**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| THE CHEROKEE NATION,<br><br>*Plaintiff - Appellee,*<br><br>v.<br><br>DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior, *et al.*,<br><br>*Defendant - Appellants*<br>and<br><br>UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, *et al.*,<br><br>*Intervenors - Defendants - Appellants* | ) | Case No. 17-7042<br>Case No. 17-7044 |

## MOTION TO STAY MANDATE[1]

## INTRODUCTION

Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure and this Circuit's Rule 41.1(B), Plaintiff-Appellee the Cherokee Nation respectfully requests that this Court stay issuance of the mandate in this case pending the filing by the Cherokee Nation of a Petition for Writ of Certiorari in the Supreme Court of the

[1] This Motion is opposed by appellants and intervenor-appellants.

United States and final disposition of the Petition by that Court. This Court will grant such a stay when the certiorari "petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(1). *See also* 10th Cir. R. 41.1(B) (motion may be granted where "there is a substantial possibility that a petition for writ of certiorari would be granted"). The Cherokee Nation satisfies both prongs of this test.

First, there is a "substantial possibility" that the Nation's petition will be granted. The panel decision held that the Secretary of the Interior has authority to take land into trust for the United Keetoowah Band ("UKB") Corporation—a tribal corporation established by an Oklahoma tribe that was *not* under federal jurisdiction when the 1934 Indian Reorganization Act ("IRA") was enacted—and without the consent of the Cherokee Nation even though that land is located *squarely within the Nation's boundaries*. The decision badly misreads both the Oklahoma Indian Welfare Act ("OIWA") and the IRA, and does serious violence to *Carcieri v. Salazar*, 555 U.S. 379 (2009), which limited the scope of the IRA's trust land provisions. The decision also results in an abrogation of the Nation's treaty rights without an express Congressional authorization, in violation of established Supreme Court precedent. *See* Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478; Treaty of Washington, July 19, 1866, 14 Stat. 799; *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019). Finally, the decision also held that an Appropriations Rider which requires

consultation with the Cherokee Nation prior to the expenditure of funds to take land into trust within the Nation's boundaries somehow worked an implied repeal of a longstanding regulatory requirement that the Nation *consent* to any such acquisition, contrary to controlling interpretive principles and the Nation's sovereign and treaty rights.

Moreover, because the case involves the *Oklahoma* Indian Welfare Act, an inter-Circuit conflict is virtually impossible; but in this context, the disagreement of numerous district court judges with the panel's recognition of UKB's sovereign rights within Cherokee Nation territory serves the same function as a conflict, illustrating that the issue presented is substantial and worthy of review. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 (2018) (granting certiorari based on split between district courts and circuit court). Further, the decision's incorrect interpretation of these federal statutes will stand unless the Supreme Court intervenes. Finally, the decision's inconsistency with *Carcieri* and its breathtaking outcome—allowing UKB to assert sovereignty over tribal land within the Cherokee Nation's boundaries without its consent and in contravention of its treaty rights—is an important and unprecedented infringement on a tribe's sovereign rights, guaranteed to result in years of conflict and litigation, and thus worthy of immediate review.

There is "good cause" to enter a stay based on the "equities in [this] case." Knibb, *Federal Court of Appeals Manual* 34:13 (6th ed. 2019). Absent a stay, the Cherokee Nation will suffer irreparable harm because the Department of the Interior has made clear its intent to take the subject land into trust for the UKB Corporation promptly upon issuance of the mandate; it has already published a notice of its intent to take the land into trust and thereby completed the final step required before taking such action; and it has declined to withhold action pending the Supreme Court's resolution of a petition in this case. Irreconcilable jurisdictional conflicts between UKB and the Cherokee Nation, including conflicts over law enforcement that potentially jeopardize public safety, are threatened as soon as the Secretary acquires the land in trust.

## I. THERE IS A SUBSTANTIAL POSSIBILITY THAT A PETITION FOR CERTIORARI WOULD BE GRANTED

### A. The Panel Decision Incorrectly Interpreted the OIWA to Authorize the Secretary to Take Land into Trust for UKB Corporation in a Manner That Conflicts with Supreme Court Precedent.

The panel's decision incorrectly resolves an "important federal question" relating to the rights and privileges extended to Oklahoma Indians and tribes by the OIWA, which incorporates the IRA by reference. *See* Sup. Ct. R. 10(c) (stating as one reason for granting review that a "court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court"). In *Carcieri* the Supreme Court held that the IRA "limits the exercise of the Secretary's

trust authority under [section 5 of the IRA] to those members of tribes that were under federal jurisdiction at the time the IRA was enacted [in 1934]." 555 U.S. at 391. Yet the panel held that the OIWA—which simply extended the IRA's rights and privileges to Oklahoma Indians and tribes previously excluded from the IRA—authorized the Secretary to exercise his trust authority with respect to the tribal corporations of Oklahoma tribes who were *not* under federal jurisdiction at the time the IRA was enacted. This result directly contravenes the Supreme Court's decision in *Carcieri* and is deeply unfair. There is, accordingly, a substantial possibility that the Court will grant a petition for certiorari.

The OIWA was enacted to fill a hole left by section 13 of the IRA. That section had *excluded* Oklahoma tribes from some of the key benefits the IRA conferred on other tribes (including the right to reorganize their governments and the right to charter tribal corporations). 25 U.S.C. § 5118. Section 3 of the OIWA corrected these omissions:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation . . . . Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and *to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934* [the IRA].

25 U.S.C. § 5203 (emphasis added). The most natural reading of this section is that it extends the IRA's tribal government and corporate charter provisions to the Oklahoma tribes—the very provisions which had been denied to them by section 13 of the original IRA. The legislative history confirms Congress's intent, stating: "[T]hese sections will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934." H.R. Rep. No. 74-2408, at 3 (1936). And in 1980, the Secretary, too, issued regulations construing the OIWA to place IRA and OIWA tribal corporations on an identical and equal footing. *See* 25 C.F.R. 151.2(b). Indeed, as the Secretary's regulations also reflect, the Secretary is without specific Congressional authorization to acquire lands in trust for *either* type of tribal corporation (outside 25 U.S.C. §§ 488, 489, not pertinent here). In sum, Oklahoma tribes, Indians and corporations have the same rights under the IRA as all others covered by the IRA—no more and no less.[2]

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[2] The OIWA's "rights or privileges" language assured that OIWA tribal corporations would enjoy the same rights or privileges as those enjoyed by IRA tribal corporations, such as protection against the involuntary disposition of shares in tribal corporate assets, 25 U.S.C. § 5017 (IRA § 4); funding of expenses for organizing Indian chartered corporations, 25 U.S.C. § 5112 (IRA § 9); access to the revolving loan fund for economic development purposes, 25 U.S.C. § 5113 (IRA § 10); assurance that corporate charters would include provisions regarding purchase, management, and disposal of property, 25 U.S.C. § 5124 (IRA § 17); and protection against revocation of a corporate charter except by Act of Congress, *id*.

Even if the Secretary possessed delegated authority under the OIWA to acquire land in trust for an OIWA tribal corporation under the IRA, that would not help UKB. Section 5 of the IRA authorizes the Secretary to take land into trust only to provide land for "Indians" and to be held "in trust for the Indian tribe or individual Indian for which the land is acquired." 25 U.S.C. § 5108. Section 19 of the IRA defines "[t]he term 'Indian' as used in this Act [to] include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction* . . . ." 25 U.S.C. § 5129 (emphasis added). The OIWA does not alter any of these provisions, nor provide any other definition of "Indian" for use in determining the scope of the rights and privileges that the OIWA confers on Oklahoma Indians and tribes through its incorporation of the IRA by reference.

The Supreme Court in *Carcieri* definitively resolved the meaning of the IRA provisions and the scope of the Secretary's authority to acquire land in trust under section 5 of the IRA. Applying "settled principles of statutory construction," the Court held that the phrase "tribe[s] now under Federal jurisdiction," as used in 25 U.S.C. § 5129, meant tribes under federal jurisdiction *in 1934*. 555 U.S. at 387-88. Moreover, in an analysis directly relevant here, the Supreme Court also expressly held that when the rights and privileges of the IRA are incorporated by reference into another statute, as they are in the OIWA, the IRA's temporal limitations carry over too. *Id.* at 394. The Court therefore expressly rejected the argument that a

provision of the Indian Land Consolidation Act, 25 U.S.C. § 2202, extended IRA section 5's rights and privileges to post-1934 tribes. 555 U.S. at 394. In words that are apt here, the Court reasoned that "the plain language of [the ILCA] does not expand the power set forth in [section 5 of the IRA] . . . [n]or does [the ILCA] alter the definition of 'Indian' in [section 19 of the IRA], *which is limited to members of tribes that were under federal jurisdiction in 1934*." *Id.* (emphasis added). The same is true of the OIWA—its incorporation of the IRA carries with it the IRA's limitation strictly to tribes under federal jurisdiction in 1934.

But here, the panel concluded that section 3 of the OIWA authorized the Secretary to take land into trust for an Oklahoma tribal corporation even if that tribe came under federal jurisdiction *after* 1934. Slip op. at 19. This reading of the OIWA cannot be squared with *Carcieri*. It also has the anomalous consequence of allowing post-1934 tribes *only in Oklahoma* to charter a corporation to take land into trust for them, while no other post-1934 tribes in any other State in the Union may do so. Respectfully, Congress did not intend this incongruous and unfair outcome when it enacted the OIWA, a statute intended to provide Oklahoma tribes with rights equal—but not superior—to those held by tribes in other States.

Accordingly, the panel decision incorrectly resolves an important question of federal law in conflict with existing Supreme Court authority, and there is a substantial possibility that the Supreme Court will grant review to correct the error,

particularly when its consequence is to trample the Cherokee Nation's sovereign rights. *See* Sup. Ct. R. 10(c).

### B. The Panel Decision Improperly Interpreted the OIWA in a Manner that Abrogates the Cherokee Nation's Treaty Right to Self-Government.

The panel decision's incorrect interpretation of the OIWA results in the abrogation of the Cherokee Nation's treaty rights without Congressional authorization, let alone the clear and express statement of Congressional intent required by established Supreme Court precedent. This interaction between a treaty and a federal statute therefore presents an "important federal question," Sup. Ct. R. 10(c), that has been resolved in a manner that conflicts with the Supreme Court's teachings.

Issues regarding the meaning and application of an Indian tribe's treaty rights, like this one, are a frequent subject of Supreme Court review, even in circumstances where there is no conflict among the lower courts, due to their public importance and the Supreme Court's recognition of the trust relationship between the United States and Indians. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175-76 (1999); *Montana v. United States*, 450 U.S. 544, 547 (1981); *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 393 (1968).

The panel here concluded, as a practical matter, that the OIWA implicitly abrogates the Nation's treaty right to peaceable possession of its reservation lands

by permitting the Secretary to acquire trust land within the Nation's treaty territory for the UKB Corporation. Slip op. at 27. This reading of the OIWA would have the unprecedented consequence of allowing UKB to exercise jurisdiction over tribal land *within the Cherokee Nation's treaty territory* in conflict with the Nation. When the United States forced the Nation to relocate to what is now Oklahoma, it agreed in Article 2 of the Treaty of New Echota that the Nation would be removed to a territory "guarantied and secured to be conveyed by patent" to the Nation. Treaty of New Echota, art. 2, Dec. 29, 1835, 7 Stat. 478. The United States further agreed that this land "shall, in no future time *without their consent*, be included within the territorial limits or jurisdiction of any State of Territory" and that the United States would secure to the Nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country . . . ." *Id.* art. 5 (emphasis added).

After the Civil War, the United States reaffirmed these rights in Article 31 of the Treaty of Washington, and again guaranteed to the Nation the "quiet and peaceable possession of their country." Treaty of Washington, art. 26, July 19, 1866, 14 Stat. 799. Article 15 of the 1866 Treaty also secured to the Nation two means by which it could *voluntarily* admit other tribes into its territory, *see Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *Cherokee Nation of Oklahoma v. Norton*, 389

F.3d 1074 (10th Circ. 2004) (discussing Article 15's "preservation" and "incorporation" options), but it never contemplated such admission over the Nation's objection. As the Supreme Court has consistently recognized, these treaty provisions guaranteed the Nation the right "to exist as an autonomous body" in what is now Oklahoma. *Talton v. Mayes*, 163 U.S. 376, 379-80 (1896). They also guaranteed that the Nation would have "virtually complete sovereignty over their new lands." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 635 (1970). And as this Circuit has held, the Treaty of New Echota, which was reaffirmed in the Treaty of Washington, "clearly and unequivocally recognizes tribal self-government" for the Cherokee Nation, *E.E.O.C.*, 871 F.2d 937, 938 (10th Cir. 1989).

Multiple District Court judges within the Tenth Circuit have affirmed this treaty right, in contrast to the panel opinion here, and have repeatedly rejected UKB's attempted assertions of sovereignty within the 1866 Treaty territory because "the Cherokee Nation's sovereignty is preeminent to that of the UKB in Cherokee Nation Indian Country." *United Keetoowah Band of Cherokee Indians v. Mankiller*, 2 F.3d 1161, 1993 WL 307937, at *3 (10th Cir. 1993); *id.* at *4 ("This court has previously decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation."); *id.* at *5 ("[T]he relief requested by the Plaintiff herein directly affects the sovereignty and

fundamental jurisdiction of the Cherokee Nation . . . .") (quotations from order of Judge Brett attached to opinion).[3]

Here, the panel found that the Nation's treaty right to territorial sovereignty was implicitly abrogated by the OIWA. Slip op. at 27. Under controlling Supreme Court precedent, however, a treaty right can be abrogated only by a clear and express statement by Congress. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); *United States v. Dion*, 476 U.S. 734, 738-39 (1986). As this Court held in *E.E.O.C v. Cherokee Nation*, when "there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights . . . the court is to apply the special canons of construction to the benefit of Indian interests," which preclude a finding that treaty rights have been abrogated without "explicit statutory language" to that effect. 871 F.2d at 938-39; *id.* at 938 ("[I]n the absence of explicit statement, 'the intention to

[3] *See Cherokee Nation v. Jewell*, No. CIV-14-428-RAW, 2017 WL 2352011, at *9 (E.D. Okla. May 31, 2017) (White, J.) ("[T]he 1866 Treaty guaranteed the Cherokee Nation protection against [UKB's assertion of jurisdiction within the reservation]."), *rev'd in part, vacated in part sub nom. Cherokee Nation v. Bernhardt*, 936 F.3d 1142 (10th Cir. 2019); Transcript of Oral Ruling, *Cherokee Nation v. Salazar*, No. 12-cv-493-GKF-TLW, at 14 (N.D. Okla. Aug. 12, 2013), ECF No. 92 (Frizzell, J.) ("The administrative agency's decision [to take into trust a 2 acre parcel] appears to have ignored the Department of Interior's own previous decisions, case law, and the legal history of the Cherokee Nation, including its treaty rights."); *Buzzard v. Okla. Tax Comm'n*, No. 90-C-848-B, slip op. at 8-9 (N.D. Okla. Feb. 24, 1992) (Brett, J.) (concluding that UKB is not an heir to the Cherokee Nation), *aff'd* 992 F.2d 1073 (10th Cir. 1993); *United Keetoowah Band of Cherokee Indians in Okla. v. Sec'y of Interior*, No. 90-C-608-B, slip op. at 6 (N.D. Okla. May 31, 1991) (Brett, J.) (noting the Secretary recognized that Cherokee Nation jurisdiction over 1866 Treaty reservation lands is superior to that of UKB).

abrogate or modify a treaty is not to be lightly imputed to the Congress.'" (quoting *Dion*, 476 U.S. at 739)). As demonstrated above, Congress made no such statement here. Indeed, the panel decision does not remotely suggest that the OIWA provides the clarity that would be required to find that Congress abrogated the Treaties entered into with the Cherokee Nation, and authorized the Secretary to permit other tribes to exercise *sovereignty* on land within the Cherokee reservation in direct contravention of the Cherokee Nation's will.

### C. The Panel Decision Erred in Finding an Implicit Repeal of a Regulation that Protected the Cherokee Nation's Treaty-Secured Right to Sovereignty Within its Reservation.

The Nation is aware of no other tribe that has been *forced* to accept another tribe's exercise of sovereignty within the boundaries of its reservation. This unprecedented consequence of the panel's interpretation of the OIWA independently supports the argument that the issue presented is important and worthy of Supreme Court review. *See* Sup. Ct. R. 10(c). This anomalous outcome is the result of another legal error: the panel's determination that an Appropriations Rider constituted an implied repeal of a regulation that protects tribal sovereignty within reservation boundaries against infringement by other tribes.

Since 1980, controlling regulations have instructed that "[a]n individual Indian or tribe may acquire land in trust status on *a reservation other than its own* only when the governing body of the tribe having jurisdiction over such reservation

*consents in writing to the acquisition* . . . ." 25 C.F.R. § 151.8 (emphasis added). This regulation has safeguarded the rights of Indian tribes, including the Cherokee Nation's treaty right, to be free of conflicting claims of tribal sovereigns within tribal territory by precluding the Secretary from taking land into trust for any other tribe within that territory—unless the tribe with jurisdiction over the territory consents in writing. *See* 25 C.F.R. § 151.2(f) (covering reservations and former reservations in Oklahoma).

In 1992, Congress also recognized this point when it enacted a rider to the Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991) ("1992 Rider"), providing (in part) that "*[no] funds [shall] be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without the consent of the Cherokee Nation," *id.* (emphasis added). The 1992 Rider was adopted to address concerns that, if UKB began providing services to Cherokee citizens within the Nation's territory, it would have the effect of "creat[ing] a duplicative or competing Cherokee tribal government, or . . . supplant[ing] the Cherokee Nation's governance." H.R. Rep. No. 102-116, at 58 (1991).

In 1999, Congress amended the 1992 Rider to read that "*no funds shall be used* to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without consultation with the Cherokee Nation." Omnibus

Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (1998) (emphasis added) ("1999 Rider"). This amendment was intended to allow the Bureau of Indian Affairs to deal with entities asserting jurisdiction in the Nation's territory, including UKB, "on issues of funding" while "prevent[ing] these tribes from establishing trust holdings within the Cherokee [Nation]'s original boundaries without Cherokee consultation." H.R. Rep. No. 105-825, at 1209 (1998) (Conf. Rep.). Nothing in the 1999 Rider addressed the broader regulatory requirements that apply to trust acquisitions generally; nor did the Act purport to rescind the decades-old regulatory requirement that a sovereign tribe's consent must be obtained in order for the Secretary to take land into trust for another tribe within that sovereign's reservation. 25 C.F.R. § 151.8. The consultation requirement was simply, and expressly, a condition on the BIA's expenditure of agency funds.

The panel, however, found that the 1999 Rider "carve[d] out an exception" to 25 C.F.R. § 151.8 for the reservation of the Cherokee Nation. Slip op. at 22. The panel acknowledged the argument that "[c]ourts will not construe an appropriations act to amend substantive law unless it is clear that Congress intended to change the substantive law." Slip op. 22 n.16. But it nonetheless found that Congress had enacted an implied repeal of a longstanding regulation, saying, without review of legislative history or consideration of the unlikely outcome, that "Congress clearly

intended the 1999 Appropriations Act to enact a substantive change in the requirements for taking lands within the original boundaries of the Cherokee territory into trust," *id.*, including the consent requirements of 25 C.F.R. § 151.8.

The panel failed to acknowledge that repeals by implication are heavily disfavored and will only be found in cases where "the later statute *expressly* contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have *any meaning at all*." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations in original) (emphases added) (internal quotations omitted); *see also Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in '*irreconcilable conflict*,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" (emphasis added) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936))). This general rule "applies with especial force" when, as here, the implied repeal would come from an appropriations act, *see United States v. Will*, 449 U.S. 200, 221-22 (1980), and particularly when, again as here, the potential repeal is of another law contained in an independent enactment, *see TVA v. Hill*, 437 U.S. 153, 190-92 (1978); *see also Nw. Forest Res. Council v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1166-67 (9th Cir. 1996) ("An implied repeal of the underlying

statutory and regulatory provisions" by an appropriations act "may be found *only if no other construction is possible*." (emphasis added)).

Other Circuits have followed this Supreme Court directive by first seeking to determine Congress's explicit and unambiguous intent before concluding that an Appropriations Act has worked an implied repeal of another longstanding law. *See, e.g.*, *W. River Elec. Ass'n, Inc. v. Black Hills Power & Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990) (court unable "to find in section 8093, on its face or in relation to the Appropriations Act as a whole, or from the legislative history, any clear and unambiguous declaration by Congress to amend the extensive and carefully-crafted body of federal procurement law").[4]

Plainly, the 1999 consultation requirement is not in "irreconcilable conflict or inconsistency" with the regulation's consent requirement. The statutory requirement in the rider for consultation with the Nation before spending funds on acquiring trust land in the Nation's territory addresses a separate stage of the trust acquisition process than the regulatory requirement for the Nation to consent before the land is

[4] *Cf. Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir. 1979) (upholding change to substantive law by appropriations act because of "the unquestionably explicit awareness by the legislators that they were using the disfavored vehicle of an appropriations measure to legislate this result and that they were setting aside their rules to do so"); *Zbaraz v. Quern*, 596 F.2d 196, 201 (7th Cir. 1979) (concluding that an appropriations act amended an earlier statute only after examining the intent demonstrated by the statutory text and the "overwhelming weight of the legislative history").

actually acquired. *Cf. Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995) (appropriations rider prohibiting expenditure of funds to carry out a statutory duty does not affect the validity of the underlying statute or duty). In the absence of any clear indication Congress intended the 1999 Rider to repeal 25 C.F.R. § 151.8, the strong presumption against repeals by implication controls—a presumption that operates with unique force in circumstances where this implied repeal would also abrogate the Nation's treaty rights.

* * *

In sum, the net effect of the panel decision is to abrogate the Cherokee Nation's treaty right to exercise exclusive tribal sovereignty over its treaty territory without a clear Congressional statement authorizing this abrogation. The panel did so by misinterpreting the OIWA in a manner that contravenes the Supreme Court's decision in *Carcieri*, by authorizing an outcome that violates the Nation's treaty rights, and by finding an implied repeal of the longstanding federal regulation that protects tribal sovereignty as against other tribes within its territory. These are important questions whose incorrect resolution has unfair and profound consequences for the Nation and are worthy of Supreme Court review.

## II. GOOD CAUSE EXISTS FOR A STAY TO PRESERVE THE STATUS QUO

The Cherokee Nation satisfies the good cause standard for granting a stay of the mandate. "Good cause" exists, *inter alia*, where the balance of equities favors

the movant and where, absent a stay, the movant will suffer irreparable harm. Knibb, *supra*; *see also Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (good cause inquiry focuses on "whether the applicant will suffer irreparable injury").

In order to take the land at issue into trust, the Department of the Interior is required to publish a notice of its intent to do so and to wait for a period of 30 days. 25 CFR § 151.12(d)(2)(iii); *see also* C.F.R. § 2.9(a). The Department published its notice in the Tahlequah Daily Press on October 4, 2019. Hill Declaration ¶ 13; *id.* Exhibit A (copy of notice). Thus, the Department could have taken the land at issue into trust as of November 4, 2019, but it has been prevented from doing so by the Order in this matter entered by the District Court for the Eastern District of Oklahoma, enjoining the Secretary from taking the land into trust without the Nation's written consent and fulfillment of other requirements. *Cherokee Nation v. Jewell*, No. CIV-14-428-RAW, 2017 WL 2352011, at *10 (E.D. Okla. May 31, 2017). Once the mandate issues and this Court has vacated the injunction, the Department will be able to take the land at issue into trust immediately, unless this Court enters a stay pending the Nation's petition for certiorari.

In these circumstances, the Nation clearly will suffer irreparable harm if this matter is not stayed. Land within its boundaries will be taken into trust for another tribe by the United States. This infringement of the Nation's sovereignty by itself is

irreparable harm for as long as it endures. In addition, once UKB establishes jurisdiction over trust land within Cherokee territory, it will likely result in "jurisdictional chaos" in the middle of the Cherokee Nation's treaty territory, where law enforcement officials from the State and local governments, as well as from the Nation, will be frustrated in the application of their laws. Hill Decl. at ¶8. ("[I]t is my informed opinion that the UKB Tribe will oppose any attempt by State, local, or Nation law enforcement officers to enforce criminal laws on the Subject Parcel.") This outcome "will create volatile situations that threaten public safety" and "could have dangerous and even deadly results." *Id.* ¶¶10-11. Once the Department takes the land into trust, it will be increasingly difficult to unscramble the consequences that follow.

## CONCLUSION

For the foregoing reasons, this Court should stay the mandate pending the Cherokee Nation's filing of a petition for certiorari in the Supreme Court.

Respectfully submitted this 15th day of November 2019.

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I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 32(g), and the word limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Fed. R. App. P. 27(a)(2)(B), this document contains 4,893 words.

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*/s/ Lloyd B. Miller*
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**CERTIFICATE OF COMPLIANCE WITH ELECTRONIC SUBMISSION**

I hereby certify that all required privacy redactions have been made in accordance with 10th Circ. R. 25.5. I further certify that the digital submission has been scanned for viruses with the most recent version of a commercial virus-scanning program, Cylance PROTECT, which is updated continuously, and that according to the program, this digital submission is free of viruses.

*/s/ Lloyd B. Miller*
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## CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, a true and correct copy of the foregoing document was served on all counsel of record via this Court's CM/ECF system.

*/s/ Lloyd B. Miller*
Lloyd B. Miller

**UNITED STATES COURT OF APPEALS**
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| THE CHEROKEE NATION,<br><br>*Plaintiff - Appellee,*<br><br>v.<br><br>DAVID BERNHARDT, in his official capacity as Secretary of the Interior, U.S. Department of the Interior; TARA KATUK MAC LEAN SWEENEY, *in her official capacity as* Acting Assistant Secretary for Indian Affairs U.S. Department of the Interior; EDDIE STREATER, *in his official capacity as* Eastern Oklahoma Regional Director, Bureau of Indian Affairs,<br><br>*Defendants - Appellants*<br>and<br><br>UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION,<br><br>*Intervenors - Defendants - Appellants* | ) | Case No. 17-7042<br>Case No. 17-7044 |

**DECLARATION OF SARA HILL IN SUPPORT OF MOTION FOR STAY OF MANDATE**

I, Sara Hill, hereby declare as follows:

1. I am an attorney licensed in Oklahoma and by the Cherokee Nation (Nation), and I serve as the Attorney General of the Nation. The Nation is the Plaintiff-Appellee in the above-captioned matters. I provide this declaration based on my experience in the position of Attorney General and in handling the legal issues that the Nation must address in connection with its treaty territory.

2. The 76-acre Subject Parcel that is the subject of the above-captioned matters is located just outside of Tahlequah, Oklahoma. Tahlequah is the Nation's capital and it and the Subject Parcel are entirely within the boundaries of the Nation's treaty territory.

3. The Subject Parcel is being used as the tribal headquarters for the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB Tribe). UKB Tribe operations on the Subject Parcel include government administrative offices, a vehicle tag office, child care services, elder services, and a tribal museum. Many people are employed in the various UKB Tribe governmental offices that are located there.

4. Nation citizens enter the Subject Parcel on a regular basis. Nation citizens are employed by the UKB Tribe. Also, because the Nation allows its citizens to also become members of the UKB Tribe under what is known as "dual enrollment," some Nation citizens are also members of the UKB Tribe. These dual

enrolled citizens enter the Subject Parcel to do business with the UKB Tribe government—for instance, obtaining services from the UKB Tribe, attending UKB government meetings or proceedings, or meeting with UKB Tribe officials or employees. And, because the Subject Parcel is deep inside the Nation's territory, Nation citizens may go there for any number of other reasons. For instance, Nation citizens could visit friends or relations who work at the Subject Parcel, deliver food or goods there, be contracted to do work for UKB Tribe there, or pass over the Subject Parcel accidentally or incidentally while on other business.

5. The Nation has expended great effort to insure uniform enforcement of criminal jurisdiction throughout its treaty territory. For instance, the Nation has entered into numerous cross-deputization agreements with the State of Oklahoma and local governments that allow state and local law enforcement officers to enforce criminal laws against Indians in Indian country in the Nation's territory and allow the Nation's law enforcement officers to enforce state criminal laws against Indians and non-Indians outside of Indian country. The Cherokee Nation Marshal Service has cross-deputization agreements with the City of Tahlequah and Cherokee County, both of which currently exercise criminal jurisdiction on the Subject Parcel. The UKB Tribe is not a party to these agreements. As far as I am aware, the UKB Tribe has no cross-deputization agreements with the State, any local governments, or the Nation.

6. If the Subject Parcel is taken into trust for the UKB Corporation, the UKB Tribe will argue that the it is "Indian country" under 18 U.S.C. § 1151. Once the Subject Parcel is taken into trust, the UKB Tribe will seek to exercise jurisdiction over it notwithstanding that this parcel is within the Nation's territory. The UKB Tribe will resist Nation jurisdiction over the property, because the UKB Tribe will assert that it now has jurisdiction over the property with the support of the Department of the Interior.

7. If the UKB Tribe asserts jurisdiction over the Subject Parcel, Nation citizens will have difficulty seeking enforcement of Nation court orders on the parcel. This poses risks to and difficulties for Nation citizens who are on the Subject Parcel. For instance, a Nation citizen, employed by the UKB Tribe, who has a Nation court order of protection against an abusive intimate partner, may be unable to seek enforcement of the order in the Nation's courts against her abuser on the Subject Parcel.

8. If the UKB Tribe asserts jurisdiction over the Subject Parcel, it is my informed opinion that the UKB Tribe will oppose any attempt by State, local, or Nation law enforcement officers to enforce criminal laws on the Subject Parcel. The result will be a 76-acre swath of jurisdictional chaos in the middle of the Nation's territory where it will be exceedingly difficult for criminal laws to be enforced peaceably without federal intervention, which is highly unlikely in almost all cases.

This could effectively leave Nation citizens with no law enforcement protection on the Subject Parcel.

9. This situation would attract attentive criminals. Fugitives and people intending to commit crimes—such as drug or human trafficking—will know that it will be harder for law enforcement officers to arrest them while they are on the Subject Parcel and will naturally seek to go there to avoid law enforcement.

10. It is very possible that UKB Tribal jurisdiction over the Subject Parcel will lead to stand-offs in which UKB Tribe members try to obstruct or stop Nation or local law enforcement involved in hot pursuit of suspects from entering or enforcing criminal laws on the Subject Parcel. This will create volatile situations that threaten public safety.

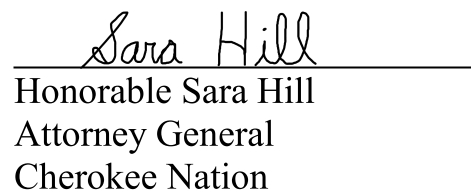
11. Armed UKB Tribal police could get into disputes with law enforcement officers from local governments or the Nation over who has jurisdiction to investigate a particular crime or incident. In on-the-spot attempts by Nation or local law enforcement officers to enforce criminal laws or pursue a fleeing suspect, this could have dangerous and even deadly results.

12. I anticipate that the UKB Tribe will seek to obtain federal funds to provide governmental services to Indians on the Subject Parcel if it is taken into trust. Because the Nation already provides governmental services to

Indians in the Nation's territory, this will duplicate services in the Nation's territory and waste valuable federal and tribal resources.

13. On October 4, 2019, the Department of the Interior published notice in the Tahlequah Daily Press, a newspaper that serves the Tahlequah area, that it intends to take the Subject Parcel into trust. Attached as Exhibit A is a true and correct copy of this notice taken from the Tahlequah Daily Press's website. *See also* http://notices.tahlequahdailypress.com/listing/33209038. The Department stated it was publishing the notice to comply with 25 C.F.R. § 151.12(d)(2)(iii), and that the trust acquisition would occur "at least thirty days" after publication of the notice. Since more than thirty days have passed since the October 4 notice was published, under the terms of this notice the Department may take the Subject Parcel into trust at any time after the mandate issues.

I declare under penalty of perjury this 14th day of November 2019, that everything that I have stated in this document is true and correct.



Honorable Sara Hill
Attorney General
Cherokee Nation

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## Notice Details

Published in the Tahlequah Daily Press on October 4, 2019 PUBLIC NOTICE TO TAKE LAND "IN TRUST" ACTION: Notice of final agency determination to take land into trust under 25, Code of Federal Regulations, Part 151. SUMMARY: The Acting Regional Director, Eastern Oklahoma Region, Bureau of Indian Affairs, U.S. Department of the Interior on the below date, has made a final determination to acquire real property "in trust" for the United Keetoowah Band of Cherokee Indians in Oklahoma, a corporation chartered under the Act of June 26, 1936 (49 Stat. 1967), and the Act of August 10, 1946 (60 Stat. 976) DATE: This determination was made on May 24, 2011. FOR FURTHER INFORMATION CONTACT: Ms. Annette Jenkins, Realty Officer, Eastern Oklahoma Region, Eastern Oklahoma Regional Office, Division of Real Estate Services, at (918) 781-4658 SUPPLEMENTARY INFORMATION: This notice is published to comply with the requirements of 25 CFR 151.12(d)(2)(iii) that notice be given to the public of the decision by the authorized representative of the Secretary of the Interior to acquire land "in trust" at least 30 days prior to signatory acceptance of land "in trust." On May 24, 2011, the Acting Regional Director issued a Decision Notice to accept land "in trust" for the United Keetoowah Band of Cherokee Indians in Oklahoma, a corporation, under the authority of Section 3, of the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. 503. The Acting Regional Director, on behalf of the Secretary of the Interior, shall acquire title in the name of the United States of America in trust for United Keetoowah Band of Cherokee Indians in Oklahoma, a corporation, no sooner than 30 days after the initial date this notice is published in the newspaper. The land referred to as "76 acres" property, (FTT Case File #G-904-2008-1667) herein and is described as: The S½N½SE¼ and the N½S½SE¼ of Section 8, Township 16 North, Range 22 East of the IB&M, according to the

Exhibit A

Government Survey thereof, Cherokee County, Oklahoma, containing 76 acres more or less, surface only, LESS a tract of land being part of the S½NE¼SE¼ of Section 8, Township 16 North, Range 22 East, IB&M, in Cherokee County, Oklahoma, more particularly described as follows: Commencing at the southeast corner of Section 8; thence north 0°03'00" east along the east line of said Section 8, to the northeast corner of the SE¼NE¼SE¼ of said Section 8 a distance of 1983.63'; thence north 89°55'56" west along the north line of the S½NE¼SE¼ of section 8 a distance of 237.07' to the true point of beginning; thence south 22°16'14" west a distance of 380.52'; thence in a northwesterly direction around a curve to the left having a radius of 146.00' and arc distance of 52.41' and having a chord bearing of north 40°07'46" west a chord distance of 52.13'; thence in a northwesterly direction around a curve to the left having a radius of 366.00' an arc distance of 451.42' and having a chord bearing of north 85°44'51" west a chord distance of 423.35'; thence in a southwesterly direction around a curve to the right having a radius of 271.54' an arc distance 147.73' and having a chord bearing of south 74°30'16" west a chord distance of 145.92'; thence north 00°05'27" east to a point on the north line of the S½NE¼SE¼ of section 8 a distance of 320.75'; thence south 89°55'56" east along the north line of S½NE¼SE¼ a distance of 740.10'; to the true point of beginning, containing 4.26 acres, more or less.

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