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7 **UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

8 ISAAC WILLIAM HESS,

Case No. 1:22-cv-3385-CJN

9 Plaintiff,

**RESPONSE TO CHEROKEE NATION
DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF LAW**

10 vs.

11 UNITED STATES DEPARTMENT OF THE
INTERIOR,
12 1849 C Street, N.W.
Washington, D.C. 20240, and

13 DEB HAALAND, in her official capacity as
14 the Secretary of the U.S. Department of the
Interior,
15 1849 C Street, N.W.
Washington, D.C. 20240,

16 THE CHEROKEE NATION,
17 and CHUCK HOSKIN, Jr.,
Principal Chief of the Cherokee Nation
18 W.W. Keeler Tribal Complex 17675 S.
Muskogee Ave. Tahlequah, OK 74464

19 Defendants.

RECEIVED

2/3/2023

Clerk, U.S. District & Bankruptcy
Court for the District of Columbia

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21 Plaintiff, Isaac William Hess, hereby files the following in response to the CHEROKEE
22 NATION DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW:

**RESPONSE TO CHEROKEE NATION DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF LAW- 1**

1 1. Defendant Cherokee Nation and Principal Chief, Chuck Hoskin Jr., seem to be relying
2 heavily upon sovereign immunity. However, sovereign immunity does not apply in an
3 action for declaratory relief when the defendants are alleged to have acted
4 unconstitutionally, which is exactly what is alleged in the instant case. “The defendant
5 would be right if the characterization of the issues were correct...What the plaintiffs do
6 demand is that the defendant be enjoined from acting in a manner which violates his
7 statutory duties under the Economic Opportunity Act or that he be declared to be acting
8 unconstitutionally. Thus this suit clearly falls within the exception to the doctrine of
9 sovereign immunity which allows suits against federal officials who have allegedly acted
10 beyond their statutory powers or have exercised their statutory powers in a
11 constitutionally void manner.” Local 2677, Am. Fed'n of Gov't Emp. v. Phillips, 358 F.
12 Supp. 60, 68 (D.D.C. 1973). In Phillips, the Court refused to allow the defendants to
13 invoke sovereign immunity because the plaintiff had alleged they’d acted outside their
14 powers under federal law. This is precisely what the Plaintiff herein is alleging: that the
15 Defendants acted outside their authority when claiming they had no jurisdiction over this
16 matter. Additionally, violating the Cherokee Constitution by not enforcing the law is a
17 violation of federal law because federal law regulates the Cherokee Constitution when it
18 was allowed to be reestablished by the Oklahoma Indian Welfare Act (OIWA). The
19 OIWA only allows the Cherokee Constitution to be passed or changed when the United

20 2. The Plaintiff does not want to force the Cherokee Nation tribal court to do anything.
21 Rather, the Plaintiff only wants the Declaratory relief to specifically affirm that if an
22 Indian tribe has adopted the UCCJEA, then it applies to them and the various states must
treat them as a state in terms of its applicability. If an Indian tribe has not passed a law to

1 adopt the UCCJEA, then they are not bound by it and retain exclusive jurisdiction over
2 the child custody and visitation decisions for all tribal children regardless of where they
3 reside. This Declaratory Relief will not force an Indian tribe to take up child custody
4 cases because they can always pass a law adopting the UCCJEA, so they only have to
5 handle cases where the child lives in the reservation. The Defendants, and more
6 especially the Principal Chief Chuck Hoskin Jr, is responsible for the passage of any such
7 UCCJEA tribal law and for its enforcement on everyone in the tribe once passed. If the
8 Cherokee Nation truly wanted such a law, he would have submitted to the Tribal Council
9 a UCCJEA law for its passage. This would have allowed the Cherokee Nation to have
10 relinquished that part of their sovereignty and prevented any potential chaos that the
11 Defendants are claiming. This Declaratory Relief will clarify who has jurisdiction and
12 then the Indian tribes can then decide how to run their own courts in the application of
13 that jurisdiction. This Declaratory Relief will simply be helping the Indian tribes, in the
14 trust relationship that the United States has with them, to understand their jurisdiction, as
15 to when they have it and when they do not. This will also help to inform the various states
16 about tribal jurisdiction and help the Indian tribes to retain their sovereignty.

- 16 3. The United States Supreme Court explicitly stated in 1993 that they had not yet decided
17 whether or not an Indian tribe's civil authority over its members extends over them when
18 not residing in Indian Country. They stated "Because all of the tribal members earning
19 income from the Tribe may live within Indian country, this Court need not determine
20 whether the Tribe's right to self-governance could operate independently of its territorial
21 jurisdiction to pre-empt the State's ability to tax income earned from work performed for
22 the Tribe itself when the employee does not reside in Indian country." (*Oklahoma Tax*

1 *Comm'n v. Sac and Fox Nation*, 508 U.S 114 (1993)). Directly after the United States
2 Supreme Court ruled in this case that a decision had not been made in regards to an
3 important part of the Indian tribes' sovereignty over their own members, the Defendants'
4 responsibility to manage all Indian affairs required them to have made a clarifying
5 declaration in regards to the subject. They could have used, as a guiding principle of their
6 declaration, what the United States Supreme Court said, that the "tradition of Indian
7 sovereignty over the reservation and tribal members must inform the determination
8 whether the exercise of state authority has been preempted by operation of federal
9 law." (*White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 142. Pp. 123-126.). This
10 informs us that the Indian tribes have sovereignty over both their land AND their tribal
11 members. The United States Supreme Court has recognized again and again that the
12 fundamental principle of Indian tribes' internal sovereignty is the supreme control over
13 a sovereign's lands and their citizens, while not expressing that the control over their
14 citizens is directly tied to their lands.

- 14 4. The Defendants claimed that *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,
15 471 U.S. 845 (1985) requires a case to go completely through a tribes' courts prior to
16 being able to be heard in a federal court. This would normally be the case, but there are
17 a few extenuating circumstances with this particular case that make it so that it would not
18 be correct to be exhausted through the Cherokee Nation tribal courts prior to being heard
19 in this Court. These circumstances are that, firstly this issue of the applicability of the
20 UCCJEA to the Indian tribes has already been heard and exhausted through multiple
21 Indian tribal courts, just not the Cherokee Nation court. Secondly, there are multiple
22 jurisdictions involved in this case and if any of them rules that they have jurisdiction

1 instead of the other, they will be imposing themselves as an external sovereign over the
2 other. The only external sovereign over the Indian tribes and the various states is the
3 United States. But, if this Court decides that the case must be exhausted through the
4 Cherokee Nation courts first, the Plaintiff asks that the Court please grant an abeyance
5 instead of simply dismissing this case, so that a reconsider and subsequent appeal, if
6 necessary, can occur within the Cherokee Nation courts.

7 5. Defendants also appear to allege the Cherokee Nation district court judge or a
8 representative of the judicial branch of the Cherokee Nation government must,
9 themselves, be joined as a party herein for proper remedy. If the Court agrees, the
10 Plaintiff asks that the Court please allow the Motion for Joinder of such a party instead
11 of simply dismissing the case.

12 6. The Plaintiff denies all claims unless specifically admitted so that it cannot be claimed
13 that the Plaintiff agreed to something that was not specifically addressed in this response.

14 WHEREFORE, Plaintiff respectfully requests that the Court deny the CHEROKEE
15 NATION DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM OF LAW and
16 allow the case to continue forward against the Defendants so that the issue of tribal jurisdiction
17 and the applicability of the UCCJEA to the Indian tribes can finally be resolved, and if needed,
18 allow the Plaintiff to join the appropriate party from the Cherokee Nation Judicial branch.

19 **DATED:** February 3, 2023

20 By: /s/ Isaac William Hess

21 Isaac William Hess, Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I electronically filed the above and foregoing document with the Clerk of Court via the email for the civil office for filing and caused it to be e-mailed to the Defendants’ e-mail addresses listed in his signature on the motion.

/s/ Isaac William Hess

Isaac William Hess