Stat. 799 (Proclamation August 11, 1866), reprinted in KAPPLER'S INDIAN LAWS AND TREATIES, V. 2 at 942-950 ("1866 Treaty"). . See *Talton v. Mayes*, 163 U.S. 376, 380, 384 (1896).

16. In 1835, the citizens of the Nation were removed to what was then Indian Territory under the Treaty of New Echota. The Nation acquired fee patent title to its new lands in

1838. The Nation's lands were reduced to its present Treaty Territory size under the 1866 Treaty and by Agreement ratified by Congress by Act of March 3, 1893, ch. 209 27 Stat. 612, 640, reprinted in KAPPLER'S 1 at 484, 489 -492 § 10.

17. Article 5 of the 1835 Treaty of New Echota guaranteed the Nation the right to self-governance, so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians. Article 13 of the 1866 Treaty reaffirmed and declared in full force all provisions of prior treaties not inconsistent with the provisions of the 1866 Treaty.

18. The Nation adopted a written Constitution in 1827, and again in 1839, after removal to Indian Territory. The Cherokee Nation maintained a government with an executive, legislative, and judicial branch over its domain in Indian Territory.

19. The Treaty of 1866 expressly provides a mechanism whereby other tribes might be settled within Cherokee country:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unsurveyed lands east of 96E, 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 . . . .

Article 15 (emphasis added).

20. Section 26 of the 1866 Treaty separately protects the right of the Cherokee Nation to the "quiet and peaceable" possession of the Nation's Treaty Territory, "against the hostilities of other tribes". In that Treaty provision, the United States expressly:

> guarantee[d] to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against interruptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory.

21. The Nation shares a common federal legal history with the other four so-called "Five Civilized Tribes" (the Chickasaw, Choctaw, Muscogee (Creek) and Seminole Nations) ("Five Tribes"). Between 1893 and 1906 Congress enacted a series of laws in order to force allotment of tribal lands of the Five Tribes. The Nation was, and is, a large tribe; there were approximately 41,800 Cherokee citizens within the Nation's Treaty Territory at the time of allotment in the early 1900's and there are now approximately 120,426 Cherokee citizens within the Nation's Treaty Territory, many of whom are also UKB members.

22. After Oklahoma statehood in 1907, Department officials and employees historically took the position that the Five Tribes had been terminated, refused to recognize tribal governmental actions, refused to release tribal funds to Five Tribes governments, and insisted that Five Tribes chiefs could only be appointed by federal officials for purposes of signing deeds to tribal lands.

23. The Nation's constitutional government structure has been in continual existence since its 1839 Constitution. The Nation adopted a new Constitution in 1976[3] under the Nation's inherent sovereign authority. Article XVI of the 1976 Constitution provides: "The provisions of this Constitution overrule and supersede the provisions of the Cherokee Nation Constitution enacted the 6th day of September 1839." The Nation later adopted a new Constitution that replaced the 1976 Constitution in 2003[4]. The federal courts have long acknowledged the Cherokee Nation's Constitution and constitutional government. *See,* e.g., *Wheeler v. U.S Department of the Interior, Bureau of Indian Affairs*, 811 F.2d 549 (10th Cir. 1987).

[3] The Constitution was drafted in 1975, but final adoption did not occur until 1976. In Cherokee law, this Constitution is referred to as the "Constitution of 1975" or "1975 Constitution."

[4] This Constitution was drafted by Convention in 1999, but was not formally approved and adopted until 2003. It is alternatively referred to as either the 1999 Constitution or the 2003 Constitution. They are the same document

24. In *Harjo v. Kleppe*, 420 F. Supp. 1110, 1129 (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) the Department took the position that federal laws had stripped the Five Tribes of essentially all governmental authority. After a detailed review of treaties and federal legislation concerning the Five Tribes, the federal district court concluded that the BIA had illegally engaged in "bureaucratic imperialism" in its dealings with the Creek Nation, and that the existence of the tribal governments had continued notwithstanding harsh federal legislative and administrative treatment. The court noted in *Harjo* that its conclusion, that the 1906 Five Tribes Act continued indefinitely the existence of the tribe, has been "confirmed by each court that has examined the question."

B. The UKB

25. As recognized by the 2012 Decision, the UKB "sought federal recognition in the 1930's in order to organize as a separate band under the OIWA," but were denied such recognition by the Department of Interior. This denial of recognition was based on an Opinion by the Solicitor of the Department that found that the UKB was not "a recognized tribe or band" of Cherokee Indians as required by 25 U.S.C. § 503 of the OIWA because it was "neither historically nor actually a governing unit of the Cherokee Nation, but a society of citizens within the Nation with common beliefs and aspirations." Op. of July 29, 1937, reprinted in 1 Op. Sol. on Indian Affairs 774 (U.S.D.I. 1979). Thus, as of 1937, the Department of the Interior had determined that the Keetoowahs were not an Indian tribe within the meaning of the OIWA.

26. In 1945, Acting Secretary of the Interior (later Associate Justice of the United States Supreme Court) Abe Fortas informed Congress that "[i]n 1937 the Keetoowah Indians requested permission to organize under section 3 of the Oklahoma Indian Welfare Act on the

grounds that the society was, in effect, a recognized band of Indians residing in Oklahoma. The Department was compelled to decline this request because it seemed impossible to make a positive finding that the Keetoowah Indians were and are a tribe or band within the meaning of the Oklahoma Indian Welfare Act." Letter of Mar. 24, 1945 from the Acting Secretary to Chairman Jackson, Committee on Indian Affairs, *reprinted in* H.R. Rep. No. 79-447, at 2 (1945) and S. Rep. No. 79-978, at 3 (1946).

27. In 1946, Congress specially authorized the UKB to organize as an Indian band under OIWA § 503. See Act of August 10, 1946, Pub. L. No. 79-715, sec. 1, 60 Stat. 976 ("*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936"). The Act did not create or recognize a reservation for the UKB nor did it give the UKB any land.

28. Pursuant to the 1946 Act, by a vote of 1,414 in favor and 1 against, the UKB on October 3, 1950 adopted a constitution and bylaws under section 3 of the OIWA, 25 U.S.C. § 503.

29. The Department has consistently determined that UKB has never had a reservation, as set out in a decision of the Assistant Secretary for Indian Affairs, issued April 17, 1987. The Assistant Secretary there advised UKB that the Department was denying an application to place land into trust on the grounds that the land at issue was within the Cherokee Nation and, under the regulations, could not be placed into trust without the Cherokee Nation's consent. The Assistant Secretary, in this letter, reasoned that:

> The first issue to be addressed is whether the United Keetoowah Band has a reservation as that term is used in the land acquisition regulations. We believe it

> is clear that they do not. The regulations defined the term "Indian reservation," in the State of Oklahoma, "as that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. 151.2(f). The United Keetoowah Band has never had a reservation in Oklahoma, and the Band has never exercised independent governing authority over any of the Cherokee Nation's reservation lands. Unlike the Creek Tribal Towns, historically, the Keetoowahs were considered to be merely a society since they never exercised any governmental authority. 1 *Op. Sol. Indian Affairs* 774 (U.S.D.I.1979). Because they lacked attributes of a political body, the legislation referenced above [Act of August 10, 1946, 60 Stat. 976] was required. *See Senate Report No. 79-978*. While the legislation recognized the society as a Band for the purposes of organizing under the Oklahoma Indian Welfare Act, it did not create or set aside a reservation for the Band. Neither did it purport to give the newly acknowledged Band any authority to assert jurisdiction over any lands belonging to the Cherokee Nation. (emphasis added)

30. The Department has reiterated this position on multiple occasions, including in letters dated December 15, 1988, and February 1, 1989, from the Acting Regional Director of the Muskogee Regional Office (now known as the "Eastern Oklahoma Regional Office") to UKB, denying other UKB applications to have the Secretary acquire land in trust for the UKB.

31. The Secretary's conclusions described in paragraphs 29 and 30, *supra*, have also been reached by the courts on multiple occasions. In *United Keetoowah Band v. Sec'y of the Interior*, No. 90-C-608-B (N.D. Okla. May 31, 1991), the UKB challenged, *inter alia*, the Department's conclusion that because the Nation was recognized as the sovereign over lands within the Cherokee Treaty Territory, the Nation's consent was required for any application by the UKB to have its land acquired in trust status. *Id.* at 1, 2. In holding that the Nation was an indispensable party to the case, the district court examined the history and relative roles of the UKB and the Nation and found that: (1) the BIA "has determined that the subject lands of the old [Nation's Treaty Territory] are under the jurisdiction of the new Cherokee Nation, not the UKB," *id.* at 6; (2) "[a]s to the old [Nation's Treaty Territory] lands, the Secretary has recognized one sovereign (Cherokee Nation of Oklahoma) over another (UKB)," *id.* at 6; (3) "[p]rior case law

indicates that neither Congress, the Secretary of the Interior, nor the courts have made a distinction between the Cherokee Nation at the time of Oklahoma statehood and the current Cherokee Nation of Oklahoma," *id.* at 12; and (4) "[t]he federal government has long recognized the special interests of the Cherokee Nation in these lands [i.e., "all 'Indian Country' within its former reservation"] . . ." *Id.* at 10.

32. The same conclusion was reached by the court in *Buzzard v. Oklahoma Tax Commission*, No. 90-C-848-B (N.D. Okla. Feb. 24, 1992), *aff'd*, 992 F.2d 1073 (10th Cir. 1993). In that case, UKB claimed that it was a successor to the Nation and thus "heir to the unallotted lands within the original [Nation's Treaty Territory]," and that it was entitled to exercise tribal sovereignty over those lands, so that they were "transform[ed] into Indian country upon the UKB's purchase in fee." *Id.* at 7. The district court rejected this claim, stating that:

> The UKB . . . offers no authority to support its claim that it is heir to the original Cherokee Indian Reservation. The Act of August 10, 1946 [under which UKB was allowed to organize] simply recognizes the UKB as a "band of Indians residing in Oklahoma"; it does not set aside a reservation for the UKB or acknowledge the UKB's jurisdiction over the original Cherokee Indian Reservation. Also, while the Act's recognition of the UKB permitted the UKB to incorporate under Section 3 of the [Oklahoma Indian Welfare Act], nothing in Section 3 creates or recognizes the UKB's claim to the original Cherokee Indian Reservation.

Id. at 8 (emphasis added). The court further found that the United States has consistently recognized that the lands within the Nation's Treaty Territory are under the jurisdiction and control of the Nation, not the UKB:

> Contrary to the UKB's claim, the Secretary of the Interior has determined that the lands within the original Cherokee Indian Reservation are not under the jurisdiction of the UKB . . . . [T]he Secretary has recognized that the original Cherokee Indian Reservation is the former reservation of the Cherokee Nation, not the UKB . . . .

Id. at 8-9 (citation omitted). Based on these factors, the court concluded "that UKB has failed to show any treaty or Congressional act establishing UKB's 'inherited' right or claim to reservation land within the boundaries of the [Nation's Treaty Territory]." *Id.* at 9 (footnote omitted). The Tenth Circuit affirmed the district court's decision. 992 F.2d 1073 (10th Cir. 1993).

33. The Court reached the same conclusion when the UKB challenged the Nation's authority to enforce its tobacco tax and licensing requirements on individual allotments that the UKB was using for smokeshops. *United Keetoowah Band v, Mankiller*, No. 92-C-585-B (N.D. Okla. 1993), aff'd 2 F3d 1161 (10th Cir. 1993). The district court held that the UKB's claim that its smokeshops were not subject to the Nation's authority "directly attack[ed] the sovereignty of the Cherokee Nation over the subject land . . ." 1993 WL 307937 at **4. The court further found that it had "previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation," and that it had "previously determined in [the two] prior cases that the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *Id.* at **2. The court concluded that, given the court's two prior holdings on the superiority of the Nation's interests and jurisdiction, principles of res judicata and collateral estoppel barred UKB from again raising the merits of its successor-in-interest claim. *Id.* at **5. The Tenth Circuit affirmed. 1993 WL 307937 (10th Cir. Aug. 12, 1993).

C. The UKB Corporation

34. Pursuant to the 1946 Act, the UKB adopted its 1950 constitution and bylaws under the OIWA. On the same date, the UKB separately adopted a corporate charter under the same section of the OIWA, forming the UKB Corporation. The UKB and the UKB Corporation

are not one and the same; they are distinctly separate legal entities. On information and belief, the UKB Corporation has no board, has never met as a corporate body, and has not taken any corporate action requesting that the subject land be taken into trust.

D. The Subject Tract

35. In 1986, the UKB entered into a contract for the purchase, by installment payments, of the Subject Tract located at 2403 South Muskogee Avenue, Tahlequah, Cherokee County, Oklahoma. By warranty deed executed November 30, 1990, and recorded by the Cherokee County Clerk on January 2, 1991, the UKB obtained fee simple title to the Subject Tract.

36. The Subject Tract is located within the Nation's Treaty Territory. This parcel is in an area that has long been recognized as within the exclusive boundaries of the Nation's Treaty Territory. BIA trust acquisition regulations provide that, for tribes situated in Oklahoma, the term "Indian reservation" means "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.3(f).

37. The 2012 Decision states the "UKB owns the property in fee as evidenced by the Warranty Deed dated February 23, 2012." Contrary to this statement, the referenced warranty deed does not constitute evidence of UKB title to the Subject Property. The referenced warranty deed is part of the trust application. It identifies "the United Keetoowah Band of Cherokee Indians in Oklahoma" as the grantor and the "United States of America in trust for the United Keetoowah Band of Cherokee Indians in Oklahoma, a corporation chartered under the Act of

June 26, 1936 (49 Stat 1967) and the Act of August 10, 1946" as the grantee, and contains a blank line for approval of the deed by the Director of the Eastern Oklahoma Regional Office.

E. NIGC Determined Subject Tract Not "Indian Lands" for Gaming Purposes

38. The UKB began to conduct gaming on the Subject Tract in 1986 and has continued to conduct gaming on the parcel ever since.

39. Gaming by Indian tribes is regulated by the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.* , but is permissible only if such gaming is conducted on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). IGRA defines "Indian lands" to mean (a) land within the limits of an Indian reservation or (b) land over which an Indian tribe exercises governmental power and that is either held in trust by the United States for the benefit of an Indian tribe or held by an Indian tribe subject to a restriction by the United States against alienation." 25 U.S.C. §2703(4) (emphasis added). IGRA also established the National Indian Gaming Commission (NIGC) to administer and enforce the Act. *Id.* § 2704.

40. On July 21, 2011, the Chairman of the NIGC issued a final agency determination concluding that the Subject Tract "is not currently Indian land eligible for gaming under IGRA," and was therefore subject to the laws of the State of Oklahoma. Letter of July 21, 2011, from Tracie L. Stevens, Chairman, National Indian Gaming Commission, to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians in Oklahoma (emphasis added).

41. The NIGC decision adopted and incorporated a memorandum dated July 18, 2011, from Lawrence Roberts, NIGC General Counsel, to the NIGC Chair, that analyzed the legal status of the Subject Tract ("Roberts Memorandum"), and was consistent with an earlier 2000 legal opinion issued by former NIGC General Counsel Kevin Washburn.

42. The Roberts Memorandum concluded that "UKB's lands encompassing the Gaming Site are not within the limits of an Indian reservation within the meaning of IGRA." Roberts Mem. at 13. The Roberts Memorandum also concluded that the Subject Tract was not held in trust by the United States for UKB, nor subject to a restriction against alienation. *Id.* at 13-14. Accordingly, the UKB's gaming on the Subject Tract has always been and continues to be unlawful.

GENERAL ALLEGATIONS

A. UKB Trust Application

43. The UKB submitted an application to the BIA on or about a date in 2006, requesting that the Subject Tract be acquired in trust for the benefit of the UKB. The Department never took final action on the original 2006 application.

44. On August 15, 2011, the UKB submitted an amended application to the BIA's Eastern Oklahoma Regional Office requesting that the BIA acquire the foregoing gaming parcel in trust for the UKB.

45. By letter dated November 4, 2011, the Eastern Oklahoma Regional Director notified the Nation of the UKB's amended application and provided the Nation with 30 days to comment on the application. On December 1, 2011, the Cherokee Nation filed comments with the BIA Eastern Oklahoma Regional office opposing the proposed trust acquisition.

B. 2012 Decision

46. On July 30, 2012, the Secretary issued the 2012 Decision recommending "that the property be accepted in trust for the benefit of the Tribe." Decision at p. 9.

47. On August 7, 2012, the Secretary published his notice in the Federal Register stating the Secretary "decided to accept approximately 2.03 acres of land into trust for the United Keetoowah Band of Oklahoma Corporation." See Exhibit 2.

48. The 2012 Decision asserts that the Keetoowah Society of Oklahoma Cherokees "existed as an organization of Cherokee Indians in Oklahoma" since the 1800s. Decision at 2, citing *Buzzard v. Okla. Tax Comm'n,* 1992 U.S.Dist. LEXIS 22864 (N.D. Okla., Mar. 3, 1992), *aff'd* 992 F.2d 1073 (10th Cir. 1993). The 2012 Decision did not discuss, and is not legally consistent with, other findings in the *Buzzard* case. See Complaint, ¶ 32.

49. The 2012 Decision acknowledges that the UKB "sought federal recognition in the 1930's in order to organize as a separate band under the OIWA," but were denied such recognition by the Department in 1937, based on a Solicitor's Opinion. See Complaint, ¶ 26.

50. The 2012 Decision recites that Congress in 1946 legislatively declared the UKB eligible to organize under 25 U.S.C. § 503, and that in 1950 the UKB adopted a constitution which was approved by the Secretary and then ratified by UKB's members. Decision at 2.

51. The 2012 Decision states that "[a]s a tribe organized pursuant to the OIWA, the UKB is entitled to the same rights and privileges as tribes organized pursuant to the Indian Reorganization Act of 1934 (IRA)." Decision at 1. Section 5 of the IRA, codified at 25 U.S.C. § 465 provides authority to the Secretary of Interior to acquire land in trust for Indian tribes regardless of whether organized under the IRA, subject to certain statutory and regulatory restrictions.

52. The 2012 Decision recognized that under IGRA, 25 U.S.C. § 2719, gaming may not be conducted on land acquired in trust after October 17, 1988 (the date of IGRA's enactment) unless such land satisfies one of several specific conditions. The Secretary found

that, since the Subject Tract was not acquired in trust prior to 1988, gaming on such land must satisfy one of these conditions. Among these conditions is that the Indian tribe has no reservation and the land is in Oklahoma and "within the boundaries of the Indian tribe's *former reservation, as defined* by the Secretary. . ." Id. § 2719(a)(2)(A)(i).) (emphasis added).

53. The 2012 Decision asserts that the Subject Tract is within the UKB "former reservation" and therefore meets the foregoing condition. Decision at 4, 5.

54. In the 2012 Decision, the Secretary states that neither IGRA nor its implementing regulations "address the question of whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other, can share the same former reservation" for purposes of IGRA. *Id.*

55. The 2012 Decision also concludes that, once acquired in trust for the UKB, "UKB may conduct gaming on this property pursuant to 25 U.S.C. § 2719(a)(2)(A)(i) ... ." *Id.* The Department states that, due to the foregoing conclusions, it is not necessary for the Department to consider "[t]he two-part determination pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(A)" (which governs gaming on newly-acquired lands not situated within a tribe's former reservation). *Id.* at 9.

56. The Department's 2012 Decision to take the Subject Tract into trust was unlawful, unwarranted by the facts, and in excess of its authority in that the Department violated its own regulations and applicable law, abused its discretion, and acted arbitrarily and capriciously by making its final determination to take the land into trust in the absence of facts and law warranting the decision, all without observance of procedures required by law.

57. By reason of the Department's unwarranted and unlawful decision to take the Subject Tract into trust, the Nation and CNE have suffered legal wrong and been adversely affected and aggrieved by the agency action.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

VIOLATION OF REGULATORY REQUIREMENTS REGARDING CHEROKEE NATION CONSENT BASED ON ERRONEOUS DETERMINATION OF UKB "FORMER RESERVATION"/"SHARED RESERVATION"

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Administrative Procedures Act, 5 U.S.C. §§ 702, 706)
(Declaratory Judgment, 28 U.S.C. § 2201)

58. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 57 and same are incorporated as if fully set forth herein.

59. The IRA, 25 U.S.C. § 465, and the OIWA, 25 U.S.C. § 501, confer upon the Secretary the discretionary authority to take land into trust.

60. The Secretary's discretionary authority is subject to compliance with the Department's Land Acquisition Regulations, 25 C.F.R. Part 151, which were promulgated to implement both the IRA and the OIWA. 25 C.F.R. § 151.5 ("land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under [25 U.S.C. § 465], if such acquisition comes within the terms of this part [25 C.F.R. § 151]").

61. Section 151.8 of the Land Acquisition Regulations states that an Indian tribe "may acquire land in trust on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition. . . ."

62. The 2012 Decision acknowledges that "[c]onsistent with this regulatory provision, the Secretary has previously declined to take any lands in trust for the UKB within the

boundaries of the Nation's Treaty Territory without the consent of the Cherokee Nation. The Cherokee Nation has consistently refused to grant its consent." The 2012 Decision nevertheless concludes that the Cherokee Nation's consent is not required for placement of the Subject Tract into trust, based on a finding that "the former reservation of CNO [Nation's Treaty Territory] is also the former reservation of the UKB for purposes of applying the exception under 25 U.S.C. §2719(a)(2)(A)(i)," Decision at 4.

63. Under the cited § 2719(a)(2)(A)(i) of IGRA, gaming may be conducted on land acquired in trust after October 17, 1988 (the date of IGRA's enactment) only if one of several specific conditions are met. Among these conditions is that the Indian tribe has no reservation and the land is in Oklahoma and "within the boundaries of the Indian tribe's *former reservation, as defined by the Secretary. . .*" 25 U.S.C. § 2719(a)(2)(A)(i).

64. The IGRA does not vest the Secretary with any authority to acquire land in trust. The IGRA vests primary authority to implement IGRA in the NIGC, not the Assistant Secretary. See ¶ 39, *supra*. Nonetheless, the 2012 Decision includes a lengthy discussion setting forth the Secretary's new position that the reservation within which the subject land is located is actually the "former reservation" of the UKB.

65. In the 2012 Decision, the Secretary asserts that the Secretary of the Interior has the discretion to make "the determination of whether the land is within the boundaries of a tribe's former reservation. . . ." in order to determine whether the "former reservation" condition in IGRA has been met. Decision at 4. This assertion is not supported by IGRA, which authorizes the Secretary to *define* the term "former reservation," and to apply that definition in making a determination.

66. The Secretary has *defined* the term "former reservation" in 25 C.F.R. 292.1 as: "lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." Instead of considering this regulatory definition and recognizing that no treaty, Executive Order, or Secretarial order ever established a reservation for the UKB, the 2012 Decision simply concludes that "[t]here is no question that the UKB occupied the former Cherokee reservation nor that the Keetoowah Society of Oklahoma Cherokees was formed out of the Cherokee Nation of Oklahoma." Decision at 4.

67. This conclusion returns to two concepts that the Department has previously entertained and then rejected: (1) the idea that the UKB is a successor-in-interest to the "historic" Cherokee Nation; and (2) the ad hoc "rule" that the UKB shares a reservation with the Cherokee Nation, rendering Cherokee Nation consent to a trust acquisition unnecessary. This "rule," which has not been promulgated in accordance with the APA, appeared in DOI's 2001 unsuccessful attempt to promulgate regulations that would have made unnecessary the consent of a tribe to the trust acquisition by another tribe on a "shared reservation". 66 F.R. 3452-01, 2001, WL 31920. Application of this unpromulgated "rule" is accordingly a violation of the APA.

68. No treaty, act of Congress or regulation has ever established a reservation for the UKB Band. Accordingly, UKB cannot now have a "former reservation."

69. There is no lawful basis for the 2012 Decision conclusion that the Cherokee Treaty Territory also constitutes the "former reservation" of the UKB. The conclusion is in defiance of the prior decisions of the Department, this Court and of this Circuit. The Department is precluded from making any such legal determination by unanimous prior judicial decisions rejecting substantively identical assertions.

70. For the foregoing reasons, the Department's decision to take the land into trust was contrary to law, arbitrary, capricious, and an abuse of discretion under the APA.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

SECOND CLAIM FOR RELIEF

ABSENCE OF STATUTORY AUTHORITY FOR SECRETARIAL ACQUISITION OF LAND INTO TRUST ON BEHALF OF TRIBAL CORPORATION

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 501, 503)
(Administrative Procedure Act, 5 U.S.C. §§702, 706)
(Declaratory Judgment, 28 U.S.C. § 2201)

71. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 70 and same are incorporated as if fully set forth.

72. Section 151.3 of the Land Acquisition Regulations states: "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." In addition, section 151.10(a) of the Regulations states that in, evaluating a request for a trust acquisition, the Secretary will consider "the existence of statutory authority for the acquisition and any limitations contained in such authority." 25 C.F.R. § 151.10(a). In accordance with this provision, the 2012 Decision states that "[l]and may be acquired in trust for tribes only when there is statutory authority to do so." 25 C.F.R. §151.3

73. The 2012 Decision indicates that the Subject Tract will be taken into trust on behalf of the UKB "Tribe", but the published Notice of the decision indicates that the Subject Tract will be taken in trust for the UKB *Corporation.* The 2012 Decision does not claim that the Secretary possesses express authority from Congress to acquire land in trust status for the UKB Corporation. Nonetheless, the Decision asserts that "Section 3 of the OIWA, 25 U.S.C. § 503, implicitly authorizes the Secretary to take land into trust for the UKB Corporation." Decision at

6 (emphasis added). To support this assertion, the Secretary cites to a September 10, 2010, decision by the Assistant Secretary (made in a separate administrative proceeding relating to a different UKB fee-to-trust application for a different parcel of land).

74. The September 2010 decision found that Congress granted the Secretary implicit authority to take land into trust for the UKB Corporation because the UKB Corporation's corporate charter in section 3(r) permits the corporation to "hold … property of every description," and because, somewhat cryptically, "[t]he Secretary has the authority to convey to corporations the authority to hold land in trust as one of the 'rights or privileges secure [sic] to an organized Indian tribe under [the IRA]'" (cryptically, because it is the Secretary which holds trust land, not the beneficiary). Decision of September 10, 2010, at 3 (quoting 25 U.S.C. § 503).

75. The Nation's appeal of the September 10, 2010, decision is pending before the Interior Board of Indian Appeals, see *Cherokee Nation v. Eastern Oklahoma Regional Director*, No. IBIA 11-122 (appeal docketed July 12, 2011).

76. Neither section 1 nor 3 of the OIWA authorizes the defendants to take land into trust for an OIWA corporation. The only authority granted to the Secretary to take land into trust under the OIWA for any entity is set forth expressly and in detail in section 1 of the OIWA, 25 U.S.C. § 501, and that section does not authorize trust land acquisitions for corporations. Section 3 of the OIWA, 25 U.S.C. § 503, does not authorize the Secretary to take land into trust for any entity, tribal or corporate. The Secretary's assertion that he possesses implied authority from the terms of UKB's corporate charter and from OIWA Section 3's "privileges and rights" provision is contrary to law.

77. The Secretary's land acquisition regulations do not authorize one entity to apply to have land taken into trust for another entity. The Secretary's land acquisition regulations do

not authorize the Secretary to take lands into trust for an entity which does not possess the lands in fee title. The Secretary's decision to acquire lands owned in fee by the UKB Band in trust for the UKB Corporation is thus contrary to law.

78. For the foregoing reasons, the defendants are without authority to acquire the Subject Tract in trust on behalf of the UKB Corporation, and the Secretary's 2012 Decision and August 7, 2012 Notice to do so is arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

THIRD CLAIM FOR RELIEF

VIOLATION OF REGULATORY REQUIREMENTS REGARDING JURISDICTIONAL CONCERNS

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Administrative Procedure Act, 5 U.S.C. §§702, 706)
(Declaratory Judgment, 28 U.S.C. § 2201)

79. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 78 and same are incorporated as if fully set forth.

80. Section 151.10(f) of the Land Acquisition Regulations requires the Department to consider "jurisdictional problems and potential conflicts of land use which may arise" from any proposed trust acquisition. 25 C.F.R. § 151.10(f).

81. The 2012 Decision acknowledges and states that the BIA Eastern Oklahoma Region "is concerned that jurisdictional conflicts will arise between the UKB and the CNO if the property is placed in trust for the UKB within the former reservation boundaries of the CNO." Decision at 8.

82. However, the 2012 Decision refers to a June 24, 2009, determination by the Assistant Secretary made in a separate administrative proceeding relating to a different fee-to-trust application by the UKB. In that decision, the Assistant Secretary "concluded that alleged jurisdictional conflicts between the Band and the Cherokee Nation would not prevent the Secretary from taking land into trust for the UKB Corporation to be governed by the Band on the former Cherokee Reservation." Decision at 6.

83. The 2012 Decision states that the June 24, 2009, analysis "supports the conclusion" that the Cherokee Nation and the UKB Band "can avail themselves of the same former reservation" for purposes of gaming under the IGRA. *Id.* The June 24, 2009, decision never characterized the Cherokee Treaty Territory as belonging to the UKB Band. The July 30 Decision fails to note that the cited June 24, 2009, decision at issue is on appeal now pending before the Interior Board of Indian Appeals, see *Cherokee Nation v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs*, *supra*.

84. Subsection (g) of § 476 of the IRA (a section involving tribal constitutional reorganization, not trust acquisitions) provides: "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." (emphasis added). The July 30 Decision cites the findings made by the Assistant Secretary in his June 24, 2009, decision that Section 476(g), "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction"

and "the UKB, like [the Cherokee Nation], possesses the authority to exercise territorial jurisdiction over its tribal lands." Decision at 8.

85. Even though the BIA Eastern Regional Office concluded the proposed acquisition of the Subject Tract in trust for the UKB would result in serious jurisdictional conflicts between the Nation and the UKB, the Department ignored its own findings in issuing the notice of intent to place the Subject Tract into trust. The Department's determination as to jurisdictional conflicts is arbitrary, capricious, and an abuse of discretion under the APA.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

FOURTH CLAIM FOR RELIEF

VIOLATION OF REGULATORY REQUIREMENTS REGARDING NEED FOR LAND

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Administrative Procedure Act, 5 U.S.C. §§702, 706)
(Declaratory Judgment, 28 U.S.C. § 2201)

86. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 85 and same are incorporated as if fully set forth.

87. Section 151.10(b) of the Trust Acquisition Regulations mandates that the Department consider the "need" of the UKB for land to be taken into trust on its behalf.

88. The 2012 Decision states that the NIGC determined the existing UKB gaming operation "is not located on Indian lands under Federal law. . . ." Notwithstanding the fact that this means that UKB has been conducting illegal gaming on the Subject Tract since 1986 in violation of state and federal law, the Department stated that the UKB may suffer "substantial

financial loss if the property is not placed in trust" and concluded that the UKB "now has an urgent need to have the property placed in trust."

89. The Department's bootstrap reasoning—that it is the ongoing conduct of an illegal gaming operation that provides the basis for a finding of a "need" for a proposed trust acquisition in order to cure the illegality of the gaming—is arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

FIFTH CLAIM FOR RELIEF

VIOLATION OF REGULATORY REQUIREMENTS REGARDING IMPACT ON LOCAL GOVERNMENTS AND THE ABILITY OF BIA TO PROVIDE SERVICES

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Administrative Procedure Act, 5 U.S.C. §§702, 706)
(Declaratory Judgment, 28 U.S.C. § 2201)

90. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 89 and same are incorporated as if fully set forth.

91. Section 151.10(g) of the Land Acquisition Regulations requires the Department to consider "whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status." Similarly, section 151.10(e) of the Regulations requires the Secretary to consider "the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls." *Id.* § 151.10(e).

92. The 2012 Decision finds that the proposed trust acquisition of the UKB gaming parcel is within the Nation's Treaty Territory and that "the lands within the former treaty boundaries of the [Cherokee Nation] are the [Cherokee Nation]'s service area for purposes of

administering BIA programs under Indian Self-Determination and Education Assistance Act, Public Law 93-638 (25 U.S.C. §§ 450 et seq.)." Decision at 8. The Department further finds that pursuant to the Indian Self-Determination Act, the Cherokee Nation, through a self-governance compact awarded pursuant to 25 U.S.C. §§ 458aa *et seq*, administers "the program functions associated with the management of trust lands" that were previously provided by the BIA, including real estate services, tribal court services and law enforcement services. Decision at 8-9. The Department notes that all funds previously spent by the BIA to provide these services have been "transferred to the [Cherokee Nation] Compact." Decision at 9.

93. The 2012 Decision concludes that "[t]here are no remaining direct service funds in the Region that have not been previously provided to the [Cherokee Nation] in its Self-Governing Compact." It also states that "the UKB would likely reject the authority of the [Cherokee Nation] employees and insist that the Region provide BIA direct services as it has done in the past with respect to other BIA services, e.g., processing of fee-to-trust acquisitions." Decision at 9.

94. Although the Decision concludes that "additional duties" associated with the newly acquired trust land may "increase the workload" of the Eastern Oklahoma Regional office, and that no funds are available to carry out that work, the Decision recites that the Region "has concluded they are capable of providing services for UKB. . . ." Decision at 9.

95. The Cherokee Nation has provided and continues to provide health, education, law enforcement and social services to all Indian people and all Indian country within the Nation's Treaty Territory. As the 2012 Decision states, all BIA programs within the Nation's Treaty Territory, and all associated funding for such programs, have already been transferred to the Nation pursuant to a self-governance compact under the ISDA, and as a consequence the

Tahlequah BIA Regional Office (which previously administered such programs) has been closed. Decision at 9.

96. Under Nation law, UKB members are eligible to be members of the Nation and are eligible for governmental services (including Federal services) provided by the Nation through its ISDA programs. But the 2012 Decision states that the UKB Band "would likely reject the authority" of the Nation to provide services formerly provided by the BIA and now provided by the Nation. Decision at 9. If the Subject Tract is taken into trust, the UKB will likely seek additional funds from the BIA, the IHS, the Department of Justice and other federal agencies to provide services to UKB members who are otherwise eligible for services from the Nation. Any such federal funds obtained by UKB threaten to diminish the funds that would be provided to the Nation and to degrade the ability of the Nation to provide services to all Indians on the Nation's Treaty Territory. Such payments to UKB also would result in unnecessary and duplicative costs to provide the same services already being provided by the Nation, to the detriment of the intended beneficiaries of such services. The Department's failure to consider the impact of the proposed trust acquisition on the Nation and on its continued ability to receive funds under the Indian Self-Determination Act and to provide services under that Act to Indians on the Nation's Treaty Territory was arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

SIXTH CLAIM FOR RELIEF

FAILURE TO APPLY *CARCIERI*

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Declaratory Judgment, 28 U.S.C. § 2201)

97. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 96 and same are incorporated as if fully set forth.

98. The Secretary's 2012 Decision purports, in part, to implement the Secretary's authority under the IRA to acquire lands in trust for Indian tribes under 25 U.S.C. §465. Decision at 1. See also id. at 6 (citing September 2010 decision discussing the IRA); supra ¶ 57. The IRA does not authorize the Secretary to acquire lands in trust for a tribal entity that was not "under federal jurisdiction" on June 18, 1934. 25 U.S.C. § 479. See also *Carcieri,* 555 U.S. at 382. The Acting Assistant Secretary's Decision mentions the Carcieri decision only in passing on p. 6 of the decision, but does not address the application of it at all.

99. The UKB indisputably became a legal entity on October 3, 1950, over 16 years past the Supreme Court's 1934 deadline. Therefore, the Secretary is barred by operation of law from granting its fee-to-trust application. It is true that a tribe organized under the OIWA may be granted a corporate charter which conveys to it, inter alia, any other rights or privileges secured to an organized Indian tribe under the IRA. Oklahoma Indian Welfare Act, § 3, 49 Stat. 1967 (codified a t25 U.S.C. § 503). But an "organized Indian tribe" under the IRA having the same characteristics as UKB - i.e., a tribe organized after 1934 - would not be eligible to receive land in trust under 25 U.S.C. § 465, as construed by *Carcieri.* In other words, section 3 of the OIWA does not grant OIWA-organized entities any rights greater than IRA-organized entities.

100. Since the UKB was not federally recognized until 1946, the Secretary cannot, as a matter of law, invoke his discretionary authority under 25 U.S.C. § 465 to accept the Subject Tract into trust under *Carcieri.*

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

SEVENTH CLAIM FOR RELIEF
VIOLATION OF IGRA

(Violation of IGRA, 25 U.S.C. § 2719)
(Declaratory Judgment, 28 U.S.C. § 2201)

101. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 100 and same are incorporated as if fully set forth.

102. The 2012 Decision concluded that when the gaming parcel is taken into trust, "UKB may conduct gaming on this property pursuant to 25 U.S.C. § 2719(a)(2)(A)(i) and the implementing regulations set forth in 25 C.F.R. Part 292." Decision at 5.

103. The Department determined that the "former reservation" exception applies to the gaming that is currently conducted by the UKB, even though this is gaming that the NIGC has specifically determined is not currently in compliance with IGRA. For the reasons stated in Count I, *supra*, the Department's determination that the gaming parcel is within the "former reservation" of the UKB is arbitrary, capricious, an abuse of discretion and contrary to law.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

EIGHTH CLAIM FOR RELIEF

VIOLATION OF TREATY RIGHTS
(Administrative Procedures Act, 5 U.S.C. §§ 702, 706)

104. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 103 and same are incorporated as if fully set forth.

105. The Treaty provisions which granted the Reservation to the Cherokee Nation to be held by the Nation as a whole, and which reconfirm the Cherokee Nation's sovereign authority and rights of self-government— rights which are to be protected against the "intrusion" of all unauthorized citizens without Cherokee Nation consent—mean that the Cherokee Nation possesses exclusive sovereign authority over trust lands within the boundaries of the Nation's Treaty Territory and holds a veto power over the entry of other tribes upon such lands.

106. The 2012 Decision violates the Cherokee Nation's right to exclusive sovereign authority over the Nation's Treaty Territory, as guaranteed by the 1866 Treaty, by purporting to provide conflicting territorial jurisdiction to the UKB Band over land within the Nation's Treaty Territory.

107. The 2012 Decision violates the Cherokee Nation's right to "peaceable possession" of the Nation's Treaty Territory, and the right to be protected against "hostilities of other tribes" and against "intrusion" by others, as guaranteed by the 1866 Treaty, by purporting to acquire the gaming parcel in trust for the UKB Corporation on the Nation's Treaty Territory without the consent of the Cherokee Nation, thereby impairing the Cherokee Nation's exclusive sovereign authority over the Nation's Treaty Territory.

108. The 2012 Decision violates the Cherokee Nation's right to "the quiet and peaceful possession of their country and protection . . . against hostilities of other tribes," as guaranteed by the 1866 Treaty, by acquiring land within the Nation's Treaty Territory in trust for the UKB Corporation, to be governed (as the Secretary sees it) by the UKB Band which, among other hostile acts, has sought to divert the distribution of federal funds from the Cherokee Nation and has conducted for decades an illegal gaming enterprise in competition with the Nation's legitimate, federally-regulated casinos which are lawfully operated by Cherokee Nation through

CNE pursuant to the IGRA, thus threatening the Cherokee Nation's peaceful possession of its country within the meaning of the 1866 Treaty.

109. Because the July 30 Decision violates the Cherokee Nation's rights under the 1866 Treaty in multiple ways, the Decision is arbitrary and capricious, an abuse of discretion and contrary to law under the APA.

WHEREFORE, the Nation prays as hereinafter set forth.

NINTH CLAIM FOR RELIEF

VIOLATION OF REGULATORY REQUIREMENTS REGARDING ECONOMIC IMPACT ON NATION ENTERPRISES

(Unlawful Exercise of Trust Authority, 25 U.S.C. § 465)
(Violation of IGRA, 25 U.S.C. § 2719)
(Declaratory Judgment, 28 U.S.C. § 2201)

110. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 109 and same are incorporated as if fully set forth.

111. The Department's 2012 Decision to take the Subject Tract into trust exceeds the statutory authority of the Department. Further, even if such authority did exist, the Department acted arbitrarily and capriciously in making its final determination to take the land into trust. The Decision is contrary to the prior decisions of the Department and the precedent of this Court. Moreover, the Decision is unwarranted by the facts and law of this case.

112. CNE is currently the only entity that may legally conduct gaming within the Nation's Treaty Territory. CNE has invested millions of dollars to build, operate, and promote its gaming venues in the Treaty Territory. These investments were made in reliance on the

Nation's and CNE's belief that the Nation (acting through CNE) has the exclusive right to conduct gaming within the Nation's Treaty Territory.

113. The Department's unauthorized and unlawful decision to take the Subject Tract into trust and its finding that, once such a taking occurs, the UKB may legally conduct gaming on the Subject Tract in compliance with IGRA unfairly and unlawfully expose CNE to legal gaming competition throughout the Nation's own Treaty Territory. Thus, CNE has suffered a legal wrong and been adversely affected and aggrieved by the agency action.

WHEREFORE, the Nation and CNE pray as hereinafter set forth.

TENTH CLAIM FOR RELIEF

INJUNCTION

(Fed.R.Civ.P. 65)

114. Plaintiffs reallege the allegations set forth in Paragraphs 1 through 113 and same are incorporated as if fully set forth.

115. The Subject Tract cannot be taken into trust because the Nation has not given consent as required by 25 C.F.R. 151.8.

116. The Secretary's conclusion that the Nation's consent is not required because the Nation and UKB share the Nation's Treaty Territory is inconsistent with previous Department determinations and developed case law.

117. Since the UKB was not federally recognized until 1946, the Secretary has no authority under 25 U.S.C. § 465 to accept the Subject Tract into trust. See *Carcieri.* Moreover, even if the Secretary had such authority, he could not properly exercise it here because the prerequisites to such a discretionary acceptance of land into trust have not occurred.

118. No lawful authority exists under which the Secretary can accept the Subject Tract into trust on behalf of the UKB or the UKB Corporation.

119. Nation and CNE are entitled to injunctive relief temporarily, preliminarily, and permanently enjoining and prohibiting the Secretary from accepting the Subject Tract into trust since there exists no legal authority empowering him to do so. The Attorney General for the Cherokee Nation, Mr. Hembree, has been informed by counsel for the United States of American that the U.S.A. will not take the Subject Tract into trust during the pendency of the action without giving Plaintiffs thirty days written notice of such intent.

120. If the Secretary is not enjoined from taking the Subject Tract into trust, the Nation and CNE will be irreparably harmed as they may or will lose the opportunity of judicial review of the Secretary's decision.

121. Further, if the Secretary is not enjoined, or voluntarily agrees to stay taking the Subject Tract into trust, both the Nation and CNE will be irreparably harmed by the improvident action and decision by the Department which threatens the sovereignty, authority and economic health of the Nation within and throughout its Treaty Territory and the established and future business opportunities of CNE on behalf of the Nation within and throughout the Nation's Treaty Territory.

122. Absent a voluntary stay, by reason of the Secretary's unlawful issuance of the Notice of Final Agency Determination, the Nation is entitled to immediate injunctive relief to stay and annul the decision and to cause the Department to deny the trust application.

PRAYER FOR RELIEF

WHEREFORE, the Nation respectfully requests that the Court enter judgment in its favor and against the Department as follows:

A. Declaring that the Nation's Treaty Territory is not a "shared reservation" or the "former reservation" of the UKB;

B. Declaring that the Department's 2012 Decision to take the Subject Tract into trust status is in violation of the treaties entered into between the Nation and the United States;

The Nation and CNE further request that the Court enter judgment in their favor and against the Department as follows:

C. Declaring that the 2012 Decision to acquire the Subject Tract in trust for the UKB Corporation is arbitrary, capricious, an abuse of discretion and contrary to law;

D. Declaring that the Department would act in excess of its legal and regulatory trust authority if it took the Subject Tract into trust;

E. After notice by the USA of its intention to take the land into trust, enjoining the Department, its agents, employees, successors and assigns in office from taking any action to effectuate or implement the July 30, 2012 Decision to acquire the subject land in trust for the UKB or the UKB Corporation;

F. Awarding the Nation and CNE costs and reasonable attorneys' fees to the extent permitted by law; and

G. Granting such other and further relief as the court deems just and proper.

Respectfully submitted,

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUL 30 2012

Honorable George Wickliffe
Chief, United Keetoowah Band of Cherokee
Indians of Oklahoma
P.O. Box 746
Tahlequah, Oklahoma 74465

Dear Chief Wickliffe:

On August 15, 2011, the United Keetoowah Band of Cherokee Indians of Oklahoma (UKB) submitted to the Bureau of Indian Affairs (BIA) Eastern Oklahoma Region (EOR) an amended application to acquire in trust approximately 2.03 acres of land, known as the Keetoowah Casino Property (Property), located in Cherokee County, Oklahoma.

By memorandum dated April 19, 2012, the EOR transmitted to the BIA its recommendation that the property be accepted into trust along with the Tribe's request and supporting documentation.[1] We have completed our review of the UKB's request, and the supporting documentation in the administrative record. For the reasons set forth below, it is our determination that the Property will be taken into trust.

BACKGROUND

The UKB is a federally recognized Indian tribe, but it does not possess any land that is held in trust or restricted status by the Federal Government. Its status as a federally recognized Indian Tribe was confirmed in 1946 when Congress passed legislation recognizing the UKB as an Indian Band within the meaning of the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. § 503 (OIWA). As a tribe organized pursuant to the OIWA, the UKB is entitled to the same rights and privileges as tribes organized pursuant to the Indian Reorganization Act of 1934 (IRA).

The history of the UKB has been discussed at length in Assistant Secretary decisions, Associate Solicitor opinions and Federal court orders, such as that of March 3, 1992 in *Buzzard v. Oklahoma Tax Commission*, 1992 U.S. Dist. LEXIS 22864 (N.D. Okla., March 3, 1992), and thus only the background relevant to the limited question of whether the parcel is within the former reservation of the UKB within the meaning of Indian Gaming Regulatory Act (IGRA) and the Department's regulations at Parts 151 and 292 is discussed below.

[1] SPRO Transmittal Memorandum.

Exhibit 1

Since the 1800s, the Keetoowah Society of Oklahoma Cherokees existed as an organization of Cherokee Indians in Oklahoma. *Buzzard v. Oklahoma Tax Commission*, 1992 U.S. Dist. LEXIS 22864 (N.D. Okla., March 3, 1992), *aff'd Buzzard v. Oklahoma Tax Commission*, 992 F.2d 1073 (10th Cir. 1993). The Keetoowahs sought federal recognition in the 1930s in order to organize as a separate band under OIWA. In an opinion dated July 29, 1937, the Solicitor found that the Keetoowahs were a society of full-bloods organized nearly a century before for the preservation of Indian culture and traditions. He found that the Keetoowahs did not constitute a band of Cherokee Indians within the meaning of the OIWA and therefore were not eligible to reorganize under it. Opinion of July 29, 1937, 1 *Op. Sol. on Indian Affairs* (U.S.D.I. 1979). In response, Congress enacted the Act of August 10, 1946, which provided that "the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936." 60 Stat. 976; *see* S. Rep. No. 79-978 (1946). The Band formally reorganized under OIWA in 1950 by adopting a constitution, by-laws, and a corporate charter that were approved by the Assistant Secretary of the Interior on May 8, 1950, and ratified by the members on October 3, 1950.

The gaming parcel is located in the City of Tahlequah in the S1/2 NE1/4 SE1/4 and part of the N1/2 SE1/4 SE1/4 SW1/4 of Section 4, Township 16 North, Range 22 East, Cherokee County, Oklahoma. The Band submitted an amended application requesting that the gaming parcel be taken into trust for the United Keetoowah Band of Cherokee Indians, a federally chartered corporation (UKB Corporation) under Section 3 of the OIWA.

The gaming parcel is owned in fee by the Band. Neither the Band nor the UKB Corporation have any lands held in trust by the United States. The Band began to offer public bingo on the gaming parcel in 1986. The gaming parcel currently is utilized for an existing gaming facility for the benefit of the Band and its members. It is the Band's only gaming facility and the gaming revenues support Tribal programs, including Human Services, Emergency Funds, Housing Rehabilitation, Family Services, Education, Clothing Voucher and Elder Assistance, all of which benefit the UKB Tribal members.

The gaming parcel is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota, 7 Stat. 478 (December 29, 1835), and the 1866 treaty between the Cherokee Nation and the United States, 14 Stat. 799 (July 19, 1866), in an area generally identified as the former Cherokee reservation. *See* April 19, 2012 Memorandum from Acting Regional Director, Eastern Oklahoma Region, Proposed Findings of Fact. This area has long been recognized as the former reservation of the Cherokee Nation of Oklahoma (CNO), a federally recognized Indian tribe. *United Keetoowah Band v. Secretary*, No 90-C-608-B (N.D. Okla., May 31, 1991); *United Keetoowah Band of Cherokee Indians v. Mankiller*, No 92-C-585-B (N.D. Okla., January 27, 1993), *aff'd* 2 F.3d 1161 (10th Cir. 1993).

DESCRIPTION OF THE PROPERTY

The 2.03 acres are located in Tahlequah, Cherokee County, Oklahoma and described as follows:[2]

> A tract of land lying in and being a part of the S/2 NE/4 SE/4 SW/4 and part of the N/2 SE/4 SE/4 SW/4 of Section 4, T-16-N, R-22-E, Cherokee County, Oklahoma, more particularly described as follows, to-wit: BEGINNING at a point 175.0 feet South of the North boundary and 131.0 feet East of the West boundary of said S/2 NE/4 SE/4 SW/4; thence S 02°56'W, 159.80 feet; thence N 89°12'W, 24.80 feet; thence S 03°30'W, 171.40 feet to a point 175.00 feet South of the North boundary of said N/2 SE/4 SE/4 SW/4; thence S 89°49'E, 384.32 feet to a point on the West boundary of U.S. Highway No. 62; thence N 05°25'W, along the West boundary of U.S. Highway No. 62, 332.00 feet; thence N 89°49'W, 309.55 feet to the Point of Beginning. Containing 2.63 acres;
>
> LESS AND EXCEPT A parcel of land BEGINNING 155.00 feet North and 84.80 feet East of the Southwest Corner of the N/2, SE/4 SE/4 SW/4; thence N3°30'E a distance of 161.90 feet; thence S89°49'E a distance of 161.90 feet; thence S3°30"W a distance of 161.90 feet; thence N89°49'W a distance of 161.90 feet to the Point of Beginning. Containing 0.60 acres more or less.

TITLE TO THE PROPERTY

The UKB owns the property in fee as evidenced by the Warranty Deed dated February 23, 2012.[3] The Warranty Deed legal description excepts the 0.60 acre parcel because that parcel was part of the Keetoowah Justice Complex.

An updated commitment for title insurance policy dated November 30, 2011, was provided by the UKB. A preliminary title opinion has been issued by the Tulsa Field Solicitor's Office dated February 13, 2012. In his opinion, the Field Solicitor noted the Summary Appraisal Report dated January 9, 2012, states that the value of this property is $1,080,000.00. However, the appraisal bases this value on the cost to reconstruct the casino on the property. The Summary Appraisal Report states that the value of the property itself, based on a comparison of sales of similar properties in the area is $265,000.00. The BIA believes this "comparable sales value" of this property is the most accurate value to consider for purposes of determining the amount of title insurance to require under the peculiar circumstances of this case. Title Commitment No. T2011120146, issued by the Old Republic National Title Insurance Company, reflects a policy amount of $91,250.00 which is the minimum amount of title insurance required under the DOJ Title Standards.

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[2] UKB Application Tab 1C.

[3] UKB Application Tab 9

COMPLIANCE WITH THE INDIAN GAMING REGULATORY ACT

The UKB is composed of Cherokee Indians, reorganized under a constitution approved by the Department expressly establishing its tribal headquarters in Tahlequah, Oklahoma. Tahlequah is the same town where the Property is located. We believe the former reservation of the CNO is also the former reservation of the UKB for the purposes of applying the exception under 25 U.S.C. § 2719(a)(2)(A)(i), making this specific trust application a unique circumstance.

The IGRA prohibits gaming on Indian lands accepted by the Secretary into trust for the benefit of an Indian tribe after October 17, 1988, unless the lands fall within certain statutory exceptions. See 25 U.S.C. § 2719. One such exception arises if the Indian tribe has no reservation and the lands are in Oklahoma and within the boundaries of the Indian tribe's former reservation, as defined by the Secretary. 25 U.S.C. § 2719(a)(2)(A)(i).

Under the Indian canons of construction, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Courts have found that the Indian canon of statutory construction applies to IGRA. *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 848-49 (W.D. Mich., 2008); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). There is no question that the UKB occupied the former Cherokee reservation nor that the Keetoowah Society of Oklahoma Cherokees was formed out of the Cherokee Nation of Oklahoma. S. Rep. No. 79-978 at 2-3 (1946). The term "former reservation" in IGRA is ambiguous as applied to the facts at hand. Interpreting the provision to the benefit of the Band would permit the gaming parcel to be taken into trust pursuant to 25 U.S.C. § 2719(a)(2)(A)(i).

The Department's regulations define "former reservation" to mean: "lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe." 25 C.F.R. § 292.2. Neither the text of IGRA, nor the Department's regulations implementing the exceptions to the general prohibition of gaming on lands acquired in trust after October 1988, 25 U.S.C. § 2719, address the question of whether two federally recognized tribes, one of which was formed under express congressional authorization from the citizens of the other, can share the same former reservation for purposes of qualifying for the "former reservation" exception in 25 U.S.C. § 2719(a)(2)(A)(i). The express language of the statute makes it clear, however, that the determination of whether the land is within the boundaries of a tribe's former reservation is a determination for the Secretary to make. *Id.*

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

We conclude that when taken into trust, the UKB may conduct gaming on this property pursuant to 25 U.S.C. § 2719 (a)(2)(A)(i) and the implementing regulations set forth in 25 C.F.R. Part 292.

The UKB's Gaming Ordinance was approved by the National Indian Gaming Commission on March 22, 1995.

COMPLIANCE WITH 25 C.F.R. PART 151

The procedures and policies governing the Secretary's exercise of discretion for acquiring lands in trust for Indian tribes and individuals are set forth in authorizing legislation and in 25 C.F.R. Part 151. This acquisition is within the former reservation of the UKB. The Department, therefore, considers the factors contained in 25 C.F.R. § 151.10, "On-reservation Acquisitions" to be applicable.

A. 25 C.F.R. 151.3 Land Acquisition Policy.

Land may be acquired in trust for tribes only when there is statutory authority to do so. Section 151.3(a) states that land may be acquired in trust for a tribe when (1) the land is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. Here, the property is located within the former reservation of the UKB, the UKB owns a fee interest in the land, and the Secretary has determined the acquisition in necessary to facilitate economic development.

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

The Assistant Secretary's June 24, 2009 Decision, remanded the application back to the Regional Director to apply the categorical exclusion checklist, as clarified by a July 30, 2009 Decision, Motion to Reconsider and Withdraw Decision requesting additional briefing from UKB and CNO on the issue of the import, if any, of the *Carcieri v. Salazar* decision and concluded that alleged jurisdictional conflicts between the Band and the Cherokee Nation would not prevent the Secretary from taking land into trust for the UKB Corporation to be governed by the Band on the former Cherokee Reservation. *Id.* at 6-7, 11; *see also* Assistant Secretary's September 10, 2010 Decision (reaffirming a decision that land could be taken into trust on the former Cherokee reservation for the UKB Corporation.) This analysis supports the conclusion that the two tribes can avail themselves of the same former reservation for purposes of 25 U.S.C. § 2719(a)(2)(A)(i).

B. 25 C.F.R. 151.10(a) The existence of statutory authority for the acquisition and any limitations contained in such authority.

The Assistant Secretary's September 10, 2010 Decision which was clarified in a January 21, 2011 letter to the UKB, concluded that Section 3 of the OIWA, 25 U.S.C. § 503, implicitly authorizes the Secretary to take land into trust for the UKB Corporation.

C. 25 CFR 151.10(b) The need of the Tribe for additional land.

Neither the UKB nor the UKB Corporation currently have any lands held in trust by the United States. The proposed site is owned in fee simple status and the UKB states the need for the fee-to-trust request is for economic development.

The Property is the UKB's only gaming facility. The UKB has received a determination by the National Indian Gaming Commission that the facility is not located on Indian lands under Federal law; the UKB now has an urgent need to have the property placed in trust. The UKB may suffer substantial financial loss if the property is not placed in trust. In 2010, the UKB utilized $1,234,933.30 of the gaming revenue for Tribal programs including Human Services, Emergency Funds, Housing Rehabilitation, Family Services, Education, Clothing Voucher and Elder Assistance which benefited the UKB Tribal members. Additional economic development will allow the UKB to support governmental functions, which should decrease dependence upon limited Federal and state funds. In order for the UKB to continue to sustain its programs and operations as a means to providing needed services and assistance to its members, the acquisition of the property into trust would allow the UKB to continue to focus on the unmet needs of the UKB and its people without interruption. The UKB's application has sufficiently justified the need for this additional land.

D. 25 CFR 151.10(c) The purposes for which the land will be used.

The application states that the UKB intends to continue utilizing the property for economic development for the benefit of the UKB and its members and the site will be utilized for gaming purposes. I find that this request adequately describes the purpose for which the land will be used.

E. 25 CFR 151.10(e) If the land to be acquired is in unrestricted fee status, the impact on the state and its political subdivision resulting from the removal of the land from the tax rolls.

The UKB currently owns this land in fee simple status. Comments on the potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments were solicited from the state and local political subdivisions. By correspondence dated November 4, 2011, comments regarding the proposed acquisition were invited from the following State, County and City Officials:

Governor of Oklahoma – No Response
Oklahoma Tax Commission – No Response
Cherokee County Commissioners – No Response
Sheriff of Cherokee County – No Response
Mayor of Tahlequah – No Response
Chief of Police of Tahlequah – No Response
Principal Chief of the Cherokee Nation – No Response
Cherokee County Assessor – Response dated November 10, 2011
Cherokee County Treasurer – Response dated November 8, 2011

Cherokee County Assessor – By response dated November 10, 2011, a copy of the Real Property Assessment Record to the Region stated the tax on the property is assessed at $1,709.00. There are no special assessments or outstanding tax assessments.[4]

Cherokee County Treasurer – By response dated November 8, 2011, the Treasurer provided information which reflects $1,709.00 was paid for 2010 taxes.[5]

Real property in Oklahoma is subject to state ad valorem taxes, which is collected by the respective counties to fund a variety of countywide services; the largest share of these taxes goes to the local school districts. The subject property is currently carried on the Cherokee County Assessor's rolls as taxable.

In a letter dated May 17, 2011, the Attorney General of the State of Oklahoma wrote to express his concerns about the amount of time taken to reach a determination on these matters. We have reviewed the Attorney General's comments as well as all comments and information submitted to the Department on this matter. This decision is reached after full consideration of these issues and the administrative record.

The Regional Director finds that the impact on the state and local governments resulting from the removal of the subject property from the tax rolls will be insignificant, we concur.

[4] EOR Application Tab 46

[5] ERO Application Tab 45

F. 25 CFR 151.10(f) Jurisdictional problems and potential conflicts of land use which may arise.

The EOR is concerned that jurisdictional conflicts will arise between the UKB and the CNO if property is placed into trust for the UKB within the former reservation boundaries of the CNO. The Assistant Secretary has previously stated in the June 24, 2009 Decision that 25 U.S.C. § 476(g) mandates that the "department or agencies of the United States shall not ... make any decision or determination pursuant to the IRA, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes." The Assistant Secretary found that this section of the IRA "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction," and "the UKB, like CN, possesses the authority to exercise territorial jurisdiction over its tribal lands."

The EOR identified a potential jurisdictional issue on a survey of the Property. Specifically, a portion of the casino building encroaches onto a separate tract of property owned in fee by the UKB ("parking lot tract"). While the UKB's ownership of the parking lot tract satisfies the Department that no legal liabilities will arise as a result of the encroachment, it recognizes the potential for jurisdictional issues given that a portion of the casino building would be subject to state jurisdiction. To address the concern, the UKB provided Tribal Resolution No. 12-UKB-33, stating that the UKB intends to make application to place the parking lot tract in trust in the near future and that, in the meantime, the UKB will not conduct gaming activities on the portion of the property that lies outside of the Property tract.

Fire, water, ambulance, and sanitation services for the property are currently provided by the city of Tahlequah. Law enforcement services for the property are currently provided by an informal agreement with the City of Tahlequah and Cherokee County law enforcement agencies whereby the Keetoowah Lighthorse, the UKB's security force, monitors tribally-owned land and reports any suspicious activities immediately to the City and County law enforcement agencies so that those entities can respond accordingly.

While there may be jurisdictional disputes in the future, the Regional Director believes that there is adequate foundation for resolving them, and we concur.

G. 25 CFR 151.10(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs (BIA) is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The land proposed for trust acquisition is within the jurisdictional boundaries of the BIA's EOR. The Secretary has determined that the lands within the former treaty boundaries of the CNO are the CNO's service area for purposes of administering BIA programs under Indian Self-Determination and Education Assistance Act, Public Law 93-638 (25 U.S.C. § 450 et seq.), as amended. The CNO administers the program functions associated with the management of trust lands formerly provided by the BIA's Tahlequah Agency and EOR Office

through a Self-Governance Compact pursuant to 25 U.S.C. § 458aa, et seq. These programs include, but are not limited to, real estate services and tribal court services, as well as law enforcement services. As a result of the BIA's Self-Governance Compact with the CNO, the BIA agency with jurisdiction over BIA programs within the treaty boundaries of the former CNO-the Tahlequah Agency-was closed and the funds used to operate that agency, along with Regional Office funds utilized for direct services to the CNO and all Indians within that area (regardless of tribal affiliation), were transferred to the CNO Compact. There are no remaining direct service funds in the Region that have not been previously provided to the CNO in its Self-Governance Compact. Although the CNO has numerous full time employees available to provide BIA services, the UKB would likely reject the authority of the CNO employees and insist that the Region provide BIA direct services as it has done in the past with respect to other BIA services, e.g., processing of fee-to-trust acquisitions. The additional duties may increase the workload on the Region unless additional appropriations or budget allocations are obtained to off-set the additional direct services to be provided by the Region. The EOR has concluded they are capable of providing services for UKB and we concur.

H. 25 CFR 151.10 (h). The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM2, Land Acquisitions: Hazardous Substances Determinations.

By memorandum dated October 6, 2011, the Chief, Division of Environmental Safety and Cultural Resources Management (DESCRM), EOR, determined the revised Phase I ESA was prepared in accordance with the American Society for Testing and Materials (ASTM) Standard for ESA's, ASTM Standard E 1527-05. Pursuant to the review by the DESCRM, the ESA was found to be in compliance with the ASTM Standard E1527-05.

This acquisition is considered to be categorically excluded under NEPA pursuant to 516 DM 10, Section 10.5-I, Land Conveyances and Other Transfers. A categorical exclusion checklist was completed by DESCRM on in accordance with NEPA and the BIA NEPA Handbook, 59 IAM 3-H. We concur with this finding.

TWO PART DETERMINATION UNDER SECTION 20 OF IGRA

The two-part determination pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(A) is not applicable because "such lands are located in Oklahoma and are within the boundaries of the Indian tribe's former reservation" 25 U.S.C. § 2719 (a)(2)(A)(i).

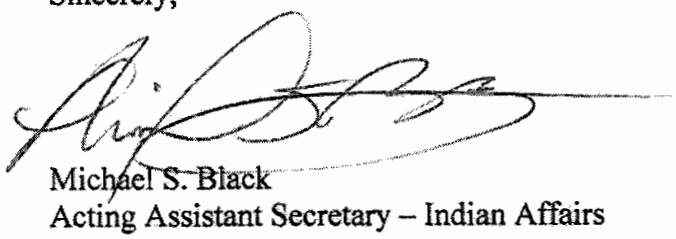
REGIONAL DIRECTOR'S RECOMMENDATION

By memorandum dated April 19, 2011, the Regional Director recommended that the property be accepted in trust for the benefit of the Tribe.

DECISION

Our evaluation of the Tribe's request indicates that the Federal requirements for acquiring this Property into trust have been satisfied. The Regional Director will be authorized to approve the conveyance document accepting the property in trust for the Tribe subject to any condition set forth herein, approval of all title requirements by the Office of the Regional Solicitor, and expiration of the thirty day period following publication in the *Federal Register* of the notice required in 25 C.F.R. § 151.12(b).

Sincerely,



Michael S. Black
Acting Assistant Secretary – Indian Affairs

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of Letter of Map Revision	Effective date of modification	Community No.
Loudoun	Town of Leesburg (11–03–1482P)	The Honorable Kristen C. Umstattd, Mayor, Town of Leesburg, 25 West Market Street, Leesburg, VA 20176.	Department of Plan Review, 25 West Market Street, Leesburg, VA 20176.	*http://www.rampp-team.com/lomrs.htm.*	July 12, 2012	510091
Prince William	Unincorporated areas of Prince William County (11–03–1518P).	The Honorable Melissa S. Peacor, County Executive, Prince William County, James J. McCoart Administration Building, 1 County Complex Court, Prince William VA 22192.	James J. McCoart Administration Building, 1 County Complex Court, Prince William, VA 22192.	*http://www.rampp-team.com/lomrs.htm.*	July 30, 2012	510119

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: July 18, 2012.

Sandra K. Knight,

Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2012–19219 Filed 8–6–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; United Keetoowah Band of Cherokee Indians of Oklahoma

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final agency determination.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately 2.03 acres of land into trust for the United Keetoowah Band of Cherokee Indians of Oklahoma on July 30, 2012.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS–3657 MIB, 1849 C Street NW., Washington, DC 20240; Telephone (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1 and is published to comply with the requirements of 25 CFR 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On July 30, 2012, the Assistant Secretary—Indian Affairs decided to accept approximately 2.03 acres of land into trust for the United Keetoowah Band of Oklahoma Corporation under the authority of the Oklahoma Indian Welfare Act Reorganization Act of 1936, 25 U.S.C. 503.

The 2.03 acres are located approximately in Tahlequah, Cherokee County, Oklahoma, and described as follows:

A tract of land lying in and being a part of the S/2 NE/4 SE/4 SW/4 and part of the N/2 SE/4 SE/4 SW/4 of Section 4, T–16–N, R–22–E, Cherokee County, Oklahoma, more particularly described as follows, to-wit: BEGINNING at a point 175.0 feet South of the North boundary and 131.0 feet East of the West boundary of said S/2 NE/4 SE/4 SW/4; thence S 02°56' W, 159.80 feet; thence N 89°12' W, 24.80 feet; thence S 03°30' W, 171.40 feet to a point 175.00 feet South of the North boundary of said N/2 SE/4 SE/4 SW/4; thence S 89°49' E, 384.32 feet to a point on the West boundary of U.S. Highway No. 62; thence N 05°25' W, along the West boundary of U.S. Highway No. 62, 332.00 feet; thence N 89°49' W, 309.55 feet to the Point of Beginning. Containing 2.63 acres;

LESS AND EXCEPT A parcel of land BEGINNING 155.00 feet North and 84.80 feet East of the Southwest Corner of the N/2, SE/4 SE/4 SW/4; thence N3°30' E a distance of 161.90 feet; thence S89°49' E a distance of 161.90 feet; thence S3°30' W a distance of 161.90 feet; thence N89°49' W a distance of 161.90 feet to the Point of Beginning. Containing 0.60 acres more or less.

Dated: July 30, 2012.

Michael S. Black,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–19205 Filed 8–6–12; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAC09000, 16100000.DQ; CACA 051408]

Public Land Order No. 7795; Withdrawal of Public Lands, Clear Creek Serpentine Area of Critical Environmental Concern; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 28,727 acres, more or less, of public lands from location and entry under the United States mining laws for a period of 20 years, to minimize impacts to human health, safety, and the environment from hazardous emissions of airborne asbestos fibers within the Clear Creek Serpentine Area of Critical Environmental Concern. In addition, approximately 3,889 acres of non-Federal lands located inside of the boundary of the withdrawal area, if acquired by or returned to the United States, will also be included in the withdrawal. The withdrawal will have no effect on the non-Federal lands until such time as title passes to the United States.

DATES: *Effective Date:* August 7, 2012.

FOR FURTHER INFORMATION CONTACT: Christine Sloand, Realty Specialist, Bureau of Land Management (BLM), Hollister Field Office, 20 Hamilton Court, Hollister, California 95023, 831–630–5022 or via email at csloand@blm.gov. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 1–800–877–8339 to contact the above individual. The FIRS is available 24 hours per day, 7 days per week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM ordered the temporary closure of the public lands in the Clear Creek

Exhibit 2