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**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** Rules Committee of the Cherokee Nation Tribal Council and  
Melanie Knight, Secretary of State for the Cherokee Nation

**Opinion Number:** 2008-CNAG-01

**Date Decided:** June 11, 2008

**To:** Todd Hembree, Counsel  
Rules Committee of the Tribal Council of the Cherokee Nation

Melanie Knight, Secretary of State  
Cherokee Nation

**From:** A. Diane Hammons, Attorney General  
Cherokee Nation

This office has received an official request from the Rules Committee of the Cherokee Nation Tribal Council and the Secretary of State of the Cherokee Nation seeking an Attorney General's Opinion regarding whether the assumption of W.W. Hastings Hospital falls within LA-15-01, Section 5(A), (which requires Tribal Council ratification) or if the assumption falls within LA-15-01, Section 5 (D), (which does not require ratification).

Your questions are:

- 1. Does the proposed assumption of the operation of the W.W. Hastings Hospital require ratification by the Cherokee Nation Tribal Council pursuant to LA-15-01, Section 5(A), or, is the proposed assumption of hospital operations a necessary**

**agreement to carry out the functions of the government as set forth in the annual comprehensive budget pursuant to LA-15-01, Section 5 (D), which does not require further ratification?**

**2. Is a Resolution enacted by the Cherokee Nation Tribal Council a law pursuant to the Constitution of the Cherokee Nation?**

The Cherokee Nation Tribal Council and the Secretary of State of the Cherokee Nation have requested that the above question be answered pursuant to Article VII, Section 13, of the 1999 Cherokee Nation Constitution and LA-12-07, Effective date March 19, 2007. <sup>1</sup>

### **Cherokee Nation Constitution**

The Cherokee Nation Constitution separates the government into three distinct branches. <sup>2</sup> Each branch performs a specific function. The Cherokee Nation Tribal Council, as the legislative branch, establishes the laws deemed necessary for the good of the Cherokee Nation, provided that said laws are not contrary to the Cherokee Nation Constitution.<sup>3</sup> The executive power of the Cherokee Nation is vested in the Principal Chief of the Cherokee Nation and the Principal Chief is charged with faithfully executing the laws of the Cherokee Nation created by the Constitution and enacted by the Cherokee Nation Tribal Council, if said laws are not contrary to the Constitution. <sup>4</sup> The Cherokee Nation Supreme Court and the Cherokee Nation District Court are charged with interpreting the Constitution and the laws created by the Tribal Council in compliance with the Constitution pursuant to Article VIII of the Constitution. The present issue concerns the respective roles of the Legislative and the Executive branch regarding the assumption of the operation of Hastings Hospital.

**Question 1: Does the proposed assumption of the operation of the W.W. Hastings Hospital require ratification by the Cherokee Nation Tribal Council pursuant to LA-15-01, Section 5(A), or, is the proposed assumption of hospital operations a necessary agreement to carry out the functions of the government as set forth in the annual comprehensive**

**budget pursuant to LA-15-01, Section 5 (D), which does not require further ratification?**

**Answer Question 1: The proposed assumption of operations at W.W. Hastings Hospital requires ratification by the Council pursuant to LA-15-01, Section 5(A). The Tribal Council had constitutional and legislative authority to authorize the Principal Chief to execute the Compact, subject to ratification by the Tribal Council pursuant to LA-15-01.**

The Legislation in question, Legislative Act 15-01, effective date May 29, 2001, sets out the intent of the Act in Section 2;

“The purpose of this Act is to grant to the Principal Chief of the Cherokee Nation the authority to execute treaties, compacts, memorandums of understanding, contracts, and other agreements on behalf of the Cherokee Nation between governments, state agencies or other entities; with said approval to be subject to ratification through a majority vote of the Cherokee Nation Tribal Council.”

The Constitutional authority for the Act is set out in Section 3 of LA-15-01 and references Article V and VI of the 1976 Constitution of the Cherokee Nation. Article VI, Section 10, of the 1976 Constitution of the Cherokee Nation provides that:

“The Principal Chief shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as shall be prescribed by law, all communications and business of the Cherokee Nation. (emphasis added) <sup>5</sup>

Article V, Section 7 of the 1976 Constitution is also referenced in Section 3 of LA-15-01 and provides:

“The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution.”<sup>6</sup>

The Act authorizes the Principal Chief to execute treaties, compacts, memorandums of understanding, contracts, and other agreements on behalf of the Cherokee Nation, however such agreements must be ratified by a majority of the Cherokee Nation Tribal Council. The

Cherokee Nation Tribal Council has the authority under Article V, now Article VI, to prescribe that the Principal Chief execute the treaties, compacts, memorandums of understanding, contracts, and other agreements on behalf of the Cherokee Nation. The Principal Chief is also authorized to execute the business of the Cherokee Nation as prescribed by the Tribal Council pursuant to Article VI, now Article VII.

The issue is whether the assumption of the operation of W.W. Hastings Hospital falls under Act. LA-15-01, Section 5(A), provides

“The Principal Chief shall have the authority to execute **treaties, compacts, memorandums of understanding, contracts**, and other agreements on behalf of the Cherokee Nation between governments, state agencies or other entities regarding the **sovereign** immunity of the Cherokee Nation, **substantial assets or credit** of the Cherokee Nation, or where **real property** of the Cherokee Nation are involved, or where **significant rights and privileges** of the Cherokee people are involved, such agreements shall be subject to ratification by majority vote of the Cherokee Nation Tribal Council, as provided herein, before they are effective.”(emphasis added)<sup>7</sup>

LA-15-01, however, does not apply to agreements necessary to carry out the functions of the government in the annual comprehensive budget. LA-15-01, Section 5(D) specifically excludes agreements that are necessary to carry out the functions of government and that have already been approved by the Tribal Council from further ratification. The specific language of the act provides that:

The provisions of this Act shall not apply to agreements necessary to carry out the functions of government as set forth in the annual comprehensive budget approved by the Tribal Council in each fiscal year.

Resolution 15-06, however, does not fall within that exception. That Resolution, effective date March 17, 2006, is titled A RESOLUTION REAFFIRMING THE AUTHORIZATION OF A

SELF-GOVERNANCE COMPACT WITH THE UNITED STATES OF AMERICA, HEALTH AND HUMAN SERVICES, INDIAN HEALTH SERVICE. It is, simply put, an authorization for the principal Chief to enter into a Compact with Indian Health Service (hereinafter I.H.S.) regarding self-governance. The resolution also states that:

**BE IT RESOLVED BY THE CHEROKEE NATION**, that the Council of the Cherokee Nation fully supports and endorses the continuation of the Nation's self-governance, reaffirms its previous authorization of Resolution Number 11-93, and authorizes the Principal Chief or his/her designee to execute an amended and restated Compact of Self-Governance with the United States Health and Human Services, Indian Health Service; (emphasis added)

and

**BE IT FURTHER RESOLVED BY THE CHEROKEE NATION**, that the Principal Chief or his/her designee is hereby authorized to negotiate and execute each associated funding agreement to operate programs, services, functions and activities of the Indian Health Service as authorized by the Compact.(emphasis added)

Sovereign immunity, as set out in Section 5 (A) is defined in Section 2 (H) of LA-15-01 as follows: "Sovereignty" means the matters that concern the boundaries, or territory, or the jurisdiction, or treaty rights, or the powers or the rights of self-governance of the Cherokee Nation." (Emphasis added) <sup>8</sup> Having determined that a compact with I.H.S., regarding the rights or power of self-governance falls under the Act pursuant to LA-15-01, Section 2(H), further analysis of Section 2 and Section 5 regarding whether Resolution 15-06 involves substantial assets or credit of the Cherokee Nation, real property of the Cherokee Nation, or significant rights and privileges of the Cherokee people is not necessary.

LA-15-01, Section 4 (J) states that the comprehensive budget "means the incomes and expenditures as estimated, balanced, and approved by the Cherokee Nation Tribal Council."

Resolution 15-06 is a specific grant of authority to the Principal Chief regarding a self-governance compact and falls within the requirements of LA-15-01 5 (B) and 5(C), which

requires that executed compacts “executed by the Principal Chief on behalf of the Cherokee Nation” be submitted to the Tribal Council for ratification.

**Question 2: Is a Resolution enacted by the Cherokee Nation Tribal Council a law pursuant to the Constitution of the Cherokee Nation?**

**Answer to Question 2: A Resolution enacted by the Cherokee Nation Tribal Council is “an act of a temporary character not prescribing a permanent rule of government but only declaratory of the will of the Council of the Cherokee Nation on a given matter or in the nature of a ministerial act. “**

Resolutions and Legislative Acts are both designated in Article VI, Section 7, of the 1999 Constitution. Although they both are seemingly characterized as “laws” under that Article, the two actions apply in different situations. An Act is a permanent rule or continuing regulation of conduct while a Resolution is of a temporary nature and a declaration of the Council on a particular matter. Since the effective date of LA-15-01 there have been approximately seven hundred and seven (707) Resolutions passed by the Cherokee Nation Tribal Council beginning with R-35-01, dated 7/16/01 and ending with R-029-08, dated 4-14-08. The subject matter ranges from granting right of ways, confirming appointments to boards and commissions, authorization to requests for funding, to waivers of Sovereign Immunity.

The Judicial Appeals Tribunal has considered the nature of a resolution on at least three (3) occasions. The first case of interest is *David A. Cornsilk, v. Joe Byrd, Principal Chief*, JAT-96-18. In *Cornsilk v Byrd*, the court held that the power of referendum does not extend to the approval of resolutions. The second case, *Linda O’Leary and Bill John Baker v. Ben Stevens and Callie Ketcher*, JAT-04-13, dealt with the relationship between a resolution and the 2005 Comprehensive Budget Act. The third case, *Chad Smith, Principal Chief, v. Charles Hathaway*, JAT-05-13, reaffirmed the Principal Chief’s ability to veto a Resolution.

The specific definition of Acts and Resolutions can be found in Title 25 of the Cherokee Nation Code.

**Title 25 CNC § 21. Definition and style of laws**

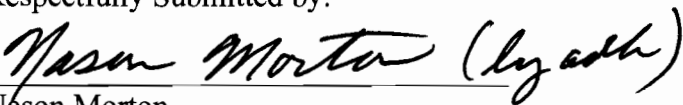
When a permanent rule of conduct of government in the form of a continuing regulation is the intent of the Council of the Cherokee Nation, the same shall be effected by an enactment of law of the Cherokee Nation... (sample of form omitted).

**Title 25 CNC § 27. Definition and style of resolutions**

When an act of a temporary character not prescribing a permanent rule of government but only declaratory of the will of the Council of the Cherokee Nation on a given matter or in the nature of a ministerial act is the intent of the Council, the same shall be effected by a resolution of the Cherokee Nation... (sample of form omitted).

As can be seen from the definition of the above sections, Acts are referred to in Section 21 as “laws,” while Resolutions are defined separately in Section 27. The two forms of legislative action are of different character, and should be utilized for only the conduct prescribed in the sections above. Acts should be used for permanent rules of governmental conduct, while Resolutions should only be used for temporary situations, or ministerial acts.

Respectfully Submitted by:



Nason Morton

Senior Assistant Attorney General



A. DIANE HAMMONS

Attorney General for the Cherokee Nation

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1. Endnote 1 Article VII. Section 13 of the 1999 Constitution created the office of Attorney General. Pursuant to Section 13, the “Attorney General shall represent the Nation in all criminal cases in the courts of the Nation, and in all civil actions wherein the Cherokee Nation is named as a party, and shall have such other duties as the Council may prescribe by law.” LA-12-07. Effective date March 19, 2007, sets out the Attorney General’s other duties, including 51 CNC Section 104(B) (4). “To give an official opinion upon all questions of law submitted to the Attorney General by any member of the Tribal Council, the Principal Chief, the Deputy Principal Chief,

or by the Group Leader or equivalent of any Cherokee Nation board, commission or executive branch department, and only upon matters in which the requesting party is officially interested.”

2. Article V. of the 1999 Constitution provides that the “The powers of the government of the Cherokee Nation shall be divided into three (3) separate branches: Legislative, Executive and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial branches of government shall be separate and distinct and no branch shall exercise the powers properly belonging to either of the others.”

3. Article VI, Section 7 of the 1999 Constitution provides that, “ The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution. The style of all bills shall be: “Be It Enacted By The Cherokee Nation”. The style of all resolutions shall be “Be It Resolved By The Cherokee Nation”.

4. Article VII. Section 1 and 9 of the 1999 Constitution provides:

Section 1. The executive power shall be vested in a Principal Chief, who shall be styled “The Principal Chief of the Cherokee Nation”.

Section 9. The Principal Chief shall cause the laws of the Cherokee Nation to be faithfully executed, and shall conduct in person and in such manner as shall be prescribed by law, all communications and business of the Cherokee Nation. The Principal Chief may cause to be formed and operated, trusts, the beneficiary of which shall be the Cherokee Nation and these trusts shall be granted such powers as provided by law for public trusts. Authorization for these trusts, however, must be approved by a majority vote of the Council.

5. Article VI, Section 10 of the 1976 Constitution was renumbered as Article VII., Section 9, in the 1999 Constitution. The language was not altered or modified. The 1999 Cherokee Nation Constitution was adopted by the Delegates of the 1999 Constitution Convention on March 6, 1999; approved for release by the Constitution Convention Style Committee on July 30, 1999; approved for referendum by resolution passed by the Council of the Cherokee Nation on May 15, 2000, and signed by Principal Chief Chadwick Smith on May 24, 2000 (Resolution #31-00); approved by vote of the citizens of the Cherokee Nation on July 26, 2003 and certified by the Cherokee Nation Election Commission on August 7, 2003; ruled effective and ordered implemented by the Cherokee Nation Judicial Appeals Tribunal (now Supreme Court) on June 7, 2006 in Case # JAT-05-04.

6. Article 5, Section 7 of the 1976 Constitution was renumbered as Article VI, Section 7 and the relevant sentence was not modified in the 1999 Constitution. The full text of each are set out below

#### **1976 Constitution**

**Section 7.** The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution. Laws or enactments which are required by Federal statutes to be approved shall be transmitted immediately upon enactment as provided by Section 11 of this Article to the President of the United States or his authorized representative. The style of all bills shall be: “Be It Enacted By The Cherokee Nation”. The style of all resolutions shall be “Be It Resolved By The Cherokee Nation”.

#### **1999 Constitution**

**Section 7.** The Council shall have the power to establish laws which it shall deem necessary and proper for the good of the Nation, which shall not be contrary to the provisions of this Constitution. The style of all bills shall be: “Be It Enacted By The Cherokee Nation”. The style of all resolutions shall be “Be It Resolved By The Cherokee Nation”.

7. The definitions of the highlighted portions are defined in Section 4 of LA-15-01 as follows:



- A. "Treaty" means a compact made between the Cherokee Nation and one or more other independent nations or tribes, which if properly authorized and ratified becomes law.
- B. "Compact" means an agreement usually applied to agreements between nations or sovereign states.
- C. "Memorandum of Understanding" means a written document embodying the terms of an agreement that the parties desire to fix by an informal written document, which will serve as the basis for a future formal contract.
- D. "Contract" means a promissory agreement, to do or abstain from doing some act, in exchange for sufficient consideration, between two or more parties that creates, modifies or destroys some legal relation.
- H. "Sovereignty" means the matters that concern the boundaries, or territory, or the jurisdiction, or treaty rights, or the powers or the rights of self-governance of the Cherokee Nation.
- I. "Substantial assets" means litigation that involves an amount in controversy in excess of twenty-five thousand dollars (\$25,000.00).
- K. "Credit of the Cherokee Nation" means obligation of tribal funds, property resources in which the Cherokee Nation has an interest.
- L. "Property of the Cherokee Nation" means real estate owned or sought to be purchased by the Cherokee Nation.
- M. "Rights or Privileges" means liberty, property, monetary, constitutional or legal interest held by citizens of the Cherokee Nation.

LA-15-01, Section 5 (B) and ( C ) set out the specific procedure for ratification.

8. Section 5 (A) sets out four (4) specific subject matter covered by the Act:

sovereign immunity of the Cherokee Nation, defined in Section 2 (H) see note 7 above.

substantial assets or credit of the Cherokee Nation, defined in Section 2 (I) and 2 (K) see note 7.

where real property of the Cherokee Nation are involved, or defined in Section 2 (L) and (K) see note 7.

where significant rights and privileges of the Cherokee people defined in Section 2 (M) see note 7.

are involved.

Section 5 (A) uses the term "sovereign immunity," and Section 4 (H) designates it as "sovereignty," the intent that compacts or agreements that involve the powers or rights of self-governance.