IN THE DISTRICT COURT OF THE CHEROKEE NATION

CRIMINAL DIVISION

CHEROKEE NATION,	**)**	
Plaintiff,	**)**	
Vs.	**)**	**Case No. CM-21-772**
Deborough Rodgers,	**)**	
Defendant,	**)**	

DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION

Defendant Deborough Rodgers, appearing *pro se,* moves the Court for an order dismissing the above styled and numbered case for want of jurisdiction and authority to act in civil and criminal cases.

BRIEF OF DEFENDANT

INTRODUCTION

Defendant is a duly enrolled "member" in the United Keetoowah Band of Cherokee Indians in Oklahoma (UBK) and a "citizen" of the Cherokee Nation of Oklahoma (CNO). In the subject case, defendant is charged with three misdemeanor counts: driving under the influence, obstruction of justice, and a firearms offense arising out of an arrest by Tahlequah and Cherokee County officers on April 7, 2021. Defendant has entered a plea of "Not Guilty" as to each count. The arrest of defendant occurred within the boundaries of the Cherokee Reservation "Territory" by Tahlequah Officer Matthew Frits and Lt. Dexter Scott, a Deputy Sheriff in Cherokee County, Oklahoma.

ARGUMENT

I. THE UKB POSSESSES CIVIL AND CRIMINAL JURISDICTION OVER THE CHEROKEE RESERVATION[1]

A. The UKB descend from the historical Cherokee Nation.

The word "KEETOOWAH" is the traditional name for the Cherokee people in the Cherokee language. The UKB traces its history to the Western Cherokees or Old Settlers, the traditional Cherokee people who began moving to the region of the Arkansas territory in the late 18th century to escape colonization and to maintain the traditional Cherokee culture, religion, and lifeways. In the west, they established a Cherokee government separate and distinct from the Eastern Cherokee government in the southeastern United States. In 1817, the Western Cherokee received a reservation in the Arkansas territory.[2] In 1828, the Western Cherokee government agreed by treaty to relinquish its Arkansas reservations in exchange for a reservation in the Indian Territory which is today Oklahoma.[3] Today's Cherokee Reservation in northeastern Oklahoma is the remnant of that 1828 reservation for the Western Cherokee.

In 1835, a faction of the Eastern Cherokee, known as the Ridge Party, signed the treaty ceding the Eastern Cherokee lands and agreeing to join the Western Cherokee in Indian Territory.[4] The Western Cherokee welcomed these Eastern emigrants. Another faction of the Eastern

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[1] Portions of this section are drawn from the "Brief of Amicus Curiae the United Keetoowah Band of Cherokee Indians in Oklahoma, In Support of Respondent" filed April 4, 2022, in the Supreme Court of the United States in *State of Oklahoma v. Victor Manuel Castro-Huerta (*21-429)

[2] Treaty With the Cherokee, 1817, 7 Stat. 156 (July 8. 1817); Treaty With the Cherokee, 1819, 7 Stat. 195 (February 27, 1819).

[3] Treaty With the Western Cherokee, 1828, 7 Stat. 311 (May6, 1828).

[4] Treaty With the Cherokee, 1835, 7 Stat. 478 (Dec. 29, 1835)

Cherokee, the Ross party, objected to the Treaty, but were forcibly removed by the federal government to the Western Cherokee reservation by 1839.

The Ross party outnumbered the combined Ridge Party and Western Cherokee leading to significant division between the two factions. In 1846, the United States negotiated a treaty merging the two Cherokee governments into one entity, known as the Cherokee Nation.[5] Nevertheless, the traditional full-blood Cherokees maintained a Keetoowah Society, which sought to protect Cherokee traditions, religion, and culture. From 1846~1859, the two groups of Cherokee people respected the 1846 treaty and lived communally as the Cherokee Nation and under the government of the Cherokee Nation. And yet, they remained as two separate factions.

In 1859, the Keetoowah National Convention approved the constitution and laws forming a government separate from the 1846 Cherokee Nation government, which the Keetoowah's viewed as representing the interests of less traditional Cherokees. A central goal of this Keetoowah government was to oppose the Cherokee Nation's support of the South in the lead up to the-Civil War.

During the Civil War, the Keetoowah's fought for the Union, while the Cherokee Nation government officially aligned with the Confederacy.[6] After the Civil War, in 1866, the United States once again treated with Keetoowah and the Cherokee Nation factions as one government.[7] The Keetoowah continued to maintain a Keetoowah Society to organize the affairs of the full-blood Cherokees.

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[5] Treaty With the Cherokee, 1846, 9 Stat. 871 (Aug.6, 1846).
[6] Treaty With the Cherokee, 1861 Stat. 394 (C.S.A.) (Oct. 7, 1861).
[7] Treaty With the Cherokee, 1866, 14 Stat. 799 (July 19,1866).

From 1898 to about 1906, (following the enactment and implementation of the Curtis Act of 1898), the government of the tribes were wound up by the federal government by effectively terminating tribal governments and closing its membership which made the tribal laws unenforceable.[8] However, in 1905 while the United States was winding up the affairs of the historical Cherokee Nation government, the Keetoowah Society obtained a federal charter to assist it in governing Keetoowah affairs.[9] Meanwhile, during this 1905 period, an American Indian-led attempt to secure statehood for Indian Territory as separate from Oklahoma Territory was ongoing. A convention termed Sequoyah Constitutional Convention, was held and the region known as Indian Territory would be called the State of Sequoyah. Then in 1906, the Oklahoma Enabling Act assisted in the admission of the State of Oklahoma into the Union in 1907. This was only made possible by denying the Indians the right to have their own state.

During the Great Depression (1929-43), steps were taken to facilitate the organization of the Indian tribes. The first major step taken was the Indian Reorganization Act (also known as the Wheeler-Howard Act; Indian New Deal) of June 18, 1934, which included all states except Hawaii, Alaska, and Oklahoma. This act was intended to restore to Indians the management of their assets and government, those things taken from them by the Curtis Act of 1898. By 1936, John Collier, Commissioner of Indian Affairs, developed the Oklahoma Indian Welfare Act (OIWA also known as the Thomas-Rogers Act) with the premises of destroying the federal policy of the "twin evils" referring to allotment and assimilation in exchange for Indian self-government to include opportunities for rebuilding Indian tribal societies, return land to the tribes, rejuvenate Indian governments, and emphasize Native culture.

[8] Act of June 28, 1898. 30 Stat. 495. AKA The Curtis Act

[9] *Certificate of Incorporation of Keetoowah Society,* No. 592, (N.D. Ind. Terr., Sept 20, 1905).

In 1936, the Keetoowah's began the process of organizing an OIWA tribal government. And by 1946, Congress recognized the "Keetoowah's of the Cherokee Nation Oklahoma" as "a band of Indians residing in Oklahoma" within the meaning of the OIWA.[10] In 1950, the UKB adopted (and the United States approved) an OIWA Constitution, By-laws, and Federal Corporate Charter.[11]

The UKB constitution. identifies the Cherokee Reservation (by the phrase, "Old Cherokee Nation") and its historical districts as the boundaries for the election of officers and district representatives to serve on its Council, the governing body of the UKB. [12] It also requires Council meetings to occur within the Cherokee Reservation.[13]

B. The CNO failed to take advantage of opportunities to form a government as provided by federal law.

Basic to the concept of jurisdiction, is that the government creating a judicial branch and the courts therein, be legitimately authorized and formed. Here, we have a situation involving legitimacy of the tribal court created by the tribe that has not received the requisite authorization from the federal government. Any court system that the Cherokee Nation of Oklahoma may have had before the Curtis Act was wiped out by the provisions of said act, which eliminated all tribal courts and rendered Cherokee law unenforceable until the government made allowances by the OIWA. The Curtis Act placed the supervision of the courts in the hands of the federal government thereby creating a situation where there was concurrent jurisdiction between the federal and state governments to the exclusion of the now defunct tribal governments.

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[10] Act of August 10, 1946, 60 Stat.976, (Aug. 10, 1946).
[11] UKB Const. and By-laws (Oct. 3, 1950); UKB Corporate Charter (Oct. 3, 1950). See Defendant's exhibits 4 and 5.
[12] UKB Const. art. II, §§ 1, 2; art. V, § 2.
[13] UKB Const. art. III, § 3.

Both the CNO and the UKB coexisted from around 1906 until around 1936 without a government. During this period from 1907-1971, the principal chiefs of the Cherokee Nation were appointed by the president of the United States of America. The purpose of these appointments as provided by an act of Congress in 1906, was to formalize the tribal governments obligation under the leadership of an appointed principal chief whose principal duties were to sign documents related to statements of the tribal government as the federal government may request him to complete.

With the passage of the OIWA in 1936, UKB worked with the Department of Interior and Bureau of Indian Affairs to form a OIWA Constitution, Bylaws and Federal Corporate Charter issued by the Department of Interior, which was recognized in 1946 and approved in 1950. CNO neglected to take advantage of the OIWA and did not pursue federal recognition or approval by utilizing the process provided by the federal government in 25 CFR §§ 83.4, 83.11.

II. THE CNO IS NOT ENTITLED TO HAVE THE TRIBAL COURTS AND THUS HAS NO AUTHORITY IN THIS CASE.

A. The federal process of acknowledgement and approval.

The Department of Interior promulgated a process for tribes to seek federal acknowledgement and perhaps approval from Congress or the Secretary of the Department of Interior. That process is found in 25 CFR §§ 83.4 and 83.11. Again, having ignored the opportunity granted by the OIWA, Cherokee Nation of Oklahoma ignored the strict requirements of the federal government as stated in 25 CFR. Instead, Cherokee Nation of Oklahoma undertook to write a constitution in 1975, purportedly to be an amendment to the 1839 constitution, apparently hoping that said action would be accepted by the federal government and give Cherokee

Nation of Oklahoma the appearance of having satisfied continuity of government required by 25 CFR § 83.4 (b). But that hope was misplaced. A new "amendment" to the 1975 constitution which purported to supersede both the 1839 and the 1975 constitutions was still being argued with the BIA well into the 21st century.

B. The federal scheme for approval by the Department of the Interior.

This brief has previously discussed the history of the two tribes at issue here, UKB and CNO. In the first decades of the post-Curtis Act era the two tribes coexisted in Cherokee Territory with the Keetoowah having a loose governmental organization known as the Keetoowah Society. With the passage of the OIWA in 1936, tribes in Oklahoma became eligible to apply for recognition by the federal government and ultimate approval by Congress and/or the Secretary of Interior. As noted previously the CNO ignored the opportunity of the limitations of the OIWA and did nothing to apply for coverage under that act. The UKB did not ignore the opportunity and cooperated with the Bureau of Indian Affairs who assisted the organization in the application. By 1946 the UKB had earned the recognition of Congress and approval of its Constitution, Bylaws and Corporate Charter as issued October 3, 1950.

Still the CNO did nothing. The Secretary of Interior continued to approve appropriate applications of other tribes on an ad hoc basis. Still, the CNO was motionless.

C. THE 1975 CONSTITUTION

The CNO drafted a constitution in 1975 that BIA Commissioner, Morris Thompson approved for referendum for June 26, 1976. Mr. Thompson as a BIA Commissioner did not have the authority to approve the constitution as that was the role of the Secretary of the Department of Interior. No information appears concerning the number of voters who participated in the

referendum or what the required number of voters constituting thirty percent of the eligible voters would be in order to approve the constitution. This was the first time the Cherokee Nation set themselves apart and called themselves The Cherokee Nation of Oklahoma. The name Cherokee Nation was and is still used as a catch-all phrase for all Cherokee peoples, including the Eastern Band of Cherokee Indians, the Cherokee Nation in Oklahoma, and the United Keetoowah Band of Cherokee Indians of Oklahoma. Each year, the Cherokee Nation gathers for a Tri-Council meeting for decisions affecting the Cherokee Nation in its entirety with the passing of resolutions which all three tribes vote to either accept or deny. The location of the meeting alternates each year, and the host tribe is responsible for scheduling activities.

The 1975 Constitution was circulated in three different forms by the CNO.[14] The first of those proposed Constitutions was a pamphlet prepared for distribution to the voters. The second was a different Constitution prepared for submission to the BIA and the third was a constitution that was prepared for submission to Congress. At no time during the processing of the 1975 Constitution did the CNO ever comply with the regulations for approval of the tribes set forth in 25 CFR §§ 83.4 and 83.11. Upon information and belief, the defendant alleges the approval by the referendum was deficient because the number of voters did not rise to the level of thirty percent of the eligible voters that must vote on the adoption of the constitution. A majority of those voting is required for approval of the constitution.

D. THE 1999 CONSTITUTION[15]

[14] See Defendant's exhibits 1, 2, and 3. For the current version 1975 Constitution go to www.cherokee.org.

[15] For the current version of the 1999 Constitution go to www.cherokee.org.

During the next twenty-three years the CNO did nothing to comply with the procedures for gaining approval, and in 1999 drafted another Constitution. That Constitution, likewise, was not preceded by any compliance with the provisions of 25 CFR §§ 83.4 and 83.11, but it was submitted to the people and allegedly approved by referendum in 2003. In addition, with the failure to comply with the federal regulations, the approval for a referendum was signed by Larry Echohawk, a BIA employee. While Mr. Echohawk was later an Assistant to the Secretary to the Department of Interior, that was not his role nor his authority when he signed off on the proposed 1999 Constitution. Therefore, the referendum was tainted from the beginning.

But again, there is a problem regarding the election. The constitution required that there be fifteen percent of the eligible voters to cast a majority vote in order to approve the Constitution. OIWA, section 5203 requires such voters to have participated by thirty percent not fifteen percent. Upon information and belief, the defendant alleges that it did not have the required number of eligible votes to approve the constitution.

The 1999 constitution is sometimes described by the CNO as the 2003 Constitution or the 2006 Constitution, and arose based upon the absence of inclusion, in that Constitution of the Cherokee Freedmen, whom were the descendants of former slaves of the Cherokees who were freed at the end of the Civil War by the Thirteenth Amendment to the Constitution of the United States of America and the Emancipation Proclamation. That matter was apparently resolved by a decision in the case of Vann v. Cherokee Nation (D.C. Cir. 2008) and the requirements for "by blood" for the Freedmen was stricken from the original draft of the 1999 Constitution and replaced with other language that would include the Freedmen in the coverage of that Constitution.

That brings up another problem; the invalid 1976 Constitution covers amendments to the Constitution in Article XV, which among other things require two thirds of the Council to vote to submit an amendment, and each amendment must have a separate election to determine if it is to be added to the Constitution.

But still no compliance with the requirements of 25 CFR and despite that, on May 12, 2021, the Secretary of Interior, Deb Haaland signed off on some portions of the 1999 or 2003 Constitution of those in particular dealing with the Freedmen situation which may have left other sections of the 1999 Constitution as officially unapproved. The CNO history fails to disclose that the purported organization of CNO has failed to fulfil federal government requirements to be recognized by Congress or by the Secretary of Interior.

III. THE DISTRICT COURT AND THE SUPREME COURT OF THE CNO WERE ESTABLISHED ON NOVEMBER 13, 1990, AT A TIME WHEN THERE WAS NO AUTHORIZATION IN EFFECT FOR THOSE COURTS.

A. The Constitution of the Cherokee Nation approved by the National Convention of the Cherokee Nation on September 06, 1839, provided the framework for a judiciary branch of the government in Article V.

That Constitution and government it created in 1839, was terminated by the provisions of the Curtis Act in 1898 and Cherokee laws enacted prior to that date were rendered unenforceable. Ninety-two years later, on November 13, 1990, the CNO Council enacted a legislative act 11-90 which recreated the District Court of CNO, defining jurisdiction and determining court procedures.[16]

[16] The legal opinion, 93-1 addressed to the Principal Chief Wilma Mankiller, by their legal officer, Chadwick Smith dated November 30, 1993, Paragraph IV.

The passage of the legislative act took place when the only authority for such an act was the invalid Constitution that had allegedly been made effective in 1976. The 1976 Constitution Article VII provided only for a Judicial Appeals Tribunal to resolve disputes or questions about the Constitution. Article XII of that Constitution referred to the right of employees to have a hearing before the Judicial Appeals Tribunal and the citizens of the tribe have a widely held opinion that the JAT was nothing more than a court for employees to air their grievances. The differences enumerated herein together with defects in the creation of the CNO government render the Constitution purportedly created to be invalid without any jurisdiction as to criminal or civil cases.

B. The CNO passed another Constitution in 1999, or 2003 that purports to be an amendment to the 1976 Constitution and repeal of a defunct Constitution of 1839.

Between the 1976 Constitution and the 1999 Constitution there was no effort by the CNO to comply with the procedures required by the federal government as found in 25 CFR §§ 8.4 and 83.11. The CNO continued to operate under an unapproved government as shown in other sections of this brief.

IV. CNO COURTS STILL OPERATE UNDER A CLOUD OF ILLEGITIMACY, LACK OF JUCICIAL INDEPENDENCE, AND UNREPEALED CONGRESSIONAL BAN ON CHEROKEE COURT SYSTEM TAINT TRIBAL JUDICIAL PROCESS.

A. Even as renamed and reorganized under the 1999 Constitution, the tribal court system of the CNO operates under a continuing cloud of illegitimacy for two fundamentally compelling reasons.

First, the so-called "Cherokee Supreme Court" functions without any semblance of judicial independence from the tribal executive branch. Throughout their terms in office, Cherokee Supreme Court 'justices' remain subject to the unabashed influence, if not overt

control, of the tribal executive branch, or more specifically, the Principal Chief of the CNO. In a word, the CNO court system is rigged. Meaningful judicial review of the abusive misconduct of tribal executive officials is, therefore, practically impossible.

A. The shadow of the Curtis Act of 1898 that expressly abolished the Cherokee court system.

Section 28 of the Curtis Act of 1898 provided that, effective July 1, 1898, "all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law connected with said courts . . ." A subsequent accord with the Cherokee Nation, called the "Cherokee Agreement," was enacted into federal law only three years later in 1901 and made clear that the abolition of Cherokee courts continued in effect. The 1901 Cherokee Agreement stated that none of its terms "shall be construed to revive or reestablish the Cherokee courts abolished" by the Curtis Act. Theses laws stripping CNO of the authority to create and maintain a tribal court system have never been repealed by Congress and remain in full force today. Although the BIA has arguably taken action inconsistent with the plain mandate of these laws, the discretionary action of a federal administrative agency such as the BIA cannot repeal or nullify a federal statute such as the Curtis Act or the Cherokee Agreement statute.

B. Hodel v Muskogee (Creek) Nation.

According to the three-judge federal court of appeals panel that decided Muscogee (Creek) Nation v. Hodel, the only way a tribal government like the CNO can restore its lawful authority to create and maintain tribal courts without direct congressional intervention is for the CNO to adopt a new constitution under the 1936 OIWA.

In *Hodel,* the Muskogee (Creek) Nation of Oklahoma overcame a similar statutory disability that had eliminated that tribe's authority to establish a tribal court system by reorganizing under the OIWA. Congress had used language to extend the Curtis Act abolition of tribal courts in the 1901 Creek Agreement, almost identical to that used in the 1901 Cherokee Agreement. In *Hodel,* the three-judge panel concluded that since the "Curtis Act and the Creek Agreement expressly stripped the tribe of the power to have courts . . . that power was not part of the 'present' tribal government." Thus, in the absence of any legislation repealing the Curtis Act abolition of tribal courts, the Muskogee (Creek) Nation would not have been able to reestablish a tribal court system. The old disabling legislation continued in force.

The *Hodel* court decided, however, that because the Creeks had to reorganize under the OIWA in 1979, their right to establish a court system had been restored by a "general repealer clause" in the OIWA. This statutory clause was held to have repealed the Curtis Act by implication for those tribes reorganizing under the OIWA. In *Hodel,* the D.C. Circuit held that "the power to adopt a constitution" conferred by the OIWA "certainly encompasses the power to create courts with general civil and criminal jurisdiction." In other words, as an OIWA tribe, the Creeks' inherent sovereign rights of self-government had been fully restored. Since the 1999 Cherokee Constitution was not adopted pursuant to the OIWA, the "general repealer clause" of the OIWA does not apply to restore CNO's legal authority to create and maintain a tribal court system. Thus, until reorganization under the OIWA occurs or Congress repeals the Cherokee tribal court ban, CNO tribal courts are operating in overt violation of federal law as embodied in the still applicable 1898 Curtis Act and the 1901 Cherokee Agreement statute. The Cherokee Supreme Court, like every other CNO court, has no legal authority until Congress expressly repeals the Cherokee court

ban or the CNO reorganizes under the OIWA. The CNO courts are illegal and have no authority or jurisdiction to act in defendant's case. The motion to dismiss should be granted.

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Deboraugh Rodgers, *pro se*