IN THE DISTRICT COURT OF THE MUSCOGEE (CREEK) NATION
OKMULGEE DISTRICT

RHONDA K. GRAYSON and
JEFFERY D. KENNEDY,

Plaintiffs,

v.

CITIZENSHIP BOARD OF THE MUSCOGEE (CREEK) NATION

Defendant

CASE NO.: CV 2020-34

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WITH INCORPORARTED MEMORANDUM OF LAW

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MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiffs, Rhonda Grayson and Jeffery Kennedy, by and through their undersigned counsel, hereby respectfully submit this motion for summary judgment. For the reasons stated in the memorandum, this Court should declare that the Treaty of 1866 between the Muscogee (Creek) Nation (the "Nation") and the United States guaranteed formerly enslaved persons ("Creek Freedmen") and their descendants all the rights and privileges of Tribal membership including the right to citizenship, and that this Treaty continues to guarantee those descendants with citizenship and all other rights of Muscogee (Creek) citizens. The Nation should be enjoined from denying Tribal membership rights to descendants of those persons listed on the Freedmen portion of the Creek Dawes Rolls and the Citizenship Board should approve Plaintiffs' application for membership.

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As set forth in the Statement of Material Facts ("SMF") there are no genuine issues of material fact precluding this Court from entering summary judgment in favor of Plaintiffs.

MEMORANDUM OF LAW

INTRODUCTION

This case arises out of attempts by Rhonda K. Grayson and Jeffrey D. Kennedy ("Plaintiffs") to acquire citizenship in the Muscogee (Creek) Nation (the "Nation"). Plaintiffs are appealing the final administrative decisions by the Muscogee (Creek) Nation Citizenship Board ("Defendant") that denied their applications for citizenship. As set forth herein the Defendants wrongfully denied the Plaintiffs their rightful citizenship within the Nation. As descendants of those enrolled by the Dawes Commission as Muscogee (Creek) Freedmen[1] (hereinafter, "Freedmen"), they possess a present right to citizenship in the Nation pursuant to Article II of the Treaty of 1866 between the Nation and the United States of America (the "1866 Treaty"). The 1866 Treaty is binding on the Nation. Article III of the Creek Constitution and current Tribal citizenship laws applied to descendants of the Dawes Freedmen Rolls are in violation of Article II of the 1866 Treaty. The Citizenship Board's most recent denial deprive Plaintiffs of their right to citizenship as guaranteed under the 1866 Treaty.

HISTORICAL SUMMARY

A. African Creeks in the Muscogee Confederacy Before the Civil War

Freedmen origins lie in the first encounters between Africans, Native Americans, and Europeans in the American Southeast. The practice of slavery among the Five Civilized Tribes (the "Five Tribes") differed greatly not only from tribe to tribe, but also within each tribe.

Before removal to the Indian Territory, the Mvskoke people occupied an area now part of the present states of South Carolina, Georgia, Alabama, and northern Florida. 1 Mvs. L. Rep. XI.

[1] At the completion of the final Dawes Rolls of 1906 thousands of individuals who were or descendants of (1) individuals who were enslaved by MCN, (2) Creeks of "African Descent," (3) free "Africans" living as citizens of the Creek Nation, and/or (4) "mixed blood" Creek Nation citizens were listed as Creek Freedmen on the Dawes Rolls.

The Mvskoke people organized themselves by clan membership, which formed the basis of a self-autonomous town (*etvlwv*). *Id.*; Sarah Deer and Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)* (2013) at 131. The leading clan of each *etvlwv* determined whether it was a "red" (*cate*) or "white" (*hvtke*) town. Deer at 133.

> The clans and towns affiliated with the color red performed external relations duties (including military defense, diplomacy, and commerce), whereas clans and towns affiliated with the color white performed domestic duties (including ceremonies, family law, crime, probate, and making of peace)...The autonomous *etvwlv* governments created this [Creek] Confederacy.

Id. at 133-134.

Traditionally, enslaved people in the Creek Confederacy were captives who were taken during war, and at times an enslaved persons may have been a person belonging to a clan who had murdered someone from another clan. Kristy Feldhousen-Giles, Ph.D., *To Prove Who You Are: Freedmen Identities in Oklahoma* (2008) at 4. A person from the offending clan, or the murderer, was obligated to go to the family of the deceased. *Id.* The family could choose whether to kill the person as punishment, to keep him/her as a slave, or to adopt him/her as a family member. *Id.* Enslaved people however were not treated as property, and it is likely that children of the enslaved had no degraded status. Gary Zellar, *African Creeks – Estelvste and the Creek Nation* (2007) at 4-5.

> People of African descent began relationships with individuals and communities of the Five Tribes in a number of ways. They entered as free people who intermarried or were adopted into tribal communities, as runaway slaves from the American colonies and states, and as enslaved people who were bound to particular individuals or communities.

Feldhousen-Giles at 3.

African slavery in the Creek Confederacy during the eighteenth and early nineteenth centuries evolved concurrently into either the kinship system of adoption into the owner's clan where slave status was not inherited or another form resembling the Euro-American chattel slavery

relationship. Zellar at 10-15. Following the end of the Red Stick War (1813-1814), the United States, under pressure from the Southern states, sought to force the removal of the Creek Confederacy to the Indian Territory west of the Mississippi River.

Upon execution of the 1832 Treaty of Cusseta, a census of the Creek Confederacy in the Southeast showed that there were 445 enslaved Africans among the Upper Creeks and 457 enslaved Africans among the Lower Creeks and 55 free African Creeks. *Id.* at 25. The first Creek emigrants to arrive in the portion of Indian Territory that is present-day Oklahoma were from the McIntosh family, which included 198 slaves and 13 free African Creeks. *Id.* at 24. Approximately 23,000 Mvskokean speaking people were forced to remove to Indian Territory. Deer at 142. Between 1834 and 1837, the migration parties of the Lower Creeks settled along the Arkansas-Verdigris river valley while the Upper Creek parties located along the branches of the Canadian River. Zellar at 25.

Although the Creek National Council enacted slave codes, most African Creek slaves did not live under the same conditions as those enslaved in the Southern United States and among the Upper Creek, a clientele form of service between master and enslaved was common. *Id.* at 32-34. Free African Creeks found jobs as teamsters, blacksmiths, stone masons, and carpenters, while many Creek families depended upon their slaves to conduct trade and commercial transactions with Euro-American traders and serve as interpreters for Tribal officials. *Id.* at 35-37.

Slaves and free African Creeks were often acculturated within the community and spoke Mvskoke. William C. Surtevant, *Handbook of North American Indians – Vol. 14 Southeast* at 756. The federal Works Progress Administration's interview with Lucinda Davis, former slave of Tuskaya-Hiniha, demonstrates how many Creek slaves were assimilated in Creek culture. Feldhousen-Giles at 8. Ms. Davis described her knowledge of stomp dances, ceremonies like

Green Corn, funeral practices, as well as some of the folklore relating to death:

> Every time dey have a funeral dey always a lot of de people say, 'Didn't you hear de stkini squalling in de night?' 'I hear dat stikini all de night!' De 'stikini' is de screech owl, and he suppose to tell when anybody going to die right soon. I hear lots of Creek people say dey hear de screech owl close to de house, and sho' nuff somebody in de family die soon.

Id.

However, through the 1840s and 1850s, the Nation abandoned its tradition of keeping slave families together and engaged in the practice of selling slaves at Southern state slave markets. Zellar at 35-37. As a result, a viable slave-hunting trade grew on the reservation, leading to many kidnappings of free African Creek women and children. *Id.* at 38-39.

B. The Civil War and the Creek Nation

Prior to the Civil War, an 1860 Census showed 1,651 enslaved Africans and 277 free African Creeks lived on the Creek Reservation in Indian Territory. *Id.* at 42. That same year, the Creek Council passed new slave laws in order to secure an alliance with the Confederacy. *Id.* at 43. These new laws administered by the Lighthorse police, prohibited Black-Creek marriages, denied citizenship to Creeks born to Creek mothers of more than half African blood, and required all free African Creeks to select a master and abandon their lands and property holdings by March 10, 1861 or risk being sold at slave markets. *Id.*; Feldhousen-Giles at 11.

The Civil War divided the Nation with Southern Creek leaders, mostly from the Lower Creek towns signing a treaty with the Confederacy. Zellar at 43. The Loyal Creek faction, led by Opothleyahola and the Upper Creeks joined the Union army in Kansas with many African Creeks, slave and free. *Id.* at 45. "[M]ore than six hundred fugitive slaves from all tribes in the Indian Territory and neighboring states had fled to the protection of 'Old Gouge, the insurgent chief' [Opothleyahola]." *Id.* at 48. A detachment of Confederate forces from Texas made the following observation,

> 'While moving to North Fork we were in camp when a small Negro Indian boy on a horse rode up. After some conversation with Capt. Whatley he rode away at a gallop, uttering a curious scream, terminating in something like the gobbling of a turkey, which the captain said was the Indian war whoop and meant mischief to us.'

Id. at 50.

The First Indian Union volunteer regiment, which included a company of Yuchi Indians led by "Joneh (Keptune Uchee, or Little Captain)", African Creeks and Seminoles fought in the battle of Round Mountain, where defeated Confederate Texas calvarymen complained about 'red niggers' at the battle. *Id.* at 51. African Creek interpreters accompanied medical officers and oversaw Union refugee subsidy programs. *Id.* at 53. Union officials "saw a significant difference in the way that African Creeks and other African Indians carried themselves when compared with African Americans from the states." *Id.* at 54. Richard J. Hinton, a *New York Times* correspondent in Kansas observed:

> They are more on an equality with their owners...He looks and acts more manly. These Negroes mostly own something – horses, cows, hogs, etc.; have patches of land to cultivate, and in various ways have been able to cultivate self-respect above their fellow states [state slaves]...Nearly every male adult slave among them owns some kind of gun.

Id.

White officer soldiers visiting the Creek Indian camps witnessed a 'traditional Indian ball game' and remarked how blacks and Indians 'mixed freely' with one another. *Id.* at 56.

C. Reconstruction and Article II of the 1866 Treaty

In 1865, as the Civil War ended, President Andrew Johnson designated a peace commission to travel to Fort Smith, Arkansas to convene a council for the purpose of negotiating new treaties with the Nation, the other Five Tribes and various Plains Tribes. *Id.* at 78. The members of that commission declared that a treaty with the United States "must" contain certain stipulations,

including:

> The institution of slavery, which has existed among several of the tribes, must be forthwith abolished, and measures taken for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members, or suitably provided for.

Ex. A, *Department of the Interior – Office of Indian Affairs: Report of D.N. Cooley, as President of the Southern Treaty Commission,* October 30, 1865 at 298.

In an exercise of its sovereignty, the Nation negotiated and executed the 1866 Treaty with the United States. The 1866 Treaty provides in pertinent part:

> [I]nasmuch as there are among the Creek many persons of African descent...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 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 said Nation shall be equally binding upon and give equal protection to all such persons . .

SMF 5.

Integration of newly freed African Creeks into the Nation resulted in the creation of new towns for the purpose of representation in the reconstituted Creek national government. Zellar at 97. Freedmen from the Arkansas Colored, Canadian Colored, and North Fork Colored towns elected representatives to the legislative assemblies of the House of Kings and the House of Warriors pursuant to the 1867 Creek Constitution. *Id.*

While Indian Agent J.W. Dunn created a membership roll of 1,774 Creek Freedmen in 1867 that was adopted by the Nation, one of the early citizenship laws the National Council passed was the adoption of additional Creek Freedmen who were omitted from the Dunn roll. *Id.* at 99; Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914* (1999) at 53.

In 1867, an internal conflict arose regarding Creek Freedmen rights to per capita payments from the national fund. Zellar at 100. The remnants of the Southern Creek faction presented a legal argument to the Commissioner of Indian Affairs regarding why the Treaty should be interpreted to exclude the Freedmen from per capita payments. *Id.* However, the Creek Freedmen mobilized a Congressional delegation to Washington D.C. to address the Senate Subcommittee on Indian Appropriations. *Id.* at 101. Congress agreed that the intent of Article II in the 1866 Treaty was indeed that freed people should share in the per capita payment and that no moneys appropriated to the Creeks would be paid until the African Creeks received their per capita share of the 1867 payment. *Id.*

Undeterred by the plain language of the Treaty of 1866 and their own 1867 Constitution, members of the Southern Creek faction continued to disregard the rights and privileges of African Creeks and newly emancipated Freedmen. The refusal by some to recognize the rights the Treaty of 1866 granted Freedmen caused Principal Chief Ward Coachman to discuss the issue during an October 1, 1877 joint legislative session of the Honorable House of Kings and House of Warriors of the Mvskoke nation. Principal Chief Coachman stated that Creek Freedmen's right to citizenship and equal rights and privileges guaranteed by the Treaty of 1866 was "so plain that no one can mistake or misunderstand it." Ex. E, Message of Principal Chief Ward Coachman.

By 1878, African Creek participation in the Nation's political affairs included not only representation on the National Council but also, Tribal court judicial appointments as judges and attorneys, popular elected positions as Lighthorse law enforcement officers and awardees of government service contracts. Zellar at 99; Angie Debo, *The Road to Disappearance* (1941) at 253.

D. 1887 Allotment

Congress passed the Dawes Act of 1887 ("Dawes Act") to assimilate Indians into the American system of private property ownership and agricultural land stewardship by allotting to Tribal members their communally held reservation lands in severalty. The Five Tribes were exempt from the Dawes Act; however, in 1893 Congress created the Commission to the Five Civilized Tribes (the "Dawes Commission") to negotiate an allotment agreement in order to "break down the autonomy of the Five Tribes and erect a white man's state upon the ruins of the Indian governments." Carter at 3. In 1896, Congress tasked the Dawes Commission with identifying all Mvskoke citizens eligible for allotments in what would come to be known as the Dawes Roll. *Id.* at 15. In 1897, Congress made federal law applicable to all persons in Indian Territory, including Indians. Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (1897); *Harjo v. Kleppe,* 420 F. Supp. 1110, 1121 (D.D.C. 1976). By this time, African Creek participation in the Nation's political affairs included not only representation on the National Council but also, Tribal court judicial appointments as judges and attorneys, popular elected positions as Lighthorse law enforcement officers and awardees of government service contracts. Zellar at 99.

Congress then passed the Curtis Act of June 28, 1898 (30 Stat. 495) ("Curtis Act"). Carter at 36. The Curtis Act directed the Dawes Commission to complete the citizenship rolls of the Creek Nation. The citizenship rolls created by the United States were: 1) the "Blood Roll," which was purportedly only composed of Creek citizens with Creek blood; and 2) the "Freedmen Roll," which was purportedly only a roll of those citizens of the Nation who were formerly enslaved Africans and devoid of any Creek blood. The Curtis Act directed the Dawes Commission to utilize the Creek Freedman roll made by Indian Agent J.W. Dunn:

> The roll of the Creek freedmen made by J.W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said

> commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

Ex. F, at 503.

In addition to determining Tribal citizenship, the Dawes Commission also determined an allottee's degree of Indian blood ("blood quantum"). If an allottee did not claim to be a full blood, the enrollment clerk **estimated** their fraction of blood quantum. Carter at 49. Where an allottee had parents from different Tribes their blood quantum was calculated for their mother's side only. *Id.* The Dawes Commission employed the hypo-descent rule[2], by which any individual with "one drop" of "Black blood" was to be considered Black. Therefore, in cases of mixed African Creek and Indian 'by blood' parents, the allottee was always enrolled on the Freedmen Roll and not given any blood quantum. *Id.* Thus, the Dawes Commission enrolled many Creeks of African descent on the Freedmen Roll, regardless of whether they or their ancestors were ever formerly enslaved or how much "Creek blood" they actually possessed. *Id.* The Dawes Commission work ultimately included the enrollment of 18,702 applications including 6,807 Creek Freedmen and the Creek Allotment Agreement of 1901. *Id.* at 64; 31 Stat. 861. Allotment of Creek lands continued for more than 15 years until Congress finally prohibited any further allotments in 1917. Act of March 2, 1917, 39 Stat. 986.

E. 1906 Five Civilized Tribes Act

After passage of the Creek Allotment Agreement, the federal government continued to reorganize the Indian Territory in anticipation of White settlement and Oklahoma statehood. The Curtis Act had declared the Creek tribal government "shall not continue" past 1906. §46, 31 Stat. 872. However, since the Dawes Commission was still in the process of disposing Tribal property

[2] Also known as the "one-drop rule" dates to a 1662 Virginia law on the treatment of mixed-race individuals.

on June 10, 1905, "it was apparent that the affairs of the tribes could not be wound up by the date set for the final dissolution of the tribes." *Harjo* at 1126. Therefore, Congress passed the Five Civilized Tribes Act on April 26, 1906. Ex. H, 34 Stat. 137. The Act approved the final Dawes citizenship rolls including the Creek Freedmen roll declaring under Section 3,

> That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

Id. at 138.

The Act expressly recognized the Nation's "tribal existence and present tribal governmen[t]" and "continued [them] in full force and effect for all purposes authorized by law." *Id.* at §28, 148.

F. 1906 - 1976

Between 1906 and 1976, the federal government dealt with Mvskoke people "as a former tribe without any constitutional authority or any right to self-determination." Deer at 162. Indeed, the Five Civilized Tribes Act empowered the President to remove and replace the principal chief, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of Tribal schools. §§6, 10, 28, 34 Stat. 139-140, 148.

On January 22, 1935, the Commissioner of Indian Affairs requested an opinion from the Office of the Solicitor on whether a per capita payment should be made to those persons enrolled on the final Dawes citizenship rolls and their heirs or to a new membership roll made after the Five Civilized Tribes Act of 1906. Solicitor's Opinion, January 22, 1935, 1 Op. Sol. On Indian Affairs 508-511 (U.S.D.I. 1979). The federal government summarized its view of Creek Freedmen rights

within the Nation stating the following:

> [B]y treaty, act of Congress and the laws of the Creek Nation, the freedmen have been admitted to membership or citizenship in the Creek Nation...with all the rights incident to such membership, including the right to share in all distributions of tribal property on an equal footing with blood members.

Id. at 509.

G. 1979 Muscogee Constitution

The 1979 Constitution was ratified by a vote of 1,896 for and 1,694 against on October 6, 1979. Muscogee (Creek) Const., Certificate of Results of Election. However, only 30 percent of the 9,125 qualified voters actually voted for the new constitution and the Creek Freedmen. Deer at 166.

Prior to the ratification vote on October 29, 1977, Principal Chief Claud Cox admitted one of the express goals of the Draft Constitution was to strip Freedmen and Creek Freedmen descendants of their citizenship rights stating:

> When you go back to the old [1867] Constitution, you are licked before you start; because it doesn't talk about Indians, it talks about CITIZENS of the CREEK NATION. When you got down to the Allotment time, there were more that was non-Indians or half-blood or less, who outnumbered the full blood, all of these totaled about 11,000 and there were only 18,000 on the entire Roll; so there was only 9,000 above One-half blood. That's the reason, they lost control; the FULLBLOOD lost control. That's what we're fighting, this blood quantum, trying to get back and let the people control because under the old Constitution, you've lost before you ever started. There were three FREEDMEN bands that would outnumber you today as citizens. So, if we want to keep the INDIAN in control, we've got to take a good look at this thing and get us a Constitution that will keep the Creek Indian in Control.

Creek Nation National Council Minutes, October 29, 1977 at 31.

Upon ratification of the 1979 Constitution, Article III of the citizenship clause limited persons eligible for citizenship to those lineal descendants whose names appear on the final 'blood' rolls as approved by the Tribes Act of 1906. Thus, the Creek Freedmen were stripped of their citizenship rights. Between 1979 to the present day Creek Freedmen descendants have been

summarily denied citizenship within the Nation.

ARGUMENT

In the Treaty of 1866, the Nation agreed that former slaves and other Creeks of African descent, who chose to remain in or return to the Creek reservation, as well as their descendants, would have "all the rights of native citizens." The plain language of the Treaty provides a guarantee of rights – that eligible Freedmen and their descendants must be accorded the same rights and privileges, and benefits, on the same basis, as native Mvskoke.

I. SUMMARY JUDGMENT STANDARD

"In all cases, the Muscogee (Creek) Nation Court shall apply the Constitution and duly enacted laws of the Muscogee Nation, the common law of the Muscogee people as established by customs and usage, and the *Treaties* and Agreements between the Muscogee nation and the United States." MCA Title 27, § 1-103(A) (emphasis added); *see also, Brown and Williamson Tobacco Corp. v. District Court,* 5 Okla. Trib. 447 (Muscogee (Creek) 1998) ("Pursuant to NCA 89–21103, the Court shall first apply tribal ordinances in any legal resolution. If there is no applicable tribal ordinance, then the court may process to apply federal law. If no tribal or federal laws are applicable, then the Court shall apply Oklahoma law.")

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Ade v. Division of Health Administration,* 4 Mvs. L. Rep. 205 (2001) (summary judgment must be supported by appropriate materials, affidavits and exhibits); *Footbridge Ltd. v. Zhang,* 584 F. Supp. 2d 150, 154 (D.D.C. 2008) (requiring statement of material facts to contain citations to record evidence). "A fact is material if, under the governing law, it

could have an effect on the outcome of the lawsuit." *Rowell v. Board of County Commissioners of Muskogee County, Oklahoma*, 2020 WL 6279207, 3 (10th Cir. 2020).

The undisputed material facts are set forth in the attached *Statement of Material Facts In Support of Their Motion for Summary Judgment* ("SMF"), and they are incorporated herein by reference. These facts are undisputed. As set forth below, on these undisputed facts, the Plaintiffs are entitled to judgment as a matter of law.

II. THE 1866 TREATY GUARANTEED CITIZENSHIP WITHIN THE MUSCOGEE (CREEK) NATION TO THE CREEK FREEDMEN AND THEIR DECENDANTS.

The central issue in this case turns on the meaning of Article II of the 1866 Treaty in which the Nation agrees:

> 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.

SMF 5.

This Treaty has the full force of federal law and Tribal law, and "[the] Treaty shall be obligatory on the contracting parties." *McGirt v. Oklahoma,* 140 S.Ct. 2452, 2460-2461 (2020) *see also Seminole Nation Development Authority v. Morris & Morris,* 2 Mvs. L. Rep. 552 (2000),

> It is imperative to note that the Muscogee (Creek) Nation District Court has upheld and expects the United States of America, other Indian Nations and the State of Oklahoma to uphold the treaties entered into with the United States of America. It is the conclusion of this Court that treaties entered into with the United States of America and Indian Nations should be held inviolate and followed by not only the United States of America and the Muscogee (Creek) Nation, but other Indian Nations and the State of Oklahoma.

Id. at 558, 566.

When interpreting language within the treaty this Court must follow the original meaning and may not "favor contemporaneous or later practices *instead of* the laws Congress passed." *McGirt.* at 2468; *Washington State Department of Licensing v. Cougar Den, Inc.* 139 S. Ct. 1000, 1016 (2019). Furthermore, when interpreting treaty language this Court requires that "the language be understood today...as that same language was understood by the tribal representatives in the 1800s when the treaty was negotiated." *Seminole Nation Development Authority* at 559; *see also Muscogee (Creek) Nation v. The American Tobacco Company, et al,* 2 Mvs. L. Rep. 376, 381 (1998). Finally, where a statute states in plain language on a particular matter, the Court will not place a different meaning on the words. *Tiger v. Muscogee (Creek) Nation Election Board, et al.* SC 07–04 (Muscogee (Creek) 2008).

The express terms of Article II of the 1866 Treaty clearly establish that eligible Creeks of African descent, whether enslaved or not, and their descendants were granted all the rights of native Mvskoke "by blood." By its plain language, the use of the terms "and their descendants"; "shall have and enjoy all the rights and privileges of native citizens" and "laws of the said nation shall be equally binding upon and give equal protection to all such persons" create citizenship for Creek Freedmen and their descendants.

Courts interpreting a treaty also look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation v. United States,* 318 U.S. 423, 432 (1943). As explained by the U.S. Supreme Court, "an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 196 (1999) *see also* Cohen, *Handbook of Federal Indian Law,* at 119-20 (2005). In this case, the history, negotiations, and practical construction of the 1866 Treaty support a conclusion that Article II

imposed a guarantee of rights, including citizenship, to the Creek Freedmen.

A. The Treaty's Plain Language Grants Full Rights within the Muscogee (Creek) Nation to the Creek Freedmen

By its express terms, Article II grants the Freedmen and other free persons of African descent then residing on the reservation "all the rights of and privileges of native citizens[.]" SMF 5. "All" means "the whole amount, quantity, or extent of." *Merriam-Webster Dictionary*[3]; *see, e.g. Mclean v. United States,* 226 U.S. 374, 383 (1912) ("'All' excludes the idea of limitation."); *Bollman Hat Co. v. Root,* 112 F.3d 113, 116-17 (3d Cir. 1997) ("'[A]ny' and 'all' both mean 'the whole of' or 'every.'" (citing Black's Law Dictionary)); *Nat'l Steel & Shipbuilding Co. v. United States,* 419 F.2d 863, 875 (Ct. Cl. 1969) ("'All' means the whole of that which it defines – not less than the entirety."). Additionally, the Treaty explicitly provides that these rights were secured not only to the Freedmen who were present in or returned to the Creek reservation in 1866 and early 1867, but also to "their descendants."

The plain meaning of this Treaty language guarantees eligible Freedmen and their descendants "all the rights and privileges of native citizens[.]" Thus, if a native Mvskoke citizen "by blood" is permitted to vote in a tribal election, a Creek Freedman would enjoy the same right. If a native Mvskoke citizen "by blood" is entitled to a benefit or service provided by the Nation, a Creek Freedman is entitled to exactly the same benefit or service. If the Nation uses Federal COVID Relief funds for per capita payments to Tribal members, then Creek Freedmen are entitled to those payments as well.

Similar language exists within Article XIII of the Treaty of 1856 regarding members of the Seminole Nation. Article XIII states:

...The members of each [Creek and Seminole Tribes] shall have the right freely to

[3] https://www.merriam-webster.com/dictionary/all?utm_campaign=sd&utm_medium=serp&utm_source=jsonld, accessed on November 25, 2020.

> settle within the country of the other, and shall thereupon be entitled to all the rights, privileges, and immunities of members thereof, except that no member of either tribe shall be entitled to participate in any funds belonging to the other tribe.

Treaty with the Creeks, 11 Stat. 700 (1856).

Here, the Treaty of 1856 granted "all the rights, privileges, and immunities" of Mvskoke citizens to members of Seminole Nation, except rights to national funds. Though they use different language, both the Treaty of 1856 and 1866 express an intention to provide their subjects – Seminole and Creek Freedmen – with the same rights as native Mvskoke citizens "by blood". Furthermore, in the case of Creek Freedmen their treaty rights are guaranteed without limitation.

B. The Historical Context and Negotiation History of the Treaty Demonstrates that Article II Guaranteed Citizenship Rights to the Freedmen

Although this Court doesn't need to go beyond the plain language of the 1866 Treaty, courts may also "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw,* 318 U.S. at 432. *See also Mille Lacs,* 526 U.S. at 197 (negotiation history as shedding light on treaty interpretation). In this case, the historical context of the 1866 Treaty and the negotiation history all support a finding that Article II guarantees citizenship rights to the Creek Freedmen. *First,* the historical context of the Treaty reveals the United States' focus on ensuring an "equal footing" for Freedmen. *Second,* the parties' negotiations establish that both parties understood and intended to "permanently" secure the "full rights" of the Freedmen.

The United States began treaty negotiations with the Five Tribes in 1865 at a Peace Council in Ft. Smith, Arkansas with the Commissioner of Indian Affairs Dennis N. Cooley. See Zellar at 78-79. The Commissioner made the following demand of all the Five Tribes:

> The institution of slavery...be forthwith abolished, and measures for the unconditional emancipation of all persons held in bondage, and for their incorporation into the tribes on an equal footing with the original members or

suitably provided for.

Ex. A, *Department of the Interior – Office of Indian Affairs: Report of D.N. Cooley, as President of the Southern Treaty Commission, October 30, 1865* at 298. The Loyal Creek Delegation responded in agreement:

> We, the delegates of the Creek Nation to this council, have had many talks with you while in attendance on sessions with us, and know the policy of the government towards us, the loyal Creeks...We are willing to provide for the abolishing of slavery and settlement of the blacks who were among us at the breaking out of the rebellion, as slaves or otherwise, as citizens entitled to all the rights and privileges that we are.

Id. at 341.

The Southern Creek faction agreed to emancipation but was in opposition to citizenship, "...we agree to the emancipation of the negroes in our nation but cannot agree to incorporate them upon principles of equality as citizens thereof – and we cannot believe the government desires us to do more than it has seen fit thus far to do." Annie Heloise Abel, *The American Indian Under Reconstruction* (1925), at 211, n. 443.

U.S. Major General Sanborn, who had been dispatched to Indian Territory to regulate relations between Freedmen and the Five Tribes observed, "[t]he Creek nation look upon the freedmen as their equals in rights, and have or are in favor of, incorporating them into their tribes, with all the rights and privileges of native Indians." SMF 6. Ultimately, both Loyal and Southern Creek factions reconciled and the Southern Creeks withdrew their protest to Creek Freedmen citizenship on May 26, 1866. Zellar at 90.

Thus, the negotiation history demonstrates an understanding on both sides that the Treaty of 1866 would provide Creek Freedmen with the same rights of native Mvskoke 'by blood' within the Nation.

C. The Practical Construction of Article II by the Parties Demonstrate a Mutual Understanding that the Treaty of 1866 Guaranteed Citizenship to the Creek Freedmen.

Courts may also look at the practical construction of the treaty by the parties in the years immediately following its adoption. *Choctaw Nation*, 318 U.S. at 482. In this case, the practical construction adopted by both parties in the years following ratification of the 1866 Treaty establish that both the United States and the Nation interpreted the 1866 Treaty as guaranteeing the Creek Freedmen all rights within the Nation, including citizenship. Both federal and Tribal legislative acts, judicial rulings, and administrative policies in the years following the 1866 Treaty show that the parties viewed Article II as providing the Creek Freedmen with citizenship and all its accompanying rights.

Upon ratification of the 1866 Treaty, the Nation unanimously adopted a constitution in October 1867 that implemented the provisions of Article II. Zellar at 97. The 1867 Creek Constitution allowed Freedmen to vote in national elections and elect National Council representatives to the House of Kings and House of Warriors from their newly established towns described as, Arkansas Colored, Canadian Colored, and the North Fork Colored towns. SMF 9.

Enrollment of Freedmen within the Nation as Tribal members began with Federal Indian Agent J.W. Dunn creating a roll of 1,774 Creek Freedmen in 1867. Zellar at 99; at 53. The first citizenship laws passed by the National Council adopted those Freedmen who returned to the Nation too late to be listed on the Dunn roll "but within the twelve months specified by the treaty." Debo at 141. The National Council expressly affirmed Creek Freedmen citizenship under the 1866 Treaty as late as 1890. SMF 13; Ex. F, *1890 Compilation of the Constitution and Laws of the Muscogee Nation.*

Creek Freedmen also shared in per capita payments from the Nation. *Supra* at 6-7. While

the Nation initially sought to exclude Creek Freedmen from per capita payments in 1867, the United States concluded the intent of Article II in the Treaty was that Creek Freedmen share in per capita payments. *Id.* Therefore, as later per capita payments were made in 1868, Creek Freedmen were included as "[t]he Southern leaders had learned their lesson, and the negroes shared equally with the Creeks in this distribution." Debo at 188.

Another example of the Nation's view on Creek Freedmen citizenship status pursuant to the Treaty of 1866 involved the criminal jurisdiction of the Tribal courts. In 1871, federal authorities sought to prosecute several African Creeks charged with murder in the federal court at a time when the Tribal courts held exclusive criminal jurisdiction. Zellar at 103. Principal Chief Samuel Checote registered his protest to the Indian Agent F.S. Lyon stating,

> The Colored people are regarded by the Creeks as their citizens having been made so by treaty stipulations...They are to all intents and purposes part and parcel of the Creek nation. We claim full jurisdiction over them subject to be tried in our courts by our laws, which they have helped to make.

Id.

Secretary of Interior Columbus Delano agreed with Principal Chief Checote declaring a ruling that held race and not citizenship determined criminal jurisdiction in Creek country would violate the spirit and intent of Article II of the 1866 Treaty. *Id.* at 104.

Finally, in *Seminole nation McIntosh Carr v. Zrtikas Zarger v. Brunner & Gooden,* 7 Mvs. L. Rep. 348 (1886), the Creek Supreme Court made the following ruling on the Article II citizenship clause of the 1866 Treaty:

> In the opinion of the Court that from the above treaty it is clearly shown that there are three classes of the African descent who are allowed to enjoy the rights of a Creek citizen. First, those lawfully residing in the nation at the time of the ratification of said treaty. Second, those who may have resided and may return to this country within one year from the certification of the treaty and their descendants. Third and such other of the same race, as may be permitted by the laws of this Nation to remain within the limits of the jurisdiction of the Nation.

SMF 12.

Thus, the constitutional reforms, legislative acts, executive statements, and judicial opinions – both federal and Tribal – show that the parties to the 1866 Treaty viewed Article II as providing the Creek Freedmen with citizenship within the Nation and all of its accompanying rights.

III. CONGRESS DID NOT ABROGRATE THE TREATY OF 1866

While Congress can abrogate treaty rights, it must say so, and "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law." *McGirt* at 2482; *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *see also Mille Lacs,* 526 U.S. at 202 (1999); *United States v. Dion,* 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."). Specifically, the Supreme Court has held there must be "clear evidence that Congress actually considered the conflict between it intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." Dion, 476 U.S. at 739-740.

The best evidence of abrogation is an explicit declaration by Congress in statutory text that intended to alter treaty rights. *See Dion,* 476 U.S. at 739; *Leavenworth, L. & G. R. Co. v. United States,* 92 U.S. 733, 741-42 (1875). The Supreme Court has made clear that treaties are the supreme law of the land and cannot be broken unless Congress makes its intent to do so perfectly clear; nothing short of a clear statement on Congress's part will suffice. *See McGirt* at 2482 ("If Congress wishes to withdraw its promises, it must say so."). Here, there is no federal legislation abrogating Article II of the 1866 Treaty and in fact, in *McGirt* the Supreme Court upheld the Nation's reservation status specifically because there was no federal law that expressly abrogated

the promises of the 1866 Treaty.

IV. THE CREEK NATION DOES NOT HAVE A SOVEREIGN RIGHT TO IGNORE THE 1866 TREATY OBLIGATIONS

The Creek Nation is a sovereign nation that holds retained powers of self-government. *See, e.g., Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). These retained powers include the power to define its own membership. *Id.* However, Tribal authority, including the right to define Tribal membership, can be constrained by treaties or other federal laws. *See United States v. Wheeler,* 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute..."); *Seminole Nation Development Authority,* 2 Mvs. L. Rep. at 566 ("It is the conclusion of this Court that treaties entered into with the United States of America and Indian Nations should be held inviolate and followed by not only the United States of America and the Muscogee (Creek) Nation, but other Indian Nations and the State of Oklahoma."). In this case, there can be no question that Article II of the Treaty of 1866 has constrained the Nation's authority to determine Tribal membership. Although the Nation retains substantial sovereign powers, it must nonetheless comply with the terms of Article II of the Treaty of 1866.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enter summary judgment in their favor as to all of Plaintiffs' claims and hold that pursuant to Article II of the Creek Treaty of 1866, all Creeks enrolled as Freedmen on the final Dawes Rolls adopted by the Act of April 26, 1906, and as referenced by Sections 1, 2, and 3 of Article III of the Creek Constitution, and their descendants are entitled to full citizenship within the Muscogee (Creek) Nation. In so doing, the Court should reverse the Defendant's denial of the Plaintiffs' citizenship and order the Defendant

to grant the Rhonda K. Grayson and Jeffrey D. Kennedy full citizenship within the Nation.

Dated this ___ day of December 2020.

Respectfully submitted,

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