IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CHEROKEE NATION, Plaintiff, v. RAYMOND NASH, *et al.*, Defendants /Cross-Claimants/ Counter-Claimants -and- MARILYN VANN, et al. Intervenors/Defendants/Cross- Claimants/Counter-Claimants v. THE CHEROKEE NATION, *et al.*, Counter-Defendants, -and- KEN SALAZAR, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR, Cross-Defendants.	)	Case No. **4:11-CV-648-TCK-TLW**

PLAINTIFF, CHEROKEE NATION'S REPLY TO THE RESPONSE OF THE FEDERAL DEFENDANTS TO THE FREEDMEN'S MOTION FOR RECONSIDERATION OR CERTIFICATION

In reply to the assertions of the Federal Defendants in their Response to the Freedmen's Motion for Reconsideration or Certification (Doc. 192), and in accordance with this Court's Order (Doc 194), Plaintiff, Cherokee Nation, respectfully submits the following:

In their Response, the Federal Defendants baldly assert that their counterclaim "which forms the heart of this lawsuit, will unquestionably survive even if the case is transferred," and that the Nation "cannot assert immunity to this claim in any forum." (Doc 192). It is worthy of note that, despite all the litigation and controversy surrounding this subject since 2003, the Federal Defendants never brought suit on this issue, anywhere, until they consented to have the

matter adjudicated in this case, in this Court, and correspondingly filed their counter-claim. In fact, the Federal Defendants moved to have the DC *Vann* case dismissed and argued that the Cherokee Nation had sovereign immunity and was a required party there[1]. They still raise their own sovereign immunity in that case[2].

The Federal Defendants cite to four cases, for the proposition that tribal sovereign immunity cannot bar a suit by the United States. None of those cases is on all fours, and notably, none is from the Tenth Circuit[3]. The Nation would first assert that its Complaint, asking for an interpretation on the disputed provision of the Treaty of 1866, is as much "the heart of this lawsuit" as the Federal Defendants' counterclaim. And, the Nation has asserted, and will again assert (if this matter is transferred) "immunity to this claim" in the District of Columbia. In his opinion in *Vann*[4], Judge Kennedy stated:

> The Freedmen assert that the Nation has waived its immunity as to all cases concerning the "subject matter" of *Nash* . . . The Nation responds that the principles of tribal sovereign immunity allow it to bring the Oklahoma action while maintaining its immunity from this suit. The Nation is correct.

Vann v. Salazar, 883 F. Supp. at 53.[5]

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[1] *See, Vann v. Salazar*, Case No 03-1711 (HHK)(D.D.C.) Government Motion to Dismiss, dated January 30, 2009, at 39-40, 42 ("A determination of the meaning of the Treaty without the Nation present would impede the Tribe's ability to protect its interests in this issue."; "It is well-established law that parties to a contract are generally indispensable parties to suit seeking to modify, invalidate, or interpret a contract."; "Chadwick Smith cannot adequately represent the Cherokee Nation with respect to claims for relief that directly implicate both the Treaty to which the Tribe is a party and the government-to-government relationship between the Tribe and the United States.")

[2] The Government's partial motion to dismiss is still pending in the DC *Vann* action; it seeks dismissal of all claims against the Government except for two claims relating to the CDIB cards. The USA continues to contend that the DC *Vann* case should be dismissed almost in its entirety against it. *Vann v. Salazar*, Case No 03-1711 (HHK)(D.D.C.)(Doc 118).

[3] Indeed, in the *Red Lake* case, the Court there recognized that it was a "question of first impression in this Circuit." *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987).

[4] *Vann v. Salazar*, 883 F.Supp.2d 44 (D.D.C. 2011), *rev'd on other grounds*, 701 F.3d 927 (D.C.Cir. 2012). However, see Doc 83 in this case wherein Judge Kennedy said: "The Court does not reach the Nation's sovereign forum immunity argument, but nevertheless determines that the case should proceed in the Northern District of Oklahoma."

[5] The D.C. Circuit did not address the issue of forum immunity. *Vann v. United States*, 701 F.3d 927, 930 (D.C.Cir

In the Tenth Circuit, it is well settled that an Indian tribe's sovereign immunity is co-extensive with that of the United States, and superior to that of individual states. *Miner v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007); *Somerlott v. Cherokee Nation Distributors*, 686 F.3d 1144, 1151 (10th Cir. 2012). Any waiver of sovereign immunity must be clearly and explicitly expressed and cannot be implied. *Walton v. Pueblo*, 443 F.3d 1274, 1277 (10th Cir. 2006); *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982). While it is true that the Cherokee Nation, through the action of its Tribal Council and Principal Chief as directed to the Attorney General, has clearly and explicitly *waived* its sovereign immunity to suit in the Northern District of Oklahoma, it has clearly and explicitly *asserted* that sovereign immunity in the District of Columbia.

While an argument can be made that a counterclaim sounding in recoupment may be brought against an Indian tribe[6], when it affirmatively institutes a lawsuit in that same court, it is very disputable that the Federal Defendants' counterclaim here could survive a transfer to another district over the Nation's overt objection and denial of a waiver of sovereign immunity. First, the Nation does not necessarily concede that the Federal Defendants' counterclaim does "sound in recoupment,[7]" nor does the Nation concede that a counterclaim can survive against it over its own assertion of sovereign immunity. Second, the Nation's government has only authorized a waiver of sovereign immunity in the Northern District of Oklahoma, and the Nation must protest a lawsuit in any other forum. Third, there is a body of case law holding that a

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2012).

[6] *See, Berrey v. Quapaw Tribe*, 439 F.3d 636, 643 (10th Cir. 2006), however *see* the United States' Supreme Court's reasoning in *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) "*W*e held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. (internal citation omitted) "Possessing ... immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Ibid.*

[7] Recoupment involves compulsory counterclaims. Counterclaims are compulsory if they would later be barred by res judicata. *Berrey, supra* . Whether or not the United States could later bring an action on the disputed Treaty provision if it did not participate in this lawsuit is arguable.

sovereign may select the forum in which it exercises a waiver. *See, e.g., West v. Gibson*, 527 U.S. 212, 226, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999).

Where a sovereign has granted an explicit waiver of sovereign immunity, the Court is bound by the terms of that waiver. "When consent to be sued is given, the terms of the consent establish the bounds of a court's jurisdiction." *Ramey*, 673 F.2d at 320. The Cherokee Nation government's consent is contained within its Tribal Council Resolution, passed by the Tribal Council, and signed by the Principal Chief. That Resolution states, in part:

> WHEREAS, Legislative Act 07-01 provides that litigation brought on behalf of Cherokee Nation and involving substantial assets or sovereignty of the Nation be authorized by the Principal Chief and ratified by the Council;
>
> WHEREAS, in Vann v. Kempthorne, 534 F.3d 741, (D.C.Cir. 2008) the Court of Appeals for the Federal Circuit ruled that the Cherokee Nation must be dismissed in the Vann case filed in the United States District Court for the District of Columbia (Case No. 1:03CV01711);
>
> WHEREAS, it is desirable for a federal court to determine the narrow issue of construction of the 1866 Treaty language and any federal law affecting that treaty regarding federal rights, if any, of freedmen and their descendants;
>
> WHEREAS, such a federal court ruling would be binding upon both parties to the Treaty of 1866;
>
> WHEREAS, it is determined that it is in the best interest of the Nation to affirmatively file a federal action in the Northern District of Oklahoma on these matters.
>
> BE IT RESOLVED BY THE CHEROKEE NATION, that litigation is hereby ratified in Cherokee Nation v. Nash, et al., Case No. 09 CV-052 (TCK) in the U.S. District Court for the Northern District of Oklahoma, and that the Attorney General is authorized to take such action as necessary to pursue such litigation and ensure that the Nation's interests are fully represented.

Cherokee Nation Tribal Council Resolution 22-09 (Doc 133-1). This Resolution expressly states the agreement of the Cherokee Nation to suit. It states, with specificity, the case and the court in which such approval is granted – this case, in this Court. This explicit waiver is binding on the Nation, and should be accepted as the full extent of the Nation's waiver.

The Federal Defendants' urging of this Court to reconsider its latest denial of a transfer raises no new substantive issues that were not before the Court in making the initial determination. The Cherokee Nation has waived its sovereign immunity in this Court, and will continue to assert its immunity and protest any inclusion in the District of Columbia. The United States has agreed to be a party in this Court. There are no legal reasons that necessitate a transfer. The Freedmen Defendants are also parties to this lawsuit, and neither the Nation nor the United States has moved to dismiss their claims on the meaning of the Treaty provision. If the "first to file" rule does apply (and for reasons previously stated the Nation continues to assert that it does not), then the Nation's continued objections to the DC forum and assertion of sovereign immunity there provide an exception to that rule which justifies leaving the case in the Northern District of Oklahoma. The Freedmen cannot raise the same assertion that the United States uses – that the Tribe's sovereign immunity does not apply to them. This is the only forum in which all three groups have consented to be sued, and have requested a decision on the interpretation of Article IX. If this forum changes, then that consent will be lost. Certainly the convenience of the parties, need for ultimate resolution on the issue, and public policy concerns weigh heavily on the side of leaving the case here.

In its Order denying the latest application for stay/transfer the Court reasoned:

> . . . . the Court now exercises its discretion to reach the "special circumstances" exception and indeed finds that special circumstances trump the first to file rule in this case. ***The special circumstances are the Cherokee Nation's waiver of immunity in***

> ***the second-filed lawsuit and successful assertion of immunity in the first-filed lawsuit. The Cherokee Nation has made clear that it intends to waive immunity and seek declaratory relief exclusively in this venue. Thus, upon transfer, it would presumably cease to seek declaratory relief and would re-assert immunity for any pending counterclaims.*** There would ultimately be no judgment for or against the Cherokee Nation itself, despite the Cherokee Nation's consent to suit in this venue. Under these unique circumstances, the Court finds that immunity in the transferee forum is a special circumstance that overrides the general first to file rule.

(Doc. 189, pp. 6 – 8, emphasis added). There has been no change in circumstances or the law, other than the United States bald assertion that its counter-claim would "undeniably" survive the transfer. As the Nation has pointed out, above, that assertion is not the legal absolute that the Federal Defendants would have this Court believe.

There is likewise no new law, evidence, or assertions under the 28 U.S.C. §1404(a)[8] analysis. In disposing of this matter the Court judiciously reasoned:

> The Court finds that this forum is not inconvenient for any party. The Freedmen Defendants argue that the Cherokee Nation's selected forum should not be entitled to any deference because the Cherokee Nation's headquarters are located in the Eastern District of Oklahoma. This argument is dubious, given that much of the Cherokee Nation's land and citizens are located in this district. This district qualifies as a "home forum" for the Cherokee Nation, and it is certainly more of a home forum than the District of Columbia. More importantly, this case will likely be decided on the briefs and exhibits, rather than on the basis of a trial. Thus the convenience of witnesses is not an important factor.

(Doc 189, p. 11).

And, again, as the Nation earlier responded, there is no recent progress made in the decade old District of Columbia case other than the naming of a new Judge to replace now-

[8] For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

retired Judge Kennedy. Still, no briefing schedule or deadlines have been entered. As this Court found:

> . . . the public interest at stake in this case is a resolution between the Cherokee Nation, the Federal Defendants, and the Freedmen Defendants regarding Freedmens' citizenship rights within the Cherokee Nation. The Cherokee Nation is willing to submit to this Court's jurisdiction to answer this important question, while it will continue to resist enforcement of any judgment rendered in the first-filed forum. Under these circumstances, the Court finds that the public interest is best served by proceeding in this venue.
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> … This Court cannot in good conscience transfer or stay the only action in which the Cherokee Nation has consented to resolution of these important issues.

(Doc 189, pp. 12, 13).

CONCLUSION

Whether or not the United States is correct in its assertion that its Counter-claim against the Cherokee Nation would survive a transfer to a different federal court, over the Nation's objections, it is clear is that such a transfer would spur additional motions, arguments, and appellate practice that would only serve to further postpone a decision on the merits. As this Court is aware, the granting or denial of a motion to dismiss on the grounds of sovereign immunity is immediately appealable. The matter would very probably go back up to the D.C.Circuit, again before any briefing on the "heart of the matter" – the interpretation of Article IX of the Treaty of 1866 – occurred. In this Court, and this Court alone, the sovereigns have agreed to be sued and that the matter should be heard on the merits. Transfer should continue to be denied for this overwhelming public policy consideration alone.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2013, I electronically transmitted the Reply to the Response of the Federal Defendants to the Court via ECF for filing and also electronically transmitted a copy of the same via email to the following:

Amber Blaha
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Respectfully submitted,

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