

Jul 02, 2025

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES W BAUGH,

Defendant.

No. 1:20-PO-08017-MKD-1

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS THE
CITATION**ECF No. 25**

Before the Court is Defendant James Baugh's Motion to Dismiss the Citation, ECF No. 25. The Court has heard from counsel, considered the parties' arguments, the briefing, the witness testimony, and the record, and is fully informed. For the reasons explained below, the Court denies the Motion.

BACKGROUND**A. Factual History**

This case stems from a citation issued to Defendant on October 20, 2019, for felling a tree in the Okanogan-Wenatchee National Forest in violation of 36 C.F.R. § 261.10(l). ECF No. 1.

1 On October 18, 2019,¹ U.S. Forest Service Officer K. Mueller observed a
2 man using a chainsaw to cut a standing tree in a prohibited area, near Forest
3 Service Road 112 in the Okanogan-Wenatchee National Forest. ECF No. 1-2.
4 Officer Mueller attempted to contact him, but he did not respond and instead put
5 away his chainsaw and drove away. Officer Mueller took photographs of the
6 man's vehicle as he drove away, and of the damaged tree. She then contacted
7 Officer T. Smith, who responded to the scene. Officer Smith observed a recently
8 cut fir tree and fresh sawdust on the ground.

9 Officer Mueller recounted her observations to Officer Smith and mentioned
10 that she thought she recognized the man as "Jim Baugh." Officer Smith checked
11 the license plate of the man's vehicle and learned that it was registered to
12 Defendant James Baugh.

13 Officer Smith contacted Defendant at his residence on October 20, 2019.
14 Defendant told Officer Smith that he "was up in the hills" to cut firewood on
15 October 18, 2019, and asked if Officer Smith had come "because the lady saw
16 [him]." Defendant said he had left because "the lady never got out of her truck."
17

18 ¹ The citation lists the offense date as October 20, 2019, although it appears that
19 was the date Officer Smith issued the citation. *See* ECF No. 1. The date of the
20 underlying offense was October 18, 2019. *See* ECF No. 1-2.

1 Defendant appeared to recognize Officer Smith. While discussing where they
2 could have met before, Defendant stated, “I have quite a history of dealing with
3 cutting firewood.”

4 Officer Smith asked Defendant if he had a permit for cutting firewood;
5 Defendant said yes and produced it for inspection. Defendant told Officer Smith
6 that he didn’t need to have a permit to cut firewood, as he is an enrolled Cherokee
7 tribal member with treaty rights, but still obtains a permit because he doesn’t “like
8 to fight in court.” Defendant denied that Officer Mueller would have seen him
9 cutting down a tree on October 18, 2019. He said he had left Road 112 without
10 any firewood to avoid conflict.

11 Officer Smith told Defendant he was not exempt from the permit
12 requirement and had been cutting firewood in an area where it was prohibited.
13 Officer Smith photographed Defendant’s permit and tribal enrollment card and
14 cited Defendant for 36 C.F.R. § 261.10(l) (violation of a term or condition of a
15 special use authorization). Defendant refused to sign the citation and declined
16 Officer Smith’s request to inspect the firewood near his home.

17 **B. Procedural History**

18 In March 2020, Defendant appeared on the citation and was appointed
19 counsel. ECF No. 9. Defendant filed the instant Motion to Dismiss. ECF No. 25.
20 The Court heard argument on Defendant’s Motion to Dismiss the Citation, ECF

1 No. 25. Defendant was present and represented by AFDs Craig Webster and Paul
2 Shelton. Interns Abigail Maurer and Bailey Hampton represented the United
3 States, under the supervision of AUSA Timothy Ohms. Following argument, the
4 Court ordered, and the parties filed, additional briefing on questions raised for the
5 first time at the hearing. ECF Nos. 37, 41, 49, 53, 54.

6 On July 9, 2021, the Court conducted an evidentiary hearing and heard
7 further oral argument. ECF No. 57.² Defendant was present and represented by
8 Mr. Webster and Mr. Shelton. Interns Cassandra Hughes and Ms. Hampton
9 represented the United States, under the supervision of AUSA Matthew Stone.
10 Southern Cherokee Tribal Chief Stevie Matthews testified for Defendant. *Id.* The
11 Court ordered a further round of optional, supplemental briefing on issues raised
12 by Chief Matthews's testimony, the parties' arguments, and the Court at that
13 hearing. ECF No. 56. Both parties submitted supplemental briefing. ECF
14 Nos. 58, 59. The Court struck Exhibits B and C from Defendant's supplemental
15 briefing, as the contents had not been identified or authenticated and were not
16 matters of which the Court could take judicial notice. ECF No. 60. The Court
17 permitted, and Defendant provided, revised briefing thereafter. ECF No. 61.

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19

 ² The Court cites to the hearing minutes when referring to the events of this
20 hearing, as there is no formal transcript filed in the record.

LEGAL STANDARD

A. Motion to Dismiss

Under Federal Rule of Criminal Procedure 12(b)(1),³ a party may “raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” “A pretrial motion is generally ‘capable of determination’ before trial if it involves questions of law rather than fact.” *United States v. Shortt Acct. Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986) (citations omitted). The Court “may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motions so long as the court’s findings on the motion do not invade the province of the ultimate finder of fact.” *Id.* (citation, quotation marks, and footnote omitted).

Whether a criminal charge is barred by a promise of immunity is a question of law that is properly brought in a pretrial motion. *See, e.g., United States v. Bulger*, 928 F. Supp. 2d 305, 318-19 (D. Mass. 2013); *United States v. Dornau*, 356 F. Supp. 1091, 1099 (S.D.N.Y. 1973); *United States v. Rand*, 308 F. Supp. 1231, 1237 (N.D. Ohio 1970).

³ The Federal Rules of Criminal Procedure apply to petty offenses unless Rule 58 provides otherwise. Fed. R. Crim. P. 58(a)(1).

1 **B. Treaty Interpretation**

2 When interpreting a treaty, a court must begin with its text. *Herrera v.*
3 *Wyoming*, 587 U.S. 329, 349 (2019) (citing *Washington v. Wash. State Com.*
4 *Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676 (1979)); *Medellin v. Texas*, 552
5 U.S. 491, 506 (2008) (“The interpretation of a treaty, like the interpretation of a
6 statute, begins with its text.”); *Minnesota v. Mille Lacs Band of Chippewa Indians*,
7 526 U.S. 172, 206 (1999). “Indian treaties cannot be re-written or expanded
8 beyond their clear terms to remedy a claimed injustice or to achieve the asserted
9 understanding of the parties.” *Choctaw Nation of Indians v. United States*, 318
10 U.S. 423, 432 (1943). In other words, “courts cannot ignore plain language that,
11 viewed in historical context . . . clearly runs counter to a tribe’s later claims.” *Or.*
12 *Dep’t of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). But
13 where the treaty text is ambiguous, ambiguities are to be resolved in favor of the
14 Indian treaty party, and “the words of a treaty must be construed in the sense in
15 which they would naturally be understood by the Indians.” *Herrera*, 587 U.S. at
16 345 (citations and quotation marks omitted).

17 **DISCUSSION**

18 **A. Summary of Parties’ Arguments**

19 Defendant argues that, as an enrolled member of the Southern Cherokee
20 Tribe, he is a beneficiary to the Treaty with the Cherokee (1835), 7 Stat. 478

1 (hereinafter “the Treaty of New Echota” or “Treaty”)).⁴ ECF No. 25 at 2-3. He
2 claims that the Treaty of New Echota⁵ conferred rights that include a right to cut
3 firewood in the Okanogan-Wenatchee National Forest. *Id.*

4 Defendant relies on the following Treaty language:

5 In addition to the seven millions of acres of land thus
6 provided for and bounded, the United States further
7 guaranty to the Cherokee nation a perpetual outlet west,
8 ***and a free and unmolested use of all the country west of
the western boundary of said seven millions of acres, as
far west as the sovereignty of the United States and their
right of soil extend . . .***

9 *Id.* at 8 (emphasis in Defendant’s brief). He argues that the conduct underlying the
10 citation was “use” of land west of the Cherokee Territory and therefore protected
11 by the Treaty. *Id.* at 2-3.

12 The Court construes this as a claim that the Treaty provision is the United
13 States’ binding promise to members of the Cherokee Nation of immunity from
14

15 ⁴ Defendant filed a copy of the Treaty of New Echota at ECF No. 25-1. For clarity,
16 the Treaty citations in this Order refer to ECF No. 25-1.

17 ⁵ At the July 9, 2021, hearing, Chief Matthews also cited the Treaty of Nogales
18 (between the Cherokee Nation and Spain, signed before the Louisiana Purchase) as
19 a pertinent source of treaty rights. However, the parties did not raise the Treaty of
20 Nogales in the briefing, so the Court does not address it.

1 prosecution for such use, such that it is properly brought in a pretrial motion to
2 dismiss. *See Bulger*, 925 F. Supp. at 318-19. Within this overarching claim of
3 Treaty immunity, the parties dispute three key issues.⁶

4 First, Defendant argues that under the rules of construction that apply to
5 Indian treaties, the scope of the Treaty right of “free and unmolested use”
6 expanded with the westward expansion of the United States’ sovereignty. ECF
7 No. 25 at 12-13; ECF No. 41 at 19-21; ECF No. 61 at 11-15. The United States
8 argues that the “use” clause applied to a finite parcel of land in Oklahoma (plus an
9 approximately two-mile strip in Kansas), which did not include, and did not
10 expand, to land in present day Washington state. ECF No. 53 at 4-6; ECF No. 58
11 at 3-4.

12 Second, Defendant contends that Congress has not expressly abrogated the
13 Treaty of New Echota nor the right of use. ECF No. 25 at 10-12, 13-15; ECF
14

15 ⁶ Two previously disputed matters are now resolved. The United States contended
16 that the cited conduct occurred in Indian Country, but the parties now agree that it
17 did not. ECF No. 30 at 3-4; ECF No. 38 at 5. Additionally, the United States no
18 longer contests that the “free and unmolested use of all the country . . . ,” as
19 described in the Treaty of New Echota, would encompass the act of cutting a tree.
20 ECF No. 53 at 4.

1 No. 54 at 11-14. The United States responds that the Treaty right of use was
2 abrogated by Congress when the Cherokee Nation conveyed the relevant land back
3 to the United States. ECF No. 53 at 6-7; ECF No. 58 at 5-7.

4 Third, Defendant argues that the Southern Cherokee descend from the
5 signors of the Treaty of New Echota and are therefore successors-in-interest to the
6 Treaty's benefits. ECF No. 41 at 2-5, 28-29; ECF No. 54 at 1-11; ECF No. 61 at
7 15. The United States asserts that Defendant is not a beneficiary of the Treaty of
8 New Echota. ECF No. 53 at 2-4; ECF No. 58 at 2-3.

9 Accordingly, to prevail on this Motion to Dismiss, Defendant must establish
10 all of the following regarding the "use" clause at issue:

11 (1) that this language confers an easement right to take resources from land
12 beyond the land conveyed to the Cherokees in fee simple by patent in
13 1838;

14 (2) that this easement right applies to any land west of the Cherokee
15 Territory that the United States subsequently acquired after the Treaty
16 was signed;

17 (3) that this easement right was not subsequently abrogated by Congress;
18 and

19 (4) that the Southern Cherokee are beneficiaries of the Treaty.
20

1 The Motion fails on the first point. Based on the Treaty language and the
2 historical context of the Treaty, and Defendant's failure to produce evidence to the
3 contrary, the Court concludes that the Treaty of New Echota did not confer a right
4 to take resources from land beyond the land conveyed by patent to the Cherokees
5 in fee simple in 1838.

6 **B. Historical Background**

7 "[R]eview of the history and the negotiations of the agreements is central to
8 the interpretation of treaties." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at
9 202 (citing *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167
10 (1999)). This is "especially helpful" in the context of Indian treaties, which are
11 interpreted "to give effect to the terms as the Indians themselves would have
12 understood them." *Id.* at 196 (citations omitted).

13 The Court begins by summarizing the history relevant to the instant motion.

14 *1. The Treaty of New Echota*

15 The Treaty of New Echota was signed on December 29, 1835, with
16 signatures and further signed articles added in 1836. ECF No. 25-1; *Cherokee*
17 *Nation v. United States*, 40 Ct. Cl. 252, 265-67 (1905). The Senate ratified the
18 Treaty and supplemental articles in May 1836. *Cherokee Nation*, 40 Ct. Cl. at 268.
19
20

1 The “Cherokee Nation”⁷ agreed to “cede, relinquish, and convey” seven
2 million acres of ancestral land east of the Mississippi River to the United States.
3 ECF No. 25-1 at 3, Art. 1. The United States promised various consideration, such
4 as money, land, a future delegate in the House of Representatives, and subsistence
5 resources. Article 2, the provision relevant to this Motion to Dismiss, contained
6 certain promises relating to land. The first portion of Article 2 read as follows:

7 ARTICLE 2. Whereas by *the treaty of May 6th 1828* and
8 *the supplementary treaty thereto of Feb. 14th 1833* with
9 the Cherokees west of the Mississippi *the United States*
10 *guarantied and secured to be conveyed by patent, to the*
11 *Cherokee nation of Indians the following tract of*
12 *country*

13 “Beginning at a point on the old western territorial line of
14 Arkansas Territory being twenty-five miles north from the
15 point where the territorial line crosses Arkansas river,
16 . . . [⁸] will make *seven millions of acres within the whole*
17 *described boundaries*. In addition to the seven millions of
18 acres of land thus provided for and bounded, the United
19 States further guaranty to the Cherokee nation a perpetual
20 outlet west, and a free and unmolested use of all the
country west of the western boundary of said seven
millions of acres, as far west as the sovereignty of the
United States and their right of soil extend:

17 ⁷ As explained below, the precise identity of the Cherokee signatories of the Treaty
18 is more complicated than the Treaty language reflects.

19 ⁸ The Court omits most of the detailed land boundary definition from the block
20 quotation.

1 *Provided however* That if the saline or salt plain on the
2 western prairie shall fall within said limits prescribed for
3 said outlet, the right is reserved to the United States to
4 permit other tribes of red men to get salt on said plain in
 common with the Cherokees; And letters patent shall be
 issued by the United States as soon as practicable for the
 land hereby guarantied.”

5 *id.* at 3-4, Art. 2 (emphases and paragraph break added). The opening clause
6 explains that the quoted language sets forth the “tract of country” that “the United
7 States guarantied and secured to be conveyed by patent” in its treaties “with the
8 Cherokees west of the Mississippi” in 1828 and 1833. ECF No. 25-1 at 3.

9 The latter portion of Article 2 read as follows:

10 And whereas it is apprehended by the Cherokees that *in*
11 *the above cession there is not contained a sufficient*
12 *quantity of land for the accommodation of the whole*
13 *nation* on their removal west of the Mississippi the United
14 States in consideration of the sum of five hundred
15 thousand dollars therefore hereby covenant and agree to
16 convey to the said Indians, and their descendants *by*
17 *patent, in fee simple* the following *additional tract of land*
18 situated between the west line of the State of Missouri and
 the Osage reservation beginning at the southeast corner of
 the same . . . *estimated to contain eight hundred*
 thousand acres of land; but it is expressly understood that
 if any of the lands assigned the Quapaws shall fall within
 the aforesaid bounds the same shall be *reserved and*
 excepted out of the lands above granted and a pro rata
 reduction shall be made in the price to be allowed to the
 United States for the same by the Cherokees.

19 To summarize, Article 2 incorporated the United States’ 1828 and 1833
20 treaty promises to “convey[] by patent” to the Cherokees a tract comprised of a

1 specifically defined 7-million-acre tract, “a perpetual outlet west, and a free and
2 unmolested use . . . ,” while reserving other Tribes’ rights to collect salt from the
3 salt plain if that salt plain happened to fall within the outlet, then promised to
4 convey to the Cherokees by patent in fee simple an additional tract of land with
5 specific boundaries, estimated to include about 800,000 acres, but minus any
6 portion of that land that overlapped with lands the United States had previously
7 assigned to the Quapaw Indians.

8 “The small number of Cherokees east of the Mississippi who negotiated”
9 and signed the Treaty of New Echota were “called or styled the ‘Treaty Party.’”
10 *Cherokee Nation*, 40 Ct. Cl. at 265. Alternatively, the Treaty Party was called the
11 “Ridge party, from the name of their leader.”⁹ *Western Cherokee Indians v. United*
12 *States*, 27 Ct. Cl. 1, 3 (1891). The Treaty Party represented a “small minority” of
13 the Eastern Cherokees who “were in favor of emigration” but had “no official
14 position [or] any delegated authority” to act on behalf of the Eastern Cherokee
15 Nation as a whole. *Id.*

17 ⁹ That leader was John Ridge, who was listed first among the “delegation . . . who
18 represented that portion of the [Cherokee] nation in favor of emigration to the
19 Cherokee Country west of the Mississippi” in the Treaty of New Echota. ECF
20 No. 25-1 at 2.

1 In response to the signing of the Treaty, the Eastern Cherokee Nation
2 “immediately, by their proper and constituted authorities, disavowed the treaty as
3 the act of the Cherokee Nation,” notified the President and Congress of their
4 position, “and at all times refused to recognize or yield any assent to its
5 requirements until compelled to do so” by military force in May 1838.¹⁰ *Id.* The
6 Treaty Party “emigrated to the Cherokee country in the Indian territory” between
7 1836 and 1838. *Id.* At that time, the Treaty Party “number[ed] about 2,200”
8 individuals, while the rest of the Eastern Cherokee Nation “numbered about
9 14,757.” *Id.*

10 The Treaty Party was also distinct from the Western Cherokees, “who were
11 removed west of the Mississippi prior to May 23, 1836.” *Cherokee Nation*, 40 Ct.
12 Cl. at 265, 268. The Western Cherokees were also known as the “Old Settlers,”
13 after the Eastern/Western terminology was “no longer distinctive.” *Id.* The
14

15 ¹⁰ A group of “between eleven and twelve hundred” Eastern Cherokee were
16 permitted to remain in North Carolina, Tennessee, and Alabama under Article 12
17 of the Treaty of New Echota. *Eastern Band of Cherokee Indians*, 117 U.S. at 303.
18 By remaining, the members of this group “ceased to be part of the Cherokee
19 nation, and henceforth they became citizens of and were subject to the laws of the
20 state in which they resided.” *Id.*

1 Western Cherokees had concluded their own treaties with the United States in
2 1817, 1819, 1828, and 1833. *Western Cherokee Indians*, 27 Ct. Cl. at 2-3; Treaty
3 with the Western Cherokee (1833), 7 Stat. 414.¹¹

4 The distinctions between the Treaty Party, Eastern Cherokee, and Western
5 Cherokee are not expressly recognized in the text of the Treaty of New Echota and
6 inconsistently recognized in other legal documents and decisions. *See* ECF
7 No. 25-1 at 2 (bearing the official title of “Treaty with the Cherokee”); ECF
8 No. 53-3 (describing the treaties of 1828, 1833, and 1835 as treaties “with the
9 Cherokee Nation of Indians”); *Western Cherokee Indians*, 27 Ct. Cl. at 3
10 (describing the Treaty of New Echota as the “treaty between the United States and
11 the Cherokee Nation, or Eastern Cherokees,” while acknowledging that the
12 Cherokee signatories were “[a] small minority of the [Eastern Cherokee] nation . . .
13 known as the treaty party, or Ridge party”); *Holden v. Joy*, 84 U.S. 211, 213 (1872)
14 (describing the Treaty of New Echota as “a treaty with the Cherokees”) (emphasis
15

16 ¹¹ Under these earlier treaties between the United States and the Western
17 Cherokees, the Eastern Cherokees “acquired . . . no right or interest in the ceded
18 lands in the Indian Territory, and asserted none.” *Western Cherokee Indians*, 27
19 Ct. Cl. at 3. “This continued to be the condition of affairs” until the Treaty of New
20 Echota. *Id.*

omitted); *Eastern Band of Cherokee Indians*, 117 U.S. at 293, 298-99 (noting that the Eastern-Western Cherokee divide was first recognized by the 1828 treaty with the Western Cherokee, and that the Treaty of New Echota was signed by “the Cherokee nation”). However, it appears well-accepted that these factional divisions existed, even if a particular faction was sometimes referred to as “the Cherokees” or “the Cherokee Nation” in general.

2. *Events from 1838 to 1846*

As referenced in the Treaty of New Echota, the United States executed a patent on December 31, 1838, (hereinafter the “Patent” or “1838 Patent”) conveying “two tracts of land” to “the Cherokee Nation of Indians” pursuant to the promises contained in the 1828 and 1833 treaties (with the Western Cherokee) and in the Treaty of New Echota. ECF No. 53-3 at 2. The Patent conveyed a total of 14,374,135.14 acres to the Cherokee Nation in fee simple, subject to the salt-plain easement secured by the Treaty of New Echota, as the salt plain “ha[d] been ascertained to be within the limits prescribed for the outlet,” and certain rights reserved by the United States in Article 3 of the Treaty of New Echota. *Id.* The conveyance was made to the Cherokee Nation as a whole, including the Treaty Party, the Eastern Cherokee, and the Western Cherokee. *Id.*; *see also E. or Emigrant Cherokees & W. or Old Settler Cherokees v. United States*, 88 Ct. Cl. 452, 465 (1939).

1 The forced removal of over 16,000 Eastern Cherokee to the Cherokee
2 Territory—the Trail of Tears—began in May 1838 and concluded in March 1839.
3 *Trail of Tears: History & Culture*, National Park Service (updated Apr. 23, 2025),
4 <https://www.nps.gov/trte/learn/historyculture/index.htm> (last visited July 1, 2025).
5 More than one thousand, and “perhaps several thousand,” Eastern Cherokee did
6 not survive the journey. *Id.*

7 Thereafter, the divisions between the three Cherokee factions remained
8 deep. The Eastern Cherokee “treated the act of signing the treaties of 1835 and
9 1836 . . . as treasonable to the Cherokee Nation” and enacted and enforced
10 “decrees of outlawry” against the Treaty Party. *Western Cherokee Indians*, 27 Ct.
11 Cl. at 5. “They also maintained their authority throughout the Cherokee country by
12 military force” against the Treaty Party “and all Western Cherokees who did not
13 submit to and recognize their government.” *Id.* The Eastern Cherokees
14 “persecuted the Treaty Party Cherokees and the Western Cherokees[,] and a period
15 of sanguinary strife, bordering on civil war, ensued.” *Cherokee Nation of Indians*
16 *in Okla. ex. rel. W. (Old Settler) Cherokee Indians v. United States*, 124 Ct. Cl.
17 315, 320 (1953). The Treaty Party and the Western Cherokee sided with each
18 other but were still outnumbered by the Eastern Cherokee. *Eastern Band of*
19 *Cherokee Indians*, 117 U.S. at 306.
20

1 On September 6, 1839, a “constitution for the reunited [Cherokee] nation”
2 was adopted. *Heckman v. United States*, 224 U.S. 413, 431 (1912); *Eastern Band*
3 *of Cherokee Indians*, 117 U.S. at 305. But the constitution’s language of
4 reunification did not end the “bitter feeling” between the factions. *Eastern Band of*
5 *Cherokee Indians*, 117 U.S. at 305. “The situation became intolerable, and in 1845
6 the contending factions”—the Old Settlers, the Treaty Party, and the “[A]nti-
7 [T]reaty [P]arty”—sent delegates to Washington” for recourse. *Id.* at 306. The
8 Old Settlers and the Treaty Party sought “a division of the people into two nations
9 and a division of the territory.” *Id.* “Demands were also made by each party
10 against the United States under the [T]reaty of New Echota.” *Id.*

11 The result was the Treaty of August 6, 1846,¹² which was negotiated by
12 delegates “appointed by the regular[l]y constituted authorities of the Cherokee
13 nation,” delegates representing the Treaty Party, and delegates representing the Old
14 Settlers. *Id.* The 1846 treaty “declared that all difficulties and differences”
15 between the factions “were settled and adjusted” and “that all party distinctions
16 should cease” except as necessary to effectuate the treaty. *Id.* at 306-07. “The
17 treaty also declared that the lands occupied by the Cherokee nation should be

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19 ¹² Treaty with the Cherokee (1846), 9 Stat. 871. This Order cites to this treaty
20 through the copy provided by Defendant at ECF No. 41-2.

1 secured to the whole Cherokee people for their common use and benefit . . . thus
2 recognizing that all the lands ceded by the United States for the benefit of the
3 Cherokees west of the Mississippi belonged to the entire nation” rather than to any
4 individual faction. *Id.* at 307; ECF No. 41-2 at 2, Art. 1.

5 However, factional distinctions remained relevant for the purpose of
6 distributing the *per capita* payments promised in the Treaty of New Echota. *See*
7 ECF No. 41-2 at 2-3, Arts. 4-6. Article 6 specifically recognized that the Treaty
8 Party had “suffered losses and incurred expenses in consequence of” the Treaty of
9 New Echota and would receive specific indemnity payments therefor, including
10 payments to the heirs of Major Ridge, John Ridge, and Elias Boudinot. ECF
11 No. 41-2 at 3-4.

12 3. *The 1866 Treaty*

13 The Cherokee Nation was one of five Indian tribes that “fought with the
14 Confederacy during the Civil War” and, after the war, signed another treaty with
15 the United States. *See Harvest Inst. Freedman Fed. v. United States*, 80 Fed. Cl.
16 197, 198-99 (2008) (quoting Treaty with the Cherokee (1866), 14 Stat. 799), *aff’d*,
17 324 F. App’x 923 (Fed. Cir. 2009). In the 1866 treaty, the Cherokee Nation ceded
18 a portion of the lands they had previously acquired through the Treaty of New
19 Echota and authorized the United States to settle or purchase other lands for
20 resettlement of other Tribes. Treaty with the Cherokee (1866) at Art. 17, 14 Stat.

799; *see also* Charles C. Royce, *Map Showing the Territory Originally Assigned to the Cherokee “Nation of” Indians West of the Mississippi* (1884), N.Y. Public Library Digital Collections, <https://digitalcollections.nypl.org/items/e14b40c0-de99-0135-1744-67aae6aad138> (last visited July 1, 2025) (regions 39 to 45 demarcate Cherokee lands affected by the 1866 treaty).

Article 4 provided that those Cherokees who “elect[ed] not to reside” between the Arkansas and Grand Rivers had “the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River” and “bounded on the . . . west by the Creek reservation.”¹³ Treaty with the Cherokee (1866) at Art. 4, 14 Stat. 799. Article 8 described the occupants of these lands as “the so-called southern Cherokees.” *Id.* at Art. 8.

4. *The “Cherokee Outlet” Agreement*

Finally, in 1891, the United States and the Cherokee Nation entered an agreement for the Cherokees’ cession of “what was known as the Cherokee Outlet in Oklahoma.” *Cherokee Nation v. United States*, 270 U.S. 476, 480 (1926). The

¹³ This language parallels Chief Matthews’s testimony that the Southern Cherokee were those living in the Canadian district or Cooweescoowee district of the Cherokee Territory.

Cherokee Outlet was comprised of “8,144,682.91 acres between the 96th and 100th degree of west longitude, south of the Kansas line.” *Id.*

C. Nature of the Treaty “Outlet” and “Use”

Defendant argues that the Treaty language, “a free and unmolested use . . .” conferred to the Cherokees an easement right to use land “[i]n addition to and separate from” the 7-million-acre “main reservation land” and the “outlet to the west of the main tract.” ECF No. 54 at 11-14; *see also* ECF No. 61 at 12-13. The United States argues that the outlet and the “free and unmolested use” provisions applied to the same “finite parcel” of land, which was conveyed in fee simple to the Cherokees in the 1838 Patent. ECF No. 53 at 4-5.

The Treaty does not define “outlet” or “use.” Both words had numerous definitions in common use as of 1835. *See, e.g., Outlet* at definitions 1.a, 1.b, 1.d, 1.3, 2, 3, 4.a, Oxford English Dictionary (https://www.oed.com/dictionary/outlet_n (last visited July 1, 2025)). Therefore, the Court looks to the context surrounding the Treaty to determine the meaning of these words.

1. Pre-1835 Contextual Sources

The concept of an “outlet” for the Cherokees appears to date back at least as far as 1818, in statements from federal executive officials. In 1818, the Secretary of War wrote to the Superintendent of Indian Affairs that the Cherokee sought “an outlet to the West to the game country” and discussed whether the Osage Indians,

1 “who hold the country west of [the Cherokees’] Settlement,” might relinquish
2 some of that land “to give the outlet, or at least to grant [the Cherokees] an
3 undisturbed passage to and from their hunting grounds.”¹⁴ *E. or Emigrant*
4 *Cherokees*, 88 Ct. Cl. at 454. The same year, President Monroe also “expressed
5 the desire to grant to [the Cherokees] an outlet west so as to provide additional
6 hunting grounds[,] . . . in the nature of an inducement to [the Cherokees] for their
7 removal from the east to the west of the Mississippi River.” *Id.* at 463. These
8 early references reflect some uncertainty about whether this “outlet” would take
9
10

11 ¹⁴ It was not uncommon for Indian treaties to reserve or confer rights for the Indian
12 beneficiaries to travel or take resources from land outside the borders of the Tribe’s
13 own territory. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that
14 an 1859 treaty with the Yakama Nation “imposed a servitude” upon the lands
15 customarily used for fishing that guaranteed tribal members the right to pass
16 through and fish on privately owned lands outside the reservation); *Antoine v.*
17 *Washington*, 420 U.S. 194, 195-97 (1975) (reversing the convictions of two
18 Colville tribal members for hunting deer out of season and outside the Colville
19 reservation based on an 1891 treaty that expressly reserved hunting and fishing
20 rights in that area).

1 the form of an additional portion of land granted to the Cherokees, or merely an
2 easement allowing “undisturbed passage to and from their hunting grounds.”

3 The first Cherokee treaty to reference the outlet was the 1828 treaty between
4 the United States and the Western Cherokee.¹⁵ *Id.* at 463-64. The preamble of the

5
6 ¹⁵ The Cherokee signatories to the 1828 treaty and the subsequent 1833 treaty were
7 the *Western* Cherokee, whereas the Treaty of New Echota was signed by the
8 Treaty Party from the Eastern Cherokee.” *E. or Emigrant Cherokees*, 88 Ct. Cl. at
9 464. But these two prior treaties are closely interconnected with the Treaty of New
10 Echota. The Treaty of New Echota expressly referenced the 1828 and 1833
11 treaties. *See* ECF No. 25-1 at 3 (“ARTICLE 2. Whereas by the treaty of May 6th
12 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees
13 west of the Mississippi . . .”). In fact, Article 2 of the Treaty of New Echota
14 quoted from the 1833 treaty, including the boundary definitions of the 7-million-
15 acre tract and the “outlet” and “use” language. *See id.* at 3-4 (enclosing in
16 quotation marks the entire section from “Beginning with . . .” on page 3 to “. . . as
17 soon as practicable for the land hereby guarantied.” on page 4). The 1838 patent
18 expressly references the United States’ commitments from these three treaties and
19 quotes from “the second and third articles of the treaty of the 29th of December,
20 1835[.]” ECF No. 53-3 at 2. Moreover, the Eastern Cherokee were formally

1 1828 treaty specifically cited “the pledges given [to the Western Cherokees] by the
2 President of the United States, and the Secretary of War” in 1818 and 1821 “in
3 regard to the outlet to the West[.]” Treaty with the Western Cherokee (1828), 7
4 Stat. 311. The 1828 treaty promised “seven millions of acres of land” to the
5 Western Cherokees and defined the borders of that tract in detail, then promised
6 the following, in more general geographic terms:

7 . . . the United States further guarantee to the Cherokee
8 Nation a perpetual outlet, West, and a free and unmolested
9 use of all the Country lying West of the Western boundary
10 of the above described limits, and as far West as the
11 sovereignty of the United States, and their right of soil
12 extend.

13 *Id.* at Art. 2.

14 The lack of any specified borders or acreage for the outlet demonstrated
15 continued uncertainty about whether the outlet would be a western addition to the
16 7-million-acre tract or an easement right to pass through Osage land. But the
17 promise of a “free and unmolested use . . . ,” which immediately followed the
18 promise of an “perpetual outlet west,” clarified that the Cherokees would
19 nevertheless receive the right to use the land west of the promised 7-million-acre
20 tract all the way to the western boundary of U.S. territory.

21 recognized as parties to the 1828 and 1833 treaties in a later treaty. *E. or Emigrant*
22 *Cherokees*, 88 Ct. Cl. at 464 (citing Treaty with the Cherokee (1846), 9 Stat. 871).

1 The 1833 treaty with the Western Cherokee revised the boundaries of the 7-
2 million-acre tract set in the 1828 treaty. *See E. or Emigrant Cherokees*, 88 Ct. Cl.
3 at 464; Treaty with the Western Cherokee (1833), 7 Stat. 414. As in the 1828
4 treaty, the 1833 treaty described the boundaries of the 7-million-acre tract in
5 precise detail, then defined the “outlet” and the “use” in essentially identical,
6 general terms:

7 . . . the United States, further guarantee to the Cherokee
8 [sic] nation, a perpetual outlet west and a free and
9 unmolested use of all the country lying west, of the
10 western boundary of said seven millions of acres, as far
11 west as the sovereignty of the United States and their right
12 of soil extend . . .

13 *Id.* at Art. 1. The 1833 treaty also added a caveat to the outlet:

14 Provided however, that if the saline, or salt plain, on the
15 great western prairie, shall fall within said limits
16 prescribed for said outlet, the right is reserved to the
17 United States to permit other tribes of red men, to get salt
18 on said plain in common with the Cherokees[.]

19 *Id.* This provision demonstrated continuing uncertainty about the ultimate location
20 of the outlet—namely, that it was not yet known whether the outlet would
encompass the “salt plain,” which might complicate other Tribes’ access to the salt
resources there.

2. Context from the Patent

As previously noted, Article 2 of the Treaty of New Echota quoted the 1833
treaty’s particularized definition of the 7-million-acre parcel of land and its less-

1 detailed promise of “a perpetual outlet west, and a free and unmolested use of all
2 the country west of the western boundary of said seven millions of acres, as far
3 west as the sovereignty of the United States and their right of soil extend[.]” ECF
4 No. 25-1 at 3-4. The Treaty described that quoted language as a definition of the
5 tract of country the United States had “guarantied and secured to be conveyed by
6 patent” to the Cherokees. ECF No. 25-1 at 3-4. This signaled that the “outlet” and
7 “use” would be addressed in a forthcoming patent.

8 The 1838 Patent specifically referenced the United States’ promises to
9 “guarantee, secure and convey by patent . . . certain tracts of land” to the Cherokee
10 Nation in the 1828 and 1833 treaties and the Treaty of New Echota, then quoted
11 directly from Article 2 and Article 3 of the Treaty of New Echota. ECF No. 53-3
12 at 2. The section of the Patent labeled “Article 3” includes a recitation of Article 3
13 of the Treaty of New Echota, *plus* new language not found anywhere in the Treaty
14 of New Echota. That new language, hereinafter referred to as the “Patent
15 Definition,” provided:

16 . . . And whereas, the United States have caused the said
17 tract of seven million acres, together with said perpetual
18 outlet, to be surveyed in one tract, the boundaries whereof
19 are as follows: Beginning at a mound of rocks four feet
20 square at base and four and a half feet high . . . containing
within the survey *thirteen millions, five hundred and
seventy-four thousand, one hundred and thirty-five acres*

1 ***and fourteen hundredths of an acre [13,574,135.14¹⁶].***
2 And whereas, the United States have also caused the said
3 tract of eight hundred thousand acres to be surveyed, and
4 have ascertained the boundaries thereof to be as follows:

5 Beginning at the southeast corner of Osage lands
6 described by a rock, from which a red oak 20 inches
7 diameter, bears south 27 degrees east 75 links, . . .
8 containing ***eight hundred thousand acres [800,000].***

9 ECF No. 53-3 at 2 (emphases added).

10 In the next paragraph, the Patent declared the conveyance as:

11 THEREFORE, In execution of the agreements and
12 stipulations contained in said several treaties, the United
13 States have given and granted, and by these presents do
14 give and grant unto the said Cherokee Nation, ***the two***
15 ***tracts of land, so surveyed and hereinbefore described,***
16 ***containing in the whole [14,374,135.14 acres],*** to have
17 and to hold the same, together with all rights, privileges
18 and appurtenances thereto belonging to the said
19 CHEROKEE NATION, forever; subject, however, to the
20 right of the United States to permit other tribes of red men
 to get salt on the salt plain, one [sic] the western prairie
 reserved to in the second article of the treaty of the 29th of
 December, 1835, which salt plain has been ascertained to
 be within the limits prescribed for the outlet agreed to be
 granted by said article; and subject also to all other rights
 reserved to the United States, in and by the article
 hereinbefore recited, to the extent and in the manner in
 which the said rights are reserved; and subject also to the
 conditions provided by the Act of Congress of the 28th of
 May, 1830, referred to in the above recited article; and
 condition is, that the lands hereby granted shall revert to

19 ¹⁶ This indicated that the outlet portion contained 6,574.135.14 acres, as the
20 difference between the total tract acreage and the 7-million-acre portion.

1 the United States if the said Cherokee Nation becomes
2 extinct or abandons the same.

3 ECF No. 53-3 at 2.

4 The text of Articles 2 and 3 of the Treaty of New Echota specified two tracts
5 of land containing 7 million acres and an “estimated” 800,000 acres, respectively.

6 ECF No. 25-1 at 3-5. In contrast, the Patent Definition specified two tracts of land
7 containing 13.574 million acres and 800,000 acres, respectively, or 14.374 million
8 acres in total. ECF No. 53-3 at 2. The acreage conveyed by the Patent “[i]n
9 execution of the agreements and stipulations contained in” the 1828 and 1833
10 treaties and the Treaty of New Echota matched the acreage in the latter two tracts.

11 *See id.*

12 Thus, the Patent Definition resolved the lingering uncertainty about the
13 nature and location of the outlet by defining one tract that combined the outlet and
14 the 7 million acres referenced in Article 2. *Id.* This combined tract extended
15 westward all the way to the territorial boundary with Mexico, northward all the
16 way to the boundary with Osage lands, and southward all the way to the boundary
17 with Creek lands:

18 thence *west on the southern boundary of Osage lands to*
19 *the line dividing the territory of the United States from*
20 *that of Mexico*, 288 miles 13 chains and 66 links, to a
mound of earth, six feet square at base, and five and a half
feet high, in which is deposited a cylinder of charcoal, 12
inches long and 4 inches diameter; *thence south along the*
line of the territory of the United States and of Mexico,

60 miles and 12 chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited a cylinder of charcoal, 18 inches long and three inches diameter; *thence east along the northern boundary of Creek lands* 273 miles 55 chains and 66 links . . .

Id. By conveying title in fee simple to the Cherokees of all land west from the 7-million-acre parcel to the edge of the U.S.-Mexico territorial border, United States “guarantee[d], secure[d] and convey[ed] by patent” Article 2’s “free and unmolested use of all the country west of the west boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.” ECF No. 53-3 at 2.

The Patent also resolved the other uncertainties in Article 2. The Patent confirmed that the salt plain referenced in Article 2 “ha[d] been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article[,]” when reiterating the United States’ reserved right to allow other Tribes to take salt from that salt plain. *Id.* The Patent also provided a more complex definition of the 800,000-acre tract, removed the conditional exclusion of any land that overlapped with Quapaw land, and confirmed that this tract contained 800,000 acres, where the Treaty had only “estimated” this tract to contain that acreage.

3. Summary of Contextual Analysis

The historical context surrounding the 1835 Treaty provides no support for the argument that the promised “use” extended past the geographic limits of the

1 land conveyed by the Patent or existed separate from the Cherokees' rights to
2 "use" the land they owned in fee simple.¹⁷ The outlet, as defined in the Patent,
3 covered all land west of the originally promised 7-million-acre tract. There was no
4 further western land within "the sovereignty of the United States and their right of
5 soil," so there was no further right of use that could be conveyed.

6 *4. Defendant's Historical Evidence*

7 Defendant has not provided evidence that supports a different conclusion.
8 His strongest evidence was the testimony of Chief Matthews. On the topic of the
9 nature of the "use" promised in the Treaty, Chief Matthews testified that members
10 of the Cherokee Nation were aware, at least as of 1849, that they needed
11 "permission from the Indian agent" to go "east or south or north" of the Cherokee
12 Territory, but not to go west to California or the Oregon Territory. ECF No. 57.
13 He stated that, during the 1849 California Gold Rush, members of the Cherokee
14 Nation headed west in wagon trains that went "north, west, through Nebraska"
15 under the belief that they did not need permission to do so. *Id.* Evidence of what
16

17 ¹⁷ As noted earlier, the Cherokee Nation ceded title to all land west of the 96th
18 degree west longitude by the 1891 Cherokee Outlet Agreement, and thereby
19 relinquished the right as titleholders to use that land. This cession totaled 8.14
20 million acres, which encompassed the entire 6,574.135.14-acre outlet and more.

1 the Cherokees understood the Treaty to mean in 1849 is relevant to determining
2 what the Cherokees understood it to mean 14 years earlier, in 1835. But such
3 evidence does not outweigh the above-described contextual evidence from treaties
4 signed 7 years and 2 years prior to the Treaty of New Echota—one of which was
5 expressly quoted in Article 2 of the Treaty of New Echota—and from the Patent
6 executed three years after, and quoted in Articles 2 and 3 of, the Treaty of New
7 Echota. Additionally, this testimony is internally inconsistent—that is, that in
8 1849, the Cherokees believed they needed permission to travel north, but not north
9 to the area of present-day Nebraska.

10 Defendant also submitted what appears to be a statement signed by several
11 members of the Southern Cherokee tribe and dated Nov. 12, 2020.¹⁸ ECF No. 41-
12 4. One of the signatories appears to be Darla Matthews, who is identified in
13 another exhibit as the Southern Cherokee Tribal Clerk. *See* ECF No. 54-1 at 1.
14 However, whether the statement is the official position of the Tribe is not clear
15 from its face—the other signatories’ identities are not provided, and there is no
16 signature from Chief Matthews, the only Tribal official that has been identified to
17 the Court to date, although the document identifies him as Chief. ECF No. 41-4 at
18

19 ¹⁸ In the associated brief, Defendant cites to this document as “Exhibit D” without
20 stating what it is or authenticating it. ECF No. 41 at 10, 19.

2. The document states that the Southern Cherokee have interpreted Article 2 of the Treaty of New Echota “to mean that [they] could hunt and fish and gather anywhere west of the Mississippi.” ECF No. 41-4.

The Court has no reason to doubt that this is the belief of some Southern Cherokee tribal members, and Defendant claims the same belief. But the statement has limited evidentiary weight where it has not been clearly identified or authenticated. Moreover, the belief that the Southern Cherokees’ Treaty rights extend “anywhere west of the Mississippi” cannot be reconciled with the Treaty language. Article 2 of the Treaty places the eastern boundary of Cherokee Territory at the borderlines with “the old western territorial line of Arkansas territory” and “the State of Missouri”; Missouri and the Arkansas Territory were also west of the Mississippi River. ECF No. 25-1 at 4, Art. 2; *see also* U.S. Topographical Bureau, *Map Showing the Lands Assigned to Emigrant Indians West of Arkansas and Missouri* (1836), Library of Congress, <https://lccn.loc.gov/99446197> (last visited July 1, 2025). In other words, the proposition claimed in ECF No. 41-4 would mean that the Treaty of New Echota conferred the Cherokees rights in Missouri and Arkansas, which would contradict the plain language of the Treaty it purports to interpret.¹⁹ Even if this document

¹⁹ The Western Cherokee had once held land in the Arkansas Territory, but they

1 had been properly identified, it does not provide a credible interpretation of the
2 Treaty.

3 Finally, Defendant has submitted what appears to be a summary of the
4 Southern Cherokee Tribe's history, authored by Ms. Matthews in 2016. ECF
5 Nos. 41-1, 54-1. This document is similarly unidentified and unauthenticated. But
6 to the limited extent that the Court can consider it, it does not shed any light on
7 how far the Treaty Party understood the right of use to extend. The section on the
8 events surrounding the Treaty of New Echota focuses on the strife between the
9 Treaty Party and the other Eastern Cherokee arising from the difficult decision
10 whether to agree to a removal treaty. ECF No. 54-1 at 58-63. It briefly describes
11 the Treaty terms as follows:

12 The Treaty provided for exchanging the Eastern
13 Cherokee's existing lands and resources in the east for the
14 *full legal title to lands and resources* west of the
15 Mississippi River. The treaties also provided the tribes
16 with full governmental jurisdiction over all people and
17 *resources within their new tribal boundaries*.

18 _____
19 ceded this land in the 1828 treaty—seven years before the Treaty of New Echota.
20 *See* Treaty with the Western Cherokee (1828), 7 Stat. 311; Royce, *supra* (the
region in Arkansas ceded by the Western Cherokees in 1828 is the area labeled
“37”).

1 ECF No. 54-1 at 63 (emphases added). If the Court were to consider this as
2 evidence of the Cherokee Nation's understanding of the Treaty terms, then it
3 would seem to confirm that the Cherokees understood their Treaty rights to apply
4 *only* to lands and resources within the boundaries of the Cherokee Territory.

5 Defendant has not produced appropriate evidence that persuades the Court
6 that the Cherokees understood the "use" promised in Article 2 of the Treaty of
7 New Echota to provide any right beyond what was conveyed to them by the 1838
8 Patent.

9 CONCLUSION

10 The historical context surrounding the Treaty of New Echota, namely the
11 1828 and 1833 treaties and the 1838 Patent, demonstrate that the "use" promised in
12 the Treaty did not confer any right to use land that extended beyond the boundaries
13 of the land conveyed in the Patent, and, therefore, did not confer a right to "use"
14 land and resources in present day Washington. Defendant has not submitted
15 persuasive evidence to the contrary. Accordingly, Defendant's Motion to Dismiss
16 is denied.

17 Accordingly, **IT IS HEREBY ORDERED:**

18 1. Defendant's Motion to Dismiss the Citation, **ECF No. 25**, is
19 **DENIED.**

1 2. **By no later than July 16, 2025**, the parties shall confer with each
2 other and the Courtroom Deputy and file a joint proposed case management
3 schedule for further proceedings in this matter.

4 **IT IS SO ORDERED.** The District Court Executive is directed to file this
5 Order and provide copies to counsel.

6 DATED July 2, 2025.

7 s/Mary K. Dimke
8 MARY K. DIMKE
9 UNITED STATES DISTRICT JUDGE
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