IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondents' Brief ("Brief") fails to rebut the procedural and substantive reversible error inherent in the district court's judgment canceling the membership requirement of the Muscogee (Creek) Nation's (the "Nation") Constitution. As such, this Court should reverse the district court's judgment.

ISSUES PRESENTED

The Respondents fail to effectually join the issues presented in the Citizenship Board's Opening Brief. Instead, Respondents mistakenly claim that the Citizenship Board argues that the Treaty of June 14, 1866, a treaty between the Nation and the United States, 14 Stat. 785 (the "Treaty") had been abrogated. Respondents then assert that the abrogation was unlawful, and that such an unlawful abrogation renders the constitutional membership requirements invalid. However, Respondents' allegation of the Citizenship Board's assertion of abrogation is incorrect.

The Citizenship Board does not claim in this appeal that the Treaty has been abrogated. In fact, abrogation is not required to support the Nation's constitutional provision under attack by Respondents here.[1] Rather, as shown at pp. 4-6, *infra*, the Constitution's membership requirement is consistent with the Treaty's language.

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[1] Contrary to the Respondents' claim, they are not protecting the Nation's sovereignty by their attack on the Constitution, the highest embodiment of sovereignty. Rather, the Citizenship Board's application and defense of the Constitution is the real protection of sovereignty. The Respondents' allegation that this Court's upholding of the Constitution would subject the Nation to harm from unnamed powerful interests due to the imagined application of the doctrine of judicial estoppel as to unidentified issues arising from unspecified treaties is legally irrelevant, and certainly not within the province of those seeking constitutional invalidation.

I. RESPONDENTS HAVE FAILED TO ESTABLISH THE DISTRICT COURT'S JURISDICTION TO CONDUCT AN EVIDENTIARY TRIAL AND THEN BASE A JUDGMENT ON EVIDENCE THAT WAS NOT BEFORE THE CITIZENSHIP BOARD.

A. The district court's jurisdiction was limited to judicial review of the record of an administrative decision pursuant to a statutory standard.

Respondents do not dispute that a review of the Citizenship Board's decision is set out by statutory authority at 7 MCNCA § 4-110(B). Respondents do not deny that the express statutory standards to be applied by the district court in such a review are the traditional deferential standards of administrative law. Respondents fail to offer any authority for judicial review that goes beyond the agency record and allows judicial reliance on new evidence that was not before the agency, much less in the form of the evidentiary trial conducted by the district court here. The district court violated sovereign immunity and statute by conducting such a trial and entering a Judgment based on the new evidence received at that trial.

B. The district court lacked jurisdiction to conduct an injunctive trial as part of its judicial review of the Citizenship Board's decisions.

Although the district court did not *per se* enter or deny an injunction or declaratory judgment, Respondents claim, without any real effect on this appeal, that the district court had subject matter jurisdiction to award injunctive and declaratory relief. Specifically, Respondents allege that 27 MCNCA § 1-102(D) constitutes a waiver of the Citizenship Board's sovereign immunity from an injunctive and declaratory action in this case.

Respondents are wrong. The Nation has waived sovereign immunity by providing only one way to challenge the administrative decisions of the Citizenship Board. 7 MCNCA § 4-110(B) provides for such singular challenge by an action seeking judicial review of the agency decisions. Such a legislatively authorized action is obviously not for injunctive or declaratory relief.

Respondents, in their general discussion of what they otherwise reference to this Supreme Court as a "paltry sovereign immunity claim," (Br. p. 2), argue that 27 MCNCA § 1-102(D) constitutes a waiver of sovereign immunity for injunctive and declaratory actions. Respondents omitted from their partial quote of that statute, at Br. p. 27, the statutory language limiting waiver "in all actions **limited to** injunctive, declaratory or equitable relief." *Id.* (emphasis added) Here, the action was for judicial review of an administrative decision, as the district court's Judgment demonstrated. The action was not limited to "injunctive, declaratory or equitable relief." The waiver in 27 MCNCA § 1-102(D) is inapplicable.[2]

II. RESPONDENTS HAVE FAILED TO SHOW THAT THE CITIZENSHIP BOARD DECISIONS WERE ARBITRARY AND CAPRICIOUS OR UNSUPPORTED BY SUBSTANTIAL EVIDENCE AS REQUIRED FOR JUDICIAL REVERSAL UNDER 7 MCNCA § 4-110(B).

The district court itself found that the Citizenship Board decisions were not arbitrary and capricious. While Respondents do not analyze that specific determination, that conclusion is compelling in the complete context of the case. The Constitution's requirements for membership that were binding on the Citizenship Board were clear. Equally clear was the fact that Respondents did not satisfy those requirements, as Respondents have admitted. Agency compliance with constitutional requirements not previously invalidated by a court of last resort is not an arbitrary or capricious action.

The administrative record's key facts are uncontroverted. Those facts, admitted by Respondents, confirm Respondents' failure to satisfy the existing constitutional requirements for

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[2] In their argument for waiver of sovereign immunity for injunctive actions, Respondents offer no judicial decision addressing an injunctive order to review an agency decision subject to judicial review under a specific statutory administrative law standard. That absence is understandable since any equitable action is unavailable when an adequate remedy at law, such as 7 MCNCA § 4-110(B), exists. *See e.g., Pulliam v. Allen*, 466 U.S. 522, 537 (1984).

citizenship.[3] Accordingly, the Citizenship Board's denial of the citizenship applications were supported by substantial evidence.

III. THE NATION'S CONSTITUTION DOES NOT VIOLATE THE 1866 TREATY, AS THE TREATY'S FEDERAL COUNTERPARTY HAS CONFIRMED.

Respondents effectively abandon support of the district court proceeding. Now they ask for a *de novo* determination as a matter of law by this Court canceling the Constitution's membership requirements. They claim that the Citizenship Board's application of the Constitution to the undisputed facts is contrary to law in violation of 7 MCNCA § 4-110 (B)'s third standard of judicial review of agency action.

A. Since the Citizenship Board is not asserting that the 1866 Treaty has been abrogated, Respondents' abrogation argument is irrelevant.

Respondents' principal legal argument on *de novo* review of the merits rests on a false allegation. Respondents wrongfully contend that the Citizenship Board's defense of the Constitution is based on a claim in this appeal by the Citizenship Board that the 1866 Treaty has been abrogated by the Oklahoma Indian Welfare Act (the "OIWA"), thereby invalidating the Constitution's requirement for citizenship. In fact, the Citizenship Board is not claiming that the Treaty has been abrogated by the OIWA or anything else. Respondents quote no sentence of the Citizenship Board's Opening Brief using "abrogate" or "abrogated." Respondents' argument and their abrogation judicial opinions lack utility in this appeal.

B. The 1866 Treaty does not confer perpetual citizenship on anyone.

Respondents also wrongly allege that the Treaty confers "perpetual citizenship" on Freedman descendants thereby precluding the Constitution's membership requirement. At p. 21 of

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[3] Because of Respondents' failure of proof as to the Constitution's requirements, there was no Citizenship Board determination whether Respondents met the restrictive definitions of Art. 2.

their Brief, Respondents state in reference to Art. 2 of the Treaty, "[t]his clause grants perpetual citizenship to Creek Freedmen as a class." That allegation is unsupported by any reference to decisional law. Instead, Respondents actually rewrite Treaty Art. 2 by selectively injecting Treaty language among language not in the Treaty in an ill-fated attempt to fabricate perpetuity of Freedmen citizenship. The Brief at p. 21, expressly citing Art. 2, states:

> So long as "native citizens" enjoy citizenship in the Nation, then "descendants" of Freedmen "shall have and enjoy" that right. *Id.*

A comparison of that statement with the actual language of the Treaty's Art. 2 affirms that the Treaty contains no such statement, further discrediting Respondents' allegation.[4]

Respondents' flawed argument that the Treaty confers "perpetual" citizenship is further contradicted by (1) the language of the Treaty, (2) the existential right of a Nation to define its own membership for tribal purposes recognized by the U.S. Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978) and (3) the express understandings of both parties to the Treaty.

1. The language of the 1866 Treaty does not preclude the constitutional provision at issue.

The Treaty does not utilize clear and unequivocal language extinguishing the Nation's citizens' right to define the Nation's membership by any limitation. There should be no legitimate dispute that a treaty limitation on such an existing existential right must be clearly and unequivocally expressed, particularly since treaties are to be construed in favor of the Indians.[5] The Treaty does not utilize "perpetual," "forever," "permanently," "unchangeable," "inalienable,"

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[4] In pertinent part, Art. 2 provides: "shall have and enjoy all the rights and privileges of native citizens."

[5] See, *Herrerra v. Wyoming*, 587 U.S. _, 139 S. Ct. 1686, 1699, 203 L.Ed. 2d 846 (2019).

or any other such language clearly demonstrating that the Treaty parties intend that Freedman descendants, or anyone else, will perpetually be citizens of the Nation without future limitations. Rather, the Treaty language indicates that Freedman descendants shall have all the rights of native citizens and nothing more. Nowhere does the Treaty indicate that native citizenship, and therefore Freedmen citizenship, cannot in the future be limited by constitutional action of an election open to all citizens.[6]

The opinion in *Tichenor v. Brewer's Ex'r*, 98 Ky 349, 33 S.W. 86 (1895), cited by the Respondents, does not establish that the Treaty confers perpetual citizenship on Freedmen descendants. That opinion did not involve tribal citizenship, Indian Nations' existential right to define their memberships, treaties involving Nations as parties, or Nations at all. The opinion cited no judicial authority for resolution of the principle appellate issue there: whether heirs at law and descendants as used in a testamentary devise are synonymous. The decision turned on the fact that the will's use of "descendants" precluded taking by collateral heirs at law. In support, the court cited a dictionary's statement that "descendant" does not mean collateral relations. The case is of no value here.

2. The existential right of an Indian Nation to define its own membership for tribal purposes includes the right of citizens of the Nation to limit its membership by a constitution submitted to all citizens for a vote.

In the absence of clear and unambiguous treaty language of perpetuity somehow limiting the Nation's citizens existential right to define its membership, the question arises whether the rights of native citizens include the right to establish by an election open to all citizens a federally

[6] The decision of this Court in *McIntosh Carr v. Zrtikas Zarger v. Brunner & Gooden*, 7 Mvs. L.Rep. 348 (Muscogee (Creek) 1886), offered by the Respondents, provides nothing useful here. That opinion, which predates to OIWA and the Solicitor's Opinion, does not address Respondents' "perpetual" allegation or discuss the "rights of native citizens" to determine membership.

approved constitution that contains membership requirements. The only parties to the Treaty, the Nation and the federal government, answer affirmatively. The Nation, in adopting its Constitution recognized that right. The Federal Congress, in enacting the OIWA authorizing tribes to adopt constitutions, recognized that right. The Federal Executive Branch, both in the Solicitor's Opinion and the Department of Interior approval of the 1979 OIWA Constitution, recognized the right. The United States Supreme Court, months before the constitutional election, reaffirmed the existential right of a tribe to determine its membership.[7] In the face of that judicial authority, Respondents offer no decision rejecting its application.

The Nation's retention of the sovereign power to enact membership requirements is consistent with the reserved rights doctrine announced in *U.S. v. Winans*, 198 U.S. 371, 380-81 (1905), grounded on the decision in *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832). As Cohen, Handbook of Federal Indian Law § 202 [2], p.118 (2012 Ed.) explains, "in *Worcester* the Supreme Court conceptualized an Indian treaty as a grant of rights from the tribe to the United States, with the tribe reserving for itself all interests not clearly ceded, rather than a complete capitulation by the Indian tribe with the United States allotting back certain concessions."

The next inquiry then must be whether the Nation's citizens may exercise that right to determine membership by enacting a constitution, approved in an election open to all citizens, that defines citizenship in such a way as to exclude in the future those that would have previously qualified to become citizens? The answer must be "yes," or the Supreme Court's recognition in *Santa Clara Pueblo v. Martinez* of a Nation's existential right to determine its membership is

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[7] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). ("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. See, *Roff v. Burney*, 168 U.S. 218 (1897), *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906).")

destroyed and tribal sovereignty is permanently impaired. Again, the Respondents provide no appellate judicial decision to the contrary or Treaty language preventing all citizens, Native and Freedmen alike, from exercising their inherent right to determine citizenship.

Accordingly, in this case, the reserved rights of the Treaty-referenced "native citizens" include the right to determine the constitutional citizenship requirements of the Nation by adopting at an election open to all citizens, a blood quantum in such requirements. No unambiguous language of the Treaty destroys that existential right. No decision of an appellate court destroys such a right. The exercise of that existential, sovereign right by the Nation's citizens is consistent with the Treaty.

3. The counterparty to the 1866 Treaty has recognized that the Constitution's membership requirements are consistent with the Treaty.

The federal party to the Treaty enacted the OIWA as part of the new federal policy of promoting tribal sovereignty through enhanced self-government and self-determination.[8] That statute marked the abandonment of earlier federal policy aimed at terminating the Five Tribes and therefore abolishing their citizenships. The OIWA federal enactment of the authorizing tribal constitutions, recognized that inherent right of the tribes to determine their citizenship. Otherwise, a constitution would be worthless. Respondents offer nothing to the contrary judicially limiting the OIWA.[9]

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[8] Congress, in enacting a statute, is presumed to do so with knowledge of then existing federal law. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.")

[9] In fact, in their Brief's "Summary of the Historical Record" at pp. 3-6, Respondents attempt to revise history by omitting any mention of the end of the Treaty period, of federal Indian policy, the subsequent statutory period, the OIWA, the Solicitor's Opinion, or the approval of the 1979 Constitution by the Department of the Interior, all discussed in the Opening Brief, pp. 17-23.

The federal party to the Treaty has on multiple occasions recognized that the OIWA, consistent with the Treaty, authorized the Nation's citizens, by an election open to all citizens, to adopt the citizenship requirements at issue here. Initially, the Solicitor of the Interior so determined in 1941, 1 Op.Sol. 1076 (Oct.1, 1941), and subsequently, the Secretary of the Interior's delegate, expressly approved blood quantums as used in the Nation's Constitution. Against those statements by the federal party to the Treaty, Respondents offer no substantial critical legal analysis.[10]

At the end of the analysis, Respondents' argument on abrogation fails. The OIWA is a statute contemplated by the Treaty. The OIWA did not abrogate the Treaty. The Nation's OIWA Constitution does not violate the Treaty language. The sovereignty inherent in the Constitution's citizenship requirement remains lawful.

IV. THE RESPONDENTS FAIL TO NEGATE THE APPLICATION OF THE RULES OF CONSTRUCTION OF TREATIES THAT FURTHER CONFIRM THE COMPLIANCE OF THE NATION'S OIWA CONSTITUTION WITH THE 1866 TREATY.

The Citizenship Board's Opening Brief offers numerous rules of construction that defeat Respondents' allegation of perpetuity and claim of conflict between the OIWA and the 1866 Treaty. Respondents cannot deny that treaties must be construed in favor of the Indians, with any ambiguity resolved in their favor. *Herrerra*, *supra*. Even if an issue somehow exists as to perpetuity citizenship under the Treaty language, since no language clearly and without doubt

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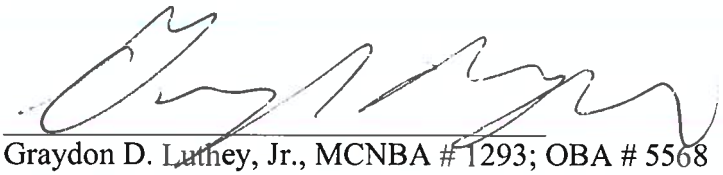
[10] Respondents attack the Solicitor Opinion by noting that, on occasion, courts disagree with the Solicitors. The mere existence of those specific occasions do not generally impeach all Opinions of all Solicitors, any more than an occasional Supreme Court reversal of a particular circuit court opinion renders all opinions of that circuit on all subjects forever legally infirm and unreliable. Rather than legally analyze in detail the Solicitor's Opinion, the Respondents attempt to neutralize the Opinion by demeaning the Solicitor as a "statement from a functionary of the United States Government," at Brief p.2, apparently overlooking the fact that the Solicitor, a Presidentially appointed, Senate confirmed officer of the United States, is the chief legal officer of the Executive Branch Department responsible for Indian affairs, including treaties.

provides perpetuity, any construction must be against depriving the Nation's citizens of their existential right of determining citizenship. Any doubtful expressions in treaties should be resolved in the Indian Nation's favor. *McClanahan v. Ariz. State Tax Com'n*, 411 U.S. 164, 174 (1973). Likewise, Respondents cannot deny that if the Treaty and the OIWA are able to be read together under the *pari-materia* doctrine as authorizing the Constitution, they must be so read and thereby defeat the Respondents' imagined claim of abrogation. See, *U.S. v. Stewart*, 311 U.S. 60, 64 (1940). Finally, Respondents cannot deny that if the Treaty language is ambiguous, it must be viewed from the Nation's point of view. Did the Nation intend forever to give up its existential right to determine, limit or modify all future citizenship and freeze the definition of citizen for all in perpetuity? The question brings this Court back to sovereignty. Sovereigns do not forever freeze their membership and intend to perpetually give up the existential right to determine their members.

CONCLUSION

The Nation's existential right of a sovereign is at issue. The Treaty language does not destroy that right by conferring perpetual citizenship on anyone. Accordingly, there is no need for Treaty abrogation. The Treaty language supports the exercise by those with the rights of native citizens, resulting in the 1979 Constitution. The Treaty counterparty has supported the result of that exercise of the rights. The legal principles of treaty construction support the constitutional exercise of those rights. The Citizenship Board urges this Court, as the ultimate guardian of the existential, sovereign rights of the citizens, to uphold that exercise of sovereignty, even though the district court failed to do so both procedurally and substantively. The judgment at issue should be reversed and the Citizenship Board's orders should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 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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