

No. 04-1368

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**In the Supreme Court of the United States**

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DELAWARE TRIBE OF INDIANS, PETITIONER

*v.*

CHEROKEE NATION OF OKLAHOMA, ET AL.

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

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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), and *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), established that the Delaware Tribe had abandoned its organized tribal status under an 1867 Agreement with the Cherokee Nation.

2. Whether the court of appeals erred by refusing to give deference to the Department of the Interior's interpretation of the 1867 Agreement.

3. Whether the court of appeals erred in finding that the Department of the Interior had acted arbitrarily and capriciously by not using or waiving the federal acknowledgment procedures found at 25 C.F.R. Part 83 to determine whether the Delaware Tribe maintained a government-to-government relationship with the United States.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 389 F.3d 1074. The opinions of the district court (Pet. App. 31a-55a, 56a-66a) are reported at 241 F. Supp. 2d 1374 and 241 F. Supp. 2d 1368.

**JURISDICTION**

The judgment of the court of appeals was entered on November 16, 2004. Pet. App. 1a. Petitions for rehearing were filed by the Delaware Tribe of Indians and by the Secretary of the Interior. An order denying the petition of the Delaware Tribe was entered on January 11, 2005, and an order granting in part, modifying the previous decision, and otherwise denying the petition of the Secretary was entered on February 16, 2005 (Pet. App. 67a-68a, 69a-70a). The petition for a writ of certiorari

was filed on April 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. On September 23, 1996, the Assistant Secretary of the Interior for Indian Affairs issued a final decision confirming a direct, government-to-government relationship between the United States and petitioner Delaware Tribe of Indians. 61 Fed. Reg. 50,862 (Pet. App. 71a-76a). The 1996 decision formally retracted a letter of May 24, 1979, in which the Bureau of Indian Affairs, acting through the Acting Deputy Commissioner, had determined that the Department of the Interior would generally engage in government-to-government relations with the Delaware Tribe only through respondent Cherokee Nation of Oklahoma, and that the Department would engage in direct relations with the Delaware Tribe solely with respect to the Tribe's claims against the United States. The 1996 decision gave notice that the Department considered "the Delaware Tribe of Indians [to be] a tribal entity recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of its status as an Indian tribe," and that, "[a]s a separate sovereign, the Delaware Tribe of Indians will have the same legal rights and responsibilities as other tribes, consistent with federal law." 61 Fed. Reg. at 50,863.

The 1996 decision was 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." 61 Fed. Reg. at 50,863. That analysis was set forth in a June 19, 1996, memorandum by the Associate Solicitor of the Interior for Indian Affairs. C.A. App. 241-266. As explained in the memoran-

dum, the United States entered into a treaty with the Cherokee Nation in 1866 (1866 Treaty), 14 Stat. 799, which provided in Article 15 that other Tribes could settle on Cherokee territory (in what later became the State of Oklahoma) under one of two options, 14 Stat. 803. See Pet. App. 78a-80a. First, Tribes wishing to abandon their tribal organization and incorporate into the Cherokee Nation could make a single payment for the right to treatment “on equal terms” with Cherokee citizens. *Id.* at 79a. Second, Tribes wishing to preserve their own tribal organizations and to maintain distinct tribal laws, customs, usages could make two payments, one for a “district of country” equal to 160 acres for each member of the incoming Tribe, and a second to “enjoy all rights of native Cherokees.” *Ibid.*

The Associate Solicitor’s memorandum determined that, pursuant to an 1867 agreement between the Delaware Tribe and the Cherokee Nation (the 1867 Agreement) (Pet. App. 91a-96a), the Delaware Tribe had made the two payments called for in the “preservation” option of Article 15 of the 1866 Treaty, thus preserving its distinct tribal organization and maintaining its own tribal laws, customs, and usages, while at the same time obtaining for its members the right to equal treatment as Cherokee citizens. The Associate Solicitor found that conclusion to be consistent both with provisions of an 1866 treaty between the United States and the Delaware Tribe, 14 Stat. 793 (Pet. App. 77a-78a), which contemplated that the Tribe would preserve its tribal organization when it moved to Cherokee territory, and with contemporaneous expressions of the Delaware Tribe’s intent. See C.A. App. 244-247.

The Associate Solicitor’s memorandum also explained that, after the Delaware Tribe relocated to

Cherokee territory, both Congress and the Executive Branch had treated the Delaware Tribe as an independent tribal entity with the ability to carry out tribal governmental functions. For instance, the Delaware Tribe over the years maintained a functioning government in the form of a Business Committee and a general council, and the Tribe in 1958 formalized its government in by-laws approved by the Department of the Interior. The Associate Solicitor also observed that this Court, in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 77 (1977), had affirmed that the Delaware Tribe was a federally recognized Tribe. For those reasons, the Associate Solicitor's memorandum determined that the position adopted in the 1979 letter, *viz.*, that the Delaware Tribe generally was to be dealt with only through the Cherokee Nation, was inconsistent with the historical record and with the Department's treatment of the Delaware Tribe for nearly a century. C.A. App. 247-266.

2. On October 2, 1996, respondent Cherokee Nation brought an action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, seeking to overturn the Department's 1996 decision to restore direct, government-to-government relations with the Delaware Tribe. The action was filed in the District Court for the District of Columbia. That court granted the government's motion to dismiss under Federal Rule of Civil Procedure 19, on the ground that the complaint had failed to name an indispensable party, the Delaware Tribe, which could not be joined due to its sovereign immunity. *Cherokee Nation of Okla. v. Babbitt*, 944 F. Supp. 974 (D.D.C. 1996).

The Court of Appeals for the District of Columbia Circuit reversed on the Rule 19 issue, concluding that the Delaware Tribe could not assert sovereign immunity as against the Cherokee Nation. *Cherokee Nation of*



*Okla. v. Babbitt*, 117 F.3d 1489, 1503 (D.C. Cir. 1997). The court of appeals expressly limited its holding to the Rule 19 issue, leaving “for initial decision by the district court the proper 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.” *Id.* at 1503 n.15. On remand, the Delaware Tribe was joined as a defendant. The district court then concluded that it lacked personal jurisdiction over the Delaware Tribe and transferred the case to the District Court for the Northern District of Oklahoma. Pet. App. 4a.

3. a. The District Court for the Northern District of Oklahoma upheld the 1996 decision. Pet. App. 31a-66a. The court held that the Department’s decision was owed substantial deference, *id.* at 36a-45a, and that the decision was not arbitrary or capricious but rather, was consistent with congressional actions and the decisions of this Court, *id.* at 62a-66a.

b. The court of appeals reversed. Pet. App. 1a-30a. The court explained at the outset its understanding that the Department’s 1996 decision was based “solely” on an interpretation of the 1867 Agreement and 1866 treaties, and that the case thus turned exclusively “on the status of the Delawares under the treaties and the agreements entered into by the Cherokees and Delawares in the 1860s.” *Id.* at 6a-7a. The court specifically left “for another day what effect, if any, the post-1867 legislative and executive dealings with the Delawares had on their alleged status as a tribe.” *Id.* at 6a-7a n.2; see *id.* at 24a (“Whether the Delawares were reconstituted—be it through Act of Congress or administrative practice—sometime after 1867 is not before us.”).

The court gave no deference to the Department's interpretation of the 1866 treaties and 1867 Agreement, reasoning that Congress had not given the agency discretion to administer those instruments. Pet. App. 7a. The court construed the 1867 Agreement and 1866 treaties as establishing that the Delaware Tribe had selected the incorporation option rather than the preservation option, and that the Tribe thus had become absorbed into the Cherokee Nation rather than maintaining a distinct tribal identity. *Id.* at 7a-24a.

The court believed that its conclusion to that effect was compelled by this Court's decisions in *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), and *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894). Pet. App. 12a-17a. The court also undertook its own analysis of the 1867 Agreement and the 1866 treaties, and, in particular, the two payments made by the Delaware Tribe to the Cherokees under the 1867 Agreement. *Id.* at 17a-22a. The court concluded, contrary to the Department of the Interior, that the second payment for the purchase of land occupancy rights was not intended to preserve the Delaware's tribal identity. Pet. App. 21a. Finally, the court rejected the government's and the Delaware Tribe's reliance on *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), in which this Court observed that the Delaware Tribe, "[d]espite their association with the Cherokees, \* \* \* have over the years maintained a distinct group identity, and they are today a federally recognized tribe," *id.* at 77. In the court of appeals' view, *Weeks* at most stood for the proposition that the Delaware Tribe had been reconstituted

for the purpose of asserting claims against the United States. Pet. App. 23a-24a.<sup>1</sup>

#### ARGUMENT

The court of appeals erred in its understanding of the effect of the 1867 Agreement on the status of the Delaware Tribe as a distinct Tribe with a government-to-government relationship with the United States. This Court’s intervention is not warranted at this time, however, particularly because the court of appeals expressly left open the possibility that the Department could determine that the Delaware’s status as a federally-recognized Tribe has been restored by later congressional and administrative actions.

1. Rejecting the Department’s interpretation of the 1867 Agreement, the court of appeals found that the two payments made by the Delaware Tribe under that Agreement did not evidence an intent to proceed under the “preservation option” established by Article 15 of the 1866 Treaty with the Cherokee. The court of appeals concluded that even though the 1867 Agreement required the Delawares to make two payments—one for rights as Cherokees and one for land in the amount of 160 acres for each individual Delaware moving to Cherokee territory—the Agreement nonetheless did not invoke the preservation option. That conclusion is incorrect, and the court of appeals gave no convincing alternative explanation of the second payment. The court

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<sup>1</sup> Judge Seymour concurred in the judgment. Pet. App. 26a-31a. She believed that the majority “unnecessarily denigrates the contrary position of the Delaware Tribe and the Department of Interior, which rely on the long and proud history of the Delaware Tribe’s relations with the federal government to argue that the Tribe maintained its tribal sovereignty.” *Id.* at 26a.

also erred in declining to grant any deference to the Department's interpretation, reached after a notice and comment process, of the 1867 Agreement, the relevant treaties with the Cherokee Nation and the Delaware Tribe, and the historical background.

The court of appeals placed heavy reliance on two early cases of this Court dealing with the rights obtained by individual Delaware Indians under the 1867 Agreement. In *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894), this Court determined that the Delawares who had moved to Cherokee territory were entitled to share equally with Cherokees in the proceeds from the rental of certain lands. In *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904), this Court held that the land purchased pursuant to the 1867 Agreement was held by individual Delawares as life estates, and could not be inherited. Neither decision ruled on whether the Delaware Tribe had preserved its tribal organization by making the second payment contemplated under Article 15 of the 1866 Cherokee Treaty. See *Babbitt*, 117 F.3d at 1500. Accordingly, the court of appeals erred in finding that *Journeycake* and *Delaware Indians* had foreclosed the Department from finding that the payment the Delaware Tribe made for lands under the 1867 Agreement preserved its tribal organization.

2. The court of appeals made clear, however, that it was not ruling on the Delaware Tribe's alternative argument that, even if its tribal organization was lost in 1867, it was restored by later administrative and congressional actions. See Pet. App. 6a n.2. The court concluded that the Department's 1996 decision had not rested on a "restoration" theory, and the court accordingly left "for another day what effect, if any, the post-1867 legislative

and executive dealings with the Delawares had on their alleged status as a tribe.” *Id.* at 6a & n.2.

There is substantial indication that, even if the Delaware Tribe relinquished its tribal organization in the 1867 Agreement, congressional and administrative actions following 1867 have restored the Delaware Tribe’s status as a recognized tribe. Such a conclusion would be consistent with this Court’s decision in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). *Weeks* upheld, against an equal protection challenge, Congress’s decision to distribute a claims award to the Delaware Tribe and a separate Tribe of Delaware descendants (the “Absentee Delawares”) while excluding another group of Delaware descendants (the “Kansas Delawares”). The Court reasoned, *inter alia*, that the Kansas Delawares had severed their tribal relations, and, unlike the Delaware Tribe and the Absentee Delawares, were not a distinct and recognized tribal entity. *Id.* at 85-86. The Court observed with respect to the Delaware Tribe that, “[d]espite their association with the Cherokees, these Indians \* \* \* have over the years maintained a distinct group identity, and today are a federally recognized tribe.” *Id.* at 77. See also *id.* at 77 n. 8 (“it is clear that Congress \* \* \* dealt with the Cherokee Delawares as a distinct entity”).

This Court’s treatment of the status of the Delaware Tribe in *Weeks* is in tension with the ruling below. At the very least, *Weeks* would be consistent with a determination that tribal status was “restored” to the Delaware Tribe subsequent to 1867.<sup>2</sup> Because the restora-

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<sup>2</sup> In dictum, the court of appeals suggested (Pet. App. 24a) that, “[a]t most, *Weeks* stands for the proposition the Delawares reconstituted for claims purposes.” Nothing in *Weeks* suggests such a limitation, and the *Weeks* majority in fact relied on a statute that recognized that the

tion question was explicitly left unresolved by the court of appeals, however, and because the case does not otherwise appear to implicate issues of broader significance concerning other Tribes, this Court's review does not appear warranted at this time.<sup>3</sup>

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Delaware Tribe had a functioning tribal government. See 430 U.S. at 77 n.8 (citing Act of Apr. 21, 1904, Ch. 1402, § 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”); see also *id.* at 94 n.4 (Stevens, J., dissenting) (“To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe.”). In any event, the court of appeals' understanding of *Weeks* would not prevent the Department from concluding that administrative and congressional actions after 1867 reflect recognition of the Delaware Tribe's status as a distinct Tribe for all purposes.

<sup>3</sup> After finding that the substance of the Department's 1996 decision was contrary to this Court's rulings in *Journeycake* and *Delaware Tribe*, the court of appeals briefly noted its view that the decision was procedurally deficient because the Department did not use (or waive) the federal acknowledgment procedures found in 25 C.F.R. Part 83. Pet. App. 25a. That statement misperceives the nature of the issue before the Department, which was whether to correct a 1979 determination that had revoked direct dealings with the Delaware Tribe as a distinct tribal entity. The Part 83 procedures are not designed to correct such an erroneous action. See 25 C.F.R. 83.3 (a) and (b).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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