United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

January 17, 2025

M-37084

Memorandum

To: Secretary

From: Solicitor

Subject: Authority of the Secretary to Take Land into Trust for the United Keetoowah Band of Cherokee Indians in Oklahoma for Gaming Purposes within the Cherokee Reservation

Introduction

The United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) is a federally recognized Indian Tribe comprised of Cherokee people with headquarters on the Cherokee Reservation in northeastern Oklahoma. In July 2022, UKB requested that the Secretary take into trust a 2.63-acre parcel of land in Tahlequah, Oklahoma. UKB intends to use the parcel for gaming purposes "to improve and advance the economic status of its members."[1] This memorandum addresses the Secretary's authority to take land into trust for UKB within the Cherokee Reservation, UKB's status as a successor in interest to the 1846 Treaty with the Cherokee, UKB's jurisdiction within the Cherokee Reservation, and the eligibility of that land for gaming.

This is not the first time UKB has submitted a fee-to-trust application to the Department of the Interior (Department) for this parcel. In 2012, the Department approved a fee-to-trust application for gaming purposes filed by UKB. That approval was challenged in federal district court by the Cherokee Nation. In March 2020, the district court issued an opinion holding that the Department had authority to take the land into trust, but that we had not sufficiently established a basis for concluding the land was eligible for gaming under the Indian Gaming Regulatory Act's exception for "former reservations" in Oklahoma. Relevant statutes and regulations have long referred to reservations in Oklahoma as "former reservations" because, for much of the last century, many Oklahoma Indian reservations were presumed disestablished. However, in the landmark *McGirt v. Oklahoma* decision issued in July 2020, the Supreme Court of the United States clarified that the Creek Reservation was never disestablished and remains

[1] Resolution 22-UKB-80, Authorizing the Submission of a Land in Trust Application for the 2.63 Acre Parcel for the United Keetoowah Band of Cherokee Indians in Oklahoma, a Corporation Chartered Under the Act of June 26, 1936 (May 7, 2022).

intact. Subsequent state court decisions concluded that the Cherokee Reservation also remains intact. Accordingly, the Department withdrew its approval of UKB's application and requested that the Tenth Circuit vacate the March 2020 district court decision so the Department could re-examine the basis of its prior approval in light of *McGirt*. The Tenth Circuit granted the request.

I invited UKB and the Cherokee Nation to provide their views regarding "what rights and/or jurisdiction the United Keetoowah Band of Cherokee Indians may have within the Cherokee Reservation."[2] In November 2022, both Tribes submitted extensive briefing, including expert reports and numerous exhibits. UKB's position is that UKB is a successor in interest to the treaties signed by the Cherokee Nation under a test announced in the *United States v. Washington* litigation.[3] As a successor in interest, UKB asserts that it shares coequal jurisdiction with the Cherokee Nation over the Cherokee Reservation.[4] Cherokee Nation, by contrast, asserts that UKB cannot qualify as a successor in interest under *U.S. v. Washington* and subsequent case law.[5] The Nation claims a treaty right to exclusive Tribal jurisdiction over the Cherokee Reservation.[6] And Cherokee Nation argues that, because the act that allowed UKB to organize is silent on treaty rights, Congress could not have abrogated the Nation's treaty right to exclusive Tribal jurisdiction.[7] The facts and conclusions in this memorandum are based on the Tribes' submissions and on independent historical and legal research.

Although the Department has taken the position in the past that UKB is not a successor to the treaties signed by the Cherokee Nation or that the Cherokee Nation is the sole successor to those treaties, I am unaware of any in-depth factual and legal analysis underpinning those positions. Indeed, several of the Department's past decisions on this subject are wholly conclusory.[8] Similarly, although courts have examined issues adjacent to the successor-in-interest question and have made statements in dicta about the successor status of either UKB or Cherokee Nation, the question of whether UKB is a successor to the treaties signed by the Cherokee Nation has never been squarely presented, briefed, and decided.[9] In addition, all of the tangentially-related

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[2] Letters from Robert T. Anderson, Solic., to Chief Joe Bunch, United Keetoowah Band of Cherokee Indians, and to Principal Chief Chuck Hoskin, Jr., Cherokee Nation (July 8, 2022).

[3] United Keetoowah Band of Cherokee Indians in Oklahoma, Response to M-Opinion Information Request from Robert T. Anderson, Solicitor, Bureau of Indian Affairs and Supplement to 2.63 Acre Land-in-trust Application for Gaming Purposes Submitted on July 12, 2022, at 3-6 (Nov. 11, 2022) [hereinafter UKB Submission].

[4] *Id.* at 5-6 ("As a successor, the UKB enjoys all treaty rights of the historical Cherokee Nation, including rights to and jurisdiction over the Cherokee reservation.").

[5] Submission of the Cherokee Nation Regarding Any Rights or Jurisdiction that the United Keetoowah Band May Have on the Cherokee Nation Reservation 120-23 (Nov. 14, 2022) [hereinafter Cherokee Nation Submission].

[6] *Id.* at 79-83.

[7] *Id.* at 131-133.

[8] *E.g.*, Letter from Acting Reg'l Dir. to Phil Estes, U.S. Dep't of Agric. (Apr. 19, 2002) (Cherokee Nation Ex. 91) (stating without justification or analysis that "UKB is not the Cherokee Nation nor does the UKB have any claim as a successor or have an interest as an entity of the Cherokee Nation"); Memorandum from Assistant Secretary – Indian Affairs to Muskogee Area Director (Oct. 26, 1984) (Cherokee Nation Ex. 80) (asserting that "the Cherokee Nation of Oklahoma, as presently constituted, to be the full successor to the Cherokee Nation of the first decade of this century" without even mentioning UKB).

[9] *E.g.*, *Buzzard v. Okla. Tax Comm'n*, No. 90-C-848-B, 1992 U.S. Dist. LEXIS 22864, at *13 (N.D. Okla. Mar. 3, 1992) (dismissing UKB's suit on summary judgment because "UKB has failed to show any treaty or Congressional act establishing UKB's 'inherited' right or claim to reservation land within the boundaries of the old Cherokee Indian Reservation" without any analysis of Cherokee treaties or the legal test for successorship); *United Keetoowah Band of Cherokee Indians v. Mankiller*, No. 92-C-585-B, 1993 U.S. App. LEXIS 31593, at *12 (N.D. Okla. Jan. 28,

decisions cited by Cherokee Nation in its submission to my office are unpublished orders that lack precedential effect.[10] I thus approach this question as a matter of first impression. My office has taken more than two years to thoroughly research and analyze the relevant facts and legal precedents while also bringing to bear the Department's considerable expertise in the area of federal Indian law. This memorandum represents my careful examination of a complex and difficult question.

I conclude below that:

- The Oklahoma Indian Welfare Act authorizes the Secretary to take land into trust for UKB.
- The Cherokee Reservation is UKB's reservation for purposes of the regulations at 25 C.F.R Part 151 (Part 151 Regulations) and the Bureau of Indian Affairs (BIA) may acquire land in trust for UKB within the Cherokee Reservation pursuant to the on-reservation criteria of 25 C.F.R. § 151.9. This conclusion is based on my findings that (1) UKB has an ownership interest in the Cherokee Reservation as a successor in interest to the Tribal signatory of the Treaty of 1846; and (2) Congress intended for UKB to possess governmental jurisdiction over the Cherokee Reservation when it enacted the Keetoowah Recognition Act.
- UKB has exclusive Tribal jurisdiction over its trust lands.
- Lands taken into trust for UKB for gaming purposes within the Cherokee Reservation qualify as "Indian lands" under the Indian Gaming Regulatory Act and are therefore eligible for gaming.

1993) (dismissing UKB's suit on Rule 19 grounds while incorrectly stating that a previous case—*UKB v. Secretary of the Interior*—"decided that the Cherokee Nation is the only tribal entity with jurisdictional authority in Indian Country within the Cherokee Nation").

[10] Cherokee Nation Submission, *supra* note 5, at 133-37.

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Background

A. Procedural History

In July 2012, the Assistant Secretary–Indian Affairs granted UKB's application to take a 2.03-acre parcel of land into trust for gaming activities.[11] That decision reasoned that what was then commonly known as the "former reservation" of the Cherokee Nation was also the "former reservation" of the UKB for purposes of the Indian Gaming Regulatory Act (IGRA). The Cherokee Nation challenged that decision, and the Northern District of Oklahoma ruled that—although the Department did have authority to take land into trust for UKB—the IGRA's requirements for gaming on such land had not been met. Specifically, the district court disagreed with the July 2012 decision's conclusion that the Cherokee Nation's former reservation was the UKB's former reservation and found that the trust acquisition for gaming purposes was therefore unlawful.[12] UKB and the Department appealed.

While those appeals were pending, the United States Supreme Court decided *McGirt v. Oklahoma*, which changed the analysis applicable to many treaty lands in Oklahoma, including what had been called the "former reservation" in the Assistant Secretary's July 2012 decision granting UKB's land-into-trust application. The *McGirt* decision is discussed in more detail below, but it and its progeny prompted the Assistant Secretary to withdraw the July 2012 decision. The Assistant Secretary notified UKB that recent judicial opinions had "changed the legal landscape of Oklahoma lands" and "undermine[d] the Department of the Interior's . . . decision regarding 'former reservation' status for these lands under [IGRA]."[13] At the Department's request, the Tenth Circuit Court of Appeals dismissed UKB's and the Department's appeals as moot and vacated the district court's judgment regarding the Assistant Secretary's July 2012 decision.[14]

B. *McGirt v. Oklahoma* and Subsequent Legal Developments

McGirt v. Oklahoma arose when Jimcy McGirt, a member of the Seminole Nation, challenged Oklahoma's jurisdiction to prosecute him for serious sexual offenses.[15] He argued that Oklahoma lacked criminal jurisdiction over his offenses because he committed them on the

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[11] UKB first began offering public bingo on this parcel of land in 1986, prior to IGRA's enactment in 1988. *See Cherokee Nation v. Bernhardt*, No. 12-cv-493-GKF-JFJ, 2020 U.S. Dist. LEXIS 50749, at *4-7 (N.D. Okla. Mar. 24, 2020) (discussing history of the parcel), *vacated as moot sub nom. Cherokee Nation v. Haaland*, Nos. 20-5054 & 20-5055, 2022 U.S. App. LEXIS 12257 (10th Cir. May 6, 2022). Nor is this the only parcel that UKB has sought to have taken into trust. In 2004, UKB submitted a land into trust application for a 76-acre parcel to be used as a Tribal and cultural center. BIA approved that application in 2011. In 2019, following a legal challenge by the Cherokee Nation, the Tenth Circuit Court of Appeals held that: (1) the "Secretary of the Interior has authority to take the [76-acre parcel] into trust under section 3 of the Oklahoma Indian Welfare Act of 1936"; (2) BIA was "not required to consider whether the UKB meets the [Indian Reorganization Act's] definition of 'Indian'"; (3) BIA was not "required to obtain the [Cherokee] Nation's consent before taking the land into trust"; and (4) BIA's decision "was not arbitrary and capricious." *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1147 (10th Cir. 2019).

[12] *Bernhardt*, 2020 U.S. Dist. LEXIS 50749, at *37.

[13] Letter from Bryan Newland, Assistant Sec'y – Indian Affs., to Joe Bunch, Chief of the United Keetoowah Band of Cherokee Indians (Nov. 23, 2021).

[14] *Haaland*, 2022 U.S. App. LEXIS 12257, at *2-4.

[15] 591 U.S. 894 (2020).

Creek Reservation, which was established by treaty in 1833. In response, Oklahoma argued that Congress had disestablished the Creek Reservation by the time of Oklahoma statehood or shortly thereafter.

The Supreme Court rejected Oklahoma's arguments in a 5-4 opinion written by Justice Neil Gorsuch. Reaffirming that only an act of Congress may disestablish a reservation, the Court held that Congress had never "dissolved the Creek Tribe or disestablished its reservation."[16] Oklahoma thus lacked criminal jurisdiction over crimes committed by Tribal members on the Creek reservation. His state convictions were vacated, and he was ultimately retried and convicted for his crimes in federal court, receiving three life sentences.

Suits were then filed to settle questions of whether other Tribes in Oklahoma, including the Cherokee, had similarly intact reservations. In 2021, Oklahoma's Court of Criminal Appeals agreed that Congress had established a Cherokee Reservation, and affirmed a lower court's decision finding no evidence that Congress had ever disestablished the boundaries of the Cherokee Reservation.[17] The effect of these decisions is to recognize that, pursuant to *McGirt*, the Cherokee Reservation is not a "former reservation," but a current one.

C. History of the Cherokee People

The intertwined history of the Cherokee Nation and the Keetoowahs is recounted below.[18]

Early History

Cherokee people exercised dominion over a vast region of the southeastern United States, including all or part of the modern states of Georgia, Alabama, Tennessee, Kentucky, West Virginia, Virginia, and the Carolinas.[19] "Although Cherokees had traditionally resided in small towns with local leaders, in response to contact with European settler nations the Nation became increasingly politically unified and centralized in order to deal with and react to other sovereigns."[20] In the first 30 years of the American republic, "the Cherokee nation," alternately referred to as "the Cherokee Indians" or "the Cherokees" signed eight treaties with the United States.[21]

Such unity was not perfect, however, and in the 1810s a group of Cherokees under the leadership of Tahlonteskee began moving west with the intention of settling in Arkansas.[22] This group is

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[16] *Id.* at 913.

[17] *Hogner v. State*, 500 P.3d 629, 634-35 (Okla. Crim. App. 2021); *Spears v. State*, 485 P.3d 873, 876-77 (Okla. Crim. App. 2021).

[18] I do not address the history of the Eastern Band of Cherokee Indians, the third federally recognized Cherokee Tribe, because it is not relevant to the present inquiry regarding the Cherokee Reservation in Oklahoma. References to the "Eastern Cherokee" or "Emigrant/Immigrant Cherokee" refer to the Cherokee who traveled or were removed west in the late 1830s, not to the Cherokee who remained in the east and later became recognized as the Eastern Band of Cherokee Indians.

[19] ROBERT J. CONLEY, THE CHEROKEE NATION: A HISTORY 6 (2005).

[20] Cherokee Nation Submission, *supra* note 5, at 14.

[21] *See, e.g.*, Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Cherokee, Oct. 2, 1798, 7 Stat. 62; Treaty with the Cherokee, Jan. 7, 1806, 7 Stat. 101.

[22] CONLEY, *supra* note 19,at 85; JAMES MOONEY, HISTORICAL SKETCH OF THE CHEROKEE 93 (1975).

known as the Old Settlers or Western Cherokees. The main body of the Cherokee Nation was opposed to relinquishing any of their eastern territory in exchange for land in Arkansas, but the United States pressed the Nation until it acquiesced in signing the Treaty of 1817.[23] That treaty guaranteed to the Cherokees in Arkansas as much land as had been ceded in the east.[24]

The Western Cherokees' time in Arkansas was short-lived. White settlers flocked to the area after Arkansas became an official U.S. Territory in 1819.[25] In the Treaty of 1828, "the undersigned, chiefs of the Cherokee nation, west of the Mississippi" agreed to cede the Arkansas lands granted by the Treaty of 1817 in exchange for lands in present-day northeastern Oklahoma that were to become the core of the present Cherokee Reservation.[26] The Treaty of 1828 also granted to the Western Cherokee a "perpetual outlet, West," commonly referred to as the "Cherokee Outlet," a wide strip of land stretching from the western boundary of the reservation as far west as the United States' sovereignty extended.[27] By this time, the Western Cherokee and Eastern Cherokee were governed by their own respective chiefs and each had adopted their own laws.[28] "The Cherokee Nation, East of the Mississippi" was not a party to the Treaty of 1828.[29] In a second treaty with the Western Cherokee in 1833, the United States agreed to secure the 1828 Treaty lands, with minor adjustments, by patent.[30]

Removal

Like their time in Arkansas, the Western Cherokees' time as a separate group was short-lived. The Cherokee Nation east of the Mississippi, led by John Ross, desired to remain in the east.[31] President Andrew Jackson, on the other hand, was determined to remove the Cherokee and other eastern Tribes. In December 1835, Jackson's treaty commissioners met and signed a treaty with a minority faction of the Cherokee known as the Treaty Party or Ridge Party.[32] Although this faction had no authority from the Nation, the 1835 Treaty of New Echota (Treaty of 1835) was ratified by Congress and went into effect.[33] The treaty ceded the Cherokees' remaining traditional lands in the southeast and provided for the removal of the Eastern Cherokee to the lands previously granted to the Western Cherokee.[34] The treaty enlarged the Cherokee Reservation by adding 800,000 acres in what would become Kansas to the seven million acres and the Cherokee Outlet previously guaranteed.[35] Notably, it also carried forward the promise

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[23] CONLEY, *supra* note 19, at 96-99; MOONEY, *supra* note 22, at 93.
[24] Treaty with the Cherokee art. V, Feb. 27, 1819, 7 Stat. 195.
[25] Declaration of Lindsay G. Robertson ¶ 7 (Nov. 9, 2022) (Cherokee Nation Ex. 3) [hereinafter Robertson].
[26] Treaty with the Western Cherokee arts. II, IV, May 6, 1828, 7 Stat. 311.
[27] *Id.* at art. II.
[28] GEORGIA RAY LEEDS, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA 4-5 (1996); Expert Report of Lisa C. Baker, *United Keetowah* [sic] *Band of Cherokee Indians in Oklahoma v. United States*, No. 06-cv-00936L, ¶ 6 (Fed. Cl. Sept. 23, 2013) [hereinafter Baker]; Robertson, *supra* note 25, ¶ 8.
[29] Terence Kehoe, Rebuttal Report 4 (Nov. 4, 2013) (Cherokee Nation Ex. 6); *see also* Baker, *supra* note 28, ¶ 7.
[30] Treaty with the Western Cherokee art. I, Feb. 14, 1833, 7 Stat. 414.
[31] Tabatha Toney, "Until We Fall to the Ground United": Cherokee Resilience and Interfactional Cooperation in the Early Twentieth Century 31-33 (May 2018) (unpublished Ph.D. dissertation, Oklahoma State University), https://openresearch.okstate.edu/entities/publication/15624281-42bf-4791-8d97-aece4cc936bc.
[32] Kehoe, *supra* note 29, at 5; Toney, *supra* note 31, at 34.
[33] MOONEY, *supra* note 22, at 119-20.
[34] Treaty with the Cherokees, arts. I, II, Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty of 1835].
[35] *Id.* at art. II; *see also* Robertson, *supra* note 25, ¶ 10.

that the Nation's lands would be secured by fee simple patent.[36] The patent was issued to the Cherokee Nation on December 31, 1838.[37]

The Treaty of 1835 was a first step in reunifying the Cherokee Nation. The treaty's preamble states that it was entered by the Cherokees "with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity . . . ."[38] The Western Cherokee were not party to the treaty, but delegates from the Western Cherokee signed an addendum that was made a supplementary article.[39] The Western delegates expressed "their desire that the nation should again be united as one people" and assured the Eastern Cherokees that they could expect "a hearty welcome and an equal participation with them in all the benefits and privileges of the Cherokee country west . . . ."[40] What this reunification meant in practice would take a decade to work out.

The Treaty Party were the first to arrive in the Cherokee Nation west, where they agreed to live under the Western Cherokee government led by Chief John Brown.[41] From the fall of 1838 through the spring of 1839, the U.S. Army forced the bulk of the Cherokee Nation to remove west.[42] The Eastern Cherokee led by John Ross, comprised of 14,000-15,000 individuals, far outnumbered the Treaty Party (2,000 individuals) and the Western Cherokees (perhaps 5,000 individuals).[43]

At a convention in June 1839, Chief John Brown proclaimed that the Eastern Cherokee were welcome to live under his leadership and the existing laws of the Western Cherokee.[44] "Ross and his party, however, wanted to replicate the former government of the Eastern Cherokee in these new lands."[45] In July 1839, a group of Cherokees passed a purported "Act of Union," and on September 6, 1839, the same group, led by John Ross, ratified a constitution similar to the 1827 constitution of the Eastern Cherokees.[46] Although the Western Cherokee did not fully acquiesce to these actions,[47] Ross and his supporters ultimately prevailed in taking power. Ross was elected first Principal Chief under the new constitution and was continually re-elected until his death in 1866.[48]

Meanwhile, on June 22, 1839, Major Ridge and other leaders of the Treaty Party who signed the Treaty of 1835 were assassinated as traitors.[49] Following this spark, tensions between the three

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[36] Treaty of 1835, *supra* note 34, art. II.
[37] Robertson, *supra* note 25, ¶ 11, Ex. 47 (attaching United States to Cherokee Nation Patent (Dec. 31, 1838)).
[38] Treaty of 1835, *supra* note 34, preamble.
[39] Kehoe, *supra* note 29, at 6; Baker, *supra* note 28, ¶ 9.
[40] Treaty of 1835, *supra* note 34, addendum, Dec. 31, 1835, 7 Stat. 487.
[41] Kehoe, *supra* note 29, at 8.
[42] CONLEY, *supra* note 19, at 155-57.
[43] Kehoe, *supra* note 29, at 7, 7 n.14.
[44] Baker, *supra* note 28, ¶ 10; Kehoe, *supra* note 29, at 7; Toney, *supra* note 31, at 37.
[45] Kehoe, *supra* note 29, at 7.
[46] Robertson, *supra* note 25, ¶¶ 13, 14; Kehoe, *supra* note 29, at 7; Baker, *supra* note 28, ¶ 10.
[47] Kehoe, *supra* note 29, at 8; Baker, *supra* note 28, ¶ 10.
[48] Robertson *supra* note 25, ¶ 14.
[49] Kehoe, *supra* note 29, at 7.

groups led to years of violence and unrest.[50] The Superintendent of Indian Affairs eventually intervened by appointing a commission to investigate and resolve the differences among the three groups.[51] The result of these proceedings was the Treaty of 1846, which was signed by leaders and representatives of the Ross/Government Party, the Treaty Party, and the Western Cherokees.[52]

The Treaty of 1846 was an important moment in Cherokee history, consolidating the Nation and affirming its territory. Article I proclaimed "[t]hat 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 . . . ."[53] Article II promised that "[a]ll difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted, and . . . [a]ll party distinctions shall cease . . . ."[54] Article II also attempted to wipe the slate clean by pardoning "[a]ll offenses and crimes" committed by citizens against the Nation or against other citizens.[55] In exchange for a share of the removal funds granted in the Treaty of 1835, the Western Cherokee relinquished their claim "to exclusive ownership" of the Cherokee Reservation.[56] Instead, such lands were to "remain the common property of the whole Cherokee people . . . ."[57] Although the Western Cherokee later protested the Treaty of 1846, the treaty served to legally unify the Cherokee Nation under the Ross government.[58]

The Civil War

The Nation enjoyed a decade of relative peace and stability before the pressures of the American Civil War began to highlight fractures in the Nation along old fault lines. The more-assimilated, slave-owning, and typically "mixed blood" progressives—former members of the Treaty Party—sympathized with the cause of the South.[59] Led by Stand Watie, they coalesced in the secret society of the Knights of the Golden Circle and were known publicly as the Southern Party.[60] Around the same time, the conservative, "full blood" element of the Nation—many of whom were supporters of John Ross—formed the Keetoowah Society.[61]

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[50] Patricia Jo Lynn King, The Forgotten Warriors: Keetoowah Abolitionists, Revitalization, the Search for Modernity, and Struggle for Autonomy in the Cherokee Nation, 1800-1866, 233 (2013) (unpublished Ph.D. dissertation, University of Oklahoma), https://shareok.org/bitstream/handle/11244/318707/King_ou_0169D_11061.pdf; Kehoe, *supra* note 29, at 8; Toney, *supra* note 31, at 49.

[51] Robertson, *supra* note 25, ¶ 15; Kehoe, *supra* note 29, at 9.

[52] Robertson, *supra* note 25, ¶ 15; Kehoe, *supra* note 29, at 9.

[53] Treaty with the Cherokee art. I, Aug. 6, 1846, 9 Stat. 871 [hereinafter Treaty of 1846].

[54] *Id.* at art. II.

[55] *Id.*

[56] *Id.* at art. IV.

[57] *Id.*

[58] Kehoe, *supra* note 29, at 9-10; Baker, *supra* note 28, ¶ 10; Robertson, *supra* note 25, ¶ 16.

[59] Kehoe, *supra* note 29, at 10.

[60] Robertson, *supra* note 25, ¶ 18; Toney, *supra* note 31, at 52-53.

[61] Robertson, *supra* note 25, ¶ 18; Toney, *supra* note 31, at 52-53; Kehoe, *supra* note 29, at 10.

There is some debate as to whether the Keetoowah Society existed prior to the 1850s,[62] but all agree that its modern iteration stems from a convention of Keetoowahs who met in secret on April 15, 1858.[63] That group nominated Budd Gritts to write a constitution for the Society, and on April 29, 1859, the constitution was ratified.[64] The Society was at once religious and political: "The rituals and activities associated with the Keetoowah Society were designed to unite the conservatives for political action. Its primary goal was to create a nationalist organization that would insure traditionalist dominance of the Nation's Council in order to preserve Cherokee sovereignty."[65]

Principal Chief Ross hoped to keep the Cherokee Nation neutral but Stand Watie and the Southern Party sided with the Confederacy.[66] Ross chose national unity over neutrality, and in October 1861, the Nation signed a treaty of alliance with the Confederacy.[67] Eventually, Ross and many of his supporters, including Keetoowahs, defected to the Union and set up their own government in opposition to the pro-Confederate Cherokee government led by Stand Watie.[68] "Once again, there were two rival Cherokee governments. Years of guerilla warfare devastated the Cherokee population and countryside."[69]

After the war, Principal Chief Ross and the Southern Party each sent delegations to negotiate with the United States for federal recognition.[70] The resulting Treaty of 1866 was signed by Ross's delegates, including members of the Keetoowah Society, confirming that the Nation's government under the 1839 Constitution would continue.[71] The treaty reaffirmed "[a]ll provisions of treaties, heretofore ratified and in force, and not inconsistent with the provisions of this treaty . . . ."[72] Nevertheless, the United States capitalized on the Nation's alliance with the South to force concessions. The Nation agreed to cede the lands in Kansas granted by the Treaty

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[62] On page 11 of its submission, UKB explains that "[w]hile the Keetoowahs insist their tribal organization dates back to time immemorial—and while there is some evidence of this—the Keetoowah tribal organization definitely existed in 1858, when fullblood Cherokees in Indian Territory reorganized it." UKB Submission, *supra* note 3, at 11 (footnote omitted). Historian Duane Champagne reports that the Keetoowah Society "was active politically during the 1830's in the campaign to prevent removal . . . ." DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK 145 (1992) (Cherokee Nation Ex. 7). *See also* J. C. Starr, Opposition to Enrollment and Desire to Retain the Old Tribal Customs Principal Characteristics (June 7, 1903), *in* WESTERN HISTORY COLLECTIONS: J. C. STARR PAPERS 11-12 (James R. Carselowey ed., University of Oklahoma, Dec. 14, 1937) (reporting that the Keetoowah organization was formed by anti-treaty fullbloods after the Treaty of 1835), https://digital.libraries.ou.edu/utils/getfile/collection/indianpp/id/6112/filename/6113.pdf.

[63] Robertson, *supra* note 25, ¶ 19; Cherokee Keetoowah Convention & Laws, Deliberation (Apr. 29, 1859) (UKB Ex. 9).

[64] Cherokee Keetoowah Convention & Laws, Deliberation (Apr. 29, 1859) (UKB Ex. 9).

[65] Patrick Neal Minges, The Keetoowah Society and the Avocation of Religious Nationalism in the Cherokee Nation 1855-1867, at 154 (1999) (unpublished Ph.D. dissertation, Union Theological Seminary).

[66] Toney, *supra* note 31, at 52-53.

[67] Robertson, *supra* note 25, ¶ 22; *see also* WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY 1839-1880, 181-90 (1993).

[68] Kehoe, *supra* note 29, at 12; MCLOUGHLIN, *supra* note 67, at 207-08; *see also* Submission, *supra* note 3, at 21 ("While initially more than 1,200 Keetoowahs marched with other Cherokee soldiers for the South, they deserted in high numbers to join the Union.").

[69] Kehoe, *supra* note 29, at 12; *see also* Toney, *supra* note 31, at 54-55.

[70] Toney, *supra* note 31, at 55; Kehoe, *supra* note 29, at 12.

[71] Treaty with the Cherokee, July 19, 1866, 14 Stat. 799 [hereinafter Treaty of 1866]; Robertson, *supra* note 25, ¶ 22.

[72] Treaty of 1866, *supra* note 71, at art. XXXI.

of 1835 and further agreed that the lands in the Cherokee Outlet could be sold to other Tribes.[73] After those alterations, the Cherokee Reservation's boundaries have remained unchanged.[74]

The Keetoowah Society and Allotment

Following the Treaty of 1866, the Cherokee Nation operated in relative harmony under its 1839 Constitution, led by its Principal Chief and the National Council.[75] The Keetoowah Society remained active during this period as evidenced by its compiled laws, which show that the organization met and adopted laws in 1860, 1861, 1866, 1876, 1884, 1885, and 1889.[76] The Keetoowahs were also active in the politics of the Nation, helping to sway the outcome of several elections.[77] In the first election after John Ross's death, "a majority of the Keetoowah Society, and certain members of the Southern party joined together and formed a party of national reconciliation" to win the election of Lewis Downing as Principal Chief.[78] In the hotly contested election of 1875, the Keetoowahs continued to align with the Downing Party in support of a traditional candidate, Charles Thompson.[79]

In 1887, Congress passed the Dawes Act, announcing its intention to allot Indian lands across the country in service of assimilating the nation's Indian Tribes.[80] Although the Dawes Act did not apply to the Five Tribes who held their lands by patent, the Dawes Act presaged what was to come for the Cherokee Nation. From the outset, "[t]he Keetoowah Society fiercely opposed allotment and assimilation" in keeping with their mission to promote Cherokee sovereignty and self-determination.[81]

After Congress established the Dawes Commission in 1893 to negotiate with the Five Tribes regarding allotment, the Keetoowah Society issued a resolution to the Cherokee delegates urging them to refuse to negotiate.[82] Indeed, the Cherokee Nation government opposed allotment and often refused to meet or cooperate with the Dawes Commission.[83]

In response to this opposition, Congress passed the Curtis Act in 1898. The Curtis Act "provided for the allotment of the lands in Indian Territory once a tribe's citizenship roll was completed and its land surveyed" regardless of Tribal consent.[84] Thereafter, the Cherokee Nation under Principal Chief Samuel Mayes appointed delegates to negotiate an allotment agreement with the United States.[85] In early 1899, Cherokee citizens voted to approve an agreement put forth by

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[73] *Id.* at arts. XVI, XVII.
[74] UKB Submission, *supra* note 3, at 21.
[75] Robertson, *supra* note 25, ¶ 23.
[76] *See generally* Cherokee Keetoowah Convention & Laws (UKB Ex. 9); *see also* UKB Submission, *supra* note 3, at 22.
[77] *See* Minges, *supra* note 65, at 155 ("At [Keetoowah Society] conventions, political candidates were recruited to run for national office and the grass roots membership was organized into a populist movement to redefine the political soul of the Cherokee Nation . . . .").
[78] CHAMPAGNE, *supra* note 62, at 214-15.
[79] Toney, *supra* note 31, at 66.
[80] Act of February 8, 1887, ch. 119, 24 Stat. 388; *see also* Kehoe, *supra* note 29, at 13.
[81] Baker, *supra* note 28, ¶ 13.
[82] Kehoe, *supra* note 29, at 13-14; UKB Submission, *supra* note 3, at 23.
[83] Kehoe, *supra* note 29, at 13; *see generally* Toney, *supra* note 31, 70-77.
[84] Kehoe, *supra* note 29, at 13; *see also* Robertson, *supra* note 25, ¶ 28.
[85] CONLEY, *supra* note 19,at 197; Toney, *supra* note 31, at 77-78.

their delegates.[86] The Keetoowahs boycotted this election, and had they not, the result might have been different.[87] For unknown reasons, Congress did not ratify this version of the agreement.[88] The Keetoowah Society continued to protest allotment by presenting a memorial to Congress and by sending a resolution to the Secretary of the Interior and the Principal Chief.[89]

Ultimately, the Nation voted to approve an allotment agreement set forth in the Act of July 1, 1902.[90] The agreement provided for a roll of Cherokee citizens to be compiled. The "Dawes Roll," as it came to be known, served as the basis for doling out allotments. The agreement also stated that "[t]he tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six."[91]

During this time period, cracks began to show among the Keetoowahs. The Nighthawk Keetoowahs, under the leadership of Redbird Smith, split from the Keetoowah Society.[92] The Nighthawks were more focused on traditional religion and ceremony than on politics, and their name likely derives from their practice of meeting at night.[93] While members of the Keetoowah Society reluctantly agreed to accept their allotments under protest, Redbird Smith and many members of the Nighthawks evaded the Dawes Commission until they were arrested and forced to receive their allotments.[94]

Transition

As the dissolution of the Cherokee national government approached, the Keetoowah Society was not done fighting for Cherokee sovereignty, and they did so on multiple fronts. The Society favored the idea of creating a separate indigenous state called Sequoyah and worked alongside the Cherokee Nation government towards that goal.[95] That dream ended in 1907 when Oklahoma became a state.[96]

In July 1905, when Principal Chief Rogers declined to call an election for the National Council—anticipating the dissolution of the government the next year—the Keetoowah Society's lawyer Frank Boudinot called for an election anyway.[97] The new National Council, composed of Keetoowah Society members, impeached Rogers and selected Boudinot as Principal Chief.[98] The United States refused to view the impeachment of Rogers or election of Boudinot as

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[86] Toney, *supra* note 31, at 77.
[87] Memorandum from D'Arcy McNickle to John Collier, Comm'r of Indian Affs. 3-4 (Apr. 24, 1944) (UKB Ex. 12; Cherokee Nation Ex. 46) [hereinafter McNickle Memo]; LEEDS, *supra* note 28,at 7; *see also Big Pow-Wow Held*, DALLAS MORNING NEWS, Oct. 19, 1902 (UKB Ex. 21) ("[W]hen the society pledges its support to a measure it must win and when the influence of these 1,700 is against any measure it must fail.").
[88] CONLEY, *supra* note 19, at 197.
[89] S. DOC. NO. 56-333 (1900) (UKB Ex. 48); Keetoowah Resolution (Nov. 28, 1900) (UKB Ex. 17).
[90] Kehoe, *supra* note 29, at 13; Baker, *supra* note 28, ¶ 13.
[91] Act of July 1, 1902, Pub. L. No. 57-241, § 63, 32 Stat. 716, 725.
[92] Kehoe, *supra* note 29, at 14; J. W. Duncan, *The Keetoowah Society*, 4 Chrons. of Okla. 251, 253 (1926).
[93] LEEDS, *supra* note 28, at 9.
[94] Kehoe, *supra* note 29, at 14; Toney, *supra* note 31, at 79; LEEDS, *supra* note 28, at 8; Gregory D. Smithers, Expert Report 14 (June 26, 2023).
[95] Toney, *supra* note 31, at 89-91.
[96] Act of June 16, 1906, Pub. L. No. 59-234, 34 Stat. 267; CONLEY, *supra* note 19, at 202.
[97] Toney, *supra* note 31, at 90-91, 95; LEEDS, *supra* note 28, at 10.
[98] Toney, *supra* note 31, at 95; CONLEY, *supra* note 19, at 198.

legitimate, and Rogers continued to be recognized by the Federal government as Principal Chief through 1917.[99]

Additionally, the Keetoowah Society chose to incorporate so that some sort of official organization might still be able to serve the Cherokee people after 1906.[100] On September 30, 1905, the United States Court for the Northern District of the Indian Territory granted the Keetoowah Society a Certificate of Incorporation under the laws of Arkansas governing "benevolent associations."[101] The Society was thereafter known as the Keetoowah Society, Inc. and its first president or head captain was Richard M. Wolfe.[102]

In part due to the efforts of the Keetoowahs and other elements of the Cherokee Nation, the process of allotment dragged on, and Congress changed course. On March 2, 1906, just days prior to the designated expiration of the Five Tribes' governments, Congress passed a joint resolution that continued the governments until all property could be distributed.[103] The United States still needed official Tribal representatives to sign deeds and the like.[104] In April, Congress went further by passing the Five Tribes Act, which declared that "tribal existence and tribal governments . . . are hereby continued in full force and effect for all purposes authorized by law."[105] While the Act did not prohibit the Cherokee Nation from electing a Principal Chief or a National Council, it provided that the President of the United States had the power to remove and replace the Principal Chief and that Tribal laws and contracts were invalid unless approved by the President.[106] Rogers continued as Principal Chief in a limited capacity through 1917, but "[f]or all practical purposes," the Cherokee Nation's governmental body, as it had existed up to that point, "had become dormant."[107]

Twilight

Historiography of the Cherokee in the first half of the twentieth century is sparse.[108] The Curtis Act, the Five Tribes Act, the "bureaucratic imperialism" of the federal government, and the difficult economic conditions on the Cherokee Reservation all worked to sap power from, and limit the functioning of, the Cherokee Tribal government after the last National Council under Principal Chief Rogers.[109] After 1917, the President of the United States occasionally appointed "chiefs for a day" as necessary for conducting business related to Cherokee Nation assets.[110]

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[99] Robertson, *supra* note 25, ¶ 29; Kehoe, *supra* note 29, at 16.
[100] Constitution of the Keetoowah Society (1905) (UKB Ex. 23); LEEDS, *supra* note 28, at 10.
[101] Robertson, *supra* note 25, ¶ 31; Kehoe, *supra* note 29, at 15; *see also* Certificate of Incorporation of Keetoowah Society (Sept. 30, 1905) (UKB Ex. 25).
[102] LEEDS, *supra* note 28, at 10; Robertson, *supra* note 25, ¶ 31.
[103] S.J. Res. 26, 59th Cong., 34 Stat. 822 (1906); Robertson, *supra* note 25, ¶ 32.
[104] Toney, *supra* note 31, at 103, 113; LEEDS, *supra* note 28, at 10-11; Kehoe, *supra* note 29, at 16.
[105] Five-Civilized Tribes Act, Pub. L. No. 59-129, 34 Stat. 137 (1906).
[106] CONLEY, *supra* note 19, at 201-202.
[107] *Id.* at 202-03.
[108] Toney, *supra* note 31, at 17.
[109] *See, e.g.*, CONLEY, *supra* note 19, at 202-03; *Harjo v. Kleppe*, 420 F. Supp. 1110, 1130 (D.D.C. 1976) ("Th[e government's] attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act.").
[110] Robertson, *supra* note 25, ¶ 32: Kehoe, *supra* note 29, at 16-17; Baker, *supra* note 28, ¶ 13.

Consequently, few primary sources or official Cherokee Nation records exist from this time.[111] Records for other Cherokee groups from the early 20th century are likewise sparse. "Primary sources for the [Nighthawk] Keetoowahs . . . are difficult to find due to their secrecy."[112] Many records of the Keetoowah Society, Inc. were stolen when their offices were burglarized during World War I.[113]

One of the few scholars to examine this twilight era of Cherokee history is Tabatha Toney, whose unpublished dissertation focuses squarely on this period.[114] She posits that Cherokee citizens set aside previous factional differences so that grassroots organizations could come together to function as an unofficial Cherokee government.[115] More specifically,

> the Cherokees worked together *under the Keetoowahs* to maintain and regain their self-determination in the early twentieth century. Without this action and unity, the Cherokee would have lost any autonomy or organization to provide the services of a tribal government, such as distributing funds and providing the Cherokee a voice and representation to the US government.[116]

Indeed, the Keetoowah Society, Inc. was one of the primary organizations working to advance Cherokee interests, especially with respect to claims against the United States.[117] The Society's lawyer, Frank Boudinot, regularly traveled to Washington, D.C., to lobby for jurisdictional acts that would allow the Cherokee to press their claims.[118] These activities were sanctioned by other groups of Cherokees through a loose coalition known as the Cherokee Executive Council.[119]

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[111] Toney, *supra* note 31, at 2 ("When the federal government no longer officially recognized the tribal government, official records of the National Council and chiefs were no longer kept.").
[112] Toney, *supra* note 31, at 11.
[113] *Claim of Frank J. Boudinot: Hearings Before a Subcomm. of the Committee on Indian Affairs*, 71st Cong. 28 (1930) (UKB Ex. 14) [hereinafter *Claim of Boudinot*].
[114] Toney, *supra* note 31, at 20 ("This dissertation picks up where previous historiography ends in the early twentieth century with the abolition of tribal governments.").
[115] *Id.* at 106; *see also* Julia Coates, Keetoowahs and the Cherokee Nation enter Contested Waters, FREEDMEN VS CHEROKEE NATION (Dec. 12, 2011), https://freedmenvscherokeenation.blogspot.com/2011/12/keetoowahs-and-cherokee-nation-enter.html ("A consortium of grassroots organizations thus become the primary collective decision-making mechanism among the Cherokees.").
[116] Toney, *supra* note 31, at 176 (emphasis added). *See also Claim of Boudinot*, *supra* note 113, at 31; Smithers, *supra* note 94, at 15 ("[T]hey formed de facto governments that operated in local communities.").
[117] *See* Letter from Frank J. Boudinot to the Sec'y of the Interior (Aug. 1919) (UKB Ex. 28) (stating that he planned to advise the Keetoowah Society to coordinate with the various elements of the Cherokee Nation to "make it possible for the whole body of the people to give fair, full and convincing expression to their wishes, in any effort they may make to reach the Executive or Legislative branches of the Government."); *Claim of Boudinot*, *supra* note 113, at 10 (statement of Rep. William W. Hastings) ("The Keetoowah Society is an organization of full-blood Indians that meets regularly from time to time, and they have been keeping up with the matter of pressing the settlement of these claims rather in lieu of a Cherokee government."); Memorandum from A. C. Monahan, Reg'l Coordinator, to the Comm'r of Indian Affs. (June 15, 1940) ("[T]he Society was taking on new life primarily for the purpose of representing the Cherokee people as the Cherokee Nation was apparently being dissolved by Act of Congress.") (Cherokee Nation Ex. 41). *See generally* Duncan, *supra* note 92.
[118] *Claim of Boudinot*, *supra* note 113, at 7 (statement of William W. Hastings, Member, Rep. of Okla.).
[119] CONLEY, *supra* note 19, at 203-04.

"Operating as a business organization, [this coalition] transacted the interests of the Cherokee Nation."[120]

In August 1916, Principal Chief Rogers issued a call for a Cherokee national convention, and in October of that year, a group of approximately 400 elected Cherokee met to discuss the prosecution of claims against the United States.[121] "The convention enacted resolutions directing Chief Rogers to cooperate with the Keetoowah Society in obtaining final settlement of these claims and authorizing Frank J. Boudinot to represent the Cherokee Indians" in pursuit of a jurisdictional bill from Congress.[122] The first such bill to be enacted was the Act of March 3, 1919, which permitted the Cherokee to sue to collect interest on a previous judgment related to the Cherokee Outlet.[123]

The Nighthawk Keetoowahs were also involved in these efforts. In November 1920, the Nighthawks convened a meeting called the "Illinois Fire" to unite Keetoowah factions that had splintered during the early part of the twentieth century.[124] They wanted to elect a chief of all Cherokees, one selected by the people instead of by the U.S. government. The Nighthawks nominated Levi Gritts to that position and asked the Keetoowah Society, Inc. to "invite other organizations of the Cherokees to meet at Tahlequah . . . ."[125] The Keetoowah Society, Inc. called for a meeting, and on January 31, 1921, a convention of Cherokees met and elected Levi Gritts as Principal Chief.[126] The convention was attended by representatives of the Cherokee Executive Committee, a group of primarily half-bloods created during the 1916 convention,[127] as well as the Keetoowah Society, Inc. and the Nighthawk Keetoowahs, who together represented the full-bloods. Although Gritts was never recognized by the U.S. government, he served in this role throughout the 1920s.[128]

The second jurisdictional bill secured by Keetoowah Society, Inc. lawyer Boudinot was the Act of March 19, 1924, a catch-all bill authorizing the Five Tribes to sue under treaty, agreement, or federal law for any unresolved claims against the United States.[129] Prior to the bill's passage, Boudinot selected a team of four other lawyers to assist in his efforts and asked the Keetoowah

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[120] LEEDS, *supra* note 28, at 13; *see also* Toney, *supra* note 31, at 124 ("The tribe retained the Cherokee Executive Council to carry out the business of their nation throughout the 1920s and 1930s. They continued to conduct meetings and pursue claims against the US. This council served as a business entity to assist their people financially rather than as a governmental institution.").

[121] LEEDS, *supra* note 28, at 23.

[122] Kehoe, *supra* note 29, at 17.

[123] *Id.*; Act of March 3, 1919, Pub. L. No. 65-331, ch. 103, 40 Stat. 1316.

[124] Toney, *supra* note 31, at 120; Charles Wisdom, The Keetoowah Society of the Oklahoms [sic] Cherokee 10 (1937) (unpublished manuscript) (on file at select libraries) (Cherokee Nation Ex. 35) [hereinafter Wisdom, The Keetoowah Society]; Chief Sam Smith & Ass't Chief William Rogers,Illinois Fire, November 10, *1920*, *in* WESTERN HISTORY COLLECTIONS: DOCUMENTS OF S. R. LEWIS 455-57 (University of Oklahoma) [hereinafter LEWIS DOCUMENTS], http://digital.libraries.ou.edu/cdm/ref/collection/indianpp/id/7983.

[125] Smith & Rogers, *in* LEWIS DOCUMENTS, *supra* note 124, at 457.

[126] James W. Duncan, Tahlequah, Oklahoma, January 31, 1921, *in* LEWIS DOCUMENTS, *supra* note 124, at 459. *See also* Levi Gritts, *as quoted in* Wisdom, The Keetoowah Society, *supra* note 124, at 14-15.

[127] *Resolution*, (Jan. 31, 1921), *in* LEWIS DOCUMENTS, *supra* note 124, at 454; *Claim of Boudinot*, *supra* note 113, at 26.

[128] Toney, *supra* note 31, at 124.

[129] Kehoe, *supra* note 29, at 18; Act of March 19, 1924, Pub. L. No. 68-57, ch. 70, 43 Stat. 27.

Society, Inc. to approve the arrangement.[130] After the Society did so, the Nighthawks, the Cherokee Executive Committee, and another representative group under the name "Cherokee Nation Organization" all passed resolutions endorsing the group of five attorneys.[131] After the jurisdictional bill was enacted by Congress, a representative committee of Cherokees was quickly convened and entered a contract with Boudinot and his team that was later approved by the Department of the Interior.[132]

In 1925, the Cherokee Executive Council—including the Cherokee Executive Committee, the Nighthawks, the Keetoowah Society, Inc., and the Eastern and Western Cherokee Councils—met in convention and re-elected Levi Gritts as Principal Chief.[133] In 1928, Gritts also became Chief of the Keetoowah Society, Inc.[134] In this role, he traveled often to Washington, DC in the early 1930s to lobby Congress regarding the nascent Indian Reorganization Act.[135]

The Act of April 25, 1932, was the final jurisdictional bill specific to the Cherokees that Boudinot helped to achieve.[136] The Act authorized claims against the United States by the "Eastern or Emigrant Cherokees, and the Western Cherokees or Old Settler Indians . . . ."[137]

In summary, although the official Cherokee Nation government was subject to presidentially appointed "chiefs for a day" during the early twentieth century, a network of grassroots Cherokee organizations continued to advocate for and do business on behalf of the Cherokee people. The Keetoowah Society, Inc. and the Nighthawks were instrumental to these efforts. Levi Gritts, a member of the Keetoowah Society, Inc., and later its Chief, was twice elected as unofficial Principal Chief by the coalition known as the Cherokee Executive Council. Frank Boudinot, the lawyer for the Keetoowah Society, Inc., was twice selected by Cherokee conventions to lobby for Cherokee interests. And as the Indian New Deal dawned, the Keetoowahs would remain at the forefront of Cherokee affairs.

The Indian New Deal

In 1928, the seminal Meriam Report[138] concluded that the United States's assimilationist policies had been a disaster.[139] When the administration of Franklin Delano Roosevelt began in 1933, the stage was set for Commissioner of Indian Affairs John Collier to usher in a new era of U.S. Indian policy. The Indian Reorganization Act (IRA), passed in 1934, was meant to reverse the

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[130] *Claim of Boudinot*, *supra* note 113, at 28.
[131] Memorandum from Calhoun, Case, Nebeker, Boudinot, & Coldren to Comm'r of Indian Affs. (Apr. 10, 1924) (UKB Ex. 20).
[132] Letter from Frank J. Bondinal [sic] to the Cherokee Representative Comm. (June 5, 1924), *in* LEWIS DOCUMENTS, *supra* note 124, at 442; *Claim of Boudinot*, *supra* note 113, at 39.
[133] Toney, *supra* note 31, at 124; Duncan, *supra* note 92, 253-54; CONLEY, *supra* note 19, at 203-04.
[134] LEEDS, *supra* note 28, at 14.
[135] *Id.*
[136] Frank J. Boudinot Interview (Apr. 9, 1937), *in* WESTERN HISTORY COLLECTIONS 440 (University of Oklahoma) (UKB Ex. 19).
[137] Act of Apr. 25, 1932, Pub. L. No. 72-105, 47 Stat. 137.
[138] LEWIS MERIAM ET AL., INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (F.W. Powell ed., 1928).
[139] CONLEY, *supra* note 19, at 204; JON S. BLACKMAN, OKLAHOMA'S INDIAN NEW DEAL 38-40 (2013).

loss of Indian lands caused by allotment and to strengthen Tribal governments.[140] Oklahoma Tribes were largely excluded from application of the bill due to the actions of Senator Elmer Thomas of Oklahoma, who "felt that with Oklahoma Indians well on the road to assimilation, the reimposition of the reservation system would only set them back."[141] His opposition was consistent with the prevailing view at the time that Oklahoma reservations had been dissolved.[142]

Nevertheless, Senator Thomas agreed to work with Commissioner Collier on a bill more tailored to Oklahoma Indians,[143] which led to the passage of the Oklahoma Indian Welfare Act (OIWA) in 1936.[144] Like the IRA, the OIWA contains provisions focused on land and Tribal governments, but with an added emphasis on welfare and economic rehabilitation.[145] The Senate Report notes that "[t]he whole plan of the bill is intended to extend to the Indian citizens the fullest possible opportunity to work out their own economic salvation."[146]

Cherokees were split in their opinions regarding the IRA and OIWA.[147] Among the Cherokee, the Keetoowah Society, Inc. and the Nighthawks were in favor of the bills while the "mixed-bloods," progressive element were generally opposed.[148] By this time, the Keetoowahs were divided into approximately six factions: (1) the Keetoowah Society, Inc., led by Levi Gritts and others, who had incorporated in 1905 in an attempt to preserve Cherokee government functions; (2) the Nighthawks, led by the Smith family, who had split from the Keetoowah Society over allotment in 1902; (3) the Seven Clan Society, a group within the Nighthawks comprised of about 120 families, and three other small groups.[149]

The Nighthawks appear to have been the first among the Cherokee to seek to organize as a band under Section 3 of OIWA. Section 3 provides that:

> 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 . . . . 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 . . . .[150]

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[140] Kehoe, *supra* note 29, at 18-19.
[141] BLACKMAN, *supra* note 139,at 75. *See* Act of June 18, 1934, Pub. L. No. 73-383, § 13, 48 Stat. 984, 986-87.
[142] *See* 78 CONG. REC. 11,125 (June 12, 1934) (statement of Sen. Elmer Thomas) ("My state is different from the other Indian states . . . . Our Indian reservations have heretofore been allotted, and there are left in Oklahoma no great Indian reservations . . . ."). *See also* S. REP. NO. 74-1232, at 6 (1935) ("In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.").
[143] Toney, *supra* note 31, at 136.
[144] Act of June 26, 1936, Pub. L. No. 74-816, 49 Stat. 1967.
[145] Smithers, *supra* note 94, at 16 ("Largely an economic tool, it became a mechanism for reclaiming land and federal recognition of political sovereignty.").
[146] S. REP. NO. 74-1232, at 7 (1935).
[147] *See* BLACKMAN, *supra* note 139, at 134.
[148] LEEDS, *supra* note 28, at 14; Toney, *supra* note 31, at 132-33.
[149] *See generally* Wisdom, The Keetoowah Society, *supra* note 124..
[150] Act of June 26, 1936, Pub. L. No. 74-816, § 3, 49 Stat. 1967.

In May 1937, a group of Bureau of Indian Affairs employees,[151] including anthropologist Charles Wisdom, met with the Nighthawks to discuss the possibility of organization.[152] Wisdom thereafter conducted research and interviews among the Nighthawks and other Keetoowah factions to assist the Department in determining whether the Nighthawks qualified as a "recognized tribe or band" under OIWA.[153]

Wisdom's resulting report, "The Keetoowah Society of the Oklahoma Cherokee," presents the information he collected without coming to firm conclusions. After discussing the ancient origins of the word "Kituwah" and the formation of the Society around the time of the Civil War, the report moves into a discussion of the six Keetoowah factions. The report is dominated by lengthy direct quotes from secondary sources or from Wisdom's interviews. Wisdom sums up the report by observing that, while the Nighthawks evolved into a "primarily religious and cultural" organization, the other Keetoowah groups are all "political in character," meaning that their purpose is to advance political agendas such as enforcing Cherokee treaties.[154]

Regional Coordinator A. C. Monahan transmitted Wisdom's report to the Commissioner of Indian Affairs, asking "whether or not any of the Keetoowah groups may be regarded as a distinct 'band' for organization under the Indian Reorganization Act or the Oklahoma Indian Welfare Act."[155] The report was forwarded to Acting Solicitor Frederic Kirgis,[156] who concluded in a brief opinion that "neither the Keetoowah Society nor any of its factions can be considered a band" because "[i]t is neither historically nor actually a governing unit of the Cherokee Nation, but a society of citizens within the Nation with common beliefs and aspirations."[157] It is not entirely clear to whom Kirgis believed himself to be referring when he used the phrase "the Keetoowah Society," but given the origins of the inquiry and the way the opinion is treated in later correspondence, it seems he was referring to the Nighthawks.

Meanwhile, the office of the Principal Chief of the Cherokee Nation was still being filled by presidential appointment. The coalition known as the Cherokee Executive Council, which

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[151] The Bureau of Indian Affairs was not called the Bureau of Indian Affairs until 1947, but I use the modern name here for simplicity. *See What Is the BIA's History?*, U.S. DEP'T OF THE INT. INDIAN AFFS. (Jan. 12, 2021, 6:27 PM), https://www.bia.gov/faqs/what-bias-history.

[152] LEEDS, *supra* note 28, at 14; Baker, *supra* note 28, ¶ 15.

[153] Letter from Charles Wisdom, Collaborator, Div. of Anthropology, to A. M. Landman, Superintendent of the Five Civilized Tribes (May 19, 1937) ("As you know, the Redbird Smith group near Gore are anxious to organize as a tribe, and it is necessary now for this office to indicate whether or not the Gore group can be considered as a band or tribe.") (Cherokee Nation Ex. 33).

[154] Wisdom, The Keetoowah Society, *supra* note 124, at 20.

[155] Letter from A.C. Monahan, Reg'l Coordinator, to Comm'r of Indian Affs. (June 28, 1937) (Cherokee Nation Ex. 37).

[156] Wisdom wrote a separate report about the Nighthawks entitled "Memorandum on the Tribal Character of the Keedoowah Society of the Cherokee" but there is no indication that this report was transmitted to or considered by the Acting Solicitor. In the "Keedoowah" memorandum, Wisdom wholeheartedly concluded that the Nighthawk "organization is today and has always been functioning exactly like that of a tribe, and not like that of a mere segment of a tribe." Charles Wisdom, Memorandum on the Tribal Character of the Keedoowah Society of the Cherokee 8 (1937) (unpublished manuscript) (UKB Ex. 8; Cherokee Nation Ex. 36).

[157] Memorandum from Frederic L. Kirgis, Acting Solic., to the Comm'r of Indian Affs. (July 29, 1937), *reprinted as* Keetoowah–Organization as Band, *in* I OP. SOLIC. ON INDIAN AFFS. 774 (Cherokee Nation Ex. 5; UKB Ex. 31).

included Keetoowah groups, continued to meet to transact Cherokee business.[158] In August 1938, the Council elected Bartley Milam as Principal Chief.[159] "On April 21, 1941, acting in the spirit of his 'New Deal,' President Roosevelt appointed Milam Principal Chief of the Cherokee Nation," a position which Milam held until his death in 1949.[160]

The United Keetoowahs

Undaunted by Kirgis's opinion regarding the Tribal character of individual Keetoowah factions, Bureau of Indian Affairs officials and Keetoowah leaders continued to explore opportunities for organization of the Keetoowahs pursuant to Section 3 of OIWA.[161] When Levi Gritts made a request to organize the Keetoowah Society, Inc., under OIWA, several Department officials "interviewed members of the various Keetoowah factions and found that there was considerable sentiment [to organize] for the benefit of the higher degree blood Cherokee Indians who constitute a portion of the original Keetoowah organization."[162]

The Department issued a notice of a meeting for the Keetoowah factions to come together in March 1939.[163] All of the factions except the Nighthawks attended, and the general sentiment was to continuing exploring the idea of organizing as a reunited group.[164] Over the course of the summer, a provisional constitution of the "United Keetoowah Cherokee Indians" was drafted and then adopted.[165] The UKCI membership thereafter elected twenty-seven councilmen and four officers.[166] Although Levi Gritts desired the role, John Hitcher was elected as Chief.[167] "After feuding with the newly elected Chief, Gritts withdrew and took some of the [Keetoowah] Society, [Inc.] members with him."[168] Nevertheless, the bulk of the Keetoowahs remained committed to the reunited organization.[169]

In February 1942, the United Keetoowah council, now calling itself the "United Keetoowah Cherokee Band of Indians in Oklahoma," passed a resolution requesting Secretarial recognition as a band under OIWA and approval of a slightly revised constitution.[170] The BIA was torn on how to proceed. The 1937 Kirgis opinion did not clearly cover a *united* Keetoowah

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[158] *See supra* at Twilight.
[159] Kehoe, *supra* note 29, at 26; Robertson, *supra* note 25, ¶ 37.
[160] CONLEY, *supra* note 19, at 205; Toney, *supra* note 31, at 148; Robertson, *supra* note 25, ¶ 50.
[161] Kehoe, *supra* note 29, at 20; LEEDS, *supra* note 28, at 15.
[162] Memorandum from Ben Dwight, Org. Field Agent, to A.C. Monahan, Reg'l Coordinator 1 (June 13, 1939) (Cherokee Nation Ex. 38) [hereinafter Dwight Memo]; Toney, *supra* note 31, at 149.
[163] Dwight Memo, *supra* note 162, at 1; Toney, *supra* note 31, at 149.
[164] LEEDS, *supra* note 28, at 15; Toney, *supra* note 31, at 149-50.
[165] LEEDS, *supra* note 28, at 16; Dwight Memo, *supra* note 162, at 2.
[166] LEEDS, *supra* note 28, at 16.
[167] *Id.*
[168] *Id.*; Kehoe, *supra* note 29, at 24.
[169] *See* Dwight Memo, *supra* note 162, at 2 ("[T]he rank and file of the various Keetoowah factional memberships are in favor of a united Keetoowah organization."); Resolution (Feb. 20, 1942) ("[S]aid organization is in effect and basically a reunion of the members or descendants of that group of Cherokees known over a period of One Hundred years or more as the Keetoowahs.") (UKB Ex. 35).
[170] Resolution (Feb. 20, 1942) (UKB Ex. 35); Constitution and By-Laws of the United Cherokee Band of Indians in Oklahoma (1942) (UKB Ex. 39). *See also* LEEDS, *supra* note 28, at 19.

organization, but it did cast doubt on the ability of Keetoowahs generally to qualify as a band under OIWA.[171]

On one hand, BIA officials A. C. Monahan and D'Arcy McNickle were supportive of the Keetoowahs. In 1940, Monahan wrote: "I see no reason why the Keetoowahs could not be recognized by the Department of the Interior as the active successor of the Cherokee Nation, particularly of that part of the Cherokee Tribe which contains a high degree of Indian blood."[172] In 1944, McNickle opined:

> The record, incomplete as it is, seems clearly to indicate that the Keetoowah group, whether we call it a society, a faction, or a band, did exercise independent political action, even to the point of initiating hostile proceedings. It has been a formally organized body at least since 1858, with representative districts, and for many years it had a common leadership.[173]

On the other hand, Assistant Commissioner William Zimmerman seemed resigned to the 1937 Kirgis opinion, writing in 1942 that "[t]he difficulty has been that under the Oklahoma Act, the Keetoowah group or groups cannot be recognized as a legal tribe. They represent only a fraction of a tribe."[174] And BIA Chief Counsel Theodore Haas remained skeptical of both Monahan's and McNickle's positions.[175]

Ultimately, BIA officials conceded that their knowledge of the history of the Keetoowahs remained incomplete.[176] Instead of returning to the Solicitor to request a new opinion, the consensus was to seek legislation to recognize "the Keetoowah Indians of the Cherokee Nation of Oklahoma" as a band under OIWA.[177] This consensus was memorialized in a June 1944 memo from Chief Counsel Theodore Haas (1944 Haas Memo). Cherokee Nation Principal Chief Milam was supportive of the Keetoowahs' bid to organize and the plan to pursue legislation.[178]

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[171] *See* Letter from William Zimmerman, Jr., Assistant Comm'r, to Mr. Frank J. Boudinot (Apr. 13, 1940) ("When the question of organizing the Kee-too-wah Indians was first presented to the Department, we had no evidence that the Kee-too-wahs would or could agree to work together as one body. . . . If [more] facts were known, it is conceivable that the findings of the Solicitor as regards the nature of the Society would be modified and even reversed.").

[172] Memorandum from A. C. Monahan, Reg'l Coordinator, to the Comm'r of Indian Affs. (June 15, 1940) (Cherokee Nation Ex. 41).

[173] McNickle Memo, *supra* note 87, at 3.

[174] Letter from William Zimmerman, Jr., Assistant Comm'r, to J. B. Milam, Principal Chief, Cherokee Nation (Mar 12, 1942).

[175] Memorandum from Theodore Haas to D'Arcy McNickle (Feb. 7, 1941) (Cherokee Nation Ex. 42); Memorandum from Theodore Haas, Chief Counsel, to William Zimmerman, Jr., Assistant Comm'r (June 6, 1944) (Cherokee Nation Ex. 48) [hereinafter 1944 Haas Memo]; *see also* Kehoe, *supra* note 29, at 21-22.

[176] 1944 Haas Memo, *supra* note 175.

[177] *Id.*

[178] Letter from J. Bartley Milam, Principal Chief, Cherokee Nation, to John Collier, Comm'r of Indian Affs. (Apr. 10, 1942) (UKB Ex. 36) ("[T]he only way we are going to accomplish anything worth while for our Indians of one-quarter and more Indian blood would be to carry through some work that is now being undertaken by the Keetowahs, forming them into one band of Cherokees to be known as the Keetowah band of Cherokees, and have this put in effect by proper legislation."); *see also* Kehoe, *supra* note 29, at 21-22.

The Keetoowah Recognition Act

Just as Levi Gritts, Frank Boudinot, and the Keetoowah Society, Inc., had been leaders in Cherokee affairs during the early twentieth century, they continued to play an active role in lobbying the Department and Congress for a Keetoowah organization under OIWA.[179] As noted above, Levi Gritts and a portion of the Keetoowah Society, Inc., members abandoned the United Keetoowah group after John Hitcher was elected Chief in lieu of Gritts. Whether Gritts and Boudinot's efforts in the 1940s were strictly on behalf of the splinter Keetoowah Society, Inc.,[180] or aimed at assisting in the broader Keetoowah organization movement, their activities were instrumental in achieving the legislation that recognized "the Keetoowah Indians of the Cherokee Nation of Oklahoma."[181]

Assistant Commissioner William Zimmerman directed D'Arcy McNickle to send a draft Keetoowah recognition bill to Levi Gritts and Frank Boudinot "with the suggestion that Senator Thomas and Representative Stigler sponsor the legislation[.]"[182] Perhaps Zimmerman chose the Keetoowah Society, Inc. as the vehicle for the legislation because "[i]t was the only group which had legal representation in Washington . . . ."[183] Boudinot forwarded the draft bill to Representative William Stigler of Oklahoma,[184] who then introduced the bill as H.R. 5419 in September of 1944.[185] Although no action occurred on the Keetoowah recognition bill in the 78th Congress, Representative Stigler reintroduced the bill in the 79th Congress as H.R. 341.[186]

The text of both bills was identical, mirroring the language first set out in the 1944 Haas Memo:

> 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).[187]

The Keetoowah Recognition Act was enacted on August 10, 1946.[188] The primary legislative history accompanying the bill is the Committee on Indian Affairs' Report, the majority of which reproduces a March 1945 letter in support of the legislation from Acting Secretary of the Interior

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[179] LEEDS, *supra* note 28, at 20-21; *see, e.g.*, Memorandum from D'Arcy McNickle to John Collier, Comm'r of Indian Affs. (Apr. 5, 1944) ("Attached papers were left with me a few day ago by Levi B. Gritts, on behalf of himself and Mr. Boudinot.").

[180] By one account, the United Keetoowahs numbered around 5,000 while the Keetoowah Society, Inc., led by Gritts had a membership of only 100-200. Memorandum from W. O. Roberts, Superintendent, to William Zimmerman, Acting Comm'r of Indian Affs. (Jan. 5, 1948) (Cherokee Nation Ex. 31).

[181] LEEDS, *supra* note 28, at 21.

[182] Memorandum from William Zimmerman, Assistant Comm'r, to D'Arcy McNickle (June 16, 1944) (Cherokee Nation Ex. 50).

[183] LEEDS, *supra* note 28, at 21.

[184] Robertson, *supra* note 25, at Ex. 26 (attaching Letter from Frank J. Boudinot to the Honorable W. G. Stigler (Sept. 6, 1944)).

[185] Robertson, *supra* note 25, ¶ 41.

[186] *Id.* ¶¶ 41-42; Kehoe, *supra* note 29, at 23.

[187] *See* Robertson, *supra* note 25, ¶ 41; *see also* 1944 Haas Memo, *supra* note 175.

[188] Act of August 10, 1946, Pub. L. No. 79-715, 60 Stat. 976.

Abe Fortas.[189] The letter explains that "[t]he purpose of the bill is to recognize the Indians who belong to the Keetoowah Society, as a separate band or organization of Cherokee Indians, so that it may organize under section 3 of [OIWA]."[190] The letter recites the history of the Keetoowah Society from the origin of the word "Keetoowah" through the formation of the Society in 1858, the Society's opposition to allotment, and the Society's incorporation in 1905. Finally, the letter recounts that "the Keetoowah Indians requested permission to organize" under OIWA in 1937 and that "[t]he Department was compelled to decline this request because it seemed impossible to make a positive finding that the Keetoowah Indians were and are a tribe or band within the meaning of the Oklahoma Indian Welfare Act."[191]

While the Keetoowah portion of the bill was enacted without amendment or debate, a subsequent section of the bill dealing with the Cheyenne and Arapaho Tribes caused the bill to be sent to conference.[192] When the bill and conference report returned to the House, Representative Martin of Massachusetts asked: "Just what does the bill do?"[193] Representative Stigler replied: "It allows two bands of Indians who call themselves Keetoowahs to organize and receive benefits under the Oklahoma Welfare Act."[194] It is unclear to which two bands Stigler was referring, but perhaps to the Nighthawks and the Keetoowah Society, Inc., who both approached the Department about organization in the late 1930s, or to the United Keetoowahs and the Keetoowah Society, Inc., who continued to pursue organization into the 1940s.

Perfecting the United Keetoowah Organization

Following passage of the Keetoowah Recognition Act, it fell to the Department to determine exactly who would be recognized under the Act.[195] Complicating matters was the imprecise language used by Congress, Department officials, and even the Keetoowahs themselves in the decade leading up to the Keetoowah Recognition Act.[196] The "Keetoowah Indians of the Cherokee Nation of Oklahoma" was not a name used by any Keetoowah organization at the time of enactment. Within the Bureau of Indian Affairs, other impediments to Keetoowah organization were (1) turnover within the BIA from those knowledgeable of the Keetoowahs to new employees without that background, and (2) a shift in ethos away from reorganization and towards termination.[197]

Three different Keetoowah groups approached the Department seeking to organize under OIWA and the Keetoowah Recognition Act: the United Keetoowahs, the splinter Keetoowah Society, Inc., and the Seven Clans Society. While the Department briefly considered allowing the groups to organize as a confederation of independent organizations,[198] the intention all along had been to

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[189] H.R. REP. NO. 79-447 (1945).
[190] *Id.* at 1.
[191] *Id.* at 2.
[192] Robertson, *supra* note 25, ¶ 42.
[193] *Id.* at Ex. 7 (attaching 92 CONG. REC. 10,591 (July 31, 1946)).
[194] *Id.*
[195] Kehoe, *supra* note 29, at 23.
[196] *Id.* at 25 ("The documents from this period can be confusing in that Government officials sometimes used the name Keetoowah Society when referring to the Ketoowah [sic] Cherokees as a whole or when referring to the organization formed in 1939 that ultimately became known as the United Keetoowah Band.").
[197] LEEDS, *supra* note 28, at 21-22.
[198] *See, e.g.*, Letter from William Zimmerman, Assistant Comm'r, to Reverend Jim Pickup (Jan. 20, 1947).

recognize a united organization that included "all persons claiming affiliation with the Keetoowah idea or philosophy."[199] They concluded that "the United Keetoowah Band of Cherokee Indians is and should be the representative body employing the Keetoowah name."[200] In 1946, Jim Pickup had succeeded John Hitcher as Chief of the united group, now calling itself the "United Keetoowah Band of Cherokee Indians in Oklahoma" (UKB).[201]

The last hurdle in perfecting the UKB organization was the question of how membership was to be defined in its constitution. In August 1949, UKB members voted to amend their 1939 constitution to extend membership to all persons residing in Oklahoma with 1/2 or more Cherokee Indian blood.[202] Assistant Commissioner Provinse objected to this provision as too broad and recommended limiting membership to those identified on a 1949 UKB membership roll.[203] After this and other minor changes were made, the Assistant Secretary pre-approved UKB's Constitution, By-Laws, and Charter.[204] The UKB membership ratified these organizing documents on October 3, 1950.[205]

Two Cherokee Tribes

Around the same time, the group now known as the Cherokee Nation was also becoming more organized. In 1946, Congress passed the Indian Claims Commission Act to resolve with finality historical Tribal claims against the United States.[206] For Tribes with functioning Tribal governments, it was relatively straightforward to hire counsel to begin prosecuting such claims. For less organized Tribes like the Cherokee, a mechanism was needed to hire counsel through a representative process.[207] Five Tribes Superintendent W. O. Roberts, in coordination with Principal Chief Milam, distributed a notice of a Cherokee national convention to be held on July 30, 1948.[208] The purposes of the convention were to hire attorneys to appear before the Indian Claims Commission and to "select a Standing Executive Committee to assist the Tribal Officials in all Cherokee matters."[209]

The July 1948 Convention was attended by Cherokees from a variety of factions: the United Keetoowah Band, the Eastern or Immigrant Cherokees, the Western or Old Settler Cherokees,

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[199] Letter from William Zimmerman, Acting Comm'r of Indian Affs., to W. O. Roberts, Superintendent of the Five Tribes 1 (Dec. 8, 1947) (Cherokee Nation Supplemental Ex. 12).
[200] Letter from W. O. Roberts, Superintendent of the Five Tribes, to William Zimmerman, Acting Comm'r of Indian Affs. 2 (Jan. 5, 1948) (Cherokee Nation Ex. 31).
[201] Toney, *supra* note 31, at 153; Kehoe, *supra* note 29, at 24.
[202] Kehoe, *supra* note 29, at 25.
[203] Letter from John H. Provinse, Assistant Comm'r, to W. O. Roberts, Superintendent, Five Civilized Tribes Agency 1 (Sept. 9, 1949).
[204] Kehoe, *supra* note 29, at 25; LEEDS, *supra* note 28, at 36.
[205] Kehoe, *supra* note 29, at 25; LEEDS, *supra* note 28, at 36.
[206] Act of August 13, 1946, Pub. L. No. 79-726, ch. 959, 60 Stat. 1049.
[207] *See* Letter from W. O. Roberts, Superintendent of the Five Tribes, to William Zimmerman, Jr., Acting Comm'r of Indian Affs. (Mar. 24, 1948) (Cherokee Nation Ex. 14).
[208] Robertson, *supra* note 25, ¶ 45.
[209] Kehoe, *supra* note 29, at 27 (quoting Public Notice to All Duly Enrolled Cherokee Indians by Blood in Oklahoma (July 1, 1948) (Cherokee Nation Ex. 15)).

the Seven Clans Society, and the Texas Cherokees.[210] The convention passed a resolution authorizing Principal Chief Milam to appoint a permanent Standing Executive Committee of nine members who would then employ "[a]ttorneys to represent all duly enrolled Cherokee Indians by blood in Oklahoma" before the Indian Claims Commission.[211] The Executive Committee was also authorized "to exercise during recess any and all powers that this or any other assembly of the duly enrolled Cherokee Indians by blood in Oklahoma could rightfully [do] in regular convention assembled."[212]

The Executive Committee conducted Cherokee business as needed through the mid-1970s, meeting with "varying frequency on an irregular basis."[213] After the death of Principal Chief Milam in 1949, the Executive Committee selected W. W. Keeler as his replacement.[214] President Truman made the election official by appointing Keeler to the position of Principal Chief.[215] UKB Chief Jim Pickup became a member of the Executive Committee in April 1950. Pickup, Keeler, and the Executive Committee worked together on a number of initiatives, including a plan to attract industrial development to a 40-acre tract on the Cherokee Reservation.[216]

As of 1950, the Cherokee Reservation was occupied by two federally recognized Cherokee Tribes: the United Keetoowah Band of Cherokee Indians of Oklahoma led by its Council and Chief, and the Cherokee Nation led by the Executive Committee and Principal Chief.[217] Congress did not provide detailed instructions regarding how these two Tribes were supposed to relate to each other and to the Cherokee Reservation. This M-Opinion seeks to clarify some of the questions raised by this history so the Department can carry out its duties to the Cherokees in a lawful manner.

Discussion

Land-in-trust applications are processed under the Secretary's statutory and regulatory authority and the specific facts present before the Secretary or her designee at the time of the decision. This memorandum does not by itself constitute the approval of any particular fee to trust application, but rather examines whether UKB may have land in trust for gaming purposes within the Cherokee Reservation, which turns on questions of reservation status and jurisdiction. In the discussion below, I reach the following four conclusions relevant to this inquiry.

First, I conclude that the Oklahoma Indian Welfare Act (OIWA) authorizes the Secretary to take land in trust for UKB. Second, I conclude that the Cherokee Reservation is UKB's reservation for purposes of the Part 151 Regulations and that UKB may acquire land in trust status within the Cherokee Reservation pursuant to the on-reservation criteria of 25 C.F.R. § 151.9. Third, I

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[210] LEEDS, *supra* note 28, at 22-23; Robertson, *supra* note 25, ¶ 45. Of note, Levi Gritts spoke at the convention on behalf of the Keetoowah Society, Inc., but left early when he perceived his voice was not being heard. *See* Toney, *supra* note 31, at 158.

[211] Resolution No. 3 (July 30, 1948) (Cherokee Nation Ex. 17).

[212] *Id.*

[213] Kehoe, *supra* note 29, at 28.

[214] *Id.*; LEEDS, *supra* note 28, at 24.

[215] Kehoe, *supra* note 29, at 28; Robertson, *supra* note 25, ¶ 50.

[216] Kehoe, *supra* note 29, at 37-39.

[217] The modern iteration of the Cherokee Nation government, including legislative and judicial branches, was organized under a new constitution on June 26, 1976. Robertson, *supra* note 25, ¶ 51.

conclude that any lands held in trust for UKB are under UKB's exclusive jurisdiction and not subject to the supervening jurisdiction of the Cherokee Nation. Contrary to the Cherokee Nation's assertions, the Treaty of 1835 does not guarantee the Cherokee Nation an exclusive right to govern the Cherokee Reservation. Fourth, I conclude that any trust lands acquired for UKB within the Cherokee Reservation qualify as "Indian Lands" eligible for gaming under IGRA.

These conclusions, taken together, establish that the Secretary has the authority to take land within the Cherokee Reservation into trust for UKB as "on-reservation" acquisitions eligible for gaming under IGRA.

A. OIWA authorizes the Secretary to take land in trust for UKB

Section 5 of the Indian Reorganization Act (IRA) provides that the Secretary of the Interior may take land into trust for Indian Tribes.[218] At the time of its enactment in 1934, the IRA excluded many Oklahoma Tribes from certain of its provisions,[219] in part because of the contemporary belief that Oklahoma Tribes no longer had reservations and were on a path toward assimilating into broader American society.[220] The opportunity to partake in the benefits of the IRA was extended to Oklahoma Tribes in 1936 with the passage of the OIWA.

Section 3 of the OIWA provides that the charter of an incorporated Oklahoma Indian group may convey to such Tribes "the right . . . to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA] . . . ."[221] The ability to petition the Secretary for land in trust is one of the primary rights or privileges secured to Tribes under the IRA,[222] so Section 3 of the OIWA extends that right to OIWA-incorporated Tribes whose charters so specify. It necessarily follows that OIWA Section 3 authorizes the Secretary to take land in trust for properly chartered Oklahoma Indian groups.[223]

UKB formally organized under OIWA in 1950 by adopting a constitution, by-laws, and a corporate charter that were approved by the Assistant Secretary of the Interior on May 8, 1950, and ratified by UKB members on October 3, 1950. The UKB charter provides that its corporate purposes include, *inter alia*, "[t]o advance the standard of living of the Band through the development of its resources, [and] the acquisition of land . . . ."[224] The charter also specifies a number of corporate powers related to land, including the power to "purchase, take by gift,

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[218] 25 U.S.C. § 5108.

[219] Act of June 18, 1934, Pub. L. No. 73-383, § 13, 48 Stat. 984, 986-87 ("Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole.").

[220] BLACKMAN, *supra* note 139, at 75, 81.

[221] 25 U.S.C. § 5203.

[222] *Carcieri v. Salazar*, 555 U.S. 379, 403-04 (2009) (Stevens, J., dissenting).

[223] In addition, Section 1 of OIWA directly authorizes the Secretary to take land into trust for groups organized under OIWA when the lands are "agricultural and grazing lands of good character and quality." 25 U.S.C. § 5201.

[224] Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma ¶ 1(b) (Oct. 3, 1950) (UKB Ex. 44).

bequest, or otherwise own, hold, manage, operate, and dispose of *property of every description*, real or personal."[225] This language from UKB's charter mirrors the authorization of corporate powers in Section 17 of the IRA,[226] presumably because UKB and the Assistant Secretary intended that the UKB corporation would have all the rights of an IRA corporation, including the ability to have land taken into trust.

Because UKB's charter empowers UKB[227] to own "property of every description," which includes beneficial title to land held in trust, and because Section 3 of the OIWA incorporates Section 5 of the IRA regarding land in trust as one of the rights and privileges secured to Tribes under the IRA, Section 3 of OIWA authorizes the Secretary to acquire land in trust for UKB.

Indeed, the Tenth Circuit has already confirmed that the Department may take land into trust for UKB on the Cherokee Reservation. When the Cherokee Nation challenged the Department's 2011 approval of UKB's request for 76 acres in trust for community services purposes, the court held that, "[b]ecause it is undisputed that the UKB is a 'recognized tribe or band of Indians residing in Oklahoma,' that has incorporated pursuant to OIWA, the [Department] properly concluded that statutory authority exists for the Secretary to take [land] into trust for the UKB Corporation."[228]

B. The Cherokee Reservation is UKB's reservation for purposes of the Part 151 Regulations.

Under the Part 151 Regulations, a Tribe's request to take land into trust is evaluated under either the on-reservation criteria listed in 25 C.F.R. § 151.9 or the off-reservation criteria in 25 C.F.R. § 151.11.[229] According to Cherokee Nation, UKB's application must be considered under the criteria for off-reservation acquisitions because, in Cherokee Nation's view, UKB does not have a reservation as defined in 25 C.F.R. § 151.2.[230] That definition provides:

> *Indian reservation or Tribe's reservation* means . . . that area of land over which the Tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma wherever historic reservations have not yet been reaffirmed, or where there has been a final judicial determination that a

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[225] *Id.* ¶ 3(r) (emphasis added).

[226] 25 U.S.C. § 5124 ("Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal . . . .").

[227] Technically, the charter lays out the powers of the UKB corporation, not UKB the sovereign. But since the UKB corporation is merely the Tribe organized as a corporate entity, this is a distinction without a difference.

[228] *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1155 (10th Cir. 2019) (citations omitted). And because the Tenth Circuit has held that trust acquisitions under Section 3 of OIWA are not constrained by the definition of "Indian" in the IRA, *id.*, I need not analyze whether UKB meets the IRA's definition of "Indian," including whether UKB was "under federal jurisdiction" in 1934. For purposes of Section 3 of OIWA, it is sufficient that UKB is a "recognized tribe or band of Indians residing in Oklahoma." 25 U.S.C. § 5203.

[229] On January 11, 2024, a revised and renumbered version of the Part 151 regulations went into effect. *See* 88 Fed. Reg. 86249 (Dec. 12, 2023). In this opinion, I will quote from and use the numbering from this new and current version of the regulations. UKB submitted its most recent fee-to-trust application in July 2022, which means that UKB has the option to request that BIA consider its trust application under the old or the new regulations. 25 C.F.R. § 151.17(a). My analysis here remains the same regardless of which option UKB chooses.

[230] Letter from Sarah Hill, Cherokee Nation Att'y Gen., to Eddie Streater, BIA Reg'l Dir. 11-12 (Jan. 12, 2023).

> reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the Tribe as defined by the Secretary.[231]

Although UKB is located in the State of Oklahoma, the Cherokee Reservation has been reaffirmed by the Oklahoma Court of Criminal Appeals in accordance with the U.S. Supreme Court's holding in *McGirt v. Oklahoma*.[232] So the question to be analyzed is whether UKB "is recognized by the United States as having governmental jurisdiction" over the Cherokee Reservation, such that the Department should treat the Cherokee Reservation as UKB's reservation for purposes of the Part 151 Regulations.[233]

I conclude that the Cherokee Reservation is UKB's reservation, and that the Department should review UKB's fee-to-trust application using the on-reservation criteria of Section § 151.9. This conclusion is based on the following two findings: (1) that UKB has an ownership interest in the Cherokee Reservation as a successor in interest to the Treaty of 1846; and (2) that Congress intended for UKB to possess governmental jurisdiction over the Cherokee Reservation and enjoy the benefits of the OIWA on its *own* reservation when it enacted the Keetoowah Recognition Act.

1. UKB has an ownership interest in the Cherokee Reservation under the 1846 Treaty.

The UKB and Cherokee Nation have long disputed UKB's claimed right to assert governmental jurisdiction within the Cherokee Reservation. At the heart of this dispute is the question of whether UKB is a successor in interest to the Cherokee Indians who signed the treaties establishing and affirming the Cherokee Reservation. This question of treaty successorship is controlling to the question of UKB's jurisdiction because only a treaty Tribe[234]—i.e., the treaty signatory, or a successor in interest to the treaty signatory—is entitled to exercise treaty rights relating to the Cherokee Reservation, including the ownership rights to the Cherokee Reservation under the Treaty of 1846.[235] And the Secretary presumes that Tribes have jurisdiction over their current reservations and all other lands constituting Indian country when it applies the Part 151 Regulations.[236]

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[231] 25 C.F.R. § 151.2.

[232] *See, e.g.*, *Hogner v. State*, 500 P.3d 629, 634-35 (Okla. Crim. App. 2021); *Spears v. State*, 485 P.3d 873, 876-77 (Okla. Crim. App. 2021).

[233] For ease of reference, I will employ the term "Cherokee Reservation" throughout this section regardless of historical context because *McGirt* confirmed that the Cherokee Reservation has always existed. Thus, I will generally not refer to the Cherokee Reservation as a "historical reservation" or "former reservation" even where those involved at the time may have believed that the reservation no longer existed. The term "Cherokee Reservation" is not meant to imply that governing authority or jurisdiction over the reservation belongs exclusively to either the Cherokee Nation or UKB.

[234] For purposes of this M-Opinion, the "signatory Tribe" designation refers to the historical Tribe whose representatives actually signed the treaty, and the term "treaty Tribe" refers to the modern-day Tribe that has established its right to exercise the treaty rights of a signatory Tribe. *See United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981).

[235] Treaty with the Cherokees, Aug. 6, 1846, 9 Stat. 871.

[236] *See Comanche Nation of Okla. v. Zinke*, 754 Fed. Appx. 768, 773 (10th Cir. 2018) ("And the Bureau of Indian Affairs ('BIA') presumes that a tribe has governmental jurisdiction over any parcel within the borders of its reservation.").

The UKB and Cherokee Nation offer two competing views on the issue of treaty successorship. UKB's position is that (1) the Tribal signatory to the relevant Cherokee treaties, including the Treaty of 1846, is the "historical" Cherokee Nation; (2) the "historical" Cherokee Nation has been dissolved and no longer exists; and (3) that both UKB and Cherokee Nation are entitled to exercise treaty rights as joint successors in interest to the historical Cherokee Nation. UKB argues it is a successor in interest because it meets both requirements of the successorship test established by the Ninth Circuit in *United States v. Washington*, which requires a modern group to show (1) descent from a signatory Tribe; and (2) that it has maintained an organized Tribal structure.[237]

The Cherokee Nation rejects the notion that the Tribal signatory to the Cherokee treaties was a "historical" Cherokee Nation that no longer exists. The Cherokee Nation instead asserts itself as the signatory Tribe, arguing it is "the same sovereign as the original Cherokee Nation" that signed treaties with the United States and that it has existed as an entity on a continuous basis since treaty times. On the successorship question, Cherokee Nation argues that the Ninth Circuit's more recent decision in *United States v. Oregon*[238] sets out the applicable standard of "political cohesion," and that UKB's claim fails under this standard because UKB politically separated itself from the signatory Tribe (Cherokee Nation) when it organized under the OIWA. The Cherokee Nation accordingly asserts that it is "the only Indian tribe that holds 'rights and/or jurisdiction' within the Cherokee Nation Reservation . . . ."[239]

For the reasons set forth below, I conclude that UKB has an ownership interest in the Cherokee Reservation as a successor in interest to the Cherokee Indians who signed the Treaty of 1846 ("1846 Treaty Cherokees").[240] In the analysis below, I first examine the reservation-ownership provision in the Treaty of 1846, which established that there was one unified Tribe that owned the Cherokee Reservation in common for all of its citizens. I then apply the successorship test from *Washington* to conclude that UKB is a successor in interest to the 1846 Treaty Cherokees because (1) UKB members descend from the Cherokee Indians who signed the Treaty of 1846; and (2) UKB has maintained an organized Tribal structure. Finally, I address the reasons why the political cohesion standard from *Oregon* is inapplicable to cases such as this, where the modern group claiming treaty rights was formed as a subgroup within the Tribal signatory and should therefore be considered as part of, rather than separate from, the Tribal signatory group.[241]

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[237] 641 F.2d 1368, 1371 (9th Cir. 1981).

[238] 29 F.3d 481 (9th Cir. 1994).

[239] Cherokee Nation Submission, *supra* note 5, at 11.

[240] The Treaty of 1846 was signed by delegations representing the Western Cherokee (Old Settlers) and the two Eastern Cherokee factions (Government Party and Treaty Party). For purposes of this M-Opinion, the term "1846 Treaty Cherokees" refers to this collective group of Cherokees in Oklahoma that signed the Treaty of 1846.

[241] The political cohesion test from *Oregon* is inapplicable and, as discussed below, the successorship test from *Washington* does not exactly fit the facts here; however, these Ninth Circuit tests, which were developed in the context of treaty fishing right claims under the Stevens Treaties of 1854-1855, are the only legal tests articulated by federal courts for determining treaty-Tribe successorship status. They are also the tests that Cherokee Nation and UKB rely on in making their respective arguments concerning UKB's treaty-Tribe status. For these reasons, I adopt the Ninth Circuit's tests as the appropriate framework for evaluating the specific question before me concerning UKB's claim of treaty rights without taking a position on whether and when these tests would be applicable in any other context.

i. The Treaty of 1846 secures the 1846 Treaty Cherokees' ownership rights in the Cherokee Reservation.

Through a series of treaties with the United States from 1817 to 1866, the Cherokee Indians ceded their aboriginal lands and migrated or were forcibly removed to the Indian Territory in what is now eastern Oklahoma. The Treaty of 1846 was the first treaty signed after the removal of the remaining Cherokee Indians living east of the Mississippi River and is relevant here because it not only "unified the Cherokee people in Oklahoma as one tribe,"[242] but also vested this unified Tribe with ownership rights in the Cherokee Reservation.

Before turning to the Treaty of 1846, it is important to understand the historical context in which the Treaty of 1846 was negotiated and signed. As noted earlier, the Cherokee people were once divided into two separate political branches: the Cherokee Nation *east* of the Mississippi (Eastern Cherokee) and the Cherokee Nation *west* of the Mississippi (Western Cherokee). The Cherokee people historically "existed as a separate and distinct Nation, in the possession and exercise of the essential attributes of sovereignty,"[243] until the Treaties of 1817 and 1819, which divided the Cherokee people into the Western Cherokee and Eastern Cherokee branches.[244] The two branches were governed by their own respective chiefs and laws and functioned as separate political communities.

In 1828, the United States negotiated separately[245] with "the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi," who agreed to cede their Arkansas lands in exchange for lands in present-day northeastern Oklahoma that were to become the core of the present Cherokee Reservation.[246] The Eastern Cherokee were not parties to the 1828 Treaty,[247] but subsequently migrated or were forcibly removed to Oklahoma following the Treaty of 1835. At the time of removal, the Eastern Cherokee had become divided into two factions—a minority faction that supported removal to the west and entering the Treaty of 1835 (the "Treaty Party"), and the larger majority of the Eastern Cherokee who resisted removal and opposed the Treaty of 1835 (the "Government Party"). In December 1835, the Treaty Party signed a treaty with the United States agreeing to removal "with a view to reuniting [the two branches] in one body and securing a permanent home" for the Cherokee people.[248]

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[242] Kehoe, *supra* note 29, at 44.

[243] Robertson, *supra* note 25, at Ex. 11 (attaching The Act of Union Between the Eastern and Western Cherokees, the Constitution and Amendments, and the Laws of the Cherokee Nation, Passed During the Session of 1868 and Subsequent Sessions (1870)).

[244] *See Cherokee Trust Funds*, 117 U.S. 288, 293 (1886) ("[T]he Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation; . . . by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokee and the Western Cherokees . . . .").

[245] *Id.* at 298-99 (noting that the Treaty of 1828 "was the first time the Cherokees west of the river [Western Cherokee] were recognized as so far a distinct and separate political body from the Cherokees east of the river [Eastern Cherokee] as to call for separate treaty negotiations with them").

[246] Treaty with the Western Cherokee arts. II, IV, May 6, 1828, 7 Stat. 311.

[247] *E. or Emigrant Cherokees and W. or Old Settler Cherokees v. United States*, 88 Ct. Cl. 452, 464 (1939).

[248] Treaty of 1835, *supra* note 34, preamble.

The arrival of the Eastern Cherokee "immigrants" exacerbated tensions and conflict among the three groups[249]—the Western Cherokee and the two Eastern Cherokee factions.[250] In 1839, the Eastern Cherokee and a small group of Western Cherokee signed an "Act of Union," which was intended to unite the Eastern and Western Cherokees under one government.[251] But the Western Cherokee government refused to ratify the Act of Union[252] and tensions continued until the groups concluded the Treaty of 1846, which was signed by representatives of each of the three groups to settle all disputes among themselves and with the United States.[253]

The Treaty of 1846 legally unified the Cherokee factions and officially merged the Eastern and Western Cherokee governments into "one nation, sharing one land and one law."[254] The Treaty of 1846 was a treaty between the United States and "the whole Cherokee people" in Oklahoma, as represented by the delegates who signed on behalf of the Western Cherokee (Old Settlers) and the two Eastern Cherokee factions (Government Party and Treaty Party).[255] After entering into the Treaty of 1846, "the Western Cherokee government was dissolved" and the Western Cherokee became "citizens of the Cherokee Nation."[256]

The Treaty of 1846 "was a compact between three parties, the United States, the Eastern, and the Western Cherokees," intended "to secure peace in the Cherokee country."[257] To that end, Article 2 of the Treaty of 1846 provided that "[a]ll 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."[258]

As relevant here, the parties also agreed that lands ceded to the Cherokees in Oklahoma would "be and remain the common property of the whole Cherokee people . . . ."[259] With respect to the

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[249] Kehoe, *supra* note 29, at 8 ("The continuing tension between the three major groups of Cherokees sometimes manifested itself in acts of murder and violence that can be described as political in nature, although they were often also acts of revenge on behalf of family members or friends harmed by a rival group.").

[250] Robertson, *supra* note 25,¶ 12 ("The pro-removal Treaty Party immigrants were welcomed by the western Cherokees, but the arrival of the much larger anti-removal Government Party group (numbering approximately 11,000) triggered conflict among the three groups.").

[251] *Id.* at Ex. 11 (attaching The Act of Union Between the Eastern and Western Cherokees, the Constitution and Amendments, and the Laws of the Cherokee Nation, Passed During the Session of 1868 and Subsequent Sessions (1870); stating "we, the People composing the Eastern and Western Cherokee Nation, in National Convention assembled, by virtue of our original and undeniable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the CHEROKEE NATION.").

[252] Baker, *supra* note 28, ¶ 10.

[253] Robertson, *supra* note 25, ¶ 15.

[254] *Id.* ¶ 16; *see also Cherokee Nation v. United States*, 270 U.S. 476, 479 (1926) (citation omitted) ("Ultimately the Eastern Cherokees . . . and the Old Settlers [Western Cherokees] were united in a common government again by the Treaty of 1846.").

[255] *E. or Emigrant Cherokees and W. or Old Settler Cherokees v. United States*, 88 Ct. Cl. 452, 465 (1939) ("Controversies having arisen between the Cherokees west of the Mississippi River, known as the Old Settlers, and those east of the Mississippi, known as the Emigrant Cherokees, with respect to the ownership of the various tracts of land and their interest therein, a treaty was entered into in 1846 whereby it was agreed that the lands occupied by the Cherokee Nation should be for the common use and benefit of the whole Cherokee people.").

[256] *W. Cherokee Indians v. United States*, 27 Ct. Cl. 1, 54 (1891); *see also Cherokee Nation*, 270 U.S. at 479 (citation omitted) ("Ultimately the Eastern Cherokees . . . and the Old Settlers [Western Cherokees] were united in a common government again by the Treaty of 1846.").

[257] *W. Cherokee Indians*, 27 Ct. Cl. at 36.

[258] Treaty with the Cherokees art. II, Aug. 6, 1846, 9 Stat. 871.

[259] *Id.* at art. IV.

Cherokee Reservation, Article I of the Treaty of 1846 declared: "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 . . . ."[260]

This provision affirmed that "the lands of the Cherokee Nation belonged to the whole Cherokee people,"[261] and that the 1846 Treaty Cherokees owned the Reservation in common for all of its citizens. This ownership interest in the Cherokee Reservation thus belonged to the 1846 Treaty Cherokees as a whole, not to its component groups individually. If UKB is a successor to the Cherokee Indians who signed the Treaty of 1846, it has a legal right to the Cherokee Reservation and, accordingly jurisdiction over that Reservation. The question, then, is whether UKB can demonstrate that it is a successor entity entitled to the rights and benefits granted to the "whole Cherokee people" under the Treaty of 1846.

ii. UKB is a successor in interest to the Cherokee Indians who signed the Treaty of 1846.

It is well settled that "[r]ights under a treaty vest with the tribe at the time of the signing of the treaty . . . ."[262] A modern-day Tribe, however, can later assert the rights of a treaty signatory Tribe by establishing "treaty-tribe status"[263]—i.e., by establishing that it is the same Tribal entity or a successor in interest as a matter of law to the Tribe that was granted, or reserved, rights in a treaty. Such determinations are often necessary in modern times given that centuries-old treaty signatory groups have often subsequently changed names, relocated, or reformed into different iterations of their original groups.[264]

Here, UKB is not claiming to be the same Tribal entity that signed the Treaty of 1846. Rather, it is seeking to assert treaty rights under the successorship test set forth in the Ninth Circuit decision, *United States v. Washington*.[265] In *Washington*, the Ninth Circuit set out the standard for determining whether a modern Tribe can exercise treaty rights as a successor in interest to a historical Tribe that signed the treaty at issue. Under that standard, a modern Tribe seeking successor status must satisfy two separate factors.[266] First, the modern Tribe must show that "a group of citizens of Indian ancestry is descended from a treaty signatory . . . ."[267] Second, it must show that it "has maintained an organized tribal structure . . . ."[268]

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[260] *Id.* at art. I.

[261] *United States v. Cherokee Nation*, 202 U.S. 101, 127 (1906).

[262] *United States v. Oregon*, 29 F.3d 481, 484 (9th Cir. 1994) (citing *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975)).

[263] *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981).

[264] *See, e.g., Nw. Band of the Shoshone Nation v. Wooten*, 83 F.4th 1205 (9th Cir. 2023) (discussing in relevant part modern Tribal rights determined by treaty signature and successorship).

[265] *Washington*, 641 F.2d 1368.

[266] The Cherokee Nation suggests that under *Washington*, a modern Tribe must also show that the government has recognized and treated the modern Tribe as a successor in interest. Cherokee Nation Submission, *supra* note 5, at 122. In *Washington*, the Ninth Circuit found that the government had consistently treated the present-day Muckleshoot Tribe as a successor in interest, but this was just one form of evidence of a modern-day Tribe's descent from the signatory Tribe. It was not a separate requirement for satisfying the successorship test. *See Washington*, 520 F.2d at 692.

[267] *Washington*, 520 F.2d at 693.

[268] *Id.*

As demonstrated below, UKB satisfies both of the *Washington* factors. Turning first to the question of descent, the evidence supports a finding that UKB is composed of descendants of the Eastern and Western Cherokee who signed the Treaty of 1846 and subsequently became part of the 1846 Treaty Cherokees. In fact, UKB can trace its ancestry to various individual representatives who signed the Treaty of 1846. As for the question of Tribal organization, the evidence sufficiently establishes that UKB, since its formation as the Keetoowah Society, has continuously maintained an organization that reflects the defining characteristics of the Cherokee Indians who signed the Treaty of 1846. UKB is therefore a treaty successor entitled to the rights and benefits accorded signatories to the Treaty of 1846.

a. UKB members descend from the Cherokee Indians who signed the Treaty of 1846.

Members of UKB descend from the Cherokee Indians who originally occupied the southeast United States and were removed to present-day Oklahoma under various Cherokee treaties with the United States.[269] The Tenth Circuit has accepted this as true[270] and to the Department's knowledge, the Cherokee Nation does not dispute this fact. The Cherokee Nation focuses instead on an argument that UKB has made elsewhere regarding its descent from the Western Cherokee specifically.[271] But the relevant question here is whether UKB members descend from the 1846 Treaty Cherokees, and not a specific faction of Cherokee people who signed the Treaty. And the evidence is clear that UKB shows such descendancy.

Under UKB's current membership criteria, UKB members must descend from individuals listed on the UKB Base Roll approved by the BIA in 1949 or the Dawes Roll, which is the base roll for the Cherokee Nation.[272] According to a genealogical study commissioned by Cherokee Nation, the vast majority of UKB's original members (as listed on the UKB Base Roll) descend exclusively or primarily from Eastern Cherokees who arrived in Oklahoma after the Treaty of 1835.[273] To reach this finding, the study calculated the ancestral relationship of individuals listed on the UKB Base Roll to individuals listed on rolls prepared by the United States in 1851 for the purpose of distributing payments owed to Cherokee members pursuant to the Treaty of 1846. The study estimated that 87.5% of UKB Base Roll members descended from the Eastern Cherokee who relocated to the Indian Territory under the Treaty of 1835, and that 8.6% of UKB Base Roll members descended from the Western Cherokee who were living in the Indian Territory prior to the Treaty of 1835.[274] The study also found that "nearly all individuals on the

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[269] H.R. REP. NO. 79-447, at 1 (1945).

[270] *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1147 (10th Cir. 2019) ("The UKB are descended from the historical Cherokee Indian tribe.").

[271] Cherokee Nation Submission, *supra* note 5, at 123 ("Elsewhere, UKB has argued that its members are descendants of the 'Old Settlers' who removed to Oklahoma prior to 1835 and signed the Treaty with the Western Cherokee in 1828.").

[272] *Tribal Enrollment*, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, https://www.ukb-nsn.gov/membership (last visited Nov. 23, 2024) ("To be eligible for UKB membership, Cherokees must be able to provide documentation that they are a descendant of an individual listed on the 1949 United Keetoowah Band Base Roll or of an individual listed on the final Dawes Roll.").

[273] Cherokee Nation Submission, *supra* note 5, at 123-24.

[274] *Id.* at 124-26; MICHAEL D. LARSEN, STATISTICAL ANALYSIS OF UKB BASE ROLL ENROLLEE ANCESTRY ON THE DRENNEN, OLD SETTLER, AND CHAPMAN ROLLS 2 (2022) (Cherokee Nation Ex. 76).

UKB Base Roll are estimated to have at least one ancestor on the [Eastern Cherokee] Roll . . . ."[275]

As this study shows, the individuals listed on the UKB Base Roll can trace their lineage to the 1846 Treaty Cherokees—i.e., the group of Western and Eastern Cherokee who were residing in the Indian Territory at or around the time the Treaty of 1846 was signed. In fact, UKB Base Roll members can trace their lineage to the specific individual representatives who signed the Treaty of 1846. As UKB points out, the UKB Base Roll reflects family names that can be traced to every treaty between the Cherokees and the United States, including the Treaty of 1846 in which ten of the eighteen individual signatories have family names that appear on the UKB Base Roll prepared nearly a century later. One of those signatories, John Ross, signed as the "principal chief of the Cherokee Nation" and is considered one of the early leaders of the Keetoowah Society.[276] The UKB Base Roll reflects ten Tribal members with the family name of "Ross."

The genealogical connections between UKB members and the 1846 Treaty Cherokees are representative of the history and evolution of UKB. The UKB traces its origins to the Keetoowah Society, which was a group of Cherokees that "existed *within* the original Cherokee Tribe of Oklahoma since the 1800s . . . ."[277] And when Congress enacted the Keetoowah Recognition Act in 1946, it recognized the UKB as Cherokee Indians living within "the Cherokee Nation of Oklahoma," i.e. the Cherokee Reservation.[278] The UKB originated as, and remained, a group within the Cherokee Indians living in Oklahoma at all relevant times, including at the time of the Treaty of 1846.

Based on the foregoing, I conclude that UKB members descend from and can trace their ancestry to the Cherokee Indians who signed the Treaty of 1846.

b. UKB has maintained an organized Tribal structure.

The second factor of the *Washington* successorship test looks to whether a modern Tribe has maintained an organized Tribal structure. "An organized tribal structure may be preserved if some defining characteristic of the original tribe persists in an evolving tribal community."[279] As the Ninth Circuit has explained, the modern group claiming treaty rights must be able to "trace a continuous and defining political or cultural characteristic to the entity that was granted the treaty rights."[280] The purpose of this showing is to "identify the group asserting treaty rights as the group named in the treaty," and thereby confirm that the Tribal status of the original signatory Tribe has been preserved.[281]

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[275] Cherokee Nation Submission, *supra* note 5, at 126 (quoting LARSEN, *supra* note 274, at 11).
[276] Treaty with the Cherokees, Aug. 6, 1846, 9 Stat. 871; Kehoe, *supra* note 29, at 9; Robertson, *supra* note 25, ¶ 18.
[277] *Buzzard v. Okla. Tax Comm'n*, No. 90-C-848-B, 1992 U.S. Dist. LEXIS 22864, at *2 (N.D. Okla. Feb. 24, 1992) (emphasis added).
[278] Act of August 10, 1946, Pub. L. No. 79-715, 60 Stat. 976. *See also* the discussion of the statutory language *supra* at Part B.2.
[279] *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990) (quotation omitted).
[280] *United States v. Oregon*, 29 F.3d 481, 485 (9th Cir. 1994); *see also United States v. Washington*, 476 F. Supp. 1101, 1105 (W.D. Wash. 1979) (finding that the Duwamish members "and their ancestors do not and have not lived as a continuous, separate, distinct and cohesive Indian cultural or political community").
[281] *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981) (explaining that "tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community").

In *Washington*, the Ninth Circuit considered whether five modern-day Tribal entities were treaty Tribes under the Treaties of Medicine Creek and Point Elliott.[282] In that case, the modern entities descended from Puget Sound Indians who "did not go to reservations, because the reservations were inadequate," and now "live[d] among non-Indians and [we]re not federally recognized."[283] Each of the modern entities claimed it was entitled to exercise treaty rights as a treaty successor because it was the *same* Tribal entity that signed the treaties.[284] In other words, each of the entities claimed to be the sole and entire modern incarnation or continuation of one of the Tribes that signed the treaties. The issue was whether the modern entities "ha[d] maintained sufficient political continuity with those who signed the treaty that it may fairly be called the same tribe."[285]

The Ninth Circuit held that the modern groups "had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communities,'" and therefore were not the same Tribes that had signed the Treaties of Medicine Creek and Point Elliott.[286] The Ninth Circuit affirmed the trial court's findings that none of the modern entities were "at th[at] time a treaty tribe in the political sense" because none of them were "at th[at] time a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott."[287]

Although, by the time of the case, the modern entities had developed constitutions and formal governments, their "[p]resent members ha[d] no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation . . . ."[288] The Ninth Circuit found that the modern entities' dealings with the United States "were not different in substance from those engaged in by any social or business entity."[289] There was no indication of continuous "governmental control over their [members'] lives and activities."[290] Nor did the groups demonstrate any continuous cultural influence of the original treaty Tribes.[291] The Ninth Circuit concluded that the entities could not establish the requisite political continuity with the treaty signatories and therefore were not entitled to treaty-Tribe status under the relevant treaties.

The evolution of the 1846 Treaty Cherokees presents a unique set of facts that do not fit neatly into the *Washington* framework for determining Tribal continuity. Unlike *Washington*, which involved modern groups claiming treaty rights as the *same* group of Indians that signed the treaty,[292] the facts here involve a modern group (UKB) claiming treaty rights as a *part of* the group that signed the treaty (1846 Treaty Cherokees). The UKB was formed as an entity within the 1846 Treaty Cherokees and, in this respect, is not the same group that signed the treaty, but rather a subgroup within the treaty signatory. After entering into the Treaty of 1846, the 1846

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[282] *Id.* at 1370 n.1.
[283] *Id.* at 1370-71.
[284] *Id.* at 1372.
[285] *Oregon*, 29 F.3d at 487 n.2 (citing *Washington*, 641 F.2d at 1372-73).
[286] *Washington*, 641 F.2d at 1373-74 (citation omitted).
[287] *United States v. Washington*, 476 F. Supp. 1101, 1104, 1111 (W.D. Wash. 1979); *Washington*, 641 F.2d at 1371.
[288] *Washington*, 476 F. Supp. at 1105-11.
[289] *Id.*
[290] *Washington*, 641 F.2d at 1372-73.
[291] *Id.* at 1373.
[292] *Washington*, 476 F. Supp. at 1104-09.

Treaty Cherokees evolved into two separate and distinct political entities, each with its own government and membership. The two entities—UKB and Cherokee Nation—are separate and distinct from each other, but can nevertheless claim equal successorship to the 1846 Treaty Cherokees from which they were formed.

The Ninth Circuit has considered treaty successorship claims of Tribal entities like UKB that did not exist at the time of the treaty, but those cases involved the consolidation or merger of smaller treaty Tribes into a new and combined political entity.[293] In the case of the Cherokee Nation of Indians, there was no merger or consolidation, but rather a split resulting in two separate Tribal entities.

The question, then, is how to establish the Tribal continuity of a group of treaty signatories (1846 Treaty Cherokees) that was effectively split into two parts (UKB and Cherokee Nation) when Congress enacted the Keetoowah Recognition Act allowing UKB to organize separately under federal law. In such cases, it makes little sense to ask whether a constituent part of the Tribal organization has maintained the organization's Tribal status and structures. The nature of the Tribal organization existing at the time of the treaty, though relevant, is not determinative in the case of UKB since neither UKB nor Cherokee Nation can establish themselves as the same group of Indians that signed the Treaty of 1846. The question in *Washington* of whether the entity has maintained an "organized tribal structure in a *political* sense"[294] is also not determinative here.

The unique history of UKB's formation calls for a different approach to the Tribal continuity inquiry. In *Washington*, the Ninth Circuit examined the entities' political organization to determine whether their Tribal status had been preserved, noting that "[t]ribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community,"[295] Here, the relevant "defining characteristic" is not UKB's political organization, but rather the Cherokee identity of those who signed the Treaty of 1846. In other words, the proper inquiry here for establishing Tribal continuity is not whether UKB has maintained political continuity, but whether it has continuously maintained and preserved the distinct Cherokee identity of the 1846 Treaty Cherokees. Because UKB is a political entity that evolved from the 1846 Treaty Cherokees, this inquiry necessarily involves an examination of the cultural and political history of the 1846 Treaty Cherokees and the subsequent historical developments that resulted in the split between the modern day UKB and the Cherokee Nation of Oklahoma.

The history of UKB and its evolution begins with the Keetoowah Society, which was formed by a group of Cherokee Indians "representing the most conservative portion of the Cherokee Indians" in Oklahoma.[296] The Keetoowah Tribal organization was initially "organized for the

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[293] *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975) (noting that "no Muckleshoot Tribe had previously existed" and that "the reservation was an arbitrary grouping" of "Indians who earlier had been represented at Medicine Creek and at Point Elliott"); *see also United States v. Washington*, 384 F. Supp. 312, 970 (W.D. Wash. 1974) (recounting the history of the Puyallup Tribe, which was formed after the treaty by "groups of Indians living on the Puyallup River, its tributary creeks, and neighboring Vashon Island . . . as well as any others who removed to the Puyallup Reservation").

[294] *Washington*, 641 F.2d at 1375 (emphasis added) (citation omitted).

[295] *Id.* at 1372-73.

[296] Memorandum from Frederic L. Kirgis, Acting Solic., to the Comm'r of Indian Affs. (July 29, 1937), *reprinted as* Keetoowah–Organization as Band, *in* I OP. SOLIC. ON INDIAN AFFS. 774 (Cherokee Nation Ex. 5; UKB Ex. 31).

purpose of promoting Cherokee welfare and the protection of Cherokee interests."[297] As Solicitor Kirgis explained in 1937, it was "[a] secret society" which "originated almost a century ago for the preservation of Indian culture and traditions."[298]

In 1859, this group of Cherokee Indians identifying themselves as Keetoowahs adopted a convention to "bind ourselves together," "abide by our laws," and "assist one another."[299] The following year, the Keetoowahs drafted their first known written laws as a Tribal organization, including a Constitution that protected members' "personal and National rights" and vested "Head Captains" with "the authority to enact laws of the Keetoowah Society."[300]

The Keetoowah Society was formed as an organization within the 1846 Treaty Cherokees, but it was formed with the goal of "preserv[ing] Cherokee sovereignty" more broadly.[301] As the historical record shows, the Keetoowahs worked among themselves and with other Cherokees to preserve the Cherokee identity and defend Cherokee rights and interests. For example, in the late nineteenth century, the Keetoowah Society opposed the United States' policy of dividing Tribal lands into allotments for individual Tribal members.[302] In 1899, the Keetoowah Society counseled its followers to abstain from the vote to ratify the allotment agreement with the United States, but the agreement was approved "by a comparatively narrow margin."[303]

At the turn of the twentieth century, Keetoowah Society members feared that a pending dissolution of the Cherokee Nation government could leave the Cherokee people without any national organization to protect their rights and interests.[304] In 1905, members of the Keetoowah Society met at a general convention and adopted a resolution authorizing the Head Captains "to take all needful steps . . . to incorporate members of the Keetoowah Organization into a body politic" that could bring treaty-based suits in the United States courts.[305]

The 1905 Keetoowah convention also adopted a new constitution, which incorporated articles from the 1859 Constitution and organized the Keetoowah's governmental territory into districts that remain the geographic basis of UKB's jurisdiction today. The 1905 Constitution stated in relevant part:

> Whereas the dissolution of the Cherokee Nation Government as heretofore existing is . . . to take place on the 4th of March, 1906, when the rights and interests of the members of the Cherokee tribe, under treaties of the United States, will be without any adequate means of protection, and

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[297] UKB Submission, *supra* note 3, at 39 (quoting LEEDS, at 15-16)
[298] *Id.* at 36 (quoting Memorandum from Frederic L. Kirgis, Acting Solic., to the Comm'r of Indian Affs. (July 29, 1937), *reprinted as* Keetoowah–Organization as Band, *in* I OP. SOLIC. ON INDIAN AFFS. 774 (Cherokee Nation Ex. 5; UKB Ex. 31)).
[299] Cherokee Keetoowah Convention & Laws, Chapter I, § 3 (Apr. 29, 1859) (UKB Ex. 9).
[300] Constitution of the Keetoowah Society § 2 (1905) (UKB Ex. 23); Cherokee Keetoowah Convention & Laws, Chapter IV, § 14 (Apr. 29, 1859) (UKB Ex. 9).
[301] Minges, *supra* note 65, at 154.
[302] H.R. REP. NO. 79-978, at 3 (1946) (UKB Ex. 26).
[303] *Id.*
[304] Kehoe, *supra* note 29, at 14.
[305] Constitution of the Keetoowah Society, Resolution No. 1 (1905) (UKB Ex. 23).

> Whereas, the Keetoowah Society has existed as a patriotic organization from time immemorial and it is important that some steps shall be taken at this time to provide a means for the protection of the rights and interests of the Cherokee people in their lands and funds, and to close up all business relations with the United States Government, including claims for the failure of said Government to fully perform all its treaty obligations with the Cherokees . . . .[306]

That same year, with legislation pending in Congress to "dissolve" the Cherokee Tribal government, the Keetoowah Society sought and obtained a federal charter of incorporation in order to "keep[] alive Cherokee institutions and the tribal entity."[307] In September 1905, the United States Court for the Northern District of the Indian Territory approved a Certificate of Incorporation for the Keetoowah Society, declaring the Keetoowah Society to be a "Body Politic corporate."[308]

Between 1903 and 1916, the newly incorporated Keetoowah Society employed attorneys and actively pursued efforts in Congress to advance Cherokee interests, especially with respect to treaty-based claims against the United States.[309] On October 2, 1916, about 400 elected Cherokee representatives convened to discuss the litigation of various Cherokee claims against the United States.[310] The convention enacted resolutions directing Principal Chief Rogers to cooperate with the Keetoowah Society in obtaining a final settlement of these claims.[311] By 1919, the Keetoowah Tribal organization was considered the "largest and most important existing organization of Cherokees concerned in, or giving attention to, the administration of Cherokee tribal or National affairs."[312] In 1930, Representative Hastings of Oklahoma told Congress that "[t]he Keetoowah Society is an organization of full-blood Indians that meets regularly from time to time, and they have been keeping up with the matter of pressing the settlement of these claims rather in lieu of a Cherokee government."[313]

After passage of the IRA and then the OIWA, the Keetoowahs sought in the 1930s to reorganize as a separate band of Cherokee Indians under the OIWA.[314] In a June 1940 memorandum to the Commission of Indian Affairs, A.C. Monahan, the BIA's Regional Coordinator for Oklahoma, argued in favor of recognizing the Keetoowahs under OIWA, concluding that there was "no reason why the Keetoowahs could not be recognized by the Department of the Interior as the

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[306] *Id.*

[307] H.R. REP. NO. 79-978, at 3.

[308] Certificate of Incorporation of Keetoowah Society, *Ex Parte Keetoowah Society*, No. 592 (Indian Terr. Sept. 30, 1905) (UKB Ex. 25).

[309] Frank J. Boudinot Interview (Apr. 9, 1937), *in* WESTERN HISTORY COLLECTIONS 438-440 (University of Oklahoma) (UKB Ex. 19); *see also* H.R. REP. NO. 79-978, at 3 ("[The Keetoowahs] employed attorneys to prosecute the *Eastern Cherokee cases* in the proceedings of 1903-6.").

[310] Kehoe, *supra* note 29, at 17.

[311] *Id.*

[312] UKB Submission, *supra* note 3, at 31 (quoting Letter from Frank J. Boudinot to the Sec'y of the Interior (Aug. 1919) (UKB Ex. 28)). *See also* Baker, *supra* note 28, ¶ 12 ("According to *The Oklahoman*, 'Upon the dissolution of the Cherokee government, due to the operation of the Curtis bill and the coming of statehood, the Keetoowah society has taken great interest in securing for the Cherokees the settlement of old claims against the government, some of which should have been paid many years ago.'") (citation omitted).

[313] *Claim of Boudinot*, *supra* note 113, at 8 (statement of Rep. William W. Hasting).

[314] H.R. REP. NO. 79-978, at 3 (1946) (UKB Ex. 26).

active successor of the Cherokee Nation, particularly of that *part of the Cherokee Tribe* which contains a high degree of Indian blood."[315]

In 1946, Congress formally "recognized" the "Keetoowah Indians of the Cherokee Nation in Oklahoma," at the recommendation of Interior Under Secretary Abe Fortas.[316] In a letter to the Chairman of the Senate Commission on Indian Affairs dated March 24, 1945, Under Secretary Fortas expressed support for the Keetoowah recognition bill, observing that "[i]t remains true that the group is composed of individuals predominately Indian who are interested in *maintaining their identity*, individually and as a group, *as Cherokee Indians*."[317] The Keetoowahs then had almost 3,700 members, representing nearly half of the Cherokees with one-half or more Indian blood residing within the Cherokee Reservation.[318]

The passage of the Keetoowah Recognition Act in 1946 thus did not change, but rather reaffirmed, the Cherokee identity of the Keetoowahs who later organized as UKB. The text of the Keetoowah Recognition Act makes clear that the Keetoowahs would not be relinquishing their Cherokee identity by organizing as a separate political entity. The Keetoowah Recognition Act provides: "Be it enacted . . . That the Keetoowah Indians *of the* Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma . . . ."[319] The phrase "of the Cherokee Nation of Oklahoma" demonstrates that Congress intended for UKB and its members to maintain their identity as Cherokee Indians living on the Cherokee Reservation.[320]

After the Keetoowah Recognition Act was passed, the UKB prepared a Base Roll of its membership, with an addendum that was approved by BIA in 1963.[321] In 1950, the BIA approved the UKB's Constitution and By-Laws and the UKB Corporate Charter issued pursuant to the Keetoowah Recognition Act and the OIWA.[322] Under authority of these documents, UKB's Tribal structure consists of a governing body, possessed with full governmental powers under the OIWA, and a corporate entity, the UKB Corporation, which is empowered to act as UKB's corporate arm.[323] The UKB Corporation's powers include the corporate power "[t]o protect any interest which the United Keetoowah Band or its members may have *in treaties made with the Cherokee Nation*."[324]

The Constitution establishes the headquarters of UKB in Tahlequah, Oklahoma, which was the former capitol of the 1846 Treaty Cherokees and is presently located within the boundaries of the

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[315] Memorandum from A. C. Monahan, Reg'l Coordinator, to the Comm'r of Indian Affs. (June 15, 1940) (Cherokee Nation Ex. 41) (emphasis added). As noted, the 1937 Kirgis opinion cast doubt on the ability of Keetoowahs generally to qualify as a band under OIWA, but BIA officials ultimately conceded that their knowledge of the history of the Keetoowahs remained uncomplete and agreed to seek legislation to recognize the Keetoowahs as a band under OIWA rather than reopen the 1937 Kirgis opinion.

[316] Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976. *See also* Kehoe, *supra* note 29, at 23.

[317] H.R. REP. NO. 79-978, at 3 (emphasis added).

[318] *Id.*

[319] 60 Stat. 976 (emphasis added).

[320] *See* the discussion of the statutory language *supra* at Part B.2.

[321] Membership Roll of the United Ketoowah [sic] Cherokee Band of Indians of Oklahoma (UKB Ex. 42).

[322] Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma (Oct. 3, 1950) (UKB Ex. 44).

[323] *Id.*

[324] *Id.* ¶ 3(t) (emphasis added).

Cherokee Reservation.[325] Under the UKB By-Laws, the Council consists of nine members representing the nine historical districts of "the Old Cherokee Nation."[326] The By-Laws include a residency requirement for all elected officials, including district representatives, who must reside within "the Old Cherokee Nation."[327]

Since its formal organization under the OIWA, UKB has remained an active Tribal government that exercises governmental authority over its members. The UKB government provides a number of Tribal programs and services for its membership, including but not limited to law enforcement through its Lighthorse Police Department, housing support through its Keetoowah Housing Department, and educational opportunities through the UKB Education Program.[328] UKB has continuously been recognized as a federally recognized Indian Tribe eligible for federal funding and services since the first BIA list of federally recognized Indian Tribes was published in 1979.[329]

As shown above, the Keetoowahs were committed to preserving their identity as Cherokee Indians and actively pursued Cherokee rights and interests as the "largest and most important existing organization of Cherokees concerned in, or giving attention to, the administration of Cherokee tribal or National affairs."[330] The Keetoowahs did not relinquish their Cherokee identity or sever their connections to the 1846 Treaty Cherokees when they organized as a separate entity following the Keetoowah Recognition Act. Rather, they maintained their cultural connection to the 1846 Treaty Cherokees, as well as their geographic connection to the reservation set aside specifically for the 1846 Treaty Cherokees. Unlike the entities in *Washington*, which descended from treaty groups that did not move to or remain on the reservation, UKB has continuously occupied and conducted governmental business from within the Cherokee Reservation.[331] In fact, since the formation of the Keetoowah Society, the Cherokee Reservation has been, without interruption, the traditional and cultural homeland for the group of Cherokee Indians identifying themselves as Keetoowahs.

The UKB never lost its defining connections to the group of Cherokees who signed the Treaty of 1846, and as demonstrated above, its organization continues to reflect the defining characteristics of that group. I therefore conclude that UKB is a successor to the signatory Tribe of the Treaty of 1846, and is entitled to share in the rights and benefits of the Treaty of 1846, including the legal right to the Cherokee Reservation under Article I of the Treaty.

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[325] UKB Submission, *supra* note 3, at 44 (citing Constitution and By-Laws of the United Keetoowah Band of Cherokee Indians in Oklahoma art. II (Oct. 3, 1950) (UKB Ex. 24)).
[326] Constitution and By-Laws of the United Keetoowah Band of Cherokee Indians in Oklahoma art. V, § 2.
[327] By-Laws of the Keetoowah Band of Cherokee Indians in Oklahoma art. II, § 3 (Oct. 3, 1950) (UKB Ex. 24) ("Any person elected or appointed to membership on the Council shall be . . . a resident of the district he represents and a member of the United Keetoowah Band of Cherokee Indians in Oklahoma.").
[328] *See Lighthorse Police*, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, https://www.ukb-nsn.gov/lighthorse-police (last visited Nov. 24, 2024); *Services and Departments*, THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, https://www.ukb-nsn.gov/servicesdepartments (last visited Nov. 24, 2024).
[329] *See* 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979).
[330] UKB Submission, *supra* note 3, at 31 (quoting Letter from Frank J. Boudinot to the Sec'y of the Interior (Aug. 1919) (UKB Ex. 28)). *See also* Baker, *supra* note 28, ¶ 12 ("According to *The Oklahoman*, 'Upon the dissolution of the Cherokee government, due to the operation of the Curtis bill and the coming of statehood, the Keetoowah society has taken great interest in securing for the Cherokees the settlement of old claims against the government, some of which should have been paid many years ago.'") (citation omitted).
[331] *See* UKB Submission, *supra* note 3, at 44-45.

iii. The political cohesion standard from United States v. Oregon is inapplicable.

The Cherokee Nation asserts it is the "same sovereign as the original Cherokee Nation" that signed the Cherokee treaties with the United States, and therefore the only signatory Tribe with rights under those treaties.[332] Based on this premise, Cherokee Nation argues that because UKB politically separated from the signatory Tribe (Cherokee Nation), UKB cannot show it has maintained "political cohesion" with the signatory Tribe and its claim to treaty rights must fail under the Ninth Circuit decision, *United States v. Oregon*.[333]

In *United States v. Oregon*, the Ninth Circuit developed the political cohesion standard to address the unique facts of that case, which involved modern Tribal groups that never received treaty rights despite being signatories to the treaty. In *Oregon*, the Confederated Tribes of the Colville Reservation sought to assert the treaty fishing rights of six of its constituent Tribes under either the Yakima Treaty of 1855 or the 1855 Nez Perce Treaty.[334] Five of the six Tribes had been signatories to the Yakima Treaty of 1855. That treaty "envisioned the creation of a successor tribe, a 'Yakima Nation' composed of all of the people represented by the signatories to the Treaty," which would thereafter hold the treaty rights.[335] But the Tribal groups at issue never moved to the reservation and subsequently negotiated separate reservation-creating treaties with the United States.[336]

The Ninth Circuit found that the constituent Tribes "have never been recognized as tribes having treaty fishing rights under the 1855 treaties," and emphasized that "[t]he critical issue . . . is whether the tribes have shown that they have maintained political cohesion with the tribal entities created by the treaties and receiving fishing rights."[337] The Ninth Circuit further held that, instead of joining this "successor tribe," the five Tribes had "deliberately separat[ed] from the Yakima Nation," and thus "failed to maintain political cohesion with the tribal entity in which the treaty fishing rights are vested."[338] The Ninth Circuit held that the five constituent Tribes were not entitled to any treaty fishing rights because they had "deliberately sought to separate themselves" politically from the entity that was granted the treaty rights—the Yakima Nation.[339]

The Cherokee Nation argues that, like the five Tribes in *Oregon*, "UKB deliberately disassociated itself from the treaty tribe—the Cherokee Nation—by organizing as a separate tribe and adopting a constitution that created a separate membership."[340] I disagree. The five Tribes in *Oregon* disengaged from the Tribal entity that was granted the treaty rights and never became a part of that entity.[341] UKB, by contrast, was an entity formed from the signatory 1846 Treaty

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[332] Cherokee Nation Submission, *supra* note 5, at 118.
[333] *Id.* at 121.
[334] *United States v. Oregon*, 29 F.3d 481, 483 (9th Cir. 1994).
[335] *Id.* at 485.
[336] *Id.*
[337] *Id.*
[338] *Id.* at 485-86.
[339] *Id.* at 486.
[340] Cherokee Nation Submission, *supra* note 5, at 121.
[341] *Oregon*, 29 F.3d at 486.

Cherokees, and was intended to remain a part of the signatory group that received treaty rights.[342] In the case of UKB, there was no separation from the signatory group, but rather a split within the signatory group that resulted in two separate Tribal entities after Congress passed the Keetoowah Recognition Act and the UKB's governing documents went into effect. The political cohesion test does not apply in cases where, as here, the Tribe was created from the treaty signatory that received treaty rights and Congress has clearly expressed its intent for the Tribe to remain a part of the treaty signatory. Instead, UKB need only show descent from a treaty Tribe and that it has maintained an organized Tribal structure under the *Washington* successorship test—which it can, for the reasons stated above.

In addition, the analysis in *Oregon* turned on the specific text and historical context of the treaties at issue and the specific post-treaty histories of the Tribes involved, which are materially different from the facts here. In *Oregon*, the critical question was whether an *off-reservation* group claiming treaty rights had maintained sufficient political continuity with those who moved to the reservation and accordingly received rights under the treaty such that it "may fairly be called the same tribe."[343] But as discussed above, UKB and its predecessor organization have continuously occupied the Cherokee Reservation. UKB was formed as an on-reservation subgroup within the 1846 Treaty Cherokees and is, in this respect, *a part of*, not separate from, the Cherokee Indians who signed the Treaty of 1846. The *Oregon* political cohesion standard is inapplicable in cases where the Tribe seeking to exercise treaty rights is the same Tribal entity that signed the treaty or, as in this case, a constituent part of that Tribal entity.

In any event, the Cherokee Nation's argument that it was the sole signatory Tribe is not supported by the facts. The Cherokee Indians who signed the Treaty of 1846 encompassed the "*people* constituting and recognized as the Cherokee nation of Indians,"[344] which, at the time of the Treaty of 1846, encompassed the Eastern and Western Cherokees residing in Oklahoma "as one nation, sharing one land and one law."[345] As the U.S. Court of Claims explained in *Eastern or Emigrant Cherokees v. United States*, this *group* of Cherokee Indians was the signatory party to the Treaty of 1846:

> [T]he *Cherokees* west of the Missisippi River, known as the Old Settlers, and those east of the Mississippi, known as the Emigrant Cherokees . . . entered into [the Treaty of] 1846 whereby it was agreed that the lands occupied by the Cherokee Nation should be for the common use and benefit of the whole Cherokee people.[346]

The Cherokee Nation cannot be the same entity as the signatory Tribe because the Cherokee Nation's membership represents only a portion of the group that signed the Treaty of 1846. The Keetoowahs, together with the Cherokee Nation, comprised the "whole Cherokee people" that signed and were parties to the Treaty of 1846.

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[342] *See* Act of Aug. 10, 1946, Pub. L. No. 79-715, 60 Stat. 976 ("Be it enacted . . . That the Keetoowah Indians *of the* Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma . . . .") (emphasis added).

[343] *Oregon*, 29 F.3d at 487 n.2.

[344] Treaty of 1846, *supra* note 53, at preamble (emphasis added).

[345] Robertson, *supra* note 25, ¶ 16.

[346] *E. or Emigrant Cherokees v. United States*, 88 Ct. Cl. 452, 465 (1939) (emphasis added).

In arguing that it is "the same sovereign as the original Cherokee Nation," the Cherokee Nation points out that it "has been the continuous government of the Cherokee people," and that Congress confirmed as much in the congressional findings included in the Arkansas Riverbed Settlement Act, which states that the Cherokee Nation "has maintained a continuous government-to-government relationship with the United States since the earliest years of the Union."[347] However, the continuous nature of a particular Tribal government is not a determinative factor under either *Washington* or *Oregon*. And even if it was, while the Cherokee Nation may have maintained a government-to-government relationship with the United States, that fails to account for the fact that the Cherokee Nation's unquestioned status as a signatory Tribe does not itself answer the question as to whether UKB similarly succeeds from that signatory and is therefore entitled to concurrent jurisdictional treaty rights.[348]

For these reasons, I conclude that the political cohesion standard from *Oregon* is inapplicable. If UKB can show descent from Treaty signatories and that it has maintained an organized Tribal structure under the *Washington* successorship test it can assert treaty rights relating to the Cherokee Reservation. As demonstrated above, UKB satisfies this test and is a successor in interest with a legal right to the Cherokee Reservation under the Treaty of 1846. As a successor in interest with ownership rights to the Cherokee Reservation, UKB is entitled to a presumption of governmental jurisdiction over land within the Cherokee Reservation.[349]

2. In enacting the Keetoowah Recognition Act, Congress intended for UKB to possess governmental jurisdiction within the Cherokee Reservation.

The Keetoowah Recognition Act further reinforces the conclusion that UKB possesses governmental jurisdictional within the Cherokee Reservation. In enacting the Keetoowah Recognition Act, Congress intended for UKB to function as an economic engine on the Cherokee Reservation, which could only be achieved if UKB had a land base and corresponding jurisdiction to pursue economic endeavors.

This intent is illustrated by the text of the Keetoowah Recognition Act, its legislative history, the historical context that informed passage of the Act, and the Department's subsequent approval of UKB's constitution, by-laws, and charter.

The Keetoowah Recognition Act 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

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[347] Cherokee Nation Submission, *supra* note 5, at 14, 118 (quoting Pub. L. No. 197-331, tit. VI, § 602(3), 116 Stat. 2834, 2845 (2002)).

[348] Further, Congress' statement that Cherokee Nation has had a continuous government-to-government relationship with the United States does not, by itself, establish Cherokee Nation as the same entity as the Cherokee Indians that signed the Treaty of 1846. As discussed herein, the treaty successorship analysis depends on two factors of descent and continued Tribal status. This statement was not made in the context of a treaty successorship analysis, but rather as part of an unrelated settlement with the United States for damages arising from the government's mismanagement of the Arkansas riverbed.

[349] *See Comanche Nation of Okla. v. Zinke*, 754 Fed. Appx. 768, 773 (10th Cir. 2018).

> 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).[350]

Statutory interpretation begins with the text. The "Act of June 26, 1936 (49 Stat. 1967)" is the Oklahoma Indian Welfare Act (OIWA) and "section 3" of OIWA is the provision that grants "[a]ny recognized tribe or band of Indians residing in Oklahoma" the right to organize and to enjoy rights or privileges included in the Indian Reorganization Act.[351] Here, Congress mandated that the Keetoowahs "be recognized as a band," in other words, as an inherent sovereign with the right to organize as a separate federally recognized band or Tribe under OIWA.[352]

Who did Congress recognize as a band? The "Keetoowah Indians of the Cherokee Nation of Oklahoma"—a group of Cherokees now known as the United Keetoowah Band of Cherokee Indians in Oklahoma. This group had been working with the Department to draft an OIWA charter and constitution.[353] That work came to fruition in 1950 when UKB ratified and the Department approved the Tribe's governing documents.[354]

The text of the Keetoowah Recognition Act and its accompanying legislative history illustrate that Congress knew the Cherokee Reservation was the Keetoowahs' home and intended the Cherokee Reservation to be considered the Keetoowahs' reservation. Congress recognized "the Keetoowah Indians of *the Cherokee Nation of Oklahoma*." To the modern reader, the phrase "the Cherokee Nation of Oklahoma" may seem to refer to the federally recognized Tribe, the Cherokee Nation, which from approximately 1976 to 2003 was known as the "Cherokee Nation of Oklahoma."[355] In 1946, by contrast, "the Cherokee Nation of Oklahoma" commonly referred to the Cherokee Reservation. Indeed, the House Report on the Keetoowah Recognition Act explains that the Keetoowahs reside "in the territory known as *the Cherokee Nation of Oklahoma*. . . ."[356] The House Report also details the history of the Keetoowahs, from their organization in the late 1850s, through their resistance to the "allotment of the Cherokee tribal lands," to their petition to the Department for recognition—at all times from their home on the

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[350] Act of August 10, 1946, Pub. L. No. 79-715, 60 Stat. 976.

[351] Oklahoma Indian Welfare Act, Pub. L. No. 74-816, § 3, 49 Stat. 1967 (1936).

[352] The words "band" and "tribe" were employed virtually interchangeably in contemporaneous usage. For example, the Indian Reorganization Act provides that "[t]he term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Act of June 18, 1934, Pub. L. No. 73-383, § 19, 48 Stat. 984, 988. The 1937 Solicitor's Opinion regarding the Keetoowahs states that a band "is a political body" that has "functions and powers of government" and that "[i]t is generally the historic unit of government in those tribes where bands exist." Memorandum from Frederic L. Kirgis, Acting Solic., to the Comm'r of Indian Affs. (July 29, 1937), *reprinted as* Keetoowah–Organization as Band, *in* I OP. SOLIC. ON INDIAN AFFS. 774 (Cherokee Nation Ex. 5; UKB Ex. 31). The Opinion goes on to emphasize that "a political organization must remain if the group of Indians can be considered a band or tribe." *Id.*

[353] *See supra* at The United Keetoowahs.

[354] *See supra* at Perfecting the United Keetoowah Organization.

[355] *Compare* CHEROKEE NATION OF OKLA. CONST. (June 26, 1976), https://thorpe.law.ou.edu/constitution/cherokee/index.html, *with* CHEROKEE NATION CONST. (July 26, 2003), https://www.cherokee.org/our-government/cherokee-nation-constitution/.

[356] H.R. REP. NO. 79-447, at 2 (Apr. 25, 1945) (emphasis added).

Cherokee Nation.[357] Thus, the text of the Keetoowah Recognition Act and its legislative history demonstrate Congress's understanding that the Cherokee Reservation is UKB's reservation.

Legislative history also illuminates the purpose of the Keetoowah Recognition Act. Congress passed the Act so that the Keetoowahs, whether for themselves or for the Cherokee Nation as a whole, could be a self-supporting economic engine on the Cherokee Reservation.

In the first half of the twentieth century, Congress severely curtailed Cherokee government institutions through statutes like the Curtis Act and the Five Tribes Act.[358] The Cherokee Reservation was allotted to individual Cherokees, and when the restrictions on allotments expired, the land quickly left Cherokee hands.[359] By the mid-1930s, Indian landholdings in Oklahoma had shrunk by 90%.[360] Without land or access to capital, many Cherokees lived in grinding poverty.[361]

The Oklahoma Indian Welfare Act was aimed at lifting Oklahoma Indians like the Cherokees out of poverty. The House Report on OIWA makes this intention clear:

> There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities nonexistent. Enactment of this legislation will open the door for many of these poverty-stricken people.[362]

The Senate Report on OIWA further explains that "[t]he whole plan of the bill is intended to extend to the Indian citizens the fullest possible opportunity to work out their own economic salvation."[363]

The Keetoowah Recognition Act applies the goals of OIWA to the Keetoowahs specifically. The House Report accompanying the passage of the Keetoowah Recognition Act explains that the purpose of the Act is to "enable these Indians to secure any benefits, which, under the Oklahoma Indian Welfare Act, are available to other Indian bands or tribes."[364] As discussed in Part A, one of the primary benefits of both the IRA and OIWA is to have land taken into trust on behalf of the Tribal organization. Thus, Congress intended that the Keetoowahs would have "the fullest possible opportunity to work out their own economic salvation" as did other Oklahoma Tribes who chose to organize under OIWA, including the opportunity to have land in trust. Indeed, UKB's charter—approved by the Assistant Secretary—provides that its corporate

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[357] *Id.* at 1-2.
[358] *See supra* at Transition.
[359] *See, e.g.*, ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 91 (1972) ("[T]he general effect of allotment was an orgy of plunder and exploitation probably unparalleled in American history.")
[360] BLACKMAN, *supra* note 139, at 32.
[361] *See, e.g.*, DEBO, *supra* note 359, at 356 (describing how members of Congress who visited the Five Tribes in November 1930 found Cherokees living in "squalid homes" and "menaced by famine").
[362] H.R. REP. NO. 74-2408, at 3 (Apr. 15, 1936).
[363] S. REP. NO. 74-1232, at 7 (July 29, 1935).
[364] H.R. REP. NO. 79-447, at 2 (Apr. 25, 1945).

purposes include "advanc[ing] the standard of living of the Band through the development of its resources, [and] the acquisition of land . . . ."[365]

Any doubt on this point can be resolved by looking at the historical context in which the Keetoowah Recognition Act was passed. As noted above, many Cherokees were living in poverty during this period. Bureau of Indian Affairs (BIA) officials were seriously concerned for their welfare and supported organization of the Keetoowahs as a solution to this difficult situation. For example, in 1942, BIA Field Agent A. A. Exendine transmitted a proposed constitution for the Keetoowahs—under the organizational name "United Cherokee Band of Indians in Oklahoma"—to the Commissioner of Indian Affairs.[366] In his transmittal letter, Exendine explained that, based on his experience with the Keetoowahs, he believed in "the necessity of doing all that can be done for a group of Indians who are in need of all possible assistance that can be afforded them in the advancement of a comprehensive socio-economic program."[367] He therefore exhorted the Commissioner to allow the Keetoowahs to organize under the OIWA or to seek legislation to do the same.[368]

Exendine was not the only one who believed that a Keetoowah organization was an important endeavor in light of the situation on the Cherokee Reservation. When asked for his views on legislation that would allow the Keetoowahs to organize, Cherokee Nation Principal Chief Bartley Milam responded that,

> the only way we are going to accomplish anything worth while for our Indians of one-quarter and more Indian blood would be to carry through some work that is now being undertaken by the Keetowahs, forming them into one band of Cherokees to be known as the Keetowah band of Cherokees, and have this put in effect by proper legislation.[369]

W. W. Keeler, who would become Principal Chief after Milam, also supported Keetoowah organization, writing in 1949 that "[t]he more I think of it the more I am convinced that the Keetoowahs are the proper ones to help the Cherokees."[370]

The view that a Keetoowah organization could benefit Cherokees more generally was not uncommon and persisted over time. As early as 1940, BIA Regional Coordinator A. C. Monahan wrote that "[a]ny practical method of organizing the Cherokees would be an organization of [Keetoowahs]."[371] And as late as 1963, BIA Area Director Virgil Harrington

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[365] Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma ¶ 1(b) (Oct. 3, 1950) (UKB Ex. 44).
[366] Letter from A. A. Exendine, Indian Org. Field Agent, to Comm'r of Indian Affs. (Oct. 26, 1942) (Cherokee Nation Ex. 43).
[367] *Id.* at 2.
[368] *Id.* at 2-3.
[369] Letter from J. Bartley Milam, Principal Chief, to John Collier, Comm'r of Indian Affs. (Apr. 10, 1942) (UKB Ex. 36).
[370] Letter from W. W. Keeler, Principal Chief, to Levi Gritts, Keetoowah Society (Mar. 10, 1949) (UKB Ex. 37).
[371] Memorandum from A. C. Monahan, Reg'l Coordinator, to the Comm'r of Indian Affs. 2 (June 15, 1940) (Cherokee Nation Ex. 41).

stated that "[t]he United Keetoowah Band would be the organization through which the Bureau can channel its programs to the Cherokee people."[372]

In summary, the general consensus both before and after the passage of the Keetoowah Recognition Act, as reflected in the views of BIA officials and Cherokee leaders, was that (1) the Cherokee people needed help, especially those with a higher degree of Indian blood, (2) the Keetoowahs desired to organize under OIWA, and that (3) organization under OIWA would allow the Keetoowahs to pursue economic development that would benefit the Keetoowahs specifically and the Cherokees more broadly. Considering this historical context, I conclude that the Keetoowah Recognition Act was intended to allow UKB to organize, to have the ability to have land taken into trust, and to have the requisite jurisdiction to engage in economic development on the reservation it calls home.

Subsequent action by the Department confirms this view. As a Tribe seeking organization pursuant to OIWA, UKB submitted its proposed constitution and by-laws to the Department for approval.[373] The Assistant Secretary approved the Constitution and By-laws on May 8, 1950,[374] including all of the following provisions:

- Article II of the UKB Constitution provides that the "headquarters of this Band shall be Tahlequah, Oklahoma, county seat of Cherokee County, unless and until otherwise provided by the governing body." Tahlequah is located within the Cherokee Reservation.
- Article V provides that the UKB Council shall consist of "nine members . . . elected to represent the nine districts of the Old Cherokee Nation," again using the term "Cherokee Nation" to refer to the reservation.
- Section 3 of Article VII regarding elections provides that UKB members "living outside of the territory known as the Old Cherokee Nation" may choose to affiliate with one of the nine districts referred to in Article V for voting purposes.
- Article II of the bylaws requires that UKB officers must be residents "of the Old Cherokee Nation."
- Article III of the by-laws directs that all meetings of the UKB Council will be held at the Tribal headquarters in Tahlequah "or at any other place within the Old Cherokee Nation as may be designated from time to time by the Council."

And finally, the preamble of the UKB Constitution proclaims that the constitution and by-laws are meant "to promote our common welfare and to secure to ourselves and our posterity the rights, powers, and privileges authorized and offered by the Oklahoma Indian Welfare Act [and the Keetoowah Recognition Act]."[375] The Department therefore understood what Congress had said in the Keetoowah Recognition Act: that the Cherokee Nation of Oklahoma or the Old Cherokee Nation—now known as the Cherokee Reservation—was UKB's home and was the

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[372] Memorandum from Virgil Harrington, Area Dir., to Members of the United Keetoowah Band of Cherokee Indians (May 7, 1963).

[373] Rules and Regulations for the Organization of the Indian Tribes of Oklahoma Under Section 3 of the Oklahoma Welfare Act (Pub. No. 816-74th Congress) as Approved by the Secretary of the Interior § 2 (Dec. 18, 1936).

[374] Letter from William Warner, Assistant Sec'y, to W. O. Roberts, General Superintendent (May 8, 1950) (UKB Ex. 43).

[375] Constitution and By-Laws of the United Keetoowah Band of Cherokee Indians in Oklahoma, preamble (Oct. 3, 1950) (citations omitted) (UKB Ex. 24).

place where UKB would exercise the rights and privileges of OIWA, such as having land taken into trust.

In summary, there is substantial evidence in the Keetoowah Recognition Act and its history that Congress intended UKB to possess governmental jurisdiction within the Cherokee Reservation, especially for purposes of land into trust and for economic development on those trust lands.

Because UKB has an ownership interest in the Cherokee Reservation as a successor in interest to the 1846 Treaty Cherokees and because Congress intended UKB to possess governmental jurisdiction within the Cherokee Reservation, the Cherokee Reservation is UKB's reservation for purposes of Part 151. Therefore, UKB may acquire land in trust status within the Cherokee Reservation pursuant to the on-reservation criteria of 25 C.F.R. § 151.9.[376]

C. UKB possesses exclusive Tribal jurisdiction over land held in trust for its benefit.

Having concluded that the Cherokee Reservation is UKB's reservation for purposes of evaluating UKB's fee-to-trust application, I next consider the issue of UKB jurisdiction *after* the land has been taken into trust. Specifically, I address the dispute between UKB and Cherokee Nation over whether UKB has exclusive Tribal jurisdiction over its own trust lands.[377]

It is a well-established principle of federal Indian law that Tribes exercise jurisdiction over their trust lands. "When the federal government takes land into trust for an Indian tribe, the state that previously exercised jurisdiction over the land cedes some of its authority to the federal and tribal governments."[378] In the litigation surrounding UKB's previous attempt to acquire land in trust for gaming, the Northern District of Oklahoma observed that once a parcel is "placed into trust . . . it would then be within the UKB's jurisdiction and would be land over which the UKB would lawfully exercise governmental power."[379] This decision has been vacated on other grounds, but it illustrates that this legal rule applies to UKB just as it applies to other federally recognized Tribes. It is therefore clear that UKB has jurisdiction over its trust lands.

Cherokee Nation agrees that lands held in trust for UKB are under UKB's jurisdiction but asserts that UKB's trust lands are subject to the supervening jurisdiction of the Cherokee Nation.[380] The Nation argues that the Treaties of 1835 and 1866 guarantee exclusive Cherokee Nation

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[376] 25 C.F.R. § 151.7 provides that a "Tribe may acquire land in trust status on an Indian reservation other than its own only when the governing body of the Tribe having jurisdiction over such reservation consents in writing to the acquisition." Because the Cherokee Reservation is UKB's reservation for purposes of Part 151, UKB is not seeking to acquire land in trust status on an Indian reservation other than its own and § 151.7 does not apply.

[377] I use the term "exclusive Tribal jurisdiction" to mean jurisdiction that is exclusive vis-à-vis other Tribes. Tribal trust lands are subject to supervening federal jurisdiction, so it would be inaccurate to say that Tribes exercise exclusive jurisdiction over their trust lands.

[378] *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 569 (2d Cir. 2016).

[379] *Cherokee Nation v. Bernhardt*, No. 12-cv-493-GKF-JFJ, 2020 U.S. Dist. LEXIS 50749, at *33 (N.D. Okla. Mar. 24, 2020), *vacated as moot sub nom. Cherokee Nation v. Haaland*, Nos. 20-5054 & 20-5055, 2022 U.S. App. LEXIS 12257 (10th Cir. May 6, 2022). *See* 25 C.F.R. § 1.4 (states and their political subdivisions lack jurisdiction over the use and development of trust lands).

[380] Cherokee Nation Submission, *supra* note 5, at 173 ("Although UKB does have the 76-acre parcel of land that was taken into trust, its jurisdiction over that parcel is still subject to the Nation's overarching sovereign authority.").

jurisdiction over the Cherokee Reservation and that this right was not abrogated by the Keetoowah Recognition Act.[381]

The Nation cites to *Herrera v. Wyoming* for the proposition that treaty rights can only be abrogated by a clear and express statement by Congress.[382] 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 right. Because the Keetoowah Recognition Act says nothing about treaty rights, so the argument goes, Congress could not have abrogated the Nation's treaty right to exclusive Cherokee Nation jurisdiction.[383]

The Nation's argument misses the mark on multiple fronts. First, while Article V of the Treaty of 1835 guarantees a right to exclusive *Cherokee* jurisdiction over the reservation, the text does not specify who among the Cherokee will wield that jurisdiction nor does it preclude a situation where two federally recognized Cherokee governments have jurisdiction. Second, the Nation's argument conflicts with the congressional intent of the Keetoowah Recognition Act. And third, Tribes are presumed to have exclusive Tribal jurisdiction over their own trust lands and there is nothing here to overcome that presumption.

Returning to the first point, Article V of the Treaty of 1835 promises a right to self-government for the Cherokee people with a special emphasis on the right to be free from state interference. Article V itself promises that the Cherokee Reservation "shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory."[384] In addition, the very first paragraph of the Treaty's preamble explains:

> Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States *under the jurisdiction and laws of the State Governments* may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers *without the territorial limits of the State sovereignties*, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.[385]

Further, in Article VII, the Treaty of 1835 provides that "with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians *in their removal beyond the territorial limits of the States*, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for

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[381] *Id.* at 79-85.
[382] 587 U.S. 329, 344 (2019) (citations omitted).
[383] Cherokee Nation Submission, *supra* note 5, at 87-88.
[384] Treaty of 1835, *supra* note 34, art. V.
[385] *Id.* at preamble (emphasis added).

the same."[386] Article VII illustrates that the Cherokee not only wanted to be free from state interference, they also wanted to be treated like a state.

The Treaty of 1835 therefore contemplates exclusive Cherokee jurisdiction over the Reservation as contrasted with state or territorial jurisdiction. It does not, however, promise exclusive Cherokee Nation jurisdiction. At the time the 1835 Treaty was signed, internal governance among the Cherokee and over the Reservation was not clear. As explained in the history section, the Western Cherokee were already residing on the Reservation with their own chief and system of laws when the Eastern Cherokee joined them.[387] The preamble states that the Treaty of 1835 was being entered "with a view to reuniting [the Cherokee] people in one body,"[388] and the addendum to the Treaty of 1835 signed by the Western Cherokee states that the Eastern Cherokee "may be assured of a hearty welcome and an equal participation with them in all the benefits and privileges of the Cherokee country west . . . ."[389]

In summary, while the Treaty of 1835 guarantees exclusive Cherokee jurisdiction over the Reservation, the language and historical context of the treaty do not point to exclusive Tribal jurisdiction for the Cherokee Nation of today. The United Keetoowah Band *of Cherokee Indians* is a federally recognized Cherokee Tribe headquartered on the Cherokee Reservation and is a successor in interest to the Treaty of 1846. Nothing in the 1835 Treaty precludes UKB from having jurisdiction within the Reservation. The Treaty of 1835 does not provide a right to exclusive Cherokee Nation jurisdiction for the Nation as now constituted, so Congress did not need to explicitly abrogate such a right in the Keetoowah Recognition Act.

Second, as discussed above, the intent of the Keetoowah Recognition Act was to authorize the Keetoowahs to organize under OIWA so that they could serve as a self-supporting economic engine on the Cherokee Reservation.[390] By including the phrase "of the Cherokee Nation of Oklahoma" in the Keetoowah Recognition Act—a phrase that refers to the Cherokee Reservation itself—Congress acknowledged the Keetoowahs' longstanding connection and rights to the Cherokee Reservation.[391] If the Keetoowahs were to be a self-supporting economic engine on the Cherokee Reservation, they would need the ability to have land taken into trust and the freedom to exercise jurisdiction over that land to pursue economic endeavors. If the Cherokee Nation were to retain supervening jurisdiction, the Nation could prohibit any UKB activity they chose.[392] Such a result would be inconsistent with congressional intent.

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[386] *Id.* at art. VII (emphasis added).
[387] *See supra* at Early History and Removal.
[388] Treaty of 1835, *supra* note 34, preamble.
[389] Treaty of 1835, *supra* note 34, addendum, Dec. 31, 1835, 7 Stat. 487.
[390] *See supra* Part B.2.
[391] *See* discussion of legislative history *supra* Part B.2. The Department also understood UKB's connection to Cherokee treaties because one of the corporate powers enumerated in UKB's charter and approved by the Secretary is "[t]o protect any interest which the United Keetoowah Band or its members may have in treaties made with the Cherokee Nation." Corporate Charter of the United Keetoowah Band of Cherokee Indians, Oklahoma ¶ 3(t) (UKB Ex. 44). No other OIWA charter acknowledges such a connection between two separate federally recognized Tribes.
[392] Cherokee Nation gives us an example of how this might manifest in the real world. The Cherokee Nation criminal code prohibits any Indian Tribe other than the Cherokee Nation, such as UKB, from operating a gaming

In fact, in a more recent statute, Congress suggested that it did not intend Cherokee Nation to retain supervening jurisdiction by providing that Cherokee Nation's consent is not required before UKB can have land taken into trust on the Cherokee Reservation. In 1991, Congress passed an appropriations bill for FY1992 that provided: "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 the consent of the Cherokee Nation . . . ."[393] The 1992 Appropriations Act meant that UKB would need Cherokee Nation consent to have land taken into trust. But in 1998, Congress reversed course in the 1999 Appropriations Act, amending the 1992 Appropriations Act language to read: "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[.]"[394] Congress thus removed the previously enacted requirement of Cherokee Nation consent for trust acquisitions within the Cherokee Reservation. The Nation therefore cannot control whether or how much land UKB acquires in trust on the Cherokee Reservation.

Third, and crucially, Indian Tribes are presumed to exercise exclusive Tribal jurisdiction over parcels taken into trust for their benefit.[395] This presumption flows from the fact that Tribes are inherently sovereign and coequal.[396]

As Cherokee Nation observes, there are two Tribes within the Cherokee Reservation for whom this presumption of exclusive Tribal jurisdiction over trust land does not apply.[397] First, Congress provided in the Shawnee Tribe Status Act that parcels taken into trust for the Shawnee Tribe on the Cherokee Reservation would generally be subject to Cherokee Nation jurisdiction.[398] Similarly, the Delaware Tribe has entered into an agreement with the Cherokee Nation that any land taken into trust for the Tribe is subject to Cherokee Nation jurisdiction.[399] These two examples illustrate fundamental principles of federal Indian law: a Tribe's sovereignty can be constrained by Congress. With respect to UKB, however, the Keetoowah Recognition Act does not provide, explicitly or implicitly, that UKB trust lands would be subject to Cherokee Nation jurisdiction. Nor has UKB consented to Cherokee Nation jurisdiction. Therefore, in the absence of evidence to the contrary, such as voluntary relinquishment or an explicit

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enterprise on lands within the jurisdiction Cherokee Nation unless the gaming is operated pursuant to the licensing and regulations of the Cherokee Nation Gaming Commission. Letter from Sarah Hill, Cherokee Nation Att'y Gen., to Eddie Streater, BIA Reg'l Dir., at 15 (Jan. 12, 2023).

[393] Pub. L. No. 102-154, 105 Stat. 990, 1004 (1991).

[394] Pub. L. No. 105-277, 112 Stat. 2681, 2681-246 (1998) (emphasis added).

[395] *See, e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States."); *Thlopthlocco Tribal Town v. Wiley*, 710 F. Supp. 3d 1043, 1060 (N.D. Okla. 2023) (citing *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1304 (10th Cir. 2001)) ("Indian tribes exercise inherent sovereign authority over their members and territories.").

[396] *See infra* discussion of the Privileges & Immunities Amendment to the Indian Reorganization Act.

[397] Cherokee Nation Submission, *supra* note 5, at 168-70.

[398] Pub. L. No. 106-568, tit. VII, § 702(3), 114 Stat. 2868, 2913 (2000) ("[C]ivil and criminal jurisdiction over Shawnee [lands] located within the State of Oklahoma shall remain with the Cherokee Nation, unless consent is obtained by the Shawnee Tribe from the Cherokee Nation to assume all or any portion of such jurisdiction.").

[399] Memorandum of Agreement between Cherokee Nation and Delaware Tribe, art. III(c) (Oct. 23, 2008) (Cherokee Nation Ex. 101) ("The [Delaware] Tribe shall not exercise jurisdiction within the Cherokee Nation Jurisdictional Boundary.").

congressional statement, I conclude that UKB has exclusive Tribal jurisdiction over parcels taken into trust for its benefit.

Apart from the Shawnee and Delaware Tribes, Cherokee Nation also seeks to draw a comparison to the situation of the neighboring Muscogee (Creek) Nation (MCN) and the Creek Tribal Towns who were allowed to organize separately from the MCN under the OIWA. Cherokee Nation asserts that federal recognition of the Creek Tribal Towns apart from the MCN "did not operate to transfer to, or bestow upon . . . the Creek tribal towns any treaty-based territorial jurisdiction or sovereign authority held by the treaty tribe . . . ."[400] Cherokee Nation argues that UKB is similarly situated and could not have gained any territorial jurisdiction or sovereign authority when it became separately recognized.

The Nation's attempt to draw a parallel between UKB and the Creek Tribal Towns is inapt. Congress was not involved in the modern recognition of the Creek Tribal Towns. The Thlopthlocco, Alabama-Quassarte, and Kialegee Tribal Towns were recognized by the Department when each organized under OIWA with the approval of the Secretary in the late 1930s and early 1940s. UKB, by contrast, was recognized by Congress in the Keetoowah Recognition Act, which along with the OIWA provides the vehicle for UKB to have land in trust and pursue economic development on the Cherokee Reservation. Moreover, Congress has not taken any actions like the 1999 Appropriations Act that could be interpreted to limit the MCN's jurisdiction.

My conclusion that UKB has exclusive Tribal jurisdiction over its trust lands is further reinforced, if not mandated, by the 1994 amendments to the Indian Reorganization Act (Privileges and Immunities Amendment). Congress provided:

> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934, as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.[401]

The purpose and effect of the Privileges and Immunities Amendment was to eliminate the distinction between "created" and "historic" Tribes, which the Department had administratively applied since 1936 and which resulted in diminished Tribal authority for those Tribes deemed "created."[402] But the Privileges and Immunities Amendment reached further, to encompass any regulation, decision, or determination of the Department made pursuant to any provision of the IRA "or any other Act of Congress."[403] This was meant to capture the understanding of Congress 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 other and to the Federal Government."[404]

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[400] Cherokee Nation Submission, *supra* note 5, at 172-73.
[401] 25 U.S.C. § 5123(f) (citation omitted).
[402] *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 993 (9th Cir. 2020).
[403] 25 U.S.C. § 5123(f).
[404] 140 CONG. REC. S6147 (May 19, 1994) (statement of Sen. Daniel Inouye).

The Privileges and Immunities Amendment has received varied treatment by federal courts. Most commonly, the Privileges and Immunities Amendment has been described as "prohibit[ing] disparate treatment between similarly situated recognized tribes."[405] At the same time, courts have recognized that the amendment does not apply to classifications of Tribes that are rooted in federal statute.[406] Congress has from time to time created classifications of federally recognized Tribes with privileges and immunities different than other similarly situated Tribes.[407] And it is widely accepted that the privileges and immunities enjoyed by individual Tribes or groups of Tribes may be limited by treaty, although such limitations must be clear and unambiguous.[408]

In this way, the Privileges and Immunities Amendment creates a natural tension. On the one hand, the Department is obligated to give effect to the Tribal classifications created by Congress. On the other, the Department is prohibited from creating such classifications by regulation, policy, or practice. This tension is eliminated by applying a rule of construction that binds the Department in its interpretation of Indian statutes.[409] If a statute purports to create a classification of Tribes and assigns some Tribes different privileges and immunities from other Tribes, that classification must be unambiguous on its face. If the statute is ambiguous, or simply does not treat Tribes differently in any way, the Department must presume that Congress has not created a classification and must treat like Tribes alike to avoid creating a prohibited administrative classification.

Here, the Keetoowah Recognition Act does not assign the Keetoowahs to a particular classification of Tribes beyond acknowledging that they are one of the many Tribes eligible to organize under the OIWA. And the OIWA certainly does not create a separate class of Tribes; it explicitly provides that OIWA Tribes are "to enjoy any other rights or privileges secured to an organized Indian tribe under the [IRA] . . . ."[410] Because neither the Keetoowah Recognition Act nor the OIWA classifies UKB separately from other Tribes, the Department is prohibited from interpreting the OIWA or the Keetoowah Recognition Act to conclude that UKB does not have

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[405] *Koi Nation of N. Cal. v. U.S. Dep't of the Interior*, 361 F. Supp. 3d 14, 54 (D.D.C. 2019); *see also Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 198 F. Supp. 2d 920, 936 (W.D. Mich. 2002). *But see Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 1, 5 (D.D.C. 2013) ("[T]here is no requirement that tribes be 'similarly situated' for the anti-discrimination provision to apply . . . ."), *vacated as moot sub nom. Akiachak Native Cmty. v. U.S. Dep't of the Interior*, 827 F.3d 100 (D.C. Cir. 2016).

[406] *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 56 (1st Cir. 2007). Additionally, the Department may apply certain facially neutral criteria, so long as the Department "appl[ies] the same legal rule in the same manner . . . ." *Native Vill. of Eklutna v. U.S. Dep't of the Interior*, No. 19-cv-2388, 2021 LEXIS 180474, at *22 (D.D.C. Sept. 22, 2021); *see also Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, 633 F. Supp. 132 (D.D.C. 2022) (permitting a regulation requiring Tribes to demonstrate a historical connection to a parcel for land to be considered "restored lands" under the Indian Gaming Regulatory Act (IGRA)). At the same time, other facially neutral criteria, such as organization of a Tribe based on residence, violate the amendment. *Jamul Action Comm.*, 974 F.3d at 993 (rejecting distinction between "historic" and "created" Tribes); *Wolfchild v. Redwood Cnty.*, 91 F. Supp. 3d 1093, 1100-01 (D. Minn. 2015) (rejecting distinction for Tribes organized on the basis of residence upon reserved lands).

[407] *See, e.g.*, Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 5(e), 94 Stat. 1785, 1791 (codified at 25 U.S.C. § 1724(e)) (restricting the authority of the Secretary to take land into trust for Maine Tribes). *See generally* 25 U.S.C. ch. 19 (codifying various Indian land claims settlements).

[408] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[2], at 224 (Nell Newton et al. eds., 2012).

[409] *See Grand Traverse Band of Ottawa & Chippewa Indians*, 198 F. Supp. 2d at 936.

[410] 25 U.S.C. § 5203.

exclusive Tribal jurisdiction over its trust lands while other Tribes enjoy exclusive Tribal jurisdiction over their trust lands.

When the Department previously determined to take land into trust for UKB—both the 2.03-acre gaming parcel and the 76-acre community services parcel—the decisionmakers relied on the Privileges and Immunities Amendment to conclude that UKB possesses territorial jurisdiction over lands held in trust for UKB.[411] The Assistant Secretary also observed in a precursor to those decisions that the 1999 Appropriations Act, which allows the Department to take land into trust on the Cherokee Reservation without Cherokee Nation consent, is incompatible with a finding that Congress intends the Cherokee Nation to possess exclusive Tribal jurisdiction over the entire Reservation.[412] The Tenth Circuit held that the Assistant Secretary "was justified in relying on the 1994 IRA Amendment and the 1999 Appropriations Act as bases for changing the BIA's stance on the exclusivity of Nation jurisdiction over former Cherokee reservation land."[413]

Additionally, nothing in *McGirt* alters my conclusion that UKB has exclusive Tribal jurisdiction over its own trust land. *McGirt* is a case about the division of jurisdiction between a state and a Tribe and says nothing about the interplay of jurisdiction among Tribes who share a reservation. Nor does *McGirt* call into question the Tenth Circuit's ruling that the BIA reasonably concluded that the Cherokee Nation does not have exclusive Tribal jurisdiction over the Cherokee Reservation. It is true that the Tenth Circuit was operating under the assumption that the Cherokee Reservation was a former reservation, but that assumption was not central to the court's holding on this point.[414]

In summary, the Treaty of 1835 promises exclusive Cherokee jurisdiction, not exclusive Cherokee Nation jurisdiction, over the Reservation. Nothing in the treaty language precludes UKB, a Cherokee government, from exercising jurisdiction within the Reservation nor does the language preclude UKB from exercising exclusive Tribal jurisdiction over its own trust parcels. To conclude otherwise would conflict with Congress's intent in the Keetoowah Recognition Act. Additionally, Tribes are presumed to have exclusive Tribal jurisdiction over their trust lands. Here, there is nothing to overcome that presumption. Both the Keetoowah Recognition Act and the 1999 Appropriations Act suggest that Congress did not intend for the Cherokee Nation to have supervening jurisdiction over UKB trust lands within the Cherokee Reservation. Moreover, the Privileges and Immunities Amendment to the IRA prohibits me from interpreting the relevant authorities in a way to diminish the privileges and immunities available to UKB relative to the

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[411] Letter from Bobby Coleman, Acting Reg'l Dir., to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians 7 (May 24, 2011) (76-acre community services parcel); Letter from Michael S. Black, Acting Assistant Sec'y – Indian Affs., to George Wickliffe, Chief, United Keetoowah Band of Cherokee Indians 8 (July 30, 2012) (2.03-acre gaming parcel); *see also* Decision from Larry Echo Hawk, Assistant Sec'y – Indian Affs., United Keetoowah Band of Cherokee Indians v. Director, E. Okla. Region 6-7 (June 24, 2009) [hereinafter AS – IA Decision] (UKB Ex. 2).

[412] AS – IA Decision, *supra* note 411, at 7.

[413] *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1161 (10th Cir. 2019). The court went on to clarify that the Assistant Secretary did not argue that he was mandated to approve UKB's land-into-trust application, but rather that UKB is entitled to "share the 'privileges and immunities available' to other Indian tribes; in this case, the right to assert jurisdiction over its tribal lands." *Id.* at 1161 n.21.

[414] The Indian canons of treaty construction are of no help here, either. Courts have recognized an exception to the application of the Indian canon of construction when Indian interests are not aligned. *See, e.g.*, *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); *Forest Cty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018).

Cherokee Nation or any other recognized Tribe. Therefore, I conclude that UKB has exclusive Tribal jurisdiction over its trust lands just as Cherokee Nation has exclusive Tribal jurisdiction over its trust land.

D. Trust lands acquired for UKB within the Cherokee Reservation qualify as "Indian lands" under the Indian Gaming Regulatory Act.

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA) "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments . . . ."[415] In the intervening thirty-five years, Indian gaming has become a driver of economic change in Indian Country, allowing many Tribes to raise the standard of living for their members.[416]

UKB initially opened a small bingo hall in Tahlequah in 1986. Over the years, the operation grew into a casino that supported approximately 300 jobs and served as the Tribe's primary source of revenue.[417] That revenue helped UKB to build a community center, childcare facility, museum, and ceremonial grounds.[418] The casino revenue also allowed UKB to raise employee salaries and offer insurance and retirement benefits.[419] Due to concerns that the casino's location on fee land violated IGRA, UKB agreed to close the casino in 2013.

IGRA generally restricts gaming to "Indian lands,"[420] which is defined as "all lands within the limits of any Indian reservation" and "lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . . ."[421] IGRA also prohibits gaming on lands acquired after October 17, 1988, with certain exceptions. 25 U.S.C. Section 2719(a) sets forth the "on-reservation exception" and the "former reservation exception":

> [G]aming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—
>
> (1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or
>
> (2) the Indian tribe has no reservation on October 17, 1988, and—

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[415] 25 U.S.C. § 2702(1).

[416] *See, e.g.*, Jeannie Hovland, *To Create, Preserve, and Protect: 35 Years of the Indian Gaming Regulatory Act*, SBCAMERICAS (Oct. 18, 2023), https://sbcamericas.com/2023/10/18/igra-tribal-gaming-jeannie-hovland/.

[417] D.E. Smoot, *Keetoowahs, Cherokees Negotiate Fate of UKB Casino*, MUSKOGEE PHOENIX (Aug. 29, 2013), https://www.muskogeephoenix.com/archives/keetoowahs-cherokees-negotiate-fate-of-ukb-casino/article_8728ad19-67ec-5f66-9657-66d1979480cf.html. *See also* Federal Defendants' Response Merits Brief at 1, *Cherokee Nation v. Jewell*, No. 12-cv-493 (N.D. Okla. Jan. 3, 2014) ("The gaming facility provided the sole source of funding for UKB tribal governmental operations and many social services.").

[418] Betty Ridge, *Casinos Contribute to Economy*, TAHLEQUAH DAILY PRESS (Feb. 22, 2012), https://www.tahlequahdailypress.com/news/features/casinos-contribute-to-economy/article_bb72d494-1b00-524f-88ae-4900a524f99f.html.

[419] *Id.*

[420] *See* 25 U.S.C. § 2710(a)(1) ("Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes . . . ."); *id.* § 2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if . . . ."); *id.* § 2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . .").

[421] 25 U.S.C. § 2703(4).

(A) such lands are located in Oklahoma and—
(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary[.]

The Department's regulations implement these requirements in 25 C.F.R. § 292.4, which provides that gaming may occur in the following situations:

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.
(b) If the tribe had no reservation on October 17, 1988, the lands must be either:
(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma[.]

IGRA and the Department's Part 292 regulations reflect the previously held understanding that many of Oklahoma's Indian reservations had been disestablished. When UKB previously applied to have land taken into trust for gaming purposes, BIA reviewed the application under that lens and analyzed whether the parcel was within the boundaries of the Tribe's former reservation. *McGirt* and its progeny clarified that the Cherokee Reservation has never been disestablished, which means that it continued to exist as of on October 17, 1988 when IGRA was enacted. Therefore, 25 U.S.C. § 2719(a)(2)(A)(i) and 25 C.F.R. § 292.4(b)(1) concerning "former reservations" no longer apply to the Cherokee Reservation.

To analyze whether UKB's trust lands may be considered "Indian lands," we now look to 25 U.S.C. § 2719(a)(1) and 25 C.F.R. § 292.4(a). The operative inquiries become whether the Cherokee Reservation qualifies as "the reservation of the Indian tribe" and whether UKB "had a reservation" in 1988. The Department's regulations define "reservation" as "[l]and set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent[.]"[422] This raises the additional question of whether the Cherokee Reservation can be considered "set aside . . . for" UKB consistent with IGRA.

As discussed above, UKB is a successor in interest to the Treaty of 1846. This means that the Cherokee Reservation was "set aside by the United States by final ratified treaty" for UKB and that the Cherokee Reservation is "the reservation of" UKB. *McGirt* and its progeny confirm that the Cherokee Reservation has never been disestablished and has continuously existed since its establishment in the 1800s, including in 1988. As a successor, UKB "had a reservation" in 1988. Therefore, UKB's trust lands within the Cherokee Reservation qualify as "Indian lands" and are eligible for gaming under IGRA and the Department's Part 292 regulations.

My conclusion is reinforced by the policies behind IGRA. The IGRA exceptions to the bar against gaming on trust lands acquired after 1988 express a policy generally to limit gaming to locations within, abutting, or otherwise related to current or historical Indian lands. Absent that geographical connection to Indian lands, gaming may occur on trust lands acquired after 1988 only if the state governor and the Department concur that gaming would not be detrimental to the

[422] 25 C.F.R. § 292.2.

surrounding community.[423] The "on-reservation exception" is not intended to limit inter-tribal competition, but to allow Tribes to use their historic territories in furtherance of IGRA's purposes of Tribal self-sufficiency and economic development. Because the Keetoowah originated as an organization of Cherokee people on the Cherokee Reservation in the 1800s, there is no doubt that the Cherokee Reservation is the historic territory of the UKB. Interpreting the IGRA to permit UKB as successor to game on the Cherokee Reservation furthers IGRA's purposes "of promoting tribal economic development, self-sufficiency, and strong tribal governments,"[424] while also respecting IGRA's desire to place geographical limits on the exercise of Indian gaming.

Conclusion

For the reasons set forth above, I conclude that the OIWA authorizes the Secretary to take land in trust for UKB, the Cherokee Reservation is UKB's reservation for purposes of the Part 151 Regulations, UKB has exclusive Tribal jurisdiction over its trust lands, and that lands taken into trust for UKB for gaming purposes within the Cherokee Reservation constitute "Indian lands" eligible for gaming under the Indian Gaming Regulatory Act.

This memorandum does not in itself constitute the approval of any land-into-trust application, but is binding on the Department as it considers any such applications that UKB may file.

Robert T. Anderson

[423] *See* 25 U.S.C. §§ 2719(a), (b)(1)(A).
[424] 25 U.S.C. § 2702(1).