

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, A federally recognized Indian Tribe,)	
)	
Plaintiff,)	
)	
v.)	Case No. 08-cv-0355-JHP
)	
DIRK KEMPTHORNE, Secretary of the Interior, et al.)	
)	
Defendants.)	

**RESPONSE TO DEFENDANTS' MOTION TO DISMISS
AND BRIEF IN SUPPORT**

Plaintiff, the United Keetoowah Band of Cherokee Indians in Oklahoma (the “Keetoowah Cherokees”), herein responds to Defendants’ Motion to Dismiss and demonstrates that the Complaint should not be dismissed for failure to join the Cherokee Nation of Oklahoma (the “CNO”), as the CNO is neither a required nor an indispensable party to this lawsuit.

Introduction

Defendants’ Motion to Dismiss completely mischaracterizes the nature of the Keetoowah Cherokees’ lawsuit. In order to make its motion, Defendants must contort this lawsuit by labeling it as an action “challenging the contract between IHS and the [CNO].” However, this is an action that challenges Defendants’ *actions and/or inaction* leading up to the contract, actions that the Keetoowah Cherokees contend constituted a violation of Defendants’ trust responsibilities to the Keetoowah Cherokees. Indeed, this is primarily a suit for declaratory judgment, seeking declarations that Defendants violated specific statutory duties, including the duties (1) to obtain the Keetoowah Cherokees’

authorization to enter into the contract with the CNO, (2) to provide meaningful consultation with the Keetoowah Cherokees prior to entering into the contract with the CNO, and (3) to assure services to all tribal members in the area serviced by the contract at issue. Complaint, ¶ 1. To the extent that the suit seeks injunctive relief, it explicitly seeks to enjoin enforcement of the contract “until Defendants comply” with their statutory duties. Id. The Keetoowah Cherokees do not seek to void or invalidate the contract.

Defendants seek to dismiss this suit under Federal Rule 12(b)(7) and prevent the Keetoowah Cherokees from enforcing their statutory rights by arguing that the CNO is a required party to this suit pursuant to Federal Rule 19. As established herein, however, relevant case law establishes that the CNO is not a required party. Thus, the Motion to Dismiss should be denied.

Argument and Authority

A motion to dismiss pursuant to Rule 19 requires a three-step analysis. The court must first determine whether the absent person—here, allegedly the CNO—is necessary or required. Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr., 94 F.3d 1407, 1411 (10th Cir. 1996) (indicating court must determine whether non-party is necessary under Rule 19(a) before proceeding to decide whether non-party is indispensable under Rule 19(b)). If found to be a necessary or required party, the court must next determine whether joinder is feasible. If joinder is not feasible, the court must finally determine whether in equity and good conscience the action can continue without the CNO. As fully articulated below, the CNO is not a required party because it does not have a protected interest in the Government’s trust responsibilities to the Keetoowah Cherokees

and its presence is not required to afford complete relief between the Keetoowah Cherokeees and the Government. While the Keetoowah Cherokeees will concede that the CNO's joinder is not feasible due to sovereign immunity, even if found to be a required party, the case may proceed in equity and good conscience between the Keetoowah Cherokeees and the Government.

A. A mere interest in the subject of the litigation by a non-party does not mandate dismissal pursuant to Federal Rule 19.

Under Rule 19, a person is a necessary, or required, party 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.

Fed. R. Civ. P. 19(a). "The relevant inquiry for Rule 19(a) is not whether the absent person has an 'interest,' in the broad sense, in the outcome of the litigation, but whether cognizable legal rights of the absent person will be prejudiced by the suit's continuation." Sac and Fox Nation v. Norton, 585 F. Supp.2d 1293, 1303 (W.D. Okla. 2006) (citing Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496 (9th Cir. 1991)). The interest "must be more than a financial stake and more than speculation about a future event." Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

Defendants bear the burden of demonstrating that the CNO has an interest relating to the Keetoowah Cherokeees' claims for declaratory and injunctive relief, stemming from the Government's failure to fulfill its trust duties to the Keetoowah Cherokeees. United States v. Davis, 192 F.3d 951, 958 (10th Cir. 1999). Indeed, the party moving for

dismissal under Federal Rule 12(b)(7), as Defendants do, “has the burden of *producing evidence* showing the nature of the interest possessed by an absent party and that protection of that interest will be impaired by the absence.” Citizen Band of Potawatomi Indian Tribe of Okla. v. Collier, 17 F.3d 1292, 1293 (10th Cir. 1994) (emphasis added). The burden may be met with production of affidavits or other relevant extra-pleading evidence. Id. (holding that submission of one letter in support of non-party’s alleged interest in the action was not sufficient to satisfy burden). Defendants fail to meet this burden, as Defendants rely on absolutely no evidentiary support and, instead, make unsupported conclusory allegations regarding alleged harm. See Motion at 6 (“a ruling would potentially disrupt health services . . .”). The Court should disregard the unsupported, ambiguous claims of harm.

To demonstrate an alleged interest in the action, Defendants rely exclusively on the fact that the CNO is a party to the contract in order to purportedly demonstrate that the CNO is a required party. This isolated fact, however, completely ignores that this action challenges Defendants’ actions—or inactions—in violation of statutory duties owing to the Keetoowah Cherokees by negotiating with the CNO (1) without obtaining the Keetoowah Cherokees’ authorization, (2) without providing meaningful consultation with the Keetoowah Cherokees, and (3) without assurances that tribal members in the area would receive adequate services under the contract at issue. As the Federal Circuit recognized, “the proper analysis to determine whether an absent party has an ‘interest’ under Rule 19(a)(2) sufficient to permit intervention in a pending action *must begin* by *correctly characterizing* the pending action between those already parties to the action.” United Keetoowah Band of Cherokee Indians of Okla. v. U.S., 480 F.3d 1318, 1326 (Fed.

Cir. 2007) (emphasis added). In that case, the court found that the Keetoowah Cherokees' suit challenged the government's acts in extinguishing certain rights belonging to the Keetoowah Cherokees; the Keetoowah Cherokees did not seek an ultimate grant of title to land. Id. As was the case therein, the Keetoowah Cherokees here challenge the government's actions, not the ultimate terms of the contract.¹

The CNO simply is not a required party to the Keetoowah Cherokees' challenge of the procedures followed by the Defendants in awarding the contract to the CNO. As the Ninth Circuit determined in Makah Indian Tribe, absent tribes were not necessary parties to a plaintiff-tribe's procedural claims that the Secretary failed to follow the administrative process in allocating fishing quotas among various tribes under certain federal acts. 910 F.2d at 559. The court noted that the procedures to be followed are subject to review under the Administrative Procedures Act by any person adversely affected by an agency action. Id. The court reasoned, "The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful." Id. Moreover, "there is no legally protected interest in particular agency procedures." Id. at 558.

The Tenth Circuit has similarly held that a non-party tribe was not a necessary party to an action that "focuse[d] solely on the propriety of the Secretary's

¹ That the Keetoowah Cherokees here challenge the Defendants' actions, not the application of terms of the contract, provides an important distinction from the cases on which Defendants rely. See, e.g., Citizen Potawatomi Nation v. Norton, 248 F.3d 993, (10th Cir. 2001) (action challenging application and interpretation of funding formulas contained within tribal compact); United States v. Tribal Dev. Corp., 100 F.3d 476, 477-78 (7th Cir. 1996) (action challenging validity of contracts and seeking rescission of same); Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1020-21 (9th Cir. 2002) (action challenging propriety of terms of proposed compacts, particularly terms that would permit slot machines, keno and blackjack gambling); Kescoli v. Babbitt, 101 F.3d 1304, 1307 (9th Cir. 1996) (action challenging specific conditions of settlement agreement).

determinations.” Sac and Fox Nation of Missouri, 240 F.3d 1250, 1258 (10th Cir. 2001).² In Sac and Fox, the State of Kansas and several tribes brought suit for declaratory relief challenging an NIGC ruling that certain land constituted Indian Land and allowing NIGC-regulated tribal gaming to occur. The land in question belonged to the Wyandotte Tribe, yet the Wyandotte Tribe was not a party to the suit, although it stood to reap economic gains from the gaming decision being challenged in the suit.

The United States moved to dismiss on the grounds that the Wyandotte Tribe was a necessary and indispensable party under Federal Rule 19 and the district court sustained the motion. The Tenth Circuit reversed the trial court’s dismissal, even though the court found that the Wyandotte Tribe had an interest in the subject litigation. Despite this interest, the Court concluded that the plaintiff tribe could obtain complete relief—a declaration that the Secretary failed to follow proper administrative processes—without joinder of the Wyandotte Tribe. Id. at 1258. There was no conduct on the part of the Wyandotte Tribe at issue in the suit. Rather, the litigation focused solely on the actions of the Defendants in declaring the land to be “Indian Land.” “Because Plaintiffs’ action focuses solely on the propriety of the Secretary’s determinations, the absence of the Wyandotte Tribe does not prevent the plaintiffs from receiving their requested declaratory relief.” Id.

Here, the heart of the Keetoowah Cherokees’ Complaint clearly is a challenge of

² Relying on Sac and Fox, Judge Ronald A. White overruled a similar Motion to Dismiss in Case No. CIV-04-340 WH between the Keetoowah Cherokees and the State of Oklahoma, et al. In particular, in that action on May 4, 2005, the Court entered the following as part of its order overruling the motion to dismiss: “the Court finds, by following the analysis provided in Sac and Fox [citation omitted] that the Cherokee Nation of Oklahoma is not an indispensable party.” Order (5/4/2005). In that suit, the Keetoowah Cherokees had challenged the final agency action of the NIGC in determining that the Keetoowah Cherokees’ gaming operation was not located on Indian Lands. Judge White held that joinder of the Cherokee Nation was not necessary in that action.

the Defendants' failure to follow statutory procedures in awarding the contract to the CNO. See Compl. at ¶¶ 15-16, 25-27 (Defendants failed to obtain the Keetoowah Cherokees' approval); ¶¶ 17-20, 30-31 (Defendants failed to ensure access to health care and treatment); ¶¶ 21-22, 34-37, 40-43 (Defendants failed to consult with the Keetoowah Cherokees). There are no actions of the CNO at issue here and the terms of the CNO's contract are not being challenged. Only the Defendants' conduct in failing to follow administrative procedures is at issue. Because all tribes have an equal interest in a lawful administrative process and because no tribe has a legally protected interest in particular procedures, the CNO is not a necessary or required party to the Keetoowah Cherokees' claims that the Defendants failed to follow statutory procedures in awarding the contract at issue to the CNO.

It is worth repeating again, a reading of the Complaint reveals that the Keetoowah Cherokees do not seek with this lawsuit to invalidate or void the CNO contract. Rather, the Prayer for Relief evidences that the Keetoowah Cherokees primarily seek judicial declarations that Defendants violated trust responsibilities (Compl. at Prayer ¶¶ 1, 2, 4, 6, 7, 8, 9) and to the extent that the Keetoowah Cherokees seek injunctive relief, it does so only "until Defendants comply" with their trust responsibilities (Compl. at Prayer ¶¶ 3, 5, 10). This relief may be afforded between the Keetoowah Cherokees and Defendants without joinder of the CNO, as all of the requested relief pertains to the Defendants' failure to involve the Keetoowah Cherokees in the negotiating and contracting process. See, e.g., Mille Lacs Band of Chippewa Indians v. State of Minnesota, 853 F. Supp. 1118, 1130-31 (D. Minn. 1994) (holding non-party tribes were not necessary to action where plaintiff tribe primarily sought declaratory judgment of its rights under a certain

treaty and sought no allocation of resources). For these reasons, the CNO is not a necessary, or required, party to the action between the Keetowah Cherokees and Defendants.

B. Considerations of equity and good conscious dictate that the suit should go forward without joinder of the CNO.

The Keetoowah Cherokees contend that the Rule 19 analysis should end with the determination that joinder of the CNO is not necessary or required under Rule 19(a), as demonstrated above. However, even if the Court were to determine that the CNO were a required party, the considerations of Rule 19(b) weigh against joinder.

“Nonjoinder even of a required person does not always result in dismissal. When joinder is not feasible, the question whether an action should proceed turns on the nonexclusive considerations in Rule 19(b), which asks whether ‘in equity and good conscience, the action should proceed among the existing parties or should be dismissed.’” Republic of the Philippines v. Pimentel, 128 S.Ct. 2180, 2182 (2008).

The mere fact that the CNO is entitled to sovereign immunity does not answer the equity and good conscious question. See United States v. Davis, 192 F.3d 951, 960-61 (10th Cir. 1999) (rejecting contention that immunity in itself is so compelling as to eliminate need to weigh Rule 19(b) factors individually). Rather, the court must consider all four factors of Rule 19(b).

Under the first factor, the court must consider the prejudice to absent entities and present parties in the event judgment is rendered without joinder. Defendants fail to demonstrate real prejudice that would result to the CNO, the government or to the Keetoowah Cherokees should judgment be rendered without the CNO’s joinder and, for this factor, rely only on the fact that the CNO is a party to the contract. Again, such

reliance mischaracterizes the nature of the suit and does not end the inquiry, especially where the CNO's interests are aligned with and, thus, completely protected by the presence of the Secretary in this action. As the Tenth Circuit noted in Sac and Fox, where a decision of the Secretary of the Interior is at issue, "the Secretary's interest in defending his determinations is 'virtually identical' to the interests" of the absent tribe. 240 F.3d at 1259, 1260.

Here, the Defendants will be defending their actions (or inaction) in awarding the contract to the CNO. The Defendants have as much interest in upholding their actions and protecting the contractual award to the CNO as does the CNO. As a result, no prejudice will result to the CNO from this suit's continuing without their joinder. See, e.g., 3A James Moore, Moore's Federal Practice ¶ 19.07[2.1], at 19-106 (2d ed. 1995) ("the fact that the absent person may be bound by the judgment does not itself require his joinder if his interests are fully represented by parties present").

Under Rule 19(b), the court must consider the extent to which any prejudice could be lessened or avoided by relief or measures alternative to dismissal. In Sac and Fox, the Tenth Circuit concluded that it need not address any concern about the ability to fashion relief in an effort to avoid prejudice, given its previous finding that the potential for prejudice was minimal. 240 F.3d at 1260. In any event, there is absolutely no prejudice whatsoever that would result to the CNO by the declaratory relief that the Keetoowah Cherokees seek. The Keetoowah Cherokees seek various declarations that the Defendants failed to fulfill trust responsibilities owed to the Keetoowah Cherokees, which responsibilities required the Defendants to obtain the tribes consent, to consult with the tribe, and to assure services to all tribal members. As discussed above, even the

injunctive relief requested in this lawsuit is simply to require the Government to fulfill its statutory duties and trust responsibilities to the Keetoowah Cherokees.

For the third factor under Rule 19(b), relief between the Keetoowah Cherokees and Defendants will be adequate without the CNO's presence, given that the case focuses on the actions—or inaction—of the Government and not the terms of the underlying contract. See, e.g., Sac and Fox, 240 F.3d at 1260 (finding relief adequate because “the claims in this action turn solely on the appropriateness of the Secretary’s actions, and the Secretary is clearly capable of defending those actions”). Defendants’ argument that relief would not be adequate because of an alleged disruption in the provision of medical care in the area served by Hastings Hospital, must be disregarded as unsupported speculation. Again, such argument mischaracterizes the nature of this suit as focusing on the underlying contract and not the actions of the Defendants.

The fourth factor likewise weighs against dismissal, as the Keetoowah Cherokees have no alternative forum available in which to challenge the Defendants’ actions and to compel the Defendants to fulfill trust responsibilities owing to the Keetoowah Cherokees. The Tenth Circuit noted this as the “most important factor” under Rule 9(b) in Sac and Fox. Id. at 1260 (“Finally, and perhaps most important, there does not appear to be any alternative forum in which plaintiffs’ claims can be heard.”). See also Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr., 94 F.3d 1407, 1413 (10th Cir. 1996) (noting that “[t]he absence of an alternative forum would weigh heavily, if not conclusively against dismissal”). The CNO’s sovereign immunity does not save this factor, as—again—the Keetoowah Cherokees are not challenging any actions of the CNO and are not challenging any particular terms of the CNO’s contract. Rather, this is an action in which

the Keetoowah Cherokees seek to enforce their statutory rights against the governmental Defendants. The Court should not permit Defendants to escape review of their actions in improperly awarding the contract by claiming that sovereign immunity bars judicial review. That result would allow the Government's improper actions to be shielded from scrutiny and would potentially perpetuate Defendant's breach of trust responsibility owing to smaller tribes, such as the Keetoowah Cherokees.

CONCLUSION

For the foregoing reasons, Plaintiff the United Keetoowah Band of Cherokee Indians in Oklahoma respectfully requests that the Court deny Defendants' motion to dismiss. In the alternative, should the Court sustain said Motion, Plaintiff requests an opportunity to amend the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2009, I electronically transmitted the foregoing document to the Clerk of the Court, using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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/s/ Tamara Schiffner Pullin

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