No. 04-

IN THE

# Supreme Court of the United States

DELAWARE TRIBE OF INDIANS,

*Petitioner*,

*v.*

CHEROKEE NATION OF OKLAHOMA,
GALE NORTON, Secretary of the Interior, and
JAMES E. CASON, acting as Assistant Secretary –
Indian Affairs,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the court of appeals erred in holding that this Court's decisions in *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), necessarily determined that the Delaware Tribe of Indians abandoned its organized tribal status in an 1867 Agreement with the Cherokee, which holding conflicts with this Court's more recent declaration in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 77 (1977), that "[d]espite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe."

II. Whether the court of appeals erred in giving no deference to the interpretation of the 1867 Agreement made by the Secretary of the Interior regarding the Delaware Tribe's status, and in refusing to consider the effect of post-1867 relations between the Delaware Tribe and the United States despite the Secretary's express reliance on legislative action and administrative practice to confirm her interpretation.

III. Where the Secretary determined in 1996, on the record following full administrative review with notice and opportunity for all affected parties to be heard, that a 1979 letter issued by a subordinate official limiting federal relations with the Delaware Tribe was erroneous and should be withdrawn, and direct federal relations restored, did the court of appeals err in holding that the Federally Recognized Indian Tribe List Act of 1994 and the federal acknowledgment procedures of 25 C.F.R. Part 83 prevented the Secretary from so correcting that error.

## LIST OF PARTIES

As more fully explained in the Statement of the Case, the Cherokee Nation of Oklahoma was the Plaintiff-Appellant in the courts below. Gale Norton, Secretary of the Interior, and Aurene Martin, then Acting Assistant Secretary of the Interior, were Defendants-Appellees along with the Delaware Tribe of Indians. Pursuant to this Court's Rule 35.3, James E. Cason, the Associate Deputy Secretary who is currently handling the duties of the Assistant Secretary – Indian Affairs, has been substituted in the caption for Ms. Martin.

Although throughout the proceedings below the Secretary and the Acting Assistant Secretary have been aligned with the Delaware Tribe of Indians as Defendants-Appellees, pursuant to this Court's Rule 12.6 they are denominated "Respondents" with respect to this Petition.



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The Delaware Tribe of Indians respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, as amended on denial of rehearing, is reported at 389 F.3d 1074 (10th Cir. 2004) (App. A). The order of the Tenth Circuit denying the petition for rehearing of the Delaware Tribe of Indians (App. E) is unreported. The order of the Tenth Circuit granting in part and denying in part the petition for rehearing of the Secretary and Acting Assistant Secretary (App. D) is unreported. The July 23, 2002, decision of the district court (App. B) is reported at 241 F. Supp. 2d 1374 (N.D. Okla. 2002); the December 20, 2002, decision of the district court (App. C) is reported at 241 F. Supp. 2d 1368 (N.D. Okla. 2002).

Previous decisions in the case, prior to its transfer to the United States District Court for the Northern District of Oklahoma, are reported at 944 F. Supp. 974 (D.D.C. 1996) and at 117 F.3d 1489 (D.C. Cir. 1997).

## JURISDICTION

The decision of the Tenth Circuit was entered on November 16, 2004. Petitions for rehearing were separately and timely filed by the Delaware Tribe of Indians and by the Secretary and Acting Assistant Secretary – Indian Affairs. An order denying the petition of the Delaware Tribe of Indians was entered on January 11, 2005. An order granting in part, modifying the previous decision, and otherwise denying the petition of the Secretary and Acting Assistant Secretary – Indian Affairs was entered on February 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## TREATIES, STATUTES, AND REGULATIONS INVOLVED

Pertinent provisions of the Treaty with the Delawares of July 4, 1866, 14 Stat. 793 (1866); the Treaty with the Cherokee of July 19, 1866, 14 Stat. 799 (1866); 25 U.S.C. §§ 479a, and

479a-1; Pub. L. No. 103-454, 108 Stat. 4791 (1994), §§ 101-104; and 25 C.F.R. Part 83 (1996) are reprinted at Appendices G - J.

## STATEMENT OF THE CASE

This case involves the existence of the Delaware Tribe of Indians as a governmental entity with which the United States maintains direct relations. It directly affects the status of more than 7,000 individuals who are members only of the Delaware Tribe.

In 1996, after notice and hearing and based on an eleven-volume administrative record, the Secretary of the Interior determined that a subordinate official had erred in issuing a 1979 letter withdrawing direct federal relations from the Delaware Tribe, which had maintained government-to-government relations with the United States since 1778. In an appeal brought by the Cherokee Nation of Oklahoma, however, the Tenth Circuit declared that the Secretary's decision to correct the prior error was "void" – not because the administrative record was inadequate (indeed, the Tenth Circuit expressly refused to consider most of that record) – but because the Tenth Circuit concluded that this Court had settled the matter in two decisions rendered more than 100 years ago.

Neither of those decisions, *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), which interpreted an 1867 Agreement between the Delaware and the Cherokee, nor the Agreement itself, states that the Delaware abandoned their own tribal organization, which statement was customary in other agreements of the period involving other tribes where such abandonment was intended. The Secretary recognized this in her 1996 decision and also credited the history of the subsequent 100 years of direct dealings between the Legislative and Executive branches of the federal government and the Delaware Tribe as confirming her interpretation. The Tenth Circuit, however, refused to consider that part of the administrative record.



In 1977, this Court actually did consider the status of the Delaware Tribe as a federally recognized tribe. In rejecting an equal protection challenge brought by a group of individuals who had relinquished tribal citizenship and stayed in Kansas when the main body of the Tribe was compelled to relocate in 1867 to what is now Oklahoma, the Court ruled in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), that Congress had a legitimate basis to distinguish between individual Indians and "recognized tribes." *Id.* at 85-86. Over a dissent that argued this was not a valid distinction, because in its view the Delaware Tribe had ceased to be a tribal entity in 1867, the Court referenced both its *Journeycake* and *Delaware Indians* decisions and nonetheless declared that "[d]espite their association with the Cherokees, these Indians . . . have over the years maintained a distinct group identity, and they are today a federally recognized tribe." *Id.* at 77. *See also id.* at 77 n.8. The Tenth Circuit, however, regarded this language in *Weeks* as "dicta" on the tribal status point and refused to consider any post-1867 history of relations between the United States and the Tribe. "Even *assuming Journeycake* and *Delaware Indians* conflict with the dicta in *Weeks* (which they do not), we nevertheless would be bound to follow those decisions." App. A at 24a (emphasis in original). It is clear that only this Court can correct the Tenth Circuit's erroneous holding regarding the meaning of this Court's decisions.

The Tenth Circuit compounded that error by conducting its own analysis of the 1867 Agreement without deference to the interpretation rendered by the Department of the Interior and without reference to the subsequent 100 years of direct government-to-government relations among the Tribe, Congress, and the Department, which the Department had used as confirmation for its interpretation. The Tenth Circuit thus substituted its own analysis for that of the agency recognized by Congress and this Court as possessing delegated authority and expertise in administering direct federal relations with tribes in general and federal recognition of tribes in particular.

Given that the status of a Tribe that has engaged in its own direct government-to-government relations with the United States since 1778 is at stake, and that thousands of the Delaware Tribe's members are directly and adversely affected, the importance of this case would be compelling even if the Delaware Tribe's status were all that was involved. But the Tenth Circuit's decision, with its additional conclusion that the Department erred in reestablishing direct relations with a tribe outside of the procedures in 25 C.F.R. Part 83 referenced in the Federally Recognized Indian Tribe List Act, casts the recognition of other tribes into doubt. Several other tribes have been recognized by the Department in recent years outside the Part 83 process. Moreover, Part 83 does not purport to deal with the power of the Department to correct its own errors, an agency power long-recognized by this Court. Yet the pernicious effect of the Tenth Circuit's decision is to cement in place a subordinate official's 1979 decision that the district court found "striking both for the superficiality of its analysis and for the sweeping impact of its conclusions." App. B at 44a.

Because the Tenth Circuit simply voided the Secretary's 1996 determination, rather than remanding for further proceedings despite pleas that it do so, the time for this Court to act is, respectfully, now.

## I. Factual Background.

### A. Pre-1867 Period.

The Delaware Tribe of Indians originally resided in the Northeast. In 1778, it become the first tribe ever to sign a treaty with the United States. *See* 7 Stat. 13 (1778) (Treaty with the Delawares, Sept. 17, 1778). Over the next few decades, in spite of assurances that each relocation would be the last, the Tribe was forced to move west by the pressures of white settlement, spending periods in Ohio, Indiana, and Missouri before the main body of the Tribe eventually came to reside in Kansas. *See* 7 Stat. 326 (1829) (Treaty with the Delawares, August 3, 1829).



Despite the promise that Kansas would be a permanent home, the United States sought yet another treaty with the Delaware Tribe in 1866, this time to relocate the Tribe to the Indian Territory. *See* 14 Stat. 793 (1866) (Treaty with the Delawares, July 4, 1866). In the Treaty of 1866, the United States promised to sell the Delaware Tribe 160 acres of land per member "in as compact a form as practicable" that would be "set off with clearly and permanently marked boundaries," promised that the Delaware Tribe would have the right to participate in any general council or territorial government established for Indian tribes or nations in the Indian Territory, and promised to "protect, preserve, and defend" the Delaware Tribe "in all their just rights." (App. G at 77a).

After signing the Treaty with the Delaware Tribe, the United States entered into a separate Treaty with the Cherokees to facilitate the resettlement of Indian tribes onto Cherokee lands in the Indian Territory. *See* 14 Stat. 799 (1866) (Treaty with the Cherokee, July 19, 1866). Article 15 of that Treaty set forth two options for resettlement. Under option one, "should any such tribe . . . settling in said country abandon their tribal organization," a single payment was to be made into the Cherokee national fund, that payment being a per capita sum to be determined based upon the number of individuals relocating in a proportionate ratio to the existing national fund. (App. G at 78a-79a). Thereafter, "they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens." *Id.* at 79a. Under option two, "should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation," they would then make two payments: (1) one for the price of having "a district of country set off for their use" that, if the tribe "should so decide," would be set off by metes and bounds and be equal to 160 acres per man, woman and child of that tribe; and (2) a second, per capita sum proportionately based upon the ratio of their number to

that of the whole number of Cherokees computed against the value of the existing national fund and "the probable proceeds of the lands herein ceded or authorized to be ceded or sold." *Id.* at 79a. After these payments, the members of such tribes "shall enjoy all the rights of native Cherokees." *Id.*

**B. The 1867 Agreement.**

The Delaware Tribe and the Cherokees met on the banks of the Caney River in Kansas in 1867 to negotiate the terms of an agreement for relocation under option two of the Cherokee Treaty's Article 15. *See* Supp. App. at 183-84.[1] The Caney River agreement described by metes and bounds a 10-mile by 30-mile strip of land to be set aside for the Delaware Tribe, included terms for the preservation of the Delaware tribal organization, and required the two payments. *See* Supp. App. at 328-29, C. App. at 282-83, C. Add. at 55-56. A purchase agreement for the land was finalized on April 8, 1867. While it called for the two payments and did not mention any "abandonment" of the Delaware tribal organization, the preamble included references to the Delawares' "consolidation" with the Cherokees, and the concluding paragraph referred to children of "such Delawares so incorporated" – language not contained in the Caney River agreement. C. Add. at 54-55, 57. When the Delaware Tribe learned of this, they held a general council of all members and unanimously reaffirmed their commitment to preserve their tribal organization. *See* C. App. at 299.

The Tribe faced escalating pressure from trespassers and the local Indian agent, the Rev. John Pratt, who withheld annuity payments until tribal members agreed to relocate. *See* Supp. App. 187-89. Eventually, the Agreement was approved by the President of the United States (as contemplated in the Agreement), the two payments were made, and the Delaware

1. "Supp. App." refers to the Supplemental Appendix jointly filed by the Secretary and Acting Assistant Secretary and the Delaware Tribe in the court of appeals; "C. App." refers to the Cherokee Nation's Appendix filed there; "C. Add." refers to the Cherokee Nation's Addendum filed there; "AR" refers to the Administrative Record in this matter.



Tribe moved to the Indian Territory. In their destitute status, more than 20 percent of the relocating Delawares died during the move. *See id.*

**C. 1867 to 1979 Period.**

After relocation to the Indian Territory, the Delaware Tribe continued to deal directly with the United States, maintained its own tribal government distinct from the Cherokees, and operated its own schools, churches, council houses, and traditional ceremonies. Supp. App. at 190-95; 191-93; 460-67. The Department of the Interior intervened in intra-tribal leadership disputes in 1873 and 1895, calling elections of the Tribe's Business Committee to assume governance duties for the Delaware Tribe. Supp. App. at 192. The Department also later determined that the Delaware Tribe could organize their government under the Oklahoma Indian Welfare Act, a statute enacted for recognized tribes. *See* 25 U.S.C. § 503; Supp. App. at 205-06. While the Department took a litigation position during the termination era (in a case involving claims relating to compensation for ceded lands) that the Delaware were a "claims organization," the agency later reaffirmed the continued existence of the Delaware Tribe's separate tribal government when the litigation concluded (as did the Claims Commission), approving the Delaware Tribe's new organizational bylaws in 1958 and 1962, and re-approving the Tribe's governing document as amended in 1974. *See* Supp. App. at 206-09, 293, 368-69, 384-92; C. App. at 403, 423. *See also Delaware Tribe of Indians v. United States*, 2 Ind. Cl. Comm. 252, 266 (1952) (finding that, despite relocation to Cherokee lands, Delawares had "continued to maintain their tribal customs, practices, and their hereditary form of government").

Twice near the beginning of this period, the Delaware Tribe had to go to court to obtain from the Cherokee the full rights to which the 1867 Agreement entitled its members. These cases made their way to this Court, which each time confirmed that, through the Agreement, the Delaware Tribe had obtained enforceable rights for its individual members to enjoy the rights

of native Cherokees. *See Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904). As will be discussed in more detail below, the rights at issue were wholly consistent with option two (the "preservation option") of the Cherokee Treaty, and in neither of these decisions did this Court hold that the Delaware Tribe had abandoned its own tribal organization.

Throughout this period, before and after this Court's decisions, Congress consistently treated the Delaware Tribe as a sovereign entity, distinct from the Cherokee Nation, in various legislative enactments. *See* 27 Stat. 612 (1893); 28 Stat. 286 (1894); 33 Stat. 189 (1904); 43 Stat. 812 (1925), as amended by 44 Stat. 1358 (1927). In 1972, Congress again confirmed the Tribe's status by apportioning funds to the credit of "the Delaware Tribe of Indians" both for claims distributions to individuals and for tribal governmental purposes. *See* 25 U.S.C. § 1294(b). From 1971 to 1979, the Tribe contracted directly with and received grants from numerous federal and state agencies to provide services to tribal members as a federally recognized tribe. *See* Supp. App. at 212-15.

Meanwhile, the Cherokees had approved the Cherokee-Dawes Agreement, 31 Stat. 848 (1901), which provided for allotment of the Cherokee reservation and the dissolution of the Cherokees' tribal government by March 4, 1906. Eventually, only a periodically appointed chief was left to dispose of assets and prosecute claims. Muriel H. Wright, *A Guide To The Indian Tribes of Oklahoma* 73 (1968). The Cherokees did not revive their tribal governing body until 1975. The newly resurrected Cherokee government first objected to federal dealings with the Delaware Tribe in 1977, after the Indian Health Service confirmed that the Delaware were a tribe under the Indian Self-Determination and Education Assistance Act of 1972, 25 U.S.C. § 450. Supp. App. at 299-300. The Cherokees renewed their objections in 1978, but the Department confirmed that the Delaware Tribe was recognized, Supp. App. at 304, 431-50,



and included the Delaware Tribe on a list of recognized tribes published in 1978. C. App. at 256 n.12.[2]

**D. 1979 to 1996 Period.**

In 1979, however, without notice to the Delaware Tribe or an opportunity for the Tribe to be heard, the Tribe was summarily omitted from the list of recognized tribes published in the Federal Register that year; it was informed in a two-page letter from the acting deputy commissioner of the Bureau of Indian Affairs that the previous approval of its Bylaws was rescinded, and that, although it was still considered to be "a tribe within the Cherokee Nation," its members were no longer to look to their own government:

> The Cherokee Delawares may deal with their judgment awards and preserve their Delaware heritage and identity. For *governmental* purposes, however, they must look to the Cherokee Nation, of which they are an integral part.

*See* C. App. at 499-500 (emphasis in original). Nevertheless, the Tribe continued to maintain its own government, and Congress continued to treat the Tribe as a distinct entity carrying out its own governmental functions. In sections 7(c), 7(e), and 7(f) of Pub. L. No. 96-318, 94 Stat. 968 (1980), Congress directed payment of "programming funds" – for which only recognized tribes are eligible – to the "Delaware Tribe of Indians." Congress' distribution of the funds was consistent with its understanding of the Delaware Tribe's status as a distinct governmental entity, as stated in the legislative history of the 1980 act:

> This group, now known as the Delaware Tribe of Indians or Cherokee Delaware, acquired full political rights in the Cherokee Tribe, but they maintained

2. Perhaps because it declined to review the full administrative record, the Tenth Circuit was thus incorrect when it stated, *cf.* App. A at 2a , that the Delaware Tribe had never been on the Department's list of recognized tribes.

> their group identity, having tribal chiefs and business committees continuously until the present time.

S. Rep. No. 96-628, at 5 (1980).

In 1992, following the request of the Delaware Tribe, the Department began a review of the 1979 letter decision. After a comprehensive, documented, and public review, with full notice and comment procedures observed, the Secretary of the Interior issued a final decision in 1996, concluding on the basis of an eleven-volume administrative record that direct government-to-government dealings with the Delaware Tribe more accurately reflected the bulk of the administrative practice. *See* C. App. at 242; App. F at 74a. Because the subordinate official's 1979 decision "did not consider the entire relevant legal record and did not construe accurately the provisions of the 1866 Treaty with the Delaware and the 1867 Agreement between the Delaware and Cherokee," the Secretary retracted the 1979 letter's position and reestablished direct federal relations with the Delaware Tribe of Indians. C. App. at 238.

**II. Procedural Background.**

The Cherokee Nation of Oklahoma challenged the Department's 1996 decision by filing suit in the United States District Court for the District of Columbia under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, naming as defendants the Secretary of the Interior and the Assistant Secretary but omitting the Delaware Tribe. The District Court for the District of Columbia concluded that the Delaware Tribe was an indispensable party under Federal Rule of Civil Procedure 19 and dismissed the action. 944 F. Supp. 974, 985. The Cherokees appealed, and the D.C. Circuit reversed. 117 F.3d 1489, 1503. In an opinion expressly limited to the Rule 19 issue on appeal,[3] the D.C. Circuit found that the

3. Our holding, of course, is limited to deciding whether the district court erred in its Rule 19 ruling. We leave for initial decision by the district court the proper (Cont'd)



Delaware Tribe could not rely upon their sovereign immunity to avoid joinder when the Delaware Tribe's immunity itself was challenged, and it remanded the case to the district court to consider the merits. *Id.* The case was then transferred to the Northern District of Oklahoma, and the Delaware Tribe was added as a party.

After an examination of the full administrative record, the District Court for the Northern District of Oklahoma determined that the 1979 letter purporting to withdraw direct relations with the Delaware Tribe was "manifestly flawed" and had been issued "without regard to legally mandated deliberation and proper procedural safeguards." App. B at 44a. The district court noted that the agency's basis for the decision set forth in the 1979 letter had not included an analysis of the historical, direct government-to-government dealings between the United States and the Delaware Tribe. App. B at 32a. After supplemental briefing, the district court also determined that the 1996 decision retracting the 1979 letter deserved "great deference" because, in contrast, it had been made after notice and comment, and after a careful, detailed review of the historical, direct government-to-government relationship between the United States and the Delaware Tribe. App. C at 61a.

The Cherokees appealed to the Tenth Circuit. The Tenth Circuit found, explicitly *without* undertaking a review of the post-1867 events recounted in the eleven-volume administrative record, that the Department's decision was based *solely* upon its legal analysis of the treaties and agreements entered into by the Cherokees and Delaware Tribe in the 1860s, App. A at 6a, and that neither the administrative practice nor the rest of the

(Cont'd)

> interpretation of the 1867 Agreement with the Delaware Tribe as a party to the proceedings and in light of the full administrative record, which is not before this court.

117 F.3d at 1503 n.15.; C. App. 120-121 (ordering insertion of above text).

post-1867 course of dealings between the Delaware Tribe and the United States need be considered, App. A at 6a n.2. Instead, in an unprecedented opinion voiding an Executive branch decision to conduct direct relations with a tribe, the Tenth Circuit concluded that (i) the Department's analysis of the treaties and the 1867 Agreement was contrary to this Court's precedent in *Journeycake* and *Delaware Indians*, (ii) this Court's statement in *Weeks* that the Delaware Tribe was "a federally recognized tribe" was "dicta," (iii) the Secretary's interpretation of the historical documents comprising the record was not entitled to deference, (iv) the Secretary's 1996 withdrawal of the 1979 letter and her concomitant reestablishment of direct relations with the Delaware Tribe violated federal law and regulations, and (v) the lower court should be reversed, without remand to the Department for further proceedings. App. A at 17a-18a, 24a, 7a, 25a

The Delaware Tribe petitioned for rehearing, including a request for remand to the Department, all of which the Tenth Circuit denied on January 11, 2005. The Secretary and Acting Assistant Secretary also petitioned for rehearing, including a request that the Tenth Circuit not declare void all actions taken on the basis of the 1996 decision. The Tenth Circuit partially amended the opinion on February 16, 2005, to direct specifically that "any action taken by the agency on its 1996 final decision is void," and otherwise denied rehearing. App. D at 68a. The Delaware Tribe then sought a stay of mandate pending petition to this Court for a writ of certiorari, which the Tenth Circuit denied on February 24, 2005, and a motion for recall of the mandate and reconsideration of the stay denial when the Department indicated it would support such a stay, which recall and stay reconsideration the Tenth Circuit denied on March 4, 2005.

As a result, by letter dated March 11, 2005, the Acting Regional Director of the Bureau of Indian Affairs informed the Tribe that the Bureau will proceed with the termination of all



existing contracts with the Tribe. The Tribe filed an Application to Stay Mandate Pending Certiorari on March 24, 2005, directed to Justice Breyer as Circuit Justice, which Application was denied on March 28.

## REASONS FOR GRANTING THE PETITION

If the Tenth Circuit had done no more than void direct federal relations with the chosen government of over 7,000 Native Americans, that alone would have made review by this Court important. That it did so by holding that two of this Court's decisions commanded that result, despite more recent Congressional acts, Executive determinations, and this Court's own *Weeks* decision, makes the importance of review by this Court compelling. That it also ruled in a way that casts into doubt the Secretary's previous recognition of several other tribes underscores this compelling need.

### I. THE TENTH CIRCUIT'S HOLDING CONCERNING THIS COURT'S PRIOR DECISIONS IS BOTH WRONG AND IN CONFLICT WITH *WEEKS*.

#### A. Neither *Journeycake* Nor *Delaware Indians* Held That The Delaware Tribe Had Abandoned Its Tribal Organization.

The Tenth Circuit's fundamental error was its holding that the Department's conclusion that the Delaware Tribe had settled in the Indian Territory under the "preservation option" (option two) of Article 15 of the 1866 Cherokee Treaty was at odds with and foreclosed by this Court's decisions in *Journeycake* and *Delaware Indians*. App. A. at 17a-18a. To begin with, that holding is in conflict with the D.C. Circuit, which reviewed *Journeycake* and *Delaware Indians* and found:

> Neither *Journeycake* nor *Delaware Indians* explicitly addressed whether the Delawares settled in Cherokee territory pursuant to the first or second provision of Article 15.

117 F.3d at 1500. The issue of which provision the Delaware Tribe settled under was in fact not decided in either *Journeycake* or *Delaware Indians*, and accordingly the Tenth Circuit erred

in holding the Department was constrained by these cases in that regard.

The *Journeycake* case could not have determined that the Delawares abandoned their organized tribal status in the 1867 Agreement or in their own 1866 Treaty, because the case concerned the rights and immunities of individuals. *See* 155 U.S. at 204 ("This case hinges on the status of the *individual* Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867.") (emphasis added). At issue was the propriety of a Cherokee decision to limit payment of rental proceeds from land known as the Cherokee Outlet to Cherokees rather than sharing the proceeds with relocated members of the Delaware Tribe, relocated Shawnees, and Cherokee Freedmen, the former slaves of the Cherokee Nation. *See Journeycake*, 155 U.S. at 203-04. The 1866 Cherokee Treaty provided that members of relocating tribes – whether settling pursuant to the "abandonment option" or the "preservation option" – would "enjoy all the rights of native Cherokees." *See* Supp. App. at 45. With the two options providing essentially the same rights and immunities to individuals, the Court had no need to determine under which option the members of the Delaware Tribe had settled. After examining the rights of individuals in the 1867 Agreement, the Court of Claims and this Court both disagreed with the Cherokee Nation's decision to restrict proceeds to Cherokees and held that individual members of the Delaware Tribe were entitled to share in the profits and proceeds from the Cherokee Outlet. 155 U.S. at 211.

Nowhere does *Journeycake* analyze whether the Delaware Tribe abandoned its tribal organization or whether it settled under one option of the 1866 Treaty or the other. The Court's statement that the Delawares were "incorporated" into the Cherokees, 155 U.S. at 216, on which the Tenth Circuit seized, did not determine that the Delaware Tribe settled under option one of Article 15. The Cherokees themselves candidly recognized as much in their own 19th century arguments before the Court of Claims in the



*Journeycake* case. There, the Cherokees represented to the court that:

> Article 15 of the treaty of 1866, under authority of which the agreement in question is made, is peculiar. It poses *two plans by which friendly Indians may incorporate with the Cherokees.*

C. Add. 101 (emphasis added).

The holding in *Delaware Indians* is similarly circumscribed. The Delaware Tribe brought the case on behalf of both the Tribe and individual Delawares to determine their rights in the Indian Territory lands.[4] In an opinion that presumed the existence of the Delaware Tribe but, like *Journeycake*, addressed only the rights of individuals, the Court held that "Registered Delawares" – members who had relocated from Kansas and were listed on a February 18, 1867, Registry – purchased individual life estates in the amount of 160 acres each rather than land in fee simple. 193 U.S. at 146. The *Delaware Indians* case does not purport to determine the status of the Delaware tribal organization or whether the Tribe settled under the "abandonment" or "preservation" options of Article 15.

Indeed, it could not. As the Court expressly stated in the *Delaware Indians* opinion, its jurisdiction was limited by the act of Congress authorizing the suit. *See* 193 U.S. 128-29. Under the Act of June 28, 1898, the Delaware Indians were authorized to sue the Cherokee Nation "for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation" under the 1867 Agreement. *Id.* at 129. Determining

4. In addition to the agency's full administrative record, the Northern District of Oklahoma also had before it the Complaint filed by the Delaware Tribe in *Delaware Indians*, in which the Delaware Tribe described its status as that of a tribe residing in the Cherokee Nation and affirmed that its members "have not abandoned their tribal organization but have preserved the same and have maintained their tribal laws, customs, and usages[.]" Complaint at 2, Ninth Averment (certified copy attached to Cherokee Nation of Oklahoma's Motion for Judicial Notice, filed November 2, 2001 in No. 98-CV-903-H(M)).

the tribal organizational status of the Delaware Tribe was not within the jurisdictional grant, beyond which the Court said it would not go. *Id.* at 144.

Thus, when this Court decided *Journeycake* and *Delaware Indians*, it did indeed confirm that certain rights were held by individual Delaware Indians to be treated equally with members of the Cherokee Nation under the 1867 Agreement. But the Court did not determine, in either decision, whether the Delaware Tribe had abandoned its tribal organization. There is no statement in either decision saying that such an abandonment occurred, nor was any conclusion regarding that issue necessary to decide the questions presented in either case. Statements concerning whether members of one tribe had been "incorporated" into the other, or noting that the two tribes were to be "united," on which the Tenth Circuit so heavily relied, do not mean that the Court decided the Delaware had stopped being a recognizable "tribe," any more than the statement that a man and a woman are to be "united" in marriage means that they cease to exist as recognizable individual entities. Such statements simply mean what they say (and no more).

The same is true of the 1867 Agreement, which nowhere says the Delaware Tribe is abandoning its organized tribal status. Nor is that a necessary implication of either the Agreement or the fact of the Delaware Tribe's relocation onto Cherokee lands. That is because, in Indian law, custom, and practice, it is possible to have a tribe (and a tribal government that governs its members with regard to tribal matters) without a specified tribal "territory," *see, e.g.*, Veronica E. Tiller, *Tiller's Guide to Indian Country* (1996) at 229 (discussing landless California tribes), 407 (discussing Chippewa-Cree who were "homeless" prior to 1915), and it is possible to have a tribe that is "united with" or "incorporated into" another tribe, but still retains its own tribal status for its own members (thus, by the Agreement, individual Delaware have all the rights of native Cherokees, but no agreement says individual Cherokee have any status as native



Delawares).[5] For example, the Minnesota Chippewa share a common constitution dating back to 1964 that identifies the Chippewa as a single "tribe," but each of the component bands (*e.g.*, the White Earth Band and the Leech Lake Band) is treated separately by the United States as a tribe. *See* 67 Fed. Reg. 46,328 (July 12, 2002); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998); *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 842 (8th Cir. 2003); National Indian Gaming Commission "Gaming Tribes" list.[6] In other instances, separate tribes share the same reservation, such as do the Eastern Shoshone Tribe and the Arapaho Tribe of the Wind River Reservation in Wyoming. *See* 25 U.S.C. § 574a; Tiller, *supra*, at 627.

It is true that the separate 1866 Treaty between the United States and *the Cherokee Nation* contemplates *as one of two possibilities* that a tribe might "abandon their tribal organization," but that only proves the point: that Treaty clearly contemplates that it is left up to a resettling tribe to decide whether or not to abandon its organized status when it moves onto Cherokee lands. To determine if any tribe actually so chose, one needs to look to the specific agreement with that tribe. The Tenth Circuit's eagerness to rely on an "implicit" finding by this Court that the Delawares had abandoned their tribal organization stands in sharp contrast to longstanding principles

5. Some tribes allow, and the federal government recognizes, "dual enrollment" – enrollment in more than one tribe if an individual meets the requirements of each. *See, e.g.*, 25 U.S.C. § 1903(5). Thus, to say that someone is or is not entitled to be "Cherokee" does not necessarily mean that she has ceased to be "Delaware." Moreover, what the Tenth Circuit termed the "Preservation Option" in the 1866 Cherokee Treaty guaranteed that members of "preserved" tribes "shall enjoy all the rights of native Cherokees." It was thus obviously understood at the time of the 1867 Agreement that a tribe could preserve its identity and its members could nevertheless also have the "rights of native Cherokees."

6. *Available at*: http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES&REGIONID=0 (listing each band separately).

of treaty interpretation[7] and the contemporaneous practice of the period, in which abandonment was expressly stated when it was intended. The Cherokees' 1869 agreement with the Shawnee, for example, drafted two years after the Delaware Tribe's agreement, explicitly states that the Shawnees are abandoning their organized tribal status. *See* C. App. at 321 ("the said Shawnees shall abandon their tribal organization"). No such language, or anything similar, is found in the 1867 Agreement between the Cherokees and Delaware Tribe.

**B. This Court Considered Both *Journeycake* And *Delaware Indians* In *Weeks* And Determined That The Delaware Tribe Preserved Its Tribal Identity And Is Federally Recognized.**

This Court in *Weeks* duly noted both the *Journeycake* and *Delaware Indians* decisions and nonetheless concluded that despite the Delaware Tribe's relocation and its members' sharing in funds with the Cherokees, the Delawares had preserved their tribal organization and were federally recognized as a tribe:

> Each Delaware moving to Indian Country and enrolling on the proper register was to receive a life estate of 160 acres of Cherokee land and the right to become a member of the Cherokee Nation. Most of the Delawares on the Kansas reservation accepted these conditions and moved to Oklahoma, where they were gradually assimilated for most purposes into the Cherokee Nation, and were permitted to share equally with the Cherokees in the general funds of that tribe. *See, e.g., Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904); *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894). Despite their association with the Cherokees, these Indians, called "Cherokee Delawares" in this suit, have over the years maintained a distinct group identity, and they are today a federally recognized tribe.

*Weeks*, 430 U.S. at 77.

7. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195-202 (1999) (discussing and applying interpretation principles).



Nor were these statements mere "dicta" on the part of the *Weeks* Court, as the Tenth Circuit erroneously held. One of the arguments being pressed by the appellees in *Weeks* was based on the equal protection component of the Due Process Clause of the Fifth Amendment. *See, e.g.*, 430 U.S. at 82. Those appellees were the so-called "Kansas Delawares," whose ancestors had, as this Court put it, long ago "severed their relations with the tribe," *id.* at 86, and had become "simply individual Indians," *id.* at 85. The *Weeks* Court twice explicitly noted that "[t]heir descendants, called 'Kansas Delawares' in this suit, are not a federally recognized tribe." *Id.* at 78. *See also id.* at 85 ("the Kansas Delawares are not a recognized tribal entity"). The Court used that distinction as the "first" reason why the different treatment of the Kansas Delawares did not offend the equal protection component of the Due Process Clause:

> First, the Kansas Delawares are not a recognized tribal entity, but are simply individual Indians with no vested right in tribal property. . . . As tribal property, the appropriated funds [at issue] were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes. . . . We cannot say that the decision of Congress to exclude the descendants of individual Delaware Indians who ended their tribal membership . . . more than a century ago, and to distribute the appropriated funds only to members of . . . the Cherokee and Absentee Delaware tribes, was not 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'

*Id.* at 85-86.

The sole *dissenter* in *Weeks* argued that this was not a valid distinction, because in his view the "Cherokee Delawares" had also "ceased being members of the Delaware Tribe in 1867, when they joined the Cherokee Nation." 430 U.S. at 94 (Stevens, J., dissenting). But even this dissent, which based its argument on the 1867 Agreement, did not actually claim that the Court had already decided that issue: it merely obliquely asserted that "*[a]spects* of the status of the Cherokee Delawares were adjudicated in *Journeycake* and in *Delaware Indians* . . . ." *Id.* at 94 n.4 (emphasis added). The dissent also did not doubt the current status of the Tribe: In a reference to the fact that the Department had re-approved the Delaware Tribe's governing document in 1974, the dissent stated: "To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe. This did not occur, however, until 1974, two years after Congress acted on the legislation in question." *Id.*

Moreover, and most importantly, these statements were made *in dissent*. They are relevant to show two things: that the question of recognized tribal status *vel non* was not dicta, and that the dissenting view concerning the effect of the 1867 Agreement on that status did not command a majority. The *Weeks* Court, immediately after itself referring to *Journeycake* and *Delaware Indians*, dispatched the "recent recognition" argument in a footnote:

> The formal name of the Cherokee Delawares is the Delaware Tribe of Indians. Appellees contend that the Cherokee Delawares were not a federally recognized tribe until after the commencement of this lawsuit. Tr. of Oral Arg. 58-59. The District Court made no finding as to the Cherokee Delawares' status as a recognized tribe, but it is clear that Congress, prior to the enactment of the statute [at issue], dealt with the Cherokee Delaware as a distinct entity. *See, e.g.*, Act of 1904, s 21, 33 Stat. 222, providing for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . ."; 43 Stat. 812; 44 Stat. 1358; and 49 Stat. 1459, amending 43 Stat. 812.



430 U.S. at 77 n.8.

The Court also stated that the statute at issue, Pub. L. No. 92-456, was an appropriation of "tribal property." 430 U.S. at 85. Examination of the underlying act shows that Congress treated the Delaware Tribe as a recognized tribe, not as an entity "reconstituted for claims purposes," as the Tenth Circuit opined. *Cf.* App. A at 24a. While various Indian groups were eligible to file claims under the Indian Claims Commission Act, the Tribe is unaware of *any* instance in which Congress has made so-called "programming funds" available to an unrecognized, "claims only" tribe. Yet the 1972 act at issue in *Weeks* (like the 1980 act, Pub. L. No. 96-318, 94 Stat. 968 (1980), that followed) expressly allowed the distribution of programming funds to the Delaware Tribe. *See* 25 U.S.C. § 1294(b).

The Tenth Circuit's erroneous holding with regard to the meaning of this Court's *Journeycake* and *Delaware Indians* decisions, and the conflict that holding thereby created with *Weeks*, are of fundamental importance. Coupled with the disastrous consequences for the Delaware Tribe and its members,[8] they would alone provide sufficiently compelling reasons to grant review. But there is more.

## II. THE TENTH CIRCUIT SHOULD HAVE DEFERRED TO THE DEPARTMENTS' DELEGATED AUTHORITY AND EXPERTISE REGARDING FEDERAL/TRIBAL RELATIONS.

Both Congress and this Court regard the Department of the Interior as having delegated authority and expertise to administer federal/tribal relations in general and federal recognition of tribes in particular. The Tenth Circuit's decision to prefer its own

8. *See, e.g.*, Affidavit of Larry Joe Brooks, Chief of the Delaware Tribe of Indians, Appendix G to the Application to Stay Mandate, No. 04A832.

analysis of the 1867 Agreement to the Secretary's interpretation – made on the record after a comprehensive review of the historical documents, confirmed by subsequent legislation and administrative practice – has the effect of reviving (and requiring deference to) a subordinate's decision that the agency has since refuted. It is APA review in reverse, and it is in conflict with this Court's precedents.

Congress has vested the Department of the Interior with broad authority to manage Indian affairs, including authority to determine the effects of agreements and treaties involving tribes. *See* 25 U.S.C. §§ 2, 9; 43 U.S.C. § 1457. *See also United States v. Clapox*, 35 F. 575, 577 (D. Ore. 1888) (Secretary has authority to administer treaty). In exercising this authority, the Department's determinations are entitled to considerable deference, as this Court has recognized. *See, e.g., Chevron U.S.A., Inc. v. Nat'l Resources Def. Council*, 467 U.S. 837, 844 (1984) (court should defer to agency interpretation of ambiguous authorities agency is entrusted to administer); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85 (1982) (deferring to agency interpretation of treaty it negotiated and enforced); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (while courts interpret treaties, meaning given them by agencies particularly charged with their negotiation and enforcement is given "great weight").

The Tenth Circuit gave little heed to such authorities, asserting it could ignore them here because the Department was not directly charged with negotiating or implementing the 1866 Treaties and the 1867 Agreement at issue. *Cf.* App. A at 7a. But that is not correct. Agents of the Department were involved with the Delaware Tribe and the Cherokees throughout, as correspondence from the Delaware Tribe and the Cherokees to the Commissioner of Indian Affairs shows, Supp. App. 53-55, 67-73, and the Secretary of the Interior himself transmitted the 1867 Agreement to the President for signature and wrote the transmittal letter referring to the "uniting" of the two tribes on which the Tenth Circuit itself relied, *cf.* App. A at 22a n.6.



What is more, the issue before the Department in its 1996 final decision was not some interpretation of a general provision of these documents, but whether they should be read as evidencing an abandonment of the Delawares' own tribal organization. Since the very time of these documents, this Court has consistently recognized and deferred to the Department's expertise in the specific area at issue in this case, the recognition of Indian tribes:

> [I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

*United States v. Holliday*, 70 U.S. 407, 419 (1865), cited with approval in *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *see also Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 347 (7th Cir. 2001) (question of whether Miamis are a "nation" with which United States might establish relations is akin to political question). Because the Department's 1996 decision was based on its interpretation of the 1867 Agreement, the Treaties referenced in the Agreement, acts of Congress it administers, and over 100 years of its own administrative practice, it deserves deference as an exercise of its delegated authority and accumulated expertise.[9]

9. The Tenth Circuit stated, erroneously, that the Department's 1996 decision to correct its 1979 position rested "solely" on its interpretation of the 1867 Agreement and the 1866 Cherokee Treaty, see App. A. at 6a, even though the 1996 decision explicitly states "[t]he decision to retract the letter of May 24, 1979, is based on a comprehensive legal analysis of the pertinent treaties and agreements *as well as* a review of the Department of the Interior's administrative practice." 67 Fed. Reg. at 50,863 (emphasis added) (App. F at 74a). Had the Tenth Circuit examined the agency's full record, it would have found that the Department reviewed this Court's cases, acts of Congress, *and* administrative practice before determining that the two-page 1979 decision was erroneous and should be withdrawn. The Tenth Circuit noted that the Department did not rely upon a theory of "restoration" to

(Cont'd)

Moreover, an agency decision should also be afforded deference when made in circumstances such as these, where a prior action made by a subordinate without notice, comment, or an adequately articulated basis is corrected after notice and comment and on a substantial record. *See Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (revised interpretation is entitled to deference, so long as agency justifies change with reasoned analysis); *Chevron*, 467 U.S. at 863-64 (agency may consider varying interpretations and wisdom of its policy on a continuing basis). An agency's power to reconsider its own decisions is well-established. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order.").

Rather than deferring to the agency's considered interpretation, confirmed by the historical record, the Tenth Circuit instead substituted its own analysis of the 1867 Agreement. In addition to the flaws already discussed, its review failed to account for the Delaware Tribe's own 1866 Treaty (in which it had expressly asserted its intent to preserve its tribal organization), simply declared "unambiguous" language that did not fit "unambiguously" within the options of the Cherokees' 1866 Treaty,[10] considered the fact of the Delaware Tribe's move as evidence but ignored the duress under which the Tribe found

(Cont'd)
determine the status of the Delaware Tribe, *cf.* App. A at 6a n.2, but as the Secretary explained in her supplemental briefing to the Tenth Circuit, that was because the Department found abundant evidence that the Delawares had never relinquished their tribal organization in the first place, which was confirmed by the fact that the United States government, through both its Legislative and Executive branches, continued to deal directly with them as a tribe after 1867. *See* Supp. Brief of Fed. Appellees, at 12 n.4.

10. The Tenth Circuit also stated, erroneously, that the D.C. Circuit found the 1867 Agreement's language to be "unambiguous," *see* App. A. at 19a, when in fact the D.C. Circuit actually said exactly the opposite: "On its face, the language of the 1867 Agreement provides no clear indication as to which of the two Article 15 provisions applies." 117 F.3d at 1500.



itself in 1867 (*see, e.g., Delaware Indians*, 193 U.S. at 141), and refused to consider evidence regarding the Delaware Tribe's contemporary understanding. *See* App. A at 18a-22a.

The end result is that, under the Tenth Circuit's erroneous analysis, it takes less for a tribe to be held to have surrendered its very relationship with the federal government than for it merely to be held to have waived its sovereign immunity in any given instance. Such a notion is contrary to the long-established precedent of this Court.[11] Here, as the Department recognized, the Delaware Tribe indisputably made two payments consistent with the "preservation" option of Article 15 (rather than merely the one payment consistent with the "abandonment" option), nowhere stated it was abandoning its tribal organization, and continued a course of conduct consistent with preservation of its tribal identity (as explicitly recognized by this Court in *Weeks*). Yet the effect of the Tenth Circuit's decision is that the Tribe is held to have waived its government's very existence in an unclear document, interpreted solely with reference to a treaty to which the Delaware Tribe was not a party (the 1866 Cherokee treaty), while under duress. Such a departure from this Court's requirements (for finding waiver, let alone abandonment of government relations), coupled with the devastating effects thereof, would also by itself provide a compelling case for review. But there is still more.

## III. THE TENTH CIRCUIT WRONGLY LIMITED THE DELEGATED POWER TO ESTABLISH FEDERAL RELATIONS WITH TRIBES.

The Tenth Circuit also held that the Department violated the law by using a process other than the Part 83 federal acknowledgment regulations to correct its 1979 error and

11. *See, e.g., C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose. . . . Similarly, to relinquish its immunity, a tribe's waiver must be 'clear'.") *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), *United States v. Testan*, 424 U.S. 392, 399 (1976), *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991).

reestablish direct relations with the Delaware Tribe. *See* App. A at 25a. This holding does more than contradict the express provisions of Part 83; it needlessly casts into doubt the recognition of many other tribes.

### A. The Acknowledgment Regulations Do Not Apply To Tribes Already Recognized By The Federal Government, and Do Not Purport to Govern the Correction of Errors.

Congress has power to regulate Indian affairs and has delegated much of that power to the Secretary of the Interior. *See* 25 U.S.C. §§ 2, 9. *See also Lonewolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning[.]"); *Miami Nation of Indians*, 255 F.3d at 345 (". . . Congress has delegated to the executive branch the power of recognition of Indian tribes[.]"); *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 132 (D.D.C. 2002) (Secretary has authority to determine who will be recognized as tribal representative for purpose of carrying out federal relations with tribe).

In an exercise of this delegated power, the Department promulgated regulations in 1978 to govern certain aspects of the process of recognizing tribes. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978). The 1978 regulations provided that:

> This part is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department.

43 Fed. Reg. at 39,362, published at 25 C.F.R. § 54.3(a). The regulations took effect on October 2, 1978. At that time, the Delaware Tribe of Indians was already federally recognized by the Executive branch and the Judicial branch. *See* AR 5 0069-70 ("Governing Bodies of Federally Recognized Indian Groups (Excluding Alaska"); *Weeks*, 430 U.S. at 77 (Delawares "are today a federally recognized tribe."). The regulations were



revised in 1994 but retained the provisions cited above. *See* 59 Fed. Reg. 9280, 9294 (Feb. 25, 1994).

The Part 83 procedures do not purport to address the correction of administrative errors. Rather, they set forth a detailed process for tribes to establish, as an initial, factual matter, that they are tribes. *See, e.g.*, 25 C.F.R. § 83.7.[12] Nor does the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, purport to limit the Department's power to correct errors. As substantive law, it merely requires the Secretary to publish an annual list of the recognized tribes. *Id.* at § 104, 25 U.S.C. § 479a-1. Although in its "findings" it notes that "Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 . . . ; or by a decision of a United States court;" *id.* at § 103(3), those "findings" do not have the force of law[13] and do not in any event purport to be an exhaustive description of the Department's delegated powers or a limitation on its recognized ability to correct its own errors. Indeed, the same Congress which passed the List Act also added provisions to Title 25 which prohibit the Department from maintaining in effect any determination that diminishes the privileges available to any one tribe relative to those available to others. *See* 25 U.S.C. 476(g); Pub. L. 103-263, § 5(b).

The Department was thus well within its discretion to act outside of Part 83 when it determined, after a comprehensive review conducted with notice and the opportunity for comment, that it erred in 1979 when it purported to end direct, government-to-government dealings with the Delaware Tribe. First, the Delaware Tribe's status as a tribe and its distinct tribal identity were never an issue, as even the 1979 letter stated. *See* C. App.

12. The process requires a petition to show conformance with seven specific criteria, using 35 kinds of evidence. 25 C.F.R. § 83.7. The regulations provide a lengthy timeline for decision. *See* 25 C.F.R. § 83.10.

13. *See, e.g., National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1996) ("statement of congressional findings is a rather thin reed upon which to base a requirement . . . neither expressed nor, we think, fairly implied in the operative sections of the Act.").

499 ("the Cherokee Delawares *are a tribe* within the Cherokee Nation. . . . [f]or *governmental* purposes, however, they must look to the Cherokee Nation.") (first emphasis added, second in original). Second, the Department's review showed that its 1979 decision to "retract" direct relations (and its companion decision to remove the Delaware Tribe from the list of federally recognized tribes in 1979) was invalid and therefore void *ab initio*, having never affected the Delaware Tribe's prior status. *See* Supp. App. 383 (1996 Letter to Cherokee Nation). *Cf.* H.R. Rep. No. 103-781, at 3, *reprinted in* 1994 U.S.C.C.A.N. 3768, 3769 (legislative history of List Act) (noting Department "does not have authority to 'derecognize' a tribe").

Finally, requiring the Delaware Tribe to go through Part 83 procedures would have been the least equitable and expedient way[14] to correct an erroneous decision found to be "striking both for the superficiality of its analysis and for the sweeping impact of its conclusions." *See* App. B at 44a. Agencies retain inherent power to correct their decisions and are afforded the discretion to interpret their regulations to determine the best means to act. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (giving great deference to Secretary's interpretation of regulation particularly when made by those charged with "making the parts work efficiently, and smoothly[.]"); *Dun & Bradstreet Corp. Foundation v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) (power to reconsider may be exercised at agency's initiative regardless of whether statute and regulations expressly provide for such review).

### B. The Tenth Circuit's Pronouncement That The Department May Act Only Pursuant To Part 83 Casts Doubt On The Status Of Other Tribes.

The issues in this case are made even more compelling by the Tenth Circuit's declaration that the Department erred in using

14. The General Accounting Office estimated that in 2001, 26 completed petitions awaited action by the BIA, which could take 15 years to resolve, even though the regulations contemplated a two-year process. *See* GAO Report No. 02-49, Indian Issues: Improvements Needed in Tribal Recognition Process, at 5, 10 (Nov. 2001).



a procedure outside of Part 83. According to the General Accounting Office, the federal acknowledgment procedures were "never intended to be the only way groups could receive recognition." *See* GAO Report No. 02-49 at 19.[15] The report notes that at least six other tribes have been "recognized" through various administrative procedures after the Part 83 process was established but outside of that process. *See id.* at 21. The Tenth Circuit's pronouncement that Part 83 applies to the Department's reaffirmation of direct relationships with tribal entities that the United States has dealt with as tribes and that have functioned as self-governing sovereigns thus has troubling implications that reach far beyond this case.

* * *

This Court has regularly acknowledged the importance of the principles of tribal self-governance, sovereignty, and independence, and has made plain its reluctance to let courts second-guess the Executive in tribal affairs. *See, e.g., United States v. Lara*, 541 U.S. 193, 205 (2004) (prior decisions make clear Constitution does not dictate "metes and bounds" of tribal autonomy and do not suggest courts should "second-guess the political branches' own determinations."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *White Mountain Apache v. Bracker*, 448 U.S. 136, 143-44 (1980). The Tenth Circuit, however, has taken the unprecedented step of voiding an Executive decision to establish direct federal relations with a tribe. And not just any tribe, but one which has been in government-to-government relations with the United States going back to 1778, which Congress has repeatedly referred to as a "tribe" in multiple Acts awarding the type of programming funds

15. When it remanded the case following its Rule 19 ruling, the D.C. Circuit also recognized that the Part 83 procedures were not exclusive, noting that direct relations with the Delaware Tribe might be reestablished by the Department following its 1979 error "either by means of the Final Decision, the Part 83 procedures, or another method." 117 F.3d at 1503.

that only "recognized" tribes receive, and that this Court itself found was "a federally recognized tribe." The Delaware Tribe of Indians respectfully submits that the decision of the Tenth Circuit merits this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX