

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)
Judge: Henry H. Kennedy

DIRK KEMPTHORNE, Secretary of the)
United States Department of the Interior,^{1/})

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.)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF FEDERAL DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

On May 8, 2007, Plaintiffs Marilyn Vann, Donald Moon, Ronald Moon, Hattie Cullers, Charlene White, and Ralph Threat (collectively referred to herein as "Plaintiffs") filed a Motion for Preliminary Injunction (Docket # 69) (hereinafter, "Plaintiffs' PI Motion" or "PI Motion") requesting extraordinary relief that has since been fully provided through the actions of

^{1/} 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.

Defendant Cherokee Nation of Oklahoma (“Cherokee Nation”), and 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”). Nevertheless, Plaintiffs refuse to abandon their Motion and seek to enjoin Federal Defendants from: 1) distributing federal funds to the Tribe; 2) recognizing any Cherokee Nation election; and 3) recognizing the government-to-government relationship with the Tribe until the Cherokee Nation restores Plaintiffs’ full citizenship rights and complies with the Act of 1970. *See* Plaintiffs’ Proposed Order for Preliminary Injunction (Docket #69-3). Plaintiffs also seek to enjoin Defendant Cherokee Nation from denying Plaintiffs their full citizenship rights and from holding any election in which Plaintiffs would not be allowed to fully participate based solely upon their status as Cherokee Freedmen. *Id.*

Significantly, the Cherokee Freedmen’s full citizenship rights have been reinstated due to the Temporary Order and Temporary Injunction (“Order”) entered on May 14, 2007, by the District Court of the Cherokee Nation (in *Raymond Nash v. Cherokee Nation Registrar*, Case Nos. CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, and CV-07-66) (Order attached hereto as “Exhibit A”). That Order, to which Defendant Cherokee Nation has agreed, directs the Cherokee Nation Registrar to:

immediately reinstate to full citizenship within the Cherokee Nation the Plaintiffs and all similarly situated persons commonly known as ‘Cherokee Freedmen.’ This order shall remain in effect until the Court reaches a decision on the merits of Plaintiffs’ claims in these actions, or until further order.

See Exhibit A at page 2. In light of the Order entered in *Raymond Nash v. Cherokee Nation Registrar*, the Cherokee Nation has indeed reinstated the citizenship rights of all Freedmen

members of the Cherokee Nation, which includes the Freedmen's right to register for and vote in the upcoming Cherokee national election, scheduled for June 23, 2007. Accordingly, there is no relief that this Court could render with regard to the Cherokee Freedmen's citizenship rights, including their right to register for and vote in the upcoming election, that has not already been given by the Cherokee Nation, itself.

Plaintiffs also contend that Federal Defendants should be enjoined from issuing funds to the Cherokee Nation under the Principal Chiefs Act of 1970, because Federal Defendants have failed to review the election procedures by which the principal chief is elected. *See* Plaintiffs' PI Motion at pages 7-9. To the contrary, as Plaintiffs are aware, Federal Defendants, through their counsel, requested that, by June 1, 2007, the Cherokee Nation provide them with the election procedures for the upcoming Cherokee Nation national elections. The Cherokee Nation agreed to do so, and, indeed, provided Federal Defendants with a copy of all of those procedures by May 22, 2007. Federal Defendants have reviewed those procedures and issued their approval of them on May 25, 2007. *See* Declaration of Carl J. Artman, Assistant Secretary-Indian Affairs ("Artman Decl."), ¶ 7.1., filed herewith, and accompanying Attachment B. Therefore, Plaintiffs cannot reasonably argue that this Court should order Federal Defendants to do what has already been done and request those procedures for review from the Cherokee Nation a second time.

Although not highlighted in Plaintiffs' PI Motion, nor supported by declaration or other evidence, Plaintiffs also argue that they are entitled to a preliminary injunction because they are not permitted to run for office. Plaintiffs claim that an injunction should issue against Federal Defendants because Plaintiffs cannot run for office, despite the fact that their Complaint fails to mention this issue at all – other than to state that while the 1976 tribal Constitution limits the

candidacy for council to members by blood, voting is not so limited. *See* Complaint, ¶ 40, page 15. Moreover, Plaintiffs could have filed to run for a position on the council during the registration time for doing so, which was between March 5, 2007, and March 8, 2007 (*see* <http://www.cherokee.org/TribalGovernment/Election/home.aspx?section=main&year=2007>); this time frame closed nearly two weeks before Plaintiffs were presented with a letter from the Tribe stating that they were no longer members of the Tribe. If, however, Plaintiffs' argument is that they couldn't register to run for office because the tribal Constitution prohibits non-blood members from holding office and that Federal Defendants should take action to prevent such a prohibition, Plaintiffs are impermissibly raising this argument for the first time in their PI Motion; this argument is not present in their Complaint, and even if it were, the argument would be time-barred as the Constitution that is in effect was passed in 1976.

Moreover, despite the inappropriateness of the broad injunction sought by Plaintiffs, their PI Motion should be denied for failure to demonstrate a likelihood of success on the merits. Plaintiffs' Complaint alleges that Federal Defendants breached their fiduciary duty to the Freedmen because the Freedmen were denied the right to vote in the 2003 tribal election and Federal Defendants did not disregard the outcome of that election. *See, generally*, Complaint. This claim fails because there is no fiduciary duty grounded in statute or regulation that mandates Federal Defendants to take action against the Tribe on behalf of its Freedmen members if the Freedmen members believe the Tribe has engaged in discriminatory conduct. While the 1866 Treaty expressly *authorizes* and *empowers* the United States to intervene in tribal affairs if the laws operate unjustly or injuriously within a district (*see* Treaty of 1866, Art. 6, July 19, 1866, 14 Stat. 799), the Treaty does not *mandate* such intervention.

Moreover, even if some duty could be found, Federal Defendants have properly performed their responsibilities. For example, Federal Defendants recently disapproved the proposed constitutional amendment seeking to remove the Secretarial approval requirement for constitutional amendments, which was part of the outcome of the 2003 tribal election upon which Plaintiffs base their Complaint. In addition, because a new national tribal election will take place next month in which the Freedmen will be allowed to vote, the Freedmen are not being denied the right to vote. Moreover, to ensure that the election for Principal Chief would be accomplished in a fair manner, Federal Defendants reviewed the tribal election procedures related to the election of the Principal Chief, and have approved them in advance of the election. *See* Artman Decl., ¶ 7.1. and Attachment B, thereto. Accordingly, Federal Defendants have taken every appropriate action and are likely to prevail on the merits of Plaintiffs' claims.

Plaintiffs' PI Motion must also fail because Plaintiffs' citizenship rights – including the right to vote in the upcoming election – have been fully restored, and, accordingly, they will suffer no injury if their PI Motion is denied. Quite simply, there is no further relief that this Court can provide; the Cherokee Nation and Federal Defendants have already taken action that provides all of the requested relief. Therefore, Plaintiffs' PI Motion should be denied.

II. FACTUAL BACKGROUND

In May of 2003, the last Cherokee national election was held. At that time, in conjunction with the election for Principal Chief, Cherokee voters passed a proposed amendment to the 1976 tribal Constitution that would remove from the Constitution the requirement that the Secretary of the Interior approve all constitutional amendments before they become effective. That proposed constitutional amendment was forwarded to the Department of the Interior for

approval. A few months later, in a run-off election, Defendant Chadwicke Smith was elected Principal Chief of the Cherokee Nation.

On March 7, 2006, the Judicial Appeals Tribunal of the Cherokee Nation issued a decision in *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09, in which that court concluded that 11 C.N.C.A. § 12, governing the Nation's membership, was more restrictive than the Nation's Constitution and was, therefore, unconstitutional. In response to that decision, the Cherokee Nation adjusted its procedures to permit Cherokee Freedmen to apply for citizenship, including the right to register to vote in tribal elections. *See* Exhibits 8 and 9 to Memorandum of the Cherokee Nation and Cherokee Nation Officials in Opposition to Plaintiffs' Motion for a Preliminary Injunction (filed 02/12/2007, Docket #47).

At a special election on March 3, 2007, members of the Cherokee Nation voted on a proposed constitutional amendment that, if passed, would exclude the Cherokee Freedmen from tribal membership. Although that proposed amendment did pass, it was not fully implemented until March 21, 2007, when the Tribe sent letters to the Cherokee Freedmen who do not possess Cherokee Indian blood informing them that they were no longer eligible for citizenship in the Tribe. *See, e.g.*, Exhibit 2 to Plaintiffs' PI Motion. Before that letter was sent, the time-frame for those wishing to register to run for a position on the tribal council in the upcoming June 23, 2007, Cherokee national election opened and closed; it occurred between March 5, 2007, and March 8, 2007. Nine days after the letter was sent, the time for eligible voters to register to vote in the upcoming June 23, 2007, Cherokee national election closed.

Plaintiffs chose not to appeal the decision to alter their citizenship status that resulted from the March 3, 2007, special election to the tribal courts. Rather, on May 8, 2007, Plaintiffs

filed their PI Motion seeking, in pertinent part, to: 1) enjoin Federal Defendants from taking certain actions until the Cherokee Nation restores Plaintiffs' full citizenship rights; and 2) to enjoin Defendant Cherokee Nation from denying Plaintiffs their full citizenship rights and from holding any election in which Plaintiffs would not be allowed to fully participate based solely upon their status as Cherokee Freedmen. *See generally* Plaintiffs' Motion for Preliminary Injunction (Docket #69) ("Plaintiffs' PI Motion").

A different group of Cherokee Freedmen took a different route to challenge the Tribe's decision to alter their citizenship status. After the results of the special election were made official, certain Cherokee Freedmen filed suit in the District Court of the Cherokee Nation in the matter of, *Raymond Nash v. Cherokee Nation Registrar*, Case Nos. CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, and CV-07-66, and sought an injunction against the Tribe's Registrar "from enforcing the Constitutional amendment adopted March 3, 2007, and seeking the reinstatement to citizenship of Plaintiffs and those similarly situated former Cherokee citizens referred to as the Cherokee Freedmen." *See* Exhibit A at p. 1. On May 14, 2007, the District Court of the Cherokee Nation issued a Temporary Order and Temporary Injunction, to which the Tribe agreed, ordering the Cherokee Nation Registrar to "immediately reinstate to full citizenship within the Cherokee Nation the Plaintiffs and all similarly situated persons commonly known as "Cherokee Freedmen." *See* Exhibit A at p. 2.

On May 18, 2007, a second Order was issued in the *Nash* matter, which was approved as to both form and content by the attorney for the *Nash* Plaintiffs, the Cherokee Nation's Attorney General, and the attorney for the Cherokee Nation Election Commission. *See* Exhibit B,

attached hereto. This Order sets forth several requirements to re-open voter registration and absentee ballot requests to ensure that the Cherokee Freedmen will be permitted to register for and vote in the upcoming Cherokee national election on June 23, 2007.

On May 21, 2007, Asst. Secretary-Indian Affairs Carl Artman issued a letter to Principal Chief Chad Smith informing him that a decision had been made to disapprove the 2003 constitutional amendment seeking to remove Secretarial approval of future amendments to the Tribe's Constitution. *See* Artman Decl., ¶ 7.e., and Attachment A, thereto. The effect of this decision is that Federal Defendants recognize the 1976 Cherokee Nation Constitution -- not the 1999 Constitution -- as the Tribe's governing document. *See* Artman Decl., ¶ 7.h. Moreover, from Federal Defendants' perspective, neither the Tribe's 1999 Constitution nor the March 3, 2007 constitutional amendment have legal effect because neither has been submitted to the Secretary of the Interior for approval. *See* Artman Decl., ¶¶ 7.f. - 7.k.

In preparation for the upcoming June 23, 2007, Cherokee national election, Federal Defendants requested the Cherokee Nation to provide them with the election procedures for the upcoming June 23, 2007, Cherokee national election. The Cherokee Nation agreed to this request and very shortly thereafter, on May 22, 2007, the Cherokee Nation provided Federal Defendants, through counsel, with the last of the requested election procedures. On May 25, 2007, Federal Defendants, in compliance with the Act of 1970, reviewed the election procedures relevant to the election of the Principal Chief, and approved those procedures. *See* Artman Decl., ¶ 7.l., and Attachment B, thereto.

III. ARGUMENT

The issuance of a preliminary injunction is an extraordinary remedy and "does not issue

as of course." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987). *See also Cuomo v. U.S. Nuclear Regulatory Commission*, 772 F.2d 972, 978 (D.C. Cir. 1985). In order to receive this extraordinary remedy, Plaintiffs bear the burden of proving a likelihood of success on the merits of their case, irreparable injury in the absence of injunctive relief, that injunctive relief would not significantly harm other interested parties, and that the public interest would be served by the granting of preliminary injunctive relief. *Professional Plant Growers Association v. United States Department of Agriculture*, 879 F. Supp. 130, 131 (D.D.C. 1995) (citing *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986)). Here, Plaintiffs have not demonstrated their heavy burden of establishing that all four requirements have been met sufficient to warrant the issuance of the extraordinary remedy of a preliminary injunction. Especially where, as here, Plaintiffs' alleged injuries have already been remedied for the foreseeable future, their extreme request for an injunction that includes the halting of the Cherokee national election, the stoppage of federal funding to the Cherokee Nation, and the severance of the government-to-government relationship between the United States and the Cherokee Nation, should be flatly denied.

A. Plaintiffs Will Suffer No Irreparable Injury if Their PI Motion Is Denied.

A critical component of any motion for preliminary injunctive relief is the establishment of irreparable injury if injunctive relief is not issued. Here, the situation that brought about Plaintiffs' PI Motion -- the denial of citizenship rights to the Plaintiffs -- does not currently exist. As set forth above, the Freedmen's citizenship rights have been fully restored for the foreseeable future and they will be allowed to participate in the upcoming Cherokee national election on June 23, 2007. This issue is central to Plaintiffs' PI Motion (*see* Plaintiffs' PI Motion at p. 11)

and is also the focus of the vast majority of their Complaint. For example, the only harm that Plaintiffs highlights in the section of their PI Motion in which they address irreparable injury, is their alleged deprivation of voting rights in the upcoming election. *Id.* The Cherokee Nation, however, has reinstated the Freedmen's full citizenship rights, including their right to register for and vote in the upcoming election. Thus, because Plaintiffs have already been relieved of their alleged injuries as a result of the actions of Federal Defendants and the Cherokee Defendants, they will suffer no irreparable injury if their PI Motion is denied.^{2/}

B. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits.

1. Federal Defendants Have No Fiduciary Duty Defined by Statute, Treaty, or Regulation that Mandates the United States to Rectify Allegations of Misconduct by the Tribe with Respect to Its Members in Intra-governmental Matters.

Plaintiffs contend that Federal Defendants have breached a fiduciary duty owed to the Cherokee Freedmen and, thus, Plaintiffs are likely to prevail on the merits of their claims.

Plaintiffs' breach of trust claims, however, lack specificity and merit.

^{2/} Although not addressed in the section of their PI Motion concerning irreparable injury, Plaintiffs also contend that they are deprived of their right to run for office. *See* Plaintiffs' PI Motion at pages 3, 5, 6, and 15. This is the first time that this claim appears in this litigation; it does not appear in Plaintiffs Complaint, other than to acknowledge the fact that their Constitution does not permit members who do not possess Cherokee blood to run for office. *See* Complaint, ¶ 40. Plaintiffs have not supported this alleged deprivation by declaration or otherwise and, consequently, it cannot be given weight. Moreover, even if this argument were deemed to be adequately supported, it is outside of the four corners of the Complaint. Further, to the extent that Plaintiffs seek to attack Federal Defendants' approval of this provision of the Tribe's Constitution, that claim is time-barred pursuant to 28 U.S.C. § 2401(a); the Tribe's Constitution became effective in 1976, and the provision addressing council members was amended by the Tribe and approved by Federal Defendants in 1989. Plaintiffs did not bring a challenge to this provision within six years of either of those dates and, consequently, any such challenge is now time-barred. It also is, arguably, barred under the doctrine of laches.

“[T]he fiduciary relationship springs from the statutes and regulations which ‘define the contours of the United States ‘fiduciary responsibilities.’” *Pawnee v. United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983)). Plaintiffs must identify the scope and extent of the alleged trust duty owed them by Federal Defendants; mere bald assertions without any further explanation is unsupported by the applicable case law. *See Mitchell II*, 463 U.S. at 224 (the “contours” of the government’s fiduciary duties are determined by looking at the applicable statutes and regulations); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 227, 237-38 (1985) (“In order to determine whether defendant did breach its fiduciary, statutory and/or regulatory obligations, it is necessary to ascertain, given the pertinent statutes [and] regulations . . . , the extent of defendant’s obligation . . .”). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions, no judicially enforceable claim for breach of trust claim can be stated. *Pawnee*, 830 F.2d at 192. *See Shoshone-Bannock Tribes*, 56 F.3d at 1482.

As this Court stressed in *Shoshone-Bannock*:

While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707, 107 S.Ct. 1487, 1491, 94 L.Ed.2d 704 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. *United States v. Mitchell*, 463 U.S. 206, 224-25, 103 S.Ct. 2691, 2971-72, 77 L.Ed.2d 580 (1983) (*Mitchell II*); *United States v. Mitchell*, 445 U.S. 535, 542, 100 S.Ct. 1349, 1353, 63 L.Ed.2d 607 (1980) (*Mitchell I*). We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty. “Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.” *National Wildlife Fed’n v. Andrus*, 642 F.2d 589, 612 (D.C. Cir.1980).

Shoshone Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (emphasis added).

Plaintiffs' breach of trust allegations appear both in their Complaint and PI Motion, however, Plaintiffs repeatedly change their definition of that alleged trust duty. For example, on page 2 of their Complaint, they argue that Federal Defendants have breached their trust duty by recognizing the results of the 2003 election because the Freedmen were prevented from voting in that election. Complaint, ¶ 3. Next, Plaintiffs argue that Federal Defendants breached their duty to the Freedmen by failing to protect their voting rights so that they "can participate in the fundamental right to elect their leaders and determine whether their Constitution should be amended." Complaint, ¶ 55. In their PI Motion, Plaintiffs argue that Federal Defendants breached their fiduciary duty to the Freedmen by failing to take action regarding the March 3, 2007, amendment. *See* Plaintiffs' PI Motion at p. 8. None of these allegations, however, are grounded in any statute or regulation that *mandates* Federal Defendants to take the kind of action that Plaintiffs seek either in the prayer for relief contained in their Complaint (i.e., declaring that the United States may not approve any election or other act by the Cherokee Nation in derogation of the rights of the Freedmen, and enjoining the Bureau of Indian Affairs from recognizing the Election results of the May 24, 2003, election until a lawful election takes place), or through their request for preliminary injunctive relief (i.e., refrain from issuing federal funding to the Cherokee Nation, refrain from recognizing any Cherokee Nation election, and refrain from recognizing its government-to-government relationship with the Cherokee Nation).

Moreover, Plaintiffs cannot point to any enforceable duty that is incumbent upon Federal Defendants to carry out on behalf of Plaintiffs. Plaintiffs loosely assert that Federal Defendants' alleged trust duty derives from the Treaty of 1866 (*see, e.g.*, Plaintiffs' PI Motion at 6).

Plaintiffs specifically appear to rely upon Article XII of this Treaty, but Article XII does not mandate that the United States take action to protect the Freedmen against alleged wrongs by the Cherokee Nation.

Enforceable fiduciary duties involve all components of a trust: a trust res, trust beneficiary, and management duties related to that res. Congress has not directed by statute or regulation that the Secretary has elaborate pervasive duties to manage the affairs of tribal government. Tribal government is designed to operate separately from the dictates of the federal government, and, by definition, is to govern itself. Enforcement of tribal laws and the rights with respect to its members, is supposed to be left to the Tribe. Congress has not chosen to pervasively and paternalistically direct Secretarial intervention into intra-tribal disputes. The Secretary is not mandated by Congress to manage intra-tribal governmental affairs; indeed the opposite is true. *See Santa Clara Pueblo v. Martinez*, 463 U.S. 49, 68 (1978). The Secretary is not directed by the Treaty of 1866 to take any particular action to enforce the terms of the Treaty to the extent a party benefitted by the Treaty provisions was allegedly being deprived of the benefit. *See, generally*, 1866 Treaty.

Courts, in other contexts, have held that, where there is a decision of Congress not to pervasively involve itself in particular Indian affairs matters, the determination has been that there exists no full fiduciary relationship from which enforceable duties flow. As the United States Court of Federal Claims noted:

This court has previously held that "Congress, unlike the situation in *Mitchell II*, did not, in the [Settlement] Act give the Commission pervasive control over, and complete supervision and management of plaintiff's property and lives." *Begay*, 16 Cl.Ct. at 124. The relationship created by § 640d-7(e) is not comparable in purpose or degree to the control or supervision of tribal monies or properties that has been found to establish a complete fiduciary duty. Nor is the system of paying private attorneys' fees in § 640d-

7(e) as comprehensive or detailed as the timber management statutes. It can hardly be said that Congress intended to give the Secretary control over plaintiff's land rights. The Secretary in no way exercised any control over plaintiff's defense of its rights. The Secretary's role is limited to reviewing bills submitted for work previously performed in order to determine whether they are appropriate for reimbursement from available funds. *This does not represent congressional intent to impose fiduciary obligations.*

Hopi Tribe v. United States, 55 Fed. Cl. 81, 95 (Fed. Cl. 2002) (emphasis added).

Here Congress entered into a treaty in 1866, which set forth certain obligations owing to the United States. Some of those obligations benefitted the Freedman; but, nowhere in the Treaty did the United States obligate itself to take particular actions on behalf of the Freedmen to ensure that the Treaty provisions were being carried out in a particular manner. Nowhere in statutes does Congress obligate the United States to take particular actions by the United States to secure the obligations in a manner that the Freedmen believe appropriate. Congress and the Treaty leave the enforcement of the Treaty, the manner of enforcement, and whether to enforce particular provisions of the Treaty entirely to the discretion of the Secretary. Congress did not direct pervasive or any particular intervention into the governmental affairs of the Tribe. Congress and the Treaty simply did not define fiduciary obligations to enforce Treaty provisions that the Freedmen believe are being violated.

Typically the enforcement of treaty obligations against third parties – even when owing to a tribe – is deemed discretionary and not part of the fiduciary obligations of the United States or the Secretary. For example, in *United States v. Creek Nation*, 318 U.S. 629, 639 (1943), the Supreme Court held that, notwithstanding a treaty provision authorizing the Secretary of the Interior to file suit against third parties who had trespassed upon the Creek Reservation, the Secretary's failure to bring any such suits did not constitute a breach of trust. Similarly, in , *Shoshone Bannock*, tribes sought to compel the United States to take action on their behalf,

specifically to sue others regarding water claims. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d at 1480. The D.C. Circuit, citing *Heckler v. Chaney*, 470 U.S. 821 (1985), found that the Attorney General's refusal to assert the tribes' claims, "was presumptively within her discretion." *Id.* at 1481. The D.C. Circuit also addressed the question of the United States' fiduciary responsibility to the tribes, holding that "an Indian tribe cannot force the government to take specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Id.* at 1482.

By contrast, Plaintiffs here appear to rely upon Article XII of the 1866 Treaty which states, in pertinent part, that the Cherokee Nation shall enact no law "inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States." The 1866 Treaty does not, unlike the Creek Nation Treaty, even authorize, much less require, the Secretary to take action against the Cherokee Nation to protect the rights of the Freedmen. Had Congress intended for the Secretary to have a more paternalistic and pervasive role, it could have created one, but it has not done so. What is clear, however, is that Congress has not unambiguously imposed specific fiduciary obligations to manage the Treaty rights for the benefit of the Freedmen. If Congress wishes to expand the Secretary's role in the future, it can do so by statute and direct the Secretary to take particular action to secure governmental benefits for the Freedmen, but unless that happens, the Secretary must refrain from interfering with intra-tribal disputes. Thus, Plaintiffs' argument that the government committed a breach of trust by not taking action against the Cherokee Nation must fail as well.

Nor have Plaintiffs articulated a statute or regulation that, reasonably interpreted, imposes a trust duty on Federal Defendants such that they are *required* to act in the manner

alleged in Plaintiffs' Complaint. In other words, Plaintiffs have not identified any positive law emanating from treaties, agreements, statutes, regulations or executive orders which imposes a trust duty upon the Federal Defendants to take action on behalf of the Freedmen against the Cherokee Nation. *See, e.g., United States v. Navajo Nation*, 537 U.S. 488, 506-12 (2003); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 809-12 (9th Cir. 2006) (held that plaintiff tribe had no common law cause of action for breach of trust and could not identify a treaty, agreement, statute, or regulation that imposed the specific trust duty alleged to exist); and *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 28 (D.D.C. 1999).

Moreover, in *Wheeler v. United States Department of the Interior*, 811 F.2d 549 (10th Cir. 1987), which involved a Cherokee Nation election dispute, the Tenth Circuit found that no trust corpus was involved, and that "and no statute or regulation requires Department involvement in Cherokee election disputes; rather, as noted previously, federal law precludes Department action."³⁷ In this case, the election dispute raised in Plaintiffs' Complaint concerns the May 2003 election. As was true in the *Wheeler* case, Plaintiffs have not identified a trust corpus at issue here, and there is no statute or regulation that *requires* the Department's involvement – especially when the June 23, 2007, election is upon us and will supersede the alleged problems created by the May 2003, election. For all of these reasons, Plaintiffs are not likely to prevail on

³⁷ Likewise, although Plaintiffs allege in their Complaint that Federal Defendants violated the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-303 ("ICRA"), they cannot reasonably argue that ICRA creates a trust duty such that a breach thereof would be remedied by the relief Plaintiffs seek. As established by the United States Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), ICRA does not authorize the bringing of civil actions for declaratory or injunctive relief to enforce its substantive provisions. *Id.* at 1674-75. It also cannot be interpreted to contain a trust duty owed to the Freedmen by the United States; indeed, the plain language of the statute is directed at the responsibilities of the tribes, and not the United States.

their breach of trust claims.

2. This Case Is Distinguishable from *Seminole Nation v. Norton*.

Plaintiffs also argue that the Department has acted arbitrarily and capriciously because it has not taken the same steps against the Cherokee that it did against the Seminole Nation when the Seminole disenfranchised their Freedmen.^{4/} In *Seminole*, the Tribe did not count the votes of its Freedmen in a Tribal Council election and the Department refused to recognize the results of that election. In *Seminole Nation v. Norton*, 223 F. Supp. 2d 122 (D.D.C. 2002), the Seminole Nation challenged the Department's decision not to recognize the election results under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq* ("APA"). This Court held that the Department acted within its authority and did not act arbitrarily or capriciously in deciding not to recognize the results of the election. Plaintiffs, here, face a very different case and are not likely to succeed on the merits of their APA argument primarily because the Cherokee Nation has reinstated the citizenship rights of the Freedmen and because the Cherokee Nation has tribal remedies to address such issues.

The Seminole situation is readily distinguished from the situation at hand. Most importantly, the Cherokee, unlike the Seminole, have demonstrated that they are capable of protecting the rights of the Freedmen.^{5/} A key to the court's decision in *Seminole* upholding the

^{4/} The Plaintiffs' Complaint addresses the election of May 2003, however, Plaintiffs' PI Motion addresses the upcoming June 2007 election. Once the upcoming election is lawfully held, the Plaintiffs claims as to the May 2003 election will be superseded by subsequent events.

^{5/} In addition, *Seminole* is distinguished by the posture of that litigation and the behavior of the Seminole Nation in that case. First, in *Seminole*, the court was considering only whether the Department had the authority not to recognize the election results in an APA challenge by the tribe. It did not hold that the Department had a specific *duty* to do so. Rather, the court held that, because there were no other available remedies, the Department had a duty to take some action

Department's decision not to recognize the actions of the unlawfully constituted tribal council was that the tribe was unable to protect the rights of the minority members. In this case, the Cherokee Nation, by reinstating the Freedmen's citizenship rights, has, to the contrary, acted to respect the Freedmen's rights.

The *Seminole* opinion defined the Department's duty to act on behalf of the Freedmen in terms of the tribe's ability or willingness to protect the Freedmen's rights. In defining the duty of the Department to act to protect the Freedmen's rights, the court wrote,

[W]here the Nation evidences that it does not intend to respect those [minority] rights, the government, as part of "the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited people," has a duty to ensure that its minority members are protected against the will of the majority that is being imposed in violation of its own Constitution. . . . Where the Nation will not protect the Constitutional rights of its minority members, the BIA has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies.

Seminole, 223 F. Supp. 2d at 146-47 (emphasis added). The *Seminole* were unable to protect the rights of the Freedmen because the tribe had no judicial system from which the Freedmen could seek a remedy. Under those circumstances, the court held, the Department was justified in fashioning a remedy to protect the Freedmen's rights. In this case, the Cherokee Nation has a judicial system that has provided meaningful protection of the rights of the Freedmen. *See Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09 (holding the Freedmen were members of the tribe under the terms of the 1976 Constitution). Moreover, in connection with this election,

to protect the Freedmen. Second, in *Seminole*, the tribe did not count the votes of the Freedmen. In this case, the Freedmen will vote and have their votes counted in the June 23, 2007, election.

the Cherokee Nation, in response to the *Nash* Order, agreed to reinstate the Freedmen to full membership rights, including the right to vote in the June 23, 2007, election. *See* Exhibits A and B, attached hereto. The Freedmen's citizenship status shall remain fully intact pending resolution of the Freedmen's appeals of the revocation of their membership. Unlike the Seminole, therefore, the Cherokee Nation is protecting the rights of the Freedmen from the will of the majority. The Department, accordingly, has no duty to intervene. Moreover, because the Cherokee is respecting the Freedmen's right to vote in the June election, the Department has no basis under *Seminole* to intervene. Quite simply, in connection with the June 23 election, the Cherokee are not violating the Freedmen's rights.

In fact, the Department would be wrong to intervene in the Freedmen's dispute with the Cherokee. The Cherokee, like other tribes, is a "distinct, independent political communit[y], retaining [its] original natural rights" in matters of local self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (*citing Worcester v. Georgia*, 6 Pet. 515, 559 (1832)). Although Congress, exercising its plenary power of Indian tribes, has divested tribes of some of the attributes of sovereignty, tribes "remain 'a separate people, with the power of regulating their internal affairs.'" *Martinez, id.*, quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). As the *Martinez* Court noted, this means that tribes have the authority to make their own laws governing internal matters and to enforce that law in tribal forums. *Martinez, id.* The Federal government, therefore, must respect the Tribe's sovereignty and rights of self-government by abstaining from intervening in internal tribal affairs. *See Wheeler v. United States*, 811 F.2d 549, 551 (10th Cir. 1987) ("courts should not require the Department to act when to do so would interfere with the tribe's right to self-government."). This duty requires that the Department

defer to the tribe's internal dispute resolution process to resolve internal tribal issues. *Wheeler*, 811 F.2d at 552 (because the Cherokee has a mechanism for resolving election disputes, the Department has no authority to contest the Tribe's resolution of the election); *see also Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983) (court recognized newly elected tribal council on an interim basis until the tribe resolved the election dispute itself). Therefore, because the Cherokee Nation affords the Freedmen internal tribal remedies, the Department actually has a duty to abstain from interfering in the Freedmen's election dispute with the Tribe so that the Tribe, exercising its sovereignty and rights of self-government, can resolve the Freedmen's claims.

The Plaintiffs, therefore, are not likely to succeed on the merits of their argument that the Department has acted arbitrarily and capriciously by failing to handle this situation in the same manner as it did when the Seminole Nation disenfranchised their Freedmen; the two situations are very different. Here, the Cherokee Nation is respecting the rights of the Freedmen and, accordingly, there is no basis for imposing on the Department a duty to intervene in the Plaintiffs' conflict with the Cherokee with respect to the June 23, election.

3. Federal Defendants Have Complied with the 1970 Principal Chiefs Act.

At the outset, Federal Defendants do not contend that they reviewed and approved the election procedures prior to the May 2003 election. Federal Defendants did, however, make a request to review them, but the procedures were not provided to Federal Defendants and, accordingly, review of them did not occur. Nevertheless, Federal Defendants, as set forth above, did make a request to the Cherokee Nation to be provided with the election procedures for the upcoming Cherokee national election. The Cherokee Nation agreed to the Federal Defendants'

request and, as of May 22, 2007, all of the election procedures were provided, through counsel, to Federal Defendants. On May 25, 2007, Federal Defendants completed their review of the election procedures related to the election of the Principal Chief, and determined that those provisions were in compliance with the Act of 1970. *See* Artman Decl., ¶ 7.1., and Attachment B, thereto. While Plaintiffs may, technically, have an argument regarding Federal Defendants' review of the election procedures for the 2003, election, they do not have such an argument with regard to the upcoming Cherokee national election. Accordingly, there is no basis for enjoining the upcoming election under the Act of 1970; enjoining the upcoming election based on a concern over Federal Defendants' compliance with the Act of 1970 for an election that occurred four years ago and is about to be superseded by subsequent events would create significant disruption, would not be in the public interest, and would not advance the purposes of the Act of 1970.

4. Plaintiffs Do Not Have a Cause of Action Under the APA Concerning the Proposed 2003 Constitutional Amendment.

In their Complaint, Plaintiffs argue that Federal Defendants violated the APA because, through inaction, they gave *de facto* approval to the allegedly illegal 2003 proposed constitutional amendment, which sought to remove the Secretarial approval for future constitutional amendments. As set forth above, on May 21, 2007, Asst. Secretary-Indian Affairs Carl Artman denied the 2003 proposed constitutional amendment. *See* Artman Decl. at ¶ 7.e., and accompanying Attachment A. Therefore, because Mr. Artman has acted on the 2003 proposed amendment, and Plaintiffs can no longer argue that Federal Defendants have failed to act in this regard. Accordingly, Plaintiffs are not likely to prevail on the merits of this claim either.

5. This Action Does Not Fit Within the APA Waiver of Sovereign Immunity Because the Freedmen Have an Adequate Remedy to Vindicate their Rights by Seeking Relief Against the Cherokee Nation.

The APA is a limited waiver of sovereign immunity. It does not give wholesale rights of review. It does not extend to agency action or inaction where a plaintiff has another judicial remedy to prevent any injury to its interests. With respect to the injuries asserted by Plaintiffs, all are ultimately related to some action taken directly by the Cherokee Nation (i.e., deprivation of citizenship rights, including the right to register to vote). The allegations against Federal Defendants, however, are derivative in nature – Plaintiffs assert that Federal Defendants should take action in response to the actions taken by the Cherokee Nation. Because this Court has determined that it can exercise jurisdiction over the Cherokee Nation, Plaintiffs can seek relief in this matter directly against the Cherokee Nation. Accordingly, Plaintiffs have an adequate alternative remedy and, therefore, the APA does not provide a waiver of sovereign immunity to challenge any derivative action or inaction attributed to Federal Defendants.

The APA limits judicial review to “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Plaintiffs have a judicial vehicle to vindicate their rights; therefore they cannot use the APA to force review of an action or inaction. *See Gillis v. United States Dept. Of Health and Human Servs.*, 759 F.2d 565, 577 (6th Cir. 1985); *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (where “an adequate remedy for the wrong allegedly inflicted on appellants by the Office of Revenue Sharing” exists, there is no APA review); *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 746 (D.C. Cir. 1990) (“We conclude instead that plaintiffs no longer have any claim under the APA because, for the

injuries they continue to assert, they have another adequate remedy.”). *See also Hitachi Metals, Ltd. v. Quigg*, 776 F. Supp. 3, 10 (D.D.C. 1991) (finding no judicial review of final agency action under the APA as remedies capable of redressing Hitachi’s potentially substantive injuries were available, including raising an allegation of patent invalidity as a defense to an infringement action); *cf. Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Thus, even if Plaintiffs could find a viable claim against Federal Defendants for action or inaction taken in response to conduct by the Cherokee Nation, the APA does not permit review of any such claims against Federal Defendants where there exists another adequate remedy in court.

C. A Balance of the Equities Does Not Favor Plaintiffs.

An injunction that is of the extraordinary nature that Plaintiffs seek would cause severe disruptions to the government-to-government relationship between the Cherokee Nation and the United States, and, no doubt, cause significant hardship to the Cherokee people – including the Freedmen members of the Tribe. If Plaintiffs were granted an injunction, a lawful election for Principal and Deputy Chief of the Tribe, and council members would not be permitted to go forward, and federal funding would be cut off. Moreover, the interference by the Court in the United States’ government-to-government relationship with the Cherokee Nation could risk raising an impermissible political question. These are extreme results that would serve no purpose. Because, at this time, the Cherokee Freedmen’s citizenship has been fully reinstated – including their right to register for and vote in the upcoming Cherokee national election – Plaintiffs’ proposed injunction would serve no purpose; Plaintiffs’ alleged harms have already been remedied by the actions of the Cherokee Defendants and Federal Defendants. Moreover,

because Plaintiffs argue in their Complaint and in their PI Motion that a lawful election must take place, Plaintiffs' PI Motion, which seeks to enjoin the upcoming Cherokee national election, would, if granted, actually have the effect of working against one of Plaintiffs' primary goals in this litigation. Balancing the disruption caused if the preliminary injunction proposed by Plaintiffs were issued against the harm that no longer exists for Plaintiffs, tips in favor of denial of the preliminary injunction. Accordingly, Plaintiffs cannot reasonably satisfy this prong of the test for obtaining injunction relief.

D. The Issuance of a Preliminary Injunction Is Not in the Public Interest.

Plaintiffs' PI Motion is based on facts that have been superseded. As set forth above, the June 23, 2007, election is ready to go forward with the participation of the Cherokee Freedmen. The Cherokee Freedmen's citizenship is now fully reinstated, and they are able to register for and vote in the upcoming Cherokee national election. Accordingly, issuance of an injunction that would direct Federal Defendants to: 1) refrain from recognizing the government-to-government relationship between the United States and the Cherokee Nation; 2) cut off federal funding to the people of the Cherokee Nation; and 3) refrain from recognizing any Cherokee Nation election would not serve the public interest. Instead, issuance of such an extraordinary injunction based on allegations that are now inaccurate would be highly disruptive to the government-to-government relationship between the Cherokee Nation and the United States and would be without justification. Therefore, Plaintiffs' PI Motion should be denied on this basis as well.

IV. CONCLUSION

Based on the foregoing and for good cause shown, Federal Defendants respectfully

request that Plaintiffs' PI Motion be denied.

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Respectfully submitted,

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