

PRELIMINARY STATEMENT

1. The allegations contained in paragraph one of the Complaint constitute Plaintiffs' characterization of their action, to which no response is required. To the extent an answer is required, Federal Defendants deny each and every allegation therein.

2. Federal Defendants admit the allegations contained in paragraph two of the Complaint to the extent that the BIA recognized the May 2003, election of Chad Smith as Principal Chief of the Cherokee Nation of Oklahoma, however, deny all remaining allegations of paragraph two of the Complaint.

3. The allegations contained in paragraph three of the Complaint constitute Plaintiffs' characterization of the holdings in *Seminole Nation of Oklahoma v. Norton*, No. 00-2384 (D.D.C. Sept. 27, 2001) (CKK) ("*Seminole I*"), *Seminole Nation of Oklahoma v. Norton*, No. Civ. A. 02-0730 (RBW), 2002 WL 31109804 (D.D.C. Sept. 23, 2002) ("*Seminole II*"), the 1970 Principal Chiefs Act, and certain referenced letters, to which no response is required. Federal Defendants further aver that the decisions issued by the court in *Seminole I* and *Seminole II*, the 1970 Principal Chiefs Act, and the referenced letters speak for themselves and are the best evidence of their contents. Federal Defendants deny the remaining allegations contained in paragraph three of the Complaint.

4. The allegations contained in paragraph four of the Complaint constitute Plaintiffs' characterization of the holdings in *Seminole I*, *Seminole II*, and the Treaty of 1866 between the United States and the Seminole Nation of Oklahoma, to which no response is required. Federal Defendants further aver that the decisions issued by the court in *Seminole I* and *Seminole II*, and the Treaty of 1866 between the United States and the Seminole Nation of Oklahoma speak for

themselves and are the best evidence of their contents. Federal Defendants admit the allegations of the last sentence of paragraph four of the Complaint to the extent that the United States and the Seminole Nation of Oklahoma entered into a treaty in 1866, however, deny all remaining allegations therein.

5. Federal Defendants admit the allegations contained in the first sentence of paragraph five of the Complaint to the extent that the United States and the Cherokee Tribe entered into a treaty in 1866 (“1866 Treaty”), however, Federal Defendants aver that the 1866 Treaty speaks for itself and is the best evidence of its contents. The remaining allegations of the first sentence of paragraph five, and the allegations contained in the second and third sentences of paragraph five constitute legal conclusions, and Plaintiffs’ characterizations of their case and the holdings in *Seminole I* and *Seminole II*, to which no response is required; to the extent a response is required, Federal Defendants deny each and every allegation therein. The allegations contained in the fourth and fifth sentences of paragraph five of the Complaint are directed at Defendants, the Cherokee Nation of Oklahoma (“CNO”) and Chadwicke Smith, and, therefore, no response from Federal Defendants is required.

PARTIES

6. Federal Defendants are without sufficient information or belief as to the truth or falsity of the allegations contained in paragraph six of the Complaint and, therefore, deny each and every such allegation.

7. Federal Defendants deny the allegations contained in paragraph seven of the Complaint to the extent that Gale A. Norton has been succeeded by Dirk Kempthorne as the Secretary of the Defendant Department of the Interior and the principal governmental official

responsible for the administration of Native American affairs and the operations of the BIA.

8. Federal Defendants admit the allegations contained in paragraph eight of the Complaint.

9. Federal Defendants admit the allegations of the first sentence of paragraph nine of the Complaint to the extent that the CNO is an Indian Tribe. The remaining allegations of the first sentence, and the allegations contained in the second sentence of paragraph 9 quote from the 1866 Treaty, which speaks for itself, is the best evidence of its contents, and to which no response is required. Federal Defendants admit the allegations contained in the last sentence of paragraph nine of the Complaint.

10. Federal Defendants admit the allegations contained in the first sentence of paragraph ten of the Complaint. The allegations contained in the last sentence of paragraph ten of the Complaint quote from the CNO Constitution, which speaks for itself, is the best evidence of its contents, and to which no response is required.

JURISDICTION AND VENUE

11. The allegations contained in paragraph 11 of the Complaint constitute legal conclusions to which no response is required.

12. The allegations contained in paragraph 12 of the Complaint constitute legal conclusions to which no response is required.

13. The allegations contained in paragraph 13 of the Complaint constitute legal conclusions to which no response is required.

14. The allegations contained in paragraph 14 of the Complaint constitute legal conclusions to which no response is required.

15. The allegations contained in paragraph 15 of the Complaint constitute legal conclusions to which no response is required.

16. The allegations contained in paragraph 16 of the Complaint constitute legal conclusions to which no response is required.

17. The allegations contained in paragraph 17 of the Complaint constitute legal conclusions to which no response is required.

18. The allegations contained in paragraph 18 of the Complaint constitute Plaintiffs' characterization of its action, to which no response is required.

19. The allegations contained in paragraph 19 of the Complaint constitute Plaintiffs' characterization of its action and legal conclusions, to which no response is required.

ALLEGATIONS COMMON TO ALL COUNTS

Background

20. Federal Defendants admit the allegations contained in paragraph 20 of the Complaint.

21. Federal Defendants admit the allegations contained in paragraph 21 of the Complaint to the extent that the 13th Amendment of the United States Constitution abolished slavery. Federal Defendants are without sufficient information or belief as to the remaining allegations of paragraph 21 of the Complaint and, therefore, deny each and every such remaining allegations.

22. Federal Defendants admit the allegations contained in the first sentence of paragraph 22 of the Complaint. The allegations contained in the remainder of paragraph 22 of the Complaint refer to selected provisions of the 1866 Treaty between the Cherokee Nation and

the United States, to which no response is required. Federal Defendants aver, however, that such Treaty provisions speak for themselves and are the best evidence of their contents.

23. The allegations contained in paragraph 23 of the Complaint constitute Plaintiffs' characterization of legislation allegedly passed by the Cherokee Tribal Council in 1883, to which no response is required. Federal Defendants aver, however, that any such legislation speaks for itself and is the best evidence of its contents.

24. The allegations contained in the first sentence of paragraph 24 of the Complaint constitute Plaintiffs' characterization of legislation found at 25 Stat. 608-609, which speaks for itself and is the best evidence of its contents. Federal Defendants are without sufficient information or belief as to the truth or falsity of the allegations contained in the second sentence of paragraph 24 and, therefore, deny each and every allegation contained therein.

25. Federal Defendants admit the allegations contained in paragraph 25 of the Complaint.

26. Federal Defendants admit the allegations contained in paragraph 26 of the Complaint to the extent that the United States Congress authorized the federal Court of Claims to adjudicate certain issues concerning the rights of the Cherokee Freedmen. Federal Defendants deny the remaining allegations contained in paragraph 26 of the Complaint.

27. The allegations contained in paragraph 27 of the Complaint constitute Plaintiffs' characterization of the holding in *Moses Whitmire, Trustee for the Cherokee Freedmen v. The Cherokee Nation and the United States*, 30 Ct. Cl. 138 (1895), to which no response is required. Federal Defendants further aver that the holding in that case speaks for itself and is the best evidence of its contents.

28. Federal Defendants admit the allegations contained in the first sentence of paragraph 28 of the Complaint. Federal Defendants admit the remaining allegations contained in paragraph 22 of the Complaint to the extent that by 1898, the Dawes Commission began enrolling the African-American Cherokees on a “Freedmen Roll,” however, deny all remaining such allegations.

29. The allegations contained in paragraph 29 of the Complaint constitute Plaintiffs’ characterization of the Curtis Act, to which no response is required. Moreover, Federal Defendants aver that the Curtis Act speaks for itself and is the best evidence of its contents.

30. Federal Defendants admit the allegations contained in paragraph 30 of the Complaint to the extent that the CNO and the United States signed an agreement in 1901 relating to the allotment of tribal lands and the tribal government of the CNO, however, Federal Defendants aver that the 1901 agreement speaks for itself and is the best evidence of its contents.

31. The allegations contained in paragraph 31 of the Complaint constitute Plaintiffs’ characterization of *Daniel Red Bird v. United States*, 203 U.S. 76, 27 S. Ct. 29 (1906), to which no response is required. Moreover, Federal Defendants aver that the Supreme Court’s holding in *Daniel Red Bird v. United States*, 203 U.S. 76, 27 S. Ct. 29 (1906) speaks for itself and is the best evidence of its contents.

32. Federal Defendants admit the allegations contained in the first sentence of paragraph 32 of the Complaint. Federal Defendants admit the allegations contained in the second sentence of paragraph 32 to the extent that the Dawes Commission created distinct rolls for Cherokees by blood and Cherokees who were African-American, and deny the allegations therein to the extent that the Dawes Commission made its determinations in an unscientific

manner. Federal Defendants are without sufficient information or belief as to the truth or falsity of the remaining allegations contained in paragraph 32 of the Complaint and, therefore, deny each and every such remaining allegation contained therein.

33. The allegations contained in the first two sentences of paragraph 33 of the Complaint refers to the BIA's Solicitor's Opinion, October 1, 1941, 1 Op. Sol. on Indian Affairs 1076 (U.S.D.I. 1979), which speaks for itself, is the best evidence of its contents, and to which no response is required. Federal Defendants admit the allegations contained in the third sentence of paragraph 33 of the Complaint. The last sentence of paragraph 33 of the Complaint constitute a legal conclusion to which no response is required.

34. The allegations contained in paragraph 34 of the Complaint constitute Plaintiffs' characterization of the 1970 Principal Chiefs Act, Pub. L. 91-495, 84 Stat. 1091, which speaks for itself, is the best evidence of its contents, and to which no response is required.

35. Federal Defendants admit the allegations contained in paragraph 35 of the Complaint.

36. The allegations contained in paragraph 36 of the Complaint constitute Plaintiffs' characterization of Article I of the 1976 Cherokee Constitution, which speaks for itself, is the best evidence of its contents, and to which no response is required.

37. The allegations contained in paragraph 37 of the Complaint constitute Plaintiffs' characterization of Article II of the 1976 Cherokee Constitution, which speaks for itself, is the best evidence of its contents, and to which no response is required.

38. The allegations contained in the first sentence of paragraph 38 of the Complaint constitute Plaintiffs' characterization of Article III, Section 1 of the 1976 Cherokee Constitution,

which speaks for itself, is the best evidence of its contents, and to which no response is required. Federal Defendants are without sufficient information or belief as to the truth or falsity of the allegations contained in the second sentence of paragraph 38 of the Complaint and, therefore, deny each and every such allegation.

39. The allegations contained in paragraph 39 of the Complaint constitute Plaintiffs' characterization of Article V, Section 7 of the 1976 Cherokee Constitution, which speaks for itself, is the best evidence of its contents, and to which no response is required.

40. The allegations contained in paragraph 40 of the Complaint refer to Article IX, Sections 1 and 2 of the 1976 Cherokee Constitution, which speak for themselves, are the best evidence of their contents, and to which no response is required.

The May 24, 2003, Election and Federal Defendants' Reversal of Position

41. The allegations contained in paragraph 41 of the Complaint constitute Plaintiffs' characterization of a March 15, 2002, letter from then Assistant Secretary of Indian Affairs, Neal McCaleb, to Cherokee Chief Chad Smith, which speaks for itself, is the best evidence of its contents, and to which no response is required.

42. The allegations contained in paragraph 42 of the Complaint, constitute Plaintiffs' characterization of the correspondence attached as Exhibits 1-17 of Plaintiffs' Complaint, which speak for themselves, are the best evidence of their contents, and to which no response is required.

43. The allegations contained in paragraph 43 of the Complaint constitute Plaintiffs' characterization of and quotations from an August 6, 2003, letter from BIA Regional Director for Eastern Oklahoma, Jeanette Hannah, which speaks for itself, is the best evidence of its contents,

and to which no response is required.

44. The allegations contained in paragraph 44 of the Complaint constitute a quotation from the August 6, 2003, letter from BIA Regional Director for Eastern Oklahoma, Jeanette Hannah, which speaks for itself, is the best evidence of its contents, and to which no response is required.

45. The allegations contained in the first sentence of paragraph 45 of the Complaint constitute a legal conclusion to which no response is required. Federal Defendants deny the remaining allegations contained in paragraph 45 of the Complaint.

46. Federal Defendants deny the allegations contained in paragraph 46 of the Complaint.

47. The allegations contained in paragraph 47 of the Complaint constitute Plaintiffs' characterization of two letters from Plaintiffs' counsel, Jon Velie, dated June 10, 2003, and July 21, 2003, which are attached to Plaintiffs' Complaint as Exhibit 18, and which speak for themselves, are the best evidence of their contents, and to which no response is required.

48. The allegations contained in paragraph 48 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

49. The allegations contained in paragraph 49 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

50. The allegations contained in paragraph 50 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal

Defendants deny each and every such allegation.

51. The allegations contained in the first two sentences of paragraph 51 of the Complaint constitute Plaintiffs' characterization of a letter dated June 9, 2006, from Cherokee Nation Chief Chad Smith, which speaks for itself, is the best evidence of its contents, and to which no response is required. The allegations contained in the third sentence of paragraph 51 of the Complaint refer to 22 IBIA 75, 83 (1992), which speaks for itself, is the best evidence of its contents, and to which no response is required. Federal Defendants deny the allegations contained in the last sentence of paragraph 51 of the Complaint.

52. Federal Defendants deny the allegations of paragraph 52 of the Complaint.

53. The allegations contained in paragraph 53 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Defendants deny each and every such allegation.

AS AND FOR A FIRST CAUSE OF ACTION
(Violation of United States Constitution/Federal Law)

54. Federal Defendants hereby incorporate their responses to the allegations contained in paragraphs one through 54 of the Complaint as if fully set forth herein.

55. The allegations contained in the first sentence of paragraph 55 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation. Federal Defendants deny the remaining allegations contained in paragraph 55 of the Complaint.

56. The allegations contained in paragraph 56 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

57. Federal Defendants deny the allegations contained in paragraph 57 of the Complaint.

58. The allegations contained in paragraph 58 and the following unnumbered paragraph of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

AS AND FOR A SECOND CAUSE OF ACTION
(Judicial Review of Agency Action under the APA)

59. Federal Defendants hereby incorporate their responses to the allegations contained in paragraphs one through 58 of the Complaint as if fully set forth herein.

60. The allegations contained in paragraph 60 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

61. The allegations contained in paragraph 61 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

62. Federal Defendants deny the allegations contained in paragraph 62 of the Complaint.

63. Federal Defendants deny the allegations contained in paragraph 63 of the Complaint.

64. The allegations contained in paragraph 64 of the Complaint constitute legal conclusions, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

65. The allegations contained in paragraph 65 of the Complaint constitute legal

conclusions and Plaintiffs' request for declaratory relief, to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation.

AS AND FOR A THIRD CAUSE OF ACTION

66. Federal Defendants hereby incorporate their responses to the allegations contained in paragraphs one through 65 of the Complaint as if fully set forth herein.

67. The allegations contained in paragraph 67 of the Complaint constitute legal conclusions directed at Defendants CNO and Chadwicke Smith, to which no response is required by Federal Defendants.

68. The allegations contained in paragraph 68 and the following unnumbered paragraph of the Complaint constitute legal conclusions directed at Defendants CNO and Chadwicke Smith, to which no response is required by Federal Defendants.

69-77. The remainder of the Complaint constitutes Plaintiffs' Prayer for Relief to which no response is required. To the extent a response is required, Federal Defendants deny each and every such allegation contained therein.

78. Federal Defendants deny each and every allegation of the Complaint that has not herein been specifically admitted or denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a cause of action for which relief can be granted under the United States Constitution; the Act of October 22, 1970, Pub. L. 91-495, 84 Stat. 1091-92, commonly referred to as "the Principal Chiefs Act of 1970" (erroneously cited by Plaintiffs in paragraph 45 of the Complaint as the "1920 Principal Chiefs Act"); the Cherokee Constitution; the Treaty between the United States and the Cherokee Indians, March 21, 1866,

14 Stat. 755; the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*; or under a breach of trust theory.

2. Plaintiffs' action is not ripe for review with regard to the Secretary's consideration of the proposed amendment to the Cherokee Constitution.

3. Plaintiffs have failed to identify a final agency action for purposes of obtaining judicial review of their action under the Administrative Procedure Act, 5 U.S.C. §§ 501, *et seq.*, with regard to the Secretary's consideration of the proposed amendment to the Cherokee Constitution.

4. Plaintiffs' requests for relief directing that Federal Defendants recognize certain persons as tribal officials and directing Federal Defendants to appoint a trustee are beyond the scope of this Court's jurisdiction.

5. To the extent Plaintiffs base any of their claims on the allegations contained in paragraph 28 of the Complaint referring to the actions of the Federal Defendants, those claims are barred by the statute of limitations found at 28 U.S.C. § 2401(a).

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