

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MARILYN VANN, RONALD MOON,)
HATTIE CULLERS, CHARLENE WHITE,)
and RALPH THREAT,)

Plaintiffs,)

v.)

Case No.: 1:03cv01711 (HHK)

GALE A. NORTON, Secretary of the United)
States Department of the Interior; UNITED)
STATES DEPARTMENT OF THE)
INTERIOR,)

Defendants.)

**PLAINTIFFS' RESPONSE TO THE MOTION
OF THE CHEROKEE NATION FOR LIMITED INTERVENTION**

The Cherokee Nation of Oklahoma's Motion to Intervene should be denied because its interest in this matter has been limited by the 1970 Principal Chiefs Act, the Government Defendants can adequately represent its interests, the Motion has been filed eighteen months after the initiation of the suit, and granting intervention would interfere with ongoing settlement discussions between the parties.

INTRODUCTION

On May 24, 2003, Cherokee Nation of Oklahoma ("CNO") held an election for its officials that was in violation of applicable United States law. The CNO did not obtain approval for its voting procedures pursuant to the 1970 Principal Chiefs Act, Pub. L. No. 91-495, 84 Stat. 1091, which states that the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and/or governing

entity. The Principal Chiefs Act further mandates that such established procedures shall be subject to approval by the Secretary of the Interior.

The Secretary of Interior could not have approved the procedures adopted by the CNO because they prohibited the Black Cherokee Nation Citizens – the Cherokee Freedmen – from voting in the election. The Secretary of the Interior recently refused to recognize a similarly situated tribe – the Seminole Nation of Oklahoma – when it attempted to vote out the Seminole Freedmen and preclude their right to vote. The Government took the position that the Seminole Freedmen were members of the Seminole Nation pursuant to the Treaty of 1866 and possessed the right to vote in Tribal elections. The Government then successfully defended its position in two cases before this Court. See Seminole Nation v. Norton, No. 00-2384 (D.D.C. Sept. 27, 2001) (CKK) (“Seminole I”), and Seminole Nation v. Norton, 2002 WL 31109804 (D.D.C.) (RBW) (2002) (“Seminole II”).

BACKGROUND ON THE LEGAL RIGHTS OF THE CHEROKEE FREEDMEN

Cherokee Freedmen were granted membership in the Cherokee Tribe pursuant to the Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. L., 799 (the “1866 Treaty”), The 1866 Treaty contains the following provisions:

ARTICLE 4.

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have 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 southeast by Grand River and west by the Creek reservation to the northeast corner thereof; from thence

west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-described in this article: *Provided*, That part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article.

ARTICLE 5.

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; *Provided*, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty; *Provided also*, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void.

ARTICLE 9.

The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of the national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all

freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.

ARTICLE 10.

Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.

(Complaint ¶ 16.)

In 1883, the Cherokee Tribal Council passed legislation that excluded the Freedmen – and other tribal citizens without Cherokee blood, such as the Shawnees, Delawares, and intermarried whites – from sharing in tribal assets. (Complaint ¶ 17.)

In 1888, the United States Congress responded with legislation that required the Tribe to share its assets equally with the Freedmen and other adopted citizens. (25 Stat. L. 608-609.) To determine the number of eligible Freedmen and provide for their equitable treatment, Congress sent a federal agent to make a full record of all those who were entitled to share in the dispersal of federal funds within the Cherokee Nation.

Complaint ¶ 18.)

In 1889, 3,524 Freedmen were enrolled on a federal document called the Wallace Rolls to legitimate their claims to Cherokee Citizenship. (Complaint ¶ 19.) In 1890, as the Cherokee Tribe continued to resist the Freedmen's equal right to Cherokee citizenry,

the United States Congress authorized the federal Court of Claims to adjudicate the rights of the Cherokee Freedmen. (Complaint ¶ 20.)

Moses Whitmire, Trustee for The Cherokee Freeman v. The Cherokee Nation and the United States, 30 Ct. Cl. 138 (1895), held that the Freedmen were entitled to receive equal per capita payments of funds as equal citizens of the Cherokee Tribe. The Court of Claims held that while the tribal council could sell the common property, it could not discriminate against a particular class of citizens in deciding who was entitled to share in the proceeds. Ruling in favor of the Freedmen, the court awarded them \$903,365 as their rightful share of \$7,240,000 that had been generated from the sale of tribal lands.

In 1893, the United States government established the Dawes Commission for the purpose of creating authoritative membership rolls for all of the Native American tribes in Oklahoma, including the Cherokee Nation. Although not required or authorized to do so, by 1898 the Dawes Commission began enrolling the Black Cherokee on a “Freedmen Roll”; other Cherokees were enrolled on a separate “Blood Roll.” The effect of this gratuitous act of racial segregation in compiling the Dawes Rolls – imposed upon the Cherokee Nation by the Dawes Commission – was to divide the Cherokee Nation into “Freedmen” (those with some Black ancestry) and “Blood Indians.” This division also was illogical and inconsistent: a Cherokee who was half Native American and half Black was designated a “Freedman”; one who was one quarter Native American and three quarters White was designated a Cherokee “by blood.” No effort was made to record the percentage of Native American blood of those listed on the “Freedmen Roll,” though historians agree that many of the Freedmen enrollees had mixed Native American

ancestry. As a result, throughout the segregation years the Freedmen were subjected to Jim Crow laws and other forms of state-sanctioned discrimination. (Complaint ¶ 22.)

1898, Congress passed the Curtis Act, providing for allotment of communal tribal lands to all citizens of Cherokee Nation including Freedmen. The Curtis Act also extended jurisdiction over Indian Territory and abolished tribal courts. (Complaint ¶ 23.)

In Daniel Red Bird v. United States, 203 U.S. 76, 27 S. Ct. 29 (1906), the Supreme Court affirmed the citizenship and proprietary rights of the Freedmen as ensured by the 1866 Treaty as opposed to the intermarried whites that did not have such rights.

In 1907, the Dawes Commission closed the final rolls of the Cherokee Tribe. The Dawes Commission created two separate rolls for the Cherokee Nation. Individuals possessing African blood as unscientifically determined by the Dawes Commission official would place the individual on the Cherokee Freedmen Roll. If an individual was half Black and half Cherokee Native American, he or she would be placed on the Freedmen Roll with no notation of Indian Blood. However, if the individual was $\frac{3}{4}$ White and $\frac{1}{4}$ Cherokee Native American, he or she would be placed on the Cherokee by Blood Roll with a notation of percentage of Indian Blood. The Dawes Commission stated that the Negroes were on equal footing with the full-bloods. (Complaint ¶ 25.)

BIA's Solicitor's Opinion, October 1, 1941, 1 Op. Sol. On Indian Affairs 1076 (U.S.D.I. 1979), addressed the question whether the Freedmen are entitled to vote on the acceptance of a Constitution in pursuance of section 3 of the Oklahoma Indian Welfare Act. The opinion states, in relevant part:

As the membership rights of the Freedmen in the Five Civilized Tribes have been fixed by Treaties, which are the equivalent of statutes, and by formal tribal action in pursuance of these treaties, the Secretary would not appear

to be authorized to issue regulations which would deprive the Freedmen of their right to vote on constitutions to be adopted by the Five Civilized Tribes under the Oklahoma Indian Welfare Act.

(Complaint ¶ 26.)

The 1970 Principal Chiefs Act, Pub. L. 91-495, 84 Stat. 1091, enacted by Congress, states that, notwithstanding any other provisions of law, the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and or governing entity. It further mandates that such established procedures shall be subject to approval by the Secretary of the Interior. (Complaint ¶ 27.)

On June 26, 1976, Cherokee Freedmen voted in a Cherokee election on the adoption of a Cherokee Constitution (“1976 Constitution.”). (Complaint ¶ 29.) Article I of the 1976 Constitution states that the Cherokee Nation is an inseparable part of the Federal Union, and that the Constitution of the United States is the Supreme law of the land, and therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law. (Complaint ¶ 30.)

Article II of the 1976 Constitution states, in pertinent part, that the appropriate protections of the Civil Rights Act of 1964 shall apply to all members of the Cherokee Nation. (Complaint ¶ 31.) Article III, Section 1, of the 1976 Constitution states: “All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls...” The Freeman can prove direct lineage to the Dawes Commission Rolls. (Complaint ¶ 32.)

Article V, Section 7 of the 1976 Constitution states, in pertinent part: “Laws or enactments which are required by Federal Statutes to be approved shall be transmitted immediately upon enactment provided by Section 11 of this Article to the President of the United States or his authorized representative.” (Complaint ¶ 33.)

Also in the 1976 Constitution, Article IX, Elections, Section 1, states in relevant part: “The Council shall enact an appropriate law not inconsistent with the provisions of this Constitution that will govern the conduct of the elections. . .” Section 2 limits the candidacy for Council to members by blood, but does not restrict voting to blood members only. Thus, pursuant to the 1976 Constitution, the Freedmen are entitled to citizenship with voting rights. (Complaint ¶ 34.)

**The Election of May 24, 2003,
and Defendants’ Reversal of Position**

On March 15, 2002, Neal McCaleb, Assistant Secretary of Indian Affairs, wrote to Cherokee Chief Chad Smith (“March 15, 2002, Letter”) that he had no objection to the Constitutional Amendment striking the approval of the President of the United States or his authorized representative from the Cherokee Constitution, subject to certain understandings. First, all members of the Cherokee Nation, including the Freedmen descendants who are otherwise qualified, must be provided an equal opportunity to vote in the election. Second, under current law, no amendment of the Nation’s constitution can eliminate the Freedmen from membership in the Nation absent Congressional authorization. And third, notwithstanding any amendment of the Nation’s Constitution, the Act of October 22, 1970 (94 Stat. 1091), until it is repealed or amended, will still require the Secretarial approval of the procedures for the election of the leaders of the Cherokee Nation and the other Five Civilized Tribes. (Complaint ¶ 35.)

In a series of subsequent letters, Defendants denied the validity of the March 15, 2002, Letter; informed Chief Smith, citing Seminole I, of the requirement that prior to an election of the Principal Chief the election procedures must be submitted to the Secretary and must be approved; advised Raymond Vann of the Cherokee Nation Election Commission that such compliance was required; notified Chief Smith on July 11, 2003, that the Nation had been previously advised on two occasions regarding the requirements of the Principal Chiefs Act of 1970 and asked the Nation to submit its current election laws for approval; stated later in July 2003 that the procedures for selecting the Principal Chief of the Cherokee Nation are subject to approval by the Secretary, and that the BIA was “aware of no evidence that the Secretary has approved the current procedures for the election of the Principal Chief.” Importantly, the July 25, 2003, letter also stated that “the BIA views the situation to be identical to the one involving the Seminole Nation of Oklahoma” (Complaint ¶ 55.)

On August 6, 2003, the BIA completely reversed its position. It did so in a letter from Jeanette Hanna to Chief Smith, stating it is “inappropriate and premature” “for the Department to question the validity of the Tribal officials. Based on the Nation’s Election Commission certification of the results of the May 24 election, the Department recognizes you as Principal Chief of the Nation.” (Complaint ¶ 36.)

In the same letter of August 6, 2003, Defendants stated: “The Department continues to have under review the May 24 Tribal election results on the proposed amendment of the Tribal constitution that would remove the requirement that future amendments be approved by the Secretary of the Interior.” (Complaint ¶ 37.)

The BIA has made a final agency decision on the election for Principal Chief. The BIA decided to not require the compliance of the 1970 Principal Chiefs Act and require submission of voter regulations. The BIA was on notice that the Freedmen citizens were not entitled to vote in the election. (Complaint ¶ 38.)

The decision of the BIA to defer review of whether to acknowledge the Constitutional amendment is also a final decision, as the decision to recognize the Principal Chief in the same Election wherein the Freedmen were not permitted to vote indicates that Defendants do not find the stripping of voting rights as a basis for disavowing the Election results. (Complaint ¶ 39.)

Prior to the BIA's abrupt reversal of position, Plaintiffs, through their counsel, notified Defendants that the Freedmen were denied the right to vote in the May 24, 2003, Election and, as a matter of policy, the Freedmen had been stripped of their membership rights. (Complaint ¶ 40.)

INTERVENTION SHOULD BE DENIED

The CNO cannot meet the standards required for intervention under Federal Rule of Civil Procedure 24.

The CNO is adequately represented by the Defendants. The CNO asserts that the arguments raised by the Defendants are the same arguments that it would raise. Its complaint is that the Defendants just have not made them fast enough. The factor of expediency is not a factor in the analysis, as the CNO clearly states the Defendants have raised the same defense of indispensable party it would raise if permitted to intervene and has stated that the Defendants with the same lawyers have adequately raised these issues in what the CNO states is a similar matter in Davis v. United States, 343 F. 3d 1282 (10th

Cir. 2003), cert. denied, 124 S. Ct. 2907. Further, in Seminole I, this Court denied the Seminole Freedmen their Motion to Intervene based on the finding that they were adequately represented by the Government Defendants in that case. The case related to virtually the same facts as the Seminole Nation argued it not need to obtain approval from the United States to amend its Constitution to vote the Black Seminoles out of the Nation. Although the membership of the Freedmen in their Nation was asserted by the Seminole Freedmen as a reason for intervention, the Court determined that the Government Defendants could adequately represent the interests of the Seminole Freedmen.

Fed. R. Civ. P. 24(b) states that upon timely application anyone may be permitted to intervene in an action (1) when a statute of the United States confers a conditional right to intervene; or (2) when an application or defense and the main action have a question of law or fact in common. In exercising its discretion the Court shall consider whether the intervenor will unduly delay or prejudice the adjudication of the rights of the original parties.

The CNO's Motion to Intervene is not related to the issue of its election but to whether it can dismiss the case based on sovereign immunity and eliminate the Secretary's duty to oversee the election, including the rights of Cherokee citizens rights to vote.

The CNO seeks to excuse its failure to file its motion to intervene earlier by stating that the parties are having "ongoing secret settlement discussions." The statement is incorrect and misleads the Court. Counsel for the Plaintiffs conversed with CNO Attorney General Julian Fite regarding the issue of Cherokee Freedmen voting rights as

the parties began settlement discussion in this case. The conversation ended with Mr. Fite stating he would speak with the Chief and get back with Plaintiffs, counsel if there was any interest. The CNO never contacted Plaintiffs' counsel following the initial conversation. In addition to the conversation with the CNO Attorney General, Plaintiffs' Counsel addressed the CNO Tribal Council on the issues of the present action the day it was filed. The CNO has made no inquiries into participation with settlement discussions. Not only has the CNO been invited into the settlement discussions, the Joint Statement, a public document, references settlement discussions. The settlement discussions are not secretive. The CNO seeks to intervene in order to dismiss the case and thereby cut off the ongoing settlement discussions.

In the event the Motion to Intervene is granted and the settlement negotiations are frustrated, the Plaintiffs intend to amend their complaint additional claims against the Defendants, including violations of the 13th and 15th Amendments to the United States Constitution. The Defendants directly violate the 13th Amendment of the Constitution in perpetuating "badges" of slavery. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

The Defendants violated the 15th Amendment, which prohibits the United States from denying the right to vote "on account of race, color, or previous condition of servitude," by its express action in permitting the discriminatory regulations of the Cherokee Nation that intentionally exclude its Freedmen citizens from the voting process. The Secretary of Interior is mandated by Congress in the 1970 Principal Chiefs Act to approve the voting procedures. The Secretary's duty to enforce the voting rights of the Cherokee Freedmen is further mandated in its duty to follow its own decisions as set forth in the almost identical issues involving the Seminole Freedmen. In the Seminole

Freedmen matter, The Secretary of the Interior, through its Bureau of Indian Affairs (“B.I.A.”), did not recognize the Seminole elected officials that took office and did not recognize the government-to-government relationship with the illegally elected administration that was elected in an election that forbid the Seminole Freedmen from voting. The B.I.A. successfully defended its position in this Court in Seminole Nation v. Norton, 2002 WL 31109804 (D.D.C.) (RBW) (2002) (Seminole II). The B.I.A. also refused to recognize the Seminole Nation or the government-to-government relationship and defended its position successfully in a case in this Court, where the Seminole Freedmen were voted out of the Seminole Nation by a Constitutional Amendment Referendum Election in Seminole Nation of Oklahoma v. Norton, No. 00-2384 (D.D.C. Sept. 27, 2001) (CKK). The basis for the B.I.A.’s position was that the Seminole Freedmen were ensured full citizenship rights under the 1866 Treaty. The Cherokee Tribe signed an 1866 Treaty with the same citizenship protections to the Cherokee Freedmen. The B.I.A.’s determination to recognize the Cherokee election is a violation of the 13th and 15th Amendments to the Constitution of the United States.

In the event the CNO is permitted to Intervene, Plaintiffs intend to amend their complaint to name the CNO as a Defendant and will be prepared to demonstrate that the Cherokee Nation’s claim to sovereign immunity is not valid.

In the event the Court does permit the CNO to intervene, the intervention should not be limited to merely filing a motion to dismiss but rather should subject the CNO to the jurisdiction of this Court on the issues raised by the Plaintiffs in the Complaint as well as any raised in the amended complaint.

Unless and until the motion to intervene is granted, there is no obligation on Plaintiffs to respond to the proposed motion to dismiss. If the motion to intervene is granted, Plaintiffs will respond to the motion to dismiss in accordance with the rules of this Court.

CONCLUSION

Based upon the foregoing and the entire record of this case, Plaintiffs respectfully request that the Cherokee Nation of Oklahoma's Motion to Intervene be denied. In the alternative, if the CNO's Motion to Intervene is granted, the extent of the intervention should not be limited.

Dated: February 1, 2005

Respectfully submitted,

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