IN THE MUSCOGEE (CREEK) NATION SUPREME COURT

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

Appeal from District Court, Okmulgee District, Muscogee (Creek) Nation.

Graydon D. Luthey, Jr., R. Trent Shores, and Barrett L. Powers, GableGotwals, Tulsa, Oklahoma; Geri Wisner, Jeremy Pittman, and Clinton Wilson, Muscogee (Creek) Nation, Department of Justice, Okmulgee, Oklahoma, for the Appellant, Citizenship Board of the Muscogee (Creek) Nation.

Jana L. Knott, Bass Law, Oklahoma City, Oklahoma; Damario Solomon-Simmons, Solomon Simmons Law, Tulsa, Oklahoma; M. David Riggs, Riggs, Abney, Neal, Turpen, Orbison & Lewis, Tulsa, Oklahoma, for the Respondents, Rhonda K. Grayson and Jeffrey D. Kennedy.

ORDER AND OPINION

MVSKOKVLKE FVTCECKV CUKO HVLWAT VKERRICKV HVYAKAT OKETV YVNKE VHAKV HAKATEN ACAKKAYEN MOMEN ENTENFVTCETV, HVTVM MVSKOKE ETVLWVKE ETEHVLVTKE VHAKV EMPVTAKV.[1]

Before: ADAMS, *C.J.*; LERBLANCE, *V.C.J.*; DEER, SUPERNAW, THOMPSON, *JJ.*

HARJO-WARE and MCNAC, *JJ*, recused and not participating in the decision.

Order of the District Court affirmed.

[1] "The Muscogee (Creek) Nation Supreme Court, after due deliberation, makes known the following decision based on traditional and modern Mvskoke law."

For centuries, our people have endured removal from our homelands, forced assimilation, and near extinction in exchange for promises from the federal government, through numerous treaties. The United Stated Supreme Court has honored these treaties and "[held] the government to its word."[2] Today, our Nation's Supreme Court is presented with a similar challenge. Are the Creek Freedmen, and their descendants, entitled to "all the rights and privileges of native [Creek] citizens," as guaranteed by the Treaty of 1866, between the United States and the Muscogee (Creek) Nation? Are we, as a Nation, bound to treaty promises made so many years ago? Today, we answer in the affirmative, because this is what Mvskoke law demands.

BACKGROUND

I. Treaty of 1866

In September of 1865, five (5) months after the surrender of the Confederacy, and the end of the American Civil War, a delegation was sent by President Andrew Johnson to Fort Smith, Arkansas for the purpose of negotiating new treaties with any of the Indian Nations located within Indian Country, or in the State of Kansas. The position of the United States was that, "[those] nations having entered into treaties with the so-called Confederate States, and the rebellion being now ended, [were left] without any treaty whatever or treaty obligations for protection by the United States."[3] The federal government required that any new treaty negotiated by this delegation include the stipulation that "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."[4] [Emphasis Added]

---

[2] McGirt v. Oklahoma, 591 U.S. 894, 898. (July 9, 2020).
[3] Report of D.N. Cooley, Southern Superintencency, October 30, 1865., 296, 298.
[4] *Id.*

Despite initial opposition, on June 14, 1866, the Creek Nation entered into a new treaty with the United States consistent with the above-referenced stipulations. Specifically, the Creek Nation agreed to the following terms in Article II of the treaty:

> The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and 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 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*, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.
>
> [Emphasis Added]

In the years immediately following ratification of the 1866 treaty, the Creek Nation took specific actions to fulfill its Article II treaty obligation to incorporate the Creek Freedmen as citizens of the Nation.

On October 12, 1867, the Creek Nation adopted a new Constitution, vesting the law-making power of the Nation within two houses, the House of Warriors and the House of Kings. The new Constitution authorized each etvlwv (tribal town) to elect a member to the House of Kings and House of Warriors. At the time, three (3) African Creek towns (Arkansas Colored, North Fork Colored, and Canadian Colored) were represented in the legislative body under these Constitutional provisions.[5] [6]

[5] Affidavit of Gary Zellar, Doc. 10, Exhibit D, Muscogee (Creek) Nation District Court Record.

[6] During oral argument, counsel for the Appellant agreed that this "certainly occurred." Recording of June 10, 2025, Oral Argument, at 27:23.

On October 1, 1877, in a letter addressed to the legislative assembly, Principal Chief Ward Coachman recommended that the legislative body take action to recognize the citizenship rights of the Creek Freedmen, stating:

> ...inasmuch as there are Freedmen among us, whose rights under the treaty of 1866, have not by some been recognized, and in consequence thereof have been discouraged, are not improving or advancing as they might do; and the treaty relative thereto being so plain that no one can mistake or misunderstand it. I allude particularly to those known as the McGilvery or McGilbrey Freedmen whom we know belong to our own people, were here within our country when the treaty was made and have remained among us ever since. I would recommend if necessary that some action be had recognizing the rights of all who under the treaty are entitled to citizenship and equal rights and privileges with us.

The legislative body subsequently adopted a new law concerning "Doubtful Citizenship[,]" which provided that "[a]ll persons who have been at any time adopted by the recognized authorities of the Muskogee Nation, and all persons of African descent, who were made citizens by the treaty of June, 1866, between the Creek Nation and the United States, shall hereafter be recognized as citizens of the Muskogee Nation."[7]

On October 20, 1886, the historic Supreme Court of the Creek Nation held 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 the Nation to remain within the limits of the jurisdiction of the Nation."[8]

---

[7] Constitution and Laws of the Muskogee Nation, as compiled by L.C. Perryman, March 1, 1890, Chapter VII, Article 1, Section 2.

[8] In re: Roley McIntosh, 7 Mvs. L.R. 348, 349.

It is clear that the historic Creek Nation, including the executive, legislative, and judicial branches of its constitutional government, understood the terms of the 1866 Treaty to require citizenship for the Creek Freedmen on the same level as by-blood citizens.

II. Allotment and Assimilation[9]

At the close of the 19th century, the United States government shifted its tribal policy to one of assimilation. In 1887, the General Allotment Act was passed by the United States Congress, taking lands held in trust for Indian tribes and redistributing smaller portions of these lands to individual tribal members in fee simple.[10] The Muscogee (Creek) Nation was excluded from this general allotment as, "the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned to them."[11] "[B]ecause of the special rights that had been conferred upon these tribes, and the fact that they held patents for their respective lands, it was considered proper, if not indispensable, to obtain the consent of the Indians to the overthrow of the communal system of land ownership."[12] As a result, the Dawes Commission was created by the United States Congress in 1893 to work out the terms of "extinguishment of the national or tribal title" with the Muscogee (Creek) Nation.[13] The tribe resisted cession of its communal lands to such an extent that in a report to Congress in December of 1894, the Commission stated "that the Indians would not, under any circumstances agree to cede any portion of their lands to the Government, but would insist that if any agreement were made for allotment of their lands it should all be divided equally among them."[14] Achieving no

[9] As explained in SC-2021-03, Thlopthlocco Tribal Town v. Anderson, et al., Order and Opinion. (February 28, 2022).
[10] 24 Stat. 388.
[11] *See*, Woodward v. De Graffenried, 238 U.S. 284, 293 (June 14, 1915).
[12] *Id.*
[13] Act of March 3, 1893, ch. 209, 27 Stat. 612, 645.
[14] S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894).

allotment agreement with the tribes, the United States Congress passed the Curtis Act in 1898, which, in addition to requiring the registration of all native-born tribal members and – separately – all "Black Creeks" on what would be known as the Creek By Blood Dawes Roll and the Creek Freedmen Dawes Roll, also would (1) initiate a forced allotment within the Muscogee (Creek) Nation if an allotment agreement was not timely reached, (2) made tribal law unenforceable within the United States and its territories, and (3) abolished tribal courts.[15] As a result, an allotment agreement of Muscogee (Creek) lands was entered in 1901, which also provided that "[t]he tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper."[16] However, this date was extended indefinitely by Congress in 1906.[17] "[B]ecause there exists no equivalent law terminating what remained, the Creek Reservation survived allotment."[18]

III. Reorganization

In 1934, the United States Congress passed the Indian Reorganization Act, which authorized "[a]ny Indian tribe, or tribes, residing on the same reservation" the right to organize and adopt a constitution for self-government.[19] The Muscogee (Creek) Nation was excluded from this initial legislation. However, in 1936 Congress passed the Oklahoma Indian Welfare Act (hereinafter, the "OIWA"), which extended similar opportunities for Oklahoma tribes.[20] On August 20, 1979, the Muscogee (Creek) Nation adopted a new Constitution pursuant to the terms

[15] Act of June 28, 1898, ch. 517, 30 Stat. 495. *See also*, Muscogee (Creek) Nation v. Hodel, 670 F. Supp 434 (September 30, 1987), for discussion on the revival of the Muscogee (Creek) Nation tribal courts.
[16] Creek Allotment Agreement, ch 676, 31 Stat. 861.
[17] Act of April 26, 1906, 34 Stat. 137.
[18] McGirt v. Oklahoma, 591 U.S. 894, 906. (July 9, 2020).
[19] Act of June 18, 1934, 48 Stat. 984.
[20] Act of June 26, 1936, 49 Stat. 1967.

of the OIWA. Article III, Section 2 of the 1979 Constitution provides the following requirements to establish citizenship within the Muscogee (Creek) Nation:

> Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians by blood whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indian by blood whose names appear on the final rolls as provided by the act of April 26, 1906 (34 Stat. 137); (except that an enrolled member of another tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.)

IV. Procedural Background

On July 20, 2018, the Respondents filed a federal action with the United States District Court for the District of Columbia, seeking an injunction that would require the Muscogee (Creek) Nation to recognize their citizenship pursuant to the Treaty of 1866. On May 6, 2019, the District of Columbia issued its *Memorandum Opinion* dismissing the action without prejudice in order for the Respondents to first exhaust all tribal remedies within the courts of the Muscogee (Creek) Nation.

In June of 2019, Respondent Grayson filed her application for citizenship with the Appellant Board. The application was denied on July 31, 2019, for failure to identify a lineal descendant on the 1906 Dawes Creek by Blood Roll. Respondent Grayson submitted her appeal to the Appellant Board on August 6, 2019, and on November 5, 2019, the Appellant Board confirmed the denial.

Respondent Kennedy submitted his application for citizenship with the Appellant Board in August of 2019. The application was denied on October 14, 2019, again, for failure to identify a lineal descendant on the 1906 Dawes Creek by Blood Roll. Respondent Kennedy subsequently submitted his request for administrative appeal, which was denied on December 12, 2019.

On March 11, 2020, the Respondents filed a *Petition* with the Muscogee (Creek) Nation District Court with one cause of action for alleged violation of the terms of the Treaty of 1866, and seeking declaratory and injunctive relief.

A two-day bench trial was conducted on April 4-5, 2023, before the Muscogee (Creek) Nation District Court, and on September 27, 2023, an *Order and Opinion on Appeal from Citizenship Board of the Muscogee (Creek) Nation Denial of Creek Freedmen Citizenship Applications* was issued, finding that the Citizenship Board acted "contrary to the law" and took action that was "unsupported by the relevant and substantial evidence[,]" therefore finding in favor of the Respondents and remanding the matter back to the Appellant Board for reconsideration "in accordance with the clear language of Article II of the Treaty of 1866…wherein lineal descendants of those individuals listed on the Dawes Final Rolls, including both the Creek By Blood Roll and Creek Freedmen Roll, are eligible for citizenship in the Muscogee (Creek) Nation."

On September 29, 2023, the Appellant timely submitted its *Notice of Intent to Appeal*. This appeal follows.

JURISDICTION, SCOPE, AND STANDARD OF REVIEW

Pursuant to appellate case law, in an appeal of an agency/board decision, "[t]his Court reviews the legal conclusions of the District Court and Board *de novo*." [21] The term *de novo* review is defined as "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings[,]"[22] meaning that the Court will review the matter with fresh eyes and give no deference to the District Court's previous ruling.

---

[21] *See*, Citizenship Board v. Donna Joan Todd, SC-1999-05, 4 Mvs. L.R. 195, 197. (February 16, 2000), and Muscogee (Creek) Nation Citizenship Board v. Ron Graham and Fred Johnson, SC-2006-03, ___ Mvs. L.R. ___. (November 2, 2007).

[22] *See*, *de novo* Review, Black's Law Dictionary (12th ed. 2024).

ISSUES PRESENTED

1. Did the Muscogee (Creek) Nation District Court commit reversable error by conducting an evidentiary trial in which witness testimony and exhibits not before the Citizenship Board in its administrative proceedings were admitted?
2. Did the Muscogee (Creek) Nation District Court commit reversable error by invalidating Article II, Section 1, and Article III of the Muscogee (Creek) Nation Constitution?

DISCUSSION

Part 1. Sovereign Immunity

The Appellant asserts that the Nation's sovereign immunity was violated by the Muscogee (Creek) Nation District Court when it conducted an evidentiary trial in which witness testimony and exhibits not previously presented to the Appellant Board during its administrative proceedings were admitted for consideration by the District Court. The Appellant asserts these actions are contrary to the statutory requirements of M(C)NCA Title 7, § 4-110 (B), which provides:

> **Judicial Appeals**. The Courts of the Muscogee (Creek) Nation are hereby granted exclusive jurisdiction over all disputes relating to, arising under or in conflict with this Title. After the applicant has exhausted the administrative remedies of the Citizenship Board, and a final determination not to enroll the applicant has been made, the applicant shall have the right to file an appeal of said decision in the Muscogee (Creek) Nation District Court. The applicant shall serve notice of the appeal to the Chairman of the Citizenship Board or his authorized representative at the Citizenship Board Offices. *In hearing the appeal, the Muscogee Nation District Court shall give proper deference to the administrative expertise of the Citizenship Board. The Muscogee Nation District Court shall not set aside, modify, or remand any determination by the Board unless it finds that the determination is arbitrary and capricious, unsupported by substantial evidence or contrary to law. Standard procedures of the Muscogee (Creek) Nation District Court, including the right to appeal to the Supreme Court, shall govern all proceedings.*
>
> [Emphasis Added]

On its face, it appears that the Appellant presents a valid argument, as § 4-110 (B) specifically requires that the District Court "give proper deference" to the Appellant's

"administrative expertise[,]" and "not set aside, modify, or remand any determination" absent a finding that the Appellant's decision was "arbitrary and capricious, unsupported by substantial evidence or contrary to law." However, the Court notes that, on March 22, 2021, the Respondents previously requested that this Court assume original jurisdiction over this action,[23] as, at that time, the Respondents alleged the matter had "been pending for over a year in the District Court[,]" with two (2) District Court judges having recused from the case without taking action in the matter. On March 26, 2021, the Appellant filed its *Motion to Dismiss Appeal*, arguing in part that the Respondents' request was "a disingenuous attempt to circumvent the legal system of the Muscogee (Creek) Nation *and the exercise of discovery in this case*...[;]" that the Appellant "must be afforded the opportunity to engage in the exercise of discovery, including responses and requests for production of documents, sworn interrogatory responses, answers to requests for admissions and the opportunity to depose Appellants, their witnesses and experts[;]" and that "[t]here are numerous questions of fact and law that must also be fully briefed and determined by the District Court in order to establish a full and complete record for purposes of appeal." On March 29, 2021, this Court issued its *Order Denying Notice of Appeal*, stating that it "would greatly benefit from the assembling of a complete record before the District Court."

As previously stated in the Jurisdiction, Scope, and Standard of Review portion of this *Order and Opinion*, an appeal to the Supreme Court of an agency or board decision is reviewed *de novo*. For purposes of this Court's review, it is immaterial whether the District Court considered evidence or witness testimony that was never presented to the Appellant Board during its proceedings, as our review is conducted without deference given to the District Court's

[23] *See*, Unassigned Supreme Court Action, SC-2021-01UN, Rhonda K. Grayson and Jeffrey D. Kennedy v. Citizenship Board of the Muscogee (Creek) Nation.

determination. However, this Court is compelled to state that the legal doctrine of judicial estoppel[24] [25] [26] would prohibit the Appellant from (on the one-hand) arguing in favor of an expanded record when requesting that this Court deny the Respondents' previous application to assume original jurisdiction, while (on the other-hand) subsequently arguing against use of that same expanded record during this appeal, after an unfavorable order has been issued by the lower court.

For these reasons, the Court is not compelled to reverse or remand the District Court's September 27, 2023, *Order and Opinion* on sovereign immunity grounds.

Part 2. Treaty of 1866 and the Muscogee (Creek) Nation Constitution

M(C)NCA Title 7, § 4-110 (B) provides that "[t]he Courts of the Muscogee (Creek) Nation are…granted exclusive jurisdiction over *all disputes* relating to, arising under or in conflict with [Title 7]." [Emphasis Added]. Once an applicant has exhausted all of their administrative remedies, and has received a final denial of citizenship, an applicant may then file an appeal with the Nation's judicial branch. The role of the court in this process is to review the agencies action(s), giving

---

[24] *Estoppel*, Black's Law Dictionary (12th ed. 2024): (1) A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. (2) A bar that prevents the relitigation of issues. (3) An affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance.

[25] *Judicial Estoppel*, Black's Law Dictionary (12th ed. 2024): Estoppel that prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.

[26] In Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, the United States Supreme Court explained in its Eleventh Amendment immunity analysis that it would be "anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity." The Court views the Appellant's prior inconsistent statements in favor of an "expanded discovery" in which "questions of fact and law" must be "fully briefed and determined by the District Court" as an effective limited waiver of its immunity in those respects. To hold otherwise would permit the Nation to achieve an unfair tactical advantage over the Respondents, or in other matters in the future.

"proper deference to the administrative expertise of the Citizenship Board."[27] The court must refrain from setting aside, modifying, or remanding the matter absent a "determination [that the Board's action] is arbitrary and capricious, unsupported by substantial evidence or contrary to law."[28] While this statutory process is unambiguous, the terms of art used in § 4-110 (B) to outline the court's appellate-review parameters (e.g. arbitrary and capricious, unsupported by substantial evidence, and contrary to law) are left undefined. This Court has previously stated that, "[w]hen a statutory provision is unambiguous, we presume the National Council intended the resulting impact of the unambiguous provision and apply the statute according to the plain meaning of its terms. Use of the "plain-meaning rule" is both an appropriate judicial deference to the National Council's constitutional law-making authority and an analytical hurdle which limits unnecessary judicial encroachment into the law-making function."[29] As such, the Court must first examine the plain-meaning, or, in this instance, the plain-use of these administrative-law-specific terms, and give them an operational definition.

Arbitrary and Capricious: "The [Administrative Procedures Act's] arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that's the agency has acted within a zone of

---

[27] M(C)NCA Title 7, § 4-110 (B)
[28] *Id.*
[29] *See*, Lisa K. Deere v. Joyce C. Deere, SC-2017-02, ___Mvs. L.R.___. (May 17, 2018), citing Slay v. Muscogee (Creek) Nation Travel Plaza and Hudson Insurance Company, SC-2014-01, ___Mvs. L.R.___. (October 23, 2014), Cox v. Kamp, SC1991-03, 4 Mvs. L.R. 75, 79. (June 27, 1991), and Ellis v. Checotah, *et al.*, SC-2010-01, ___Mvs. L.R.___. (May 22, 2013).

reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision."[30]

Unsupported by Substantial Evidence: "The phrase "substantial evidence" is a "term of art" used throughout administrative law to describe how courts are to review agency factfinding. Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations. And whatever the meaning of "substantial" in other contexts, the threshold for such evidentiary sufficiency is not high. Substantial evidence, [the United States Supreme Court] has said, is "more than a mere scintilla." It means - and means only - "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[31]

Contrary to Law: Simply defined as an action that is "[i]llegal; unlawful; [or] conflicting with established law."[32]

With these terms now defined, the Court must review the Appellant Board's proceedings, along with the relevant provisions of the Muscogee (Creek) Nation Constitution, treaties, and applicable Mvskoke law to determine if the Appellant's actions were (1) arbitrary and capricious, (2) unsupported by substantial evidence, or (3) contrary to law.

Part 2 (a) Arbitrary and Capricious

As stated above, when reviewing agency action under the arbitrary and capricious standard, the Court's role is simply to determine if the agency's actions were reasonable, and that their

---

[30] *See*, Federal Communications Commission v. Prometheus Radio Project, 592 U.S. 414, 423. (April 1, 2021), citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513-514; Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43; FCC v. WNCN Listeners Guild, 450 U.S. 582, 596.

[31] *See*, Biestek v. Berryhill, 587 U.S. 97, 102-103. (April 1, 2019), citing T-Mobile South, LLC v. Roswell, 574 U.S. 293; Consolidated Edison Co. v. NLRB, 305 U.S. 197; Richardson v. Perales, 402 U.S. 389; Dickinson v. Zurko, 527 U.S. 150.

[32] *Contrary to Law*, Black's Law Dictionary (12th ed. 2024).

decision was reasonably explained. Pursuant to the record-on-appeal, it is clear that the Appellant Board followed the procedural requirements of Title 7. The Respondents were both provided notification that their applications for citizenship had been denied for failure to identify a lineal descendent on the 1906 Creek By Blood Dawes Roll. This decision was based on the Appellant Board's understanding of Title 7 and the Muscogee (Creek) Nation Constitution, and was bolstered by discussions with the Nation's Office of Attorney General, who advised the Appellant Board that they were "following the law and the Constitution and the Code. So [the Appellant Board should] continue to do what [they were] doing."[33] The Appellant Board is not a legal-counsel functionary of the Nation's government. Its role is to process citizenship applications in line with its understanding of Title 7 and the Nation's laws. It is entirely reasonable that the Appellant Board relied on legal advice it received from the Nation's Office of Attorney General, and continued denying citizenship applications listing only lineal descendants on the 1906 Creek Freedmen Dawes Roll, and not the Creek By Blood Dawes, despite stated concerns related to the Muscogee (Creek) Nation Constitution and the Treaty of 1866. As such, the Court finds that the Appellant Board's actions were not arbitrary and capricious, with respect to its treatment of the Respondents' citizenship applications.

Part 2 (b) Unsupported by Substantial Evidence

While the word "substantial" conjures to the mind an extremely high bar to attain, the truth of the matter is, in an administrative law context, substantial evidence is just "more than a mere scintilla[;]"[34] just enough evidence necessary to support the Appellant Board's ultimate conclusion. In this instance, the Appellant Board was presented two (2) citizenship applications,

[33] Trial Transcript, April 5, 2023, Pg. 34, Ln. 1-3.
[34] *Scintilla* is defined as "[a] spark or trace." Black's Law Dictionary (12th ed. 2024).

both providing significant supporting documentation verifying a lineal descendant on the 1906 Creek Freedmen Dawes Roll, but with no supporting documentation supporting a lineal descendant on the 1906 Creek By Blood Dawes Roll. This lack of supporting evidence linking the applicants to a Creek by-blood descendant, combined with the Appellant Board's understanding of the applicable law (even if flawed) supports the conclusion that the Appellant Board's actions we supported by substantial evidence, as that phrase is understood in an administrative law context.

Part 2 (c) Contrary to Law

Article I, Section 2 of the Muscogee (Creek) Nation Constitution provides that the "*political jurisdiction* of the Muscogee (Creek) Nation…is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America[.]" [Emphasis Added]. Additionally, M(C)NCA Title 27, § 1-101 provides that "[t]he *authority* of the Muscogee (Creek) Nation…is based upon…[t]he inherent sovereignty of the Muscogee (Creek) Nation and the Treaties and Agreements between the Muscogee (Creek) Nation and the United States, including but not limited to the Treaty of 1790 and the Treaty of 1866." [Emphasis Added]. Finally, M(C)NCA Title 27, § 1-103 provides that "*[i]n all cases*, the Muscogee (Creek) Nation Courts *shall apply* the *Constitution* and *duly enacted laws* of the Muscogee (Creek) Nation, the *common law* of the Muscogee people as established by custom and usage, and the *Treaties and Agreements* between the Muscogee (Creek) Nation and United States." [Emphasis Added].

From the perspective of the United States, treaties represent the "supreme Law of the Land[,]"[35] and are viewed as "equivalent to an act of the legislature[.]"[36] This is particularly

[35] Constitution of the United States, Article VI, provides: "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."
[36] Foster v. Neilson, 27 U.S. 253, 314. (January 1, 1829).

relevant to Indian tribes, as the United States' Congress retains plenary power[37] over tribal relations.[38] Meaning that, any treaty entered into between the Muscogee (Creek) Nation and the United States represents an expression of Congress' plenary power over the tribe. As such, this Court must carefully review the terms of any applicable treaty with the United States with the understanding that those treaty terms that have not been specifically abrogated by Congress represent the law of the land (both under federal and Mvskoke law), and must be followed.

The Appellant, through their various briefs to the Court, and during oral argument, emphatically claim that they are not asserting Congress has abrogated the terms of the Treaty of 1866 in any way.[39] [40] Instead, the Appellant argues that, because Article II of the Treaty of 1866 does not include specific "words of perpetuity," such as "forever," or "permanently," or "for all time," the Nation therefore retains the right[41] to make changes to its membership requirements in the future, including (they argue) subsequently adopting a new constitution that prohibits Creek Freedmen from citizenship within the Nation.

Again, Article II of the Treaty of 1866 provides:

> The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the

---

[37] The *Plenary-Power Doctrine* is defined as "[t]he principle that Congress possesses broad authority to regulate Indian tribes and affairs." Black's Law Dictionary (12th ed. 2024).

[38] *See*, the "Marshall Trilogy" Johnson v. M'Intosh, 21 U.S. 543. (March 10, 1823); Cherokee Nation v. Georgia, 30 U.S. 1. (January 1, 1831); Worcester v. Georgia, 31 U.S. 515. (January 1, 1832). *See also*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565. (January 5, 1903).

[39] Appellant's April 4, 2024, *Reply Brief* states the "Respondents wrongfully contend that the Citizenship Board's defense of the Constitution is based on a claim in this appeal by the Citizenship Board that the 1866 Treaty has been abrogated by the Oklahoma Indian Welfare Act (the "OIWA"), thereby invalidating the Constitution's requirement for citizenship. In fact, the Citizenship Board is not claiming that the Treaty has been abrogated by the OIWA or anything else."

[40] Counsel for the Appellant stated the following during oral argument: "Let's be clear. We're not arguing that the treaty was abrogated. That erases everything you've just heard from our opponents. In fact, we claim the treaty remains in effect. You never heard us say it was abrogated. We don't say the department of the interior abrogated it. We don't say the Constitution abrogated it." Recording of June 10, 2025, Oral Argument, at 54:34 to 55:04.

[41] "Under Chief Justice Marshall, the [United States] Supreme Court conceptualized an Indian treaty as a grant of rights from the tribe to the United States, with the tribe reserving for itself all interests not clearly ceded, rather than a complete capitulation by the tribe." Cohen Handbook of Federal Indian Law § 2.02[2], pg. 118 (2012 ed.).

> parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and 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 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, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

To determine the validity of the Appellant's "retained rights" claim, the Court must analyze the terms of Article II using recognized canons of treaty construction. "From the earliest years of the United States, the Supreme Court has liberally construed Indian treaties in favor of tribal interests. The [United States Supreme] Court recognized that treaties are agreements between sovereigns that are entitled to supremacy under the Constitution, but also that many treaties are the product of unequal bargaining power. The substance of the treaties themselves generally created a legal relationship between a superior sovereign agreeing to protect the people, lands, and sovereignty of Indian nations. The canons of construction are tools of judicial statutory construction that have been refined since their early incarnation in the Marshall Trilogy, and invoked hundreds of times by courts to interpret and construe Indian treaty language. In general, the canons are: (1) A treaty must be liberally interpreted in favor of the Indians or tribes in question[,] (2) A treaty must be construed as the Indians understood it[,] (3) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the given Indian tribe[, and] (4) Treaty provisions that are not clear on their face may be interpreted from the surrounding circumstances and history."[42]

[42] Matthew L.M. Fletcher, Principles of Federal Indian Law 153-154 (2017).

Upon applying these canons of construction, the following facts are clear to the Court: (1) historical writings, legislative actions, and Court opinions in the years immediately following ratification of the Treaty of 1866 clearly show that the historic Creek Nation believed the Treaty of 1866 *demanded* citizenship rights be given to the Creek Freedmen,[43] (2) this was the position of the historic Creek Nation for over one hundred years, until the adoption of the 1979 Constitution of the Muscogee (Creek) Nation, and (3) Article II of the Treaty of 1866 clearly extends these citizenship rights to the "descendants" of the Creek Freedmen, and gives no endpoint at which those descendants should be excluded.

Like the Appellant, this Court firmly believes that all rights not transferred through treaty or other uses of Congress' plenary power are rights that are fully vested and retained by the Nation. However, it is clear to the Court that the Nation's right to exclude the Creek Freedmen from citizenship, both at the time of ratification, and for as long as there are living lineal descendants, has been foreclosed by the terms of the Treaty of 1866.

Alternatively, the Appellant argues that passage of the Oklahoma Indian Welfare Act (OIWA) in June of 1936 (authorizing federally recognized Oklahoma Indian tribes to form new constitutions)[44]; combined with a Solicitor's Opinion, issued on October 1, 1941 (supporting the

[43] See the Background section of this Order and Opinion, highlighting certain executive, legislative, and judicial actions taken by the historic Creek Nation in the years following ratification of the Treaty of 1866.

[44] Section 3 of the OIWA provides: "Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. The Secretary of the Interior may issue to any such organized group a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: Provided, however, That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such chapter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984): Provided, That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter."

removal of Freedmen from citizenship in these newly adopted constitutions)[45], shows that the "counterparty to the Treaty of 1866 [the United States] has recognized that the Constitution's membership requirements are consistent with the Treaty."[46] Though, the Appellant fails to explain how "dropping [the Creek Freedmen] from tribal rolls"[47] would be consistent with the Treaty of 1866. In practical terms, the Appellant is asking this Court to accept that a subsequent Act of Congress (the OIWA) that is entirely silent concerning treatment of the Freedmen parties, combined with a Solicitor's Opinion (derived from the *executive branch* of the federal government…not the legislative branch) supporting the exclusion of the Freedmen under any new Constitution adopted pursuant to the OIWA is somehow *consistent* with the Treaty of 1866, which *requires* citizenship be granted to Creek Freedmen and their descendants. This is anything but

---

[45] *See*, 1 Op.Sol. 1076 (October 1, 1941), which provides, in part: "The question whether Freedmen now citizens of various Nations of Oklahoma may be excluded by appropriate provisions in constitutions to be adopted by these Nations pursuant to the Oklahoma Welfare Act must be answered in the affirmative. The Oklahoma Welfare Act represents a turning point in the organization of Indian tribes. A new type of organization on a new basis is provided by this act. It thus takes its place beside the various treaties of 1866 which after the end of the Civil War similarly provided for a new organization of the Five Civilized Tribes on a new membership basis. With the consent of Congress and pursuant to these treaties the tribes resolved to modify their membership basis and to include a large number of Freedmen who thus became Indians by law only. It would appear that the tribes should be able to modify their membership once more and, having obtained the consent of Congress, through the Oklahoma Welfare Act, to arrange their membership and other affairs in a constitution to be adopted by their free vote. They are entitled to decide that in the future only Indians by blood shall be members of the new tribal organization that is to come into being by adoption of these constitutions. A number of Indian tribes have incorporated similar provisions in their constitutions in order to limit membership to persons of Indian blood. Among these are the Cheyenne River Sioux Tribe of South Dakota, the Quileute Tribe of the Quileute Reservation, Washington, and the Kialogee Tribal Town of Oklahoma. The customary provision reads as follows:

> "The membership of the *** Tribe shall consist of the following:
>
> "(a) All persons of Indian blood whose names appear on the official census roll of the tribes as of June 18, 1934."
>
> "(b) All children born to any member of the *** Tribe who is a resident of the reservation at the time of the birth of said children."

Such a provision has the effect of dropping from tribal rolls those members who cannot satisfy the Indian-blood requirement. Such exclusion from membership does not interfere with any vested individual rights, such as title to allotted land, but does deprive Freedmen so excluded of benefits arising in the future out of tribal membership."

[46] Appellant's April 4, 2024, *Reply Brief*, Sub-Section Title (B)(3).

[47] 1 Op.Sol. 1076 (October 1, 1941).

"consistent" with the terms of Article II. However, the Court understands that this argument is necessary for the Appellant to (1) avoid the strict requirements of abrogation, and (2) for the Appellant to avoid claims of judicial estoppel.[48]

As the United States Supreme Court explained in McGirt v. Oklahoma (when analyzing abrogation and the disestablishment of the Creek reservation):

> To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *But that power, this Court has cautioned, belongs to Congress alone*. Nor will this Court lightly infer such a breach once Congress has established a reservation... Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges-facing no possibility of electoral consequences themselves-will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.[49]
>
> [Emphasis Added]

There are no provisions in the OIWA that mention the Freedmen. The Act *only* concerns the reorganization of federally recognized Oklahoma Indian tribes and the development and approval of new tribal constitutions. To that effect, Congress delegated minimal authority to the Secretary of the Interior to create "rules and regulations" aimed only at the development of these new tribal constitutions. Congress did *not* provide any language that could be read as a specific delegation to the executive branch authorizing it to change any prior treaty terms. If Congress wished to abrogate the terms of Article II, and change the citizenship guarantees made to the Creek Freedmen and

---

[48] See, most notably, Brief for Amicus Curiae Muscogee (Creek) Nation in Support of Petitioner, McGirt v. Oklahoma, United States Supreme Court, Case No. 18-9526, wherein the Muscogee (Creek) Nation argued that the Creek reservation (created in part by the Treaty of 1866) had never been disestablished, and that Indian Reorganization Act and Oklahoma Indian Welfare Act "sought to revitalize powers of tribal self-government "*which Congress ha[d] never seen fit to abrogate.*"". [Emphasis Added]

[49] McGirt v. Oklahoma, 591 U.S. 894, 903. (July 9, 2020)

their descendants, then *Congress* must say so. But, a Solicitor's Opinion, issued by the executive branch of government, does not satisfy this requirement.[50]

The Court finds that there have been no actions taken by the United States Congress to abrogate the Treaty of 1866, and that this treaty stands as the supreme law of the land under both federal and Mvskoke law. Further, the Treaty of 1866 requires that Creek Freedmen, and their descendants, shall be granted "all the rights and privileges of native citizens[.]" As such, it was contrary to law for the Appellant Board to deny citizenship to any lineal descendant of the Creek Freedmen Dawes Roll.

Part 2(d) Effect of Ruling on 1979 Muscogee (Creek) Nation Constitution

The 1979 Muscogee (Creek) Nation Constitution limits citizenship to "Muscogee (Creek) Indians *by blood* … and persons who are lineal descendants of those Muscogee (Creek) Indians *by blood*…[.]" [Emphasis Added]. While it is certainly true that the Muscogee (Creek) Nation retains the sovereign right to define its own membership, this Court has clarified (above) that those membership requirements must be consistent with any applicable act of the United States Congress (in exercising its plenary power over Indian affairs), and the terms of any valid treaty made between the Muscogee (Creek) Nation and the United States. The 1979 Muscogee (Creek) Nation Constitution, in its current form (limiting citizenship only to Muscogee (Creek) Indians *by blood*, and their lineal descendants), stands as a complete barrier to Creek Freedmen citizenship and is wholly inconsistent with Article II of the Treaty of 1866. As such, the Court finds that any reference to "by blood" citizenship, specifically in the 1979 Muscogee (Creek) Nation

[50] This Court understands the Nation's prior reliance on the 1941 Solicitor's Opinion and the Secretary's approval of the 1979 Constitution to exclude the Creek Freedmen and their descendants from enrollment. Nonetheless, this Court finds that the U.S. Department of the Interior's position and subsequent action does not alter the terms of the Treaty of 1866.

Constitution, but also in the Muscogee (Creek) Nation Code, or in any associated Mvskoke rules, regulations, policies, or procedures is unlawful[51] and *void ab initio*.[52] [53] By striking "by blood" from Article III, Section 2, the Nation is left with the following citizenship provision:

> Persons eligible for citizenship in the Muscogee (Creek) Nation shall consist of Muscogee (Creek) Indians ~~by blood~~ whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians ~~by blood~~ whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137); (except that an enrolled member of another Indian tribe, nation, band, or pueblo shall not be eligible for citizenship in the Muscogee (Creek) Nation.)

With this correction, citizenship is available to any "Muscogee (Creek) Indians whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137), and persons who are lineal descendants of those Muscogee (Creek) Indians whose names appear on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137)[.]" This Court interprets "Muscogee (Creek) Indian" (as that terms relates to citizenship) to mean any individual who is able to trace their lineage to a Creek by-blood or Creek Freedmen name on the final rolls as provided by the Act of April 26, 1906 (34 Stat. 137). Under this interpretation the Nation satisfies its duties to the Creek Freedmen under Article II of the Treaty of 1866.

---

[51] "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." McGirt v. Oklahoma, 591 U.S. 894, 938. (July 9, 2025).

[52] *Void ab initio* is defined as "[n]ull from the beginning...[.]" Black's Law Dictionary (12th ed. 2024).

[53] Similarly, the Cherokee Nation recently concluded that "[t]he "by blood" language found within the Cherokee Nation Constitution, and any laws which flow from that language, is illegal, obsolete, and repugnant to the ideal of liberty. These words insult and degrade the descendants of Freedmen much like the Jim Crow laws found lingering on the books in Southern states some fifty-seven years after the passage of the 1964 Civil Rights Act. "By blood" is a relic of a painful and ugly, racial past. These words have no place in the Cherokee Nation, neither in present day, nor in its future." Case No. SC-20217-07, In re: Effect of Cherokee Nation v. Nash and Vann v. Zinke, District Court for the District of Columbia, Case No. 13-01313 (TFH) and Petition for Writ of Mandamus Requiring the Cherokee Nation Registrar to Begin Processing Citizenship Applications, at 8. (February 22, 2021).

CONCLUSION

For the reasons stated above, the Court **AFFIRMS** the District Court's September 27, 2023, *Order and Opinion on Appeal from Citizenship Board of the Muscogee (Creek) Nation Denial of Creek Freedmen Citizenship Applications*, on grounds that the Appellant acted "contrary to law" when it failed to apply Article II of the Treaty of 1866, and denied the Respondents' applications for citizenship solely for failure to trace to a lineal descendant on the Creek By-Blood Dawes Roll. Further, the Court finds that any reference to "by blood" citizenship in the 1979 Muscogee (Creek) Nation Constitution to be **UNLAWFUL** and ***VOID AB INITIO***. The matter is **REMANDED** to the Appellant, Citizenship Board, who is directed to apply the Treaty of 1866 and issue citizenship to the Respondents, and any other future applicant who is able to establish a lineal descendant on the Creek By Blood Dawes Roll, or the Creek Freedmen Dawes Roll.

FILED AND ENTERED: July 23, 2025

Andrew Adams III
Chief Justice

Richard C. Lerblance
Vice-Chief Justice

Montie R. Deer
Associate Justice

Kathleen Supernaw
Associate Justice

George Thompson, Jr.
Associate Justice

CERTIFICATE OF MAILING

I hereby certify that on July 23, 2025, I mailed a true and correct copy of the foregoing *Order and Opinion* with proper postage prepaid to each of the following: Graydon D. Luthey, Jr., R. Trent Shores, and Barrett L. Powers, GableGotwals, 110 N. Elgin Ave., Suite 200, Tulsa, OK 74120; Geri Wisner, Jeremy Pittman, and Clinton Wilson, Muscogee (Creek) Nation, Department of Justice, P.O. Box 580, Okmulgee, OK 74447; Jana L. Knott, Bass Law, 252 NW 70th St., Oklahoma City, OK 73116; Damario Solomon-Simmons, Solomon Simmons Law, 601 S. Boulder Ave., Suite 602, Tulsa, OK 74119; M. David Riggs, Riggs, Abney, Neal, Turpen, Orbison & Lewis, 502 W. 6th St., Tulsa, OK 74119. A true and correct copy was also hand-delivered to the Clerk of the Muscogee (Creek) Nation District Court.

Laura Marks

Laura Marks, Deputy Court Clerk