Case No. 2011-3113

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HARVEST INSTITUTE FREEDMAN FEDERATION, LLC, LEATRICE TANNER-BROWN, *ET AL.*

Plaintiffs-Appellants.

v.

UNITED STATES OF AMERICA, *ET AL.*

Defendants- Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
CASE NO. 2:10-CV-01131

REPLY BRIEF OF PLAINTIFFS-APPELLANTS HARVEST INSTITUTE FREEDMAN FEDERATION, LLC, LEATRICE TANNER BROWN, *ET AL.*

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*Counsel for Appellants, Percy Squire, was indefinitely suspended from the practice of law by the Ohio Supreme Court on November 3, 2011. On November 3, 2011 and November 4, 2011, in accordance with 6th Cir. R. 46, Mr. Squire notified the Court of the action of the Ohio Supreme Court and requested an opportunity to show cause why reciprocal deference should not be accorded to the Ohio Supreme Court suspension due to infirmities in the record and a denial of due process of law. See, In re. Ruffalo 390 U.S.544 (1968) and Theard v. United States, 354 U.S.278 (1957). See, Sixth Circuit Case No. 11-9540.

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Defendants- Appellees.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1, Appellants make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome?

   No.

s/Percy Squire _____ April 9, 2012
Percy Squire
Counsel for Appellants

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ARGUMENT

I. INTRODUCTION AND BACKGROUND

This is an appeal from an order dismissing Appellants' action for a declaration of unconstitutionality and an injunction against implementation of federal legislation that is racially biased and threatens to cause immediate, grave and irreparable harm to Appellants and members of their putative class. Title I of HR 4783, the "Claims Resolution Act of 2010" (hereinafter "The Act") was signed into law by the President of the United States on December 8, 2010. The Act which expands the jurisdiction of the United States District Court for the District of Columbia and authorizes the expenditure of $3.4 Billion dollars to fund a settlement in Eloise Pepion Cobell, et al. v. Ken Salazar, Case No. 1:96-cv-01285 (D.D.C), is racially discriminatory and causes present injury to Appellants by perpetuating past unlawful racial discrimination in violation of the Equal Protection Clause of the Fifth Amendment.

At issue in this appeal is the following:

1. Whether Appellants have standing to challenge the Act.
2. Whether the United States is presently discriminating against Appellants on the basis of race.
3. Whether the Act perpetuates past unlawful racial discrimination.

The United States has filed Opposition to Appellants' claims. The United States has alleged that Appellants lack standing to challenge the Act for the reasons

they are not holders of a trust account covered by the Act, Appellants are not owners of interests in trust or restricted land, and are not members of the class of Native American plaintiffs in Cobell v. Salazar, Case No. 1:96-cv-01285 (D.D.C.).

Appellees' arguments are baseless and entirely miss the point of this appeal, which is whether it is racial discrimination to treat two discrete groups, Freedmen and Native Americans, with identical claims in a racially disparate manner without a compelling governmental interest. The United States has a long and shameful history of overt racial discrimination against Freedmen. See, footnote 1 for examples[1]. Appellees argument that Appellants lack standing for the reason they

[1] For evidence of overt racial discrimination by the United States against Freedmen, See, August 11,1938 correspondence from the Commissioner of Indian Affairs to the Solicitor United States Department of the Interior and October 1,1941, Response , Exhibit C to United States Court of Appeals Case No.11-5158, D.C. Circuit Court of Appeals, Docket No.1351644, Enclosed here as Appendix 2. In this correspondence officials in the United States Department of Interior conspire in writing to formulate means to circumvent the provisions of the 1866 Treaties by excluding, on race-based grounds ,Freedmen from tribal citizenship. Specifically, the Commissioner of Indian Affairs requests that the Department Solicitor opine concerning the status of the Freedmen of the Five Civilized Tribes in order to "find some way to eliminate the Freedmen". The Solicitor's legally erroneous Response to the Commissioner's request was that the Tribes could use the Oklahoma Welfare Act of June 26, 1936, to eliminate Freedmen from tribal membership. This correspondence is additional evidence of the blatant and historically racially discriminatory attitude of the United States towards Freedmen. Compare the 1938 correspondence to that at Appendix 3 issued September 11, 2011, by the Assistant Secretary of Interior for Indian Affairs, Larry Echohawk, explaining the historically recognized status of Freedmen as follows:"The Department's position is, and has been, that the 1866 Treaty…vested…Freedmen with rights of citizenship in the Nation…"The Tribes and the United States were attempting to include quantum of Indian blood as a condition to tribal citizenship.

are not members of the Cobell class or do not own trust property is patently and demonstrably erroneous.

The grandfather of Appellant Leatrice Tanner-Brown, George Curls, was enrolled on the Dawes Roll of the Cherokee Freedmen, under the Dawes Act on July 1, 1902. See, Exhibit E, Appellants' Brief, for transcript of 1902 Department of the Interior Enrollment Hearing adding George Curls to Cherokee Freedmen Dawes Roll, Cherokee Freedman No. 4304. At the time of his enrollment, George Curls was five years old, having been born to former Cherokee slave parents in Indian Country, Oklahoma in 1897. See, Exhibit F, Appellant's Brief, for George Curls' death certificate.

Mr. Curls received a forty acre allotment deed from the Cherokee Tribe under the Curtis Act on December 5, 1910. See, Exhibit G, Appellants' Brief, for Certified Copy of "Allotment Deed" and Exhibit H, Appellants' Brief, for a Certified Copy of a twenty acre "Homestead Deed," also received by Mr. Curls. Under these two deeds, Mr. Curls received Curtis Act allotments equaling 60 acres. These allotments were received at a point in time when Mr. Curls was a minor, thirteen years old. These allotments and royalties from them, qualify as trust property under Cobell for reasons discussed below. Notwithstanding the

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Blood quantum was never a criterion for tribal citizenship under the 1866 Treaties. The renewed focus on blood quantum is part of an ongoing racially-based strategy to deprive Freedmen of tribal benefits and land.

equivalent status of Freedmen property, the Act, HR4783, classifies Freedmen trust property differently than Indian trust property. There is no rational basis for this disparate treatment under the Act, HR4783.

Under the Act of May 27, 1908, Appendix 1, restrictions against alienation of Freedmen allotments or royalties received therefrom, were retained for minors, such as Mr. Curls. Under the Act of 1908 any royalties from allotments owned by minor Freedmen were to be controlled by the Department of Interior. See, Sections 2 and 6 of Appendix 1. Any royalties derived from leases on Mr. Curls' allotments should have been placed in trust by the Department of Interior under the terms of Sections 2 and 6 of the 1908 Act. Instead, the Interior Department has no records of these royalties, despite evidence that the land was leased for oil and gas drilling. Moreover, a guardian, as required by Congress under the Act of 1908, was not appointed to protect the interests of Mr. Curls. The Interior Department failed to take any measures whatsoever, as required by Congress under the Act of 1908, to protect the allotment interests of Freedmen minors such as George Curls. It is conduct of this nature, among other acts of misfeasance and nonfeasance, that gives rise to the accounting, breach of trust, and fiduciary duty claims against the United States in Cobell. The Cobell claims are being resolved by HR4783 but not the identical claims of Appellants. This is why the Act is unconstitutional.

Aside from this, attached at Appendices 2 and 3, is correspondence from the United States which manifests a specific overt intention to discriminate against Appellants' ancestors on the basis of race. Appellants, descendants of persons held in bondage by the Five Civilized Indian Tribes[2], desired to pursue claims against the United States for breaches of fiduciary duty in relation to trust property held by

[2] The Five Civilized Tribes were Seminole, Cherokee, Creek, Choctaw and Chickasaw, all of which allied themselves with the Confederacy during the Civil War and attempted to maintain slaves following the War. As a result of the Tribes, disloyalty to the United States during the Civil War all territory owned by the Tribes was forfeited. The status of the Tribes was reestablished under Treaties entered in 1866.

The Treaties of 1866 came into existence as a result of the post-civil war reconciliation effort, and provided a means for the Five Tribes to re-establish their government-to-government relations with the United States, following their ill-concerned alliances with the Confederate States of America and long history of slavery. The Treaties addressed a number of issues for readmitting the Five Tribes back into the federal union, including amnesty for all war crimes committed by its citizens, establishment of federal courts in the Indian territory, the settlement of "civilized friendly Indians" within the Tribes and the adoption of all freed slaves and free colored persons into the Tribes as tribal citizens. Article IX of the Cherokee Treaty is an example, and provides:

> The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that **all freedmen who have been liberated by voluntary act of their former owners by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents there in, or who may return within six months, and their descendants, shall have all the rights of native Cherokees:** Provided, that owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.

Under the 1866 Treaties, Freedmen and their descendants, were to receive all the rights of native Tribe members. "All rights" can only be read to mean all rights, including but not limited to, the right of citizenship. See, Appellant Brief, Cherokee Nation v. Nash, Case No. SC-2011-02, Supreme Court of the Cherokee Nation,(emphasis added).

the Department of Interior. Appellants alleged in 2006 in the United States Court of Federal Claims, mismanagement by the Department of Interior of trust property owned by Appellants' Freedmen ancestors, which has caused economic harm to Appellants. On January 15, 2008, the Court of Federal Claims dismissed Appellants' claims. The Court determined that Appellants' claims were barred by the six year statute of limitation applicable to claims under the Indian Tucker Act, 28 U.S.C. §2501 and that no general trust relationship existed between the United States and Appellants' ancestors, the Freedmen. The United States Court of Appeals affirmed the District Court on March 30, 2008. The United States Supreme Court declined review on January 19, 2010. A Petition for Rehearing was denied by the United States Supreme Court on March 22, 2010.

On March 22, 2010, Appellants filed a Motion for Reconsideration in the United States Court of Claims based upon findings made in the case of Elouise Cobell, et al. v. Salazar, United States District Court for the District of Columbia, Case No. 96-1285, that contrary to the January 15, 2008 Opinion of the Federal Court of Claims, the 1866 Treaties, the Dawes Act and Curtis Act, created fiduciary duties between the Department of Interior and the Five Civilized Tribes. In addition, in Cobell the Court determined that the Tucker Act six year statute of limitations was not a bar to breach of fiduciary duty claims under the Curtis Act by members of the Five Civilized Tribes. Five Civilized Tribe members are included

within the class certified in the Cobell breach of fiduciary duty action against the United States.

Notwithstanding the direct conflict between the Court of Federal Claims and the United States District Court for the District of Columbia concerning whether fiduciary duties arose under the 1866 Treaties and the Curtis Act between the United States, the Five Civilized Tribes and their members, which by operation of the civic parity provisions of the 1866 Treaties would also apply to Freedmen of the Five Civilized Tribes, the Court of Claims again dismissed Appellants' breach of fiduciary duty claims for trust mismanagement by the United States.

Appellants appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit dismissed Appellants' second appeal. However, prior to dismissing, the Appellate Court for the Federal Circuit required the United States to respond to Appellants' Motion for Rehearing and Rehearing en banc. The Court of Appeals dismissed Appellants' second appeal on December 14, 2011.

During the pendency of Appellants' request for reconsideration in the Federal Court of Claims, Congress enacted the Claims Resolution Act of 2010, the Act being challenged here, authorizing settlement of Cobell v. Salazar.

Among the class of persons covered by the Cobell settlement are:

> Individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Administration Claim of a Land Administration Claim prior to the filing of the Amended Complaint),

> had a recorded or other demonstrable beneficial ownership interest in land held in trust of restricted status, regardless of the existence of an IIM account and regardless of the proceeds, if any, generated from the trust land, except that the Trust Administrative Class does not include beneficiaries deceased as of September 30, 2009 and does not include the estate of any deceased beneficiary whose IIM Accounts or other trust assets had been open in probate as of September 30, 2009.

See, Class definition Cobell v. Salazar, supra. (Emphasis added.)

In Cobell it was alleged that the United States had breached fiduciary duties to the Cobell class through the following conduct:

> Defendants, the officers charged with carrying out the trust obligations of the United States, and their predecessors, have grossly mismanaged, and continue grossly to mismanage, such trusts and trust assets in at least the following respects, among others:
>
> (a) They have failed to keep adequate records and to install an adequate accounting system, including but not limited to their failure to install an adequate accounts receivable system;
>
> (b) They have destroyed records bearing upon their breaches of trust;
>
> (c) They have failed to account to the trust beneficiaries with respect to their money;…

See, Cobell Settlement, supra.

The conduct of the United States redressed by Cobell under the Act, is the same conduct in relation to the Freedmen that the Act ignores.

Under terms of post-antebellum treaties between the Five Civilized Tribes and the United States described above and subsequent legislation, most notably the

Curtis Act of 1898[3], members of the Five Civilized Tribes and persons formerly held in bondage by these Tribes or living among them (Freedmen), received allotments of, forty, sixty, eighty or one hundred sixty acre tracts of land. Trust responsibilities arose between the Freedmen and the United States in relation to these allotments. There is a "general trust relationship between the United States and the Indian people," United States v. Mitchell, 463 U.S. 206, 225 (1983), which stems from "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." Seminole Nation v. United States, 316 U.S. 286, 296 (1942). However, the existence of this general trust relationship does not create a specific fiduciary duty to protect the rights of the Freedmen. As this D.C. Circuit has held:

> While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987), it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. United States v. Mitchell, 463 U.S. 206, 224-25 (1983) (Mitchell II); United States v. Mitchell, 445 U.S. 535, 542 (1980) (Mitchell I). We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by

[3] The Curtis Act of 1989 was an amendment to the United States Dawes Act that brought about the allotment process of lands of the Five Civilized Tribes of Indian Territory; the Choctaw, Chickasaw, Muscogee, Cherokee, and Seminole. These tribes had been previously exempt from the 1887 General Allotment Act, also known as the Dawes Act (also known as the Dawes Severalty Act, named for its sponsor and author Senator Henry Laurens Dawes). By effectively abolishing tribal courts and tribal governments in the Indian Territory of Oklahoma, the Act enabled Oklahoma to attain statehood, which followed some years later.

> implication, that duty. "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." National Wildlife Fed'n v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980).

Shoshone Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995); see also Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006), cert denied, 128 S.Ct. 176 (2007).

The basic elements of a fiduciary relationship must still be found. A fiduciary relationship, including the one between the United States and Indians, requires a trust corpus. See, e.g., Mitchell, 463 U.S. at 224; United States v. Friday, 525 F.3d 938, 957 (10th Cir. 2008); Intertribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1995). The Freedmen's citizenship rights within the Five Tribes do not form a trust corpus. Nero v. Cherokee Nation of Oklahoma, 892 F. 2d 1457, 1465 (10th Cir. 1989); Wheeler v. United States Dep't of Interior, 811 F.2d 549 (10th Cir. 1987). However, to the extent the Cobell Court determined that a trust corpus exists between the United States and the Five Civilized Tribes, an equivalent trust corpus exists as to the Freedmen by reason of the citizenship parity provisions of the 1866 Treaties. The question in this appeal is whether given this "citizenship parity," refusal of the Act below to give cognizance to the Freedmen equivalent trust corpus or status, constitutes unlawful racial

discrimination, is violative of the 1866 Treaties, the Act of May 27, 1908, and the Fifth Amendment.

The claim that the Freedmen claims are barred by the statute of limitation was recently addressed directly. On January 12, 2012, the United States Court of Appeals for the Federal Circuit held in the Shoshone Indians Tribe of Wind Tower Reservation Wyoming v. United States, Case No. 2010-5150, a cause of action for breach of trust, …only "accrues when the trustee 'repudiates' the trust and the beneficiary has knowledge of that repudiation." Shoshone II, 364 F.3d at 1348 (emphasis added) (citing Hopland Band of Pomo Indians, 855 F.2d at 1578; Restatement (Second) of Trusts § 219 (1992); Cobell v. Norton, 260 F.Supp.2d 98, 105 (D.D.C.2003); Manchester Band of Pomo Indians v. United States, 363 F.Supp. 1238, 1249 (N.D.Ca1.1973)). The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. Jones v. United States, 801 F.2d 1334, 1336 (Fed .Cir.1986) (citing Philippi v. Philippe, 115 U.S. 151, 157 (1885)); see also Shoshone II, 364 F.3d at 1348 ("[P]lacing the beneficiary on notice that a breach has occurred," is sufficient to establish the beneficiary's knowledge of the repudiation).

Aside from Shoshone, Congress determined in Public Law 108-108:

> notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or

> individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Emphasis added). This trust fund provision serves to stop the statute of limitations period from beginning to run on claims involving losses or mismanagement of Indian trust funds until an accounting has been provided.

Appellants here have never been provided an accounting and therefore the determination that Appellants' claims are barred by the statutes of limitations is erroneous and contrary to Appellee's argument, has nothing to do with this appeal.

The district court should be reversed for the reason it failed to give credence to the Act of May 27, 1908 which contains express directives from Congress to the Department of Interior to manage and protect allotments issued under the Curtis Act to Freedmen minors, such as George Curls. The district court erred when, despite the language of the Act of May 27, 1908 and P.L. 108-108, it concluded Appellants' lack standing to challenge HR4783.

II. APPELLANTS HAVE BEEN DENIED EQUAL PROTECTION OF THE LAW

Controlling precedent firmly establishes that it is a violation of the Fifth Amendment for the government to engage in activity which perpetuates past unlawful racial discrimination. The Act, HR4783, operates under discriminatory criteria developed in the past. The Act only reaches mismanagement of royalties

from allotments and Individual Indian Money accounts for the descendants of Native American members of the Five Civilized Tribes, but fails to redress mismanagement of royalties from allotments belonging to slaves of the Five Civilized Tribes, the ancestors of Appellants here. This disparate treatment, is unlawful racial discrimination. The Equal Protection Clause condemns this form of racial discrimination. It has been stated that:

> Vestiges of past discrimination do not exist gratuitously or only to a small degree – creating systematic, pervasive, and enduring vestiges is what effective discrimination was and is all about. Like a terrorist pouring poison into a city water system, an official who engages in racial discrimination intentionally sets in motion events that will cause harms that he cannot predict to victims whom he will never know. Because it is this evil that the Fourteenth Amendment was designed to halt, the Equal membership under the 1866 Treaties. This condition was part of a renewed strategy to defraud Freedmen. Protection Clause should be construed to provide redress for present injuries caused by past discrimination. The passage of time between the discriminatory intent and the resulting harm is irrelevant both to the purpose and to the effect of that discrimination and thus cannot be permitted to limit the protection afforded by the Constitution.

Here the United States exercised trust oversight, initially utilizing racial and ethnic criteria. Due to discriminatory government policies, in many instances Individual Indian Money (IIM) accounts were not established for statutorily eligible Freedmen despite their entitlement under the 1866 treaties to these accounts. Furthermore, the royalties due to minors were never invested, records were not kept as required under the Act of May 27, 1908, and restrictions on allotments to Freedmen minors were violated with impunity. This is the specific

type of conduct the Act addresses by authorizing the Cobell settlement. The Act perpetrates historic racial discrimination against the Freedmen by authorizing redress of breaches of trust against Native Americans, while denying any trust obligations are owed to the Freedmen. The district court opinion failed to focus on this issue, and instead accepted Appellee's standing argument.

III. HISTORIC RACIAL DISCRIMINATION AGAINST APPELLANTS' ANCESTORS

Abundant evidence is available to support Appellants' claim of historic racial discrimination against their ancestors. For instance, the grandfather of Appellant Leatrice Tanner-Brown, George Curls, was enrolled on the Rolls of the Cherokee Freedmen, under the Dawes Act on July 1, 1902.

Although George Curls did not receive his allotment until 1910, the discovery of oil led to political pressure to make allotments freely alienable. Due to this context, in violation of the fiduciary duties to Freedmen who were often less educated and sophisticated than their former slave masters, the United States, on racially motivated grounds, through the Act of 1908 permitted these allottees to be exploited by grafters and speculators anxious to obtain oil rich lands for little or no payment to allottees. The allotments belonging to George Curls were in Nowata County, as stated in the midst of this oil rich territory. The Curls allotment is located North of the lucrative Alluwe Oil Field in the vicinity of the Cherokee

Shallow Sands Oil Fields where oil was located a mere thirty-six feet below the surface[4] in 1904.

Allotments in the hands of minor Freedmen were susceptible to being transferred, free from the restrictions placed upon allotments in the hands of Native Americans.

George Curls' Nowata County allotments were located in one of the oil rich areas that according to Deboe was ripe for exploitation.

According to Deboe:

> The Five Tribes Act provided that all the rolls should close March 4, 1907. But some duplications were afterwards cancelled, and 312 names were added by act of Congress in 1914. The rolls included several small groups that had been incorporated into the tribes, especially about seven hundred Euchees, who formed a part of the Creek Nation, and about a thousand Delawares, who had purchased the right to Cherokee citizenship in 1867. The quantum of blood indicated by the rolls is somewhat misleading, partly because of inaccuracies in matters of this nature at that time seemed unimportant, and partly because fullblood Indians of mixed tribal descent were classed as mixed bloods. The final rolls are as follows:

	INDIANS			WHITES	**FREEDMAN**	TOTAL
	Fullbloods	mixed	total			
Cherokees	8,703	27,916	36,619	286	**4,919**	41,824
Choctaws	7.087	10,401	17,488	1,651	**6,029**	25,168
Miss. Choc.	1,357	303	1,660			1,660
Chickasaws	1,515	4,144	5,659	645	**4,662**	10,966
Creeks	6,858	5,094	11,952		**6,809**	18,761
Seminoles	1,254	887	2,141		**896**	3,127
TOTAL	26,774	48,745	75,519	2,582	**23,405**	101,506

[4] Gary L. Cheatham, "Nowata County, " Encyclopedia of Oklahoma History and Culture, March 28, 2007, and Kenny A Franks, "Petroleum." Id.

Deboe, p. 47.

> Although the law of 1908 had certainly entrusted [the department] with the responsibility of protecting all minor allottees, it was decided at the very beginning to limit such protection to restricted children. It was, of course, the unrestricted children of Negro, mixed Indian and white, or mixed Indian blood who were subject to the greatest exploitation, but the Department officials believe it wiser to concentrate upon the "real Indians"; as Kelsey said in 1910, with reference to some especially shocking pillaging of unrestricted children, "in my judgment the only remedy … is for the general citizenship of the State of Oklahoma to awake to the fact that the less intelligent residents of the community are being robbed by the connivance of grafters and dishonest officials, and that sooner or later these people who have been robbed will become public charges, and to avoid this ultimate condition public sentiment with respect to getting what the allottee has must change and the citizens must elect honest officers who will protect the minors, whether they be white, red, or black.
>
> But although the district agents' work was limited by such administrative decisions,, there was so much need for reform that like Stolper they accomplished a great deal. During the last six months of the first year of their employment they recovered about $548,306.78. House Reports, 61 Cong., 2 Seas., No. 2273, Vol. II, appendix, 1322-23. Department of the Interior, Annual Report, 1912, II, 486; Indian Office Files, 72545/08 Five Tribes 311. Each agent made a monthly report showing the exact sums that he recovered in specific cases, and these amounts were added to form the totals.

Contrary to Appellee's Argument the Freedmen should have been included in the Cobell class and have standing. Participation in Cobell is not limited as Appellee argues to persons with IIM's. Appellants have standing by reason of their interest in restricted trust property, proceeds from royalties on the land of

George Curl. This interest gives Appellants standing. In Devlin v. Scardelletti, 536 U.S. (2002), the United States Supreme Court stated:

> [W]e begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution. As a member of the retiree class, petitioner has an interest in the settlement that creates a "case or controversy" sufficient to satisfy the constitutional requirements of injury, causation, and redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); see also, In re. Navigant Consulting, Inc., Securities Litigation, 275 F. 3d 616, 620 (CA7 2001).

Id. (Emphasis added.)

Devlin makes clear Appellants as individuals who objected to Cobell and challenged HR 4783 have standing.

The district court accepted the Appellee's standing argument and failed to correctly analyze Appellants' challenge the Act in light of the property interests in allotments which Appellants have an equitable claim by reason of violation by the United States of the Act of May 1, 1908, Appendix 1.

CONCLUSION

For the reasons set forth above the district court below should be reversed.

Respectfully submitted,

April 9, 2012

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CERTIFICATE OF COMPLIANCE

In accordance with the provisions of Fed. R. App. P. 32, the undersigned certifies that this appellate brief complies with the type limitations of this Rule.

1. The brief contains no more than 4,708 words in its entirety.
2. The brief has been prepared in 14-point Times New Roman typeface using Microsoft Word 2007.

s/Percy Squire
Percy Squire

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the court's electronic mail service, April 9, 2012, upon counsel of record.

s/Percy Squire
Percy Squire

APPENDIX

APPENDIX "1" - Act of May 27, 1908……1

APPENDIX "2" - August 11,1938 correspondence from the Commissioner of Indian Affairs to the Solicitor United States Department of the Interior and October 1,1941, Response…….6

APPENDIX "3" - September 11, 2011 correspondence by the Assistant Secretary of Interior for Indian Affairs, Larry Echohawk……..11

ACT OF MAY 27, 1908

35 Stat. 312

***

May 27, 1908.
[H.R. 15641.]

[Public, No. 140.]

Be it enacted by the Senate and Hause of Representatives of the United States of America inn Congress assembled, That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nine teen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continu ing to remove restrictions as heretofore, and nothing herein shall-be construed to impose restrictions removed from land by or under any law prior to the passage of this Act No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Five Civilized Tribes
Status of allotments.

Alienation restrictions removed

Restrictions continued

Removal by Secretary of the Interior

Oklahoma.
Rights of way through Indian lands continued.
Vol. 32, p. 47.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males

Leases of restricted lands.

Provisos.
Oil, gas, or mining purposes.

Lands of minors, etc., under same restrictions.

under the age of twenty-one years and all females under the age of eighteen years.

SEC. 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclu sive evidence as to the age of said citizen or freedman.

Rolls of citizens and freedmen evidence of quantum of Indian blood.

That no oil, gas, or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior as if this Act had not been passed: *Provided,* That the owner or owners of any allotted land from which restrictions are removed by this Act, or have been removed by previous Acts of Congress, or by the Secretary of the Interior, or may hereafter be removed under and by authority of any Act of Congress, shall have the power to cancel and annul any oil, gas, or mineral lease on said land whenever the owner or owners of said land and the owner or owners of the lease thereon agree in writing to terminate said lease and file with the Secretary of the Interior, or his designated agent, a true copy of the agreement in writing canceling said lease, which said agreement shall be executed and acknowledged by the parties thereto in the manner required by the laws of Oklahoma for the execution and acknowledgment of deeds, and the same shall be recorded in the county where the land is situate.

Statutes of prior leases by allottees.

Proviso.

Power of owners of unrestricted lands over oil, etc., leases.

SEC. 4. That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided,* That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against the allottees arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law.

Unrestricted lands subject to taxation.

Proviso.

Exemption from prior claims.

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made,before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

Alienation, etc. of restricted lands void.

SEC 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specitically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to re port said matter in full to the proper probate court arid take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve

Authority of Oklahoma probate courts over minor allottees.

Local agent of Interior Department for estates of minors.

Duties.

the property and protect the interests of said minor allottees and it shall be the further Duties. duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of May be appointed said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

May be appointed guardian.

And said representatives of the Secretary of the Interior are further restricted lands, authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, with out charge, except the necessary court and recording fees and expen ses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

Other duties as to restricted lands.

Supplemental to the funds appropriated and available for expenses connected with the affairs of the Five Civilized Tribes, there is hereby appropriated, for the salaries and expenses arising under this section, out of any funds in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, to be available immediately, and until July first, nineteen hundred and nine, for expenditure under the direction of the Secretary of the Interior: *Provided,* That no restricted lands of living minors shall be sold or encumbered, except by leases author ized bylaw, by order of the court or otherwise.

Appropriation for expenses.

Proviso. Restrictions on lands of minors.

And there is hereby further appropriated, out of any money in the suits in the Treasury not otherwise appropriated, to be immediately available and available until exynded as the Attorney-General may direct, the sum of fifty thousand dollars, to be used in the payment of necessary expenses incident to any suits brought at the request of the Secretary of the Interior in the eastern judicial district of Oklahoma; *Provided,* That the sum of ten thousand dollars of the above amount, or so such thereof as may be necessary, may be expended in the prosecution of cases in the western judicial district of Oklahoma.

Appropriation for suits in Oklahoma.

Proviso. For western district.

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismised and the title quieted upon payment of the full balance due on the original appraisement of such lot: Provided, That such investigation must be concluded within six months after the passage of this Act.

Suits against vendees, etc., of town lots.

Proviso. Conclusion of investigation.

Nothing in this act shall be construed as denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases or contrates of any other kind or charcter whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in

Suits as to title, etc., of restricted lands.

so doing to be defrayed from the money appropriated by this act.

SEC. 7. That no contest shall be instituted after sixty days from the date of the selection of any allotment hereafter made, nor after ninety days from the approval of this Act in case of selections made prior thereto by or for any allottee of the Five Civilized Tribes, and, as early thereafter as practicable, deed or patent shall issue therefor.

Contests of selections of allotment.
Time limited.

SEC 8. That section twenty-three of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, is hereby amended by adding at the end of said section, the words "or a judge of a county court of the State of Oklahoma".

Wills of full-blood Indians.
Acknowledgment before Oklahoma judge.
Vol. 34, p. 145, amended.

SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixt, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Allottees.
Restrictions removed by death.
Provisos.
Conveyances.
Distribution of estates of Indians of half-blood or more.
In case of no issue.
Acknowledgment of wills.
Vol. 34, p. 145.
Supra.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to pay out of any moneys in the Treasury of the United States, belonging to the Choctaw or Chickasaw nations respectively, any and all outstanding general and school warrants duly signed by the auditor of public accounts of the Choctaw and Chickasaw mations, and drawn on the national treasures thereof prior to January first, nineteen hundred and seve, with six per cent interest per annum from the respective dates of said warrants: *Provided*, That said warrants be presented to the United States Indian agent at the Union Agency, Muskogee, Oklahoma, within sixty days from the passage of this act, together with the affidavits of the respective holders of said warrants that they purchased the same in good faith for a valuable consideration, and had no reason to suspect fraud in the issuance of said warrants: *Provided further*, That such warrants remaining in the hands of the original payee shall be paid by said Secretary when it is shown that the services for which said warrants were issued were actually performed by said payee.

Choctaw and Chickasaw warrants.
Payment of outstanding.
Provisos.
Payment to holders for value.
To original payees.

SEC. 11. That all royalties arising on and after July first, nineteen hundred and eight, from mineral leased of allotted Seminole lands heretofore or hereafter made, which are subject to the supervision of the Secretary of the Interior, shall be paid to the United States Indian agent, Union Agency, for the benefit of the Indian lessor or his proper representative to whom such royalties shall thereafter belong; and no such lease shall be made after said date except with the allottee or owner of the land: *Provided*,

That the interest of the Seminole Nation in leases or royalties arising thereunder on all allotted lands shall cease on June thirtieth, nineteen hundred and eight.

SEC. 12. That all records pertaining to the allotment of lands of the Five Civilized Tribes shall be finally deposited in the office of the United States Indian agent, Union Agency, when and as the Secretary of the Interior shall determine such action shall be taken, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available as the Secretary of the Interior to furnish the various counties of the State of Oklahoma certified copies of such portions of said records as affect title to lands in the respective counties.

(1)

163618

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of Indian Affairs
Washington

August 11, 1938.

MEMORANDUM TO THE SOLICITOR:

Your consideration is requested on the question as to the status of the freedmen in the Five Tribes and particularly in the Seminole Nation of Oklahoma.

It is our understanding that a group of the Indians are favorable to organizing under the Oklahoma Welfare Act amending the Indian Reorganization Act, but they want to find some way to eliminate the freedmen, who in fact are not Indians but are carried on the tribal roll, received allotments, etc. The Oklahoma Welfare Act speaks of and applies to Indians and apparently would exclude non-Indians. There is enclosed a copy of a memorandum as prepared in this Office which discusses the status of each of the Five Tribes and the freedmen members thereof.

We realize that in the adoption of a constitution the tribe could enact provisions whereby freedmen or other non-Indians who might be on the roll would and could be eliminated, but the question is whether by reason of the status of these freedmen they would be entitled to vote on the adoption of a constitution. If so, then this group, plus other opponents to the idea of organization, could probably defeat the adoption of a constitution, which on its face would show that there was an intent to eliminate such non-Indians.

We would appreciate an expression of your opinion on the subject. It may be that later we would want a formal opinion, but doubt the necessity therefor at this time.

John Collier

Commissioner.

Enclosure 1310801.

APPENDIX "2"

(2)

163618

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

October 1, 1941.

MEMORANDUM for the
Commissioner of Indian Affairs.

Your inquiry of August 11, 1938, presented a question concerning the status of the Freedmen in the Five Civilized Tribes in connection with the desire of some of these tribes, and particularly the Seminole Nation, to organize under the Oklahoma Welfare Act of June 26, 1936.

This question involves two problems which will be taken up in order.

1. Are the Freedmen of the Five Civilized Tribes entitled to vote on the acceptance of a constitution in pursuance of section 3 of the Oklahoma Welfare Act?

2. Would it be admissible under the act to adopt a constitution containing provisions whereby Freedmen who might be on the rolls would and could be eliminated?

1. The memorandum of the Director of Lands to Indian Organization, dated October 25, 1937, which was attached to your inquiry, would appear to deal adequately with this question. The Freedmen were adopted as full members into the Cherokee, the Choctaw, the Seminole, and the Creek Tribes pursuant to the treaties of July 19, 1866 (14 Stat. 799) (Cherokee), April 28, 1866 (14 Stat. 769) (Choctaw), June 14, 1866 (14 Stat. 785) (Creek), and March 21, 1866 (14 Stat. 755) (Seminole), and in conformity with the amendment to section 5 of article 3 of the constitution of the Cherokee Nation of November 28, 1866, and the act of May 21, 1883, passed by the General Council of the Choctaw Nation and recognized by Congress in the act of March 3, 1885 (23 Stat. 366). Only the Chickasaw Nation refused admission to the Freedmen by act of its legislature dated October 22, 1885, which provided:

> "That the Chickasaw people hereby refuse to accept or adopt the Freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever and respectfully request the Governor of our Nation to notify the Department at Washington of the action of the legislature in the premises." (See United States v. The Choctaw Nation, et al., 33 Ct. Cl. 558.)

(3)

The Freedmen thus having been made full-fledged members of four of the five tribes which in accordance with various acts of Congress granted them all rights of citizenship in the Nations, including the right of suffrage (see Whitmire v. Cherokee Nation et al., 30 Ct. Cl. 138 at 157; Choctaw and Chickasaw Nations v. United States, 81 Ct. Cl. 63; Opinion of Secretary of the Interior of August 9, 1898, No. 15030-1913, JED), the Freedmen are entitled to vote on any constitution along with all other members of these tribes. This case is thus different from that of the Kiowa Indians dealt with in the proposed letter of the Commissioner to Mr. Ben Dwight, Organization Field Agent at Oklahoma City, Oklahoma, transmitted to the Assistant Commissioner of Indian Affairs by the Solicitor with his memorandum dated October 9, 1937. In that letter it was stated:

> "There is no treaty nor statute which has come to my attention which conveys membership in any of the tribes under the Kiowa Agency to persons not of Indian blood. * * * If, therefore, these persons or other white persons have in fact been adopted as members of the tribes, the basis for such adoption must have been some definite tribal action taken with departmental approval. If no such tribal action occurred, those persons have no legal claim to membership, and no recognition as members need be accorded them by the tribe."

As in the case of these four tribes clear action had been taken to make the Freedmen full citizens, these Freedmen have in principle the right to vote on any proposed constitution to be adopted under the Oklahoma Welfare Act.

It has, however, been suggested that the Secretary may issue regulations to the effect that only tribal members of Indian blood may vote on the adoption of such a constitution. It is true that section 3 of the Oklahoma Welfare Act provides that the Secretary of the Interior may prescribe rules and regulations to govern the adoption of a constitution by any tribe organized under this act. This provision corresponds to section 16 of the Indian Reorganization Act which has been held to confer a broad authority upon the Secretary of the Interior to pass upon the qualifications of voters without therein being limited by past enrollments (Solicitor's opinion M. 27810, December 13, 1934). This opinion, however, pointed out that the Secretary in the exercise of his authority is bound by any statutes which may determine tribal membership. As the membership rights of the Freedmen in the Five Civilized Tribes have been fixed by treaties, which are the equivalent of statutes, and by formal tribal action in pursuance of these treaties, the Secretary would not appear to be authorized to issue regulations which would deprive the Freedmen of their right to vote on constitutions to be adopted by the Five Civilized Tribes under the Oklahoma Welfare Act.

2. The question whether Freedmen now citizens of various Nations of Oklahoma may be excluded by appropriate provisions in constitutions

(4)

to be adopted by these Nations pursuant to the Oklahoma Welfare Act must be answered in the affirmative. The Oklahoma Welfare Act represents a turning point in the organization of Indian tribes. A new type of organization on a new basis is provided by this act. It thus takes its place beside the various treaties of 1866 which after the end of the Civil War similarly provided for a new organization of the Five Civilized Tribes on a new membership basis. With the consent of Congress and pursuant to these treaties the tribes resolved to modify their membership basis and to include a large number of Freedmen who thus became Indians by law only. It would appear that the tribes should be able to modify their membership once more and, having obtained the consent of Congress through the Oklahoma Welfare Act, to arrange their membership and other affairs in a constitution to be adopted by their free vote. They are thus entitled to decide that in the future only Indians by blood shall be members of the new tribal organization that is to come into being by adoption of these constitutions. A number of Indian tribes have incorporated similar provisions in their constitutions in order to limit membership to persons of Indian blood. Among these are the Cheyenne River Sioux Tribe of South Dakota, the Quileute Tribe of the Quileute Reservation, Washington, and the Kialegee Tribal Town of Oklahoma. The customary provision reads as follows:

> "The membership of the * * * Tribe shall consist of the following:
>
> "(a) All persons of Indian blood whose names appear on the official census roll of the tribe as of June 18, 1934.
>
> "(b) All children born to any member of the * * * Tribe who is a resident of the reservation at the time of the birth of said children."

Such a provision has the effect of dropping from tribal rolls those members who cannot satisfy the Indian-blood requirement. Such exclusion from membership does not interfere with any vested individual rights, such as title to allotted land, but does deprive the Freedmen so excluded of benefits arising in the future out of tribal membership.

Nathan R. Margold

Solicitor.

(5)

163618

Membership Choctaw Nation

Blood members including Mississippi Choctaws	20,409
By marriage	1,672
Freedmen	6,019

Membership Chickasaw Nation

Blood members	5,968
By marriage	648
Freedmen	4,583

Membership Cherokee Nation

Blood members including Delawares	38,114
By marriage	288
Freedmen	4,979

Membership Creek Nation

Blood members	11,967
Freedmen	6,837

Membership Seminole Nation

Blood members	2,147
Freedmen	2,886

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 0 9 2011

The Honorable S. Joe Crittenden
Acting Principal Chief, The Cherokee Nation
P.O. Box 948
Tahlequah, Oklahoma 74465-0948

Dear Chief Crittenden:

We have followed the news of the upcoming election for Principal Chief with interest and growing concern. I write to advise you that the Department of the Interior (Department) has serious concerns about the legality of the Cherokee Nation's actions with respect to the Cherokee Freedmen, as well as the planned September 24, 2011, election.

On August 22, 2011, the Supreme Court of the Cherokee Nation issued its decision in the matter of the *Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02. In this decision, the Court vacated and reversed the earlier decision of the Cherokee District Court, as well as the temporary injunction that maintained the citizenship of the Freedmen. We have carefully reviewed this most recent decision. I am compelled to advise you that the Department respectfully disagrees with the Court's observations regarding the meaning of the Treaty of 1866, between the United States of America and the Cherokee Nation (Nation), 14 Stat. 799, as well as the status of the March 3, 2007, amendment to the Cherokee Constitution.

The Cherokee Constitution ratified by the voters in June 1976 expressly provides that "[n]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative," which is the Secretary of the Interior. The Department declined to approve the 2003 amendments of the 1976 Constitution, as evidenced by the August 30, 2006, letter from Associate Deputy Secretary James Cason to Principal Chief Chad Smith and the March 28, 2007, letter from Assistant Secretary – Indian Affairs (AS-IA) Carl Artman to Principal Chief Smith, copies of which are enclosed. Although on August 8, 2007, AS-IA Artman approved a June 23, 2007, amendment to the 1976 Constitution that removes the requirement for Secretarial approval of amendments, that decision is not retroactive. Thus, the decision of the Cherokee Nation Supreme Court appears to be premised on the misunderstanding that both the unapproved Constitution adopted in 2003, and the March 3, 2007, amendment that would make Freedmen ineligible for citizenship, are valid. The Department has never approved these amendments to the Cherokee Constitution as required by the Cherokee Constitution itself.

Furthermore, we understand that in 2010 the Nation adopted new election procedures which will govern the upcoming election for Principal Chief. Those procedures were never submitted to, nor approved by, the Secretary of the Interior or any designated Department of the Interior official as required by the Principal Chiefs Act, (Pub. L. 91-495, 84 Stat. 1091). Pursuant to the Principal

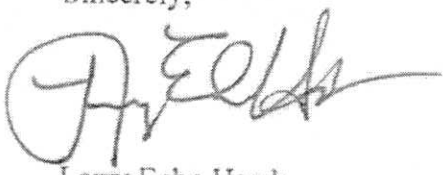
APPENDIX "3"

Chiefs Act, enacted by Congress in 1970, the Secretary is required to approve procedures for the selection of the Principal Chief of the Cherokee Nation.

We are concerned that the recent decision from the Cherokee Nation Supreme Court, together with 2010 election procedures that have not been approved by the Secretary of the Interior as required by the Principal Chiefs Act, will be the basis for denying Cherokee Freedmen citizenship and the right to vote in the upcoming election. The Department's position is, and has been, that the 1866 Treaty between the United States and the Cherokee Nation vested Cherokee Freedmen with rights of citizenship in the Nation, including the right of suffrage.

I urge you to consider carefully the Nation's next steps in proceeding with an election that does not comply with Federal law. The Department will not recognize any action taken by the Nation that is inconsistent with these principles and does not accord its Freedmen members full rights of citizenship. We stand ready to work with you to explore ways to honor and implement the Treaty.

Sincerely,



Larry Echo Hawk
Assistant Secretary – Indian Affairs

Enclosures