Nos. 13-5106, 13-5109

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHEROKEE NATION OF INDIANS, et al.,

Plaintiffs - Appelles,

v.

S.M.R. JEWELL, et al.,

Defendants - Appellants,

and

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS,

Defendant-Intervenor - Appellant.

On Appeal from the U.S. District Court for the
Northern District of Oklahoma (Hon. Gregory K. Frizell)

REPLY OF THE FEDERAL DEFENDANTS-APPELLANTS IN SUPPORT OF ITS MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION AND SUMMARY

Pursuant to Fed. R. App. P. 27(a)(4), the federal defendants-appellants, S.M.R. Jewell, et al. (collectively, Interior) submit this reply to the response of plaintiffs-appellees Cherokee Nation, et al. (collectively, Cherokee Nation) to the motions for stay pending appeal of Interior and intervenor-defendant-appellant the United Keetoowah Band of Cherokee Indians (UKB). While we rely on our motion to refute most of the Cherokee Nation's arguments, we provide this reply to address the following important issues where the Nation failed to provide legal support for its arguments or to address critical arguments set forth in Interior's motion.

Specifically, the Nation first erroneously argues that the requirement of Fed. R. App. P. 8(a)(1) was not met even though the district court denied the UKB's oral motion for stay pending appeal. Second, the Nation provides no support for its contention that the 1936 Oklahoma Indian Welfare Act (OIWA) incorporated the definition of "Indian" in the 1934 Indian Reorganization Act (IRA), and fails to respond to Interior's demonstration that such incorporation would be unnecessary and contrary to common sense. Moreover, the Nation wholly fails to address Interior's argument that the court must defer to Interior's interpretation of its regulation governing trust acquisitions for tribal corporations at 25 C.F.R. § 151.2(b) because Interior showed, with ample legal support, that its interpretation is not plainly erroneous or inconsistent with the regulation. The Nation's argument that the Cherokee and the UKB cannot share the same reservation is similarly conclusory and fails to grapple with the unique circumstances here, where both tribes evolved from Cherokee Indians who have co-existed within the historic reservation boundaries

since they were established. Finally, the Nation argues that the purported invalidity of the UKB Corporation's sovereign immunity waiver makes it uncertain whether the Property, if taken into trust, can be taken back out. The Nation fails to address Interior's argument that because the Supreme Court has held that a trust acquisition may be challenged under the APA, and a tribe is not a necessary party to such a suit, a court may invalidate and nullify a trust acquisition without any participation of the tribe for whom Interior took the property in trust.

ARGUMENT

A. The requirements of Fed. R. App. P. 8(a)(1) are satisfied.

Contrary to the Cherokee Nation's suggestion otherwise (Resp. 8-13), the district court's denial of the motion of the United Keetoowah Band of Cherokee Indians (UKB) for stay pending appeal satisfies the requirement of Fed. R. App. P. 8(a)(1) to obtain a ruling of the district court before seeking a stay in this court. Nothing in Rule 8(a) imposes a requirement that Interior obtain a separate ruling from the district court on its motion for stay. That is particularly true here, where Interior's motion seeks relief identical to that sought by the UKB and is based on the substantial economic harm that will result to the UKB and the public in the absence of a stay.

B. Section 3 of the 1936 Oklahoma Indian Welfare Act (OIWA) does not import the definition of "Indian" from the 1934 Indian Reorganization Act (IRA).

Our motion demonstrated (pp. 14-16) that section 3 of the 1936 Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 503, provided Interior with the statutory authority to take the land into trust for the UKB Corporation by virtue of its authorization for tribal corporations established under the OIWA to enjoy any rights

secured to an organized tribe under the IRA. The Cherokee Nation contends (Resp. 14-15) that the OIWA does not authorize Interior to take land into trust for the UKB because section 3 of the OIWA incorporated the definition of "Indian" in the 1934 Indian Reorganization Act (IRA), 25 U.S.C. § 479, which includes only members of tribes "under federal jurisdiction" when the IRA was enacted. The Nation, however, provides no legal support for this contention and fails to respond to Interior's arguments demonstrating that the OIWA did not incorporate the 1934 limitation.

The Nation fails to provide any reason why Congress, which expressly provided that OIWA Section 3 applies to "any recognized tribe or band of Indians residing in Oklahoma," 25 U.S.C. § 503, would have imported the IRA's definition of "Indian tribe," which includes "any recognized tribe now under federal jurisdiction." 25 U.S.C. § 479. Importing that definition would redundantly define a tribe to be a "recognized" tribe, which is unnecessary, and would limit the rights and privileges authorized in the 1936 OIWA to tribes under federal jurisdiction in 1934, which is inexplicable. It is even more far-fetched to conclude that Congress, when it expressly recognized the UKB in 1946, intended to base the UKB's rights and privileges on the IRA's 1934 enactment date. The Cherokee Nation provides no legal or common sense rationale to support its reading of these statutes.

In addition, the Cherokee Nation failed to address the multiple statutes we cited that restored recognition to certain tribes and similarly conferred on them the rights and privileges under the IRA – statutes enacted in the 1970s and 1980s when Congress certainly had no intent to invoke the IRA's 1934 limitation. The Nation has provided no basis for concluding that Congress's incorporation of the rights under the

IRA into another statute imports the IRA's definition of "Indian" as well.

Finally, contrary to the Cherokee Nation's assertions (Response at 15-16), Interior has not – as noted in our motion (p. 15 n.2) – determined that the UKB was not "under federal jurisdiction" in 1934 when the IRA was enacted. Rather, given the complexities of making such determinations for a number of tribes that had applications for Interior to take land into trust pending when the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), Interior in such cases examined whether other statutory authority existed for such trust acquisitions. Interior undertook such an examination with respect to the UKB here and identified section 3 of the OIWA as a source of such authority, precluding the need to make a determination as to whether authority was also provided by the IRA.

C. The trust acquisition is authorized under 25 C.F.R. § 151.2(b).

Interior further showed (Mot. 16-17) that the regulatory requirement of 25 C.F.R. § 151.2(b) – that a trust acquisition for a corporation be "specifically" authorized by statute – may be satisfied by an "implicit" statutory authorization, and that section 3 of the OIWA provides such authorization here. Specifically, we demonstrated that (1) the court must defer to Interior's interpretation of its own regulation unless it is plainly erroneous or inconsistent with regulation; and (2) Interior's interpretation of §151.2(b) is *not* plainly erroneous or inconsistent with the regulation because "specific" authority may be "implicit" or explicit, as we amply demonstrated in our motion (p. 17, citing cases). The Cherokee Nation entirely fails to address either these points, which conclusively demonstrate the lawfulness of Interior's application of the regulation here.

Rather, the Cherokee Nation relies (Resp. 17) on Interior's response to comments on the trust acquisition regulations proposed in 1980, which is irrelevant to interpretation of the OIWA in any event. One commenter had asked Interior to add a regulation providing for taking land into trust for tribal corporations, noting that such statutory authority existed in 25 U.S.C. § 489. Interior agreed and added 25 C.F.R. § 151.2(b). The Nation's contention that, since Interior did not note that such statutory authority also existed under section 3 of the OIWA, Interior had concluded that it did not is unsupportable. Interior did not purport to be interpreting the OIWA, and the regulation itself recognizes that other statutory authority for such trust acquisitions may exist. *See* 25 C.F.R. § 151.2(b).

D. Interior reasonably determined that the Property is within the UKB's former reservation.

In our motion (pp. 9-14), we also established that the statutory and regulatory provisions governing the identification of a "former reservation" under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(a)(2)(A)(i), are ambiguous as to whether two tribes may share a former reservation under the unique circumstances here. We further demonstrated that Interior reasonably determined, in accordance with the principles of deference, that the Property is within the UKB's former reservation within the meaning of IGRA.[1/] The Cherokee Nation does not address the statutory language, and its argument (Resp. 17) that the regulation at 25 C.F.R. § 292.2

[1/] In P.L. 107-63 (Nov. 5, 2001), 115 Stat. 442-443, Congress reaffirmed that "[t]he authority to determine whether a specific area of land is a "reservation" for purposes of [IGRA] was delegated to the Secretary of the Interior on October 17, 1988.

unambiguously provides that the Cherokee Nation alone can claim the area within the historic reservation boundaries as a former reservation fails. That argument is not supported by the regulation's text, which focuses on identifying former reservation boundaries based on federal treaties or orders pertaining to "an Oklahoma tribe," in order to limit Indian gaming to those lands subject to certain exceptions. Neither the regulation's language or purpose bars Interior from exercising its discretion to determine whether a former reservation may be shared where, as here, Congress recognized one tribe that developed from another and the members of both have co-existed within the boundaries of the former reservation since the time it was established. *See* H. Rep. No. 447 (Apr. 25, 1945) (describing history of Keetoowahs' development within the Cherokee tribe).

The Cherokee Nation next takes Interior to task for failing to adequately explain its departure from purported prior determinations that the Nation has exclusive jurisdiction within the historic reservation boundaries. But the Nation then argues that this Court cannot consider most of Interior's explanation on the theory that Interior did not provide that explanation to the district court. The explanations the Nation seeks to exclude are not new legal argument by counsel but, as set forth in our motion (p. 13), merely summarize Interior's analysis and explanations expressly incorporated into Interior's 2012 decision. Interior's entire rationale set forth and incorporated into its 2012 decision is properly before this Court.

E. No sovereign immunity waiver is necessary to take land out of trust pursuant to a court's order in an APA challenge to Interior's decision to take the land in trust.

Interior established in its motion (pp. 18-19) that, under *Match-E-Be-Nash-She-*

Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012), if a court rules that Interior's decision to take land into trust violates the Administrative Procedure Act (APA), that decision is rendered null – so that, if the land was taken into trust prior to the district court's decision, the trust acquisition is rendered void *ab initio*. As *Patchak* itself involved a challenge to an already completed trust acquisition, *Patchak*'s holding that a trust acquisition may be challenged under the APA necessarily subjects that acquisition to the federal courts' powers under the APA.

The Cherokee Nation does not address or dispute this analysis. It argues only that there are deficiencies in the UKB Corporation's waiver of sovereign immunity that might allow it to object to such transfer. But as we demonstrated in our motion (p. 18), a tribe that Interior decides to take land into trust for is not a necessary or indispensable party to an APA challenge to that decision. Thus, the sovereign immunity waiver is irrelevant, and the Cherokee Nation's argument fails.

CONCLUSION

For the reasons set forth in Interior's motion and this reply, this Court should grant a stay of the preliminary injunction pending appeal.

Respectfully submitted,

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August 26, 2013
90-1-18-13579

CERTIFICATE OF SERVICE
AND DIGITAL SUBMISSIONS

I hereby certify that on August 26, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate ECF system and that all participants in this case were served through that system.

I further certify that all required privacy redactions have been made and, with the exception of those redactions, the digital submission of this brief is an exact copy of the written document filed with the Clerk, and that the digital submission has been scanned for viruses with Microsoft Forefront Client Security, client version 1.157.398.0, created on August 25, 2013, and, according to the program, the document is free of viruses.

s/ Katherine J. Barton