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

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

REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON SECTION 16 OF THE 1906 ACT

I. INTRODUCTION

Section 16 of the 1906 Act plainly directed the Department of the Interior ("Interior") to sell Plaintiffs' unallotted and unreserved lands without exception. Plaintiffs' opposition to Defendants' cross-motion for summary judgment focuses on everything but Section 16's clear directive to sell such "residue" lands. This Court's analysis should not proceed beyond that plain language. But the entirety of the 1906 Act, the Act's legislative history, and the contemporaneous constructions of the Act by both Interior and Plaintiffs also confirm Congress' clearly stated mandate in Section 16 to dispose of all Plaintiffs' residue lands, and to distribute the sales proceeds to Plaintiffs' members.

II. ARGUMENT

A. Section 16 of the 1906 Act Required the Sale of All Unallotted Land

As Defendants established, Section 16's first sentence required Interior to sell Plaintiffs unallotted and unreserved lands. Defs.' Cross-Mot. For Partial Summ. J., ECF 260-1 at 6-8. Plaintiffs' opposition all but ignores this central, dispositive point. Out of the box, Section 16 required Interior to sell "the residue of lands in each of said nations not reserved or otherwise disposed of." 34 Stat. 137, 143. Conversely, no provision in Section 16 required Interior to retain Plaintiffs' lands in trust. And no provision in Section 16 restricted Interior's authority to sell lands "principally valuable for timber purposes." As discussed below, this simple and straightforward mandate cannot be displaced by irrelevant policy arguments, which fail to address, much less rebut, Section 16's critical first sentence.

Plaintiffs' failure to give effect to Section 16's first sentence – mandating the sale of **all** the Nations' residue lands – is fatal to their interpretation. Loughrin v. United States, 134 S. Ct. 2384, 2390 (2014) (courts must give effect to every clause or word of a statute). The only reasonable interpretation of Section 16, and the only interpretation that gives effect to all of its provisions, is that its first sentence required the sale of all of Plaintiffs' unreserved and unallotted lands, while the fourth and fifth sentences established acreage limitations on that requirement for certain kinds of lands. Specifically, the only permissible reading of Section 16's fourth sentence is that it imposed a parcel-size limitation on lands that were **not** principally valuable for timber, mining, or agricultural purposes. Plaintiffs' reading of Section 16's fourth sentence – to prohibit entirely the sale of lands principally valuable for timber purposes – directly contradicts the first sentence's mandate to sell all residue lands.[1] Manufacturing such a conflict within Section 16 is contrary to basic tenets of statutory interpretation. Anderson v. Dep't of Health & Human Servs., 907 F.2d 936, 944 (10th Cir. 1990). In short, Section 16 neither prohibited the sale of certain lands nor made sales of certain types of lands discretionary. Rather, Congress directed Interior to sell the remaining lands.

Section 16's fourth sentence does not – as Plaintiffs argue – negate the first sentence's mandate to sell residue lands. Pls.' Reply Br., ECF 266 at 11. It merely imposed a parcel-size restriction on the sale of lands "**not** principally valuable for

[1] At ECF 266 at 11-13, Plaintiffs mischaracterize Defendants' interpretation of Section 16's fourth sentence as **authorizing** the Secretary to sell tribal lands. That is not Defendants' position. The authorization is conferred by the first sentence's requirement to sell all residue lands.

"mining, agricultural, or timber purposes." 34 Stat. at 144 (emphasis added). Nor did Congress create an inconsistency in which the first sentence **mandated** the sale of all residue lands while the fourth sentence made "the sale of the timber lands" **discretionary**. Instead, these two sentences can be read – as they must under precepts of statutory interpretation – in complete harmony. The fourth sentence's authorization to sell lands "whenever . . . it may be desirable" committed the timing of sales – rather than the issue of whether land would be sold – to Interior's discretion. Id. Simply put, Section 16's first sentence required Interior to sell all unallotted lands, and generally vested Interior with discretion to prescribe regulations governing those sales. The fourth and fifth sentences limited that discretion with respect to sales of certain types of unallotted lands, neither of which was "timber lands."[2]

Section 7 did not void Section 16's mandate to sell all residue lands because it addressed different lands. ECF 260-1 at 11-13. Contrary to Plaintiffs' assertion, Section 7 is not made superfluous by Defendants' interpretation of Section 16. ECF 266 at 11, 14-15. Section 7 did two things, it: (1) reserved specific tracts from the allotment process

[2] Plaintiffs misapply the rule of the last antecedent as well by interpreting the phrase "which is not principally valuable for mining, agricultural, or timber purposes" to modify the subject's (Secretary) predicate "authorized to sell" instead of "unallotted lands in the Chickasaw and Choctaw Nations." ECF 266 at 12-13. But, as Plaintiffs concede, the rule of the last antecedent applies to the immediately preceding "noun or phrase," Barnhart v. Thomas, 540 U.S. 20, 26 (2003). The words "authorized" and "to sell" are neither nouns nor phrases and do not immediately precede the phrase "which is not principally valuable for mining, agricultural, or timber purposes." 34 Stat. 143. Instead, the clause "which is not principally valuable for mining, agricultural, or timber purposes" is immediately preceded by the phrase "unallotted lands in the Chickasaw and Choctaw Nations," meaning that the sentence does not apply to mining agricultural, or timber lands. Id. The rule of the last antecedent thus dictates that Section 16's fourth sentence be construed to impose a tract size limitation on sales of "valueless" unallotted lands, and as not altering Interior's duty to sell all unallotted lands.

even if an individual wished to select them for allotment and (2) ordered those tracts to be appraised. 34 Stat. at 139. By contrast, Section 16 applied to different lands – **unreserved** lands not otherwise allotted or disposed of. Id. at 143. Simply put, Section 16 did not render Section 7 superfluous because Section 7 required the separate treatment of distinct tracts of lands.

B. Plaintiffs' Policy Arguments Do Not Diminish Section 16's Plain Meaning.

Plaintiffs' primary rejoinder to Defendants' plain meaning statutory interpretation is that selling Plaintiffs' lands principally valuable for timber was inconsistent with a general federal policy to preserve forest lands. ECF 266 at 9-10. But any general policy favoring the creation of forest reserves on **non-Indian** lands has no bearing on the plain meaning of a statute specific to Plaintiffs. See United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (analysis of government's trust duties "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions").[3] And Plaintiffs' argument that it would be "absurd" to interpret Section 16 to permit the sale of an unlimited quantity of "timber lands" to any person notably does not cite any language prohibiting such sales. ECF 254 at 25-26. Indeed, Section 16's first sentence granted Interior authority to prescribe regulations governing the sale of **all** residue lands.

[3] The specific policy applicable to Plaintiffs is illustrated by criticism of Interior by Plaintiffs' leaders and members of Congress when, in 1907, acting administratively without statutory authorization, Interior withheld lands from allotment and sale to afford Congress an opportunity to withdraw lands for a forest reserve. See ECF 260-1 at 27-29. Interior released these lands when Congress did not act to set them aside for the proposed forest reserve.

Instead, the 1906 Act continued the now-rejected congressional assimilationist policy set in motion by the Dawes Act, Curtis Act, and the 1902 Act. ECF 260-1 at 14-19. Plaintiffs' argument that the 1906 Act was intended to "reverse" this policy, ECF 266 at 16-18, ignores the 1906 Act's text, Tenth Circuit precedent, and the simple historical fact that this phase of assimilationist policy was not rejected until 1934. See Cohen's Handbook on Indian Law at § 1.05 (Matthew Bender & Co., Inc., 2012).[4]

The Tenth Circuit's Magnolia Petroleum opinion dispatches Plaintiffs' new argument that Congress intended the 1906 Act to reverse its prevailing policy. United States v. Magnolia Petroleum, 110 F. 2d 212 (1939). Magnolia Petroleum held that abandoned railroad rights-of-ways did not revert to Plaintiffs because it "would be inconsistent with the purpose and intent of the statute as a whole." Id. at 218. That "legislative purpose of the entire act [was] to bring to final conclusion the affairs of the tribes." Id. In other words, the 1906 Act continued assimilationist policy.

Indeed, when read in its entirety, the 1906 Act confirms Congress's intent to implement the since-rejected assimilationist policy. See Appendix 1 (Ex. 1). The 1906

[4] Rather than analyzing the 1906 Act as a whole, Plaintiffs rely on citations to Harjo v. Kleppe, 420 F.Supp. 1110 (D.D.C 1976), a case applying Section 28 of 1906 Act to the Creek Nation. ECF 266 at 3, 16-18, 25-26. Harjo does not support Plaintiffs' theory. Harjo applies to the Creek government, not Creek lands. And even in that context, Harjo found that "it was anticipated that the tribes would eventually be dissolved." Id. at 1129.

Harjo only highlights that Congress did not reject a large element of its assimilationist policy specific to Plaintiffs until 1970. See ECF 266 at 3 (citing Harjo, 420 F. Supp. at 1142-43). Harjo found "critical" the Act of October 22, 1970, which "came at a time when federal Indian policy had once again reversed itself, this time in favor of tribal self-government." Harjo, 420 F. Supp. at 1139-40. This reversal provided Plaintiffs with the right to elect their chief executives. But while the 1970 Act informed Harjo's interpretation of Creek electoral rights, statutes enacted after lands were sold under the 1906 Act have no bearing on the legality of those sales when they occurred.

Act provided for disposal, rather than retention, of land and funds. See Appendix 1, 1906 Act, §§ 6, 7, 12, 13,[5] 14, 15, 16, 17, 21. Other sections of the 1906 Act explicitly envision the "dissolution" of Plaintiffs' governments. Id. §§ 11, 18, 27.[6] Interpreting the 1906 Act to impose a duty to retain Plaintiffs' unallotted lands would be wholly at odds with the Act's clear language and purpose, as well as Congress's clear intent in 1906.

C. Other Sources of Statutory Interpretation Confirm that Section 16 Required the Sale of the Nations' Unallotted Lands

As Defendants demonstrated, the clarity of Section 16's directive to sell Plaintiffs' unallotted lands makes it unnecessary for the Court to examine the 1906 Act's legislative history. In any event, that history does not support Plaintiffs' argument, ECF 266 at 18-19, that the 1906 Act reflected a "change of heart" regarding assimilation policy and an intent to limit Interior's ability to sell Plaintiffs' lands. The debate Plaintiffs cite actually indicates that Congress required the sale of all Plaintiffs' lands. And no canon of construction saves Plaintiffs from Section 16's plain meaning.

---

[5] Contrary to Plaintiffs' argument, ECF 266 at 3-4, Section 13 of the 1906 Act does not manifest Congress's intent to preserve unallotted lands indefinitely. Congress reserved coal and asphalt lands from sale only "until the existing leases . . . have expired." 34 Stat. at 142. See also Act of Feb. 8, 1918, 40 Stat. 433 (authorizing Interior to "sell the coal and asphalt deposits, leased and unleased").

[6] Sections 27 and 28 do not, contrary to Plaintiffs' assertion, ECF 266 at 15-17, evidence an intent to perpetually hold land in trust for entities that were to be dissolved. Section 27 instead envisions the possibility of Plaintiffs' dissolution before their lands were sold under the 1906 Act. In that case, lands would be "held in trust . . . for the use and benefit" of Plaintiffs' members to be sold and disbursed under the 1906 Act rather than converting into United States property. Appendix 1. And Section 28 rendered tribal resolutions and contracts invalid without Presidential approval and limited Plaintiffs' legislative meetings. Id. Simply put, the 1906 Act's language does not implicitly suggest, much less expressly require, the perpetual management of land for Plaintiffs.

Plaintiffs do not dispute the accuracy of Defendants' discussion of the 1906 Act's legislative history. ECF 260-1 at 19-25; ECF 266 at 18-21. Nor do Plaintiffs dispute that isolated statements in a debate receive little, if any, interpretive weight,[7] and that only changes reflected in committee reports may be considered. Id. But the isolated statements Plaintiffs cite do not support their interpretation, so any weight given them only reinforces Defendants' position. For example, the Secretary's statement that he did not "care to sell a tract of 100,000 acres to any one person . . . without the direct authority of Congress" is consistent with Section 16's authorization to sell residue lands. cf. ECF 266 at 21. That the Secretary did not care to use that authority in a particular way absent Congress's explicit directive reflects his judgment, not a statutory limit on his authority.

Plaintiffs' reliance on the Indian canon of construction is similarly unavailing because Section 16's language is clear. See ECF 260-1 at 20-21. Regardless, Plaintiffs are incorrect that the canon requires any statutory ambiguity to be resolved in favor of a Tribe's current position. Cf. ECF 266 at 22. The canon's basis is that treaties should be interpreted in the manner in which they "were understood" at the time the treaties were signed. Worcester v. Georgia, 31 U.S. 515, 582 (1832). Therefore, even if the 1906 Act's text and legislative history were unclear, the Indian canon militates in favor of

[7] Plaintiffs rely on a single remark by Rep. Stephens, ECF 266 at 19, but use ellipses to eliminate the portion of Rep. Stephens' statement indicating that he objected not to selling Plaintiffs' surplus lands, but to their sale **in large parcels**. ECF 260-9, 40 Cong. Rec. at 1245 (1906). Plaintiffs do not identify any legislative history suggesting that Congress intended the "valueless land" parcel-size limit to apply to timber lands. Nor do Plaintiffs identify any suggestion that any member of Congress wanted to reverse the Curtis Act and 1902 Act agreements to dispose of Plaintiffs' land through allotment and sale. See ECF 260-1 at 22-23.

construing ambiguous provisions in light of the Indians' contemporaneous understanding at the time the 1906 Act was enacted – not the early 21st century. Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89-90 (1918).[8] As previously shown, Plaintiffs understood the 1906 Act to be a continuation of their 1898 and 1902 agreements requiring the sale of their lands. See ECF 260-1 at 16-18, 27-29.

Plaintiffs do not seriously contest Defendants' account of the contemporaneous construction of the 1906 Act as requiring the sale of Plaintiffs' lands.[9] Plaintiffs instead attempt to avoid this subject by claiming that their leaders were controlled. ECF 266 at 23-26. But Plaintiffs' contemporaneous interpretation of Section 16 was **not** controlled by Interior, as demonstrated by the historical fact that Plaintiffs' leaders **protested** Interior's withdrawal of land for a forest reserve and delay in selling those lands as in "violation of our agreement with the Government." See ECF 260-1 at 29. Plaintiffs thus accused Interior of violating their treaties, which were enacted by the Curtis Act and 1902 Act, by **not** promptly selling Plaintiffs' lands. Therefore, even were the Court to apply the Indian canon, it cannot support Plaintiffs' current statutory interpretation.

---

[8] Cohen's full citation provides "**treaties and agreements are to be construed as the Indians would have understood them,** and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." § 2.02; ECF 266 at 5 (language omitted by Plaintiffs in bold).

[9] Plaintiffs' misstate the Secretary's testimony at a 1907 hearing. ECF 266 at 26. The Secretary testified only that Section 16's fourth sentence restricted the parcel-size for sales of "valueless" land. ECF 266-6. He did not address lands "principally valuable for mining, agricultural or timber." Id.

D. The Act of March 4, 1911 Confirmed Defendants' Interpretation of Section 16

As Defendants established, the Act of March 4, 1911 confirmed Section 16's clear mandate by appropriating funds for the reappraisement and sale of Plaintiffs' "unallotted timber lands" as "heretofore required by law." ECF 260-1 at 26 (quoting 36 Stat. 1289). Contrary to Plaintiffs' argument, ECF 266 at 22, the 1911 Act did not appropriate $30,000 to appraise only the 10,801 acres of lands identified in Section 7 of the 1906 Act. Instead, those funds were used to appraise 1,278,412 acres of "timber or reserved lands." 1911 Annual Report of The Commissioner to the Five Civilized Tribes for the Fiscal Year Ending June 30, 1911, H.R. Doc. No. 120-24, at 395-96 (1911) (Ex. 2). Simply put, it is reasonable to surmise that Congress would not have funded the appraisal of land for sale if the Secretary lacked the authority to sell that land.

E. Current Policy Does Not Transform the 1906 Act's Plain Meaning

Defendants' current policies do not supersede or otherwise define any statutorily-driven trust duties that existed during the pre-1946 period that is the focus of Phase I of this case. Plaintiffs' reliance on Defendants' current policy to interpret an act passed in 1906 is therefore misplaced. ECF 266 at 1-4.[10] Congress accepts Indian trust responsibilities only to the extent it "expressly accepts those responsibilities by statute." ECF 260-1 at 2-3, 8 (quoting United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2325 (2011)). When, as here, "'the Tribe cannot identify a specific, applicable, trust-

[10] Testimony regarding legal conclusions is outside of the scope of 30(b)(6) fact depositions and is not binding. See, e.g., In re Indep. Serv. Orgs. Antitrust Litig., 168 F.R.D. 651, 654 (D. Kan. 1996). Regardless, Plaintiffs misconstrue testimony regarding identification of parcels sold to address the authority to sell. ECF 266 at 5-7.

creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" Jicarilla Apache Nation, 131 S. Ct. at 2325 (quotation omitted).[11] Therefore, neither common-law trust principles nor current policies and laws bear on whether the 1906 Act expressly accepted a duty to perpetually retain Plaintiffs' lands. Rather, the only issue before this court is whether the sale of lands between 1914 and 1938 was prohibited by the 1906 Act. The plain language of the 1906 Act required the land to be sold.

Dated: April 9, 2015 Respectfully submitted,

SANFORD C. COATS
United States Attorney

R.D. EVANS, JR., Louisiana Bar # 20805
Don.Evans@usdoj.gov
Assistant United States Attorney
Western District of Oklahoma
210 Park Avenue, Suite 400
Oklahoma City, OK 73102
Tel: (405) 553-8700
Fax: (405) 553-8885

JOHN C. CRUDEN
Assistant Attorney General

/s/ Matthew Marinelli
ANTHONY P. HOANG, FL Bar #0798193
Anthony.Hoang@usdoj.gov

[11] Plaintiffs' claim, ECF 266 at 4-5, is particularly misplaced with respect to "timber lands" because no money mandating duty to manage Plaintiffs' "timber lands" existed. Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565, 578-9 (1990) (dismissing claims for allegedly failing to: (1) properly manage forest resources; (2) properly sell forest products; (3) require reforestation; and (4) prosecute trespass)) (applied to Plaintiffs by Choctaw Nation of Okla. v. United States, 25 Cl. Ct. 363, 364-65 (1992)). Any timber management duties set forth in the IRA do not apply to Plaintiffs. Cherokee Nation, 21 Cl. Ct. at 578-9.

EDWARD GELDERMANN, FL BAR # 0038316
Jay.Geldermann@usdoj.gov
MATTHEW MARINELLI, IL Bar #6277967
Matthew.Marinelli@usdoj.gov
JESSICA HELD, DC Bar #975864
Jessica.Held@usdoj.gov
MARISSA A. PIROPATO, NY BAR #4323242
Marissa.Piropato@usdoj.gov
FRANK J. SINGER
Frank.Singer@usdoj.gov
REUBEN S. SCHIFMAN
Reuben.Schifman@usdoj.gov
JUDITH COLEMAN
Judith.Coleman@usdoj.gov
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-0241
Tel: (202) 305-0242
Tel: (202) 305-0239
Tel: (202) 305-0575
Tel: (202) 305-0470
Tel: (202) 616-9409
Tel: (202) 305-4224
Tel: (202) 514-3553
Fax: (202) 305-0506

Attorneys for Defendants

OF COUNSEL:

CHARLES R. BABST, JR.
Office of the Field Solicitor
United States Department of the Interior
Tulsa, OK 74145

KENNETH DALTON
MICHAEL BIANCO
KAREN BOYD
HOLLY CLEMENT
GLADYS COJOCARI

KRISTEN KOKINOS
DONDRAE MAIDEN
Office of the Solicitor
United States Department of the Interior
Washington, D.C. 20240

REBECCA SALTIEL
THOMAS KEARNS
Office of the Chief Counsel
Bureau of the Fiscal Service
United States Department of the Treasury
Washington, D.C. 20227

CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2015, I authorized the electronic filing of the foregoing Defendants' Reply in Support of Defendants' Cross-Motion for Summary Judgment on Section 16 of the 1906 Act with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all registered parties.

/s/ Matthew M. Marinelli
MATTHEW M. MARINELLI