IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARILYN VANN, RONALD MOON, HATTIE CULLERS, CHARLENE WHITE, and RALPH THREAT, Plaintiffs, v. GALE A. NORTON, Secretary of the United States Department of the Interior; UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants, and CHEROKEE NATION, P.O. Box 948 Tahlequah, Oklahoma 74465-0948 Limited Intervenor.	Case No.: 1:03cv01711 (HHK) Judge: Henry H. Kennedy Docket Type: Civil Rights (non-employment) Date Stamp: 08/11/03

LIMITED INTERVENOR CHEROKEE NATION'S MOTION TO DISMISS

Limited Intervenor Cherokee Nation respectfully moves this Court for an Order dismissing this action for lack of jurisdiction, based upon (1) the failure of the plaintiffs to join a necessary and indispensable party, and (2) the failure of the plaintiffs to allege any final agency action from which the plaintiffs may appeal.[1] In support of this Motion the Court is respectfully referred to the accompanying Memorandum of Law.

[1] By making this motion, the Cherokee Nation seeks to intervene solely for the limited purpose of filing a motion to dismiss. The Cherokee Nation does not, by making this motion, waive its sovereign immunity or consent to be sued with regard to any issue presented in this case, and the Cherokee Nation expressly reserves its immunity from suit.

Wherefore, the Cherokee Nation respectfully requests that its Motion for Dismissal of this action be granted.

Respectfully submitted this 14th day of January, 2005.

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MEMORANDUM IN SUPPORT OF LIMITED INTERVENOR CHEROKEE NATION'S MOTION TO DISMISS

The Plaintiffs in this action seek a declaration prohibiting the Secretary of the Interior from recognizing the results of the Cherokee Nation's May 24, 2003 tribal election. At that election, the Principal Chief and fourteen Council Members were elected. At the same election, the Cherokee Constitution was amended to remove a provision (art. XV, sec. 10) no longer present in many tribal constitutions, which made Constitutional amendments subject to approval by the Secretary of the Interior.

The plaintiffs seek a declaration that the May 24, 2003 Cherokee Nation election is invalid in its entirety, and an order from this Court directing the Secretary to recognize the former elected officials of the Cherokee Nation as duly elected until a new election is held that is

satisfactory to the plaintiffs. Complaint at 17 (Aug. 11, 2003). The Plaintiffs also seek an order prohibiting the Secretary from approving the Constitutional amendment the voters adopted at the May 24 election. *Id.*

These claims directly attack and impair the fundamental interests of an absent party – the Cherokee Nation – because they seek to undo the most sovereign of actions the Cherokee Nation can take: holding tribal elections and amending the Tribe's Constitution. Because the Cherokee Nation has direct interests in this action but cannot be joined as a party due to its sovereign immunity, the Complaint must be dismissed under Rule 19 due to lack of jurisdiction for want of a necessary and indispensable party.[1] Further, the Complaint must independently be dismissed for lack of jurisdiction because there is no "final agency action" from which an appeal may be taken.

STATEMENT OF THE CASE

The Cherokee Nation is a federally recognized Indian Tribe situated in northeastern Oklahoma. The Nation's seat of government is in Tahlequah, Oklahoma.

On May 24, 2003 the Cherokee Nation conducted a tribal election for the twin purposes of (1) electing a new Principal Chief, Deputy Chief and fifteen new members to the Nation Council, and (2) amending the Nation's Constitution to remove a provision (art. XV, sec. 10) requiring approval by the Secretary of the Interior before any future amendment to the Constitution could become effective. The Constitutional amendment passed overwhelmingly.

[1] The Cherokee Nation by separate motion seeks to intervene solely for the limited purpose of filing this motion to dismiss. The Nation does not, by its limited intervention, waive its sovereign immunity or consent to be sued with regard to any issue presented in this case, and the Nation expressly reserves its immunity from suit.

Consistent with the constitutional provision being removed, the amendment was forwarded to the Secretary of the Interior for approval. To date, the Secretary has taken no action on the amendment. However, the Secretary, acting through the Eastern Oklahoma Regional Director, recognized the outcome of the May 24 candidate elections as valid and binding and, consistent therewith, recognized the re-election of Principal Chief Chad Smith. Complaint, Exh. 17.[2]

Five individuals alleging to be "citizens"[3] or "enrolled members"[4] of the Cherokee Nation filed this action in August 2003 against the Secretary of the Interior. The parties agree that the plaintiffs (who also term themselves "Freedmen") –

> challenge the United States' recognition of the results of the May 24, 2002[3] [*sic*] election (and subsequent run-off), in which the tribal Chief and other elected officials were elected, and a proposed constitutional amendment, which provides for the elimination of the requirement that [the Department of the] Interior approve future amendments to the Tribe's constitution, was passed. *See generally* Complaint. Plaintiffs allege that the Freedmen were unlawfully precluded from voting in the election. Thus, they challenge the United States' recognition of the tribal officials elected to office, and Interior's alleged *de facto* approval of the constitutional amendment.

Joint Statement Following Local Rule 16.3 Meeting at 1-2 (July 27, 2004).

The Secretary filed an Answer on March 18, 2004. The Answer alleged five defenses, including the defense that "To the extent the Cherokee Nation is a necessary and indispensable

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[2] On July 26, 2003 a second tribal election was held for the purpose of conducting a run-off election for the Deputy Chief and one Council member position, and further amending the Nation's Constitution. These amendments, too, passed overwhelmingly. Given that the May 24 amendment removed the constitutional provision requiring Secretarial approval for future amendments, the July 26 amendments were never submitted to the Secretary. None of the amendments adopted at the May 24 or July 26 elections altered Cherokee Nation citizenship or voting rights.

[3] Complaint at 1.

[4] Complaint at 3.

party, Plaintiffs' Complaint may have to be dismissed." Answer at 10 (Mar. 18, 2004). Notwithstanding that such a defense is jurisdictional, the Secretary has not filed a motion to dismiss, nor otherwise brought this (or other jurisdictional defects, such as the absence of any final agency action) to this Court's attention for resolution.[5]

Instead, the Secretary has engaged in secret "settlement" discussions with the plaintiffs without any notice to the Cherokee Nation, much less any opportunity to participate therein. *See e.g.* Joint Statement, *supra* at 2-4; Supplement to Joint Statement and Request for Further Stay at 2-3 (Oct. 26, 2004); Joint Status Report and Request for Further Stay at 1-2 (Dec. 13, 2004). Yet, the parties have repeatedly informed the Court that this action concerns the results of the *Cherokee Nation's* elections and an amendment to the *Cherokee Nation's* Constitution. Joint Statement at 1-2; Supplement at 1-2.

ARGUMENT

A. The Suit Must Be Dismissed for Failure to Join the Cherokee Nation As an Indispensable Party.

The plaintiffs' central allegations – that the Cherokee Nation's May 24, 2003 election was unlawful and therefore void and of no effect – is a direct attack on the sovereignty and internal affairs of the Cherokee Nation. It is a direct attack on the right of the Principal Chief and other elected Cherokee Nation officials to be recognized as the duly elected officials of the Cherokee Nation. It is a direct attack on the right of the Cherokee Nation to adopt its own

[5] Both counsel for the plaintiffs and counsel for the government are familiar with these jurisdictional defects. Only sixteen months ago the Tenth Circuit dismissed on indispensability grounds a similar action against the Secretary brought by persons alleging to be members of the Seminole Tribe. *Davis v. United States*, 343 F.3d 1282 (10th Cir. 2003), *cert. denied* 124 S. Ct. 2907 (2004) (finding Seminole Tribe necessary and indispensable to litigation challenging exclusion of plaintiffs from the benefits of a tribal land claims judgment, and dismissing other claims against the Secretary for failure to exhaust administrative remedies). Counsel for both parties there are the same counsel appearing here.

Constitution and Constitutional amendments. It is a direct attack on the right of the Cherokee Nation to conduct its own elections, to adopt the procedures governing those elections, and to adopt the procedures for challenging those elections through the Nation's administrative and judicial tribunals. In the words of the Supreme Court, it is a direct attack on the right of the Cherokee Nation, like other sovereign Indian tribes, "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).[6]

There is nothing subtle about the plaintiffs' attack on the Cherokee Nation's election. The Complaint makes it abundantly clear that the plaintiffs in this action seek a declaration prohibiting the Secretary of the Interior from recognizing the results of the Nation's May 24, 2003 tribal election. The plaintiffs seek a declaration that this election is invalid. The plaintiffs also seek an order directing the Secretary to recognize the former elected officials of the Cherokee Nation as holdover officials until a new election is held that is satisfactory to the plaintiffs, Complaint at 17, (although earlier elections were conducted under the same rules and procedures the plaintiffs now contest). In sum, and as *both* parties recognize, the plaintiffs

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[6] As one district court recently summarized:

> Courts have long recognized that a governmental entity has sovereign interests in exercising power over individuals and entities in its territory and in having its territory and power recognized by other sovereigns. *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601, (1982). A governmental body's sovereign interest is the type of direct, significant and legally protectable interest that could justify intervention under Rule 24(a)(2).

Miami Tribe of Oklahoma v. Walden, 206 F.R.D. 238, 242 (S.D. Ill. 2001). *See also*, *Fletcher v. United States*, 116 F.3d 1315, 1326-27 (10th Cir.1997) ("Indian tribes are separate sovereigns with the power to regulate their internal and social relations, including their form of government and tribal membership") citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, at 62-63 (1978); *United States v. Wheeler,* 435 U.S. 313, 322-23 & n.18 (1978); and *Felix S. Cohen's Handbook of Federal Indian Law* 247-48 (1982 ed).

"challenge the United States' recognition of the results of the [Cherokee Nation's] May 24, 2002[3] [*sic*] election (and subsequent run-off)." Joint Statement at 1-2.

It is a bedrock principle of federal Indian law that Indian Tribes possess sovereign immunity from suit without their consent. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe v. Wash. Dep't of Game*, 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). Sovereign immunity prevents Tribes such as the Cherokee Nation from being joined in litigation without their consent. *Id. See also Davis v. United States*, 343 F.3d 1282, 1289 (10th Cir. 2003); *Davis v. United States*, 192 F.3d 951, 959 & n.8 (10th Cir. 1999) (both involving Rule 19 analysis as applied to suit against the Secretary over rights in Seminole Nation property and dismissing claims because joinder of necessary and indispensable Indian Tribe was barred by tribal sovereign immunity); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1459 (10th Cir. 1989) (dismissing on sovereign immunity grounds almost identical suit to the case at bar over voting rights issues).

As demonstrated below, the Cherokee Nation is a necessary party to this action under Rule 19(a). But because the Nation cannot be joined due to its sovereign immunity from suit, it is also an indispensable party under Rule 19(b). As such, its absence deprives this Court of jurisdiction over the Complaint. *Pueblo of Sandia v. Babbitt*, 47 F. Supp.2d 49, 52 (D.D.C. 1999), discussing *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1494 (D.C. Cir. 1995).

1. The Cherokee Nation is a necessary party under Rule 19(a).

Rule 19(a) deems a party "necessary" if the person "claims an interest" relating to the action and is so situated that disposition of the case in the party's absence may "impair or impede" the party's ability to protect that interest. Fed.R.Civ.P. 19(a)(1)(i). The standard is similar to the "impair or impede" standard for mandatory intervention under Rule 24(a)(2) and is readily met here.[7]

Obviously the Cherokee Nation "claims an interest" in the integrity of its own elections. So, too, if the plaintiffs' suit results in the invalidation of the Cherokee Nation's election, such a disposition will "impair or impede" the ability of the Cherokee Nation to carry out the laws of the Nation, to conduct elections, to operate its government consistent with the result of those elections, to provide internal procedures for contesting those elections, and to structure (and restructure) its very government through the adoption of amendments to its Constitution.

Rule 19(a) also deems a party "necessary" if the person "claims an interest" relating to the action and is so situated that disposition of the action may "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Fed.R.Civ.P. 19(a)(1)(ii). This alternative formulation for "necessary" party status is equally met here since, in the Cherokee Nation's absence, the Nation would not be bound by the disposition of this action. Thus, the Nation and

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[7] Under Rule 19(a) a party is deemed necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

the Secretary could find themselves in separate litigation here or in Oklahoma that would result in the courts imposing "inconsistent obligations" on the Secretary vis-a-vis the Cherokee Nation's elections. The risk that one court might order the Secretary not to recognize the validity of the Nation's election while another court might order the precise opposite relief independently establishes that the Cherokee Nation is "necessary" under Rule 19(a).

As other courts have held, the characterization of a claim or the fact that it has been brought only against federal defendants does not control a determination of whether the claim would affect the rights of an absent Tribe. For example, when the Quileute Tribe brought suit against the Secretary of the Interior to review the Secretary's decision that certain fractional interests in land within the Quinault Reservation escheated to the Quinault Tribe, and challenged the constitutionality of the statute underlying the Secretary's decision, the court dismissed the action on the grounds that the Quinault Tribe's property and sovereign interests would be affected by the claim, but that the Tribe could not be joined because of its immunity from suit. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460-61 (9th Cir. 1994). The fact that the suit was brought only against the Secretary did not affect the conclusion, for "the necessity of the Quinaults . . . cannot be avoided by characterizing the issue as the constitutionality of [the Act providing for escheat]." *Id.* at 1458.

The court reached the same conclusion in *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), where (not unlike the case at bar) various groups of Indians brought suit against the Secretary to enjoin him from "dealing with the Quinault Indian Nation . . . as the governing body of the Quinault Indian Reservation. . . ." *Id.* at 1498. The court found that adjudication of plaintiffs' claims – although again directed at federal officials – unavoidably affected the rights and interests of the Quinault Tribe. Again, the

court dismissed the action because the Quinault Tribe could not be joined due to its immunity from suit. In reasoning that has full application here, the Court said (*id.*):

> [T]he Quinault Nation undoubtedly has a legal interest in the litigation. Plaintiffs seek a complete rejection of the Quinault Nation's current status as the exclusive governing authority of the reservation. Even partial success by the plaintiffs could subject both the Quinault Nation and the federal government to substantial risk of multiple or inconsistent legal obligations.

The same principle holds true here. Plaintiffs have brought suit against the Secretary to enjoin him from dealing with the duly elected Principal Chief of the Cherokee Nation, and to direct him to deal only with former elected officials until a new election is held. Plaintiffs also seek to enjoin the Secretary from approving an amendment to the Cherokee Constitution. These claims plainly encroach upon the core interests of the Nation and its sovereignty, and raise claims for which the Nation is a necessary party.

2. The Cherokee Nation is an indispensable party under Rule 19(b).

Rule 19(b) provides that when a necessary party "cannot be made a party," the court should determine whether the action "should proceed among the parties before it, or should be dismissed, the absent [party] being thus regarded as indispensable." In making this determination, the court is to weigh various equitable factors.[8]

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[8] Where a necessary but absent party cannot be joined, Rule 19(b) instructs a court to determine:

> whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent [party] being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the [party's] absence might be prejudicial to [that party] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the [party's] absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The law applying these standards to Indian tribes as indispensable parties is well-established. As a bedrock proposition of tribal sovereignty, Indian tribes cannot be sued in court because of their sovereign immunity. *Supra* at 5. Thus, in those cases where Indian tribes are a necessary party but joinder under Rule 19(a) is not available due to tribal immunity, the courts must make a determination as to their indispensability under Rule 19(b). Although a district court generally has a considerable measure of discretion in weighing the factors relevant to a Rule 19(b) analysis, that discretion is significantly "cabined" when the necessary party that cannot be joined possesses sovereign immunity from suit. *Kickapoo Tribe*, 43 F.3d at 1500 (referring to the district court's "cabined discretion" under Rule 19 when the absent party possesses sovereign immunity from suit, and adding that the absent party "was both a necessary party under Rule 19(a) and immune from suit, thereby cabining the district court's discretion to consider factors under Rule 19(b)"). As noted in *Kickapoo*,

> "[T]here is very little room for balancing of other factors" set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests "compelling by themselves."

Id. at 1496, quoting *Wichita & Affiliated Tribes*, 788 F.2d at 777 n.13. Under such circumstances, Rule 19(b) calls for a much more "circumscribed inquiry." *Id.* at 1497. Particularly in this more limited framework, the relevant factors weigh in favor of dismissal.

For instance, there can be no doubt that under Rule 19(b)'s first of four specified criteria, "a judgment rendered in the [Cherokee Nation's] absence might be prejudicial to the [Cherokee Nation]," Rule 19(b)'s first consideration. Indeed, such a judgment could completely overturn the Cherokee Nation's laws and procedures for conducting Tribal elections, throw sitting Council members and the Principal Chief out of office, and undo an amendment to the Cherokee Constitution. A judgment in favor of the plaintiffs could even be prejudicial to the Secretary, in

the event subsequent litigation to which the Cherokee Nation is a party reaches a contrary or inconsistent outcome. Thus, Rule 19(b)'s first criterion counsels heavily in favor of dismissal.

For similar reasons, there is no way that relief can be "shape[d]" under Rule 19(b)'s second criterion, for the relief requested in the Complaint is the outright overturning of the Cherokee Nation's May 24, 2003 election, the nullification of a Constitutional amendment, and the establishment of new rules to govern all future elections. Such prejudice cannot be overcome by forcing the Cherokee Nation to intervene fully and against its will, for "[f]ailure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity." *Kickapoo Tribe*, 43 F.3d. at 1498.

Nor can a judgment in the absence of the Cherokee Nation possibly be "adequate" under Rule 19(b)'s third criterion, for the Cherokee Nation will not be bound by any such judgment. As the Tenth Circuit noted in *Davis*, since a Tribe cannot be bound by a judgment rendered in its absence, "a judgment rendered in the Tribe's absence could initiate further litigation and possible inconsistent judgment." *Davis*, 343 F.3d at 1293. The purpose of this factor is "not intended to address the adequacy of the judgment from the plaintiff's point of view," but rather is meant to protect the interest of "the courts and the public in complete, consistent, and efficient settlement of controversies." *Id.* at 1292-93 (internal citations omitted).

Finally, although it is likely that the plaintiffs will not be able to obtain the same relief if forced to pursue their claims in appropriate Tribal fora, the availability of such avenues demonstrates that the plaintiffs will not be entirely without a remedy in the event of a dismissal. Even if this were not the case (and borrowing from *Kickapoo*), this Court must conclude that "even if the [plaintiffs] lacked an adequate remedy by which to vindicate [their] statutory rights,

absence of an alternative remedy alone does not dictate retention of jurisdiction under Rule 19." 43 F.3d at 1499.

The outcome here – dismissal of the action under Rule 19 – is hardly unprecedented. When the interests of sovereign Indian tribes are at stake, the law applying Rule 19 to Indian Tribes is well-established. Where an Indian Tribe is a necessary party but joinder under Rule 19(a) is not possible because of the Tribe's immunity to suit, courts have routinely dismissed the complaint under Rule 19 for want of an indispensable party. This has been true where a claim has been made that could adversely affect a Tribe's property rights[9] or its sovereign authority,[10] including challenges to tribal elections.[11] This rule has also been applied in cases where the United States was named as a defendant.[12]

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[9] *E.g.*, *Quileute*, 18 F.3d 1456 (challenge to Tribe's right to escheated property within its reservation); *Pit River Home and Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088 (9th Cir. 1994) (tribal organization's suit claiming title to tribal land). Courts have similarly held Tribes to be indispensable to suits regarding the validity of contracts or other agreements to which a Tribe was a party. *E.g., Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974). *See also Kickapoo*, 43 F.3d at 1500 (State was an indispensable party to suit brought by a Tribe against the Secretary seeking to establish validity of tribal-state gaming compact, due to party's sovereign immunity from suit).

[10] *E.g.*, *Chehalis*, 928 F.2d 1496 (suit to enjoin the Secretary of the Interior from dealing with the Quinault Tribe as the governing body of the Quinault Reservation dismissed because Quinault Tribe was indispensable). *See also Davis*, 343 F.3d 1282 (suit challenging tribal determination on eligibility to share in judgment dismissed because Tribe was an indispensable party); *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543 (8th Cir. 1992) (Tribe held indispensable to suit brought by individual Indians to compel Secretary to impose conditions on Tribe's use of tribal judgment funds).

[11] *Fletcher*, 116 F.3d at 1333 n.36 (suit by individuals of Osage ancestry) ("[m]oreover, Tribal Defendants were indispensable because the case, essentially an internal tribal dispute[,] could not in equity and good conscience proceed in their absence, Fed.R.Civ.P. 19(b), in light of Tribal Defendants' interests").

[12] *E.g., Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000) (Tribe is indispensable to suit by tribal members challenging the Hopi-Navajo Land Settlement Act and related

The indispensable party rule applies with equal force here.[13] Indeed, on numerous occasions, suits involving the interests of the Cherokee Nation have been dismissed due to the Nation's indispensability as a necessary party that could not be joined. *See, e.g., Nero, supra* (involving identical claims pertaining to Cherokee Nation elections); *United Keetoowah Band v. Sec't of the Interior*, No. 90-C-608-B, slip op. at 10-11 (N.D. Okla. May 31, 1991) ("under the concept of Rule 19(a) important interests of the Cherokee Nation are involved that would not be protected and further that the Defendant would be subjected to a substantial risk of incurring

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agreement as violative of their First Amendment rights); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) (Tribe indispensable to suit by tribal members against the Secretary of the Interior challenging the terms of proposed leases to be issued pursuant to a settlement act); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) (Tribes indispensable to suit brought against the Secretary seeking a declaratory judgment that one condition in a settlement agreement regarding protection of burial sites was invalid); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992) (Tribes indispensable to suit challenging constitutionality of act partitioning tribal reservation); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (Tribe indispensable to a suit alleging the Tribe breached its lease); *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989) (Tribe indispensable to suit regarding validity of contract made with Tribe); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986) (Tribe indispensable to inter-tribal dispute on allocation of trust funds); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987) (Tribe indispensable to suit brought by the Tribe's lessee against the Secretary in which lessee sought to pay adjusted bonuses to preserve interests in leases).

[13] As noted earlier, it is no answer to suppose that the Cherokee Nation could avoid prejudice and protect its interests by waiving its immunity and seeking a full, rather than limited, intervention in this case. Such a proposition has been repeatedly rejected as a response to a tribe's indispensability. *E.g., Chehalis*, 928 F.2d at 1500, citing *Makah v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("the ability to intervene if it requires a waiver of immunity is not a factor that lessens prejudice"); *Am. Greyhound,* 305 F.3d at 1025 ("we have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs"); *Citizen Potawatomi Nation v. Norton,* 248 F.3d 993, 1001 (10th Cir. 2001) (noting a "'strong policy of favoring dismissal when a court cannot join a tribe because of sovereign immunity'") (citation omitted).

Nor can the Secretary's participation here protect the interests of the Cherokee Nation as an absent party. As discussed in the Cherokee Nation's memorandum in support of its motion for limited intervention, the Secretary's conduct to date only underscores the *inadequacy* of its representation of the Cherokee Nation. *See also Enter. Mgmt. Consultants, Inc*, 883 F.2d at 894 (discussing federal government's inability, when sued as a defendant, to adequately represent the interests of a "necessary" Tribe in not having its legal rights adjudicated without its consent).

inconsistent obligations by reason of the claimed interests. * * * When the factors to be considered under Rule 19(b) are analyzed, the Court concludes that the Cherokee Nation of Oklahoma is an indispensable party") (citations omitted);[14] *United Keetoowah Band v. Mankiller*, 2 F.3d 1161, 1993 WL 307937 (10th Cir. 1993) (unpub. disp), *affirming and reprinting* District Court's Order of Jan. 27, 1993. In the latter case, the Secretary was sued in a case challenging the Cherokee Nation's jurisdiction over persons who were operating "smoke shops" on land within the Cherokee Reservation, but without the licenses required by Cherokee law. The district court dismissed the action, concluding that:

> Since the relief requested by the Plaintiff herein directly affects the sovereignty and fundamental jurisdiction of the Cherokee Nation, the court concludes the Cherokee Nation's interests are substantial and the case cannot be completely and efficiently resolved without the presence of the Cherokee Nation. However, it is well established that absent express consent of the Cherokee Nation or by Congress, the Cherokee Nation cannot be joined due to its sovereign immunity from suit.

1993 WL 307937, *5. The court added that: "[c]ourts have routinely dismissed actions under [Rule] 19(b) because an Indian tribe is indispensable where a plaintiff has sought to litigate matters affecting an absent tribe's interests," and it accordingly dismissed the action "for want of an indispensable party." *Id.* The Tenth Circuit affirmed.[15]

As noted earlier, it is true that Rule 19 may leave the plaintiffs without a judicial forum to litigate their precise claim (although alternative Tribal fora are available), "[b]ut this result is a common consequence of sovereign immunity, and the Tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims. . . . [W]e have

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[14] This opinion is attached as Exhibit A.

[15] As the Tenth Circuit's unpublished disposition noted, "[t]he doctrine of sovereign immunity serves as a bar to the nonconsensual joinder of an Indian tribe in any type of action, regardless of whether the relief sought is equitable or legal in nature." 2 F.3d at 1161.

regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Am. Greyhound*, 305 F.3d at 1025.[16] Indeed, the absence of a judicial remedy is a basic feature of sovereign immunity. *E.g., Seminole Tribe of Fla. v. Florida,* 517 U.S. 44 (1996) (State sovereign immunity leaves Tribes without judicial remedy regarding State obligation to negotiate in good faith with Tribes under the Indian Gaming Regulatory Act). That reality overcomes neither the Cherokee Nation's immunity nor its indispensability to the claims asserted here.[17]

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[16] *See Kickapoo Tribe,* 43 F.3d at 1496 ("[T]here is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves.") (citation and internal quotation marks omitted); *Wichita and Affiliated Tribes,* 788 F.2d at 776 (the policy of sovereign immunity "accords to tribal sovereignty and autonomy a place in the hierarchy of values over society's interest in making tribes amenable to suit"). *See also Clinton,* 180 F.3d at 1090 (since Tribe's "interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim," action must be dismissed on indispensable party grounds); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2nd Cir. 1991) (where a Tribe is immune from suit "there is very little room for balancing of other factors," since "immunity may be viewed as one of those interests compelling by themselves") (citations and internal quotation marks omitted); *Enter. Mgmt. Consultants*, 883 F.2d at 894 (in determining whether to dismiss an action where an absent Tribe is a necessary party, other considerations are "outweighed by the Tribe's interest in maintaining its sovereign immunity").

[17] Even outside the Rule 19 arena, federal courts routinely dismiss suits over tribal elections citing tribal sovereign immunity and other jurisdictional barriers. *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989) (affirming dismissal of suit by descendants of slaves over alleged right to vote in Cherokee Nation elections on the basis of tribal sovereign immunity); *Runs After v. United States*, 766 F.2d 347, 350 (8th Cir. 1985) (affirming dismissal of claims against Tribe regarding reapportionment of tribal election districts for lack of subject matter jurisdiction); *Goodface v. Grassrope*, 708 F.2d 335, 338 (8th Cir. 1983) (holding district court lacked subject matter jurisdiction over merits of tribal election dispute); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971) (dismissing claim that Cherokee Nation Principal Chief's election was illegal due to lack of jurisdiction over internal tribal affairs); *Motah v. United States*, 402 F.2d 1, 2 (10th Cir. 1968) (dismissing tribal members' suit against the Tribe over voting rights, holding that "[t]he action stems from an internal controversy among Indians over tribal government, a subject not within the jurisdiction of the court as a federal question"); *Twin Cities Chippewa Tribal Council v. Minn. Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967) (dismissing action against the Tribe and the Secretary of Interior to invalidate a tribal election held to amend the Tribe's constitution and bylaws, stating that "[w]e can think of no better

B. The Suit Must Be Dismissed On Jurisdictional Grounds For Lack Of Any Final Agency Action.

The plaintiffs challenge the Eastern Oklahoma Regional Director's recognition of the Principal Chief as a result of the May 24, 2003 election, but have failed to appeal the Regional Director's decision either to the Secretary or to the Interior Board of Indian Appeals. The plaintiffs also challenge the Secretary's approval of the Constitutional amendment adopted at the May 24, 2003 election, but acknowledge that the Secretary has never issued any approval or disapproval of that amendment, and that the Secretary instead "continues to have [the matter] under review." Complaint at 13. The Complaint must therefore independently be dismissed for absence of any final agency actions.

Under the Administrative Procedures Act (the "APA") the Court's authority to review an agency's conduct is limited to cases challenging "final agency action." 5 U.S.C. § 704. The Secretary has not yet taken final action here. Indeed, she has taken no action whatsoever with respect to the Constitutional amendment, and the lower-level action taken with respect to the election of the Principal Chief has never been appealed within the Department. Hence, "[j]udical review at [this] stage [would] improperly intrude[] into the agency's decisionmaking process. It also [would] squander[] judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind." *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726, 732 (D.C. Cir. 2003), quoting *Ciba-Geigy Corp v. EPA,* 801 F.2d 430, 436 (D.C. Cir. 1986).[18] The plaintiffs cannot "overcome the lack of finality

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example of a tribe's local governmental procedure than that of regulating a tribal election amending the tribe's constitution and bylaws, the very framework of the local government."

[18] Final agency action "mark[s] the consummation of the agency's decision-making process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear,* 520 U.S. 154, 178 (1997) (internal quotation marks

[] by arguing that the case is ripe," *Public Citizen v. Office of the United States Trade Rep.*, 970 F.2d 916, 921 (D.C. Cir. 1992), for under the APA, "[w]here finality is an independent jurisdictional requirement, it must be met." *Id.*

CONCLUSION

For the foregoing reasons, the Complaint must be dismissed for lack of jurisdiction.

Respectfully submitted this 14th day of January, 2005.

Lloyd B. Miller per t.d.j.

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and citations omitted). Agency action is considered final to the extent that it imposes an obligation, denies a right, or fixes some legal relationship. *Role Models Am., Inc. v. White,* 317 F.3d 327, 331-32 (D.C. Cir. 2003). Since the Secretary has not approved or disapproved the Constitutional amendment, the Secretary's decision-making process is not yet complete, no rights have been assigned or legal obligations incurred, and the action must therefore be dismissed. So, too, since the Regional Director's challenged action is subject to appeal, it too is not "final agency action" for the Department and this aspect of the Complaint must be dismissed as well.

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Plaintiff,

vs.

THE SECRETARY OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA,

Defendant.

No. 90-C-608-B

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

Before the Court for decision is the Motion to Dismiss the Complaint of Plaintiff United Keetoowah Bank of Cherokee Indians in Oklahoma ("UKB"), pursuant to Fed.R.Civ.P. Rule 12(b)(1)(2)(6) and (7).

The Plaintiff's Complaint alleges four claims for relief essentially as follows:

(1) The Defendant Secretary has arbitrarily failed and refused to carry out his legal responsibility to enter into Indian Self-Determination Act ("ISDA") grants and contracts with the Plaintiff;

(2) Defendant's refusal to provide ISDA grants and contracts to Plaintiff and, additionally, Defendant's advice or direction to other federal agencies to refuse contracts and grants to Plaintiff has adversely affected Plaintiff's rights to such grants and contracts;

(3) The Defendant is in possession and holds title to land of the old Cherokee reservation in Oklahoma for further conveyance to Indians such as the Plaintiff pursuant to the Oklahoma Indian

Welfare Act, 25 U.S.C. § 5001 *et seq.* Plaintiff is entitled to said trust lands and unalloted lands held by the United States and the Defendant has failed and refused to permit the Plaintiff to use and exercise its rights therein;

(4) The Secretary has arbitrarily refused to approve Plaintiff's acquisition request for trust lands in the old Cherokee reservation without the consent of third parties.

In reference to said four claims the Plaintiff seeks injunctive and mandatory relief requiring the Defendant to: (a) allow the Plaintiff the grants and contracts it is entitled to under the Indian Self-Determination Act and grant the UKB the assistance to which it is entitled under the Act; (b) advise other federal agencies the UKB is eligible for federal funding as a federally recognized Indian tribe, band or nation; (c) convey to the UKB in trust such lands as the Secretary now holds in trust for an "organization of Cherokee Indians organized pursuant to the Oklahoma Indian Welfare Act"; (d) entertain the land applications of the UKB and its members on the same basis as other recognized Indian tribes, bands or nations within their respective reservations.

Plaintiff also seeks an accounting for all funds to which the UKB would have been entitled pursuant to the ISDA, and other programs administered by the Defendant. The Plaintiff seeks in excess of $10,000,000.00 which has been unlawfully withheld or given to other entities. The Plaintiff also seeks an accounting for all unalloted Cherokee lands and all lands received by the

Secretary to which it is entitled, as well as rents, profits, royalties, bonuses and other payments received to which Plaintiff is entitled. Plaintiff seeks such other relief as law or equity requires.

With respect to Plaintiff's first claim for relief, the Defendant asserts that Plaintiff has failed to exhaust its available administrative remedies.[1] The Defendant admits in its brief that the UKB is eligible to apply directly for ISDA services because it is a recognized Indian organization. The Code of Federal Regulations sets out Department of Interior procedures concerning administrative remedies for ISDA claims. 25 C.F.R. Part 2 and 43 C.F.R. Part 4 provides an appeal process for when a Bureau of Indian Affairs action or decision is protested as a violation of a right or privilege of the appellant. 25 C.F.R. §§ 271.81-82 provide for an appeal process when an ISDA contract application has been declined. 25 C.F.R. §§ 272.51-55 provide an appeal process when ISDA grant applications are declined.

The Plaintiff does not allege in the Complaint that it has exhausted administrative remedies relative to the first claim for relief and the alleged denial of grant and contract benefits. Authority supports the fact that judicial review of such an

[1]The Plaintiff in its Brief in Support of its Objection to Defendant's Motion to Dismiss (pages 10-13) mistakenly responds that it is unnecessary to exhaust administrative remedies regarding its third and fourth claims for relief in the Complaint. It is clear from the Defendant's Motion to Dismiss that its exhaustion of administrative remedies assertion applies only to Plaintiff's first claim for relief regarding Defendant's arbitrary failure to enter into ISDA grants and contracts with Plaintiff.

administrative decision is not proper, and the Court is without subject matter jurisdiction, until the Plaintiff exhausts administrative remedies. McKart v. United States, 395 U.S. 185 (1969); FCC v. Schreiber, 381 U.S. 279 (1965); Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947); and National Indian Youth Council v. Morton, 363 F.Supp. 475 (W.D.Okl. 1973).

Because Plaintiff's Complaint in reference to the first claim for relief fails to allege or establish an exhaustion of administrative remedies available for ISDA claims, or allege facts precluding the necessity of exhaustion of administrative remedies, the Defendant's Motion to Dismiss Plaintiff's first claim for relief is hereby SUSTAINED. The Court's dismissal is equally applicable to Plaintiff's second claim for relief because it arises from and is related to Plaintiff's alleged first claim for relief.

In reference to the UKB third and fourth claims for relief regarding its entitlement to use and live upon or acquire trust and unallotted lands of the old Cherokee Nation, as previously stated the Secretary does not assert a failure to exhaust administrative remedies. The UKB also asserts alternatively it should be compensated if said lands have been given to another Indian or Indian entity.

The crux of the dispute concerning the old Cherokee Reservation lands is found in Exhibits A and D attached by the UKB to its opposition brief filed April 9, 1991. Exhibit A (Letter of April 17, 1987 from Acting Assistant Secretary - Indian Affairs - Secretary of Interior to Chief of UKB) states at pages 3-4:

> We do not dispute the fact that the United Keetoowah Band is a viable and distinct federally recognized tribal body which has a somewhat undetermined relationship with the Cherokee Nation of Oklahoma. Further, we agree that the Band has the authority to request the Secretary to place lands in trust on its behalf. However, the 1946 Act, while recognizing the United Keetoowahs as a band of Indians within the meaning of the Oklahoma Indian Welfare Act, can in no way be read as authorizing the Band to exercise concurrent jurisdiction over Cherokee lands within the former Cherokee Reservation. Furthermore, because the subject lands fall within the Cherokee Nation's former reservation their consent is required under 25 C.F.R. 151.8. Therefore, we must affirm the Acting Area Director's decision of December 19, 1985 and require the concurrence of the Cherokee Nation of Oklahoma before the Band's request for trust land can properly be evaluated by the Muskogee Area Office.

Exhibit D (Letter dated June 22, 1990 to the Chief of the UKB from the Acting Area Director of the Bureau of Indian Affairs) states:

> Insofar as taking land in trust for the Band's use and benefit, our position remains as articulated by the Acting Assistant Secretary - Indian Affairs in his letter of April 17, 1987. As you are familiar, this decision affirmed a previous Area Director's decision, on your appeal. As was set out, the 1946 Act recognizing the United Keetoowahs as a band of Indians within the meaning of the Oklahoma Indian Welfare Act, did not authorize or recognize concurrent jurisdiction over Cherokee lands within the former reservation area. Neither did the legislation create or set aside a reservation for the Band. It was also held that 25 C.F.R. 151.8 requires the concurrence of the Cherokee Nation. The 1987 decision remains in force, and this office is without authority to overturn a decision of the designate of the Secretary of Interior."
>
> This office will be pleased to evaluate a proposal on behalf of the United Keetoowah

> Band when submitted in the proper format. Each trust acquisition request, however, must be considered on its own merits. The Band has no right or entitlement to acquire property in a trust status. Statutory acquisition authorities are committed to the discretion of the Secretary of the Interior.

Thus, the Secretary of the Interior, or his designee, has determined that the subject lands of the old Cherokee Reservation are under the jurisdiction of the new Cherokee Nation, not the UKB. We have two competing recognized Cherokee Indian entities asserting rights to the old Cherokee Reservation lands. One of the entities is before the Court in this action, while the other is not a party herein. The Defendant asserts that the new Cherokee Nation of Oklahoma, under Fed.R.Civ.P. 19, is an indispensable party to this action but then further asserts that it cannot be joined herein due to sovereign immunity from suit. If the Secretary's assertion is correct, we are faced with the incongruity of the UKB suffering an alleged denial of rights without a present judicial remedy. As to the old Cherokee Reservation lands, the Secretary has recognized one sovereign (Cherokee Nation of Oklahoma) over another (UKB).

The legal conundrum presented by the competing sovereigns is highlighted by the Plaintiff in its opposition brief of April 9, 1991 at page 15 where it states:

> According to the Secretary said Cherokee Nation of Oklahoma may not be joined, and the suit may not proceed without the Cherokee Nation of Oklahoma. Thus if the Secretary reverses his decision on which tribe has a right to live upon the old reservation, the New Cherokee Nation of Oklahoma could not bring suit against him. The Secretary could simply argue that the UKB was an indispensable party and could not be joined. Thus,

> according to the Secretary, he could decide each tribe's rights to the old reservation and the aggrieved tribe, ousted from its homeland, could not bring suit against him.
>
> This action does not seek to deprive the new Cherokee Nation of Oklahoma any rights it lawfully has, but to force the Secretary to recognize the rights of all rightful inhabitants of the reservation. If two Cherokee Bands or Tribes, have equal right to live upon the reservation in accordance with the Treaty of August 6, 1846, the Secretary may not unilaterally deny the rights of one Band, Tribe, or Nation while simultaneously blocking their right to lawful action with Rule 19.

25 C.F.R. 151.8 in relevant part states:

> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition. . .

Regarding the Defendant's Motion to Dismiss Plaintiff's third and fourth claims for relief under Fed.R.Civ.P. 12(b)(7), failure to join a party under Rule 19, the record points up the following legislative, executive and judicial history: the Acts of March 1, 1901, 31 Stat. 848, the Act of July 1, 1902, 32 Stat. 716 and the Act of April 29, 1906, 34 Stat. 137, provided for all Cherokee tribal lands to be allotted equally to Cherokee members and close the tribal rolls as of December 1, 1905.

Some unallotted Cherokee lands remain today as Cherokee Nation tribal lands in trust or restricted status. Pursuant to ISDA contract, effective October 1, 1989, the Cherokee Nation of Oklahoma assumed most of the Bureau of Indian Affairs' responsibility for administering these approximately 329 unallotted

acres.

In Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), the Supreme Court held that the ninety-six mile navigable segment of the Arkansas River bed had been granted to the Cherokee, Choctaw and Chickasaw Nations in nineteenth century treaties. The Cherokee portion of the claim of the Arkansas River bed is yet to be precisely determined.

In 1982 the Cherokee, Choctaw and Chickasaw Nations were authorized by statute to sue the United States, for takings of their river bed lands by the Corps of Engineers as the result of the construction of the Arkansas River Navigation System, pursuant to §2 of the Indian Claims Commission Act of 1946, 60 Stat. 1050, 25 U.S.C. § 70a, Pub. L. No. 97-385, 96 Stat. 1944 (1982). The suit filed by the Cherokee Nation pursuant to that statute is presently pending in the Tenth Circuit.

In 1989 the Cherokee Nation sued the United States in the United States Court of Claims for alleged breach of fiduciary duty in the trust management of its river bed lands and management of other lands. The Cherokee Nation of Oklahoma v. The United States of America, No. 218-89-L (Cl.Ct. filed April 21, 1989). The UKB has not sought to intervene in either suit to assert its alleged interest in the subject lands.

The United States Government currently has approximately 61,000 acres of land in trust within the old Cherokee Reservation for the Cherokee Nation. No land is currently being held for the UKB as a recognized tribal entity. The UKB's former request to

acquire trust land located in the boundary of the old Cherokee Reservation was denied by the Acting Assistant Secretary of the Interior on April 7, 1987. The Secretary of the Interior and/or its designate has refused to consider the request of the UKB without the written concurrence of the Cherokee Nation of Oklahoma and points to departmental regulation, 25 C.F.R. 151.8, as its authority.

Fed.R.Civ.P. 19(a) requires the Court find that a party is necessary and Fed.R.Civ.P. 19(b) then requires the Court to determine whether the party is indispensable. Provident Trademens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), Wright v. First National Bank of Altus, Oklahoma, 483 F.2d 73, 75 (10th Cir. 1973); *see also,* Manygoats v. Kleppe, 558 F.2d 556, 559-60 (10th Cir. 1977).

Rule 19(a) states that a person or entity who "claims an interest relating to the subject of the action and is so situated that the disposition of the action may . . . as a practical matter impair or impede his ability to protect that interest" shall be joined in the action, if feasible.

Rule 19(b) determines whether a party is indispensable so that the action cannot "in equity and good conscience" proceed in the party's absence. In Provident Trademens Bank & Trust Co. v. Patterson, *supra,* the court identified four interests to be examined in determining indispensability of a party: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another; (3) the

interest of the party alleged to be indispensable; and (4) the interests of the court and the public in complete, consistent, and efficient settlement of controversies. *Id.* at 109-111.

The record before the Court is clear that the Cherokee Nation of Oklahoma has an interest in the subject lands and its interest has long been recognized by the federal government. The Cherokee Nation lays claim to the former Cherokee Reservation as successor in interest to the Cherokee Tribe. The Cherokee Nation Council has enacted a comprehensive law enforcement code over all "Indian Country" within its former reservation. The federal government has long recognized the special interests of the Cherokee Nation in these lands through Indian programs defining the tribal service territory as including the entire former reservation. *See,* 42 U.S.C. § 682(i)(5), Job Training, Department of Health and Human Services; 29 U.S.C. § 750(c), Handicapped Vocational Rehabilitation, Department of Labor; 25 U.S.C. § 1452(d), Indian Financing Act; 42 U.S.C. § 5318(n), Urban Development Action Grants; 33 U.S.C. § 1377, Sewage Treatment Grants, Environmental Protection Agency.

It appears that under the concept of Rule 19(a) important interests of the Cherokee Nation are involved that would not be protected and further that the Defendant would be subjected to a substantial risk of incurring inconsistent obligations by reason of the claimed interests.

Courts have often dismissed actions when a tribe is determined to be an indispensable party under Rule 19(b). McClendon v. United States, 885 F.2d 629 (9th Cir. 1989); Enterprise Management, Inc.

v. United States, 883 F.2d 890, 893-94 (10th Cir. 1989); Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 n. 13 (D.C.Cir. 1986); Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied sub nom.* Susenkewa v. Kleppe, 425 U.S. 903 (1976);; Tewa Tesuque v. Morton, 498 F.2d 240, 242 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

Recognized Indian tribes have immunity from suit unless the immunity is specifically waived. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe v. Dept. of Game, 433 U.S. 165, 172-73 (1977); United States v. Testan, 424 U.S. 392, 399 (1976). Even though the plaintiff would be left with no adequate remedy if the action were dismissed, the tribe's sovereign immunity was dispositive under Rule 19(b). Kickapoo Tribe of Oklahoma v. Lujan, 728 F.Supp. 791, 796-797 (D.D.C. 1990). In Sekaquaptewa v. McDonald, 591 F.2d 1289 (9th Cir. 1979), the court observed that absent congressional authorization in the 1974 Navajo-Hopi Settlement Act, 25 U.S.C. § 640d.7, neither tribe in the longstanding land dispute between the Hopi and Navajo Tribes would have been able to maintain the action against the other.

When the factors to be considered under Rule 19(b) are analyzed, the Court concludes that the Cherokee Nation of Oklahoma is an indispensable party.[2]

[2] Under the present state of the law, it appears that the UKB's remedy is to convince the Secretary of the Interior to the contrary by political persuasion or seek a congressional enactment permitting UKB to maintain a suit against the sovereign New Cherokee Nation or seek other congressional relief.

Prior case law indicates that neither Congress, the Secretary of the Interior, nor the courts have made a distinction between the Cherokee Nation at the time of Oklahoma statehood and the current Cherokee Nation of Oklahoma. *See,* Groundhog v. Keeler, 442 F.2d 674, 677 (10th Cir. 1971) (Cherokee tribal existence continues by virtue of Section 28, Act of April 26, 1906, 34 Stat. 137, 148); Wheeler v. U.S. Dept. of Interior, 811 F.2d 549 (10th Cir. 1987); and Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) (The Cherokee Nation still possesses an inherent right of self-government).

Wherein the UKB is claiming damages based upon its claims for relief or the "taking without just compensation," this court is without subject matter jurisdiction because such exclusive jurisdiction rests with the United States Court of Claims where such claims exceed $10,000.00. 28 U.S.C. §§ 1346(a)(2), 1491 and 1505. *See also,* United States v. Mottaz, 476 U.S. 834, 850, (1986) wherein a Tucker Act based land suit sought damages equal to just compensation for an already completed taking of the claimant's land.

For the reasons stated above, the Motion to Dismiss of the Defendant, The Secretary of the Department of the Interior, is hereby SUSTAINED and Plaintiff's action is dismissed without prejudice.

DATED this 31st day of May, 1992.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE