IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION,	)	
Appellant,	)	
v.	)	**Case No.: SC-2023-10** **(District Court Case No. CV-2020-34)**
RHONDA K. GRAYSON and JEFFERY D. KENNEDY,	)	
Respondents.	)	

BRIEF OF APPELLANT

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INTRODUCTION

This appeal turns on the sovereignty of the Muscogee (Creek) Nation (the "Nation"). At issue is whether the Nation's sovereign immunity bars claims against the Nation's Citizenship Board except for an administrative law appeal of the Citizenship Board's decision on a citizenship application. Also at issue is whether the Nation's sovereignty, expressed by legislation of the National Council, limits judicial review of a decision of the Citizenship Board to the administrative record of the proceeding before the Citizenship Board.

Finally, this appeal raises the ultimate issue of sovereignty—whether the Nation has authority to determine its own citizenship.

Here, the District Court's Opinion violated the Nation's sovereignty when that Opinion canceled the Nation's Constitution Art. III, Secs 2 and 3 and required Plaintiffs be given citizenship. The Citizenship Board now asks this Court, on *de novo* review, to reverse the District Court's Order and enter judgment in favor of the Nation's Citizenship Board.

QUESTIONS PRESENTED

1. Does the Nation's Sovereign Immunity bar Plaintiffs' lawsuit seeking only declaratory and injunctive relief?

2. Does the Nation's Sovereign Immunity bar Plaintiffs from an action seeking judicial enforcement of the Treaty of 1866?

3. Does the District Court have jurisdiction under 7 MCNCA, Sec. 4-110(B), to conduct an evidentiary trial and rely on material not before the Citizenship Board in the appellate judicial review of the Citizenship Board decision authorized by Sec. 4-110(B)?

4. Did the District Court commit reversible error by cancelling Muscogee (Creek) Nation Constitution Article III, Sec. 2, and requiring the Citizenship Board to admit Plaintiffs to citizenship when they admitted failure to satisfy the constitutional requirement for citizenship in the Nation?

STATEMENT OF THE CASE

A. Plaintiffs' loss in federal court.

On July 20, 2018, in the United States District Court for the District of Columbia,[1] Plaintiffs, as descendants of Creek Freedmen, sought an injunction requiring the Nation to recognize them as citizens pursuant to the Treaty of June 14, 1866, a treaty between the Nation and the Unites States, 14 Stat. 785 (the "1866 Treaty"). At the outset, the Court dismissed the case without prejudice based on Plaintiff's failure to comply with the law by exhausting tribal remedies. Specifically, the federal court held at *Muscogee Creek Indian Freedmen Band, Inc., et al., v. David Bernhardt, et al.,* 385 F.Supp.3d 16, 28 (D.D.C. 2019):

> Plaintiffs were required to exhaustion (sic) their tribal remedies prior to bringing suit in this Court. Plaintiffs have not established that exhaustion should be excused due to the presence of federal defendants in this lawsuit or due to futility. Accordingly, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' complaint pending the exhaustion of tribal remedies.

B. Plaintiffs' proceedings before the Citizenship Board.

Upon the dismissal of their case, Plaintiffs each applied for tribal citizenship to the Nation's constitutionally created Citizenship Board.[2] In June 2019, Plaintiff Grayson filed her application for citizenship. The Citizenship Board denied the application on July 31, 2019. (R.

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[1] *Muscogee Creek Indian Freedmen Band, Inc., et al., v. David Bernhardt, et al.,* 385 F.Supp.3d 16, 28 (D.D.C. 2019).

[2] Constitution of the Muscogee (Creek) Nation of 1979, (the "Constitution") Art. III, Sec. 1, (Exhibit A, pertinent portions, to this Brief) which provides:

> The Principal Chief shall appoint, subject to majority approval of the Muscogee (Creek) National Council, a Citizenship Board comprised of five (5) citizens who shall be charged with the responsibility of the establishment and maintenance of a Citizenship Roll, showing degree of Muscogee (Creek) Indian blood based upon the final rolls prepared pursuant to the Act of April 26, 1906 (34 Stat. 137), and other evidence, as prescribed by ordinance.

80, p. 18)[3] On August 6, 2019, Plaintiff Grayson appealed to the Citizenship Board the denial of her citizenship application.[4] On October 30, 2019, the Citizenship Board conducted a hearing. Plaintiff Grayson failed to meet the requirement imposed by the People, and approved by the United States, in Constitution Art III, Sec. 2, of a Muscogee (Creek) Indian "by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the act of April 26, 1906 (34 Stat. 137); (except that an enrolled member of another Indian tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.)" (The Muscogee (Creek) Nation Constitution is the Supreme Law of the Land. *Harjo v. Muscogee (Creek) Election Board*, CV-2007-50 (Muscogee (Creek) 2007)). On November 5, 2019, the Citizenship Board affirmed the denial of the application for citizenship. (R. 80, p. 15)

Plaintiff Kennedy followed the same process with the same result on December 12, 2019. (R. 75, pp. 39 and 64)

C. Plaintiffs' petition in the District Court.

On March 11, 2020, Plaintiffs initiated suit in the Nation's District Court, *Rhonda K. Grayson and Jeffrey D. Kennedy v. Citizenship Board of the Muscogee (Creek) Nation of*

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[3] Citations to the Record on Appeal are given as R., document number, and page. Citations to a transcript are given as R., document number, page/line.

[4] 7 MCNCA § 4.110(A) provides in pertinent part:

> **Administrative appeal**. If certification is denied or if certification is granted but the applicant disagrees with the Muscogee (Creek) blood quantum on the membership card, the applicant may appeal the decision within ten (10) days of receipt of the decision of the Citizenship Board. The burden of proof shall be upon the applicant, to demonstrate by a preponderance of evidence that he or she is a Muscogee (Creek) Indian by blood or to prove the correct Muscogee (Creek) blood quantum for membership purposes.

Oklahoma, Case No. CV-2020-34 (Dt. Ct. MCN). In exercising the Nations' sovereignty, the National Council codified judicial appellate review of the administrative law decision of the Citizenship Board under a deferential standard setting forth limited grounds for that review.[5] Plaintiffs' Petition did not seek judicial review of the Administrative Orders under the National Council's express limited standard of judicial review. Instead, Plaintiffs filed a suit for "declaratory and injunctive" relief. (R. 1, p.15, ¶¶ 81, *et seq.*) The Petition asserted only one "cause of action" that was a "violation of the U.S. Constitution and Federal Law." (R. 1, p.14) As a further indication that the suit was not for judicial review of an administrative order, the Petition's prayer for relief asked for nine declarations, none of which mentioned the Citizenship Board's Orders, and an injunction that also did not mention the Citizenship Board or its Orders. (R. 1, pp. 15-16)

D. Plaintiffs' unsuccessful Motion for Summary Judgment.

On December 30, 2020, Plaintiffs moved for summary judgment. (R. 9) In so doing, Plaintiffs confirmed that their lawsuit was for something other than the judicial appellate review

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[5] 7 MCNCA § 4-110(B) provides:

> **Judicial appeals**. The Courts of the Muscogee (Creek) Nation are hereby granted exclusive jurisdiction over all disputes relating to, arising under or in conflict with this Title. After the applicant has exhausted the administrative remedies of the Citizenship Board, and a final determination not to enroll the applicant has been made, the applicant shall have the right to file an appeal of said decision in the Muscogee (Creek) Nation District Court. The applicant shall serve notice of the appeal to the Chairman of the Citizenship Board or his authorized representative at the Citizenship Board Offices. In hearing the appeal, the Muscogee Nation District Court shall give proper deference to the administrative expertise of the Citizenship Board. The Muscogee Nation District Court shall not set aside, modify, or remand any determination by the Board unless it finds that the determination is arbitrary and capricious, unsupported by substantial evidence or contrary to law. Standard procedures of the Muscogee (Creek) Nation District Court, including the right to appeal to the Supreme Court, shall govern all proceedings.

of an agency administrative decision as authorized by 7 MCNCA § 4-110(B). The Citizenship Board opposed summary judgment by asserting that the lawsuit should be confined to the Citizenship Board's record of the hearings. (R. 17, pp. 12-22)

In its Order on the Plaintiffs' Motion, the District Court discussed the procedural history of the lawsuit. (R. 42, pp. 1-2) In so doing, the District Court did not identify the case as for appellate judicial review of a Citizenship Board decision pursuant to 7 MCNCA § 4-110(B). *Id.* The District Court expressly noted the Citizenship Board's objection to summary judgment since Plaintiffs relied on affidavits which are "new documents not submitted at the time of Plaintiffs' applications for enrollment, nor part of the administrative record." (R. 42, p. 4) The District Court, implicitly recognizing that the lawsuit was not for judicial appellate review of an agency order, denied the motion. Specifically, the District Court stated:

> "Summary judgment should be decided on the facts not in dispute as shown by evidence which may include among other things deposition testimony, documentary evidence, etc." (R. 42, p. 5)

The District Court continued in its Order denying summary judgment by addressing a matter that should have been provided by Plaintiffs in the administrative record:

> "While Defendant admits Ms. Grayson and Mr. Kennedy were denied enrollment, it denies that any letter was sent to either Plaintiff citing descending from the Creek Freedmen Roll as the rationale for denial. This certainly is a genuine issue of material fact upon which that entire case turns, and clearly it is in dispute." (R. 42, p. 6)

In spite of that focus on what the District Court had recognized as the administrative record, the District Court allowed discovery and proceeded to conduct a trial with live testimony and exhibits beyond the administrative record.

E. The District Court trial with live witnesses and exhibits that were not before the Citizenship Board in its administrative proceedings.

1. The admitted failure of Plaintiffs' satisfaction of constitutional requirements for citizenship.

At the evidentiary trial, there was no dispute that the Nation's Constitution, expressly enacted pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 5201, *et seq.*, Act of June 26, 1936, 48 Stat. 1967 ("OIWA")[6] and approved by the United States pursuant to that federal statute, required a successful applicant for citizenship to show to the Citizenship Board lineal descent from "those Muscogee (Creek) Indian blood whose names appear on the final rolls proved by the Act of April 26, 1906 (34 Stat. 137)".[7] Likewise, it was undisputed that neither Plaintiff made that showing in either their application or appeal to the Citizenship Board.

2. Expert testimony not offered before the Citizenship Board.

Prior to trial, the Citizenship Board moved to strike and exclude an expert witness proposed by Plaintiffs who was not present nor involved in Plaintiffs' citizenship proceedings before the Citizenship Board. The Citizenship Board asserted that such new evidence was inappropriate in the administrative appeal pursuant to 7 MCNCA § 4-110. (R. 55, p. 1; R. 56, pp. 1-2)

At the trial, the District Court rejected the Citizenship Board's motion for the Court to conduct the case as the judicial appellate review contemplated by the National Council in 7 MCNCA § 4-110. The District Court received both oral testimony and a written report from an

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[6] Muscogee (Creek) Nation Const. Art I, Sec. 1 provides:

> The name of this Tribe of Muscogee (Creek) people shall be the "Muscogee (Creek) Nation", and is hereby organized under Section 3 of the Act of June 26, 1936 (48 Stat. 1967).

[7] See, Muscogee (Creek) Nation Const. Art. III, Secs. 2 and 3.

adopted child of Choctaw Freedmen descendants who was a law professor. (R. 90, p. 80/15-16) That "expert" witness was not involved in Plaintiffs' proceedings before the Citizenship Board and, in fact, had not read the record of those proceedings. (R. 90, p. 60/21) The witness had not practiced tribal law as a lawyer and did not teach Indian law in her current employment. (R. 90, p. 62/20 and p. 63/8) There was no evidence in the record that her work had been peer reviewed. (R. 90, pp. 4-82) She had served as an appellate judge for the Standing Rock Sioux Supreme Court. (R. 90, pp. 27/10-13)

She had not served as an expert witness previously. (R. 90, p. 26/16) The law professor's sole role was to provide an opinion purely on a legal issue—whether the 1866 Treaty was abrogated. (R. 90, p. 29/22-25) There was no showing of incapacity or other impediment preventing the district judge from deciding the legal issue on her own.

The remainder of the evidentiary trial consisted of testimony from Plaintiffs as to the Citizenship Board's hearing, Plaintiffs' lay legal opinions, and questions to the Citizenship Board members and staff seeking lay legal opinions and invading their deliberation process and attorney-client privileges. (R. 89 and 91)

3. Plaintiffs' motion for judgment as a matter of law.

At the end of Plaintiffs' case, the District Court again demonstrated that it was not conducting an appellate judicial review of an administrative agency decision. Plaintiffs moved for judgment as a matter of law. (R. 89, p. 87/1-3) The District Court then indicated that it needed to resolve factual conflicts arising from the evidence received at the trial, a clear function of a trial, rather the judicial appellate review of an agency decision. Further, rather than perform the sole applicable function of reviewing the record of the Citizenship Board for legal error under the limited standard of appellate review provided by the National Council, the District Court focused

on Plaintiffs' trial evidence and denied the Motion for Judgment as a matter of law by stating:

> "I'm going to overall (sic) your motion. I do think we need to hear from the defendants (sic) to see if they (sic) can put forth the evidence to support their (sic) position. There is a contested issue here. So I'm going to say your motion is overruled and will continue with the trial.

(R. 89, p. 92/20-25)

F. The District Court Opinion.

On September 27, 2023, the District Court filed an "Order and Opinion on Approval from the Citizenship Board of the Muscogee (Creek) Nation Denial of Creek Freedmen Citizenship Applications" (the "Opinion"). (R. 111) In the Opinion, the District Court went beyond the appellate function of judicial review of agency action. The Opinion referred to and relied upon testimony and exhibits at trial that were not part of the record before the Citizenship Board on which record an appellate judicial review would have been conducted. (R. 111, p. 4, fn. 6, referencing an affidavit of Plaintiffs affixed to their denied Motion for Summary Judgment, p. 2, fn. 2, referencing trial testimony; p. 5 referencing witness testimony and direct evidence were presented at trial; pp. 9-11; trial testimony, p. 11 referencing unidentified "substantial additional documents;" and pp. 12-14 witness testimony of the Citizenship Board's deliberation process not in the administrative record of the Citizenship Board hearings)

At page 5 of the Opinion, the District Court described the Petition that began the lawsuit. R. 111, p. 5) Omitted from the Court's description was the fact that the Petition expressly sought injunctive relief. The Opinion failed to mention that the Petition asserted only one "cause of action" which was not to "set aside, modify or remove" the Citizenship Board's decision, (the only relief authorized by the National Council in 7 MCNCA § 4-110(B)), but rather was for "violation of the U.S. Constitution and Federal Law." (R. 111)

In articulating the standard of review that it intended to apply to the new evidence at trial, the Opinion quoted the portion of § 4-110(B) that effectively limits the District Court's review to the record of the administrative process before the Citizenship Board. The Opinion omitted the mandate of the National Council in § 4-110(B) that:

> "In hearing the appeal, the Muscogee Nation District Court shall give proper deference to the administrative expertise of the Citizenship Board."

The Opinion went beyond the administrative record and reached contradictory conclusions. First, the Opinion defined the National Council's "arbitrary and capricious" standard of appellate judicial review, set out in § 4-110(B) as requiring the Citizenship Board action to be "in disregard of law." (R. 111, p. 7) In applying that standard, the Opinion expressly found that the Citizenship Board's decisions were not arbitrary and capricious. (R. 111, pp. 9-10) Accordingly, the Citizenship Board's decision did not disregard the law in deciding that the Nation's Constitution's blood requirement legally controlled Plaintiffs' citizenship applications.

Having decided that the Citizenship Board's decision was not "in disregard of law," the Opinion then found that the Citizenship Board's decision was unsupported by substantial evidence. (R. 111, p.10) The Opinion stated that the applications were supported by "voluminous documentation." The Opinion did not describe that documentation. The District Court acknowledged as undisputed that Plaintiffs offered no evidence to the Citizenship Board that they could satisfy the Nation's constitutional requirement for citizenship of tracing lineage back to the Creek by blood rolls. (R. 111, pp. 10-11)

The Opinion then relied on the trial testimony of Plaintiffs, Plaintiffs' "expert," and Citizenship Board personnel, including the legal opinions of non-lawyers. (R. 111, pp. 13-14) After having previously found that the Citizenship Board did not disregard the law, the Opinion

concluded that the Citizenship Board disregarded the law (the 1866 Treaty) by denying the citizenship applications of Plaintiffs who had admitted that they could not satisfy the lineage tracing membership requirement of the Nation's Constitution. (R. 111, p. 14)

The Opinion did not mention the 1866 Treaty's express authorization of future legislation, the OIWA invocation in Plaintiffs' Petition, the provisions of the OIWA, or the U.S. Solicitor of the Interior 1941 Opinion[8] effectively approving the constitutional membership requirements that controlled the Citizenship Board's decisions and implicitly rejected Plaintiffs' arguments. The Opinion did not discuss the fact that the United States, which was the counterparty to the 1866 Treaty, expressly approved the Nation's Constitution lineage tracing requirement for citizenship. The Opinion did not attempt to reconcile the federally-approved Nation's Constitution with the 1866 Treaty. Rather, the Opinion relied upon the inadmissible legal opinion of a Choctaw Freedmen descendants' adoptee to invalidate the Nation's Constitutional requirement for membership.[9] The Opinion did not discuss any Indian Rule of Construction or any other rule of construction.

Although the Opinion had determined that the Citizenship Board's administrative law decisions did not disregard the law, the Opinion, based on new evidence at trial, then found that the Citizenship Board's decision was contrary to law. The District Court, citing no decision from this Court or any other appellate court addressing the OIWA or the 1866 Treaty, effectively held that the 1866 Treaty cancelled the Nation's Constitution's Article III, Secs. 2 and 3, which had been enacted by a vote of the Muscogee (Creek) membership and approved by the United States. The District Court then effectively reversed the Citizenship Board's constitutionally mandated

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[8] 1 Op.Sol. 1076 (Oct. 1, 1941) (M-Opinion).

[9] The Opinion also invoked *McGirt v. Oklahoma,* 591 U.S. _, 140 S. Ct. 2452, 207 L.Ed.2d 895 (2020), which did not address the Nation's citizenship. (R. 111, p. 9)

decision and required that Plaintiffs be granted citizenship in the Nation, their admitted failure to satisfy the Nation's constitutional requirements notwithstanding. (R. 111, pp. 13-14)

The Citizenship Board now appeals.

ARGUMENT

I: THE NATION IS A SOVEREIGN WHOSE IMMUNITY PROTECTS ITS CITIZENSHIP BOARD.

The Nation, a federally-recognized Indian tribe, is a sovereign with inherent sovereign authority. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). As a sovereign, it enjoys sovereign immunity that protects it from suit. *Id.* That immunity is "a necessary corollary to Indian sovereignty and self-governance." *Id.* Any suit against a tribe is to be dismissed absent congressional authorization or waiver. *Id.* at 789. Waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). A valid waiver is determined under tribal law. *See Dillner v. Seneca-Cayuga Tribe of Oklahoma*, 2011 OK 61, ¶ 13. For a waiver to be valid, it must be embodied in the Nation's Constitution or in an act of the National Council and signed by the Chief. Such a waiver by the Nation is indisputably an exercise of the Nation's sovereignty, as is its absence.

The immunity of a sovereign has two distinct components. Initially, in the absence of express waiver by the sovereign or Congress, the sovereign is immune from suit asserting a claim against it. Secondly, even in the event of waiver of immunity from suit as to particular claim, immunity protects the sovereign from suit on the claim in any court for which immunity has not been expressly waived. *See, Pennhurst State Sch. v. Halderman*, 465 U.S. 89 (1984); *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 89 (2nd Cir. 2001).

An Indian nation's sovereign immunity extends to its tribal governmental actors. *See, Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities).

Accordingly, the Nation's constitutionally created Citizenship Board enjoys sovereign immunity as to claims and suits in the Nation's courts unless expressly waived by the Constitution or the National Council and approved by the Chief.

II: IN ITS EXERCISE OF ITS SOVEREIGNTY BY THE NATIONAL COUNCIL AND THE CHIEF, THE NATION HAS WAIVED THE CITIZENSHIP BOARD'S SOVEREIGN IMMUNITY ONLY FOR A REVIEW IN THE DISTRICT COURT UNDER A NARROW ADMINISTRATIVE LAW STANDARD OF REVIEW OF THE CITIZENSHIP BOARD'S ADMINISTRATIVE AGENCY ACTION.

The Citizenship Board and its powers were created by the Constitution and by the National Council and the Chief together exercising the Nation's sovereignty in enacting 7 MCNCA § 4-110. In so doing, the Nation did not generally waive the Citizenship Board's sovereign immunity as to claim or forum. In specifying how the Citizenship Board is to exercise the Nation's sovereignty, the National Council provided a limited express waiver of immunity in the administrative law context. 7 MCNCA § 4-110(B) allows an appeal of the Citizenship Board's decision of an application for citizenship. Specifically, the National Council required that the District Court, as the appellate forum, properly defer to the expertise of the Citizenship Board:

> **Judicial appeals**. The Courts of the Muscogee (Creek) Nation are hereby granted exclusive jurisdiction over all disputes relating to, arising under or in conflict with this Title. After the applicant has exhausted the administrative remedies of the Citizenship Board, and a final determination not to enroll the applicant has been made, the applicant shall have the right to file an appeal of said decision in the Muscogee (Creek) Nation District Court. The applicant shall serve notice of the appeal to the Chairman of the Citizenship Board or his authorized representative at the Citizenship Board Offices. **In hearing the appeal, the Muscogee Nation District Court shall give proper deference to the administrative expertise of the**

> **Citizenship Board. The Muscogee Nation District Court shall not set aside, modify, or remand any determination by the Board unless it finds that the determination is arbitrary and capricious, unsupported by substantial evidence or contrary to law.** Standard procedures of the Muscogee (Creek) Nation District Court, including the right to appeal to the Supreme Court, shall govern all proceedings.

(Emphasis added) No other waiver of the Citizenship Board's sovereign immunity allows suit against the Citizenship Board for any other claims in any other type of action in the District Court. Accordingly, the Citizenship Board is immune from all other claims of the Plaintiffs' Petition.

III: THE SOVEREIGN IMMUNITY OF THE NATION CONFERRED ON THE CITIZENSHIP BOARD IN ITS CREATION BY THE CONSTITUTION PREVENTS THE DISTRICT COURT FROM VIOLATING THAT SOVEREIGN IMMUNITY BY CONDUCTING AN EVIDENTIARY TRIAL FOR INJUNCTIVE AND DECLARATORY RELIEF AND ENTERING A JUDGMENT BASED ON THAT TRIAL EVIDENCE.

Plaintiffs expressly sought declaratory and injunctive relief from the District Court. Those types of claims, if they survive legal challenges on the pleadings or at summary judgment, result in evidentiary trials on the merits. Those claims are not an action for appellate judicial review on an administrative record of an order by an administrative agency, the only action over which the District Court has subject matter jurisdiction.[10] Specifically, the Nation has not waived the sovereign immunity enjoyed by the Citizenship Board to allow the District Court to conduct an evidentiary trial as to anything involving Orders of the Citizenship Board. By so proceeding and utilizing the evidence from the trial the District Court violated the Nation's sovereignty, violated the sovereign immunity of the Citizenship Board, and acted without subject matter jurisdiction.

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[10] A court lacks subject matter jurisdiction by proceeding against a party with sovereign immunity unless that sovereign immunity has been expressly waived. *See, Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 789 (2014), citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998).

That lack of subject matter jurisdiction to conduct any evidentiary trial on claims for injunctive and declaratory relief and then base its judgment on that evidentiary trial requires reversal of the judgment.

IV. THE DISTRICT COURT VIOLATED THE NATION'S SOVEREIGNTY BY FAILING TO FOLLOW THE NATIONAL COUNCIL'S LIMITATION OF A REVIEW OF THE CITIZENSHIP BOARD'S ORDER TO THE CITIZENSHIP BOARD'S ADMINISTRATIVE RECORD AND THEN BY ENTERING AN ORDER BASED ON EVIDENCE AT TRIAL NOT CONTAINED IN THE ADMINISTRATIVE RECORD.

The scope of an appeal, oftentimes called "judicial review" in the context of administrative agency orders, is limited by the statute authorizing the appeal. Statutes typically establish the standard of judicial review of administrative proceedings. Judicial review of an administrative agency order is ordinarily limited to the record before the agency. As explained in *State ex rel Kolbach v. United States Dept. of Interior*, 72 F.4th 1107, 1126 (10th Cir. 2023,) in upholding a district court's striking of an expert's new affidavit not offered in the agency proceeding:

> **New evidence in the form of after-the-fact expert rebuttal evidence is not allowed.** "We have permitted courts to supplement administrative record in 'extremely limited' circumstances. *Id.* Those circumstances have not included allowing parties to introduce after-the-fact expert rebuttal evidence. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (affirming ruling to strike extra-record affidavit where affidavit 'simply presents an expert opinion conflicting with the U.S. Air Force's conclusion'). To permit that rebuttal would subvert our standard of review, which asks whether the Secretary acted arbitrarily and capriciously based on the administrative record before it—not whether new evidence defeats the Secretary's prior reasoning." *Id.*

(Emphasis added)

The National Council's use of the word "deference" in its standard of review in 7 MCNCA § 4-110(B) makes the point. That which is entitled to deference is an act of the Citizenship Board—the issuance of the Order at issue. That deference only makes sense if it is applied to the Order,

which occurred at a specific prior time and was based on the record as it existed at that prior time. If not, the whole process of review, including what is to be reviewed, and the record on which it was based, collapses into merits-based, judicial activism embodied in an evidentiary court trial supporting the administrative action and is totally separated from the concept of *de novo* judicial review required by this Court in *Muskogee (Creek) Nation of Oklahoma Citizenship Board v. Graham & Johnson*, SC 2006-03 (Muscogee (Creek) 2007).

Here, the judgment makes clear that the court did not follow the legislatively-mandated, restricted judicial review. The court considered and premised its opinion on evidence not before the Citizenship Board, including an after-the-fact "expert" testimony and report, and testimony from the Citizenship Board membership and staff as to deliberation process.[11] (R. 111, pp.9-14)

Accordingly, that District Court's reception of and reliance on evidence not before the Citizenship Board violated the National Council's limitation of judicial review to the record before the Citizenship Board. See § 4-110(B). The District Court's actions constitute reversible error and requires reversal of the District Court's judgment.

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[11] The testimony and report of the "expert," in addition to being inadmissible in a judicial appellate review of the Citizenship Board's Orders, were rendered useless by the "expert's" omission. The "expert" witness (a) did not address the express language of the 1866 Treaty between the Nation and the United States that made the treaty subject to future legislation by Congress, (b) did not analyze the impact of the OIWA on the Treaty language as to future legislation, and (c) did not discuss any rules of construction requiring the 1866 Treaty and the Nation's Constitution to be read to give effect to both. The witness omitted in her testimony and written report the October 1, 1941 Opinion of the Solicitor of the Department of the Interior that "As the Oklahoma Welfare Act constitutes the basis for complete reorganization of the Oklahoma tribes, the Five Civilized Tribes have full authority to reorganize their membership on a new basis excluding the Freedmen."

V. BASED ON THE RECORD OF THE ADMINISTRATIVE PROCEEDINGS RESULTING IN THE CITIZENSHIP BOARD'S ORDERS DENYING THE CITIZENSHIP APPLICATIONS OF PLAINTIFFS, THE DISTRICT COURT'S VACATION OF THAT DENIAL CONSTITUTES REVERSIBLE ERROR UNDER THE NATIONAL COUNCIL'S STANDARD OF REVIEW OF THE CITIZENSHIP BOARD'S ORDERS.

A. The Standard of Review in this Court.

The *de novo* standard governs this Court's review of the Opinion's substantive cancellation of the constitutional citizenship requirements. *See, Muscogee (Creek) Nation of Oklahoma Citizenship Board v. Graham & Johnson*, SC 2006-03 (Muscogee (Creek) 2007). That standard is consistent with the standard generally used by appellate courts to evaluate district court review of an administrative agency order. In *State ex rel Kolbach v. Department of Interior*, the Tenth Circuit explained the operation of the standard in the procedural context here:

> And we review a district court's rulings on agency actions de novo. *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1293 (10th Cir. 1999) (citation omitted). To that end, "we owe no deference to the district court's decision." *Sac & Fox Nation*, 240 F.3d at 1260. Indeed, "in reviewing a district court's review of an agency decision, the identical standard of review is employed at both levels; and once appealed, the district court's decision is accorded no particular deference." *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1267 (10th Cir. 1994) (citations and internal quotation marks omitted). And we will not disturb agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In otherwords, as a legal matter here, in this Court it is as if the District Court decision on the merits never happened. This Court, itself, reviews the Citizenship Board's denials of the applications under the limited statutory standard in § 4-110(B). Unless the Plaintiffs demonstrate in this Court that the Citizenship Board's Orders were arbitrary and capricious, unsupported by substantial evidence, or contrary to law, the Citizenship Board's decision must be affirmed.

B. The legal history giving rise to the Nation's constitutional citizenship requirement.

The historical legal context giving rise to the Constitution provision cancelled by the Opinion should further this Court's effective judicial review of the Citizenship Board's action. After that review, application of controlling legal principles demonstrates that Plaintiffs cannot carry their burden in this Court to invalidate the Constitution expressly approved by the counterparty to the 1866 Treaty.

1. The Treaty period and the 1866 Treaty.

The United States Constitution recognizes the sovereign equality that Indian Nations share with the United States by authorizing treaties between the Nations and the United States.[12] Even though the United States Supreme Court announced in *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831), that the Court considered tribal Nations "domestic dependent nations," the Court in *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), recognized that such relationship did not abolish pre-existing tribal powers or make the tribes dependent on federal law for inherent powers of self-government. The United States continued to deal with the Nations by treaty for decades.

In the 1866 Treaty, the Creeks recognized Freedmen as citizens:

> ...inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens [thereof,] shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons,

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[12] United States Constitution Art. 8 provides that Congress shall have power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

> and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

Article 2, 1866 Treaty. (Exhibit B to this Brief)

The Treaty continued by specifically providing that terms of the Treaty may be modified by Act of Congress:

> The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

Article 10, 1866 Treaty.

2. The post-Treaty, statutory period and attempted termination of the Nation.

After the post-Civil War Treaties of 1866,[13] Congress prohibited the making of any further treaties with Indian Nations and Tribes. 25 U.S.C. § 7 (the Act of 1871). The prohibition as to future treaties apparently was premised on dissatisfaction by the federal House of Representatives of its exclusion from the Treaty process of formulating and implementing federal policy toward Indian Nations and Tribes. *Antoine v. Washington*, 420 U.S. 194, 202 (1975) ("the Act of 1871 resulted from the oppression of the House of Representatives.") When the treaty period of bilateral negotiation with the Nations and Tribes ended, the United States dealt with the Nations and Tribes unilaterally by statute. See *id.* at 201-204.

This unilateral approach was used to impose an assimilationist agenda that for the Muscogee (Creek) Nation culminated in the allotment and termination legislation of the 1890s and

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[13] The 1866 Treaty with the Choctaw and Chickasaw, proclaimed on July 10, 1866. Treaty with the Cherokee, proclaimed on August 11, 1866. Treaty with the Seminole, proclaimed on August 16, 1866 (collectively, the "1866 Treaties").

1900s.[14]

3. The restoration of tribal government power by the Indian Reorganization Act and the Oklahoma Indian Welfare Act.

In the late 1920s and 1930s, the United States reversed its assimilation/termination policy in favor of tribal revitalization and self-governance. The paramount embodiment of this new policy was the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq.* (formerly cited as 25 U.S.C. § 461, *et seq.*, of 1934) (the "IRA"). However, the IRA expressly excluded from its application the Muscogee (Creek) Nation along with the Cherokee, Chickasaw, Choctaw, and Seminole Nations. 25 U.S.C. § 473.

In order to expand its self-governance policy embodied in the IRA to the Five Tribes, the United States, through its Congress and President, enacted the Oklahoma Indian Welfare Act, 25 U.S.C. § 5201 (formerly cited as 25 U.S.C. § 501) (the "OIWA"), as authorized by the Treaty of 1866. The OIWA expressly recognized the right of Oklahoma tribes to adopt a constitution and bylaws:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however*, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote.

25 U.S.C. § 5203.

The Secretary of the Interior issued regulations requiring any constitution authorized by OIWA be approved by the Secretary of the Interior or a secretarial designee. To assist in that

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[14] See, Act of Mar. 3, 1893, §16, 27 Stat. 512; Act of June 28, 1898, §§ 11-17, 22-23, 30 Stat. 495; and Act of Apr. 26, 1906, 34 Stat. 137.

federal approval process, the federal government, through the Bureau of Indian Affairs, issued model form constitutions for tribal consideration and adoption.[15]

4. <u>The United States, which was party to the 1866 Treaty, expressly determined that the Indian Nations that were parties to the 1866 Treaties, could, pursuant to the OIWA, recognize citizenship in a way that required Indian blood.</u>

The United States specifically recognized that re-organization under the Oklahoma Indian Welfare Act gave full authority to the Five Civilized Tribes to recognize their membership on a new basis which may exclude Freedmen as long as Freedman were allowed to vote on the acceptance of a constitution. On October 1, 1941, the Solicitor of the Department of the Interior issued an Opinion entitled "Five Civilized Tribes – Status of Freedmen – Organization Under Oklahoma Welfare Act." 1 Op.Sol 1076 (Oct. 1, 1941) (M-Opinion) (Exhibit C to this Brief). The Opinion addressed two questions:

> i. Are the Freedmen of the Five Civilized Tribes entitled to vote on the acceptance of a constitution in pursuance of section 3 of the Oklahoma Welfare Act?
>
> ii. Would it be admissible under the act to adopt a constitution containing provisions whereby Freedmen who might be on the rolls would and could be eliminated?

In answer to those questions, the Solicitor held:

> i. The Freedmen having been admitted by treaties and formal tribal actions as full-fledged members in all of the Five Civilized Tribes excepting the Chickasaw Nation, they have the right to vote on any constitution to be adopted by these tribes under the Oklahoma Welfare Act.
>
> ii. As the Oklahoma Welfare Act constitutes the basis for complete reorganization of the Oklahoma tribes, the Five Civilized Tribes

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[15] According to Cohen, <u>Handbook of Federal Indian Law</u> (2012 Ed.), § 4.04[3][a], p. 257, n. 20, "agents ultimately presented tribes with a variety of examples of Tribal Constitutions." David E. Wilkins, <u>Introduction</u> in Felix S. Cohen, <u>On the Drafting of Tribal Constitutions</u>, xix-xxix (U. Okla. Press 2007).

have full authority to reorganize their membership on a new basis excluding the Freedmen.

In so holding, the Solicitor of the Department of the Interior stated in pertinent part:

> The Freedmen were adopted as full members into the Cherokee, the Choctaw, the Seminole, and the Creek Tribes pursuant to the treaties of July 19, 1866 (14 Stat. 799) (Cherokee), April 28, 1866 (14 Stat. 769) (Choctaw), June 14, 1866 (14 Stat. 785) (Creek), and March 21, 1866 (14 Stat. 755) (Seminole)... The Freedmen thus having been made full-fledged members of four of the five tribes which in accordance with various acts of Congress granted them all rights of citizenship in the Nations, including the right of suffrage (see *Whitmire* v. *Cherokee Nation et al.*, 30 Ct. Cl. 138 at 157; *Choctaw and Chickasaw Nations* v. *United States*, 81 Ct. Cl. 63; Opinion of Secretary of the Interior of August 9, 1898, .No. 15030-1913, JED), the Freedmen are entitled to vote on any constitution along with all other members of these tribes.... As in the case of these four tribes clear action had been taken to make the Freedmen full citizens, these Freedmen have in principle the right to vote on any proposed constitution to be adopted under the Oklahoma Welfare Act.
>
> ***
>
> **The question whether Freedmen now citizens of various Nations of Oklahoma may be excluded by appropriate provisions in constitutions to be adopted by these Nations pursuant to the Oklahoma Welfare Act must be answered in the affirmative.** The Oklahoma Welfare Act represents a turning point in the organization of Indian tribes. A new type of organization on a new basis is provided by this act. It thus takes its place beside the various treaties of 1866 which after the end of the Civil War similarly provided for a new organization of the Five Civilized Tribes on a new membership basis. With the consent of Congress and pursuant to these treaties the tribes resolved to modify their membership basis and to include a large number of Freedmen who thus became Indians by law only. It would appear that the tribes should be able to modify their membership once more and, having obtained the consent of Congress through the Oklahoma Welfare Act, to arrange their membership and other affairs in a constitution to be adopted by their free vote. They are thus entitled to decide that in the future only Indians by blood shall be members of the new tribal organization that is to come into being by adoption of these constitutions. A number of Indian tribes have incorporated similar provisions in their constitutions in order to limit membership to persons of Indian blood. Among these are the Cheyenne River Sioux Tribe of South Dakota, the Quileute Tribe of

> the Quileute Reservation, Washington, and the Kialogee Tribal Town of Oklahoma. The customary provision reads as follows:
>
> > "The membership of the *** Tribe shall consist of the following:
> >
> > (a) All persons of Indian blood whose names appear on the official census roll of the tribe as of June 18, 1934.
> >
> > (b) All children born to any member of the *** Tribe who is a resident of the reservation at the time of the birth of said children."
>
> **Such a provision has the effect of dropping from tribal rolls those members who cannot satisfy the Indian-blood requirement. Such exclusion from membership does not interfere with any vested individual rights, such as title to allotted land, but does deprive the Freedmen so excluded of benefits arising in the future out of tribal membership.**

1 Op.Sol 1076 (Oct. 1, 1941) (emphasis added). (Attached to this Brief as Exhibit C)

Consistent with the Solicitor's Opinion, in *Harjo v. Kleppe*, 420 F.Supp. 1110, 1137 (D. D.C. 1976), the Court recognized the United States' position that a new Muscogee (Creek) Constitution could be adopted under the OIWA which excluded freedmen from tribal membership if freedmen were allowed to vote on that provision:

> In reply, the office of the Commissioner of Indian Affairs stated that no funds would be approved for a tribal organization which was not approved under the provisions of the Act, and pointed out that the new constitution could not be approved under the Act because the new governing document excluded the freedmen from membership in the tribe without having given them an opportunity to vote on that provision.

5. <u>The Nation's exercise of its sovereignty in adoption of its Constitution of 1979</u>.

Consistent with the view of the United States published in the 1941 Solicitor's Opinion and further noted by the Court in *Harjo, supra*, the Muscogee (Creek) Nation in 1979 adopted its Constitution. The Constitution expressly recognizes that its enactment is pursuant to the OIWA:

> The name of this Tribe of Muscogee (Creek) people shall be the "Muscogee (Creek) Nation", and is hereby organized under Section 3 of the Act of June 26, 1936 (48 Stat. 1967).

Constitution Art. 1, Section 1. Pursuant to the OIWA, that Constitution was approved by the United States. (See approval page of Constitution)

The power of an Indian tribe to determine issues of its own membership is organic and immutable. That existential power goes to the very essence of a tribe's identity and existence. The United States Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978), stated:

> "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."

In so stating, the Supreme Court affirmed a tribe's power to confer and withdraw citizenship, consistent with its decision over 125 years ago in *Roff v. Burney*, 168 U.S. 218, 222 (1897).

In its federally-approved Constitution, the Nation, through the electorate, exercised its sovereign, existential, right to determine the qualifications for membership. As recognized in the Solicitor's Opinion as is the case for many Indian nations or tribes, the Nation's Constitution Article III, Sec. 2, requires a blood quantum for citizenship:

> Person eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the act of April 26, 1906 (34 Stat. 137; (except that an enrolled member of another Indian tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.

Additionally, the Nation, in an exercise of its sovereignty, in Constitution Article III, Sec. 4, requires a specific blood quantum for office holders:

> Full citizenship in the Muscogee (Creek) Nation shall be those persons and their lineal descendants whose blood quantum is one-

> quarter (1/4) or more Muscogee (Creek) Indian, hereinafter referred to as those of full citizenship. All Muscogee (Creek) Indians by blood who are less than one-quarter (1/4) Muscogee (Creek) Indian by blood shall be considered citizens and shall have all rights and entitlement as members of the Muscogee (Creek) Nation except the right to hold office.

As shown in Constitution Article III, Sec. 2, *supra*, the Nation, in a further exercise of its sovereignty, precludes membership of anyone who also holds membership in another Indian nation or tribe.

C. The 1866 Treaty does not invalidate the membership requirements contained in the Nation's Constitution and approved by the United States.

1. The language of the 1866 Treaty authorizes the constitutional provision as to membership adopted with federal approval pursuant to the OIWA.

The 1866 Treaty did not preclude the United States from subsequently enacting legislation that would impact the Treaty. In fact, the Treaty language contemplated such statutes. See, *supra*, p. 17. Additionally, the language of the Treaty did not preclude that Freedmen descendants' future applications for citizenship could be subject to terms agreed to by the Treaty parties that might ultimately prevent the descendants from becoming citizens. Further, the Treaty language does not guarantee that all Freedmen descendants forever will automatically be citizens of the Nation. Rather, the Treaty gives Freedmen descendants the right to become citizens, which right includes the right of all citizens to vote on constitutional limitations to citizenship that might exclude the Freedmen descendants' future descendants, as noted in *Harjo, supra*. The right of citizens to have such a vote is completely consistent with the Nation's existential power as recognized in *Santa Clara Pueblo v. Martinez*, *supra*.

2. If the 1866 Treaty and the OIWA are ambiguous and in need of construction, the Rules of Construction support the Constitution's provision as to membership.

Even if the 1866 Treaty and the Constitution were ambiguous, the Rules of Construction

requiring the honoring of the intent of the parties to the 1866 Treaty supports the Nation's Constitution. There are two, and only two parties, to the 1866 Treaty, the United States and the Nation. The United States by its approval of the Constitution along with the issuance of the Solicitor's Opinion, demonstrated its intent that the nation's OIWA-authorized Constitution is consistent with the 1866 Treaty. The Nation expressed that intent by the vote of its citizens adopting the Constitution.

Additionally, application of a fundamental legal principle underscores the authority for constitutional authority. When two enactments involve a particular subject, they should be read to give effect, if possible, to both enactments. As the United States Supreme Court explained in *U.S. v. Stewart*, 311 U.S. 60, 64 (1940):

> It is clear that 'all acts in *pari materia* are to be taken together, as if they were one law.' *United States v. Freeman*, 3 How, 556, 564, 11 L.Ed. 724. That these two acts are in *pari materia* is plain. Both deal with precisely the same subject matter, viz., the scope of the tax exemption afforded farm loan bonds. The later act can therefore be regarded as a legislative interpretation of the earlier act (*Cope v. Cope*, 137 U.S. 682, 688, 11 S.Ct. 222, 224, 34 L.Ed. 832; Cf. *Stockdale v. Atlantic Insurance Company*, 20 Wall. 323, 331, 332, 22 L.Ed. 348) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. It is therefore entitled to great weight in resolving any ambiguities and doubts. Cf. *United States v. Stafoff*, 260 U.S. 477, 480, 43 S.Ct. 197, 199, 67 L.Ed. 358.

As demonstrated by the Solicitor's Opinion, the OIWA does so in tandem with the Treaty, resulting in the Nation's valid constitutional provisions on citizenship.

Moreover, the Indian Canons of Construction support the Constitution's validity in light of the OIWA and the Treaty. Treaties must be interpreted in light of the parties' intentions, with any ambiguity resolved in favor of the Indians. *Herrerra v. Wyoming*, 587 U.S _ 139 S.Ct. 1686, 1699, 203 L.Ed.2d 846 (2019). Treaty terms must be construed in the sense in which they would naturally

be understood by the Indians. *Id.* Likewise, statutes such as the OIWA are to be liberally construed in favor of the tribes, with ambiguous provisions interpreted to their benefit. *City of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 269 (1992). The Citizenship Board's Orders were consistent with those Canons of Construction.

3. <u>The purpose of the OIWA is furthered by the Constitution.</u>

Finally, the OIWA should be construed and applied to give effect to its purpose—the restoration and enhancement of sovereign tribal self-government. As supported by the United States Supreme Court in *Martinez*, *supra*, nothing is more essential to the sovereignty of a Nation than a Nation's determination of its membership. That constitutional membership requirement here resulted from a vote of the Nation's citizens at that time—including Freedmen descendants.

D. The Nation's *de novo* standard of review requires reversal of the District Court's Opinion.

De novo, deferential application of § 4-110 (B)'s standard of review by this Court to the administrative record of the Citizenship Board confirms that Plaintiffs cannot carry their burden in this Court. First, the Citizenship Board applied the undisputed evidence to the Constitution's requirement for citizenship. Even the District Court found that in so doing, the Citizenship Board's Orders were not arbitrary and capricious. Second, substantial evidence supported the Citizenship Board's Orders denying Plaintiffs' applications for citizenship under the Constitution's requirements. All involved concede that the Plaintiffs did not trace their lineage to the Creek Blood rolls. Finally, the Citizenship Board's Orders applying the Nation's Constitution to that undisputed fact were consistent with the OIWA-authorized Muscogee (Creek) Nation 1979 Constitution approved by the United States, the other party to the 1866 Treaty. That Treaty allowed the 1979 Constitution's citizenship requirements, rather than cancelled them. Accordingly, the Citizenship Board's Orders were not contrary to law.

CONCLUSION

The procedural decisions of the District Court violated the Nation's sovereignty. The District Court violated the Nation's sovereign immunity by allowing an action for injunctive and declaratory relief against the Citizenship Board. The District Court violated the Nation's sovereignty expressed by the National Council in 7 MCNCA § 4-110(B) by conducting an evidentiary trial, with witnesses and exhibits, beyond the administrative record. The District Court violated the Nation's sovereignty by basing the Opinion on evidence not before the Citizenship Board, in contravention of § 4-110(B). Finally, the District Court violated the Nation's existential right as a sovereign to "define its own membership for tribal purposes"[16] by invalidating the Constitution's requirements for citizenship, approved by both parties to the 1866 Treaty.

Plaintiffs cannot show in this deferential, judicial review of the Citizenship Board's denial of the Plaintiffs' applications, that the Citizenship Board's decisions were arbitrary and capricious, not supported by substantial evidence, or contrary to law. Upon this Court's *de novo* review of the non-existent record of the Citizenship Board's hearings, the District Court's activist judicial cancellation of the Nation's Constitution should be reversed and the Citizenship Board's decisions should be affirmed.

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[16] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2024, a true and correct copy of the foregoing instrument was served via Hand-Delivery and/or Electronic Mail to the following:

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EXHIBIT

A

CONSTITUTION
OF THE
MUSCOGEE (CREEK) NATION

Under the guidance of the Almighty God, our Creator, We the People of the Muscogee (Creek) Nation, do promote Unity, to establish Justice, and secure to ourselves and our children the blessings of Freedom, to preserve our basic Rights and Heritage, to strengthen and preserve self and local Government, in continued relations with the United States of America, do ordain and establish this Constitution for the Muscogee (Creek) Nation.

ARTICLE I

Section 1. The name of this Tribe of Muscogee (Creek) people shall be the "Muscogee (Creek) Nation", and is hereby organized under Section 3 of the Act of June 26, 1936 (48 Stat. 1967).

Section 2. The political jurisdiction of the Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America; and such jurisdiction shall include, however not limited to, properties held in trust by the United States of America and to such other properties as held by the Muscogee (Creek) Nation, such property, real and personal to be TAX-EXEMPT for Federal and State taxation, when not inconsistent with Federal law.

Section 3. The official seal of the Muscogee (Creek) Nation shall be the Seal as is illustrated:

ARTICLE II

Section 1. Each Muscogee (Creek) Indian by blood shall have the opportunity for citizenship in the Muscogee (Creek) Nation.

Section 2. This Constitution shall not abridge the rights and privileges of individual citizens of the Muscogee (Creek) Nation enjoyed as citizens of the State of Oklahoma and of the United States of America.

Section 3. This Constitution shall not abridge the rights and privileges of persons of Muscogee (Creek) blood for purposes of claims against the United States of America.

Section 4. This Constitution shall not affect the rights and privileges of individual citizens of the Muscogee (Creek) Nation in their trust relationship with the United States of America as members of a federally recognized tribe.

Section 5. This Constitution shall not in any way abolish the rights and privileges of persons of the Muscogee (Creek) Nation to organize tribal towns or recognize its Muscogee (Creek) traditions.

ARTICLE III

Section 1. The Principal Chief shall appoint, subject to majority approval of the Muscogee (Creek) National Council, a Citizenship Board comprised of five (5) citizens who shall be charged with the responsibility of the establishment and maintenance of a Citizenship Roll, showing degree of Muscogee (Creek) Indian blood based upon the final rolls prepared pursuant to the Act of April 26, 1906 (34 Stat. 137), and other evidence, as prescribed by ordinance.

Section 2. Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the act of April 26, 1906 (34 Stat. 137); (except that an enrolled member of another Indian tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.)

Section 3. (a) All persons eligible for citizenship shall register as an applicant for citizenship; and

(b) The Citizenship Board shall certify citizenship, and the declaration of citizenship may be affirmed at any time with the name of the individual being entered on the citizenship roll, and the persons being recognized as a citizen of the Muscogee (Creek) Nation, provided that:

(1) the person is a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, (34 Stat. 137), or the person is a lineal descendant of a Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the at of April 26, 1906, (34 Stat. 137); and is not an enrolled member of another tribe, nation, or pueblo; and

(2) has made application to the Citizenship Board to become a citizen of the Muscogee (Creek) Nation;

(c) Except those persons who are Muscogee (Creek) Indian by blood whose name appears on the final rolls as provided by the Act of April 26, 1906, (34 Stat. 137), shall be automatically included as citizens of the Muscogee (Creek) Nation.

Section 4. Full citizenship in the Muscogee (Creek) Nation shall be those persons and their lineal descendants whose blood quantum is one-quarter (1/4) or more Muscogee (Creek) Indian, hereinafter referred to as those of full citizenship. All Muscogee (Creek) Indians by blood who are less than one-quarter (1/4) Muscogee (Creek) Indian by blood shall be considered citizens and shall have all rights and entitlement as members of the Muscogee (Creek) Nation except the right to hold office.

ARTICLE IV

Section 1. The Principal Chief shall appoint, subject to majority approval of the Muscogee (Creek) National Council, an Election Board comprised of five (5) citizens who shall be charged with the responsibility of conducting, as prescribed by ordinance, all regular and special elections of the Muscogee (Creek) Nation.

Section 2. Every citizen of the Muscogee (Creek) Nation, regardless of religion, creed, or sex, shall be eligible to vote in the tribal elections provided that (a) they are registered voters for elections; (b) they are at least eighteen (18) years of age at the date of election, with the registrant providing sufficient proof of age to the Election Board; and (c) they hold citizenship.

ADOPTED this 20th day of August, 1979, by the Creek Constitution Commission in accordance with the Court Order of September 2, 1976, in the case of Harjo v. Andrus, Case 4-189, U.S.; District Court, Washington, D.C.

CREEK CONSTITUTION COMMISSION

August 20th, 1979
Date

/S/
Bryant Jesse, Chairman

/S/
Louis Fish, Commissioner

/S/
Allen Harjo, Commissioner

/S/
Virginia Thomas, Commissioner

/S/
Robert Trepp, Commissioner

CERTIFIED:

August 20, 1979
Date

/S/
Paula L. Francis
Recording Secretary

APPROVAL

I, Sidney L. Mills, Acting Deputy Commissioner of Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 26, 1936, 49 Stat. 1967, as amended and delegated to me by 230 DM 1.1, do hereby approve the Constitution of The Muscogee (Creek) Nation subject to ratification by the qualified voters as provided in Article X of said Constitution; provided that nothing in this approval shall be construed as authorizing any action under the Constitution that would be contrary to federal law.

Acting Deputy Commissioner of Indian Affairs, Washington, DC

Date: August 17, 1979

CERTIFICATE OF RESULTS OF ELECTION

The Acting Deputy Commissioner of Indian Affairs Approved the foregoing Constitution of the Muscogee (Creek) Nation on August 17, 1979

It was submitted for ratification to the qualified voters of the Muscogee (Creek) Nation and was on October 6, 1979 duly ratified by a vote of 1,896 for and 1,694 against, in an election in which at least 30 percent (30%) of the 9,125 qualified voters cast their ballots in accordance with Section 3 of the Act of June 26, 1936, 49 Stat. 1967.

/S/
Bryant Jesse, Chairman

/S/
Louis Fish, Commissioner

/S/
Allen Harjo, Commissioner

/S/
Virginia Thomas, Commissioner

/S/
Robert Trepp, Commissioner

Date: October 9, 1979

EXHIBIT B

1866 WL 18777(Trty.)
(TREATY)

TREATY WITH THE CREEKS, 1866.

June 14, 1866.

Treaty of cession and indemnity concluded at the city of Washington on the fourteenth day of June, in the year of our Lord one thousand eight hundred and sixty-six, by and between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, Elija Sells, superintendent of Indian affairs for the southern superintendency, and Col. Ely S. Parker, special commissioner, and the Creek Nation of Indians, represented by Ok-tars-sars-harjo, or Sands; Cow-e-to-me-co and Che-chu-chee, delegates at large, and D. N. McIntosh and James Smith, special delegates of the Southern Creeks. [FNA][FNB]

PREAMBLE.

Whereas existing treaties between the United States and the Creek Nation have become insufficient to meet their mutual necessities; and whereas the Creeks made a treaty with the so-called Confederate States, on the tenth of July, one thousand eight hundred and sixty-one, whereby they ignored their allegiance to the United States, and unsettled the treaty relations existing between the Creeks and the United States, and did so render themselves liable to forfeit to the[FNC] United States all benefits and advantages enjoyed by them in lands, annuities, protection, and immunities, including their lands and other property held by grant or gift from the United States; and whereas in view of said liabilities the United States require of the Creeks a portion of their land whereon to settle other Indians; and whereas a treaty of peace and amity was entered into between the United States and the Creeks and other tribes at Fort Smith, September thirteenth (tenth,) eighteen hundred and sixty-five,[FND] whereby the Creeks revoked, cancelled, and repudiated the aforesaid treaty made with the so-called Confederate States; and whereas the United States, through its commissioners, in said treaty of peace and amity, promised to enter into treaty with the Creeks to arrange and settle all questions relating to and growing out of said treaty with the so-called Confederate States: Now, therefore, the United States, by its commissioners, and the above-named delegates of the Creek Nation, the day and year above mentioned, mutually stipulate and agree, on behalf of the respective parties, as follows, to wit:

ARTICLE 1

There shall be perpetual peace and friendship between the parties to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in putting down its enemies. They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country, at any time, by the United States, and the United States agree to station and continue in said country from time to time, at its own expense, such force as may be necessary for that purpose. A general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek Nation, is hereby declared. And the Creeks, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who have remained friendly to, or taken up arms against, the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative. [FNE] [FNF][FNG]

ARTICLE 2

The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek Nation as citizens (thereof,) shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever[FNH][FNI] race or color, who may be adopted as citizens or members of said tribe.

ARTICLE 3

In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands, estimated to contain three millions two hundred and fifty thousand five hundred and sixty acres, the United States agree to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand one hundred and sixty-eight dollars, in the manner hereinafter provided, to wit: two hundred thousand dollars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty, to enable the Creeks to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and to pay the damages sustained by the mission schools on the North Fork and the Arkansas Rivers, not to exceed two thousand dollars, and to pay the delegates such per diem as the agent and Creek council may agree upon, as a just and fair compensation, all of which shall be distributed for that purpose by the agent, with the advice of the Creek council, under the direction of the Secretary of the Interior. One hundred thousand dollars shall be paid in money and divided to soldiers that enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses; four hundred thousand dollars be paid in money and divided per capita to said Creek Nation, unless otherwise directed by the President of the United States, under the direction of the Secretary of the Interior, as the same may accrue from the sale of land to other Indians. The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent. per annum from the date of the ratification of this treaty, on the amount hereinbefore agreed upon for said ceded lands, after deducting the said two hundred thousand dollars; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars, shall remain in the Treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated. [FNJ][FNK]

ARTICLE 4

Immediately after the ratification of this treaty the United States agree to ascertain the amount due the respective soldiers who enlisted in the Federal Army, loyal refugee Indians and freedmen, in proportion to their several losses, and to pay the amount awarded each, in the following manner, to wit: A census of the Creeks shall be taken by the agent of the United States for said nation, under the direction of the Secretary of the Interior, and a roll of the names of all soldiers that enlisted in the Federal Army, loyal refugee Indians, and freedmen, be made by him. The superintendent of Indian affairs for the Southern superintendency and the agent of the United States for the Creek Nation shall proceed to investigate and determine from said roll the amounts due the respective refugee Indians, and shall transmit to the Commissioner of Indian affairs for his approval,

and that of the Secretary of the Interior, their awards, together with the reasons therefor. In case the awards so made shall be duly approved, said awards shall be paid from the proceeds of the sale of said lands within one year from the ratification of this treaty, or so soon as said[FNL][FNM] amount of one hundred thousand ($100,000) dollars can be raised from the sale of said land to other Indians.

ARTICLE 5

The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek Nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek Nation and the party or parties building said road, subject to the approval of the President of the United States: Provided, however, That said land thus sold shall not be reconveyed, leased, or rented to, or be occupied by any one not a citizen of the Creek Nation, according to its laws and recognized usages: Provided, also, That officers, servants, and employees of said railroad necessary to its construction and management, shall not be excluded from such necessary occupancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be made to the party building and managing said road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior. [FNN][FNO][FNP][FNQ]

ARTICLE 6

(Stricken out.)

ARTICLE 7

The Creeks hereby agree that the Seminole tribe of Indians may sell and convey to the United States all or any portion of the Seminole lands, upon such terms as may be mutually agreed upon by and between the Seminoles and the United States. [FNR]

ARTICLE 8

It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of Creek lands to the United States in article third of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States. [FNS]

ARTICLE 9

Inasmuch as the agency buildings of the Creek tribe have been destroyed during the late war, it is further agreed that the United States shall at their own expense, not exceeding ten thousand dollars, cause to be erected suitable agency buildings, the sites whereof shall be selected by the agent of said tribe, in the reduced Creek reservation, under the direction of the superintendent of Indian affairs. [FNT]

In consideration whereof, the Creeks hereby cede and relinquish to the United States one section of their lands, to be designated and selected by their agent, under the direction of the superintendent of Indian affairs, upon which said agency buildings shall be erected, which section of land shall revert to the Creek nation when said agency buildings are no longer used by the United States, upon said nation paying a fair and reasonable value for said buildings at the time vacated.

ARTICLE 10

The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: Provided, however, (That) said[FNU] legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs. The Creeks also agree that a general council, consisting of delegates elected by each nation or tribe lawfully resident within the Indian territory, may be annually convened in said territory, which council shall be organized in such manner and possess such powers as are hereinafter described. [FNV]

First. After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census, or enumeration of each tribe lawfully resident in said territory, shall be taken under the direction of the superintendent of Indian affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior, and paid by the United States. [FNW]

Second. The first general council shall consist of one member from each tribe, and an additional member from each one thousand Indians, or each fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council, and if none should be thus formerly selected by any nation or tribe, the said nation or tribe shall be represented in said general council by the chief or chiefs and head men of said tribe, to be taken in the order of their rank as recognized in tribal usage, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the superintendent of Indian affairs shall publish and declare to each tribe the number of members of said council to which they shall be entitled under the provisions of this article, and the persons entitled to so represent said tribes shall meet at such time and place as he shall appoint, but thereafter the time and place of the sessions of said council shall be determined by its action: Provided, That no session in any one year shall exceed the term of thirty days, and provided that special sessions of said council may be called whenever, in the judgment of the Secretary of the Interior, the interest of said tribe shall require. [FNX][FNY][FNZ][FNAA]

Third. Said general council shall have power to legislate upon all rightful subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in said territory, the arrest and extradition of criminals and offenders escaping from one tribe to another, the administration of justice between members of the several tribes of said territory, and persons other than Indians and members of said tribes or nations, the construction of works of internal improvement, and the common defence and safety of the nations of said territory. All laws enacted by said general council shall take effect at such time as may therein be provided, unless suspended by direction of the Secretary of the Interior or the President of the United States. No law shall be enacted inconsistent with the Constitution of the United States, or the laws of Congress, or existing treaty stipulations with the United States, nor shall said council legislate upon matters pertaining to the organization, laws, or customs of the several tribes, except as herein provided for. [FNBB]

Fourth. Said council shall be presided over by the superintendent of Indian affairs, or, in case of his absence from any cause, the duties of said superintendent enumerated in this article shall be performed by such person as the Secretary of the Interior may direct. [FNCC]

Fifth. The Secretary of the Interior shall appoint a secretary of said council, whose duty it shall be to keep an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the superintendent of Indian affairs, to the Secretary of the Interior immediately after the sessions of said[FNDD] council shall terminate. He shall be paid out of the Treasury of the United States an annually salary of five hundred dollars. [FNEE]

Sixth. The members of said council shall be paid by the United States the sum of four dollars per diem during the time actually in attendance on the sessions of said council, and at the rate of four dollars for every twenty miles necessar(il)ly traveled by them in going to and returning to their homes respectively, from said council, to be certified by the secretary of said council and the superintendent of Indian affairs. [FNFF]

Seventh. The Creeks also agree that a court or courts may be established in said territory, with such jurisdiction and organized in such manner as Congress may by law provide. [FNGG]

ARTICLE 11

The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called Confederate States; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek Nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six. [FNHH][FNII]

ARTICLE 12

The United States re-affirms and re-assumes all obligations of treaty stipulations with the Creek Nation entered into before the treaty of said Creek Nation with the so-called Confederate States, July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleventh. [FNJJ]

ARTICLE 13

A quantity of land not exceeding one hundred and sixty acres, to be selected according to legal subdivision, in one body, and to include their improvements, is hereby granted to every religious society or denomination, which has erected, or which, with the consent of the Indians, may hereafter erect, buildings within the Creek country for missionary or educational purposes; but no land thus granted, nor the buildings which have been or may be erected thereon, shall ever be sold or otherwise disposed of, except with the consent and approval of the Secretary of the Interior; and whenever any such lands or buildings shall be so sold or disposed of, the proceeds thereof shall be applied, under the direction of the Secretary of the Interior, to the support and maintenance of other similar establishments for the benefit of the Creeks and such other persons as may be or may hereafter become members of the tribe according to its laws, customs, and usages; and if at any time said improvements shall be abandoned for one year for missionary or educational purposes, all the rights herein granted for missionary and educational purposes shall revert to the said Creek Nation. [FNKK][FNLL][FNMM]

ARTICLE 14

It is further agreed that all treaties heretofore entered into between the United States and the Creek Nation which are inconsistent with any of the articles or provisions of this treaty shall be, and are hereby, rescinded and annulled; and it is further agreed that ten thousand dollars shall be paid by the United States, or so much thereof as may be necessary, to pay the expenses incurred in negotiating the foregoing treaty. [FNNN]

In testimony whereof, we, the commissioners representing the United States and the delegates representing the Creek nation, have[FNOO] hereunto set our hands and seals at the place and on the day and year above written.

D. N. Cooley, Commissioner Indian Affairs.

Elijah Sells, Superintendent Indian Affairs.

Ok-ta-has Harjo, his x mark.

Cow Mikko, his x mark.

Cotch-cho-chee, his x mark.

D. N. McIntosh.

James M. C. Smith.

In the presence of - -

J. W. Dunn, United States Indian agent.

J. Harlan, United States Indian agent.

Charles E. Mix.

J. M. Tebbetts.

Geo. A. Reynolds, United States Indian agent.

John B. Sanborn.

John F. Brown, Seminole delegate.

John Chupco, his x mark.

Fos-har-jo, his x mark.

Cho-cote-huga, his x mark.

R. Fields, Cherokee delegate.

Douglas H. Cooper.

Wm. Penn Adair.

Harry Island, his x mark, United States interpreter, Creek Nation.

Suludin Watie.

Footnotes

A Ratified July 19, 1866.
FNB Proclaimed Aug. 11, 1866.
FNC Ante, p. 911, and note.
FND This agreement, a copy of which has been obtained from the report of the negotiating commissioners, found accompanying the Report of the Commissioner of Indian Affairs for 1865, is set forth in the Appendix to this Compilation, post, p. 1050.
FNE Peace and friendship.
FNF Military occupation and protection by the United States.
FNG Amnesty.
FNH Slavery not to exist among the Creeks.
FNI Rights of those of African descent.
FNJ Cession of lands to the United States.
FNK Payment therefor, and mode of payment.
FNL Losses of loyal refugee Indians and freedmen, soldiers enlisted in Federal Army.
FNM Census.
FNN Right of way granted for a railroad.
FNO Conditions.
FNP Lands will be sold.
FNQ Proviso.
FNR Seminole may convey to the United States.
FNS Line dividing Creek country to be surveyed.
FNT Agency buildings.
FNU Creeks agree to certain legislation.
FNV General council.
FNW Census.
FNX First general council; how composed.
FNY Time and place of meeting.
FNZ Sessions not to exceed thirty days.
FNAA Special session.
FNBB Powers of general council.
FNCC Who to preside over council.
FNDD Secretary of council.
FNEE Pay.

End of Document

EXHIBIT C

FIVE CIVILIZED TRIBES--STATUS OF FREEDMEN--ORGANIZATION UNDER OKLAHOMA WELFARE ACT

October 1, 1941.

Syllabus

Re:

1. Are the Freedmen of the Five Civilized Tribes entitled to vote on the acceptance of a constitution in pursuance of section 15 of the Oklahoma Welfare Act?

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

Held:

1. The Freedmen having been admitted by treaties and formal tribal actions as full-fledged members in all of the Five Civilized Tribes excepting the Chickasaw Nation, they have the right to vote on any constitution to be adopted by these tribes under the Oklahoma Welfare Act.

2. As the Oklahoma Welfare Act constitutes the basis for complete reorganization of the Oklahoma tribes, the Five Civilized Tribes have full authority to reorganize their membership on a new basis excluding the Freedmen.

Memorandum for the Commissioner of Indian Affairs.

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

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

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

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

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

> "That the Chickasaw people hereby refuse to accept or adopt the Freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever and respectfully request the Governor of our Nation to notify the Department at Washington of the action of the legislature in the premises." (See *United States* v. *The Choctaw Nation et al.*, 38 Ct. Cl. 558).

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

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

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

It has, however, been suggested that the Secretary may issue regulations to the effect that only tribal members of Indian blood may vote on the adoption of such a constitution. It is true that section 3 of the Oklahoma Welfare Act provides that the Secretary of the Interior may prescribe rules and regulations to govern the adoption of a constitution by any tribe organized under this act. This provision corresponds to section 16 of the Indian Reorganization Act which has been held to confer a broad authority upon the Secretary of the Interior to pass upon the qualifications of voters without therein being limited by past enrollments (Solicitor's opinion M. 27810,

December 13, 1934). This opinion, however, pointed out that the Secretary in the exercise of his authority is bound by any statutes which may determine tribal membership. As the membership rights of the Freedmen in the Five Civilized Tribes have been fixed by treaties, which are the equivalent of statutes, and by formal tribal action in pursuance of these treaties, the Secretary would not appear to be authorized to issue regulations which would deprive the Freedmen of their right to vote on constitutions to be adopted by the Five Civilized Tribes under the Oklahoma Welfare Act.

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

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

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

NATHAN R. MARGOLD,

Solicitor.