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

THE CHICKASAW NATION and THE CHOCTAW NATION,	)	
Plaintiffs,	)	
v.	)	No.: 05-01524-W
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	Senior Judge Lee West
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON SECTION 16 OF THE 1906 ACT

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rules 7.1 and 56.1 of the Local Civil Rules, Plaintiffs, the Chickasaw Nation and the Choctaw Nation (the "Nations" or "Plaintiffs"), respectfully move the Court to enter an order against Defendants, United States of America; the Department of the Interior (Interior); S.M.R. Jewell, Secretary of the Interior; the Bureau of Indian Affairs; Kevin K. Washburn, Assistant Secretary of Indian Affairs; the Office of the Special Trustee for American Indians; Vincent G. Logan, Special Trustee for American Indians; the Office of Trust Fund Management; Sim Wing Gohard, Director of the Office of Trust Fund Management; the Bureau of Land Management; Neil Kornze, Director of the Bureau of Land Management; the Bureau of Ocean Energy Management; Abigail Ross Hopper, Director of the Bureau of Ocean Energy Management; the Bureau of Safety and Environmental Enforcement; Brian Salerno, Director of the Bureau of Safety and Environmental Enforcement;[1] the Department of Treasury; and Jacob Lew, Secretary of the Treasury ("Defendants" or the "United States"), holding as a matter of law that Section 16 of the 1906 Act, 34 Stat. 137 ("Section 16"), prohibited the sale of the Nations' unallotted lands "principally valuable for…timber purposes".[2]

[1] "On October 1, 2011, the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE), formerly the Minerals Management Service (MMS), was replaced by the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) as part of a major reorganization." *See* http://www.boemre.gov (last visited Jan. 20, 2015).

[2] Plaintiffs anticipate there will be additional issues appropriate for summary judgment, requiring further motions. Plaintiffs are aware LCvR56.1 requires leave of court to file additional summary judgment motions. Plaintiffs submit the determination of what statutory sections will be addressed in this motion is appropriate for summary judgment, requiring further motions. Plaintiffs are aware LCvR56.1 requires leave of court to file

Plaintiffs seek judgment as a matter of law on a single legal issue: did Section 16 of the 1906 Act, 34 Stat. 137, prohibit the United States from selling the Nations' lands principally valued for timber purposes. This Court has already held that the answer to this question is yes. Accordingly, the purposes of the Nations' Motion is simply to request the Court to reduce it prior ruling to judgment as a matter of law on this single issue.

I. BACKGROUND

At the heart of this case is the "well-established" "unique" and "historical" trust relationship between the United States and Indian Nations. *See* Secretary Jewell's August 20, 2014 Order (the "Secretarial Order") (Doc. No. 232-1). As Secretary Jewell affirmed in her Secretarial Order, this "trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of the tribal and individual Indian lands, assets, resources and treaty and similarly recognized rights." *Id.* at § 3.a. Since the signing of the Treaty of Hopewell in 1786, "the United States has held in trust for the[] Nations vast resources including, inter alia, land, minerals, and monetary funds."[3] April 16, 2014 Order at 1 (Doc. No. 176 "April 16 Order").[4] As this Court

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additional summary judgment motions. Plaintiffs submit the determination of what statutory restriction Section 16 of the 1906 Act, 34 Stat. 137 (the "1906 Act) imposes on Defendants is a necessary step to the filing of subsequent motions and the narrowing of issues for trial. Accordingly, Plaintiffs respectfully request leave of the Court to file additional summary judgment motions on or before the March 30, 2015, deadline for filing dispositive motions. *See* April 8, 2014 Scheduling Order (Doc. No. 180).

[3] Congress imposed specific obligations on the United States regarding the management and disposition of much of the Nations' resources, providing the United States pervasive control over these resources. *See, e.g.*, 1906 Act, 34 Stat. 137, §§11 (revenues), 12-17 (town lots, coal and asphalt lands, reserved lands, tribal buildings and appurtenant lands,

recognized, "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." *Id*. at 50 n.80 (quoting *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*")). Among the vast resources held in trust are the Nations' land principally valued for timber purposes (hereinafter also referred to as "timber lands")—lands Congress ***expressly*** mandated the United States retain in trust on behalf of the Nations. Indeed, this Court has already recognized that, save a specific and small amount of land not at issue here, "Congress has *never* authorized the sale of the Nations' timber lands." *Id*. at 22 n.32.[5] This is the law of the case. *See Loeffelbein v. Rare Medium Group, Inc.*, Case No. 02-2435-CM, 2004 U.S. Dist. LEXIS 7911, at *6 (D. Kan. Feb. 26, 2004) ("when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").

The Nations initiated this litigation to demand a complete and meaningful accounting of the Nations' assets held in trust by the United States, which the United States argues it has no duty to provide or, alternatively, has already provided. The scope of the United States' duties and whether it complied with any such duties, including any associated duties to preserve the Nations' trust assets, will be tried to the Court in July. However, prior to the Court's determination of those issues, and consistent with the April 16, 2014 Order, Plaintiffs request summary judgment on a clear and plain issue of law—

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unallotted residue lands), 18 (authorizing the Department of the Interior to file suit in name of the tribe for the collections of revenues or recovery of lands).

[4] Unless otherwise noted, all internal quotation marks and citations have been omitted.

[5] Unless otherwise noted, all emphasis in this document has been added.

whether the United States lacked authority to sell the Nations' unallotted lands principally valuable for timber purposes during the period of the United States' pervasive federal control of the Nations and their property.

The United States sold approximately three million acres of the Nations' unallotted lands. *See* Defendants' Memorandum of Points and Authorities in Support of Their Motion for Dismissal or, in the Alternative, for Summary Judgment on All Claims in Phase 1 of Case at 3 (July 23, 2010) (Doc. No. 103-1, "Defendants' Motion"); April 16, 2014 Order at 27. Thus, a ruling on whether Defendants' were allowed to sell the Nations' timber lands under Section 16 of the 1906 Act, is integral to this litigation. Significantly, this is not the first time Section 16 has been at issue.

Defendants' first invoked Section 16 in Defendants' Motion—incorrectly claiming Section 16 allowed the sale of all of the Nations' unallotted lands. *Id.* at 3. As Plaintiffs' clarified in their Response in Opposition (Sept. 14, 2010) (Doc. No. 119), Defendants' Motion omitted key language from Section 16, which make clear the Nations' valuable timber lands expressly could not be sold by the United States. *Id.* at 16. In Defendants' Reply Brief in Support (Oct. 22, 2010) (Doc. No. 124, the "Reply"), Defendants reasserted their position that "the 1906 Act permitted the sale of [Plaintiffs' timber lands]." *Id*. at 17 n.15. The Court did not agree, recognizing that, save a specific and small amount of land not at issue here, "Congress has *never* authorized the sale of the Nations' timber lands." April 16 Order at 22 n.32.

The issue of whether Section 16 authorized the sale of the Nations' timber lands is purely a legal question involving only the interpretation of the statute's language.

Defendants neither plead nor argue that Section 16 is ambiguous. Further, there are no material facts at issue even relevant to a ruling on the single issue of the correct statutory interpretation of Section 16. Accordingly, Plaintiffs do not include a Statement of Undisputed Material Facts in this Motion. Therefore, the Nations request a partial summary judgment ruling on that single issue.

The plain language of Section 16 expressly prohibited the Secretary of the Interior from selling the Nations' unallotted lands principally valuable for timber purposes. Section 16 reads in relevant part:

> The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw Nations, **which is *not* principally valuable for mining, agricultural, or *timber purposes***, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

Neither the Nations nor Defendants claim this language is ambiguous. Yet, the United States ignored this clear Congressional mandate to retain the Nations' valuable timber lands and violated its highest duties by selling over 1.3 million acres of those valuable timber lands.[6]

[6] "Defendants admit a significant portion of Plaintiffs' lands that contained valuable timber resources were sold or transferred out of trust prior to 1937." Defendants' Answer to Third Amended Complaint (Doc. No. 99) at 19; *see also* Defendant's exhibit entitled Disposal of the Chickasaw and Choctaw Nations' Timberlands as Set Forth in Annual Reports of the Commissioner to the Five Civilized Tribes (Doc No. 148-1) (reporting a total of 1,358,702.4 acres of timber lands sold); April 16, 2014 Order at 27 ("… DOI, after allotting the Nations' tribal lands to their members sold over three million acres of the Nations' remaining lands, including over one million acres of the Nations' timber lands….)"

As Secretary Jewell recognized in her Secretarial Order:

> …certain obligations are so fundamental to the role of a trustee that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee. 'This is so because elementary trust law, after all, confirms the commonsense assumption that ***a fiduciary actually administering trust property may not allow it to fall into ruin on his watch***. ***One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets***.'

Id. at § 3.a. (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)). Further, as the Department of the Interior's Trust Principles state, Defendants had an inalienable duty to prevent the waste and diminishment of the Nations' land:

> [i]t is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty. The proper discharge of the Secretary's trust responsibilities requires that persons who manage Indian trust assets…***Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste and depletion***…

Department of the Interior, Trust Principles, attached hereto as Exhibit 1.

Even assuming *arguendo* that Section 16 is ambiguous—which it is not—the legislative history of Section 16 confirms Congress' intent to prohibit the United States from selling the Nations' unallotted lands principally valuable for timber purposes.[7] And, under the Indian canons of construction, the statute must be broadly construed so as to benefit the Nations' interest at stake—valuable timber lands that were wrongfully sold.

[7] While Defendants do not allege Section 16 is ambiguous, Defendants recently admitted they do not know (and have never known) what the language "principally valuable for timber purposes" means. Excerpts from Deposition of Michele F. Singer, Principle Deputy Special Trustee for American Indians, February 13, 2015 ("Singer Deposition") at 132:10-134:3; 178:24-179:19; 180:21-181:10; 187:5-17, attached hereto as Exhibit 2. As such, Defendants admit they have never performed any analysis or survey of the Nations' unallotted lands to determine which lands were principally valuable for timber and therefore, could or could not be sold under Section 16. *See id.* at 180:6-19.

In sum, the plain language of Section 16, its legislative history, the Indian canons of construction and this Court's April 16, 2014 Order all support the Nations' claim that Section 16 prohibited Defendants from selling the Nations' unallotted lands principally valuable for timber purposes. As such, Plaintiffs' Motion should be granted.

II. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

Summary judgment is proper if the movant shows "there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Wing v. Gillis*, 525 Fed. Appx. 795, 798 (10th Cir. 2013). "Summary judgment procedure is properly regarded…as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1). Summary judgment "isolate[s] and dispose[s] of factually unsupported claims or defenses." *Id*. at 323-24.

Rule 56 does not require disposition of the full matter in controversy, but instead allows a party to move for summary judgment on "each claim or defense"—or "part of each claim or defense." FED. R. CIV. P. 56(a); *see also* Notes of Advisory Committee on 2010 amendments, subdivision (a) ("…summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense."); 11 MOORE'S FEDERAL PRACTICE, § 56.122 (Matthew Bender 3d. ed. 2010). Thus, a party may move for summary judgment on certain elements of a claim—a motion for "partial summary judgment." *Gray Ins. Co. v. Heggy*, Case No. CIV-11-733-C, 2012

U.S. Dist. LEXIS 133976, at *6 n.1 (W.D. Okla. Sept. 19, 2012).

Moreover, "[s]tatutory interpretation is a matter of law appropriate for resolution on summary judgment." *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011); s*ee also Oklahoma ex rel. Dept. of Human Servs. v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983) ("the questions of statutory construction and legislative history raised herein present legal questions properly resolved by summary judgment."); *Wold v. Hunt Oil Co.*, 52 F. Supp. 2d 1330, 1331, 1337 (D. Wyo. 1999); *Arctic Catering, Inc. on behalf of MacMillan v. Thornburgh*, 769 F. Supp. 1167, 1168 (D. Colo. 1991). Here, the issue to be determined—whether Section 16 prohibited Defendants from selling the Nations' unallotted lands principally valuable for timber purposes—is strictly a question of law for the Court to decide. Because the sole issue before the Court is purely a question of statutory interpretation, there are no relevant material facts at issue and Plaintiffs are entitled to judgment as a matter of law.

B. The Plain Language of Section 16 Did Not Authorize the Department of the Interior to Sell the Nations' Unallotted Lands Principally Valuable for Timber Purposes

The plain language of Section 16 expressly prohibited Defendants from selling the Nations' unallotted timber lands. "The starting point in any case involving statutory construction is the language of the statute itself." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir. 1997). "When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances." *Id.*; *see also Woods v. Std. Ins. Co.*, 771 F.3d 1257, 1265 (10th Cir. 2014). "[T]he court 'must give effect to the unambiguously expressed intent of Congress.'" *NCUA Bd. v.*

Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1225 (10th Cir. 2014). "Where the language of the statute is plain, it is improper for this Court to consult legislative history in determining congressional intent." *N.M. Cattle Growers Ass'n v. United States Fish & Wildlife Serv.*, 248 F.3d 1277, 1282 (10th Cir. 2001). Instead, courts "assume that Congress's intent is expressed correctly in the ordinary meaning of the words it employs…." *Id.* Neither the Nations nor Defendants claim Section 16 is ambiguous.

To the contrary, the express language of Section 16 imposed a duty on Defendants to *retain* the Nations' unallotted timber lands. Again, Section 16 states, in relevant part,

> The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, ***which is not principally valuable for mining, agricultural, or timber purposes***, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances:

1906 Act at § 16. The plain language of the statute makes clear the Secretary of Interior *only* had the authority to sell the Nations' unallotted land that was *not* principally valuable for mining or timber purposes. Section 16 mandated the Secretary retain the Nations' unallotted land that was principally valuable for mining or timber purposes.

Moreover, Section 27 of the 1906 Act required the Nations' lands be "held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs." 1906 Act at § 27. As such, when read together, Sections 16 and 27 imposed a fiduciary duty on the United States to retain the Nations' timber lands in trust for the benefit of the Nations. Indeed, as Secretary Jewell affirmed, the

United States' trust responsibilities to the Nations include "fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and **to take affirmative action to preserve trust property**." *See* Secretarial Order at § 3.d. (quoting Memorandum from former Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman (Nov. 21, 1978)).[8]

Further, a comparison of Sections 16 and 7 of the 1906 Act supports the Nations' interpretation of the plain meaning of Section 16. Section 7 expressly *authorized* the Secretary to sell a small number of specific tracts of the Nations' timber lands reserved from allotment.[9] Specifically, Section 7 stated, in relevant part:

> That the Secretary of the Interior shall, by written order, within ninety days from the passage of this Act, segregate and reserve from allotment sections one, two, three, four, five, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, the east half of section sixteen, and the northeast quarter of section six, in township nine south, range twenty-six east, and sections five, six, seven, eight, seventeen, eighteen, and the west half of section sixteen, in township nine south, range twenty-six east, Choctaw Nation, Indian territory….The Secretary of the Interior shall also cause to be estimated and appraised the standing pine timber on all of said land, and the land segregated shall not be allotted…Said segregated land and the pine timber thereon shall be sold and disposed of at public auction, or by sealed bids for cash, under the direction of the Secretary of the Interior

1906 Act at § 7. This Court already ruled that Section 7 was the *only* provision authorizing the sale of the Nations' timber lands, and that Section 7 only allowed sales of

[8] In breach of their duties, Defendants admit they have never defined the phrase "principally valuable for timber purposes" in Section 16. *See* Singer Deposition at 132:10-133:3; 178:8-179:19; 180:21-181:10; 187:5-17. Defendants also admit they have no knowledge of whether they ever analyzed the inherent future value of the Nations' timber lands, timber rights or other surface or subsurface rights. *Id.* at 111:8-19; 122:13-123:3; 125:1-126:5; 133:5-14; 156:2-158:25.

[9] The specifically enumerated tracts of land sold under Section 7 are not at issue in this litigation.

the specifically enumerated tracts as set out above. April 16, 2014 Order at 22 n.32. This ruling is consistent with the *Department of Interior's admitted* position that "the [government's] timber sale authority is confined to the lands specifically described in section 7 of the act of 1906." *See* Nathan R. Margold Memorandum to the Assistant Commissioner of Indian Affairs (May 19, 1936), attached hereto as Exhibit 3.

And the Court's ruling is consistent with the admitted position of the Office of Indian Affairs. Indeed, on June 23, 1936, the Assistant Commissioner for the Department of the Interior Office of Indian Affairs wrote the following in response to an offer to buy part of the Nations' timber lands:

> This land, as in the case of the land in McCurtain County which the A&E Lumber Company desired to purchase, is not included in the lands described in Section 7 of the Act of April 26, 2906 (34 Stat., 137) and therefore ***there is no authority of law which will permit the sale of the timber***.

G03DIS0031650 attached hereto as Exhibit 4. The Assistant Commissioner further stated that in order to sell any timber lands, the Department of the Interior must "secure legislation next year to permit the sale of timber on the Choctaw and Chickasaw tribal lands not described in Section 7 of the Act." *Id*.[10]

[10] It is startling, to say the least, that Defendants would take the position that Section 16 allowed the sale of the Nations' timber lands in the face of the clear language of the Act and this very clear expression of the Act's meaning by the Department of the Interior. But, to ignore and deny the facts and instead choose to engage in frivolous and acrimonious litigation warfare against Indian Nations is part of the Department of Justice's playbook. *See, e.g.,* Department of the Interior, Report of the Commission on Indian Trust Administration and Reform, Dec. 10, 2013 at 23, *available at* http://www.doi.gov/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf (…the Justice Department…has taken what can only be characterized as a legal position completely at

As the Tenth Circuit has held, "we construe statutes 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Mallo v. IRS (In re Mallo)*, Case No. 13-1464, 2014 U.S. App. LEXIS 24560, at *5-6 (10th Cir. 2014) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Here, if Section 16 did not prohibit the sale of the Nations' unallotted timber lands, then Section 7—which expressly authorized only the sale of specific tracts of timber land—would be rendered entirely superfluous.[11] This cannot have been Congress' intent.

Moreover, "it is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1177, 1197 (D. Colo. 2006) (quoting *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 452 (2002)); *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000). Here, Congress chose to include the narrow language of Section 7 authorizing the Secretary to sell certain specific tracts of the Nations' unallotted timber lands. As such, it must be presumed that Congress acted intentionally and purposely in choosing *not* to include any similar grant of authority in Section 16. Had Congress intended to authorize the Secretary to sell the

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odds with its fiduciary obligations to individual Indians and tribes."); *see also id.* at 26-27 (discussing the inherent conflict of interest when the United States litigates cases as trustee for Indian tribes and defends lawsuits brought by Indian tribes against the federal government noting, "[t]here is considerable evidence that the Indians are the losers when such situations arise.").

[11] Congress' intent is even clearer in light of the fact that Congress only added language to Section 7 authorizing the sale of those specific tracts of timber land *after* it had amended Section 16 to prohibit the sale of timber lands. *See* discussion in Section II.C.2, *infra*.

Nations' unallotted timber lands pursuant to Section 16, it would have expressly done so.

To date, Defendants have attempted to justify their unauthorized sale of over 1.3 million acres of the Nations' unallotted timber lands pursuant to Section 16 by offering three strained, incorrect readings of the statute. Because Defendants have raised these arguments in prior filings and discovery responses, Plaintiffs will address each in turn.

Defendants initially focus on the last sentence of Section 16, which states "agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person." 1906 Act at § 16; Reply at 17 n.15, (Doc. No. 124). Defendants claim that because Section 16 provided the Secretary authorization to sell any of the Nations' unallotted lands "not principally valuable for mining, **agricultural**, or timber purposes," and then provided that "agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person," Congress intended also to authorize the sale of timber and mining lands. *See id.* Defendants are wrong.

Defendants' assertion conflicts with the plain language of the statute and the recognized principles of statutory construction articulated above—*i.e.*, "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Concepcion Sablan*, 555 F. Supp. 2d at 1197; *Joseph*, 223 F.3d at 1161. Thus, while Congress was clear and explicit in authorizing the sale of agricultural lands, it was equally clear and explicit in *not* authorizing the sale of mining or timber lands. Put another way, Congress intentionally included "timber" and "mining" lands in the fourth sentence of Section 16; if Congress intended to include those

lands in the last sentence and authorize their sale, as it did for agricultural lands, it would have done so. But it did not. To the contrary, Congress' only reference in Section 16 to timber and mining lands was the provision expressly prohibiting their sale.

Defendants' false assertion also conflicts with the well-settled principle of statutory construction that "we are to give meaning to every word of a statute where possible." *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1165 (10th Cir. 1999) (en banc). Defendants' interpretation of Section 16 requires the Court to read out of the statute the words "which is *not* principally valuable for mining … or timber purposes." 1906 Act at § 16. The final clause merely authorized a limited sale of agricultural lands. However, that Congress authorized the sale of agricultural lands in no way modifies Congress' express prohibition of the sale of *timber* lands. That express prohibition should not be ignored.[12] Rather, the express words prohibiting the sale of the Nations' unallotted timber lands must be given meaning.

Defendants' second proffered interpretation of Section 16 argues that the title of the 1906 Act: "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" evidences Defendants' authority to sell the Nations' unallotted timber lands. *See, e.g.*, Defendants' Motion at 31 n.50. This Court previously rejected this argument:

> To the extent, if any, the title of the 1906 [Act]—"An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," 34 Stat. 137, arguably demands a

[12] The significance of these words is even clearer given that these words were purposely added to limit the provision as originally proposed, which did allow the Secretary to sell *all* of the Nations' unallotted lands. *See* discussion in Section II.C.2, *infra*.

> different interpretation, the Court is mindful "that the title of a statute ... cannot limit the plain meaning of the text." *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad*, 331 U.S. 519, 528-29 (1947)(citations omitted). That is to say, titles "are but tools available for the resolution of doubt. But they cannot undo or limit that which the text makes plain." *Id*.

April 16, 2014 Order at 21 n.29. The fact remains that Section 16 expressly provided: "[t]he Secretary of the Interior is hereby authorized to sell…any of the unallotted land in the Choctaw and Chickasaw nations, which is **not principally valuable for** mining, agricultural, or **timber purposes**." 1906 Act at § 16. The title of the 1906 Act cannot "undo or limit" the plain meaning of Section 16. *See* April 16, 2014 Order at 21, n.29. Accordingly, Defendants' second argument also lacks merit.

Defendants' third "interpretation" of Section 16 argues that the first phrase of Section 16, "when allotments as provided by this and other Acts of Congress have been made…lands in each of said nations not reserved or otherwise disposed of shall be sold…" provided Defendants the authority to sell *all* of the Nations' unallotted lands. *See, e.g.*, Defendants' Response to Plaintiffs' First Set of Interrogatories (Doc. No. 224-1) at 53. Significantly, the phrase relied on by Defendants refers to the Nations' lands "*not reserved or otherwise disposed of.*" 1906 Act at § 16. Yet, the Nations' timber lands *were* expressly reserved by the language prohibiting sales of "lands...principally valuable for…timber purposes." Thus, Defendants' argument that the first phrase of Section allowed the sale of timber lands is illogical. In addition, Defendants' argument would require, once again, that the Court ignore the express language of Section 16 and the recognized canon of statutory construction that "the specific governs the general."

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, __ U.S. __, 132 S. Ct. 2065, 2071 (2012). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* "To eliminate the contradiction, the specific provision is construed as an exception to the general one." *Id.* Here, the specific prohibition on the sale of the Nations' unallotted lands principally valuable for timber controls over the general permission that the Secretary may sell "the residue…not reserved or otherwise disposed of." Thus, Defendants' third "interpretation" also is wrong.

Additionally, the fact that even those provisions authorizing the sale of the Nations' unallotted *non*-timber lands were heavily qualified by restrictions, further weakens Defendants' flawed argument that Section 16 allowed the Secretary broad authority to sell all the Nations' unallotted timber lands. For example: (1) the amount of generic unallotted residual land any one person could buy was limited to 640 acres; and (2) land principally valuable for agricultural purposes was limited to 160 acre tracts; and (3) additional restrictions were placed on transfers to allottees. *See* 1906 Act § 16. Defendants' interpretation of Section 16 would render all of these express restrictions meaningless, thus violating the general/specific and anti-superfluity canons.

Put simply, Congress' intent to prohibit the sale of the Nations' unallotted timber lands is evident from the plain language of the statute. As neither party claims the statute is ambiguous, the plain meaning of the statute controls. Neither the title of the 1906 Act, the first phrase of Section 16, nor the phrase authorizing the Secretary to sell **agricultural** land trumps, limits or renders meaningless the express and more specific

provision that expressly prohibited the Secretary from selling unallotted lands "***principally valuable for…timber purposes***." *Id.* Plaintiffs' Motion should be granted.

C. Even if Section 16 were Ambiguous, the Indian Canons of Construction and Legislative History Support the Nations' Interpretation

Even assuming *arguendo* that Section 16 is ambiguous—which it is not—the Indian canons of construction and the legislative history of the 1906 Act confirm that the Nations' interpretation of the statute is correct.

1. Under the Indian canons of construction, Section 16 must be construed in favor of the Nations

The Indian canons of construction mandate that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002). The Indian canons further provide for a "broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited." *Pueblo of San Juan*, 276 F.3d at 1194 (quoting Felix Cohen, *Handbook of Federal Indian Law* 225 (1982)). Finally the Indian canons provide that, "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." *Cohen's Handbook of Federal Indian Law* § 2.02 (Nell Jessup Newton ed., 2012); *see e.g. Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985). These canons of statutory construction are "'rooted in the unique trust relationship between the United States and the Indians.'" *Ramah Navajo Chapter*, 112 F.3d at 1461 (quoting *Oneida*

County, 470 U.S. 226 at 247). In other words, the Indian canons derive from the recognition that the United States—which dictated most of the terms of the Indian treaties and all of the provisions of the Indians statutes—has typically possessed a great advantage and position of power over the Nations. *See, e.g.,* Nell Jessup Newton, *et al.*, ed., *Cohen's Handbook of Federal Indian Law* § 2.02; Hardy Myers *et al.*, ed., *American Indian Law Deskbook* 17-18 (2004); Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constituionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 400-06, 408-11 (1993).

Moreover, "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter*, 112 F.3d at 1462; *see also Cal. Valley Miwok Tribe v. United States,* 515 F.3d 1262, 1266 n.7 (D.C. Cir. 2008) (recognizing that full *Chevron* deference is not typically applied to an agency interpretation of an ambiguous statutory provision involving Indian affairs). "'The result, then, is that if the [Act] can reasonably be construed as the Tribe would have it construed it *must* be construed that way.'" *Ramah Navajo Chapter*, 112 F.3d at 1462 (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1996)) (emphasis in original).

Section 16's plain language clearly prohibits the sale of the Nations' unallotted lands principally valuable for timber purposes. And the Indian canons of contstruction requires that this Act be construed favorably for the Nations. Moreover, even if the statute were ambiguous, which it is not, the Indian canons of construction require that Section 16 be broadly construed to preserve the Nations' rights and interests and

narrowly construed when the Nations' rights are to be abrogated or limited. Clearly, the Nations' plain language interpretation of Section 16 as prohibiting the sale of the Nations' unallotted timber lands is consistent with, and indeed required by, the foregoing Indian canons of construction. Conversely, the strained interpretations of Section 16 offered by Defendants to date, which drastically limit the Nations' rights and interests, are in direct conflict with this same canons. And, as discussed in Section II.C.2 *supra*, the Nations' interpretation of Section 16 is not only reasonable, but also comports with its legislative history. As such, assuming *arguendo* that Section 16 was ambiguous, Section 16 *must* be construed according to the Nations' interpretation under the Indian canons.

2. The legislative history of Sections 7 and 16 confirms Congress' intent that the United States retain the Nations' unallotted lands principally valuable for timber purposes

The relevant legislative history also supports the Nations' interpretation of Section 16. Although Section 16 is not ambiguous, consulting the legislative history confirms the Nations' plain reading of the statute. "When a statute's plain meaning is ambiguous, courts may seek guidance from legislative intent and statutory purpose to determine congressional intent." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702, 723 (10th Cir. 2006); *see also United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) (quoting *United States v. LaHue*, 170 F.3d 1026, 1028 (10th Cir. 1999)) ("If the statute's plain language is ambiguous as to Congressional intent, 'we look to the legislative history and the underlying public policy of the statute.'"); *Blackfeet Tribe,* 471 U.S. at 766-67 (construing statute liberally in favor of Indians, the Court examined both text and legislative history to ascertain congressional

intent); *Ramah Navajo Chapter*, 112 F.3d at 1462 (same).

The legislative history of Section 16 clearly demonstrates: (1) Congress did *not* intend to vest the Secretary with unfettered authority to sell all of the Nations' unallotted lands; and (2) Congress specifically intended to prohibit the sale of the Nations' valuable timber lands. Indeed, Defendants' argument that the first phrase of Section 16 allowed the Secretary broad authority to sell *all* of the Nations' unallotted lands without limitation is directly contradicted by the congressional record. The statutory amendments to Sections 7 and 16 and the congressional debate surrounding their enactment reveal there was not a scintilla of congressional support for granting the Secretary unfettered discretion to sell the Nations' timber lands. Rather, these legislative materials affirmatively establish Congress' intent to protect the Nations' timber lands.

The evolution of the amendments to Section 16 prior to its enactment demonstrates that Congress intentionally limited the Secretary's authority to sell the Nations' unallotted lands. As originally proposed by the Executive Branch on December 7, 1905, Section 16 would have required the Secretary to sell *all* of the unalloted lands without limitation. *See* H.R. Doc. No. 59-74 at 8 (Doc. No. 119-17) ("…the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him…"). Congress later **rejected** this proposed language. On January 11, 1906, the Committee on Indian Affairs first proposed that Section 16 prohibit the sale of land "valuable for agriculture, mineral or timber purposes." *See* H.R. Rep. No. 59-183 at 3 (Doc. No. 119-18). As this Court noted, the Committee on Indian Affairs recognized "that 'the timber

on certain sections in the . . . Choctaw Nation[] . . . [had been] reported as being very valuable,' and that it was 'the judgment of [DOI] . . . and of the Dawes Commission that it would be in the best interests of the [Choctaw Nation] to ascertain its value before it [was] . . . placed on the market.'" April 16, 2014 Order at 22 (quoting H.R. Report 59-183 at 2). The specific language proposed by the Committee stated, in relevant part,

> Provided, That the Secretary of the Interior be permitted to sell **to any association or person one hundred thousand acres of land not valuable for agriculture, mineral or timber purpose**, at not less than its appraised value, under such rules and regulations as he may prescribe, to be used for a game preserve only.

H.R. Rep. No. 59-183 at 3. Significantly, the language proposed by the Committee strictly limited the Secretary's ability to sell only the Nations' land "not valuable for agriculture, mineral or timber purposes," a limitation that did not appear in the originally proposed statute. Representative Charles Curtis stated the Secretary sought such authorization so that large-acreage sales of "**valueless**" unallotted land could proceed.[13] 40 Cong. Rec. 1244 (1906).[14] Again, Congress objected to granting such authority. For example Representative Stephens stated,

> There are 6,000,000 acres of this land that is to be sold as surplus land. This bill provides that they shall be sold in unlimited quantities, giving the Secretary of the Interior if he sees proper the right to sell it to one man or one corporation. I offered an amendment and I shall offer it again, that no

[13] Notably, the language that would have allowed sales of 100,000 acre tracts of the Nations' lands would have been strictly limited even under the proposed amendment, *i.e.*, (1) the land had to be "valueless" as to natural resources, (2) the land transfer was for a specified use—a "game preserve;" and (3) direct authority from Congress for the transaction was required. *See id.* at 3. Nonetheless, even this restricted authority did not survive congressional debate and was never granted to the Secretary.

[14] All references to the Congressional Record in this document are attached as Exhibit 27 to Doc. No. 119.

> more than 160 acres shall be sold to any one person or individual. There is rough land in that country and after it is ascertained that it will not sell in blocks of 160 acres we can open the doors and sell it in larger quantities. A great deal of this land is valuable land worth from $10 to $50 per acre, and why should we permit corporations that have been existing there for years organized for that very purpose to beat these very Indians which have obtained some kind of right from the Indians and if you pass this bill you will give these men the benefits for which they have plotted and schemed for years.

Id. at 1245. The Secretary's authority to sell up to 100,000 "valueless" acres to an individual, was limited even further to only **640 acres** in the version of Section 16 ultimately enacted. The limitation on sales of tracts of "valueless" lands to 640 acres directly undermines Defendants' claim that Section 16 provided the Secretary unfettered authority to sell tracts of the Nations' lands "***valuable*** for timber purposes" in tracts in excess of 640 acres. It is clear from the legislative record that Congress never intended the Secretary to have the authority to sell such vast tracts of even "valueless" land, let alone valuable timber lands. In fact, Congress never proposed language that authorized the sale of the valuable timber lands under *any* conditions.

Congressional debate surrounding Section 16 further confirms that land valuable for mining or timber purposes was *not* within the scope of land intended to be sold under Section 16. *See, e.g.,* 40 Cong. Rec. at 1245, 1258, 3063-4, 3121, 3204 and 5505. For example, during the debate leading to the House adopting a limitation on the Secretary's authority to sell the Nations' valuable lands, Representative Curtis noted, "there were millions of acres of land in that country which were valueless or are supposed at this time to be valueless for *agricultural, grazing, timber or mineral purposes*." *Id.* at 1255 (1906). This statement clearly demonstrates Congress' intent to treat the Nations'

"valueless" unalloted lands differently from the Nations *valuable* natural resources. During this same exchange, Representative Waldo remarked,

> It is the most remarkable thing that the United States should now propose to anybody who wants to buy 100,000 acres of land in that country that the Secretary of Interior shall say is *not agricultural, mineral or timber land* that he can buy it provided they can agree on a price.

Id. at 1258 (1906). Representative Waldo's statement further demonstrates Congress' intent throughout the debate to limit the Secretary's authority to sell the Nations' unallotted lands containing valuable timber.

When debate on this issue reached the Senate, many senators expressed the same desire to restrict the Secretary's power to sell the Nations' unallotted lands. For example, Senator Bailey stated, "[e]ven if I could consent to confer such power upon anybody, the present Secretary of the Interior is the last man of my acquaintance upon whom I would consent to confer it." *Id*. at 3121 (1906). The Senate debate revealed a strong desire to *prevent* the Nations' timber assets from being sold by the Secretary of the Interior, in part due to the recognition of the United States' trust obligations to retain the lands for the benefit the Nations. For example, Senator Teller, former Secretary of Interior and key participant in the debate, stated:

> I do know that if it shall be said later that the railroads own this land, by any decision of the court, **there will be a moral obligation upon this nation to pay the Indians for that land, because we have assumed guardianship over it without the consent of the Indians, and we have voluntarily given away that which we admit we are holding for the benefit of the Indians then I shall myself feel that however much it costs, the government of the United States ought to pay for it**.

Id. at 3063 (1906).[15] And, in a later debate, Senator Teller stated "[i]f we can protect these Indian lands longer, we ought to do it." *Id*. at 5055 (1906).

The legislative evolution of Section 7 also supports the reading that Section 16 was intended to prohibit the sale of timber lands. As originally introduced, Section 7 included no specific sales authority for the tracts that were reserved from allotment. *See* H.R. Doc. No. 59-74 at 6. Because Section 16 was originally drafted to allow the Secretary to sell all of the Nations' unallotted lands, such authority was not required in Section 7. However, *after* Section 16 was amended to include language prohibiting the sale of lands primarily valuable for timber, language was also added to Section 7 explicitly authorizing the sale of those specific lands enumerated in that Section. *See* H.R. 5976, 101st Cong. (1906), attached hereto as Exhibit 5. The addition of this language makes it clear that Congress recognized the need to specifically authorize the sale of the tracts enumerated in Section 7 because they *could not be sold* under the revised Section 16.

As evidenced above, the legislative debate regarding Section 16 focused on **limiting** the Secretary's authority to sell the Nations' land, not expanding it. In addition, amendments were made to Section 16 to restrict the Secretary's authority to sell the Nations' unallotted lands, including to prohibit the sale of the Nations' valuable timber lands. At the same time, Section 7 was amended to include language authorizing the sale

[15] Although the Nations' timber lands were given to varying industrial interests, including timber companies, the proper remedy, articulated by Teller above, is remarkably well-preserved as part of the legislative history surrounding the passage of Section 16 of the 1906 Act.

of the specifically enumerated tracts in that provision. This legislative history conclusively demonstrates Congress' intent that the United States retain the Nations' timber lands. As such, the Nations' interpretation of Section 16 is consistent with the relevant legislative history.

D. The Contextual History Defendants Rely on Does Not Support Defendants' Interpretation of Section 16

In a last-ditch effort, Defendants argue the historical context surrounding the passage of the 1906 Act "establishes the common understanding that Plaintiffs would be dissolved and their land sold." *See* Reply at 17 n.15. Defendants contend this "common understanding" supports their incorrect interpretation of Section 16 as authorizing the Secretary to sell *all* the Nations' unallotted lands, including the Nations unallotted timber lands. This argument is fatally flawed. Defendants rely on two statutes and five historical documents to support their "common understanding" argument. Neither the statutes, nor the documents support Defendants' interpretation of Section 16 as authorizing the sale of the Nations' unallotted timber lands.

While courts may look to contemporaneous context to determine Congressional intent where a statute is ambiguous, *see, e.g.*, *Woods v. Std. Ins. Co.*, 771 F.3d 1257, 1265 (10th Cir. 2014); *United States v. Kansas*, 580 F. Supp. 512, 517 (D. Kan. 1984), Defendants' suggestion that the Court should infer what Congress *intended* based on select statements made by individuals *outside* of Congress (rather than what members of Congress *actually said*) is illogical and antithetical to proper statutory interpretation. *See Kansas*, 580 F. Supp. at 516 (rejecting plaintiff's contention that court should construe

statute that was silent as to a particular practice as prohibiting that practice simply because the national mind set at the time the statute was enacted was against the practice). In essence, Defendants ask this Court to ignore the statute's plain language, the clear congressional intent evidenced in the plain language and the legislative history of Section 16, and hold that Congress really meant something different. That is absurd.

1. Neither the Curtis Act, nor the 1911 Appropriations Bill support Defendants' interpretation of Section 16

Defendants erroneously claim the Curtis Act of 1898, 30 Stat. 495, including its supplement, the 1902 Act (collectively, the "Curtis Act") and the supplemental appropriations bill in the Act of March 4, 1911, 36 Stat. 1289 (the "1911 Appropriations Bill") establish a "common understanding" that the Nations' governments would be dissolved and all of their unallotted lands sold. Reply at 17, n.15. Defendants' reliance on the Curtis Act to interpret the 1906 Act ignores the fact that the 1906 Act was a substantive and material change of course from the Curtis Act. While the Curtis Act provided for the sale of the Nations' lands and the dissolution of the Nations' governments, Congress largely abandoned these objectives in the 1906 Act. Section 28 of the 1906 Act expressly preserved the Nations' governments.[16] Section 16 of the 1906 Act placed restrictions on the sale of the Nations' lands, including a prohibition on the

[16] Under the Curtis Act of 1898, 30 Stat. 495, and its supplement, the 1902 Act, 32 Stat. 641, the Nations' governments were to terminate on March 4, 1906, and the United States was to sell the Nations' unallotted lands and distribute the proceeds per capita to the Nations' members. However, upon passage of the 1906 Act, this objective was largely abandoned. Indeed, Section 28 of the 1906 Act, states, "[the] present tribal governments of the Choctaw [and] Chickasaw . . . [N]ations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law . . . ." 1906 Act at § 28.

sale of the Nations' unallotted lands principally valuable for timber. And, as this Court has already noted, Section 29 of the 1906 Act expressly provided that all inconsistent previous acts were repealed. 1906 Act at § 29; April 16, 2014 Order at 23 n.33 ("Because Section 29 of the 1906 Act . . . repealed all inconsistent provisions of earlier enactments, any prior legislative provisions authorizing the sale of unallotted timber lands had been repealed."). As such, Defendants' contention that the Curtis Act controls the interpretation of the 1906 Act is untenable.

The 1911 Appropriations Bill also did not authorize the sale of the Nations' unallotted timber lands. The provision Defendants rely on is part of a large supplemental appropriations bill "to supply deficiencies in appropriations…for prior years." 36 Stat. 1289. It is directed at funding "the completion of the work **heretofore required by law** to be done by the Commissioner of the Civilized Tribes, including…the reappraisement and selling of the unallotted timber lands of the Choctaw Nation and the timber thereon." *Id.* at 1309. Thus, by its terms, the 1911 Appropriations Bill did not authorize anything to be done that was not previously authorized by law. For example, Congress had previously authorized the appraisement of all timber land and, as explained in Section II.B *supra*, the sale of specific tracts of unallotted timber lands pursuant to **Section 7** of the 1906 Act. *See* 1906 Act at § 7. The 1911 Appropriations Bill allowed for the completion of such preauthorized tasks. It did not confer *new* authority on the Department of Interior to sell the Nations' unallotted timber lands in violation of Section 16. Indeed, "if Congress wants to use an appropriation act as the vehicle for suspending, modifying, or repealing a provision of existing law, it must do so advisedly, speaking

directly and explicitly to the issue." *See* 1 Government Accountability Office, Principle of Federal Appropriations Law 2-68 (3d. ed. 2004), *available at* http://www.gao.gov/assets/210/202437.pdf. To the contrary, the language of the 1911 Appropriations Bill limited its mandate to the "completion of the work *heretofore required by law*." As such, the 1911 Act—like the Curtis Act—does *not* change the meaning of the 1906 Act to authorize the sale of the Nations' unallotted timber lands.

2. The historical documents Defendants rely on do not demonstrate a "common understanding" that the Nations' unallotted timber lands would be sold

Defendants rely on five documents to support their claim that there was a "common understanding" at the time the 1906 Act was enacted that the Nations' unallotted timber lands would be sold. Four of these documents purportedly demonstrate the Nations' unlawfully and federally appointed leaders acquiesced to the dissolution of their governments and the sale of their unallotted timber lands. *See News Item of D.H. Johnston,* Mannsville News (Dec. 1, 1905) (Doc. No. 124-3); Annual Message of Green McCurtain, at 4 (Oct. 5, 1908) (Doc. No. 124-4); Resolution, Per Capita Payment to Chickasaws and Choctaws NOW (Feb. 11, 1915) (Doc. No. 124-5); Letter from M. Wright to H. Blake (Feb. 12, 1930) (Doc. No. 124-6). The fifth document purportedly demonstrates the Choctaw Nations' unlawfully and federally appointed attorneys' opinions about the purpose and meaning of the 1902 and 1906 Acts. Petition, Ct. Cl. Docket 249 (Doc. No. 113-5). None of these documents establish a "common understanding" that Congress intended Section 16 to authorize the sale of the Nations' unallotted timber lands, much less the Nations' acquiescence to this objective.

In reality, the process of allotment, sale and termination was very controversial within the Nations. *See* Angie Debo, *The Rise and Fall of the Choctaw Republic* at 264-266 (University of Oklahoma Press, 1934); Michael W. Lovegrove, *A Nation in Transition* at 75-82 (Chickasaw Press 1st ed. 2009). Whether the Nations should be terminated and their lands sold were critical issues in the 1902 elections for both the Choctaw and the Chickasaw Nations. Expert Report of Kenny Arthur Franks (Jan. 15, 2015) attached hereto as Exhibit 6 at 39-41. And, the Government was closely involved in the Nations' 1902 elections to ensure the Nations' leadership would consent to the passage of the 1902 Act, which aimed to dissolve the Nations. *Id.* Accordingly, Defendants are incorrect in arguing there was a "common understanding" so widely held that the plain language of Section 16 and its legislative history should be entirely ignored.

Moreover, by relying on these documents, Defendants once again seek refuge in the history of corruption and "bureaucratic imperialism," that they themselves created. This Court already has noted that, during this time, "DOI had total control over the Nations' governments." April 16, 2014 Order at 26 n.36; *see also id.* at 15 n.16 ("[t]he available evidence clearly reveals a pattern of action on the part of…[DOI] and…[BIA] *designed to prevent any tribal resistance to…[DOI's] methods of administering those Indian affairs delegated to it by Congress*." (quoting *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976)). Yet, despite recognition and contrition from the United States regarding the fact that it implanted "false leaders" within the Nations, Defendants continue to rely on statements of these leaders to the detriment of the Nations. *See* Remarks of Kevin Gover, Assistant Secretary-Indian Affairs: Address to Tribal Leaders

(Sept. 8, 2000) attached hereto as Exhibit 7 ("Never again will we appoint false leaders who serve purposes other than those of the tribes.").

In this case, former Assistant Secretary-Indian Affairs, Kevin Gover, described the Department of the Interior's complete control over the federally appointed leaders of the Nations:

> the traditional tribal system of selecting leadership was, like I said, either suppressed or underground and might have been operating behind the scenes, but was not acknowledged by the United States as authoritative. So they deprived the tribes of any agency to speak for themselves. When the agent would appoint somebody to speak for the tribe, that person has no agency…they could do any number of things to them. You know, they could withhold their rations. The statute book still have things in it that kind of blow your mind for the authorities that the superintendent had when dealing with the tribe, and so all sorts of benefits could be withheld for a variety of reasons. But basically, they were saying, get with the program or we are going to withhold the things you need in order to subsist.

Excerpt of Deposition of Kevin Gover at 97:14-98:18, attached hereto as Exhibit 8. Clearly, any statements made by the Nations' federally appointed and completely controlled officials simply reflect the Department of the Interior's desired interpretation of Section 16, *not* a "common understanding" of the Nations' interpretation or Congress' intent. As such, Defendants' claim that Section 16 should be construed based on a contemporaneous "common understanding" that the Nations' unallotted lands would be sold should be flatly rejected.

III. CONCLUSION

For the foregoing reasons, Plaintiffs seek an order from this Court holding as a matter of law that Section 16 of the 1906 Act prohibited the sale of any lands determined to be "principally valuable for timber purposes."

DATED this 5th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: March 5, 2015.

/s/ Michael Burrage
Michael Burrage