UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, **Plaintiff,** **v.** **RAYMOND NASH, et al.,** **Defendants /Cross-Claimants/ Counter-Claimants** **-and-** **MARILYN VANN, et al.** **Intervenors/Defendants/Cross-Claimants/Counter-Claimants** **v.** **THE CHEROKEE NATION, et al.,** **Counter-Defendants,** **-and-** **SALLY JEWELL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,** **Counter-Claimants/Cross-Defendants.**	**Case No. 1:13-cv-01313 (TFH)** **Judge: Thomas F. Hogan**

THE CHEROKEE FREEDMEN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE CHEROKEE PARTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF THE CHEROKEE FREEDMEN'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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The Cherokee Freedmen ("Freedmen") are descendants of persons held as slaves by the Cherokee Nation of Oklahoma ("Cherokee Nation") who were listed on the Dawes Freedmen Roll, and they are entitled to "all the rights of native Cherokees" pursuant to the Treaty between the United States and the Cherokee Nation of 1866, July 19, 1866, 14 Stat. 799 ("Treaty," attached as Exhibit 1). The plain language of the Treaty and the historical record demonstrate that "all of the rights of native Cherokees" include equal citizenship in the tribe. And while the Cherokee Nation has repeatedly attempted to avoid and undermine its Treaty obligations to the Freedmen, federal courts have properly rebuffed such efforts. This latest attempt to circumvent the plain language of the Treaty, by attempting to unilaterally decree that the modern-day descendants of the original Freedmen are not entitled to any citizenship rights in the Cherokee Nation, should be similarly rejected by the Court. Indeed, the historical record demonstrates that the Cherokee ancestors who signed and implemented the Treaty would have seen this most recent attempt to strip the Freedmen of their citizenship rights as a violation of the Treaty's plain meaning – and so it is.

I. OVERVIEW AND PROCEDURAL BACKGROUND

This case is the latest in a long string of disputes regarding the Freedmen's status and rights within the Cherokee Nation since the Cherokee Nation agreed in an 1866 Treaty with the United States Government to grant the Freedmen "all the rights of native Cherokees," including the right of equal citizenship.

Some of the earliest disputes concerned *which* Freedmen were entitled to claim citizenship under Article 9 of the Treaty (the "Freedmen Clause"); those were resolved when the official "Freedmen Roll" of Cherokee Freedmen, compiled by the United States through the Dawes Commission, set forth by name the Freedmen who were entitled to citizenship in the Cherokee Nation. Each of the individual Freedmen litigants in this case (Defendants Raymond

Nash, Larry Wasson, Robert Allen, Kathy Washington, and Lisa Duke and Intervenor-Defendants Marilyn Vann, Ronald Moon, Donald Moon, Charlene White, Ralph Threat, Faith Russell, Angela Sanders, and Samuel E. Ford) can trace his or her ancestry to the Freedmen Roll.[1] After adoption of the Treaty, the Cherokee Nation also disputed *what* property rights Freedmen citizens were entitled to receive: Despite the Treaty's unambiguous language, the Cherokee Nation repeatedly argued that "all the rights of native Cherokees" did not include the right to share equally in the tribe's assets. This question was also settled in favor of the Freedmen. The Cherokee Nation has further argued that the Treaty should be revised to exclude the Freedmen from citizenship on the grounds that the Treaty was negotiated under duress and force, a mistake of fact or law, unconscionable consideration, and lack of fair and honorable dealings. Yet again, the Cherokee Nation's arguments failed when the Indian Claims Commission rejected the Cherokee Nation's attempt to avoid its Treaty obligations and was affirmed by the Court of Claims.

The Cherokee Nation now claims that the Treaty does not grant the Freedmen citizenship rights at all. Instead, the Cherokee Nation claims that the Freedmen's citizenship rights flow from 1866 amendments to the Cherokee Nation Constitution, rather than the Treaty. They also claim – without support – that the Treaty has been abrogated.

This attempt at rewriting history requires both a willful blindness to the clear language of the Treaty and the historical record. The 1866 amendments were obligatory under the Treaty. Indeed, the historical record demonstrates that the Cherokee Nation has always understood that it

[1] As explained more fully herein, the Dawes Commission rolls now serve as the basis for citizenship in the Cherokee Nation. Each of the individual Freedman litigants is also an enrolled citizen of the Cherokee Nation except Angela Sanders, who is entitled to and has applied for citizenship; the Cherokee Nation stopped processing Freedmen applications for citizenship in 2007.

was required to amend its Constitution to comply with its Treaty obligations. Moreover, the terms of the Treaty have not changed to allow the Cherokee Nation to exclude its Freedmen from citizenship.

In 2003, the Cherokee Nation, in direct violation of the Treaty, refused to allow the Freedmen to vote in an election to approve an amendment to the Cherokee Constitution that would remove the requirement for approval by the Secretary of the Interior of all constitutional amendments. The Freedmen responded by bringing a related action, *Vann v. Jewell*, Case No. 1:03-cv-0171, in this Court. In 2007, the Cherokee Nation attempted to disenroll the Freedmen by amending its Constitution, once again in contravention of the Treaty. In 2009, the Cherokee Nation filed this case in the United States District Court for the Northern District of Oklahoma while *Vann v. Jewell* was pending in this Court.

For the past decade, the parties have skirmished over ancillary and procedural issues, such as venue, the Cherokee Nation's sovereign immunity, and the extent of the Freedmen's voting rights while these actions remain pending. After this action was transferred to this Court, the parties agreed that further litigation of these issues can only lead to further delay, expense, and injustice and have therefore asked this Court to determine the Freedmen's right to citizenship in the Cherokee Nation under Article 9 of the Treaty, which grants the Freedmen and their descendants, "all the rights of native Cherokees." The Court should now hold that the Cherokee Nation cannot deny the Freedmen the citizenship rights that the Cherokee Nation agreed to provide nearly 150 years ago.

II. FACTUAL BACKGROUND

A. Statement of Undisputed Facts Material to Partial Summary Judgment[2]

While the historical background of this matter is long and complex, the facts material to the parties' cross-motions for summary judgment are not. The following undisputed material facts are before the Court for decision and, standing alone, they demonstrate that the Freedmen are entitled to citizenship in the Cherokee Nation.

Prior to and during the Civil War, members of the Cherokee Nation owned slaves of African descent, and some free blacks also lived in the Cherokee Nation's territory.[3] In 1861, the Cherokee Nation entered into a treaty with the Confederacy and severed its ties with the United States.[4] Following the Civil War, the United States and the Cherokee Nation entered into a Treaty in July 1866 that, among other things, permanently abolished slavery.[5] Article 9 of the Treaty, in relevant part, provides:

> [The Cherokee Nation] further agree[s] 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.[6]

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[2] The Freedmen provide this brief Statement of Undisputed Facts Material to Partial Summary Judgment pursuant to Local Civil Rule 7(h). The Cherokee Nation did not file a Rule 7(h) Statement; rather, the Cherokee Nation provided two separate "Historical Summaries." (Cherokee Motion at 3-7 and Exhibit B.) The Freedmen have also provided a detailed historical background to supplement their Rule 7(h) Statement. *See infra* at pp. 6-34. Although the Freedmen dispute the Cherokee Nation's characterization of historical facts throughout its "Historical Summary," the Freedmen do not dispute the basic facts cited by the Cherokee Nation regarding the occurrence of historical events and statements that were made. Similarly, the facts underlying the Freedmen's account of the historical background are not in dispute.

[3] *See infra* pp. 6-7 and note 18.

[4] *See infra* at pp. 12 and notes 37-42.

[5] *See* Exhibit 1 at Art. 9.

[6] *Id*.

In addition, Article 6 of the Treaty provides that laws "shall be uniform throughout [the Cherokee Nation],"[7] and Article 12 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."[8]

Shortly after adopting the Treaty, the Cherokee Nation amended its Constitution, which had previously condoned slavery and expressly discriminated against free persons of African descent, to remove discriminatory provisions and to describe the citizenship rights of the Freedmen.[9] In his Proclamation accompanying the amendments, Principal Chief William Ross stated that the Cherokee Nation was amending its Constitution because "certain things were agreed to between the parties to said treaty, involving changes in the Constitution of the Cherokee Nation, which changes cannot be accomplished by the usual mode, and . . . [i]t is the desire of the people and government of the Cherokee Nation, to carry out in good faith all of its obligations, to the end that law and order be preserved, and the institutions of their government."[10] Both the Treaty and the Cherokee Nation Constitution contain a limitation on those persons who are entitled to "all the rights of native Cherokees" under Article 9 of the Treaty.[11] Specifically, Article 9 applies to those Freedmen "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."[12]

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[7] *Id.* at Art. 6.
[8] *Id.* at Art. 12.
[9] *See infra* pp. 19 and notes 63-65.
[10] *See infra* p. 19 and note 63.
[11] *See infra* p. 20 and note 67; Exhibit 1 at Art. 9.
[12] Exhibit 1 at Art. 9.

From 1898 through 1907, with certain additions made in 1914, the United States Government, acting through the Dawes Commission, and with the input of the Cherokee Nation, worked to compile a definitive listing of those entitled to citizenship in the Cherokee Nation.[13] The Dawes Commission compiled separate rolls of Cherokee citizens "by blood," members of the Delaware tribe adopted by the Cherokees, and Freedmen entitled to "all the rights of native Cherokees" under Article 9 of the Treaty (cumulatively, the "Dawes Rolls").[14] The Cherokee Nation uses descendancy from an ancestor listed on the Dawes Rolls as the determinative factor in whether an individual is entitled to claim citizenship.[15] The Freedmen before the Court, and numerous other Freedmen like them, have an ancestor or ancestors listed on the Dawes Freedmen Roll.[16] The Cherokee Nation now seeks to limit citizenship to only those persons with an ancestor listed on the Cherokee "by blood" roll and the Delaware roll.[17]

B. Historical Background of the Treaty and its Interpretation

While the undisputed material facts in this case are uncomplicated, the historical context of this case is extensive, and begins well before the Treaty was signed in 1866. The following summary of this extensive historical context reveals that the Freedmen Clause, as originally intended and as it has been interpreted over time, means exactly what it says: The Freedmen are entitled to all the rights of native Cherokees, including citizenship.

1. Slavery in the Cherokee Nation Prior to the Civil War

From the mid-to late Eighteenth Century through the end of the American Civil War, members of the Cherokee Nation, like certain other Native American Tribes, held slaves. Like

[13] *See infra* p. 25-26 and notes 85-90.
[14] *See infra* p. 26-27 and notes 91-95.
[15] *See infra* p. 29 and note 104.
[16] *See supra* p. 2.
[17] *See infra* pp. 29-34.

the slaveholding states of the American South, the Cherokee Nation enacted slave codes and other laws discriminating against even free persons of African ancestry, even where such persons also had Cherokee ancestry. The slaves themselves were, as in the American South, a form of property, and Cherokee laws treated them as such.[18]

In about 1817, the United States government began implementing formal efforts to remove Indian tribes from the Southeastern United States to west of the Mississippi. In that year, Andrew Jackson negotiated a treaty with the Cherokees that ceded about one-third of Cherokee land east of the Mississippi for equal acreage in Arkansas.[19] The Cherokees who removed to Arkansas pursuant to this treaty (the "Western Cherokees" or "Old Settlers") were eventually, pursuant to a treaty signed in 1828, once again relocated to land in what is now northeastern Oklahoma.[20] Many of the wealthier persons in this group owned slaves and brought those slaves with them. In 1830, Congress passed the Indian Removal Act, which authorized the government to negotiate with Native American tribes in the Southeastern United States for their removal West of the Mississippi River.[21] In 1835, a minority faction of Cherokees (the "Treaty Party"), believing that forcible removal by the U.S. Government was inevitable, and that voluntary negotiation of a removal treaty would bring about more favorable terms for the Cherokees, entered into the Treaty of New Echota; this treaty was ratified by the U.S. Senate in 1836, but

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[18] *See* Theda Purdue, SLAVERY AND THE EVOLUTION OF CHEROKEE SOCIETY 1540-1866 (1979), at 56-58. (Due to copyright concerns, the Freedmen have not attached copies of materials not in the public domain, or otherwise available without charge on the internet or in public archives, to their brief because those materials would then be available to the public via PACER. The Freedmen will provide the Court and any party to this action with copies of the cited excerpts from this book and other such materials cited upon request.)

[19] *See* Cecelia E. Naylor, AFRICAN CHEROKEES IN INDIAN TERRITORY: FROM CHATTEL TO CITIZENS (2008) at 15-16.

[20] *Id.* at 16.

[21] *See id.;* Purdue, *supra* note 18 at 63.

was never approved by the Cherokee National Council.[22] Members of the Treaty Party subsequently removed to Indian Territory (present-day Oklahoma), joining the Western Cherokees in 1836.[23]

In 1838-39, the remaining "Eastern" Cherokees, after unsuccessfully attempting to undo the effect of the Treaty of New Echota, were forcibly removed from their ancestral lands in the Southeastern United States and forced to migrate to Indian Territory along what became known as the "Trail of Tears." Among those persons who traversed the Trail of Tears were slaves held by the Cherokees, as well as free intermarried Blacks and children of mixed-race families.[24]

Following removal to Oklahoma, the Eastern Cherokees re-united politically with the Western Cherokees, and this reunion was memorialized in the 1839 Cherokee Constitution. Though both the Eastern and Western Cherokees had slave codes and discriminatory laws prior to reunification, the reunified Cherokee Nation proceeded to enact more restrictive slave codes and laws discriminating against persons of African descent, whether slave or free, residing within Cherokee territory.[25] This discrimination extended even to those with Cherokee blood. The 1839 Cherokee Constitution provided:

> No person shall be eligible to a seat in the National Council but a free Cherokee Male citizen who shall have attained the age of twenty-five years.
>
> The descendants of Cherokee men by free women except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of Cherokee women by all free men. No person

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[22] *See* Naylor, *supra* note 19 at 15-16; Purdue, *supra* note 18 at 67.

[23] *See* Purdue, *supra* note 18 at 66-67 (and related footnotes).

[24] *See* Daniel F. Littlefield, Jr., THE CHEROKEE FREEDMEN: FROM EMANCIPATION TO AMERICAN CITIZENSHIP (1978) at 8-9; *see also* Daniel F. Littlefield, Jr. and Robert E. Sanderson, *African-Descended People and Indian Removal*, The Journal of the Fort Smith Historical Society, Vol. 34, No. 1 (April 2010) at 30-34, relevant pages attached as Exhibit 2.

[25] *See* Naylor, *supra* note 19 at 26; *see also* Littlefield, *supra* note 24 at 9.

> who is of negro and mulatto parentage, either by the father or mother's side, shall be eligible to hold any office of profit, honor or trust under this Government.[26]

The discrimination did not stop with the Cherokee Constitution. For example, in 1839, the Cherokee Nation passed an anti-miscegenation statute that prohibited intermarriage between any free person and "any slave or person of color," punishable by up to 50 lashes for free persons, and up to 100 lashes for males of African descent.[27] In 1840, it passed a law that prohibited slaves and free blacks not of Cherokee blood from holding improvements and other property – property already held by such persons was sold to the highest bidder."[28] In 1841, the Nation passed a law prohibiting anyone from teaching any black individual to read or write.[29] Following a Cherokee slave revolt in 1842, the Cherokee slave codes were enlarged and more vigorously enforced, and the Cherokee Nation took steps to remove all free blacks from its territory, for fear that they would aid further attempts by Cherokee slaves to escape or revolt.[30]

Slaves made up a substantial proportion of the Cherokee population in Indian Territory prior to the Civil War; Cherokees held a greater number of slaves than any of the other so-called

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[26] 1839 Cherokee Constitution Art. III, Sec. 5, reprinted in Constitution and Laws of the Cherokee Nation Passed at Tahlequah, Cherokee Nation 1839-1851 ("Cherokee Laws 1839-1851") (cited portions attached as Exhibit 3), at 5-15.

[27] Cherokee Laws 1839-1851 at 19; *see also* Littlefield, *supra* note 24 at 9. A few days later, the National Council passed "An Act to legalize Intermarriage with White Men." Cherokee Laws 1839-1851 at 32-33.

[28] Cherokee Laws 1839-1851 at 44.

[29] *Id.* at 55-56.

[30] *See* Daniel Littlefield, Jr. and Lonnie E. Underhill, *Slave "Revolt" in the Cherokee Nation, 1842*, American Indian Quarterly, Vol. 3, No. 2 (Summer 1977), pp. 121-131 (available at http://www.jstor.org/stable/1184177) (copy will be provided to the Court on request). An 1842 law passed by the National Council a few days after the revolt dictated that "free negroes" except those freed by a Cherokee slaveholder, be removed from the Nation's territory, that Cherokees who freed their slaves should provide for their conduct out of the Territory, and that, "should any free negro or negroes be found guilty of aiding, abetting, or decoying any slave or slaves, to leave his or their owner or employer, such free negro or negroes, shall receive for each and every offense, one hundred lashes on the bare back, and be immediately removed from this Nation." Cherokee Laws 1839-1851 at 71.

Five Civilized Tribes, which included the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles.[31] The federal census of Indian Territory in 1860 counted 2,511 slaves held by the Cherokees and 13,821 "blood" Cherokees.[32] Many of these slaves "were culturally Cherokee, speaking only the Cherokee language and living immersed in Cherokee life and traditions," and some slaves were of mixed Cherokee and African descent.[33]

2. The Cherokee Nation Sides with the Confederacy.

When the Civil War broke out in April 1861, the Cherokee Nation initially declared its neutrality, although a substantial proportion of the population actively supported the Confederate cause.[34] The question of whether the Cherokee Nation would continue to honor its existing treaty with the Union (by remaining neutral) or to actively support the Confederate cause was not wholly linked to the question of whether the Cherokee Nation should continue to support the practice of chattel slavery – this was a question that both sides considered "settled" in favor of slavery, at least as far as the Cherokee Nation was concerned. In a prewar address to the National Council, Principal Chief John Ross remarked:

> It is a cause of deep regret that the subject of slavery has become paramount to all other considerations in opposite sections of the United States…[.] Slavery has existed among the Cherokees for many years, is recognized by them as legal and they have no wish or purpose to disturb it or agitate it – others have no excuse for doing so come from whatever quarter they may. It is not an open question among

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[31] *See* Littlefield, *supra* note 24 at 8-9.

[32] Michael Doran, "Negro Slaves of the Five Civilized Tribes," *Annals of the Association of American Geographers* 68.3 (Sept. 1978) at 347.

[33] Fay A. Yarbrough, Race and the Cherokee Nation: Sovereignty in the Nineteenth Century (2008), at 71.

[34] The Cherokee Nation web site states: "March 1861: Elias C. Boudinot, [prominent Cherokee supporter of the Confederacy] Stand Watie's nephew, elected Secretary of the Arkansas Secession Convention. Watie helped to organize local chapters of the pro-Southern secret society called the 'Knights of the Golden Circle' which later became 'The Southern Rights Party.' Watie also raised a company of Cherokees to assist the South." http://www.cherokee.org/AboutTheNation/History/Facts/TheCherokeeandtheCivilWar.aspx, attached as Exhibit 4.

> us but a settled one. Agitation in regard to it of any kind can be productive of good to no one.[35]

Ross himself owned a substantial number of slaves.[36]

The Cherokee Nation very soon abandoned its policy of neutrality and gave its full support to the Confederacy after the South won some early victories in the first months of the war. In August 1861, the Cherokee Nation held a general meeting attended by some 4,000 adult Cherokee citizens. Principal Chief Ross, who had previously (on May 17, 1861) issued a proclamation counseling neutrality, addressed the assembled Cherokees:

> The people are here. Say . . . whether you are faithful to the constitutions and laws of your country – whether you abide by all the rights they guarantee, particularly including that of slavery, and whether you have any wish or purpose to abolish or interfere with it in the Cherokee Nation.
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> …
>
> [A]s you regard your own rights, as you regard the welfare of your posterity, be prudent how you act. The permanent disruption of the United States is now probable. The State on our border and the Indian nations about us have severed their connection from the United States and joined the Confederate States. Our general interests are inseparable from theirs, and it is not desirable that we should stand alone. The preservation of our rights and of our existence are above every other consideration. And, in view of all the circumstances of our situation, I do say to you frankly that, in my opinion, the time has now come when you should signify your consent for the authorities of the nation to adopt preliminary steps for an alliance with the Confederate States upon terms honorable and advantageous to the Cherokee Nation.[37]

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[35] Purdue, *supra* note 18, at 129 (quoting remarks of Principal Chief John Ross).

[36] *See* 1860 Slave Federal Census of Cherokee Nation, Indian Territory, Sheet No: 430A, Reel no: M653-54, Division: Tahlequah District in the Cherokee Nation (record enumerating Ross slaves), attached as Exhibit 5.

[37] Address of Principal Chief John Ross to assembled Cherokee citizens at Tahlequah, Indian Territory, August 21, 1861, quoted in Oklahoma Historical Society, The Chronicles of Oklahoma, Vol. 2, No. 2 "The Cherokee Question," Joseph B. Thoburn (June 1924), at 232-233, text available at http://digital.library.okstate.edu/chronicles/v002/v002p141.html).

One of the several related resolutions read to the assembled Cherokees and carried unanimously was a resolution that deemed an alliance with the Confederate States of America "expedient and desirable."[38] On August 24, 1861, Principal Chief Ross forwarded this resolution to Confederate General Benjamin McCulloch by letter, advising that the Cherokee Nation wished to form

> an alliance with the Confederate States, which we are determined to do as early as practicable. … [W]e have deemed it prudent to proceed to organize a regiment of mounted men and tender them for service. … Having abandoned our neutrality and espoused the cause of the Confederate States, we are ready and willing to do all in our power to sustain and advance it.[39]

On October 7, 1861, the Cherokee Nation entered into a treaty with the Confederacy and declared war against the United States. The treaty was debated upon and ratified by a unanimous National Council.[40] On October 28, 1861, the Cherokee Nation issued a "Declaration of Causes" enumerating the reasons for its decision, which included the "succession of victories" won by the Confederacy in the early days of the war, the Cherokee Nation's perception that "the war now raging is a war of northern cupidity and fanaticism against the institution of African servitude[,]" and its sense that "[the Cherokee Nation's] institutions are similar to those of the Southern States, and their interests identical with theirs."[41] Cherokees volunteered to fight in the Confederate army in numbers, and several of its prominent citizens served as Confederate Army officers.[42]

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[38] *The Cherokee Nation v. United States*, 12 Indian Cl. Comm. 570, 573 (1963), *aff'd* 180 Ct. Cl. 181, 1967 WL 1509 (Ct. Cl. 1967), attached as Exhibit 6.

[39] *Id.* at 597 (quoting U.S. War Department, *War of the Rebellion: Official Records of the Union and Confederate Armies* (Washington: 1880-1901): III, 10, 673-678).

[40] 12 Ind. C1. Comm. at 574.

[41] A copy of the Declaration is available at http://www.cherokee.org/AboutTheNation/History/Events/CherokeeDeclarationofCauses(October28,1861).aspx

[42] "The first Confederate regiment of Cherokees, under the command of Col. John Drew, was put into action shortly after the treaty was signed on October 7, 1861. Another Cherokee regiment was put into action under the command of the prominent Cherokee leader, Stand Watie. This (cont.)

Over the course of the war, the Cherokees became divided in their loyalties, reflecting preexisting political and cultural fissures within the tribe dating back to the removal period. In the end, a substantial number of Cherokees supported the Union (the "Northern" Cherokees, sometimes referred to as the "loyal" Cherokees), though the Nation as a political entity did not officially restore its relations with the Union until after the end of the war. In January 1863, slavery was abolished in the United States by the Emancipation Proclamation. Later the same year, the Northern Cherokees convened a National Council at which they passed bills repudiating the Cherokee treaty with the Confederacy and abolishing slavery within the Cherokee Nation.[43] Thereafter, all of the Black Cherokees became known as "Freedmen." Many of the slaveholding Cherokees remained loyal to the Confederacy and ignored the new Cherokee law abolishing slavery, either by simply continuing to hold their slaves in bondage until the end of the Civil War or by relocating with their slaves outside Cherokee territory into slaveholding states.[44] The National Council also passed a law confiscating the property of the Cherokees who remained aligned with the Confederacy (the "Southern" Cherokees, also referred to as the "disloyal" Cherokees).[45]

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latter regiment fought on the side of the Confederacy until the end of the war." 12 Ind. C1. Comm. at 574-75. Brigadier General Watie was the last Confederate general to officially surrender at the end of the war, on June 23, 1865. *See* ENCYCLOPEDIA OF OKLAHOMA HISTORY & CULTURE, *Watie's Regiment (First Regiment of Cherokee Mounted Volunteers)*, Kenny A. Franks, available at http://digital.library.okstate.edu/encyclopedia/entries/W/WA041.html.

[43] 12 Ind. C1. Comm. at 576.

[44] *See* Circe Sturm, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA (2002) at74 ("most of these 'freed' Cherokee slaves belonged to masters who were still loyal to the Confederacy, and in the end they had to fight their way to freedom").

[45] 12 Ind. Cl. Comm. At 576.

3. The Cherokee Nation Negotiates a New Treaty with the United States.

Following the Civil War, each of the Five Civilized Tribes, all of which had held slaves and allied with the Confederacy, negotiated a treaty to re-establish its relationship with the United States. The Cherokee Treaty was the last of these treaties to be signed, in July 1866, in part because two factions of Cherokees presented themselves to attempt to negotiate the treaty on behalf of the Cherokee Nation.

Shortly after the termination of the Civil War, President Andrew Johnson appointed the Southern Treaty Commission to represent the Government in the making of new treaties with various Indian tribes that had allied with the Confederacy. This Commission held many councils at Fort Smith, Arkansas, with delegations representing each of the Five Civilized Tribes, as well as other Indian nations and tribes. Upon the opening of the proceedings on September 8, 1865, the tribes were informed generally of the object for which the Commission had come to them. Addressing the assembled tribal delegations, Dennis Cooley, Commissioner of Indian Affairs and president of the Treaty Commission, stated:

> Portions of several tribes and nations have attempted to throw off their allegiance to the United States and have made treaty stipulations with the enemies of the government and have been in open war with those who remained loyal and true, and at war with the United States. All such have rightfully forfeited all annuities and interests in the lands in the Indian territory. But with the return of peace, … the President is willing to hear his erring children in extenuation of their great crime. He has authorized us to make new treaties with such nations and tribes as are willing to be at peace among themselves and with the United States.[46]

At the council meeting of September 9, 1865, Cooley informed the Indian delegates that, to renew relations with the federal government, the errant tribes would be obliged to comply with seven stipulations to be incorporated into the terms of their new treaties with the United States.

[46] 12 Ind. Cl. Comm. 570, 605 (quoting remarks of D. N. Cooley, President of the Peace Commission, addressing the assembled tribes on Sept. 8, 1865, as recorded in Annual Report of the Commissioner of Indian Affairs 1865, excerpts attached as Exhibit 7, at 297).

These terms included (1) "permanent peace and amity with themselves, each nation and tribe, and with the United States"; (2) measures to assist the government in keeping the peace between the Plains Indians and the United States and the tribes in Indian Territory; (3) the abolition of slavery and measures to incorporate the tribes' emancipated Freedmen "on an equal footing" with other members of the tribe or to otherwise "suitably" provide for them; (4) stipulation that slavery or involuntary servitude shall never again exist in the tribe; (5) the surrender of portions of tribal lands to be used to resettle tribes from Kansas; (6) the organization of a single, consolidated government of the tribes in Indian Territory; and (7) the exclusion of whites from living in Indian Territory unless "formally incorporated" into a tribe.[47]

The official Cherokee delegation to Fort Smith included only the Northern Cherokees, led by Principal Chief John Ross. Like many of the other tribes, however, at the time of the 1865 conference, Cherokee society remained deeply divided, and a delegation of the Southern Cherokees arrived a few days later to also try to negotiate on behalf of the Cherokee Nation. The federal commissioners attempted to assist with resolving factional differences between members of individual tribes, but "[t]he only tribe with whom the commissioners were unsuccessful in re-establishing friendly relations between the two factions was the Cherokees."[48] Like the other tribes present at the Fort Smith conference, neither group of Cherokees had authority to enter

[47] Exhibit 7, at 298-99. (Remarks of D. N. Cooley, President of the Peace Commission, addressing the assembled tribes on Sept. 9, 1865).

[48] Charles C. Royce, *The Cherokee Nation of Indians*, reprinted in Fifth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution 1883-84) (1887), excerpt attached as Exhibit 8, at 343 (citing Report of D. N. Cooley, President of the Commission, dated October 30, 1865).

into a final treaty with the United States and, like other tribes present, each side eventually agreed to "preliminary articles of peace and amity," though they did so conditionally.[49]

Treaty negotiations between the United States and the Cherokees resumed in Washington, D.C., in January 1866, when delegations from both the Northern and Southern Cherokee factions again presented themselves for negotiation. The United States treaty commissioners negotiated with both delegations, trying to achieve a treaty that would be satisfactory to all Cherokees, and "encountered great difficulties in negotiating any treaty acceptable to both Cherokee factions."[50] Over the ensuing months, several drafts of the treaty were proposed, debated, and rejected by the parties.[51]

Commissioner Cooley eventually offered both Cherokee factions nine "ultimate" compromise propositions, in an attempt to fairly address the issues raised by both Cherokee factions as well as the United States's desired outcomes, and to bring the treaty negotiations to a successful close.[52] One of the points that the commissioners had anticipated would consume a great deal of discussion was the proper relations that the Freedmen would thereafter hold toward the remainder of the Cherokees.[53] However, neither faction objected to the proposition providing the Freedmen "all the rights of native Cherokees," and the Northern delegation stated,

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[49] *Id.* at 343-44.

[50] 12 Ind. Cl. Comm. at 582, 616.

[51] See, for example, handwritten draft dated May 3, 1866, included in Ratified treaty no. 358, documents relating to the negotiation of the treaty of July 19, 1866, with the Cherokee Indians, National Archives, July 19, 1866 (available at http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?id=History.IT1866no358). Therein, the draft Article 3 provides for a number of important rights for the tribe's Freedmen, but not "all the rights of native Cherokees." The draft also provides, at draft article 12, for agreement to a unified territorial government for Indian Territory – something both factions of Cherokees hotly opposed and which did not appear in the final treaty.

[52] 12 Ind. Cl. Comm. at 581, 616.

[53] *Id.* at 582.

with regard to the Freedmen, that "we have no doubt that any arrangement the Government would ask for their benefit would be freely conceded by us."[54] The four government propositions that were hotly contested involved large land grants to the government for railroad rights-of-way; agreement to the establishment of a unified territorial government with authority over all of the tribes in Indian Territory; uncompensated cessions of land; and, most objectionable to the Northern Cherokees, but desirable to the Southern Cherokees, the complete division of the Cherokee Nation into independent political units.[55]

The Treaty was executed in Washington, D.C., on July 19, 1866, and thereafter ratified by the United States Senate and officially promulgated by President Andrew Johnson on August 11, 1866. "Examination of the treaty provisions discloses that the skillful and experienced Cherokee negotiators were wholly successful in avoiding the four propositions which they deemed so repugnant."[56] The Commissioner of Indian Affairs remarked:

> … a treaty was finally concluded on the 19th of July, which, although not entirely satisfactory to any party, was the best possible settlement of the matter attainable. While it partially satisfied the national party by continuing the nation, as such, under one constitution and government, it nevertheless secures the other party (i.e., the "disloyal" Cherokee faction) from apprehended persecution by the national authorities by locating them in a specific part of the domain…[57]

With regard to the Freedmen, the Treaty 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."[58]

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[54] *Id.*
[55] *Id.* at 618.
[56] *Id.* at 617.
[57] *Id*. at 618.
[58] Exhibit 1 at Article 9.

Significantly, Article 9 placed a limitation on the class of Freedmen to whom "all the rights of native Cherokees" must be extended – specifically, to such persons "who were in the country at the commencement of the rebellion, and are now residents therein, or who may return with six months, and their descendants" (the "Six-Month Limitation").

The Treaty also gives the Freedmen the right to elect officials and to representation "according to numbers" on the national council[59] and the right to sue in federal court if an action arose between a Freedman and another member of the Cherokee Nation.[60] The Treaty further guarantees the Freedmen that laws "shall be uniform throughout said nation" and provides that if "any law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly in [the Freedmen] district, he is hereby authorized and empowered to correct such evil."[61] 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."[62]

4. The Cherokee Nation Enacts the Freedmen Clause.

Shortly after ratification of the Treaty, the Cherokee National Council adopted amendments to the Cherokee Constitution to comport with the terms of the treaty. Those amendments were put before the Cherokee people for ratification at a convention held in the Cherokee capital of Tahlequah on November 26, 1866. A proclamation issued by Principal Chief William P. Ross to the Cherokee people announcing the proposed changes stated:

> Whereas, By the treaty executed at Washington, on the 19th day of July, A. D. 1866, between the United States and the Cherokee Nation, through its delegation,

[59] *Id.* at Articles 5-6.
[60] *Id.* at Article 7.
[61] *Id.* at Article 6.
[62] *Id.* at Article 12.

> ratified by the Senate and officially promulgated by the President of the United States, August 11th, 1866, certain things were agreed to between the parties to said treaty, involving changes in the Constitution of the Cherokee Nation, which changes cannot be accomplished by the usual mode, and
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> Whereas, It is the desire of the people and government of the Cherokee Nation, to carry out in good faith all of its obligations, to the end that law and order be preserved, and the institutions of their government maintained:
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> Therefore, *Be it Resolved by the National Council,* That the following *amendments* to the Constitution of the Cherokee Nation be submitted to a convention of the Cherokee people, to assemble at Tahlequah, on the twenty-sixth (26th) day of November, A. D., 1866, under the proclamation of the Principal Chief; and should said amendments hereto annexed, be ratified by said convention, then they shall be officially published, and declared by the Principal Chief to be, and shall constitute a part or parts of the Constitution of the Cherokee Nation.[63]

The proposed changes to the Cherokee Constitution included a revised Article III, Section 5, defining the Freedmen as unqualified citizens of the Cherokee Nation:

> All native born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen as well as 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 from the 19th of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation.[64]

These amendments were "read, considered, and severally approved and adopted by the Cherokee people," and duly approved and proclaimed to be a part of the Cherokee Constitution by Principal Chief William Ross.[65] As the Indian Claims Commission later found,

> When, after these amendments were adopted, the Cherokees had occasion to mention the freedmen, it was the consensus of its leaders that the freedmen were

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[63] Cherokee Nation, *Constitution and Laws of the Cherokee Nation*, Published by the Authority of the National Council (1875), at 23-24; cited excerpts attached as Exhibit 9.

[64] *Id*. at 25; *see also* Exhibit 4 ("November 28, 1866: Cherokee Constitution amended by the National Council to comply with the terms of the new treaty."); available at http://www.cherokee.org/AboutTheNation/History/Facts/TheCherokeeandtheCivilWar.aspx.

[65] *Id*. at 4-5.

> in fact Cherokee citizens, with all the rights of native Cherokees, and that they acquired such rights by virtue of Article IX of the treaty of 1866.
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> At all material times, the Cherokees intended that when they granted the freedmen "all the rights of native Cherokees," no civil, political, or property rights were excluded and all conceivable rights were included. [66]

5. The Cherokee Nation Strictly Enforces the Freedmen Clause.

As more Freedmen returned to Cherokee territory following the Civil War, the Cherokee Nation attempted to identify which individuals were entitled to Cherokee citizenship under the strict terms of Article 9 of the Treaty. The Six-Month Limitation, which was also incorporated into the amended Cherokee Constitution, was a means for the Cherokees to limit the number of Freedmen to whom citizenship would be extended as a matter of right.[67] In time, the Cherokee Nation would effectively use the Six-Month Limitation to place substantial limitations on the number of Freedmen adopted into the tribe.

In late 1869, the National Council decreed that all persons whose status as Freedmen was questioned by the 1870 Cherokee census appear before the Cherokee Supreme Court to establish their rights to citizenship under the Treaty.[68] Most of these cases involved persons who arrived "too late" to qualify for protection under the Article 9 of the Treaty and, in most cases, the claims for citizenship rights were denied, although in a few cases the Cherokee courts permitted enrollment.[69] Throughout the 1870s, the Cherokee Nation attempted to identify and remove

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[66] 12 Ind. Cl. Comm. at 583.

[67] *See United States ex rel. Lowe v. Fisher*, 223 U.S. 95, 100 (1912) (referencing unpublished Court of Claims order in the *Whitmire* litigation dated February 18, 1896, a copy of which is attached as Exhibit 10).

[68] Littlefield, *supra* note 24 at 75-76.

[69] *See* Littlefield, *supra* note 24 at 77 and note 5 (enumerating Freedmen households admitted to citizenship by the Cherokee Supreme Court in June 1871); see also Daniel Littlefield, "Study of Historical Facts Clarifies Freedmen Citizenship Issue," Cherokee Phoenix, December 2006, available at http://www.cherokeephoenix.org/19194/Article.aspx ("The Nation's own (cont.)

those Freedmen who were not clearly entitled to citizenship under the Treaty, often over the objection of U.S. government officials, who encouraged the Cherokees to be more generous.[70] Ultimately, however, the government officials felt that there was little else they could do to interfere in the cases of those who had not arrived in Cherokee territory within the six-month time limit set by Article 9.[71]

The Cherokee National Council's most significant action regarding citizenship was authentication of the 1880 Cherokee census roll.[72] A committee of Cherokees appointed by the Council examined the 1880 census roll, struck those it believed were not entitled to citizenship, and added those whose names had been inadvertently omitted.[73] That authentication effort resulted in a core list of Freedmen whose legitimate claim to Cherokee citizenship under Article 9 was not disputed. Those whose names were omitted were summoned to appear before the citizenship committee to defend their claims to citizenship.[74]

Though some Cherokees, including Principal Chiefs William Ross and Dennis Wolfe Bushyhead, argued that the Nation ought, of its own volition, extend citizenship further to

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citizenship court and Supreme Court subsequently admitted large numbers of additional Freedmen applicants to citizenship. These were primarily Freedmen who had not returned to the [Cherokee Nation] within the six-month limit set by the treaty. A good example was the Supreme Court's action on June 21, 1871, which 'admitted to Cherokee Rights and Citizenship' 34 Cherokee Freedman households. Without doubt, the court realized the implications of its action: not only those admitted but their hundreds of descendants would be future citizens of the Nation. This was only one of a number of such decisions.").

[70] *See* Littlefield, *supra* note 24 at 75-103.

[71] Littlefield, *supra* note 24 at 77 ("The position of the Indian Office officials was that the six-months' clause was explicit enough and that there was nothing the department could do for [those Freedmen who arrived in Cherokee territory "too late" to claim rights under Article 9 the Treaty].").

[72] Littlefield, *supra* note 24 at 115.

[73] *Id*.

[74] Littlefield, *supra* note 24 at 115-116.

include all of the tribe's former slaves, public sentiment did not support that idea.[75] George W. Johnson, editor of the *Cherokee Advocate*, wrote that, although no Cherokee would deny the Freedmen their treaty rights, "[i]f that instrument is not in their favor, there is no help for them; they cannot live in this Nation as citizens. . . . We admit, their case is a hard one; but it is not our fault."[76] It remained clear, however, that all acknowledged the citizenship rights of those Freedmen who met the requirements of the Treaty.

In February 1874, Principal Chief William Ross testified before the House Committee on Indian Affairs regarding a bill that would have organized the Territory of Oklahoma from the Indian Territory:

> By the treaty of 1866 all freed persons who were former slaves to the Cherokees, and all free negroes residing in the nation at the beginning of the war, and who should return to the nation within six months from the date of the treaty, and their descendants, have all the rights of native Cherokees.
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> ***
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> From these provisions of the treaties it will be evident that the leading tribes of the Indian Territory, and which are the only ones within its limits who held slaves at the beginning of the war, have dealt with them in the main in a just and liberal manner. The Cherokees and Creeks and Seminoles have been munificent toward them, placing them upon an equal footing with native citizens, and this signifies equal rights under their laws in political franchises, in lands and moneys.[77]

In May 1885, when asked whether he knew "anything about the complaint of the freedmen that they are not recognized as citizens[,]" then-former Principal Chief Ross testified before the Senate's Committee on Indian Affairs that

> "I know this, *the treaty of 1866 provided what class of colored people were to be citizens*. The largest portion of those who returned within the time so fixed have been admitted to citizenship and have regularly enjoyed their rights as citizens;

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[75] *See* Littlefield, *supra* note 24 at 80-81; 109.

[76] Littlefield, *supra* note 24 at 102 (quoting from *Cherokee Advocate*, July 30, 1879).

[77] Quoted in 12 Ind. Cl. Comm. at 621.

> and there are a great many others who, if they had returned within six months would have been citizens, were they not barred by the limitation of the treaty."[78]

Executive Secretary of the Cherokee Nation, William P. Boudinot, who had also served as a compiler of the Cherokee Laws in 1874-75, testified before the Committee that

> The treaty was made at the close of the war, declaring [the Freedmen] free according to law, and giving the right of native Cherokees, and that act was construed by the Cherokees in 186[6] as meaning that they were entitled to full citizenship. In 186[6] there was a general convention called to meet at [Tahlequah]. And the constitution, which before the war only recognized Cherokees by *blood* as citizens, was changed so as to admit the newly-made freedmen described by the treaty, and Indians and white men who were admitted by adoption. All those classes were, under the constitution, after that recognized as citizens and placed upon an equality with the citizens by blood.[79]

6. The Cherokee Nation Attempts to Circumscribe the Freedmen's Citizenship Rights.

Despite acknowledging citizenship rights for at least those Freedmen whose citizenship claims were not in doubt under the Treaty, the Cherokee Nation later attempted to distinguish the Freedmen's civil and political rights from the right to share equally in the assets of the tribe. This was of particular interest as the time came to distribute to individual citizens allotments of tribal assets gained from land sales to the U.S. Government. 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. This legislation was passed over the veto of Principal Chief Bushyhead, who argued that depriving the Freedmen of "all the rights of native Cherokees" violated the Treaty.[80] The 1883

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[78] *Testimony of William P. Ross* (emphasis added), Committee on Indian Affairs, U.S. Senate, May 23, 1885, excerpts attached as Exhibit 11.

[79] *Testimony of William P. Boudinot*, Committee on Indian Affairs, U.S. Senate, May 1885, attached as Exhibit 12; *see also* Proclamation declaring William Boudinot as a compiler of Cherokee laws, *Constitution and Laws of the Cherokee Nation*, *supra* note 63, at 2.

[80] *See* Littlefield, *supra* note 24 at 119; Sturm, *supra* note 44 at 76.

Cherokee legislation instigated a wave of additional legislation and litigation to deal with the Cherokees' refusal to treat certain of its citizens as equals with its citizens "by blood."

In 1888, the United States Congress responded with legislation that required the Cherokee Nation to share its assets equally with the Freedmen and other adopted citizens.[81] In 1890, as the Cherokee Nation continued to resist the Freedmen's equal right to Cherokee citizenship, the United States Congress authorized the federal Court of Claims to adjudicate the rights of the Cherokee Freedmen.[82] The Court of Claims subsequently held that, under the Treaty, as fulfilled in the amendments to the Cherokee Constitution, the Freedmen were equal citizens of the tribe entitled to equal per capita payments of funds.[83] The Court noted that although the class of people had been defined, the persons entitled to membership in the class of Freedmen citizenship was not yet determined. The effort to compile a comprehensive list of persons entitled to citizenship in the Cherokee Nation (as Freedmen or otherwise) would not be complete for another dozen years following the 1895 decision in *Whitmire I*.[84]

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[81] Act of Oct. 19, 1888, 25 Stat. 608-609.

[82] 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, Oct. 1, 1890, 26 Stat. 636.

[83] *Whitmire v. Cherokee Nation*, 30 Ct. Cl. 138, 1895 WL 708, at *10-11 (Ct. Cl. 1895) ("*Whitmire I*").

[84] The *Whitmire* litigation resulted in numerous opinions, orders, and decrees over a period of seventeen years. Following *Whitmire I*, the Court of Claims entered a decree on May 8, 1895, holding that a previously-created list of Freedmen, known as the Wallace Roll, would be used to determine which Freedmen had the right to participate in property distributions. *See Whitmire v. The Cherokee Nation*, Decree of May 8, 1895 (Ct. Cl.) ("*Whitmire II*"). On February 3, 1896, the Court of Claims vacated *Whitmire II* and entered a new decree reaffirming the Freedmen's right to participate in distributions of tribal assets and authorizing the Secretary of the Interior to create a new commission (the "Kern-Clifton Commission") to determine which Freedmen were entitled under the Treaty to participate in the distributions. *See Whitmire v. The Cherokee Nation*, Decree of February 3, 1896 (Ct. Cl.), attached as Exhibit 13 ("*Whitmire III*"). Two weeks later, in an unpublished opinion, the Court of Claims clarified for the Kern-Clifton Commission that the Six-Month Limitation applied to both freed slaves and free blacks living amongst the Cherokee Nation, and that the six-month period (cont.)

In 1893, the United States established the Dawes Commission, which by order of Congress in 1896 set about creating authoritative membership rolls for all Native American tribes in Indian Territory, including the Cherokee Nation.[85] In 1898, the Curtis Act declared the Dawes Commission's initial tribal enrollment efforts invalid and established formal enrollment criteria.[86] Pursuant to Section 21 of the Curtis Act, the Dawes Commission carried out its evaluation of Freedmen claims under a lengthy set of criteria developed in compliance with the Court of Claims order in *Whitmire III*.[87] The Cherokee Nation's own authenticated census roll of 1880 served as a basis for the Dawes Rolls.[88] The Cherokee Nation further actively assisted the Dawes Commission in preparing the final rolls of citizens of The Cherokee Nation, contesting the enrollment of some individual Freedmen and exercising its right of appeal from the

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began running on the date of the promulgation of the Treaty. *See Whitmire v. The Cherokee Nation*, Opinion dated Feb. 18, 1896 (Ct. Cl.), attached as Exhibit 10 ("*Whitmire IV*"). Thirteen years later, certain Freedmen who were included on the roll created by the Kern-Clifton Commission (known as the Kern-Clifton Roll), but who were excluded from the Dawes Rolls, which were created at the direction of Congress (*see infra* note 124), brought claims to address the extent of their rights, and the Court of Claims accordingly authorized appointment of a trustee to present their claims. *See Whitmire v. United States*, 44 Ct. Cl. 453, 1908 WL 760 (Ct. Cl. 1909) (*"Whitmire V*"). Two years later, the Court of Claims determined that the individuals excluded from the Dawes Rolls, but included on the Kern-Clifton Roll, should also be included in property distributions to Cherokee citizens. *See Whitmire v. United States*, 46 Ct. Cl. 227, 1910 WL 930 (Ct. Cl. 1911) ("*Whitmire VI*"). This decision was reversed by the Supreme Court, which held that, by enacting legislation that led to the creation of the Dawes Rolls, Congress superseded the Court of Claims' order authorizing the creation of the Kern-Clifton Roll (in *Whitmire III*), and thus the Dawes Rolls were definitive in determining which Freedmen had rights under the Treaty. *See Cherokee Nation v. Whitmire*, 223 U.S. 108 (1912) ("*Whitmire VII*").

[85] *See Whitmire VII,* 223 U.S. at 115-16.

[86] *See* Ch. 517, 30 Stat. 495 (1898).

[87] *See Stephens v. Cherokee Nation,* 174 U.S. 445, 489-90 (1899); *see also* 12 Ind. Cl. Comm. 570, 627-28; Instructions by the Secretary of the Interior to Commission Appointed by Him Under the Decree [of the Court of Claims] of February 3, 1896, attached as Exhibit 14.

[88] *See* Littlefield, *supra* note 24 at 229.

Commission's decision to the United States District Court.[89] "The Cherokee Nation did not at any time contend that all Freedmen as Freedmen should be excluded from the final Cherokee rolls."[90]

Although neither required nor authorized to do so, the Dawes Commission almost always enrolled tribal members with some Black ancestry on a "Freedmen Roll" and enrolled tribal members with Indian ancestry and no Black ancestry on a separate "Blood Roll."[91] This gratuitous racial segregation was illogical and inconsistent; a tribe member who was half Native American and half Black was designated a "Freedman," while one who was one quarter Native American and three quarters White was designated an Indian "by blood."[92] No effort was made to record the percentage of Native American blood of those listed on the "Freedmen Roll," though historians agree that many of the Freedmen had mixed Native American ancestry, and some Freedmen enrollment records support this finding.[93] Despite creating segregated rolls, the Dawes Commission stated that those on the Freedmen Roll were on equal footing with those on

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[89] 12 Ind. Cl. Comm. at 584, 627-29; *see also* Littlefield, *supra* note 24 at 229-232.

[90] *Id.*

[91] *See* Barbara Krauthamer, Black Slaves, Indian Masters: Slavery, Emancipation, and Citizenship in the Native American South (2013), at 147.

[92] *Id.*

[93] Of the Dawes enrollment records for adult Cherokee Freedmen, approximately 300 indicate some degree of Indian heritage. Sturm, *supra* note 44 at 186; *see also* Enrollment Records of Mary Lynch Kelly (denoting that Ms. Kelly was a child of a Cherokee mother who was placed on the Freedmen Roll) and Solomon Baldridge (denoting that the children of a freedman and a Shawnee woman were placed on the Freedmen Roll) (attached as Exhibit 15); *Riggs v. Ummerteskee*, Case No. JAT 97-03-K (Cherokee Nation Judicial Appeals Tribunal 2001), attached as Exhibit 16 (acknowledging that the petitioner possesses "some degree of Cherokee blood" but had no ancestor on the Dawes "Blood" Roll, but did have ancestors listed on the Freedmen Roll).

the so-called "Blood Roll."[94] The Commission also created rolls of Delaware tribal members, including adopted whites, adopted into the Cherokee Nation, and of Intermarried Whites.[95]

The Curtis Act also provided for allotment of communal tribal lands to all citizens of Cherokee Nation, including the Freedmen, extended federal court jurisdiction over Indian Territory, and abolished tribal courts. In 1901, the Cherokee Nation signed an agreement with the United States that provided for the allotment of tribal lands and abolished the tribal government of the Cherokee Nation effective March 4, 1906. When the Dawes Rolls were finalized in 1907, 4,924 persons were listed on the final Freedman Roll.[96] Allotments were made to all persons listed as Cherokees "by blood," Delawares, and Freedmen.

Consistent with the 1901 agreement, a Congressional Act of 1902 provided for the dissolution of the Cherokee Nation's government as of March 4, 1906[97]; similar acts provided for the dissolution of the tribal governments of the Seminole, Choctaw, Chickasaw, and Creek Nations, in anticipation of Oklahoma statehood. However, because the Dawes Commission's enrollment work remained incomplete in 1906, Congress passed The Five Tribes Act,[98] which provided "[t]hat the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for

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[94] Sturm, *supra* note 44 at 173.

[95] *See* Sturm, *supra* note 44 at 79; National Archives Pamphlet Describing the Enrollment Cards for the Five Civilized Tribes, attached as Exhibit 17, at 1 (describing the categories of tribal citizens enrolled by the Dawes Commission).

[96] *See* Index and Final Rolls of Citizens and Freedmen of the Cherokee Tribe in Indian Territory approved by Act of Congress dated June 21, 1906 (34 Stat. 325) ("Dawes Rolls") (closing rolls as of March 4, 1907).; *see also* Littlefield, *supra* note 24 at 238. An additional 312 persons were added to the rolls in 1914, including three Freedmen. *See* Act of Aug. 1, 1914, ch. 222, 38 Stat. 582, 600.

[97] Act of July 1, 1902, ch. 1375, 32 Stat. 716, 725, § 63.

[98] Act of Apr. 26, 1906, 34 Stat. 137.

all purposes authorized by law, until otherwise provided by law."[99] Congress never thereafter took action to permanently dissolve these tribal governments, which consequently maintained their legal existence pursuant to the Five Tribes Act.[100] The Oklahoma Indian Welfare Act of 1936 ("OIWA")[101] marked the end of the federal government's official policy of allotment and assimilation for Indian tribes and permitted the Five Civilized Tribes to reorganize their governments under the OIWA; the Cherokee Nation has not chosen to do so.

7. The Principal Chiefs Act and 1976 Cherokee Constitution Trigger New Attempts to Limit the Freedmen's Rights.

In 1970, Congress reestablished the right of the Cherokee Nation (as well as that of the Seminole, Creek, Choctaw, and Chickasaw Tribes) to elect its own Principal Chief.[102] Under the Principal Chiefs Act, Congress authorized the Cherokee Nation and other tribes to choose their tribal leaders by popular election but made the tribes' election procedures subject to the approval of the Secretary of the U.S. Department of Interior (the "Secretary"). Accordingly, in 1976, the Cherokee Nation, in an election in which the Freedmen were permitted to vote, approved a Cherokee Constitution (the "1976 Constitution") providing that all "members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls." The 1976 Constitution did not distinguish between the Blood Roll and the Freedmen Roll for purposes of citizenship. In addition, the 1976 Constitution stated that the Cherokee Nation would abide by

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[99] Act of Apr. 26, 1906, § 28, 34 Stat. 148; *see also* Littlefield, *supra* note 24, at 237.

[100] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[1][c], at 303 (Nell Jessup Newton, ed., 2012) (explaining that the federal courts have interpreted the "full force and effect" provision of the Five Tribes Act "as 'continuing indefinitely the existence' of the Five Tribes") (quoting *Harjo v. Kleppe*, 420 F. Supp. 1110, 1129 (D.D.C. 1976) , *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978)).

[101] 25 U.S.C. § 501, *et seq*.

[102] Pub. L. No. 91-495, 84 Stat. 1091 ("Principal Chiefs Act").

any federal statutes requiring federal approval of any laws or enactments of the Cherokee Nation, including amendments to its Constitution.

Soon after approving the 1976 Constitution, however, the Cherokee Nation began restricting the Freedmen's membership and voting rights in the tribe.[103] Eventually, in 1993, this policy was codified in 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.[104] This provision of the Code directly conflicts with the language of the 1976 Cherokee Constitution and the Treaty.

8. The Cherokee Nation Attempts to Exclude the Freedmen by Amending the Cherokee Constitution.

On May 24, 2003, the Cherokee Nation held a special election to amend its constitution to state that any future constitutional amendments would not require approval by the Secretary. On July 26, 2003, the Cherokee Nation held a general election for Principal Chief and other officials. For each of these two elections, the Cherokee Nation permitted only Cherokees who traced their Cherokee citizenship to the Dawes Commission Blood Roll to vote; the Cherokee Nation did not permit Cherokees who traced their Cherokee citizenship only to the Freedmen Roll to vote.

The Freedmen objected to both the Cherokee Nation and to the Secretary that the denial of the right to vote in the 2003 elections deprived them of their rights as Cherokee citizens, as guaranteed by, among other things, the Treaty. The Cherokee Nation did not alter its course in

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[103] The Cherokee voter registration committee began as early as 1977 to require proof that an individual was descended from the Dawes "Blood Roll." Tribal policy systematically excluded Freedmen from tribal elections, and denied access to federal monies and programs intended to benefit all members of the Cherokee Nation.

[104] *See* Cherokee Nation Tribal Council Legislative Act 6-92, later codified at 11 C.N.C.A. § 12 (1993), attached as Exhibit 18.

response to the Freedmen's objections. The Secretary initially supported the Freedmen with respect to the 2003 elections, but then reversed course. In response, the Freedmen, specifically Intervenor-Defendants Marilyn Vann, et al., brought in this Court the related action *Vann v. Jewell* on August 11, 2003, seeking relief against the Federal Defendants only.[105]

In 2006, the Cherokee Judicial Appeals Tribunal ("JAT"), the Cherokee Nation's highest court, ruled that the Cherokee voting and membership laws that prohibited the Freedmen from voting in the May 2003 election were unconstitutional.[106] Principal Chief Smith responded by dissolving the three-member JAT and appointing two new judges to the newly-constituted Cherokee Supreme Court, which then held 3-2 that a proposed amendment seeking to amend the Cherokee Constitution to remove the Freedmen's citizenship rights could be placed before Cherokee voters for ratification. The Cherokee Nation approved that amendment on March 3, 2007. On March 28, 2007, Assistant Secretary of the Interior Carl Artman sent a letter to Chief Smith stating that the Cherokee Nation's 1999 Constitution (*i.e.*, the amendments ratified at the 2003 elections without Freedmen participation) was still under review by the Federal Defendants.

The Freedmen filed a motion for preliminary injunction in the related *Vann* action, seeking a declaration preserving their citizenship and voting rights in a June 23, 2007, Cherokee Nation election for Principal Chief and other tribal officers. In response to the motion for preliminary injunction, the Cherokee Nation District Court entered an order temporarily

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[105] The Cherokee Nation later moved to intervene for the limited purpose of moving to dismiss this action in its entirety on the ground that it was a necessary party but could not be joined because it is immune; thereafter the Principal Chief was joined as a party. After the United States Court of Appeals for the District of Columbia Circuit ruled that the Cherokee Nation was immune from suit, but that its Principal Chief was not, the Cherokee Nation filed this action in the Northern District of Oklahoma on February 3, 2009.

[106] *Allen v. Cherokee Nation Tribal Council*, JAT–04–09, 6 Am. Tribal Law 18 (March 7, 2006).

reinstating citizenship rights to the few Freedmen who had previously been registered as citizens, and a second order reopening voter registration to Cherokee Freedmen for a period of nine days.[107]

On May 21, 2007, the Department of the Interior issued a decision disapproving the amendment approved by Cherokee voters (with the exclusion of the Freedmen) on May 24, 2003, "that would remove from the constitution the requirement that the Secretary approve all constitutional amendments for them to be effective."[108] In the letter, Assistant Secretary Artman stated that he was concerned about the removal of the Freedmen in "apparent violation of the 1866 Treaty." Assistant Secretary Artman stated 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 of the remaining amendments from the 1999 Constitution that were adopted in the July 26, 2003, election.

In response to the disapproval of the May 24, 2003, amendment, the Cherokee Nation, in its June 23, 2007, general election, approved an amendment to the Cherokee Constitution to remove the requirement of United States approval for any amendment to the Cherokee Constitution. The few Freedmen who were registered as Cherokee citizens were permitted to vote in that general election, in accordance with an injunction entered in tribal court. However, Freedmen citizens have not been permitted to vote to ratify the 2003 amendment that the Cherokee Nation has implemented without the requisite United States approval.

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[107] Out of approximately 25,000 Freedmen, only about 2,800 have citizenship in the Cherokee Nation and only about 1,000 were able to register to vote in time for the general election conducted on June 23, 2007.

[108] *See* Exhibit 19.

On August 9, 2007, the BIA notified Principal Chief Smith that the amendment to remove the requirement for approval of any further amendments to the Cherokee Constitution – adopted in the June 23, 2007, election – had been approved by the BIA.[109] No further amendments have been made to the Cherokee Constitution after the BIA letter dated August 9, 2007.

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.[110] This order preserved the citizenship rights of certain Freedmen, pending the Cherokee Nation's appeal of the order to the Cherokee Nation Supreme Court.[111] On August 22, 2011, the Cherokee Supreme Court vacated the District Court order on the ground that that the Cherokee courts lacked subject matter jurisdiction to determine the validity of an amendment to the Cherokee Constitution.[112] The Cherokee Supreme Court further stated that the Treaty 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.[113] The Freedmen responded by moving this Court for a preliminary injunction in the related *Vann* action.[114]

On September 9, 2011, the BIA sent a letter to the Acting Chief of the Cherokee Nation, recognizing the BIA's August 8, 2007, approval of the June 23, 2007, amendment to the 1976

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[109] *See* Exhibit 20.

[110] *See Nash v. Cherokee Nation Registrar*, Case No. CV-07-40, *et al.* (Cherokee Nation Dist. Ct. Jan. 14, 2011), attached as Exhibit 21.

[111] *See id*.

[112] *See Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02 (Cherokee Nation Sup. Ct. Aug. 22, 2011), attached as Exhibit 22.

[113] *See id*.

[114] *See Vann v. Jewell*, Case No. 1:03-cv-01711 (HHK), ECF No. 146.

Constitution that removed the requirement for Secretarial approval of amendments. However, the September 9 letter clarified (i) that the decision was not retroactive; (ii) that the 1999 Constitution and the March 3, 2007 amendment stripping Freedmen of citizenship remained unapproved; (iii) that the Cherokee Nation's election procedures adopted in 2010 must be submitted for approval pursuant to the Act of 1970; (iv) "that the 1866 Treaty between the United States and the Cherokee Nation vested Cherokee Freedmen with rights of citizenship in the Nation, including the right of suffrage"; and (v) that the BIA "will not recognize any action taken by the Nation that . . . does not accord its Freedmen members full rights of citizenship."[115]

On September 21, 2011, on the joint motion of the parties to resolve the Freedmen's pending motion for a preliminary injunction, this Court ordered in this action and in *Vann* that the Acting Principal Chief must ensure that Freedmen previously recognized as Cherokee citizens would be permitted to vote in the September 24, 2011, election for Principal Chief and would be recognized as Cherokee citizens pending disposition of the case or further order of the court ("September 21, 2011 Order").[116] The order did not provide for the registration of new Freedmen citizens. On September 24, 2011, the Cherokee Nation held a special election for Principal Chief, in which previously-recognized Freedmen citizens were permitted to vote. The Cherokee Nation has since held another general election, in June 2013, in which previously-recognized Freedmen citizens were also permitted to vote. As set forth in the September 21, 2011, Order, only the Freedmen who were enrolled as citizens as of August 22, 2011, were permitted to vote. Freedmen who had citizenship petitions pending were denied the right to vote because the Cherokee Nation had not processed any Freedmen citizenship applications since

[115] *See* Exhibit 23.

[116] *See Vann v. Jewell*, Case No. 1:03-cv-01711 (HHK), ECF Doc. No. 153.

2007. On September 13, 2013, this Court granted the parties' joint motion setting a briefing schedule for partial summary judgment on the "core question" in this litigation – namely "whether the Freedmen possess a right to equal citizenship in the Cherokee Nation under the Treaty of 1866."[117]

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The parties here agree that, based on the undisputed facts before the Court, the Court may determine the rights of the Freedmen under the Treaty as a matter of law. ECF Doc. No. 223; *see also Seminole Nation of Okla. v. Norton*, Civil Action No. 00-2384, 2001 WL 36228153 (D.D.C. Sept. 27, 2001) (determining on cross-motions for summary judgment the rights of the Seminole Freedmen under the Seminole Treaty of 1866).

IV. LEGAL ARGUMENT

A. The Treaty Means What It Says: The Freedmen are Entitled to Cherokee Citizenship.

This case is not complicated. It requires only a determination that, because the Cherokee Nation agreed to give the Freedmen "all the rights of native Cherokees," the Cherokee Nation is in fact required to give the Freedmen "all the rights of native Cherokees." Because the Cherokee Nation gives "native Cherokees," which the Cherokee Nation has defined as individuals who can identify an ancestor on the Dawes Blood Roll, the right to citizenship, the Treaty requires that the Cherokee Nation give the same right to the Freedmen and their descendants.

The Cherokee Nation has always understood the Treaty to confer citizenship on the Freedmen. *See The Cherokee Nation*, 12 Ind. Cl. Comm. at 583 ("When, after these

[117] *Vann v. Jewell*, ECF Doc. No. 224, granting ECF Doc. No. 223.

amendments were adopted, the Cherokees had occasion to mention the freedmen, it was the consensus of its leaders that the freedmen were in fact Cherokee citizens, with all the rights of native Cherokees, and that they acquired such rights by virtue of Article 9 of the treaty of 1866.") ; *Cherokee Nation v. Journeycake*, 155 U.S. 196, 217 (1894) (quoting Principal Chief D. W. Bushyhead's 1883 statement that, "[b]y this treaty, made by and with this Nation, other classes of persons were provided to be vested with all the rights of 'native Cherokees' upon specified conditions. These conditions have been fulfilled as regards the acknowledged colored citizens of this Nation[.]").[118]

Nonetheless, for over one hundred years, the Cherokee Nation has been arguing, as an attorney for the Freedmen put it in 1895, "that all does not signify all, but that it means something less, and so much less indeed that one practical result of the interpretation insisted upon by the nation would be to destroy every right conceded to have been granted by this treaty." *Whitmire I*, 1895 WL 708 at *2. The Cherokee Nation's position has been repeatedly rejected. *See*, *e.g.*, *id.* at *14 (holding that the Freedmen are entitled to participate in property distributions on equal footing with native Cherokees); *Red Bird v. United States*, 203 U.S. 76, 87 (1906) ("The Delawares, the Shawnees and the freedmen acquired their property rights by the express words of treaties . . . "); *Keetoowah Society v. Lane*, 41 App. D.C. 319, 322 (D.C. Cir. 1914) ("[W]e do not think the right of these freedmen to participate in the lands and funds of the Cherokee Nation longer open to question."). Notably, however, in these cases over the question of whether the enrolled Freedmen (and others) were entitled to equal division of property rights

[118] *See also* Testimony of William P. Ross and William P. Boudinot, *supra* notes 78-79 ("The treaty was made at the close of the war, declaring them free according to law, and giving them the right of native Cherokees, and that act was construed by the Cherokees in 1867 as meaning that they were entitled to full citizenship.").

the Cherokee Nation never questioned the enrolled Freedmen's rights of political and civil rights as citizens of the Cherokee Nation. *See id*. at 319 ("the Cherokees accepted this treaty reluctantly, and 'subsequently contended that it conferred civil, not property, rights'"), quoting *United States ex rel. Lowe v. Fisher*, 223 U. S. 95, 99 (1912).

More recently, in 1963, Cherokee Nation made a new challenge to allotments made to the Freedmen pursuant to the *Whitmire* litigation, this time to the Indian Claims Commission, which was established in 1946 to hear claims by Indians against the United States.[119] *See Cherokee Nation*, 12 Ind. Cl. Comm. at 587-88. There, the Cherokee Nation sought to invalidate Article 9 altogether, arguing that they had entered into the Treaty under duress, and under a unilateral mistake of fact as to the meaning and import of the Freedmen clause. *Id.* at 629-643. The Indian Claims Commissions, after extensively reviewing the historical record, found that there was no duress and no mistake of fact. *Id.* at 640-41. It further found that

> [w]hen, after the [T]reaty, the Cherokees had occasion to mention the [T]reaty or the [F]reedmen, it was the consensus of its leaders that the [F]reedmen were in fact Cherokee citizens, with all of the rights of native Cherokees, and that they acquired such rights by virtue of Article [9] of the [Treaty].

Id. at 640. Accordingly, because the "[t]he freedmen became members of The Cherokee Nation as a consequence of a treaty made in 1866 between the plaintiff and the defendant[,]" *id.* at 587,

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[119] This litigation was essentially an attempt to undo the outcome of the *Whitmire* litigation, the ultimate issue in this case was the entitlement of the Cherokee Freedmen to share in the assets of the Cherokee Nation as equal citizens. *See id.* at 587 ("This is a suit to recover funds, and the value of lands, distributed to certain members of The Cherokee Nation many years after the Civil War." Specifically, the Cherokee Nation sought to recover funds distributed to the Freedmen, as defined under the Treaty, pursuant to the *Whitmire* litigation.). Notably, in 1961, the Cherokee Nation had won a judgment against the United States before the Indian Claims Commission, after bringing a claim that it had not been fairly compensated for the sale of the "Cherokee Outlet" lands to the United States in 1893, winning a judgment of $14,789,476.15, less allowable offsets. *See The Cherokee Nation v. United States*, 9 Ind. Cl. Comm. 162, 196 (Docket No. 173) (1961). The funds resulting from the original sale of the Cherokee Outlet lands was one of the underlying assets at issue in the *Whitmire* litigation.

the Indian Claims Commission, yet again, affirmed the rights of the Freedmen under the Treaty. *See id.* at 640, 643.[120]

Therefore, just as they were in 1895, 1906, 1914, and 1963, the Freedmen today are entitled under the Treaty to citizenship in the Cherokee Nation.

B. Nothing in the Treaty is to the Contrary.

1. Articles 4-6 Reinforce Article 9, Rather Than Limit It.

Despite the plain language of the Treaty, the Cherokee Nation claims that Articles 4, 5, 6, and 9 of the Treaty, read together, only gave the Freedmen the right to reside in the Cherokee Nation's territory with rights of self-governance and equal protection of law. (Cherokee Motion at 8-11.) This argument ignores the purpose of Articles 4-6, which were intended to resolve the disputes between the Northern and Southern factions of Cherokees by providing a separate area of land in which the Southern faction could settle, while remaining part of the Cherokee Nation. As noted by the Commissioner of Indian Affairs, these articles "secure[] the other party (i.e., the "disloyal" Cherokee faction) from apprehended persecution by the national authorities by locating them in a specific part of the domain[.]" *Supra* at 17. That the Treaty also allowed the Freedmen to reside in that district in no way limits Article 9's grant to the Freedmen of "all the rights of native Cherokees." Rather, it confirms that the Freedmen were to be treated under this Treaty as equal to native Cherokees in all respects.

Interpreting a nearly identical provision in an 1866 treaty between the U.S. Government and the Seminole Nation, the Court of Claims found it "impossible to ascribe to the Seminoles an intent and meaning to grant [the Freedmen] no more than the slender privilege of dwelling as an Indian citizen upon a reservation where Indian laws and regulations were in a large measure

[120] The Indian Claims Commission's decision was later affirmed by the Court of Claims. 180 Ct. Cl. 181 (1967).

supreme, and opportunities for a livelihood decidedly circumscribed and the hazard of immediate loss of all they acquired by an allotment of the lands of the tribe." *Seminole Nation v. United States,* 78 Ct. Cl. 455, 466, 1933 WL 1802, at *6 (Ct. Cl. 1933) (holding that Seminole Freedmen were entitled to land allotments because "the rights accorded the freedmen included equality not with an ordinary citizen of the tribe, an adopted member, but a *native* citizen" and that "[l]anguage, it seems, could not more accurately define assimilated rights") (emphasis in original).[121]

In support of its limited reading of the word "all," the Cherokee Nation cites two canons of interpretation by which treaties are to be "liberally construed in favor of the Indians" and "construed as the Indians would have understood them." (Motion at 11 n.26.) There is no need to resort to canons of interpretation, however, because the Treaty is unambiguous – "all" means "all." *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (declining to contradict an unambiguous treaty provision because "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

Application of these canons here would also be contrary to their purpose. These canons exist because of the unique relationship between the United States and the Indian nations. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985) ("The canons of

[121] Cases involving the Seminole treaty, which gave the Seminole Freedmen "all the rights of native citizens," are instructive because "Article 9 of this treaty [with the Cherokee Nation] in its provision is almost word for word similar to article 2 of the Seminole treaty of 1866." *Id.* at *6. Although the language of the Seminole treaty varies slightly from the language seen in the Cherokee Treaty ("native citizens" as opposed to "native Cherokees"), the distinction is unimportant. *See Seminole Nation v. United States*, 78 Ct. Cl. 455, 1933 WL 1802, at *6 (Ct. Cl. Nov. 6, 1933) ("[W]e think a native citizen is one possessing all the rights of a native Indian").

construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."); *Hagen v. Utah*, 510 U.S. 399, 422-23 n.1 (1994). This trust relationship extends beyond the tribal governments to individual members of the Indian tribes, which, because of the Treaty, includes the Freedmen. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation."). Accordingly, if anything, the Treaty should be liberally construed in favor of the Freedmen, who were not represented during the treaty negotiations, rather than the Cherokee Nation, whose "skillful and experienced Cherokee negotiators were wholly successful in avoiding all four of the propositions which they deemed so repugnant[.]" *The Cherokee Nation*, 12 Ind. Cl. Comm. at 582.

Moreover, as noted above, the Cherokee Nation did not, in 1866 or at any time during the protracted disputes regarding which Freedmen were entitled to citizenship and whether the Freedmen's equal citizenship rights included the right to share equally in tribal assets, interpret the Treaty in the way that the Cherokee Nation today urges. Accordingly, the plain language of Article 9, which grants the Freedmen citizenship, controls in this case. Nothing in Articles 4, 5, or 6 is to the contrary.

2. Article 15 Addresses an Entirely Different Situation.

The Cherokee Nation next cites Article 15 of the Treaty, which addresses incorporation of other Indian tribes into the Cherokee Nation. Article 15, however, is irrelevant to determining the rights of the Freedmen. The tribes incorporated into the Cherokee Nation via Article 15 were, at the time, independent entities with sovereign governments and their own citizens.

Article 15 provided a means by which these tribes could either choose to merge into the Cherokee Nation, giving up their separate tribal sovereignty and identity in perpetuity, or to instead compensate the Cherokee Nation for the privilege of residing in Cherokee territory, while retaining the right to remain a separate and independent tribe. *See Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1084 (10th Cir. 2004) (holding that, as authorized by Article 15 and memorialized in an 1867 agreement between the Delaware tribe and the Cherokee Nation, the Delaware tribe chose to cede its tribal identity and become fully incorporated into the Cherokee Nation). Individual citizens of tribes choosing to become incorporated in the Cherokee Nation would therefore be giving up their former tribal citizenship, and thereafter become Cherokee citizens, on equal terms with other Cherokee citizens. Article 15 merely articulates the full effect of the incorporation option on individual citizens of the incorporated tribes.

By contrast, the Freedmen had no other tribal citizenship, nor did they have any sovereignty to give up. Indeed, at the time of the Treaty, the Freedmen had no citizenship in any political body of any kind (including the United States). Because the Freedmen, unlike citizens of the tribes covered by Article 15 (like the Delawares), were only gaining rights, and not giving any up, there was no need to address in the Freedmen Clause whether their former citizenship rights were surrendered in perpetuity in favor of Cherokee citizenship rights or whether the Freedmen could reclaim them at a later date. In sum, Article 15 shows nothing more than that the drafters of the Treaty used different language to address different situations.

C. The Cherokee Nation Amended its Constitution to Meet the Treaty's Requirements.

In its Second Proposition, the Cherokee Nation relies on *Whitmire I* to claim that its 1866 amendments to the Cherokee Nation Constitution granted the Freedmen tribal citizenship, rather than the Treaty. The Court of Claims has squarely rejected this interpretation of *Whitmire I*:

Less than one year after *Whitmire I*, the Court of Claims entered a decree in the *Whitmire* litigation that had been jointly requested by the Cherokee Nation and the Freedmen, stating:

> And it appearing to the court that *under the provisions of article 9 of the treaty of July 19, 1866*, made by and between the Cherokee Nation and the United States, the said freedmen . . . , and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.

Whitmire III, at 85 (emphasis added); *see also Stephens,* 174 U.S. at 489-90.

Nonetheless, in 1933, the Seminole Nation cited *Whitmire I* in a case involving the nearly-identical Seminole treaty and argued "that this court in [*Whitmire I*] held that the freedmen did not acquire their rights under the treaty but under the constitution of the tribe." *Seminole Nation*, 1933 WL 1802 at *6. In response, the Court of Claims held that "it is apparent from an analysis of the decision that the fundamental property rights of the freedmen originated in the grant conferred by article 9 of the treaty, and reference to the constitution of the tribe was made to disclose the meaning which the Indians themselves ascribed to the previous grant in the effect to be given thereto." *Id.*

Indeed, *Whitmire I* itself confirms that the Treaty requires "that the freedmen should become citizens 'with all the rights,' that is, political rights, 'of native Cherokees,' and that 'all laws of the Cherokee Nation shall be uniform throughout said nation,' and that the President of the United States should have the power to secure to the freedmen 'a fair and equitable application and expenditure of the national funds.'" *Whitmire I*, 1895 WL 708 at *14. That *Whitmire I* has been consistently interpreted this way is not surprising, given that any other interpretation would contradict the Treaty's directive that the Freedmen be given *all* the rights of native Cherokees. *See The Cherokee Nation*, 12 Ind. Cl. Comm. at 583 ("At all material times,

the Cherokees intended that when they granted the freedmen 'all the rights of native Cherokees', no civil, political, or property rights were excluded and all conceivable rights were included.").

Rather than an original source of citizenship rights, the 1866 amendments to the Cherokee Constitution merely adapted inconsistent provisions of the 1839 Cherokee Constitution to the requirements of the Treaty. In his Proclamation accompanying the amendments, Principal Chief William Ross confirmed that the Cherokee Nation was amending its Constitution because "certain things were agreed to between the parties to said treaty, involving changes in the Constitution of the Cherokee Nation, which changes cannot be accomplished by the usual mode, and . . . [i]t is the desire of the people and government of the Cherokee Nation, to carry out in good faith all of its obligations, to the end that law and order be preserved, and the institutions of their government." *Supra* at 19. Even today, a historical timeline on the Cherokee Nation's website states as follows: "November 28, 1866: Cherokee Constitution amended by the National Council to comply with the terms of the new treaty." *Supra* note 64. Likewise, the Court of Claims stated in 1905 that "[t]he constitutional amendment quoted was simply declaratory of the new order of things," *In re Enrollment of Persons Claiming Rights in the Cherokee Nation*, 40 Ct. Cl. 411, 1904 WL 878, at *20 (Ct. Cl. 1905), *aff'd* 203 U.S. 76 (1906), and the Supreme Court stated in 1906:

> As to the freedmen, their participation in property distribution was secured by the terms of the treaty of 1866 (the result of the Civil War), and of the constitutional amendments thereupon adopted. The court of claims referred to them thus: 'These constitutional amendments were brought about by the action of the United States at the close of the Civil War in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees.

Red Bird, 203 U.S. at 84.[122]

Accordingly, the Freedmen received citizenship rights directly from the Treaty, and the amendments to the Cherokee Constitution merely served to conform that document to the Cherokee Nation's obligations under the Treaty.

D. The Descendants of the Freedmen Listed on the Dawes Rolls are Entitled to Cherokee Citizenship.

The Cherokee Nation also argues that the Treaty only applied to individuals who actually were residents on Cherokee territory as of the date of the Treaty or had returned to it within six months and that the Treaty does not apply to their descendants who were not alive and in being as of that date (and thus that any rights held by the modern-day Freedmen came only from the Cherokee Constitution). This argument ignores the plain language of the Treaty.

First, heritable citizenship is a right that is given to native Cherokees, and any interpretation of the Treaty that denies such a right to the Freedmen would require a finding that "all" means something less than "all." *See The Cherokee Nation*, 12 Ind. Cl. Comm. at 583 ("At all material times, the Cherokees intended that when they granted the freedmen 'all the rights of native Cherokees', no civil, political, or property rights were excluded and all conceivable rights were included."). Second, the placement of the phrase "and their descendants" in Article 9 *after* the Six-Month Limitation shows that the limiting clause does not apply to the descendants, but is

[122] The Cherokee Nation cites to *Cherokee Freedmen and Cherokee Freedmen's Ass'n v. United States*, 195 Ct. Cl. 39 (1971), for the proposition that "the federal courts recognized that it was the Nation's 1866 Constitutional Amendment in response to the 1886 Treaty provisions that actually granted citizenship to the Freedmen" (Cherokee Br. at 15). However, that case does not so hold, and moreover it cites for its statement regarding the Cherokee Constitution to the Court of Claims decision in *Cherokee Nation v. United States*, 180 Ct. Cl. 181 (1967), which affirms the Indian Claims Commission's decision in *The Cherokee Nation,* 12 Ind. Cl. Comm. 570, which, as noted above, expressly found that the Treaty was the source of the Freedmen's citizenship rights, as acknowledged by the Cherokee Nation at the time. *See supra* at 34-35.

rather a limitation on the phrase "all freedmen who have been liberated . . . , as well as all free colored persons who were in the country at the commencement of the rebellion."[123] *See Red Bird*, 203 U.S. at 87 ("The treaty of 1866, between the United States and the Cherokee Nation, provided as to the former slaves, that they should be free and they '*and their descendants* shall have the rights of native Cherokees.'") (emphasis added).

Moreover, because individuals could not be citizens of both the United States and a tribe in 1866, granting tribal citizenship to only one generation of Freedmen, and making no provisions for their descendants, would make no sense, as it would mean that the descendants would, in essence, be stateless. The Cherokee Nation relies on *Whitmire VI*, but by that phase of the litigation, the *Whitmire* court was only addressing a dispute over which specific Freedmen were entitled to claim the right to receive an allotment based on the rights conferred under Article 9 of the Treaty. The rights of the Freedmen as a class were not in dispute.[124] *Whitmire VI*, therefore, does not address the rights of descendants of Freedmen who were properly listed on the Dawes Rolls – because the Court had already determined in *Whitmire I* in 1895 that such persons were entitled to "all the rights of native Cherokees." *See Whitmire I*, 1895 WL 708 at *14.[125]

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[123] In full, the relevant portion of Article 9 reads: "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.

[124] Specifically, in *Whitmire VI* the Court of Claims ruled that Freedmen enrolled on the Kern-Clifton Roll (created by the Department of the Interior) but omitted on the Dawes Freedmen Roll (created at the direction of Congress) were entitled to an allotment. This decision was later overruled by the Supreme Court in *Whitmire VII*, which found that Congress has determined that the Dawes Rolls were to be treated as definitive for purposes of the allotments.

[125] At the time of *Whitmire I*, the Court of Claims observed that the question of just who qualified for equal citizenship rights under Article 9 was not yet a settled question. As noted (cont.)

E. The Treaty Has Not Been Abrogated.

Contrary to the Cherokee Nation's Third Proposition, the Treaty has never been abrogated. "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Accordingly, "unless Congress makes clear its intent to abrogate a treaty, a court will not lightly infer such intent but will strive to harmonize the conflicting enactments." *Seminole Nation of Okla. v. Norton*, 2001 WL 36228153 at *12; *see also Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 413 (1968)*, citing Pigeon River, etc., Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress."). Likewise, "a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *U.S. v. White*, 508 F.2d 453, 456 (8th Cir. 1974), citing *Cook v. United States*, 288 U.S. 102, 120 (1933).

The Five Tribes Act simply does not express any Congressional intent to abrogate the Treaty. Rather, the Five Tribes Act was a means by which Congress closed and finalized all of the Dawes Rolls, including both the Freedmen and Cherokee by blood rolls. *See* Five Tribes Act at Sec. 1 ("Be it enacted . . . That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes of Indians

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above, the Cherokees acknowledged a core group of Freedmen; following *Whitmire I* and the U.S. Government made several attempts to identify the group of citizens entitled to allotments, including Freedmen. This effort culminated in the final, approved Dawes Rolls.

in the Indian Territory, except as herein otherwise provided . . . "). In fact, the Five Tribes Act, along with other statutes passed around that time,

> reflect[ed] a congressional intent to carry into execution the express purpose of the Government in extinguishing prevailing Indian title to lands, distribute their tribal funds, and by a gradual process set aside the original tribal organizations in the hope of creating a new and more beneficial relationship between the Indians and the Government, and nowhere in all this legislation may it be found that Congress did aught else by its terms than to approve and ratify what its created commission and the Secretary of the Interior were authorized to do.

The Seminole Nation, 1933 WL 1802, at *13.

The Cherokee Nation cites *Garfield v. United States ex rel. Lowe*, 34 App. D.C. 70, 1909 WL 21538 (App. D.C. 1909), but "[t]he only question determined in Lowe's case was that after the partial list of rolls had been sent up by the Dawes Commission and approved by the Secretary of the Interior, he still had the right after notice and hearing and upon proof of fraud to strike from these rolls the names of persons improperly placed upon them by the Dawes Commission." *Whitmire VI*, 1910 WL 930 at *15. Neither the Five Tribes Act nor *Garfield* addresses the rights of Freedmen who were already properly listed on the Dawes Rolls when Congress passed the Five Tribes Act or the rights of those Freedmen who were permitted by the Five Tribes Act to subsequently enroll.

What is more, six years after Congress passed the Five Tribes Act and three years after *Garfield*, the "Supreme Court implicitly acknowledged the continued validity of the Treaty of 1866[.]" *Seminole Nation of Okla. v. Norton*, 2001 WL 36228153, at *14, citing *Goat v. United States*, 224 U.S. 458, 468 (1912). "The *Goat* Court accepted and recited the explanation of the Dawes Commission in 1898, that the Seminole Freedmen were, pursuant to treaty, 'on equal footing with the citizens by blood.' In doing so, the Supreme Court effectively foreclosed the conclusion that the statute which underlies the creation of the Dawes Commission and the Seminole Rolls, the Curtis Act, abrogated the Treaty of 1866." *Seminole Nation of Okla. v.*

Norton, 2001 WL 36228153 at *15 (internal citation omitted). For the same reason, *Goat* forecloses the conclusion that the Five Tribes Act abrogated the Cherokee Treaty. Accordingly, as with the Seminole treaty, "there can be no other conclusion but that it remains in force." *Id.* at *17; *see also The Seminole Nation*, 1933 WL 1802, at **8-13 (holding that, despite various statutes, including the Five Tribes Act, the Seminole Treaty of 1866 confers full citizenship on the Seminole Freedmen).

F. The Treaty Limits the Cherokee Nation's Ability to Determine its Own Membership.

The Cherokee Nation argues that it is "a well-accepted tenet of Indian law that 'one of an Indian tribe's most basic powers is the authority to determine questions of its own membership.'" (Cherokee Motion at 21) (citing COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005), § 3.03(3)). While this is true, it is equally well-accepted that tribes retain this power, "unless limited by treaty or statute." *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978), citing *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906). As described above, the Treaty prohibits the Cherokee Nation from excluding from citizenship any Freedmen who can trace their ancestry to an individual listed on the Dawes Rolls. The Cherokee Nation's general right to determine its own membership thus has no bearing on this case.

The cases cited by the Cherokee Nation do not hold otherwise. In fact, they are irrelevant because not a single one addresses the question that is currently before the Court, *i.e.* whether the Treaty limits the Cherokee Nation's ability to exclude certain classes of people from citizenship. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that the tribe's sovereign immunity protected it from claims under the Indian Civil Rights Act ("ICRA") and holding that ICRA did not give the plaintiff a private right of action against tribal officials); *Lewis v. Norton*, 424 F.3d 959 (9th Cir. 2005) (holding that the plaintiffs' claims were barred by sovereign

immunity); *Quair v. Sisco*, 359 F. Supp. 2d 948 (E.D. Cal. 2004) (addressing habeas corpus claims under ICRA); *Hendrix v. Coffey*, 305 F. App'x 495 (10th Cir. 2008) (holding that the court lacked jurisdiction under ICRA over a dispute over tribal membership); *Nero v. Cherokee Nation*, 892 F.2d 1457 (10th Cir. 1989) (holding, *inter alia*, that sovereign immunity barred the plaintiffs' claims against the Cherokee Nation under ICRA and that federal civil rights statutes do not apply to claims regarding tribal membership).

The Cherokee Nation also cites the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501, *et seq.* ("OIWA"), as an "expression of Congress' intent to strengthen tribal self-governance," (Cherokee Motion at 22), but the OIWA is inapplicable. The OIWA gave certain tribes the right to reorganize and, in doing so, to adopt new constitutions. *See* 25 U.S.C. § 503. The Cherokee Nation has not done so. Moreover, even if it had, the OIWA in no way contradicts the requirement in the Treaty that the Cherokee Nation provide the Freedmen and their descendants with tribal citizenship. *See id.*

It is true that a 1941 Opinion by the Solicitor of the Department of Interior relating to Indian Affairs argued that, after reorganization under the OIWA, a tribe could vote to exclude the Freedmen from tribal membership, if all of the Freedmen were permitted to vote, but this Opinion is irrelevant for three reasons. First, "Solicitor's opinions, helpful as they may be to agencies which study them, cannot properly be viewed as an administrative agency interpretation of statute that has the force of law." *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 n.16 (9th Cir. 2003). Second, the Solicitor's Opinion contradicts the established rule that, "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Menominee Tribe of Indians*, 391 U.S. at 413*, citing Pigeon River*, 291 U.S. at 160. Third, the Cherokee Nation has never reorganized under the OIWA, and has thus not taken the step the

Solicitor's Opinion said is required to remove the Freedmen from the tribe. *See* Five Civilized Tribes – Status of Freedmen – Organization Under Oklahoma Welfare Act, 1 Op. Sol. Dep't of Int. relating to Indian Affairs 1077 (1941), *available at* http://thorpe.ou.edu/solicitor.html. In fact, the Solicitor's Opinion recognizes that, absent reorganization under the OIWA, "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." *Id.*

V. CONCLUSION

Because, as set forth above, the plain language of the Treaty grants the Freedmen "all the rights of native Cherokees," which includes equal citizenship, and the Treaty has never been abrogated, the Freedmen respectfully request that the Court (1) deny the Cherokee Nation's and Principal Chief Bill John Baker's Motion for Partial Summary Judgment, and (2) grant the Freedmen's Cross-Motion for Partial Summary Judgment.

Dated: January 31, 2014

Respectfully submitted,

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