2012-5130

United States Court of Appeals for the Federal Circuit

KLAMATH CLAIMS COMMITTEE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States District Court of Federal Claims in Case No. 09-CV-00075, Judge Francis M. Allegra.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

The Committee appeals decisions of the Court of Federal Claims ("CFC") dismissing the Committee's complaint under RCFC 19 and denying its motion to amend as moot. Ignoring this Court's "claim of interest" analysis announced in United Keetoowah Band of Cherokee Indians of Okla. v. United States, 480 F.3d 1318 (Fed. Cir. 2007) ("UKB"), the CFC's RCFC 19(a) analysis began and ended with the claims of the absent Klamath Indian Tribes ("KIT" or the "restored tribe"), never seriously addressing plaintiff's claims. Had the CFC done so, it would have found insufficient grounds to dismiss the Committee's claims under RCFC 19 and would not have denied its proposed claims as "moot."

The United States skips over the UKB "claim of interest" standard and offers no response to the Committee's detailed discussion of the basis of its claims in the Klamath Termination, Distribution, and Restoration Acts. It argues that the Committee's claims are futile because the restored tribe claims an interest therein and because the United States owes the 1954 Membership no duties. But the Government offers conflicting grounds for its arguments. On the one hand it suggests the Termination Act didn't alter the Government's trust responsibilities to the terminated tribe. On the other it suggests that any statutory rights the 1954 Membership may have held were extinguished by Congress in 1986. The language of the Klamath Acts renders either position untenable.

ARGUMENT

I. THE UNITED STATES SKIPS OVER THE CFC'S FAILURE TO APPLY THE CORRECT ANALYSIS UNDER RCFC 19(a).

The United States doesn't dispute that the CFC focused "more on the interests of those not before the court" than on the claims of the plaintiff Committee, as it should have. Aplt. Br. 42, citing Klamath Claims Committee v. United States, 97 Fed. Cl. 203, 211 (Fed. Cl. 2011). The Government doesn't deny that the CFC didn't review the statutory basis of the Committee's claims and that it focused on the claims of the restored tribe, going so far as to demand evidence of restored tribal authority for the Committee's suit where none was required. Aplt. Br. 45-46, 43. The transcript from the motion hearing showed that the CFC presumed such control from the outset and carried this presumption over to its denial of the Committee's motion to amend. U.S. Br. 46; cf. Aplt. Br. 45, citing A896, 935, 940, 954, 985, 1046. The Government chose not to respond to the Committee's claim that the CFC should have assessed the restored tribe's claim of interest under the standard announced in United Keetoowah Band of Cherokee Indians of Okla. v. United States, 480 F.3d 1318, 1324-25 (Fed. Cir. 2007) ("UKB"), avoiding discussion of that standard entirely. See, e.g., U.S. Br. 53 (issue instead is whether restored tribe "claims an interest" in the subject of the action) (emphasis original).

UKB makes unequivocal that the CFC's inquiry should have started with the claims between those already parties to the action before addressing the

absentee's purported interests. Aplt. Br. 42-46. UKB, 480 F.3d at 1326. Had the CFC done so and considered the language of the Klamath Acts, it would have seen that the restored tribe's claims cannot be claims "which the substantive law recognizes as belonging to or being owned by" it. Osage Tribe of Indians of Oklahoma v. United States, 85 Fed. Cl. 162, 169 (Fed. Cl. 2008) (emphasis original), citing Am. Mar. Transp., Inc. v. United States, 870 F.2d 1559, 1561 (Fed. Cir. 1989). The United States ignores this. Instead it provides what it believes a 19(a) analysis should be, starting and ending – like the CFC – with the purported claims of the restored tribe. U.S. Br. 41-48. The Government's skewed perspective hides what Congress otherwise made clear: The property rights established and preserved by the Termination, Distribution, and Restoration Acts are vested in the 1954 Membership alone.[1] The Government has a duty to follow the law as written, not seek the result it prefers.

The Termination Act divided the interests in trust property of the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians ("KMYBSI" or "terminated tribe") equally among its 2,133 final members. 25 U.S.C. § 564 et seq.; Aplt. Br. 46. With publication of the final roll, their interests in tribal property

[1] Act of Aug. 13, 1954, 68 Stat. 718, codified as amended at 25 U.S.C. § 564 et seq. (the "Termination Act"); Pub. L. 89-224 (Oct. 1, 1965), 79 Stat. 897, codified at 25 U.S.C. § 565 et seq. (the "Distribution Act"); Pub. L. 99-398 (Aug. 27, 1986), 100 Stat. 849, codified at 25 U.S.C. § 566 et seq. (the "Restoration Act"); collectively, the "Klamath Acts."

became vested, personal property that included the right to bring post-termination claims on behalf of the terminated tribe. 25 U.S.C. §§ 564c, 564e(c); 564t. The Government doesn't deny that in the ensuing years the final enrollees did just that. See, e.g., Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974), 590 F.2d 768 (9th Cir. 1979) ("Kimball I" and "Kimball II"). The Litigation Trust Fund, the subject of the Committee's proposed claims, provided the financial means for doing so. The Fund was established by the Secretary of the Interior from terminated tribal assets to pay the costs of post-termination claims. Congress provided that final enrollees would share equally in judgment awards and in funds of the Klamath Tribe deposited in the Treasury. 25 U.S.C. § 565. Congress made the Secretary responsible for distributing such monies to the final enrollees or their heirs and legatees when necessary. 25 U.S.C. § 565b. The Government ignores the Committee's point that when Congress restored recognition in 1986, it did not repeal the Termination and Distribution Acts, as it could have. Aplt. Br. 50-51. Instead it rendered ineffective only those provisions that were inconsistent. 25 U.S.C. § 566(b). The Act also preserved existing property rights, which necessarily included the right of the final enrollees to bring tribal claims for harms arising before restoration. 25 U.S.C. § 566(d).

The United States endeavors to blur the clear distinction between the rights of the 1954 Membership and those of the restored tribe. The Committee's existing

and proposed claims are asserted for the 1954 Membership under authority provided by Congress. Congress defined the 1954 Membership to be the final enrollees of KMYBSI and their heirs and legatees. See 25 U.S.C. §§ 564b, 565a(b). The 1954 Membership is not a subset of the restored tribe, "ill-defined" or otherwise. U.S. Br. 42. See Fig. 1. The Committee has consistently stated that it does not and cannot either assert claims or speak for the restored tribe. See Klamath Claims Committee v. United States, -- Fed. Cl. --, 2012 WL 2878551, n. 6 (July 16, 2012) ("Klamath II"). Any overlap of the 1954 Membership and the restored tribe is irrelevant to the RCFC 19(a) analysis since the statutory rights at issue here are vested in the 1954 Membership alone.

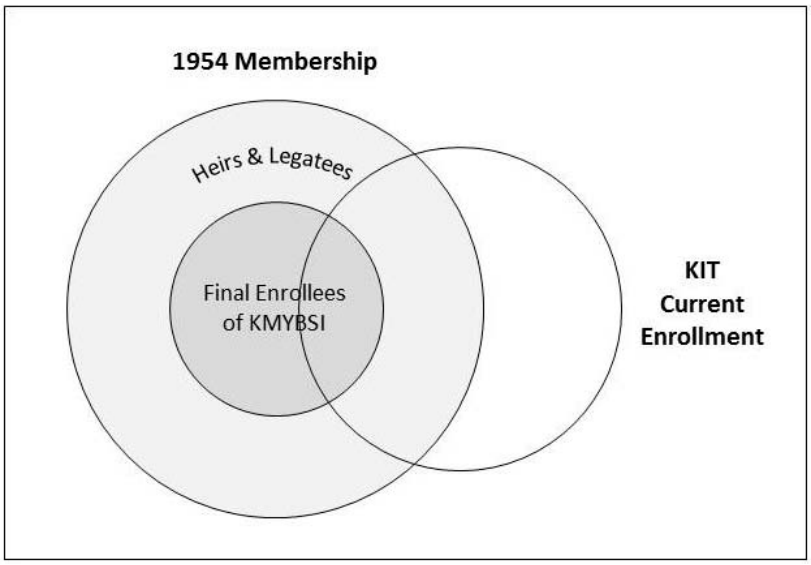

Fig. 1. Overlap of 1954 Membership and Restored Tribe Enrollment.

The claim-of-interest analysis must focus on the distinct statutory rights of the former. The terminated tribe's right to bring treaty claims against the United States

devolved to the 1954 Membership under the Termination and Distribution Acts. The Restoration Act preserved the 1954 Membership's right to bring tribal claims but limited it to claims for harms occurring before August 27, 1986. Aplt. Br. 53. The rights Congress conferred on the 1954 Membership are neither conditioned upon nor defeated by enrollment in the restored tribe.

Rather than address the RCFC 19(a) analysis under UKB, the Government tries to distinguish the case on its facts. U.S. Br. 47. But the Committee's claims are not claims for monies owed under the Termination Act, U.S. Br. 44, n. 4, and they do not allege "statutory water rights" separate from the Klamath Acts. U.S. Br. 43. They are claims of the terminated tribe exercisable by the final enrollees as of right under the Klamath Acts. Because these claims are statutorily distinct from the rights of the restored tribe and cover distinct periods, the restored tribe will suffer no prejudice from a judgment and the United States does not face the prospect of double or multiple payments or face conflicting judgments. U.S. Br. 51-52.

II. THE GOVERNMENT'S INDISPENSABILITY ARGUMENTS ARE FLAWED

The United States doesn't dispute that the Committee would lack any adequate remedy for enforcing its statutory rights if its claims were dismissed based on the restored tribe's indispensability. U.S. Br. 50. It agrees that the CFC's 19(b) determination relied on the restored tribe's assertion of an interest that might be impaired by an adverse ruling and by the threat of multiple or conflicting claims

against the United States with respect to the same rights. Id. The Government disputes the Committee's arguments (1) that the claims cannot impair an absentee's interests where the absentee has no legally cognizable interest in those claims; and (2) that the CFC improperly allowed a restored tribe's interest in sovereign immunity to outweigh Congress' interest in having its Indian legislation enforced. U.S. Br. 50-51.

A. A Judgment In The Absence Of The Restored Tribe Cannot Cause Any Prejudice

The United States does not address the Committee's point that the Termination Act devolved certain interests in the treaty rights of the terminated tribe to the final enrollees. Aplt. Br. 53; 25 U.S.C. § 564m (termination not abrogate hunting and fishing rights under treaty). See Fig. 2. Those rights devolved again to KIT at restoration. The assumption of treaty rights by the restored tribal

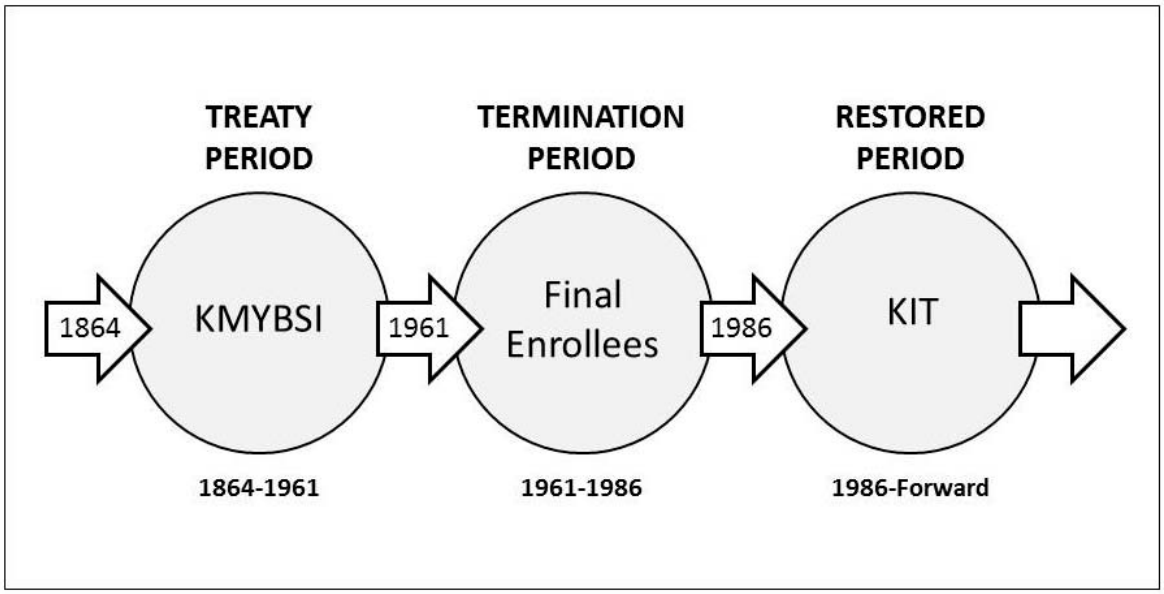

Fig. 2. Transfer of Treaty Rights Over Time.

entity going forward from 1986 did not retroactively extinguish the right of the final enrollees to bring claims for harms arising before then, which Congress preserved. Id. The restored tribe's treaty rights are not at issue in this case.

The restored tribe was not a signatory to the 1864 Treaty. U.S. Br. 51. It is a successor-in-interest to the terminated tribe, the federally recognized entity that executed the treaty. See 16 Stat. 707. After Congress terminated KMYBSI and devolved its rights to its final enrollees, no tribal entity existed for federal purposes between 1961 and 1986 capable of holding or enforcing any rights under the 1864 Treaty. Aplt. Br. 46. The only persons capable of exercising treaty rights in that period were the final enrollees. The rights of the 1954 Membership relate to a time before the restored tribe existed as a legally cognizable tribal entity. Therefore a determination of those rights cannot practically impair the restored tribe. U.S. Br. 42. The cases cited by the Government for the contrary position are inapposite and involve claims based on tribal rights that are shared simultaneously with other recognized but absent tribes and that are based on different statutory language and intent. N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272 (10th Cir. 2012); Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990); United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975). Nor is this a case of conflicting claims by beneficiaries to a common trust. U.S. Br. 55, citing Wichita and Affiliated Tribes of Okla. v. Hodel, 788 F.2d 765, 774 (D.C. Cir. 1999). The

Litigation Trust Fund was established by the final enrollees with the vested assets of the final enrollees and has been held by the Secretary for the final enrollees ever since.

Kimball I and II are consistent with Congress' intent that the 1954 Membership exercise post-termination treaty rights and that withdrawing final enrollees relinquish all interest in tribal property other than treaty-based claims. U.S. Br. 57; 25 U.S.C. § 564e. The Termination Act makes clear that it doesn't abrogate or extinguish treaty water and fishing rights, but preserves them post-termination. 25 U.S.C. § 564m; see U.S. Br. 57-58, citing Kimball I. That leaves the question of who could exercise such rights under federal law if KMYBSI was terminated. Though the United States ignores that glaring question, Congress did not. It obviously considered the question and devolved those rights to the final enrollees as final enrollees of the terminated tribe, and gave them the right to enforce them.

The Government instead argues that the Termination Act "contemplated the continuing existence of the Klamath Tribe." U.S. Br. 57. Not so. Any "continuing existence" contemplated by the Act was social and cultural. For all federal purposes, Congress made clear the tribe did not exist and mandated that federal officials act accordingly. See 25 U.S.C. § 564r. The Act "terminated" the powers of the Secretary of the Interior or other federal officers from taking, reviewing, or

approving any action under the constitution and bylaws of the tribe. 25 U.S.C. § 564r. It terminated any powers conferred upon the tribe by its constitution to the extent they were inconsistent with the Act. Id. Actions by federal officials taken under guise of tribal law – such as establishing a post-termination litigation fund – could therefore only have been taken by and for the final enrollees, not a tribe. See, e.g., U.S. Br. 25; A807-810; 813-820. Given these mandates, and given, as a practical matter, that the final enrollees and the tribe were one and the same at the time of termination, any references to "tribe" in the termination era must be understood for federal purposes as references to the final enrollees.

Disposition of the Committee's claims won't leave the United States at risk of multiple or inconsistent obligations. U.S. Br. 48. The United States has no obligations to anyone other than the 1954 Membership under the Klamath Acts with respect to the subject of the Committee's claims. U.S. Br. 48. The same is true with respect to its obligations to the restored tribe at stake in the related action of Nez Perce v. Salazar, to the extent those claims relate to harms arising after 1986. U.S. Br. 12. Because the 1954 Membership and the restored tribe cannot assert overlapping claims under the Klamath Acts, the United States cannot reasonably face prospect of having to recover damages improperly awarded. U.S. Br. 48.

Relying on precedent from other circuits, the United States argues that Rule 19 precludes analysis of whether an absent party has a legally protectable interest

in the outcome of the action. U.S. Br. 53, citing Shermoen v. United States, 982 F.2d 1312, 1317-18 (9th Cir. 1992). That misses the point. The inquiry in this Circuit begins with the nature of the claims between those already parties to the action. UKB, 480 F.3d at 1326. Then the inquiry looks to whether the interest of an absent party is of a direct and immediate, not indirect or contingent, character such that the absent party will either gain or lose by the direct legal operation and effect of the judgment. Id. at 1325. That is the reason the proper analysis must begin by characterizing the pending action. The Committee's existing and proposed claims assert rights exclusive to the 1954 Membership. Any interest the restored tribe possibly has is indirect and contingent at best.

Congress delineated the separate interests that the 1954 Members and the restored tribe have in the interests of the terminated tribe. This litigation will only affect the pending Klamath Basin water rights adjudication if the United States or the restored tribe improperly attempt to settle rights they do not possess. U.S. Br. 55. If any prejudice to the Government or restored tribe were possible, it could be avoided by careful drafting of a judgment paying attention to the temporal boundaries that limit the respective rights of the 1954 Membership and the restored tribe. U.S. Br. 56. It is because "each entity claims exclusive rights" for different periods that it is possible to do so. U.S. Br. 56. The means for limiting prejudice to the Government or the restored tribe is therefore simple: Honor the intent of

Congress as expressed in the Klamath Acts. U.S. Br. 57. If the Government seeks another result, it must direct its concerns to Congress, not this Court.

B. Equity & Good Conscience Requires Consideration Of Congress' Interest In Enforcing Its Laws

The CFC did not properly factor in the United States' interests in assessing whether, in equity and good conscience, the action should proceed in the restored tribe's absence. U.S. Br. 59. In weighing the sovereign interests of the restored tribe against the statutory rights of the 1954 Membership, the CFC should have considered the superior interests of Congress in having its laws enforced, particularly where such laws relate to the exercise of its plenary authority over Indian affairs and the protection of vested interests under the Constitution. The Government cannot deny that the United States has an interest in having its laws enforced. United States v. Bernhardt, 831 F.2d 181, 183 (9th Cir. 1987) (a government's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another sovereign's enforcement of its own laws); Stauffer v. Brooks Bros., Inc., 619 F.3d 1321, 1328 (Fed. Cir. 2010) (government has an interest in enforcement of its laws); Couch v. United States, 409 U.S. 322, 336 (1973) (noting threat to society's legitimate interest in enforcement of its laws from overbroad reading of narrow constitutional principles).

It is unclear what the Appellee means when it says that Congress's interests can be considered separately from those of the United States. U.S. Br. 59. In any

event, the Committee nowhere purports to "speak[] for Congress's interests." Id. Its point is straightforward. In carrying out the indispensability analysis and weighing the sovereign interests of the restored tribe, the CFC did not give sufficient weight to the fact that its decision would foreclose the ability of the 1954 Membership to enforce property rights granted to them by Congress. The Government's position would allow the Department of the Interior to use a tribe's indispensability as a pretext for choosing the federal laws it shall enforce and, in so doing, to tread upon Congress' plenary power over Indian affairs. U.S. Br. 60.

The Committee showed that the United States inappropriately privileged the fiduciary obligations it owes the restored tribe at the expense of those it simultaneously owes to the 1954 Membership. The Committee opposed the restored tribe's motion to file an amicus brief in this appeal opposing the Committee's claims on the limited basis that the restored tribe's attorneys once represented the 1954 Membership on matters substantially related to those at issue here. See ECF 28-1. The restored tribe's attorneys have already used such information in opposing the rights of the 1954 Membership asserted in the related case of Nez Perce. The Committee indicated below that if the United States owes fiduciary obligations to the 1954 Membership, any assistance it offers the restored tribe in defeating the Committee's claims would be inappropriate. See A627-628. Such efforts are evident here in the United States' attempt to insert extra-record

material from the restored tribe in the addendum to the Government's brief. U.S. Br. 77-78, n. 17; U.S. Add. 12-16. See discussion below, Section IV. Congress established fiduciary obligations on the part of the United States toward both the 1954 Membership and the restored tribe, and it is not for the Government to pick and choose among them.

This case cannot involve the scope of the restored tribe's rights if the rights of the 1954 Membership are exclusive. U.S. Br. 60. Though grounded in the same treaty rights of the terminated tribe, the rights of the 1954 Membership and the restored tribe are temporally distinct. See above Fig. 2. Because of this, any determination of the Committee's claims would not expose the United States to conflicting or multiple adverse rulings. U.S. Br. 60.

III. THE PROPOSED CLAIMS ARE NOT FUTILE

The Government concurs that the CFC erred by granting the motion to dismiss and then denying the motion to amend as moot. U.S. Br. 61. It denies that the CFC's decision entailed a finding that the restored tribe held an interest in the Litigation Trust Fund (though the Government proceeds to argue just that). U.S. Br. 61, n. 10. It agrees with the Committee that the CFC's error can be remedied by this Court without remand, but contends that the CFC's denial can be upheld on alternate grounds. U.S. Br. 61, 62. The Committee rejects that position and notes that the "alternate" grounds proposed by the Government represent a distinction

without a difference since it also relies on the restored tribe's claim of interest. U.S. Br. 62. As with the existing claims, the United States avoids discussion of UKB's claim-of-interest standard with respect to the proposed claims. See Aplt. Br. 66 ff. Instead the Government attacks the Committee's motion to amend for being unduly delayed, futile, and otherwise unwarranted. U.S. Br. 63.

A. The Proposed Claims Were Not Unduly Delayed

The Committee quickly moved to amend its complaint once the United States repudiated its responsibilities to the 1954 Membership by denying the Committee access to the Litigation Trust Fund on the grounds that the Fund belonged to the restored tribe. A755. As the Committee has shown, the restored tribe long disclaimed any interest in the Fund and stated that it belongs to the 1954 Membership. Aplt. Br. 69, citing A728. See also A697-98; A711-12; A714; A716-18; A726. As late as June 2009, after this action began, Bureau of Indian Affairs officials said the same thing. A704 (litigation fund monies "not truly tribal funds but 1954 Member[ship] funds"). The Committee alleged that not until it requested use of the Fund to pay the costs of this litigation and an accounting did the Government's position change. A755. Hence contrary to the Government, the gravamen of the proposed claims was unknown to the Committee until after its action started and could not have been included in the Committee's original complaint. U.S. Br. 64-65.

The United States' claim that the Committee lacked "any" valid reason for whatever delays may have occurred in this action is as inaccurate as it is insensitive. U.S. Br. 66. The Committee's original counsel of record was diagnosed with and succumbed to terminal illness after the action began. Aplt. Br. 27; Klamath II at *5. See also A322; A363-64. The record shows it took the Committee several months to retain new counsel. A367. Once current counsel was retained, it acted swiftly and diligently in prosecuting the Committee's case. This is not about conjuring "endless second thoughts on how to litigate a case." U.S. Br. 67. It is about the Committee's struggles to contend with fate and a hostile trustee.

The United States' argument that the proposed claims will prejudice its interests is self-serving. U.S. Br. 67. The Committee's proposed claims will not require "additional fact-finding" that would protract this suit, since no discovery has yet occurred. U.S. Br. 67-68, citing Tenneco Resins, Inc. v. Reeves Brothers, Inc., 752 F.2d 630, 634-35 (Fed. Cir. 1985). The facts needed to determine the proposed claims are accounting records the Government already maintains and which it concedes it has been providing to the restored tribe. The Government presumably has relied on the same records in its settlement discussions with the restored tribe in the related case of Nez Perce. No federal agencies are involved so no agency remand is possible. Saarstahl AG v. United States, 177 F.3d 1314 (Fed. Cir. 1999). Joinder of the Committee's proposed claims will promote judicial

economy and the speedy disposition of the dispute between the parties. Chandler v. James, 783 F. Supp. 2d 33, 39 (D.D.C. 2011), referencing 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1506 (2d ed. 1990)).

The cases upon which the Government relies support the proposition that the Committee's motion to amend was not unduly delayed. U.S. Br. 66. Te-Moak Bands of Western Shoshone Indians of Nevada, et al. v. United States, 948 F.2d 1258 (Fed. Cir. 1991), found undue delay where exceptions were filed in 1982 to an accounting submitted in 1974 in an action commenced in 1951. While the motion to amend in Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc., 690 F.2d 1157 (5th Cir. 1982), came over two years after the complaint was filed, the amendments did not involve new claims, but "merely sought to clarify the precise boundaries of the Chitimachas' aboriginal domain" set out in the original complaint Id. at 1164.[2]

[2] The other Fifth Circuit decisions the Government relies on are the same. U.S. Br. 66, n. 13. Jackson v. Columbus Dodge, Inc., 676 F.2d 120 (5th Cir. 1982) (denial where new claim barred by statute of limitations); Daly v. Sprague, 675 F.2d 716 (5th Cir. 1982) (denial where motion added new claims not germane to original complaint); and Daves v. Payless Cashways, Inc., 661 F.2d 1022 (5th Cir. 1981) (denial where motion came on first day of trial and new claims substantially altered what had to be proved).

B. The Proposed Claims Are Not Futile Under 12(b)(6) or 12(b)(7)

The United States failed to satisfy its burden of proving that the Committee's proposed claims are futile. Dave v. Dist. of Columbia, 811 F. Supp. 2d 111, 118 (D.D.C. 2011). The Committee's proposed claims would survive a motion to dismiss under RCFC 12(b)(6). Where the underlying circumstances relied on by a plaintiff may be a proper subject of relief, that plaintiff must be afforded an opportunity to test the claim on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962). Even if substantial reason to deny leave to amend exists, the court should consider prejudice to the movant and judicial economy in deciding whether justice requires granting leave. Jamieson By & Through Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1985). Where, as here, a proposed claim has a legal foundation that has not been presented in a prior version of the complaint, a court lacks substantial reason to deny leave to amend, and its discretion to do so is severely restricted. Wright & Miller, 27A Fed. Proc., L. Ed. § 62:280 (2012), citing Jamieson By & Through Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1985), reh'g. den., 776 F.2d 1048.

The allegations contained in the Committee's proposed complaint suffice to give rise to a legal remedy. U.S. Br. 69. The proposed complaint alleged facts plausibly suggesting a showing of entitlement to relief beyond the speculative level. Cary v. United States, 552 F.3d 1373, 1376 (Fed. Cir. 2009), citing Bell Atlantic

Corp. v. Twombly, 550 U.S. 544 (2007). It stated a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The Committee's proposed complaint alleged in detail how the United States has a trust responsibility to the 1954 Membership established by the Klamath Acts (A746-50); how the Klamath Acts established trust assets to be held by the Government for the benefit of the 1954 Membership in which no one other than the 1954 Membership held any interest (A750-754); how the Government breached its trust responsibilities by indicating it had transferred ownership and control of these trust assets to a third party (A755); and how an accounting was necessary to determine the specific scope and magnitude of the harms. A764. The Committee's proposed complaint contained more than mere labels and conclusions or a formulaic recitation of the elements of a cause of action. U.S. Br. 69. The 1954 Membership will suffer irreversible harm if it is denied its statutory rights. Any information that may be lacking is a result of the Government's own withholding of account information.

It is telling that the United States, whose submissions put the precise identity of the 1954 Membership's trust accounts into question, chose not to address that issue in its brief. See Aplt. Br. 70-71; compare A796-800, A808. The United States admits that it holds the accounts in trust and that they were established as a set-aside from terminated tribal funds. U.S. Br. 71. Yet it insists

that it has done so for the restored tribe alone. Both the Senate hearings it cites and the Distribution Act itself show that funds held in the Treasury to the credit of the terminated tribe were held in trust for the benefit of final enrollees as the successors-in-interest to the terminated tribe's property. U.S. Br. 71 n. 14; 25 U.S.C. § 565a(a).

Whether the relevant accounts are or are not held for the benefit of the 1954 Membership, and whether the United States does or does not owe the 1954 Membership a legal duty are questions going to the merits of the proposed claims, not the sufficiency of the complaint. U.S. Br. 69. A primary federal policy goal behind permitting liberal amendment under Rule 15 is precisely to facilitate determination of claims on the merits. Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 598 (5th Cir. 1981). The self-serving assertion that the Government owes a duty only to the restored tribe is not enough to render the Committee's claims futile and the detailed and specific allegations of the proposed amended complaint refute the claim that the Committee made no attempt to proffer sufficient facts to withstand a 12(b)(6) motion. U.S. Br. 71-72.

The Committee's proposed claims are also sufficient to survive a motion to dismiss under 12(b)(7). U.S. Br. 72. The CFC denied the motion to amend as moot based on its finding that the restored tribe was a required party that could not be joined. The United States seems to argue that the denial may be upheld on the

"alternate ground[]" that the restored tribe is a required party that cannot be joined because it holds an interest in the Fund. U.S. Br. 62, 68, 72. That alternate ground – if alternative it be – presumes that the restored tribe has a claim of interest in the Fund sufficient under RCFC 19(a), an issue the United States nowhere addresses. The Government unilaterally claims that it holds the accounts for the restored tribe, notwithstanding the clear language of the Klamath Acts and the fact that the restored tribe has disclaimed any such interest. Aplt. Br. 68. But even if the restored tribe had asserted such a claim, it would be insufficient under RCFC 19(a) since the Committee can show that the 1954 Membership's beneficial property rights are exclusive.

The United States never explains how or when the restored tribe acquired its purported interest in the Fund. Before 1986, no tribe existed for federal purposes capable of holding, much less claiming, such an interest. Between 1961 and 1986 the Termination Act prohibited the United States from taking any action like holding or managing trust assets on behalf of a Klamath tribal entity. 25 U.S.C. § 564r. That is also why the Distribution Act provides that any accounts deposited in the Treasury for the Klamath Tribe after termination are held for distribution to the 1954 Membership. 25 U.S.C. § 565c. To argue that the restored tribe has an interest in trust assets established before its federal restoration and after its predecessor's termination makes no sense. See, e.g., A783 (stating that the restored

Tribes was not terminated by the Termination Act). Such a position renders the Termination and Distribution Acts meaningless and the Restoration Act superfluous. Because the proposed claims relate to trust assets in which the final enrollees have an exclusive proprietary interest they would survive a motion to dismiss under 12(b)(7).

C. The Proposed Claims Must Be Allowed Either As Amended Or Supplemental Claims

The United States errs in claiming that the Committee seeks to supplement its existing complaint. U.S. Br. 61 ff. The Committee's proposed claims do not contain allegations regarding events that happened after the first complaint, but rather events occurring before the action that only came to light after it commenced. Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1504 (3d ed.). The United States mistakes events that later reveal that a harm occurred with the previous occurrence of the harm itself. U.S. Br. 73. The proposed claims do not arise from the United States' refusal to pay the Committee's costs and fees in this action but from the taking of property on which that refusal was based. U.S. Br. 73. The proposed claims rely on the fact that under the Termination and Distribution Acts obliged the United States to hold the Fund for the exclusive benefit and use of the 1954 Membership for use in paying the costs of claims against the United States. Since its refusal, the United States has further revealed that it has long sent account statements to the restored tribe's officials, requested investment instructions and

sought authorization from them for distributions from the Fund. A773-74. These revelations demonstrate that the reasonableness of the Committee's timing and that the gravamen of its proposed claims pre-dates the start of this action. Cf. U.S. Br. 76.

The Government's confusion between supplemental and amended pleadings is not relevant. Because the discretion exercised by a court in deciding whether to grant leave to amend is similar to that exercised on a motion for leave to file a supplemental pleading, the formal distinction should be of no consequence. Wright & Miller, 6A Fed. Prac. & Proc. Civ. § 1504 (3d ed.). The United States concedes that motions under Rule 15 (a) and Rule 15(d) are subject to the same standard. U.S. Br. 74. Though whether to grant leave to amend or supplement a complaint is within the discretion of a court, leave should be freely given unless there is a good reason to the contrary. Wildearth Guardians v. Kempthorne, 592 F. Supp. 2d 18, 23 (D.D.C. 2008). Here there is no good reason to do so.

The United States argues that the proposed claims are futile because the 1954 Membership lacks a vested right in the Litigation Trust Fund. U.S. Br. 74-75. The Committee alleged with particularity the statutory basis of the 1954 Membership's right to the Fund. A637 (Proposed Amended Complaint, ¶ 2). The final enrollees' personal property interests in tribal assets vested with publication of the final roll. See Aplt. Br. 34 ff.; 25 U.S.C. § 564c; Klamath and Modoc Tribes

v. U.S., 436 F.2d 1008, 1021 (Ct. Cl. 1971), citing Choctaw Nation v. United States, 100 F.Supp. 318, 320-22 (Ct. Cl. 1951), cert. denied, 343 U.S. 955 (1952). This included the right to bring post-termination claims on behalf of the tribe and to share in the distribution of judgment awards therefrom. 25 U.S.C. §§ 564e, 565a. The Termination Act extinguished the existence of the tribe as a tribe for any federal purposes. The final enrollees therefore had an exclusive vested interest in the Litigation Trust Fund when it was created. The Distribution Act governs the use of the Litigation Trust Fund. The Act does not limit use of the Fund to claims pending before the Indian Claims Commission. A773. The Act plainly states that the 1954 Membership has an interest in post-termination awards of the Indian Claims Commission. U.S. Br. 75.

The Committee's motion to amend its complaint is not a "desperate effort to protract the litigation" or complicate a defense. U.S. Br. 76. Further delay only harms the Committee. The Committee has yet to pay any of the costs or fees incurred in this suit on account of the United States, and it remains unable to do so without access to the Fund. The longer that continues the greater the pressure on the Committee's attorneys either to withdraw or to reduce the time they devote to this matter. Therefore the Committee has a strong incentive to seek a speedy resolution. The gravamen of the proposed claims is that the Department of the Interior took trust property that Congress gave to the 1954 Membership and

bestowed it upon a third party in violation of the rights of the 1954 Membership under the Klamath Acts. U.S. Br. 76.

The Committee's proposed claims raise no issues, complicated or otherwise, about whom it represents. U.S. Br. 76. The Committee brings its statutory claims on behalf of the final enrollees, who were the "tribal members enrolled at termination." U.S. Br. 76. Together with their heirs and legatees, the final enrollees comprise the 1954 Membership. See Fig. 1. The United States confuses the distinction in rights between the 1954 Membership and the restored tribe by claiming that all living final enrollees were "automatically made members" of the restored tribe in 1986. U.S. Br. 54, 76 n. 16. In making this claim, for which it offers no support, the United States confuses provisions of the restored tribe's constitution granting final enrollees automatic eligibility for enrollment with enrollment itself. Aplt. Br. 24, 54. A tribe may not unilaterally enroll persons lacking a meaningful political relationship with the tribal government or who have chosen to withdraw. Henry Sam Littlefield, Jr., 7 IBIA 128, 135, 86 Interior Dec. 217 (1979), 135 (membership is a bilateral relation depending not only upon the action of tribe but upon action of the individual); Masayesva for & on Behalf of Hopi Indian Tribe v. Zah, 792 F. Supp. 1178, 1181 (D. Ariz. 1992); Miami Nation of Indians of Indiana, Inc. v. Babbitt, 112 F. Supp. 2d 742, 756 (N.D. Ind. 2000) aff'd sub nom. Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the

Interior, 255 F.3d 342 (7th Cir. 2001); Means v. Navajo Nation, 432 F.3d 924, 934 n. 68 (9th Cir. 2005).

The United States' focus on the enrollment status of the final enrollees omits half the picture and ignores the rights of the final enrollees' heirs or legatees, who today comprise the larger part of the 1954 Membership. 25 U.S.C. § 565a(b) (interests of deceased final enrollees to go to their heirs or legatees). Many of them are likely not enrolled or eligible to enroll in the restored tribe. The Distribution Act established the authority of the Secretary of the Interior to identify the heirs or legatees of deceased final enrollees who are eligible to receive distributions from the Litigation Trust Fund and other tribal assets. See, e.g., 25 U.S.C. § 565b. Under the Distribution Act, any damages awards that the 1954 Membership may ultimately receive must be deposited in the Treasury accounts maintained by the Secretary for their benefit for distribution by the Secretary to them, in accordance with the Distribution Act. The Committee alleged that it worked with federal officials in the past to identify and locate those individuals in aid of effecting distributions under the Distribution Act. See A751, ¶ 24; A675-76; A678-80; A682-83. The restored tribe lacks any legal basis whatsoever for disposing of the statutory rights of the 1954 Membership. U.S. Br. 77.

IV. THE EXTRA-RECORD MATERIAL SHOULD BE STRICKEN FROM THE ADDENDUM TO THE GOVERNMENT'S BRIEF

Pursuant to Fed. R. App. P. 28(f) and Fed. Cir. R. 27(e), the Committee requests that the non-record material included in the addendum to the Government's brief be stricken. U.S. Add. 12-16. As a general matter, this Court reviews only the record that was before the court or agency from which an appeal was taken and does not consider new evidence presented for the first time after the record is closed. Frisby v. Office of Pers. Mgmt., 06-3239, 2006 WL 3206103 (Fed. Cir. Nov. 7, 2006). The submission on appeal of documents not before the court below is improper and such documents should be stricken. In re Mark Indus., 751 F.2d 1219, 1224 (Fed. Cir. 1984).

To the extent the Government is requesting judicial notice of the extra-record materials, see U.S. Br. 77, n. 17, that request should be rejected. Judicial notice does not circumvent the requirements of orderly judicial procedure, including the requirement that appellate tribunals ordinarily consider only what has been properly presented to the trier of fact below. Turtle Mountain Band of Chippewa Indians v. U.S., 203 Ct. Cl. 426, 443 (1976). The materials raise issues not argued below and not part of the record on appeal. The material is offered for the irrelevant purpose of showing that the restored tribe believes that it and not the Committee should dispense the Litigation Trust Fund. U.S. Br. 77. The Committee has already shown that the Distribution Act makes the Secretary of the Interior –

not the restored tribe or the Committee – responsible for distributing funds to the 1954 Membership. 25 U.S.C. § 565b. The material contradicts the restored tribe's previous positions disavowing any interest in the Fund precisely because it belonged to the 1954 Membership alone. A697-98; A711-12; A714; A716-18; A726. The restored tribe's inconsistency is evident in the extra-record material itself. Compare U.S. Add. 13 (restored tribe lacks beneficial interest in litigation fund) with U.S. Add. 16 (restored tribe orders distribution of litigation funds). The content of the material is not relevant to the RCFC 19 inquiry and sheds no light on the character of the Committee's claims or the statutory rights on which they are based. The restored tribe's self-serving assertions cannot substitute for the Government's failure to show a valid basis for restored tribal authority over the final enrollees, their heirs or legatees, their legal claims or their federal rights.

CONCLUSION

The United States failed to show that the absentee's purported claim of interest in the existing or proposed action was sufficient under RCFC 19(a). The Government did not discuss the standard announced by this Court for considering a claim of interest under RCFC 19(a). It did not discuss the exclusive character of the Committee's claims or the statutory property rights on which they are based. It did not dispute the Committee's analysis of the Klamath Acts or the conclusions drawn therefrom. Instead it attacked the Committee's claims as futile and unduly delayed,

assertions finding little support in the record or the law. Inappropriately relying on the absent party and its attorneys to defeat the Committee's claims, the United States shows that the only "tangled web of issues" there is arises from the Government's unlawful effort to ignore the clear intent of Congress and pick and choose its statutory obligations. Strict adherence to its fiduciary obligations is the first step in untangling such complexities.

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Respectfully submitted,

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United States Court of Appeals
for the Federal Circuit

KLAMATH CLAIMS COMMITTEE v. UNITED STATES, No. 2012-5130

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by FREDERICKS PEEBLES & MORGAN LLP, Attorneys for Plaintiff-Appellant to print this document. I am an employee of Counsel Press.

On **February 22, 2013**, Counsel for Appellant has authorized me to electronically file the foregoing **Reply Brief of Plaintiff-Appellant** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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