

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs, )

v. )

DIRK KEMPTHORNE, Secretary of the )  
United States Department of the Interior,<sup>1/</sup> )

UNITED STATES DEPARTMENT OF THE )  
INTERIOR, )

CHEROKEE NATION OF OKLAHOMA, )

CHADWICKE SMITH, Individually and in His )  
Official Capacity, and )

John Does, Individually and in their Official )  
Capacity, )

Defendants. )

Case No. 1:03CV01711 (HHK)

Judge: Henry H. Kennedy

Deck Type: Civil Rights  
(non-employment)

Date Stamp: 08/11/03

**FEDERAL DEFENDANTS' RESPONSE TO**  
**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

On February 1, 2007, Plaintiffs filed a Motion for Preliminary Injunction (“Plaintiffs’ PI Motion”) seeking to enjoin Defendant Cherokee Nation of Oklahoma (“Cherokee Nation”) from holding a special election on March 3, 2007, on a proposed amendment to the Cherokee Nation Constitution of 1999 (“1999 Constitution”) that, if passed, would remove the Cherokee Freedmen from tribal membership. *See* Plaintiffs’ PI Motion at 1-2. As represented to

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<sup>1/</sup> In accordance with Federal Rule of Civil Procedure 25(d)(1), Secretary of the Interior Dirk Kempthorne is automatically substituted for former Secretary of the Interior Gale A. Norton.

Plaintiffs' counsel, Federal Defendants, DIRK KEMPTHORNE, in his official capacity as Secretary of the United States Department of the Interior; and the UNITED STATES DEPARTMENT OF THE INTERIOR (collectively referred to herein as "Federal Defendants"), do not object to the relief sought by Plaintiffs in their PI Motion, however, Federal Defendants reserve the right to respond to the merits of the underlying case. Accordingly, Federal Defendants now respond to certain aspects of the merits issues raised in Plaintiffs' latest filing.

The challenge in Plaintiffs' PI Motion involves a discrete action taken by the Cherokee Nation – a decision to hold a special election on a proposed amendment to the 1999 Constitution to remove the Cherokee Freedmen as citizens of the Cherokee Nation. With regard to the special election, Plaintiffs claim that Federal Defendants "failed to fulfill [their] fiduciary duty to protect the rights of the Cherokee Freedmen." Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' PI Memo.") at 5. Federal Defendants, however, maintain that the Cherokee Nation Constitution of 1975 remains in effect because the Secretary of the Interior has not approved the proposed Constitutional amendment to the 1975 Constitution removing the authority of the Secretary to approve future Constitutional amendments; that approval decision remains pending. *See* letter from Associate Deputy Secretary James E. Cason to the Honorable Chad Smith, dated August 30, 2006 (attached hereto as "Exhibit A"). The Cherokee Nation, to the contrary, recognizes the 1999 Constitution as the "organic law of the Cherokee Nation" (*see* letter from Principal Chief Chad Smith to James Cason, dated October 13, 2006, and attached hereto as "Exhibit B"). Because Federal Defendants recognize the 1975 Constitution as being in effect, any amendment to the 1999 Constitution would not be recognized

by Federal Defendants as being in effect.<sup>2/</sup>

Moreover, Federal Defendants maintain that, at this juncture, the Cherokee Nation takes the position that Freedmen with ancestors on the Freedmen rolls are able to register to vote. *See* Exhibit B. If, however, at the conclusion of the March 3, 2007, special election, the proposed amendment passes and the Cherokee Nation changes its position with regard to the rights of the Freedmen, Federal Defendants will review the ramifications on its trust responsibilities at that time. At this point in time, however, the Cherokee Nation has decided to hold a special election – it has not officially altered its position with regard to the rights of the Freedmen. Accordingly, Federal Defendants have not committed a breach of their trust duty by not interfering with the Tribe’s decision to hold the special election. *See, e.g., Wheeler v. United States*, 811 F.2d 549,

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<sup>2/</sup> The Judicial Appeals Tribunal of the Cherokee Nation, in *In re: The Status and Implementation of the 1999 Constitution of the Cherokee Nation*, JAT 05-04 (attached hereto as “Exhibit C”), determined that former Assistant Secretary- Indian Affairs, Neal A. McCaleb, intended to approve the proposed amendment to the 1975 Constitution removing Secretarial approval of future amendments, and, therefore, concluded that the 1999 Constitution was in effect. The Judicial Appeals Tribunal based its determination, in part, on an affidavit executed by Mr. McCaleb on April 4, 2006, *after* he left office. *See* Exhibit C at p. 4. *See also* Exhibit A. The 1999 Constitution does not contain a provision calling for the Secretary of the Interior to approve amendments to the Constitution.

551 (10<sup>th</sup> Cir. 1987) (“courts should not require the Department to act when to do so would interfere with the tribe’s right to self-government”).

Dated: February 12, 2007

Respectfully submitted,

/S/ CAROLINE M. BLANCO

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