IN THE UNITED STATES COURT OF FEDERAL CLAIMS

KLAMATH CLAIMS COMMITTEE	)	
	)	
Plaintiff,	)	Case No. 09-75C-FMA
	)	Judge Francis M. Allegra
v.	)	
	)	**SUPPLEMENTAL BRIEF**
UNITED STATES OF AMERICA,	)	**OF KLAMATH**
	)	**CLAIMS COMMITTEE**
Defendant.	)	
	)	

I. INTRODUCTION & BACKGROUND

In 1954 Congress enacted the Klamath Termination Act, which terminated the Federal trust relationship to the property of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians ("Klamath" or "Tribe") and Federal supervision over the affairs of the Tribe's members. Pub. L. No. 83–587, 68 Stat. 718 (codified, as amended, at 25 U.S.C. §§ 564–564x) (the "Termination Act"). The Termination Act required that a final roll of Klamath's living members be prepared (the "Final Roll"). 25 U.S.C. § 564b. Tribal members whose names appeared on the Final Roll were permitted by the Act to have their interest in Tribal property converted into money or the equivalent in land, upon which the withdrawing members would "cease to be members of the tribe." 25 U.S.C. §§ 564d(a)(2), 564e(c). Klamath and Modoc Tribes v. United States, 436 F.2d 1008, 1010-11 (Cl. Ct. 1971); see also Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974) ("Callahan I"). Anyone claiming membership rights in the Tribe or an interest in its assets had the right to contest the inclusion or omission of the name of any person on or from the Final Roll. 25 U.S.C. § 564b. However the Termination Act closed the Klamath membership roll as of midnight on August 13, 1954, and no child born thereafter was

eligible for enrollment. Id.[1] See also Kimball v. Callahan, 590 F.2d 768, 770 (9th Cir. 1979) ("Callahan II"). The Final Roll was published in the Federal Register on November 21, 1957. 22 Fed. Reg. 9303 (Nov. 21, 1957). Of the 2,133 Tribal members listed, 1,660 eventually elected to withdraw and 473 remained. Klamath Tribe Claims Committee v. United States, 97 Fed. Cl. 203, 206 (2011). The notice of termination of the Federal trust relationship was published in the Federal Register on August 12, 1961. 26 Fed. Reg. 7362 (Aug. 12, 1961).

Following passage of the Termination Act, the Klamath General Council authorized the creation of the "Klamath Tribal Executive Committee (Claims)," today's Claims Committee and Plaintiff in this action, under article V, cl. II of the Constitution and By-laws of the Klamath General Council adopted Oct. 12, 1950. See Klamath Tribal Executive Committee Resolution No. 83-2, a copy of which is attached hereto as Exhibit 1. See also Klamath Claims Committee Resolution No. CC10596, a copy of which is attached hereto as Exhibit 2.

The Claims Committee was established to act in the name of the General Council "for purposes of supervision and management of tribal claims against the United States for all dealings, including entering into contracts and making amendments thereto, with claims attorneys." Ex. 1. The Claims Committee's authority to act on behalf of the General Council has since been reaffirmed by both the Klamath General Council and by the United States Department of the Interior. See, e.g., Ex. 1. See also Klamath Gen. Council Res. No. 2004-002 (Jul. 24, 2004), a copy of which is attached hereto as Exhibit 3; Letter, S. Speaks, BIA Northwest Regional Director, to J. Kirk, Chairman Klamath Indian Tribe (Jun. 23, 2009), a copy of which is attached hereto as Exhibit 4; Letter, Joe Kirk, Chairman Klamath Tribe, to S. Speaks, BIA Northwest Regional Director (Jun. 29, 2009), a copy of which is attached hereto as Exhibit 5.

[1] 25 U.S.C. § 564b is titled "Membership roll; closure; preparation and initial publication; appeal from inclusion or omission from roll; finality of determination; final publication."

By virtue of the authority vested in the Claims Committee by the Klamath General Council, and on behalf of the 1954 Membership, Plaintiff initiated this action on February 6, 2009. Docket No. ("Dkt.") 1. Defendant subsequently moved this Court to dismiss the action, which was ultimately argued on April 19, 2010 after several postponements due to the illness of counsel representing the Claims Committee. Dkts. 9, 29. Days before the Court issued its February 11, 2011 ruling on Defendant's motion, Dkt. 36 (hereafter the "Decision"), Plaintiff's counsel died. See Dkt. 44-1; Dkt. 38. Plaintiff, unable to retain new counsel until July, did not receive a copy of the Decision until approximately April, 20, 2011. See ¶ 9, Affidavit of Melva J. Fye (Sept. 25, 2011), a copy of which is attached hereto as Exhibit 6.

In its Decision, the Court invited Klamath to intervene in this action. Dkt. 36, p. 15. The Decision provided that in the event Klamath declined to intervene, the Court would determine whether Klamath was an indispensable party under 19(b) of the Rules of the Court of Federal Claims ("RCFC"). By letter filed April 20, 2011, Klamath purportedly declined the Court's invitation and, without explanation, claimed an interest in the remaining subject matter of the suit and asserted that disposing of the case in the Tribe's absence might impede the Tribe's ability to protect its interests. Dkt. 37. By order dated August 11, 2011, the Court directed Plaintiff and Defendant to address the Tribe's purported response and, in particular, whether Klamath was an indispensable party under RCFC 19(b). Dkt. 45.

II. ARGUMENT

A. The Response To The Court's Invitation Must Be Rejected As Unauthorized By Klamath Tribal Law

The document declining this Court's invitation to intervene, filed on April 20, 2011 purportedly on behalf of the Klamath Tribe, consists only of a single page signed by a Mr. Carl Ullman as "Counsel for The Klamath Tribes" with what appears to be a personal email address

in the signature block. Dkt. 37. On its face, Docket 37 does not appear to be an authorized or legally sufficient response of the Klamath Indian Tribe.

The governing body of the Klamath Tribe is a General Council consisting of all adult members of the Tribe. See Constitution of the Klamath Tribe (2000) (hereafter "Klamath Const."), arts. II, III, VI, a copy of which is attached hereto as Exhibit 7. The Klamath General Council has the authority to exercise all reserved powers or powers delegated to or conferred upon the Tribe by Congress or other governmental agencies. Ex. 7, Klamath Const., art. VI, sec. I. Members of the General Council elect officials of the Tribal Council, who act on behalf of the General Council "regarding day to day business of the Tribes." Ex. 7, Klamath Const., art. VII, sec. I. See also Klamath Tribal Code § 1.01, art. I (1996) ("Tribal Council By-Laws") (Tribal Council directs day-to-day business and governmental affairs of the Klamath Tribe), a copy of which is attached hereto as Exhibit 8. Under the Klamath Constitution, the name of the Klamath Tribe may not be used by any organization, group, or individual to do business or represent the Tribe in any official capacity without the approval of the Tribal Council and consent of the General Council specifying, in writing, the purpose and conditions of its use. Ex. 7, Klamath Const., art. I, sec. II.

Docket 37 provides no evidence of – and contains no reference whatsoever to – any authorizing actions taken by the Klamath General or Tribal Councils with respect to this Court's invitation. Indeed, the record lacks any evidence that the Court's invitation was even transmitted to or received by the appropriate Tribal authority, much less duly considered and acted upon in accordance with Klamath governing law. Cf. 28 U.S.C. § 2403 (specifying state and federal officials to whom invitations from federal courts to intervene in cases raising constitutional issues must be sent), a copy of which is attached hereto as Exhibit 9; Klamath Tribal Code,

Govt'l. Notice Ordinance, § 17.05(e) (2006) (authorizing office of Senior Tribal Attorney to intervene on Tribe's behalf in Klamath Tribal Court actions only upon approval and direction of Tribal Council), a copy of which is attached hereto as Exhibit 10.

Docket 37 also contains no information with respect to the Tribal authority, if any, pursuant to which it was filed. It does not, for example, reference (much less attach a copy of) an authorized General or Tribal Council resolution. Nor does it attach an affidavit attesting that its filing was duly authorized by the appropriate Tribal authorities.

Docket 37 contains no assertion and offers no evidence that "Counsel for the Klamath Tribes" is a government office empowered to speak on behalf of the Klamath Tribe. The Klamath Constitution does not mention an office called "Counsel for The Klamath Tribes," which in any event seems distinct from the office of Tribal Attorney established by Tribal Law. Moreover, the mailing address of the filer listed in Docket 37 appears on the Klamath Tribe's official website as the mailing address for the Tribe's Water Attorney, which differs from the mailing address shown for the office of Tribal Attorney.[2] Equally unclear, therefore, is whether "Counsel for The Klamath Tribes" is a government official or a private attorney retained by the Tribe; if the latter, it raises further questions as to the authority by which he was retained. See Seneca Nation of Indians v. United States, 122 Ct. Cl. 163, 165 (1952) (affirming petition dismissal for failure by attorney to show authority to represent Tribe); Snoqualmie Tribe of Indians v. United States of America, 9 Ind. Ct. Cl. 25, 29 (1960) (verifying validity and sufficiency of Tribe's attorney's contract).

Plaintiff would be no less concerned for the valid authority of Docket 37 had that document purported to accept the Court's invitation. In that case the need to ascertain the validity

[2] See http://www.klamathtribes.org/contact (accessed Sept. 21, 2011), a print-out of which is attached hereto as Exhibit 11.

of its authority would be all the more urgent since a decision to intervene could effect a waiver of the Tribe's sovereign immunity. See Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 776 (D.C. Cir. 1986) (intervention would require waiver of tribal immunity); Biomedical Patent Mgt. Corp. v. California, Dept. of Health Services, 505 F.3d 1328, 1333 (Fed. Cir. 2007) (intervention by DHS waived sovereign immunity). To accept Docket 37 at face value and assume, without more, that "Counsel for the Klamath Tribes" is empowered to act on behalf of the Klamath General Council would be a de facto determination of Klamath's governing authority that would impermissibly tread on the Tribe's fundamental rights of self-governance and self-determination. See Sioux Tribe of Indians v. United States, 862 F.2d 275, 283 (Fed. Cir. 1988) (United States' fiduciary responsibility toward tribes includes respecting Tribal authority to ascertain its best interests and not impose on Tribes the views of their lawyer); Koopman v. Forest County Potawatomi Member Ben. Plan, 2006 WL 1785769, *2 (E.D. Wis. 2006) (dismissing ERISA complaint against Tribe where challenges to attorney's authority to represent Tribe threatened to turn matter into a wide-ranging case about tribal constitution, role of the Council, and powers of tribal authorities).

Under principles of comity, this Court should defer to the Klamath Tribal Council's concern for protecting its Tribal sovereignty as expressed in its laws and demand evidence of the Tribal authority under which Docket 37 was filed. Absent such authority, Docket 37 must be stricken from the record and the Court should conclude that the Tribe's failure to respond to the Court's invitation indicates that Klamath believes its limited interests in this action will be adequately represented by Plaintiff and that it is therefore not an indispensable party to this action. Cf. Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt, 43 F.3d

1491, 1498 (D.C. Cir. 1995) (failure to intervene is not a component of the prejudice analysis where intervention would require the absent party to waive sovereign immunity).

B. The Klamath Tribe Is Not An Indispensable Party

In the Order of February 11, 2011, this Court determined that under RCFC 19(a), Klamath was a necessary party that should be joined. Dkt. 36, p. 13. Recognizing, however, that Klamath's sovereign immunity prevented its joinder, the Court invited Klamath to intervene, stating that in the event the Tribe declined, the Court would proceed to determine whether Klamath was an indispensable party under RCFC 19(b). Id. at 14-15. The inability to join a necessary party under 19(a) is not necessarily fatal. Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1986). Rather the court must determine whether in equity and good conscience the action should proceed or be dismissed. A123 Systems, Inc. v. Hydro-Quebec, 626 F.3d 1213, 1220 (Fed. Cir. 2010). Applying the Rule 19(b) analysis to the present facts makes clear that in equity and good conscience, the present action should be allowed to proceed because Klamath is not indispensable to the resolution of the claims of the 1954 Membership.

Rule 19 should not be a barrier preventing parties from obtaining justice simply because an absent tribe claims an interest in the suit but refuses to participate: "The rule's twin goals are complete resolution of the parties' dispute and avoidance of multiple or piecemeal litigation." Nicholas V. Merkley, "COMPULSORY PARTY JOINDER AND TRIBAL SOVEREIGN IMMUNITY: A PROPOSAL TO MODIFY FEDERAL COURTS' APPLICATION OF RULE 19 TO CASES INVOLVING ABSENT TRIBES AS 'NECESSARY' PARTIES," 56 Okla. L. Rev. 931, 964 (2003). RCFC 19(b) is identical, in pertinent part, to FRCP 19(b). Rosales v. United States, 89 Fed. Cl. 565, n. 19 (Cl. Ct. 2009).

Under the 19(b) analysis, the court must consider four factors: (i) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (ii) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures; (iii) whether a judgment rendered in the person's absence would be adequate; and (iv) whether the plaintiff would have an adequate remedy if the action were dismissed for non-joinder. Brown v. U.S., 42 Fed. Cl. 538, 565 (1998), affd. 195 F.3d 1334 (Fed. Cir. 1999), reh. den. (2000). The weight given to each factor is determined by the context of each particular case. United Keetoowah Band of Cherokee Indians of Oklahoma v. United States, 67 Fed. Cl. 695 (2005), rev'd on other grounds, 480 F.3d 1318 (Fed. Cir. 2007); see also Davis v. United States, 199 F.Supp. 2d 1164, 1175-76 (W.D. Okla. 2002), affd. sub nom. Davis ex rel. Davis v. United States, 343 F.3d 1282 (10th Cir. 2003), citing Cloverleaf Standardbred Owners Ass'n, Inc. v. National Bank of Washington, 699 F.2d 1274, 1277 (D.C. Cir. 1983); Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt, 43 F.3d 1491, 1495 (D.C. Cir. 1995) (district court has substantial discretion in considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward). While the sovereign immunity of a Tribe that is a necessary party is important to the analysis it is not, standing alone, dispositive. Davis v. United States, 192 F.3d 951, 960 (10th Cir. 1999) (reversing FRCP 19(b) dismissal based on inability to join Tribe due to sovereign immunity). The 19(b) factors are not mutually exclusive, and other considerations may be taken into account. United Keetoowah Band, 67 Fed. Cl. at 695 (citing 7 Wright & Miller, Fed. Prac. & Proc. Civ. § 1607 (3d ed.)). A careful analysis of the context of this case demonstrates that that the Klamath Tribe is not an indispensable party to this action.

1. No Prejudice to the Parties

The first factor in the 19(b) analysis overlaps considerably with the necessary party analysis under rule 19(a). Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1499 (9th Cir. 1991). In its February 11, 2011 Order, the Court suggested that there might be "an overlap between the membership and interests of the Tribes and the Klamath Claims Committee" in this action. Dkt. 36, p. 12. However, based in part on the statement of the Tribe's Chairman that the litigation might affect the Tribal rights of the entire General Council membership, id., the Court indicated it could not afford complete relief as between Plaintiff and the Defendant. Id. at 13. That conclusion was wrong as a matter of law and fact, though it was not timely challenged by Plaintiff owing to the death of Plaintiff's counsel in the days leading up to the Court's decision, and due to the delays Plaintiff thereafter faced in retaining new counsel.[3] While a membership overlap does in fact exist, that fact alone is insufficient to deem Klamath an indispensable party. To the contrary: A judgment will not prejudice Klamath or the present parties because the 1954 Membership represented by the Claims Committee not only encompasses substantially all the legitimately enrolled members of Klamath, but includes a substantial number of Klamath Indians who are not enrolled members of the restored Tribe but who retain rights under the 1864 Treaty and the Termination Act.

[3] Plaintiff's case files in this matter, previously in the possession of the estate of Daniel Israel, Plaintiff's former attorney of record, were not made available to Plaintiff's current counsel until September 6, 2011. See Ex. 6, Fye Aff. To prevent a manifest injustice to Plaintiff from its inability to timely appeal the Court's February 11, 2011 Decision and to avoid unnecessary additional filings, Plaintiff respectfully requests that the Court also treat this supplemental filing as a request under RCFC 59(a) for a reconsideration of the February 11, 2011 Decision, and in particular the determination therein that the Klamath Tribe is a necessary party to this action.

As set forth above, Federal supervision over Klamath and its members was terminated in 1961.[4] Under the Termination Act, Congress ordered preparation of a final membership roll that would be closed to new members after 1954 and that would guide the distribution of Tribal assets. 25 U.S.C. § 564b. The 2,133 persons listed on the Final Roll, as well as their descendants, comprise the 1954 Membership represented by the Claims Committee. Not all of the 1954 Membership are enrolled members of the restored Klamath Tribe, however. Further, there exists legitimate concern whether, under the terms of the Restoration Act, all of the 1954 Membership is eligible for enrollment in the Tribe.

Of the persons listed on the Final Roll, 1,660 elected to receive payment for their share of Tribal assets.[5] See Klamath Tribe Claims Committee v. United States, 97 Fed. Cl. 203, 206 (2011); Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 679-80 (1971), cert. den. sub nom. Anderson v. United States, 404 U.S. 950 (1971). In doing so, these 1,660 individuals became disenrolled from Tribal membership. 25 U.S.C. § 564e(c) (Tribal members receiving money value for interests in Tribal property cease to be members of the Tribe). As of April 1958, Congress had therefore limited Tribal enrollment to the 433 remaining members and proscribed further new enrollment.

Congress restored Klamath's recognition in 1986. Pub. L. 99-398, 100 Stat. 849 (Aug. 27, 1986), 25 U.S.C. §§ 566-566h (the "Restoration Act"). Thereafter the Tribe adopted a new Constitution. See Klamath Constitution (2000). The Klamath Constitution provides that all persons whose names appear on the final roll prepared at termination shall "automatically" be enrolled in the Klamath Tribe. Klamath Const., art. III, sec. I (2000). However, based on the

[4] See pp. 1-2 above.
[5] The withdrawal election was conducted in April of 1958. Klamath and Modoc Tribes, 193 Ct. Cl. at 680.

language of the Restoration Act and other Federal law, it is unclear whether Klamath is empowered to do so.

While it is true that, notwithstanding the Termination Act, the Restoration Act restored recognition, 25 U.S.C. § 566(a), it also remains true that Congress never repealed the Termination Act. Indeed, as originally introduced, the language of section 10 of H.R. 3554, the bill restoring Klamath recognition, expressly repealed the Termination Act. See § 10, H.R. 3554 (99th cong., 1st sess.) (introduced Oct. 10, 1985), a copy of which is attached hereto as Exhibit 12. H.R. 3554's original language repealing the Termination Act was stripped from the bill by the House Committee on Interior and Insular Affairs. See H. Rpt. 99-630 (June 11, 1986), p. 2, a copy of which is attached hereto as Exhibit 13. Instead the Committee added the language, now codified at 25 U.S.C. § 566(b), that only limited the provisions of the Termination Act "to the extent that they are inconsistent" with the Restoration Act. See Ex. 13, p. 1. The Termination Act disenrolled 1,660 Tribal members who withdrew, limited Tribal enrollment to 433 individuals, and closed the Tribal roll. Having disenrolled the 1,660 withdrawn members, the only members that Congress could restore to recognition in 1986 were the 433 final enrollees.

When Congress restored Klamath to recognition in 1986, it did not expressly reopen the Klamath membership roll to descendants of the 433 final enrollees, much less to the descendants of the 1,660 disenrolled by withdrawing, though Congress has repeatedly done so for other tribes it terminated then restored to recognition.[6] While not opening the rolls to descendants of the 433

[6] Congress did so, for example, when it restored the Confederated Tribes of Siletz Indians, an Oregon tribe terminated around the same time as Klamath. See 68 Stat. 724 (Aug. 13, 1954). In restoring Siletz, Congress expressly provided for membership enrollment of descendants of members whose names appeared on the tribe's final membership roll prepared at termination. 25 U.S.C. § 711b(b)(1)(C). Congress did the same for the descendants of the final enrollees of the Confederated Tribes of the Grande Ronde Community of Oregon, another Oregon tribe terminated and restored at nearly the same time as Klamath. 25 U.S.C. § 713e(b)(1)(C); Pub. L.

remaining members may arguably be inconsistent with the Restoration Act, (see 25 U.S.C. § 566(b) (provisions of Termination Act inapplicable to Tribe to the extent inconsistent with Restoration Act)), the same cannot be said for the descendants of the 1,660 withdrawn members whom Congress disenrolled.

Ordinarily, a tribe's ability to determine its own membership is immune from interference by the judicial or executive branches of the federal government. As an aspect of retained tribal sovereignty that predates, and thus does not derive from, federal authority, a tribe's ability to determine its membership can only be limited by the plenary power of Congress. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (Congress may strip a tribe of any aspect of sovereignty at its pleasure); Winnemucca Indian Colony, et al. v. United States of America ex. rel. Dept. of Interior, No. 11-cv-0622 (U.S.D.C. Nev.) (Aug. 31, 2011), p. 7 (Tribes only retain those aspects of sovereignty consistent with their dependent status and not removed by Congress). In the case of Klamath, Congress exercised its plenary power and disenrolled the withdrawing members. The Restoration Act does not change that, not least because the rights expressly restored to the Tribe by the Act are only those that derive from any Federal authority. 25 U.S.C. § 566(b).

Because Congress terminated the status of the withdrawn members as an exercise of its plenary authority, the Tribe may not restore them to membership without Congressional assent.

98-165 (Nov. 22, 1983). Congress did the same again for the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (25 U.S.C. § 714b(1)(c)) and the Coquille Indian Tribe (25 U.S.C. is § 715e(b)(1)(C)), two more Oregon tribes terminated and restored in the same eras as Klamath. Indeed, on many occasions of restoration Congress has expressly provided for the enrollment of the descendants of final enrollees or final distributees. See, e.g., 25 U.S.C. § 763(b)(1) (Paiute Indians of Utah); 25 U.S.C. § 941e(a)(3), (d) (Catawba Indian Tribe of South Carolina) (expressly granting tribe right to determine future membership); 25 U.S.C. § 1300*l*-3(b)(1)(c) (Auburn Rancheria of California); 25 U.S.C. § 1300n-4(b)(1)(D) (Graton Rancheria of California).

See 25 C.F.R. § 83.3(e) (terminated tribes barred from seeking recognition by Office of Federal Acknowledgment); 43 Fed. Reg. 39361 (Aug. 24, 1978) (even if otherwise eligible, Department of the Interior cannot undo termination by Congress). Article III, section I of the Klamath Constitution, which purports to "automatically" enroll the 1954 Membership, cannot change that fundamental principle of Federal Indian law.[7] As section II of article III of the Klamath Constitution makes clear, even if the Tribe could unilaterally and automatically enroll members, it would extend only to the persons whose names appeared on the final roll prepared at termination; their descendants must still apply to and be approval by the Tribe for membership. Consequently there exist Klamath Indians who descend from those whose names appeared on the Final Roll who are not enrolled members of the Tribe. Ex. 6, Fye Aff.

The disenrolled Klamath Indians and their descendants comprise a large part of the 1954 Membership represented by the Claims Committee. To the extent they identify with or descend from the 1954 Membership, the legitimately enrolled members of Klamath are also represented by the Claims Committee. With respect to the issues at stake in this litigation, namely the rights of the 1954 Membership under the 1864 Treaty and the Termination Act – the interests of the Claims Committee and the Tribe are virtually identical, which is precisely why the Tribe's General Council as well as the Bureau of Indian Affairs have repeatedly recognized the Claims Committee's authority to bring suit on behalf of the 1954 Membership to enforce the rights given them under the Termination Act. 25 U.S.C. § 564e(c).

The potential for prejudice to the Tribe if this action proceeds without them is minimal. In the first instance, the Klamath General Council authorized the Claims Committee to bring this

[7] Nor, in any event, can a tribe "automatically" enroll adult members without some affirmative and reciprocal act by those so "enrolled." This is so because tribal membership is a bilateral relation that depends on the actions of both the tribe and its members. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed.), § 3.03[3].

action, an authority that the General Council never rescinded. On August 1, 1961, in the days leading up to termination, the Klamath General Council delegated to the Executive Committee (later known as the Executive Committee on Claims, today's Claims Committee) the authority to act in name of the General Council in pursuing claims. See Ex. 2, Klamath Tribal Council Res. No. CC10596. Not only has the General Council never withdrawn the Claims Committee's authority, it continues to rely on it, as evidenced most recently by the authorization of Plaintiff's prior attorney of record, Daniel Israel, to aggressively pursue claims, including the present one, for damages against the United States for the destruction of "Water supplies, Water Quality, [and] Treaty Fishing Rights." Ex. 3, Klamath General Council Res. No. 2004-002, p. 2.

The Tribal Council followed the General Council's direction and acknowledged the Committee's responsibility to "pursue claims, including … claims now being prosecuted against PacifiCorp. and other claims approved by the Claims Committee acting within their authority as established by the General Council." Dkt. 13-1, Klamath Tribal Council & Klamath Claims Committee, Joint Res. 2008-13 (Mar. 13, 2008) (emphasis added). Indeed, even after the commencement of this action, the Klamath Tribal Council by motion instructed the Bureau of Indian Affairs that trust funds held for use in litigation are not Tribal funds, but funds belonging to the 1954 Membership over which the Claims Committee, not the Tribal Council, has authority. Ex. 5, Letter of Klamath Chairman to BIA Regional Director (June 29, 2009).

The authority vested in the Claims Committee by the General Council remains there to this day, notwithstanding the assertion by the Tribal Council Chair that he cannot support litigation over which the Tribal Council has no control. See Dkt. 36, p. 12, quoting Dkt. 32 (Letter of Tribal Council Chair to Claims Committee Chairman dated June 17, 2010). Pursuant to the General Council's direction, the Claims Committee is responsible for litigation affecting the

1954 Membership, over which the Tribal Council and its Chair concededly have limited authority. See Dkt. 32 (noting that office of chairman lacks authority to sign affidavit for use in litigation).

Any potential for prejudice to Klamath's interests if this action continues without it is reduced by the overlapping membership of the Tribe and the 1954 Membership. In other words, there will be present in this suit other plaintiffs with interests substantially similar, if not identical, to Klamath's. See Kansas v. U.S., 249 F.3d 1213 (10th Cir. 2001). The Claims Committee's significant involvement in litigating such claims on behalf of the 1954 Membership and the Tribe[8] attests to its ability to adequately represent the interests of all members of the 1954 Membership, including those of the legitimately enrolled members.

The present action seeks money damages for violations of the treaty rights of the 1954 Membership by the 2008 removal of the Chiloquin Dam, and a judgment in the Committee's favor will effect no practical prejudice to the Tribe. See United Keetoowah Band of Cherokee Indians of Okla. v. United States, 480 F.3d 1318, 1326 (Fed. Cir. 2007) (plaintiff's action sought damages for statutory extinguishment of its title claim, not title itself); cf. Keweenaw Bay Indian Community v. Michigan, 11 F.3d 1341 (6th Cir. 1993) (seeking injunctive relief with respect to Tribe's treaty-based fishing rights) [cited in Order, Dkt. 36 at p. 10]; Davis v. United States, 192 F.3d 951, 959 (10th Cir. 1999) (seeking effective modification of tribal ordinances); Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990) (challenging fishing quotas as violation of treaty-based fishing rights). Any judgment in favor of the Committee would inure to the benefit

[8] See, e.g., Klamath and Modoc Tribes and Yahooskin Band of Indians, et al. v. United States, 193 Ct. Cl. 670 (1971), cert. den. sub nom. Anderson v. U.S., 404 U.S. 950 (1971); Kimball, et al. v. Callahan, et al., 493 F.2d 564 (9th Cir. 1974), cert. den., 419 U.S. 1019 (1974); Kimball, et al. v. Callahan, et al., 590 F.2d 768 (1979), cert. den., 444 U.S. 826 (1979); Klamath Tribes of Oregon, et al. v. PacifiCorp, 2005 WL 1661821 (D. Oreg. 2005); Klamath Tribes of Oregon, et al. v. PacificCorp, 268 Fed. Appx. 575 (2008), cert. den., 555 U.S. 821 (2008).

of most of the Tribe's members, who represent but a part of the 1954 Membership. As to the United States, a judgment on the merits is unlikely to lead to distinct and inconsistent judgments in future, since any finding of liability would be precedential and would preclude renewed litigation over the issue of the Chiloquin Dam.

A court must be extra cautious in dismissing a case for nonjoinder if plaintiff lacks an adequate remedy elsewhere. Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 777 (D.C. Cir. 1986). Here, that is precisely the case. If the present action is dismissed for indispensability, then unenrolled Klamath Indians will be precluded from pursuing a right Congress intended they be allowed to pursue under the Termination Act, a right which is itself not inconsistent with the Restoration Act, and a claim that can only be brought in this Court. At this point, if the Klamath government even chose to raise their claims, assuming it had standing to do so, the statute of limitations on the claim would already have run. Venue and the statute of limitations will preclude litigation of this case.

To the extent Klamath could claim an interest in an award to its legitimately enrolled members, that interest could theoretically be harmed if the Tribe is not joined. However, any such interest may easily be protected, for example, by tailoring the judgment to ensure distribution of a pro rata share of any award to the Tribe as parens patriae on behalf of its enrolled members. Or, as with previous actions pursued by the Claims Committee, any award in the current matter in favor of the Committee could be entrusted to the Bureau of Indian Affairs for distribution to the 1954 Membership.

III. CONCLUSION

The response filed with this Court in response to the Court's February 11, 2011 invitation to intervene in this action appears on its face to be unauthorized by Klamath Tribal law. Without

any evidence that it was filed under appropriate government authority of the Klamath Tribe, it must be rejected and considered a non-response. That lack of response, in turn, should be interpreted as a lack of objection to the prosecution of this case by the Claims Committee, and should be considered a dispositive factor in the indispensable party analysis under RCFC 19(b).

In all equity and good conscience, this case should not be dismissed simply because the sovereign immunity of the Klamath Tribe prevent it being joined as a plaintiff in this action. The Klamath General Council, the governing body of the Tribe, long ago authorized the Claims Committee to act in its behalf in bringing claims to enforce the rights of the 1954 Membership. The Claims Committee has enjoyed some measure of success working with the Tribe to protect the interests of the 1954 Membership. That includes substantially all of the Tribe's legitimately enrolled members, but also encompasses an even larger number of Klamath Indians who, through Congressional action, may be precluded from Tribal enrollment. The authority vested in the Claims Committee by the General Council has never been rescinded and continues to be recognized by the Tribal Council and the Bureau of Indian Affairs. The interests of the Klamath Tribe will not be prejudiced if this case is allowed to go forward. Because of their overlapping membership, plaintiffs will adequately represent the interests of the Tribe, as the Claims Committee's previous record of litigating treaty rights demonstrates. Because this is a claim for money damages only, a judgment can be tailored to assure that the Tribe receives the pro rata share of any award or settlement as parens patriae for its legitimately enrolled members. The United States will not face inconsistent or duplicate judgments, since any decision as to its liability for the removal of the Chiloquin Dam will become res judicata. Because the 1954 Membership encompasses substantially all of the Tribe's members, any judgment would be adequate even without the Tribe's participation. By contrast, the 1954 Membership will lack any

adequate remedy in the event of dismissal for indispensability, since venue and statute of limitations would preclude further litigation of the Chiloquin Dam issue in the Court of Federal Claims. For these reasons, the Court should find that the Klamath Tribe is not an indispensable party.

Dated: September 26, 2011

Respectfully Submitted,

s/ Thomas W. Fredericks
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Tel: (303) 671-9600
Fax: (303) 671-9155
tfredericks@ndnlaw.com

Attorney of Record for Plaintiff

OF COUNSEL:

MATTHEW J. KELLY
Fredericks Peebles & Morgan LLP
1301 Connecticut Avenue, NW
Suite 450
Washington, DC 20036
Tel: (202) 450-4887
Fax: (202) 450-5106
mkelly@ndnlaw.com