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Cherokee Council House
Cherokee, North Carolina
FEB 06 2020

Date: _____

Ordinance No. 124 (2020)

*Short title: an ordinance amending Cherokee Code Chapter 2
governing the exclusion power of the Tribe.*

WHEREAS, the Tribe has expressed its authority to exclude (or banish) persons from Tribal lands if they engage in behavior that causes certain types of harm or risk of harm to the Tribe, its members, or its resources; and

WHEREAS, the Tribal law governing exclusions is expressed in Cherokee Code (C.C.) Chapter 2; and

WHEREAS, C.C. Chapter 2 is unnecessarily complicated in some places and would benefit from clarification and elaboration in other places; and

WHEREAS, C.C. Chapter 2 should be amended to clarify the process by which Tribal Council will consider Writs of Emergency Temporary Exclusion and exclusion resolutions, to clarify notice requirements; to assign responsibility for maintenance of exclusion records; and to declare that the power of exclusion is an inherent part and exercise of Tribal sovereignty and self-governance.

NOW THEREFORE BE IT ORDAINED, by the Tribal Council of the Eastern Band of Cherokee Indians, in Council assembled, at which a quorum is present, that C.C. Chapter 2, governing the exclusion power of the Tribe, shall be amended to read as follows:

Chapter 2 - EXCLUSION POWERS OF TRIBE

Sec. 2-1. - Power to exclude.

(a) The Tribal Council shall have the power to exclude enrolled Tribal members for sexual offenses against minors and for convictions for trafficking in controlled substance under Chapter 14 of the Cherokee Code. Tribal Council shall also have the authority to exclude enrolled Tribal members for violations of state and federal law where such offenses would constitute trafficking in controlled substance under the Cherokee Code if committed within the territory of the Eastern Band of Cherokee Indians.

(b) The Tribal Council shall have the power to exclude other persons from Cherokee trust lands when necessary to protect the integrity and law and order on Tribal lands and territory or the welfare of its members.

(c) The Tribal Council shall have the power to exclude from or prohibit operation of a business on Cherokee trust lands or specific locations thereon, if the business threatens the

1 health, safety or welfare of Tribal members or Tribal natural resources due to spills,
2 accidents, illegal dumping, or other unauthorized releases of hazardous materials into the
3 environment.

4 (d) The power to exclude contains the power to modify or terminate a previously ordered
5 exclusion.

6 (e) The Tribe hereby declares that the power to exclude is an inherent and essential part of
7 Tribal sovereignty. It is indispensable to the Tribe's autonomy and self-governance.
8 Further, it is a natural right of the members of this Tribe, through their Tribal leaders and
9 codified Tribal law, to exercise the power of exclusion to protect the Tribe's natural,
10 economic, and cultural resources, and to protect the health, safety and welfare of Tribal
11 members.

12
13 (f) In this Chapter, "exclusion" means the power to limit or prohibit a person's or entity's
14 presence and activities on Tribal lands. "Tribal lands" and "territory" mean lands held in
15 trust for the Tribe by the United States.

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17 (g) Notwithstanding any other provision of law, the Tribe reserves its sovereign immunity and
18 shall not be liable for claims of loss, damage or injury resulting from exclusions.
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20 Sec. 2-2. - Tribal Council proceedings.

21 The Tribal Council shall exercise its power to exclude persons from Cherokee trust lands
22 only in open session of the Council. Nothing in this section shall prohibit the issuance of Writs of
23 Emergency Temporary Exclusion under Sec. 2-9 or the exclusion of persons under Sec. 2-3(f).

24
25 Sec. 2-3. - Notice and legal defense rights.

26 (a) The Tribal Council shall provide reasonable written notice to all persons over whom it
27 exercises the power of exclusion, together with hearing before the Tribal Council.

28 ~~(b) The Tribal Council shall provide not less than ten calendar days written notice to such~~
29 ~~persons prior to hearing. For good cause shown, the Council can waive the ten-day period~~
30 ~~and exclude immediately.~~

31 ~~(e)~~(b) Such persons shall be provided with a written statement of the grounds for the proposed
32 exclusion at the same time notice of the hearing is served upon them.

33 ~~(d)~~(c) Such persons shall have the right to appear in person before the Tribal Council, ~~to be~~
34 ~~represented by legal counsel before the Tribal Council, to require all testimony to be under~~
35 ~~oath at such hearing, to subpoena witnesses in their behalf for such hearing, to confront or~~
36 ~~question witnesses bringing exclusion actions against them to the Tribal Council or~~
37 ~~testifying against them in such hearing. In a hearing at which the Tribal Council is~~
38 ~~considering excluding a person or considering modifying or terminating a previously issued~~

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Sec. 2-7. - Request for exclusion action.

The persons with standing to bring a request to the Tribal Council for an exclusion action against a person who is subject to this Chapter are:

- (1) The Principal Chief.
- (2) The Vice Chief.
- (3) Members of the Tribal Council.
- (4) The Chief of the Cherokee Police Department.
- (5) The Tribal Prosecutor.
- (6) The Attorney General.

Sec. 2-8. - List of convictions for which exclusion is a punishment.

The Clerk of Cherokee Court shall semiannually provide Tribal Council with a list of all persons convicted of crimes during the preceding six months in which banishment is provided by statute. The list shall be transmitted no later than January 31, 2007 and every six months thereafter. The initial list shall include all persons convicted since April 1, 2000.

Sec. 2-9. - Emergency temporary exclusion.

(a) *Definitions.* For the purpose of this section the following definitions shall apply:

- (1) *Officer:* A sworn law enforcement officer of the Cherokee Police Department or any other law enforcement officer with the responsibility of enforcing Cherokee Law under authority of this code or a mutual aid agreement.
- (2) *Cherokee Officer:* A sworn law enforcement officer of the Cherokee Police Department only.
- (3) *Crimes Against Children:* Any act which would violate the provisions of Article VII of Chapter 14 of the Cherokee Code committed within the territorial jurisdiction of the Eastern Band of Cherokee Indians, whether or not the Cherokee Court has jurisdiction over the individual committing the offense.
- (4) *Drug Offense:* Any act which would violate the provisions of Article XVI of Chapter 14 of the Cherokee Code committed within the territorial jurisdiction of the Eastern Band of Cherokee Indians, whether or not the Cherokee Court has jurisdiction over the individual committing the offense. Considering all appropriate aggravating factors which may be present, the term "Drug Offense" shall not include any act which would be punished as a class D offense under Cherokee law.

1 (5) *Non-member*: Any person not officially enrolled as a Tribal member in the Eastern
2 Band of Cherokee Indians

3 (6) *Designated Official*: An individual designated by Cherokee Law to enforce the
4 provisions of this section by issuing Writs of Emergency Temporary Exclusion. Any
5 ~~magistrate~~ judicial official of the Cherokee Court shall be a designated official for the
6 purposes of this Chapter. In this Chapter, "judicial official" means a justice, judge or
7 magistrate who is subject to the provisions of Cherokee Code Chapter 7 (the Judicial
8 Code).

9 (7) *Writ of Emergency Temporary Exclusion (Writ)*: A legally binding order issued by the
10 designated official exercising the power of exclusion of Tribal Council excluding a non-
11 member from the Cherokee Trust lands. The Writ shall clearly state on its face the date,
12 time and location of the next scheduled Tribal Council session ~~until there is future~~
13 ~~action by the Tribal Council. Unless renewed by a vote of the Tribal Council in open~~
14 ~~council, the Writ shall expire at the end of the next regularly scheduled Tribal Council~~
15 ~~meeting following its issuance.~~ The Writ shall remain in full force and effect for no
16 longer than ninety (90) days after it is issued by a designated official.

17 (b) When a Law Enforcement Officer has probable cause to believe that a non-member has
18 committed a Drug Offense, the officer shall bring the non-member before the designated
19 official without unnecessary delay to determine whether a Writ of Emergency Temporary
20 Exclusion is necessary to protect the integrity and law and order on Tribal lands and territory
21 or the welfare of its members. The commission of any Drug Offense by a non-member shall
22 constitute a per se threat to the integrity and law and order on Tribal lands and territory or
23 the welfare of its members.

24 (c) The officer shall complete a sworn, written application for Writ of Emergency Temporary
25 Exclusion. The application shall contain a written statement of the essential facts
26 constituting the Drug Offense. If the application establishes probable cause to believe that a
27 Drug Offense has been committed by a non-member, the designated official must issue Writ
28 of Emergency Temporary Exclusion. Without exception, a copy of the application and Writ
29 and any appropriate information considered by the Designated Official shall be transmitted
30 to the ~~English Clerk of~~ Tribal Operations Program of the Tribal Council no later than the
31 beginning of the next scheduled Tribal council or 72 hours after the application was
32 considered, whichever is sooner.

33 (d) Any Cherokee Officer shall be authorized to execute a Writ of Emergency Temporary
34 Exclusion upon a named non-member. The Cherokee Officer shall execute the Writ by
35 serving a copy of the Writ and application upon the non-member and transporting the non-
36 member to any location outside the territorial jurisdiction of the Eastern Band of Cherokee
37 Indians.

38 (e) The issuance and execution of a Writ of Emergency Temporary Exclusion shall be
39 independent of any criminal charges filed against the non-member in Cherokee Court or any
40 other jurisdiction.

41 (f) Regardless of whether a writ is issued, the non-member shall be given notice of the next
42 scheduled meeting of Tribal Council and the application and writ shall be placed upon the
43 agenda. A decision by the Designated Official regarding probable cause shall not be binding

1 on Tribal Council and hearing before Council shall require a de novo review of all
2 appropriate facts and determinations. If no Writ is issued upon application, the Tribal
3 Council may review the facts and hold a proceeding for non-emergency exclusion. At the
4 designated meeting or any subsequent scheduled meeting, Tribal Council may renew the
5 Writ until the next scheduled session, complete the process of formal exclusion under this
6 chapter, or decline to take further action.

7 (g) The requirements of Cherokee Code Sections 2-2, 2-3, 2-4, 2-5, and 2-7 shall not apply to
8 Writs of Temporary Emergency Exclusion issued under this section, but shall apply to all
9 subsequent proceedings before Council.

10 (h) There is no right to judicial appeal of a Tribal Council decision to exclude a person from
11 Cherokee trust lands; provided, however, nothing in this Chapter shall preclude Tribal
12 Council from re-considering an exclusion and modifying or terminating the order of
13 exclusion by appropriate resolution, if Tribal Council believes a change of circumstances
14 warrants such action.

15 Sec. 2-10. – Harboring excluded persons.

16 Any person who harbors an excluded person on Cherokee trust lands shall be guilty of a
17 crime and upon conviction thereof may be sentenced to a term of imprisonment not to exceed six
18 months or a fine not to exceed \$5,000, or both.

19 Sec. 2-11. – Service of exclusion resolution.

20 A copy of the Tribal Council resolution excluding a person from Cherokee trust lands
21 shall be served on the excluded individual by a person authorized to serve legal process. Proof
22 of service on excluded individuals shall be maintained by the Tribal Operations Program, in
23 coordination with the Office of the Attorney General.

24 **BE IT FINALLY ORDAINED** that this Ordinance shall be effective upon ratification by the
25 Principal Chief, and all ordinances and resolutions inconsistent with this ordinance shall be
26 rescinded.

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28 *Submitted by the Office of the Attorney General*