17-7042

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THE CHEROKEE NATION, Plaintiff – Appellee, v. RYAN ZINKE, et al., Defendants, And UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, et al., Intervenors Defendants – Appellants	)	No. 17-7042

On Appeal from the United States District Court for the Eastern District of Oklahoma, Honorable Ronald A. White, Case No. 14-cv-428-RAW

OPENING BRIEF FOR THE INTERVENORS DEFENDANTS – APPELLANTS

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Oral Argument Requested

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CORPORATE DISCLOSURE STATEMENT

Intervenor Defendant United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") is a federally recognized Indian tribe. Intervenor Defendant United Keetoowah Band of Cherokee Indians, Oklahoma Corporation ("UKB Corporation") is a federally chartered corporation chartered under Section 3 of the Oklahoma Indian Welfare Act, now codified at 25 U.S.C. § 5203 (formerly § 503). There are no other owners of the UKB Corporation or of the UKB tribe.

STATEMENT OF RELATED CASES

This appeal has been consolidated with an appeal from the same district-court judgment, docketed as 10th Cir. No. 17-7044, filed by Defendants-Appellants Ryan Zinke, in his official capacity as Secretary of the Interior, U.S. Department of the Interior, Michael S. Black, in his official capacity as Acting Assistant Secretary – Indian Affairs, U.S. Department of the Interior, and Eddie Streater, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs ("BIA").

GLOSSARY

CNO	Cherokee Nation of Oklahoma
IBIA	Interior Board of Indian Appeals
IRA	Indian Reorganization Act
OIWA	Oklahoma Indian Welfare Act
UKB	United Keetoowah Band of Cherokee Indians in Oklahoma

INTRODUCTION

The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") is a federally recognized tribe of Cherokee Indians. UKB membership requires at least one-quarter Cherokee blood. UKB law prohibits members from being enrolled in, or members of, any other Indian tribe. The UKB presently has more than 14,000 members. The UKB traces its history to the Western Cherokees who moved from the southeastern United States to a reservation in Arkansas in the early 1800s, and ultimately settled the original Cherokee territory in Oklahoma in the 1820s. The UKB first organized a written constitution and written laws in 1859. The UKB views itself as a successor in interest to the historical Cherokee tribe.

The Cherokee Nation of Oklahoma ("CNO") is also a federally recognized tribe of Cherokee Indians. Membership in the CNO is tied not to blood quantum but to ancestry from an early 1900s roll of Cherokees. The CNO has over 350,000 members. The CNO argues it is the exclusive successor in interest to the historical Cherokee tribe, but that issue has never been finally determined by a court.

Congress has plenary power over Indian affairs. In an appropriations act in 1998, Congress determined CNO consent is not required for the United States Department of the Interior ("Interior") to take land within the original Cherokee territory in trust for the UKB. Congress did so by expressly changing a CNO consent requirement from a previous appropriations act to a requirement for CNO consultation. Congress' decision to allow Interior to take land in trust for the UKB

controls. Congress has explicitly adopted an antidiscrimination policy prohibiting Interior from treating one Indian tribe differently than another. Any contrary regulations should fall in the face of this Congressional action. The district court's Order should be reversed and the Court should hold Congress has given Interior authority to take land within the original Cherokee territory (where both the UKB and the CNO have resided for nearly two centuries) in trust for the UKB. Interior's decision to do so was not arbitrary, capricious, or otherwise in violation of the law.

JURISDICTIONAL STATEMENT

CNO sued Interior asserting claims under the Administrative Procedures Act, 5 U.S.C. 701 *et seq.*, after Interior issued a final agency action taking a Community Services Parcel in trust for the UKB. CNO claimed Interior did not have such authority without CNO's consent. CNO's claims required interpretation of the Oklahoma Indian Welfare Act of 1936 ("OIWA") (codified at 25 U.S.C. § 5201 *et seq.*) the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 ("1999 Appropriations Act"), Pub. L. No. 105-277, 112 Stat. 2681 (1998), and 25 C.F.R. § 151.8.

The district court entered an order and a final judgment on May 31, 2017. (Aplt. App. 35–54). The UKB filed a timely notice of appeal on July 28, 2017. (Aplt. App. 55–56). This Court has appellate jurisdiction under 28 U.S.C. § 1291. Alternatively, this Court has appellate jurisdiction to review the district court's order under the practical-finality rule. *See Miami Tribe of Okla. v. United States*, 656

F.3d 1129, 1140 (10th Cir. 2011) because the district court's order forecloses the UKB from obtaining appellate review of decisive issues in its applications for land in trust.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to review the district court's order under either 28 U.S.C. § 1291 or the practical-finality rule?

2. Does the definition of Indian in the IRA apply to land-into-trust acquisitions under the OIWA?

3. Did Congress authorize Interior to take land within the original Cherokee territory in trust for the UKB without CNO consent?

4. Did Interior act arbitrarily or capriciously or in violation of the law, when it found the OIWA gives it authority to take land in trust for the UKB?

STATEMENT OF THE CASE

A. Legal Background

1. Treaties

In 1817, the Western Cherokees entered into a treaty with the United States for a reservation in Arkansas ("1817 Treaty"). 7 Stat. 156. In 1828, the Western Cherokees entered into a treaty with the United States to relinquish their reservation in Arkansas for a reservation in Oklahoma ("1828 Treaty"). 7 Stat. 311. The 1846 Treaty with the Cherokees guaranteed to the Western Cherokees their rights to the

original Oklahoma territory. 9 Stat. 871.[1] The UKB trace their lineage to those Western Cherokees who settled in Arkansas and then Oklahoma.[2]

In 1859, the UKB reorganized the government of the Western Cherokees, adopting a constitution and laws to govern the traditional Cherokees, who opposed slavery. (Aplt. App. 252–69). After the American Civil War, the historical Cherokee tribe, including the Keetoowah Cherokees, agreed to the Treaty of 1866. 14 Stat. 799. That Treaty prevented foreign tribes (that is non-Cherokees) from being settled in the original Cherokee territory without Cherokee consent.

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[1] *Id.* at art. 4 ("the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, *as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi* . . .")(emphasis added).

[2] For more detailed descriptions of this history, *see, e.g.*, *United Keetoowah Band of Cherokee Indians*, OKLAHOMA INDIAN TRIBE EDUCATION GUIDE, Okla. Dep't of Educ., 4 (July 2014) *available at* http://sde.ok.gov/sde/sites/ok.gov.sde/files/documents/files/Tribes_of_OK_Education%20Guide_United_Keetoowah_Band_Cherokee.pdf, *and* John Clough, *United Keetoowah Band,* THE ENCYCLOPEDIA OF OKLA. HIST. AND CULTURE (Okla. Hist. Society 2007) *available at* http://www.okhistory.org/publications/enc/entry.php?entry=UN006 ("CNO–UKB relations have been tenuous for more than two centuries. Keetoowahs trace their lineage to the Old Settler Cherokees who settled in Arkansas in 1817 and moved to present northeastern Oklahoma in 1828. The arrival of the main body of Cherokees over the Trail of Tears in 1838 and 1839 led to a power struggle with the Old Settlers over the structure of the government. The contest ultimately ended in a bloody civil war.")

2. Oklahoma Indian Welfare Act

In the early 1930s, Congress sought to reverse its policy of allotting Indian lands to non-Indians thereby breaking up the tribal land bases. In 1934, Congress passed the Indian Reorganization Act ("IRA"), which ended allotment, authorized the federal government to take lands in trust for Indian tribes, and promoted self-government for tribes. At the time, the IRA excluded Oklahoma tribes from reorganizing under the IRA. In 1936, Congress passed the Oklahoma Indian Welfare Act ("OIWA") authorizing Oklahoma tribes to take advantage of the rights and privileges contained in the IRA. *See* 25 U.S.C. § 5123.

In 1946, Congress passed an act authorizing the UKB to reorganize under the OIWA. Act of Aug. 10, 1946, 60 Stat. 976. The UKB did so, adopting a constitution and bylaws and corporate charter (forming the "UKB Corporation"), which were approved by Interior. (Aplt. App. 78–90). In 1976, CNO formed. *See Cherokee Nation v. Nash*, No. CV 13-01313 (TFH), 2017 WL 3822870, at *16 (D.D.C. Aug. 30, 2017)

3. 1999 Appropriations Act

In 1980, Interior adopted regulations prohibiting foreign tribes from taking land in another tribe's reservation without that tribe's consent. 25 C.F.R. § 151.8. In 1991, Congress prevented Interior from taking land in the original Cherokee territory in trust for the UKB, without CNO's consent. Dep't of the Interior and Related Agencies Appropriations Act, 1992 ("1992 Appropriations Act"), Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991). At the time, Interior viewed the CNO as the

exclusive successor of the historical Cherokee tribe, and discriminated between the CNO and the UKB with respect to funding, land-into-trust acquisitions, and federal services. (*See, e.g.*, Aplt. App. 216).

In 1994, Congress added antidiscrimination provisions to the text of the IRA. Act of May 31, 1994 Pub. L. No. 108-263, 108 Stat. 707 ("1994 IRA Amendments") (codified at 25 U.S.C. § 5123(f) and (g)). Those provisions prevented Interior from discriminating between Indian tribes. *Id.* In 1998, Congress revisited the prohibition on the UKB receiving land in the original Cherokee territory in trust without CNO consent. Congress expressly changed the law to require only CNO consultation, not consent. Dep't of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (Oct. 21, 1998) ("1999 Appropriations Act").

B. Factual Background

1. The United Keetoowah Band of Cherokee Indians

In 1859, the UKB, then simply called the Keetoowah Cherokees (descended from the Western Cherokees), reorganized their government by adopting a constitution and laws governing the traditional full-blood Cherokees. Their goal was to create a separate Cherokee government for traditional Cherokee people that would preserve their culture, oppose slavery, and oppose the South in the coming Civil War. (Aplt. App. 252–69). In 1866, the Cherokee entered into a treaty with the United

States. The Keetoowah Cherokees, which had opposed slavery and the South during the Civil War, were parties to that treaty.

"Today the UKB has over 14,300 members, with 13,300 living within the state of Oklahoma." *United Keetoowah Band of Cherokee Indians*, OKLAHOMA INDIAN TRIBE EDUCATION GUIDE, Okla. Dep't of Educ., 4 (July 2014) *available at* http://sde.ok.gov/sde/sites/ok.gov.sde/files/documents/files/Tribes_of_OK_Education%20Guide_United_Keetoowah_Band_Cherokee.pdf. The UKB limits its membership to those of one-fourth or more Cherokee blood, and members cannot carry dual citizenship in both the UKB and the CNO. *Id.* (Aplt. App. 236–37).

The CNO opposes the UKB having rights or privileges under the OIWA as demonstrated by a 2011 CNO law prohibiting the CNO Principal Chief and other officials from consenting to lands within the original Cherokee territory being taken in trust for the UKB. Land Into Trust by Foreign Native American Tribes Act of 2011, CNO Nat'l Council Leg. Act 24-11, (Nov. 17, 2011)

2. The land-into-trust application.

In 2000, the UKB purchased an undeveloped 76 acre parcel in Tahlequah, Oklahoma ("Community Services Parcel") (Aplt. App. 60, 63). Since then, the UKB has built several buildings for tribal community services and the Parcel has become a place where Keetoowah Cherokees can come together and maintain their community and tribal existence. (Aplt. App. 64).

The Parcel is the hub of UKB cultural and social activities. On the Parcel, the UKB have built roads (through the tribal roads program), a tribal museum (the John Hair Cultural Center and Museum), a Lighthorse Tribal Security building, a tribal government building, and a community services building for providing services to tribal elders and other tribal members. Services provided include an elder nutrition program and elder dental program, health and fitness education programs, and diabetes prevention services. (Aplt. App. 64). The Parcel also hosts the annual Keetoowah Celebration annually. The event commemorates the reorganization of Keetoowah government in 1950. (*Id.*).[3]

In 2004, the UKB applied to Interior for the Community Services Parcel to be taken in trust for its benefit. (Aplt. App. 60–77). The UKB sought to have the Parcel taken in trust for the establishment of a land base (*Id.* at 62), which is essential to tribal self-determination and self-government. *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987) ("The land is the essential base of tribal culture, development, and society. As trustee, the United States properly acts with the jealousy of a fiduciary to protect this base.").

After seven years of proceedings, including consultation with CNO, Interior decided to take the Community Services Parcel in trust for the UKB. The UKB

[3] For a legal description and other background on the Parcel see Aplt. App. 278.

adopts Interior's background on its decision making process in the Opening Brief for the Federal Appellants, 12–18. (Doc. No. 01019910600).[4]

C. Procedural Background

In 2014, the CNO filed this action against Interior seeking injunctive and declaratory relief and reversal of the 2011 Decision. The UKB and UKB Corporation intervened as defendants.

In 2017, the district entered an order and judgment. (Dist. Ct. Materials 1). The district court found: (a) the 1999 Appropriations Act did not change the consent requirement of 25 C.F.R. § 151.8 (*id.* at 16); (b) the 1866 Treaty requires CNO consent for the UKB to take land in trust in the original Cherokee territory (*id.* at 17); and (c) the Assistant Secretary's decision that jurisdictional conflicts and administration of federal services to the UKB should not preclude the UKB's trust acquisition was arbitrary and capricious (*id.* at 19).

The UKB and UKB Corporation filed this appeal of the district court's decision. Interior filed a separate appeal that has been consolidated with this one.

SUMMARY OF THE ARGUMENT

The Court has jurisdiction over this appeal. This appeal does not implicate the administrative-remand rule because the district court issued a final decision. The district court order and judgment resolved the suit, granted relief to the CNO, and did not instruct Interior to resume its review of the UKB trust application. If the decision

[4] Fed. R. App. P. 28(i).

is not final, the Court still has appellate jurisdiction under the practical-finality rule because the UKB will be foreclosed from obtaining appellate review of the district court's holding that CNO consent is required. UKB will never obtain CNO consent.

In the 1999 Appropriations Act, Congress authorized Interior to take land within the original Cherokee territory in trust for the UKB without CNO consent. Congress understood that requiring CNO consultation instead of CNO consent would allow the UKB to have land taken in trust within the original Cherokee territory. The 1999 Appropriations Act also effectuates Congress' stated antidiscrimination policies, which prohibit Interior from treating one tribe differently than another tribe. Those antidiscrimination provisions were added to the IRA in 1994. Yet, all of the Interior statements and court decisions relied on by CNO, for its argument that it is the sole successor to the historic Cherokee tribe, were decided before 1994. The change in law effectuated by the antidiscrimination provisions and the 1999 Appropriations Act demonstrates Congress authorized Interior to take land within the original Cherokee territory in trust for the UKB without CNO consent. And that is precisely what Interior determined to be the law in this case.

The regulation requiring consent for land-into-trust applications for a tribe in a tribal reservation "other than its own" does not apply here. 25 C.F.R. § 151.8. Interior adopted the regulation in 1980, well before Congress enacted the antidiscrimination provisions (1994) and authorized Interior to take land within the original Cherokee

territory in trust for the UKB without Cherokee consent (1998).[5] The original Cherokee territory in Oklahoma has been the UKB's reservation since 1828. The UKB has never left the Cherokee reservation.

The 1866 Treaty with the historic Cherokee tribe does not require CNO consent for the Community Services Parcel to be taken in trust. The 1866 Treaty predates the express congressional authorization for Interior to take land in trust for Indian tribes by more than seventy years. The 1866 Treaty did not contemplate land being taken in trust for either the UKB or the CNO. Further, the UKB descend from Cherokee Indians who signed the 1866 Treaty. It would be absurd if a treaty that was intended to protect Cherokee Indians, including the Keetoowahs, from harassment by foreign tribes could be read to prevent one of the descendent tribes from having land taken in trust without the other descendent tribe's consent.

Interior correctly found Congress gave it authority in the unambiguous 1999 Appropriations Act to take the Community Services Parcel in trust for the UKB without CNO consent. Interior carefully considered the potential jurisdictional conflicts and administrative burdens over the course of more than five years.

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[5] In its 2011 Decision, Interior decided the regulation does not apply because Congress overrode its consent requirement in the 1999 Appropriations Act (Aplt. App. 293). But even if Congress had not overrode the regulation, a plain reading shows it does not apply to the UKB's trust application. It only applies where foreign tribes from outside a reservation seek to have land taken in trust in a reservation "other than its own." 25 C.F.R. § 151.8.

Interior's decision to take the Parcel in trust for the UKB was well reasoned and complied with the law governing land-into-trust acquisitions.

STANDARD OF REVIEW

The district court interpreted three federal statutes—the IRA, the OIWA, and the 1999 Appropriations Act—and the 1866 Treaty. This Court reviews of these interpretations de novo. *Par. Oil Co. v. Dillon Cos.*, 523 F.3d 1244, 1248 (10th Cir. 2008) (statutes); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 988 (10th Cir. 2004) (treaties with Indian tribes).

The district court also interpreted 25 C.F.R. § 151.8. Interior's interpretation of its own regulations govern unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The district court rejected Interior's decision on two trust-acquisition criteria in 25 C.F.R. § 151.10, as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This Court's "review under this standard is narrow and *highly deferential to the agency*." *Compass Envtl., Inc. v. OSHRC*, 663 F.3d 1164, 1167 (10th Cir. 2011) (emphasis added). "Under this standard," moreover, this Court "will not disturb an agency action unless the agency 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise.'" *WildEarth Guardians v. United States EPA*, 770 F.3d 919, 927 (10th Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). This Court "must uphold the agency's action if it has articulated a rational basis for the decision and has considered relevant factors." *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir. 2006) (quoting *Slingluff v. OSHRC*, 425 F.3d 861, 866 (10th Cir. 2005)).

ARGUMENT

I. The Court has jurisdiction over this appeal.

The Clerk of Court entered an order on August 15, 2017, ordering the parties to address whether this appeal implicates the administrative remand rule. That rule is not implicated because the district court entered a final order and judgment in favor of the CNO. "It is bedrock law that we have jurisdiction over all final decisions of federal district courts under 28 U.S.C. § 1291. *Miami Tribe Of Oklahoma v. United States*, 656 F.3d 1129, 1137 (10th Cir. 2011). The UKB adopts Interior's discussion of the administrative remand rule and the practical finality rule in the Opening Brief for the Federal Appellants, 23–24. (Doc. No. 01019910600).

II. In the 1999 Appropriations Act, Congress authorized Interior to take land within the original Cherokee territory in trust for the UKB without CNO consent.

A. Congress has plenary power over Indian affairs.

Congress has plenary power over Indian affairs. "The Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200 (2004) (cleaned up). Congress' plenary power derives from the Indian Commerce Clause. Const. art. I, § 8 ("The Congress shall have power to . . . regulate commerce . . . with the Indian tribes . . . ."); *see also Lara*, 541 U.S. at 200 (describing the Indian Commerce Clause's "central function" as providing "Congress with plenary power to legislate in the field of Indian affairs."). Using this power, Congress gave Interior authority to take land in the original Cherokee territory in Oklahoma in trust for the UKB without CNO consent.[6]

B. To advance its policy of antidiscrimination between Indian tribes, Congress changed the requirement for CNO consent to a requirement for CNO consultation.

At one time, Interior lacked authority to take land in the original Cherokee territory in trust for the UKB without CNO consent. Congress created the requirement for CNO consent in 1991 when it prohibited Interior from using any funds "to take land into trust within the boundaries of the original Cherokee territory

[6] It is undisputed that both CNO and UKB are federally recognized Indian tribes.

in Oklahoma *without the consent of the Cherokee Nation.*" Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 St. 990, 1004 (Nov. 13, 1991) ("1992 Appropriations Act") (emphasis added).[7]

After 1991, however, Congress changed course. First, in 1994, Congress amended Section 16 of the IRA to prohibit Interior from discriminating between Indian tribes. Congress stated Interior "shall not promulgate any regulation or make any decision or determination . . . that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe *relative to* the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes." Technical Amendments: Indians Pub. L. No. 103–263, 108 Stat 707 (May 31, 1994) (codified at 25 U.S.C. § 5123(f) (emphasis added)). In that same bill, Congress also added a provision to Section 16 of the IRA voiding any regulation "that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes." *Id.* (codified at § 5123(g)).

Second, in 1998 Congress expressly changed the statutory prohibition in the 1992 Appropriations Act by changing "consent" to "consult." Department of the

[7] The full provision reads: "[U]ntil such time as legislation is enacted to the contrary, none of the funds appropriated in this or any other Act for the benefit of Indians residing within the jurisdictional service area of the Cherokee Nation of Oklahoma shall be expended by other than the Cherokee Nation, nor shall any funds 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.*

Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (Oct. 21, 1998) ("1999 Appropriations Act").[8] By changing "consent" to "consult" Congress explicitly removed CNO's veto authority over UKB land-in-trust decisions. The change comports with Congress' own requirement that Interior not discriminate between federally recognized tribes, including the CNO and the UKB. 25 U.S.C. § 5123(f) and (g). As a result, Interior has express statutory authority to take land within the original Cherokee territory in trust for the UKB without CNO consent.

The legislative history of the 1994 IRA amendments and the 1999 Appropriations Act support Interior's authority to take land within the original Cherokee territory in trust for the UKB without CNO consent. The legislative history of the 1994 antidiscrimination measures (25 U.S.C. § 5123(f) and (g)) shows Congress intended to prevent Interior from treating one tribe differently than any other tribe. Congressman Richardson explained to the House of Representatives that Interior had begun classifying and discriminating between "historic" tribes and "created" tribes. Making Certain Technical Corrections to Various Federal Statutes Affecting Native Americans, 140 Cong. Rec. H3802-01, 140 Cong. Rec. H3802-01, H3803, 1994 WL 200895.

[8] The full provision reads: "[U]ntil such time as legislation is enacted to the contrary, 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." *Id.*

He explained this discriminatory practice had no basis in law and the antidiscrimination amendments were intended to prevent such discrimination.

> Neither the Congress nor the Secretary can create an Indian tribe where none previously existed. Congress itself cannot create Indian tribes, so there is no authority for the Congress to delegate to the Secretary in this regard. . . .
>
> The recognition of an Indian tribe by the Federal Government is an acknowledgement that the Indian tribe is a sovereign entity with governmental authority which predates the U.S. Constitution. The Federal Government has extended recognition to Indian tribes through treaties, Executive orders, a course of dealing, decisions of the Federal courts, acts of Congress and administrative action. Whatever the method by which recognition was extended, *all* Indian tribes enjoy *the same relationship* with the United States and *exercise the same inherent authority*. . . .
>
> The amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an *equal footing to each others and to the Federal Government*, and that each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes. . . . The Congress has *never* acknowledged distinctions in or classifications of inherent sovereignty possessed by federally recognized Indian tribes.

Id. (emphases added).

The legislative history of the 1999 Appropriations Act shows Congress intended to authorize Interior to take land within the original Cherokee territory in trust for the UKB *without CNO consent.* The conference report for the enacted House bill later explained that as amended, the provision allows Interior "to deal with the United Keetoowah Band of Cherokees . . . on issues of funding, but prevents the[]

tribe[] from establishing trust holdings within the Cherokee's original boundaries without Cherokee *consultation*." H.R. Conf. Rep. 105-825, 1209 (emphasis added). Further, Interior informed Congress prior to passing the 1999 Appropriations Act that the 1992 Appropriations Act's CNO consent requirement could deny the UKB rights and privileges of other Indian tribes, including the right to self-governance and economic self-sufficiency.

> The [1992 Appropriations Act] proviso could be interpreted as prohibiting the Bureau from dealing directly with the United Keetoowah Band of Cherokees . . . . *This type of interpretation would mean that the [UKB] . . . could not enjoy the same privileges as other federally recognized Tribes when* contracting and *dealing with the Department.* This would preclude the Tribe[] achieving self governance or self sufficiency. This lack of equality is *inconsistent with* the policy enunciated by Congress in the 1994 amendments to the Indian Reorganization Act, which prohibits the Department from classifying, enhancing, or diminishing the privileges available to other federally recognized Tribes.

Department of the Interior, Budget Justifications and Annual Performance Plan FY 1999: Hearing Before a Subcommittee of the H. Comm. on Appropriations, Part 2: Justification of Budget Estimates, 105th Cong., 2d Sess. 838 (1998).

Interior found the 1994 IRA amendments and the 1999 Appropriations Act authorized it to take land within the original Cherokee territory in trust for the UKB without CNO consent. (Aplt. App. 219). The Court should affirm that decision and reverse the district court's decision that Interior lacked such authority.

C. Congress expressly repealed the CNO consent requirement.

The 1999 Appropriations Act's CNO consultation clause expressly repealed the earlier 1992 Appropriations Act's CNO consent clause because Congress said so. Just before the amendment, Congress stated the 1992 Appropriations Act provision regarding CNO consent is "amended to read as follows." 112 Stat. 2681-246. The quoted language creates an express repeal of the language in the earlier statute. *See, e.g.*, *Willson v. Cagle*, 894 F.2d 1344 (9th Cir. 1990) (unpublished) (holding a statutory change including the phrase "amended to read as follows" expressly repealed the earlier statutory provision; "We reject the appellants' valiant attempt to convince us that the 1988 Reform Act did not repeal that portion of the Federal Drivers Act of 1961 upon which they rely. We have no difficulty in doing so. Repeal of the 1961 Act was not implied; it was express.").

Here, with additions shown in underline and deletions shown in strikethrough is the key clause of the 1999 Appropriations Act:

> [U]ntil such time as legislation is enacted to the contrary, . . . no funds shall ~~nor shall any funds~~ be used to take land into trust within the boundaries of the original Cherokee territory in Oklahoma without ~~the consent of~~ consultation with the Cherokee Nation.

Cf'ing 105 Stat. 1004 *with* 112 Stat. 2681-246. Because Congress authorized Interior to take land within the original Cherokee territory in trust for the UKB with CNO consultation—expressly repealing the requirement for CNO consent—and because

Interior consulted with CNO, Interior had full authority to take the Community Services Parcel in trust for the UKB.

II. The 1999 Appropriations Act supersedes the regulation requiring consent for land-in-trust applications for one tribe in another tribe's reservation.

The district court found the 1999 Appropriations Act did not repeal 25 C.F.R. § 151.8. (Dist. Ct. Materials 16). The district court's decision should be reversed because acts of Congress trump regulations. The UKB are not a foreign tribe from outside the boundaries of the original Cherokee territory. The UKB have been in the original Cherokee territory since the 1820s.

Section 151.8 allows a tribe to "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 (emphases added). Interior's 2009 Decision found the 1999 Appropriations Act repealed Section 151.8 with respect to the Community Services Parcel application. "Congress overrode this regulatory requirement with respect to lands within the boundaries of the former Cherokee reservation" when it passed the 1999 Appropriations Act. (Aplt. App. 218) "CNO does not need to consent to the acquisition in trust of the UKB's land. It is only necessary that the Department consult with the CNO. The Department satisfied this requirement when it solicited comments from the CNO." (*Id.*). The 1999 Appropriations Act authorized Interior to take land in the original Cherokee territory

in trust for the UKB without CNO consent. That act of Congress supersedes any contrary regulation, including Section 151.8.

It is well settled that a statute prevails over a conflicting regulation. "A valid statute *always* prevails over a conflicting regulation and a regulation can never trump the plain meaning of a statute." *Texas v. E.P.A.*, 726 F.3d 180, 195 (D.C. Cir. 2013) (cleaned up) (emphasis added). Where Congressional intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The court below has previously been reversed, in a case involving the UKB, for applying a regulation that was "contrary to the clear language" of a statute. *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't of Hous. & Urban Dev.*, 567 F.3d 1235, 1236–46 (10th Cir. 2009) *rev'g United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dep't of Hous. & Urban Dev.*, No. CIV-06-533-RAW, 2008 WL 7358289, *2 (E.D. Okla. Jan. 9, 2008) (White, J.).

Here, the 1999 Appropriations Act is a congressional act that directly conflicts with Section 151.8, a regulation. The statute allows Interior to take land in the original Cherokee territory in trust as long as Interior *consults* with CNO. The regulation requiring consent directly conflicts with the 1999 Appropriations Act requiring only consultation. The 1999 Appropriations Act superseded Section 151.8's consent requirement for UKB land-into-trust applications within the original Cherokee

territory. The UKB adopts Interior's explanation that statutes supersede regulations in the Opening Brief for the Federal Appellants, 28–31 (Doc. No. 01019910600).

The district court only held the 1999 Appropriations Act did not repeal Section 151.8. (Dist. Ct. Materials 15–16). To determine the impact of the 1999 Appropriations Act, Interior assumed without deciding Section 151.8 would otherwise apply. ((Opening Brief for the Fed. Aplts., 29 n.3 (Doc. No. 01019910600)). So the application of Section 151.8 to the Community Services Parcel is not properly before this Court.[9]

III. The 1866 Treaty with the historic Cherokee tribe does not require CNO consent for the Community Services Parcel to be taken in trust.

[9] If the UKB were required to address the application of Section 151.8 to the Community Services Parcel application, the UKB would note they have been in the original Cherokee territory since it was established in 1828, when the Western Cherokees ceded their Arkansas reservation for an Oklahoma reservation. Section 151.8 only applies to a tribe seeking to acquire land in a reservation "other than its own." The Community Services Parcel is not in a reservation "other than [the UKB's] own," as Congress recognized when it passed the 1999 Appropriations Act with the intent of allowing UKB to have land taken into trust in the original Cherokee territory without CNO consent. Section 151.8, therefore, would not apply to the acquisition of the Community Services Parcel. Further, Section 151.8 only applies to lands over which a tribe has jurisdiction. "An 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). The CNO claims no jurisdiction over fee land within the original Cherokee territory, which includes the Community Services Parcel. The CNO's reservation is limited to trust and restricted parcels. As the Supreme Court held in *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 1259, 67 L. Ed. 2d 493 (1981), a tribe generally lacks jurisdiction over land owned in fee by non-members. *Id.* The UKB owns the Community Services Parcel. Plainly, the UKB, as a federally recognized Indian tribe, is not and cannot be a CNO member.

Disputes between the Cherokee Indians who became the UKB and those who became the CNO date back centuries. In the early 19th century, the traditional Keetoowah Cherokees began leaving their original territory in the southeastern United States to settle in the west. The UKB's ancestors obtained a reservation in Arkansas through the 1817 Treaty and relinquished it for the Oklahoma reservation in the 1828 Treaty, a decade before the CNO's ancestors arrived in Oklahoma.[10] *See United States v. Old Settlers*, 148 U.S. 427, 435-36 (1893) (statement by Fuller, C.J.). When the CNO's ancestors arrived in the Oklahoma reservation, "they, being in the majority, refused to submit to the established government of the Western Cherokees" so they "set up their own laws and government" and "persecuted the Treaty Party Cherokees and the Western Cherokees," resulting in "a period of sanguinary strife, bordering on civil war." *Cherokee Nation of Indians in Okla. for & on Behalf of W. Cherokee Indians v. United States*, 109 F. Supp. 532, 534 (Ct. Cl. 1953).

The traditional high-blood-quantum Keetoowah Cherokees and the CNO's forebears disagreed over many things, including slavery. The Cherokee Indians who became CNO supported slavery and owned slaves. That history lingers. The CNO spent the better part of the last two decades attempting to disenroll African-American CNO tribal members (known as "Freedmen"), even though the 1866 Treaty

[10] "The Cherokees that migrated to lands west of the Mississippi River were referred to as the 'Old Settlers' or 'Western Cherokees' while the Cherokees that remained east of that river were referred to as the 'Eastern Cherokees.'" *Id.* at 437, 446.

guaranteed the Freedmen citizenship. *See Cherokee Nation v. Nash*, ___ F. Supp. 3d ___, No. 13–01313 (TFH), 2017 WL 3822870, *4–9, 29 (D.D.C. Aug. 30, 2017) (finding 1866 Treaty guaranteed the Freedmen rights to citizenship); *see also Cherokee Nation*, 109 F. Supp. at 534; *E. Band of Cherokee Indians v. United States*, 117 U.S. 288, 305–06 (1886) (describing the "bitter feeling between the old settlers and the newcomers" who "being the more numerous, claimed to control the government of the country, and endeavored to compel the old settlers to submit to their rule").

Before the civil war, the UKB adopted a constitution and governing laws organizing a government for the traditional Western Cherokees. (Aplt. App. 252-269). The UKB laws required members to be full-blood Cherokee and to have no formal education. (Aplt. App. 255). The UKB organized this government because they opposed slavery and did not want to side with the South, which they viewed as having taken their lands. (Aplt. App. 252-254) (The "South are the people who took our lands away from us which lands the Creator had given to us, where our forefathers were raised.").

It is undisputed that, as Cherokees loyal to the United States during the Civil War, the UKBs were also parties to the 1866 Treaty with the historical Cherokee Nation. Even the district court recognized the UKB were part of the historical Cherokee tribe, which entered the 1866 Treaty. (Dist. Ct. Materials 17). The 1866 Treaty, which protected rights of the Cherokees (including the UKB) should not be used by one faction of the historical Cherokee tribe against another faction. Any

rights the CNO have in the 1866 Treaty also extend to the UKB, including the right to consent to foreign tribes being settled within their reservation.

With respect to the interpretation of the 1866 Treaty's text and to the district court's unwarranted assumption the CNO is one and the same as the historical Cherokee tribe, the UKB adopts Interior's arguments. (Opening Brief for the Fed. Aplts., 31–43 (Doc. No. 01019910600)).

IV. Interior correctly found it has authority to take the Community Services Parcel in trust for the UKB.

In its 2010 and 2011 Decisions, Interior determined Section 3 of the OIWA gives Interior independent authority to take land in trust for the UKB. (Aplt. App. 270–72). The district court agreed. "As section 503 provides a corporation formed thereunder the same rights provided in the IRA, the Region is correct that statutory authority exists to take land into trust for the UKB Corporation.". (Dist. Ct. Materials 12). Congress has clearly authorized Interior to take the Parcel in trust for the UKB. In its application, the UKB asked Interior to take the Community Services Parcel in trust for the UKB Corporation under Section 3 of the OIWA (codified at 25 U.S.C. § 5203) (Aplt. App. 275). In its final 2011 Decision, Interior based its authority to take the Parcel in trust on Section 3. (Aplt. App. 289, 291-92).

A. OIWA Section 3 gives Interior authority to take land in trust for the UKB.

When Congress recognized the UKB as a tribe eligible for reorganization under the OIWA in 1946, it expressly referenced Section 3.[11] That Congressional reference shows Congress intended Interior to have the authority to take land in trust for the UKB under Section 3 because the UKB organized under Section 3 and obtained a federal charter authorizing it to acquire land. Section 3 states:

> 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, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. 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 (48 Stat. 984) [IRA].

[11] The Act of Aug. 10, 1946, Pub. L. 79-715, 60 Stat. 976, provides: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of Section 3 of the Act of June 26, 1936 (49 Stat. 1967)."

25 U.S.C. § 5203 (emphasis in original). This provision applies the rights and privileges of the IRA to tribes organized under the OIWA without restriction on the date on which the tribe was under federal jurisdiction.

The UKB Constitution and Charter each provided for this adoption of IRA rights and privileges. On October 3, 1950, the UKB voted, nearly unanimously, to ratify the Constitution and By-Laws of the United Keetoowah Band of Cherokee Indians in Oklahoma. The constitution provides the UKB shall "secure for its members the benefits, rights, privileges and powers as provided for under the Act of Congress approved June 26, 1936 (49 Stat. 1967) [OIWA] and the Act of Congress approved June 18, 1934 (48 Stat. 984) [IRA], so far as the same been made applicable to Oklahoma Indians." (Aplt. App. 79).

On May 8, 1950, Interior issued the UKB an OIWA corporate charter ("Charter") further demonstrating UKB's intent to adopt the OIWA's (and IRA's) rights and privileges. (Aplt. App. 90). The Charter claims all rights and privileges given to OIWA tribes. Those rights and privileges include the power to have Interior take land in trust.

Indeed, the Charter contains many provisions dealing with the acquisition and protection of lands for the UKB. (Aplt. App. 84, 86–89). For instance, the UKB Corporation has authority "[t]o advance the standard of living of the Band through the development of its resources, the acquisition of land, the preservation of existing landholdings, [and] the better utilization of land (Aplt. App. 84); "[t]o prevent any

disposition, lease or encumbrance of land belonging to the Band, [or] interest in land" (*Id.* 86); "[t]o purchase . . . property of every description, real or personal" (Charter art. 3(t)) (*Id.* 87). Further, the Charter expressly prohibits land owned by the Band from ever being sold or mortgaged. (*Id.*).

Thus, the governing documents ratified by the UKB under the OIWA with Interior's approval, claim the rights and privileges granted to such tribes under the IRA and OIWA. Those rights include the right to have land taken into trust.[12] OIWA Section 3 would be meaningless if it allowed Interior to issue OIWA charters that grant the right to have land in trust, but then failed to give meaning to that right by not allowing Interior to acquire land in trust for OIWA corporations.

B. Interior properly considered all regulatory factors when it decided to take the Community Services Parcel in trust for the UKB.

The UKB adopts Interior's arguments regarding its consideration of the trust acquisition criteria. (Opening Brief for the Fed. Appellants, 38–47 (Doc. No. 01019910600)).

CONCLUSION

Allowing the CNO to block UKB's acquisition of any trust land within its original territory, as the district court has done, flies in the face of Congress' express 1994 IRA antidiscrimination amendments and the 1999 Appropriations Act

[12] Interior determined *Carcieri v. Salazar*, 555 U.S. 379 (2009), does not apply to OIWA Section 3 trust acquisitions. (Aplt. App. 272, 289). The district court did not make a holding on whether *Carcieri* applies. (Dist. Ct. Materials 14 ("[T]he court will not opine on the issue in the first instance")).

requirement of CNO consultation. Congress plainly desires for federal Indian tribes organized under the OIWA to have land taken in trust to promote self-determination and self-government. The UKB is a federally recognized tribe just like the CNO. The UKB's OIWA reorganization long predates the CNO's 1976 governmental organization. The UKB should be entitled to the protections of the 1866 Treaty just as CNO is protected by that treaty. Both tribes descend from the Cherokee Indians the Treaty was designed to protect. The UKB asks this Court to take jurisdiction of this appeal, to reverse the district court, and to hold Interior did not act arbitrarily, capriciously, or otherwise in violation of law in deciding to take the Community Services Parcel in trust for the UKB without CNO consent.

STATEMENT REGARDING ORAL ARGUMENT

The UKB respectfully requests oral argument. This appeal concerns the UKB's ability to acquire land in trust for its cultural grounds. At issue are interpretative questions of first impression regarding the IRA, the OIWA, the 1999 Appropriations Act, and the 1866 Treaty with the Cherokees. The UKB believes oral argument may assist the Court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,410 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), according to the count of Microsoft Word.

s/ Klint A. Cowan
Klint A. Cowan

FORM CERTIFICATIONS

I hereby certify that:

- There is no information in this brief subject to the privacy redaction requirements of 10th Circuit Rule 25.5; and

- The hard copies of this brief to be submitted to the Court are exact copies of the version submitted electronically; and

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s/ Klint A. Cowan
Klint A. Cowan

STATUTORY AND REGULATORY ADDENDUM

TREATIES

1817 Treaty with the Cherokees

1828 Treaty with the Western Cherokees

1866 Treaty with the Cherokees

STATUTES

Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976

Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-154, 105 St. 990, 1004 (Nov. 13, 1991)

Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (Oct. 21, 1998)

25 U.S.C. § 5108 (formerly § 465) (Section 5 of the IRA)

25 U.S.C. § 5201 (formerly § 501) (Section 1 of the OIWA)

25 U.S.C. § 5203 (formerly § 503) (Section 3 of the OIWA)

25 U.S.C. § 5204 (formerly § 504) (Section 4 of the OIWA)

TRIBAL LAWS

Land Into Trust by Foreign Native American Tribes Act of 2011, CNO Nat'l Council Leg. Act 24-11, (Nov. 17, 2011)

CODE OF FEDERAL REGULATIONS

25 C.F.R. § 151.8

25 C.F.R. § 151.10

1817 WL 2156(Trty.)
(TREATY)

TREATY WITH THE CHEROKEE, 1817.

July 8, 1817.

Articles of a treaty concluded, at the Cherokee Agency, within the Cherokee nation, between major general Andrew Jackson, Joseph M'Minn, governor of the state of Tennessee, and general David Meriwether, commissioners plenipotentiary of the United States of America, of the one part, and the chiefs, head men, and warriors, of the Cherokee nation, east of the Mississippi river, and the chiefs, head men, and warriors, of the Cherokees on the Arkansas river, and their deputies, John D. Chisholm and James Rogers, duly authorized by the chiefs of the Cherokees on the Arkansas river, in open council, by written power of attorney, duly signed and executed, in presence of Joseph Sevier and William Ware. [FNA]

WHEREAS in the autumn of the year one thousand eight hundred and eight, a deputation from the Upper and Lower Cherokee towns, duly authorized by their nation, went on to the city of Washington, the first[FNB] named to declare to the President of the United States their anxious desire to engage in the pursuits of agriculture and civilized life, in the country they then occupied, and to make known to the President of the United States the impracticability of inducing the nation at large to do this, and to request the establishment of a division line between the upper and lower towns, so as to include all the waters of the Hiwassee river to the upper town, that, by thus contracting their society within narrow limits, they proposed to begin the establishment of fixed laws and a regular government: The deputies from the lower towns to make known their desire to continue the hunter life, and also the scarcity of game where they then lived, and, under those circumstances, their wish to remove across the Mississippi river, on some vacant lands of the United States. And whereas the President of the United States, after maturely considering the petitions of both parties, on the ninth day of January, A.D. one thousand eight hundred and nine, including other subjects, answered those petitions as follows:

The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove, are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. The regular districts of the government of St. Louis are already laid off to the St. Francis.

When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right. Every aid towards their removal, and what will be necessary for them there, will then be freely administered to them; and when established in their new settlements, we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand."

And whereas the Cherokees, relying on the promises of the President of the United States, as above recited, did explore the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States' lands, to which no other tribe of Indians have any just claim, and have duly notified the President of the United States thereof, and of their anxious desire for the full and complete ratification of his promise, and, to that end, as notified by the President of the United States, have sent on their agents, with full powers to execute a treaty, relinquishing to the United States all the right, title, and interest, to all lands of right to them belonging, as part of the Cherokee nation, which they have left, and which they are about to leave, proportioned to their numbers,

including, with those now on the Arkansas, those who are about to remove thither, and to a portion of which they have an equal right agreeably to their numbers.

Now, know ye, that the contracting parties, to carry into full effect the before recited promises with good faith, and to promote a continuation of friendship with their brothers on the Arkansas river, and for that purpose to make an equal distribution of the annuities secured to be paid by the United States to the whole Cherokee nation, have agreed and concluded on the following articles, viz:

ARTICLE 1

The chiefs, head men, and warriors, of the whole Cherokee nation, cede to the United States all the lands lying north and east of the following boundaries, viz: Beginning at the high shoals of the Appalachy river, and running thence, along the boundary line between the Creek and Cherokee nations, westwardly to the Chatahouchy river; [FNC] thence, up the Chatahouchy river, to the mouth of Souque creek; thence, continuing with the general course of the river until it reaches the Indian boundary line, and, should it strike the Turrurar river, thence, with its meanders, down said river to its mouth, in part of the proportion of land in the Cherokee nation east of the Mississippi, to which those now on the Arkansas and those about to remove there are justly entitled.

ARTICLE 2

The chiefs, head men, and warriors, of the whole Cherokee nation, do also cede to the United States all the lands lying north and west of the following boundary lines, viz: Beginning at the Indian boundary line that runs from the north bank of the Tennessee river, opposite to the mouth of Hywassee river, at a point on the top of Walden's ridge, where it divides the waters of the Tennessee river from those of the Sequatchie river; thence, along the said ridge, southwardly, to the bank of the Tennessee river, at a point near to a place called the Negro Sugar Camp, opposite to the upper end of the first island above Running Water Town; thence, westwardly, a straight line to the mouth of Little Sequatchie river; thence, up said river, to its main fork; thence, up its northernmost fork, to its source; and thence, due west, to the Indian boundary line. [FND]

ARTICLE 3

It is also stipulated by the contracting parties, that a census shall be taken of the whole Cherokee nation, during the month of June, in the year of our Lord one thousand eight hundred and eighteen, in the following manner, viz: That the census of those on the east side of the Mississippi river, who declare their intention of remaining, shall be taken by a commissioner appointed by the President of the United States, and a commissioner appointed by the Cherokees on the Arkansas river; and the census of the Cherokees on the Arkansas river, and those removing there, and who, at that time, declare their intention of removing there, shall be taken by a commissioner appointed by the President of the United States, and one appointed by the Cherokees east of the Mississippi river. [FNE]

ARTICLE 4

The contracting parties do also stipulate that the annuity due from the United States to the whole Cherokee nation for the year one thousand eight hundred and eighteen, is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty; and to be continued to be divided thereafter in proportion to their numbers; and the lands to be apportioned and surrendered to the United States agreeably to the aforesaid enumeration, as the proportionate part, agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty.[FNF]

ARTICLE 5

The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee nation on the Arkansas as much land on said river and White river as they have or may hereafter receive from the Cherokee nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry on White river, running up and between said rivers for complement, the banks of which rivers to be the lines; and to have the above line, from the point of beginning to the point on White river, run and marked, which shall be done soon after the ratification of this treaty; and all citizens of the United States, except Mrs. P. Lovely, who is to remain where she lives during life, removed from within the bounds as above named. And it is further stipulated, [FNG][FNH] that the treaties heretofore between the Cherokee nation and the United States are to continue in full force with both parts of the nation, and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties; the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined.

ARTICLE 6

The United States do also bind themselves to give to all the poor warriors who may remove to the western side of the Mississippi river, one rifle gun and ammunition, one blanket, and one brass kettle, or, in lieu of the brass kettle, a beaver trap, which is to be considered as a full compensation for the improvements which they may leave; which articles are to be delivered at such point as the President of the United States may direct: and to aid in the removal of the emigrants, they further agree to furnish flat bottomed boats and provisions sufficient for that purpose: and to those emigrants whose improvements add real value to their lands, the United States agree to pay a full valuation for the same, which is to be ascertained by a commissioner appointed by the President of the United States for that purpose, and paid for as soon after the ratification of this treaty as practicable. The boats and provisions promised to the emigrants are to be furnished by the agent on the Tennessee river, at such time and place as the emigrants may notify him of; and it shall be his duty to furnish the same. [FNI][FNJ]

ARTICLE 7

And for all improvements which add real value to the lands lying within the boundaries ceded to the United States, by the first and second articles of this treaty, the United States do agree to pay for at the time, and to be valued in the same manner, as stipulated in the sixth article of this treaty; or, in lieu thereof, to give in exchange improvements of equal value which the emigrants may leave, and for which they are to receive pay. And it is further stipulated, that all these improvements, left by the emigrants within the bounds of the Cherokee nation east of the Mississippi river, which add real value to the lands, and for which the United States shall give a consideration, and not so exchanged, shall be rented to the Indians by the agent, year after year, for the benefit of the poor and decrepit of that part of the nation east of the Mississippi river, until surrendered by the nation, or to the nation. And it is further agreed, that the said Cherokee nation shall not be called upon for any part of the consideration paid for said improvements at any future period. [FNK]

ARTICLE 8

And to each and every head of any Indian family residing on the east side of the Mississippi river, on the lands that are now, or may hereafter be, surrendered to the United States, who may wish to become citizens of the United States, the United States do agree to give a reservation of six hundred and forty acres of land, in a square, to include their improvements, which are to be as near the centre thereof as practicable, in which they will have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower, the register of whose names is to be filed in the office of the Cherokee agent, which shall be kept open until the census is taken as stipulated in the third article of this treaty. Provided, That if any of the heads of families, for whom reservations may be made, should remove therefrom, then, in that case, the right to revert to the United States. And provided further, That the land which may be reserved

under this article, be deducted from the amount which has been ceded under the first and second articles of this treaty. [FNL]

ARTICLE 9

It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein. [FNM]

ARTICLE 10

The whole of the Cherokee nation do hereby cede to the United States all right, title, and claim, to all reservations made to Doublehead and others, which were reserved to them by a treaty made and entered into at the city of Washington, bearing date the seventh of January, one thousand eight hundred and six. [FNN]

ARTICLE 11

It is further agreed that the boundary lines of the lands ceded to the United States by the first and second articles of this treaty, and the boundary line of the lands ceded by the United States in the fifth article of this treaty, is to be run and marked by a commissioner or commissioners appointed by the President of the United States, who shall be accompanied by such commissioners as the Cherokees may appoint; due notice thereof to be given to the nation. [FNO]

ARTICLE 12

The United States do also bind themselves to prevent the intrusion of any of its citizens within the lands ceded by the first and second articles of this treaty, until the same shall be ratified by the President and Senate of the United States, and duly promulgated. [FNP]

ARTICLE 13

The contracting parties do also stipulate that this treaty shall take effect and be obligatory on the contracting parties so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate of the United States. [FNQ]

In witness of all and every thing herein determined, by and between the before recited contracting parties, we have, in full and open council, at the Cherokee Agency, this eighth day of July, A.D. one thousand eight hundred and seventeen, set our hands and seals.

Andrew Jackson, (L.S.)

Joseph McMinn, (L.S.)

D. Meriwether, (L.S.)

United States Commis'rs.

Richard Brown, his x mark, (L.S.)

Cabbin Smith, his x mark, (L.S.)

Sleeping Rabbit, his x mark, (L.S.)

George Saunders, his x mark, (L.S.)

Roman Nose, his x mark, (L.S.)

Currohe Dick, his x mark, (L.S.)

John Walker, his x mark, (L.S.)

George Lowry, (L.S.)

Richard Taylor, (L.S.)

Walter Adair, (L.S.)

James Brown, (L.S.)

Kelachule, his x mark, (L.S.)

Sour Mush, his x mark, (L.S.)

Chulioa, his x mark, (L.S.)

Chickasautchee, his x mark, (L.S.)

The Bark of Chota, his x mark, (L.S.)

The Bark of Hightower, his x mark, (L.S.)

Big Half Breed, his x mark, (L.S.)

Going Snake, his x mark, (L.S.)

Leyestisky, his x mark, (L.S.)

Ch. Hicks, (L.S.)

Young Davis, his x mark, (L.S.)

Souanooka, his x mark, (L.S.)

The Locust, his x mark, (L.S.)

Beaver Carrier, his x mark, (L.S.)

Dreadful Water, his x mark, (L.S.)

Chyula, his x mark, (L.S.)

Ja. Martin, (L.S.)

John McIntosh, his x mark, (L.S.)

Katchee of Cowee, his x mark, (L.S.)

White Man Killer, his x mark, (L.S.)

Arkansas chiefs:

Toochalar, his x mark, (L.S.)

The Glass, his x mark, (L.S.)

Wassosee, his x mark, (L.S.)

John Jolly, his x mark, (L.S.)

The Gourd, his x mark, (L.S.)

Spring Frog, his x mark, (L.S.)

John D. Chisholm, (L.S.)

James Rogers, (L.S.)

Wawhatchy, his x mark, (L.S.)

Attalona, his x mark, (L.S.)

Kulsuttchee, his x mark, (L.S.)

Tuskekeetchee, his x mark, (L.S.)

Chillawgatchee, his x mark, (L.S.)

John Smith, his x mark, (L.S.)

Toosawallata, his x mark, (L.S.)

In presence of - -

J.M. Glassel, secretary to the commission,

Thomas Wilson, clerk to the commissioners,

Walter Adair,

John Speirs, interpreter, his x mark,

A. McCoy, interpreter,

James C. Bronaugh, hospital surgeon, U.S. Army,

Isham Randolph, captain First Redoubtables,

Wm. Meriwether,

Return J. Meigs, agent Cherokee Nation.

A Proclamation, Dec. 26, 1817.
FNB Preamble.
FNC Cession of lands to United States in exchange for other lands.
FND Further cession of lands.
FNE A census of the Cherokee Nation to be taken.
FNF Annuity, how to be divided between the Cherokees.
FNG The United States to give as much land, etc., as they receive from the Cherokees.
FNH Former treaties in force.
FNI Rifle guns, ammunition, etc., as compensation for Cherokee improvements.
FNJ Full compensation for improvements of real value.
FNK Payment for improvements which add real value to ceded lands, etc.
FNL Reservations for heads of Indian families.
FNM Free navigation of all the waters, etc.
FNN Cession to the United States of certain reservations.
FNO Boundary lines to be run by commissioners.
FNP United States to prevent intruders until the treaty is ratified, etc.
FNQ When to take effect.

End of Document

1828 WL 3107(Trty.)
(TREATY)

TREATY WITH THE WESTERN CHEROKEE, 1828.

May 6, 1828.

Articles of a Convention, concluded at the City of Washington this sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, between James Barbour, Secretary of War, being especially authorized therefor by the President of the United States, and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi, they being duly authorized and empowered by their Nation. [FNA]

WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever - - a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connection with the Territory of Arkansas, and guard themselves from such connections in future; and, Whereas, it being important, not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz: [FNB]

ARTICLE 1

The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with said line to the River Arkansas, thence in a direct line to the South West corner of Missouri. [FNC]

ARTICLE 2

The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: Commencing at that point on Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South-West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neasho, generally called Grand River, thence due West to a point from which a due South course will strike the present North West corner of Arkansas Territory, thence continuing due South, on and with the present Western boundary line of the Territory to the main branch of Arkansas River, thence down said River to its junction with the Canadian River, and thence up and between the said Rivers Arkansas and Canadian,[FND] to a point at which a line running North and South from River to River, will give the aforesaid seven millions of acres. In addition

to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extend.

ARTICLE 3

The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any other sort, shall exist to annoy the Cherokees - - and also to keep all such from the West of said line in future. [FNE]

ARTICLE 4

The United States moreover agree to appoint suitable persons whose duty it shall be, in conjunction with the Agent, to value all such improvements as the Cherokees may abandon in their removal from their present homes to the District of Country as ceded in the second Article of this agreement, and to pay for the same immediately after the assessment is made, and the amount ascertained. It is further agreed, that the property and improvements connected with the agency, shall be sold under the direction of the Agent, and the proceeds of the same applied to aid in the erection, in the country to which the Cherokees are going, of a Grist, and Saw Mill, for their use. The aforesaid property and improvements are thus defined: Commence at the Arkansas River opposite William Stinnetts, and run due North one mile, thence due East to a point from which a due South line to the Arkansas River would include the Chalybeate, or Mineral Spring, attached to or near the present residence of the Agent, and thence up said River (Arkansas) to the place of beginning. [FNF]

ARTICLE 5

It is further agreed, that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the lands herein ceded to the Cherokees, as compared with that of those in Arkansas which were made theirs by the Treaty of 1817, and the Convention of 1819, will pay to the Cherokees, immediately after their removal which shall be within fourteen months of the date of this agreement, the sum of fifty thousand dollars; also an annuity, for three years, of two thousand dollars, towards defraying the cost and trouble which may attend upon going after and recovering their stock which may stray into the Territory in quest of the pastures from which they may be driven - - also, eight thousand seven hundred and sixty dollars, for spoilations committed on them, (the Cherokees,) which sum will be in full of all demands of the kind up to this date, as well as those against the Osages, as those against citizens of the United States - - this being the amount of the claims for said spoilations, as rendered by the Cherokees, and which are believed to be correctly and fairly stated. - - Also, one thousand two hundred dollars for the use of Thomas Graves, a Cherokee Chief, for losses sustained in his property, and for personal suffering endured by him when confined as a prisoner, on a criminal, but false accusation; also, five hundred dollars for the use of George Guess, another Cherokee, for the great benefits he has conferred upon the Cherokee people, in the beneficial results which they are now experiencing from the use of the Alphabet discovered by him, to whom also, in consideration of his relinquishing a valuable saline, the privilege is hereby given to locate and occupy another saline on Lee's Creek. It is further agreed by the United States, to pay two thousand dollars,[FNG] annually, to the Cherokees, for ten years, to be expended under the direction of the President of the United States in the education of their children, in their own country, in letters and the mechanic arts; also, one thousand dollars towards the purchase of a Printing Press and Types to aid the Cherokees in the progress of education, and to benefit and enlighten them as a people, in their own, and our language. It is agreed further that the expense incurred other than that paid by the United States in the erection of the buildings and improvements, so far as that may have been paid by the benevolent society who have been, and yet are, engaged in instructing the Cherokee children, shall be paid to the society, it being the understanding that the amount shall be expended in the erection of other buildings and improvements, for like purposes, in the country herein ceded to

the Cherokees. The United States relinquish their claim due by the Cherokees to the late United States Factory, provided the same does not exceed three thousand five hundred dollars.

ARTICLE 6

It is moreover agreed, by the United States, whenever the Cherokees may desire it, to give them a set of plain laws, suited to their condition - - also, when they may wish to lay off their lands, and own them individually, a surveyor shall be sent to make the surveys at the cost of the United States. [FNH]

ARTICLE 7

The Chiefs and Head Men of the Cherokee Nation, aforesaid, for and in consideration of the foregoing stipulations and provisions, do hereby agree, in the name and behalf of their Nation, to give up, and they do hereby surrender, to the United States, and agree to leave the same within fourteen months, as herein before stipulated, all the lands to which they are entitled in Arkansas, and which were secured to them by the Treaty of 8th January, 1817, and the Convention of the 27th February, 1819. [FNI]

ARTICLE 8

The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extent of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessings of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) also, a just compensation for the property he may abandon, to be assessed by persons to be appointed by the President of the United States. The cost of the emigration of all such shall also be borne by the United States, and good and suitable ways opened, and provisions procured for their comfort, accommodation, and support, by the way, and provisions for twelve months after their arrival at the Agency; and to each person, or head of a family, if he take along with him four persons, shall be paid immediately on his arriving at the Agency and reporting himself and his family or followers, as emigrants and permanent settlers, in addition to the above, provided he and they shall have emigrated from within the Chartered limits of the State of Georgia, the sum of fifty dollars, and this sum in proportion to any greater or less number that may accompany him from within the aforesaid Chartered limits of the State of Georgia. [FNJ]

ARTICLE 9

It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the[FNK] United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neasho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two mile distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

ARTICLE 10

It is agreed that Captain James Rogers, in consideration of his having lost a horse in the service of the United States, and for services rendered by him to the United States, shall be paid, in full for the above, and all other claims for losses and services, the sum of Five Hundred Dollars. [FNL]

ARTICLE 11

This Treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year above written.

James Barbour. (L.S.)

Black Fox, his x mark, (L.S.)

Thomas Graves, his x mark, (L.S.)

George Guess,[FNM] (L.S.)

Thomas Maw,[FNM] (L.S.)

George Marvis,[FNM] (L.S.)

John Looney,[FNM] (L.S.)

John Rogers, (L.S.)

J. W. Flawey, counsellor of Del. (L.S.)

Chiefs of the delegation.

Witnesses:

Thos. L. McKenney,

James Rogers, interpreter,

D. Kurtz,

H. Miller,

Thomas Murray,

D. Brown, secretary Cherokee delegation,

Pierye Pierya,

E. W. Duval, United States agent, etc.

Ratified with the following proviso:

Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,

31st May, 1828.

To the Hon. HENRY CLAY,

Secretary of State:
SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be.

I have the honor to be, very respectfully, your obedient servant,

SAM'L. L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,

Washington, May 31st, 1828.

To the SECRETARY OF WAR,

Washington City:
SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto subscribe their names and affix their seals.

Thomas Graves, his x mark, (L.S.)

George Maw, his x mark, (L.S.)

George Guess, his x mark, (L.S.)

Thomas Marvis, his x mark, (L.S.)

John Rogers. (L.S.)

Signed and sealed in the presence of - -

E. W. Duval, United States agent, etc.

Thomas Murray,

James Rogers, interpreter.

A Proclamation, May 28, 1828.
FNB Object of the treaty.
FNC Western boundary of Arkansas defined.
FND Territory guaranteed to Cherokees by United States.
FNE United States to run the lines.
FNF Persons to be appointed to value Cherokee improvements.
FNG Further agreement.
FNH Further agreement.
FNI Cherokees to surrender lands in Arkansas within fourteen months.
FNJ Cost of emigration, etc., to be borne by the United States.
FNK A certain tract of land to be reserved for the benefit of the United States.
FNL Capt. J. Rogers to be paid in full for property lost in the service of United States.
FNM Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

End of Document

1846 WL 6332(Trty.)
(TREATY)

TREATY WITH THE CHEROKEE, 1846.

August 6, 1846.

Articles of a treaty made and concluded at Washington, in the District of Columbia, between the United States of America, by three commissioners, Edmund Burke, William Armstrong, and Albion K. Parris; and John Ross, principal chief of the Cherokee Nation; David Vann, William S. Coody, Richard Taylor, T. H. Walker, Clement V. McNair, Stephen Foreman, John Drew, and Richard Field, delegates duly appointed by the regularly constituted authorities of the Cherokee Nation; George W. Adair, John A. Bell, Stand Watie, Joseph M. Lynch, John Huss, and Brice Martin, a delegation appointed by, and representing that portion of the Cherokee tribe of Indians known and recognized as the "Treaty Party;" John Brown, Captain Dutch, John L. McCoy, Richard Drew, and Ellis Phillips, delegates appointed by, and representing, that portion of the Cherokee Tribe of Indians known and recognized as "Western Cherokees," or "Old Settlers."[FNA][FNB]

WHEREAS serious difficulties have, for a considerable time past, existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, so that peace and harmony may be restored among them; and whereas certain claims exist on the part of the Cherokee Nation, and portions of the Cherokee people, against the United States; Therefore, with a view to the final and amicable settlement of the difficulties and claims before mentioned, it is mutually agreed by the several parties to this convention as follows, viz: [FNC]

ARTICLE 1

That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided, always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."[FND][FNE][FNF]

ARTICLE 2

All difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted, and shall, as far as possible, be forgotten and forever buried in oblivion. All party distinctions shall cease, except so far as they may be necessary to carry out this convention or treaty. A general amnesty is hereby declared. All offences and crimes committed by a citizen or citizens of the Cherokee Nation against the nation, or against an individual or individuals, are hereby pardoned. All Cherokees who are now out of the nation are invited and earnestly requested to return to their homes, where they may live in peace, assured that they shall not be prosecuted for any offence heretofore committed against the Cherokee Nation, or any individual thereof. And this pardon and amnesty shall extend to all who may now be out of the nation, and who shall return thereto on or before 1st day of December next. The several parties agree to unite in enforcing the laws against all future offenders. Laws shall be passed for equal protection, and for the security of life, liberty, and property; and full authority shall be given by law, to all or any portion of the Cherokee[FNG]

[FNH] people, peaceably to assemble and petition their own government, or the Government of the United States, for the redress of grievances, and to discuss their rights. All armed police, light horse, and other military organization, shall be abolished, and the laws enforced by the civil authority alone.

No one shall be punished for any crime or misdemeanor except on conviction by a jury of his country, and the sentence of a court duly authorized by law to take cognizance of the offence. And it is further agreed, all fugitives from justice, except those included in the general amnesty herein stipulated, seeking refuge in the territory of the United States, shall be delivered up by the authorities of the United States to the Cherokee Nation for trial and punishment. [FNI][FNJ]

ARTICLE 3

Whereas certain claims have been allowed by the several boards of commissioners heretofore appointed under the treaty of 1835, for rents, under the name of improvements and spoilations, and for property of which the Indians were dispossessed, provided for under the 16th article of the treaty of 1835; and whereas the said claims have been paid out of the $5,000,000 fund; and whereas said claims were not justly chargeable to that fund, but were to be paid by the United States, the said United States agree to re-imburse the said fund the amount thus charged to said fund, and the same shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty; and whereas a further amount has been allowed for reservations under the provisions of the 13th article of the treaty of 1835, by said commissioners, and has been paid out of the said fund, and which said sums were properly chargeable to, and should have been paid by, the United States, the said United States further agree to re-imburse the amounts thus paid for reservations to said fund; and whereas the expenses of making the treaty of New Echoto were also paid out of said fund, when they should have been borne by the United States, the United States agree to re-imburse the same, and also to re-imburse all other sums paid to any agent of the government, and improperly charged to said fund; and the same also shall form a part of the aggregate amount to be distributed to the Cherokee people, as provided in the 9th article of this treaty. [FNK]

ARTICLE 4

And whereas it has been decided by the board of commissioners recently appointed by the President of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the "Old Settlers," or "Western Cherokees," had no exclusive title to the territory ceded in that treaty, but that the same was intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that, inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then west of the Mississippi, by the equitable operation of the same treaty, acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as they, as a constituent portion of the nation, retained, in proportion to their numbers, a common interest in the country west of the Mississippi, and in the general funds of the nation; and therefore they have an equitable claim upon the United States for the value of[FNL] that interest, whatever it may be. Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousand dollars, (which investments and expenditures are particularly enumerated in the 15th article of the treaty of 1835,) to be first deducted from said aggregate sum, thus ascertaining the residuum or amount which would, under such marshalling of accounts, be left for per capita distribution among the Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the Old Settlers (or Western Cherokees) a sum equal to one third part of said residuum, to be distributed per capita to each individual of said party of "Old Settlers," or "Western Cherokees." It is further agreed that, so far as

the Western Cherokees are concerned, in estimating the expense of removal and subsistence of an Eastern Cherokee, to be charged to the aggregate fund of five million six hundred thousand dollars above mentioned, the sums for removal and subsistence stipulated in the 8th article of the treaty of 1835, as commutation money in those cases in which the parties entitled to it removed themselves, shall be adopted. And as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund; and it is hereby further understood and agreed, that the principle above defined shall embrace all those Cherokees west of the Mississippi, who emigrated prior to the treaty of 1835. [FNM]

In the consideration of the foregoing stipulation on the part of the United States, the "Western Cherokees," or "Old Settlers," hereby release and quit-claim to the United States all right, title, interest, or claim they may have to a common property in the Cherokee lands east of the Mississippi River, and to exclusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west, consenting and agreeing that the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included. [FNN]

ARTICLE 5

It is mutually agreed that the per capita allowance to be given to the "Western Cherokees," or "Old Settlers," upon the principle above stated, shall be held in trust by the Government of the United States, and paid out to each individual belonging to that party or head of family, or his legal representatives. And it is further agreed that the per capita allowance to be paid as aforesaid shall not be assignable, but shall be paid directly to the persons entitled to it, or to his heirs or legal representatives, by the agent of the United States, authorized to make such payments. [FNO][FNP]

And it is further agreed that a committee of five persons shall be appointed by the President of the United States, from the party of "Old Settlers," whose duty it shall be, in conjunction with an agent of the United States, to ascertain what persons are entitled to the per capita allowance provided for in this and the preceding article. [FNQ]

ARTICLE 6

And whereas many of that portion of the Cherokee people known and designated as the "Treaty Party" have suffered losses and incurred expenses in consequence of the treaty of 1835, therefore, to indemnify the treaty party, the United States agree to pay to the said treaty party the sum of one hundred and fifteen thousand dollars, of which the sum of five thousand dollars shall be paid by the United States to the heirs or legal representatives of Major Ridge, the sum of five thousand dollars to the heirs or legal representatives of John Ridge, and the sum of five thousand dollars to the heirs or legal representatives of Elias Boudinot, and the balance, being the sum of one[FNR][FNS] hundred thousand dollars, which shall be paid by the United States, in such amounts and to such persons as may be certified by a committee to be appointed by the treaty party, and which committee shall consist of not exceeding five persons, and approved by an agent of the United States, to be entitled to receive the same for losses and damages sustained by them, or by those of whom they are the heirs or legal representatives: Provided, That out of the said balance of one hundred thousand dollars, the present delegation of the treaty party may receive the sum of twenty-five thousand dollars, to be by them applied to the payment of claims and other expenses. And it is further provided that, if the said sum of one hundred thousand dollars should not be sufficient to pay all the claims allowed for losses and damages, that then the same shall be paid to the said claimants pro rata, and which payments shall be in full of all claims and losses of the said treaty party. [FNT]

ARTICLE 7

The value of all salines which were the private property of individuals of the Western Cherokees, and of which they were dispossessed, provided there be any such, shall be ascertained by the United States agent, and a commissioner to be appointed by the Cherokee authorities; and, should they be unable to agree, they shall select an umpire, whose decision

shall be final; and the several amounts found due shall be paid by the Cherokee Nation, or the salines returned to their respective owners. [FNU]

ARTICLE 8

The United States agree to pay to the Cherokee Nation the sum of two thousand dollars for a printing-press, materials, and other property destroyed at that time; the sum of five thousand dollars to be equally divided among all those whose arms were taken from them previous to their removal West by order of an officer of the United States; and the further sum of twenty thousand dollars, in lieu of all claims of the Cherokee Nation, as a nation, prior to the treaty of 1835, except all lands reserved, by treaties heretofore made, for school funds. [FNV]

ARTICLE 9

The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoilations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six millions six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto. [FNW]

ARTICLE 10

It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto. [FNX]

ARTICLE 11

Whereas the Cherokee delegations contend that the amount expended for the one year's subsistence, after their arrival in the west, of the Eastern Cherokees, is not properly chargeable to the treaty fund: it is hereby agreed that that question shall be submitted to the Senate of the United States for its decision, which shall decide[FNY] whether the subsistence shall be borne by the United States or the Cherokee funds, and if by the Cherokees, then to say, whether the subsistence shall be charged at a greater rate than thirty-three, 33/100 dollars per head; and also the question, whether the Cherokee Nation shall be allowed interest on whatever sum may be found to be due the nation, and from what date and at what rate per annum.

ARTICLE 12

(Stricken out.)

ARTICLE 13

This treaty, after the same shall be ratified by the President and Senate of the United States, shall be obligatory on the contracting parties.

In testimony whereof, the said Edmund Burke, William Armstrong, and Albion K. Parris, Commissioners as aforesaid, and the several delegations aforesaid, and the Cherokee nation and people, have hereunto set their hands and seals, at Washington aforesaid, this sixth day of August, in the year of our Lord one thousand eight hundred and forty-six.

Edmund Burke.

Wm. Armstrong.

Albion K. Parris.

Delegation of the Government Party:

Jno. Ross,

W. S. Coody,

R. Taylor,

C. V. McNair,

Stephen Foreman,

John Drew,

Richard Fields.

Delegation of the Treaty Party:

Geo. W. Adair,

J. A. Bell,

S. Watie,

Joseph M. Lynch,

John Huss,

Brice Martin (by J.M. Lynch, his attorney).

Delegation of the Old Settlers:

Jno. Brown,

Wm. Dutch,

John L. McCoy,

Richard Drew,

Ellis F. Phillips.

(To each of the names of the Indians a seal is affixed.)

In presence of - -

Joseph Bryan, of Alabama.

Geo. W. Paschal.

John P. Wolf, (Secretary of Board.)

W. S. Adair.

Jno. F. Wheeler.

A Ratified Aug. 8, 1846.
FNB Proclaimed Aug. 17, 1846.
FNC Preamble.
FND Lands occupied by Cherokee Nation to be secured to whole people, and a patent to be issued.
FNE 1830, Ch. 148.
FNF Reversion to be in United States.
FNG All difficulties and disputes adjusted, and a general amnesty declared.
FNH Laws to be passed for equal protection, and for the security of life, liberty, and property.
FNI No one to be punished for any crime, except on conviction by a jury.
FNJ Fugitives from justice.
FNK Certain claims paid out of the $5,000,000 fund to be reimbursed by the United States.
FNL Provisions for the equitable interest of the Western Cherokees in lands ceded by treaty of 1828.
FNM How the value of said interest shall be ascertained.
FNN Release by Western Cherokees to United States.
FNO Per capita allowance for Western Cherokees to be held in trust by United States, etc.
FNP Not assignable.
FNQ Committee of five from "Old Settlers."
FNR Indemnity for "Treaty Party."
FNS Provisions for heirs of Major Ridge, John Ridge, and Elias Boudinot.
FNT Proviso.
FNU Values of salines to be ascertained and paid to individuals dispossessed to them.
FNV Payment for a printing press, arms, etc.
FNW Afair and just settlement of all moneys due the Cherokees under the treaty of 1835 to be made.
FNX Rights under treaty of Aug. 1, 1835, not affected.
FNY Certain questions to be submitted to Senate of United States.

End of Document

1866 WL 18776(Trty.)
(TREATY)

TREATY WITH THE CHEROKEE, 1866.

July 19, 1866.

Articles of agreement and convention at the city of Washington on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, (and) Elijah Sells, superintendent of Indian affairs for the southern superintendency, and the Cherokee Nation of Indians, represented by its delegates, James McDaniel, Smith Christie, White Catcher, S. H. Benge, J. B. Jones, and Daniel H. Ross - - John Ross, principal chief of the Cherokees, being too unwell to join in these negotiations. [FNA][FNB]

PREAMBLE.

Whereas existing treaties between the United States and the Cherokee Nation are deemed to be insufficient, the said contracting parties agree as follows, viz:

ARTICLE 1

The pretended treaty made with the so-called Confederate States by the Cherokee Nation on the seventh day of October, eighteen hundred and sixty-one, and repudiated by the national council of the Cherokee Nation on the eighteenth day of February, eighteen hundred and sixty-three, is hereby declared to be void. [FNC]

ARTICLE 2

Amnesty is hereby declared by the United States and the Cherokee Nation for all crimes and misdemeanors committed by one Cherokee on the person or property of another Cherokee, or of a citizen of the United States, prior to the fourth day of July, eighteen hundred and sixty-six; and no right of action arising out of wrongs committed in aid or in the suppression of the rebellion shall be prosecuted or maintained in the courts of the United States or in the courts of the Cherokee Nation. [FND]

But the Cherokee Nation stipulate and agree to deliver up to the United States, or their duly authorized agent, any or all public property, particularly ordnance, ordnance stores, arms of all kinds, and quartermaster's stores, in their possession or control, which belonged to the United States or the so-called Confederate States, without any reservation.

ARTICLE 3

The confiscation laws of the Cherokee Nation shall be repealed, and the same, and all sales of farms, and improvements on real estate, made or pretended to be made in pursuance thereof, are hereby agreed and declared to be null and void, and the former owners of such property so sold, their heirs or assigns, shall have the right peaceably to re-occupy their homes, and the purchaser under the confiscation laws, or his heirs or assigns, shall be repaid by the treasurer of the Cherokee Nation from the national funds, the money paid for said property and the cost of permanent improvements on such real estate, made thereon since the confiscation sale; the cost of such improvements to be fixed by a commission, to be composed of one person designated by the Secretary of the Interior and one by the principal chief of the nation, which two may appoint a third in cases of disagreement, which cost so fixed shall be refunded to the national treasurer by the returning Cherokees within three years from the ratification hereof.[FNE][FNF]

ARTICLE 4

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River, and bounded on the southeast by Grand River and west by the Creek reservation to the northeast corner thereof; from thence west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-described in this article: Provided, That that part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article. [FNG][FNH]

ARTICLE 5

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; Provided, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty; Provided also, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void. [FNI][FNJ][FNK]

ARTICLE 6

The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds as between the people of this and of every other district in said nation. [FNL][FNM]

ARTICLE 7

The United States court to be created in the Indian Territory; and until such court is created therein, the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, and all process issued in said district by any officer of the Cherokee Nation, to be executed on an inhabitant residing outside of said district, and all process issued by any officer of the Cherokee Nation outside of said district, to be executed on an inhabitant residing in said district, shall be to all intents and purposes null and void, unless indorsed by the district judge for the district where such process is to be served, and said person, so arrested, shall be held in custody by the officer so arresting him, until he shall be delivered over to the United States marshal, or consent to be tried by the Cherokee court: Provided, That any or all the provisions of this treaty, which make any distinction in rights and remedies between the citizens of any district and the citizens of the rest of the nation, shall be

abrogated whenever the President shall have ascertained, by an election duly ordered by him, that a majority of the voters of such district desire them to be abrogated, and he shall have declared such abrogation: And provided further, That no law or regulation, to be hereafter enacted within said Cherokee Nation or any district thereof, prescribing a penalty for its violation, shall take effect or be enforced until after ninety days from the date of its promulgation, either by publication in one or more newspapers of general circulation in said Cherokee Nation, or by posting up copies thereof in the Cherokee and English languages in each district where the same is to take effect, at the usual place of holding district courts. [FNN][FNO][FNP][FNQ]

ARTICLE 8

No license to trade in goods, wares, or merchandise merchandise shall be granted by the United States to trade in the Cherokee Nation, unless approved by the Cherokee national council, except in the Canadian district, and such other district north of Arkansas River and west of Grand River occupied by the so-called southern Cherokees, as provided in Article 4 of this treaty. [FNR]

ARTICLE 9

The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated. [FNS][FNT][FNU]

ARTICLE 10

Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory. [FNV]

ARTICLE 11

The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide, except at stations, switches, water stations, or crossing of rivers, where more may be indispensable to the full enjoyment of the franchise herein granted, and then only two hundred additional feet shall be taken, and only for such length as may be absolutely necessary, through all their lands, to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west of, and which may pass through, the Cherokee Nation. Said company or corporation, and their employees and laborers, while constructing and repairing the same, and in operating said road or roads, including all necessary agents on the line, at stations, switches, water tanks, and all others necessary to the successful operation of a railroad, shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation.[FNW]

ARTICLE 12

The Cherokees agree that a general council, consisting of delegates elected by each nation or tribe lawfully residing within the Indian Territory, may be annually convened in said Territory, which council shall be organized in such manner and possess such powers as hereinafter prescribed. [FNX]

First. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said Territory shall be taken under the direction of the Commissioner of Indian Affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States. [FNY]

Second. The first general council shall consist of one member from each tribe, and an additional member for each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said Territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council; and if none should be thus formally selected by any nation or tribe so assenting, the said nation or tribe shall be represented in said general council by the chief or chiefs and headmen of said tribes, to be taken in the order of their rank as recognized in tribal usage, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the superintendent of Indian affairs shall publish and declare to each tribe assenting to the establishment of such council the number of members of such council to which they shall be entitled under the provisions of this article, and the persons entitled to represent said tribes shall meet at such time and place as he shall approve; but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days: And provided, That special sessions of said council may be called by the Secretary of the Interior whenever in his judgment the interest of said tribes shall require such special session.[FNZ][FNAA][FNBB][FNCC]

Third. Said general council shall have power to legislate upon matters pertaining to the intercourse and relations of the Indian tribes and nations and colonies of freedmen resident in said Territory; the arrest and extradition of criminals and offenders escaping from one tribe to another, or into any community of freedmen; the administration of[FNDD] justice between members of different tribes of said Territory and persons other than Indians and members of said tribes or nations; and the common defence and safety of the nations of said Territory.

All laws enacted by such council shall take effect at such time as may therein be provided, unless suspended by direction of the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States. Nor shall said council legislate upon matters other than those above indicated: Provided, however, That the legislative power of such general council may be enlarged by the consent of the national council of each nation or tribe assenting to its establishment, with the approval of the President of the United States. [FNEE][FNFF]

Fourth. Said council shall be presided over by such person as may be designated by the Secretary of the Interior. [FNGG]

Fifth. The council shall elect a secretary, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the presiding officer of such council, to the Secretary of the Interior, and to each tribe or nation represented in said council, immediately after the sessions of said council shall terminate. He shall be paid out of the Treasury of the United States an annual salary of five hundred dollars. [FNHH][FNII]

Sixth. The members of said council shall be paid by the United States the sum of four dollars per diem during the term actually in attendance on the sessions of said council, and at the rate of four dollars for every twenty miles necessarily traveled by them in going from and returning to their homes, respectively, from said council, to be certified by the secretary and president of the said council. [FNJJ]

ARTICLE 13

The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty. [FNKK]

ARTICLE 14

The right to the use and occupancy of a quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivisions in one body, and to include their improvements, and not including the improvements of any member of the Cherokee Nation, is hereby granted to every society or denomination which has erected, or which with the consent of the national council may hereafter erect, buildings within the Cherokee country for missionary or educational purposes. But no land thus granted, nor buildings which have been or may be erected thereon, shall ever be sold or (o)therwise disposed of except with the consent and approval of the Cherokee national council and the Secretary of the Interior. And whenever any such lands or buildings shall be sold or disposed of, the proceeds thereof shall be applied by said society or societies for like purposes within said nation, subject to the approval of the Secretary of the Interior. [FNLL][FNMM][FNNN]

ARTICLE 15

The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national[FNOO] fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.[FNPP] [FNQQ]

And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96 degrees of longitude without the consent of the Cherokee national council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve the tribal organizations shall be permitted to settle, as herein provided, east of the 96 degrees of longitude without such consent being first obtained, unless the President of the United States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96 degrees of longitude. [FNRR][FNSS]

ARTICLE 16

The United States may settle friendly Indians in any part of the Cherokee country west of 96 degrees, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be

settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee-simple to each of said tribes to be held in common or by their members in severalty as the United States may decide. [FNTT] [FNUU]

Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 degrees of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied. [FNVV]

ARTICLE 17

The Cherokee Nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.

The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the Commissioner of the General Land-Office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, and, in case of disagreement,[FNWW][FNXX] by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.

And the Secretary of the Interior shall, from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash, in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: Provided, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the appraised value, the smallest quantity of land in legal subdivisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: Provided, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre. [FNYY][FNZZ][FNAAA]

ARTICLE 18

That any lands owned by the Cherokees in the State of Arkansas and in States east of the Mississippi may be sold by the Cherokee Nation in such manner as their national council may prescribe, all such sales being first approved by the Secretary of the Interior.[FNBBB]

ARTICLE 19

All Cherokees being heads of families residing at the date of the ratification of this treaty on any of the lands herein ceded, or authorized to be sold, and desiring to remove to the reserved country, shall be paid by the purchasers of said lands the value of such improvements, to be ascertained and appraised by the commissioners who appraise the lands, subject to the approval of the Secretary of the Interior; and if he shall elect to remain on the land now occupied by him,

shall be entitled to receive a patent from the United States in fee-simple for three hundred and twenty acres of land to include his improvements, and thereupon he and his family shall cease to be members of the nation. [FNCCC]

And the Secretary of the Interior shall also be authorized to pay the reasonable costs and expenses of the delegates of the southern Cherokees.

The moneys to be paid under this article shall be paid out of the proceeds of the sales of the national lands in Kansas.

ARTICLE 20

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States. [FNDDD]

ARTICLE 21

It being difficult to learn the precise boundary line between the Cherokee country and the States of Arkansas, Missouri, and Kansas, it is agreed that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council. [FNEEE]

ARTICLE 22

The Cherokee national council, or any duly appointed delegation thereof, shall have the privilege to appoint an agent to examine the accounts of the nation with the Government of the United States at such time as they may see proper, and to continue or discharge[FNFFF] such agent, and to appoint another, as may be thought best by such council or delegation; and such agent shall have free access to all accounts and books in the executive departments relating to the business of said Cherokee Nation, and an opportunity to examine the same in the presence of the officer having such books and papers in charge.

ARTICLE 23

All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States, as hereinbefore provided for, shall be invested in the United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common-schools of the nation and educational purposes; fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the nation, on the order of the national council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee Nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars. [FNGGG][FNHHH]

ARTICLE 24

As a slight testimony for the useful and arduous services of the Rev. Evan Jones, for forty years a missionary in the Cherokee Nation, now a cripple, old and poor, it is agreed that the sum of three thousand dollars be paid to him, under the direction of the Secretary of the Interior, out of any Cherokee fund in or to come into his hands not otherwise appropriated. [FNIII]

ARTICLE 25

A large number of the Cherokees who served in the Army of the United States having died, leaving no heirs entitled to receive bounties and arrears of pay on account of such service, it is agreed that all bounties and arrears for service in the regiments of Indian United States volunteers which shall remain unclaimed by any person legally entitled to receive the same for two years from the ratification of this treaty, shall be paid as the national council may direct, to be applied to the foundation and support of an asylum for the education of orphan children, which asylum shall be under the control of the national council, or of such benevolent society as said council may designate, subject to the approval of the Secretary of the Interior. [FNJJJ]

ARTICLE 26

The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes. They shall also be protected against inter(r)uptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory. In case of hostilities among the Indian tribes, the United States agree that the party or parties commencing the same shall, so far as practicable, make reparation for the damages done. [FNKKK]

ARTICLE 27

The United States shall have the right to establish one or more military posts or stations in the Cherokee Nation, as may be deemed necessary for the proper protection of the citizens of the United States lawfully residing therein and the Cherokee and other citizens of the Indian country. But no sutler or other person connected therewith, either in or out of the military organization, shall be permitted to introduce any spirit(u)ous, vinous, or malt liquors into the Cherokee Nation, except the medical department proper, and by them only for strictly medical purposes. And all persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation, or remaining in the same, except as herein otherwise provided; and[FNLLL][FNMMM][FNNNN] it is the duty of the United States Indian agent for the Cherokees to have such persons, not lawfully residing or sojourning therein, removed from the nation, as they now are, or hereafter may be, required by the Indian intercourse laws of the United States.

ARTICLE 28

The United States hereby agree to pay for provisions and clothing furnished the army under Appotholehala in the winter of 1861 and 1862, not to exceed the sum of ten thousand dollars, the accounts to be ascertained and settled by the Secretary of the Interior. [FNOOO]

ARTICLE 29

The sum of ten thousand dollars or so much thereof as may be necessary to pay the expenses of the delegates and representatives of the Cherokees invited by the Government to visit Washington for the purposes of making this treaty, shall be paid by the United States on the ratification of this treaty. [FNPPP]

ARTICLE 30

The United States agree to pay to the proper claimants all losses of property by missionaries or missionary societies, resulting from their being ordered or driven from the country by united States agents, and from their property being taken and occupied or destroyed by by United States troops, not exceeding in the aggregate twenty thousand dollars, to be ascertained by the Secretary of the Interior. [FNQQQ]

ARTICLE 31

All provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby re-affirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties, except as herein expressly provided.[FNRRR]

In testimony whereof, the said commissioners on the part of the United States, and the said delegation on the part of the Cherokee Nation, have hereunto set their hands and seals at the city of Washington, this ninth (nineteenth) day of July, A.D. one thousand eight hundred and sixty-six. [FNSSS]

D. N. Cooley, Commissioner of Indian Affairs.

Elijah Sells, Superintendent of Indian Affairs.

Smith Christie,

White Catcher,

James McDaniel,

S. H. Benge,

Danl. H. Ross,

J. B. Jones.

Delegates of the Cherokee Nation, appointed by Resolution of the National Council.

In presence of - -

W. H. Watson,

J. W. Wright.

Signatures witnessed by the following-named persons, the following interlineations being made before signing: On page 1st the word "the" underlined, on page 11 the word "the" struck out, and to said page 11 sheet attached requiring publication of laws; and on page 34th the word "ceded" struck out and the words "neutral lands" inserted. Page 47/1/2 added relating to expenses of treaty.

Thomas Ewing, jr.

Wm. A. Phillips,

J. W. Wright.

A Ratified July 27, 1866.

FNB Proclaimed Aug. 11, 1866.
FNC Pretended treaty declared void.
FND Amnesty.
FNE Confiscation laws repealed and former owners restored to their rights.
FNF Improvements.
FNG Cherokees, freed persons, and free negroes may elect to reside where.
FNH Proviso.
FNI Those so electing to reside there may elect local officers, judges, etc.
FNJ Proviso.
FNK Proviso.
FNL Representation in national council.
FNM Unequal laws.
FNN Courts.
FNO Process.
FNP Proviso.
FNQ Proviso.
FNR Licenses to trade not to be granted unless, etc.
FNS Slavery, etc., not to exist.
FNT Freedmen.
FNU No pay for emancipated slaves.
FNV Farm products may be sold, etc.
FNW Right of way of railroads.
FNX General council.
FNY Census.
FNZ First general council; how composed.
FNAA Time and place of first meeting.
FNBB Session not to exceed thirty days.
FNCC Special sessions.
FNDD Powers of general council.
FNEE Laws, when to take effect.
FNFF Legislative power may be enlarged.
FNGG President of council.
FNHH Secretary of council.
FNII Pay.
FNJJ Pay of members of council.
FNKK Courts.
FNLL Lands for missionary or educational purposes.
FNMM Not to be sold except for.
FNNN Proceeds of sale.
FNOO The United States may settle civilized Indians in the Cherokee country.
FNPP How may be made part of Cherokee Nation.
FNQQ Those wishing to preserve tribal organization to have land set off to them.
FNRR To pay sum into national fund.
FNSS Limits of places of settlement
FNTT Where the United States may settle friendly Indians.
FNUU Lands.
FNVV Cession of lands to the United States in trust.
FNWW Cession of lands to the United States in trust.
FNXX Lands to be surveyed and Appraised.
FNYY May be sold to highest bidder.
FNZZ Improvements.
FNAAA Proviso.
FNBBB Sales by Cherokee of lands in Arkansas.

FNCCC Heads of families.
FNDDD Lands preserved to be surveyed and allotted.
FNEEE Boundary line to be run and marked.
FNFFF Agent of Cherokees to examine accounts, books, etc.
FNGGG Funds, how to be invested.
FNHHH Interest, how to be paid.
FNIII Payment to Rev. Evan Jones.
FNJJJ Bounties and arrears for services as Indian volunteers; how to be paid.
FNKKK Possession and protection guaranteed.
FNLLL Military posts in Cherokee Nation.
FNMMM Spirituous, etc., liquors forbidden except, ect.
FNNNN Certain persons prohibited from coming into the nation.
FNOOO Payment for certain provisions and clothing.
FNPPP Expenses of Cherokee delegations.
FNQQQ Payment of certain losses by missionaries, etc.
FNRRR Inconsistent treaty provisions annulled.
FNSSS Execution.

End of Document

Committee: Special Rules
Date: 09-30-11 Committee Date: 10-10-11
Author: Todd Hembree
Sponsor: Lee Keener, Buel Anglen and Cara Cowan Watts
3

An Act

Legislative Act 24-11

AN ACT ESTABLISHING PROCEDURES FOR APPLICATIONS FOR PLACING LAND INTO TRUST BY FOREIGN NATIVE AMERICAN TRIBES WITHIN THE JURISDICTION OF THE CHEROKEE NATION

BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This Legislative Act shall be titled as the "Land into Trust by Foreign Native American Tribes Act of 2011" and codified under Title_____ of the Cherokee Nation Code Annotated ("CNCA").

Section 2. Purpose

The purpose of this Act is to establish procedures to approve any application by a Federally Recognized Native American Tribe or member(s) thereof, to have land put into Federal Trust Status, when said land is within the jurisdictional area of the Cherokee Nation and when said tribe or individual is neither the Cherokee Nation nor a citizen of the Cherokee Nation.

Section 3. Legislative History

Article VI, Section 7 of the Cherokee Nation Constitution.

Section 4. Definitions

Foreign Native American Tribes: means federally recognized Indian Tribes or bands, excluding the Cherokee Nation.

Federal Trust Status: means land the title to which is held in trust by the United States for an individual Indian or a tribe.

Section 5. Substantive Provisions

A. The Cherokee Nation, through its Principal Chief and its officers, shall object to any application, request, or proposal by a Foreign Native American Tribe to acquire, transfer, or otherwise place land in Federal Trust Status within the jurisdictional boundaries of the Cherokee Nation, unless the Principal Chief is authorized to consent to the same by a resolution of the Council of the Cherokee Nation, approved by a 2/3 vote of the Council's entire membership, and approved by the Principal Chief under Article VI, Section 10 of the Constitution of the Cherokee Nation.

The Principal Chief and the Officers of the Cherokee Nation may be enjoined by the Courts of the Cherokee Nation to carry out this obligation.

B. Except as authorized under § 5.A above, neither the Principal Chief nor any other officer of the Cherokee Nation may authorize or consent to establishment of Federal Trust Status for land within the jurisdictional boundaries of the Cherokee Nation by any Foreign Native American Tribes or member(s) thereof.

C. Except as authorized under § 5.B above, neither the Principal Chief nor any other officer of the Cherokee Nation shall have any authority to consent to or otherwise authorize the acquisition of land in Federal Trust Status by any Foreign Native American Tribes or member(s) thereof. The grant of such consent or, assuming actual notice has been received, a failure to object to land acquired in Federal Trust Status by Foreign Native American Tribes or members thereof within the jurisdictional area of the Cherokee Nation without the resolution required in § 5.B. above shall be considered a "willful neglect of duty" as defined in Article XI, Section 1 of the Constitution of the Cherokee Nation.

Section 6. **Provisions as Cumulative**

The provisions of this Act shall be cumulative to existing law.

Section 7. **Severability**

The provisions of this Act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Section 8. **Emergency Declared**

It being immediately necessary for the welfare of the Cherokee Nation, the Council hereby declares that an emergency exists, by reason whereof this Act shall take effect and be in full force after its passage and approval.

Enacted by the Council of the Cherokee Nation on the 14th day of November, 2011.

Meredith Frailey

Meredith Frailey, Speaker
Council of the Cherokee Nation

ATTEST:

Don Garvin

Don Garvin, Secretary
Council of the Cherokee Nation

Approved and signed by the Principal Chief this 17th day of Nov, 2011.
1:31

Bill John Baker, Principal Chief
Cherokee Nation

ATTEST:

Melanie Knight, Secretary of State
Cherokee Nation

YEAS AND NAYS AS RECORDED:

Vacant Seat (District 1)	n/a	Dick Lay	Yea
Tina Glory Jordan	Yea	Meredith A. Frailey	Yea
David Walkingstick	Yea	Chuck Hoskin, Jr.	Yea
Vacant Seat (District 2)	n/a	Buel Anglen	Yea
Jodie Fishinghawk	Yea	Cara Cowan Watts	Yea
Curtis Snell	Yea	Lee Keener, Jr.	Yea
Don Garvin	Yea	Julia Coates	Yea
Janelle Lattimore Fullbright	Yea	Jack Baker	Yea
David W. Thornton, Sr.	Yea		

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5108
Formerly cited as 25 USCA § 465

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Pub.L. 100-581, Title II, § 214, Nov. 1, 1988, 102 Stat. 2941.)

Notes of Decisions (166)

25 U.S.C.A. § 5108, 25 USCA § 5108
Current through P.L. 115-90.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45A. Oklahoma Indian Welfare (Refs & Annos)

25 U.S.C.A. § 5201
Formerly cited as 25 USCA § 501

§ 5201. Acquisition of agricultural and grazing lands for Indians; title to lands; tax exemption

Currentness

The Secretary of the Interior is authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided*, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is authorized and directed to cause to be paid.

CREDIT(S)

(June 26, 1936, c. 831, § 1, 49 Stat. 1967.)

Notes of Decisions (6)

25 U.S.C.A. § 5201, 25 USCA § 5201
Current through P.L. 115-90.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45A. Oklahoma Indian Welfare (Refs & Annos)

25 U.S.C.A. § 5203
Formerly cited as 25 USCA § 503

§ 5203. Organization of tribes or bands; constitution; charter; right to participate in revolving credit fund

Currentness

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, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. 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 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

CREDIT(S)

(June 26, 1936, c. 831, § 3, 49 Stat. 1967.)

Notes of Decisions (9)

25 U.S.C.A. § 5203, 25 USCA § 5203
Current through P.L. 115-90.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45A. Oklahoma Indian Welfare (Refs & Annos)

25 U.S.C.A. § 5204
Formerly cited as 25 USCA § 504

§ 5204. Cooperative associations; charter; purposes; voting rights

Currentness

Any ten or more Indians, as determined by the official tribal rolls, or Indian descendants of such enrolled members, or Indians as defined in the Act of June 18, 1934 (48 Stat. 984), who reside within the State of Oklahoma in convenient proximity to each other may receive from the Secretary of the Interior a charter as a local cooperative association for any one or more of the following purposes: Credit administration, production, marketing, consumers' protection, or land management. The provisions of this chapter, the regulations of the Secretary of the Interior, and the charters of the cooperative associations issued pursuant thereto shall govern such cooperative associations: *Provided*, That in those matters not covered by this chapter, regulations, or charters, the laws of the State of Oklahoma, if applicable, shall govern. In any stock or nonstock cooperative association no one member shall have more than one vote, and membership therein shall be open to all Indians residing within the prescribed district.

CREDIT(S)

(June 26, 1936, c. 831, § 4, 49 Stat. 1967.)

25 U.S.C.A. § 5204, 25 USCA § 5204
Current through P.L. 115-90.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

25 C.F.R. § 151.8

§ 151.8 Tribal consent for nonmember acquisitions.

Currentness

An 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; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161; 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

Notes of Decisions (145)

Current through December 14, 2017; 82 FR 59497.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions (Refs & Annos)

25 C.F.R. § 151.10

§ 151.10 On-reservation acquisitions.

Currentness

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30–day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

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

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

Credits

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, March 30, 1982; 66 FR 3458, Jan. 16, 2001; 66 FR 8899, Feb. 5, 2001; 66 FR 10816, Feb. 20, 2001; 66 FR 31976, June 13, 2001, 66 FR 42415, Aug. 13, 2001; 66 FR 56608, Nov. 9, 2001, unless otherwise noted.

AUTHORITY: R.S. 161; 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

Notes of Decisions (159)

Current through December 14, 2017; 82 FR 59497.

End of Document

DISTRICT COURT DECISIONS

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

THE CHEROKEE NATION, Plaintiff, v. S.M.R. JEWELL, in her official capacity as Secretary of the Interior, U.S. Department of the Interior, KEVIN WASHBURN, in his official capacity as Acting Assistant Secretary for Indian Affairs, U.S. Department of the Interior, and ROBERT IMPSON, in his official capacity as Eastern Oklahoma Regional Director, Bureau of Indian Affairs, Defendants, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, and UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA CORPORATION, Intervenor/Defendants.	Case No. CIV-14-428-RAW

ORDER[1]

On May 24, 2011, the Bureau of Indian Affairs ("BIA"), Eastern Oklahoma Region ("Region") for the United States Department of the Interior ("DOI") issued a Decision ("2011 Decision") approving an amended application of the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") to take a 76 acre tract located in Cherokee County ("Subject

[1] For clarity and consistency herein, when the court cites to CM/ECF, it uses the pagination assigned by CM/ECF.

Tract") into trust for the use and benefit of the UKB Corporation. The UKB owns the Subject Tract in fee. The Subject Tract is also located within the former reservation of the Cherokee Nation.

The Cherokee Nation filed this action challenging the 2011 Decision, pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA") and 25 U.S.C. § 465.[2] The Cherokee Nation argues that the 2011 Decision is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law because, *inter alia*, there is no statutory or regulatory authority to take land into trust for the UKB Corporation, the Cherokee Nation's consent is required to take the Subject Tract into trust, the 2011 Decision violates its treaties, and the 2011 Decision ignores precedent, the jurisdictional conflicts between the Cherokee Nation and the UKB, and the administrative burdens that would be created by the trust acquisition.

The Cherokee Nation urges this court to set aside the 2011 Decision and to enjoin the Secretary of the Interior ("Secretary") from accepting the Subject Tract into trust. Now before the court are the Administrative Record and the merits briefs submitted by the Cherokee Nation [Docket No. 67 and 78], by S.M.R. Jewell, Kevin Washburn, and Robert Impson ("Federal Defendants") [Docket No. 79-1], and by the UKB [Docket No. 77]. For the reasons set forth below, the court finds in favor of the Cherokee Nation, remands this action to the Region, and enjoins the Secretary from taking the Subject Land into trust for the UKB or the UKB Corporation without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts between the Cherokee Nation and the UKB and the resulting administrative burdens the acquisition would place on the Region.

[2] This section has been transferred to 25 U.S.C. § 5108. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "465" in the text.

History of the UKB Application

Following is the history of the UKB fee-to-trust application provided in the 2011 Decision. The UKB initially submitted its application to acquire the Subject Tract[3] into trust on June 9, 2004. On April 7, 2006, the Region issued a decision declining to take the Subject Tract into trust ("2006 Decision"). The UKB appealed the 2006 Decision. On May 2, 2008, the Region requested a remand for reconsideration in response to a directive issued by the Assistant Secretary – Indian Affairs ("Assistant Secretary") on April 5, 2008 ("2008 Directive"). On June 4, 2008, the Interior Board of Indian Appeals ("IBIA") vacated the 2006 Decision and remanded the case to the Region for reconsideration.

On August 6, 2008, the Region again denied the UKB's application ("2008 Decision"). The UKB appealed the 2008 Decision to the IBIA. On September 4, 2008, the Acting Assistant Secretary informed the IBIA that he was taking jurisdiction of the appeal.[4] The Assistant Secretary then issued decisions dated June 24, 2009 ("2009 Decision"), July 30, 2009, and September 10, 2010 ("2010 Decision"), which vacated the 2008 Decision and remanded the application to the Region.

The Assistant Secretary concluded in his 2010 Decision that the UKB should be allowed to amend its application to invoke alternative authority for the acquisition of the land into trust. The UKB amended its application on October 5, 2010, requesting that the Subject Tract be taken into trust for the UKB Corporation rather than the UKB and pursuant to Section 3 of the

[3] More specifically defined, the subject tract is "76 acres located in Section 8, Township 16 North, Range 22 East, in Cherokee County, Oklahoma." 2011 Decision, Docket No. 67-5, at 45.

[4] The Region also noted that the authority to acquire property in trust is vested in the Secretary and delegated to the Region. 2011 Decision, Docket No. 67-5, at 46.

Oklahoma Indian Welfare Act of June 26, 1936 ("OIWA"), 25 U.S.C. § 503,[5] rather than pursuant to Section 5 of the Indian Reorganization Act of June 18, 1934 ("IRA"), 25 U.S.C. § 465. The Assistant Secretary sent a letter dated January 21, 2011 to the UKB further clarifying matters pertaining to the application ("2011 Letter").

The DOI does not presently hold and has not ever held any land in trust for the UKB or the UKB Corporation.

2011 Decision Findings[6]

In accordance with the Assistant Secretary's June 24, 2009, July 30, 2009 and September 10, 2010 Decisions, his June 21, 2011 Letter to the UKB, and the Region's review and evaluation of the UKB's amended application, the Region found that statutory authority for the acquisition of the Subject Tract in trust for the UKB Corporation exists in 25 C.F.R §§ 151.3(a)(2) and (3) and Section 3 of the OIWA, 25 U.S.C. § 503. 2011 Decision, Docket No. 67-5, at 53.

In the 2011 Decision, the Region made the following findings:

1. ***25 C.F.R. § 151.3 & OIWA***

The Region found that 25 C.F.R. § 151.3(a)[7] authorizes the Secretary to take land into trust for the UKB Corporation. 2011 Decision, Docket No. 67-5, at 46 and 53. Section

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[5] This section has been transferred to 25 U.S.C. § 5203. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "503" in the text.

[6] Incorporated by reference in the 2011 Decision are the Assistant Secretary's April 5, 2008 Directive; his June 24, 2009, July 30, 2009 and September 10, 2010 Decisions; and his June 21, 2011 Letter to the UKB.

[7] Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

151.3(a)(2) applies because the UKB owns the Subject Tract in fee. Section 151.3(a)(3) applies because the Secretary found that the UKB has a need for the Subject Tract to be taken into trust so that the UKB may exercise jurisdiction over it, thus facilitating tribal self-determination. Id. at 46.

The Region further found that "Section 3 of the OIWA, 25 U.S.C. § 503[8], implicitly authorizes the Secretary to take land into trust for the UKB Corporation." Id. at 46 and 53. Pertinent to the Region's finding is the following language: "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 enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA]." 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503).

> (a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:
>
> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3.

[8] 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, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. 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 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503) (emphasis in original).

2. 25 C.F.R. § 151.8 & 1999 Appropriations Act – Consent/Consultation

The Region determined that consultation with, rather than the consent of, the Cherokee Nation is required before the Secretary may take land into trust for the UKB Corporation. The Subject Tract is located within the former reservation[9] of the Cherokee Nation. Specifically, it "is located within the last treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota . . . and the 1866 treaty between the Cherokee Nation and the United States . . . ." 2011 Decision, Docket No. 67-5, at 47. An Indian tribe[10] "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).

The Region concluded, however, that Congress overrode the consent requirement of 25 C.F.R. § 151.8 with respect to lands within the boundaries of the former Cherokee reservation by including in the "Interior and Related Agencies Appropriations Act of 1999"[11] ("1999 Appropriations Act") the following language: "until such time as legislation is enacted to the contrary, 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." 1999

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[9] A reservation is defined as "that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f).

[10] "Tribe means any Indian tribe, band, nation, pueblo, community, Rancheria, colony, or other group of Indians . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. *For purposes of* acquisitions made under the authority of 25 U.S.C. 188 and 489, or other *statutory authority which specifically authorizes trust acquisitions for such corporations, "Tribe" also means a corporation chartered under section 17 of the Act of June 18, 1934*." 25 C.F.R. § 151.2(b) (emphasis added).

[11] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998).

Appropriations Act, 112 Stat. 2681-246 (emphasis added). The Region consulted with the Cherokee Nation.[12]

3. 25 C.F.R. § 151.9 – The Application

The Region found that the amended fee-to-trust application dated October 5, 2010 by the UKB requesting that the Subject Tract be placed in trust for the UKB Corporation satisfied the requirements of 25 C.F.R. § 151.9.[13]

4. 25 C.F.R. §§ 151.10 and 151.11 – Evaluating Criteria

Section 151.10 lists criteria the Secretary must consider when evaluating requests for acquisition of land in trust when the land is "on-reservation."[14] Section 151.11 lists the criteria to be considered for land that is "off-reservation."[15] The Assistant Secretary determined that he need not decide whether the Subject Tract is an on- or off-reservation acquisition, as the result is

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[12] Whether that consultation was sufficient is in dispute, but given the court's rulings herein, the court need not reach this question.

[13] "An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9.

[14] The Secretary considers the following criteria:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority; (b) The need of the individual Indian or the tribe for the additional land; (c) The purposes for which the land will be used; (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs; (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; and (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities from the acquisition of the land in trust status.

25 C.F.R. § 151.10. Subsection (h) requires the applicant to provide information that allows the Secretary to comply with environmental standards. Id.

[15] Section 151.11 states in part that the Secretary shall consider the "criteria listed in § 151.10 (a) through (c) and (e) through (h)." 25 C.F.R. § 151.11(a). After those considerations are addressed, the section addresses concerns regarding relations with state and local governments and anticipated economic benefits. 25 C.F.R. § 151.11(b)-(d).

the same under both analyses.[16] Following are the Region's findings as to each of the criteria listed in § 151.10:

(a) As noted above, the Region found statutory authority in Section 3 of the OIWA, 25 U.S.C. § 503.

(b) As noted above, the Region determined that the UKB, having no land in trust, has a need for this land to be taken into trust to facilitate tribal self-determination.

(c) The Region found that the UKB's stated uses for the Subject Tract – for the operation of programs that provide services to its tribal members – are permissible. The Subject Tract holds community program buildings and a dance ground. 2008 Directive, Docket No. 67-2, at 185. The UKB's application did not identify any expected changes in the intended use of the property.

(d) As the application is not for an individual, this section did not apply.

(e) The Region found that the impact on the state and local governments resulting from the removal of the Subject Tract from the tax rolls would be insignificant.

(f) As noted above, the Subject Tract is located within the treaty boundaries of the Cherokee Nation as defined by the terms of the Treaty of New Echota and the 1866 treaty between the Cherokee Nation and the United States. The BIA has consistently recognized this area as the 'former reservation' of the Cherokee Nation. 2011 Decision, Docket No. 67-5, at 50. The Region "twice previously concluded that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weighed heavily against approval of the acquisition." 2011 Decision, Docket No. 67-5, at 51. The Region noted that it has been recognized in

[16] In his 2010 Decision, the Assistant Secretary also withdrew his former conclusion that the UKB is a successor in interest to the "historic Cherokee Nation."

federal courts that the Cherokee Nation is the only tribal entity with jurisdictional authority within its former reservation. The Region further noted that if the Subject Tract is placed into trust for the UKB, both the UKB and the Cherokee Nation would assert jurisdiction over the property. The Assistant Secretary, however, found that the Cherokee Nation does not have exclusive jurisdiction within its former reservation[17] and that the UKB would have exclusive jurisdiction over land taken into trust for it.[18] The Assistant Secretary further found that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." 2011 Decision, Docket No. 67-5, at 51-52. The Region remains concerned that jurisdictional conflicts will arise between the UKB and the Cherokee Nation if the Subject Tract is placed into trust for the UKB. Nevertheless, the Assistant Secretary's findings are binding on the Region.

(g) The Region found that the Cherokee Nation currently administers programs for the Subject Tract including, but not limited to, real estate services, tribal court services, and law enforcement services. The Region further found that if the Subject Tract is placed into trust for the UKB, the UKB would likely reject the authority of the Cherokee Nation and insist that the Region provide direct services. The Region previously determined and remains concerned that this trust acquisition would create a need for these programs and that the Region does not have funds in its budget to

[17] The Assistant Secretary noted that the conclusion that the Cherokee Nation does not have exclusive jurisdiction within its former reservation is consistent with the 1999 Appropriations Act's requirement of only the Cherokee Nation's consultation rather than consent before funds could be used to acquire land within its former reservation. 2009 Decision, Docket No. 67-3, at 89.

[18] The Assistant Secretary noted that even if the UKB and the Cherokee Nation had shared jurisdiction over the Subject Tract, they should be able to find a workable solution. 2009 Decision, Docket No. 67-3, at 89-90.

provide them. Nevertheless, the Assistant Secretary determined that the duties associated with this trust acquisition would not be significant. Again, the Assistant Secretary's determination is binding on the Region.

(h) The Region determined that there is no evidence to indicate that any change in land use is planned for the Subject Tract and no environmental assessment is necessary.

STANDARD OF REVIEW

When a final agency action[19] is challenged, the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions,[20] and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The APA further provides in pertinent part that the court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance of law; . . . (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law; . . . ." 5 U.S.C. § 706(2).

An agency's action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the

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[19] It is undisputed that the 2011 Decision is a final agency decision.

[20] When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." United Keetoowah Band of Cherokee Indians of Okla. v. United States Dept. of Housing and Urban Dev., 567 F.3d 1235, 1239 (10th Cir. 2009) (citation omitted). The standard of review is narrow, and the court may not substitute its judgment for that of the agency. Id. Nevertheless, the court must "engage in a substantial inquiry" and conduct a "thorough, probing, in-depth review." Id.

ANALYSIS

Statutory Authority

The Region found that statutory authority for the acquisition of the Subject Tract in trust for the UKB Corporation exists in 25 C.F.R §§ 151.3(a)(2) and (3) and Section 3 of the OIWA, 25 U.S.C. § 503. The Region is correct that sections 151.3(a)(2) and (3) are applicable, as the UKB owns the Subject Tract in fee and the Secretary has determined that acquisition of it in trust is necessary to facilitate tribal self-determination. Of course, as noted in section 151.3, the acquisition must be authorized by an act of Congress.

The Region found that Section 3 of the OIWA, 25 U.S.C. § 503 *implicitly* authorizes the acquisition. That section provides that the Secretary may issue a charter of incorporation to a recognized band of Indians in Oklahoma. Section 503 further provides that the corporation then has the right to "enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984)" – the IRA. 25 U.S.C. § 5203 (West) (formerly cited as 25 U.S.C. § 503). The *explicit* authority, therefore, lies in the IRA.

Section 465[21] of the IRA authorizes the Secretary to take land into trust "for the purpose of providing lands for Indians." 25 U.S.C. § 5108 (West) (formerly cited as 25 U.S.C. § 465). As section 503 provides a corporation formed thereunder the same rights provided in the IRA, the Region is correct that statutory authority exists to take land into trust for the UKB Corporation.[22]

The next question, however, is whether section 503 provides a path to utilize one portion of the IRA without regard to its other provisions and definitions or whether the IRA must be taken as a whole. Section 503 does not extend to corporations formed thereunder the same rights and privileges provided in section 465; it provides them the same rights and privileges provided in the IRA. An Indian tribe or individual Indian under the IRA is subject to that statute as a whole. To allow a corporation formed under the OIWA to enjoy a portion of the IRA's provisions without regard to its other provisions and definitions would be to provide it more rights and privileges than the IRA provides.

Moreover, this court "construes statutes 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" In re Mallo, 774 F.3d

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[21] The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

* * *

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108 (West) (formerly cited as 25 U.S.C. § 465).

[22] The Cherokee Nation argues that pursuant to 25 C.F.R. § 151.2(b), the Secretary may not take land into trust for a corporation chartered under OIWA unless the statutory authority *specifically* authorizes it. Without regard to "implicit" or "explicit" grants of authority, the court finds that section 503 *specifically* grants the rights that were granted in the IRA, including the right to have land taken into trust.

1313, 1317 (10th Cir. 2014) (citation omitted). The court reads "statutes as a whole, with no section interpreted 'in isolation from the context of the whole Act.'" United States v. Al Kassar, 660 F.3d 108, 124 (2d Cir. 2011) (citation omitted). See also Samantar v. Yousuf, 560 U.S. 305, 319 (2010).

Accordingly, the court must look to the IRA as a whole to determine whether the Secretary may take land into trust for the UKB Corporation pursuant to section 465. In 2009, the Supreme Court issued a decision interpreting a portion of the IRA. Carcieri v. Salazar, 555 U.S. 379 (2009). The parties disagree as to the import of that decision on the UKB's proposed acquisition.

The Impact of Carcieri

Section 479[23] of the IRA provides in pertinent part:

> The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

25 U.S.C.A. § 5129 (West) (formerly cited as 25 U.S.C. § 479) (emphasis added).[24] The OIWA does not contain a definition of the term "Indian." The Federal Defendants argue that the OIWA applies to "[a]ny recognized tribe or band of Indians residing in Oklahoma," and thus a definition of "Indian" was not necessary. The court disagrees. Moreover, as the OIWA points to the IRA,

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[23] This section has been transferred to 25 U.S.C. § 5129. For clarity herein, the court will cite to the new section, but will continue to refer to it as section "479" in the text.

[24] The regulations setting forth the authorities, policies, and procedures governing acquisitions of land in trust for individual Indians and tribes include a definition of the term that is similar to the one provided in the IRA. The regulations define an "Individual Indian" as: (1) Any person who is an enrolled member of a tribe; (2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation; (3) Any other person possessing a total of one-half or more degree Indian blood of a tribe . . . ." 25 C.F.R. § 151.2(c).

the definition of the term "Indian" therein is applicable to any acquisition thereunder. Section 465 provides the right to have land taken into trust "for the purpose of providing land for Indians." Section 479 defines "Indians." "There is simply no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479." Carcieri, 555 U.S. at 393.

The Supreme Court in Carcieri held that "the term '*now* under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934." Carcieri, 555 U.S. at 395 (emphasis added). This holding is very narrow, applying to only one of three of the definitions included in section 479.

While the Assistant Secretary mentions the Carcieri holding in his 2009 and 2010 Decisions and invites briefing from the Cherokee Nation and the UKB, he does not provide an opinion as to how it might affect the UKB's proposed acquisition. The Assistant Secretary suggests taking the Subject Tract into trust pursuant to Section 3 of the OIWA rather than pursuant to the IRA and appears to believe that this avenue circumvents the need to consider the Carcieri ruling. The Region, therefore, does not discuss Carcieri in the 2011 Decision. As the Carcieri ruling is so narrow, it may not prevent the Secretary from taking land into trust for the UKB or the UKB Corporation. Nevertheless, the court will not opine on the issue in the first instance. Upon remand, before taking any land into trust for the UKB or the UKB Corporation, the Region shall reach the question of how any acquisition for the UKB or the UKB Corporation is affected by Carcieri.

The Application

Citing the regulations, 25 C.F.R. § 151.1, *et seq.*, and the DOI Fee to Trust Handbook, the Cherokee Nation argues that the Assistant Secretary abused his discretion by processing an application filed by the UKB for the UKB Corporation. The Cherokee Nation argues that the DOI Handbook states that the Secretary shall base any decision to make a trust acquisition on the criteria set forth in the regulations. The regulations provide:

> An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

25 C.F.R. § 151.9. The court finds that the application by the UKB on behalf of the UKB Corporation satisfied the requirements.

Cherokee Nation Consent

The Region determined that Congress overrode the consent requirement in 25 C.F.R. 151.8 with the passage of the 1999 Appropriations Act. The Cherokee Nation argues that Congress did not override the consent requirement with the passage of the 1999 Appropriations Act. The court agrees with the Cherokee Nation.

The regulations at 25 C.F.R. § 151.1, *et seq.* govern the acquisition of land in trust for individual Indians and tribes. Section 151.8 provides that an 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 section was revisited in 2001. Id. Congress did not

remove the consent requirement from trust acquisitions within the former reservation of the Cherokee Nation.

The 1999 Appropriations Act provides that "until such time as legislation is enacted to the contrary, *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." 1999 Appropriations Act, 112 Stat. 2681-246 (emphasis added). The court understands the confusion. As the Federal Defendants and the UKB argue, words have meaning. The fact that Congress changed "consent" in the 1992 Appropriations Act to "consultation" in the 1999 Appropriations Act seems to support their argument.

The 1999 Appropriations Act, however, applies to funding. It does not override the land acquisitions regulations. It is well established that "repeals by implication are not favored." United States v. Will, 449 U.S. 200, 221 (1980) (citation omitted). If Congress intended to remove the consent requirement for trust acquisitions within the former reservation of the Cherokee Nation, it could have explicitly stated so within the regulations when it revisited those regulations.[25] The consent requirement for any acquisition of trust land on a reservation other than a tribe's own remains. The Cherokee Nation is correct that its consent is required before land may be taken into trust in its former reservation.[26]

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[25] "It is a 'fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs.'" Shawnee Tribe v. United States, 423 F.3d 1204, 1213 (10th Cir. 2005) (citation omitted). Of course, "[s]uch determinations can frequently be flipped." Reames v. Oklahoma ex re. OK Health Care Auth., 411 F.3d 1164, 1172-73, n. 7 (10th Cir. 2005). In this case, the provisions are not conflicting. Section 151.8 applies to trust acquisitions, while the 1999 Appropriations Act applies only to funding.

[26] The Assistant Secretary noted that 25 U.S.C. § 476(g) (now § 5123(g)) "prohibits the Department from finding that the UKB lacks territorial jurisdiction while other tribes have territorial jurisdiction." 2009 Decision, Docket No. 67-3, at 88. Even if this conclusion is

Treaties, Precedent and Jurisdictional Conflicts

The court agrees with the Cherokee Nation's arguments that taking land into trust within the Cherokee Nation's former reservation without its consent violates its treaties, is contrary to precedent, and ignores the jurisdictional conflicts. The 1866 Treaty with the Cherokee Nation provides: "The United States guarantee to the people of the Cherokee Nation the quiet and peaceable possession of their country and protection against domestic feuds and insurrections, and against hostilities of other tribes." 1866 Treaty with the Cherokee Nation, art. 26, July 19, 1866, 14 Stat. 799. The members of the UKB are also Cherokee; thus, this could be considered a "domestic feud or insurrection." The UKB is also an independent tribe; thus, this could be considered "hostility of another tribe," as the UKB has announced its intention to assert exclusive jurisdiction over the Subject Tract. In either event, the 1866 Treaty guaranteed the Cherokee Nation protection against it.

Even if the court erred in the previous section and Congress intended to override the consent requirement in 25 C.F.R. § 151.8, Congress did not override the United States treaties with the Cherokee Nation. To override a treaty, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 739-40 (1986). There is no evidence of such intent.

Additionally, the BIA has consistently recognized the Subject Tract as being within the 'former reservation' of the Cherokee Nation. 2011 Decision, Docket No. 67-5, at 50. The Cherokee Nation is the only Indian tribe with trust land within its former reservation. The BIA has never taken land into trust for the UKB or any Indian tribe other than the Cherokee Nation

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correct, it does not follow that land may be taken from one tribe's jurisdiction without its consent and placed into trust for another tribe.

within the former reservation of the Cherokee Nation. The Assistant Secretary dismissed this precedent spanning well over a century, however, citing his opinion that the 1999 Appropriations Act negated the Cherokee Nation's exclusive jurisdiction within its former reservation. "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure." Utahns for Better Transp. v. U.S. Department of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002). The Assistant Secretary did not follow the BIA's precedent and did not provide an adequate rational explanation for his departure.

Furthermore, as the Cherokee Nation does not intend to relinquish exclusive jurisdiction and the UKB intends to assert exclusive jurisdiction over the Subject Tract if it is placed into trust, the Region has twice concluded and remains concerned "that the potential for jurisdictional problems between the Cherokee Nation and the UKB is of utmost concern and weigh[s] heavily against approval of the acquisition." 2011 Decision, Docket No. 67-5, at 51. The Region has also stated: "UKB's need to have *this* property taken into trust is outweighed by the potential for jurisdictional problems, conflicts of land use and the additional burdens that would be placed upon the Region were it to be taken into trust . . . ." 2008 Decision, Docket No. 67-3, at 10 (emphasis in original). There is no evidence of any change in the circumstances regarding the jurisdictional conflict. The Assistant Secretary, however, dismissed this concern, finding that "the perceived jurisdictional conflicts between the UKB and the CN are not so significant that I should deny the UKB's application." 2011 Decision, Docket No. 67-5, at 51-52. The court finds this was arbitrary and capricious, as the Assistant Secretary entirely failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before him.

BIA Additional Responsibilities

The Region found that the Cherokee Nation currently administers programs for the Subject Tract including, but not limited to, real estate services, tribal court services, and law enforcement services. The Region further found that if the Subject Tract is placed into trust for the UKB or the UBK Corporation, the UKB would likely reject the authority of the Cherokee Nation and insist that the Region provide direct services. The Region previously determined and remains concerned that this trust acquisition would create a need for these programs and that the Region does not have funds in its budget to provide them. Nevertheless, the Assistant Secretary dismissed these concerns and found that the duties would not be significant. The court finds this was arbitrary and capricious, as the Assistant Secretary entirely failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before him.

CONCLUSION

The 2011 Decision was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. Accordingly, the court finds in favor of the Cherokee Nation and remands this action to the Region. Furthermore, in accordance with the court's findings herein, the Secretary is enjoined from taking the Subject Tract into trust without the Cherokee Nation's written consent and full consideration of the jurisdictional conflicts and the resulting administrative burdens the acquisition would place on the Region. Before taking *any* land into trust for the UKB or the UKB Corporation, the Region shall consider the effect of Carcieri on such acquisition.

IT IS SO ORDERED this 31st day of May, 2017.

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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