UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, **Plaintiff,** **v.** **RAYMOND NASH, et al.,** **Defendants /Cross-Claimants/ Counter-Claimants** **-and-** **MARILYN VANN, et al.** **Intervenors/Defendants/Cross-Claimants/Counter-Claimants** **v.** **THE CHEROKEE NATION, et al.,** **Counter-Defendants,** **-and-** **SALLY JEWELL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,** **Cross-Defendants.**	**Case No. 1:13-cv-01313 (TFH)** **Judge: Thomas F. Hogan**

CHEROKEE NATION AND PRINCIPAL CHIEF BAKER'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

The Cherokee Nation (the "Nation") and Principal Chief Bill John Baker (the "Principal Chief"), by and through their undersigned counsel, and pursuant to the agreement of the parties (Doc. No. 223) and the Order of this Court (Doc. No. 224), hereby respectfully submit this partial motion for summary judgment and the attached brief in support thereof.

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). Here, it is has been agreed by the parties that cross-motions for summary judgment will be filed on the core question before the Court – i.e., whether the Freedmen possess a present right to citizenship in the Cherokee Nation under Article IX of the Treaty of 1866 between the Nation and the United States of America.

As will be shown in the accompanying brief, the Nation and Principal Chief are entitled to summary judgment on this core question. One of a tribe's most inherent rights is the ability to determine its own membership. In this case, it was the Nation's Constitution, and not the 1866 Treaty, which bestowed citizenship rights upon the Freedmen. The Nation has now amended its Constitution, pursuant to the will of its electorate and within its rights, and determined that one must trace an Indian ancestor to the Dawes Rolls in order to be entitled to current citizenship within the Nation. The Nation and Principal Chief are entitled to partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure because there is no issue as to any material fact on this issue.

[SIGNATURE ON FOLLOWING PAGE]

Dated: November 29, 2013

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF CHEROKEE NATION AND PRINCIPAL CHIEF BAKER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The parties have agreed to submit cross motions for partial summary judgment on the core question before the Court – whether the Freedmen[1] possess a present right to citizenship in the Cherokee Nation (the "Nation") under Article IX of the Treaty of 1866 between the Nation and the United States of America (the "1866 Treaty").[2] This question is of moment today because, in 2007, the Nation amended its Constitution to limit citizenship in the Cherokee Nation to the descendants of those enrolled on the Dawes Rolls, which excluded those descended from persons designated as "Freedmen" or "Inter-married White" by the Dawes Commission.

The Freedmen assert that the last treaty the Nation ever signed – the 1866 Treaty, imposed immediately after the Civil War – entitles them to a current federal right to citizenship within the Nation for themselves, and their progeny, for all time. Should this Court find such a right, it will be a greater right than any other citizen of the Nation possesses. Unlike most other Native American tribes, the Nation, at present, does not have any minimum "blood quantum" requirement for citizenship but there is no question that the Nation's electorate could institute such a requirement.[3] Under the Freedmen's assertions, no blood quantum requirement could ever affect their citizenship rights, nor those of their descendants, while it certainly would affect the rights of any "native born Cherokees" who did not meet the quantum criteria.

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[1] The original Freedmen plaintiffs in the *Vann* case (D.D.C.), the Freedmen defendants in the *Nash* case (N.D. Okla.), and the Freedmen intervenors will all be jointly referred to herein as "Freedmen," as their ancestors were termed in the cases and statutes. It is from those individuals that the current "Freedmen" parties claim a right to citizenship within the Nation.

[2] *See* Doc. No. 223. A copy of the 1866 Treaty is attached hereto as Exhibit A.

[3] Some Cherokees anecdotally refer to the 2007 Constitutional Amendment at issue here as requiring a blood quantum of "some" because the Amendment requires an Indian ancestor on the Dawes rolls, thus excluding the Freedmen and Intermarried White descendants who cannot trace to an Indian ancestor and thus have no blood quantum.

The Nation, on the other hand, asserts that the 1866 Treaty guaranteed to the Freedmen and their descendents who returned to the Nation within six months of ratification of the Treaty the same civil rights protections within the Nation's geographical territory that "native" Cherokees possessed, and nothing more. The Nation asserts that the 1866 Treaty does not grant a contemporary right of citizenship for Freedmen within the modern Nation.

The basis for the Freedmen's claimed federal right stems from the language of Article IX of the 1866 Treaty, which states, in part:

> The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime . . . . They further agree that 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 residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

Treaty Between the United States of America and the Cherokee Nation of Indians, July 19, 1866, Art. IX, 14 Stat. 799, 801.

This is by no means the first time that Article IX of the 1866 Treaty has been discussed. On numerous occasions, prior courts have been called upon to determine what this language does and does not guarantee the Freedmen. The 1866 Treaty has also been altered by subsequent federal legislation. All of the previous determinations by federal courts and subsequent legislative acts are relevant to the determination the Court is called upon to make in this case.

As set forth more fully herein, an analysis of the past cases and legislation will reveal that it was the Nation's own 1866 Constitutional Amendment that granted citizenship to the Freedmen, ***not*** the 1866 Treaty. The Treaty language granted the Freedmen protection within the Nation's territorial boundaries, but it was the Nation's Constitution that granted them citizenship.

A survey of the cases, federal legislation, and the language used in the 1866 Treaty when referring to the Freedmen compared to that used in relation to other Indian tribes illustrate this. Under well-established law, Indian tribes, including the Nation, may define their own membership and may exclude individuals, including Freedmen descendants, from contemporary citizenship within their tribes.

HISTORICAL SUMMARY

The crux of the controversy before this Honorable Court – what is the present day effect of Article IX of the 1866 Treaty – is a determination that must be made within the context of the history of the Nation, considering its relationship with the post Civil War federal government, and with an understanding of the historical relationship between those individuals known as the Freedmen and the Nation. A brief historical overview for the controversy is thus in order.[4]

A. African Slavery and the Cherokees

It is of some debate when slavery was first introduced into the Nation. The Cherokees themselves were sometimes sold as slaves by the British colonists.[5] Perhaps the first Africans the Cherokee ever saw were in the sixteenth century expeditions of Ferdinand De Soto and other explorers. Historical accounts of interaction between the Cherokees and African slaves of the explorers suggest no "predisposed antipathies towards one another."[6] Cherokee lands became known as a haven for runaway slaves, and Cherokees often gave them refuge.

[4] For an expanded version of this Historical Summary, see Exhibit B. Also, attached hereto as Exhibit C is a procedural timeline, which contains a chronological timeline of events surrounding the core question from 1863 to the present day. Given that the parties have agreed that the Court can resolve the core legal question on summary judgment, the Nation has not included a statement of material facts as to which there is no disputed issue.

[5] "Bone of My Bone: Stories of a Black-Cherokee Family, 1790 – 1826," by Tiya Alicia Miles, dissertation to the University of Minnesota, December 2000, p. 50.

[6] *Id.* at 49.

In the late seventeenth and early eighteenth centuries, great changes were taking place in the Nation. A post-Revolutionary War Treaty[7] was signed with the new United States in 1791, encouraging Cherokees "to be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters."[8] Some Cherokees even became plantation owners and adopted the American institution of slavery. Under the strong influence of the growing mixed-blood population, a "progressive" faction of Cherokees developed. They sent their children to schools in the northern states. They dressed like their white neighbors. The Nation was divided into voting districts, and a written constitution was approved. A chief executive, called the Principal Chief, was elected by popular vote.[9]

By 1801, with the inexorable advancement of settlement, dissolution of much of the tribal lands[10], inter-marriage with the white settlers and "other things of civilization, negro slavery had been introduced (to the Cherokees) and several of the leading men were now slaveholders."[11] By the time of Removal[12], less than 8% of all Cherokee households owned slaves.[13] As historian Miles summarizes, "[i]n a painful irony, the Cherokee Nation

[7] In what was to become a precursor of misfortune in backing the wrong side in great conflicts, the Cherokees had fought with the British, with whom they had signed a treaty.

[8] Article 14, Treaty with the Cherokee, 1791, 7 Stat. 39 (commonly called the "Treaty of Holston").

[9] "Cherokee," text by Robert Conley, Graphic Arts Center Publishing Co., Portland, OR, 2002, pp. 58-59.

[10] For a discussion of the Treaties and land concessions made by the Cherokees, see *Eastern Band of the Cherokee Indians v. United States*, 117 U.S. 288, 295-310 (1886).

[11] Mooney, James. 1992 (reprint). *James Mooney's History, Myths, and Sacred Formulas of the Cherokees.* Asheville, North Carolina: Bright Mountain Books, p. 83.

[12] The "Removal" refers to the forced relocation of the Cherokee in the nineteenth century from their lands in various states to the Indian Territory, which is in present day Oklahoma.

[13] "Collision and Collusion: Native Americans and African Americans in the Cherokee and Creek Nations, 1830s to 1920s," by Katja Helma May, dissertation to the University of California at Berkeley, 1994, p. 65; Miles, p. 140.

borrowed systems and ideologies of governance from the United States to avoid being colonized by the United States."[14]

The Nation went to the United States courts in efforts to preserve their homelands, and though it appeared that the Nation had won in court, it was a hollow victory.[15] Cherokee families were rounded up and placed in stockades, where conditions were so deplorable that they could have accurately been described as concentration camps. From 1838 to 1839, including through one of the most bitter cold winters in their lives, thousands of Cherokees made the journey west. It has been estimated that one-fourth of those who began the journey died along the way, including Chief John Ross's wife.[16]

B. The Civil War in the Cherokee Nation

At the outset of the Civil War, the Nation attempted to remain neutral and was initially protected by Union soldiers who were later dispatched to other areas of the war. "[A]s a result of the withdrawal of federal troops from Indian Territory, preparations by Confederate forces to invade the area and increasing pressure within the Cherokee Nation to take a more active position in the war,"[17] Chief Ross ultimately acquiesced to form an alliance with the Confederacy. The Commission for the Confederacy, Albert Pike of Arkansas, had arrived in Indian Territory to obtain treaties with each of the Five Civilized Tribes. The Cherokees were the "last to yield" to his demands.[18]

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[14] Miles, p. 135.

[15] *Worcester v. Georgia*, 31 U.S. 515 (1832).

[16] Conley, p. 45.

[17] "More at Home with the Indians: African-American Slaves and Freed people in the Cherokee Nation, Indian Territory," dissertation by Celia E. Naylor-Ojurongbe to Duke University, 2001, p. 163.

[18] Littlefield, Daniel F., Jr., "The Cherokee Freedmen – From Emancipation to American Citizenship," Greenwood Press, 1978, pp. 10-11.

The Cherokees issued their own Emancipation Proclamation, freeing all slaves within their Territory, on February 21, 1863. During the winter of 1863, President Lincoln "assured Ross that the treaty between the Confederacy and the Cherokee Nation would not be held against him personally or against the Cherokee Nation by the government of the United States."[19]

Six days after Lee surrendered to Grant at Appomattox, President Lincoln was assassinated. "At the end of the Civil War, the Cherokee Nation was a wasteland."[20] It was noted that:

> The events of the war brought to (the Cherokees) more of desolation and ruin than perhaps to any other community. Raided and sacked alternately, not only by the Confederate and Union forces, but by the vindictive ferocity and hate of their own factional divisions, their country became a blackened and desolate waste. Driven from comfortable homes, exposed to want, misery, and the elements, they perished like sheep in a snow storm. Their houses, fences, and other improvements were burned, their orchards destroyed, their flocks and herds slaughtered or driven off, their schools broken up, their schoolhouses given to the flames, and their churches and public buildings subjected to a similar fate; and that entire portion of their country which had been occupied by their settlements was distinguishable from the virgin prairies only by the scorched and blackened chimneys and the plowed but now neglected fields.[21]

On July 19, 1866, the Nation was forced into the 1866 Treaty with the United States, which contrary to the promises made by President Lincoln, was severely punitive in nature. Unlike the southern states that fought with the Confederacy, the Nation was forced to give up lands to the United States. It was the last Treaty the Cherokees would ever enter sign.

At the end of the Civil War, there was division among the Cherokees between those who had supported the Union and those who had supported the Confederacy, between the Ross and

[19] Conley, Robert J. 2005. *The Cherokee Nation: A History*. Albuquerque, New Mexico: University of New Mexico Press, p. 170.

[20] Conley, *The Cherokee Nation: A History*, p. 179; Naylor-Ojurongube, p. 172.

[21] Mooney, pp. 150-151, quoting Royce, Fifth Annual Report Bureau of Ethnology, 1888.

Ridge party remnants, and between those Cherokee who had settled the area prior to Removal and the Removal arrivals. Of course, the distinctions often overlapped.[22] For its part, the United States had motives of its own for Indian Territory. The 1866 treaties that it entered into with the Nation and other tribes would operate as a curtailment of the jurisdiction of the Five Civilized Tribes[23]. "What may have been sympathy for the excluded freedmen on the part of individual bureaucrats was transformed into federal policy, usually overt in its objective, aimed at subversion of the autonomy of the Cherokee Nation and dissolution of the tribal status."[24]

The next forty years saw a consistent erosion of the tribal governments, as the United States sought to supplant all of Indian Territory, including the Cherokee's sizeable portion, with a new state. More and more intruders came into the Territory. Although disagreement over the terms of the 1866 Treaty began almost from its inception, the Nation's Territory was a relatively peaceful haven for Freedmen and was immortalized in song and print as a refuge for freed slaves and free people of color alike. In 1907, all that came to an end with Oklahoma statehood. Indian Territory was no more.

LEGAL ANALYSIS

PROPOSITION I: THE LANGUAGE OF THE 1866 TREATY DOES NOT GRANT "CITIZENSHIP" WITHIN THE CHEROKEE NATION TO THE FREEDMEN AND THEIR DESCENDANTS.

The Freedmen allege that Article IX of the 1866 Treaty confers upon them an inalienable right of tribal citizenship in the Nation. The argument of the Freedmen rests upon a misappropriation of the meaning of citizenship in the Nation: that the rights bestowed upon

[22] *See generally* Littlefield, pp. 18-29.

[23] "Five Civilized Tribes" refers to the Cherokee, Chickasaw, Choctaw, Creek, and Seminole tribes.

[24] *Id.* at 250.

them by the 1866 Treaty in the Cherokee Nation's Indian Territory confer upon them an inalienable right of tribal citizenship in the contemporary body-politic of the Nation. Such an allegation is nothing less than an historical sleight of hand as the language of the 1866 Treaty confers no such right.

The 1866 Treaty, when read as a whole, confers upon the Freedmen the right to settle and occupy the lands within the Cherokee Nation of Indian Territory as a distinct class of individuals with rights of self-governance and equal protection of law. In other words, the 1866 Treaty afforded the Freedmen equal rights as citizens residing in the Nation's portion of Indian Territory, it did not confer upon them a right of tribal citizenship in the body-politic of the Nation.

i. Articles IV through IX of the 1866 Treaty confer upon the Freedmen the right to reside in the Cherokee Nation with rights of self-governance and equal protection of law.

The Freedmen are first referenced in Article IV of the 1866 Treaty. Article IV provides the Freedmen with, *inter alia*, the right to settle in the Canadian district of the Nation's Territory along with the southern Cherokees and the free Negroes who had resided in the Nation prior to the war.[25] Article IV, in pertinent part, provides as follows:

> All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of the Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River […] equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-describe in this article[…]

Id. at Art. IV.

[25] *Id.* at Article VIII (referring to the "southern Cherokees, as provided in Article IV of this treaty").

Article V provides the rights of self-governance and popular representation in the general council of Indian Territory to the Freedmen and others electing to reside in the Canadian district, and equal protection of law amongst the Cherokees residing therein. Article V, in its entirety, provides as follows:

> The inhabitants electing to reside in this described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by the numbers they may be entitled in a general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulation and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; *Provided*, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities of those who elect to settle in said district under the provisions of this treaty; *Provided also*, That if any such police regulation or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district or in any other district of the nation, discriminating against the citizens of other districts are prohibited, and shall be void.

Id. at Art. V.

Article VI, similarly, provides for representation in the national council of the Nation and equal protection of law to the Freedmen, and others, electing to reside in the Canadian district. Article VI, in its entirety, provides as follows:

> The inhabitants of the said district herein before described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform through-out said nation. And should any such law, either in its provisions or the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as the fair and equitable application and expenditure of the national funds as between the people of this and every other district in said nation.

Id. at Art. VI.

Article IX memorializes the abolition of slavery in the Nation and ensures equal rights to the Freedmen, the free Negroes, and their descendants who would return to the Nation within six months of ratification of the Treaty. Article IX, in pertinent part, provides as follows:

> [The Cherokee Nation] further agree that 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 residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, That owners of all slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.

Id. at Art. IX.

Article XII establishes the national council of Indian Territory. The third section of this article references the Freedmen as residing in distinct communities in Indian Territory and grants the national council the power to legislate upon matters pertaining to these Freedmen communities. Article XII, Section Three, in pertinent part, provides as follows:

> Third. Said general council shall have power to legislate upon matters pertaining to the intercourse and relations of the Indian tribes and nations and colonies of freedmen resident in said Territory; the arrest and extradition of criminals and offenders escaping from one tribe to another, or into any community of freedmen[…]

These Articles, when read together in the entirety of the 1866 Treaty, confer upon the Freedmen the right of occupancy in the Nation's Territory with rights of self-governance and equal protection of law residing as a group distinct from the native citizenry. At no point in these provisions are the Freedmen deemed to have been adopted or otherwise incorporated into the body-politic of the Nation as tribal citizens. With respect to Article IX in particular, the plain language of Article IX grants the Freedmen "equal rights" to native Cherokees but does not

declare a right of citizenship for the Freedmen. Indian law canons of construction dictate that such language be construed in favor of the Nation.[26]

ii. Article XV of the 1866 Treaty provides a means for other Indian tribes to be permanently incorporated into the Nation.

Article XV makes clear that Congress intended to preclude the Freedmen from permanent incorporation into the Nation by reserving that right to other Indian tribes upon the approval of the Nation and payment into the national fund. Article XV, in pertinent part, states as follows:

> The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, with the Cherokee Nation, on unoccupied lands east of the 96°, on such terms as may be agreed upon by any such tribe and the Cherokees […] there first being paid into the Cherokee national fund a sum of money […] they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs and usages […] they shall have a district of country set off for their use by metes and bounds […] And the said tribe thus settled shall also pay into the national fund a sum of money […] and thence afterwards they shall enjoy all the rights of native Cherokees.

Id. at Art. XV.

The above-referenced language stands in direct contrast to the language of Articles IV through IX of the 1866 Treaty with respect to the rights afforded to the Freedmen. Specifically, the language of Articles IV through IX confers upon the Freedmen the right settle in the Nation

[26] The Supreme Court has stated: "[T]he standard principles of statutory interpretation do not have their usual force in cases involving Indian law." *See Cohen's Handbook of Federal Indian Law* (2005), § 2.02[1] (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). The basic Indian law canons of construction require that treaties, agreements, statues and executive orders be liberally construed in favor of the Indians, and all ambiguities are to be resolved in favor of the Indians. In addition, the treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress' intent to the contrary is clear and unambiguous. *Id.* (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor")). These canons were first developed in the context of treaty interpretation and remain vital today. *Id.* (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (stating that the court looks "beyond the written words to the larger context that frames the Treaty," including "the history of the treaty, the negotiations, and the practical construction adopted by the parties")).

with rights of self-governance and equal protection of law; whereas Article XV provides for the permanent incorporation of other Indian tribes into the tribal citizenry of the Nation, on "equal terms in every respect," as agreed upon between the United States and the Cherokees, and after having paid a sum certain into the national fund.[27]

PROPOSITION II: AN 1866 AMENDMENT TO THE CHEROKEE CONSTITUTION, NOT ARTICLE IX OF THE 1866 TREATY, GRANTED CITIZENSHIP STATUS TO THE FREEDMEN.

Although Article IX of the 1866 Treaty did not refer to "citizenship" for Freedmen, the Nation amended its Constitution to provide that:

> [A]ll freedmen who have been liberated by 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 taken and deemed to be citizens of the Cherokee Nation.

Cherokee Nation Const., art. III, § 5 (1839 as amended 1866). It is that amendment, not the 1866 Treaty, that granted citizenship to the Freedmen.

i. Federal courts recognize that the Cherokee Constitution granted citizenship to the Freedmen.

There can be no dispute that the provisions of the 1866 Treaty were extremely punitive towards the Nation, and were used as a furtherance of the United States' desire for a complete diminishment and dissolution of the Nation. Disagreement over the meaning of

[27] *See also Cherokee Nation, et al. v. Journeycake*, 155 U.S. 196, 200-02 (1894) (citing to the agreement of April 8, 1867, between the Cherokee and the Delaware, which was formed pursuant to Article XV of the 1866 Treaty, providing that the Delaware would "become members of the Cherokee Nation with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees . . . . And the children born of such Delawares so incorporated in the Cherokee Nation shall in all respects be regarded as native Cherokees.").

Article IX language began almost from the date of its ratification.[28] Such disagreements resulted in Congress' passage of an act granting jurisdiction to the Court of Claims "to hear and determine what are the just rights in law or in equity of . . . the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions [of the 1866 Treaty] . . . ." 26 Stat. 636, Chap. 1249, § 1, Oct. 1, 1890. It is under this jurisdictional act that the Freedmen brought the *Whitmire* cases wherein the federal courts determined the rights of the Freedmen and determined who qualified as a Freedman for purposes of Article IX. *See Whitmire* v. *Cherokee Nation,* 30 Ct. Cl. 138 (Ct. Cl. 1895); *Whitmire v. Cherokee Nation*, 46 Ct. Cl. 227, 1910 WL 930 (Ct. Cl. 1911), *rev'd on other grounds, Cherokee Nation v. Whitmire,* 223 U S. 108 (1912) (citing decree of Feb. 18, 1896).

The *Whitmire* cases occurred as the Nation struggled with the reality of allotment and wholesale liquidation of Nation assets for distribution per capita – a reality not contemplated by the Nation during the signing of the 1866 Treaty. The Nation argued that taking a portion of its general assets and distributing them to the Freedmen was unnecessarily punitive, as most of the Nation's citizens had never held slaves.

> If a punishment were to be imposed on account of the holding of these people in bondage common justice would dictate that it should be imposed with some regard to the degrees of guiltiness for the commission of the wrong, and not that the innocent should be made to suffer equally with the guilty. (Statement of Mr. George S. Chase for the Cherokee Nation)

Whitmire, 30 Ct. Cl. at 144.

The Court of Claims rejected the Nation's argument that Freedmen citizens within the

[28] It should also be noted that there were ongoing disputes concerning the meaning of the 1866 Treaty's language, not just as it related to Freedman, but also as it related to "friendly Indians" and intermarried whites. *See, e.g., Cherokee Nation* v. *Journevcake*, 155 U.S. 196 (1894) (Delaware Indians); *Red Bird v. United States*, 203 U.S. 76 (1906) (intermarried whites).

Nation should not be allowed to participate in the distribution of proceeds from the common lands. The Court found that the Nation had conferred equal citizenship upon the Freedmen when the 1866 Constitutional amendment was adopted:

> When the Cherokee people wrote into their constitution in 1866 "all nativeborn Cherokees, all Indians and whites legally members of the nation by adoption and all freedmen," "shall be taken and be deemed to be citizens of the Cherokee Nation," ***they fixed the status of the freedman and raised him to the same rank of citizenship*** which they themselves enjoyed. Thenceforth he was to be equal with themselves under the constitution, governed by the same laws, enjoying the same rights, possessed of the same immunities, and entitled to the same protection.

Id. at 155 (emphasis added). The Court further noted that:

> The United States did not, it may be conceded, stipulate for more than that the freedmen should become citizens "with all the rights," that is, political rights, "of native Cherokees," . . . ***but the constitution of the Cherokee Nation then came into the case and defined what citizenship was***, and in express terms ranked "freedmen" with "native-born Cherokees," and the lands of the nation as "common property."

Id. at 157 (emphasis added).

ii. Federal courts recognize the limited scope of Article IX of the 1866 Treaty.

Later, in the 1911 version of the same case, the Court of Claims interpreted Article IX of the 1866 Treaty and found that the language "and are now residents therein, or who may return within six months, and their descendants" was:

> intended for the protection of the Cherokee Nation as a limitation upon the number of persons who might avail themselves of the provisions of the treaty, and consequently that they referred to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree, and that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867.

Whitmire, 46 Ct. Cl. 227, 1910 WL 930, *4. Thus, the 1866 Treaty provisions only applied to **former slaves, descendants of those slaves and "free colored persons" who resided in the Cherokee Nation as of February 11, 1867. Those people, and only those people, constituted the group of individuals known as the Freedmen pursuant to the Treaty of 1866 and were entitled to "all the rights of native Cherokees."** It was that limited group of people who were entitled to the civil protections and rights outlined in the 1866 Treaty.[29]

The federal courts recognized that it was the ***Nation's 1866 Constitutional Amendment*** in response to the 1886 Treaty provisions that actually granted citizenship to the Freedmen. *Cherokee Freedmen and Cherokee Freedmen's Ass'n v. United States*, 195 Ct. Cl. 39 (1971); *Whitmire*, 30 Ct. Cl. at 155. Since the Nation had granted that citizenship status, those individuals were entitled to the same monetary distributions as citizens who were Cherokee by blood.

Several rolls of "Freedmen" were taken for the purpose of distributing property. The Wallace Roll was conceived to determine who would be eligible for a per capita distribution of funds due to the sale of Cherokee lands. The Kern-Clifton Roll was approved in 1897 to supplement the Wallace Roll. These rolls did not grant citizenship, nor did they attempt to define who the Freedmen were under the 1866 Treaty; they only documented who was living in the Nation and considered eligible under the various court rulings and statutes that governed distribution of monies.

The Freedmen, as that term is defined in the 1866 Treaty, who were former slaves, descendants of those slaves and "free colored persons" who resided in the Cherokee Nation as of February 11, 1867, have long since died. Upon the death of the last Freedmen, the provisions of

[29] Those individuals who did not return to the Nation in time to be entitled to application of the 1866 Treaty language were sometimes colloquially known as "too lates." *See, e.g.*, Naylor-Ojurongbe, p. 209.

Article IX of the 1866 Treaty ceased to apply to any individual. It was only under the Nation's Constitution that descendants of the Freedmen maintained their citizenship.

iii. The 2007 Amendment to the Cherokee Constitution lawfully limited citizenship in the Nation.

The need for territorial protection for Freedmen descendants or any Cherokee within the physical boundaries of the Nation no longer exists. It is not the same Nation as it was in 1866. The goals of territorial and legal protection to Freedmen at the end of the Civil War were accomplished; they remained in the Nation until its territorial extinction by Oklahoma statehood in 1907. Because it was the Nation's Constitution that conveyed citizenship to the Freedmen, an amendment to that Constitution can lawfully take away that citizenship, just as an amendment to the Constitution could take away the citizenship rights of any "native born Cherokee." In March 2007, the Cherokee Nation electorate, including any registered Freedmen[30] voters, passed the following Amendment to the Cherokee Constitution:

> 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 day of June, 1869.[31]

The effect of this Amendment was to limit citizenship in the Nation to only those persons who were Cherokee, Shawnee, or Delaware by blood. *See* Cherokee Nation Const., art. III.[32]

[30] From March 2006 until passage of the Amendment, Freedmen descendants were entitled to enroll as citizens of the Cherokee Nation. They received the same citizenship identification card as Cherokees by blood, and were entitled to all the same rights and benefits, including the right of suffrage.

[31] Copies of the Resolution Confirming the Dates of the Special Election, Notice of Special Election, and Official Election Results are attached hereto as Exhibit D.

[32] A copy of the current Constitution of the Cherokee Nation is attached hereto as Exhibit E.

Persons who were descended from those persons designated as "Freedmen" or "Inter-married White" by the Dawes Commission were excluded and/or removed from citizenship within the Nation.

The Freedmen parties and the United States would have this Court find that the above 2007 Amendment is a nullity – that the territorial and political protections guaranteed to the Freedmen at the end of the Civil War in the 1866 Treaty prevents such an amendment from ever being enacted and that no amendment may ever be passed affecting the citizenship status of the Freedmen descendants. That argument not only disregards the plain language of the 1866 Treaty – which conferred "the rights of native Cherokees" to the Freedmen, not citizenship – it also disregards the wealth of case law and statutory interpretation providing that the Cherokee Constitution, not the 1866 Treaty, conferred citizenship to the Freedmen and that any rights of the Freedmen under the 1866 Treaty expired upon the death of the last Freedmen or descendent that actually resided in the Nation as of February 11, 1867.

PROPOSITION III: EVEN IF ARTICLE IX OF THE 1866 TREATY GRANTED CITIZENSHIP TO THE FREEDMEN AND THEIR DESCENDANTS, IT NO LONGER APPLIES.

Even if Article IX of the 1866 originally conferred citizenship on the Freedmen (it did not) and even if that right to citizenship was not originally limited to descendents actually residing in the Nation as of February 11, 1867 (it was), Congress expressly limited the meaning of Article IX in the Five Tribes Act, such that it no longer has application today.

By way of background, the Dawes Rolls were founded in Section 21 of the Curtis Act of 1898, which provided that the Commission of the Five Civilized Tribes (the "Dawes Commission") was:

> [A]uthorized and directed to take the roll of Cherokee Citizens of eighteen hundred and eighty (not including Freedman) as the only roll intended to be

> confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee Blood have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law . . . .

Curtis Act of 1898, ch. 517, § 21, 30 Stat. 495.[33] The second paragraph of Section 21 of the Curtis Act directs the Dawes Commission to: "make a roll of Cherokee Freedman in strict compliance with the decree of the Court of Claims . . . ." *Id.* (emphasis added).

In 1906, Congress passed an act which was intended to allot the lands of and eventually dissolve the governments of the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations in preparation for creation of a state. *See* The Five Tribes Act, ch. 1876, § 3, 34 Stat. 137, 138 (1906) ("The Five Tribes Act'').[34] Because the Dawes Commission's work had dragged out for years, the Five Tribes Act required the Dawes Commission to complete its work on the rolls by March 4, 1907, and limited enrollment of individuals to those who were living as of March 4, 1906. *Id.* §§ 2, 29.

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[33] A copy of the Curtis Act is attached as Exhibit F. That the Nation's Constitution is the source of all Cherokee citizenship, not just that of the Freedmen, is also illustrated by the acts of Congress relating to the development of the Dawes Rolls. Although the Dawes Commission was given the authority to create the rolls, Congress expressly limited the Commission to enrolling those individuals recognized as citizens by the tribes themselves: "But it [the Dawes Commission] shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such . . . ." Act of May 31, 1900, ch. 598, 31 Stat. 221, 236 (1900); reaffirmed in Act of July l, 1902, ch. 1375, § 27, 32 Stat. 716, 720 (1902).

[34] A copy of the Five Tribes Act is attached as Exhibit G. The Act stated that the tribal governments were to continue in full force and effect unless a subsequent Congressional Act provided otherwise. The Five Tribes Act, § 28. Such a termination act was never passed, and the federal courts have held that the governments of the Five Tribes continued in full force and effect and continue to exist despite the efforts of the federal government to dissolve the tribes. *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus* 581 F.2d 949 (D.C. Cir. 1978); *see also Morris v. Watt*, 640 F.2d 404 (D.C. Cir. 1981).

The Five Tribes Act provided that:

> The roll of Cherokee freedmen shall include only such 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 August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of Interior.

Id. § 3. This language was included, in part, as a result of issues arising in the *Whitmire* cases as well as the practices of the Dawes Commission and was presented into the legislation by the Nation in order to limit the number of individuals who would be involved in the per capita distribution of the Nation's property. *See Whitmire*, 46 Ct. Cl. 227, 1910 WL 930, *11.

In the Five Tribes Act, Congress moved the term "and their descendants" from the end of the paragraph and placed "descendants" before the time-limiting residency term. Thus, the descendants to be included on the Freedmen Roll were also expressly required to be *bona fide* residents of the Nation by February 11, 1867. Under Article IX's language then, the beneficiaries of the 1866 Treaty were those Freedmen and their descendants who resided in the Nation on August 11, 1866, returned to the Nation by February 11, 1867. Any failure of a descendant to reside within or return to the Nation within that time frame excluded that descendant from being placed on the Dawes Roll. All Freedmen descendants deemed by the United States, interpreting federal law, to qualify as Cherokee Freedmen were thus listed on the Dawes Freedmen Roll.

Controlling federal case law interprets the law as outlined above. The Court of Appeals for the District of Columbia, in a case affirmed by the Supreme Court, ruled that, in relation to Article IX, Section 3 "constitutes a legislative interpretation of, and supersedes *pro tanto*, the

prior treaty." *Garfield v. United States ex rel. Lowe*, 34 App. D.C. 70, 1909 WL 21538, at *4 (App. D.C. 1909), *aff'd sub nom, United States ex rel. Lowe v. Fisher*, 223 U.S. 95 (1912). The *Garfield* court stated that all doubts as to the construction of Article IX were resolved by Section 3 of the Five Tribes Act. *Id.* The court went on to determine that:

> [T]he benefits of citizenship were conferred only upon free colored persons, or the slaves of Cherokee citizens and their descendants, who were actual bona fide residents of the Cherokee Nation August 11th, 1866, or who actually returned and established such residence in the Cherokee Nation within six months from that time.

Garfield, 1909 WL 21538, at *4.

The *Garfield* case was brought by individuals who were descendants of a person who had been a slave of a Cherokee citizen. *Id.* at *3. The court refused to require the Secretary of Interior to add the descendants to the Cherokee Freedmen Roll even though, as descendants of a slave to a Cherokee citizen, they arguably fit Article IX's definition of a Freedman. *Id.* at *3. The court reasoned that the Five Tribes Act's language expressly revised Article IX and ruled that the claimants were not entitled to enrollment because neither they nor their ancestors were *bona fide* residents of the Nation within the prescribed time frame. *Id.* at *3-4. The Supreme Court affirmed the lower court's decision and ruled that Freedmen descendants who did not return within six months of the 1866 Treaty were excluded from the benefits of the Treaty. *Fisher*, 223 U.S. at 100.

Thus, even if it could be argued that the language in Article IX of the 1866 Treaty gave descendants of Freedmen an eternal right to citizenship, that language is no longer valid, given Congress' alteration of the language regarding descendants. Plaintiffs' reliance on Article IX as an entitlement to citizenship is entirely misplaced.[35]

[35] It should also be noted that the language of the Five Tribes Act further reflects that the federal government did not intend for Freedmen to be considered citizens of the Five Tribes. Sections 1 and 16

PROPOSITION IV: THE ABILITY TO DETERMINE ITS MEMBERSHIP IS CENTRAL TO A TRIBE'S SOVEREIGNTY, AND MODERN COURTS HAVE GRANTED WIDE DEFERENCE TO THAT ASPECT OF SOVEREIGNTY.

The United States has consistently encouraged broad powers of tribal self-governance. These powers of self-governance include the power to determine tribal membership, even to the exclusion of the Freedmen from the tribal enrollment. It is, in fact, a well-accepted tenet of Indian law that "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Cohen's Handbook of Federal Indian Law (2005), § 3.03(3). "[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership." *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978) (citing *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906)). "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, 789 (9th Cir. 2007).

As discussed above, Congressional policy post-1893 served to terminate tribal governments in Indian Territory and to allot tribal lands in severalty as a means of paving the

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of the Five Tribes Act, for example, specifically distinguish between citizens and Freedmen. *See* Five Tribes Act, § 1 ("no person shall be enrolled as a citizen or freedman"); § 16 ("when allotments as provided by this and other Acts of Congress have been made to all members and freedmen"). The Five Tribes Act also makes clear that the federal government distinguished Freedmen from Cherokee citizens "by blood." *See Id.* § 4 ("no name shall be transferred from the approved freedmen or any other approved rolls . . . to the roll of citizens by blood"); § 6 (permitting President to appoint a "citizen by blood" as principal chief of any of the tribes); § 19 ("the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens," implying citizens maintained an Indian blood quantum).

way for statehood in Oklahoma.[36] However, legislation since statehood and the rulings of modern courts have continued to strengthen the governmental powers of the Indian tribes.[37]

i. Congress has recognized tribal powers of self-governance.

Perhaps the fullest expression of Congress' intent to strengthen tribal self-governance is the Oklahoma Indian Welfare Act of 1936 (the "OIWA").[38] The OIWA authorized tribes to organize "for [their] common welfare," adopt constitutions, and receive charters of incorporation.[39] The Department of Interior has recognized that such powers of self-governance extend to a tribe's right to exclude the Freedmen from tribal citizenship.

On August 11, 1938, the Commissioner of Indian Affairs presented to the Office of the Solicitor of the Department of Interior a question concerning the status of the Freedmen of the Five Tribes in connection with a tribe's desire to reorganize under the OIWA.[40] The Commissioner specifically inquired as to whether a tribe might adopt a constitution under the OIWA containing provisions whereby the Freedmen would be eliminated from membership.[41] In addressing this question, the Solicitor found that the various treaties of 1866 with the Five Tribes and their respective constitutional amendments resulted in the Freedmen being granted full rights of tribal membership, including rights of suffrage. Similarly, the OIWA operated as consent by Congress for the tribes to reorganize on a new membership basis.[42] As such, the Freedmen were entitled to vote on the adoption of any proposed constitution under the OIWA, including those

[36] Act of June 28, 1898, §§ 26, 28, 30 Stat. 495.

[37] *See generally* Cohen's Handbook of Federal Indian Law (2005), § 4.07[1][c].

[38] 25 U.S.C. § 501, *et seq.* A copy of OIWA is attached as Exhibit H.

[39] 25 U.S.C. § 503.

[40] Five Civilized Tribes – Status of Freedmen – Organization Under Oklahoma Welfare Act, 1 Op. Sol. Dept. of Int. relating to Indian Affairs 1077 (1941), *available at* http://thorpe.ou.edu/solicitor.html.

[41] *Id.*

[42] *Id.*

which would exclude the Freedmen from membership. In other words, the OIWA granted the Five Tribes the authority to adopt respective constitutions excluding the Freedmen from tribal membership so long as the Freedmen were entitled to vote upon the same.

These powers of self-governance are not confined to those tribes choosing to reorganize under the OIWA and are retained by the Nation. As stated by the court in *Wheeler v. U.S. Department of Interior*, 811 F.2d 549, 550 (10th Cir. 1987), the Supreme Court has long recognized that the Nation is capable of self-governance[43] and has uniformly recognized the right of self-governance as fundamental to tribal existence.[44] The Federal Government, similarly, has adopted a policy of encouraging tribal self-governance.[45] Similar to other tribes, the Nation's right to self-governance includes the right to amend its constitution so as to define its tribal membership.

ii. Courts have recognized that Indian tribes, including the Cherokee Nation, have the fundamental right to determine their own membership.

Given that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership, courts are loath to intervene in intramural matters dealing with determination of tribal citizenship. *See Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (rejecting a suit against the Secretary of Interior seeking to challenge federal recognition of a tribe because of allegedly erroneous tribal membership decisions). For instance, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court had occasion to discuss the application and implementation of the Indian Civil Rights Act ("ICRA") to a citizenship question raised by

[43] *Wheeler*, 811 F.2d at 551 (citing *Talton v. Mayes*, 163 U.S. 376, 379-81 (1896), and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

[44] *Id.* (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-45 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973)).

[45] *See generally* Indian Civil Rights Act, 25 U.S.C. §§ 1301-41, and Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a.

certain female members of the Santa Clara Pueblo in New Mexico, alleging violations of ICRA because their children (the offspring of Santa Clara females and non-Santa Clara males) were denied citizenship while similarly situated children (the offspring of Santa Clara males and non-Santa Clara females) were accorded citizenship under tribal law. The Supreme Court, after a lengthy discussion of ICRA, its history in the legislature and prior case law, held that ICRA did not operate as a waiver of sovereign immunity of the tribe, and ICRA did not authorize private actions for declaratory or injunctive relief. The only relief ICRA authorizes is that of federal habeas corpus relief. The Supreme Court reversed the decision of the Tenth Circuit, which had held injunctive relief should have been granted against the pueblo prohibiting enforcement of the tribal ordinance denying membership.

In the case of *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004), the plaintiffs had been members of the Santa Rosa Rancheria Tachi Indian Tribe until they were banished and disenrolled, or expatriated, from tribal membership. They brought a federal *habeas corpus* action under §1302 of ICRA. The Eastern District of California first found that "disenrollment from tribal membership and subsequent banishment from the reservation constitutes detention in the sense of a severe restriction on petitioners' liberty not shared by other members of the Tribe, and is thus reviewable in a writ for habeas corpus relief." The Court rejected the respondents' assertions that the issue of membership was solely an intra-tribal concern, not cognizable in the federal courts. The Court found:

> [T]he court is not addressing whether the decisions to disenroll and banish petitioners should or should not have been made in their particular cases. Rather the Court is addressing whether the General Council and the Tribe were required to comply with the requirements of Section 1302 in making these decisions.

359 F.2d at 976. In discussing its jurisdictional boundaries on the matter, the Court opined:

> [I]f the court concludes that petitioners were denied their rights to procedural due process in connection with the decisions to disenroll them and banish them from the reservation, the remedy is not reinstatement, which would interfere with tribal sovereignty and internal tribal affairs but, rather, a direction to provide appropriate due process, essentially a re-hearing.

359 F.2d at 977. Thus, even though the "custody" requirement for a federal habeas action was met, the sole issue was whether or not due process had been given to those disenrolled. Courts continue to acknowledge this important right of self-governance, refusing to become involved, even when disenfranchisement has occurred. *See, e.g., Hendrix v. Coffey*, 305 F. App'x 495 (10th Cir. 2008).

Most relevant here, after the national elections of 1983, a group of Freedmen descendants brought an action in the Northern District of Oklahoma alleging that they had improperly been denied the right to vote in those elections, and the right to participate in certain governmental services and benefits. They raised both Thirteenth Amendment and 1866 Treaty arguments. Judge Cook of the Northern District dismissed the claims against the Nation on the basis of sovereign immunity. The Freedmen descendants appealed to the Tenth Circuit. In a published decision, the Circuit upheld Judge Cook's decision. In addressing the plaintiffs' claims of racial discrimination, the Court said that:

> [N]o right is more integral to a tribe's self-governance than its ability to establish its membership . . . Applying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribe's sovereign power to define itself.

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

CONCLUSION

It is undisputed that the Cherokee Nation has the right to determine its own citizenship, unless Congress has abridged that right. From the authority herein, it is apparent that Congress, the federal courts, and the Dawes Commission relied upon the Nation's own determination of its citizenship, as articulated in its 1866 Constitutional Amendment, in deciding that Freedmen were citizens of the Nation and construing the application of Article IX of the 1866 Treaty.

In 2007, the Nation again amended its Constitution, this time limiting citizenship to those who were Indian "by blood" and removing the Freedmen and Inter-married White descendants from eligibility for citizenship. That amendment was made according to tribal law, was participated in by eligible Freedmen voters, and was within the Nation's authority. Should the Court embrace the Freedmen's position and find that the Nation's electorate was forestalled by the 1866 Treaty from making such a citizenship determination, it will be the first time a United States court has ever infringed upon such an inherent tribal sovereignty right.

It made sense at the end of the Civil War for those within the boundaries of the Nation to be entitled to the protection of the Nation. The Nation was ***the*** government within its geographical domain and was very much a land based entity. If you left the Nation, you were an expatriate – no longer a citizen. And, as neither Indians nor Freedmen were yet entitled to United States citizenship, without the protection of the Nation's government, individuals would find themselves without the protection of any government at all.

The Cherokee Nation's geography has been necessarily impacted by allotment and statehood. One hundred forty seven years later, one of the few aspects of Cherokee Nation government that remains inviolate is the right of self-determination, the right to decide its own membership. The Freedmen plaintiffs and the United States ask this Court to eviscerate that – to

ring the death knell of the Nation. For if the laws of one government, even a benevolent superior one, may dictate the make-up of a subordinate government, how long will that subordinate government survive?

Dated: November 29, 2013

Respectfully submitted,

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Certificate of Service

I certify that on November 29, 2013, I caused the foregoing Cherokee Nation and Principal Chief John Baker's Motion for Partial Summary Judgment, Supporting Memorandum and Exhibits to be served on all opposing counsel through the electronic case filing system.

/s/ A. Diane Hammons
A. Diane Hammons