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OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: Wes Nofire, Cherokee Nation Tribal Councilor

Opinion Number: 2020-CNAG-01 Constitutionality of Contracting Resolution

Date decided: April 27, 2019

You have effectively asked the Office of the Attorney General for an official opinion regarding:

- I. **Does the proposed Resolution authorizing the Principal Chief to execute certain contracts, currently under consideration by the Tribal Council, unconstitutionally delegate legislative authority to the executive branch?**

ANSWER AND ANALYSIS

Short Answer:

No, the Resolution Authorizing the Principal Chief to Execute Certain Contracts, is not a violation of the distribution of powers clause under the Cherokee Nation Constitution.

Background:

It is an unusual circumstance that a pending resolution before the Tribal Council would be the subject of an Attorney General Opinion, which typically interprets existing law, and not proposed law. But, these are unusual times in the Cherokee Nation. Since March of 2020, the United States and the world have been trying to deal with a novel coronavirus, which causes a disease known as COVID-19. Nearly a million Americans have been diagnosed with the disease, and over 50,000 Americans have been killed by it, including citizens and employees of the Cherokee Nation. Many of the Nation's businesses and government buildings are closed or restricted to both the public and employees.

The Principal Chief of the Cherokee Nation, Chuck Hoskin, Jr., has proposed a Resolution for the Tribal Council to consider. There are a small number of contracts that require approval by the Tribal Council. Any contract which contains provisions where the Nation consents to be sued must be approved by the Nation's government and per the Constitution, the Tribal Council must approve any pledge of the Nation's credit. As all consumers are aware, contracts for either goods or services often contain "boilerplate"¹ language which says that the party signing the contract agrees that it may be sued in a certain court for violations of the terms of the contract. Very occasionally, a vendor may

¹ boilerplate n. (1893) 1. Ready-made or all-purpose language that will fit in a variety of documents. • Originally, the term may have denoted a steel plate affixed to a boiler. But the modern sense comes from copy and artwork etched on metal plates (or molds made from a master plate) and distributed to newspapers and printers. The copy could not be edited. 2. Fixed or standardized contractual language that the proposing party often views as relatively nonnegotiable. Boilerplate, Black's Law Dictionary (11th ed. 2019) (emphasis added).

insist that a lease agreement for an expensive piece of medical or construction equipment be accompanied by a pledge of credit. The proposed Resolution authorizes the Principal Chief to execute contracts containing these terms in very limited circumstances.

The Principal Chief argues that this authority could mean the difference between life and death in a pandemic. Imagine, for instance, that a safer and more effective ventilator were suddenly produced in limited quantities by a major vendor of medical equipment. The Nation finds itself in a position to purchase one of these machines for W.W. Hastings Hospital, but the competition for these new ventilators is fierce and international. To purchase the ventilator, the Principal Chief must execute within two business days a contract requiring the Nation to agree to be sued for the amount owed on the ventilator if the invoice is not paid within 30 days. If the Principal Chief is unable to immediately execute the contract, the opportunity to purchase the ventilator will instead be given to some other hospital.

This is the practical concern the Resolution is attempting to address.

Analysis:

The substantive provisions of the proposed Resolution, in its entire final form at this time, is reprinted below:

WHEREAS, the Cherokee Nation since time immemorial has exercised the sovereign rights of self-government on behalf of the Cherokee people;

WHEREAS, the Cherokee Nation is a federally recognized Indian Nation with a historic and continual government to government relationship with the United States of America;

WHEREAS, the Principal Chief on behalf of the Cherokee Nation issued an Emergency Disaster Declaration on March 16, 2020 in response to COVID-19, the virus that has been declared an international pandemic;

WHEREAS, certain contracts require Tribal Council authorization prior to execution pursuant to Article X, Section 7 of the Cherokee Nation Constitution; 62 CNCA § 61; 73 CNCA § 4; and 73 CNCA § 301 et seq.; and

WHEREAS, the Cherokee Nation Tribal Council wishes to expedite the execution of certain contracts for emergency response to the COVID-19 pandemic. Such contracts include only those relating to personal protective equipment (PPE); other medical supplies and equipment; software and other technology agreements to meet remote work and telemedicine requirements; and emergency food, supplies and equipment;

BE IT RESOLVED BY THE CHEROKEE NATION, that the Cherokee Nation Tribal Council authorizes the Principal Chief execute contracts that would otherwise require prior approval by the Cherokee Nation Tribal Council pursuant to Article X, Section 7 of the Cherokee Nation Constitution; 62 CNCA § 61; 73 CNCA § 4; and 73 CNCA § 301 et seq. This authority shall be limited to contracts for the emergency response to the COVID-19 pandemic. This authority shall be limited to contracts that do not exceed one million dollars (\$1,000,000.00). Tribal Council shall be notified as soon as possible, but no later than one business day later, of any contracts executed pursuant to this Resolution. Notification shall include name of vendor, amount, and a brief description of goods or services. Further, if the contract is sole sourced, the justification should be included in the notification to Tribal Council. Copies of all contracts executed pursuant to this Resolution will be maintained in the Office of the Attorney General and will be available for review by any Tribal Councilor upon request. The Office of the Attorney General shall ensure that review of any contract signed pursuant to this Resolution will occur virtually if needed.

BE IT FURTHER RESOLVED BY THE CHEROKEE NATION, that this Resolution expires June 15, 2020 or simultaneously with the expiration of any Emergency Disaster Declaration by the Principal Chief whichever is sooner.

Prior to an analysis of the Constitutional provisions, it is important to discuss what this Resolution does and does not allow the Principal Chief to do.

The Resolution recognizes that the Cherokee Nation is in a state of emergency due to the global pandemic caused by the novel coronavirus. The Resolution lays out a very narrow authorization which will permit the Principal Chief to execute contracts that may otherwise require prior approval by Cherokee Nation Tribal Council. However, most of those conditions of approval are required by statute, and not the Constitution. The resolution authorizes the Principal Chief to execute contracts that statutorily require Council approval. Those contracts that statutorily require approval include contracts that involve the “sovereign immunity of Cherokee Nation,² substantial assets or credit of Cherokee Nation, or where real property of Cherokee Nation is involved, or where significant rights and privileges of the Cherokee people are involved.”³ See 73 CNCA § 304.

² It shall be noted that while the Constitution of the Cherokee Nation affirms the inherent sovereignty of the tribe, it does not address “sovereign immunity” as it relates to contracts. Sovereignty is the ability to govern oneself, it is not subject to temporary waiver by any branch of the government. Sovereign immunity, on the other hand, is a judicially created concept that stands for the idea that a “sovereign” (tribe, state or federal government) cannot be sued without its consent. The Constitution of the Cherokee Nation does not even mention “waivers of sovereign immunity” and more specifically it does not reserve that “power” to the Tribal Council. It must be noted and strongly emphasized here that a “waiver of sovereign immunity” for the purpose of a potential lawsuit, is not “waiving the sovereignty of the Nation,” and that the Constitution does not give any branch the sole power to waive sovereign immunity.

³ The vast majority of the contracts entered by the Cherokee Nation are not reviewed, approved, or even seen by the Cherokee Nation Tribal Council. Their ability to approve contracts only arises when there is a pledge of credit, waiver of sovereign immunity, or investment of the Nation’s funds. Article X, Section 7 Cherokee Nation Constitution; 62 C.N.C.A. § 61; 73 C.N.C.A. § 4; and 73 C.N.C.A. §§ 301 *et seq.*

The contracts in question under the proposed resolution must be limited to those for “personal protective equipment (PPE); other medical supplies and equipment; software and other technology agreements to meet remote work and telemedicine requirements; and emergency food, supplies and equipment.” See proposed Resolution R-____-20. The contracts also must not exceed \$1,000,000. Additionally the Council must receive notification within 24 hours of the vendor, type, and amount of contract. Finally, if the contract was sole sourced, the justification must be provided to Council. While Council normally would have access to this information, they will actually receive it faster under this proposed Resolution than they would under the existing laws of the Nation.⁴

The proposed Resolution does not allow the Chief to spend money that has not been appropriated. It does not allow the Chief to enter personal service contracts outside of COVID-19 emergencies. And it certainly does not allow the Chief to exercise the legislative or appropriations powers of the Council.

The Constitution and statutes of the Cherokee Nation mentioned in the Resolution and that may otherwise require the Cherokee Nation Tribal Council to approve or ratify a contract are:

- 1) Article X, Section 7 of the Cherokee Nation Constitution;
- 2) 62 C.N.C.A. § 61;
- 3) 73 C.N.C.A. § 4; and

⁴ See the Enhanced Governmental Records Act of 2014, 19 C.N.C.A. §§ 41, *et seq.*, which allows up to twenty (20) days to make governmental records, including contracts, available to Tribal Council.

4) 73 C.N.C.A. §§ 301 *et seq.*

The only Constitutional reference in the proposed Resolution is to Article 10, Section 7 which involves the Nation's pledge of credit. Section 7 states:

The credit of the Cherokee Nation shall not be given, pledged, or loaned to any individual, firm, company, corporation, or association without the approval of the Council. The Cherokee Nation shall not make any donations by gift, bonus, or otherwise, to any individual, firm, company, corporation, or association without the approval of the Council.

In order to address whether the Council providing prior approval for limited pledges of credit violates the "Distribution of Powers" clause of the Cherokee Nation Constitution, we must first examine the language of the Constitution as well as the Supreme Court's interpretation of the "Distribution of Powers" clause contained in Article V of the Cherokee Nation Constitution.

First, the Cherokee Nation Constitution separates the Cherokee Nation's government into three branches: Executive, which is led by the Principal Chief, Deputy Chief, cabinet members, and contains the majority of Nation's employees; Legislative, led by the elected Tribal Council; and Judicial, led by the judges of the District and Supreme Court of the Nation. The Constitution lays out the duties and powers of each branch. The Constitution further defines the "Distribution of Powers" between the three branches stating that "The powers of the government of the Cherokee Nation shall be divided into three (3) separate branches: Legislative, Executive and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial branches of government shall be

separate and distinct and no branch shall exercise the powers properly belonging to either of the others.” Cherokee Nation Constitution Article V.

The Cherokee Nation Supreme Court (including its predecessor the Judicial Appeals Tribunal) has on occasion addressed the “Distribution of Powers” contained in the Cherokee Nation Constitution. See *In Re: Effect of Cherokee Nation v. Nash*, SC-2017-07; *Cherokee Nation v. O’Leary*, SC-2006, 13; *Mayes v. Smith*, JAT-01-12; *Demoss v. Eagle*, JAT-98-10B; *Phillips v. Eagle*, JAT 98-09; *Cantrell v. Cherokee Nation*, JAT 97-01. The Court has repeatedly stated that one branch of government cannot exercise the powers or duties of the other two branches, as dictated by the Cherokee people through the Cherokee Nation Constitution. In order to determine whether one branch of the Cherokee Nation is impermissibly exercising the powers of another branch, we must first examine the powers and duties assigned to each branch by the Constitution. This opinion will focus on the powers and duties of the Executive and Legislative Branches.

Under the Cherokee Nation Constitution, the Principal Chief shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as shall be prescribed by law, all communications and business of the Cherokee Nation. The Principal Chief may cause to be formed and operated, trusts, the beneficiary of which shall be the Cherokee Nation and these trusts shall be granted such powers as provided by law for public trusts. Authorization for these trusts, however, must be approved by a majority vote of the Council.

Cherokee Nation Constitution Article VII, Section 9.

These powers are broad but specifically include conducting the business of the Nation. “The business of the Nation” that must be conducted by the Principal Chief includes executing contracts,⁵ hiring and firing employees,⁶ and managing the day to day operations of the Nation. Council may prescribe via resolution and legislation the general parameters under which this business is conducted. However, Council cannot, by legislation, resolution or otherwise, so constrict the actions of the Principal Chief that it interferes or coopts his ability to carry out the business of the Nation. See 2012-CNAG-05 (holding that “the Principal Chief can employ individuals to assist with the day-to-day affairs of running the Cherokee Nation as deemed proper. As such, the Act which imposes restrictions upon the Principal Chief’s ability to employ such administrative assistants as deemed proper, is in direct violation of this Section” [Article VII, Section 11 of the Cherokee Nation Constitution]); 2014-CNAG-01 (holding that the Chief, via executive order, could pay employees more than the minimum wage established in an Act passed by Tribal Council because the legislation served as a floor, not a ceiling).

⁵ Consistent with Council action including budget appropriations and the Cherokee Nation Employment Rights Act (“TERO”), 40 C.N.C.A. § 101 *et seq.*, providing preference in contracting and hiring to Cherokee Nation citizens, other Cherokee tribal citizens, other members of federally recognized tribes.

⁶ Consistent with Council action including the Employee Access to Justice Act of 2017, 51 C.N.C.A. §§ 1001, *et seq.*, providing the reasons that Cherokee Nation (government and entity) employees can be terminated from employment, waiving sovereign immunity for suits in the Cherokee Nation Courts, and providing remedies for wrongful termination.

Conversely, the Constitution reserves to the Tribal Council more specific and enumerated powers. Those powers include general legislative power to “establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution.” Article VI, Section 7. Council has other specific constitutional duties and powers not pertinent to this opinion including codification,⁷ annual appropriations,⁸ requiring maintenance and record of financial records,⁹ authorizing investment of the Nation’s funds,¹⁰ and ensuring that all expenditures

⁷ Title VI, Section 11 of the Cherokee Nation Constitution. The Council shall establish a continuing system of permanent publication for all laws of the Cherokee Nation and judicial opinions of the highest appellate court. The system shall provide for regular updating, indexing and digesting and shall be of public record at all times. The text of all laws, resolutions, judicial opinions and orders, except otherwise protected by law, and all other governmental publications, except those by Nation-owned entities, shall be in the public domain and free from encumbrances against use by the Citizens. This shall not constrain the Nation from copyrighting other aspects of governmental publications, except that citizens shall always have license for personal use of the copyrighted work without notice or fee.

⁸ Title X, Section 2. The Council shall provide by law for annual expenditure of funds, and the source from which funds are to be derived, to defray the estimated expenses of the Executive, Legislative, and Judicial branches and the departments of government of the Cherokee Nation for each fiscal year. The budget shall not exceed estimated revenues.

⁹ Title X, Section 4 of the Cherokee Nation Constitution. The Council shall require that records be maintained and provided to the Council of all funds, monies, accounts and indebtedness and all other accounts bearing upon the fiscal interests, including but not limited to, any and all outside business interests, both for-profit and not for-profit, of the Cherokee Nation by the use of an accounting system adhering to Generally Accepted Accounting Principles (GAAP). The annual financial statement shall be audited by a Certified Public Accountant and presented to the Council within six months following the end of each fiscal year. Unaudited reports will be submitted as required by the Council.

¹⁰ Title X, Section 6 of the Cherokee Nation Constitution. The Council shall authorize the Treasurer to invest funds or money of the Cherokee Nation and determine the preference

are for specific, designated purposes.¹¹ The Constitutional power and duty of the Tribal Council that seems to be of issue in the proposed Resolution is Article 10, Section 7 of the Cherokee Nation Constitution. Section 7 states in its entirety

The credit of the Cherokee Nation shall not be given, pledged, or loaned to any individual, firm, company, corporation, or association without the approval of the Council. The Cherokee Nation shall not make any donations by gift, bonus, or otherwise, to any individual, firm, company, corporation, or association without the approval of the Council.

Some have argued that the proposed Resolution violates the Constitution because it somehow assigns or delegates to the Principal Chief this constitutionally required Tribal Council approval of pledging the Nation's credit. This is not the case. The proposed Resolution does not delegate the Tribal Council's authority to the Chief, but is the approval of the Council. The Resolution directs the Chief to execute certain contracts, including possible pledges of credit that meet certain narrow and specifically enumerated criteria.

to be given to the security for such investments, the manner of selecting the securities, prescribing the rules, regulations, restrictions and conditions upon which the funds shall be loaned or invested, provided that no investment shall be in mortgages other than first mortgages only, and do all things necessary for the safety of the funds and permanence of the investments. If required by law, such investments would be subject to the approval of the Secretary of the Interior.

¹¹ Title X, Section 8 of the Cherokee Nation Constitution. All laws authorizing expenditures of money by and on behalf of the Cherokee Nation shall specify the purpose for which the money is to be used, and the money so designated shall be used for no other purpose. No monies or resources of the Cherokee Nation or any of its entities shall be used to pay for representation of a defendant in a criminal matter, except where a public defender is authorized under Cherokee law. Annual expenditures shall not exceed the available funds.

The Resolution is the Tribal Council granting approval for a pledge of credit, not delegating the approval to the Chief. This Constitutional requirement simply says the Council must approve pledges of the Nation's credit. The provision does not say how Council must approve it, and does not require prior approval or review of the terms of the credit.¹² The Resolution in question is not Tribal Council delegating or abdicating its Constitutional duties, but instead a direct and necessary exercise of those duties. The proposed Resolution is not only constitutionally valid, it is an example of how the separate and equal branches of the Cherokee Nation may work together in this unprecedented emergency to ensure that the needs of our citizens are met without delay.

Early in the COVID-19 pandemic response the Nation had two separate contracts that had provisions that would not have allowed them to be executed without Council approval under the current laws and policies of the Nation. In both instances, the employees of the Nation were able to find alternative language that satisfied the vendor or the vendor was able to insert language that protected the Nation. In the event that the Nation was unable to reach such an agreement with the vendor, without this Resolution, the quickest that Tribal Council could approve a contract is 10 days from when the need arose. It has been suggested that Council could call an "emergency meeting" to *immediately* deal with any urgent contracts that arose, but that is not possible.

¹² To be sure, Titles 62 and 73 of the Cherokee Nation Code do prescribe how these approvals are granted, but this Resolution excepts this limited class of contracts from those statutes for a limited amount of time, due to an emergency.

The Constitution governs regular and special meetings of the Council. Outside of regularly scheduled meetings, Council can only convene pursuant to Article VI, Section 5 of the Constitution, which states:

Special meetings of the Council may be called: (A) by the Principal Chief, (B) by the Deputy Principal Chief when he or she has the full powers of the Principal Chief as elsewhere defined, (C) upon written request of fifty-one percent (51%) of the members of the Council, or (D) upon the written request of ten percent (10%) of the number of registered voters who voted in the last general election of the Cherokee Nation. The purposes of said meeting shall be stated in a notice published not less than ten (10) days prior to the meeting, and the Council may not consider any other subject not within such purposes. No meetings may convene until thirty (30) days have elapsed after the adjournment of a prior session or meeting unless called pursuant to Section 7 of Article VII.

Section 7 of Article VII states:

The Principal Chief may, on extraordinary occasions, convene the Council at the seat of government pursuant to Article VI, Section 5, and such notice and other laws as may be prescribed by the Council. The purposes of said meetings must be stated and the Council may consider only such matters as are specified in the call of the extraordinary meetings. Before the extraordinary meetings may be legally sufficient to conduct business, a quorum of the Council must be present.

These two Constitutional provisions determine the only time and circumstances under which the Cherokee Nation Tribal Council may convene for a special meeting. There

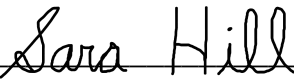
are no allowable exceptions for meeting with 24¹³ or 48 hours' notice. The ten (10) day notice applies to both special meetings called by the Chief and special meetings that Council initiates on their own. However, if a Special Meeting is initiated by Tribal Council, it cannot "convene until thirty (30) days have elapsed after the adjournment of a prior session or meeting." Cherokee Nation Constitution, Article VI, Section 5. Therefore, in an emergency situation, 10 days is the soonest that Tribal Council can legally convene for a meeting to conduct the business of the Nation. It is not legal, practical, or feasible to hold emergency meetings with less than 10 days' notice nor is it possible for Council to hold a "special meeting" every 10 days.

There is nothing in this proposed Resolution that violates the Distribution of Powers Clause of the Cherokee Nation Constitution. There is nothing in this proposed Resolution that usurps the normal appropriations process of the Nation. And there is nothing in this proposed Resolution that violates any law or policy of the Nation. Quite the opposite, this proposed Resolution is a valid exercise of the Constitutional powers reserved to both the Legislative and Executive Branches of the Nation. It is also a cooperative and measured approach to dealing with emergencies that may save the lives of our citizens.

¹³ The Open Meetings Act of the Cherokee Nation allows public bodies to have a special meeting with only 24 hours' notice, however, that provision cannot apply to Tribal Council when the Constitution states that all Special Meetings of the Council must provide 10 days' notice. See 67 CNCA § 109. "Emergency Meetings" are not otherwise authorized under the Cherokee Nation Constitution. Tribal Council can have regularly scheduled meetings that must include a ten (10) day notice via a publically posted agenda, or Tribal Council can hold a Special Meeting, called by the Principal Chief or Tribal Council, which must also include a ten (10) notice via publically posted agenda. That is it. The Constitution does not allow Tribal Council to hold "emergency meetings."

Conclusion:

It is the Official opinion of the Office of the Attorney General that the proposed Resolution is Constitutionally sound. This Opinion shall have the force and effect of law “until a differing opinion or order is entered by a Cherokee Nation Court.” 51 C.N.C.A. § 105(B)(4).



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