**IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION**
**OKMUGEE DISTRICT**

DISTRICT COURT
FILED
2023 SEP 27 A 11:57
CYNTHIA FREEMAN
COURT CLERK

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| **RHONDA K. GRAYSON and JEFFREY D. KENNEDY,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Case No. CV-2020-34** |
| **CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION OF OKLAHOMA,** | ) | |
| **Defendant.** | ) | |

**ORDER AND OPINION ON APPEAL**
**FROM CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION**
**DENIAL OF CREEK FREEDMEN CITIZENSHIP APPLICATIONS**

COMES NOW this Court to enter its Order and Opinion in the captioned matter which was tried via bench trial on April 4 and 5, 2023.

## I. HISTORICAL BACKGROUND

The Muscogee Creek Nation has risen from its complicated history with the United States to stand today as one of the most dynamic and enduring tribes of the more than 500 currently recognized by the United States government. A portion of that complicated history unfortunately includes a period of slavery within the tribe. Slavery within the tribe did not always look like slavery in the southern United States. Slaves were often adopted into the owner's clan where they participated in cultural ceremonies and spoke the Mvskoke language.[1]

[1] It is likely that children of the enslaved had no degraded status whatsoever. *See generally*, Gary Zellnar, *African Creeks – Estelvste and the Creek Nation* (2007) and William C. Sturtevant, *Handbook of North American Indians – Vol. 14: Southeast*.

The families later known as Creek Freedmen ("Freedmen") likewise walked the Trail of Tears alongside the tribal clans and fought to protect the new homeland upon arrival in Indian Territory. During that time, the Freedmen families played significant roles in tribal government including as tribal town leaders in the House of Kings and House of Warriors.[2]

The Nation – previously practicing kinship slavery - assumed more traditional southern slavery customs as the Civil War drew near and the Nation found itself divided, much like the United States, with a portion of the Nation in alliance with the Confederacy and the other in alliance with the Union. Eventually, Muscogee citizens fought on both the Union and Confederate sides.

In 1865, as the Civil War came to an end, President Andrew Johnson designated a commission to travel to Fort Smith, Arkansas, to convene a council for the purpose of negotiating new treaties with the so-called "Five Civilized Tribes": the Creek, Cherokee, Choctaw, Chickasaw, and Seminole. Members of that commission declared that a treaty with the United States "must" contain certain stipulations, including that "[the] institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for." *Department of the Interior - Report of D.N. Cooley, Southern Treaty Commission,* 296, 298. (Oct. 30, 1865).

Exercising its sovereignty, the representatives of the Nation negotiated and executed the treaty, which has served for the past one hundred fifty-seven years as the foundational document establishing the boundaries of the reservation of the Muscogee (Creek) Nation as well as

[2] *Tr. Of Trial, April 4, 2023*, 31:4-9 (afternoon session).

recognizing the Nation's tribal sovereignty. That treaty is today in full force and effect, and is the Treaty of 1866 ("the Treaty"). Article II of the Treaty states:

> The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with the laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch 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, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

In 1898 the Curtis Act required the registration of all native-born tribal members and – separately – all "Black Creeks" on what would be known as the Creek By Blood Dawes Roll and the Creek Freedmen Dawes Roll. Together, the rolls are known as the Final Dawes Roll.[3]

For more than one hundred years the Nation followed Article II of the Treaty by including those individuals listed on the Creek Freedmen Roll and their descendants as tribal citizens. Not until its 1979 Constitution did the Nation specify a blood quantum requirement for citizenship.

Article III, Section 2 of the 1979 Constitution reads:

> Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians *by blood* whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians *by blood* whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137); (except that an enrolled member of another Indian

[3] *See, U.S. National Archives and Records Administration, archives.gov,* April 11, 2023. The Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory – also known as the Dawes Rolls or "Final Rolls" are the lists of individuals who were accepted as eligible for tribal membership in the "Five Civilized Tribes": Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles. Those found eligible for the Final Rolls were entitled to an allotment of land, usually as a homestead.

> tribe, nation band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation). (emphasis added)[4]

Prior to 1979, neither blood quantum nor Creek Freedmen status was determinative in tribal citizenship. The 1867 Constitution in fact made no mention of citizenship eligibility whatsoever, and the Nation even established "African Creek" towns in which Creek Freedmen continued to participate in and lead tribal government.[5,6]

The Nation's current constitution (the "Constitution") is the legal successor to the 1867 Constitution, and it defines the Nation's co-equal branches of government and their jurisdictions, as well as the basic rights of its citizens. It has been the governing authority for citizenship eligibility for nearly 45 years, and the principles therein must represent the resilience, dignity, and honor of the Muscogee people.

## II. PROCEDURAL BACKGROUND

This matter arises from attempts by Plaintiffs Rhonda K. Grayson and Jeffrey D. Kennedy ("Plaintiffs"), each being a lineal descendant from the Creek Freedmen Roll, to become members of the Muscogee (Creek) Nation (the "Nation" or "Tribe") through citizenship applications filed individually with the Citizenship Board of the Muscogee (Creek) Nation (the "Board" or "Defendant") in 2019. Applications of both Grayson and Kennedy were denied by the Board, upon

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[4] Through the Act of April 26, 1906, Congress dissolved tribal governments, stripped tribal lands of their communal nature, and provided for the allotment of former communal tribal lands to individual tribal members, including freedmen of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole tribes.

[5] *See generally*, the *Constitution and Civil and Criminal Code of the Muskokee Nation*, approved at the Council Ground, Muskokee Nation, October 12, 1867. Library of Congress. (n.d.). https://www.loc.gov/item/28014186/.

[6] Tribal towns in 1867 included three African Creek towns: Arkansas Colored, North Fork Colored, and Canadian Colored. *See* Affidavit of Dr. Gary Zellar, *Plaintiffs' Statement Of Material Facts In Support of Their Motion For Summary Judgment, Exhibit D.*

which each made a formal administrative appeal to the Board for reconsideration.[7] Despite the substantial additional evidence provided by each applicant, the appeal of each was also denied.[8]

On March 11, 2020, the Plaintiffs filed their petition in the District Court of the Muscogee (Creek) Nation in accordance with M(C)NCA Title 7 § 4-110(B) challenging Defendant's denial of their respective applications, seeking the Court's review of the Board's decisions, and praying for declaratory relief and attorney fees and costs. Following protracted delays (the fault of neither party nor the Court), a bench trial of the matter commenced on April 4, 2023.

The Parties presented witness testimony and direct evidence over a two day period. Following closing arguments from both Plaintiffs and Defendant, the Court took the matter under advisement to render judgment at a later date.

## III. NO PRECEDENT IN THE NATION'S COURTS REGARDING THE APPLICABILITY OF THE TREATY OF 1866

In 2006, the Muscogee (Creek) Nation District Court issued an opinion in consolidated cases *Graham v. Citizenship Board,* CV 2003-53 and *Johnson v. Citizenship Board*, CV 2003-54, in which the plaintiffs asked the court to find that the Board had acted in an arbitrary and capricious manner in failing to process their citizenship applications because they were Creek Freedmen and not Creek by blood. The District Court remanded the plaintiffs' applications to the Citizenship Board, stating the Board had not followed the Muscogee (Creek) Code in regard to proper processing. Addressing only a procedural question, the District Court did not reach the question of the applicability of the Treaty of 1866.[9] Following an appeal to the Muscogee (Creek) Nation

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[7] Plaintiff Grayson's application was denied on July 31, 2019, and her administrative appeal was filed on August 6, 2019. Plaintiff Kennedy's application was denied on October 14, 2019 and his administrative appeal was filed on December 23, 2019.

[8] Plaintiff Grayson's administrative appeal was denied on November 5, 2019; Plaintiff Grayson's administrative appeal was denied on February 20, 2020.

[9] Treaty of 1866, June 14, 1866, Ratified July 19, 1866, Proclaimed Aug. 11, 1866.

Supreme Court ("the Supreme Court") and its *de novo* review, the lower court's order was unanimously reversed and remanded for dismissal, with the Supreme Court finding that the Board had not acted in an arbitrary and capricious manner, but failing to reach the question of the applicability of the Treaty of 1866 to Muscogee (Creek) Nation citizenship eligibility.[10]

Subsequently, in May, 2019, petitioner Ron Graham filed a second application for citizenship in the Nation and again was denied. Following denial of his administrative appeal, Graham appealed to the Nation's District Court which ruled in favor of the Board, and then appealed the District Court's decision to the Supreme Court. His brief in support of appeal to the Supreme Court argued that the District Court had erred when it applied the wrong law to his case. Graham further asked the Supreme Court to find that the 2017 Memorandum Opinion issued by a federal district court in *Cherokee Nation v. Nash, et al,* required the Nation's courts to analyze citizenship applications in accordance with the Treaty of 1866.[11] In its 2020 Opinion the Nation's Supreme Court denied Graham's second appeal, ruling it failed on procedural grounds and again not reaching the question of the applicability of the Treaty of 1866.[12]

As such, the Court finds the fundamental question in this case – whether the Nation's laws regarding citizenship eligibility must comply with those established in the Treaty of 1866 – has not been addressed by the Nation's Supreme Court, and therefore this Court is not bound by the principle of *stare decisis*.

## IV. STANDARD OF REVIEW

M(C)NCA Title 7 §4-110(B) states in relevant part:

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[10] *See, Graham and Johnson v. Muscogee (Creek) Nation of Oklahoma Citizenship Board*, SC 2006-03 (2007).
[11] *See, Cherokee Nation v. Nash, et al.*, 267 F. Supp. 3d. 86 (August 30, 2017). The federal District Court concluded that under the Treaty of 1866 between the Cherokee Nation and the United States, "the Cherokee Freedmen have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees."
[12] *Ron Graham v. Muscogee (Creek) Nation Citizenship Board*, SC 2020-01 (2020). (District Court case No. CV 2019-138).

> "...The Muscogee Nation District Court shall not set aside, modify, or remand any determination by the Board unless it finds that the determination is arbitrary and capricious, unsupported by substantial evidence or contrary to law."

The plain language of this statute indicates that a finding by the Court that the Board's decision falls within any one of those three standards must result in a ruling for the Plaintiffs.[13] Thus, this Court must weigh the facts and evidence under three standards;

1. *Was the action of the Board arbitrary and capricious, i.e., a willful and unreasonable action taken without consideration or in disregard of acts or law or without a determining principle?*[14] Such review should be narrow and without substitution of the Court's judgment for that of the Board. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011). "An agency decision will be upheld as long as there is a rational connection between the facts found and the conclusions made." *Barnes*, 655 F.3d at 1132 (citing *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009)). Under this "arbitrary and capricious" standard, a reviewing court must consider whether an agency's decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003). The court may reverse only when the agency has relied on impermissible factors, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence or is so implausible it could not be ascribed to a difference in view or to agency expertise. *See id.*

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[13] Use of the word "or" intends to express an alternative or to give a choice of one among two or more things. *Black's Law Dictionary,* Sixth Ed., 1990, at 1095.

[14] Arbitrary and capricious. Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle. *Elwood Investors Co. v. Behme,* 79 Misc.2d 910, 361 N.Y. S.2d 488, 492. *Id.* at 105.

2. *Was the action of the Board unsupported by substantial evidence?* Substantial evidence is more than a scintilla and is evidence creating relevant consequence and furnishing a substantial basis of fact from which issues tendered can be reasonably resolved. *See, State v. Green,* 218 Kan. 438, 544 P2d. 356, 362. Under the substantial evidence rule, as applied in administrative proceedings, all evidence is competent and may be considered, regardless of its source and nature, if it is the kind of evidence that a reasonable mind might accept as adequate to support a conclusion. Further, substantial evidence means that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than a preponderance of the evidence.[15] In other words, the competency of evidence for purposes of administrative agency adjudicatory proceedings rests upon the logical persuasiveness of such evidence to the reasonable mind in using it to support a conclusion.

3. *Was the action of the Board contrary to law?* An action is contrary to law if it is unlawful or is in violation of a legal regulation or a legal statute. Black's Law Dictionary defines "contrary to law" quite simply as, "Illegal. In violation of statute or legal regulations at a given time." Under this plain definition, the Court must consider whether any statute, regulation, or law in effect at the time of the action is in contradiction to the decisions of the Board.

[15] 58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69302, Dec. 12, 2003.

## V. FINDINGS

The paramount question in this case is whether the statement, in Article II of the Treaty of 1866, that qualifying Freedmen and their lineal descendants "shall have and enjoy all the rights and privileges of native citizens" encompasses a right to citizenship in the Muscogee (Creek) Nation. The answer to this question will establish whether the 1979 Muscogee (Creek) Nation Constitution is in conflict with Article II of the Treaty of 1866, and whether applications for Muscogee (Creek) citizenship should be reviewed for eligibility in accordance with the citizenship language found in the Treaty.

### A. <u>The Board's Determinations Regarding Each Plaintiff's Application For Citizenship Was Neither Arbitrary Nor Capricious</u>.

At trial, Plaintiffs' witness, Nate Wilson, Director of the Muscogee (Creek) Nation Citizenship Board, testified under oath regarding the "by blood" lineal requirement found in the Nation's Constitution, and stated he began to have concerns regarding whether such a limitation was appropriate in light of applicant letters which referenced the Treaty and which took the position that the Treaty was controlling law that had not been abrogated, in whole or in part, by the United States.[16] According to Wilson's testimony he also had concerns because the Nation had recently been successful in stating its position to the U.S. Supreme Court (in *McGirt v. Oklahoma*[17]) that the Nation's reservation established by the Treaty of 1866 had never been de-established and remained as denoted in the unabrogated Treaty.[18] The U.S. Supreme Court's ruling in *McGirt* unequivocally held that there had not been an abrogation of the Treaty and upheld the Nation's sovereignty and rights found within the Treaty of 1866.

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[16] *Tr. Of Nonjury Trial (Day Two), April 5, 2023* at 33:17-24.
[17] *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020.
[18] *See*, S. Ct. Docket No. 18-9526, *Brief For Amicus Curiae Muscogee (Creek) Nation In Support Of Petitioner.*

Wilson testified that he requested guidance from the Nation's Office of the Attorney General in an effort to ease his concerns and obtain clarification on the appropriate actions for the Board to take regarding citizenship eligibility. Wilson testified he was told to continue using the eligibility requirements for citizen applications as specified in the Nation's current Constitution and in M(C)NCA Title 7 § 4-105(A).[19,20] Wilson and the Board then followed the recommendation thus provided.

Although the recommendation received from the Nation's Office of the Attorney General may have been flawed, the Board in fact sought guidance from it, thereby relieving their actions from being taken as arbitrary or capricious, or in willful disregard of the law. Therefore, this Court finds that the Board did not take a willful and unreasonable action without consideration or in disregard of acts or law.

B. **Denial of Each Plaintiff's Citizenship Application and Appeal Was Erroneous And Unsupported By Substantial Evidence.**

Plaintiffs presented the Court with testimony and evidence regarding the applications for Grayson and Kennedy, including documents presented by each to the Board during their initial applications and during their administrative appeals. Documentation during the initial applications included various records and affidavits required by the Board to demonstrate eligibility.[21] However, while each Plaintiff's voluminous documentation reflected a direct lineage to

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[19] MCN Constitution Article II § 1 states:

> **[Opportunity for citizenship]** Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in The Muscogee (Creek) Nation.

M(C)NCA Title 7 § 4-105(A) states:

> **Lineal descent.** Evidence of lineal descent from a Muscogee (Creek) Indian by blood whose name appears on the final rolls prepared pursuant to the act of April 26, 1906 (34 Stat. 137), shall be required from each applicant.

[20] *Tr. of Nonjury Trial Apr. 5, 2023 (Day Two)* at 33:20 – 34:3, 39:16 – 40:16.

[21] Plaintiff Kennedy's application file presented at trial included approximately 75 pages of material in support of his application and appeal; Plaintiff Grayson's application file included approximately 90 pages of material in support of her application and appeal.

individuals listed on the Dawes Final Rolls, their lineages related back to individuals not listed on the Creek Nation Creek Roll (also known as "the Creek By Blood Roll") but rather to individuals listed on the Creek Nation Freedmen Roll (also known as "the Creek Freedmen Roll").

Upon administrative appeal, both Plaintiffs submitted substantial additional documentation regarding the Treaty of 1866 and its applicability to their applications for citizenship in the Nation, including a lengthy letter written and read to the Board by Grayson, during her administrative appeal, which cited Article II of the Treaty of 1866 and Article VI, Clause 3 of the United States Constitution[22] in support of her theory that the Treaty of 1866 supersedes the Nation's Constitution of 1979, and her application for citizenship in the Nation should be approved. Grayson testified she included excerpts of both the Treaty of 1866 and the U.S. Constitution's Supremacy Clause to draw the Board's attention to the law she believed was controlling and should be considered in reviewing her eligibility for citizenship.[23] Plaintiff Kennedy testified he also submitted extensive documentation evidencing his lineage dating back to a Creek by blood relative who died before the Dawes Rolls were created, and to ancestors who were listed on the Creek Freedmen Roll of the Dawes Commission. In his appeal to the Board, Kennedy also included a statement citing excerpts from the Treaty of 1866 as well as supplying the Board with more than 70 pages of documentation and a copy of the Treaty in its entirety.

The Board was unable (neither through direct examination of its own witness nor cross-examination of Plaintiffs' witnesses) to provide any evidence whatsoever of the abrogation or

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[22] Article VI, Clause 3 (known as the Supremacy Clause) of the United States Constitution states:
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[23] *Tr. of Trial, April 4, 2023* at 72:9 – 73:6 (morning session).

inapplicability of the Treaty of 1866 and in fact provided confirmation of its own uncertainty regarding the effect of the conflict between the Nation's Constitution and the Treaty.[24]

The Court finds that the Board's actions in denying Plaintiffs' applications and appeals were unsupported in light of the substantial evidence regarding the applicability of the Treaty of 1866 which was presented by Plaintiffs during and along with their applications and administrative appeals.

### C. The Actions Of The Board Were Contrary To The Treaty of 1866.

It has long been established that the Nation's Constitution is its governing law. At trial, witnesses repeatedly cited the Constitution as the law they must follow. Remarkably, both the Nation's Constitution and the Muscogee (Creek) Nation Code of Laws ("Code" or "Code of Laws") recognize the binding authority of the Nation's treaties with the United States.

Article I, Section 2 of the Nation's current Constitution states:

> The political jurisdiction of the Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is ***based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America***; and such jurisdiction shall include, however not limited to, properties held in trust by the United States of America and to such other properties as held by the Muscogee (Creek) Nation, such property, real and personal to be TAX-EXEMPT for Federal and State taxation, when not inconsistent with Federal law. (emphasis added)

Additionally, M(C)NCA Title 27, Judicial Procedures, states:

> § 1–101. Authority.
> A. Basis of authority. The authority of the Muscogee (Creek) Nation to adopt this title is based upon:
> 1. The inherent sovereignty of the Muscogee (Creek) Nation and ***the Treaties and Agreements between the Muscogee (Creek) Nation and the United States, including but not limited to the Treaty of 1790 and the Treaty of 1866.*** (emphasis added)

and,

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[24] *Tr. Of Nonjury Trial (Day Two)*, 33:17-24; 40:9-20; 61:16-21.

§ 1-103. Law Applicable.

A. Constitution and Laws of the Nation. In all cases, the Muscogee (Creek) Nation Courts shall apply the Constitution and duly enacted laws of the Muscogee Nation, the common law of the Muscogee people as established by customs and usage, and ***the Treaties and Agreements between the Muscogee Nation and the United States.***(emphasis added)

Plaintiffs' expert, Dr. Carla Pratt, testified extensively regarding the nature and application of the Treaty of 1866 and provided an excellent overview of the legal process for treaty abrogation. Her testimony concluded that there has been no abrogation of the Treaty of 1866 whether in part or in full. In other words, the Treaty of 1866 was in full force and effect at the time of the Plaintiffs' applications for citizenship as well as at the time of their administrative appeals. This Court, the U.S. Supreme Court, and the Nation agree.

As specified by the Nation's current Constitution and its current Code of Laws, the Nation and this Court "...shall apply the Constitution and duly enacted laws of the Muscogee Nation, the common law of the Muscogee people as established by customs and usage, and the Treaties and Agreements between the Muscogee Nation and the United States."[25] The Treaty of 1866 itself is specifically identified *by name* in the Nation's Code of Laws as a source of its authority.[26] There can be no doubt that the Treaty must be followed in *all* regards, including as it relates to the eligibility for citizenship of those whose ancestors are listed on the Creek Freedmen Roll.

The Board limited their review of the Plaintiffs' applications for citizenship to an examination only of the Creek By Blood Roll, and proven lineal descendants therefrom, in contradiction to the clear language of the Treaty of 1866. Plaintiffs' witness, Board member Lea Ann Nix, testified repeatedly that the Board makes no review of the Final Rolls whatsoever if

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[25] M(C)NCA Title 27, § 1-103. Law Applicable.
[26] M(C)NCA Title 27, § 1-101. Authority.

applicants ancestors are traced only to the Creek Freedmen Roll.[27] Both the Nation's current Constitution and its Code mistakenly, and in contradiction to the Treaty of 1866, limit eligibility for citizenship to those whose ancestors may be traced to the Creek by Blood Roll.

The Nation cannot choose to select and rely on portions of the Treaty to which it points as evidence of the tribe's intact reservation, and also negate the clear language entitling descendants of a segment of the Dawes Final Roll – the Creek Freedmen – from eligibility for citizenship. There simply is no legal avenue for configuring a checkerboard of validity where parts of the Treaty are intact and other parts are invalid. Either the Treaty in its entirety is binding or none of it is. The Nation has urged in *McGirt* – and the U.S. Supreme Court agreed - that the Treaty is in fact intact and binding upon both the Nation and the United States, having never been abrogated in full or in part by Congress. To now assert that Article II of the Treaty does not apply to the Nation would be disingenuous.

As such, this Court as well as the divisions and agencies of the Nation must adhere to the language found in the Treaty of 1866, including the language directing the Nation to embrace as citizens the African Creeks listed on the Creek Freedmen Roll and their lineal descendants.

The Court finds that the actions of the Board in denying Plaintiffs' citizenship applications and appeals were contrary to law, specifically the Treaty of 1866 and its required inclusion of the Creek Freedmen and their lineal descendants within the citizenship of the Muscogee (Creek) Nation.

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[27] *Tr. Of Nonjury Trial (Day Two)*, 68:3-5; 69:9-19; 71:2-5; 72:5-12; 73:6-15; 73:25 – 75:16; 77:25 – 78:7; 80:19-24; 81:12-17; 82:11-18.

## V. ORDER

Having weighed all the facts and evidence presented by the parties, this Court finds the acts of the Defendant in this matter to have been contrary to the law and unsupported by the relevant and substantial evidence presented by each Plaintiff, Rhonda Grayson and Jeffery Kennedy.

Judgment is hereby rendered for PLAINTIFFS. The decisions of the Board in denying the citizenship applications of the Plaintiffs are hereby REVERSED and REMANDED to the Citizenship Board of the Muscogee (Creek) Nation for reconsideration of the Plaintiffs' applications for citizenship in accordance with the clear language of Article II of the Treaty of 1866 between the Muscogee (Creek) Nation and the United States of America whereby lineal descendants of those individuals listed on the Dawes Final Rolls, including both the Creek By Blood Roll and the Creek Freedmen Roll, are eligible for citizenship in the Muscogee (Creek) Nation.

Plaintiffs' request for attorney fees and costs is DENIED.

SO ORDERED THIS 27th DAY OF SEPTEMBER, 2023.

District Court Judge

## CERTIFICATE OF MAILING

I, Stephanie Bear, Deputy Court Clerk for the Muscogee (Creek) Nation District Court, do hereby certify that on this 27th day of September, 2023, I emailed a true and correct copy of the foregoing **Order and Opinion on Appeal from Citizenship Board of the Muscogee (Creek) Nation Denial of Creek Freedmen Citizenship Applications – CV-2020-34** to: Attorney General's Office, gwisner@mcnag.com; cwilson@mcnag.com; jpittman@mcnag.com and Damario Solomon-Simmons, business@solomon-simmons.com; Beatriz Mate-Kodjo, bmate-kodjo@solomonsimmons.com; Kimberly Heckenkemper, kheckenkemper@solomonsimmons.com.

Stephanie Bear

Stephanie Bear, Chief Deputy Court Clerk