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

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA	)	
Plaintiff,	)	**CIV 08-355-JHP**
v.	)	
DIRK KEMPTHORNE, Secretary of the Interior; MICHAEL O. LEAVITT, Secretary of the United States Department of Health and Human Services; ROBERT G. MCSWAIN, Director of the Indian Health Service, United States Department of Health and Human Services; HANKIE ORTIZ, Director of the Office of Tribal Self-Governance, Indian Health Service	)	
Defendants.	)	

DEFENDANT'S MOTION TO DISMISS
WITH BRIEF IN SUPPORT

COMES NOW the Defendants, by and through Sheldon J. Sperling, United States Attorney for the Eastern District of Oklahoma and Linda A. Epperley, Assistant United States Attorney, respectfully moves to dismiss Plaintiff's Complaint in its entirety pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, for inability to join a party required under Rule 19.

I. INTRODUCTION

The contract being challenged in this lawsuit involves a party not before this court, the Cherokee Nation of Oklahoma ("Cherokee Nation"). This case should be dismissed because Federal

Rule of Civil Procedure 19 ("Rule 19"), the mandatory joinder rule, and tribal sovereign immunity, prevent this action from proceeding in the absence of the Cherokee Nation.

As authorized under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§450 et seq., the W. W. Hastings Indian Hospital ("Hastings Hospital") was transferred from the Indian Health Service ("IHS") to the Cherokee Nation. Cherokee Nation assumed operation of all programs, services, functions and activities at Hastings Hospital under an ISDEAA contract with IHS.

The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") has now filed a Complaint challenging the contract between IHS and the Cherokee Nation. In each count of the Complaint, the UKB asks the court to declare that the contract between the Cherokee Nation and IHS is unlawful and to enjoin IHS actions pursuant to the contract. UKB Complaint ¶¶ 28, 32, 38, 44.

This motion to dismiss does not address the underlying merits of the UKB claims. Instead, Defendants request that this court dismiss this case by ruling in conformity with the principles of tribal sovereign immunity and the important objectives advanced by Rule 19. Defendants further urge — for the reasons discussed below — that this court hold that the Cherokee Nation is required to be present in this action to assert its own interests regarding its own contract. Further, Defendants ask this court to hold that joinder of the Cherokee Nation is not feasible because the Cherokee Nation, as a federally-recognized tribal government, possesses sovereign immunity. The ISDEAA itself states that "*nothing*" in the Act shall be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. 450n (emphasis added). Pursuant to Rule 19, equity and good conscience require dismissal of this case.

II. STATUTORY BACKGROUND

A. The Indian Health Service and Its Authorizing Statutes

In 1954, Congress transferred responsibility for the health care of American Indians and Alaska Natives from within the Department of the Interior ("DOI"), Bureau of Indian Affairs ("BIA"), to what is now the IHS, an agency within the Department of Health and Human Services ("HHS"). See U.S. CONST. ART. I sect. 8, cl. 3 (granting Congress the plenary power to legislate in the field of Indian affairs). IHS' principal mission is to provide primary health care for the approximately 1.9 million American Indians and Alaska Natives throughout the United States. See IHS Fact Sheet: Year 2008 Profile (June 2008), available at http://info.ihs.gov/Profile08.asp ("2008 Profile"). See also S. Rep. No. 102-392, 102d Cong., 2d Sess., at 2-3 (1992), reprinted in 1992 U.S.C.C.A.N. 3943 (identifying 1.6 million American Indians and Alaska Natives at that time); and Lincoln v. Vigil, 508 U.S. 182, 185 (1993) (identifying 1.5 million American Indians and Alaska Natives at that time).

IHS provides health care to American Indians and Alaska Natives through three separate mechanisms: 1) by administering health care services directly through IHS facilities and with IHS' own employees; 2) by contracting with tribes and tribal organizations to allow tribes to independently operate health care delivery programs previously operated by IHS; and 3) by funding contracts and grants to organizations operating health programs for urban Indians. S. Rep. No. 102-392, at 4. Under the first two mechanisms, IHS and its tribal contractors deliver health care services through 163 "service units" that are grouped geographically within 12 IHS Area Offices and overseen by a Headquarters Office located in Rockville, Maryland. 2008 Profile.

IHS' authority to provide health care services to American Indians and Alaska Natives flows from two primary statutes. The first, the Snyder Act, 25 U.S.C. §13, is a general and broad statutory mandate authorizing IHS to "expend such moneys as Congress may from time to time appropriate for the benefit, care, and assistance of the Indians" for the "relief of distress and conservation of health." 25 U.S.C. §13 (providing the authority to BIA); and 42 U.S.C. §2001(a) (transferring the responsibility for Indian health care to IHS). The second, the Indian Health Care Improvement Act, 25 U.S.C. §1601 et seq., establishes numerous programs specifically created by Congress to address particular Indian health initiatives, such as alcohol and substance abuse, diabetes, medical training, and urban Indian health.

B. The Indian Self-Determination and Education Assistance Act

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDEAA"), codified at 25 U.S.C. §§450 et seq., and designed the statute to foster Indian self-government by permitting the transfer of certain Federal programs to tribal governments and other tribal organizations. 25 U.S.C. §§450, 450a. In the opening paragraphs of the ISDEAA, Congress declared its commitment to the Federal Government's unique relationship and responsibility to Indian tribes and to Indian people. Id. Further, Congress declared that this relationship should be carried out through the establishment of a meaningful self-determination policy that would decrease Federal domination of programs for Indians and effectuate meaningful participation by Indian tribes in the planning, conduct, and administration of Indian programs and services. Id.

The ISDEAA directs the Secretary of HHS, upon the request of an Indian tribe, to enter into a "self-determination contract" with that tribe. 25 U.S.C. §§450f(a)(1), 450b(I) (defining Secretary).

A self-determination contract is a contract between a tribe or tribal organization and the Secretary for the "planning, conduct and administration of programs or services which are otherwise provided [by IHS] to Indian tribes and their members pursuant to Federal law." Id. §450b(j). By the end of fiscal year 2007, IHS had entered contracts with 323 tribes and tribal organizations under the ISDEAA. IHS Fact Sheet: Tribal Self-Determination (January 2008), available at http://info.ihs.gov/TrblSlfDtrm.asp.

C. The Cherokee Nation's ISDEAA Contract

The ISDEAA provides that any Federally-recognized tribe has a right to enter into a self-determination contract and to assume operations of health programs previously conducted by IHS. The Cherokee Nation entered a contract (also known as a "Self-Governance compact"[1]) and assumed control of all applicable programs, services, functions and activities associated with Hastings Hospital on October 1, 2008. UKB Complaint ¶ 13.

III. ARGUMENT

Under Rule 19, a court must dismiss an action if: (1) an absent party is required, (2) it is not feasible to join the absent party and (3) it is determined "in equity and good conscience" that the action should not proceed among the existing parties. Philippines v. Pimentel, ___U.S.___, 128 S. Ct. 2180, 2185 (2008). Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 997 (10th Cir. 2001).[2]

---

[1] The term "compact" is used to refer to an agreement between sovereign entities. The term "contract" as used in this memorandum is intended to include such compacts.

[2] Rule 19 was changed in 2007. The word "required" replaced the word "necessary" and the word "indispensable" was removed. The changes are stylistic only. Pimentel, 128 S. Ct. at 2184 (agreeing with the Rules Committee comment that the changes to Rule 19 are changes of style and not substance). References in this memorandum to decisions issued before the 2007 amendments may use the older language.

A party to a contract is the quintessential "indispensable party" and "no procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987) (quoting Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975)). In Jicarilla, a petroleum company sued the federal government over its oil and gas leases on the Jicarilla Apache Reservation. Id. at 538. The court affirmed the district court's dismissal of the company's action, finding the Jicarilla Apache Nation indispensable because the "Tribes's interest in the oil leases is at the heart of the controversy" and that it could not be joined because of its sovereign immunity. Id. at 540. See also United States ex rel. Hall v. Tribal Dev. Corp., discussed infra, 100 F.3d 476, 479 (7th Cir. 1996) (citing Travlers Indem. Co. v. Household Int'l, Inc., 775 F. Supp. 518, 527 (D. Conn. 1991) ("a contracting party is the paradigm of an indispensable party")).

In the instant case, like in Jicarilla, the heart of the controversy is a contract - specifically the contract entered into by IHS and the Cherokee Nation. Since the Cherokee Nation is a required absent sovereign, the court should dismiss the UKB action. The Cherokee Nation can claim a direct interest relating to the subject of this action since, if the UKB is successful, the requested relief will immediately affect the Cherokee Nation's contract with IHS. for example, the requested relief by the UKB would enjoin the Cherokee Nation from operating Hastings Hospital. Moreover, such a ruling would potentially disrupt health care services for thousands of the Cherokee Nation tribal members and members of other tribes who are served by the Cherokee Nation at the Hastings Hospital.

Joinder of the one of the parties to the contract at issue herein, namely the Cherokee Nation, is not feasible because the Cherokee Nation possesses sovereign immunity. Therefore, for the reasons discussed below, this court, in equity and good conscience, should dismiss the UKB action.

A. The Cherokee Nation is a Party to the Contract Challenged by the Plaintiff and is Therefore a Required Party under Rule 19(a).

A party is required if, in its absence: (1) complete relief is not possible among those already parties to the action or (2) the absent party claims a legally protected interest relating to the subject of the action and its interest will be impaired or impeded. Rule 19(a). Citizen Potawatomi Nation, 248 F.3d at 997.

Citizen Potawatomi Nation is one of several courts that has relied on the basic principle that a party to a contract is the paradigm of a party that is required under Rule 19(a). In Citizen Potawatomi Nation, the 10th Circuit applied Rule 19 to a challenge to the Department of the Interior's method for calculating funding that five tribes received in ISDEAA contracts. Id. at 997-1001. The court readily found that the requirements for Rule 19(a) were met because the absent tribes (the Shawnee Tribe, the Kickapoo Tribe of Oklahoma, the Sac & Fox Nation, and the Iowa Tribe of Oklahoma) claimed an interest relating to the subject of the action — the Citizen Potawatomi action may have altered the funding that the four absent tribes would receive in their contracts. Id. at 999.

In Tribal Dev. Corp., the plaintiff sought to void contracts regarding goods and services for casinos between the (absent) Menominee Tribe and the Tribal Development Corporation, 100 F.3d at 477. The court held that the Menominee had a clear commercial stake in the outcome and it was "beyond dispute" that the tribe was a necessary party. Id at 479. In Am. Greyhound Racing, Inc. v.

Hull, horse and dog track owners and operators brought an action against the Governor of Arizona challenging the legality of the governor's actions in negotiating new gaming contracts. 305 F.3d 1015, 1018 (9th Cir. 2002). Since litigation might have led to the automatic termination of the gaming contracts, the court found that "the interests of the tribes in their compacts are impaired and, not being parties, the tribes cannot defend those interests." Id. at 1023. In Kescoli v. Babbitt, the court held that the Navajo and Hopi nations were required parties in a suit by a Navajo Nation member challenging a mining permit issued by the Secretary of the Interior because the case would affect the tribes' lease agreements with the mining company. 101 F.3d 1304, 1310 (9th Cir. 1996) In these cases and others, the absent contracting party is required since a contracting party obviously has a plain, clear and vital interest in the contract at issue. The Cherokee Nation also has a vital and immediate interest — and therefore it is a required party — in the instant UKB action since the action involves the Cherokee Nation's contract.[3]

[3] In contrast, in a recent case which did not involve a contract, the court found no linkage between the claim of the absent party (the Cherokee Nation) and the subject matter of the action (also filed by the UKB). United Keetoowah Band of Cherokee Indians of Okla. v. U.S., 480 F.3d 1318 (Fed. Cir. 2007). The court ruled that the case could proceed. The UKB brought a statutory claim under an independent section of the Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§ 1779-1779g, that provides a right for the UKB and other specified Tribes to sue the United States over claims about the Arkansas Riverbed Lands of Oklahoma (but that "by its terms... does not apply to the Cherokee, Choctaw, and Chickasaw tribes" who are covered by other sections of the Act). Id. at 1321. The court held that the Cherokee Nation did not possess any interest relating to the UKB's statutory claims and that awarding monetary damages to the UKB under the Settlement Act would not affect the Cherokee Nation's property interest in the Riverbed Lands. Id. at 1325-1326. Therefore, the Tenth Circuit held that the absent Cherokee Nation could not claim an interest in the UKB action and was not a required party. Id.

B. Tribal Sovereign Immunity Renders Any Effort to Join the Cherokee Nation, a Required Party, Unfeasible.

Under Rule 19(a), a required party must be joined "if feasible." Because Indian tribes possess sovereign immunity, joinder of a tribe is not feasible unless the tribe waives its immunity or the suit is authorized by Congress. Citizen Potawatomi Nation, 248 F.3d at 997 (citing to Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories.... As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress."). See also Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997) and Kiowa Tribe v. Mfg. Technologies, Inc., 523 U.S. 751 (1998). The ISDEAA itself affirms the principle of tribal sovereign immunity, stating that "*nothing* [in the ISDEAA] shall be construed as... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe..." 25 U.S.C. 450n (emphasis added). See Okla. Tax Commn., 498 U.S. at 510 (the ISDEAA is one of the statutes through which Congress "reiterated its approval of the doctrine of tribal sovereign immunity").

Because the Cherokee Nation is a federally-recognized tribe and immune from suit — and because nothing in the ISDEAA abrogates this immunity — it is not feasible to join the Cherokee Nation in this lawsuit.

C. Equity and Good Conscience Dictate that This Action Should Not Proceed Among the Existing Parties.

The 10th Circuit has emphasized the "strong policy" favoring dismissal of a case when a tribe cannot be joined because of its sovereign immunity. Davis v. U.S., 192 F.3d 951, 960 (10th Cir.

1999). The court also added that there remains a need to weigh each of the Rule 19(b) factors in order to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. Id.

The four factors to be considered in Rule 19(b) are: (1) the extent to which a judgment rendered in the party's absence might prejudice that party or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, the shaping of the relief, or other measures; (3) whether a judgment rendered in the party's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. The four factors of Rule 19(b) mandate dismissal in this case.

The first factor concerns whether a judgment rendered in the absence of the party would prejudice that party. As discussed in the analysis of Rule 19(a), supra, a judgment rendered about the Cherokee Nation's contract in its absence would surely prejudice the Cherokee Nation. The consideration of the first factor under Rule 19(b) "is essentially the same as the inquiry under [Rule 19(a)(1)(B)]" into whether the continuation of the action without the absent party will impair the ability of that party to protect its interest. Enterprise Mgt. Consultants v. U.S., 883 F.2d 890, 894, n. 4 (10th Cir. 1989).

The second factor — whether measures could be taken to lessen or avoid the prejudice — also weighs in favor of dismissal because the court would be unable to lessen or avoid the prejudice to the Cherokee Nation by inserting protective provisions in the judgment or through other measures. In Citizen Potawatomi Nation, the court stated that the absent tribes would suffer substantial prejudice "*and there was no way to lessen that prejudice*." 248 F.3d at 1001 (emphasis added). There is simply no way to fashion a remedy that would not impact the Cherokee Nation's contract.

In Citizen Potawatomi Nation, the court affirmed the District Court's dismissal based on these first two Rule 19(b) factors) factors in combination with the strong policy favoring dismissal due to tribal sovereign immunity. Id.

The third factor — whether a judgment rendered in the party's absence would be adequate — concerns the public interest in settling disputes in their totality, thereby avoiding the inefficient administration of justice and multiple litigation. Pimentel, 128 S. Ct. at 2193. Since the Cherokee Nation would be a non-party to any judgment, it would not be bound by the court's judgment and it would be free to file a separate lawsuit to assert its own interests and to challenge any action IHS may be required to take in order to comply with the court's ruling on the contract involving Hastings Hospital. Rulings stemming from this litigation could result in conflicting obligations for IHS and subject the United States to multiple lawsuits. The public interest is not favored by disrupting the provision of medical care to Native Americans, whether members of the Cherokee Nation or of any other tribe residing in area served by Hastings Hospital. Nor is the public well-served when the United States is forced to expend resources defending additional lawsuits which would follow any relief granted to the Plaintiff in this case.

The fourth factor concerns whether the plaintiff will have an adequate remedy if the case is dismissed. Although the UKB will not have an alternative forum in which to pursue its present claim if the case is dismissed for nonjoinder, this result is contemplated under the doctrine of tribal sovereign immunity. Dismissal based on tribal sovereign immunity, despite the lack of an available alternative forum "is less troublesome" than in other cases because "dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit." Wichita & Affiliated Tribes of Okla. v. Hodel, 788 F. 2d 765, 777 (D.C. Cir. 1986).

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted, and the Complaint dismissed. In the event that the Motion to Dismiss is denied, the United States respectfully requests a reasonable time within which to answer the Complaint.

Respectfully Submitted,

SHELDON J. SPERLING
United States Attorney

S/Linda A. Epperley
LINDA A. EPPERLEY, OBA #12057
Assistant United States Attorney
1200 W. Okmulgee
Muskogee, Oklahoma 74401
Telephone: 918-684-5100
Facsimile: 918-684-5150
linda.epperley@usdoj.gov

OF COUNSEL:
Michael H. Wolf
Attorney
HHS Office of the General Counsel
Public Health Division / IHS Branch
5600 Fishers Ln., Room 4A-53
Rockville, MD 20857
Tel: 301-443-9572
michael.wolf@ihs.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2009, I electronically transmitted the attached 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:

James C. McMillan - james.mcmillin@mcafeetaft.com

Michael D. McMahan - mdmcmahan@andrewsdavis.com

Tamara Schiffner Pullin - tamara.pullin@mcafeetaft.com

S/Linda A. Epperley
LINDA A. EPPERLEY