IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, HATTIE CULLERS, CHARLENE WHITE, And RALPH THREAT,	)	
Plaintiffs,	)	
v.	)	**Case No.: 1:03cv01711 (HHK)**
	)	**Judge: Henry H. Kennedy**
GALE A. NORTON, Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR,	)	**Docket Type: Civil Rights (non-employment)**
	)	**Date Stamp: 08/11/03**
CHEROKEE NATION OF OKLAHOMA	)	
CHADWICKE SMITH, Individually and in His Official Capacity	)	
John Does, Individually and in their official capacity	)	
Defendants,	)	

PLAINTIFFS OPPOSITION TO INTERVENER CHEROKEE NATION'S MOTION TO DISMISS

Plaintiffs Marilyn Vann, Ronald Moon, Hattie Cullers, Charlene White and Ralph Threat, submit their Opposition to Limited Intervener Cherokee Nation's Motion to Dismiss. The Court should deny the motion to dismiss because jurisdiction may properly be found with this Court and Plaintiffs are not barred from bringing this suit due to an alleged failure to exhaust administrative remedies.

INTRODUCTION

Plaintiffs are citizens of the Cherokee Nation of Oklahoma ("Cherokee Nation") pursuant to the Tribe's Constitution and the Treaty between the Tribe and the United States of 1866. However, the Cherokee Nation's position is that it and its elected officials can ignore numerous federal statutes, the Treaty of 1866 and the Cherokee Nation

Constitution to forbid the Plaintiffs and the other Black citizens, commonly known as the Cherokee Freedmen, of the Cherokee Nation to vote in Tribal elections.

In a further effort to deny the Cherokee Freedmen the right to participate in Tribal elections, the Cherokee Nation has intervened in the present action for the sole purpose of moving to dismiss it. The Cherokee Nation's Motion to Dismiss alleges that the current action should be dismissed for two principal reasons.

First, the Cherokee Nation alleges that (1) it is a necessary party to this suit, (2) because it enjoys sovereign immunity it may not be joined as party to this suit, (3) the inability to join the Cherokee Nation as a necessary party makes them an indispensable party under Fed. R. Civ. P. 19, and (4) the failure to join an indispensable party deprives the Court of jurisdiction pursuant to Fed. R. Civ. P. 19 and makes dismissal appropriate.

Second, the Cherokee Nation's motion argues that the case must be dismissed for the alleged failure of Plaintiffs to exhaust their administrative remedies. Both arguments must fail.

To begin with, the Cherokee Freedmen were not required to exhaust administrative remedies because the agency in question wrongly determined that it lacked the authority to grant the requested relief and further pursuit of administrative remedies would have been futile. Alternatively, the agency decision not to intervene in the dispute is a sufficiently final decision for the purposes of satisfying administrative exhaustion.

Furthermore, the sovereign immunity enjoyed by the Cherokee Nation is limited by treaty, by statute, by its own constitution, and by the United States Constitution in a way that clearly does not render the Cherokee Nation immune from this suit.

Sovereign immunity does not permit the Cherokee Nation to violate specific acts of Congress such as its duty to provide its voting procedures to the Secretary of the Interior under the 1970 Principal Chiefs Act. Sovereign immunity does not permit the Cherokee Nation to violate the Constitution of the United States such as the Plaintiffs 13th and 15th Amendment Rights as applicable under the Cherokee Nation's Constitution which states that the U.S. Constitution is the Supreme Law of the Cherokee Nation. Sovereign Immunity does not permit the Cherokee Nation to evade the specific grant of Federal Jurisdiction for violations of the Treaty of 1866.

The premise of the Cherokee Nation's position that its actions are not reviewable in this Court under the doctrine of sovereign immunity is a gross overextension of the sovereign powers the Tribe or the Principal Chief or other individual officials possess. The Cherokee Nation ignores the specific limitations that Congress and the Cherokee Nation itself placed on the extent of its sovereignty and falsely relies on broad swatches of dicta from case law to erect what it believes is an absolute wall of sovereignty. The Cherokee Nation and its officials have erected this wall not to protect the validity of the Tribal Constitution and Treaties it executed, but to defy them for the purpose of oppressing its own minority members and denying them the most fundamental right; the right to vote for their leaders and whether to amend their Constitution.

But the present case is not just a case of denied justice, the law sits squarely in favor of the Freedmen with a clear grant of federal jurisdiction to protect their rights and numerous Congressional Acts limiting the Cherokee Nation's ability to cloak itself in sovereignty. As consistently echoed in the case law, the boundaries of tribal sovereignty are limited.

Plaintiffs assert their voting rights under the 13th and 15th Amendments of the U.S. Constitution and under 28 U.S.C. § 1343 as enabling such a suit. The statute provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: … (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343 (1979). As will be discussed below, the Cherokee Nation has declared that the U.S. Constitution is the supreme law of the land and that no law shall be made in conflict with federal law. As such, general civil rights legislation enforcing the 13th and 15th amendments is applicable to the Cherokee Nation, and thus the federal district courts have jurisdiction over this case, through this statute.

Moreover, once the Cherokee Nation entered the lawsuit, it submitted itself to the jurisdiction of the Court. The Cherokee Nation cites no case law supporting its intervention for the sole purpose of having the suit dismissed. This opposition to the Cherokee Nation's Motion to Dismiss is being followed by an Amended Complaint which names the Cherokee Nation and Chadwicke Smith, in his individual and official capacities, as defendants. The Amended Complaint, which names these additional parties, along with the intervention of the Cherokee Nation resolves any deficiencies relating to these parties not being named in the original Complaint.

I. The United States and the Cherokee Nation have substantially limited the sovereign power of the Cherokee Nation of Oklahoma regarding the rights of Black Cherokees including specific grant of federal jurisdiction.

The sovereignty of Native American tribes is well established,[1] but tribal sovereignty is not absolute and subject to the plenary power of Congress.[2] The Cherokee Nation called Plaintiff's action a direct attack on the right of Indian tribes "to make their own laws and be ruled by them," citing *Williams v. Lee*, 358 U.S. 217, 220 (1959).[3] However, the full sentence in *Williams* states, "Essentially, *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (emphasis added). *Id.* Congress' exercise of plenary power over the tribes can limit the sovereignty they enjoy. In *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), the court

[1] *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 530 (1832) "[B]y which treaties the United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory…"; *United States v. Kagama*, 118 U.S. 375, 381 (1886) "They [Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations…"; *Turner v. United States*, 248 U.S. 354, 354-5 (1919) "Subject to the control of Congress, they [Indians] then exercised within a defined territory the powers of a sovereign people…"; *United States v. Mazurie*, 419 U.S. 544, 557 (1975) "Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) "the Indian tribes have not given up their full sovereignty…. The sovereignty that the Indian tribes retain is of a unique and limited character"; Felix S. Cohen, *Handbook of Federal Indian Law*, 232-235, 234 (1982 ed.): "[T]ribes did not lose their status as sovereign governments."

[2] *See Lone wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning…"; *Santa Clara Pueblo v. Martinez*, 436 U.S 49, 56 (1978) "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"; *United States. v. Wheeler*, 435 U.S. 313, 323 (1978) "It [tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance"; *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) "This sovereignty is not absolute. Tribal sovereignty is subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on the tribes, or by implication due to the tribes' dependent status"; Felix S. Cohen, *Handbook of Federal Indian Law*, 241-246, 241 (1982 ed.) "While the sovereignty of tribes exists independently from federal delegation of authority, and while tribal sovereign powers may be exercised to the exclusion of both federal and state governments, tribal powers are subject to important limitations."

[3] In fact, the Cherokee Nation cites several cases (on page 5 and FN6 of the memorandum in support of motion to dismiss) to support their position that Plaintiff's action is a direct attack on tribal sovereignty. Their analysis of the cases, however, omits language present in each case that recognizes Congress' ability to limit tribal sovereignty. *See Fletcher v. United States*, 116 F.3d 1315, 1327 (1997) "These powers of sovereignty are subject to the plenary power of Congress. Also, tribes retain sovereign powers except where restricted by treaty or statute or where… inconsistent with a tribe's status as a domestic dependent nation (citations omitted)"; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978) "Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess"; and *United States v. Wheeler*, 435 U.S. 313, 319 (1978) "Congress has plenary authority to legislate for the Indian tribes in all matters…."

enunciated four circumstances under which Congress can limit a tribe's sovereignty, "by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on the tribes, or by implication due to the tribes' dependent status." Plaintiffs contend that all four limitations are present in the current case.

A. Treaty provisions

In 1866, after the Civil War, the United States renegotiated its treaty with the Cherokee Nation, as it did with all of the Five Civilized Tribes, because "some tribal members had been openly aligned with the South; factions of each tribe signed treaties with the Confederacy." Felix S. Cohen, *Handbook of Federal Indian Law*, 102-105, 104 (1982 ed.). The Treaty with the Cherokee, July 19, 1866, U.S.-Cherokee Nat., 14 Stat. 799, Art. 9, provides that "never hereafter shall either slavery or involuntary servitude exist in their nation…" and that "all freedmen who have been liberated… as well as all free colored persons… and their descendants, shall have all the rights of Native Cherokees." Additionally, the treaty provides for United States district court jurisdiction for causes of action involving the Freedmen. *Id.* at Art. 7. "The United States court… shall have exclusive jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described [the Freedmen district described in Art. 4 of the treaty] shall be a party…." *Id.* The treaty provided a right of action for Freedmen to enforce the treaty in federal court, stripping the Cherokee Nation's jurisdiction over such matters. Further, the Cherokees relinquished incidences of their sovereignty in Art. 6, when agreeing that

> …should any such law [of the Cherokee Nation], either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice…. *Id.* at Art. 6.

Therefore, the Cherokee Nation's sovereignty with regards to the Freedmen has been substantially limited through treaty and federal court jurisdiction has been specifically conferred for this action.

B. Statutes

Congress has also limited the extent of the Cherokee Nation's sovereignty through various statutes. First, the 1970 Principle Chiefs Act, Pub. L. 91-495, provides for the election of the principal chief (and governor with regard to the Chickasaw tribe) of the Five Civilized Tribes. The Act also requires that the elections be "in accordance with procedures established by the officially recognized tribal spokesman and or governing entity." *Id.* at § 1. Further, the Act provides that "[s]uch established procedures shall be subject to approval by the Secretary of the Interior." *Id.* at § 2. Therefore, this law not only allows, but mandates that election procedures be submitted for federal approval, which was not done in this case, despite several letters requesting submission of such procedures prior to the May 2003 election.[4]

Second, the Curtis Act, 30 Stat. 495 (1898) provides for joinder of tribes in civil suits, equal protection, regardless of race, and jurisdiction in federal court. The Act also

[4] *See* Letter from Neil McCaleb, Assistant Secretary for Indian Affairs, Dept. of Interior, to Hon. Chadwicke Smith, Principal Chief, Cherokee Nation (March 15, 2002) and Letter from Jeanette Hannah, Regional Director, BIA Eastern Okla. Regional Office, to Hon. Chadwicke Smith, Principal Chief, Cherokee Nation (July 25, 2003). True and accurate copies of the letters are attached as exhibits to Plaintiffs initial complaint.

abolishes tribal courts, a measure which denies the Freedmen any tribal remedy for suits such as this. Section 2 of the Act states:

> That when in the progress of any civil suit, either in law or equity, pending in the United States court in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit… and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action. *Id.*

This provision *requires* a U.S. district court to join a tribe to a suit if tribal issues are affected. Therefore, if the tribe claims an interest in this case, then the court is "authorized and required" to make the tribe a party. Section 14, paragraph 2 provides that "all inhabitants of such cities and towns [of the Cherokee Nation], without regard to race… shall have equal rights, privileges, and protections therein." *Id.* The actions taken by the Cherokee Nation in this case are in direct contravention to this provision, in that they denied Cherokee Freedmen the right to vote on the basis of race. As such section 14, paragraph 2, which provides for United States court jurisdiction to enforce the laws within Indian Territory, should come into play to allow the court to remedy the injustice perpetrated on the Freedmen. Finally, section 28 provides "[t]hat on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished…." *Id.* (pending cases to be transferred to the U.S. court in the Indian Territory.) Therefore, the Curtis Act makes significant limitations on the Cherokee Nation's sovereignty, particularly with regard to judicial jurisdiction and tribal judicial authority. The issue of Curtis Act regarding the extent of tribal sovereignty was addressed

in *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. C.A. 1988). The Appeals Court held that, because the tribe had reorganized under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, they were no longer subject to the Curtis Act provisions abolishing the tribal courts. "The OIWA clearly does not *expressly* repeal the abolition of the Tribal Courts. It contains no reference to the Curtis Act or the related legislation. It does, however, unlike the IRA, contain a general repealer clause" (emphasis original). *Hodel*, 851 F.2d at 1444. Thus, the general repealer clause allowed tribes who reorganize under OIWA to reinstate their tribal court system. Because the Cherokee Nation did not reorganized under the OIWA, they are still subject to the provisions of the Curtis Act.

The Indian Citizenship Act, 43 Stat. 253 (codified at 8 U.S.C. §1401(b)) (1924), is a further statutory limitation on the Cherokee Nation's sovereignty. In granting citizenship to "Indians born within the Territorial limits of the United States," the Act gave Native Americans the same protections as any other U.S. citizen. In dicta in *Duro v. Reina*, 495 U.S. 676, 692 (1990), the Supreme Court stated, "[t]hat Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class…. In absence of such legislation, however, Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected… from unwarranted intrusions on their personal liberty.'" In a case where citizenship was granted to tribal members under allotment, the Supreme Court held that "the Indian as a citizen was entitled to the rights, privileges, and immunities of citizenship…." *United States v. Pelican*, 232 U.S. 442, 448 (1914). Thus, statutes that previously excluded Indians for their lack of citizenship, would then apply to Indians as citizens. One example of this would be the Civil Rights Act of 1866, 14 Stat. 27 (codified in 42 U.S.C.

1982), which gives citizens of every race and color the same rights as white citizens. Section 2 of the Act provides "[t]hat the district courts of the United States… shall have… cognizance of all crimes and offenses committed against the provisions of this act." *Id.* Though Indians were excluded from the definition of citizens at the time, they became entitled to the protections provided by the Act upon receiving citizenship. As such, the Freedmen Cherokees should be allowed to avail themselves of the jurisdiction provided in section 2 of the Act to remedy the invidious discrimination practiced against them by their own tribe.

C. The Cherokee Nation Constitution states that the US Constitution is its Supreme law.

Article I of the Cherokee Constitution provides that "[t]he Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with Federal law." Cherokee Const., art. I (1976). This provision makes all of the U.S. Constitution specifically binding on the Tribe, as it was adopted by the Cherokee Nation.

In July 2003, the Cherokee Nation conducted a referendum election without permitting its Freedmen citizens to vote, to revise its Constitution changing the language above to "[t]he Cherokee Nation reaffirms it sovereignty and mutually beneficial relationship with the United States of American." Proposed Cherokee Const., art. I (1999 proposed changes). However, the new Constitution can not become law until approved by the Bureau of Indian Affairs, presently the Constitutional amendment has not been

approved.[5] Therefore, the Cherokee Nation is still under the authority of the U.S. Constitution, by virtue of its own Constitution. Thus, the 13th and 15th Amendments apply in this case to protect the rights of the Cherokee Freedmen, particularly in relation to voting in the tribal elections.

D. Tribes' dependent status

The Supreme Court established the existence of the guardian-ward relationship between the federal government and the Indian tribes in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The doctrine has been upheld in cases like *United States v. Kagama*, 118 U.S. 375, 384 (1886). "These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States…" (emphasis original). The United States has a responsibility to protect the tribes and their individual members, which include the Freedmen. To allow the current disenfranchisement to continue would be a failing in the guardianship duties of the U.S. toward these members. Despite an unpopular perception among some tribal leaders, the federal government fulfills its role as a guardian by intervening to protect other tribal members from discrimination. Just as this nation had to rise above initial unpopularity of the 1960s Civil Rights movement to strengthen and unite the country, the Cherokee Nation will have to overcome this invidious discrimination before it can move forward as a united people.

[5] Two letters from the BIA to the Cherokee Nation confirm that the May 2003 amendment has not been approved. In the first letter, the BIA stated "The proposed amendment that would remove the requirement for Secretarial approval of future amendments or a new constitution *has not been approved and is therefore not yet effective*" (emphasis added). Letter from Jeanette Hannah, Regional Director, BIA Eastern Okla. Regional Office, to Hon. Chadwicke Smith, Principal Chief, Cherokee Nation (July 25, 2003). Even in the letter recognizing Chad Smith as the new Principal Chief, the BIA stated "The Department *continues to have under review* the May 24 Tribal election results on the proposed amendment of the Tribal constitution that would remove the requirement that future amendments be approved by the Secretary of the Interior. *The review is on-going*" (emphasis added). Letter from Jeanette Hannah, Regional Director, BIA Eastern Okla. Regional Office, to Hon. Chadwicke Smith, Principal Chief, Cherokee Nation (Aug. 6, 2003). Nothing in the record has revealed that any changes have occurred with relation to the BIA's review of the amendment, and as such, it has not yet taken effect.

In *Cherokee Nation of Oklahoma v. United States*, 937 F.2d 1539 (10th Cir. 1991), the court had to decide whether the government owed a "special obligation" to the Cherokee Nation in regard to the navigation rights on the Arkansas River. Though the court declined to find that the U.S. owed a "special obligation" to the tribe in this case, it did lay out some requirements for such a finding. *Id.* "In *Heckman*, there were *specific statutory provisions* made for the imposition of restrictions on alienation for the benefit of the allotees, and there were *clear statutory provisions* for the maintenance of suits to enforce the restrictions" (emphasis added). *Id.* at 1545 (citing *Heckman v. U.S.*, 224 U.S. 413, 437 (1912)). In the current case, there are specific statutory provisions, including the Principal Chiefs Act, the Curtis Act and the Cherokee Treaty, that restricted tribal sovereignty on this issue and providing the Freedmen with specific rights. Additionally, as stated above, the Curtis Act and the Cherokee Treaty provide the clear statutory provisions for suit to enforce the rights of the Freedmen. "If particular activities or interests of the Cherokee Nation had been specifically protected by the statutes and representations of the government… [and then violated], a violation of a special relationship might be shown." *Id.* at 1546. The rights of the Freedmen have been specifically protected by the statutes listed above, and thus, by failing to protect these rights, the U.S. has violated their duties as a guardian.

In *Wheeler v. Dept. of Interior*, 811 F.2d 549, 551 (10th Cir. 1987), the court stated that "…when a dispute is an intratribal matters, the Federal Government should not interfere." However, the court held that there are situations that require department action. "Certain federal statutes require Department involvement in tribal matters." *Id.* at 551-552. In the present case, the Principal Chiefs Act directs the Department to require

approval of election procedures. The BIA repeatedly requested compliance with the 1970 Principal Chiefs Act yet the Cherokee Nation and Chief Smith refused to comply. As stated by Ms. Jeanette Hanna of the BIA in her July 23, 2003 letter, the Cherokee Nation did not comply.

Further, "If a tribe's Constitution or its statutes call for Department to take an active role in lawmaking, the Department may refuse to recognize laws that the tribal authorities have passed." *Id.* The Cherokee Constitution requires federal approval for constitutional amendments, requires compliance with the Constitution of the United States and declares citizenship for the Freedmen.

In *Seminole Nation v. Norton*, F.Supp.2d 122, 137 (D.D.C. 2002) (*Seminole II*), an almost identical situation in which the Seminole Nation did not permit its Freedmen to vote and in reference to *Wheeler* and other cases, the court found a duty for the BIA to intervene in tribal elections to protect the rights of the Freedmen. "[T]here is an element here of oppressive action on the Nation's part against its own minority members." *Id.* at 137. While the court noted the importance of tribal sovereignty, it also noted that "as a sovereign, the Nation has the duty and the responsibility to respect the rights of all of its members, including the rights of its minority members, as guaranteed by the Nation's Constitution." *Id.* at 146.

> [W]here the Nation evidences that it does not intend to respect those rights, the government, as part of "the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited people"… has a duty to ensure that its minority members are protected against the will of the majority that is being imposed in violation of its own Constitution. *Id.* at 146-147.

Finally, the court concluded that the BIA had an obligation to protect the Freedmen members' rights, analogizing it to the Civil Rights movement of the 1960s. "Where the

Nation will not protect the Constitutional rights of its minority members, the BIA has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies." *Id.* at 147. The oppressive action found in *Seminole II* is also present in the current attempt of the Cherokee Nation to disenfranchise its minority members. In the present case Congress specifically mandates a duty under the 1970 Principal Chiefs Act for BIA review of election procedures. The trust responsibility of the Secretary of the Interior is to protect the rights of individual members of the Cherokee Nation, namely the Freedmen's right to vote. These rights are specifically covered in the Treaty of 1866, the Cherokee Constitution, the recent cases dealing with the same issues within the Seminole Nation, and the BIA's initial actions regarding the Cherokee Nation in requesting compliance with the 1970 Principal Chiefs Act. These laws provide access to this court for actions brought by the Freedmen.

II. The Cherokee Nation of Oklahoma cannot invoke sovereign immunity to escape liability for its actions denying its Black citizens the right to vote.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the court refused to find a waiver of sovereign immunity in this case but discussed the "accidental nature" of the doctrine itself, seemingly contemplating a complete abrogation. The court discussed the origination of the doctrine in *Turner v. U.S.*, 248 U.S. 354 (1919), but noted that "[i]t is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of the doctrine." *Kiowa,* 523 U.S. at 757. "There are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. In the end, however, the court leaves abrogation of the doctrine to Congress. *Id.* Plaintiffs here do not wish for the court to effect a complete abrogation of the doctrine and acknowledge the importance of the sovereign immunity doctrine, as applied to the Indian Nations.

However, Plaintiffs do assert that sovereign immunity cannot, and should not, be absolute but is subject to limitation in specific circumstances, particularly to protect individual tribal members from discrimination.

A. Tribal immunity absent specific enforcement clauses

In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the Supreme Court found that an arbitration clause in a contract was sufficient to establish a waiver of sovereign immunity despite the lack of language that specifically addressed the issue.

> The clause no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration. *Id.* at 422.

The Court upheld a line of reasoning adhered to in several lower court decisions that providing a right like arbitration is meaningless in the face of an assertion of tribal sovereign immunity.[6] Similarly, providing Cherokee Freedmen with the rights of full membership and rights to the protections afforded under the Constitution of the United States in the tribe would be meaningless if there were no way to hold the tribe or officials responsible for violations. The Supremacy Clause in the Cherokee Nation Constitution and the Tribe's execution of the Treaty of 1866 should be considered waivers of

[6] *Rosebud Sioux Tribe v. Val-U Construction Company of South Dakota*, 50 F.3d 560, 562 (8th Cir. 1995) "By definition such disputes could not be resolved by arbitration if one party intended to assert sovereign immunity as a defense."; *Val/Del, Inc. v. Superior Court*, 703 P.2d 502, 509 (Ariz. C.A. 1985) "However, after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity."; and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alas. S.C. 1983) "[W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity.... The arbitration clause ... would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed."

sovereign immunity regarding the causes of actions in the present case. The latter also provides federal court jurisdiction.

In *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968), the Supreme Court examined enforcement of the 13th Amendments through anti-discrimination statutes. The statute in question, 42 U.S.C. § 1982, dealt with racial discrimination in real estate sales but did not include specific enforcement provisions. "The fact that [a statute]… is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent the federal courts from fashioning an effective equitable remedy." *Id.* at 414. Additionally, the Court addressed Congress' authority to pass the statute in question and looked at language from the Congressional record when the Civil Rights Act of 1866 was passed. The Court concluded that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. The denial of the Freedmen's voting rights by the Cherokee Nation is equivalent to "badges and incidents of slavery." They were promised the rights of native Cherokees through the Treaty of 1866, but these rights have been denied because of race and their ancestors' former condition of servitude. The Court also looked at the legislative history of the 13th Amendment itself:

> "[W]hen I voted for the amendment to abolish slavery… I did not suppose that I was offering… a mere paper guarantee. And when I voted for the second section of the amendment, I felt… certain that I had…given to Congress ability to protect… the rights which the first section gave…" (quoting Representative Thayer of Pensylvania). *Id*. at 433-434

In the current case, to allow a sovereign immunity defense to triumph would be reducing the Freedmen's civil rights to a mere paper guarantee.

Several subsequent cases have applied the *Jones* reasoning in an Indian context. First, *Johnson v. Lower Elwha Tribal Community*, 484 F.2d 200 (9th Cir. 1973), brought suit under the Indian Civil Rights Act (hereinafter "ICRA") and 28 U.S.C. § 1343 to enforce the due process clause of the ICRA. The court found jurisdiction and a waiver of sovereign immunity through the combination of § 1343 and the ICRA.

> Appellee contends that the Act by itself is not jurisdictional. However, the pre-existing grant of jurisdiction under 28 U.S.C. § 1343(4) serves as a basis upon which to enforce alleged violations of provisions of the Indian Civil Rights Act which would, if appellee's argument were accepted, be unenforceable and thus almost meaningless. *Id.* at 203.

The court also analogized between this case and *Jones* in determining whether there was a cause of action under the statutes in question. "The Supreme Court in situations similar to this has implied an appropriate remedy (usually a private cause of action) to carry out Congressional purposes." (citing *Jones v. Mayer*) *Id.* at 203, FN5.

Second, in *Crowe v. Eastern Band of Cherokee Indians*, 506 F.2d 1231 (4th Cir. 1974), a tribal member brought an action against the tribe for violations of the equal protection and due process clauses of the ICRA, via § 1343. Again, the court upheld the use of § 1343 jurisdiction, saying "[w]e agree with this jurisdictional conclusion of the court below since section 1343(4) provides a logical and specific basis of jurisdiction and to hold otherwise would render the provisions of the Act unenforceable and an exercise in Congressional futility." *Id.* at 1234.

Third, *Dry Creek Lodge, Inc. v. U.S.*, 515 F.2d 926 (10th Cir. 1975) dealt with jurisdiction over individual tribal officers and again sought redress through the ICRA and § 1343. The court found that jurisdiction under § 1343 does not typically extend to individual tribal members. *Id.* at 935. "Of course, to the extent that individuals are

acting as agents for the tribes or the Council, the court does possess jurisdiction to extend injunctive relief to the individual agents." *Id.* Though a waiver of sovereign immunity under the ICRA for certain actions has been precluded through *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), jurisdiction under combinations of § 1343 and other statutes relating to Indian rights has not been struck down (as discussed below).

There have also been other abrogations of tribal sovereign immunity absent specific enforcement provisions in federal statutes. For example, *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999), held that the Safe Drinking Water Act abrogated sovereign immunity, despite the absence of any clause specifically stating that tribal sovereign immunity was waived. The court reasoned that the statute provides a cause of action against a "person" violating the act, that "person" is defined to include municipalities, and that "municipalities" is defined to include Indian tribes. *Id.* at 1181. "Thus, under the express language of the Act, Indian tribes are included within the coverage of the whistle blower enforcement provisions." *Id.* The court also noticed that though "Congress could have been more clear… that degree of explicitness is not required" (internal quotation marks and citations omitted). *Id.* Finally, the court stated that "[w]here the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the *Santa Clara* requirement than that Congress unequivocally state its intent." *Id.* Thus, it seems that a statute need not use any magic words to abrogate sovereign immunity, but need only include some clear statement of applicability to Indian tribes.[7] In the current case, the Treaty of 1866, *supra*

[7] *See also Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (holding the Resource Conservation and Recovery Act to abrogate sovereign immunity using similar reasoning) and *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community*, 827 F.Supp. 608 (D.Ariz 1993) (holding similarly with regards to the Clean Water Act).

Art. 7, provides for federal court jurisdiction for claims to enforce the treaty, and the Curtis Act, *supra* at § 2, requires joinder of tribes in suits that affect the tribe.

B. The Cherokee Nation attempts to extend the dicta of *Santa Clara Pueblo v. Martinez* beyond the scope of the present case.

The Cherokee Nation relies heavily on *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), as a basis for it sovereign immunity in the present action. However, the Supreme Court dealt with tribal sovereign immunity under the limited jurisdiction conferred under the Indian Civil Rights Act "ICRA." In *Martinez,* a female member of the tribe brought suit under the equal protection clause of the ICRA when her children were denied membership in the tribe because she had married outside the tribe. *Id.* at 51. The court found that tribal sovereign immunity barred the suit against the tribe and held that the only action available under the ICRA, in Federal Title III Courts, was for a writ of habeas corpus. *Id.* at 58. "In 25 U.S.C. [ ] 1303, the only remedial provision expressly supplied by Congress, the 'privilege of the writ of habeas corpus' is made 'available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian tribe.'" *Id.* The court discussed the specific limitations within the statute and found that they struck a balance between individual rights and tribal sovereignty, and "[u]nder *these circumstances*, we are reluctant to disturb the balance between the dual statutory objectives which Congress apparently struck in providing only for habeas relief" (emphasis added). *Id.* at 66. Furthermore, the court stated "it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of §[ ] 1302." *Id.* at 69.

Though the Court in *Martinez* restricted the holdings in *Johnson*, *Crowe*, and *Dry Creek Lodge* insofar as they pertain to the ICRA, it specifically avoids making a finding on § 1343 jurisdiction. "For purposes of this case, we need not decide whether §[ ] 1343(4) jurisdiction can be established…." *Id.* at 53, FN4. Therefore, Plaintiffs contend that sovereignty is limited through the provisions hereinbefore discussed, that these provisions did not have any limitations as to their remedies, and that § 1343(4) provides jurisdiction in federal court to redress the discrimination suffered by the Freedmen. Plaintiffs acknowledge the limitation to ICRA suits, as set in *Martinez,* and therefore seek resolution through alternative statutory and other provisions, protecting the Freedmen from discrimination.

In *U.S. v. Wadena*, 152 F.3d 831 (8th Cir. 1998) tribal officials conspired to fraudulently engineer election results and subsequently asserted that the *Martinez* holding barred jurisdiction over them. The court held that *Martinez* did not preclude jurisdiction over intratribal disputes, nor could it serve as a veil for tribal officials to run roughshod over the law because they were cloaked in tribal sovereign immunity. The premise of *Wadena* is that *Martinez* is not intended to preclude non-tribal courts from hearing internal tribal disputes but rather is limited to the analysis of using the ICRA as the enabling statute. *Wadena* goes as far as discussing other jurisdictional avenues, used in combination with the ICRA, to assert jurisdiction, such as § 241 which provided jurisdiction to find criminal liability against tribal officials. *Id.* at 845. Similarly, Plaintiffs in the present case assert jurisdiction under 28 U.S.C. § 1343, violations of the United States Constitution as made applicable under the Cherokee Constitution and violations of the Treaty of 1866 with federal court jurisdiction conferred under the

Treaty. Second, the court held that the tribe's "right to self-determination, which the court sought to protect in *Santa Clara*, is not being threatened by ensuring that voters are not defrauded." *Id.* at 846. Likewise, ensuring that all members of the Cherokee Nation, including the Freedmen, have the opportunity to vote will not endanger the tribe's sovereignty or self-governance. "In fact, the Band's right to free and open elections is vindicated by the present criminal action." *Id.* Although the *Wadena* case dealt with criminal jurisdiction, it's logic should be extended to the present case to defend the rights of the Freedmen to participate in their own tribal elections from those who would seek to disenfranchise them. "No purpose of tribal autonomy is served by allowing a corrupt, unrepresentative system to continue unabated." *Id.* at 847. Because the BIA has refused to intervene and stop the unconstitutional disenfranchisement of Cherokee Freedmen, the present action must vindicate their rights and cease their discriminatory course of action. Further, the court held that "failure of the United States to assert criminal jurisdiction over activity on a reservation when the tribal government no longer operates legitimately would be an abrogation of the U.S. government's trustee relationship with tribes such as the Chippewa." *Id.* Similarly, if the court were to grant the present Motion to Dismiss, the Freedmen would be deprived of any effective remedy to ensure their right to vote. This would be an abrogation of the federal government's duty as a guardian of tribal interests and tribal member well-being.

C. ***R.H. Nero v. Cherokee Nation of Oklahoma*** **does not bar the present case, because it was pled utilizing different statutes**.

R.H. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989) arose from an almost identical factual situation as the current case. In fact, in the Cherokee

Motion to Dismiss, they contend that because of the similar factual situation this case should be dismissed on the same grounds. "Indeed, on numerous occasions, suits involving the interests of the Cherokee Nation have been dismissed due to the Nation's indispensability as a necessary party that could not be joined. *See, e.g., Nero, supra* (involving identical claims pertaining to Cherokee Nation elections)…." Memorandum in Support of Motion at 6. However, there are several factors that distinguish the present case from *Nero*. The plaintiffs in *Nero* made three arguments to overcome sovereign immunity:

> First, plaintiffs assert that their claims under Title I of the Indian Civil Rights Act… should not have been dismissed because the ICRA, as interpreted by this court in *Dry Creek Lodge, Inc. v Arapahoe & Shoshone Tribes* [citation omitted, *Dry Creek II*], deprives that Tribe of immunity from suit under its provisions. Plaintiff alternatively urge that the Tribe waived its immunity to suit pursuant to the ICRA by virtue of a provision in the Cherokee Constitution [Art. 2]. Finally, plaintiffs argue that the Tribe is amenable to suit under the various civil rights acts because the Treaty of 1866 [Art. 9] limits the Tribe's sovereign power and, concomitantly, limits the scope of protection from suit afforded by sovereign immunity. *Nero*, 892 F.2d at 1459.

In the current case, Plaintiffs contend that since *Nero* relied on a different jurisdictional basis, because the court is confined to make a decision based on the facts and pleadings before it, the *Nero* court could not consider the bases for jurisdiction the current case raises. First, the present claim is not brought under the ICRA, and as such, the claim does not fall under the strict limitations enunciated in *Martinez* and upheld in *Nero*. Second, Plaintiffs do not rely on Art. 2 of the tribe's constitution, but rather on the supremacy clause in Art. 1, which makes the U.S. Constitution the supreme law of the Cherokee Nation. Third, the Plaintiffs do not rely on Article 9 of the 1866 Treaty, providing equal rights for the Freedmen members, but rather on Article 7 which provides

the Freedmen with a Federal Court jurisdiction for enforcement of the Treaty of 1866. *Nero* was dismissed based on procedural or technical issues not on the merits. As the present case possesses an enabling statute, federal laws, tribal acceptance of relevant federal law and conference of federal jurisdiction, it stands on solid jurisdictional footing, as the basis of *Nero's* dismissal was based on failure to meet jurisdiction under different laws it cannot control in the current case, despite its factual similarities.

D. Waiver and self-imposed limitations of sovereign immunity

Plaintiffs contend that the Cherokee Nation has waived sovereign immunity in three ways: through its Constitution, through the 1866 Treaty, and through it's intervention in the current case. First, the Cherokee Constitution, *supra* at Art. 1, adopts the United States Constitution as the supreme law of the land and thereby subjects itself to suit to enforce its provisions. Second, the Treaty with the Cherokee, *supra* at Art. 7, provides a federal right of action for Cherokee Freedmen to enforce the provisions of the treaty. By agreeing to the provisions and signing the treaty, the Cherokee Nation accepted such jurisdiction. Third, by intervening in this action, the Cherokee Nation has conceded to the jurisdiction of the federal court. In *U.S. v. Oregon*, 657 F.2d 1009, 1015 (9th Cir. 1981), the court held that "[b]y intervening, the Tribe assumed the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse." Despite their assertion that their intervention is limited to the filing of the motion to dismiss and is not a waiver of sovereign immunity, the Cherokee Nation has intervened and thus runs the risk that their motion will be denied and that they may be held to a result they deem adverse.

III. The Cherokee Nation of Oklahoma is neither necessary nor indispensable to this action, and thus it may proceed without joining them.

Plaintiffs argue, in the alternative to the above contentions, that even if sovereign immunity barred the Cherokee Nation from being joined in the suit, the Cherokee Nation is not a necessary party, or in the alternative, the tribe is not indispensable to the action. Therefore, joinder of the tribe is not required under the Federal Rules of Civil Procedure for the suit to be continued.

A. Necessary Party

Rule 19(a) of the Federal Rules of Civil Procedure provides the guidelines for determining when a party is necessary to continue an action in federal court.

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the person already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Plaintiffs contend that none of these conditions are met and therefore the Cherokee Nation need not be joined as a party to the suit in order for proceedings to continue.

First, even if the Cherokee Nation were not joined complete relief can be obtained among the current parties to the suit. The Bureau of Indian Affairs already had it within their power to review and approve or disapprove of the Cherokee Nation's election procedures. In fact, they requested submission of the procedures. "Until it is repealed or amended, the Act of October 22, 1970 (94 Stat. 1091) [Principal Chiefs Act], will however, still apply." Letter, Neil McCaleb, Assistant Secretary – Indian Affairs, to

Chief Chad Smith, April 23, 2002. Because the BIA can protect the rights of the Freedmen through their authority under the Principal Chiefs Act and review of the proposed amendment, joinder of the tribe is not necessary.

Second, the Cherokee Nation's absence will not impair protection of their interest nor leave anyone already a party subject to any inconsistent obligation. As stated, the BIA can afford complete relief with little effect to the Cherokee Nation. A new election would not disrupt tribal governance in a significant fashion, because Chad Smith was the Principal Chief prior to the May 2003 election and the contested amendment has still not received BIA approval, as required. The BIA was already obligated to approve election procedures under the Principal Chiefs Act and protect *all* citizens of the Cherokee Nation. The action currently before the court would not subject the current parties to any new obligations, but simply require that parties uphold the obligations to which they were previously duty-bound.

B. Indispensable Party

If a party is necessary under Rule 19(a), and they cannot be made a party, the court must determine whether they are indispensable, thus requiring dismissal of the action. Rule 19(b) sets forth a non-exhaustive list of factors to consider in the determination of the indispensability of a party:

> The factor's to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"In general indispensable parties are those persons who not only have a direct and tangible interest in the controversy, but also whose interest would necessarily be affected in such a way by the judgment that it would be inequitable to proceed without them." *Harjo v. Kleppe*, 420 F.Supp. 1110, 1117 (D.D.C. 1976). Sovereign immunity does not, in and of itself, render a necessary party indispensable. "Neither this court… nor the D.C. Circuit… held that immunity is so compelling by itself as to eliminate the need to weigh the four Rule 19(b) factors." *Davis v. U.S.*, 192 F.3d 951, 960 (10th Cir. 1999) (*Davis I*). In *Davis v. U.S.*, 343 F.3d 1282 (10th Cir. 2003) (*Davis II*), the court applied the four factors in a similar fact pattern.

First, with regard to potential prejudice, the court noted that "[t]he underlying merits of the litigation are irrelevant to a Rule 19 inquiry… at least unless the claimed interest is patently frivolous" (internal quotation marks and citations omitted). *Id.* at 1291. The court also noted that the potential prejudice factor is in essence the same as the analysis under Rule 19(a)(2)(i) concerning the party's ability to protect his/her interest. *Id.* In the present case, the potential prejudice is slight because Plaintiffs only request that a new election be held pursuant to specific and applicable Federal law requiring BIA-approved procedures allowing everyone to vote. Since the current principal chief was the former principal chief, this will effect very little within the tribal government. Plaintiffs only ask that every Cherokee member, regardless of race, be allowed to vote on such grave issues.

Second, the Cherokee Nation can be protected from any prejudice in its absence because any decree can be limited to enforcing obligations already held by the BIA and other parties, rather than creating new duties. The court need not create new

responsibilities because the Freedmen's rights are already covered under previously mentioned legislation and treaties. Plaintiffs seek only to enforce the rights already guaranteed them. Additionally, the Court could restrict any declaratory or injunctive relief to the BIA, who have the duty to oversee the procedures of tribal elections. This is similar to the argument raised in *Davis II*. However, because it wasn't brought up until the reply, the court stated "we do not address that argument because it was not timely raised." *Id.* at 1292.

Third, in *Davis II*, the court addressed the adequacy of judgment factor and discussed the possibility of further litigation causing inadequacy in the remedy. *Id.* at 1293. In particular, the court reasoned that, because the suit involved the division of funds from land claims and such claims are often contentious, further litigation would likely result, possibly in inconsistent judgment. In the present case, any resolution would not take money from the Cherokee Nation, nor would it require further proceedings. If the court were to agree with Plaintiffs, then it would simply mean that the Cherokee Nation would have to fulfill obligations to which it was already committed, by holding elections with appropriate procedures.

Fourth, as in *Davis II*, pursuing remedies through tribal means would be futile. The Curtis Act, *supra* at § 28, abolished tribal courts, and since the Cherokee Nation did not reorganize under the Oklahoma Indian Welfare Act (hereinafter "OIWA"), the tribe lacks authority to reconstitute their tribal courts. In *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. C.A. 1988), the Muscogee (Creek) tribe sought funding from the BIA to establish a tribal court and law enforcement program. The lower court found that the Tribe had no authority to establish tribal courts because of the Curtis Act. However,

the Appeals Court held that, because the tribe had reorganized under the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, they were no longer subject to the Curtis Act provisions abolishing the tribal courts. "The OIWA clearly does not *expressly* repeal the abolition of the Tribal Courts. It contains no reference to the Curtis Act or the related legislation. It does, however, unlike the IRA, contain a general repealer clause" (emphasis original). *Hodel*, 851 F.2d at 1444. Thus, the general repealer clause allowed tribes who reorganize under OIWA to reinstate their tribal court system. Because the Cherokee Nation did not reorganized under the OIWA, they are still subject to the provisions of the Curtis Act abolishing their court system. Thus, the Plaintiffs cannot find remedy through the current tribal court system, which has no authority under the Curtis Act. Further, even if the tribal courts have authority to adjudicate this dispute, the Cherokee Nation could invoke sovereign immunity in any forum, including a tribal court.

Since the tribe did not object to the argument of the lack of tribal jurisdiction in *Davis II*, the court decided that "[t]he issue here, then is not whether an adequate remedy can be found elsewhere, but only the weight to be given this factor." *Id.* Because of the prejudice to the Cherokee Nation is only slight and because they can be protected from this prejudice, the lack of alternative remedies should weigh heavily in favor of Plaintiffs.

Because the list of factors in Rule 19(b) is not exhaustive, other equitable considerations should be weighed to decide whether the Cherokee Nation is an indispensable party in this action. If the May 2003 election were to stand, then the court would be solidifying the Cherokee Nation's attempts to disenfranchise the Freedmen members, and allowing the vote to stand would allow the Cherokee Nation to further degrade the position of Freedmen. In fact, if the May 2003 proposed amendment is

accepted, the tribe could go so far as to completely take away the Freedmen's membership rights, and they would have no recourse because of sovereign immunity. In general, sovereign immunity should not be available as a defense to aid a government in oppressing its people.

IV. Tribal officials named in this suit cannot invoke the sovereign immunity of the tribe because they were acting outside the scope of their authority in denying Black Cherokees the right to vote.

Tribal sovereign immunity does exist in many circumstances, as previously noted, and under those circumstances, the immunity may extend to the official acts of tribal officers.[8] However, even if tribal sovereign immunity were to apply in the case at bar, it would not shield individual tribal officials from liability for their illegal acts. "[T]he courts evolved the rule that officers acting outside the scope of their authority, or unconstitutionally, are often not protected by sovereign immunity." Cohen at 319. Even *Martinez*, 436 U.S. at 59, acknowledges that suits for declaratory and injunctive relief against a tribal official are not barred by the tribe's sovereign immunity.

In *Ex Parte Young*, 209 U.S. 123 (1908), the Supreme Court considered the issue of suit against a government official, and though the case related to a state official, such reasoning is applicable in suits against tribal officials. After examining previous cases, the Court concluded that, in using the name of the state to enforce an unconstitutional statute, a government official is engaging in an illegal act. *Id.* at 159. Further, the Court states:

> If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The

[8] *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 318-319 (1982 ed.)

> state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. *Id.* at 159-160.

In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949), the Supreme Court discussed the types of cases in which a government official will not be shielded by the sovereign's immunity. The first case applies when the officer is acting as an individual rather than in his official capacity, and the second case is when the officer's actions are unconstitutional. The court finds that sovereign immunity does attach in these situations because "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." *Id.*

In the current case, Chief Smith has engaged in actions which are unconstitutional and contrary to the Treaty of 1866. He refused repeated requests from the BIA to submit election procedures as mandated by the 1970 Principal Chiefs Act and stood by while members of his own tribe were denied the right to vote based on the color of their skin. Thus, even if the Cherokee Nation were immune from this type of suit, the tribe could not impart immunity to Chief Smith for illegal actions committed by him while in office. He must be held responsible to "the supreme authority of the United States" for his illegal actions disenfranchising the Cherokee Freedmen.

In *Turner v. Martire*, 2000 WL 964931, 2 (Cal. App. 4 Dist. 2000), the court stated that "lower federal court decisions have extended immunity to 'tribal officials when acting *in their official capacity and within their scope of authority*'" (citations omitted and emphasis added). Similarly in *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997), the court held that "[b]ecause there is no reason to treat tribal immunity differently from state or federal immunity in this sense, tribal immunity protects tribal officials against claims *in their official capacity*" (emphasis added). However, the

actions of the individual tribal officials in this case were contrary to the 1866 Treaty, which guaranteed the Freedmen equal rights. Thus, they were acting outside of their authority, and therefore, cannot be protected by the tribe's sovereign immunity, if it exists in this case.

V. Plaintiff had exhausted remedies provided to them and exhaustion of administrative remedies not provided to them would have been futile because the Bureau of Indian Affairs made a determination that it did not have authority to issue a decision regarding the validity of the election.

Plaintiffs drafted letters to the Bureau of Indian Affairs detailing that they were not permitted to vote. The Bureau of Indian Affairs did not make a determination to them, instead the Bureau of Indian Affairs raised the concerns of the Plaintiffs to the Cherokee Nation of Oklahoma. In its letter of July 25, 2003 it stated that the Tribe did not comply with the Principal Chiefs Act. In its subsequent letter of August 6, 2003, The Bureau indicated that it did not have the authority to not recognize the elected officials and that was an issue for the Cherokee Nation. The BIA therefore did not take an action that the Plaintiffs could have appealed, no appeal rights were explained to the Plaintiffs and without an action to appeal, there was no ability to overturn or affirm it.

Here, the BIA has already stated a clear position on the issue and is unwilling to reconsider that position. What's more, in a letter to Chief Smith, the BIA went so far as to disclaim its authority to make a determination of the validity of the election results and that individuals seeking to invalidate the election should seek relief in an appropriate tribal forum. The letter reversed an earlier decision of the BIA to reject the results of the election. Plaintiffs were not the recipient of the letter, and they were not informed that the BIA was making a binding decision. That the BIA would not inform Plaintiffs

directly of its decision is not surprising since the decision was that the BIA lacked the authority to intervene in what it considered an internal tribal election dispute.

The decision of the BIA that it lacked authority to intervene rendered any further attempts by Plaintiffs to pursue administrative remedies futile. Courts excuse the exhaustion of administrative remedies requirement when exhaustion would be futile or when it is unavailable. *See Panola Land Buyers Assoc. v. Shuman*, 762 F.2d 1550, 1556 (11th Cir. 1985) ("Courts will not require exhaustion when the administrative remedy is inadequate because it does not exist, or would not provide relief commensurate with the claim … would unreasonably delay the action … [or] if the claim clearly will be denied, or where administrative action will not resolve the merits of the claim.") (*citing Walker v. Southern Railway*, 385 U.S. 196, 87 S. Ct. 365, 17 L. Ed. 2d 294 (1966); *Patsy v. Florida International University*, 634 F.2d 900, 903 (5th Cir. 1981), *rev'd. on other grounds*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982); *Rhodes v. United States*, 574 F.2d at 1181.)

The BIA clearly stated its intent to recognize the election stating "there is no express requirement in Federal law that the Department is required to certify the Tribal election results." This letter was the second correspondence to the Cherokee Nation and clearly shows that the BIA would not intervene based on the Cherokee Nation's denial of the Freedmen's right to vote in the election. Although the BIA decision not to intervene is contrary to the 1970 Principal Chief's Act which requires the Tribe to submit its voting procedures to the Department for approval, the BIA's actions still render an administrative remedy to Plaintiffs futile and unavailable.

Furthermore, contrary to the Cherokee Nation's assertions, even if Plaintiffs failed to exhaust their administrative remedies, the Court may still use its discretion in determining whether the lack of exhaustion bars Plaintiffs' suit. *Panola,* 762 F. 2d. at 1557 ("exhaustion is not a jurisdictional doctrine, but one subject to the discretion of the trial court.") (*citing NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 419, 426 n.8, 88 S. Ct. 1717, 1719, 1723 n.8, 20 L. Ed. 2d 706 (1968); *Haitian Refugee Center v. Smith*, 676 F.2d at 1034.).

Based on the foregoing, Plaintiffs respectfully request that the Cherokee Nation's Motion to Dismiss be denied.

Respectfully Submitted,

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