UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, DONALD MOON, CHARLENE WHITE, RALPH THREAT, FAITH RUSSELL, ANGELA SANDERS, SAMUEL E. FORD and THE FREEDMEN BAND OF THE CHEROKEE NATION OF OKLAHOMA,	)	
Plaintiffs,	)	
vs.	)	Case No. 1:03-cv-01711 (HHK)
	)	Judge: Henry H. Kennedy
KEN SALAZAR, Secretary of the United States Department of the Interior;	)	Docket Type: Civil Rights (non-employment)
UNITED STATES DEPARTMENT OF THE INTERIOR;	)	
S. JOE CRITTENDEN, Individually and in his Official Capacity;	)	
JOHN DOES, Individually and in their Official Capacities,	)	
Defendants.	)	

DEFENDANT PRINCIPAL CHIEF'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The plaintiff Freedmen descendants request for preliminary injunction should be denied for the following reasons. Initially, the lack of private rights of action in federal court under the 13th Amendment of the U.S. Constitution and the Treaty between the United States of America and the Cherokee Nation of Indians, July 19, 1866, 14 Stat. 799 (the "1866 Treaty"),[1] as noted in *Vann v. Kempthorne*, 534 F.3d 741, 748-49 (D.C. Cir. 2008) makes it impossible for plaintiffs to establish any likelihood of success on the merits. Not only does that failure mandate refusal of the preliminary injunction, it renders futile any consideration of plaintiffs' pending request for leave to amend and related jurisdictional issues and requires dismissal with prejudice of plaintiffs' claims as to any Cherokee party, as the long-standing motions to dismiss demonstrate.

Further, the other elements on injunctive relief weigh heavily in favor of any Cherokee party. The long-recognized first principle of sovereignty that tribes alone determine their membership without federal interference, along with the enormous impact on the Cherokee Nation (the "Nation") and the exercise of its sovereignty resulting from a granting of plaintiffs' motion seeking to overturn a Nation Supreme Court decision, invalidating a Nation constitutional provision, and disrupting an election already in progress further warrant denial of the preliminary injunction.

[1] Although this issue of a lack of private right of action is one of the cornerstones of the fully briefed Principal Chief's pending Motion to Dismiss the Fourth Amended Complaint and should terminate with prejudice all claims by the Freedmen descendants, the plaintiffs with telling silence completely ignore it in their request for preliminary injunction.

STATEMENT OF FACTS

1. Prior to the end of the Civil War, the Cherokee Nation emancipated slaves owned by individuals within the Nation's territory.

2. The 1866 Treaty, Article IX provided in pertinent part:

> 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 resident therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

3. The Freedmen were not parties to the 1866 Treaty, because they hold no political class or sovereign affiliation. The Freedmen were, and are, private individuals with no federal treaty enforcement rights. Unlike its agreement with the Delaware Tribe of Indians, the Cherokee Nation did not enter into an express agreement with the Freedmen that they should become members of the Cherokee Nation "with the same rights and immunities", "and the same participation in the national funds as native Cherokees" and that their children thereafter born "should in all respects be regarded as native Cherokees". *Whitmire* at 1895 WL 708 at *7-8. Freedmen rights pursuant to tribal law are governed by the Cherokee Nation Constitution exclusively.

4. Although the 1866 Treaty provided one narrow private right of action that is wholly inapplicable here, no private right of action in federal court was provided against the Nation concerning Article IX. *See, Vann v. Kempthorne*, 534 F.3d 741, 749 (D.C. Cir. 2008).

5. After the 1866 Treaty, the Cherokee people amended their Constitution to confer citizenship on Freedmen providing that:

> All native born Cherokees, all Indians, all whites legally members of the Nation by adoption, and all freedmen who have now been liberated by the voluntary act of their former owners, or by law, as well as 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 from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be deemed to be citizens of the Cherokee Nation.

As judicially noted, by so doing the Cherokee people constitutionally fixed the status of the Freedmen and extended the same rank of citizenship as other classes of Cherokee citizens enjoyed. Thereafter, the Freedmen were to be equal with other classes of Cherokee citizens, including intermarried whites, under the tribal constitution, governed by tribal law, enjoyed the same rights, possessed of the same immunities, and entitled to the same protection. *Whitmire* at *10.

6. In 1890, Congress recognized that the 1866 Treaty did not create a private right of action in federal court against the Cherokee Nation by Freedmen for recovery of federal funds to which the Freedmen claimed they were entitled under the 1866 Treaty. Congress passed the Act of October 1, 1890, 26 Stat. 636, and in later appropriation acts referred to the U.S. Court of Claims certain claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation.

7. In 1893 a commission was appointed by Congress to deal with the Five Tribes for the planned allotment of their lands. This Commission officially entitled "Commission for the Five Civilized Tribes" is commonly referred to as the "Dawes Commission" after Senator Henry Dawes, who championed the theory that Indians could not become civilized until they gave up the custom of holding land and possessions in common. Based on this theory, the Dawes Commission was tasked with developing a list of tribal citizens who would be entitled to receive parcels of land and any annuities resulting from the expected sale of tribal assets. These lists

became known as the Dawes Rolls and freedmen were included as a separate class among the various classes of Cherokee citizens as it existed at the time.

8. In 1906, Congress passed an act intended to allot the lands of the Cherokee, Chickasaw, Choctaw, Creek and Seminole Nations in preparation for the creation of a state. The Five Tribes Act, ch. 1876, 83, 34 Stat. 137, 138 (1906). The Act required the Commission to complete its work on the Dawes Rolls by March 5, 1907 limiting enrollment to those individuals living as of March 4, 1906 and expressly addressed Cherokee Freedmen:

> The roll of Cherokee freedmen shall include only such other persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual, personal, bona fide residents of the Cherokee Nation on August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 1, 1867.

This language was included to limit the number of individuals who would be involved in the per capita distribution of the Nation's property. See *Whitmire v. U.S.*, 46 Ct. Cl. 227, 1910 WL 930, *11, rev'd on other grounds, *Cherokee Nation v. Whitmire*, 223 U.S. 108 (1912).

9. In 2007, the citizens of the Cherokee Nation, at an election that included the Freedmen descendants recognized by the Nation's constitution, voted to limit Nation Citizenship to Indians by requiring ancestry traceable to the Dawes Rolls only those listed as Cherokee by blood, Delaware Cherokees or Shawnee Cherokees. This requirement of limiting tribal membership to those with identifiable Indian blood is not unusual. The Constitution, as amended, provides:

> Notwithstanding any provisions of the Cherokee Nation Constitution approved on October 2, 1975, and the Cherokee Nation Constitution ratified by the people on July 26, 2003, upon passage of this Amendment, thereafter, citizenship of the Cherokee Nation shall be limited to those originally enrolled on, or descendants of those enrolled on, the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Rolls, for those listed as Cherokees by blood, Delaware Cherokees pursuant to Article II of the Delaware Agreement dated the 8th day of

> May, 1867, and the Shawnee Cherokees pursuant to Article III of the Shawnee Agreement dated the 9th of June, 1869.

As a result of the amendment, intermarried white and Freedmen descendants who were unable to trace their ancestry to a Cherokee by Blood Dawes Roll enrollee or Delaware Cherokee or Shawnee Cherokee were unqualified for citizenship and, if citizens, were disenrolled. Freedmen descendants and other African Americans who could trace their ancestry to one of those three Indian groups were still entitled to citizenship.

10. The Nation's Registrar provided notice of disenrollment to Freedmen descendants without that required Indian ancestry. That notice also described appeal rights. Hundreds of Freedmen descendants filed appeals (the "Nation class action") in the Cherokee Nation District Court, which consolidated the appeals. The District Court then certified a class of "all original enrollees, or descendants of original enrollees, listed on the Dawes Commission Rolls, designated as 'Final Roll of Cherokee Freedmen' and 'Final Roll of Cherokee Freedmen-Minor Children'" and appointed as class representatives the Freedmen descendants who had appealed. The parties agreed that the effectiveness of the Constitutional Amendment would be stayed pending ultimate Nation Court resolution. (Ex. 11 to plaintiffs' Memorandum in Support of Motion for Preliminary Injunction.)

11. In the Nation class action, the parties filed cross motions for summary judgment. The class argued that the Constitutional Amendment violated the Cherokee Constitution, the 13th Amendment to the U.S. Constitution, the 1866 Treaty and various federal statutes. Without analyzing, among other things, the Five Tribes Act, the Nation's District Court granted summary judgment for the class invalidating the Constitutional Amendment. (Ex. 9 to plaintiffs' Memorandum in Support of Motion for Preliminary Injunction.)

12. The Nation's Supreme Court reversed the District Court's judgment and remanded with instructions to dismiss the case for lack of jurisdiction. The injunction staying effectiveness of the Constitutional Amendment was vacated. (Ex. 11 to plaintiffs' Memorandum.)

13. The Nation's Election Commission, an independent constitutional agency not subject to the Principal Chief's control, is conducting a special election for the office of Principal Chief on September 24, 2011. The special election results from the Cherokee Nation Supreme Court's vacation of a recount of the election of June 25, 2011 and determination that because of improperly notarized absentee ballot envelopes the result of that election could not be determined with mathematical certainty. Absentee ballots have been returned and walk-in early voting will have occurred prior to the hearing on the motion for preliminary injunction.

14. The Election Commission is complying with the Nation's Supreme Court decision and has unregistered those Freedmen descendants without required Indian ancestry who were previously registered to vote (Ex. 14 to plaintiffs' Memorandum). None of the thirteen affiants in support of the motion here claimed that they intended to vote in the special election. Several claim ancestry from a Dawes Rolls enrollee.

STATEMENT OF THE CASE

The Freedmen descendants initiated this action in 2003 bringing claims against the federal defendants alleging violations of the Constitution, federal law and the 1866 Treaty and challenging the Department of Interior's alleged failure to approve election procedures under the Principal Chief's Act. The Nation was granted status as a limited intervenor for the purpose of challenging the Court's jurisdiction under Fed. R. Civ. P. 19. *Vann v. Kempthorne*, 534 F.3d 741, 745 (D.C. Cir. 2008). The Nation sought dismissal of the case on the grounds that although

it was a necessary and indispensible party, sovereign immunity barred its joinder. The plaintiffs responded with a motion for leave to join the Principal Chief and other Nation officers, all of whom were alleged to have violated the 13th Amendment and the 1866 Treaty. After determining that the Nation was a necessary party under Rule 19(a), this Court determined that the Cherokee defendants could be joined because it found the 13th Amendment and the 1866 Treaty waived sovereign immunity. *Id.*

The Cherokee defendants appealed. The Court of Appeals reversed the finding of waivers of sovereign immunity in the 13th Amendment and the 1866 Treaty and dismissed the Nation. *Id.* at 749. In language particularly instructive on the absence of a private right of action that dooms plaintiffs' request for injunctive relief, the Court of Appeals explained. *Id.* at 748-749:

> **Nothing in § 1 of the Thirteenth Amendment so much as hints at a federal court suit by a private party to enforce the prohibition against badges and incidents of slavery against Indian tribes**. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). Although § 2 of the Thirteenth Amendment gives congress the power to generate express and unequivocal language abrogating tribal sovereign immunity to allow for such suits, that promise remains unfulfilled absent some further legislative enactment, *Id. § 2* ("Congress shall have power to enforce this article by appropriate legislation."). The 1866 Treaty similarly lacks any clear abrogation of tribal sovereign immunity, as the Tenth Circuit correctly concluded in *Nero*¸ 892 F.2d at 1461. **The Freedmen point to articles VI, IX and XII of the 1866 Treaty, but these say nothing about federal court suits against the Cherokee Nation**. (emphasis added)

The Court of Appeals allowed the joinder of the Principal Chief and Tribal officers under the *Ex parte Young* doctrine. However, the Court of Appeals instructed "[o]n remand, the district court must determine whether in 'equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Id.* at 756.

During the pendency of the appeal, plaintiffs filed a Third Amended Complaint adding new claims against the federal defendants. On December 13, 2008, plaintiffs filed a Fourth Amended Complaint ("FAC"), which modified the claims against the Cherokee Defendants, by dropping all such defendants except the Principal Chief. Plaintiffs' Fourth Amended Complaint ("FAC") invokes the 1866 Treaty, purportedly to determine plaintiffs' status as citizens of the Cherokee Nation and then enjoin the BIA from recognizing the amendments to the Cherokee Constitution adopted at the July 23, 2003 election, enjoin the BIA from disbursing funds to the Cherokee Nation, compel the BIA to issue CDIB cards to non-Indian descendants of Cherokee Freedmen, enjoin the BIA from recognizing any action of the Cherokee Nation until such time as it is constituted with non-Indian Freedmen descendant citizens and enjoin any action of the administration of Principal Chief or any subsequent administration until such time as the non-Indian freedmen descendants are permitted to vote. Plaintiffs also seek to enjoin the Principal Chief from recognizing or implementing the results of the 2003 and 2007 elections and from implementing any law recognizing the results of the March 3, 2007 election.

Significantly, the FAC alleges only two causes of action against the Principal Chief. Its First Cause of Action against the federal defendants and the Principal Chief alleges that he violated the Thirteenth Amendment to the U.S. Constitution, the Principal Chiefs Act of 1970, the Cherokee Constitution, the Treaty of 1866 and the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* ("ICRA") by his administration's denial of Cherokee citizenship rights for descendants and non-Indian Freedmen purportedly conferred by the 1866 Treaty (FAC ¶¶ 95-97). The Third Cause of Action alleges that same basic claim against the Principal Chief only.[2]

[2] The second cause of action is not against the Principal Chief.

The Principal Chief has moved to dismiss the FAC on multiple grounds. (Doc. 119). Pursuant to the Court of Appeals mandated Fed. R. Civ. P. 19(b) analysis, dismissal is sought because of the sovereign immunity-based absence of a required party, the Nation. Dismissal of the ICRA and Cherokee Constitution claims is sought because this Court has already determined that it lacks subject matter jurisdiction over those claims. *Vann v. Kempthorne*, 467 F.Supp.2d 56, 74 (D.D.C. 2006) (rev'd in part 534 F.3d 741 (D.C. Cir. 2008)). Dismissal of claims under the 13th Amendment and the Treaty of 1866 is sought for absence of a private right of action for such claims. Dismissal of the Principal Chiefs' Act claim is sought in light of plaintiffs' earlier admission that the Act does not provide a private right of action against the Nation.

The federal defendants also seek dismissal of certain claims. (Doc. 118). Like the Principal Chief, the federal defendants assert that no private rights of action exist under the 13th Amendment, the 1866 Treaty, ICRA, the Principal Chiefs Act or the Cherokee Constitution.

The briefing on those motions to dismiss closed on March 11, 2009. (Doc. 126). Nothing further is required for their adjudication.

Now, in support of the FAC, the Freedmen plaintiffs seek a preliminary injunction, among other things, to invalidate the Nation Supreme Court decision allowing the Constitutional Amendment to operate, to halt the election already in progress, to require the Nation to treat all Freedmen descendants (whether enrolled or not and registered to vote or not) as eligible voters and otherwise citizens of the Nation,[3] to revoke federal funding of the Nation, and abrogate the

[3] This proposed relief goes far beyond preserving the status quo that existed prior to the Nation Supreme Court August 2011 decision. Prior to that decision, pursuant to the agreed Nation court stay, only those Freedmen descendants recognized as citizens by the Nation Registrar and actually registered to vote were eligible to vote in the election for Principal Chief.

Nation's government-to-government relationship with the United States.[4]

PROPOSITION I: THE LACK OF A FEDERAL PRIVATE RIGHT OF ACTION PRECLUDES THESE FREEDMEN DESCENDANTS FROM SHOWING ANY LIKELIHOOD OF SUCCESS ON THE MERITS, REQUIRES A DENIAL OF THE PRELIMINARY INJUNCTION AND WARRANTS DISMISSAL WITH PREJUDICE OF THE CLAIMS AGAINST ANY CHEROKEE PARTY.

A. THE THIRTEENTH AMENDMENT DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION FOR THE FREEDMEN DESCENDANTS TO SUE FOR BADGES AND INCIDENTS OF SLAVERY.

Although the Freedmen descendants claim that the Principal Chief and his administration violated the Thirteenth Amendment to the U.S. Constitution by denying the non-Indian descendants of Freedmen their full constitutional rights (FAC ¶6, 20, 97), no private right of action exists for such a claim.[5] As the Supreme Court and this Court have noted, the Thirteenth Amendment prohibits slavery or indentured servitude and leaves to Congress the enactment of enforcement legislation against the "badges and incidents of slavery." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the

[4] Because of the lack of a private right of action here and inaction in the Nation's courts, after the briefing closed on the motion to dismiss the FAC, the Nation initiated a declaratory judgment action against the federal defendants in the Northern District of Oklahoma seeking a declaration that the Nation had not violated the 1866 Treaty by its Constitutional Amendment. Certain Freedmen descendant class representatives in the Nation class action were also joined. The action was transferred to this District and this particular Court for an initial determination of the appropriate forum in light of the Nation's forum sovereign immunity. *Cherokee Nation v. Nash et al.* Case No. 1:10-cv-1169 (HHK). After the federal defendants challenged subject matter jurisdiction because of their own sovereign immunity, the Court dismissed its claims against the federal defendants. Accordingly all parties to the 1866 Treaty are not parties to the action. (Doc. 71 in 1:10-cv-1169-HHK). That action now consists of counterclaims by the Freedmen descendant defendants which are identical to the plaintiffs' claims here in the FAC against the Principal Chief and cross claims against the federal defendants identical to the plaintiffs' claims here against the federal defendants, along with the Nation's claim for declaratory relief on a treaty to which the other party is absent from the action.

[5] The Freedmen descendants also allege without specification, that "the Defendants" violated the Fifteenth Amendment. (FAC ¶97) That reference cannot apply to the Principal Chief since the Fifteenth Amendment is applicable only to the United States.

authority to translate that determination into effective legislation.");[6] *Richardson v. Loyola College T/A Facility*, No. 02-01597 (HHK) (D.D.C. Aug 14, 2003), Memorandum Opin. pp. 7-8, *aff'd* 167 Fed.Appx. 223, 2005 WL 3619423 (D.C. Cir. 2005) ("Richardson's Thirteenth Amendment claim cannot succeed because the Thirteenth Amendment does not provide a direct cause of action. A plaintiff asserting a claim grounded on the Thirteenth Amendment must prosecute her claim via a statutory remedy such as 42 U.S.C. § 1981."); *Vann v. Kempthorne*, 534 F.3d 741, 748 (D.C. Cir. 2008), *see also Vann v. Kempthorne*, 467 F.Supp.2d 56, 67 (D.D.C. 2006) (explaining that the Thirteenth Amendment was constructed to authorize Congress to legislate against slavery itself and against the badges and relics of a slave system) (citation omitted).

Because the Thirteenth Amendment provides no private right of action for alleged badges or incidents of slavery, Congress passed civil rights laws under §2 of the Thirteenth Amendment to prohibit the "badges and incidents of slavery." *See, e.g.*, Civil Rights Act of 1866, codified at 42 U.S.C. §1982. Consistent with this Court's holding in *Richardson*, affirmed by the D.C. Circuit, that the Thirteenth Amendment does not provide a direct cause of action, in order to bring a claim that the conduct of the Cherokee Nation or its Principal Chief created "badges or incidents of slavery," the Freedmen descendants must bring their claims under an enforcement statute. The only civil rights statute cited by the Freedmen descendants is the ICRA, and, this Court has already determined that it does not have jurisdiction over claims arising under the

[6] The Supreme Court did not create a private right of action for plaintiffs to claim "badges and incidents of slavery" in *Jones*, 392 U.S. at 438-439. There, the Supreme Court held only that 42 U.S.C. §1982 -- a statute that grants to all citizens the same right to purchase and lease property -- applies to both private and public conduct. *Jones*, 392 U.S. at 437-38. It further held that this statute is a proper exercise of the power of Congress to enforce the Thirteenth Amendment. *Id.* at 443-44.

ICRA. Moreover, any reliance by Plaintiffs as in their prior filings, to the Fourteenth and Fifteenth Amendments is also meritless.[7]

B. THE TREATY OF 1866 DOES NOT PROVIDE THE PRIVATE RIGHT OF ACTION THAT THE FREEDMEN DESCENDANTS ASSERT.

1. General Principles Surrounding Private Rights of Action Under Treaties.

There are two well-established principles of treaty interpretation that govern this case; (1) treaties do not generally create judicially-enforceable rights and there is a presumption against such rights; and (2) for treaties to confer such rights, they must do so unambiguously. Necessitating the denial of Plaintiff's motion and this action's dismissal, the 1866 Treaty fails these tests.

a. Treaties Do Not Generally Create Judicially Enforceable Rights And There Is A Presumption Against Such Rights.

It is "well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) (explaining that "[e]ven where a treaty provides certain benefits for nationals of a particular state--such as fishing rights--it is traditionally held that 'any rights arising from such provisions are, under international law, those of states and . . .

[7] Needless to say, this Court's language in *Richardson* along with the Court of Appeals decision in *Vann* also make short shrift of plaintiffs prior assertion that since their claims are like "an action to enjoin the state from denying them the right to vote in violation of their constitutional rights" such "claims can always be brought directly under the Constitution." (Plaintiffs Memorandum of Law in Opposition to Motion to Dismiss at 29, Doc. 123). In light of *Richardson's* 13th Amendment-specific holding, *Smith v. Allwright*, 321 U.S. 649 (1944), *Nixon v. Condon*, 286 U.S. 73 (1932) and *Nixon v. Herndon*, 273 U.S. 536 (1927), none of which involved the 13th Amendment, are of no utility here. Reliance on these cases would be particularly misplaced because all of them were based on allegations of violations of an express constitutional right, challenging state action that denied "equal protection of the laws." By contrast, plaintiffs do not assert that the Cherokee Nation is holding them as slaves or involuntary servants.

individual rights are only derivative through states.'" (citations omitted)). The Supreme Court recently affirmed this understanding of treaties, stating that "the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1357 n. 3 (2008)(collecting cases acknowledging such a presumption). *See also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (U.S. 1989) ("These conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs, n. 10. They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts"); *Mora v. New York,* 524 F.3d 183, 200 (2nd Cir. 2008) ("We have recognized that international treaties establish rights and obligations between "States-parties - and generally not between states and individuals, not withstanding the fact that individuals may benefit because of a treaty's existence."); *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) ("However, this observation has no bearing on the issues before this Court. Paraguay is not a private individual seeking enforcement of the treaty. It is an actual party to the contract and it has standing based on this status.") *aff'd*, 134 F.3d 622, *cert. denied*, 523 U.S. 571 (1998); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("Nor do we find merit in Rosenthal's argument that the actions of the United States violate this country's extradition treaty with Columbia. Under international law it is the contracting foreign government that has the right to complain about a violation.") (*modified,* 801 F.2d 378 (11th Cir. 1986)).

The reason for this rule is that treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *Matta-Ballesteros*, 896 F.2d at 259 (collecting cases).

The Supreme Court has on numerous occasions summarized the basic relationship between treaties and individual rights. A treaty is primarily a compact between independent nations that ordinarily depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. *Edye v. Robertson*, 112 U.S. 580, 598 (1884); *Medellin*, 128 S.Ct. at 1357 (citations omitted). "If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress …" *Edye v. Robertson*, 112 U.S. at 598.

b. For A Treaty To Confer A Private Right Of Action, The Right Should Appear Unambiguously In The Treaty.

For a treaty to confer a private right of action, the right should appear unambiguously in the treaty. *See, e.g. Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 546 (D.D.C. 1981) ("treaties must provide expressly for a private right of action before an individual can assert a claim thereunder in federal court") *aff'd*, 726 F.2d 774 (D.C. Cir. 1984); *Mora*, 524 F.3d at 202 ("If contracting States-parties wish to impose upon themselves legal obligation that extend not only to each other, but to all individual foreign nationals, we would ordinarily expect expression of these obligations to be unambiguous."). This "cautious approach to recognizing private rights within treaty provisions obtains even when international treaties appear to confer benefits on individuals." *Mora*, 524 F.3d at 201.

2. Indian Treaties Generally Create Tribal, Not Individual, Rights.

Consistent with the general principle that treaties do not provide judicially enforceable rights, it is "well-settled that '[t]he very great majority of Indian treaties create tribal, not individual, rights . . . '" *Dry v. U.S.*, 235 F.3d 1249, 1256 (10th Cir. 2000). The Supreme Court clearly articulated this principle in the context of Indian treaties when it stated:

> The United States, as the guardian of the Indian, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either

> express or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contracts or undertaking the personal rights of individual Indians.

Blackfeather v. United States, 190 U.S. 368, 377 (1903). The breadth of this principle was illustrated by its application to a treaty providing for financial payments to specified beneficiaries out of annuities paid to the tribe. In *Sac and Fox Indians of Mississippi in Iowa v. Sac and Fox Indians of Mississippi in Okla.*, 220 U.S. 481, 484 (1911), the Supreme Court held that individual rights were not created by the treaty because the treaties under which the annuities were due were "promises to the tribes." Just as international treaties are "primarily compacts between independent nations," Indian treaties are compacts between the United States and an Indian Nation.

3. The 1866 Treaty Affords No Private Right of Action to These Plaintiffs.

The principle that treaties do not confer individual rights is not universal or without exception in the context of Indian treaties, and "some few Indian treaties" may confer individual rights. *Hebah v. United States*, 428 F.2d 1334 (Ct.Cl. 1970). Since a treaty may, in certain unusual circumstances confer a private, judicially enforceable right of action, the question to be answered is "whether an individual can bring a claim under *this* particular treaty." *Medellin v. Drekte*, 544 U.S. 660, 680 (2005). Whether a treaty creates a right in an individual litigant that can be enforced in court proceedings by that litigant is for the court to decide as a matter of treaty interpretation. *Mora*, 524 F.3d at 193 (citing *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001).

a. The 1866 Treaty Does Not Unambiguously Confer A Private Right Of Action On Plaintiffs.

The interpretation of a treaty, like the interpretation of a statute, begins with its text. *Medellin v. Texas*, 128 S. Ct. at 1357. In those cases where courts have found private rights it

was clear "that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by the affected individuals." *See Mora*, 524 F.3d at 203.[8] The lack of any mention in the text of Article IX as to whether or how Freedmen might vindicate their asserted rights confirms that the drafters of the Treaty did *not* intend to confer a right of action directly upon individuals. *See Mora*, 524 F.3d at 194. The 1866 Treaty is unambiguous. It does not afford any private right of action in federal court to the Freedmen. This court must therefore accord the Treaty its plain meaning. "It is axiomatic that a treaty's plain language must control absent extraordinarily strong contrary evidence." *Sale v. Haitian Centers Counsel*, 509 U.S. 155, 194-195 (1993). The Freedmen descendants have made no such showing here, let alone an "extraordinary" one.

b. The 1866 Treaty Does Not Imply A Private Right of Action for Plaintiffs.

(i) Implied Rights of Action Are Disfavored.

Because the 1866 Treaty does not expressly provide plaintiffs a private right of action, they must argue that the treaty implies such a right. Such implication requires an "extraordinarily strong" showing. *Sale*, 509 U.S. at 194-195. The difficulty of such showing is exacerbated by the increasing judicial disfavor of implied rights of action. The "Supreme Court has 'retreated from [its] previous willingness to imply a cause of action where Congress has not provided one,'" *Prunte v. Universal Music Group*, 484 F. Supp. 2d 32, 42 (D.D.C. 2007) (quoting *Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001)), and has "'responded cautiously to suggestions that [implied private rights of action] would be extended into new

[8] Where courts have found private rights it was clear "that the intent of the treaty drafters was to confer rights that could be vindicated in the manner sought by the affected individuals." *Id.* at 203. There are a "number of ways" in which the drafters of the 1866 Treaty, had they intended to provide for an individual right of action, could have signaled their intention to do so. See *Id.* at 203. However, they did not.

contexts,' even when declining to do so means that injuries would go unredressed." *Id*. (citing *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)).

The judicial disfavoring of implied rights of action is particularly strong when the long-protected right of a tribe to define its own member is involved. As the Supreme Court recognized in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978), in such instances "the judiciary should not rush to create causes of action that would intrude on these delicate matters."

(ii) Even References To Individual "Rights" Do Not Necessarily Imply A Private Right Of Action.

The "vocabulary of individual rights may be used to refer to certain potential benefits provided by treaty that do not actually create rights enforceable by the individuals benefited." *Mora*, 524 F.3d at 195 (citing *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2nd Cir. 1975). As Judges Selya and Boudin explained in their concurring opinion in *United States. v. Li*, 206 F.3d 56, 66 (1st Cir. 2000), *cert. denied*, 531 U.S. 956 (2000):

> Of course, there are references in the treaties to a "right" of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a "right" to communicate with their consul is a means of implementing the treaty obligation *as between States.* Any other way of phrasing the promise as to what will be said to detainees would be both artificial and awkward.

Li, 206 F.3d at 66 (Selya & Boudin, JJ., concurring) (emphasis in original). Likewise, the reference in the 1866 Treaty to the Freedmen having the "rights" of native Cherokees is the contracting nations granting each other rights, and stating that the Freedmen will have the "rights" of native Cherokees is a means of implementing the treaty obligation of the Cherokee Nation to the United States.

Even with respect to statutes, the courts have on several occasions rejected the argument that references to the "rights" of persons potentially benefited by legislation necessarily support

the view that the legislation creates rights in individuals that can be enforced by those individuals through an implied right of action. *Mora*, 524 F.3d at 195 (collecting cases).

(iii) The Clear Language and Structure of the Treaty as a Whole Evidences the Parties' Intent to not Create the Private Right of Action Asserted by the Freedmen Descendants Here.

Specifically, the Treaty's language confirms that the signatory nations knew how to create a private right of action when they so intended. Article VII of the 1866 Treaty provides a U.S. district court with original jurisdiction over any claims that might be brought by or against persons living in a designated district of land (established in Article IV of the 1866 Treaty) against or by those members of the Nation living in other parts of Nation territory. By so doing, Article VII demonstrates that the parties recognized that persons living in Indian territory (including Cherokees and Freedmen) did not otherwise have access to U.S. courts for claims amongst themselves unless Congress expressly provided for it, and Congress did so only for the limited instance described in Article VII. The parties, therefore, made an explicit choice to limit U.S. court jurisdiction to that manner. Finding an implied right of action in this case would directly contravene that express choice.

Article XIII of the 1866 Treaty definitely evidences the absence of an implied private right of action. Article XIII expressly states that Congress may later provide U.S. court jurisdiction over claims arising on the Cherokee Nation's land, and then otherwise reserves claims arising on the Nation's land to Tribal court jurisdiction. The private rights of action asserted here are clearly inconsistent with such a reservation.

Any doubt as to the parties' use of Articles VII and XIII to express their intent to severely limit actions based on the Treaty of 1866 is dispelled in the Supreme Court decision in *In re Mayfield*, 141 U.S. 107, 114-115 (1891):

> As the seventh article of the treaty limited the power of the court proposed to be created, and of the district courts already existing, to cases of which this is not one, it would seem to follow that offences not there described were intended to be cognizable in the Indian courts, and that the thirteenth article was inserted as a further declaration or recognition of that fact.

Simply put, when the parties intended to use the 1866 Treaty to create a private right cause of action or delegate such a creation to Congress, they knew how to do so. Their failure to do so as to plaintiffs' claims clearly negates any implied right of action here.[9]

(iv) The Civil Rights Act of 1866 Further Evidences that the U.S. Government Intended That There Be No Federal Action for Plaintiffs Claims

Just months before the execution and ratification of the Treaty, Congress passed the Civil Rights Act of 1866. 14 Stat. 27 (1866) and provided in that law a specific private right of action in federal court. While plaintiffs have liked to analogize the 1866 Treaty and this law to buttress their arguments about a federal right of action, the 1866 Civil Rights Act necessarily does the opposite. In the 1866 Civil Rights Act, the U.S. Government clearly demonstrated that it knew how to create private rights of action when inclined to do so. It could have done so for the plaintiffs claims here when negotiating and ratifying the 1866 Treaty, but did not. Thus the President's and Senate's choice not to include a private right of action as to Article IX, on the

[9] As the Court of Appeals has noted, Articles VI and XII do not recreate private rights of action against the Nation in federal court. *Vann v. Kempthorne*, 534 F.3d at 748-49. Article VI, which provides that laws shall be uniform throughout the Nation, authorizes only the President of the United States to remedy any breach of it. Article XII, which applies to the laws of a then-hypothetical "general council" that was interned to consist of delegates from every recognized Indian tribe in the territory, rather than the Nation's own laws, provides no private right of action.

heels of the 1866 Civil Rights Act, further evidences the treaty parties' intent that there be no private right of action for the Treaty other than allowed in Article VII.

v. Subsequent Congressional Action Creating Private Rights of Action Pursuant to the Treaty of 1866, Further Establishes the Nonexistence of the Private Right of Action Invoked by Plaintiffs.

When Congress wanted to subject the Cherokee Nation to suits by Cherokee Freedmen in federal courts under the 1866 Treaty, it passed a statute for that specific purpose. For example, in 1890, Congress authorized the U.S. Court of Federal Claims to hear suits by the Freedmen against the Cherokee Nation for recovery of federal funds to which the Freedmen claimed they were entitled under the 1866 Treaty. (FAC ¶31) (citing the Act of October 1, 1890, 26 Stat. 636, referring to the U.S. Court of Claims certain claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation). If the United States intended and believed that the Freedmen possessed a private right of action to sue the Cherokee Nation under the 1866 Treaty, there would have been no need for Congress to pass such a statute. By enacting such a statute, the United States confirmed the absence of implied rights of action under the Treaty of 1866.

If the Act of October 1, 1890 itself is not sufficient to confirm the absence of a private right of action, the floor debate in the Senate made clear that private rights of action are not implied in favor of Freedmen in the Treaty:

> Mr. Platt: [I]t has seemed to me that the Delawares and freedmen had at least a fair claim to some portion of this money which the Cherokees have received and divided among the pure-bloods only, and the only way in which they can get it, as I understand, is for this act to be passed enabling them to go into the Court of Claims and to there prosecute a suit for it.
>
> Mr. Reagan: Will the Senator allow me to ask him, if these Indians and freedmen have no legal or equitable right on which they can go into court, what rights have they to ask for this action?
>
> Mr. Platt: They have a right to ask Congress. It is the very reason why they

> should ask Congress to authorize them to go to the Court of Claims and bring their suit there to see whether they are not entitled to some portion of this money.

CONG. REC., Vol. 21, 10359 (1890). Another Senator added, "[h]ere is a large body of freedmen who have been kept out of a large sum of money because there is no place for them to go to assert their claims." *Id*. at 10360. Accordingly, Congress enacted the legally necessary private right of action.

(vi) Any Ambiguity in the Treaty is to be Construed in Favor of the Cherokee Nation Signatory.

Even if the 1866 Treaty were ambiguous about who may assert private causes of action, which it is not, the Supreme Court has long held that treaties and other agreements with Indian Tribes must be interpreted in their favor, and any ambiguities must be construed to their benefit. *See e.g. Choate v. Trapp*, 224 U. S. 665 (1912) (noting that this "rule of construction has been recognized, *without exception, for more than a hundred years . . . "* (emphasis added)). The Supreme Court "has often held that treaties with the Indians must be interpreted as they would have understood them . . ." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (internal citations omitted). *See also Choctaw Nation of Indians v. United States*, 318 U.S. at 432 (treaties with Indian nations "are to be construed, so far as possible, in the sense in which the Indians understood them . . . "); *Worchester v. Georgia*, 31 U.S. 515, 551-554 (1832) (interpreting Treaty of Hopewell as Cherokees would have understood its meaning); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 119 (1945).

Here, the interpretation most favorable to the Cherokee Nation, as it would have understood the Treaty, would not grant the private right of action determinable in federal court, at issue here, to Freedmen descendants. The right of action on which the Freedmen descendants

premise their private claims is simply not implied in the 1866 Treaty.

C. THE CLAIM AGAINST THE PRINCIPAL CHIEF PURSUANT TO THE 1970 PRINCIPAL CHIEFS ACT WARRANTS DISMISSAL BECAUSE THAT ACT PROVIDES NO PRIVATE RIGHT OF ACTION.

The Freedmen descendants claim that the Principal Chief by depriving plaintiffs of their rights as citizens, in effect violated the Principal Chiefs Act of 1970. (FAC ¶¶ 39, 96, 107-112) This claim fails as a matter of law because the Act provides no private right of action to these Freedmen descendants, as they have admitted. Indeed, in Plaintiffs Memorandum of Law in Opposition to Cherokee Nation Defendants' Motion to Dismiss, or in the Alternative, For a Stay Pending Appeal, filed January 14, 2008, at p. 6, n. 3, plaintiffs state the following: "Plaintiffs acknowledge that the Principal Chiefs Act of 1970 ("Act of 1970") does not provide a private right of action for the Plaintiffs to assert claims against the Cherokee Nation." The absence of any private right of action under the Principal Chiefs Act is not in dispute.

PROPOSITION II: THE EQUITIES DO NOT FAVOR THE PLAINTIFFS.

A. FIRST PRINCIPLES OF TRIBAL SOVEREIGNTY PRECLUDE THIS COURT FROM OVERTURNING THE NATION'S MEMBERSHIP DETERMINATION.

It is a well-accepted tenant of Indian law that "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." § 303(3). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005). "[U]nless limited by a treaty or statute, a tribe has the power to determine tribe membership." *United States v. Wheeler*, 435 U.S. 313 (1978); "An Indian tribe has the power to define membership as it chooses, subject to the plenary power of Congress. Nor need the tribe, in the absence of Congressional constraints, comply with the constitutional limitations binding on federal and state governments when it exercises this and other powers." *Williams v. Gover*, 490 F.3d 785, (9th Cir. 2007).

Disputes involving membership in a tribe do not present a federal question. *Fondahn v. Native Village of Tyonek*, 450 F.2d 520, 522 (9th Cir. 1971). "There is perhaps no greater intrusion upon tribal sovereignty for a federal court to interfere with a sovereign tribe's membership determination." *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1997). Tribes have the right to control their membership roster, and any federal litigation on the subject would disrupt the conduct of intra-tribal affairs, an area that the federal government has left to the tribe itself. *Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994).

Of particular note, the Tenth Circuit has explained the broad sweep of the tribal right to define its membership in upholding the dismissal for failure to state a claim in a case involving 13th Amendment and 1866 Treaty claims by Freedmen descendants against the Cherokee Nation:

> Plaintiffs argue that they state a claim for relief under both section 1981 and section 2000d because these provisions prohibit race discrimination. However, no right is more integral to a tribe's self-governance than its ability to establish its membership. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n. 32, 98 S.Ct. at 1684 n. 32; *see also Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257, 67 L.Ed.2d 493 (1981); *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, S.Ct. 1079, 1085 n. 18, 55 L.Ed.2d 303 (1978). Applying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribes sovereign power to define itself, and thus would constitute an unacceptable interference "with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Santa Clara Pueblo*, 436 U.S. at 72, 98 S.Ct. at 1684. We thus hold that Plaintiffs have failed to state a claim under section 1981 and 2000d.

Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1463 (10th Cir. 1989).

B. CONTRARY TO PLAINTIFFS' ASSERTION, THE REQUESTED INJUNCTION WILL HAVE SIGNIFICANT HARM TO THE CHEROKEE NATION.

The plaintiffs' assertion "that the impact of a preliminary injunction on the Cherokee Nation would be minimal" is patently false, as the injunctive relief requested confirms. Based on

the affidavits of Freedmen descendants, who are not named plaintiffs, who have no federal private right of action, who lost their tribal court litigation, who have no rights under the Five Tribes Act changes to the 1866 Treaty and who do not indicate an intention to vote, the plaintiffs seek to enjoin a tribal election already in progress to resolve an inconclusive election held three month earlier. The Election Commission has already finished mailing absentee ballots and is receiving their return. Early voting will have occurred prior to the hearing of plaintiffs' motion.

Not only will the requested relief cause significant harm to an already delayed election that the Nation wants concluded, but the legal import of the proposed injunction will cause significant harm to the Nation. In essence, plaintiffs ask this Court to enjoin the effect of the Nation's Supreme Court decision in the Nation's District Court class action. That affront to sovereignty is particularly patent, as the lack of a decision from plaintiffs enjoining a tribal election confirms.[10]

Until the election for Principal Chief is finally concluded, the duly elected Deputy Principal Chief is serving as Acting Chief, and the duly elected Speaker of the Tribal Council is serving as Acting Deputy Chief. Because the Speaker cannot perform both her legislative duties and serve as Acting Chief, there is now a vacancy on the Tribal Council. Neither official ran for the offices they are now holding, and neither should be required to hold such office indefinitely.

The impact of the proposed preliminary injunction on the Nation is further heightened by the relief sought against the United States, which is actually against the Nation. Plaintiffs ask this Court to cut off federal funding of the Nation, to prohibit the recognition of any Cherokee

[10] The only decision advanced by plaintiffs to support "minimal impact" involved allowing a voter at the wrong location to cast a challenged absentee ballot, a procedure agreed to by the governmental entity conducting the election. That is a far cry from the requested relief here.

election regardless of margin of outcome, and to abrogate the government-to-government relationship between two sovereigns.

If the plaintiffs' scorched earth requested relief of cessation of federal funding and federal recognition is granted, the effect upon hundreds of thousands individuals, as well as the economic health of Oklahoma, cannot be overstated. The population of the Cherokee Nation is now over 312,000. The Nation is the largest employer in northeastern Oklahoma, with 8500 direct employees. If federal funding is cut the Nation would lose more than $135 million in federal funding for health care from our self-governance compact with the United States, plus an additional $30 million from various federal agencies from grants that have been awarded. The Nation currently provides health care to 130,000 patients and it is the only source of health care for many of those patients. The Nation's health care system serves over 250 federally recognized Indian tribes. In 2010, Cherokee Nation health system provided 753,940 ambulatory care visits. Without federal funding, many of these patients have no option for treatment at all as approximately 50% of the patients do not have a third party resource. CNHS also refers to, and pays out an additional $20 million, to private sector health care providers which would no longer be an option and decrease the economic impact for the private health care sector. In 2010 the Nation's pharmacies filled over 1 million prescriptions. Almost 44,000 dental visits occurred at the Nation's clinics.

Further, nearly $31 million in federal education and child care funding estimated for the 2012 budget would be cut. These programs include federal child care programs and education services - 842 children in Head Start and Early Head Start programs would be affected. Sequoyah High School, a boarding school with an enrollment of nearly 400 Indian students from all over the country would be forced to close. More than 20,000 Indian students who receive

assistance in their public schools through the JOM Program, which helps pay for school supplies, tutoring services, and graduation caps and gowns, would lose that support. Over 3100 students would lose funding for college.

Likewise, more than $26 million would disappear from human services, including those that feed the elderly, the handicapped and lower-income Indians from dozens of tribes. The Cherokee Nation feeds more than 35,000 households (or 90,000 individuals) every year through their federally funded food distribution program, and delivers more than 40,000 meals a year to elderly citizens. Without this funding, the state system will be flooded, and many would lose access to this vital source of food.

Additionally, more than $38 million would be lost from federal housing and community assistance for the 2012 budget. Almost 2000 families would not receive homeownership assistance, including mortgage assistance, rehab and construction of new homes, and homebuyer counseling. An additional 3,000 families would not receive direct rental assistance; 1,850 people would not receive homeless prevention assistance; 500 people would not receive job training or day work opportunities and 900 housing units would not be patrolled to reduce criminal activity.

Finally, the Nation's roads and rehabilitation projects would be devastated - 14 Oklahoma counties and approximately 100 communities would lose access to important infrastructure provided by the Nation, such as roads, bridges, and water lines.

The impact of the plaintiffs' requested relief is far from minimal.

C. CONTRARY TO PLAINTIFFS ASSERTION, THE PUBLIC INTEREST WOULD NOT BE SERVED BY THE REQUESTED PRELIMINARY INJUNCTION.

The plaintiffs' claim that the public interest "favors voracious review on the merits to ensure that the laws are properly enforced." None of the three cases offered by the plaintiffs are applicable here. First, none involved claims for which no private right of action existed, much less held that injunction should issue when the absence of a private right of action precludes any likelihood of success on the merits. The faithful application of the laws cited by plaintiffs should result in immediate dismissal of the Principal Chief from this action with prejudice, particularly since the necessary briefing concerning the lack of private right of action has been completed for years and no further briefing is needed.

Second, and equally significant, the plaintiffs offer no decision addressing the public interest in advancing the sovereignty of Indian Tribes by fostering that judicially protected right of tribal determination of membership and supporting self-governance by tribal election. When measured against these important interests plaintiffs' claim that the public interest would be served by the draconian request of preliminary injunction lacks credibility.[11]

[11] The plaintiffs attempt to prop up their motion for preliminary injunction by claiming that jurisdictional issues can be decided later. The legal wrangling over jurisdiction of the transferred action from the Northern District of Oklahoma does not prevent denial of the preliminary injunction and dismissal of Plaintiffs' claims (and counterclaims in the transferred case). The futility of the Plaintiffs' claims due to the lack of a private right of action precludes any likelihood of success on the merits and renders the waiver of sovereign immunity issues legally irrelevant. By submitting this brief, the Principal Chief does not waive the arguments, including dismissal under Fed. R. Civ. P. 19(b), in his pending Motion to Dismiss the FAC, nor his opposition for leave to file a Fifth Amended Complaint. Likewise, because determination of the legal effect of the 1866 Treaty on Freedmen descendants is not required for denial of the preliminary injunction and because the case is not yet at issue, the Principal Chief is reserving argument of that legal effect without waiver of it.

CONCLUSION

The plaintiffs' Motion for Preliminary Injunction should be denied since, as a matter of law, as already noted by the Court of Appeals, they have no private right of action on which to base injunctive relief. Further, the fundamental policy of judicial avoidance of involvement in tribal membership issues strengthens the need for denial of the over-reaching injunction. After that denial, the plaintiffs' claims here, and counterclaims in the transferred action, should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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