IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, DONALD MOON, CHARLENE WHITE, RAPLH THREAT, FAITH RUSSELL, ANGELA SANDERS, SAMUEL E. FORD, AND THE FREEDMEN BAND OF THE CHEROKEE NATION OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	
	)	**Case No. 1:03CV01711 (HHK)**
KEN SALAZAR, Secretary of the United States Department of the Interior,	)	**Judge Henry H. Kennedy**
UNITED STATES DEPARTMENT OF THE INTERIOR, and	)	
CHADWICK SMITH,	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Authorities on which we chiefly rely are marked with an asterisk.

Page

CASES:

STATUTES:

Pursuant to Federal Rule of Civil Procedure Rule 12(b), Defendants Ken Salazar[1/] and the United States Department of the Interior (collectively, "the Department" or "Federal Defendants") submit this memorandum of points and authorities in support of their Motion to Dismiss Claims One, Two, and Four of Plaintiffs' Fourth Amended Complaint ("FAC") brought against the Federal Defendants.[2/]

INTRODUCTION

This dispute centers around Plaintiffs' claims, as descendants of individuals listed as "Freedmen" on the Dawes Commission rolls, that they have been improperly denied tribal membership and voting rights. The Treaty of 1866 between the Cherokee Nation and the United States provides that "all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees...." FAC ¶ 27.

As a federally-recognized Indian tribe, the Cherokee Nation is a "distinct, independent political communit[y], retaining their original natural rights in matters of local self-government," subject to Congress' "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49,

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[1/] Secretary of the Interior Ken Salazar is substituted for former Secretary Dirk Kempthorne. Fed. R. Civ. P. 25(d).

[2/] Claim Three is brought against the Cherokee Defendants. Federal Defendants are not moving to dismiss Plaintiffs' Fifth Cause of Action (Review of Agency Action – Denial of CDIB Cards) or Sixth Cause of Action (Equal Protection – Denial of CDIB Cards) at this time. By filing this partial motion to dismiss, Federal Defendants do not concede any aspect of Plaintiffs' remaining claims, and reserve their right to file additional responsive pleadings pursuant to Fed. R. Civ. P. 12(a)(4)(A).

55-56 (1978) (citations and internal quotation marks omitted). An Indian tribe's sovereignty is "at its strongest . . . when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe," such as when "determining tribe membership." *See San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007) (internal citations omitted).

Mindful of both the terms of the Treaty of 1866 and the fundamental principle of tribal sovereignty, the Department has acted lawfully in its interactions with the Cherokee Nation and the Freedmen. The Department refused to approve the May 2003 Constitutional amendments submitted by the Nation, in part because the Freedmen were not permitted to vote in the 2003 election and "approval by the Department of the 2003 amendment at this time would be used by some as a validation or evidence of the legitimacy of the Cherokee Nation's removal of its Freedmen members from the tribe in apparent violation of the 1866 treaty." FAC ¶ 70, FAC Ex. 2. The highest Cherokee Court, the Judicial Appeals Tribunal, ruled that the Cherokee voting and membership laws that prohibited the Freedmen from voting in 2003 were unconstitutional, and the Tribe reinstated the Freedmen's eligibility for citizenship. FAC ¶ 56. In light of this ruling, which has not been disturbed, the Department approved the new election procedures for Principal Chief, as well as an amendment to the Cherokee Constitution that removes the requirement for Departmental approval of future constitutional amendments. Notably, the Department has not approved the 2003 amendments creating the 1999 Constitution or any amendment denying citizenship rights to the Freedmen.

At bottom, Plaintiffs' dispute is really one with the Cherokee Nation, and concerns membership and other issues fundamental to the Nation's sovereignty that federal courts have

been reluctant to interfere with. It is well-established that the federal courts will not permit a suit challenging tribal membership decisions to proceed in the guise of a suit against a federal agency, which is what Plaintiffs attempt here. Nor has the Department erred by allowing the Tribe and its courts to address these issues in the first instance, while still refusing to condone any action that removes the citizenship rights of the Freedmen. Plaintiffs' suit against the Department, therefore, is fundamentally flawed. This motion addresses three causes of action asserted in the Fourth Amended Complaint against the Federal Defendants, which fail to fall within this Court's subject matter jurisdiction, fail to state a claim upon which relief can be granted, or fail to join an indispensable party under Rule 19, and thus should be dismissed.

FACTUAL BACKGROUND

A. The 2003 Elections

In May of 2003, the Cherokee Nation held a national election. In that election, Cherokee voters reelected Chadwick Smith as Principal Chief and passed a proposed amendment to the 1976 Cherokee Constitution that would remove from the Constitution the requirement that the Secretary of the Interior approve all constitutional amendments for them to be effective. FAC ¶ 1. That proposed constitutional amendment was itself forwarded to the Department of the Interior for approval, in accordance with the Cherokee Constitution. FAC ¶ 53. On July 26, 2003, the Cherokee Nation held a separate election to ratify a new constitution ("the 1999 constitution). FAC ¶ 1. In accordance with Cherokee statutory law in effect at the time, the Cherokee Freedmen were not eligible to register to vote in the 2003 elections. FAC ¶ 46. Plaintiffs allege that the Department improperly did not approve election procedures prior to this election, and improperly recognized Chadwick Smith as Principal Chief. FAC ¶¶ 101-102.

On March 7, 2006, the Judicial Appeals Tribunal of the Cherokee Nation issued a decision in *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09, in which that court concluded that 11 C.N.C.A. § 12, governing the Nation's membership, was more restrictive than the Nation's constitution and was, therefore, unconstitutional. FAC ¶ 56. In response to that decision, the Cherokee Nation adjusted its procedures to permit Cherokee Freedmen to apply for citizenship. FAC ¶ 57.

B. The 2007 Election

At a special election on March 3, 2007, members of the Cherokee Nation voted on a proposed constitutional amendment that would exclude the Cherokee Freedmen from tribal membership by basing membership on proof of Cherokee Indian blood. FAC ¶ 67. Although that proposed amendment did pass, it was not fully implemented by the Tribe until March 21, 2007, when the Tribe sent letters to the Cherokee Freedmen who do not possess Cherokee Indian blood informing them that they were no longer eligible for citizenship in the Tribe. *Id.* Plaintiffs chose not to appeal the decision to alter their citizenship status that resulted from the March 3, 2007, special election to the tribal court.

After the results of the special election were made official, certain Cherokee Freedmen filed suit in the District Court of the Cherokee Nation in the matter of *Raymond Nash v. Cherokee Nation Registrar*, and sought an injunction against the Tribe's Registrar from enforcing the constitutional amendment adopted March 3, 2007, and seeking the reinstatement to citizenship of tribal court Plaintiffs and those similarly situated former Cherokee citizens referred to as the Cherokee Freedmen. On May 14, 2007, the District Court of the Cherokee Nation issued a Temporary Order and Temporary Injunction, to which the Tribe agreed, ordering the Cherokee Nation Registrar to immediately reinstate to full citizenship within the Cherokee

Nation the *Nash* Plaintiffs and all similarly situated persons commonly known as Cherokee Freedmen. On May 18, 2007, a second Order was issued in the *Nash* matter. This Order sets forth several requirements to re-open voter registration and absentee ballot requests to ensure that the Cherokee Freedmen will be permitted to register for and vote in the Cherokee national election on June 23, 2007. FAC ¶ 69.

On May 21, 2007, then-Asst. Secretary-Indian Affairs Carl Artman issued a letter to Principal Chief Chad Smith informing him that a decision had been made to disapprove the 2003 constitutional amendment seeking to remove Secretarial approval of future amendments to the Tribe's Constitution. FAC ¶ 70. In part, Assistant Secretary Artman cited his concern that approval of the constitutional amendment "would be used by some as a validation or evidence of legitimacy of the Cherokee Nation's removal of its Freedmen members in apparent violation of the 1866 treaty." FAC ¶ 70, Ex. 2. In light of Asst. Secretary Artman's decision, the Cherokee Constitution's requirement that constitutional amendments be approved by the Department remained in effect. Because neither the 2003 nor the March 2007 constitutional amendments had been submitted to and approved by the Secretary of Interior as required by the Cherokee Constitution, neither has legal effect. *See* Declaration of Carl J. Artman ¶ 7 (Exhibit 1) (previously submitted as an exhibit to Federal Defendants' May 29, 2007 Opposition to Plaintiffs' Motion for Preliminary Injunction). Thus, the 1976 Cherokee Constitution remains in effect.

In preparation for the upcoming June 23, 2007, Cherokee national election, Federal Defendants requested the Cherokee Nation to provide them with the election procedures for the June 23, 2007, Cherokee national election. The Cherokee Nation agreed to this request and on May 22, 2007, the Cherokee Nation provided Federal Defendants with the last of the requested

election procedures. On May 25, 2007, Federal Defendants, in accordance with the authority granted by the Act of 1970, approved the election procedures for election of the Principal Chief of the Cherokee Nation. *See* Artman Decl., ¶ 7.l and Ex. B (Ex. 1).

The Cherokee Nation held an election on June 23, 2007. Pursuant to the decision in *Nash*, Cherokee Freedmen were permitted to register and vote in this election. FAC ¶ 69. At this election, voters passed a Constitutional amendment which would remove the requirement for Secretarial approval of future Constitutional amendments, and re-elected Chadwick Smith as Principal Chief. These election results were submitted to the Department, and on August 9, 2007, the Department approved the constitutional amendment removing the Departmental approval requirement for future constitutional amendments. FAC ¶ 75. Plaintiffs challenge this approval in their Fourth Amended Complaint. FAC ¶ 103. Approval of this amendment did not affect the status of the 1999 Constitution or the March 3, 2007 amendment.

C. Federal Court Proceedings

Plaintiffs brought suit in this Court in 2003, bringing claims against the Federal Defendants alleging violations of the Constitution, federal law, and the Treaty of 1866, and challenging the Department's alleged failure to approve election procedures in accordance with the Principal Chiefs Act. The Cherokee Nation was granted status as limited intervenors for the purpose of challenging the Court's jurisdiction.

On December 19, 2006, the Court issued a Memorandum Opinion and Order denying the Cherokee Nation's Motion to Dismiss on the grounds of failure to join an indispensable party and lack of final agency action. *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 74 (D.D.C. 2006). The Court found that the Cherokee Nation was a necessary party, and that the Tribe's immunity had been abrogated with respect to claimed violations of the Thirteenth Amendment. The Court

granted Plaintiffs leave to amend their complaint to add the Cherokee Nation and its Chief as defendants.

The Cherokee Nation appealed the determination that the Cherokee Nation's immunity was abrogated, and the Court of Appeals reversed. *Vann v. Kempthorne*, 534 F.3d 741, 756 (D.C. Cir. 2008). However, the Court of Appeals held that the Tribe's officials could be sued under the doctrine of *Ex parte Young*. *Id.* at 754-56. The Court instructed "[o]n remand, the district court must determine whether "in equity and good conscience" the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Id.* at 756.

During the pendency of the appeal, Plaintiffs filed a Third Amended Complaint adding three new claims against the Federal Defendants: a Fourth Cause of Action alleging equal protection violations based on the "denial of entitlement benefits;" a Fifth Cause of Action seeking review of agency action for the alleged denial of Certificate of Degree of Indian Blood cards; and a Sixth Cause of Action alleging equal protection violations based on the alleged denial of Certificate of Degree of Indian Blood cards. On December 13, 2008, Plaintiffs filed a Fourth Amended Complaint, which modified the claims against the tribal officials in light of the Court of Appeals' decision. The Fourth Amended Complaint also brought a new challenge to the Department's action approving the June 2007 Cherokee Constitution amendment removing the requirement for Secretarial approval of future constitutional amendments. FAC ¶ 103.

ARGUMENT

I. Standards of Law Under Federal Rule of Civil Procedure 12

A. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"). A court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993). However, "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge,* 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350).

B. Federal Rule of Civil Procedure 12(b)(6)

The Federal Rules of Civil Procedure require that a complaint contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). "A plaintiff's obligation to provide the 'grounds'" of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citations omitted).

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must

construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994). While the court must construe the complaint in the plaintiff's favor, it "need not accept inferences drawn by the plaintiff[] if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Factual allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 127 S.Ct. at 1965. Moreover, the court is not bound to accept the legal conclusions of the non-moving party. *See Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997).

II. Plaintiffs' First Cause of Action Should be Dismissed for Failure to State a Claim and for Lack of Subject Matter Jurisdiction

Plaintiffs' First Cause of Action ("Violation of United States Constitution/Federal Law") alleges that the BIA has violated a variety of constitutional and statutory provisions, including the 1970 Principal Chiefs Act, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians (1866), the Indian Civil Rights Act, 25 U.S.C. §§ 1301 et seq., and the 13th and 15th Amendments to the U.S. Constitution. FAC ¶¶ 95-98. This Cause of Action fails to state a claim upon which relief can be granted, and portions of the claim fail for the independent reasons that this Court lacks subject matter jurisdiction. Given the disparate and sometimes ill-defined grounds on which the First Cause of Action is based, each constitutional, statutory, or other basis asserted in this cause of action is addressed separately below.

A. Plaintiffs Have Failed to State a Claim Against the United States Based on a Violation of the Cherokee Constitution

Plaintiffs allege that the Federal Defendants have violated the Cherokee Constitution. FAC ¶ 96. As this Court recognized in its December 19, 2006 Memorandum Opinion and Order

with respect to claims against the Cherokee Tribe and its officials, the claim that the Federal Defendants violated the Cherokee Constitution does not "arise under the Constitution, laws, or treaties of the United States"; thus, there is no federal court jurisdiction under 28 U.S.C. § 1331. *See Vann v. Kempthorne*, 467 F. Supp. 2d 56, 74 (D.D.C. 2006) (citing *Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1143 (10th Cir. 2004).

Furthermore, the United States is not subject to the Cherokee Constitution; thus, there is no right to sue the Federal Defendants for violating this tribal document, nor is there any waiver of the United States' sovereign immunity for this claim. Plaintiffs' claims alleging that the United States has violated the Cherokee Constitution should be dismissed.

B. Plaintiffs Have Failed to State a Claim Under the 1970 Principal Chiefs Act

Plaintiffs' First Cause of Action also alleges that the United States' actions violate the Act of 1970, also known as the Principal Chiefs Act, Pub. L. 91-495, 84 Stat. 1091 (1970). FAC ¶ 96. The Principal Chiefs Act provides, *inter alia*, that the principal chief of the Cherokee Tribe "shall be popularly selected by the respective tribe[] in accordance with procedures established by the officially recognized tribal spokesman and/or governing entity." The Act also provides that these procedures "shall be subject to approval by the Secretary of the Interior." 84 Stat. 1091, Section 1. The purpose of this bill was to "increase the autonomy and self-government of the tribe." *E.g., Harjo v. Kleppe*, 420 F. Supp. 1110, 1140 (D.D.C. 1976).

The Principal Chiefs Act does not provide for a direct private right of action against the United States. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress" (citation omitted)). Nor does the Act waive the United States' sovereign immunity. *See, e.g., United States v. Idaho ex rel. Director, Idaho Dep't of Water Resources*, 508 U.S. 1, 6 (1993) ("waivers of federal sovereign immunity

must be 'unequivocally expressed' in the statutory text"). Thus, Plaintiffs' claim against the United States for violation of the Principal Chiefs Act should be dismissed.[3/]

C. Plaintiffs Have No Right of Action Under the Treaty of 1866; Thus, This Claim Fails for Lack of Subject Matter Jurisdiction

Plaintiffs allege that the Federal Defendants have violated the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 799. FAC ¶ 96. Because the Treaty does not provide Plaintiffs with a private right of action authorizing them to sue directly under the Treaty, this claim fails for lack of subject matter jurisdiction. *E.g. Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 548 (D.D.C. 1981).

Although treaties may constitute binding domestic law, they do not necessarily create private rights of action to enforce their terms. *Medellin v. Texas*, 128 S. Ct. 1346, 1357 n.3 (2008). In order for a treaty to create a private right of action enforceable in federal courts, it must contain express language to that effect. *Id.* ("[T]reaties do not create privately enforceable rights in the absence of express language to the contrary."); *accord McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89 (D.C. Cir. 2008) (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992)).[4/]

Furthermore, the "background presumption is that '[i]nternational agreements, even those benefitting private persons, generally do not create private rights or provide for a private cause

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[3/] As discussed in Section III, a claim based on violation of the Principal Chiefs Act also does not fall within the APA's limited waiver of sovereign immunity. *See infra* at section III.A.

[4/] Although earlier case law in the D.C. Circuit had suggested that a treaty could create a private right of action either by providing expressly for such a right or by being self-executing, the Supreme Court's decision in *Medellin*, 128 S. Ct. at 1357 n.3, clearly establishes a more restrictive standard, and the D.C. Circuit has subsequently adopted this approach, *McKesson Corp.*, 539 F.3d at 489.

of action in domestic courts.'" *Medellin*, 128 S. Ct. at 1357 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1986)). In order for the 1866 Treaty to confer a private right of action upon Plaintiffs, it must therefore do so explicitly and through its plain language.

As with statutory interpretation, interpretation of the 1866 Treaty "must . . . begin with the language of the Treaty itself," and plain meaning must control unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Iceland Steamship Co., Ltd.-Eimskip v. U.S. Dept. of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)) (internal quotation marks omitted). When interpreting the 1866 Treaty, this Court must resolve any ambiguities in the Tribe's favor. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

On its face, the 1866 Treaty contains no language that confers a private right of action upon Plaintiffs. The language of Article 9 of the 1866 Treaty, which is at issue in this case, is unambiguous and contains no express private right of action. Its provisions confirm the Cherokee Nation's abolition and ongoing prohibition of slavery and grant citizenship rights to the Freedmen. Nothing in Article 9 creates jurisdiction in any court or authorizes anyone to sue regarding its terms. Since the plain meaning of a treaty controls, *Iceland Steamship Co.*, 201 F.3d at 458, and since a private right of action must be granted by express language, *Medellin*, 128 S. Ct. at 1357 n.3, Plaintiffs' claim under the 1866 Treaty must be rejected.

It is fundamental that Federal courts are courts of limited jurisdiction;[5/] thus, the absence

[5/] *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994); *see also* 13 Wright, Miller & Cooper, Jurisdiction § 3522.

of any express provision in the 1866 Treaty granting a private right of action is fatal to Plaintiffs' claim, as treaties may not be read to contain implied rights of action. *Medellin*, 128 S. Ct. at 1357 n.3; *Hanoch Tel-Oren*, 517 F. Supp. at 546 ("[T]reaties must provide expressly for a private right of action before an individual can assert a claim thereunder in federal court."), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984). Regardless, in previous briefing before this Court, Plaintiffs have argued that the Treaty contains an implied right of action which would permit their suit to go forward. Even assuming that rights of action could permissibly be implied in treaties, there can be no implied right of action unless the law in question can be interpreted as disclosing the intent to create one. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 772 (2008). In *Stoneridge Investment Partners*, the Court stated, "[i]n the absence of congressional intent the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. . . .' Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us." *Id.* at 772-73 (internal citations omitted). To read an implied right of action into the 1866 Treaty where there is no expressly conferred right would thus fly in the face of an entire body of case law reflecting the federal courts' increasing hesitation to infer private rights of action.

Plaintiffs have argued in earlier briefing that the 1866 Treaty confers an implied right of action upon them on the basis of their status as the "only class of litigants entitled to the protection of the Treaty of 1866." (Pls.' Mem. in Opp'n to Cherokee Nation Defs.' Mot. to Dismiss 17.) However, Plaintiffs have offered no explanation for why a treaty that creates protections in a single class of potential litigants must necessarily confer a private right of action upon the individuals in that group. In the absence of support for such a vague claim, this Court

must reject Plaintiffs' argument.

Furthermore, the existence of an express private right of action elsewhere in the 1866 Treaty militates even more strongly in favor of refusing to find an implied private right of action with respect to Article 9. Congress certainly knows how to create a private right of action, as evidenced by the fact that it did so in Article 7 of the Treaty. *See* FAC ¶ 27 (reproducing Article 7 of the Treaty, which granted inhabitants of the "Canadian District" of the Cherokee Nation a private right of action in the federal court nearest to the Cherokee Nation against inhabitants of other parts of the Nation's territory.). Congress could not have intended to create a private right of action in multiple sections of the 1866 Treaty, but only have provided for it expressly in one of those sections. The Treaty is thus devoid of any evidence of congressional intent to permit suits such as the one Plaintiffs have brought here. Therefore, this claim should be dismissed for lack of subject matter jurisdiction.

D. Plaintiffs Have Failed to State a Claim Against the United States Based on a Violation of ICRA

Plaintiffs also allege that the Federal Defendants have violated the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*. FAC ¶ 96. This claim also fails for lack of subject matter jurisdiction. Federal courts lack subject matter jurisdiction under ICRA for claims for declaratory relief. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 69-70; *see also Vann*, 467 F. Supp. 2d at 74. Moreover, ICRA imposes requirements on Indian tribes, not on the United States. *See* 25 U.S.C. § 1302 ("No Indian tribe in exercising powers of self-government shall . . ."). ICRA is not enforceable against the United States, nor has the United States waived its sovereign immunity with respect to claims brought under ICRA. Plaintiffs' claim alleging that the United States has violated ICRA should be dismissed.

E. Plaintiffs Have Failed to State a Claim Under the 13th Amendment

Plaintiffs allege that the United States "directly violate[s] the 13th Amendment of the Constitution in perpetuating 'badges' of slavery," citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). FAC ¶ 97. This claim must be dismissed, on the ground that the Thirteenth Amendment does not give rise to an independent cause of action for discrimination. The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have the power to enforce this article by appropriate legislation.

Section 1 of the Thirteenth Amendment by its own force abolished slavery, and Section 2 granted Congress the power to "determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*, 392 U.S. at 440. The Supreme Court has expressly not decided "whether Section 1 of the Amendment by its own terms did anything more than abolish slavery." *City of Memphis v. Greene*, 451 U.S. 100, 125-26 (1981) (noting that the Court left this question open in *Jones*).

This court has held that the Thirteenth Amendment does not provide an independent right of action to sue for discrimination or other "badges and incidents of slavery." For example, in *Holland v. Board of Trustees of the University of the District of Columbia*, 794 F. Supp. 420 (D.D.C. 1992), the plaintiff brought suit under the Thirteenth Amendment and other constitutional and statutory provisions against the University for racial discrimination in employment. The Court dismissed the Thirteenth Amendment claim, noting that "[t]he Thirteenth Amendment does not give rise to an independent cause of action; Plaintiffs in

discrimination suits must confine themselves to remedies such as 42 U.S.C. § 1981 adopted pursuant to Section 2 of that amendment." *Id.* at 424 (citing *Westray v. Porthole, Inc.*, 586 F. Supp. 834, 839 (D. Md. 1984). The D.C. Circuit endorsed this rule in *Richardson v. Loyola College in Maryland, Inc.*, 167 Fed. Appx. 223, 2005 WL 3619423 (D. C. Cir. Mar. 4, 2005), affirming the district court's dismissal of a Thirteenth Amendment claim because "the Thirteenth Amendment does not provide an independent cause of action for discrimination." *Id.* at 225 (citing *Holland*).

Numerous other courts have also held that the Thirteenth Amendment provides no direct cause of action for suits based on discrimination or other "badges and incidents of slavery." In *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997), the Fifth Circuit distinguished between suits alleging compulsory labor under Section 1 of the Amendment, which is "undoubtedly self-executing," and "suits attacking the 'badges and incidents of slavery' [which] must be based on a statute enacted under Section 2." *Id.* at 217 n.5. *See also Westray*, 586 F. Supp. at 838-839 ("the Thirteenth Amendment does not give rise to an independent cause of action" (citing cases)); *Crenshaw v. City of Defuniak Springs*, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) (noting that "district courts have uniformly held that the amendment does not reach forms of discrimination other than slavery or involuntary servitude"); *Baker v. McDonald's Corp.*, 686 F. Supp. 1474, 1480 n. 12 (S.D. Fla. 1987); *Matthews v. Freedman*, 128 F.R.D. 194, 201 (E.D. Pa. 1989). Thus, Plaintiffs have not, and cannot, state a claim under the 13th Amendment against the Federal Defendants, and this claim should be dismissed.

F. Plaintiffs Have Failed to State a Claim Under the 15th Amendment

Plaintiffs allege that the Department has violated the Fifteenth Amendment "by its express action in permitting the discriminatory regulations of the Cherokee Nation that

intentionally exclude its Freedmen citizens from the voting process." FAC ¶ 97. This claim must be dismissed, on the ground that the Fifteenth Amendment does not apply to tribal elections, nor to the United States' limited role in approving the Cherokee Nation's election procedures.

The Fifteenth Amendment states:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

By its express terms, the Amendment only applies to the actions of the United States or any State, and does not apply to Indian tribes. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56. In *Rice v. Cayetano*, 528 U.S. 495, 520 (2000), the Court made clear the distinction between elections of a State and elections of a tribe, noting that it was because the challenged elections were those "of the State, not of a separate quasi sovereign" that the Fifteenth Amendment applied. Recognizing the right of recognized Indian tribes to determine eligibility for voting in tribal elections free from the constraints of the Fifteenth Amendment, the Court stated, "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign." *Id.* at 520.

Significantly, in 1968, Congress passed the Indian Civil Rights Act, which imposed "certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," *Santa Clara*, 436 U.S. at 57, but expressly chose

not to make the provisions of the Fifteenth Amendment applicable to Indian tribes. In *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971) (challenge to appointment of Cherokee Principal Chief dismissed for lack of jurisdiction), the Tenth Circuit reviewed the legislative history of ICRA and noted that the Senate Committee report on the bill "makes it clear that Congress intended that the provisions of the Fifteenth Amendment . . . should not be embraced in [ICRA]." The Court continued, "[b]y its stated intentional exclusion from the Act of the provisions of the Fifteenth Amendment, any basis of federal court jurisdiction over tribal elections was definitely eliminated." *Id.* By excluding the Fifteenth Amendment from ICRA, Congress implicitly recognized that tribal membership and eligibility for voting in tribal elections is typically based on ancestry, which in some cases may correlate directly with race.

To prohibit all "racial" classifications in tribal voting requirements would confuse the fundamental origins of the tribes and their sovereignty.[6] Nor can Plaintiffs end-run the well-settled principle that the Fifteenth Amendment does not apply to tribal elections by seeking to challenge the BIA's limited actions in approving election procedures and recognizing the results of valid tribal elections. To hold otherwise would turn the principle of Indian sovereignty on its head, since Indian tribes typically define membership, and thus eligibility for voting, based on ancestry, which may be a proxy for race. *See Rice v. Cayetano*, 528 U.S. at 514 ("Ancestry can be a proxy for race."). Allowing Plaintiffs' claim to proceed would contravene precedent recognizing that tribes may define their own membership, including through the use of blood quantum, ancestry, and other characteristics that could be considered "racial." *See, e.g. Santa*

[6] The Supreme Court has made it clear that notwithstanding elements of ancestry and race, Indian tribes are fundamentally political and not racial organizations. *Morton v. Mancari*, 417 U.S. 535 (1974).

Clara Pueblo, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community).[7]

The Tenth Circuit recognized the inapplicability of discrimination laws to tribal membership and elections in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989), when it rejected the application of anti-discrimination statutes to the Tribe, holding that "applying the statutory prohibitions against race discrimination to a tribe's designation of tribal members would in effect eviscerate the tribe's sovereign power to define itself, and thus would constitute an unacceptable interference with a tribe's ability to maintain itself as a culturally and politically distinct entity." (citing *Santa Clara Pueblo*) (citations omitted).

Similarly, imposing the strictures of the Fifteenth Amendment onto the Department's review of tribal election procedures or results would "eviscerate the tribe's sovereign power to define itself." Allowing Plaintiffs' unprecedented Fifteenth Amendment claim against the Federal Defendants to proceed would also contravene the Supreme Court's admonition to federal courts not to unduly interfere with matters of tribal sovereignty and membership, which stated, "[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." *See, e.g. Santa Clara Pueblo*, 436 U.S. at 72 n. 32. For these reasons, Plaintiffs' claim based on the Fifteenth Amendment fails to state a claim upon which relief could be granted, and must be dismissed.

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[7] The tribal right to define its own membership may be abrogated by Congress by statute or treaty. Here, the Treaty of 1866 does limit, in certain respects, the Cherokee Nation's right to define its membership. *See supra* at p. 1, FAC ¶ 27.

G. To the Extent that Plaintiffs Bring a Claim for Breach of Fiduciary Duty, this Claim Should Be Dismissed Because Federal Defendants Have No Trust Duty to Intervene on Behalf of Plaintiffs

Although Plaintiffs style their First Cause of Action as a "Violation of United States Constitution/Federal Law," one of the allegations in this claim is that the Department has breached a fiduciary duty owed to the Cherokee Freedmen. FAC ¶ 95. To the extent that this can be considered a separate ground for this Cause of Action, it also fails to state a claim.

The United States does not have a fiduciary relationship at issue here because the Freedmen's claims do not involve trust assets. In order for a fiduciary relationship to exist, each of the necessary elements of a common-law trust must be present: a trustee, a beneficiary, and a trust corpus. *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (noting that a trust corpus is an essential element of a fiduciary relationship, and defining United States' trust responsibility with regard to trust assets only). Plaintiffs' claims concern political rights, not trust assets. The United States does not have a trust responsibility with regard to political rights. *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d at 1465; *Wheeler v. United States Dept. of the Interior*, 811 F.2d 549 (10th Cir. 1987) (Cherokee election dispute involved no trust corpus).

In addition, in order for Plaintiffs to state a valid claim for breach of fiduciary duty, they must point to a specific statute, regulation, or treaty that imposes a specific duty on the Federal Defendants with regard to the Plaintiffs' rights. "[T]he fiduciary relationship springs from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities." *Pawnee v. United States*, 830 F.2d 187, 192 (Fed. Cir. 1987) (quoting *United States v. Mitchell*, 463 U.S. at 224). Thus, where the federal government has fully complied with all applicable statutes, treaties, regulations, and contractual provisions, no judicially enforceable

claim for breach of trust claim can be stated.[8] *Pawnee*, 830 F.2d at 192; *see also Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

Plaintiffs' First Cause of Action alleges that the Department "has breached its fiduciary duty to protect the citizenship rights of the Freedmen, including without limitation their voting rights and rights to run for office." FAC ¶ 95. Plaintiffs fail to point to any statute, regulation, or treaty that mandates Federal Defendants to take the kind of action that Plaintiffs seek in the prayer for relief contained in their complaint (i.e., declaring that the United States may not approve any election or other act by the Cherokee Nation in derogation of the rights of the Freedmen, and enjoining the Bureau of Indian Affairs from recognizing the results of the May 24, 2003, election until a lawful election takes place).

The Tenth Circuit has twice rejected claims that mirror Plaintiffs' claims here. In *Wheeler v. United States Department of the Interior*, 811 F.2d 549, which involved a Cherokee Nation election dispute, the Tenth Circuit rejected the assertion that the Department has a fiduciary duty to "protect the Cherokee Indians' right to self-government" by involving itself in election disputes, finding that no trust corpus was involved, and that "and no statute or regulation requires Department involvement in Cherokee election disputes." *Id.* at 552-553. And, in *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, a case closely paralleling this one, the Tenth

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[8] In previous briefing and opinions, *Seminole Nation v. United States*, 316 U.S. 286 (1942), has been cited as supporting the claim for breach of fiduciary duty. *See Vann*, 467 F. Supp. 2d at 71. The ruling in *Seminole Nation* supports the rule that prior to finding a fiduciary duty on the part of the United States, there must be a trust corpus and a statute, regulation, or treaty defining the United States' obligations. In *Seminole Nation*, the United States was obligated by treaty to pay annual annuities to members of the Seminole Nation. Thus, unlike here, there was both a trust corpus (funds designated to benefit individual Indians), and a federal duty defined by law. *Seminole Nation* did not create a general fiduciary duty on the part of the United States to intervene in tribal election or membership disputes, as Plaintiffs assert here.

Circuit rejected a suit brought by Cherokee Freedmen against the United States and the Cherokee Nation alleging violations of "a broad array of constitutional and statutory provisions by denying Plaintiffs the right to vote in tribal elections and the right to participate in federal Indian benefits programs." *Id.* at 1458. The court found that the Plaintiffs had failed to state a claim against the Federal Defendants, relying on *Wheeler* to conclude that "Plaintiffs had no cause of action based on the government's non-intervention in the tribal election process." *Id.* at 1465. As was true in the *Wheeler* and *Nero* cases, there is no trust corpus at issue here, and there is no statute or regulation that requires the Department's involvement. Thus, Plaintiffs fail to state a claim for breach of fiduciary duty.

III. Plaintiffs' Second Cause of Action Should Be Dismissed for Lack of Jurisdiction and Failure to State a Claim

Plaintiffs' Second Cause of Action is styled as "Judicial Review of Agency Action Under the APA." In this Cause of Action, Plaintiffs identify four purported agency actions, or inactions, for which they seek review. Two of these alleged actions, or inactions, concern the Cherokee Nation's 2003 election. These allegations fail because they fail to state a proper claim under the APA, and because they are moot. Plaintiffs also seek review under the APA of the Department's August 2007 approval of the amendment to the Cherokee Constitution removing the requirement that the Secretary of the Interior must approve future constitutional amendments. This claim fails for lack of standing and failure to state claim under APA. Plaintiffs also make a general allegation that the Department has failed "to follow the law as set forth in the *Seminole I* and *Seminole II* decisions." FAC ¶ 104. To the extent that this purports to present a separate basis for the APA claim, this allegation fails to state a claim under the APA. Finally, each of Plaintiffs' APA claims fails for the additional reason that Plaintiffs have an adequate remedy by

seeking relief against Cherokee officials in this suit and in tribal court; thus, suit is barred under the APA.

A. Plaintiffs' Claim That the Department Failed to Require the Filing of Election Procedures Prior to the 2003 Election Fails to State a Claim Under the APA

In the Second Cause of Action, Plaintiffs allege that the Department violated the APA in connection with the Cherokee Nation's July 2003 election "[b]y failing to require the filing of procedures pursuant to the Act of 1970 prior to the July 2003 Election, the Federal Defendants have breached their fiduciary duty." FAC ¶ 101. This allegation fails to state a valid claim under the APA.

While the Plaintiffs do not specify the specific section of the APA upon which this claim relies, the Supreme Court has recently addressed the proper framework for addressing APA claims alleging that an agency failed to act. In *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004), the Court noted that "[t]he APA provides relief for a failure to act in [5 U.S.C.] § 706(1): 'The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.'" *Id.* at 62. The *SUWA* Court held that the APA permits only suits challenging an agency's failure to act when the Plaintiffs allege that the agency failed to take a discrete action that the agency was legally required to take. *Id.* at 62-63. For a agency action to be legally required, it must be "non-discretionary." *Id.* at 64.

Here, Plaintiffs have pointed to no non-discretionary act that the Department was "legally required" to take. The Principal Chiefs Act provides that the principal chief of the Cherokee Tribe "shall be popularly selected by the . . . Tribe in accordance with procedures established by the officially recognized tribal spokesman and or governing entity" and that "[s]uch established procedures shall be subject to approval by the Secretary of the Interior." Pub. L. 91-495; 84 Stat.

1091. The phrase "shall be subject to approval by the Secretary of the Interior" authorizes the Secretary to approve the procedures; it does not create a mandatory or non-discretionary duty to do so.

In *Florida Public Interest Research Group Citizen Lobby, Inc. v. E.P.A.*, 386 F.3d 1070, 1080 (11th Cir. 2004), the Eleventh Circuit interpreted similar language and found that it did not create a mandatory or legally required duty for the agency to act. In that case, EPA's regulations permitted states to establish policies which are "subject to EPA review and approval." *Id.* at 1080 n. 15. The Court held that "[t]his language does not create a mandatory duty subject to APA regulation, and 'the only agency action that can be compelled under the APA is action legally required.'" *Id.* (citing *SUWA*). Similarly, because Plaintiffs here have failed to allege that the Department has failed to take a legally required action, they lack standing to bring this claim under the APA, and the claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).[9/]

B. Both of Plaintiffs' Claims Based on the 2003 Election Also Fail Because They Are Moot

In addition to Plaintiffs' allegation that the Department improperly failed to require the filing of procedures prior to the 2003 election, Plaintiffs also allege that "[b]y recognizing Chadwick Smith as the Principal Chief of the Cherokee Nation, as well as other officials elected to office in the illegal July 2003 Election, the Federal Defendants have approved the racially discriminatory and unlawful disenfranchisement of the Freedmen." FAC ¶ 102. The 2003 election results have been overtaken by the 2007 results; thus, these claims should be dismissed

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[9/] In the alternative, the Department moves for dismissal of the claim pursuant to Rule 12(b)(6). *See, e.g. Long Term Care Pharmacy Alliance v. Leavitt*, 530 F. Supp. 2d 173, 187 n. 7 (D.D.C. 2008) (recognizing that courts have addressed this question as both a matter of standing under Rule 12(b)(1) and as a failure to state a claim under Rule 12(b)(6), but electing to dismiss the claim under Rule 12(b)(1)).

as moot.

"Article III, Section 2 of the Constitution permits federal courts to adjudicate only actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52, 56 (D.C. Cir. 2001) (citing *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992)).

Plaintiffs do not clearly state what relief they request for this claim. The Second Cause of Action requests only a declaration that "the complained of actions of the Federal Defendants are arbitrary, capricious, an abuse of discretion and not in accordance with law." FAC ¶ 105. However, the only relief allowed under the APA for an alleged failure to act would be an order "compel[ling] agency action." 5 U.S.C. § 706(1). Here, an order compelling the Department to approve or disapprove election procedures under the Principal Chiefs Act would be meaningless, since the Department has already done so, as part of the 2007 election.[10/]

To the extent that Plaintiffs challenge the Department's recognition of the results of the 2003 elections, a declaration ordering the Department to not recognize those election results would also be meaningless, since the Cherokee Nation held a subsequent election in 2007, according to procedures approved by the Department. *See, e.g., Rosales v. United States*, 477 F.

[10/] As Plaintiffs are aware, the Federal Defendants requested that the Cherokee Nation provide them with election procedures for the 2007 Cherokee Nation national elections. The Cherokee Nation provided the Department with a copy of all those procedures by May 22, 2007. Federal Defendants reviewed those procedures and issued their approval of them on May 25, 2007. *See* Artman Decl. ¶ 7.1, and attachment B (Ex. 1) (previously submitted with the Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction). The Cherokee Nation subsequently held elections on June 23, 2007, and elected Chadwick Smith as Chief.

Supp. 2d 119, 129-30 & n.14 (D.D.C. 2007) (challenges to tribal elections are mooted by subsequent, unchallenged election); *see also Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (action challenging Ohio Board of Elections action with respect to election ballot was moot once the election was over); *Grano v. Barry*, 733 F.2d 164, 167 (D.C. Cir. 1984) (action seeking injunction pending a referendum was moot once referendum was held); *O'Callaghan v. State*, 920 P.2d 1387 (Alaska 1996) (election challenge is mooted by subsequent election). The 2003 election results have been eclipsed by the 2007 results, and Plaintiffs have alleged no wrongdoing on the part of the Department with respect to the 2007 election of the Principal Chief. Thus, Plaintiffs' challenge to the Department's alleged failure to require the filing of election procedures prior to the July 2003 election and challenge to the Department's recognition of those election results is moot, and should be dismissed for lack of subject matter jurisdiction.

C. Plaintiffs Do Not Have Standing to Challenge the Approval of the June 2007 Vote Removing the Requirement for the United States to Approve Amendments to the Cherokee Constitution

Plaintiffs' Fourth Amended Complaint adds a claim for violation of the APA based on the Department's August 9, 2007 letter approving the constitutional amendment to the Cherokee Nation Constitution which removes the requirement that the Cherokee Nation submit future amendments for review and approval by the Secretary of the Interior. FAC ¶ 103. Plaintiffs have failed to demonstrate standing to bring this claim.

As described by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992) (citations, internal quotation marks, and alterations omitted):

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between

> the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Plaintiffs bear the burden of establishing these elements. *Id.* at 561.

Plaintiffs allege that the Department's August 9, 2007 approval of the Cherokee Constitutional amendment "permitted Chadwick Smith and his administration to conduct the following illegal acts," including allowing Chadwick Smith to "call an election to amend the 1999 Constitution to terminate the Freedmen's citizenship rights" and "implement policies and procedures to deprive the Freedmen of their citizenship rights." FAC ¶ 103. Here, even assuming *arguendo* that Plaintiffs have suffered an injury-in-fact stemming from the curtailment of their citizenship rights, that injury does not have a causal connection with the Department's decision to approve the Cherokee Constitutional amendment removing the requirement for Departmental approval of future amendments. Furthermore, Plaintiffs have not demonstrated that their claimed injury would be redressed by a favorable decision.

Plaintiffs do not allege that the Department's action approving the amendment directly affected them; rather, they allege that they were harmed because the Department's actions permitted a third party – Chadwick Smith – to injure their rights. It is well-established that Plaintiffs bear a higher burden to show causation and redressability when a plaintiff's asserted injury "arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*."[11/] *Lujan*, 504 U.S. at 562. In these cases, "[t]he existence of one or more of the

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[11/] In this case, the alleged injury does not even stem from the government's asserted ***regulation*** of a third party, as the authority to approve constitutional amendments stems from the Cherokee Constitution itself, and not from the Department's regulatory authority.

essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (internal quotations and citations omitted).

Here, Plaintiffs have failed to allege facts showing that the complained-of injury was caused by the Department's action. Plaintiffs allege that the Department's approval of the Constitutional amendment "permitted" Chadwick Smith to conduct a variety of illegal acts. The Department's action did nothing of the sort. To the contrary, it simply approved a duly-enacted amendment to the Cherokee Constitution that removed the requirement for Secretarial approval for future Constitutional amendments.[12/] Plaintiffs have not shown that the Department's action has caused the Cherokee Nation to take any action to harm the Freedmen. Notably, Plaintiffs' Fourth Amended Complaint does not allege that Chadwick Smith or the Cherokee Nation has taken ***any*** action subsequent to the August 9, 2007 approval of the amendment with respect to the Freedmen. Instead, each of the complained-of actions by the Tribe occurred prior to the approval of the amendment. Plaintiffs themselves allege that "[u]pon information and belief, no amendments have been made to the Cherokee Constitution after the BIA letter dated August 9, 2007." FAC ¶ 76. In order to show standing, the record must present "substantial evidence of a causal relationship between government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." *Renal Physicians Ass'n v. U.S. Dep't of Health*

[12/] Notably, the Department disapproved a similar May 2003 amendment, in part on the ground that the Cherokee Nation had removed the Freedmen members from the tribe "in apparent violation of the 1866 treaty." FAC ¶ 9; FAC Ex. 2. In contrast, Freedmen citizens were permitted to register and vote in the 2007 election.

and Human Servs., 489 F.3d 1267, 1275 (D.C. Cir. 2007) (citing *National Wrestling Coaches Ass'n v. Dep't of Education*, 366 F.3d 930, 940 (D.C. Cir. 2004)). Where, as here, the third party conduct causing the alleged injury occurred ***before*** the challenged agency decision, no such causal relationship can be found.

Nor did the Department's approval of the amendment "authorize conduct that would otherwise have been illegal." *See, e.g.*, *Renal Physicians Ass'n*, 489 F.3d at 1275 (citing *National Wrestling*). To the contrary, the letter approving the amendment explicitly states that "[n]othing in this approval shall be construed as authorizing any action that would be contrary to Federal law." FAC Ex. 22. This disclaimer includes actions that would violate the Treaty of 1866.

To the extent that Plaintiffs allege that the Department's approval of the Constitutional amendment allowed Chadwick Smith to "operate under the unapproved 1999 constitution," FAC ¶ 103, this is false. As Plaintiffs themselves acknowledge, the Department informed Chadwick Smith that the "Cherokee Nation's constitution requires Secretarial approval of amendments and neither the Secretary nor any authorized representative of the Secretary has approved the amendment" creating the 1999 constitution. FAC Ex. 19. The Department's approval of the June 2007 amendment removing the Secretarial approval requirement did not change this status quo, much less allow Chadwick Smith to operate under an invalid constitution. Plaintiffs have failed to show that the Department's approval of the constitutional amendment has caused them any concrete injury.

Nor have Plaintiffs shown that their alleged injury would be redressed by an order reversing the Department's decision to approve the amendment. To establish redressability at the pleading stage, this Circuit requires "that the facts alleged be sufficient to demonstrate a

substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Renal Physicians Ass'n*, 489 F.3d at 1275 (citing *National Wrestling*). Here, the complained-of actions of the Cherokee Nation – in particular, the March 3, 2007 constitutional amendment that purported to remove the Freedmen from the Tribe – preceded the Department's approval of the amendment, and there is no reason to believe that the Court's invalidation of that approval would cause the Cherokee Nation to change its actions. Where, as here, "it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve," the redressibility prong of the standing analysis is not met. *Lujan*, 504 U.S. at 571.

D. Plaintiffs' Claim Challenging the Department's Approval of the Constitutional Amendment Fails to State a Claim Under the APA

While there is a presumption in favor of review of agency action under the APA, section 701(a)(2) of the Administrative Procedure Act precludes judicial review where agency action is committed to agency discretion by law. Agency action is committed to the agency's discretion when "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotations omitted), or there is "no meaningful standard against which to judge the agency's exercise of discretion." *See also Heckler v. Cheney*, 470 U.S. 821, 830 (1985) (agency decision not to take enforcement action not reviewable because decision is committed to agency discretion); *Shoshone-Bannock Tribes*, 56 F.3d at 1482 (no meaningful standard to apply to assess Attorney General's discretion in deciding whether to assert water rights claims on behalf of tribe); *Mansur v. Albright*, 130 F. Supp. 2d 59, 61 (D.D.C. 2001) (when no statute or regulation limits the agency's discretion to revoke visa, "there is no law to apply to the Secretary's discretionary

revocation, and this court lacks jurisdiction to review the revocation by the Secretary's delegate.")

Here, Plaintiffs have pointed to no statute or regulation that imposes any limitations on the Secretary's authority to approve the Cherokee Nation's constitutional amendments. The authority to do so stems from the Secretary's general authority over Indian affairs, *see* 25 U.S.C. § 2, and the specific grant of this authority in the Cherokee Constitution. While section 701(a)(2) may be a narrow exception to the presumption of reviewability of agency action, it applies here where there is no statutory or regulatory limit on the Department's discretion. Therefore, Plaintiffs have failed to state a claim under the APA. *See also supra* section III.A (addressing failure of Plaintiffs to state claim under the APA for Department's review of election procedures).

E. Plaintiffs' Allegation That the Department has Failed to Follow *Seminole I* and *Seminole II* Does Not State a Claim Under the APA

Plaintiffs' general allegation that "[b]y failing to follow the law as set forth in the *Seminole I* and *Seminole II* decisions, the Federal Defendants have failed to follow their own recognized laws and policies. . . " (FAC ¶ 104) fails to state a claim under the APA. To state a claim under the APA, Plaintiffs must challenge a "final agency action," 5 U.S.C. § 704, or an agency's failure to take a discrete, legally required action. 5 U.S.C. § 706, *SUWA*, 542 U.S. at 61-62. Federal court jurisdiction under the APA "does not extend to reviewing generalized complaints about agency behavior." *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006).

Here, Plaintiffs have not pointed to any final agency action or any failure to take a discrete, legally required action. A general allegation that the Department has not taken the same actions as it did in the *Seminole* case in this, an entirely different case, fails to present a

valid claim under the APA.

F. This Action Does Not Fit Within the APA Waiver of Sovereign Immunity Because the Freedmen Have an Adequate Remedy to Vindicate Their Rights By Seeking Relief Against the Cherokee Nation

The APA is a limited waiver of sovereign immunity. It does not give wholesale rights of review. It does not extend to agency action or inaction where a plaintiff has another judicial remedy to prevent any injury to its interests. *See* 5 U.S.C. § 704. With respect to the injuries asserted by Plaintiffs, all are ultimately related to some action taken directly by the Cherokee Nation (i.e. deprivation of citizenship rights, including the right to register to vote). In other words, the allegations against the Federal Defendants are derivative in nature – Plaintiffs assert that the Department should take action in response to the actions taken by the Cherokee Nation. Because the Court of Appeals has determined that it can exercise jurisdiction over Chadwick Smith, Principal Chief of the Cherokee Nation, Plaintiffs can seek relief in this matter directly against an officer of the Tribe. *Vann*, 534 F.3d at 750. Accordingly, Plaintiffs have an adequate alternate remedy and, therefore, the APA does not provide a waiver of sovereign immunity to challenge any derivative action or inaction attributed to the Department.

In addition, as evidenced by the suit pending in the Cherokee Nation's courts, Plaintiffs have an adequate remedy in tribal court to address their grievances, which are fundamentally against the Tribe itself. As recognized by the Supreme Court, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara*, 436 U.S. at 65-66.

The APA limits judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Where,

as here, Plaintiffs have another judicial vehicle to vindicate their rights, they cannot use the APA to force review of an action or inaction. *See Gillis v. United States Dep't of Health and Human Servs.*, 759 F.2d 565, 577-78 (6th Cir. 1985); *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1531 (D.C. Cir. 1983) (where "an adequate remedy for the wrong allegedly inflicted on appellants" by the Office of Revenue Sharing exists, there is no APA review); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 746 n. 2 (D.C. Cir. 1990) ("We conclude instead that plaintiffs no longer have any claim under the APA because, for the injuries they continue to assert, they have another adequate remedy.").

This is particularly true where, as here, Plaintiffs' suit against the Department is principally a challenge to the Tribe's actions, not the Department's, and seeks relief aimed at getting the Tribe to change its membership determinations. As two Courts of Appeals have recognized, Plaintiffs challenging tribal membership decisions cannot "end run" well-settled principles of tribal immunity and self-determination by framing their suit as one against federal agencies. *See Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (rejecting suit against federal agencies requesting an order forcing the tribe to recognize plaintiffs as members and prohibiting the agencies from distributing federal funds until plaintiffs were recognized as members); *Ordinance 59 Ass'n v. U.S. Dep't of Interior*, 163 F.3d 1150, 1160 (10th Cir. 1998) (noting that a "federal court order compelling the Secretary to comply with the requests of [plaintiffs] would not have the effect of enrolling [the alleged members] in the tribe because tribes, not the federal government, retain authority to determine tribal membership"). As in these cases, this Court should hold that Plaintiffs must seek relief in their membership disputes with the Tribe in either a tribal forum or through claims brought against tribal officers in this Court, and should not be permitted to seek relief against the Tribe through the vehicle of a thinly-disguised claim under

the APA. Thus, even if Plaintiffs could find a viable claim against the Federal Defendants for action or inaction taken with respect to the Cherokee Nation, the APA does not permit review of any such claims against Federal Defendants because Plaintiffs have an alternative remedy in court, and Plaintiffs' APA claim should be dismissed.

IV. Plaintiffs Have Not Demonstrated Standing to Bring Their Fourth Cause of Action

Plaintiffs' Fourth Cause of Action alleges that the "denial of entitlement benefits deriving from the funds distributed by the United States to the CNO is a denial of equal protection of the laws. . . ." FAC ¶ 116. Plaintiffs have failed to allege facts supporting their standing to bring this claim.

Under Article III of the Constitution, "a showing of standing is an essential and unchanging predicate to any exercise of [a court's] jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (citing *Lujan*, 504 U.S. at 560). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Lujan*, 504 U.S. at 561. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," and the court "presum[es] that general allegations embrace the specific facts that are necessary to support the claim." *Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (quoting *Lujan*, 504 U.S. at 561). To demonstrate standing, Plaintiffs must establish that they have "personally . . . suffered some actual or threatened injury," which may be "fairly . . . traced to the challenged action" and is "likely to be redressed by a favorable decision" of the court. *Fla. Audubon Soc'y*, 94 F.3d at 661 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Here, Plaintiffs have not made sufficient factual allegations to demonstrate that they have been injured by any "denial of entitlement benefits" deriving from funds administered by the

Department. Indeed, it is unclear from Plaintiffs' complaint exactly what "entitlement benefits" they are referring to, whether they allege that any such benefits have actually been denied them, and whether such denial is fairly traceable to any challenged action of the Department. Because Plaintiffs have failed to make sufficient factual allegations to demonstrate that they have standing to pursue this claim, the Fourth Cause of Action should be dismissed for lack of jurisdiction.

V. This Court Should Also Modify or Dismiss Claims for Relief 130 through 134

In paragraphs 130 and 131, Plaintiffs request that this Court "[d]eclar[e] that the United States government . . . may not approve any election or any other act by the Cherokee Nation in derogation of the rights of its Freedmen citizens" and that the Court "[e]njoin[] Federal Defendants and the BIA from recognizing the amendments to the Cherokee Constitution of 1976 . . . until such time as Freedmen citizens are permitted to vote for ratification of the amendments." Under the APA, judicial relief is limited to an order compelling agency action unlawfully withheld or holding unlawful and setting aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. 706(1) & (2). Not only does this requested relief exceed what is permitted by the APA, it also is a thinly disguised attempt to regulate the Tribe's actions through a suit against the Federal Defendants. As this Court recognized in *St. Pierre v. Norton*, 498 F. Supp. 2d 214, 219 (D.D.C. 2007) (Kessler, J.), claims that essentially seek "to change the Tribe's chosen method for adopting new tribal members," even if nominally brought against the Department under the APA, fail for inability to join the Tribe as an indispensable party. The *St. Pierre* court noted that ruling in favor of plaintiffs "would essentially reverse current tribal law regarding membership determinations," and that such a ruling "would also totally undermine the Tribe's authority to

make independent membership determinations without federal interference." *Id.* at 220-221. Similarly, the broad relief requested by Plaintiffs here would impermissibly involve the federal courts in tribal membership determinations. *See also Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996) (noting that "there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe's membership determinations").

Plaintiffs' requests for relief in paragraphs 132, 133, and 134 fail for the same reasons, and also must be dismissed because the relief requested exceeds the scope of any proper claim stated by Plaintiffs, as well as the authority of this Court. Moreover, these claims impermissibly infringe on the right of the United States to control government-to-government relations with Indian tribes. These paragraphs request that this Court "[e]njoin[] Federal Defendants and the BIA from recognizing any action of the Cherokee Nation under the alleged 1999 Cherokee Constitution until such time as all Freedmen citizens are permitted to vote for ratification of the 1999 Constitution" (FAC 132); "[e]njoin[] the Federal Defendants from recognizing the actions of the Cherokee Nation until such time that it is constituted with Freedmen representatives, operates under a Constitution that has been ratified at an election including Freedmen citizens, and all Freedmen entitled to citizenship and the right to vote are granted the same ability to do so as other Cherokee citizens" (FAC 133), and "[e]njoin[] the BIA from recognizing the Chadwick Smith Administration or any subsequent Cherokee Nation government until it is lawfully constituted and operating in compliance with the Treaty of 1866." (FAC 134).

Again, this requested relief far exceeds what is available under the APA. The APA permits a court to "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that is arbitrary, capricious, or in violation of law. 5 U.S.C. § 706. Even assuming *arguendo* that Plaintiffs have stated any valid claim under the

APA, the requested relief fits within neither of these categories, and thus falls outside the authority of the Court under the APA. *See, e.g. SUWA*, 542 U.S. at 64 (noting that section 706(1) "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act") (citations omitted); *Benzman v. Whitman*, 523 F.3d 119, 132 (2d Cir. 2008) (plaintiffs' request for court order requiring EPA to prospectively do testing, monitoring, and additional clean up was not relief available under APA section 706(2)). The APA's waiver of sovereign immunity cannot be properly read as an authorization for courts to prospectively and broadly manage the Department's relations with a Tribe. *See SUWA*, 542 U.S. at 64 (plaintiff cannot seek broad programmatic changes through APA suit; such changes are left to the discretion of the Executive and Legislative branches) (citing *Lujan*, 497 U.S. at 891).

The requested relief, which would enjoin the United States from recognizing "the actions of the Cherokee Nation" and its leadership, should also be stricken on the grounds that it impermissibly infringes on the United States' authority to control government-to-government relations with Indian tribes. The decision of whether the United States will recognize an Indian tribe, and interact with the Tribe on a government-to-government basis, is an authority that is vested, as an initial matter, in the political branches of the government. This is a fundamental principle that has been recognized by numerous courts. *E.g., United States v. Sandoval*, 231 U.S. 28, 46 (1913) ("[T]he questions whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."); *see also United States v. Holliday*, 70 U.S. (3 Wall) 407, 419 (1865) ("In reference to all matters [of tribal organization], it is the rule of this court to follow the action of the executive and other

political departments of the government, whose more special duty it is to determine such affairs."); *see also Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 484 (1st Cir.1987) (same). For these reasons, Plaintiffs' claims for relief in paragraphs 130-134 should be dismissed.

VI. Plaintiffs' Claim for Relief Under the Treaty of 1866 and Elements of Plaintiffs' Requested Relief Should Also Be Dismissed for Inability to Join the Cherokee Nation as an Indispensable Party

This Court has previously found that the Cherokee Nation is a necessary party pursuant to Rule 19(a), at least with respect to the First and Second Causes of Action. *Vann*, 467 F. Supp. 2d at 66. After holding that the Cherokee Nation was immune from suit, the Court of Appeals remanded to the district court to determine "whether 'in equity and good conscience' the suit can proceed with the Cherokee Nation's officers but without the Cherokee Nation itself." *Vann*, 534 F.3d at 756. On November 12, 2008, at the Court's request, the Federal Defendants informed the Court that they would take a position on this issue in subsequent briefing.

To the extent that Plaintiffs state valid claims against the Federal Defendants at all, these claims must be limited to claims under the APA that challenge discrete agency action, and limit the requested remedy to that available under the APA. With the exception of the claim regarding violation of the Treaty of 1866, Plaintiffs' claims that meet the APA criteria, to the extent that any such claims exist, could proceed against the Federal Defendants with the presence of the Cherokee Nation's officers in the case, but without the Cherokee Nation itself.[13/] However, Plaintiffs' claim against the Federal Defendants alleging violation of the Treaty of 1866 must be

[13/] As discussed in this motion, many of Plaintiffs' claims are ill-defined, do not specify their basis for relief, fail to fall within this Court's subject matter jurisdiction, or fail to state a claim. If Plaintiffs modify or clarify any of their claims, the government reserves the right to reevaluate the necessity of the Tribe as a party to this action.

dismissed for inability to join an indispensable party. In addition, the Court must narrow the relief available to Plaintiffs, as certain aspects of the relief requested fail for the additional reason that they implicate the Cherokee Nation's sovereign interests.

A. Plaintiffs' Claim Under the Treaty of 1866 Cannot Proceed Without the Cherokee Nation

Plaintiffs' First Cause of Action includes a general allegation that the Department's actions violate the Treaty of 1866. While this claim fails on independent grounds, *see supra* at section II.C, it also fails because the Cherokee Nation is an indispensable party to this claim. Under Rule 19(b), the court must determine whether the action should proceed without a necessary party after considering:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Applying the first factor, the Treaty of 1866 is an agreement between two sovereigns – the Cherokee Nation and the United States. A determination of the meaning of the Treaty without the Nation present would impede the Tribe's ability to protect its interests in this issue. *See, e.g. Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341 (6th Cir. 1993) (other bands who were party to fishing rights treaty were indispensable to suit interpreting treaty). It is well-established law that parties to a contract are generally indispensable parties to suits seeking to modify, invalidate, or interpret a contract. *See Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (Kansas is indispensable party to suit challenging validity of

gaming compact to which it is a party); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890 (10th Cir. 1989) (tribe is indispensable party to suit seeking review of bingo management contracts to which tribe is party); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987) (tribe is indispensable party to suit involving oil leases on reservation that tribe claimed interest in); *see also Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."). And, the Supreme Court has recently affirmed that a missing party's sovereign immunity should be a compelling factor in the Rule 19(b) analysis. *Republic of Phillippines v. Pimentel*, 128 S. Ct. 2180, 2190-91 (2008). A sovereign's interest in its rights under a treaty are subject to at least the same protections as its rights under a contract; thus, this factor weighs strongly in favor of finding that the Tribe is indispensable.[14/]

Furthermore, a court declaration regarding the meaning of the treaty and the parties' rights thereunder could also prejudice the United States by subjecting it to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." This is because any judgment regarding the meaning of the Treaty would be binding on the United States, but not on the Cherokee Nation, which could continue to assert its view of the Treaty in its relations with the United States. *See, e.g., Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150 (9th Cir. 2002) (finding defendant would be subject to inconsistent obligations if the other party to a lease – the Navajo Nation – is not a party to the

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[14/] Moreover, in this Circuit, "there is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit, because immunity may be viewed as one of those interests compelling by themselves." *Kickapoo Tribe*, 43 F.3d at 1496 (citations and internal quotations omitted).

suit); *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991) (court could not accord complete relief because "[j]udgment against the federal officials would not be binding on the Quinault nation, which could continue to assert sovereign powers."). This could result in multiple lawsuits against the United States and the "inconsistent obligations" that Rule 19(a) is specifically designed to prevent.

B. Elements of the Relief Sought By Plaintiffs Must Also Be Struck for Failure to Join an Indispensable Party

As discussed *supra* at section V, Plaintiffs seek impermissibly broad relief, and fail to tie this requested relief to any particular claim. Plaintiffs' requests for relief in paragraphs 130, 131, 132, 133, and 134 fail for the additional reason that they implicate the sovereign interests of the Cherokee Nation, which is an indispensable party that cannot be joined. These claims for relief must be narrowed or stricken in order for the case to proceed.

As discussed *supra*, requests for relief 130 and 131 are a thinly disguised attempt to regulate the Tribe's actions through a suit against the Federal Defendants. Claims that essentially seek "to change the Tribe's chosen method for adopting new tribal members," even if nominally brought against the Department under the APA, fail for inability to join the Tribe as an indispensable party. *St. Pierre v. Norton*, 498 F. Supp. 2d at 219. For the same reasons here, the elements of relief that seek to regulate the Cherokee Nation's membership decisions should be dismissed because the Cherokee Nation, an indispensable party, cannot be joined.

Furthermore, in paragraphs 132-134, Plaintiffs request that this Court enjoin the Federal Defendants from recognizing any action of the Cherokee Nation or from recognizing the Cherokee government until the Tribe has taken certain actions to provide the Freedmen with citizenship and voting rights. Such relief is not only beyond the authority of this Court, see

discussion *supra* at section V, and impermissibly seeks to interfere with tribal membership determinations, but it also would prejudice the Tribe itself and impose an "intolerable burden on governmental functions." *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992). In addition to requiring an interpretation of the Treaty to which the Cherokee Nation is a party, *see discussion supra* at section VI.A, the requested relief would essentially halt government-to-government relations between the United States and the Tribe. This indisputably infringes on the core sovereign functions and immunity of the Tribe itself.

Nor can Chadwick Smith adequately represent the Cherokee Nation with respect to this relief. In *Shermoen v. United States*, 982 F.2d at 1320, the Ninth Circuit recognized that a suit should be considered against the sovereign, as opposed to against an officer of the sovereign, "if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." In *Shermoen*, the court found that the relief sought in a suit challenging the constitutionality of a tribal settlement act "would prevent the absent tribes from exercising sovereignty over the reservations allotted to them by Congress" and that this would present an "intolerable burden on governmental functions." *Id.* at 1320. As a result, the court found that the suit could not proceed without the tribe, even if tribal officials were joined. Similarly, here, Chadwick Smith cannot adequately represent the Cherokee Nation with respect to claims for relief that directly implicate both a treaty to which the Tribe is a party and the government-to-government relationship between the Tribe and the United States. Thus, Plaintiffs' claims seeking relief under the Treaty of 1866, and Plaintiffs' claims for relief 130, 131, 132, 133, and 134, should be narrowed or dismissed for the additional reason that they cannot proceed without the Cherokee Nation, which cannot be joined due to its sovereign

immunity.

CONCLUSION

For the reasons stated herein, Plaintiffs' First, Second, and Fourth Causes of Action against the Federal Defendants should be dismissed for lack of subject matter jurisdiction, failure to state a claim, and inability to join an indispensable party. Furthermore, Plaintiffs' requests for relief in paragraphs 130 through 134 must be stricken as failing to state relief that can be properly granted by this Court and for inability to join an indispensable party.

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Respectfully Submitted,

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