IN THE DISTRICT COURT OF THE CHEROKEE NATION
CRIMINAL DIVISION

CHEROKEE NATION,	)	
Plaintiff,	)	
	)	
v.	)	**CRM-2016-54**
	)	
	)	
KIMBERLIE A. GILLILAND,	)	
	)	
Defendant.	)	

REPLY TO NATION'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND MOTION TO STRIKE.

Defendant replies to the Nation's Response to Defendant's Motion to Dismiss. Defendant also moves the Court to strike the Plaintiff's reference in it Reply Brief to *Murphy v. Royal,* --- F.3d ---- 2017 WL 3389877 (10th Cir. Aug. 8, 2017), because it is not a final decision and may not be cited as precedence.

It is important to note that in its response, the Cherokee Nation ("Nation") has not refuted, rebutted or challenged the fact the alleged crimes occurred at the offices of the Cherokee Nation Foundation ("CNF"), which is located on commercial fee land in Tahlequah, OK; not on trust or restricted allotments. Therefore, the Nation admits that alleged crimes did not occur on trust or restricted allotments. Among other things, the Nation argues this Court has situs jurisdiction because the alleged crimes occurred on fee land located within the treaty boundaries of the Cherokee Nation.

A *fundamental issue herein is that this Court's criminal jurisdiction is established only by Cherokee Nation law-not federal law.*

Proposition One: There is no organizational or financial nexus with the Nation or CNB that creates jurisdiction for this Court.

The Nation asserts various facts regarding CNF's relationship to the Nation and

Cherokee Nation Businesses ("CNB") in an effort to show that CNF is an instrumentality of the Nation; therefore, it is cloaked with some jurisdictional nexus to Indian country.[1] The Nation's argument is without merit.

CNF is a non-profit organization with an Internal Revenue Service ("IRS") 501(c)(3) tax exempt certification, which provides a safe harbor for donor's contributions to be tax deductible and for contributions to it to be non-taxable. However, a paramount condition for IRS 501(c)(3) status is that the organization must be independent and not controlled by a parent; in other words, CNF cannot be an instrumentality of the Nation or it would lose its tax exempt status.[2] According to CNF's representations to the IRS for its 501(c)(3) status, it is an independent organization and not an instrumentality of the Nation or CNB.[3]

18 CNCA 302, allows the Nation to "form" a non-profit corporation, not to own it. It is formed for charitable, educational, scientific, literary or any other purpose allowed by the IRS to qualify for 501(c)(3) status. See 18 CNCA 304. A non-profit may have "shareholders or members," but it has no capital stock for anyone to own. See 18 CNCA 303.3. Therefore, neither the Nation nor CNB have any proprietary interest in CNF.

The Nation erroneously argued that, "The alleged crimes committed by the Defendant against the funds and property of CNF" because the alleged victim of the alleged crime is CNF, not its funds and property. The Nation's hyperbole that "The "victim" of the Defendant's crimes is the Cherokee people" is also wrong. The alleged victim is CNF, a corporation-neither

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Nation Response Brief at pg. 1:
A..... CNF is a not-for-profit charitable institution organized under the Cherokee Nation code and is designed to provide education assistance and scholarships to qualifying Cherokee students.
B. The Board members of CNF are appointed by the Cherokee Nation Principal Chief, and must be approved by the Cherokee Nation Tribal Council.
C. CNF receives substantial funding from both the Cherokee Nation and Cherokee Nation Businesses, both of whose headquarters are located on Indian country as defined in 18 U.S.C. 1151.

[2] The duty of loyalty requires a director to act in the interest of the charity rather than in the personal interest of the director or some other person or organization. See https://www.irs.gov/pub/irs-tege/governance_practices.pdf

[3] If the Nation is correct that CNF is the Nation's instrumentality, this Court and the attorneys attendant may have a duty to report to the IRS, that CNF is a controlled by another entity and its 501(c)(3) status should be withdrawn.

an Indian nor a tribe. This case does not involve "integral issues of self-governance and internal controls of the Cherokee Nation over its businesses, charities, political appointees, and employees." According to federal tax law, CNF is an independent non-profit corporation - nothing more.

Contributions to a non-profit 501(c)(3) organization, once donated, become the property of the non-profit organization. According to the Financial Accounting Standards Board ("FASB"), a contribution is an unconditional and nonreciprocal transfer of cash or other assets from one entity to another. See SFAS No. 116. In addition, donors relinquish dominion and control over the donated property. *Gundanna v. Comm'r of Internal Revenue*, 136 T.C. 151, 162, 136 T.C. No. 8 (U.S.T.C., 2011); *Pollard v. Commissioner,* 786 F.2d 1063, 1067 (11th Cir.1986), affg. T.C. Memo.1984–536. So regardless of the source of funds donated, once donated, the funds no longer belong to the donor. Furthermore, contributions are to be made with a donative intent and without an expectation of any substantial benefit in return. *Gundanna* at 162; *United States v. Am. Bar Endowment,* 477 U.S. 105, 118, 106 S.Ct. 2426, (1986).

Although the CNF received contributions from the Nation and CNB, they were not the only donors. Attempting to establish jurisdiction based on the location of a specific donor would place CNF and its directors and officers under the jurisdiction of a court in many foreign states. Simply, the Nation's and CNB's donations lose their character and identity as tribal funds when the funds are donated.

CNF is not cloaked with tribal character and there is no organizational or financial nexus with the Nation or CNB or their donations to establish situs jurisdiction of this Court. The Nation and CNB are jurisdictional strangers in this case and have no relevance. The Nation may as well be bringing a case on behalf of the Red Cross!

Proposition Two: This Court has never exercised jurisdiction over fee land because the Nation has not been affirmatively granted it territorial jurisdiction.

This Court may exercise jurisdiction over this case only if it was unequivocally granted jurisdiction by Cherokee Nation statute. The Nation's law *has not* granted this Court criminal situs jurisdiction over fee land. 20 CNCA 25 provides, "The territorial jurisdiction of Cherokee Nation District Court shall extend to include all "Indian country" also known as "Cherokee country" 20 CNCA 25 was enacted in 1990.[4]

It was clear the Council did not intend for the Nation to assert criminal jurisdiction over fee land within its treaty boundaries in 1990 because it has never appropriated the resources for law enforcement or tribal courts for the entire 14 county treaty area of northeastern Oklahoma. In fact, the Special Prosecutor in this case was the Nation's Attorney General prior to 2011, and oversaw cross-deputization agreements between the Nation and Oklahoma county and city law enforcement officers. The Nation did not have or assert criminal jurisdiction over fee land within the Nation's territory boundaries, otherwise its Marshal Service would not need cross-deputization. The Nation asserted *limited* criminal jurisdiction only over trust and restricted allotments.

The Nation suggests this court use common sense in interpreting what the Council intended with passage of 20 CNCA 25. Common sense tells us that with enactment of 20 CNCA 25, the Nation certainly did not intend to expend tens of millions of dollars over 7 million acres to protect over a hundred thousand Cherokees and prosecute thousands and

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[4] AN ACT ESTABLISHING A CHEROKEE NATION DISTRICT COURT, JURISDICTION AND PROCEDURE" LA-11-90, Nov. 13, 1990 Section 14. Jurisdiction - Territorial:
The territorial jurisdiction of the Cherokee Nation District Court shall extend to and include all "Indian country" also known as "Cherokee country" within the fourteen (14) county area of northeastern Oklahoma as defined by the treaties of 1828, 1833 and 1835 and the patent of 1838 between the United States of America and the Cherokee Nation, and at such other locations within the United States which qualify as "Cherokee country."

thousands of Indians in the Cherokee Nation District Court. None of the Nation's Attorney Generals have ever filed one criminal case for crimes that occurred on fee land within the Cherokee Nation's treaty boundaries.

In fact, the Nation has not asserted criminal jurisdiction over one person on fee land since it reinstituted its criminal court in 1990. Even if the court had territorial jurisdiction over Defendant's case, this court should dismiss this case based on selective prosecution. Since the District Court's reinstatement twenty-seven years ago, Defendant's case is the only criminal case ever filed in this court where the crime did not occur on trust or restricted allotment land.

Proposition Three: This Court's jurisdiction is limited to "Cherokee country" as defined by the Nation.

It is important to note that 20 CNCA 25 does not reference 18 U.S.C. § 1151. 20 CNCA 25 was enacted in 1990 in response to the criminal jurisdictional void left by the Tenth Circuit Court of Appeal decision in *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1990). In *Ross*, the court noted that:

> At the time Ross was arrested (1986), the law regarding the jurisdiction of local police officers on Indian Tribal Trust land in Oklahoma was not clearly established. Broad language in Supreme Court opinions, some of which we have quoted above, gave the appearance of allowing state intervention when it was determined that such intervention would not compromise tribal or federal interests.

The federal court held that the trust allotment where the crime occurred was Indian country and the state had no jurisdiction. Immediately preceding *Ross* was *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 402, in which the Oklahoma Court of Criminal Appeals held that an original restricted allotment was Indian country for criminal law jurisdiction purposes.

In *Eaves v. State*, 1990 OK CR 42, 795 P.2d 1060, the Oklahoma Court of Criminal Appeals made clear that the prevailing law in 1990 was that Indian country *only included trust and restricted allotments*. The court held that an Indian housing authority project in Osage

County was *not* Indian country as defined by in 18 U.S.C. §1151, which includes Indian reservations, dependent Indian communities, and all Indian allotments. If Osage County was an Indian reservation pursuant to 18 U.S.C. §1151, then there was no need to argue the Osage Nation housing authority site was a dependent Indian community.[5]

Two Tenth Circuit decisions address the status of the land the Nation now claims as its reservation, See *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1077 (10th Cir. 1993) (holding that tribally owned fee simple lands within the 14-county area are not "Indian country" because the federal government had not set them apart for tribal use); and *United States v. Adair*, 111 F.3d 770, 777 (10th Cir. 1997) (holding that non-Indian land within the 14-county area is not Indian country) (abrogated on other grounds).

When the Nation enacted 20 CNCA 25 in 1990, it clearly understood that Cherokee country for criminal jurisdiction purposes was limited to trust and restricted allotments and did not include fee land within its treaty boundaries.

The Nation argues that 20 CNCA 24 must be read in conjunction with 20 CNCA 25 which allegedly expands this court's jurisdiction beyond restricted or trust allotments. The Nation is wrong because 20 CNCA 25 defines "territory jurisdiction" as Cherokee country and 20 CNCA 24 applies that definition.[6]

When 20 CNCA 25 was enacted, the council conformed its grant of jurisdiction to the then prevailing law that the Nation only has criminal jurisdiction over trust or restricted

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[5] The argument that Osage County which was the territory of the Osage Nation, is an Indian reservation pursuant to 18 U.S.C. 1151 is arguably stronger than the Cherokee Nation's arguments that its treaty territory is a reservation because the Osage County mineral interests are held in trust by the United States for the Osage Nation.

[6] The District Court of Cherokee Nation shall have general jurisdiction and is vested with original jurisdiction, not otherwise reserved to the Supreme Court, to hear and resolve disputes arising under the laws or Constitution of Cherokee Nation in both law and equity, whether criminal or civil in nature. Such actions shall include, but are not limited to, the following:

1. Crimes. All violations of the Criminal Code of Cherokee Nation committed within its territorial jurisdiction within the following categories: . . .

allotments. Since the Nation does not plead facts in its Complaint that alleged crimes occurred on restricted or trust allotments, this court has no jurisdiction under Cherokee Nation law.

Proposition Four: The Tenth Circuit case of *Murphy* may not be cited as precedent and should be stricken from the Nation's brief.

Recently the Tenth Circuit decided in *Murphy* that the Muscogee (Creek) Nation's treaty territory was a reservation that had not been disestablished; therefore, the state has no criminal jurisdiction over Indians on fee land within that territory.

First, *Murphy* is not final until the time to request a rehearing or appeal to the Supreme Court has run. The State had moved for an extension of time to request a rehearing and the 10th Circuit has granted it, so it is obvious that the State intends to appeal or request a rehearing.[7]

As a threshold matter, the Nation's reliance on *Murphy* is misplaced because that opinion was issued just a few weeks ago and is not yet final. The Supreme Court has held, "'[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.'" *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990) (quoting *Dep't of Banking of Neb. v. Pink*, 317 U.S. 264, 266 (1942)) (ellipses in original).[8] "A timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties' address whether rehearing should be ordered share this key characteristic: All three raise the question whether the court will modify the judgment and alter the parties' rights." *Hibbs v. Winn*, 542 U.S. 88, 98 (2004).

Accordingly, when a decision is still subject to rehearing by the issuing court—as is plainly the situation in *Murphy*—it is premature to treat that decision as precedent. *See, e.g.*,

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[7] *See* Order, *Murphy v. Royal*, No. 07-7068 (Aug. 15, 2017) (extending time to file petition for rehearing to September 21).

[8] *See Forman v. United States*, 361 U.S. 416, 426 (1960) ("The original opinion [of the court of appeals] was entirely interlocutory and no mandate was ever issued thereon. It never became final and was subject to further action on rehearing.").

Mecham v. Smith, No. 1:10-CV-00264, 2011 WL 3626307, at *6 n.3 (D. Idaho Aug. 17, 2011) ("the Court does not rely on [then-recent Ninth Circuit opinion] because of the pending petition for rehearing"); *Nello L. Teer Co. v. Wash. Metr. Area Transit Auth.*, 695 F. Supp. 583, 594 (D.D.C. 1988) (holding decision in abeyance until court of appeals ruled on pending rehearing petition in case likely to bear directly on issue before district court); *Czerwinsky v. Lieske*, 831 P.2d 564, 566 (Idaho Ct. App. 1992) ("We emphasize that our decision above is not dependent upon [then-recent opinion of the Idaho Supreme Court], which is not final because of a pending petition for rehearing."); *Karren v. Bair*, 225 P. 1094, 1097 (Utah 1924) ("[T]here is an application for a rehearing pending in that case, and, under the practice of this court, such an application, while pending, suspends the judgment, and hence that case cannot be relied on or cited as authority.").[9]

Second, *Murphy*, a decision by a three-judge panel conflicts with earlier 10th Circuit decisions which found that the entire 14 county area is "Indian Country" and cannot overrule those earlier decisions. Only an *en banc* ruling can do so. Therefore, the Nation's reference to *Murphy* in its Reply Brief is improper and must be stricken.

Proposition Five: Regardless of *Murphy*, the Nation's amendment of 20 CNCA 25 affirms that the Nation has not granted this Court criminal jurisdiction over fee land within its treaty territory.

The Nation enacted its definition and grant of jurisdiction to the District Court in 1990 limiting territorial jurisdiction to "Cherokee country." If the Nation had intended to assert territorial jurisdiction to include fee lands within the treaty boundary of the Nation, there would be no need to limit the jurisdictional grant to Cherokee country. If the Nation intendeded to

[9] *See also, e.g.*, *Fitzgerald v. Procunier*, 393 F. Supp. 335, 339 (N.D. Cal. 1975) (Renfrew, J.) (explaining that on relevant date prison officials "were under no duty to institute new procedures conforming to [Ninth Circuit] opinion, since a decision on rehearing might have mandated very different requirements"); *Daniel v. Daniel*, 42 P.3d 863, 867 (Okla. 2001) (agreeing with contention "that a Court of Civil Appeals' opinion is not effective or enforceable unless and until mandate issues").

assert jurisdiction over all lands within its treaty territory, it would have said so and could have done so by stating, "The territorial jurisdiction of the Cherokee Nation District Court shall extend the territory defined by the treaties of 1828, 1833 and 1835 and the patent of 1838." The Nation did not.

The 20 CNCA 25 provision for territorial jurisdiction was not changed until February 14, 2011 when the Nation enacted the "A Legislative Act Amending Title 20 of the Cherokee Nation Code Annotated - Courts and Procedure; Amending Section 24; Jurisdiction - General ("Child Support Act"). LAS-03-11. The Child Support Act amended 20 CNCA 24 which provided:

> Section 4. The District Court of Cherokee Nation shall have general jurisdiction and is vested with original jurisdiction, not otherwise reserved to the Supreme Court, to hear and resolve disputes arising under the laws or Constitution of Cherokee Nation in both law and equity, whether criminal or civil in nature. Such actions shall include, but are not limited to, the following:
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> . . .
>
> D. (1.) All child support cases *arising on fee land within the jurisdictional boundaries* of Cherokee Nation if the child in question is an enrolled citizen of Cherokee Nation or is eligible for enrollment as a citizen of Cherokee Nation except that the petitioning party may request that the matter be heard in state district court. (Emphasis added.)

If the Nation needed to specifically amend its jurisdictional law in its child support cases to grant the District Court jurisdiction over "All child support cases *arising on fee land* within the jurisdictional boundaries of Cherokee Nation," then it is apparent the District Court had no jurisdiction over fee lands prior to the act. It should be noted that criminal jurisdiction is more rigid and any grants of criminal jurisdiction must be strictly construed. If the Nation had not granted this Court jurisdiction over fee land for child support cases prior to 2011, then it certainly had not granted this Court jurisdiction over fee land criminal cases.

Proposition Six: Change of Law cannot be applied retroactively

The Cherokee Nation Constitution prohibits the retroactive application of law. *See*

Article VI, Section 8. Never in the Cherokee Nation's modern history has it asserted jurisdiction over crimes committed within its territory that are not on trust or restricted allotments. If this court of the Nation changes the definition of Cherokee country for purposes of criminal jurisdiction, it can only do so prospectively.

Conclusion

This Court's criminal jurisdiction is established only by Cherokee Nation law-not federal law. The reason that the District Court since its revival twenty-seven years ago has not heard a criminal case where the allegations occurred on fee land within its territorial boundaries is it does not have jurisdiction over crimes. 20 CNCA 25 defined territorial jurisdiction, which limited its criminal jurisdiction to "Cherokee county" does not include fee land. The Nation's definition of Cherokee country as Indian country within the Cherokee Nation was enacted in reference to prevailing federal and Oklahoma cases. Since 1990, the Nation has relied on its own laws and has provided law enforcement or judicial services *only* for those crimes occurring on trust or restricted allotments. It belies common sense to think in 1990, that the Nation intended to provide law enforcement for the entirety of its treaty territory - the 14 northeastern Oklahoma counties. That would be thousands of law enforcement officers spread over seven million acres with possibly thousands of criminal cases a year.

If this Court had criminal jurisdiction over fee land since 1990, why have not any of Nation's Attorney Generals, including the Special Prosecutor herein, ever filed one criminal fee land case while the state was filing tens of thousands of cases against Cherokees within the Nation's territorial boundaries? If this Court had general jurisdiction over fee land, why did it amend its law in 2011 to specifically expand child support jurisdiction to fee land? Why is the jurisdictional child support fee land grant the Nation's only jurisdictional grant over fee land? Why has the Nation in the twenty–seven years since the revival of this District Court filed only

one criminal fee land case, -the instant case?

The Court should strike reference and arguments relating to *Murphy*. The Court should find any jurisdictional change must be applied prospectively and that CNF is not an instrumentality of the Nation or CNB.

Under Cherokee Nation statutes, federal case law, and basic common sense, the Nation has limited its jurisdiction to trust and restricted allotments for prosecution of the alleged crimes. This Court has no jurisdiction and must dismiss this case.

Submitted this 5th day of September, 2017.

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Certificate of Delivery

I, Chadwick Smith, do hereby certify that on the 5th day of September, 2017, pursuant to CNDC Rule 7, I emailed a true and complete copy of the foregoing document to the persons listed below:

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