IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MUSCOGEE CREEK INDIAN FREEDMEN BAND, INC., *et al.* Plaintiffs, v. ZINKE, *et al.* Defendants.	Case No.: 18-cv-01705 (CKK)

PLAINTIFFS' OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

The Federal Defendants seek to avoid an uncomfortable truth—the United States has repeatedly approved the systematic disenfranchisement of a group of tribal citizens on the basis of their race and their legal status as descendants of enslaved Africans. The Treaty of June 14, 1866 ("Treaty of 1866") could not be clearer: "persons of African descent . . . and their descendants . . . shall have and enjoy all the rights and privileges of native citizens . . . ." Treaty of 1866, Art. 2, June 14, 1866, 14 Stat. 785. There is no dispute that the Treaty of 1866 remains a valid obligation, binding both the Muscogee Creek Nation ("MCN" or the "Nation") and the United States. The Federal Defendants do not contest that the members of the Muscogee Creek Indian Freedman Band ("MCIFB") and the named Plaintiffs (collectively the "Creek Freedmen") are descendants under the terms of the treaty. Moreover, Plaintiffs have pled that Plaintiffs have been denied "all the rights and privileges of native citizens" by the MCN and the Federal Defendants, in violation of the treaty and federal law. Treaty of 1866, 14 Stat. 785. This lawsuit seeks to require the Federal Defendants to uphold their obligations under federal law and treaty by recognizing the Creek Freedmen for what they are: citizens of the Muscogee Creek Nation entitled to all of the rights and privileges that come with that citizenship.

The Federal Defendants ignore these realities and instead rely on a single objection—that the Creek Freedmen's disenfranchisement cannot be remedied because they have been disenfranchised for too long. The Federal Defendants' assertion that this Court's jurisdiction is barred by the statute of limitations set forth in 28 U.S.C. § 2401(a) is unavailing. The Court must reject this transparent attempt to erase the painful truth of the Federal Defendants' actions.

The Creek Freedmen have stated claims that arise directly from an action or omission within the last six years. Therefore, the exercise of jurisdiction here is proper under 28 U.S.C. § 2401(a). Specifically, the Creek Freedmen alleged that the Federal Defendants violated federal

laws, including the U.S. Constitution and the Treaty of 1866, when they approved the illegal 2015 tribal election of Principal Chief Floyd. *See* Am. Compl. ¶ 89. Pursuant to agency precedent, the Department of Interior ("DOI") and Bureau of Indian Affairs ("BIA") have the authority and the obligation to decline to recognize the results of an illegal tribal action. Likewise, the Federal Defendants continue to violate federal law and the Treaty of 1866 every time they disburse federal funds to MCN despite knowing that Creek Freedmen will not receive any benefit from said funds. *See* Am. Comp. ¶ 87. The Federal Defendants have failed to meet their obligation to protect the Freedmen's rights, injuring the Plaintiffs as recently as 2015. Whether best construed as agency action or inaction—the Creek Freedmen's claims regarding the 2015 election are timely under the Administrative Procedure Act.

In an effort to shift focus from its actions regarding approval of the 2015 election, the Federal Defendants grossly mischaracterize Plaintiffs' assertions as they relate to the 1979 Constitution. To be sure, the 1979 Constitution is an instance of wrongdoing by the Federal Defendants. The Federal Defendants contend however that its numerous subsequent actions and omissions must be swept aside because they "are each a reframing of a single grievance . . . ." Defs.' Mot. Dismiss 9. But the Federal Defendants' own words in approving the 1979 Constitution belie its argument that there is a single grievance here. The Department of the Interior's approval of the 1979 Constitution expressly withheld authorization of "any *action* under the [1979] Constitution that would be contrary to federal law." *See* Blaha Decl. Ex. D (1979 Constitution) (emphasis added).[1] Because Interior's approval of the 1979 Constitution withheld authorization of any action contrary to federal law, each subsequent approval of such a

[1] Notably, Article 4 of MCN Constitution specifically states that "this Constitution shall not affect the rights and privileges of individual citizens of the Muscogee (Creek) Nation in their trust relationship with the United States of America as members of a federally recognized tribe."

tribal action must by definition result from a separate evaluation of that action. At a minimum, the approval of the 1979 Constitution cannot be considered the single act from which those later actions stem such that the statute of limitations began to accrue. *See* Defs.' Mot. Dismiss 11.

The Federal Defendants have an ongoing obligation to adhere to the terms of the Treaty of 1866 and the U.S Constitution, as well as to protect the interests of all rightful citizens of the MCN. The approval of the 1979 Constitution is but one violation of this duty and each subsequent act recognizing the MCN government constituted without Freedmen participation is a separate "grievance" providing this Court jurisdiction. Federal approval of the 1979 Constitution made clear the Federal Defendants' obligation to make a separate and distinct approval of *any action* under that Constitution, as it did by approving the illegal election of Principal Chief Floyd in 2015. The fact that the Federal Defendants have repeatedly approved actions that violated federal law does not make a new approval within the last six years untimely for review. To hold otherwise would amount to illegal abrogation of the Treaty of 1866 and allow the Federal Defendants to perpetuate the badges of slavery in violation of the Thirteenth Amendment. The Creek Freedmen have pled facts sufficient to state a timely claim and this Court should not countenance a further silencing of their voices.

II. BACKGROUND

The Creek Freedmen are the direct lineal descendants of individuals who were enslaved by the Creek Nation, free blacks living alongside the Creeks, and Creek citizens of African descent who were listed on the final Dawes Rolls of 1906 as "Creek Nation Freedmen." Am. Compl. ¶¶ 49–50. Pursuant to Article 2 of the Treaty of 1866, the Creek Freedmen and their descendants, regardless of their "blood" status were to "have and enjoy all the rights and privileges of native citizens . . . ." of the MCN. Am. Compl. ¶ 38. After the signing of the Treaty of 1866 these individuals were citizens of the MCN, with all the attendant rights and privileges

thereof. *See* Am. Compl. ¶ 43. It was not until 1906 that these members of the Nation were formally branded as "Creek Freedmen," and something separate and distinct from "Creek by Blood." Am. Compl. ¶ 51. Despite this odious classification, based purely on race, the Creek Freedmen's citizenship status did not change for many decades.

A. Reorganization of the MCN and the 1979 Constitution

In 1936, Congress passed the Oklahoma Indian Welfare Act, ("OIWA"), 25 U.S.C. § 5203. In OIWA, Congress provided the means for BIA to transfer rights of self-government to Oklahoma tribes, allowing reorganization and the adoption of a constitution. *See id.* (listing the rights and privileges granted to an organization chartered pursuant to OIWA). OIWA did not modify or abrogate the Treaty of 1866 to allow the exclusion of the Creek Freedmen as part of any reorganization.

In 1944, the MCN adopted a new constitution and bylaws, but did not purport to do so under OIWA. *See* Defs.' Mot. Dismiss 4 (citing *Harjo v. Kleppe,* 420 F. Supp. 1110, 1137 (D.D.C. 1976)). DOI refused to approve a constitution outside the framework of OIWA. Moreover, the constitution was rejected "because the new governing document excluded the freedmen from membership in the tribe without having given them an opportunity to vote on that provision." *Harjo*, 420 F. Supp. at 1137. The 1944 proposed constitution never became operational.[2]

In the 1970s, the MCN resumed its efforts to adopt a constitution. In 1975, the MCN, through its National Council, submitted a draft constitution ("Draft Constitution") to the Federal Defendants. Am. Compl. ¶ 52. Later that year, the Federal Defendants offered feedback and suggested revisions to various parts of the Draft Constitution.

[2] For several decades following the submission of the 1944 proposed constitution to the DOI, the MCN operated a government "wholly without the benefit of any specific Congressional mandate." *Harjo*, 420 F. Supp. at 1139

Separately and unrelated to the MCN's efforts to invoke its authority under OIWA, a group of Creek citizens brought suit against the Federal Defendants, alleging that DOI had acted illegally in dispersing funds to the Principal Chief without the consent of the legislature as required under the 1867 Constitution. *Harjo*, 420 F. Supp. at 1142. The *Harjo* court agreed with plaintiffs, but noted that the legislature had not existed since about 1916. *Id.* at 1143. Rather than impose a government on the MCN, the court fashioned a remedy that allowed the MCN to re-create a democratic government. *Id.* To do this, the *Harjo* court ordered a procedure by which the MCN themselves could propose and adopt a government and new constitution under OIWA. *Id.* at 1144–45. At no point in the litigation did the *Harjo* court address the issue of legality of future disenfranchisement of the Creek Freedmen.

Pursuant to this Court's order, the Federal Defendants were required to review and approve the MCN's attempt to invoke its rights under OIWA to reorganize and adopt a new constitution. *See* Blaha Decl. Ex. A. DOI granted its approval of the MCN's proposed constitution on August 17, 1979:

> Sidney L. Mills, Acting Deputy Commissioner of Indian Affairs, by virtue of the authority granted to the Secretary of the Interior by the Act of June 26, 1936, 49 Stat. 1967, as amended and delegated to me by 230 DM 1.1, do hereby approve The Constitution of The Muscogee (Creek) Nation subject to ratification by the Qualified voters as provided in Article X of said Constitution; *provided that nothing in this approval shall be construed as authorizing any action under the Constitution that would be contrary to federal law*."

Blaha Decl. Ex. D (emphasis added). Upon receiving this qualified approval, on October 6, 1979, the MCN held an election to formally adopt the 1979 Constitution and replace the 1867 Constitution. Am. Compl. ¶ 57.

III. STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), "the district court must accept all of the complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Pitney Bowes, Inc. v. U.S. Postal Serv.*, 27 F. Supp. 2d 15, 19 (D.D.C. 1998). While the "plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence," *Pitney Bowes, Inc.*, 27 F. Supp. 2d at 19, "the plaintiff need only make a *prima facie* showing of jurisdiction." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). "In resolving a motion to dismiss for lack of subject-matter jurisdiction, the Court may consider materials outside the pleadings to determine whether it has jurisdiction." *Adams v. U.S. Capitol Police Bd.*, 564 F. Supp. 2d 37, 40 (D.D.C. 2008).

"A motion to dismiss . . . for lack of subject matter jurisdiction should not prevail 'unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.'" *All. For Democracy v. Fed. Election Comm'n*, 362 F. Supp. 2d 138, 142 (D.D.C. 2005) (quoting *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994)); *see also Beverly Enters., Inc. v. Herman*, 50 F.Supp.2d 7, 11 (D.D.C.1999).

IV. ARGUMENT

The Federal Defendants' motion oversimplifies Plaintiffs' complaint and principles of Indian law to argue all of Plaintiffs' claims accrued in 1979. Plaintiffs' allegations here stem from recent breaches of the Federal Defendants' duties to the Creek Freedmen, not a long-past action as the Federal Defendants argue. The Federal Defendants' motion fails to recognize their ongoing duty to the Creek Freedmen memorialized in the Treaty of 1866. The Federal Defendants also fail to acknowledge that it is possible to breach that duty more than once, and with actions more recent than 1979, as Plaintiffs allege.

The Federal Defendants cannot ignore the plain, binding language of the Treaty of 1866 and perpetuate the badges of slavery forever, against unborn generations of Freedmen, because other Freedmen did not challenge the qualified approval of the 1979 Constitution. This would mean no Freedmen could ever again claim an injury affecting Creek Freedmen rights as citizens of the MCN—even Freedmen such as the minor Plaintiff N.K. who were not yet born in 1979—irrespective of the limitation on DOI's approval of the 1979 Constitution or any subsequent actions by the Federal Defendants. Simply put, that the Federal Defendants took previous actions that injured Creek Freedmen does not give the government carte blanche to take more actions that injure the Freedmen on the basis of their race and legal status as descendants of enslaved Africans.

A. The Federal Defendants Have a Duty to Protect the Rights of Creek Freedmen.

It is well established that the Federal Defendants have a duty to protect the rights of tribal citizens. *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (holding that in carrying out its trust obligations, the United States has "charged itself with moral obligations of the highest responsibility and trust"). To uphold this duty, the Federal Defendants must ensure tribal elections comply with tribal and federal law, promote tribal integrity, deal fairly with all beneficiaries for whom they serve as a trustee, and protect minority tribal citizens. The Federal Defendants owe these duties to the Creek Freedmen, as Creek Indians, because they "have and enjoy all the rights and privileges of native citizens." Treaty of 1866, Art. 2, 14 Stat. 785 (1866).

The Federal Defendants do not and cannot take the position that the Treaty of 1866 was abrogated. It is clear that the Federal Defendants cannot stand idly by while the rights of tribal citizens are trampled, let alone on the basis of their race and legal status as descendants of enslaved Africans, in contravention of the Treaty of 1866 and the Thirteenth Amendment. This is

precisely what Plaintiffs allege the Federal Defendants did after the 2015 election, and each time the Federal Defendants provide MCN with federal funds in breach of their obligations to the Creek Freedmen. These breaches occurred well within the six-year statute of limitations period imposed by 28 U.S.C. § 2401(a). *See* Am. Compl. ¶¶ 74–76, 86–87. Accordingly, Plaintiffs' allegations defeat the Federal Defendants' Rule 12(b)(1) motion.

1. The Federal Defendants Failed to Ensure the 2015 Election Complied with the Treaty of 1866 and ICRA.

The Federal Defendants must ensure tribal elections meet requirements under tribal and federal law. The Creek Freedmen allege in the Amended Complaint that the Federal Defendants breached that duty in 2015, when it approved a tribal election that denied Creek Freedmen equal protection guaranteed under the Treaty of 1866 and the Indian Civil Rights Act ("ICRA"). *See* 25 U.S.C. § 1302 ("[n]o Indian tribe in exercising powers of self-government shall—(8) deny to any person within its jurisdiction the equal protection of its laws."). Am. Compl.¶ 74.

The Federal Defendants' duty has been confirmed by its own agency precedent. In *United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director*, the Interior Board of Indian Appeals ("IBIA") refused to overturn a BIA decision denying recognition to a chief elected by the Cherokee Nation. 22 IBIA 75, 77 (1992). The Cherokee had retroactively applied a tribal citizenship law to remove candidates from the ballot in an election for Chief. *Id.* The BIA Area Director refused to recognize the resulting government, concluding that the election violated the candidates' due process rights under ICRA. *Id.* The IBIA affirmed and further held that the BIA "has the authority *and the responsibility* to decline to recognize the results of a tribal election when it finds that a violation of ICRA has tainted the election results." *Id.* (emphasis added). The IBIA employed similar reasoning to declare that "when BIA receives information suggesting Federal [laws] have been violated [by a tribe], it has an *affirmative duty*

to inquire into the matter and *take appropriate action to correct or end any violation* found to exist." *Estate of Mary Dodge Peshlakai v. Area Director, Navajo Area Office, Bureau of Indian Affairs*, 15 IBIA 24, 37 (1986) (emphasis added). Plaintiffs allege here that the Federal Defendants did not ensure the 2015 election complied with either the Treaty of 1866 or ICRA, in breach of their duty to ensure the election did not violate federal law. Am. Compl. ¶ 89.

2. The Federal Defendants Failed to Promote Tribal Political Integrity in the 2015 Election.

The Federal Defendants must also promote tribal political integrity. It is well established that the Federal Defendants may only engage in "government-to-government relations" with a tribe that represents the nation *as a whole*. *See Morris v. Watt*, 640 F.2d 404, 415 (D.C. Cir. 1981). Just this past year, the Federal Defendants recognized this very concept, noting "it is well-accepted that the Secretary [of the Interior] has a duty 'to promote a tribe's political integrity.'" *See* Zorn Decl. Ex. A, (Opp. to Mot. for Preliminary Injunction, *Nooksack Indian Tribe v. Zinke*) (quoting *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008)).

This duty includes an obligation to refuse to recognize the results of an illegal election. *See Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) ("[T]he DOI has the authority and *responsibility* to ensure that the Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole.") (emphasis added) (citing *Seminole Nation v. United States*, 316 U.S. 286 (1942)); *California Valley Miwok Tribe v. United States* 424 F. Supp. 2d 197, 201 (D.D.C. 2006) ("At the core of this authority over [public business relating to Indians] is a responsibility to ensure that [the] Secretary deals only with a tribal government that actually represents the members of a tribe."). In *Nooksack Indian Tribe,* Federal Defendants invoked this duty to support its refusal to

recognize a tribal council composed of several members whose terms had expired. *See* Zorn Ex. A. The council was therefore not a "duly constituted government that represent[ed] the tribe as a whole." *Id*. (citation omitted). Plaintiffs allege here that the Federal Defendants failed to take a similar action, and thus breached its duty to promote political integrity when it approved of the results of the 2015 election. *See* Am. Compl. ¶ 74.

3. The Federal Defendants Did Not Protect the Rights of Freedmen Minority MCN Citizens.

The Federal Defendants have a mandatory duty to protect tribal rights, both of tribes themselves and of individual tribal members. *Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 137 (D.D.C. 2002) ("And the duty to protect these rights is the same whether the infringement is by non-members or by members of the tribe.") (quoting *Milam v. U.S. Dep't of Interior*, 10 ILR 1013, 1017 (1982)). As this Court recognized, this duty includes protecting the Creek Freedmen as minority citizens of the Nation. *See, e.g., Seminole Nation of Oklahoma v. Norton*, 223 F. Supp. 2d 122, 147 (D.D.C. 2002). The Federal Defendants have at least twice taken the position that treaty provisions functionally identical to Article 2 of the Treaty of 1866 continue to create a duty to guarantee Freedmen descendants the right of citizenship in other Oklahoma tribes—specifically the Seminole and the Cherokee. *See* Am. Compl. ¶ 83.

The Seminole Nation, like the MCN, signed a treaty in 1866 providing that "persons of African descent and blood . . . shall have and enjoy all rights and privileges of native citizens." Treaty with the Seminole, Mar. 21, 1866, Art. 2, 14 Stat. 755. In light of this language, in *Seminole Nation of Oklahoma v. Norton*, the Federal Defendants took the position that "[t]he exclusion of the Freedmen from participation in the Nation's government in violation of the treaty rights guaranteed to them in 1866 means that the United States *cannot* discharge its trust responsibilities to the Seminole Nation . . . because that governing body is no longer lawfully

constituted." 223 F. Supp. 2d 122, 134 (D.D.C. 2002) (emphasis added). In other words, DOI recognized its duty to reject the results of an election because Freedmen were excluded in violation of their treaty-guaranteed rights. The Court went on to say that "the BIA has the *responsibility* and indeed, the *duty*, to intervene and attempt to protect [the] rights [of minority members of the tribe]." *Id.*

Similarly, the Cherokee Treaty of 1866 provides that "persons of African descent and blood . . . shall have and enjoy all the rights of native citizens." Treaty with the Cherokee, July 19, 1866, Art. 9, 14 Stat. 799. In *Cherokee Nation v. Nash*, DOI sought a "declaration that the Treaty of 1866 between the Cherokee Nation and the United States guaranteed certain Cherokee Freedmen and their descendants all the rights of native Cherokees, including the right to citizenship in the Cherokee Nation, and that this Treaty provision continues to guarantee descendants of eligible Freedmen with citizenship and all other rights of 'native' Cherokees." 267 F. Supp. 3d 86, 113 (D.D.C. 2017) (internal citations omitted). This Court granted that declaration holding that while the "Cherokee Nation can continue to define itself as it sees fit," it "must do so equally and evenhandedly with respect to native Cherokees and the descendants of Cherokee freedmen." *Id.* at 140. Plaintiffs here allege that the Treaty of 1866 carries the same meaning and effect, and therefore the Federal Defendants had and breached a duty to protect the rights of the Creek Freedmen in the 2015 election. Am. Comp. ¶¶ 94–95.

4. The Federal Defendants Have an Obligation to Ensure Creek Freedmen Benefit from Federal Funds Provided to MCN.

It is a well-established principle that "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Here, just as in

Seminole Nation, where a tribe seeks money on behalf of all its citizens it "st[ands] in a fiduciary capacity to them." *Id.* As such, the Federal Defendants have a duty to ensure monies paid to the MCN are not misappropriated. Yet, the Federal Defendants have given federal funds to the MCN in the last six years with the express knowledge that Creek Freedmen will be excluded from said funds. *See* Am. Compl. ¶ 76.

5. The Federal Defendants' Duty to the Creek Freedmen Has Not Been Abrogated or Terminated.

The Federal Defendants' do not and cannot explicitly contend that the Treaty of 1866 has been abrogated. This reality is fatal to Federal Defendants' motion as the treaty is the operative document extending Defendants' obligations to the Creek Freedmen. The Federal Defendants make a passing reference to a DOI Solicitor's Opinion from October 1, 1941, which concluded that a constitution adopted under OIWA may exclude Freedmen. *See* Defs.' Mot. Dismiss 3–4. An agency opinion letter is not binding on this Court. *See Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.,* 323 U.S. 124 140 (1944)). Moreover, this opinion was adopted prior to Supreme Court precedent establishing that only clear and unambiguous acts of Congress can abrogate treaties and the obligations that stem from them. *See United States v. Dion*, 476 U.S. 436, 439–40 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). This is not one of those circumstances. The Federal Defendants have not cited any statute or act of Congress that abrogated the Treaty of 1866. They have not done so because there is none.

B. The Federal Defendants Confuse a Continuing Duty with a Single Continuing Act.

The Federal Defendants mistake a series of related but discrete events for a single occurrence. A continuing duty may arise from a specific point in time, such as the signing of a treaty, passing of a statute, or adoption of a constitution. That duty does not mean every

subsequent act bearing some relationship to the duty is a continuing act for purposes of assessing the timeliness of a claim. The cases the Federal Defendants cite do not support their expansive view of the statute of limitations. Those are clear cases of single actions with long-lasting effects, and they are distinguishable from the Plaintiffs' allegations here that the Federal Defendants breached a current duty in a discrete occurrence within the last six years.

1. Approval of the 2015 Election and Is A Discrete Act Arising from an Ongoing Duty.

Plaintiffs' allegations here stem from recent breaches of the Federal Defendants' duties to the Creek Freedmen, not a long-past action as the Federal Defendants argue. The Federal Defendants' approval of the 1979 Constitution made clear that the MCN did not have DOI's approval for every act going forward. Rather, DOI specifically withheld authorization from MCN for actions "that would be contrary to Federal Law." Blaha Decl. Ex. D. By definition, each subsequent approval or disapproval of an MCN action subject to DOI authorization must be the result of a separate and discrete decision. Importantly, these later decisions nevertheless are subject to the Federal Defendants' ongoing duties described in Section IV.A. above. The review and approval of MCN actions to determine compliance with federal law, in accordance with DOI's approval of the 1979 constitution, is a discrete act.

In 2015, the Federal Defendants recognized an MCN election that clearly violated, at minimum, the Treaty of 1866 and the Thirteenth Amendment. The 2015 election also violated ICRA, which requires the MCN to provide all persons within its jurisdiction "the equal protection of its laws." 25 U.S.C. § 1302. When the MCN denied the right to vote to a class of its citizens on a racial basis, it committed a textbook equal protection violation. *See e.g. Nixon v. Herndon*, 273 U.S. 536 (1927) (finding it "hard to imagine a more direct and obvious infringement" of the analogous clause in Fourteenth Amendment, than the denial of the right to

vote based on race). According to the terms of the Federal Defendants' approval of the 1979 Constitution, DOI was obligated to determine whether the 2015 election violated federal law before approving it.

The 2015 MCN election was illegal because Creek Freedmen were barred from participating in the election, in violation of the Treaty of 1866, the Thirteenth Amendment, and ICRA. The 2015 election implicated all of the duties the Federal Defendants have to the Creek Freedmen as rightful citizens of the MCN. The Federal Defendants' recognition of the MCN government elected in 2015, despite the violations of federal law, constitutes a new and independent breach of those duties. The Creek Freedmen properly asserted this breach in the Amended Complaint. Am. Compl. ¶¶ 94–95. The Federal Defendants' Motion to Dismiss must therefore be denied.

2. Payment of Federal Funds to the MCN Are Discrete Acts Arising from an Ongoing Duty.

The Federal Defendants made payments of federal funds to the MCN during the last six years, each of which constitutes a distinct breach of its fiduciary obligation to the Creek Freedmen. Under *Seminole Nation v. United States*, the Federal Defendants are liable for a breach of trust where it distributes funds to a tribe in full knowledge that those funds will be misappropriated. 316 U.S. at 296. The Federal Defendants continue to give federal funds to the MCN with the express knowledge that Creek Freedmen will be excluded from said funds. *See* Am. Compl. ¶ 76. Indeed, at numerous occasions within the last six years, the Federal Defendants have distributed to the MCN millions of dollars, purportedly for the benefit of all MCN citizens. This includes a recent $8,386,000.00 payment to settle a lawsuit wherein the MCN alleged the Federal Defendants violated their fiduciary duty to properly manage MCN trust

assets between 1972–1992.[3] Tellingly, the injury associated with Federal Defendants breach of its duty —denial of a proper share of a multi-million settlement payment — could not have been discovered in 1979. *See* Defs.' Mot. 12 (citing *Rotella v. Wood,* 528 U.S. 549, 555 (2000)).

3. Comparison to Statutorily Terminated Tribes Does Not Support the Federal Defendants' Position.

A critical flaw in Federal Defendants' Motion to Dismiss is its reliance on cases where Congress terminated a trust relationship, which it unquestionably has authority to do, and therefore terminated any duty DOI may have owed the plaintiffs in those cases. *See* Defs.' Mot. Dismiss 9. For example, the plaintiffs in *Felter v. Kempthorne* asked this court to review agency actions implementing a statute that provided for the distribution of trust assets and termination of membership for certain members of the Ute Indian Tribe. *See* 473 F.3d 1255, 1258 (D.C. Cir. 2007). After partitioning trust assets between "full blood" members who were to remain in the tribe and the Congressionally terminated "mixed-blood" Utes, DOI terminated federal supervision of the "mixed-blood" Utes and their property in 1961. *Id.* at 1258–59. Terminated members and their descendants brought suit in 2002, claiming that DOI improperly carried out its statutory mandate to terminate "mixed-blood" members and partition assets. *Id.* The appeals court upheld dismissal of the claims under 28 U. S. C. §2401(a), finding that all of plaintiffs' claims were an attempt to recast DOI's actions from 1961 and before as a continued action. *Id*. at 1259.

Felter differs from Plaintiffs' case here in at least two significant ways. First, the *Felter* plaintiffs appear to have asserted no new acts after the 1961 termination. *Id.* at 1260. That is not true here. Plaintiffs assert that the Federal Defendants' actions within the past six years have

[3] *See* Joint Stipulation of Settlement at 3, *Muscogee (Creek) Nation v. Jewell,* No. 06-cv-02161 (D.D.C. Aug. 30, 2016). This Court may take judicial notice of matters of public record in deciding a motion to dismiss. *See Kaempe v. Myers,* 367 F.3d 958, 965 (D.C. Cir. 2004)

caused injury to the Creek Freedmen. *See* Am. Compl.¶ 74. Second, DOI in *Felter* was acting under a statutory mandate to allocate the property and terminate the rights of the "mixed-blood" Utes. 473 F.3d at 1258. In fact, in *Felter,* Congress directed DOI to prepare and publish in the federal registry a roll of the "mixed-blood" Utes to be terminated as federally recognized Indians. *Id.* Congress, with its plenary authority over Indian tribes, thus clearly dictated that DOI end relations with the "mixed-blood" Utes. That DOI would effect the previously ordered termination on some indeterminate date in the future did not change the fact that Congress intended—and plaintiffs could anticipate—when those "mixed-blood" Utes would no longer be recognized as Utes and the trust relationship between those Utes and the government would cease to exist.

There is no such Congressional mandate here. Congress did not direct and DOI has not created a roll of Freedmen to be terminated. Congress did not direct and DOI has not published a roll of Creek Freedmen to be terminated as federally recognized Indians.[4] The trust relationship between the Creek Freedmen and the Federal Defendants, as established in the Treaty of 1866, exists to this day, and Plaintiffs allege the Federal Defendants have acted in breach of its duties to Plaintiffs within the last six years. *Felter*, therefore, is distinguishable on law and facts, and the Federal Defendants' reliance on its holdings is misplaced.[5]

[4] Creek Freedmen have never received any official written notice from Federal Defendants stating that they were subject to losing their status as federally recognized and protected Creek Indians.

[5] Federal Defendants' cite another case that stems from the same statute and termination process at issue in *Felter*. *See Ute Distribution Corp. v. Sec'y of the Interior*, 584 F.3d 1275 (10th Cir. 2009). Plaintiffs' claims there, which were similar to the *Felter* claims, were also found untimely for the same reasons the *Felter* plaintiffs' claims were barred. *See id.* at 1283 (noting that the "single, discrete event" was the Secretary's approval of plan that implemented the 1954 Ute Partition and Termination Act, 25 U.S.C. §§ 677 *et seq*).

The Federal Defendants' analysis of *Hopland Band of Pomo Indians v. United States* is similarly flawed. *See* 855 F.2d 1573 (Fed. Cir. 1988). Again, Congress, with its plenary authority, enacted a statute to terminate the trust relationship with a band of Indians, this time from the Hopland Rancheria. *Id.* at 1574. Congress tasked DOI with effecting termination, which it did in 1967. *Id.* at 1575 ("At that time, the Band's status as a Tribe was formally terminated by the United States."). Plaintiffs brought suit in 1986, which the Claims Court dismissed as untimely under Sec. 2401(a). *Id.* at 1576. As in *Felter*, the *Hopland* plaintiffs did not allege any new actions during the six years preceding their complaint. Here, Congress has not acted to abrogate the Creek Freedmen's citizenship rights or terminate the trust relationship between the federal government and the Creek Freedmen. Further, as alleged in the Amended Complaint, DOI has acted in the last six years in breach of its duties to the Plaintiffs. Therefore, *Hopland* is distinguishable and the Federal Defendants' reliance on it is inapposite.[6]

4. The Federal Defendants' Interpretation Would Force Minors and Yet Unborn Freedmen to Wear Badges of Slavery.

The Federal Defendants are asking this Court to insert a glaring loophole in the Thirteenth Amendment that will allow the federal government to perpetuate the effects of slavery. By the Federal Defendants' argument, no Freedman born more than six years after ratification of the 1979 Constitution could ever have had the opportunity to argue for her rights

[6] The Federal Defendants argument that the Creek Freedmen's claims are barred by the doctrine of laches must also fail. *See* Defs.' Mot. Dismiss 12, n.5. The doctrine of laches may only bar injunctive relief if there is a "substantial delay" prior to filing suit, the plaintiff was aware of the injury, and defendants have establish a "substantial reliance interest." *N.A.A.C.P. v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc*., 753 F.2d 131, 137 (D.C. Cir. 1985). In this case, none of the "three affirmative requirements" is present. *Id.* Indeed, the Creek Freedmen could not have brought claims related to the 2015 Principal Chief election prior to that election. Nor could claims related to the 2016 settlement payment been brought before that settlement was reached. Further, Federal Defendants have not invested resources creating "value" in Chief Floyd's government such that there would be reliance interest in its continued existence. *Id.* at 138 ("'[M]ere delay' by itself does not bar injunctive relief if the defendant did not invest resources that contribute to [the] future value.").

as a Creek citizen. That may have been true had Congress acted to terminate a tribal relationship, but it is not true here. Plaintiffs allege discrete federal actions within the last six years resulted in new injuries perpetuating the badges of slavery on Freedmen who otherwise have no opportunity to vindicate their rights. Minor Freedmen, such as Plaintiff N.K., and those yet unborn cannot be forced to wear the badges of slavery forever. Granting the Federal Defendants' Motion to Dismiss would ensure that they do.

V. CONCLUSION

The Federal Defendants grossly misstate the nature of their failings to the Creek Freedmen. This was not a one-time wrong, 40 years past and doomed to be forgotten among the litany of injustices the Freedmen have suffered because they are the legally descendants of enslaved Africans. The Federal Defendants have an obligation to ensure a tribe exercising its right to govern itself does so within the limits on its authority set by treaty, statute, and the U.S. and tribal constitutions, and further duties to protect minority groups within tribes. The Federal Defendants failed to live up to those obligations in 2015, after the MCN conducted its illegal election, and again in 2016, after it provided funds to the MCN knowing they would not inure to the benefit of the Creek Freedmen. Plaintiffs' claims as pleaded in the Amended Complaint therefore accrued well within the six-year statute of limitations. This Court has jurisdiction over Plaintiffs' claims, and the Court should therefore deny the Federal Defendants' motion.

Dated: October 24, 2018

Respectfully Submitted,

/s/ Graham C. Zorn

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CERTIFICATE OF SERVICE

I, Graham C. Zorn, hereby certify that on Oct. 24, 2018, I caused the foregoing Plaintiffs' Opposition to the Federal Defendants' Motion to Dismiss to be served on all counsel of record via this Court's CM/ECF system.

Dated: October 24, 2018 */s/ Graham C. Zorn*