IN THE 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**

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

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INTRODUCTION

Both parties to the 1866 Treaty are before this Court, and all parties in this litigation agree that Article 9 of that Treaty means what it says, that Freedmen were granted "all the rights of native Cherokees."[1] The Cherokee Nation accepted and entered into the 1866 Treaty with the United States of America and stands by every provision contained in it. The USA and the Freedmen argue that this Court should assume there is additional language implicit in Article 9 of that Treaty—words that the nineteenth century drafters certainly knew, but did not use: words like "permanent," "eternal," "ever after," or "citizens." The USA and Freedmen would have this Court find that those terms are implicit in Article 9; that they were really meant to be there. But they were not, and the canons of construction regarding Indian treaties, as well as the statutory "plain language" rule, require this Court to deny the other parties' demand that implicit terms be found. Indeed, the term "citizens" was used elsewhere in the Cherokee Treaty of 1866 and in the 1866 treaties of the other Five Tribes,[2] but it was not used in Article 9 of the Cherokee Treaty of 1866—the provision that the parties have agreed to ask this Honorable Court to interpret.

See, for example, the terms used in the 1866 Treaty regarding the settlement of other "friendly Indians" within the Cherokee Nation:

> The United States may settle any civilized Indians, friendly with the Cherokees . . . on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee

[1] All terms not otherwise defined herein shall have the meaning attributed to them in the Memorandum in Support of Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment (Dkt. No. 233).

[2] Today, the Cherokee, Choctaw, Chickasaw, Seminole and Muscogee (Creek) Nation prefer the term "Five Tribes" to "Five Civilized Tribes."

> country **they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens.**

Treaty Between the United States of America and the Cherokee Nation of Indians art. 15, July 19, 1866, 14 Stat. 799 (attached as Exhibit A to Memorandum in Support of Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment (Dkt. No. 233) ("Nation Ex. A")) (emphasis added). And, in the other Five Tribes' treaties, the term "citizens" was actually used:

> And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and **the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens** or members of said tribe. (Treaty Between the United States of America and the Seminole Nation of Indians art. II, Aug. 16, 1866, 14 Stat. 755 (emphasis added).)

> [U]ntil the legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nation at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, **all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations** . . . . (Treaty with the Choctaw and Chickasaw art. 3, Apr. 28, 1866, 14 Stat. 769 (emphasis added).)

> [I]nasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and **their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof,) shall have and enjoy all the rights and privileges of native citizens** . . . . (Treaty with the Creeks art. 2, June 14, 1866, 14 Stat. 785 (emphasis added).)

From a reading of other contemporaneous Treaty language it becomes apparent that, if the parties to the 1866 Treaty had meant that the Freedmen and their descendants were to have

eternal rights of citizenship within the Cherokee Nation, they would have said it. The "rights of native Cherokees" did not mean eternal, unalienable citizenship then, and does not mean that now. The Cherokee Nation is the only party asking this Court to give strict literal meaning to the 1866 Treaty terms; the other two parties ask this Court to interpret additional meaning and language into Article 9.

The limitations on who qualified as a citizen of the Cherokee Nation in the nineteenth century were much more stringent than they are today. It must always be remembered that in 1866 the Cherokee Nation was an autonomous geo-political tribal entity. Within its boundaries, it governed.[3] If a Cherokee citizen left those boundaries, he was no longer a citizen.[4] Read in this historical context, the language of Article 9 makes much more sense. It was intended to protect those Freedmen who were within the boundaries of the Nation at the end of the Civil War, or who returned shortly thereafter. ***Inside*** the Nation's boundaries, its Indian Territory, the Freedmen would not have been protected by or subject to the laws of any sovereign except the Cherokee Nation. It did not apply to any Freedman who remained ***outside*** the boundaries of the Nation, however long that individual might have lived in the Cherokee Nation, or accepted Cherokee culture, language or traditions.

The Freedmen and the USA seek to stretch this territorial protection and apply it in ways that strain credulity in 2014. There can be no straight-faced assertion that the framers of the 1866 Treaty, either the federal agents creeping into Indian Territory or the Cherokees still reeling from the ravages of war, anticipated that almost 150 years later the Freedmen would be claiming

[3] Subject, of course, to ever increasing federal superintendence. However, the Nation at that time was very much a geographically defined "domestic community." *Worcester v. Georgia*, 31 U.S. 515, 583 (1832).

[4] "[W]henever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other Government, all his rights and privileges as a citizen of this Nation shall cease." Cherokee Nation Const. art. I, § 2 (1839) (attached hereto as Exhibit A).

an eternal inalienable right of citizenship with the Cherokee Nation—a right, if granted, that would be superior to any right held by a native Cherokee today.

REPLY TO HISTORICAL INACCURACIES

The parties agreed to submit the crucial legal issue in this matter to this Honorable Court upon cross-motions for summary judgment. To that end, the Cherokee Nation did not obtain any experts to opine on the issue, nor did the Nation intend to enter into disagreements with the parties over factual matters. The Nation asserts, as all parties have in agreeing to submit these issues to the Court on cross-motions for summary judgment, that there are no material facts in controversy regarding this core legal issue. The language of the 1866 Treaty is what it is, and despite the often egregious inaccuracies put forth by the USA and Freedmen in their briefs, there are no ***relevant*** material legal facts in dispute.[5]

In fact, the Nation does not dispute the content of the historical documents, letters, legislation, and cases cited and attached as exhibits by the other parties.[6] A thorough reading of all three of the parties' historical exhibits should be undertaken because any one of the parties can take isolated statements or remarks and argue them to best advantage. While no findings of fact are necessary, an understanding of the history behind the 1866 Treaty may be helpful in the Court's decision-making in this case; it was for this purpose that the Nation initially provided a historical summary for the Court's consideration.

[5] It is for that reason that the Nation did not attach a statement of undisputed facts to its Motion, which rationale the USA now criticizes. For the sake of a complete record, the Nation prepared a brief Statement of Uncontroverted Material Facts, attached hereto as Exhibit B.

[6] It does dispute, however, the conclusions and opinions of the expert report attached as Exhibit 3 to the USA's Cross-Motion (Dkt. No. 234). (The USA's expert does not even correctly identify the extent of the Nation's Territory prior to Removal.) That report is the subject of a Motion to Strike filed by the Nation contemporaneously with this Reply.

Although the Nation did participate in a series of cases seeking to delineate what exactly Freedmen were guaranteed under Article 9 of the Treaty, there can be little claim that the Nation did not honor its commitments under the Treaty. Indeed, the Court of Claims found that the Cherokee Nation ***had*** honored its commitment to the Freedmen:

> From these provisions of the treaties it will be evident that the leading tribes of the Indian Territory, and which are the only ones within its limits who held slaves at the beginning of the war, have dealt with them in the main in a just and liberal manner. The Cherokees and Creeks and Seminoles have been munificent toward them, placing them upon an equal footing with native citizens, and this signifies equal rights under their laws in political franchises, in lands and moneys.
>
> A Memorial to Congress on this subject was presented on February 20, 1874 (2 Cong. Rec. 1664).

Cherokee Nation v. United States, 12 Ind. Cl. Comm. 570, 621 (Sept. 25, 1963) (attached as Exhibit 4 to United States Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and Opposition to the Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment (Dkt. No. 234) ("USA Ex. 4")).

In its brief, the USA states that the "treaty negotiations should be viewed in the context of other federal actions of the same period."[7] The Cherokee Nation agrees. As far as Indian policy, and the contextual position of the federal government to Indian country, the era was one of impending catastrophe upon the tribes.

> During the next few years, the federal government continued to reorganize the Indian Territory in anticipation of imminent statehood. The enrollment and allotment process moved slowly ahead, and townsites were surveyed and towns created and organized. Throughout this period, the federal officials and agents dominated the lives of the Five Civilized Tribes, using their control over tribal disbursements and resources to ensure that the administration of the Territory during that time conformed to the preferences, values, and priorities of the Interior Department.

[7] United States Memorandum of Points and Authorities in Support of its Motion for Summary Judgment and Opposition to the Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment (Dkt. No. 234) (hereinafter "USA Br.") at 17.

Harjo v. Kleppe, 420 F. Supp. 1110, 1126 (D.D.C. 1976). "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."[8]

The Cherokee Nation also disputes that its forced and short-lived alliance with the Confederacy had the permanent legal effect of nullifying all of its previous Treaties with the United States;[9] there is no factual support for such a claim and federal law itself defies the imposition of such an interpretation.[10] Despite what the federal delegates to Fort Smith may have told the Indians in attempting to persuade them to enter into new treaties with the United States (treaties that ended up giving the United States millions more acres of land), the USA can cite to no legal authority that the ***United States*** regarded all previous treaties with the Cherokees as nullified—certainly the United States never offered to return the lands that had been ceded under those Treaties. The Indian Claims Commission found that the President did not issue a "proclamation declaring the abrogation of pre-war treaties between The Cherokee Nation and the United States," though he had been authorized to do so by Congressional legislation in July 1862. 12 Ind. Cl. Comm at 577 (USA Ex. 4). The statements in the Indian Claims Commission case regarding abrogation refer to the Cherokee/Confederacy Treaty language, and the Cherokee Nation's unilateral annulment of "all pre-existing treaties between that Nation and the United States" by signing that agreement with the Confederacy. *Id.* at 597, 632 (USA Ex. 4). Indeed,

[8] Daniel F. Littlefield, Jr., *The Cherokee Freedmen – From Emancipation to American Citizenship* 250 (Greenwood Press 1978).

[9] *See* USA Br. at 4.

[10] "[N]o obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." 25 U.S.C. § 71.

the Commission's finding quotes the United States commissioner's statements to the Cherokee's Treaty delegation:

> The Cherokee nation are at fault in interpreting what was said by us on Saturday as to forfeiture of land, &c., as a fact accomplished, but the commissioners said: "All such as have made treaties, &c" have "rightfully forfeited, &c," (under the law of Congress, July 5, 1862, which authorized the complete forfeiture,) but the President does not desire to enforce the penalties for the unwise action of these nations.

Id. at 608 (USA Ex. 4). Memorializing this, Article 31 of the Cherokee Treaty of 1866 specifically provided that "[a]ll provisions of treaties . . . are hereby re-affirmed and declared to be in full force." 1866 Treaty art. 31 (Nation Ex. A).

The Cherokee Nation also disputes that the evidence is uncontroverted that it has, for a century, "viewed the Treaty as granting to Freedmen all of the civil and political rights given to other Cherokee citizens."[11] Many contemporaneous statements surrounding the 1866 Treaty cite the Cherokee's own Constitutional Amendment as having granted citizenship to the Freedmen, as does the case law cited in the Nation's opening brief and herein. Again, a thorough reading of the contemporaneous documents of the era is in order. Other misstatements, though not rising to the level of "material facts," are scattered throughout the USA's brief.[12]

The Cherokee Nation does not dispute that Freedmen who met the criteria of the 1866 Constitutional Amendment were citizens of the Nation up until the Dawes Rolls. After the

[11] USA Br. at 2.

[12] For example, the USA claims that the Nation's 2007 Constitutional amendment limited citizenship to "those on the 'by blood' and 'Delaware' portions of the Dawes Rolls." USA Br. at 19. The Amendment actually limited Cherokee citizenship to those individuals who could trace an ancestor to a "by blood" Indian on the Dawes Rolls, whether Cherokee, Delaware, or Shawnee Cherokee.

The USA also misstates the facts regarding appellate review of the tribal court case. *Id.* at 19–20. It was actually the Cherokee Nation Supreme Court (the Judicial Appeals Tribunal having been renamed the Supreme Court by virtue of the 2003 Amendment) that ruled it did not have jurisdiction to hear the matter in *Cherokee Nation Registrar v. Nash*, Case No. S.C. 2011-02, 10 Am. Tribal Law 307 (Sup. Ct. of the Cherokee Nation, Aug. 22, 2011).

Dawes rolls, during the period of allotment/assimilation and federally anticipated dissolution of the Five Tribes, Freedmen on the Dawes Rolls were still treated as citizens of the Nation, at least by the Nation. It was not until the period of re-growth and tribal self-determination in the 1970s, and the creation of a new Constitution in 1976, that questions began to arise regarding whether Freedmen descendants could make contemporary claims of Cherokee citizenship.

The Freedmen, in their brief, allege that the Cherokee Nation is so unaccountable and undemocratic that the Principal Chief can "dissolve" the highest court by executive whim.[13] They also (with the USA) make many assertions about federal approval (or lack thereof) of the 2003 Constitution.[14] These statements, taken in the best possible light, display a basic lack of understanding regarding the structure and recent legal history of the Cherokee Nation.

The 1976 Constitution explicitly superseded the 1839 Constitution of the Cherokee Nation and served as the fundamental law of the Cherokee Nation for nearly 30 years. In the 1976 Constitution, the Cherokee people imposed upon themselves the limitation contained in Article XV, Section 10, which stated that "[n]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative."[15] In the general election held on June 17, 1995, Cherokee voters approved a constitutional convention to revisit the 1976 Constitution. A Constitutional Convention Commission was created to undertake this task, and on March 6, 1999, the Commission adopted a new constitution.

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[13] The Cherokee Freedmen's Memorandum of Points and Authorities in Opposition to the Cherokee Parties' Motion for Partial Summary Judgment and in Support of the Cherokee Freedmen's Cross-Motion for Partial Summary Judgment (Dkt. No. 235) (hereinafter "Freedmen Br.") at 30.

[14] This latest, and present Constitution of the Cherokee Nation, is variously referred to as the "1999 Constitution," the "2003 Constitution," or the "2006 Constitution." It is the same document. The recitation of its formation should explain the different names.

[15] Cherokee Nation Const. art. XV, § 10 (1976) (attached hereto as Exhibit C).

The Tribal Council, in Resolution No. 1-03, called for a special election on May 24, 2003, wherein the Cherokee people would vote to remove Section 10 of Article XV from the 1976 Constitution. A letter sent from Neil McCaleb, Assistant Secretary of Indian Affairs, on April 23, 2002, indicated that "[w]e have no objection to the referendum as proposed and I am prepared to approve the amendment deleting the requirement for Federal approval of future amendments."[16] A vote on the newly adopted Constitution was set for July 26, 2003. The Cherokee people voted to both remove Article XV, Section 10 and approve the new Constitution.

Mr. McCaleb's assurances notwithstanding, approval of both the Amendment and the 2003 Constitution languished at the federal level. The Cherokee people voted to remove federal oversight and adopted a new Constitution, but the federal government would not respond. Members of the Cherokee Nation's Constitution Convention Commission brought an action before the Cherokee Nation's highest court—the Judicial Appeals Tribunal—to obtain a ruling on whether the 1976 or the 2003 Constitution were in effect given the earlier statement of Mr. McCaleb, an affidavit he offered in the subsequent litigation, and the inaction and non-appearance of the federal government. On June 7, 2006, the Judicial Appeals Tribunal held that the 2003 Constitution had been in effect since its passage by the Cherokee people whose "inherent sovereign power had the right to remove the self-imposed requirement."[17] *In re The Status and Implementation of the 1999 Constitution of the Cherokee Nation*, JAT 05-04, 6 Am. Tribal Law 63 (Sup. Ct. of the Cherokee Nation, June 7, 2006). In addition, the court created a timeline for transition to the governmental structure under the new Constitution, including the

[16] Letter from Neil McCaleb, Assistant Secretary of Indian Affairs, to The Honorable Chad Smith, Cherokee Nation (Apr. 23, 2002) (attached hereto as Exhibit D).

[17] Recall that the *Allen* decision, ruling in favor of the Freedmen on the issue of tribal membership, had been decided by the same three-justice Judicial Appeals Tribunal in March 2006. *See Allen v. Cherokee Nation Tribal Council*, Case No. JAT 04-09, 6 Am. Tribal Law 18 (Judicial Appeals Tribunal of the Cherokee Nation, Mar. 7, 2006).

transition of the court from a three-member Judicial Appeals Tribunal to the five-member Cherokee Nation Supreme Court. Two new Justices were sworn into the newly named Supreme Court in July of 2006.[18] If the transition from the three-justice Judicial Appeals Tribunal to the five-justice Supreme Court was a "dissolution" by anyone, it was by the court itself. It can be more correctly described as a transition from one Constitutional government to another. Further, the three justices who had comprised the Judicial Appeals Tribunal remained on the court.[19]

Although the United States never intervened or appeared in the litigation before the Judicial Appeals Tribunal, on August 30, 2006 Assistant Secretary of Indian Affairs Carl Artman, apparently in response to the decision of the Tribunal, disavowed his predecessor's assurances and stated that he could not be bound by the former official's acts. In May 2007, Mr. Artman specifically disapproved the amendment removing Article XV, Section 10 of the 1976 Constitution, excusing his Department's neglect by stating that "[n]othing in . . . the Department's regulations imposes a time limit on the Department's responsibility to approve or disapprove amendments to the Constitution."[20] On June 23, 2007, the Cherokee people again

[18] *See* Resolutions Confirming the Appointments of Kyle Haskins and Jim Wilcoxen as Justices of the Supreme Court of the Cherokee Nation, attached hereto as Exhibits E and F, respectively.

[19] Since the 1976 Constitution, the Nation's highest Court has been required to be composed of Cherokee citizens who are also licensed attorneys. When the five justice Supreme Court was first fully seated in 2006, it was composed of a former First Assistant District Attorney (Darrell Dowty), a longtime private practitioner from the Tulsa area (Darrell Matlock), a University of Kansas law professor (Stacy Leeds), a Tulsa County Associate District Judge (Kyle Haskins), and a longtime private practitioner from Muskogee and former commissioner on various Cherokee boards (Jim Wilcoxen). For a detailed composition of the Court and biographies of its Justices, see its website at: http://www.cherokeecourts.org/History.

[20] Letter from Carl Artman, Assistant Secretary of Indian Affairs, to The Honorable Chad Smith, Cherokee Nation (May 21, 2007) (attached hereto as Exhibit G).

voted to remove Section 10 of Article XV from the 1976 Constitution. In a letter dated August 9, 2007, Mr. Artman finally approved this new amendment as adopted by the Cherokee people.[21]

Of course by the time Mr. Artman approved the amendment, the Cherokee Nation had already smoothly transitioned the government under the 2003 Constitution per order of the Judicial Appeals Tribunal. To this day, the federal government has taken no action to either approve or disapprove the 2003 Constitution in its entirety, but continues to recognize the Cherokee Nation government whose members are elected under the provisions of the 2003 Constitution.

REPLY AND REITERATION OF THE NATION'S LEGAL CLAIMS

The Nation asserts first that Article 9 of the 1866 Treaty did not bestow permanent, inalienable rights of citizenship upon the Freedmen and their descendants. A review of the plain language of the provision, as well as the historical context, supports this and application of the canons of construction requires such a finding. In support of this assertion, the Nation argues that the Treaty did not bestow "citizenship;" the Cherokee Constitutional Amendment in 1866 did that. If the Treaty had operated exclusively as a bestowal of citizenship, there would have been no need for the Nation to amend its Constitution.

Secondly, the Nation argues that even if the Article 9 language is stretched into meaning "citizenship," instead of "rights of native Cherokees," that "citizenship" must be considered as limited by what the "rights of native Cherokees" had at the time. Native Cherokees in the mid-19th century lost their citizenship rights by leaving the territorial boundaries of the Nation. A review of the case law involving Freedmen reveals that this same geographical limitation was applied to them.

[21] *See* Letter from Carl Artman, Assistant Secretary of Indian Affairs, to The Honorable Chadwick Smith, Cherokee Nation (Aug. 9, 2007) (attached hereto as Exhibit H).

Further, native Cherokees can always lose their citizenship status by a vote of the people instituting a minimum blood quantum.[22] An individual who has 1/8 degree of Cherokee blood can be disenfranchised by a vote establishing a minimum blood quantum of 1/4 Cherokee. Many tribes have established minimum blood quantums. In fact, in an article published in the 2008–2009 American Indian Law Review, the author found that 70% of tribal constitutions now have a blood quantum requirement.[23]

But the USA and Freedmen argue that the body politic of the Cherokee Nation cannot define itself as other tribes can, at least insofar as the Freedmen are concerned. While a native Cherokee by blood might be disenfranchised or expatriated, they argue that the character of Freedmen citizenship is such that they are above the laws of the Nation that govern all others.

Thirdly, the Nation argues that the late 19th century and early 20th century cases point out that the 1866 Treaty was modified by federal statute limiting the class of Freedmen to whom it applied. The rationale behind these cases belies the other parties' assertions that the Freedmen have a present right of citizenship in the Cherokee Nation.

There is an undeniable and tremendous hypocrisy in the arguments of the United States to accuse the Nation of treaty violations. The USA has long been in breach of its 1866 Treaty guarantees to the Nation—violations it has rationalized and excused in a variety of ways over the last 148 years. Further, the USA does not require eternal citizenship for Freedmen descendants upon other 1866 Treaty tribes. And, the USA's own laws and regulations make clear that it would not consider Freedmen descendants as Indians, even if they were citizens of the Nation.

[22] The right of a tribe to define its membership has long been considered a critical aspect of sovereignty. "Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)).

[23] Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243, 263 (2009).

The Nation agrees with the USA's assertion that the 1866 Treaty was a solemn contract agreed to by two sovereigns. Where one sovereign has been in constant breach of that contract, and seeks requirements of the second sovereign that it does not impose upon itself, its claims of breach should be read in context. The USA does not regard Freedmen citizens of other tribes as "Indians," and it permits other tribes with post-Civil War treaties to exclude Freedmen from citizenship. How then can it claim breach of the 1866 Treaty against the Nation?

LEGAL ANALYSIS

PROPOSITION I: ARTICLE 9 OF THE 1866 TREATY DID NOT GRANT "ETERNAL, UNALTERABLE CITIZENSHIP" TO THE FREEDMEN, BUT ONLY "ALL THE RIGHTS OF NATIVE CHEROKEES."

The Cherokee Nation merely asks this Court to interpret the language of the 1866 Treaty according to its terms—that Freedmen were granted all the "rights of native Cherokees." It is the other two parties that are asking this Court to construe Article 9 to say something other than its plain language.

Treaty provisions should be read according to their plain language, placed in historical context. *See, e.g.*, *Johnson v. Gearlds*, 234 U.S. 422, 441–42 (1914); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506–07 (1986). The United States Supreme Court has 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). And, one of the canons of construction "is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975). Construing the civil rights protections given to Freedmen immediately after the Civil War who chose to remain in Indian Territory as an eternal, unalienable right of citizenship superior to that of native Cherokees is construing the Treaty language to the prejudice of the Indians.

The USA's recitation in its brief regarding the historical context is absolutely correct:

> In 1865, the Cherokee Nation was located in the Indian Territory – not a state – and the United States recognized the Nation's sovereign authority over its territory and members. The status of the former slaves within the Indian Territory – including the degree to which their status would be governed by generally applicable federal legislation – was uncertain; thus, the Federal officials wanted specific provisions regarding Freedmen rights and welfare in the Treaty.

USA Br. at 28. That was the USA's concern, which the Nation's officials understood—protection of the Freedmen within the Nation's Territory. The Nation's 1866 Amendment recited the element of "within the Nation" as a requirement of citizenship.

> [A]ll freedmen who have been freed by voluntary act of their former owners or by law, as well as free colored persons who were in this 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 (amended 1866) (emphasis added) (attached hereto as Exhibit I). And, although there was certainly later litigation regarding the intent of the above language as to property rights and monetary settlements, the Nation fulfilled its Treaty obligations. The above Amendment was the law of the Nation during the life of Indian Territory, up through allotment, and into statehood.

The present day Freedmen descendants wish to expand the plain language of the Treaty; they assert that their ancestors' rights were superior to those of Cherokees by blood. Of course, historically that was not the case—Freedmen could lose their citizenship, just as native Cherokees could. See, for example, one of the *Whitmire* court's restrictions:

> It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree.

Whitmire v. Cherokee Nation, Ct. Cl. No. 17209, at 129 (Ct. Cl. Feb. 3, 1896) (USA Ex. 19).

To reiterate, if any Cherokee citizen left the Nation's geographical boundaries in 1866, that individual was no longer a Cherokee citizen. It is absurd to assume that the mid-19th century drafters of the 1866 Treaty meant anything other than that geographical protection in assuring that Freedmen were guaranteed "all the rights of native Cherokees." If the drafters had meant for Freedmen and their descendants to have ***more*** rights than native Cherokees, they would have said so. It is unthinkable, however, that the Cherokee signatories to the Treaty would have agreed to such a far-reaching provision. It is within this historical context that Article 9 must be considered.

Cherokee citizenship was granted by the Constitution, and no one contested that. If it had not been, why would the Nation have had to do anything at all to implement the provisions of the 1866 Treaty? And, that Constitutional citizenship was limited by geographical location.

One of the most basic, well settled rules of law in construing legal documents is the "plain language" rule. The Supreme Court has declared this unambiguously:

> [W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S 1, 89–90 (1823). This is all the Nation is asking this Court to find—that Freedmen citizens had "all the rights of native Cherokees," and no greater.

The Court of Claims, in its recitation of facts, articulated that shortly after Principal Chief John Ross died in August 1866, his nephew and successor, William P. Ross, called a national council meeting. The court found:

> Chief Ross called into session a national council of The Cherokee Nation to ratify amendments to the Cherokee constitution which was compatible with the treaty signed in Washington. The Cherokee people, united and no longer factional, attended. Chief Ross wrote the amendments which were adopted by the

> Cherokees on November 28, 1866, and proclaimed on the seventh of December of that year. No Federal influence was exerted to secure adoption of the amendments or any of them.
>
> Section 2 of Article I of the Cherokee constitution was amended to affirm that the lands of The Cherokee Nation would remain common property until allotted as permitted by Article XX of the treaty. Section 5 of Article III of the constitution was amended to define freedmen and their descendants as unqualified citizens of The Cherokee Nation. When, ***after these amendments were adopted, the Cherokees had occasion to mention the freedmen, it was the consensus of its leaders that the freedmen were in fact Cherokee citizens***, with all of the rights of native Cherokees, and that they acquired such rights by virtue of Article IX of the treaty of 1866.

12 Ind. Cl. Comm. at 582–83 (USA Ex. 4) (emphasis added). It was thus only ***after*** the Cherokee Constitutional Amendments were adopted that the Nation regarded Freedmen as citizens. The authority cited by the other parties also demonstrates this—that case law was ***after*** the 1866 Constitutional Amendment. The Freedmen were citizens of the Nation.

A thorough reading of the *Whitmire* cases also lends support for this assertion.

> The facts that the freedmen did not pay for the homes which they acquired; that they did not contribute to the national fund; that they did not come into the nation by virtue of an express agreement; that their foothold was acquired exclusively through the interposition of the United States, and exclusively by virtue of the treaty of 1866, are facts which operate against the equity of their case, but do not take their legal rights out of the safeguard of the constitution, or the obligations of the treaty. ***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.

Whitmire v. Cherokee Nation, 30 Ct. Cl. 138, 155 (Ct. Cl. 1895) (emphasis added).

The *Whitmire* court made no reference to the rights of future descendants, which stands to reason, as the court was concerned with determining who was entitled to enrollment and sharing in the "final" allotment of the Cherokee Nation. The court would have had no cause

to be concerned with citizenship rights of descendants in 1896, as it was clearly envisioned at that time that the Five Tribes would come to final dissolution and termination at Oklahoma statehood.

Fortunately, the Cherokee Nation lived on through Oklahoma statehood and subsequent allotment, although not without changes to the governmental structure, including changes to its Constitution and laws regarding citizenship. The United States Supreme Court acknowledged that the Court of Claims had found "that under the Cherokee constitution of 1866 the freedmen became citizens equally with the Cherokees." *United States ex rel. Lowe v. Fisher*, 223 U.S. 95, 100 (1912). The Cherokee people have a right to set their own requirements for citizenship; they did so in ways that suited the USA in 1866 and they've done so in ways that have not suited the USA in 2007. In 1866, the USA acknowledged the sovereign right of the Cherokee people to adopt the Freedmen as citizens; today they would forcibly enroll the Freedmen in violation of the Cherokee Nation's Constitution. The position of the USA in this case is not consonant with self-determination; it is a return to the sort of bureaucratic imperialism and federal paternalism that have proved disastrous for tribal people time and again.

As the Court in *Harjo v. Kleppe* so aptly characterized the Creek Nation's claims:

> In conclusion, plaintiffs have asked the Court to vindicate certain legal rights guaranteed them by solemn promises of the United States, given over the course of a century and a half. While the credibility of these promises has been gravely undermined by various federal actions, culminating in the abolition of the tribe's territorial sovereignty, the essence of those promises, that the tribe has the right to determine its own destiny, remains binding upon the United States, and federal policy in fact now recognizes self-determination as the guiding principle of Indian relations. Plaintiffs' claim is, at bottom, simply an assertion of their right to democratic self-government, a concept not wholly alien to American political thought. Plaintiffs have demonstrated a clear legal entitlement to have these rights vindicated, and the Court cannot honorably do otherwise.

420 F. Supp. at 1143. The Cherokee Nation has few rights "of democratic self-government" left to it—its ability to determine its own citizenship should remain inviolate.

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. Cohen's Handbook of Federal Indian Law, § 2.02[1] (2005) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973) ("[A]ny doubtful expressions in [treaties] should be resolved in the Indians' favor.")). If a law is ambiguous and can reasonably be construed as the Tribe would have construed it, "it *must* be construed that way."[24] *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988); *see also Winters v. United* States, 207 U.S. 564, 576–77 (1908); *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 269 (1992). 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's intent to the contrary is clear and unambiguous. Cohen's Handbook of Federal Indian Law, § 2.02[1] (2005). These canons were first developed in the context of treaty interpretation and remain vital today. *Id.*; *see also 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").

As one legal text describes the need for the canons:

> Much has been written on the uneven balance of power through theses treaty negotiations due to the template format, the documents written in the English language using legal terminology, the false promises made to obtain signatures or the failure to obtain valid consent from legitimate tribal leadership. In addition, many treaties sent to the U.S. Senate for approval were unilaterally modified without the knowledge of the tribal leadership and approved contrary to the terms consented to. These circumstances surrounding the treaty documents have resulted in special interpretive tools applied by the U.S. judiciary for construing treaty terms. The Indian canons of construction apply to treaty documents and

[24] The United States Supreme Court has found that Article 9 is "undoubtedly ambiguous." *Lowe*, 223 U.S. at 98.

> require the following: 1) treaties are to be construed as the Indians would have understood them, 2) any ambiguities are to be construed in favor of the Indian understanding of the treaty document, and 3) all powers and rights are reserved to a Tribe unless expressly relinquished in a treaty document.

Angelique Townsend EagleWoman & Stacy L. Leeds, *Mastering American Indian Law* 10 (2013).

Here, the canons of Indian construction dictate that Article 9 be construed in favor of the Nation. The plain language of Article 9 did not give the Freedmen eternal, superior rights to citizenship within the Cherokee Nation. It gave them the rights of native Cherokees. An amendment to the Cherokee Constitution granted them citizenship in 1866, and an amendment to the Cherokee Constitution removed that citizenship in 2007. Read in historical context, it makes sense that the protections of Article 9 applied in Indian Territory, and the evidence is uncontroverted that the protections did not apply ***outside*** Indian Territory. Indian Territory ceased to exist with Oklahoma statehood in 1907. The canons of construction require that this Court construe the provision the way the drafters at the time did. The drafters of the Treaty understood the need for the protection and agreed to it. Finally, if Article 9 is ambiguous, those ambiguities have to be construed in the Nation's favor. Here, it is inconceivable that the Tribe would have construed Article 9 to grant eternal unalienable rights of citizenship to Freedmen descendants. Again, the canons of construction require that interpretation.

PROPOSITION II: THE FIVE TRIBES ACT AMENDED ARTICLE 9 OF THE TREATY.

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.

The Five Tribes Act, ch. 1876, § 3, 34 Stat. 137, 138 (1906). It is undisputed that this language was intended to incorporate the holdings of the previous Freedmen decisions, including those in the *Whitmire* cases. In fact, the 1911 *Whitmire* court found that the 1906 Act was a practical reenactment of its decree. *Whitmire v. United States*, 46 Ct. Cl. 227, 248–49 (Ct. Cl. 1911), *rev'd on other grounds, Cherokee Nation v. Whitmire*, 223 U S. 108 (1912).[25]

In the Five Tribes Act, Congress moved the term "and their descendants" from the end of the paragraph, thereby changing the terms it modified to "free colored or the slaves of Cherokee citizens," placing "descendants" before the time-limiting residency term. In contrast, Article 9 had placed the term "and their descendants" after describing the Freedmen who were *bona fide* residents of the Nation at the commencement of the rebellion or who returned thereto within six months of the Treaty.

This construction of the Five Tribes Act is articulated clearly in the case of *Garfield v. United States ex rel. Lowe*, 34 App. D.C. 70 (D.C. Cir. 1909), *aff'd sub nom, United States ex rel. Lowe v. Fisher*, 223 U.S. 95 (1912). In *Garfield*, the challengers were descendants of Freedmen who claimed that their ancestor had returned to the Nation within the time period

[25] As to the USA's passing insinuation that the Nation is barred by issue preclusion from raising its claims now because of the *Whitmire* holdings (USA Br. at 39), the Nation would rely upon the test articulated in *West Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1283 (D.C. 1990). *See also Felter v. Salazar*, 679 F. Supp. 2d 1, 9 (D.D.C. 2010). While the *Whitmire* cases and their progeny are instructive on the scope of Article 9, there has never been any decision on the merits as to whether or not it is a violation of Article 9 for the Cherokee citizenry to amend their Constitution to remove Freedmen descendants from eligibility for membership. The closest holding to that is *Nero v. Cherokee Nation*, 892 F.2d 1457 (10th Cir. 1989), wherein the United States was not a party. Furthermore, the parties here all agreed to submit this core issue to the Court for determination on this core issue; issue preclusion is not appropriate.

specified by the *Whitmire* cases, and that they therefore met the requirements to be allowed on the rolls. 34 App. D.C. at 71–73. In discussing the matter, the court held:

> If any doubt theretofore existed as to the proper construction to be given article 9 of said treaty of August 11th, 1866, that doubt was dissipated by the language of sec. 3 of the above act of April 26th, 1906, for that language constitutes a legislative interpretation of, and supersedes *pro tanto*, the prior treaty. In other words, we think that, under the true construction of the language of said treaty of August 11th, 1866, the 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.

Id. at 76–77 (citation omitted).

The United States Supreme Court affirmed the District of Columbia Court of Appeals in *United States ex rel. Lowe v. Fisher*, 223 U.S. 95 (1912) and specifically discussed the meaning of Article 9 in the Cherokee's 1866 Treaty.

> But the act of July 1, 1902 (32 Stat. at L. 716, § 27, chap. 1375), emphasized the requirement that the enrollment of freedmen must be made in strict conformity with the decree of the court of claims. ***Congress was even more particular in the act of April 26, 1906 (34 Stat. at L. 137, chap. 1876***). Section 3 of the act explicitly 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 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11, 1867."

223 U.S. 95, 104–05 (emphasis added).

It is clear that the federal appellate courts and the United States Supreme Court held that the 1902 and 1906 Acts changed the terms of the 1866 Treaty to follow the Court of Claims decisions. That construction, first placed on the language by the federal courts, and incorporated into Congressional action, emphasizes the territorial protection that was the motivation for the Treaty's requirement of civil rights for Freedmen on par with the civil rights of natives. If they were not residents of the Territory within those Congressional time limits, they did not fall under

the Treaty's protection or the Nation's Constitutional protections. As the Indian Territory is now situated within the State of Oklahoma, there is no longer any reason for the Treaty protections.

PROPOSITION III: THE NATION ADMITS THAT IT IS BOUND BY THE TERMS OF THE TREATY, BUT NO FURTHER.

The Cherokee Nation agrees with the USA's assertion that a Treaty is "essentially a contract between two sovereign nations."[26] *See, e.g.*, *Keweenaw Bay Indian Cmty. v. Naftaly*, 370 F. Supp. 2d 620, 628 (W.D. Mich. 2005). One of the parties to the contract, the USA, has been in default on it for a number of years. Yet, that same party seeks to "enforce" against the Nation a construction of Article 9 that it does not follow itself.

The Cherokee Nation has asked this Court to construe a clause in that contract, and will fully comply with an ultimate federal court determination as to what that clause means. However, the United States cannot make a straight-faced argument that it is a non-breaching party to the Treaty. Briefly, some of the 1866 Treaty provisions violated by the United States include Article 8 (Cherokee Council must approve licenses to trade within its borders), Article 12 (establishment of an inter-tribal government within Indian territory), Article 13 (Nation retains exclusive civil and criminal jurisdiction over its citizens), and particularly Article 16 (Cherokees guaranteed the "quiet and peaceable possession" of Indian territory with no "interruptions or intrusion from all unauthorized citizens.").

The USA certainly does not have "clean hands" with regards to its claim that the Nation has violated the terms of the 1866 Treaty. The Supreme Court has held that the "unclean hands" doctrine "closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of

[26] USA Br. at 22 (citation omitted).

the defendant." *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 330 (1994) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). Furthermore, the USA is demanding that the Cherokee Nation do something that it has refused to do: treat the Freedmen and their descendants as Indians. The Department of Interior has always differentiated in its treatment of Freedmen and Indians "by blood" and continues to do so. *See, e.g.*, 25 C.F.R. § 32.4; 25 C.F.R. § 273.12. For example, in the case of *Frame v. Bivens*, 189 F. 785 (E.D. Okla. 1909), the Court found that non-Indian Choctaw citizens validly mortgaged their allotted property, because the Indian appropriation act of 1904 had removed the restrictions against alienation on the property. The court held:

> By the Indian appropriation act (Act April 21, 1904, c. 1402, 33 Stat. 204), it was provided that:
>
> "All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

Id. at 788.

The United States has always treated the Freedmen differently than native Cherokees. One of the many ironies in this case that if the USA prevails, it will be ***ONLY*** the Nation treating the Freedmen as Indians, not the Government. In the recent case of *Greene v. Impson*, 530 F. App'x 777, 780 (10th Cir. 2013) (unpublished decision), the Tenth Circuit upheld a decision by the BIA Regional Director in Muskogee[27] refusing to grant a Certificate of Degree of Indian Blood ("CDIB") card to a Choctaw Freedmen descendant. The court stated:

> To be federally recognized as an Indian for purposes of participating in certain government assistance programs, a CDIB is required. The BIA only issues CDIBs to individuals possessing a specific quantum of Indian blood which is determined by reference to the rolls established by the Dawes Commission.

Greene, 530 F. App'x at 780 (citations omitted).

[27] This is the same BIA Regional Director whose service area includes the Cherokee Nation.

Neither would the United States prosecute a Cherokee Freedmen citizen as an Indian for the purposes of the Major Crimes Act. "To find that a person is an Indian the court must first make factual findings that the person has 'some Indian blood' and, second, that the person is 'recognized as an Indian by a tribe or by the federal government.'" *United States v. Diaz*, 679 F.3d 1183, 1187 (10th Cir. 2012) (citations omitted); s*ee also United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005); *United States v. LaBuff*, 658 F.3d 873, 877 (9th Cir. 2011). And, the definition of "Indian" in the Indian Reorganization Act "shall include all persons of Indian descent." 25 U.S.C. § 479. The Department of Interior continues to include "by blood" requirements in its review of tribal membership standards.

> The BIA's *Handbook for BIA Personnel*, still in use, specifies that in addition to reviewing new constitutions or constitutional amendments for compliance with federal law, "except in very special individual cases, proposed constitutions must also conform to current Departmental policies." The handbook shows the centrality of membership rules in establishing an "appropriate" tribal constitution that conforms with policy. It contains a list of eighteen provisions that "render proposed constitutions inappropriate," six of which relate to membership. They are: "[f]ailure to require that members demonstrate a bilateral political relationship with the tribe; attempts to disenroll members retroactively; unfounded expansion of federally acknowledged membership; ***inclusion of non-Indians as members***; unclear definitions of criteria for membership; [and] ascribing incorrect and/or insupportable blood degrees to members."

Gover, *supra*, at 257 (emphasis added) (footnotes omitted). One of the criteria that Interior uses in examining IRA and OIWA tribal constitutions is whether or not "non-Indians" are included in the tribal membership criteria; the inclusion of "non-Indians" is considered negatively.[28]

Both the USA and the Freedmen assert that while OIWA[29] tribes could properly have excluded Freedmen from citizenship, regardless of their post-Civil War treaties, that the Nation

[28] "In addition to insisting that the relation between members and tribes be political, the federal government also believes that tribes should be comprised of persons who are Indian." Gover , *supra*, at 263.

[29] 25 U.S.C. §§ 501–510 (commonly referred to as the "Oklahoma Indian Welfare Act").

cannot because it is not an IRA[30]/OIWA tribe—implicitly insinuating that the Cherokee Nation has less powers of self-governance than IRA/OIWA tribes. The converse may actually be true—IRA tribes are required to submit constitutions, bylaws and amendments to the Secretary, and thereby arguably have fewer powers of self-governance and autonomy than "inherent sovereignty" tribes like the Cherokee Nation. *See* 25 U.S.C. § 476. Non-IRA/OIWA tribes, such as the Cherokee Nation, can remove the authority of the President to approve tribal Constitutions at will. *In re The Status and Implementation of the 1999 Constitution of the Cherokee Nation*, JAT 05-04, 6 Am. Tribal Law 63 (Sup. Ct. of the Cherokee Nation, June 7, 2006). Further, the federal courts have spoken definitively on this subject:

> In a companion case to this, appellants sought a determination that the BIA had authority to interfere in a tribal election even where the tribe provided administrative and judicial procedures for contesting elections. *Wheeler v. United States Dept. of Interior,* 811 F.2d 549 (10th Cir.1987). We held in that case that the Department of Interior, and thus the BIA, had no authority to take action contrary to the tribal resolution of the disputes, and therefore the courts have no authority to order the Department to grant the relief sought. ***This court also held that the Cherokee Nation possesses an inherent right to self-government that is not diminished by its failure to reorganize under the Oklahoma Indian Welfare Act,*** 25 U.S.C. § 503. We reaffirmed that the Cherokee Nation is a distinct organization capable of governing itself and that it is entitled to pursue this right without federal government intrusion.

Wheeler v. Swimmer, 835 F.2d 259, 260–61 (10th Cir. 1987) (emphasis added). The Cherokee Nation's right to self-government, and to amend its own organic Constitution, is not restricted because it did not organize under OIWA. To construe otherwise would be a denial of equal protection under the law.

The USA's double standards—for the Cherokee Nation and OIWA tribes (OIWA tribes, even those with Freedmen provisions in post-Civil War treaties may amend their constitutions to remove Freedmen), and for the Cherokee Nation and itself (the Nation must allow the Freedmen

[30] 25 U.S.C. §§ 461–479 (commonly referred to as the "Indian Reorganization Act").

to be citizens of its Nation, but the USA will continue to treat them differently and won't recognize them as Indians)—should forestall it from claiming any breach of the 1866 Treaty on the part of the Nation. Basic principles of fairness preclude the USA's claims.

CONCLUSION

There is only one party to this litigation that asks this Court to give literal interpretation to Article 9 of the Treaty, and that is the Cherokee Nation. Freedmen and their descendants who remained (or shortly returned) within the Nation's boundaries after the Civil War were granted "all the rights of native Cherokees." The USA and the Freedmen do not dispute that "native Cherokees" who left the Territory in 1866 lost their citizenship. The USA and the Freedmen do not dispute that "native Cherokees" alive today might at any time be expatriated by the institution of a blood quantum by the Cherokee electorate. Yet they claim that Freedmen descendants have super-citizenship rights that can never be abolished by a vote of the Cherokee people. The Nation respectfully asserts those are not the "rights of native Cherokees" that were contracted for in the 1866 Treaty. As has been established by the case law and statutes, that provision was limited to a group of individuals who were within the Nation's Indian Territory at a particular time.

The Cherokee people voted to amend their Constitution to require citizenship in the Nation for only those with Indian blood. This requirement is consistent with long practices of the Department of Interior, federal laws, and is not prohibited by Article 9 of the 1866 Treaty.

The Cherokee Nation respectfully asserts that it is entitled to judgment as a matter of law.

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Respectfully submitted,

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