

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION,

Plaintiff,

v.

RAYMOND NASH, LARRY WASSON, ROBERT ALLEN,  
KATHY WASHINGTON, LISA DUKE, KEN SALAZAR,  
SECRETARY OF THE INTERIOR, AND THE UNITED  
STATES DEPARTMENT OF THE INTERIOR,

Defendants / Cross-Claimants/ Counter-  
Claimants

v.

THE CHEROKEE NATION;

PRINCIPAL CHIEF BILL JOHN BAKER, in his Official  
Capacity;

DEPUTY PRINCIPAL CHIEF S. JOE CRITTENDEN, in his  
Official Capacity;

REGISTRAR JOHN DOE, in his Official Capacity;

ELECTION COMMISSION CHAIR JOHN DOE, in his  
Official Capacity;

ELECTION COMMISSION VICE CHAIR JOHN DOE, in his  
Official Capacity;

ELECTION COMMISSION SECRETARY JOHN DOE, in his  
Official Capacity;

ELECTION COMMISSION MEMBER 1 JOHN DOE, in his  
Official Capacity;

ELECTION COMMISSION MEMBER 2 JOHN DOE, in his  
Official Capacity;

ELECTION COMMISSION MEMBER 3 JOHN DOE, in his

Case No.:  
11CV-0648  
TCK TLW

**Official Capacity;**

**Counter-Defendants,**

**KEN SALAZAR, SECRETARY OF THE INTERIOR, AND  
THE UNITED STATES DEPARTMENT OF THE  
INTERIOR,**

**Cross-Defendants.**

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**FREEDMEN DEFENDANTS' AMENDED ANSWER,  
COUNTERCLAIMS AGAINST THE CHEROKEE NATION OF OKLAHOMA,  
AND CROSS-CLAIMS AGAINST FEDERAL DEFENDANTS**

Defendants RAYMOND NASH, LARRY WASSON, ROBERT ALLEN, KATHY WASHINGTON and LISA DUKE (the “Freedmen Defendants”), by and through their undersigned counsel, in Answer to the Complaint of Plaintiff Cherokee Nation and in support of the Freedmen Defendants’ counterclaims against Plaintiff Cherokee Nation, Counter-Defendant Principal Chief Bill John Baker, Counter-Defendant Deputy Principal Chief S. Joe Crittenden, Counter-Defendant Registrar John Doe, Counter-Defendant Election Commission Chair John Doe, Counter-Defendant Election Commission Vice Chair John Doe, Counter-Defendant Election Commission Secretary John Doe, Counter-Defendant Election Commission Member 1 John Doe, Counter-Defendant Election Commission Member 2 John Doe, and Counter-Defendant Election Commission Member 3 John Doe (“Cherokee Nation Officers”) and cross-claims against the Federal Defendants, state as follows:

**ANSWER**

**FIRST DEFENSE**

In response to the numbered paragraphs of the Complaint, the Freedmen Defendants hereby answer:

1. Denied to the extent that the United States does not recognize the Plaintiff under the name “Cherokee Nation” at this time. Plaintiff adopted the name “Cherokee Nation” under the 1999 Cherokee Constitution. The 1999 Cherokee Constitution has not been lawfully enacted as it requires approval by the President of the United States pursuant to the 1976 Cherokee Constitution, which has not been granted. The 1976 Cherokee Constitution states that the name of the Tribe is the “Cherokee Nation of Oklahoma.” The United States recognizes the Cherokee Nation of Oklahoma under the Federal Register of Federally Recognized Tribes.

2. Admitted to the extent that the Secretary of the Interior of the United States of America and the United States Department of the Interior (the “Federal Defendants”) are responsible for the administration of the Treaty between the United States and the Cherokee Nation, July 19, 1866, 14 Stat. 799 (“Treaty of 1866”); and that Defendants claim rights as citizens of the Cherokee Nation under the Treaty of 1866 and to the benefits based thereon. The Freedmen Defendants deny that the Federal Defendants’ responsibilities under the Treaty of 1866 are limited only to those persons recognized as Cherokee citizens by Plaintiff. The Freedmen Defendants deny that they are non-Indians. The Freedmen Defendants admit that they reside in the Northern District of Oklahoma.

3. The Freedmen Defendants admit that an actual case or controversy exists between the Cherokee Nation and the individual defendants but further state that said controversy is being actively litigated as part of a larger, earlier-filed action currently pending before the United

States Court of Appeals for the District of Columbia, docketed as Case No. 11-5322 (“D.C. Action Appeal”).

4. The allegations contained in paragraph 4 of the Complaint constitute legal conclusions to which no response is required.

5. The Freedmen Defendants admit that a portion of the Cherokee Nation is situated in the federal Northern District of Oklahoma but otherwise deny that venue is proper in light of the pending D.C. Action Appeal described in paragraph 3 of this Answer.

6. The Freedmen Defendants lack sufficient knowledge to form a belief as to the allegations contained in paragraph 6.

7. The Freedmen Defendants lack sufficient knowledge to form a belief as to the allegation made in the first sentence contained in paragraph 7. The Freedmen Defendants admit the remaining allegations in paragraph 7 to the extent that the Cherokee Nation abolished slavery in 1863 and that former Cherokee slaves became known as “Freedmen” but lack sufficient knowledge to form a belief as to whether the Cherokee Nation’s abolition of slavery by the Cherokee Nation was voluntary.

8. The Freedmen Defendants do not dispute that the Cherokee Nation voluntarily entered the Treaty of 1866 with the United States government; that Article IX of the Treaty of 1866 provides that Freedmen and their descendants shall have all the rights of “native Cherokee”; and that the Cherokee Nation amended the Cherokee Nation Constitution in 1866 to grant citizenship to the Freedmen, Intermarried Whites, and members of certain foreign tribes resident in the Cherokee Nation. The Freedmen Defendants deny the remaining allegations in paragraph 8.

9. The Freedmen Defendants admit that in 1871 the United States Congress passed legislation ending the practice of entering into treaties with Indian tribes.

10. The Freedmen Defendants admit that the census in the Cherokee Nation lands conducted by the United States government between 1898 and 1907 resulted in the creation of the four separate “Dawes Rolls” listings: “Cherokee by Blood,” “Delaware,” “Intermarried Whites,” and “Freedmen.” The Freedmen Defendants lack sufficient knowledge to form a belief concerning the remaining allegations in paragraph 10.

11. The Freedmen Defendants admit that the Five Tribes Act was passed by Congress in 1906, but otherwise deny that the Five Tribes Act or any other act of Congress modified the Treaty of 1866 to diminish any rights vested in Cherokee Freedmen.

12. Denied.

13. Admitted.

### **COUNT ONE**

14. The Freedmen Defendants admit that an actual case or controversy exists between the Cherokee Nation and the descendants of the original Cherokee Freedmen but further state that this controversy is currently being litigated in another federal court as described in paragraph 3 of this Answer. The Freedmen Defendants deny that they are non-Indian.

15. The Freedmen Defendants deny that they and other Cherokee Freedmen are “non-Indian” but otherwise admit the allegations contained in paragraph 15.

16. Denied.

17. Denied.

18. Denied.

**SECOND DEFENSE**

19. The Freedmen Defendants deny each and every allegation not specifically addressed in its first defense.

**AFFIRMATIVE DEFENSES**

19. The Compliant is barred in whole or in part on the grounds of res judicata and collateral estoppel.

20. The Complaint is barred in whole or in part based on the doctrine of unclean hands.

Dated: July 2, 2012

Respectfully submitted,

/s/ Alvin Dunn

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Jack McKay (*Admitted Pro Hac Vice*)

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**COUNTERCLAIMS AGAINST THE CHEROKEE NATION OF OKLAHOMA  
AND CHEROKEE NATION OFFICIALS AND  
CROSS-CLAIMS AGAINST FEDERAL DEFENDANTS**

Defendants/Counter-Plaintiffs/Cross-Claimants RAYMOND NASH, LARRY WASSON, ROBERT ALLEN, KATHY WASHINGTON, and LISA DUKE (hereinafter referred to jointly as the “Freedmen Defendants”), citizens of the Cherokee Nation of Oklahoma, as the direct descendants of individuals enrolled under the inclusive “Freedmen” category on the Dawes Commission Rolls of the Cherokee Tribe (hereinafter referred to as the “Freedmen”), by and through their undersigned counsel, for their Counterclaims against Plaintiff/Counter-Defendant the Cherokee Nation of Oklahoma (“CNO”), Counter-Defendant Principal Chief Bill John Baker, Counter-Defendant Deputy Principal Chief S. Joe Crittenden, Counter-Defendant Registrar John Doe, Counter-Defendant Election Commission Chair John Doe, Counter-Defendant Election Commission Vice Chair John Doe, Counter-Defendant Election Commission Secretary John Doe, Counter-Defendant Election Commission Member 1 John Doe, Counter-Defendant Election Commission Member 2 John Doe, and Counter-Defendant Election Commission Member 3 John Doe (“Cherokee Nation Officers”), and their Cross-Claims against Defendants Ken Salazar, Secretary of the United States Department of the Interior (“Secretary” or “Salazar”), and the United States Department of the Interior (“Department” or “DOI”), an agency of which is the Bureau of Indian Affairs (“BIA”) (hereinafter referred to jointly as “Federal Defendants”), state as follows:

**NATURE OF THE CASE**

1. The Freedmen Defendants, individual citizens of the Cherokee Nation of Oklahoma, bring these claims for declaratory and injunctive relief arising under the Constitution and laws of the United States to vindicate the rights of a long-oppressed and disadvantaged

people. The Freedmen Defendants bring these claims to redress long-standing and invidious racial discrimination against them by the CNO, the Cherokee Nation Officers, and the Federal Defendants. This discrimination has excluded the Freedmen from their right to vote in elections held on May 24, 2003, and on July 26, 2003 (together, the “2003 Elections”). The May 24 election determined the Principal Chief and other elected officials of the Cherokee Nation and ratified an amendment to the Cherokee Constitution to strike the following clause: “No amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative.” The July 26 election ratified a new Cherokee Constitution that changed the structure of the Cherokee government.

2. On or about August 6, 2003, the BIA, assisted by its local officials, reversed its position that Pub. L. No. 91-495, 84 Stat. 1091 (“Act of 1970”) mandates that the CNO submit its election provisions to the DOI prior to holding an election, and the BIA recognized the election of Chadwick Smith as Principal Chief of the CNO.

3. The BIA’s decision to recognize the illegal election (i) violates the Department’s fiduciary duty to protect the Freedmen from unlawful elections, (ii) violates the Act of 1970, (iii) reverses its position stated in numerous letters to Chief Smith informing him of the requirement of submitting election procedures prior to holding the Election, (iv) reverses the BIA’s position toward the Seminole Nation of Oklahoma regarding virtually the same matter, and (v) violates the 13th and 15th Amendments to the U.S. Constitution.

4. The BIA took action to enforce the full citizenship rights guaranteed by treaty to the Seminole Freedmen by refusing to recognize the results of a Seminole election from which Freedmen voters had been illegally excluded and by refusing to recognize any government-to-government relationship with that illegally elected administration. *Seminole Nation v. Norton*,



223 F. Supp. 2d. 122 (D.D.C. Sept. 23, 2002) (“*Seminole II*”). In another case, the BIA refused to recognize the Seminole Nation or the government-to-government relationship where the Seminole Freedmen were deprived of their citizenship rights in the Seminole Nation by a Constitutional Amendment Referendum Election. *Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1 (D.D.C. Sept. 27, 2001) (CKK) (“*Seminole I*”). In both cases, the basis for the BIA’s position, upheld on judicial review, was that the Seminole Freedmen were ensured full citizenship rights under a treaty entered into between the United States and the Seminole Nation of Oklahoma in 1866.

5. The Cherokee Tribe signed the Treaty between the United States and the Cherokee Nation of 1866, July 19, 1866, 14 Stat. 799 (“Treaty of 1866”), affording the same citizenship protections to the Cherokee Freedmen that were awarded to the Seminole Freedmen in the Seminole Treaty of 1866. There is thus no principled distinction between this litigation and that involving the Seminoles. The BIA’s determination to recognize the results of a Cherokee Election in which Cherokee Freedmen citizens had been illegally prevented from exercising their right to vote is a breach of the BIA’s fiduciary duty. *See Seminole II*, 223 F. Supp. 2d. at 137-38 (finding that the BIA has a fiduciary duty to protect Freedmen citizens from discrimination by the tribe).

6. The CNO and the Cherokee Nation Officers have violated the Treaty of 1866 and the Thirteenth Amendment to the Constitution of the United States by denying Freedmen citizens their full citizenship rights, based solely on their status as Freedmen.

7. The CNO and the Cherokee Nation Officers have violated the Act of 1970 by refusing to submit the CNO Voting Regulations to the Secretary of the Interior.

8. On June 9, 2006, Chief Chadwick Smith notified the DOI that he considered the 2003 constitutional amendments approved by a ruling of the Cherokee Nation Judicial Appeals Tribunal. *See* Exhibit 1.

9. As of June 9, 2006, the DOI had not yet decided whether to approve the 2003 Constitution. In a letter dated May 21, 2007, the DOI informed the CNO and Chief Smith of its decision to deny approval of the amendments because the Freedmen were not permitted to vote in the election ratifying the constitution. *See* Exhibit 2.

10. Upon information and belief, the CNO and the Cherokee Nation Officers took the following actions based upon the 2003 Constitution:

- a. The CNO and the Cherokee Nation Officers dissolved the Judicial Appeals Tribunal (“JAT”), the highest Cherokee court, after the JAT ruled that the Freedmen were entitled to citizenship under the Treaty of 1866 and the 1976 Cherokee Constitution. *See Allen v. Cherokee Nation Tribal Council*, No. JAT 04-09 (Cherokee Nation Jud. App. Trib. Mar. 7, 2006);
- b. The CNO and the Cherokee Nation Officers appointed justices to the newly established Cherokee Supreme Court;
- c. The new Cherokee Supreme Court ruled that the Freedmen could be denied citizenship in the Cherokee Nation by a vote of the Cherokee citizens;
- d. On March 3, 2007, the CNO and the Cherokee Nation Officers oversaw a popular election in which a constitutional amendment was approved denying citizenship rights to the Freedmen;

- e. On or about March 21, 2007, Cherokee Nation Registrar Lela Ummerteskee notified the Freedmen of the new law severing the citizenship of the Freedmen and stopped processing Freedmen citizenship applications. The letter notified the Freedmen that they had been expelled from the Cherokee Nation;
- f. Cherokee Clinic Administrator Darrel O'Field notified the Freedmen that their medical benefits from the Cherokee Nation had been severed;
- g. In response to a motion for a preliminary injunction filed in *Vann v. Norton*, Case No. 1:03cv01711 (filed in the United States District Court for the District of Columbia) (the "D.C. Action"), the Cherokee Nation District Court temporarily restored rights to a small percentage of Cherokee Freedmen that had been recognized as citizens between March 2006 and March 2007, through a Cherokee court order. The restored rights did not include the right to run for office as guaranteed by the Treaty of 1866 because Cherokee law prohibited Freedmen from running for office;
- h. The CNO and the Cherokee Nation Officers restricted the Freedmen's right to register to vote, resulting in only a small percentage of potential Freedmen voters actually registering;
- i. The CNO and the Cherokee Nation Officers did not permit Freedmen to vote with equal standing in the June 23, 2007, election: (i) upon information and belief, Freedmen voters were turned away at the polls, and (ii) upon information and belief, Freedmen voters who attempted to

vote in person were forced to vote challenge ballots, which were placed in separate envelopes;

- j. The CNO and the Cherokee Nation Officers denied Freedmen the right to vote on ratification of the 1999 Constitution. The sole ballot issue at the June 23, 2007, election was the proposal to remove United States oversight.

11. On September 9, 2011, the BIA sent a letter to the Acting Chief of the CNO, recognizing the BIA's August 8, 2007, approval of the June 23, 2007, amendment to the 1976 Constitution that removed the requirement for Secretarial approval of amendments. However, the BIA letter stated that the decision was not retroactive; that the 1999 Constitution and the March 3, 2007, amendment stripping Freedmen of citizenship remained unapproved; that the CNO's election procedures adopted in 2010 must be submitted for approval pursuant to the Act of 1970; that the Treaty of 1866 vested the Cherokee Freedmen with citizenship rights, including the right of suffrage; and that the BIA would not recognize any CNO action that did not accord the Freedmen full citizenship rights. *See Exhibit 3.*

### **PARTIES**

12. Defendants/Counter-Plaintiffs/Cross-Claimants Raymond Nash, Larry Wasson, Robert Allen, Kathy Washington, and Lisa Duke (the "Freedmen Defendants") are Freedmen currently enrolled as citizens of the Cherokee Nation. Each Freedman Defendant can trace his or her ancestry to the Index and Final Rolls of Citizens and Freedmen of the Cherokee Tribe in Indian Territory as compiled by the United States through the Dawes Commission and approved by Act of Congress dated June 21, 1906 (34 Stat. 325) ("Dawes Rolls"), and is, accordingly, an enrolled member of the Cherokee Nation.

13. Plaintiff/Counter-Defendant the Cherokee Nation of Oklahoma is a federally-recognized Indian Tribe whose Constitution states as follows: “The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.” Cherokee Nation Oklah. Const. art. I (1976). The Cherokee Nation boundaries of sovereignty have been limited by its own Constitution, the Treaty of 1866 with the United States, the Curtis Act of 1902, and the Agreement with the United States of 1901.

14. Defendant United States Department of the Interior (“DOI”) is and at all relevant times was an agency of the United States Government. The DOI includes, among various agencies, the Bureau of Indian Affairs (“BIA”) and is responsible for the operations of the BIA. Under 25 U.S.C. § 2, the Commissioner of Indian Affairs “shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.”

15. Defendant Ken Salazar is the Secretary of the Department of the Interior (“Salazar” or “Secretary”) and the principal governmental official responsible for the administration of Indian affairs and the operations of the BIA. Salazar is an officer of the United States of America (“United States”), which is the custodian and trustee of all Native American communal property.

16. Counter-Defendant Principal Chief Bill John Baker is the Principal Chief of the Cherokee Nation of Oklahoma.

17. Counter-Defendant Deputy Principal Chief S. Joe Crittenden is the Deputy Principal Chief of the Cherokee Nation of Oklahoma.

18. Counter-Defendant Registrar John Doe is the Registrar of the Cherokee Nation of Oklahoma.

19. Counter-Defendant Election Commission Chair John Doe is the Chair of the Election Commission of the Cherokee Nation of Oklahoma.

20. Counter-Defendant Election Commission Vice Chair John Doe is the Vice Chair of the Election Commission of the Cherokee Nation of Oklahoma.

21. Counter-Defendant Election Commission Secretary John Doe is the Secretary of the Election Commission of the Cherokee Nation of Oklahoma.

22. Counter-Defendant Election Commission Member 1 John Doe is a member of the Election Commission of the Cherokee Nation of Oklahoma.

23. Counter-Defendant Election Commission Member 2 John Doe is a member of the Election Commission of the Cherokee Nation of Oklahoma.

24. Counter-Defendant Election Commission Member 3 John Doe is a member of the Election Commission of the Cherokee Nation of Oklahoma.

### **JURISDICTION AND VENUE**

25. This Court has jurisdiction over the Freedmen Defendants' claims pursuant to 18 U.S.C. §§ 1331 and 1362. Jurisdiction to review agency action is invoked pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-703. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201-2202. Equitable relief is sought pursuant to 28 U.S.C. § 1343.

26. These claims arise under the Constitution and laws of the United States, including, but not limited to, the Fifth, Thirteenth and Fifteenth Amendments to the Constitution of the United States, the Treaty of 1866, Pub. L. No. 91-495, 84 Stat. 1091 ("Act of 1970"), and the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 *et seq.* ("ICRA").

27. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

28. The United States has waived its and Defendant Salazar's sovereign immunity to the claims herein by virtue of (without limitation) the APA and the United States' fiduciary and trustee obligations toward the Cherokee Nation and its citizens. Defendant Salazar, in turn, has acted beyond his statutory authority by allowing his subordinate officers to violate the laws and Constitution of the United States, as alleged herein, and thus has no sovereign immunity under the doctrines established by *Ex parte Young*, 209 U.S. 123 (1908), *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

29. The Cherokee Nation Officers have acted beyond the scope of their authority by violating or allowing their subordinate officers to violate the laws of the United States, in particular the Treaty of 1866 and the Thirteenth Amendment to the United States Constitution, as alleged herein, and thus have no sovereign immunity under the doctrines established by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), *Larsen v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

30. The CNO's sovereignty is limited by the Constitution and Acts of the United States by virtue of (without limitation) the Thirteenth Amendment to the Constitution of the United States, the Fifteenth Amendment to the Constitution of the United States, the Treaty of 1866, the Act of 1970 and the Civil Rights Act. The CNO has, by filing this action, affirmatively waived its sovereign immunity with regard to the violations of federal statutory and constitutional law alleged by the Freedmen Defendants/Counter-Plaintiffs.

31. The CNO's courts have no authority to adjudicate the claims raised in this action because United States officials are a party to this action under the APA and are not subject to jurisdiction in CNO courts. *See Vann v. Kempthorne*, 467 F. Supp. 2d 56, 73 (D.D.C. 2006). In any event, exhaustion of tribal remedies would be futile.

## **ALLEGATIONS COMMON TO ALL COUNTERCLAIMS AND CROSS-CLAIMS**

### **Background**

32. In the 1830s, Cherokees were forcibly removed from their lands in the southeastern United States and forced to migrate to Indian Territory, present day Oklahoma, in what has become known as the Trail of Tears. Among those persons in the Trail of Tears were slaves of Cherokees as well as free intermarried Blacks or children of mixed racial families.

33. In 1863, slavery was abolished and the Black Cherokees were emancipated by virtue of the Thirteenth Amendment to the United States Constitution. In the same year, the Cherokee National Council also abolished slavery. Thereafter, all of the Black Cherokees became known as "Freedmen."

34. In 1866, the Cherokees and the United States entered into the Treaty of 1866. The Treaty of 1866 provides that the Cherokee Nation "hereby covenant[s] and agree[s] that never hereafter shall either slavery or involuntary servitude exist in [the Cherokee Nation]" and that "all freedmen who have been liberated . . . as well as all free colored persons . . . and their descendants, shall have all the rights of native Cherokees." Treaty of 1866, art. 9. The Freedmen are given the right to elect officials and to representation "according to numbers" on the national council. *Id.* arts. 5-6. They are also given the right to sue in federal court if an action arises between a Freedman and another member of the Cherokee Nation. *Id.* art. 7. The Treaty of 1866 guarantees the Freedmen that laws "shall be uniform throughout said nation" and



provides that if “any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in [the Freedmen] district, he is hereby authorized and empowered to correct such evil.” *Id.* art. 6. Finally, the Treaty provides that “[n]o law shall be enacted inconsistent with the Constitution of the United States, or laws of Congress, or existing treaty stipulations with the United States.” *Id.* art. 12.

35. The Treaty of 1866 contains the following provisions:

#### ARTICLE 4.

All the Cherokees and freed persons who were formerly slaves to any Cherokee, and all free negroes not having been such slaves, who resided in the Cherokee Nation prior to June first, eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River, shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River, and bounded on the southeast by Grand River and west by the Creek reservation to the northeast corner thereof; from thence west on the north line of the Creek reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above-described in this article: *Provided*, That that part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article.

#### ARTICLE 5.

The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII, and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States; *Provided*, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty; *Provided also*, That if any such police

regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited, and shall be void.

#### ARTICLE 6.

The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds as between the people of this and of every other district in said nation.

#### ARTICLE 7.

The United States Court to be created in the Indian Territory; and until such court is created therein, the United States district court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal, wherein an inhabitant of the district hereinbefore described shall be a party, and where an inhabitant outside of said district, in the Cherokee Nation, shall be the other party, as plaintiff or defendant in a civil cause, or shall be defendant or prosecutor in a criminal case, and all process issued in said district by any officer of the Cherokee Nation, to be executed on an inhabitant residing outside of said district, and all process issued in said district by any officer of the Cherokee Nation outside of said district, to be executed on an inhabitant residing in said district, shall be to all intents and purposes null and void, unless indorsed by the district judge where such process is to be served, and said person, so arrested, shall be held in custody by the officer so arresting him, until he shall be delivered over to the United States marshal, or consent to be tried by the Cherokee court: *Provided*, That any or all the provisions of this treaty, which make any distinction in rights and remedies between the citizens of any district and the citizens of the rest of the nation, shall be abrogated whenever the President shall have ascertained, by an election duly ordered by him, that a majority of the voters of such district desire them to be abrogated, and he shall have declared such abrogation: *And provided further*, That no law or regulation, to be hereafter enacted within said Cherokee Nation or any district thereof, prescribing a penalty for its violation, shall take effect or be enforced until after ninety days from the date of its promulgation, either by publication in one or more newspapers of general circulation in said Cherokee Nation, or by posting up copies

thereof in the Cherokee and English languages in each district where the same is to take effect, at the usual place of holding district courts.

ARTICLE 9.

The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of the 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 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: *Provided*, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated.

ARTICLE 10.

Every Cherokee and freed person resident in the Cherokee Nation shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian Territory.

36. At the time that the treaty was signed, “it was the consensus of [the Cherokee Nation’s leaders] that the freedmen were in fact Cherokee citizens, with all of the rights of native Cherokees, and that they acquired such rights by virtue of Article IX of the treaty of 1866.” *The Cherokee Nation v. United States*, 12 ICC 570 (1963). For example, in 1885, former Principal Chief of the Cherokee Nation Chief William P. Ross, involved in treaty negotiations after the Civil War, testified before the Senate’s Committee on Indian Affairs that “the [T]reaty of 1866 provided what class of colored people were to be citizens,” demonstrating Ross’s awareness that the Treaty of 1866 granted the Freedmen full citizenship rights in the Cherokee Nation. *Testimony of William P. Ross*, Committee on Indian Affairs, U.S. Senate, May 23, 1885.

37. In 1883, the Cherokee Tribal Council passed legislation that excluded the Freedmen and other tribal citizens without Cherokee blood, such as the Shawnees, Delawares, and “Intermarried Whites,” from sharing in tribal assets.

38. In 1888, the United States Congress responded to the Tribal Council’s legislation with a law requiring the Tribe to share its assets equally with the Freedmen and other adopted citizens. Act of Oct. 19, 1888, 25 Stat. 608-609. To determine the number of eligible Freedmen and provide for their equitable treatment, Congress sent a federal agent to make a full record of all those who were entitled to share in the dispersal of federal funds within the Cherokee Nation.

39. In 1889, 3,524 Freedmen were enrolled on a federal document called the Wallace Rolls to legitimate their claims to Cherokee Citizenship.

40. In 1890, as the Cherokee Tribe continued to resist the Freedmen’s equal rights to Cherokee citizenry, the United States Congress authorized the federal Court of Claims to adjudicate the rights of the Cherokee Freedmen. An Act to refer to the U.S. Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation. Act of Oct. 1, 1890, 26 Stat. 636.

41. *Moses Whitmire, Trustee for The Cherokee Freeman v. Cherokee Nation & the United States*, 30 Ct. Cl. 138 (1895), held that the Freedmen were entitled to receive equal per capita payments of funds as equal citizens of the Cherokee Tribe. The Court of Claims held that tribal sovereignty could not be exercised in a manner that breached the Cherokee Nation’s treaty obligations with the United States. Ruling in favor of the Freedmen, the court awarded them \$903,365 as their rightful share of \$7,240,000 generated from the sale of tribal lands.

42. Upon information and belief, Freedmen have served on the Cherokee National Council in the past, including Joseph Ross, who was elected in 1893 to serve in the Tahlequah district.

43. In 1893, the United States government established the Dawes Commission for the purpose of creating authoritative membership rolls for all of the Indian tribes in Oklahoma, including the Cherokee Nation. Although not required or authorized to do so, by 1898 the Dawes Commission began enrolling the Black Cherokees on a “Freedmen Roll,” while other Cherokees were enrolled on a separate “Blood Roll.” The effect of this gratuitous act of racial segregation in compiling the Dawes Rolls – imposed upon the Cherokee Nation by the Dawes Commission – was to divide the Cherokee Nation into “Freedmen” (those with some Black ancestry) and “Blood Indians.” This division was illogical and inconsistent – a Cherokee who was half Indian and half Black was designated a “Freedman”; one who was one quarter Indian and three quarters White was designated a Cherokee “by blood.” No effort was made to record the percentage of Indian blood of those listed on the “Freedmen Roll,” though historians agree that many of the Freedmen enrollees had mixed Indian ancestry. *See, e.g.,* Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1907), at 107. As a result, throughout the segregation years the Freedmen were subjected to Jim Crow laws and other forms of state-sanctioned discrimination, including being denied the right to vote in Oklahoma elections. At the same time, other Cherokee citizens were not subject to state-sanctioned discrimination.

44. Upon information and belief, Raswell Mackey, an ancestor of Freedmen Defendant Kathy Washington, was initially listed as a “native Cherokee” on the 1880 Cherokee

Census authorized by the Cherokee National Council but was later listed on the Freedmen Rolls by the Dawes Commission.

45. In 1898, Congress passed the Curtis Act, providing for allotment of communal tribal lands to all citizens of the Cherokee Nation including the Freedmen. The Curtis Act also extended federal court jurisdiction over Indian Territory and abolished tribal courts.

46. In 1901, the CNO signed an agreement with the United States providing for the allotment of tribal lands and abolishing the tribal government of the CNO, effective March 4, 1906.

47. In *Daniel Red Bird v. United States*, 203 U.S. 76 (1906), the Supreme Court affirmed the citizenship and proprietary rights of the Freedmen under the Treaty of 1866, as opposed to the “Intermarried Whites,” who did not have such rights.

48. In 1907, the Dawes Commission closed the final rolls of the Cherokee Tribe. The Dawes Commission created two separate rolls for the Cherokee Nation. Individuals possessing African blood – as unscientifically determined by the Dawes Commission officials – would be placed on the Cherokee Freedmen Roll. If an individual was half Black and half Cherokee Indian, he or she would be placed on the Freedmen Roll with no notation of Indian Blood. The Dawes Commission, however, stated that those on the Freedmen Roll were on equal footing with those on the so-called “Blood Roll.”

49. BIA’s Solicitor’s Opinion, October 1, 1941, 1 Op. Sol. On Indian Affairs 1076 (U.S.D.I. 1979), addressed the question whether the Freedmen are entitled to vote on the acceptance of a Cherokee Constitution pursuant to section 3 of the Oklahoma Indian Welfare Act (“OIWA”). The opinion states, in relevant part:

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 Indian Welfare Act.

50. The CNO never reorganized under the OIWA, but the treaties and other agreements are still in effect to provide the Freedmen with full membership rights, including voting rights. As such, neither the BIA nor the CNO can deprive the Freedmen of their right to vote.

51. The Indian Civil Rights Act of 1968, enacted by Congress, states, among other things, “No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”

52. The Act of 1970, enacted by Congress, states that, notwithstanding any other provisions of law, the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the respective tribes. It further mandates that “such established procedures shall be subject to approval by the Secretary of the Interior.”

53. On June 26, 1976, Cherokee Freedmen voted in a Cherokee election on the adoption of a Cherokee Constitution (“1976 Cherokee Constitution”).

54. Article I of the 1976 Cherokee Constitution states that the Cherokee Nation is an inseparable part of the Federal Union, and that the Constitution of the United States is the Supreme law of the land, and therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.

55. Article II of the 1976 Cherokee Constitution states, in pertinent part, that the appropriate protections of the Civil Rights Act of 1964 shall apply to all members of the Cherokee Nation.

56. Article III, Section 1, of the 1976 Cherokee Constitution states: “All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . . .” The Freedmen can prove direct lineage to the Dawes Commission Rolls.

57. Article V, Section 7 of the 1976 Cherokee Constitution states, in pertinent part: “Laws or enactments which are required by Federal Statutes to be approved shall be transmitted immediately upon enactment provided by Section 11 of this Article to the President of the United States or his authorized representative.”

58. The 1976 Cherokee Constitution, Article IX, Elections, Section 1, states in relevant part: “The Council shall enact an appropriate law not inconsistent with the provisions of this Constitution that will govern the conduct of the elections. . . .” Section 2 limits the candidacy for Council to members by blood, but does not restrict voting to blood members only. Thus, under the 1976 Cherokee Constitution, Freedmen are entitled to citizenship with voting rights.

59. Freedmen were excluded from voting in the 2003 Elections pursuant to the Code of the Cherokee Nation, which provides that “[t]ribal membership is derived only through proof of Cherokee blood based on the Final Rolls” of the Dawes Commission. 11 C.N.C.A. § 12.

### **The 2003 Elections**

60. On March 15, 2002, Neal McCaleb, Assistant Secretary of Indian Affairs, wrote to Chief Smith (“March 15, 2002, Letter”) stating that he had no objection to the Cherokee Constitutional Amendment striking the required approval of the President of the United States or



his authorized representative for changes to the Cherokee Constitution, subject to certain understandings. First, all members of the Cherokee Nation, including the Freedmen descendants who are otherwise qualified, must be provided an equal opportunity to vote in the election. Second, under current law, no amendment of the Nation's constitution can eliminate the Freedmen from membership in the Nation absent Congressional authorization. Lastly, notwithstanding any amendment of the Cherokee Nation's Constitution, the Act of 1970, until it is repealed or amended, will still require the Secretarial approval of the procedures for the election of the leaders of the Cherokee Nation and the other Five Civilized Tribes. *See* Exhibit 4.

61. In a series of subsequent letters, the BIA (i) denied the validity of the March 15, 2002, Letter; (ii) informed Chief Smith, citing *Seminole I*, of the requirement that, prior to an election of the Principal Chief, the election procedures must be submitted to the Secretary and must be approved; (iii) advised Raymond Vann of the Cherokee Nation Election Commission that such compliance was required; (iv) notified Chief Smith on July 11, 2003, that the CNO had been previously advised on two occasions regarding the requirements of the Act of 1970 and asked the CNO to submit its current election laws for approval; (v) stated later in a letter dated July 25, 2003, that the procedures for selecting the Principal Chief of the Cherokee Nation are subject to approval by the Secretary, and that the BIA was "aware of no evidence that the Secretary has approved the current procedures for the election of the Principal Chief." The July 25, 2003, letter also stated that "the BIA views the situation to be identical to the one involving the Seminole Nation of Oklahoma . . . ." Copies of this correspondence and the CNO's replies are attached hereto as Exhibits 5-13.

62. Upon information and belief, lobbyist Jack Abramoff donated \$1,500 to the campaign of Chadwick Smith for Principal Chief in 2003. *See* Exhibit 14. Upon information

and belief Jack Abramoff was retained and paid by Cherokee Nation Enterprises to lobby for “sovereignty issues” at some point during 2003. *See* Exhibit 15.

63. Following the BIA determination to not recognize the election of Chadwick Smith because it violated the Act of 1970, upon information and belief, Cherokee officials met with Steven Griles, Aurene Martin, and possibly other DOI officials to discuss the constitutional amendments.

64. On August 6, 2003, the BIA completely reversed its position. In a letter from Jeanette Hanna to Chief Smith, the BIA stated that it was “inappropriate and premature for the Department to question the validity of the Tribal officials. Based on the Nation’s Election Commission certification of the results of the May 24 election, the Department recognizes you as Principal Chief of the Nation.” *See* Exhibit 16. In the same letter, the BIA stated: “The Department continues to have under review the May 24 Tribal Election results on the proposed amendment of the Tribal constitution that would remove the requirement that future amendments be approved by the Secretary of the Interior.” *Id.*

65. The BIA made a final agency decision on the May 24, 2003, election for Principal Chief. The BIA decided not to require compliance with the Act of 1970, or to require submission of voter regulations. The BIA was aware that the Freedmen citizens were not entitled to vote in the 2003 Elections.

66. Upon information and belief, the CNO called for an election to be held on July 26, 2003, to ratify several amendments to the 1976 Cherokee Constitution. The amendments changed the number of representatives on the National Council, created “at-large” seats on the National Council, dissolved the Judicial Appeals Tribunal and established in its place the Cherokee Supreme Court, changed the number of justices from three to five, and removed the

provision in Article I that states “The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law.” The Freedmen were not permitted to vote under tribal law in the July 26, 2003, election.

67. The D.C. Action Plaintiffs, through their counsel, notified Federal Defendants that the Freedmen were denied the right to vote in the May 24, 2003, election and, as a matter of policy, the Freedmen had been stripped of their membership rights. Copies of June 10, 2003, and July 21, 2003, letters from D.C. Action Plaintiffs’ counsel, Jon Velie, are attached hereto as Exhibit 17 .

68. On August 11, 2003, Freedman Marilyn Vann and five other individual Freedmen (the “D.C. Action Plaintiffs”) filed the D.C. Action, asserting that the Federal Defendants had failed to protect the civil rights guaranteed to the Cherokee Freedmen under the Treaty of 1866 and other laws.

69. On January 14, 2005, the CNO moved to intervene in the D.C. Action for the limited purpose of asserting that it was a necessary and indispensable party under Federal Rule of Civil Procedure 19 but that because its sovereign immunity barred its joinder, the entire case must be dismissed. The D.C. Action Plaintiffs responded by filing a motion to amend to add as defendants the CNO, Chief Chadwick Smith, and other tribal officials (the “Cherokee Nation Defendants”). The Freedmen alleged that the Cherokee Nation Defendants violated the Thirteenth Amendment, the Treaty of 1866, and related laws that protect the civil rights of the Freedmen.

70. In December 2006, the district court ruled in the D.C. Action that the Cherokee Nation was a necessary party under Rule 19 and that the Cherokee Nation and its officers could

be joined because, under the Thirteenth Amendment and the Treaty of 1866, Congress unequivocally indicated its intent to abrogate the Cherokee Nation's immunity with respect to racial oppression against the Freedmen. *Vann v. Kempthorne*, 467 F. Supp. 2d 56, 70, 74 (D.D.C. 2006) (“*Vann I*”). On interlocutory appeal, the United States Court of Appeals for the District of Columbia Circuit held that while the Cherokee Nation is immune from suit, the Cherokee officials may be sued under *Ex parte Young*. *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (“*Vann II*”). On remand, the district court held that where the Cherokee officials were properly sued under *Ex parte Young* but where the Cherokee Nation itself was not joined in the suit, the Cherokee Nation was an indispensable party, necessitating the case's dismissal. *Vann v. Salazar*, --- F. Supp. 2d ---, No. 03-1711 (HHK), 2011 WL 4953030 (D.D.C. Sept. 30, 2011) (“*Vann III*”). The Freedmen appealed in *Vann v. United States Dep't of Interior*, No. 11-5322 (“*Vann IV*”), which is pending before the D.C. Circuit.

### **Implementation of the 1999 Cherokee Constitution**

71. The highest Cherokee Court, the Judicial Appeals Tribunal (JAT), in *Allen v. Cherokee Nation Tribal Council*, JAT 04-09 (Cherokee Nation Jud. App. Trib. Mar. 7, 2006) ruled that the voting and membership laws that prohibited the Freedmen from voting in the May 2003 election violated the Cherokee Constitution. The *Allen* Court also stated the Treaty of 1866 could be unilaterally abrogated by the CNO through a popular vote of its citizens to define citizenship.

72. After the *Allen* decision, the CNO began recognizing citizenship for certain Freedmen. Chief Smith sent a memorandum to the Cherokee Nation Registrar instructing the enrollment of Freedmen on the same basis as all other citizenship applications. See Memorandum attached as Exhibit 18. Upon information and belief, after the JAT had issued its

ruling in the *Allen* case, Chief Smith stated that “[t]he process to decide the issue of Freedmen citizenship is a constitutional amendment at the polls.” *See* Exhibit 19.

73. Upon information and belief, the CNO believes that the “Cherokee Nation has had no remaining obligation arising from the Treaty of 1866 on the issue of citizenship for over 105 years.” *See* Exhibit 20.

74. On June 7, 2006, the Cherokee Nation Judicial Appeals Tribunal determined that the CNO could operate under the new Constitution (“1999 Constitution”) ratified by CNO voters at the July 26, 2003, election. The 1999 Constitution, among other things, made several changes to the CNO government. Cherokee Freedmen were not permitted to vote for ratification of the 1999 Constitution. In addition, the Federal Defendants have not approved the 1999 Constitution pursuant to the terms of the existing 1976 Constitution. *In re 1999 Constitution*, JAT 05-04 (June 7, 2006). *See* Exhibit 21.

75. Operating under the unapproved 1999 Constitution, the CNO dissolved the Judicial Appeals Tribunal and created a new, larger Supreme Court and added to it two new judges.

76. Upon information and belief, the CNO informed the DOI on June 9, 2006, that the Cherokee Nation was withdrawing its request for approval by the United States of the 1999 Constitution. In response to the June 9 letter, the DOI informed the CNO 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.” *See* Exhibits 1, 22.

### **Stripping the Cherokee Freedmen of Citizenship**

77. The new Cherokee Supreme Court voted 3-2 that the CNO could hold an election to expel the Freedmen. *In re Protest to 1999 Amendment Petition*, SC-06-12 (Dec. 19, 2006). The two new judges made the difference because the holdover judges from the Judicial Appeals Tribunal had ruled 2-1 that it could not.

78. After the *Allen* decision, CNO citizens began circulating an initiative petition seeking to amend the 1999 Constitution to remove the Freedmen's citizenship rights. The Cherokee Nation Supreme Court ruled that the initiative could be placed before Cherokee voters for ratification. The CNO called for a special election and eventually set an election date of March 3, 2007. The proposed amendment read as follows:

This measure amends the Cherokee Nation Constitution section which deals with who can be a citizen of the Cherokee Nation. A vote "yes" for this amendment would mean that citizenship would be limited to those who are original enrollees or descendants of Cherokees by blood, Delawares by blood, or Shawnees by blood as listed on the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Commission Rolls closed in 1906. *This amendment would take away citizenship of current citizens and deny citizenship to future applicants who are solely descendants of those on either the Dawes Intermarried Whites or Freedmen Rolls.* A vote 'no' would mean that Intermarried Whites and Freedmen original enrollees and their descendants would continue to be eligible for citizenship. Neither 'yes' or a 'no' vote will affect the citizenship rights of those individuals who are original enrollees or descendants of Cherokees by blood, Delaware by blood, or Shawnees by blood as listed on the Final Rolls of the Dawes Commission Rolls closed in 1906.

*See Exhibit 23.*

79. Upon information and belief, Chief Smith supported the measure and called the Freedmen "non-Indians." Smith has engaged in a pervasive nationwide public campaign in which he has stated at conferences, in press releases, newspaper articles, radio shows, and other media outlets that the Freedmen are non-Indians and that the CNO has a right to exclude these non-Indians from the Cherokee Nation.

80. The Cherokee Nation citizens approved the amendment on March 3, 2007. On or about March 21, 2007, the Freedmen Defendants received letters stating that their citizenship had been terminated following the March 3 election. *See* Exhibit 24 (Letter from the Cherokee Nation Registrar to Charlene White, a Freedman Plaintiff in the D.C. Action). On March 28, 2007, Cherokee Clinic Administrator Darrel O’Field notified the Freedmen that “because of the Constitutional Amendment, you are no longer eligible to receive medical benefits through Cherokee Nation.” *See* Exhibit 25 (Letter from Cherokee Clinic Administrator to Charlene White).

81. On March 28, 2007, Assistant Secretary Carl Artman sent a letter to CNO officials stating that the 2003 Constitutional amendments (the amendments ratified at the 2003 elections without Freedmen participation) were still under review.

82. On May 14, 2007, in response to a motion for preliminary injunction filed in the D.C. Action, the Cherokee Nation District Court entered an order temporarily reinstating the citizenship of the Freedmen. On May 17, the Cherokee Nation District Court entered a second order reopening voter registration to Freedmen for a period of nine days. Only a small percentage of Freedmen have citizenship in the CNO and were able to register to vote for the upcoming June 23, 2007, general election.

83. On May 21, 2007, the DOI issued a decision disapproving the 2003 amendment “that would remove from the constitution the requirement that the Secretary approve all constitutional amendments for them to be effective.” *See* Exhibit 2. In the letter, Assistant Secretary Artman stated that he was concerned about the removal of the Freedmen in “apparent violation of the Treaty of 1866.” Artman also informed the CNO that until the provision requiring United States approval of amendments was removed from the Cherokee Constitution,

all amendments would require approval. To date, the United States has not approved any amendments from the July 26, 2003, election.

84. In response to the disapproval of the May 24, 2003 amendment, which would have removed United States oversight, the CNO placed on the June 23, 2007, general election ballot the same measure – to remove the requirement of United States approval for any amendment to the Cherokee Constitution. The CNO did not place the other amendments approved at the July 26, 2003, election, those making changes to the structure of the Cherokee government, on the June 23, 2007 election ballot. To date, Freedmen citizens have not been able to vote to ratify the 1999 Constitution that the CNO considers to be the governing document of the Tribe, notwithstanding the absence of required United States approval.

85. The June 23, 2007, general election was held under the 1999 Constitution. “At-large” district representatives were elected. Upon information and belief, the Freedmen were informed by letter that they would be required to vote by absentee ballot regardless of where they lived.

86. Freedmen were treated as second-class citizens when attempting to exercise their right to vote at the June 23, 2007, election. Upon information and belief, Freedmen ballots were segregated from other ballots, placed in envelopes, and left on desks with no protection of the ballot. Freedmen were verbally abused by precinct workers. Freedman Ruth Adair Nash was not permitted to place her ballot in the voting machine but instead forced to put it in an envelope. It was put aside as a “challenged ballot.” The precinct worker told Ms. Nash “We wouldn’t have this problem except for Marilyn Vann.” Upon information and belief, other Freedmen voters were turned away from the polls.



87. No Freedmen were permitted to run for office in the June 23, 2007, election. In addition, no seat on the National Council was for the Freedmen “according to their numbers” as required by the Treaty of 1866. Certain Freedmen, if permitted, would run for office.

88. On August 9, 2007, the BIA notified the CNO that the amendment to remove the requirement for approval of any amendments to the Cherokee Constitution had been approved by the BIA. *See* Exhibit 26.

89. On January 14, 2011, the Cherokee Nation District Court issued a final order declaring that the March 2007 Amendment stripping the Freedmen of their citizenship was “void as a matter of law” under the Treaty of 1866. Tribal Court Action (Jan. 14, 2011 Order). This order preserved the citizenship rights of certain Freedmen, pending the Cherokee Nation’s appeal of the order to the Cherokee Nation Supreme Court. *See* Exhibit 27.

90. The Cherokee Nation held a general election on June 25, 2011, for, among other elected positions, the office of Principal Chief of the Cherokee Nation. The limited number of Freedmen who were registered Cherokee citizens and who had registered to vote were permitted to vote in this election. However, many Freedmen were unable to vote because the Cherokee Nation stopped processing citizenship petitions after the brief processing period in May 2007.

91. On July 21, 2011, the Cherokee Nation Supreme Court issued an order declaring the June 25, 2011 election for Principal Chief invalid, explaining that the election between Chief Smith and challenger Bill John Baker was too close to call. *In re 2011 General Election*, Case No. SC-2011-06 (Cherokee Nation Sup. Ct. July 21, 2011). *See* Exhibit 28. Principal Chief Smith’s term came to an end on August 14, 2011, at the previously determined inauguration date, and the duly elected Chief S. Joe Crittenden took office as Acting Principal Chief of the Cherokee Nation. A special election for Principal Chief was scheduled for September 24, 2011.

92. On August 22, 2011, the Supreme Court of the Cherokee Nation issued a ruling upholding the validity of the March 2007 amendment stripping the Freedmen of their citizenship rights, reversing and vacating the order of the Cherokee Nation District Court issued on January 14, 2011. The Cherokee Nation Supreme Court ruled that it lacked subject matter jurisdiction to determine the validity of an amendment to the Cherokee Constitution. *See Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02 (Cherokee Nation Sup. Ct. Aug. 22, 2011). The Cherokee Nation Supreme Court stated that the Treaty of 1866 did not grant citizenship rights to the Freedmen but that the Cherokee Nation Constitution, amended in 1866 to grant citizenship to the Freedmen, was the exclusive document from which Freedmen derived their citizenship rights. *See Exhibit 29*.

93. Following the Cherokee Supreme Court's decision, the Cherokee Nation and Acting Principal Chief began taking steps to strip the Freedmen of their citizenship rights. The Cherokee Election Commission began removing Freedmen from the voting rolls in advance of the September 24 election. *See Letter from Kalyn Free to Cherokee Nation Election Commission (September 2, 2011) (Election Commission has coded 1233 registered Freedmen as "inactive" and has not sent absentee ballots to 354 registered Freedmen who requested them) (attached as Exhibit 30); email from Lloyd Cole, Jr. to Kalyn Free (September 2, 2011) (acknowledging that Freedmen are being removed from the Cherokee voter rolls and Cherokee Election Commission database) (attached as Exhibit 31)*.

94. On September 2, 2011, the Freedmen moved for a preliminary injunction prohibiting the CNO Defendants from denying the Freedmen their full citizenship rights and from holding any election where Freedmen could not vote, based solely upon their status as Cherokee Freedmen.

95. On September 9, 2011, the BIA sent a letter to the Acting Chief of the CNO, recognizing the BIA's August 8, 2007, approval of the June 23, 2007, amendment to the 1976 Constitution that removed the requirement for Secretarial approval of amendments. However, the September 9 letter clarified that the decision was not retroactive; that the 1999 Constitution and the March 3, 2007 amendment stripping Freedmen of citizenship remained unapproved; that the CNO's election procedures adopted in 2010 must be submitted for approval pursuant to the Act of 1970; that the Treaty of 1866 vested Cherokee Freedmen with citizenship rights, including the right of suffrage; and that the BIA would not recognize any CNO action that did not accord the Freedmen full citizenship rights. *See* Exhibit 3.

96. On September 21, 2011, on the joint motion of the parties, the U.S. District Court for the District of Columbia ordered that Acting Chief Crittenden must ensure that Freedmen previously recognized as Cherokee citizens would be permitted to vote in the upcoming election for Principal Chief and would be recognized as Cherokee citizens pending disposition of the case or further order of the court. *See* Exhibit 32.

97. On September 24, 2011, the Cherokee Nation held a special election for Principal Chief Bill John Baker. As set forth in the Order, only the Freedmen who were enrolled as citizens as of August 22, 2011 were permitted to vote. Many Freedmen had pending citizenship petitions, because no such citizenship petitions had been processed since 2007, and were thus denied the right to vote in the election.

98. The Freedmen Defendants/Cross-Claimants have exhausted their remedies before the BIA, and, further, their pursuit of any such remedies would be futile in light of the well-documented and pervasive discrimination against them.

99. The Freedmen Defendants/Counter-Plaintiffs/Cross-Claimants have no remedy with the tribal government because the CNO tribal courts have no authority to adjudicate violations by United States officials or violations of the APA or other United States laws. Further, the Cherokee courts have already determined in the *Allen* decision that the Freedmen should have been able to vote in the 2003 elections. Instead of voiding the illegal election and holding a new election, illegally elected Chief Smith, operating under the 1999 Constitution that was not ratified by the Freedmen citizens nor approved by the United States as required by Cherokee law, dismantled the JAT and established the Cherokee Supreme Court and packed it with new judges. Therefore, the Cherokee court system is not lawfully constituted. Furthermore, in *Cherokee Nation Registrar v. Nash*, the Cherokee Nation Supreme Court has already ruled that the Treaty of 1866 did not grant citizenship rights to the Freedmen and found that such rights were granted only by the Cherokee Nation Constitution. *See* Exhibit 29. In addition, as the court held in *Davis v. United States*, 343 F.3d 1282, 1293 (2003) (“*Davis II*”), it would be futile for the Freedmen to “seek adjudication in tribal forums” (internal citation and quotation marks omitted).

100. The Freedmen Defendants/Counter-Plaintiffs have no remedy with the CNO because: (i) the citizenship granted to the Freedmen under the Treaty of 1866 and recognized by the Dawes Commission is exclusively a determination of the United States; (ii) the Cherokee Nation Supreme Court is not lawfully constituted as it was created under the unapproved 1999 Cherokee Constitution; (iii) the Cherokee Judicial Appeals Tribunal has already determined that the CNO could abrogate the Treaty of 1866 with a constitutional amendment popular vote; and (iv) the Cherokee Nation Supreme Court has already determined that the Treaty of 1866 did not

grant citizenship rights to the Freedmen and found that such rights were granted only by the Cherokee Nation Constitution.

101. The Freedmen Defendants/Counter-Claimants have a final agency determination from the DOI as the decision by BIA Muskogee Area Director Jeanette Hanna specifically stated in a letter to Chief Smith that the determination of elected officials was an issue to be resolved by the Cherokee Nation. *See* Exhibit 16.

102. In a letter dated June 9, 2006, Chief Smith notified the DOI that the CNO was withdrawing its request for DOI's approval of the 1999 Constitution. *See* Exhibit 1. The CNO stated that DOI approval was a moot issue.

103. Upon information and belief, the BIA denies Cherokee Freedmen Certificate of Degree of Indian Blood ("CDIB") cards as a matter of policy.

104. Upon information and belief, the CNO receives federal funding distributed by the DOI for the benefit of Cherokee citizens. Upon information and belief, the BIA has knowledge that the CNO distributes funds under these federal programs in a discriminatory manner. In particular, Cherokee Freedmen are denied the right to receive benefits from these programs by virtue of their status as Freedmen.

105. Upon information and belief, the CNO and the Cherokee Nation Officers have taken the position that the Freedmen are non-Indians whose citizenship has been revoked by popular vote of Cherokee citizens on March 3, 2007.

106. Upon information and belief, the CNO and the Cherokee Nation Officers have implemented laws and/or policies that have resulted in halting citizenship grants to Freedmen applicants.

107. The Freedmen Defendants/Counter-Plaintiffs/Cross-Claimants have no adequate remedy at law.

**COUNTERCLAIMS AGAINST THE CHEROKEE NATION OF OKLAHOMA AND  
THE CHEROKEE NATION OFFICERS**

**FIRST CAUSE OF ACTION**

(Violation of the United States Constitution/ Federal Law)

108. The Freedmen Defendants/Counter-Plaintiffs repeat and re-allege the allegations contained in paragraphs 1–107 as though set forth fully herein.

109. The Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma’s and the Counter-Defendant Cherokee Nation Officers’ acts violate, without limitation, the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

110. The Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers directly violate the Thirteenth Amendment of the Constitution in perpetuating “badges and incidents” of slavery because their actions and inactions depriving the Freedmen of the full citizenship rights to which the Freedmen are entitled are based on the Freedmen’s status as descendants of former slaves. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

111. By implementing policies denying the Freedmen Defendants/Counter-Plaintiffs the right to vote, the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers have violated, without limitation, the Thirteenth Amendment, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

112. By implementing policies denying the Freedmen Defendants/Counter-Plaintiffs the right to run for office, the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers have violated, without limitation, the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

113. By implementing policies stripping the Freedmen Defendants/Counter-Plaintiffs of their citizenship in the Cherokee Nation, the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers have violated, without limitation, the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

114. By implementing policies denying the Freedmen Defendants/Counter-Plaintiffs the right to have their Cherokee citizenship application processed, the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers have violated, without limitation, the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

115. By implementing policies denying the Freedmen Defendants/Counter-Plaintiffs the right to equal access to federal funds provided to the CNO for the benefit of all Cherokee citizens, the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers have violated, without limitation, the United States Constitution, the Act of 1970, the Cherokee Constitution, the Treaty Between the United States



and the Cherokee Indians, March 21, 1866, 14 Stat. 755, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301, *et seq.*

116. The Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma's and the Counter-Defendant Cherokee Nation Officers' actions were taken with deliberate, conscious, and callous indifference to Freedmen Defendants/Counter-Plaintiffs' rights, and represent an ongoing violation of Freedmen Defendants/Counter-Plaintiffs' constitutional and treaty rights.

117. By reason of the foregoing, a ripe and justiciable controversy exists, and the Freedmen Defendants/Counter-Plaintiffs have standing to assert their rights and are entitled to declaratory and injunctive relief to preserve their rights as members of the CNO.

WHEREFORE, Freedmen Defendants/Counter-Plaintiffs respectfully pray for judgment granting declaratory and injunctive relief as follows:

118. Declaring that the Treaty of 1866 guarantees the Freedmen the right to citizenship within the CNO; that the Freedmen are legally indistinguishable from other citizens of the CNO under the Treaty of 1866; and that the Freedmen are entitled to enjoy all civil and proprietary rights arising from citizenship in the CNO equally and on the same basis as all other citizens of the CNO under the Treaty of 1866, including without limitation the right to vote with equal status within the CNO, the right to run for office, the right to receive medical benefits through the CNO, equal access to CNO scholarship funds, the right to participate equally in CNO activities, and equal access to federal funds provided to the CNO.

119. Declaring that neither the Five Tribes Act nor any other federal statute has modified the Freedmen's citizenship rights as granted in the Treaty of 1866.

120. Declaring that no amendment to the Cherokee Constitution could modify the citizenship rights of Freedmen because those rights are derived from the Treaty of 1866 and not the Cherokee Constitution.

121. Declaring that neither the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma nor the Counter-Defendant Cherokee Nation Officers may strip the Freedmen of their citizenship rights or otherwise treat the Freedmen in a manner different from any other Cherokee citizen because such actions would violate the Thirteenth Amendment to the U.S. Constitution, the Treaty of 1866, and the Indian Civil Rights Act.

122. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from taking any further actions to disenfranchise or otherwise strip the citizenship rights of the Freedmen.

123. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing any law recognizing the July 26, 2003, election (ratifying the alleged 1999 Cherokee Constitution and changing the structure of the Cherokee government) or implementing any law recognizing the alleged 1999 Cherokee Constitution, until such time as all Freedmen are permitted to vote and run for office.

124. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing any law recognizing the results of the March 3, 2007, election (amending the Cherokee Constitution to deny citizenship rights to the Freedmen).

125. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from initiating, implementing, or recognizing any election that seeks to limit the citizenship rights of the Cherokee Freedmen in any way, or that seeks to limit the rights that flow therefrom.

126. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from recognizing the results of the May 24, 2003, election (among other things, removing the requirement for secretarial approval of amendments to the Cherokee Constitution), the results of the June 23, 2007, election (removing the requirement for Secretarial approval of amendments to the Cherokee Constitution), or the results of any other election seeking to ratify an amendment to the Cherokee Constitution that removes the requirement for secretarial approval of amendments to the Cherokee Constitution.

127. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing any policy that prohibits the Freedmen from voting in future elections.

128. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing any policy that prohibits the Freedmen from running for Tribal Council in proportion to their numbers pursuant to the Treaty of 1866.

129. Directing the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers to promptly process Freedmen citizenship petitions, and to treat petitions equally whether an applicant traces his or her ancestry through the Blood Rolls or through the Freedmen Rolls and enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing or permitting any policy that prohibits the adjudication of Freedmen citizenship petitions in accordance with the Thirteenth Amendment and the Treaty of 1866.

130. Enjoining the Plaintiff/Counter-Defendant Cherokee Nation of Oklahoma and the Counter-Defendant Cherokee Nation Officers from implementing any policy that denies Freedmen the right to participate equally in federal funds distributed to the CNO for the benefit of all Cherokee citizens.

131. Awarding the Freedmen Defendants/Counter-Plaintiffs their reasonable attorneys fees, costs, and disbursements from the parties, including, but not limited to, recovery of fees and costs from the United States pursuant to the Equal Access to Justice Act.

132. Awarding such other relief as accords with the Freedmen Defendants/Counter-Plaintiffs' causes of action herein and as the Court deems just and proper.

## **CROSS-CLAIMS AGAINST THE FEDERAL DEFENDANTS**

### **FIRST CAUSE OF ACTION**

(Violation of United States Constitution / Federal Law)

133. Freedmen Defendants/Cross-Claimants repeat and re-allege the allegations contained in paragraphs 1- 107 as though set forth fully herein.

134. The Federal Defendants have breached their fiduciary duty to protect the citizenship rights of the Freedmen, including without limitation their voting rights, their rights to run for office, their rights to equal access to all benefits arising from citizenship in the CNO. The Federal Defendants have taken no action despite their responsibilities to the Freedmen, allowing the CNO to disenfranchise the Freedmen through the denial of their right to vote, the election to strip the Freedmen of their citizenship, policies that prevent over 90% of the Freedmen entitled to citizenship under the Treaty of 1866 from obtaining citizenship status, and policies limiting the Freedmen's access to all benefits arising out of citizenship in the CNO. The United States has and will continue to disperse hundreds of millions of dollars of United States funds to Cherokee administrations despite violations of federal law by Chiefs Smith's and Chief Baker's administrations and despite the demands and requests for the Federal Defendants' protection of the oppressed Freedmen citizens. The funds dispersed to Chief Baker's administration are currently denied to over 90% of the Freedmen eligible for citizenship under the Treaty of 1866.

135. The Federal Defendants' acts violate, without limitation, the United States Constitution, the Act of 1970, the Treaty of 1866, and the Indian Civil Rights Act.

136. The Federal Defendants directly violate the Thirteenth Amendment of the Constitution in perpetuating "badges and incidents" of slavery by treating the Freedmen

differently than other citizens of the Cherokee Nation based on the Freedmen's status as descendants of former slaves. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

137. The Federal Defendants violate the Fifteenth Amendment, which prohibits the United States from denying the right to vote "on account of race, color, or previous condition of servitude" by its express action in permitting the discriminatory regulations of the CNO that intentionally exclude its Freedmen citizens from the voting process.

138. By reason of the foregoing, a ripe and justiciable controversy exists, and Freedmen Defendants/Cross-Claimants have standing to assert their rights. As a result of the foregoing, Freedmen Defendants/Cross-Claimants are entitled to declaratory and injunctive relief to preserve their rights as members of the Cherokee Nation.

139. 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 and thus deprives the Cherokee Freedmen of due process of law in violation of the Fifth Amendment of the Constitution of the United States. There is no legitimate reason for the denial of benefits deriving from the funds distributed by the United States to the CNO. The Federal Defendants' policy in this respect is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

140. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Treaty of 1866 guarantees the Freedmen the right to citizenship within the CNO; that the Freedmen are legally indistinguishable from other citizens of the CNO under the Treaty of 1866; and that the Freedmen are entitled to enjoy all civil and proprietary rights arising from citizenship in the CNO equally and on the same basis as all other citizens of the CNO under the Treaty of 1866, including without limitation the right to vote with equal status within the CNO,

the right to run for office, the right to receive medical benefits through the CNO, equal access to CNO scholarship funds, the right to participate equally in CNO activities, and equal access to federal funds provided to the CNO.

141. The Freedmen Defendants/Cross-Claimants require and request a declaration that neither the Five Tribes Act nor any other federal statute modified the Freedmen's citizenship rights as granted in the Treaty of 1866.

142. The Freedmen Defendants/Cross-Claimants require and request a declaration that no amendment to the Cherokee Constitution could modify the citizenship rights of Freedmen since those rights are derived from the Treaty of 1866 and not the Cherokee Constitution.

143. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants have a fiduciary responsibility to protect the citizenship rights of the Freedmen.

144. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants, in their capacity as fiduciaries and trustees, may not approve any election or other act by the CNO in derogation of the rights of its Freedmen citizens.

145. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to appoint a Trustee to ensure the civil rights of the Freedmen are not violated in the future.

146. The Freedmen Defendants/Cross-Claimants require and request an injunction preventing the Federal Defendants from recognizing the results of the June 23, 2007, election (removing the requirement for Secretarial approval of amendments to the Cherokee Constitution), and that prohibits them from recognizing the results of any other election seeking

to ratify an amendment to the Cherokee Constitution that removes the requirement for secretarial approval of amendments to the Cherokee Constitution.

147. The Freedmen Defendants/Cross-Claimants require and request an injunction preventing the Federal Defendants from recognizing the Bill John Baker Administration, any subsequent CNO government, or any actions of the CNO 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, operates in compliance with the Treaty of 1866, the U.S. Constitution, the Indian Civil Rights Act, and the Act of 1970.

148. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Cherokee Freedmen are entitled to receive CDIB Cards.

149. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to accept and approve each application for a CDIB card submitted by a Cherokee Freedmen who can trace his or her ancestry to an individual listed on the Dawes Rolls.

150. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to disapprove disbursements from the funds distributed by the United States to the CNO unless those disbursements benefit the Cherokee Freedmen on the same terms as they benefit all other members of the Cherokee Nation; and further, to condition any further release or payment of monies from the funds distributed by the United States to the CNO on the Cherokee Nation's compliance with said directive.

## **SECOND CAUSE OF ACTION**

(Judicial Review of Agency Action Under the APA and Breach of Fiduciary Duty)



151. Freedmen Defendants/Cross-Claimants repeat and re-allege the allegations set forth in paragraphs 1- 107 as if set forth fully herein.

152. Freedmen Defendants/Cross-Claimants have exhausted their administrative remedies, and all BIA action in this respect is final. Alternatively, Freedmen Defendants/Cross-Claimants are not required to exhaust any purported administrative remedies or to demonstrate final agency action because pursuit of such remedies would be futile, because Freedmen Defendants/Cross-Claimants' Constitutional rights are being violated, because the issue to be decided is a purely legal one, and because irreparable harm would otherwise ensue.

153. According to prior DOI precedent, the "BIA has the *authority and the responsibility* to decline to recognize the results of a tribal election when it finds that a violation of the [Indian Civil Rights Act] has tainted the election results." *United Keetoowah Band of Cherokee Indians in Okla. v. Muskogee Area Dir.*, 22 IBIA 75, 83 (1992) (emphasis added). By continuing to recognize the CNO and its Constitution, which was approved without permitting the Cherokee Freedmen to vote on it, the DOI has breached its fiduciary duty to protect the Freedmen.

154. Despite the actions of the CNO in allegedly approving and acting under the 1999 Cherokee Constitution, the Federal Defendants must still fulfill their statutory obligations to protect the Cherokee Freedmen and refuse recognition of the CNO government and 1999 Cherokee Constitution until such time as the Cherokee Nation and its officers affirm the citizenship rights of the Cherokee Freedmen.

155. By failing to require the filing of procedures pursuant to the Act of 1970 prior to the July 2003 Election, the Federal Defendants acted arbitrarily, capriciously, in abuse of their

discretion, or otherwise not in accordance with law and breached their fiduciary duty to the Freedmen.

156. By recognizing Chadwick Smith as Principal Chief of the Cherokee Nation, as well as other officials elected to office in the illegal July 2003 Election, the Federal Defendants acted arbitrarily, capriciously, in abuse of their discretion, or otherwise not in accordance with law by approving the racially discriminatory and unlawful disenfranchisement of the Freedmen in violation of the Treaty of 1866, failing to meet their obligations under the Act of 1970, and breaching their fiduciary duties to the Freedmen.

157. By approving the June 2007 vote removing the requirement for the United States to approve amendments to the Cherokee Constitution, the Federal Defendants acted arbitrarily, capriciously, in abuse of their discretion, or otherwise not in accordance with law and have violated their fiduciary duties to the Freedmen by (1) sanctioning an election in which the Freedmen were deprived of their citizenship rights, including the right to vote with equal standing; and (2) violating their fiduciary duty to the Freedmen by abandoning their duty to withhold approval of Constitutional amendments that encroach upon the Freedmen's rights.

158. The Federal Defendants' policy of refusing to provide Cherokee Freedmen with CDIB Cards is arbitrary and capricious, contrary to law, in violation of the Federal Defendants' own regulations, and unconstitutionally discriminatory.

159. By failing to follow the law as set forth in the *Seminole I* and *Seminole II* decisions, the Federal Defendants have acted arbitrarily, capriciously, in abuse of their discretion, or otherwise not in accordance with law by failing to follow their own recognized laws and policies, discriminating against the Cherokee Freedmen to their injury and prejudice, and breaching their fiduciary duties to the Freedmen.

160. The Freedmen Defendants/Cross-Claimants require and request a declaration, pursuant to 28 U.S.C. § 2201, that pursuant to 5 U.S.C. §§ 701 *et seq.*, the complained of actions of the Federal Defendants are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

161. The Freedmen Defendants/ Cross-Claimants require and request a declaration that the Treaty of 1866 guarantees the Freedmen the right to citizenship within the CNO; that the Freedmen are legally indistinguishable from other citizens of the CNO under the Treaty of 1866; and that the Freedmen are entitled to enjoy all civil and proprietary rights arising from citizenship in the CNO equally and on the same basis as all other citizens of the CNO under the Treaty of 1866, including without limitation the right to vote with equal status within the CNO, the right to run for office, the right to receive medical benefits through the CNO, equal access to CNO scholarship funds, the right to participate equally in CNO activities, and equal access to federal funds provided to the CNO.

162. The Freedmen Defendants/Cross-Claimants require and request a declaration that neither the Five Tribes Act nor any other federal statute modified the Freedmen's citizenship rights as granted in the Treaty of 1866.

163. The Freedmen Defendants/Cross-Claimants require and request a declaration that no amendment to the Cherokee Constitution could modify the citizenship rights of Freedmen since those rights are derived from the Treaty of 1866 and not the Cherokee Constitution.

164. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants have a fiduciary responsibility to protect the citizenship rights of the Freedmen.

165. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants, in their capacity as fiduciaries and trustees, may not approve any election or other act by the CNO in derogation of the rights of its Freedmen citizens.

166. The Freedmen Defendants/Cross-Claimants require and request an injunction prohibiting the Federal Defendants from recognizing the results of the June 23, 2007 election (removing the requirement for Secretarial approval of amendments to the Cherokee Constitution), and that prohibits them from recognizing the results of any other election seeking to ratify an amendment to the Cherokee Constitution that removes the requirement for secretarial approval of amendments to the Cherokee Constitution.

167. The Freedmen Defendants/Cross-Claimants require and request an injunction prohibiting the Federal Defendants from recognizing the Bill John Baker Administration, any subsequent CNO government, or any actions of the CNO until such time that it is constituted with Freedmen representatives, operates under a Constitution that has been ratified at an election including Freedmen citizens, grants all Freedmen entitled to citizenship and the right to vote the same ability to do so as other Cherokee citizens, and operates in compliance with the Treaty of 1866, the U.S. Constitution, the Indian Civil Rights Act, and the Act of 1970.

168. The Freedmen Defendants/Cross-Claimants require and request an injunction directing the Federal Defendants to appoint a Trustee to ensure the civil rights of the Freedmen are not violated in the future.

169. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Cherokee Freedmen are entitled to receive CDIB Cards.

170. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to accept and approve each application for a CDIB card

submitted by a Cherokee Freedmen who can trace his or her ancestry to an individual listed on the Dawes Rolls.

**THIRD CAUSE OF ACTION**  
(Equal Protection)

171. Freedmen Defendants/Cross-Claimants repeat and re-allege the allegations set forth in paragraphs 1 - 107 as if set forth fully herein.

172. 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 and thus deprives the Cherokee Freedmen of due process of law in violation of the Fifth Amendment of the Constitution of the United States. There is no legitimate reason for the denial of benefits deriving from the funds distributed by the United States to the CNO. The Federal Defendants' policy in this respect is irrational.

173. Denial of CDIB Cards to the Cherokee Freedmen is a denial of equal protection of the laws and thus deprives the Cherokee Freedmen of due process of law in violation of the Fifth Amendment of the Constitution of the United States. There is no legitimate reason for the denial of CDIB Cards to the Cherokee Freedmen. The Federal Defendants' policy in this respect is irrational.

174. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Treaty of 1866 guarantees the Freedmen the right to citizenship within the CNO; that the Freedmen are legally indistinguishable from other citizens of the CNO under the Treaty of 1866; and that the Freedmen are entitled to enjoy all civil and proprietary rights arising from citizenship in the CNO equally and on the same basis as all other citizens of the CNO under the Treaty of 1866, including without limitation the right to vote with equal status within the CNO,

the right to run for office, the right to receive medical benefits through the CNO, equal access to CNO scholarship funds, the right to participate equally in CNO activities, and equal access to federal funds provided to the CNO.

175. The Freedmen Defendants/Cross-Claimants require and request a declaration that neither the Five Tribes Act nor any other federal statute modified the Freedmen's citizenship rights as granted in the Treaty of 1866.

176. The Freedmen Defendants/Cross-Claimants require and request a declaration that no amendment to the Cherokee Constitution could modify the citizenship rights of Freedmen since those rights are derived from the Treaty of 1866 and not the Cherokee Constitution.

177. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants have a fiduciary responsibility to protect the citizenship rights of the Freedmen.

178. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Federal Defendants, in their capacity as fiduciaries and trustees, may not approve any election or other act by the CNO in derogation of the rights of its Freedmen citizens.

179. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to appoint a Trustee to ensure the civil rights of the Freedmen are not violated in the future.

180. The Freedmen Defendants/Cross-Claimants require and request an injunction preventing the Federal Defendants from recognizing the June 23, 2007 amendment to the 1976 Constitution that removes the requirement for Secretarial approval of amendments to the Cherokee Constitution, or from recognizing any similar amendment seeking to remove the requirement for secretarial approval of amendments to the Cherokee Constitution.

181. The Freedmen Defendants/Cross-Claimants require and request an injunction preventing the Federal Defendants from recognizing the Bill John Baker Administration, any subsequent CNO government, or any actions of the CNO 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, operates in compliance with the Treaty of 1866, the U.S. Constitution, the Indian Civil Rights Act, and the Act of 1970.

182. The Freedmen Defendants/Cross-Claimants require and request a declaration that the Cherokee Freedmen are entitled to receive CDIB Cards.

183. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to accept and approve each application for a CDIB card submitted by a Cherokee Freedmen who can trace his or her ancestry to an individual listed on the Dawes Rolls.

184. The Freedmen Defendants/Cross-Claimants require and request an injunction compelling the Federal Defendants to disapprove disbursements from the funds distributed by the United States to the CNO unless those disbursements benefit the Cherokee Freedmen on the same terms as they benefit all other members of the Cherokee Nation; and further, to condition any further release or payment of monies from the funds distributed by the United States to the CNO on the Cherokee Nation's compliance with said directive.

WHEREFORE, Freedmen Defendants/Cross-Claimants respectfully pray for judgment granting declaratory and injunctive relief as follows:

185. Declaring that the Treaty of 1866 guarantees the Freedmen the right to citizenship within the CNO; that the Freedmen are legally indistinguishable from other citizens of the CNO under the Treaty of 1866; and that the Freedmen are entitled to enjoy all civil and proprietary rights arising from citizenship in the CNO equally and on the same basis as all other citizens of the CNO under the Treaty of 1866, including without limitation the right to vote with equal status within the CNO, the right to run for office, the right to receive medical benefits through the CNO, equal access to CNO scholarship funds, the right to participate equally in CNO activities, and equal access to federal funds provided to the CNO.

186. Declaring that neither the Five Tribes Act nor any other federal statute modified the Freedmen's citizenship rights as granted in the Treaty of 1866.

187. Declaring that no amendment to the Cherokee Constitution could modify the citizenship rights of Freedmen since those rights are derived from the Treaty of 1866 and not the Cherokee Constitution.

188. Declaring that the Federal Defendants have a fiduciary responsibility to protect the citizenship rights of the Freedmen.

189. Declaring that the Federal Defendants, in their capacity as fiduciaries and trustees, may not approve any election or other act by the CNO in derogation of the rights of its Freedmen citizens.

190. Directing the Federal Defendants to appoint a Trustee to ensure the civil rights of the Freedmen are not violated in the future.



191. Enjoining the Federal Defendants from recognizing the June 23, 2007 amendment to the 1976 Constitution that removes the requirement for Secretarial approval of amendments to the Cherokee Constitution, or from recognizing any similar amendment seeking to remove the requirement for secretarial approval of amendments to the Cherokee Constitution.

192. Enjoining the Federal Defendants from recognizing the Bill John Baker Administration, any subsequent CNO government, or any actions of the CNO 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, operates in compliance with the Treaty of 1866, the U.S. Constitution, the Indian Civil Rights Act, and the Act of 1970.

193. Declaring that the Cherokee Freedmen are entitled to receive CDIB Cards.

194. Issuing an injunction compelling the Federal Defendants to accept and approve each application for a CDIB card submitted by a Cherokee Freedmen who can trace his or her ancestry to an individual listed on the Dawes Rolls.

195. Issuing an injunction compelling the Federal Defendants to disapprove disbursements from the funds distributed by the United States to the CNO unless those disbursements benefit the Cherokee Freedmen on the same terms as they benefit all other members of the Cherokee Nation; and further, to condition any further release or payment of monies from the funds distributed by the United States to the CNO on the Cherokee Nation's compliance with said directive.

196. Awarding Freedmen Defendants/Cross Claimants their reasonable attorneys fees, costs, and disbursements from the parties, including but not limited to recovery of fees and costs from the United States pursuant to the Equal Access to Justice Act.

197. Awarding such other relief as accords with Freedmen Defendants/Cross-Claimants' causes of action herein and as the Court deems just and proper.

Dated: July 2, 2012

Respectfully submitted,

/s/ Alvin Dunn

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Counter-Plaintiffs/Cross-Claimants*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 2, 2012, I electronically transmitted Freedmen Defendants' Amended Answer, Counterclaims Against the Cherokee Nation of Oklahoma and the Cherokee Nation Officials, and Cross-Claims Against the Federal Defendants, and related exhibits, to the Court via ECF for filing and for service of Notice of Transmittal upon the following:

Amber Blaha  
Sara E Costello  
A Diane Hammons  
Graydon Dean Luthey, Jr.  
Ralph F Keen, Jr.

A courtesy paper copy of this document and related exhibits has been sent to the Court.

The summons will be served upon the newly added Cherokee Nation Officials upon receipt of the summons from the Court.

Dated: July 2, 2012

Respectfully submitted,

/s/ Alvin Dunn

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