



Council of Cherokee Nation

Meeting Minutes

Rules Committee

Friday, January 5, 2007

1:00 PM

Legislative Conference Room

Special Session

Call To Order

Chair Frailey called the meeting to order at 1:00 p.m.

Invocation

Councilman Johnson gave the invocation.

Roll Call

Present 15 - Bill John Baker; S. Joe Crittenden; Jackie Bob Martin; David Thornton Sr. ; Don Garvin; Linda Hughes-O'Leary; Melvina Shotpouch; John F. Keener; Meredith Frailey; Cara Cowan Watts; William G. "Bill" Johnson; Buel Anglen; Charles "Chuck" Hoskin; Taylor Keen and Jack D. Baker

Absent 1 - Phyllis Yargee

Late Arrival 1 - Audra Smoke-Conner

Chair Frailey stated for the record this is a special rules meeting not scheduled by the chair nor were the items approved by the chair, however the majority did call the meeting and approve the agenda. There are two items on the agenda and the first is a briefing on the federal court case filed by Ms. Vann et al and against the Department of Interior and the Secretary seeking conjunctive relief under the petition that the 2003 Cherokee Nation elections were invalid and if you recall Cherokee Nation intervened in this case on a limited basis for the purpose of filing a motion to dismiss challenging the federal courts jurisdiction and accordingly the court granted the limited intervention but denied the motion to dismiss. The second item is a resolution rescinding our current resolution approved by the Tribal Council covering a constitutional amendment calling for a vote of Cherokee people to decide citizenship in the Cherokee Nation. She understands there was some confusion on the agenda therefore to ensure they have a properly called meeting she requested a poll of all the members for confirmation of what they signed.

A motion was made by that this matter be Polled. The motion carried by the following vote:

Yea: 9 - Bill John Baker; Audra Smoke-Conner; S. Joe Crittenden; David Thornton Sr. ; Linda Hughes-O'Leary; Melvina Shotpouch; John F. Keener; Charles "Chuck" Hoskin and Taylor Keen

Nay: 7 - Jackie Bob Martin; Don Garvin; Meredith Frailey; Cara Cowan Watts; William G. "Bill" Johnson; Buel Anglen and Jack D. Baker

1. Briefing on a recent court decision involving the special election for a constitutional amendment and the Marilyn Vann (Freedmen) case pending in the U.S. District Court.

Todd Hembree gave a briefing on the order that came down in late December concerning the lawsuit filed by Marilyn Vann against Gail Norton, Secretary of Interior. The actual decision was to deny Cherokee Nation's motion to dismiss and grant Ms. Vann's motion to leave and join additional parties. The Judge ruled first of all that Cherokee Nation was the necessary party and they could be feasibly joined. The basis for the Nation's motion to dismiss was basically that Cherokee Nation did a special appearance and filed a motion to dismiss saying we, the Nation are the necessary party to this lawsuit because they are talking about our citizenship rights and since we, the Nation are the necessary party and we cannot be feasibly joined because of sovereign immunity this case must be dismissed. The reason why Cherokee Nation can be feasibly joined was that under the 13th amendment of the United States Constitution it states "Neither slavery or involuntary servitude exempt as punishment for a crime whereas the party shall have been duly convicted shall exist within the United States nor any place subject to their jurisdiction". Section two, "The Congress shall have the power to enforce this article by appropriate legislation". The treaty of 1866 specifically brought grants for freedmen and their descendents all privileges of citizenship to the Cherokee Nation. There you have the 13th amendment and the treaty of 1866, two months later you have the 1866 civil rights act and this act was the necessary legislation by Congress to bring forth those rights. This is contrary to a number of cases particularly in the tenth circuit where the basic legal doctrine is that Indian tribes will be able to control their citizenship and the United States will not interfere with that based upon our sovereignty. This law journal basically set out a road map for Judge Kennedy's ruling. There are a number of legal options available to Cherokee Nation which would be best discussed by Lloyd Miller or Diane Hammons.

Diane Hammons stated her primary concern has little to do with citizenship rights of the freedmen. What really concerns her about this decision is the possible of the over reaching affect of this novel idea of abrogation and doing away with sovereign immunity. In order to find a waiver of sovereign immunity there has to be a clear expression of that by Congress or a declaration by the Tribe itself. When Congress does the special legislation or some type of law they have to specifically say so and that is a well established principle in Indian law. Judge Kennedy's decision finds a waiver of sovereign immunity out of this marriage of the 13th amendment which is the anti-slavery amendment and the 1866 treaty and finds that somehow those two things combine express clear Congressional intent. That is a novel holding and Judge Kennedy tries to argue an article that is heavily cited and tries to narrowly tailor that but its very frightening to her because that is a departure and it could set a road map for waivers of sovereign immunity to be found down the road on other issues. That is the most disturbing part of Judge Kennedy's ruling and the part she feels most strongly about appealing or challenging in some way. Judge Kennedy stated it was clear because of principles of the 13th amendment and there is no express law in the 13th amendment that says anything about Indian tribes waiving their sovereign immunity but the principles of the 13th amendment corresponding with the civil rights act of 1866 considered in the context of history equated to a waiver of sovereign immunity. It was a preliminary order and the Nation intervened only in a limited respect to contest and file a motion to dismiss. We are parties to the lawsuit yet that motion to dismiss was denied and the freedmen plaintiffs made a motion to add the Nation and its officials as parties in their second amended complaint and that was granted.

Lloyd Miller, Sonosky Law Firm, Washington, DC stated there was an election in May 2003 and also another election in 2003 but this lawsuit was filed to contest the first election. This is the election in which the Principal Chief was elected and also where one provision of the Constitution that required secretarial approval to put before the voters where they were asked to repeal that provision of the Constitution. The voters did agree to repeal the Constitution and they also elected Principal Chief to the position Chad Smith

was elected for. The whole matter then went to the Department of Interior because of the 1970 Principle Chief act provisions and also because the of the provisions removing secretarial approval itself had to be approved by the secretary. Once that provision is removed by approval of the secretary then it is out of the Constitution and future amendments no longer require secretarial approval. The plan was to have a two step constitutional amendment process where the secretary was taken out of the process as step one and the people were given the opportunity to consider further amendments to the Constitution in part two. Part two did take place, those amendments did pass by the voters but they were never submitted to the Department of Interior. There had been communications prior to the May 2003 elections between the Nation and the Secretary of Interiors representatives over the elections. The Nation had indications from the Department that the proposed amendment to remove the approval requirement would go through along with the elections procedures as all proper. After the election in due course the results of the election were acknowledged by the Department of the Interior in so far as the election of the Principle Chief is concerned and other members of the Council. However the Department never took action of the approval of the constitutional amendment itself, the amendment that removed the approval requirement and in fact over the past three years the Interior has not taken action on that issue. There was peril litigation in tribal court but that litigation concluded that the Department of Interior had approved the constitutional amendment removing secretarial approval and that issue was not directly before the court in the case in Washington DC and in fact the Judge noted he had not had a copy of that petition and was not commenting on it in any way. The plaintiffs in the case brought a lawsuit to Washington DC a few months after the election and before that lawsuit they wrote on more than one occasion to the secretary, assistant secretary and the Interior not to approve the constitutional amendment. Their argument was that the election was defective because Cherokee freedmen had not been allowed to participate in the election that occurred in May 2003. After the Department recognized the election in so far as the Principle Chief the freedmen decided to file a lawsuit and for a time as they monitored the lawsuit they found there were settlement negotiations underway. The settlement negotiations were occurring without the involvement of the Cherokee Nation and the whole case, everything that was being talked about concerned the Cherokee Nation. Neither the Justice Department nor the attorneys representing the plaintiffs in that case invited the Nation to the table and in response to these developments Cherokee Nation filed a motion to intervene but for a very limited purpose. Cherokee Nation's motion to intervene asked the Court for permission to intervene just in a limited purpose of asking the court to dismiss this case for lack of jurisdiction. This procedure is common when the sovereign interest is involved in a case but nobody has named the sovereign in the lawsuit. The general rule is that a sovereign is immune from being sued and many cases have been dismissed because of this rule. Judge Kennedy issues four major rulings that are not in Cherokee Nation's favor and five major rulings that are in the Nation's favor. The Cherokee Nation has a number of alternatives available to them. One is to appeal Judge Kennedy's ruling, jurisdiction where the case will be heard and possibly a trial.

Councilman Thornton stated on page 6 it states there was a letter dated March 15th, 2002 that was written and signed by Mr. McCaleb and he would like to have a copy of that letter and also the letter stated on page 7. Todd Hembree will provide a copy of both letters.

Cherokee Nation Supreme Court Case Briefing. Todd Hembree stated on December 19th, 2006 the Cherokee Nation Supreme Court issued a ruling on the freedmen petition, which is the petition that calls for the constitutional amendment to the Cherokee Nation Constitution that would specifically disenfranchise the freedmen descendents. A petition was circulated, three thousand signatures were gathered and it went to the CN election commission and the election commission through their review deleting 800 signatures

leaving approximately 2300 signatures and after the certification of the signatures there was a protest filed by a freedmen descendent and there was a court case held and that decision ruled there was 2175 qualified signatures which was more than the 2087 necessary to propose a constitutional amendment and the court also ruled the Principle Chief had the authority to call a special election on the petition. It was a 3-2 decision, Justices Matlock, Wilcoxon and Haskins wrote for the majority, Justices Dowty and Leeds both wrote individual descending opinions. The real crutch of the issue here was there were allegations of fraud in the petition process and that specifically Leeds and Dowty ruled for the descent that there was obviously fraud admitted so much to the point that the petition process should be invalidated. The majority ruled that although there may have been fraud committed and what if there had been fraud committed it should be forwarded to the Marshal Service for investigation and to his understanding that has been forwarded to the Marshal Service. The validity of the signatures comes down to if it is determined that a circulator committed fraud, is it just that one petition with their signatures that are thrown out or all the petitions that that circulator certified are thrown out. The court ruled if there is fraud committed then only that particular sheet is thrown out unless by other evidence the remainder of those signatures can be verified. The court ruled the election can go forward and that is where it stands at this point.

2.

A RESOLUTION RESCINDING PREVIOUS COUNCIL RESOLUTION #63-06

Todd Hembree stated this was drafted at the request of Councilman Keen.

Councilman Keen acknowledged this is probably one of the most emotional issues they have at the Cherokee Nation because identity is important to all of us and its implications for our Nation are indeed serious. He brought forth this measure as an opportunity for them to begin to restore unity among the Cherokee Nation. He believes if they rescind this motion today it does not affect the petition that is out there, the petition stands on its own to call for a special election, however if they vote to rescind this he believes they will bring the Nation out of a constitutional crisis and begin to unify our great nation once again.

Councilman Crittenden moved for approval. Councilman Bill John Baker seconded the motion.

Councilman Anglen requested to yield his time to Steven Keys from the Oologah District to give comments and to speak to this resolution.

Steven Keys stated he asked Councilman Anglen to allow him to speak on this issue because it is a very volatile issue but the bottom of line what he thinks Taylor has introduced really absurd. He feels number one that it is political suicide and number two he feels its hierarchy and communism.

Councilman Bill Baker called for point of order and stated we are not going to talk about communism and talk to a Councilor in this audience.

Chair Frailey requested Mr. Keys to keep his comments general and not to make them personal.

Councilman Martin stated due to the many questions and doubts expressed he moves to table this issue. Council member Cowan Watts seconded the motion. Motion carried.

Roll call is as follows:

Yea: 10 - Audra Smoke-Conner; Jackie Bob Martin; Don Garvin; Melvina Shotpouch; Meredith Frailey; Cara Cowan Watts; William G. "Bill" Johnson; Buel Anglen; Charles "Chuck" Hoskin and Jack D. Baker

Nay: 6 - Bill John Baker; S. Joe Crittenden; David Thornton Sr. ; Linda Hughes-O'Leary; John F. Keener and Taylor Keen

Announcements

None.

Adjournment

Councilman Martin moved for adjournment. Council member Cowan Watts seconded the motion. Motion carried.

APPROVAL / DISTRIBUTION

Minutes submitted by: Gayle Miller, Recording Secretary

Motion to approve minutes made by: _____

Minutes attested and concurred by: _____

Date: _____

STAFF PRESENT:

Will Chavez Tom Elkins Melanie Knight Diane Hammons

Randy Gibson Flossie Girty Todd Enlow

VISITORS PRESENT:

*Todd Hembree Steve Keys Ron Graham
Lois Ross Jim Ketcher Edgar McNac
Charles White Marilyn Vann Tony McNac
Arthur McNac John Ketcher Raymond Vann
Tony Ballew Sarah Brown Linda Lee
Stacy Leeds Joe Grayson Rosemary Marshal*