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

REPLY BRIEF FOR THE INTERVENORS DEFENDANTS – APPELLANTS

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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

THE UKB'S REPLY BRIEF

Background

Although the only holdings being challenged in this action are (1) the definition of "Indian" in the IRA applies to land-into-trust acquisitions under the OIWA, (2) CNO consent was required under both 25 C.F.R. § 151.8 (Dist. Ct. Order at 16) and the 1866 Treaty (Dist. Ct. Order at 17), and (3) Interior did not properly consider jurisdictional conflicts and additional responsibilities of the BIA (Dist. Ct. Order at 18–19), the CNO spends much of its Brief mischaracterizing Cherokee history. But the CNO fails to tie its historical background to the holdings being challenged in this action. In this Reply Brief, the UKB attempts to correct some of those mischaracterizations even though they were not decided by the district court and are not at issue in this appeal.

The UKB and the CNO have different views of Cherokee history. The CNO maintains it is the "only" Cherokee Nation. But the UKB's members directly descend from Cherokee Indians who were parties to the 1817 Treaty, the 1828 Treaty, the 1846 Treaty, and the 1866 Treaty. The CNO attempts to conflate itself with the historical Cherokee Nation and implies no other descendants of the historical Cherokee Nation have any rights under those treaties. (Appellee's Br. 1–15).

The CNO even goes so far as to claim "[t]here is only one Cherokee Nation." (Appellee's Br. 43 n.15). In reality, *three* federally recognized Cherokee governments

exist today in the United States: the CNO (in Oklahoma), the UKB (in Oklahoma), and the Eastern Band of Cherokee Indians (in North Carolina). *See* 82 Fed. Reg. 4,915, 4,916, 4,919 (Jan. 17, 2017). The historical "Cherokee Nation" in Oklahoma as it existed in 1846 and 1866 included ancestors of *both* CNO members *and* UKB members. *See Cherokee Ancestry*, Department of the Interior, https://www.doi.gov/tribes/Cherokee.

The CNO's claim "there is only one Cherokee Nation" is also historically incorrect. The Cherokee people had separate governments including the government of the Western Cherokees, which entered into treaties with the United States in 1817 and 1828 and which the UKB views as its predecessor. The Supreme Court has recognized the Western Cherokees were a separate political entity from the historical Eastern Cherokees between 1817 and 1839. *United States v. "Old Settlers"*, 148 U.S. 427, 436, 479 (1893) (noting the Western Cherokees, or "Old Settlers", "were treated as distinct and separate from the Cherokee nation, so far as necessary to enable the government to accord them their treaty rights").[1]

[1] A 1936 Court of Claims decision explains there was a distinction between the governments of the Western Cherokees and the Eastern Cherokees and notes the Eastern Cherokees were not a party to the 1828 Treaty. *W. or Old Settler Cherokees v. United States*, 82 Ct. Cl. 566, 580 (1936). "The plaintiffs herein are the Western or Old Settler Cherokees referred to in section 1 of the Jurisdictional Act, and are those Cherokees or their successors who were parties to the [1846] treaty. . . ." *Id.* The court also described the 1817 and 1828 Treaties as being between the United States and the Western Cherokees and stated the Eastern Cherokees "were not parties to those treaties and had no interest and claimed no interest in the land ceded therein." *Id.*

The historical Cherokee Nation no longer exists as a single polity, as the Assistant Secretary noted in his June 2009 Decision (Aplt. App. 216 n.2). "The CNO is a new political organization, therefore, because the historical CN no longer exists and the CNO government is a new government."[2] (*Id.*).

Argument & Authorities

I. The CNO's factual background contains numerous errors and mischaracterizations.

The CNO does not explain how its version of Cherokee history relates to the holdings being challenged in this appeal. In this Brief, the UKB offers a more balanced historical background, even though the historical questions are not issues in this appeal.

A. The CNO's fact section incorrectly asserts the historical Cherokee Nation was never dissolved and continues on as CNO.

In its factual background, the CNO argues it is the historical Cherokee Nation government and relies on the Act of April 26, 1906 ("Five Tribes Act"), to support its claim. (Appellee's Br. at 10). But the Five Tribes Act primarily extended Cherokee government for the purpose of dealing with allotment issues. The Five Tribes Act expressly contemplates the dissolution of the historical Cherokee Nation government.

[2] In his July 2009 Decision, the Assistant Secretary "clarified" his statements regarding the historical Cherokee Nation. "I also wish to clarify that I did not intend to make any binding findings regarding the status of the historic Cherokee Tribe. As such, my June 24 decision was a partial ruling that did not make any finding of law or fact regarding my authority to take the land into trust on behalf of the UKB under any particular theory." (Aplt. App. 230).

34 Stat. 141, 148. The Five Tribes Act also expressly precludes any enrollment of Cherokees in the historical Cherokee Nation, unless the application for enrollment was presented before December 1, 1905. "[A]fter the approval of this Act no person shall be enrolled as a citizen . . . of the . . . Cherokee . . . tribe[] of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five." Five Tribes Act, Act of April 26, 1906, 34 Stat. 137. While the Five Tribes Act may have continued the historical Cherokee Nation's government, it only did so as long as the members of the historical Cherokee Nation were alive. At any rate, the Five Tribes Act does not preclude federally recognized Cherokee governments such as the UKB from being a successor to the historical Cherokee Nation.

Also in its factual background, the CNO relies on *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971), for the proposition the historical Cherokee Nation government continues as the CNO. (Appellee's Br. 10). The CNO's reliance on *Groundhog* is misplaced. The only quote the CNO finds in *Groundhog* is "Cherokee tribal existence continues by virtue of § 28 [of the 1906 Act]." (*Id.*). That statement does not show the CNO is the same political entity as the historical Cherokee Nation. The CNO's government was not organized until 1976, five years after *Groundhog*. Regardless, *Groundhog* was dismissed for lack of jurisdiction. *Id.* The Tenth Circuit explained the action was "so lacking in substance and so contrary to the well established law enunciating the power of Congress to legislate with respect to the

Indian tribes and their affairs that it affords no substantial basis for a claim of federal jurisdiction." *Id.* at 678. *Groundhog* does not support the CNO's claim to be the only successor of the historical Cherokee Nation.

B. The CNO's inaccurate retelling of Cherokee history does not support its argument the 1866 Treaty's hostilities clause applies here.

The CNO mischaracterizes Cherokee history ostensibly to support its argument the 1866 Treaty requires CNO consent for the UKB to have land taken in trust in the original Cherokee territory. There is no dispute the UKB's ancestors were part of the historical Cherokee Nation, which entered into the 1866 Treaty. As such, the UKB cannot be seen as an "other tribe" for the purposes of the hostilities clause, which is the only clause the CNO relies on to give it veto power over the UKB land-into-trust application. The CNO's historical background also not support its theory the UKB is a foreign tribe under 25 C.F.R. § 151.8.

The CNO argues it is exactly the same entity as the historical Cherokee Nation, when in fact the CNO was not organized until 1976. The CNO even claims it is listed as the "Cherokee Nation" in the IRA (Appellee's Br. 7) ("Included in the list of Indian tribes in 1934 is the Cherokee Nation"), when in fact the entity listed in the IRA is the Cherokee tribe, which would include the ancestors of both the CNO and the UKB.[3]

[3] CNO's reliance on *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-27 (1970), (Appellee's Br. at 3) is also misplaced because it was decided six years before CNO organized in 1976.

Further, because the UKB's ancestors were part of the historical Cherokee Nation as it existed in 1866, the UKB cannot be an "other tribe" hostile to the CNO under the 1866 Treaty's hostilities clause. This concept has been developed in treaty fishing rights cases involving the State of Washington. Those cases involve numerous tribes seeking to assert fishing rights under several nineteenth century treaties. In the course of litigating the tribes' rights, the courts have reviewed the status of many contemporary tribes, some of which existed at the time the treaties were entered into, but many of which were created by the subsequent confederation or consolidation of various treaty-signatory and non-treaty-signatory tribal groups.

An example of such a group is the Muckleshoot Tribe, which the Ninth Circuit, in affirming the district court's decision, described as follows:

> The Muckleshoot Indian Reservation, named after the prairie on which it is located, was established in 1857, *two years after the treaties were signed*. It was occupied by Indians who *earlier had been represented* at Medicine Creek and at Point Elliott [when those treaties were signed], as well as by some Indians who apparently were parties to neither of those treaties. The reservation was an arbitrary grouping; no Muckleshoot Tribe had previously existed. Nevertheless, the inhabitants of the reservation today are recognized as a tribe by the United States. The district court recognized the Muckleshoots *as a treaty tribe*. We agree.

United States v. State of Wash., 520 F.2d 676, 692 (9th Cir. 1975) (emphases added).

Ancestors of Muckleshoot tribal members were members of the parties to the Treaties of Medicine Creek and Point Elliot, and as such, the present-day federally

recognized Muckleshoot Tribe was a successor to those treaty rights.[4] "The Muckleshoot Tribe is the present day tribal entity which, with respect to the matters that are the subject of this litigation, *is the successor to*, and *is made up principally of descendants of*, tribes or bands which were parties to the Treaty of Point Elliott and the Treaty of Medicine Creek. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government" on the Muckleshoot reservation. *United States v. State of Wash.*, 384 F. Supp. 312, 365 (W.D. Wash. 1974) (internal citations omitted) (emphases added), *aff'd and remanded,* 520 F.2d 676 (9th Cir. 1975).

The IBIA has also recognized separate federally recognized tribes as successors to treaty tribes. In a case involving disputes over one tribe's ability to exclude other tribes from a common treaty area, the IBIA rejected the argument one tribe descended from the Chippewa Tribe as it existed at the time of an 1842 Treaty could exclude other tribes whose members were also descended from the Chippewa Tribe

[4] The district court described the background of the Muckleshoot Tribe as follows: "Pursuant to authority of the Treaty of Medicine Creek and the Treaty of Point Elliott, Indians from the Green and White River areas who constituted bands which were parties to the Treaty of Point Elliott, and some Indians from the upriver portions of the Puyallup River who were party to the Treaty of Medicine Creek, were removed to and consolidated on the Muckleshoot Reservation. No aboriginal band or tribe known collectively by the name 'Muckleshoot' (however spelled) existed at treaty time. Those Indians who were removed to and consolidated on the Muckleshoot Reservation thereafter became known as the 'Muckleshoot Indians' or 'Muckleshoot Tribe.'" *Id.* at 366 (internal citations omitted). *United States v. State of Wash.*, 384 F. Supp. 312, 366 (W.D. Wash. 1974) (internal citations omitted), *aff'd and remanded,* 520 F.2d 676 (9th Cir. 1975).

as it existed in 1842. *Keweenaw Bay Indian Community v. Minneapolis Area Director*, 29 IBIA 72 (1996).[5] The Keweenaw Bay Indian Community claimed the right to exclude two federally recognized Bands, whose members descended from the 1842 Chippewa Tribe.

The IBIA concluded "the United States was dealing in the 1842 Treaty with the Chippewa bands *as a whole* and was not particularly concerned about how the various bands divided and/or utilized any of the territories and rights secured by the treaty." *Id.* (emphases added). The IBIA determined the 1842 Treaty gave a right "to the signatory Chippewa bands *as a whole*." *Id.* (emphasis added). The IBIA also noted "the Department, *which owes a trust responsibility to each of those signatory bands*, should be especially circumspect when asked to approve *an action taken by one band that would work to the detriment of other bands* . . . ." *Id.* (emphases added).[6]

As in the Muckleshoot and Keweenaw cases, the UKB's ancestors were parties to the 1866 Treaty. As descendants of a treaty party, who are also members of a

[5] The 1842 Treaty with the Chippewa did not name specific bands of Chippewa as parties. The Treaty was between the United States and the historical Chippewa Tribe. Later, three separate Chippewa bands were federally recognized: the Bad River Band of Lake Superior Chippewa Indians; the Red Cliff Band of Lake Superior Chippewa Indians; and the Keweenaw Bay Indian Community.

[6] The Keweenaw also tried to litigate their alleged right to exclusive jurisdiction based on the 1842 Treaty, but the courts declined to hear the dispute because the Bad River and Red Cliff bands were necessary and indispensable parties under Rule 19. *Keweenaw Bay Indian Cmty. v. State*, 11 F.3d 1341, 1348 (6th Cir. 1993).

present-day federally recognized Cherokee tribe (UKB) the 1866 Treaty cannot be used to exclude the UKB as an "other tribe" hostile to the CNO.

C. The CNO is incorrect the UKB did not exist until 1946.

The CNO is incorrect when it says "the UKB did not exist until 1946." (Appellee's Br. 1). The record includes numerous references to the Keetoowah Cherokees and their predecessor, the Western Cherokees, including the 1859 Keetoowah Constitution and 1876 laws of the Keetoowah Cherokees. (Aplt. App. 257–274). Those documents show the UKB existed nearly one hundred years before Congress officially recognized the UKB as a band under the OIWA in 1946.

THE CNO also states, incorrectly, the UKB's first constitution was approved in 1950. (Appellee's Br. at 1) ("It [UKB] approved its first constitution in 1950). The record shows the UKB (called simply Keetoowah Cherokees at the time) approved a constitution and passed laws governing its members between 1859 and 1876. (Aplt. App. 257–74). The 1950 constitution may be the first constitution the United States has approved for the UKB, but it is not the first UKB constitution.

D. The CNO incorrectly argues the CNO is the only Cherokee government to have entered into treaties between 1817 and 1846.

In its legal background, the CNO argues it is the same entity as the historical Cherokee Nation that entered into treaties with the United States between 1817 and 1846. "Between 1817 and 1846, the United States and the Cherokee Nation entered into treaties which ultimately resulted in the removal of the Nation from the

southeastern United States to Arkansas and then to Oklahoma." (Appellee's Br. at 3). (Appellee's Br. at 3). In fact, multiple Cherokee governments signed the treaties of that era, including the Western Cherokees and Eastern Cherokees.

The 1817 Treaty was with two separate governments of the "Cherokee nation", the Eastern Cherokees and the Western Cherokees (who had already voluntarily removed to Arkansas). (UKB Opening Br. at 43) The 1817 Treaty itself states it is between the United States and two different Cherokee governments.[7]

The 1828 Treaty was also with the government of the Western Cherokees, which resided in Arkansas, but which was relocating to Indian Territory. (UKB Opening Br. 50). The 1828 Treaty itself shows the Treaty was not with the CNO's predecessor, the Eastern Cherokees, who still resided in the southeastern United States at the time, but was with the UKB's predecessor, the Western Cherokees. The Treaty states it is between the United States "and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi." (*Id.*). Again in 1846, the United States treated with two different Cherokee governments: the Western Cherokees and the Eastern Cherokees, which had been removed to Indian

[7] "Articles of a treaty concluded, at the Cherokee Agency, within the Cherokee nation, between major general Andrew Jackson, Joseph McMinn, 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, headmen, and warriors, of the Cherokee nation, east of the Mississippi river [Eastern Cherokees] and the chiefs, head men, and warriors, of the Cherokees on the Arkansas river [Western Cherokees]." (*Id.*).

Territory in 1839. Those treaties show the United States recognized multiple "Cherokee nation" governments between 1817 and 1846.

II. The CNO is incorrect when it says the UKB Corporation has not applied for the Community Services Parcel to be taken in trust.

The CNO suggests the Community Services Parcel cannot be taken in trust for the UKB Corporation and claims, incorrectly, the UKB Corporation has "[n]ever made an application to have the Subject Land taken in trust . . . ." (Appellee's Br. at 2). The record shows the Secretary authorized the UKB to "amend its application to invoke [his] authority under Section 3 of the OIWA and to have the land held in trust for the UKB Corporation." (Aplt. App. at 272). In response to the Secretary's offer, the UKB amended its application to change the proposed trust beneficiary from the UKB to the UKB Corporation. (Aplt. App. at 274-77). The UKB Corporation has in fact made an application to have the Parcel taken in trust for its benefit.

III. The CNO is incorrect that pre-1946 Interior Opinions Are Relevant Here.

The CNO relies on a 1937 Interior Memorandum discussing the Keetoowah Cherokees' status. (Appellees' Br. 14). In that Memorandum, Interior stated the Keetoowah Cherokees were not eligible to reorganize under the OIWA because the Keetoowah Cherokees were not a tribe or band of Indians. (*Id.*)

The CNO's reliance on that Memorandum is misplaced. Congress expressly overruled Interior's analysis in 1946 when it passed the Act recognizing the UKB as a

band eligible for reorganization under the OIWA. Interior's prior analysis, therefore, is no longer of any force or effect. Congress—the body with plenary power over Indian affairs—spoke clearly in the 1946 Act and expressly overruled Interior's pre-1946 analysis.

IV. The UKB joins in the Federal Defendants' Reply Brief.

The UKB hereby joins in and incorporates the arguments and authorities contained in the Federal Defendants' Reply Brief filed on February 1, 2018 (Doc. 01019939433, 1–23).

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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.

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s/ Klint A. Cowan
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I hereby certify that:

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, 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.

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