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L A W O F F I C E

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Edgar French, President
Executive Committee
Delaware Nation
P.O. Box 825
Anadarko OK 73005

RE: TRIBAL COURTS

Dear President:

This memorandum is provided in response to concerns that adoption of a Constitutional amendment that establishes a Tribal Court will force the Nation to adopt a new Constitution. Again, this theory appears to be based on a misunderstanding of current case law. As you may know, the Tribal Courts in Indian Territory were abolished in 1898 by the Curtis Act, 30 Stat. 495, less than two years after the Supreme Court had upheld tribal criminal jurisdiction for Oklahoma tribes in Talton v. Mayes, 163 U.S. 376, 16 S.Ct. 986 (1896). The Curtis Act "rendered tribal law unenforceable in the federal courts (§ 26) and, after allowing time for the completion of a portion of the cases then pending in the tribal courts, abolished the tribal courts and transferred the remaining cases to the federal courts (§ 28)."

By 1928 the need to change policies towards tribal government structures was clear. In response to the Merriam Report, Congress passed the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act. 25 U.S.C. §476. The IRA allowed tribes to adopt constitutions and to reestablish their tribal governance organization. In many instances, this reestablishment included replacing CFR courts with a tribal court system to administer tribal codes passed by the tribal governments and approved by the Secretary of the Interior.

Although the Oklahoma tribes were originally excluded from the IRA, the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. §501-509, "permitted Oklahoma Indians to take advantage of most of the provisions of the 1934 Wheeler-Howard Act, which ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds"

Although the OIWA did not explicitly repeal the Curtis Act, subsequent court decisions have found that the abolishment of Tribal Courts was repealed. For example, in Muscogee Nation v.

Hodel, 851 F.2d 1439 (D.C. 1988), the D.C. Circuit held that the Indian tribes involved had the power to establish tribal courts because the prohibition on tribal courts set by the Curtis Act was repealed when the tribes acted to adopt a constitution and set up courts to enforce laws pursuant to the Oklahoma Indian Welfare Act of 1936 ("OIWA"). The court admitted, "OIWA clearly does not expressly repeal the abolition of the Tribal Courts," and the Department of Interior wanted to read the OIWA as not repealing the Curtis Act. The court refused to interpret the statute in that way, holding:

[Interior] fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law.... "[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." ... If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it must be construed that way.

Hence, the Tribes in Oklahoma may establish Tribal Courts via their Constitutions pursuant to the Oklahoma Indian Welfare Act. Pursuant to 25 C.F.R. §81, this establishment may be achieved by amending the current Constitution.

Please contact me if there are any questions.

Sincerely,

STEVEN SANDVEN
Attorney for the Delaware Nation