



## Legislation Text

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File #: 13-048, Version: 1

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### **A RESOLUTION AUTHORIZING THE LIMITED WAIVER OF SOVEREIGN IMMUNITY OF THE CHEROKEE NATION IN CONNECTION WITH A WIND DEVELOPMENT AGREEMENT WITH CHILOCCO WIND FARM, LLC**

**WHEREAS**, the Cherokee Nation since time immemorial has exercised the sovereign rights of self-government in behalf of the Cherokee people; and

**WHEREAS**, the Cherokee Nation is a federally-recognized Indian Tribe with a historic and continual government-to-government relationship with the United States of America; and

**WHEREAS**, the Principal Chief and/or his designee have negotiated arrangements with Chilocco Wind Farm, LLC relating to the entering of a Wind Development Agreement between Cherokee Nation and Chilocco Wind Farm, LLC; and

**WHEREAS**, in connection with the development of the wind farm on tribal land, it is necessary that the Principal Chief and/or his designee negotiate as necessary a limited waiver of sovereign immunity of the Cherokee Nation;

**BE IT RESOLVED BY THE CHEROKEE NATION** that the Council recognizes that, in order to allow reasonable redress to the counterparties of the Wind Development Agreement (“WDA”) in the event that Cherokee Nation breaches the WDA, it is necessary to grant a limited waiver of sovereign immunity with respect to the Cherokee Nation so that Chilocco Wind Farm, LLC, may maintain causes of action against the Cherokee Nation in the event of default by the Cherokee Nation under the terms of the Wind Development Agreement;

**BE IT FURTHER RESOLVED** that the Council further recognizes that the remedy available as a result of a waiver of sovereign immunity must be carefully and strictly defined, and therefore desires to establish herein the provisions that must be expressly set forth in the Wind Development Agreement;

**BE IT FURTHER RESOLVED** that for the sole purpose of allowing for enforcement of the terms of the above referenced documents, the Cherokee Nation agrees to a limited waiver of sovereign immunity, only if all of the following conditions are met:

- (1) The entity seeking to bring suit against the Nation is Chilocco Wind Farm, LLC, or its successors or assigns, and
- (2) The claim is for breach of contract and seeks only actual or liquidated damages resulting from the Nation’s noncompliance with the Wind Development Agreement, and
- (3) The claim will be limited to the breach of the WDA by Cherokee Nation that results in the project failing to achieve COD as defined in the WDA, and

(4) The claim will be limited to the funding of those amounts that the counterparty would have received from the sale of the interest, not to exceed \$6,000,000 and that the counterparty will still be able to proceed with the Chilocco Wind Energy Evaluation Leases and the Wind Resource Leases and retain all rights to sell the project to an investor chosen by the counterparty. The Cherokee Nation will be reimbursed the amount paid to the counterparty under the settlement of breach and is entitled to receive any other funds generated as a result of the provisions of the WDA, and

(5) The waiver of sovereign immunity for monetary damages is limited to the period before the Notice to Proceed is issued and thereafter, the Cherokee Nation's waiver of sovereign immunity for monetary damages within the Wind Development Agreement is terminated, and

(6) That in the event of an award of actual monetary damages, the award may be initially paid out of any assets of the Cherokee Nation, excluding real property and improvements by way of fixtures and excluding funds held in trust by the United States on behalf of the Cherokee Nation and shall not be a lien or encumbrance upon tribal property or allow recovery from any elected officials, officers, or employees of the Cherokee Nation for monetary damages, punitive or exemplary damages, court costs or attorney fees, and

(7) That any action can only be brought in the United States District Court for the Northern District of Oklahoma;

**BE IT FURTHER RESOLVED** that nothing herein shall be construed as a waiver of immunity from suit seeking punitive damages or any other form of damages from any party whatsoever, or as a waiver extended for the benefit of any entity, person, partnership, or firm whatsoever, other than Chilocco Wind Farm, LLC, or its successor or assign, as a party to the above referenced documents for enforcement of said agreement;

**BE IT FURTHER RESOLVED** that this waiver shall not be construed to authorize any action or claim against the Nation sounding in tort or any other type of claim or recovery not expressly authorized herein, for which purposes the Cherokee Nation's sovereign immunity is and shall be reserved;

**BE IT FURTHER RESOLVED** that the authorization of the Principal Chief to waive immunity from suit is limited to suits that meet all of the following requirements: (a) suit is filed in the United States District Court for the Northern District of Oklahoma; and (b) suit is filed by Chilocco Wind Farm, LLC, or its successor or assign, to enforce the agreement;

**BE IT FURTHER RESOLVED** that this waiver shall not allow recovery from any elected officials, officers or employees of the Cherokee Nation for monetary damages, punitive or exemplary damages, court costs, attorney fees or any other damages whatsoever;

**BE IT FURTHER RESOLVED** that the Cherokee Nation elects to expressly waive the sovereign immunity of the Cherokee Nation as it applies to the Wind Development Agreement and hereby authorizes the Principal Chief to negotiate and execute a limited waiver of sovereign immunity;

**BE IT FURTHER RESOLVED** that this Resolution shall in no manner or in any respect operate or be construed to operate to waive or otherwise diminish the sovereign immunity of the Cherokee Nation, except as to allow certain actions against the Cherokee Nation as provided herein.

