IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, DONALD 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; UNITED STATES DEPARTMENT OF THE INTERIOR,	)	**Docket Type: Civil Rights (non-employment)**
	)	**Date Stamp: 08/11/03**
CHEROKEE NATION OF OKLAHOMA	)	
CHADWICK SMITH, Individually and in His Official Capacity	)	
John Does, Individually and in their official capacity	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

Plaintiff, by and through its counsel, submits this memorandum in support of its Motion for Leave to File Third Amended Complaint ("Motion to Amend"). As set forth in more detail below, the amendment meets the standards of Rule 15 and should be permitted in the interests of justice.

STATEMENT OF FACTS

The Court is well familiar with the facts of this case so Plaintiffs will highlight only those facts relevant to the instant motion. In May, 2003, the Cherokee Nation held an election for tribal officials and also to amend its Constitution removing federal approval for any subsequent constitutional amendments. Plaintiffs, a representative group of approximately 25,000

Cherokees of African descent who can trace directly to ancestors listed on the Dawes Rolls, collectively known as the Cherokee Freedmen, were denied the right to vote in the election. Plaintiffs sought relief by asking the Bureau of Indian Affairs to not recognize the election as the Tribe did not comply with the 1970 Principal Chiefs Act as required by law and stated in two letters from Bureau of Indian Affairs Asst. Secretary Neil McCaleb to Cherokee Principal Chief Chadwicke Smith. Although the BIA had refused to recognize a factually similar election in 2000 when the Seminole Nation did not permit the Seminole Freedmen from voting and the BIA took the initial stance with the Cherokee, the BIA reversed its position and issued a letter to Principal Chief Chadwicke Smith stating that the BIA had no authority to recognize the election of the Cherokee officials and that issue was reserved for Cherokee tribunals. Plaintiffs filed suit in this Court against Gale Norton and the United States Department of Interior. On September 8, 2005, the Cherokee Nation of Oklahoma obtained the right to intervene in the present litigation and filed a Motion to Dismiss. On September 23, 2005, Plaintiffs filed a Motion for Leave to file an Amended Complaint to add the Cherokee Nation of Oklahoma and Principal Chief Smith as Defendants and add causes of action seeking relief under the Constitutional provisions of the 13th and 15th Amendments and jurisdiction under the Treaty of 1866, the Curtis Act and other relevant facts.

On June 7, 2006, The Cherokee Nation's highest court approved the 1999 Constitution and declared it binding on the Cherokee Nation. The Cherokee Nation took this action in contradiction to Cherokee Tribal law and United States law requiring approval of the United States. Chief Chadwicke Smith and other Cherokee officials immediately began calling for elections to remove the Freedmen from the Cherokee Nation.

On March 3, 2007, Cherokee Defendants held a popular election which expelled the Freedmen. Although the Tribal Courts have purported to temporarily maintain the citizenship status of the Freedmen, the Freedmen were not permitted to vote with equal standing in a June 23, 2007 election held by the Cherokee Nation and have otherwise been denied full citizenship status in numerous ways outlined in the Amended Complaint.

The Federal Defendants have refused to meet their obligations to regard the full citizenship rights of the Freedmen and have continued to recognize the government of the Cherokee Nation and to dispense funds to the Cherokee Nation notwithstanding their legal obligations to the contrary.

The Motion to Amend has been brought to incorporate these new factual developments and to add additional parties that have been injured by the actions of Defendants to this suit. The parties and the Court would benefit from having these recent actions of the Cherokee Nation and the Federal Defendants made part of the record.

ARGUMENT

Under Fed. R. Civ. P. 15(a), after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Rule 15(a) is to be liberally construed and motions to amend are to be granted "[i]n the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive . . . , repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party . . . , futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In exercising its discretion on whether to grant leave to amend, a District Court should be guided by "Rule 15's mandate that leave is to be 'freely given when justice so requires.'" *Anderson v. USAA Cas. Ins. Co.*, 218

F.R.D. 307, 310 (D.D.C. 2003) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). As such, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182.

In this case, none of the traditional concerns that would militate against the granting of leave to amend (namely, undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies through earlier revisions, undue prejudice, and futility) can be raised as an impediment to this Court's allowing Plaintiffs to file their Third Amended Complaint. Rather, Plaintiffs seek to amend their complaint in response to recent actions of the Cherokee Nation and the Federal Defendants and the shifting harm that they have visited upon Plaintiffs.

Plaintiffs have previously been granted leave to amend their complaint but those amendments were also proper and brought in response to the developing factual and procedural character of this ongoing dispute. The proposed third amendment is thus made without undue delay.

The proposed amended complaint is not futile. It is well settled that a claim is deemed futile for the purposes of Rule 15(a) only where it cannot properly survive a motion to dismiss. *See Henderson v. Stanton*, No. 97- 5358, 1998 U.S. App. LEXIS 30884 at * 6 (D.C. Cir. 1998); *M.K. v. Tenet*, 216 F.R.D. 133, 139 (D.D.C. 2002) ("amendment is not futile because it contains facts that support relief."). Plaintiffs have clearly demonstrated a viable basis for the requested relief and the recent actions of the Cherokee Nation and the Federal Defendants have solidified the fact that Plaintiffs have stated valid causes of action and that the case should not be dismissed.

Additionally, the amendment will not unduly prejudice the United States or the Cherokee Nation. In order "to show prejudice sufficient to justify denial of leave to amend 'the opposing party must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely.'" *In re: Vitamins*, 217 F.R.D. at 29 (citing and quoting *Dooley v. United Technologies Corp.*, 152 F.R.D. 419, 425 (D.D.C. 1993)). Discovery in this case has yet to begin and allowing Plaintiffs' amendment in no way threatens to disrupt the United States or the Cherokee Nation's ability to obtain evidence or present facts. *See Tenet*, 216 F.R.D. at 141 (noting the appropriateness of granting leave to amend where discovery has yet to fully begin). There is no risk of surprise or prejudice to either the United States or the Cherokee Nation. Finally, the interests of justice favor the allowance of amendment to Plaintiffs' Complaint.

In sum, the proposed amendment does not arise from bad faith or undue delay, is not futile and does not risk prejudice to the United States or the Cherokee Nation. In accordance with the liberal federal policy favoring amendment, Plaintiffs' motion should accordingly be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court grant it leave to file the Third Amended Complaint attached to its motion.

Dated: July 17, 2007

Respectfully submitted,

___________/s/_______________
Alvin Dunn (D.C. Bar No. 423229)
Thomas G. Allen (D.C. Bar No. 484425)
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Phone: (202) 663-8000
Facsimile: (202) 663-8007

Jonathan Velie
VELIE & VELIE
210 East Main Street, Suite 222
Norman, Oklahoma 73069
Phone: (405) 364-2525
Facsimile: (405) 364-2587

Attorneys for Plaintiffs, Marilyn Vann, *et al.*