

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2009 DEC -1 PM 4:44

CLERK OF DISTRICT COURT
KROSTENHOPEA
CHEROKEE NATION

RAYMOND NASH, et al,

Plaintiff, Appellant

vs.

CHEROKEE NATION REGISTRAR,

Defendant, Appellee.

Consolidated Case Nos CV-07-40, CV-07-41, CV-07-42, CV-07-43, CV-07-44, CV-07-45, CV-07-46, CV-07-47, CV-07-48, CV-07-49, CV-07-50, CV-07-53, CV-07-56, CV-07-65, CV-07-66, CV-07-72, CV-07-78, CV-07-85, CV-07-86, CV-07-99, CV-07-100, CV-07-112, and CV-07-116

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT IN FAVOR OF THE CHEROKEE FREEDMEN

Comes now the Class Appellants, by and through appointed Class Counsel, Ralph F Keen II, who offers the following facts, arguments and legal authorities in support of the Class's motion for partial summary judgment¹ in favor of the Cherokee Freedmen in this cause.

INTRODUCTION

This cause is a class appeal of over 380 individual appeals timely filed in response to negative final enrollment decisions of the Registrar's office in connection with the implementation of the March 3, 2007 amendment to the Cherokee Constitution. The amendment, as applied by the Appellee, operated to disenroll more than 2,800 citizens of the Cherokee Nation, who are descendants of enrollees of the Cherokee Freedmen and/or Cherokee Freedmen – Minors Rolls, prepared and finalized by the Dawes Commission in 1907.²

¹ This motion is limited in scope to the rights of the Cherokee Freedmen as a class, and preserves for later determination any issues relating to adopted whites or other non-Freedmen claims.

² Class counsel has recently learned that a small number of appellants may in fact be descendants of enrollees of either the Cherokee by Blood Roll, designated "AW" (adopted white), or the Intermarried White Roll. At the time of this filing, counsel is in the process of seeking discovery on these questions for determination by the Court at a later time.

In this brief Appellants will establish that there are no genuine issues of material fact in dispute, and Appellants are entitled to judgment as a matter of law for three separate and independent reasons, any one of which being more than adequate to support a finding of summary judgment as to the rights of Cherokee Freedmen. First, Appellants will establish that the Amendment is void as a matter of law under the Treaty of 1866, by virtue of the supremacy clause of the United States Constitution. This argument establishes the status of treaty provisions as being co-equal to legislation under federal supremacy, and the resulting diminishing effects the 1866 Treaty had on Cherokee sovereignty, which left it powerless to disenfranchise the Cherokee Freedmen. Section II sets forth how the Amendment is equally void for violating the Thirteenth Amendment's prohibition on slavery, and badges and incidents of slavery, based on the 1866 Treaty being a special congressional tool of enforcement of the Thirteenth Amendment. Section III examines how the Amendment violates both the equal protection clause of the Cherokee Constitution, as well as the federal Indian Civil Right Act, as invidious race-based discrimination which denies two distinct classes of citizens the equal protection of the law. Finally, Appellants argue in the alternative, if found valid, the Amendment cannot be applied retroactively to disenroll Cherokee citizens enrolled prior to its effective date.

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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. The Cherokee Nation, since time immemorial, has exercised the sovereign rights of self-governance on behalf of the Cherokee People.

2. In 1839, following their forced removal from their indigenous homelands in the East to the Indian Territory, the Cherokee people organized to set up a new constitutional government, and adopted a written constitution on September 6, 1839.

3. Following the close of the American Civil War and the abolition of slavery, the Cherokee Nation entered into a treaty with the United States of America on July 19, 1866. Article IX of the treaty addressed the status of freed slaves ("Freedmen") within the Cherokee Nation and provided that Freedmen and their descendants "shall have all the rights of native Cherokees."³

4. In accord with the 1866 Treaty, on November 26, 1866, the Cherokee people adopted certain amendments to the 1839 Constitution which provided that Freedmen and their descendants "shall be taken, and deemed to be, citizens of the Cherokee Nation."⁴

5. In 1895 the United States Court of Claims ruled that Cherokee Freedmen, and their descendants, were "admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood."⁵

³ Treaty with the Cherokee Indians, July 19, 1866, Art IX, 14 Stat. 799 (*hereinafter* 1866 Treaty) attached hereto as Exhibit "A."

⁴ See Amendment to Art. III, Sec. 5 of the Cherokee Const. of 1839, as reprinted in: Jack Gregory & Rennard Strickland, *Starr's History of the Cherokee Indians*, Indian Heritage Assoc., 1967, attached hereto as Exhibit "B."

⁵ Whitmire v. Cherokee Nation, 30 Ct. Cl. 180, 191 (1895), attached hereto as Exhibit "C".

6. In 1906 the United States Supreme Court ruled that intermarried whites were not entitled to the same citizenship rights as Cherokee by blood, or as adopted Shawnee, Delaware and Freedmen, who acquired their property rights by the express words of treaties.⁶

7. In 1962 Cherokee Freedmen were included in per capita payments from the sale of tribal lands at the instruction of Congress.⁷

8. In 1967, the United States Court of Claims ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund as descendants of citizens listed on the Dawes Commission Rolls.⁸

9. Congress provided for the reestablishment of free elections of the Principal Chief in Cherokee Nation by passage of the Principal Chiefs Act of 1970.⁹

10. In 1971 the United States Court of Claims reaffirmed that Freedmen and their descendants listed on the Dawes Rolls were entitled to share in Cherokee Nation funds.¹⁰

11. Cherokee Nation reestablished a constitutional form of government by approving a new constitution on June 26, 1976.

12. The Cherokee Council codified a statute in 1992 which required proof of ancestry to an original enrollee of the "by blood" Cherokee rolls of the Dawes Commission as a precondition to tribal membership, and existentially to tribal voting rights.¹¹

⁶ Daniel Red Bird v. U.S., a/k/a/ Cherokee Intermarriage Cases, 203 U.S. 76, 88 (1906).

⁷ Act of October 9, 1962, Pub. L. No. 87-775.

⁸ Cherokee Nation v. U.S., 180 Ct. Cl. 181 (1967).

⁹ Act of October 22, 1970, Pub. L. No 91-495, 84 Stat. 1091 (1970), attached hereto as Exhibit "D".

¹⁰ Cherokee Freedmen & Cherokee Freedmen's Association v. U.S. and the Cherokee Nation, 195 Ct. Cl. 39 (1971).

¹¹ 11 C.N.C.A. § 12 (declared unconstitutional as to the Freedmen in Allen v. Cherokee Nation, JAT-04-09 (2004).

13. Following a duly called Constitutional Convention in 1999, the Cherokee People approved a new constitution at referendum on July 26, 2003.

14. By opinion issued March 7, 2006, the Judicial Appeals Tribunal found 11 C.N.C.A. § 12 to be unconstitutional, and required enrollment of Cherokee Freedmen as citizens.¹²

15. By opinion issued June 7, 2006, the 2003 Constitution was validated and ordered implemented by the Judicial Appeals as the fundamental law of Cherokee Nation, effective July 26, 2003.¹³

16. On June 12, 2006, the Council of the Cherokee Nation approved a proposed amendment to the Cherokee Nation Constitution affecting the criteria for citizenship into the Cherokee Nation.¹⁴

17. The language of The Amendment provided as follows:

Notwithstanding any provisions of the Cherokee Nation Constitution approved on October 2, 1975, and the Cherokee Nation Constitution ratified by the people on July 26, 2003, upon passage of this Amendment, citizens of the Cherokee Nation shall be only those originally enrolled on, or descendants of those enrolled on, the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Rolls, for those listed as Cherokees by blood, Delaware Cherokees pursuant to Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees pursuant to Article III of the Shawnee Agreement dated the 9th day of June, 1869.¹⁵

¹² Allen v. Cherokee Nation Tribal Council, et al, JAT-04-09 (2006), attached hereto as Exhibit "E."

¹³ In re: Status and Implementation of the 1999 Constitution of the Cherokee Nation, JAT-05-04 (2005).

¹⁴ Council Resolution 63-06, attached hereto as Exhibit "F."

¹⁵ See Joint Stipulation of the Parties, attached hereto as Exhibit "G," stipulation No. 6

18. The proposed amendment (hereinafter "Amendment") was approved by majority vote of the Cherokee People on March 3, 2007 during a special election conducted in compliance with Cherokee Nation election laws and procedures.¹⁶

19. The Cherokee Nation Registrar interpreted the Amendment language as applying the new criteria for citizenship to existing, enrolled citizens of the Cherokee Nation.¹⁷

20. As a result, Appellee notified Appellant Class of its determination of ineligibility for continued membership in March of 2007.¹⁸

21. Appellant Class was removed from the citizenship rolls of the Cherokee Nation, effective March 16, 2007.¹⁹

22. As a result of the disenrollment, Appellant Class has been denied tribal services and rights as Cherokee citizens.²⁰

23. All unprocessed applications for citizenship in Appellee's possession received from Appellant Class members are being held in abeyance without further processing, pending the final outcome of this appeal.²¹

¹⁶ Exhibit "G," stipulation Nos. 4 & 5.

¹⁷ Exhibit "G," stipulation No. 7.

¹⁸ Exhibit "G," stipulation No. 8.

¹⁹ Exhibit "G," stipulation No. 9.

²⁰ Exhibit "G," stipulation No. 10. (A very small number of critically ill people continued to receive health services, paid from tribal funds, because to have interrupted treatment for those individuals would have been very hazardous.)

²¹ Exhibit "G," stipulation No. 11.

ARGUMENTS AND AUTHORITIES

Rule 124 of the Cherokee Nation District Court Rules provides: “[e]ither party may move for summary judgment by alleging that there is no genuine issue as to any material fact and by alleging that the moving party is entitled to judgment as a matter of law.” Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.²² A material fact is one that could affect the outcome of the suit under governing law, and a genuine issue is one for which the evidence is such that a reasonable jury could return a verdict for the nonmoving party.²³ A close examination of the undisputed facts and issues presented by this case reveals that there are no genuine issues of material fact, and that Plaintiff/Appellants are entitled to judgment as a matter of law.

I. THE CHEROKEE AMENDMENT IS VOID AS A MATTER OF LAW UNDER THE TREATY OF 1866, BY VIRTUE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

a. Cherokee Nation Is A Sovereign Nation, But Is Also Subject To The Supremacy of Federal Law.

There is no dispute that Cherokee Nation is a sovereign nation. Organized as a distinct political community under its inherent sovereign authority to do so, Cherokee Nation has either retained, or regained, many attributes of its original inherent sovereignty.²⁴ Cherokee Nation is a sovereign nation, but similar to the fifty states and other Indian nations, Cherokee Nation is also subjugated to the supremacy of the federal government and federal law. The power of the

²² Fed. R. Civ. P. 56 (c).

²³ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

²⁴ Less we forget, only 38 years ago the government of the Cherokee Nation consisted of only a single individual appointed by the President of the United States. The reawakening of the Nation and the re-establishment of its constitutional government with three distinct fully functioning branches is a tremendous achievement in self-governance by the Cherokee People.

federal government over Indian tribes is well-settled in American jurisprudence, stemming primarily from the Indian commerce clause of the U.S. Constitution,²⁵ and the Treaty Clause, which grants exclusive authority to the national government to enter into treaties with Indian tribes.²⁶ Based on these two sources, Congress' power over Indian affairs has been described as "plenary"²⁷ and extends to the very political existence of a tribe, as recognized by the federal government.²⁸ Cherokee Nation has always been at the forefront of the development of federal Indian law, and was indeed the subject of three early Supreme Court decisions known as the Cherokee Trilogy that became the cornerstones of modern Indian law.²⁹ Chief Justice John Marshall described Cherokee Nation as a "domestic dependant nation"³⁰ within the United States, with a distinct community, territory and boundaries in which the laws of the state of Georgia could have no force or effect.³¹

However, since the revolutionary war and the emergence of the federal government as the dominant sovereign, the sovereignty of Cherokee Nation has never been recognized as being on equal footing as, or superior to that of the United States. In 1855 the U.S. Supreme Court so found in Mackey v. Coxe, which articulated Nation's status as follows:

This organization [Cherokee Nation] is not only under the sanction of the general government, but it guarantees their independence, **subject to the restriction that their laws shall be consistent with**

²⁵ Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I Sec. 8, cl. 3.

²⁶ U.S. Const. Art II Sec. 2, cl. 2.

²⁷ Delaware Tribal Business Comm. v. Weeks, 430, U.S. 73, 83-84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40,57 (1946).

²⁸ This is not to suggest that a tribe's existence depends on the federal government, but rather recognition of a tribe to share in a government-to-government relationship with the United States. This federal recognition can be granted, continued, or terminated at the will of the United States.

²⁹ The Cherokee Trilogy consists of: Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

³⁰ Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

³¹ Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561.

the constitution of the United States, and the acts of congress which regulate trade and intercourse with the Indians. . . .

They are not only within our jurisdiction, but the faith of the nation is pledged for their protection.³²

Indeed, throughout Cherokee/American history, the supremacy of the federal law has been openly expressed and acknowledged, but never more concisely than in Article I of the 1976 Cherokee Constitution, which states:

The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is conflict with any Federal law.³³

While this phraseology did not find its way into the 2003 Cherokee Constitution, federal supremacy is nonetheless acknowledged in Article I. [Federal Relationship]: "The Cherokee Nation reaffirms its sovereignty and mutually beneficial relationship with the United States of America," and again in Article XIII, where every Cherokee officer must pledge an oath to protect and defend the Constitutions of both the Cherokee Nation, and the United States of America:

All officers elected or appointed shall, before entering upon the duties of their respective offices, take and subscribe to the following oath or affirmation: "I do solemnly swear, or affirm, that I will faithfully execute the duties of _____ of the Cherokee Nation, and will, to the best of my ability, preserve, protect and defend the **Constitutions of the Cherokee Nation, and the United States of America.** I swear or affirm further, that I will do everything within my power to promote the culture, heritage and traditions of the Cherokee Nation."³⁴

Throughout the course of American history, there has never been any question that Cherokee law, like the laws of other Indian governments, the states, and other federal protectorates, must

³² Mackey v. Coxe, 59 U.S. (18 How.) 100, 103(1855) [*emphasis added*].

³³ Cherokee Const. of 1976, Art. I. Federal Regulations.

³⁴ Cherokee Const. of 2003, Art. XIII. Oath, Sec. 1 [*emphasis added*].

co-exist within the framework of the United States Constitution, and any Cherokee law violating the principles of federal supremacy can only be considered null and void as a matter of law.

b. **Treaties With The United States Are Afforded The Same Weight As The U.S. Constitution And Federal Legislation, And Are Accordingly The Supreme Law Of The Land.**

As long as the Cherokee Nation is necessarily subject to the supremacy of federal law, then Cherokee jurisprudence must also necessarily acknowledge the plain language of Article VI, Section 2, of the United States Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; **and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;** and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The inclusion of "all Treaties made" in the supremacy clause was in fact one of the primary philosophical linchpins Chief Justice Marshall relied upon in the recognition of Cherokee sovereignty by the *Worcester* Court:

The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.³⁵

Moreover, by virtue of the supremacy clause, treaties with the United States supersede any conflicting state laws, and carry the same force and preemptive effect as federal statutes.³⁶

Historically, this principle was expressly incorporated into Cherokee law vis-à-vis the Cherokee

³⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (finding the supremacy of treaty law to be one of the defining reasons Indian tribes enjoy sovereign existence apart from the authority of the states).

³⁶ *Antoine v. Washington*, 420 U.S. 194, 204 (1975) (holding post treaty era agreements, ratified by congress were supreme and binding on the states, even though the states were not a party to the agreement); *see also* Felix S. Cohen's *Handbook of Federal Indian Law* 270, 271(1982).

Constitution of 1839, which provided: "All acknowledged treaties shall be the supreme laws of the land, and the National Council shall have the sole power of deciding on the construction of all treaty stipulations."³⁷ This was the fundamental law in Cherokee Nation when the Treaty of 1866 was ratified, and continues to carry contemporary relevance in the modern construction and application of the treaty provisions and language.

c. **The Treaty Of 1866 Provides That Cherokee Freedmen, And Their Descendants, Shall Have All The Rights Of Native Cherokees.**

The Treaty of 1866 came into existence as a result of the post-civil war reconciliation effort, and provided a means for Cherokee Nation to re-establish its government-to-government relations with the United States, following its in-providential alliances with the Confederate States of America and long history of slavery.³⁸ The Treaty addressed a number of issues and provisos for readmitting Cherokee Nation to the federal union, including amnesty for all war crimes committed by its citizens,³⁹ establishment of federal courts in the Indian territory,⁴⁰ the settlement of "civilized friendly Indians" within the Cherokee Nation,⁴¹ and case-in-point to this dispute, the adoption of all freed slaves into the Cherokee Nation as tribal citizens. Article IX of the Treaty directly dealt with the tribal status of the Freedmen, and provides:

The Cherokee nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall

³⁷ Cherokee Const. of 1839, Art. III, Sec. 20.

³⁸ Cherokee Nation was one of the few slave-holding Indian tribes. Dating to early contact with the British Colonists, Cherokees owned more African slaves than any other Indian tribe. Jon Velie, *Should the United States Be Fighting For Jim Crow's Survival By Its Complicity In Denying Voting Rights To The Cherokee Freedmen?* 54-FEB Fed. Law. 43, 45 (2007). By 1860 Cherokees owned approximately 2,511 slaves. Kent Carter, *The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893-1914*, 106 Ancestry.com Incorporated (1999).

³⁹ Exhibit "A," Art. II.

⁴⁰ Exhibit "A," Art. VII.

⁴¹ Exhibit "A," Art. XV.

have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that **freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees:** Provided, That owners of slaves so emancipated in the Cherokee nation shall never receive any compensation or pay for the slaves so emancipated.⁴²

The Treaty language is clear and concise. It contains no ambiguity. It requires no special maxims of interpretation or construction. Cherokee Freedmen, and their descendants, were to receive all the rights of native Cherokees. "All rights" can only be read to mean all rights, including but not limited to, the right of citizenship, and the unabridged right of suffrage.

d. The Treaty Of 1866 Remains In Full Force And Effect.

The Treaty of 1866 was entered by Cherokee Nation and its terms were incorporated into Cherokee law. Within four months of the signing of the Treaty of 1866, the Cherokee Nation adopted a series of amendments to the 1839 Cherokee Constitution which carried out the terms of the treaty, including expressly granting Freedmen and their descendants citizenship in the Cherokee Nation.⁴³ The Treaty of 1866 has not been abrogated or repealed by congress, and remains in full force and effect. The Cherokee Nation Judicial Appeals Tribunal reached the same conclusion in the Allen decision, which struck down as unconstitutional the tribal registration statute that excluded the Freedmen from tribal membership. The Allen Court held:

It cannot be overstated that the 1866 Treaty, in which the Cherokee Nation agreed to extend citizenship to the Freedmen is the exact same treaty where the Cherokee Nation agreed to have other Indian tribes (ultimately the Shawnee and Delaware) relocated inside the Cherokee Nation. After the 1866 Treaty, the Cherokee Nation

⁴² Exhibit "A," Article IX [*emphasis added*].

⁴³ See Exhibit "B."

amended the 1839 Constitution to extend citizenship to the Freedmen as a matter of tribal law. After the 1866 Treaty, the Cherokee Nation also entered into individual treaties with both the Delaware and the Shawnee Indian tribes. Both of these actions show that the Cherokee Nation complied with the terms of 1866 Treaty. . . .

If the Treaty is enforceable for the ultimate inclusion of Shawnee and Delaware it must be enforceable as to the Freedmen. The fact that internal Cherokee laws were amended to acknowledge the Cherokee Nation's compliance with the 1866 Treaty should not be ignored.⁴⁴

The Allen Court also found that the framers of the 1976 Cherokee Constitution could not have been unaware that the Freedmen had been citizens for more than 110 years,⁴⁵ and were entitled to vote in the 1976 constitutional referendum.⁴⁶ Without reservation the Allen Court reaffirmed the continuing validity of the 1866 Treaty, and its conclusions are supported by numerous federal court opinions and acts of Congress over the 141 years since its passage. Allen observed that in 1888 Congress referenced the 1866 Treaty in an Act specifically securing the Cherokee Freedmen their proportion of certain proceeds of lands under the Act of March 3, 1883.⁴⁷ The following year Congress passed appropriations to fulfill the treaty stipulations to the Freedmen.⁴⁸ When the Cherokee Nation excluded the Freedmen from payments, Congress passed legislation in 1890 authorizing them to bring suit against Nation in the Court of Claims.⁴⁹

In 1895 the United States Court of Claims relied on the Treaty of 1866 in *Whitmire v. Cherokee Nation* in concluding that Cherokee Freedmen, and their descendants, were:

⁴⁴ Exhibit "E," p. 18-19.

⁴⁵ *Id.* at 15.

⁴⁶ *Id.* at 12-13 *holding*: "This Court unanimously agrees on one thing: the Cherokees by blood, Cherokee Freedmen, Shawnee and Delaware were all citizens in 1975 on the eve of the adoption of the Constitution. If they were citizens in 1975, then they all would have been legally entitled to vote."

⁴⁷ Act of October 19, 1888, 25 Stat. L. 608.

⁴⁸ Act of March 2, 1889, 25 Stat. L. 980.

⁴⁹ Act of October 1, 1890, 26 Stat. L. 636.

[A]dmitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.⁵⁰

As a result Cherokee Freedmen were entitled to share in the proceeds from the sale of Cherokee lands. The *Whitmire* Court also took an unequivocal stance on the binding nature of treaty provisions, foreclosing any question as to whether they could be violated by the tribe.

It needs no argument to show that the Cherokee Nation cannot violate its treaty obligations. The United States, not only as a party to the treaty, but as guardian of the rights and interests of those affected by the treaty, will insist upon and secure the observance of all the treaty stipulations.⁵¹

In 1906, citing the Treaty of 1866, the United States Supreme Court ruled that intermarried whites were not entitled to the same citizenship rights as Cherokee by blood, or as adopted Shawnee, Delaware and Freedmen, who acquired their property rights by the express words of treaties.⁵² In 1962 Cherokee Freedmen were included in per capita payments from the sale of tribal lands at the instruction of Congress.⁵³ In 1967, the United States Court of Claims again ruled that the Cherokee Freedmen were entitled to receive payments from the Cherokee Nation judgment fund as descendants of citizens listed on the Dawes Commission Rolls.⁵⁴ In 1971 a federal court reaffirmed that Freedmen and their descendants listed on the Dawes Rolls were entitled to share in Cherokee Nation funds.⁵⁵

Time and again, throughout history, federal courts and Congress have consistently upheld the rights of Cherokee Freedmen based on the continuing validity of the Treaty of 1866. The

⁵⁰ *Whitmire*, Exhibit "C" at 191.

⁵¹ *Whitmire*, Exhibit "C" at 143.

⁵² *Cherokee Intermarriage Cases*, 203 U.S. 76, 88 (1906).

⁵³ Public Law 87-775 (October 9, 1962).

⁵⁴ Undisputed Fact No. 8.

⁵⁵ Undisputed Fact No. 10.