IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, Plaintiff/Counter-Defendant, v. RAYMOND NASH, et al. Defendants/Cross-Claimants/ Counter-Claimants, and MARILYN VANN, et al. Intervenor-Defendants/Cross-Claimants/ Counter-Claimants, and SALLY JEWELL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, Counter-Claimants/Cross-Defendants.	)	Case No. 1:13-CV-1313 TFH Judge Thomas F. Hogan

THE DEPARTMENT OF THE INTERIOR'S REPLY
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT
AND SURREPLY TO THE CHEROKEE NATION AND
PRINCIPAL CHIEF BAKER'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The Cherokee Nation has failed to raise any genuine legal or factual dispute with Interior's claim that Article 9 of the Treaty of 1866 continues to provide Freedmen descendants with "all the rights of native Cherokees," which include rights to citizenship, voting, and other tribal benefits and privileges. The Cherokee Nation does not dispute any material facts or submit new evidence, nor does it present any new legal authority that supports its argument. It instead resorts to a series of scattershot arguments that avoid the governing legal standards and rely on generalized notions of equity and tribal sovereignty. These equitable arguments not only lack merit on their face, but have no place in this treaty interpretation case. The Supreme Court has clearly set forth the analytical framework for interpreting treaties. Using this framework, Interior has presented substantial – and uncontroverted – evidence that supports the view that the Treaty means exactly what it says – that the Cherokee Nation must provide Freedmen descendants with the same rights that are provided to "native Cherokees," including citizenship, voting rights, and other privileges.

The Cherokee Nation mistakenly suggests that these rights were limited in duration because the Treaty lacks language expressly indicating their permanence and because the Treaty's signers did not anticipate how the rights would develop over time. There are no such limitations in Article 9. There is no evidence that the parties intended the rights granted by Article 9 to be temporary in nature; in fact, the historical evidence shows an understanding that under Article 9, the Freedmen would permanently be on an "equal footing" with other Cherokees. Further, treaty rights do not "expire" simply because their modern-day effect was not contemplated.

The Cherokee Nation also mischaracterizes Interior's position in this case, suggesting that Interior is advocating some sort of "super-citizenship." This mischaracterization is a false, manufactured strawman. Article 9 of the Treaty simply requires the Cherokee Nation to treat the descendants of its former slaves in the same manner as native Cherokees. If a native Cherokee is eligible for citizenship within the Tribe, a similarly-situated Freedmen must be eligible as well. If a native Cherokee citizen is permitted to vote in a tribal election, a Freedmen citizen must be allowed to vote as well. The Cherokee Nation still retains sovereignty to define exactly which rights are available to those who might be eligible for membership in the Tribe, but through Article 9 of the Treaty of 1866, it ceded the right to treat its former slaves and their descendants differently from native Cherokees. Until modified by Congress, Article 9 remains the supreme law of the land, and the Cherokee Nation must abide by the terms that it agreed to in 1866.

ARGUMENT

I. The Cherokee Nation Has Not Raised Any Genuine Issue of Material Fact in Response to Interior's Submission of Historical Evidence.

The Cherokee Nation's Reply brief includes a discussion entitled "Reply to Historical Inaccuracies." Cherokee Nation's Reply Memorandum (Docket No. 239) ("CN Reply") at 4-11. None of the issues raised in this section create any genuine issue of material fact, nor do they provide meaningful support for the Cherokee Nation's argument.

First, the Cherokee Nation erroneously downplays the importance of historical evidence in elucidating the meaning of the Treaty. *See* CN Reply at 4 ("an understanding of the history behind the 1866 Treaty may be helpful."). Governing Supreme Court precedent instructs courts interpreting treaties to consider the history of the treaty, negotiation history, and contemporaneous practical construction adopted by the parties. *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). Given the complexity of historical evidence, courts

routinely consider expert testimony on these issues as well.[1] The Cherokee Nation does not dispute this case law or the legal framework set forth by Interior for evaluating the meaning of a treaty. Instead, the Cherokee Nation asserts that it did not "intend to enter into disagreements with the parties over factual matters" and "did not obtain any experts to opine on the issue." CN Reply at 4. Of course, the whole purpose of a summary judgment motion is to determine if there are any genuine disputes as to any material facts, and whether the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In light of the governing legal standard for evaluating treaties, Interior properly submitted evidence, including an expert report, regarding the historical context, negotiation history, and subsequent interpretation of the treaty.[2] The Cherokee Nation, in contrast, has failed to offer contrary evidence or expert reports. The Court, therefore, should consider this uncontroverted evidence and conclude that it supports Interior's view of Article 9.

Second, the Cherokee Nation raises a number of specific issues related to the historical context of this case. None of them are material to the issue before this Court on summary judgment. For example, the Cherokee Nation argues that its previous treaties with the United States were not nullified by its alliance with the Confederacy. CN Reply at 6. Interior did not argue that they were; Interior only noted that the Indian Claims Commission had made this

[1] *See, e.g.*, *Cree v. Flores*, 157 F.3d 762, 766 (9th Cir. 1998) (discussing consideration of expert testimony in interpreting provision of Yakama Treaty); *Sohappy v. Hodel*, 911 F.2d 1312, 1319-20 (9th Cir. 1990) (considering affidavit of expert anthropologist to evaluate parties' intent with respect to fishing provisions in treaty); *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184, 199 (W.D. Wis. 1996) ("Determining the Indians' understanding may require expert testimony to explain the historical and cultural context in which the Indians viewed the treaty provisions.").

[2] The Cherokee Nation filed a Motion to Strike alleging procedural defects with Interior's expert submission, which are addressed in Interior's Response to the Motion to Strike. In addition, the declaration of Dr. Emily Greenwald is attached here as Exhibit 1. *See also* Ex. 2, Declaration of Amber Blaha.

finding in its consideration of the negotiation history of the Treaty of 1866. Department of the Interior's Memorandum in Support of Motion for Summary Judgment (Docket No. 234) ("DOI Br.") at 4. Under any circumstances, the status of the Cherokee Nation's earlier treaties has no effect on this dispute. Similarly, the Cherokee Nation's lengthy discussion of modern-day events, including the attempted disenfranchisement of the Freedmen, recent constitutional amendments, and tribal court proceedings, CN Reply at 8-11, have no bearing on the issue before the Court today – the meaning of Article 9 of the Treaty of 1866.

II. The Plain Language, Historical Context, and Subsequent Interpretation of the Treaty of 1866 Support Interior's Position.

The Cherokee Nation does not dispute Interior's articulation of the legal standard governing the interpretation of Indian treaties. *See* DOI Br. at 22. Courts must first look to the language of the treaty, but also may look "beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation*, 318 U.S., at 431-32; *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999). The Cherokee Nation has failed to demonstrate that any of these factors weigh in favor of its cramped interpretation of Article 9.

The Cherokee Nation argues that the Indian canons of construction "dictate" a ruling in its favor regarding the meaning of Article 9. CN Reply at 18-19. In fact, the canons cited by the Cherokee Nation either do not apply here, or support Interior's position. Under any circumstances, the canons do not require that a tribe's modern-day interpretation of a treaty or statute must govern, particularly where that position is not supported by the plain language or historical evidence of the parties' understanding of the provision.

One canon cited by the Tribe provides that any "ambiguities" in a treaty must be "resolved from the standpoint of the Indians." *Winters v. United* States, 207 U.S. 564, 576-77

(1908). This canon does not apply in this case because there is no ambiguity in Article 9. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist. . . ."); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expression of tribal and congressional intent."); *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 145 (D.D.C. 2005)) ("[T]he canon only has a role in the interpretation of an ambiguous statute."). Article 9 unambiguously granted Freedmen and other blacks then residing in Cherokee territory, and their descendants, "***all*** the rights of native Cherokees." (emphasis added.) This expansive language clearly requires the Cherokee Nation to provide Freedmen and their descendants with the same rights, on the same basis, that are given to "native Cherokee." The historical context of the Treaty further supports the lack of ambiguity surrounding this conclusion. *See* DOI Br. at 26-37; *infra* at 11-12; *see also Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) ("[C]courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claim." (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

Another Indian canon of construction directs courts to consider how both parties would have understood the terms of an agreement. *Mille Lacs*, 526 U.S. at 196; Cohen, *Handbook of Federal Indian Law* § 2.02[1] (2005). In this case, Interior has submitted substantial uncontroverted evidence demonstrating that in and around 1866, both the Cherokee Nation and the Federal government understood the Treaty as providing for the "full rights" of Freedmen, including tribal citizenship, with no temporal limitation. *See* DOI Br. at 26-37. Indeed, the

Cherokee Nation continued to view Article 9 as providing Freedmen with political rights well into the twentieth century, as shown by the position it took before the Indian Claims Commission. *Id.* at 44-47. The Cherokee Nation has provided no meaningful evidence that it understood Article 9 any differently in 1866. Thus, the application of this canon supports Interior's position, not the Cherokee Nation's.

Further, the Indian canons are of limited assistance where, as here, the matter is an intra-tribal dispute. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (the canon that statutes passed for the benefit of Indian tribes are to be liberally construed in their favor "has no application here; the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members"); *State of Utah v. Babbitt*, 53 F.3d 1145 (10th Cir. 1995). Some Freedmen descendants are currently citizens of the Cherokee Nation, and it is questionable whether the canons should favor the Tribe in a dispute with one class of its membership, particularly in a situation such as this, where Article 9 of the Treaty was intended to correct a fundamental injustice done by the Tribe to a group of people – the former slaves of the Cherokee. The Indian canons do not aid the Cherokee Nation's argument in this case.

A. The Plain Language of the Treaty Indicates that Freedmen and Their Descendants Are Entitled to "All the Rights of Native Cherokees."

As described in Interior's opening brief, the plain meaning of Article 9 is that Freedmen and their descendants are entitled to "all the rights of native Cherokees." DOI Br. at 23-26. Although Article 9 only granted these rights to a particular class of Freedmen and newly freed slaves, the grant of rights itself is expansive ("all the rights") and without limitation. The Cherokee Nation asks this Court to ignore this plain meaning.

1. Treaties Do Not Require Special Language or Indications of Permanence.

The Cherokee Nation asserts that, unless a treaty contains express language of permanence, its provisions should not have lasting effect. CN Reply at 1 (arguing that Interior's reading of the Treaty would require the Court to "assume there is additional language implicit in Article 9 of that Treaty… words like 'permanent,' 'eternal,' 'ever after,' or 'citizens.'"); *see also* CN Reply at 3. Although the Cherokee Nation mischaracterizes many of Interior's arguments, it is correct to the extent it suggests that Interior generally views Indian treaty rights as "eternal" and "inalienable" unless a contrary intent is clear from the treaty language or the treaty was clearly abrogated by Congress. CN Reply at 3. Treaties – like statutes – do not need to include specific words of permanence in order for their terms to remain in effect.[3]

Indeed, the Supreme Court, interpreting contingent treaty language, unlike that in Article 9, has explicitly rejected a rule that would distinguish between "temporary and precarious treaty rights, as opposed to treaty rights which were of such a nature as to imply their perpetuity." *Mille Lacs*, 526 U.S. at 206 (internal quotations omitted). Rather, the Court looks to whether the treaty in question provided a "fixed termination point" for particular rights based on conditions that were "clearly contemplated" when the Treaty was ratified. *Id.* at 207. The Cherokee Nation has not pointed to any language in the Treaty or other clear evidence that the parties contemplated that Article 9 of the Treaty would cease to have effect at some particular point in

[3] In very limited circumstances that are distinct from those present here, the Court of Claims has found that monetary claims based on certain treaty obligations could be impliedly time-limited. *See, e.g. Sioux Tribe of Indians v. United States*, 86 Ct. Cl. 299 (Ct. Cl. 1938) (finding that provisions of treaty requiring Federal government to furnish cows and oxen to families of the tribes who moved to the reservation and commenced farming did not obligate the government for an indefinite period of time); *Sioux Tribe of Indians v. United States*, 89 Ct. Cl. 31 (Ct. Cl. 1939) (finding that provisions of treaty requiring Federal government to supply seeds and agricultural implements to tribal families did not obligate the government for an indefinite period of time).

the future. In fact, the evidence in the record indicates an understanding that Article 9 provided ***permanent*** rights to the Freedmen. DOI Br. at 29, 31.

Suggesting that Article 9 was merely a "territorial protection" in 1866 that is not required today, the Cherokee Nation argues, in essence, that a treaty right or obligation cannot be enforced in modern times unless the signers of the treaty contemplated exactly how the right or obligation would play out in the future. *See* CN Reply at 3 ("There can be no straight-faced assertion that the framers of the 1866 Treaty . . . anticipated that almost 150 years later the Freedmen would be claiming an eternal inalienable right of citizenship. . . ."). This type of argument has been soundly rejected by the Supreme Court. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, the Court considered Indian treaty provisions that secured a "right of taking fish" to particular tribes in the Pacific Northwest. After reviewing the historical background to the negotiations, the Court stated, "[i]n sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce." *Id.* at 669. Notwithstanding this, the Court determined that the treaties continued to guarantee "approximately equal treaty and nontreaty shares" of the fish run even though those runs were shrinking. *Id.* at 685. Indeed, the Court of Claims has previously rejected the very same argument from the Cherokee Nation that it attempts to resurrect today. *See Whitmire v. Cherokee Nation*, 30 Ct. Cl. 138, 156 (1895) (notwithstanding "the earnest argument of the counsel for the [Cherokee Nation] that this result could not have been anticipated by the Cherokees when they ratified the treaty of 1866," the Court held that the Freedmen were entitled to a share of the proceeds derived from the sale of Cherokee lands). In

this case, the fact that the treaty parties may not have considered how Article 9 would operate in the twenty-first century does not justify nullifying its provisions.

These principles – that treaty rights are presumed to be permanent and do not require special language of permanence, do not "expire" even if their modern-day effect was not contemplated by the parties at the time of the treaty, and may only be modified by clear acts of Congress – are, in nearly all cases, protective of Indian tribes and their treaty rights. The Cherokee Nation's position seeks to re-write these established principles, and it would harm the interests of Indian tribes throughout the United States if the Court were to adopt a new standard here.

2. Article 9 of the Treaty Simply Requires the Cherokee Nation to Grant Freedmen the Same Rights as Other Cherokees.

The Cherokee Nation agrees that the 1866 Treaty granted the Freedmen "all the rights of native Cherokees," CN Reply at 1, but argues that this language was not intended to grant the Freedmen "an eternal, unalienable right of citizenship superior to that of native Cherokees."[4] CN Reply at 13. The Cherokee Nation mischaracterizes Interior's argument. Article 9 requires the Cherokee Nation to offer the same privileges, rights, and benefits to the Freedmen on the same terms as those applied to "native Cherokees." *See* DOI Br. at 23. This means that the Cherokee

[4] The Cherokee Nation argues that it is significant that the term "citizen" was not used in Article 9, but was used in other places in the Treaty and in other treaties with the Five Civilized Tribes. CN Reply at 1-2. But this argument does not aid the Nation. In each of the examples cited by the Cherokee, Freedmen (or other Indians, in the case of Article 15 of the Treaty with the Cherokee) were granted the same ***rights*** as citizens of the tribe. *See, e.g.*, Treaty with the Seminoles (Mar. 21, 1866), 14 Stat. 755, Article 2 (persons of African descent "shall have and enjoy all the rights of native citizens"). None of those treaties actually specify that the Freedmen shall be granted citizenship. However, this necessarily follows – if an individual is given all the rights as citizens they are, for all intents and purposes, a citizen. Article 9 is no different. It grants Freedmen "all the rights of native Cherokees." Native Cherokees – in 1866 and today – have the right to citizenship in the Tribe. By the Treaty's plain language, the Freedmen are entitled to this right as well.

Nation may not impose restrictions that eliminate Freedmen from eligibility for these benefits, as the Cherokee Nation seeks to do now. Thus, since the Cherokee Nation makes citizenship available to "original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls," Article 9 requires that citizenship be available on the same terms to individuals who are descendants of original enrollees listed on the Dawes Commission Freedmen Roll. *See* Ex. E to Memorandum in Support of Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment (Cherokee Constitution).

This requirement does not mean that the Cherokee Nation could not alter both the qualifications for citizenship and the privileges that accompany it. For example, the Cherokee Nation notes that "native Cherokees can always lose their citizenship status by a vote of the people instituting a minimum blood quantum." CN Reply at 12. If the Cherokee Nation were to impose such a limitation on its membership, it could impose it on Freedmen descendants only if it did so in an equitable fashion. For example, if the Nation were to institute a blood quantum requirement as part of its membership, it might apply a similar requirement to the Freedmen by measuring the blood quantum of a Freedman based on their degree of descendancy from individuals on the Dawes Freedmen roll.

The Cherokee Nation also focuses on the fact that historically, tribal citizenship was tied to residing within the Nation's boundaries. CN Reply at 3, 15. Similarly, Article 9 applied only to those "freedmen . . . and 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," as well as the descendants of these individuals. *See* DOI Br. at 21. While the exact meaning of this limitation (*e.g.*, whether it applied to both freedmen and free blacks, the exact date cutoff) was the subject of much dispute in the late nineteenth century, *see* DOI Br. at 10, 15-

16, the treaty language clearly does not impose an ongoing residency requirement on Freedmen. However, if the Cherokee Nation wishes to impose a territorial requirement for membership today, it could do so, so long as Freedmen descendants are treated equally with other Cherokees and not specifically excluded from membership or other benefits.

Without stating it expressly, the Cherokee Nation seems to suggest that because all "native Cherokees" are subject to the possibility of changing tribal citizenship requirements, citizenship requirements can be changed to exclude the Freedmen. But the Cherokee Nation is not imposing a heightened membership requirement applying to all Cherokee – it seeks to change its citizenship requirements to specifically exclude the Freedmen, and the Freedmen only, from the Tribe. This flies in the face of the letter and the spirit of Article 9. In short, Article 9 of the Treaty prohibits the Cherokee Nation from excluding Freedmen from rights provided to native Cherokees, such as by making them entirely ineligible for citizenship or other rights and benefits.

B. The Historical Context of the Treaty and the Practical Construction of Article 9 by the Parties Demonstrates that the Freedmen Have the Same Political, Civil, and Other Rights within the Tribe as Those Offered to Native Cherokees.

Courts interpreting treaties "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation*, 318 U.S. at 431-32; *Mille Lacs*, 526 U.S. at 196. Here, the uncontroverted historical evidence submitted by Interior demonstrates that the parties to the Treaty understood that Article 9's grant of "all the rights of native Cherokees" to the Freedmen meant that they were entitled to political and other rights in the Tribe on the same basis as other Cherokees. *See* DOI Br. at 26-37. The United States' intent in crafting the Treaty was to ensure that the Freedmen would be on an "equal footing" with native Cherokee, which means that they were entitled to the same rights, on the

same terms, as native Cherokees. *Id.* at 28. The negotiation history demonstrates that both the Cherokee Nation and the United States understood that the Treaty "permanently" secured the "full rights" of the Freedmen. *Id.* at 31. Finally, the parties' practical construction, including federal and tribal legislative action and statements, show that the parties interpreted Article 9 as providing the Freedmen with full rights in the Tribe, including citizenship rights. *Id.* at 33. The Cherokee Nation does not effectively dispute any of the evidence or arguments submitted by Interior on these points, and did not submit any evidence in support of its own arguments.

1. There Is No Evidence to Support the Cherokee Nation's Assertion that the Treaty Signatories Only Intended to Provide Temporary "Geographical Protection."

Although the Cherokee Nation seeks to minimize the importance of the historical evidence submitted by Interior, it claims (without providing evidentiary support) that certain aspects of the historical context support its interpretation of Article 9. In particular, the Cherokee Nation asserts that, in the nineteenth century, the Cherokee Nation and its citizens were defined by geographical boundaries and that Freedmen in Indian Territory in 1866 "would not have been protected by or subject to the laws of any sovereign except the Cherokee Nation."[5] CN Reply at 3. Thus, the Cherokee Nation argues, "[i]t is absurd to assume that the mid-19th century drafters of the 1866 Treaty meant anything other than that geographical protection in assuring that Freedmen were guaranteed 'all the rights of native Cherokees.'" *Id.* at 15.

[5] This is a mischaracterization of the jurisdictional situation in the Indian Territory at the time. Although some aspects of jurisdiction were murky on the ground, Indian Territory was part of the United States and was subject to federal law. *See The Cherokee Tobacco*, 78 U.S. 616, 619 (1870). In particular, non-Indians in Indian Territory were subject to the laws, including the criminal laws, of the United States. *See, e.g.*, 4 Stat. 729 (June 30, 1834), ch. 161 (providing that laws applicable to other federal jurisdictions shall be in force in Indian country, except as to crimes committed by one Indian against the person or property of another Indian.)

Although it is difficult to determine exactly what the Cherokee Nation gains with this argument, to the extent that it is arguing that Article 9 granted only a limited and temporary set of rights, this position is contradicted by the uncontroverted evidence in the historical record, which demonstrates that the parties understood that the Freedmen and their descendants were granted permanent citizenship rights. In particular, it is clear from the negotiation history that both parties understood that those Freedmen and free blacks who returned to Cherokee Territory within the six-month time frame, and their descendants, would be on an "equal footing" with native Cherokee, without temporal or other limitation.[6] DOI Br. at 28-35. The Commission of Indian Affairs' 1866 report noted that under the Treaty "the full rights of the freedmen are acknowledged" and "the rights of [the Freedmen] have been permanently secured. . . ." Ex. 30 to DOI Br., *Annual Report of the Commission of Indian Affairs for the Year 1866* at 12, 56. There is no support in the historical record for imposing a temporal limitation on Article 9.[7]

[6] To the extent the Cherokee Nation is arguing that the need for Freedmen citizenship rights disappeared once Oklahoma became a state, this is not a valid basis for modifying the plain meaning of Article 9. "Treaty rights are not impliedly terminated upon statehood." *Mille Lacs*, 526 U.S. at 207.

[7] In an apparent attempt to rescue its unsupported argument about the limitations of the Treaty, the Cherokee Nation also contends that the *Whitmire* court "made no reference to the rights of future descendants." CN Reply at 16. Although that court was focused on whether funds should be distributed to those Freedmen and their descendants living in the Cherokee Nation at the time, the court's decree, which it issued two months after the quoted opinion, declared that Freedmen and their descendants were "entitled to participate *hereafter* in the common property of the Cherokee Nation" and enjoined the Cherokee Nation from discriminating between Cherokees by blood and Freedmen, free blacks, and their descendants "in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita *at any time hereafter*. . . ." *Whitmire v. Cherokee Nation*, 30 Ct. Cl. 180, 193 (1895) (emphasis added). This same language was included in the modified decree entered by the Court of Claims on February 3, 1896. *See Whitmire v. Cherokee Nation*, 46 Ct. Cl. 227, 241-42 (1911) ("There was nothing in the terms of the [February 3, 1896] decree or in the conduct of the parties affected by it to raise the inference that its language did not apply to all future distributions of property. . . .").

2. The Cherokee Nation Has Failed to Demonstrate that the Source of the Freedmen's Rights Is the Cherokee Constitution, Not Article 9.

The Cherokee Nation asserts that the Cherokee constitutional amendment granted citizenship rights to the Freedmen. CN Reply at 15-16. As a matter of the Cherokee Nation's domestic law, this may have been true. But it was not a discretionary grant – it was required by Article 9 of the Treaty. Article 9 required that the Cherokee Nation grant eligible Freedmen and their descendants "all the rights of native Cherokees." In 1866, one right of "native Cherokees" was the right to citizenship in the Nation. *See* Ex. 10 to DOI Br., Cherokee Constitution and Proclamation and Amendments to the Constitution, Art. III, Sec. 5, at 7. Thus, the Cherokee Constitution needed to be amended to include Freedmen in this right. As discussed *supra* at 9-10, Article 9 does not define precisely which rights must be granted to Freedmen and their descendants – only that they be "all the rights" that are given to native Cherokees. The Cherokee Nation today fails to abide by that standard, since it grants citizenship to individuals who can demonstrate that they have an ancestor on the Cherokee Dawes Roll. By excluding those individuals who have an ancestor only on the Dawes Cherokee Freedmen Roll, the Cherokee Nation has failed to give Freedmen descendants "all the rights" of native Cherokees.

The Cherokee Nation fails to provide any effective rebuttal to the evidence that the Cherokee Nation leadership at the time understood the constitutional amendment to be ***required*** by Article 9. *See* DOI Br. at 34-38. The Cherokee Nation claims that "[m]any contemporaneous statements surrounding the 1866 Treaty cite the Cherokee's own Constitutional Amendment" as having granted citizenship to the Freedmen, but fails to point to a single example of such a statement. CN Reply at 7. This is because the contemporaneous statements in fact show that the constitutional amendment was enacted specifically to implement Article 9. DOI Br. at 34-35. For example, a month *before* the constitutional amendment, the Principal Chief himself stated

that "blacks [were] admitted to the full rights of Citizenship by the 9th Article of the Treaty," and that this required amendment of the Cherokee Constitution. Ex. 9 to DOI Br., Message of Hon. Wm. P. Ross to the Cherokee Council; Ex. 3 to DOI Br., Greenwald Rep. at 20; *see also* Ex. 10 to DOI Br., at 17. The constitutional amendment incorporated language verbatim from Article 9, further demonstrating that the change was made in order to come into compliance with the Treaty. In addition, 1883 Cherokee tribal legislation explicitly recognized that the Treaty provided "civil, political, and personal" rights to the Freedmen. DOI Br. at 37.

Rather than grounding its claim about the Cherokee Constitution in factual evidence, the Cherokee Nation relies on unsubstantiated blanket statements and a rhetorical question: "why would the Nation have had to do anything at all to implement the provisions of the 1866 Treaty?" CN Reply at 15. The answer to this question is straightforward: parties to a treaty routinely amend their domestic law to comply with a new treaty obligation. *Cf. Medellin v. Texas*, 552 U.S. 491, 505 (2008) (noting that non-self-executing treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing.'"). It was eminently reasonable – and arguably required – for Tribal officials at the time to make the Tribe's domestic law consistent with its treaty obligations.

Since all of the Cherokee officials' contemporaneous statements contradict its argument, the Cherokee Nation is forced to rely on out-of-context language in judicial decisions made decades after the Treaty was signed to support its claim that the Freedmen's citizenship rights stemmed from the constitutional amendment. First, the Cherokee Nation quotes the Indian Claims Commission's statement that "[w]hen, after these 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 IX of the treaty of 1866." CN Reply at 16. The Cherokee Nation erroneously concludes that the word "after" suggests a causal connection between the amendment and the Cherokee Nation's recognition that the Freedmen were citizens. In fact, "after" simply means "following in time." Under any circumstances, the Indian Claims Commission left no ambiguity that it viewed the Freedmen's rights as stemming from the Treaty, because it said so explicitly in the very same sentence. *Cherokee Nation v. United States,* Docket 190, 12 Ind. Cl. Comm. 570, 582-83 (Sept. 25, 1963) (". . . with all the rights of native Cherokees, and that [the Freedmen] acquired such rights by virtue of Article IX of the treaty of 1866.").

The Cherokee Nation also quotes the Court of Claims March 1895 *Whitmire* opinion, but here, too, the language does not bear the weight placed on it. As with the Indian Claims Commission opinion, the Court of Claims also explicitly stated that the Freedmen's foothold was gained "exclusively by virtue of the treaty of 1866," thus undercutting the Cherokee Nation's attenuated argument. *Whitmire v. Cherokee Nation*, 30 Ct. Cl. at 155. The Court of Claims re-emphasized this conclusion when, ten years later in a case about intermarried whites in the Cherokee Nation, the Court of Claims remarked that the amendment to the Cherokee Constitution was "simply declaratory of the new order of things." *In the Matter of Enrollment of Persons Claiming Rights in the Cherokee Nation*, 40 Ct. Cl. 411, 442 (1905), *aff'd Red Bird v. United States*, 203 U.S. 76 (1906). Finally, the Cherokee Nation again seeks to rely on *United States ex rel. Lowe v. Fisher*, 223 U.S. 95, 100 (1912), for this point, but the *Lowe* Court was merely characterizing a lower court's decision and it fails to provide any independent support for the Cherokee Nation's position.

III. No Equitable Doctrines or Alleged "Breach" Justifies Modifying Article 9 of the Treaty.

In its reply, the Cherokee Nation presents a new set of arguments – that the United States' own actions create "unclean hands" or put it in breach of the Treaty and that Article 9 should thus not be enforced. CN Reply at 22-23. This argument lacks any legal authority, is without factual support, and if accepted, would create damaging precedent for other tribes across the Nation.

The history of the Federal government's relations with the Cherokee Nation since 1866 are recounted in some detail in Interior's opening brief, *see* DOI Br. at 3-20, and are undoubtedly marked by periods of Federal hostility to the rights of the Tribe and its members. But the Cherokee Nation has pointed to no authority (and Interior is aware of none) that supports the nullification of express language in a treaty or federal statute due to the government's alleged "unclean hands." The single citation in support of the Cherokee Nation's argument, *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 330 (1994) is to Justice Scalia's concurrence in that case, which stated his view that the N.L.R.B. should have denied relief to a private individual plaintiff because he perjured himself under oath. The case in no way suggests that treaty provisions should be ignored based on the alleged "unclean hands" of the United States.

Pursuant to Article VI of the United States Constitution, the Treaty is "the supreme law of the land," and has the full force of Federal law until modified or altered by Congress. *See, e.g., South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Mille Lacs*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 738 (1986). To the extent that other provisions in the Treaty of 1866 are no longer in effect, they were legitimately abrogated or modified by Congress. *See* CN Reply at 22. For example, Article 13, which provides that Cherokee courts were allowed to retain exclusive jurisdiction over civil and criminal cases arising in Cherokee territory and

involving only tribal members, was modified in 1885 by statute providing that certain crimes involving any Indian should come before the Federal courts, 23 Stat. 362, 385 (Sec. 9) (Mar. 3, 1885), and again in 1897 by statute that expressly provided that the body of federal law in Indian Territory was to apply "irrespective of race." 30 Stat. 62, 83 (ch. 3) (June 7, 1897).

Even if Congress has abrogated one or more provisions in a treaty, such limited congressional action does not invalidate the rest of the treaty. If the rule of law was that abrogation of one provision invalidated the entire treaty, tribes across the country would lose important rights merely because Congress had altered or eliminated some other right provided by the same treaty. *See, e.g.*, *Mille Lacs*, 526 U.S. at 195-202 (reviewing a subsequent treaty that ceded lands and rights provided by 1837 treaty, but concluding that hunting and fishing rights addressed in 1837 treaty survived); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-12 (1968) (hunting and fishing rights granted or preserved by Wolf River Treaty of 1854 survived Termination Act of 1954, which abrogated other aspects of 1854 Treaty). Thus, Article 9 remains in full effect.

Finally, to the extent that the Cherokee Nation claims that the United States has breached treaty obligations, Congress has provided specific mechanisms to address these claims and provide monetary damages. In 1946, Congress established the Indian Claims Commission, which gave the Commission jurisdiction to hear certain claims including "those in law or equity arising under the Constitution, laws, and treaties of the United States." 60 Stat. 1049, 1050 (Aug. 13, 1946). The Cherokee Nation brought claims against the United States pursuant to the Indian Claims Commission Act. The Indian Tucker Act, 28 U.S.C. § 1505, provides for jurisdiction in the Court of Federal Claims over certain types of claims against the United States accruing after August 13, 1946.

The Cherokee Nation also asserts that the United States does not treat Freedmen the same as native Cherokees for all purposes. This is true in some instances because statutes relating to Indians (and the judicial interpretations of these statutes) contain different requirements for their application. Some statutes are framed in terms of tribes and their members, in which case the United States defers to the tribe's determination of the membership. Other statutes are framed in terms of individual Indians. The Supreme Court has long recognized that a non-Indian could be entitled to privileges within a tribe, but not meet certain federal definitions of "Indian." *See, e.g.*, *Duro v. Reina*, 495 U.S. 676, 694 (1990) ("We held in *U.S. v. Rogers*, 4 How. 567, 11 L.Ed 1105 (1846), that a non-Indian could not, through his adoption into the Cherokee Tribe, bring himself within the federal definition of 'Indian' for purposes of an exemption to a federal jurisdictional provision. But we recognized that a non-Indian could, by adoption, 'become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages.' *Id*.").

Historically, many Indian tribes contained non-Indian members who were adopted into the tribe. But Congress may rationally decide that a particular federal benefit or statute should be limited to only native Indians. *See, e.g.*, *United States v. Rogers*, 45 U.S. 567, 573 (1846) ("It can hardly be supposed that Congress intended" to exempt white men who were adopted by marriage into the tribe from the criminal jurisdiction of federal courts); *see also* "A Legal History of Blood Quantum in Federal Indian Law to 1935," 51 *S.D. L. Rev.* 1, 11 (2006) (discussing Congress's historical practice of providing benefits based on Indian blood quantum). Thus, for example, for purposes of the Major Crimes Act, "a defendant is an Indian if the government proves beyond a reasonable doubt that he has: (1) a sufficient degree of Indian blood and (2) tribal or federal recognition as an Indian." *See United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005). The Freedmen have brought a claim asserting the right to Certificate of

Degree of Indian Blood (CDIB) cards in this case, *see* Fifth Amended Complaint, Docket No. 121, at 52-55, but those claims are stayed at the request of the parties and are not before this Court today. And under any circumstances, a federal agency's actions with respect to providing CDIB cards to Freedmen cannot modify Article 9 of the Treaty, which is federal law.[8] Only Congress has the authority to alter treaty rights; the actions or inactions of the Executive branch cannot nullify a treaty provision. *See United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981) ("The Department of the Interior cannot under any circumstances abrogate an Indian treaty directly or indirectly. Only Congress can abrogate a treaty, and only by making absolutely clear its intention to do so.").

The Cherokee Nation also suggests that the Oklahoma Indian Welfare Act (OIWA) creates a "double standard" under which the Cherokee Nation is treated differently than tribes that have reorganized under the provision of that statute. CN Reply at 24-26. This is false. As described in Interior's opening brief, the Solicitor of the Department of the Interior opined in 1941 that OIWA provided the statutory authority and consent of Congress for tribes to reorganize under that Act and modify their membership requirements. DOI Br. at 58. In reliance on Interior's interpretation, the Muscogee (Creek) Nation and Choctaw Nation reorganized under the terms of OIWA, and defined their membership to exclude Freedmen. But the Cherokee Nation has not done so. In essence, the Cherokee Nation is asking this Court to

[8] The issuance of CDIBs is not required by statute nor directly by regulation, although the regulations for some federal programs that do require a specific degree of Indian blood may refer to CDIBs. *See* 65 Fed. Reg. 20,775 (April 18, 2000).

find that it need not follow the same legal standards as other tribes.[9] This argument, and the Cherokee Nation's other equitable arguments, should be rejected.

IV. The Cherokee Nation Offers No Evidence that the Five Tribes Act of 1906 Abrogated Article 9.

The Cherokee Nation has not responded to any of Interior's arguments for why the Cherokee Nation's abrogation claim fails, nor has it provided any new evidence showing that Congress clearly expressed an intent to abrogate Article 9 when it passed the Five Tribes Act (FTA). *See* DOI Br. at 49-55. Instead, the Cherokee Nation merely reiterates the flawed rationale from its opening brief. CN Reply at 19-22.

The Cherokee Nation fails to, and cannot, carry its burden for showing that Congress abrogated Article 9. The weight of the historical record shows that Congress did not make an explicit declaration that the FTA abrogated Article 9; that the FTA and the Treaty are not in irreconcilable conflict because they can co-exist; and that there is no clear and reliable evidence in the FTA's legislative history or surrounding circumstances that Congress intended to abrogate Article 9. *See* DOI Br. at 49-55. The Cherokee Nation mistakenly argues that Congress impliedly abrogated the Freedmen's rights through the incorporation of Indian Territory into the State of Oklahoma; there is simply no evidence for this conclusion. Further, no federal court has found that the FTA abrogated Article 9. *See id.* at 55-57. In particular, the D.C. Circuit's decision in *Garfield v. United States ex rel. Lowe*, 34 App. D.C. 70 (D.C. Cir. 1909)), did not address the question of whether the descendants of Freedmen must have returned in the time

[9] The Cherokee Nation makes the strange assertion that it "would be a denial of equal protection under the law" if the Cherokee Nation could not amend its membership requirements because it did not re-organize under OIWA. CN Reply at 25. Of course, the reverse is true: the Cherokee Nation is arguing that it is entitled to special treatment by suggesting that it should have the right to modify its Treaty-defined membership obligations without following the same procedures required of similarly situated tribes.

limits established by the Treaty, and therefore did not "articulate[] clearly" the construction urged by the Cherokee Nation. CN Reply at 20.

The Cherokee Nation's reliance on the FTA as a "practical reenactment" of the February 3, 1896 decree in *Whitmire* in support of its abrogation argument is misplaced. The Cherokee Nation suggests that that decree, and the February 18, 1896 letter interpreting it, narrowed the universe of Freedmen descendants that could be covered by Article 9. A close examination of that decree, however, demonstrates that the debate centered on whether the six-month limit applied to both newly freed blacks and freedmen. *See* DOI Br. 39-42. Indeed, the Court of Claims stated that although the February 3, 1896 decree had raised the question of whether the time limit applied to both groups, "[t]hese doubts had been resolved by the language of the decree of February 18, 1896, and the language of this [third] section of the [Five Tribes] act of April 26, 1906, is almost precisely the same with that of the decree."[10] *Whitmire v. Cherokee Nation*, 46 Ct. Cl. 227, 248 (1911). The circumstances of the decree show that Congress's decision to move the phrase "and their descendants" resulted from disputes about Article 9's application to Freedmen and free blacks and not from any attempt to limit the coverage for Freedmen descendants.

CONCLUSION

For the reasons stated in Interior's opening brief and herein, summary judgment should be granted in favor of Interior.

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Respectfully Submitted,

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[10] The February 18, 1896 document referred to here was a letter sent by the Court to the Commissioner of Indian Affairs, not a decree.

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