

Docket No. 2012-5130

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

KLAMATH CLAIMS COMMITTEE,
Plaintiff-Appellant,

-v.-

UNITED STATES,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF FEDERAL CLAIMS
Case No. 09-cv-0075 (Hon. Francis M. Allegra)

**BRIEF *AMICUS CURIAE* OF THE KLAMATH TRIBES IN SUPPORT OF
DEFENDANT-APPELLEE UNITED STATES OF AMERICA
AND AFFIRMANCE OF THE DECISION BELOW**

Of Counsel:
DONALD R. WHARTON

January 29, 2013

MELODY L. MCCOY
Counsel of Record for Amicus Curiae
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE* AND SOURCE OF AUTHORITY TO FILE BRIEF *AMICUS CURIAE*

The Klamath Tribes¹ (Tribes) is a federally recognized sovereign American Indian Nation. In 1864 the Tribes entered into a Treaty with the United States. Treaty between the United States and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707 (“1864 Treaty”). The 1864 Treaty has been construed to impliedly reserve water rights to support the expressly reserved hunting, fishing, gathering, and agricultural rights. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

Congress has enacted legislation specific to the Tribes. *E.g.*, the Klamath Termination Act, Act of Aug. 13, 1954, 68 Stat. 718, *codified as amended at 25 U.S.C. §§ 564-566h* (“1954 Termination Act”); the Klamath Tribe: Distribution of Judgment Funds Act, Pub. L. 89-224, 79 Stat. 897 (Oct. 1, 1965); the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (Aug. 27, 1986), *codified at 25 U.S.C. §§ 566, 566a-566h*. Federal courts of appeals have construed this legislation and confirmed that, notwithstanding the 1954 Termination Act, the Tribes’ 1864 Treaty rights continue to exist. *See, e.g., Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974) (“*Kimball I*”);

¹ The present day Klamath Tribes is a single federally-recognized tribal government that uses the plural “Tribes” to reflect that it is comprised of the Klamath and Modoc Tribes, and Yahooskin Band of the Snake Indians. We use “Tribes” to refer to the single tribal government entity.

Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) (“*Kimball II*”). The scope of the Tribes’ treaty-based water rights is the subject of an ongoing adjudication in state proceedings. See *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995); *United States v. Braren*, 338 F.3d 971, 973-74 (9th Cir. 2003).

The present action is an extralegal effort by the “Klamath Claims Committee” (KCC) to co-opt the sovereignty and property of the Tribes. No federal law recognizes KCC much less authorizes it to represent the Tribes’ water rights or any interest of the Tribes. Nor has KCC shown nor can it show any federal or tribal authority for its purported representation of any constituent part of the Tribes or the interests thereof. To assist this Court’s understanding of KCC’s extralegality, the Tribes as *amicus* will provide additional information regarding the federal laws, judicial interpretations of those laws, and tribal laws relied upon by Defendant-Appellee. KCC’s extralegality bears directly on the threshold jurisdictional questions of proper parties under RCFC 19 and the Tribe’s sovereign immunity from suit at issue in this appeal. In addition, the Tribes as *amicus* here argues, as it does as a party in a similar situation in another pending case, that KCC’s extralegality amounts to a lack of Article III standing in this action.²

² The Tribes is a Plaintiff in *Nez Perce Tribe, et al., v. Salazar*, No. 06-CV-2239 (D.D.C. filed Dec. 28, 2006). In June 2012, KCC moved to intervene in that action seeking *inter alia*, injunctive relief requiring an accounting of one of the

Defendant-Appellee consents to the filing of this brief *amicus curiae* by the Tribes but KCC does not, and thus the Tribes seek this Court's leave under Fed. R. App. P. 29(b) to file this *amicus* brief by the motion that this brief accompanies.

**STATEMENT OF AUTHORSHIP OF AND CONTRIBUTION TO BRIEF
*AMICUS CURIAE***

Counsel to the Tribes authored this brief *amicus curiae* in its entirety, and received neither funding nor assistance in the preparation or submission of the brief from any party to this case nor from any person -- other than the Tribes or its counsel.

ARGUMENT

I. The Underlying Subject Matter Of This Action Is The Treaty-Based Water Rights Of The Klamath Tribes, and the Tribes is a Necessary and Indispensable Party to an Action Involving such Subject Matter

The appeal in this action involves claims alleging that actions of the U.S. Department of the Interior in connection with the removal of a dam caused property (water rights based in the 1864 Treaty) to be taken without just compensation, and amounted to a breach of fiduciary duty. *See* Defendant-

trust funds of the Tribes, also known as the Litigation Fund Account. *See* Part II(D) of this Brief, *infra*. The Litigation Fund Account is the subject matter of KCC's proposed second amended complaint in this action, the dismissal of which by the Court of Federal Claims (CFC) is challenged in this appeal. The Tribes oppose KCC's intervention in *Nez Perce* where the matter is pending before the Court.

Appellee's Answering Brief at 4, *citing* A50 and A54-55.³ The CFC correctly recognized that the Tribes have an interest in the claim to the 1864 Treaty based water rights. The CFC also correctly dismissed the claims for failure to join an indispensable party – the Tribes – under RCFC 19 due to the Tribes' sovereign immunity from suit.

The Tribes agree with Defendant-Appellee that the CFC correctly determined that the Tribes is a required party under RCFC 19(a), due to the Tribes' interest in this action's subject matter. Further, the Tribes agree that the CFC properly factored the Tribes' sovereign immunity in determining that the action should be dismissed. KCC's argument, Plaintiff-Appellant Brief at 50-52, that the Tribes' sovereign immunity from suit is somehow a lesser or "limited"⁴ interest is directly contradicted by a long line of cases regarding tribal sovereign immunity generally, and its role in the necessary and indispensable party analysis specifically. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law

³ The Tribes agree with Defendant-Appellee that the claims set forth in KCC's proposed second amended complaint regarding the Litigation Fund Account are not properly in this action. Should those claims be determined to be properly in this action, however, the Tribes' position that KCC is acting extralegally with respect to the Tribes' treaty-based water rights applies equally to the Tribes' trust funds including the Litigation Fund Account.

⁴ KCC asserts that the Restoration Act "limited" the Tribes' sovereign immunity without citing to any provision of the Act that in fact does so. Plaintiff-Appellant Brief at 50.

immunity from suit *traditionally enjoyed by sovereign powers*”) (emphasis added); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (noting that “there is no reason to treat tribal immunity differently from state or federal immunity” for purposes of official immunity analysis); *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (dismissal of suit is “a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims”); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346-47 (6th Cir. 1993) (holding that tribal bands claiming an interest in fishing rights dispute who could not be joined due to sovereign immunity were indispensable parties).

II. KCC Has No Authority Under Federal Or Tribal Law To Co-Opt And Assert Claims Of The Tribes Or Any Constituent Part Of The Tribes

A. The Origins of the Tribes’ Executive Committee’s Authority in the 1950 Constitution

As government-to-government relations with the Tribes were about to be “terminated” by Congress the Tribes organized its present-day government under a written Constitution. Constitution and By-Laws of Klamath General Council (Feb. 3, 1950) at Klamath Tribes’ Website, Document A.⁵ Article V of the 1950 Constitution lodged all enumerated powers of the Tribes in a General Council, which under Article III consisted of all adult enrolled members of the Tribes.

⁵ The Tribes’ law generally is available publicly at <http://www.klamathtribes.org/claims.html> (“Klamath Tribes’ Website”).

Article VI provided for Officers of the General Council that sat on a ten member Executive Committee of the Tribes. Article V, Cl. 11, provided that the General Council could delegate any of its powers to the Executive Committee. There were no other sources of powers for the Executive Committee, and this historically has been recognized expressly by that Committee.⁶ KCC's assertion, Plaintiff-Appellant's Brief at 9, that "the final enrollees, acting pursuant to their old constitution, established the Plaintiff Claims Committee in order to pursue tribal claims against the United States after termination, A216-220," is belied by the very authority upon which KCC relies – the 1961 Resolution expressly refers to the "ten-member Klamath Executive Committee as created by the General Council." A218.

B. 1954 Termination Act Terminates Federal Supervision Over Tribal Property Held by Federal Government and Mandates Roll Creation Process for Limited Purpose of Determining Eligibility to Share in Property Sold or Retained Under Act

⁶ *See, e.g.*, Klamath Tribal Executive Committee, Resolution (Unnumbered) (Aug. 2, 1961) ("the Klamath General Council has delegated to the Executive Committee . . . authority to act in the name of the General Council," at 1) A216-220 (Klamath Tribes' Website, Document B); Klamath Tribal Executive Committee (Claims), Resolution No. 83-2 (Jan. 18, 1983) ["pursuant to resolution of the Klamath General Council adopted August 21, 1952, in accordance with the Constitution and By-Laws of the Klamath General Council (Art. V, Cl. 11), the Klamath Tribal Executive Committee (Claims) is empowered to act for and on behalf of the Klamath Tribe . . ." at 1], A221-224 (Klamath Tribes' Website, Document C).

The purpose of the 1954 Termination Act “was to terminate federal supervision over the Klamath Tribe of Indians, to dispose of federally owned property acquired for the administration of Indian affairs, and to terminate the provision of federal services to the Indians solely because of their status as Indians.” *Kimball I*, 493 F.2d at 567. The Act, *inter alia*, mandated the preparation of a “roll” of all members of the Tribes living as of midnight August 13, 1954. 25 U.S.C. § 564b.

The sole purpose of the roll was to determine exactly the Tribes’ members and how each member would share in the tribal property as disposed of under the Act. *See* 25 U.S.C. §§ 564d(a)(2) and (a)(5); *see also Kimball II*, 590 F.2d at 776 (“The tribal roll created by the Act was for purposes of determining who should share in the resulting distribution of property”). Each Tribes member on the roll had to either “withdraw” from the Tribes for the purpose of taking an individual monetary share of the overall proceeds from the sale of tribal property sold, or “remain” in the Tribes for the purpose of participating in a management plan for the remaining unsold tribal property which would be managed by a private trustee.⁷ 25 U.S.C. §§ 564d(a)(2) and (a)(5); *see United States v. Adair*, 723 F.2d at 1398

⁷ Pursuant to the management plan, the private trustee worked with a committee of the remaining members known as the “Executive Committee of Remaining Members.”

(“Under this Act, tribe members could give up their interest in tribal property for cash”).

The tribal property for disposition primarily consisted of the remaining land at that time held by the federal government in trust for the Tribes -- about 880,000 acres -- within the Reservation established by the 1864 Treaty. Implementation of the 1954 Termination Act resulted in about seventy-eight percent (78%) of the property being sold, and about twenty-two percent (22%) being managed under private trusteeship. *See KCC v. United States*, 97 Fed. Cl. 203, 206 (Fed. Cl. 2011).

The 1954 Termination Act is the source of the terms “withdraw” and “remain” with respect to those on the roll, and has resulted in the terms “1954 Final Roll” and “1954 Final Enrollees.” But under the Act itself the import of all of these terms is quite limited. They pertain only to the manner in which those on the roll shared in tribal property sold or not sold under the Act. The Act did not “dis-enroll” any tribe members, “cease” any individual’s tribe membership, or “close” membership in the Tribes. These and any other meanings that KCC attributes to these terms beyond their limited purpose as set forth in the Act are simply unfounded misstatements or overstatements. Indeed, as the Tribes will show next, the Act did not alter the fundamental rights or powers of the Tribes generally, including the Tribes’ rights and powers to determine tribal membership. *See Kimball II*, 590 F.2d at 776 (finding that, despite termination, “The Klamaths still

maintain a tribal constitution and tribal government, which among other things establishes criteria for membership in the Tribe”).

C. Tribes Continued to Exist Notwithstanding 1954 Termination Act, and Act Expressly Preserves Tribal Governmental Powers

While the 1954 Termination Act altered the government-to-government relationship between the Tribes and the United States at least with respect to federal supervision over the Tribes’ property and provision of federal services to the Tribes and its members, the Act “specifically contemplated the continuing existence of the Klamath Tribe,” and “did not affect the power of the Tribe to take any action under its constitution and bylaws consistent with the Act.” *Kimball II*, 590 F.2d at 776, *citing* 25 U.S.C. § 564r. As the Act expressly contemplated, the Tribes’ government in fact continued to govern, including through its legitimate agencies and committees.

D. 1954 Termination Act’s Preservation of Tribal Claims Pending Before the Indian Claims Commission Leads to Creation of Litigation Fund Account

The 1954 Termination Act also provided that “[n]othing contained in this subchapter shall deprive the tribe or its constituent parts of any right, privilege, or benefit granted by the Act of August 13, 1946 (60 Stat. 1049) [(the Indian Claims Commission Act)]”. 25 U.S.C. § 564t. At the time of termination the Tribes’

claims pending before the Indian Claims Commission (ICC) were in ICC Docket No. 100.⁸

Soon after the 1954 Termination Act the Tribes and the federal government together addressed the establishment and management of an account for the Tribes' ICC claims' attorneys' fees and case costs. The Executive Committee, acting pursuant to its delegated authority, adopted Resolution No. 1958-5⁹ which resolved "that the Secretary of the Interior be authorized and requested to establish a separate fund in the amount of \$350,000 from any available Klamath tribal funds for the purpose of providing a reserve of necessary funds for prosecution of the Klamath claims against the United States." A809-810 (Klamath Tribes' Website, Document E).

The Secretary agreed to continue supervision of the Tribes' ICC claims attorneys, create a separate Tribes' ICC litigation fund account, set aside \$350,000 of tribal funds in the account, and continue to manage the account (the "Litigation

⁸ The Tribes also had an ICC claim that bore Docket No. 389-72. That claim was the same claim as in Docket No. 100, although asserted on a different jurisdictional basis, and it was later consolidated with Docket No. 100. *Klamath and Modoc Tribes v. United States*, 1 Cl.Ct. 380 (Cl. Ct. 1982). In this Brief *Amicus Curiae* all claims of the Tribes before the ICC are referred to as ICC Docket No. 100.

⁹ Contrary to KCC's assertion, Plaintiff-Appellant Brief at 10, that "in 1961 the final enrollees set aside \$350,000 from tribal assets to pay the cost of pursuing tribal claims," the documented record demonstrates that the Executive Committee of the Tribes that took that action.

Fund Account”). *See* Klamath Tribal Executive Committee, Resolution, Aug. 2, 1961, A216-220 (Klamath Tribes’ Website, Document B); *see also* Affidavit of J.L. Norwood, Chief, Branch of Budget and Finance, Bureau of Indian Affairs, U.S. Department of the Interior (Aug. 21, 1964), filed in *Crawford v. Udall*, (D.D.C.) (No. 1401-64), A807-808 (Klamath Tribes’ Website, Document G).

The Executive Committee’s primary focus, post-termination, on management of the Tribes’ ICC claims led to the Executive Committee being referred to variously as a “Claims Committee” and / or an “Executive Committee (Claims).” *See, e.g.*, Klamath Tribal Executive Committee (Claims) Resolution 83-2, Jan. 18, 1983, A221-224 (Klamath Tribes’ Website, Document C).

E. 1975 General Council Meeting and Election of New Officers and Members of the Tribes’ Executive Committee

In 1974 *Kimball I* clarified, as a matter of federal law, the continuing existence of the Tribes’ treaty-reserved hunting and fishing rights, as well as the continued existence of the Tribes itself. Shortly thereafter, on March 1, 1975 the General Council, pursuant to its authority under the 1950 Constitution, met for the first time since enactment of the 1954 Termination Act. Its second item of business, after changing the voting age to 18 for all enrolled members, was to create an “Interim Executive Committee of the Klamath General Council.” The Interim Executive Committee was comprised of two separate existing entities: 1) the 1950 Constitution Executive Committee, and 2) the 1954 Termination Act

management-plan-created Executive Committee of Remaining Members, *see supra* fn 7. Motions and Minutes of Klamath Tribe General Council Meeting, at 1-3 (Mar. 1, 1975) (Klamath Tribes' Website, Document I). The Interim Executive Committee was bestowed with authority to, *inter alia*, appoint members of a Tribal Game Commission and to facilitate the nomination and election of officers and members of a newly constituted 1950 Constitution Executive Committee. *Id.*

The General Council met again on April 12, 1975 at which nominations for officers and members of the 1950 Constitution Executive Committee were made, and an Elections Board selected. Motions and Minutes of Klamath General Council Meeting, at 1-2 (Apr. 12, 1975) (Klamath Tribes' Website, Document H). On September 27, 1975 the newly elected officers and members of the Tribes' Executive Committee were sworn in, replacing the Interim Executive Committee. Motions and Minutes of Klamath General Council Meeting, at 6 (Sept. 27, 1975) (Klamath Tribes' Website, Document J).

F. Amended Constitutions Expressly Acknowledge the Executive Committee but Make no Mention of KCC

After the Executive Committee elections, the Tribes on July 30, 1976 amended its Constitution (Klamath Tribes' Website, Document K) to provide that "By adoption of this Constitution and By-Laws we establish ourselves as a body which along with its appropriate committees, shall act to represent the Klamath Tribes in its relations with the United States government, the State of Oregon,

other Indian tribes and associations, and all other persons or bodies.” *Id.* at 1. In addition, that Constitution expressly noted that:

In adopting this Constitution and By-Laws we recognize the authority of the tribal committees formed by this General Council in March and April of 1975 to deal with the administration of our hunting and fishing rights, and we recognize the authority of the officers elected at that time under our Constitution and By-Laws of February 3, 1950.

Id.

The committees formed in 1975 were the Executive Committee, the By-Laws Committee, the Elections Board, and the Klamath Indian Game Commission. There was no mention of a separate “Claims Committee” or “Executive Committee (Claims).” Motions and Minutes of the Klamath Tribe General Council Meeting, at 2-3 (Mar. 1, 1975) (Klamath Tribes’ Website, Document I); Motions and Minutes of Klamath General Council Meeting, at 2-3 (Apr. 12, 1975) (Klamath Tribes’ Website, Document H). Amendments to the Constitution in 1979 did not alter these provisions. (Klamath Tribes’ Website, Document L). In 1982 the Constitution was amended again, this time expressly listing at Article VI the Executive Committee and at Article IX the permanent committees of the Klamath Tribes, which included: (A) Klamath Indian Game Commission; (B) Enrollment Committee; (C) By-Laws Committee; and (D) Budget Committee. Constitution and By-Laws for the Klamath Tribes, at 1 (Apr. 10, 1982) (Klamath Tribes’

Website, Document M). There is no mention of a “Claims” committee by any name.

G. The Executive Committee (Claims) Continued Management of Tribes’ ICC Claims and the Tribes Deferred to that Management Under Mistaken Belief that the Executive Committee (Claims) Had Such Authority

Notwithstanding the Tribes’ Executive Committee elections in 1975, the Executive Committee (Claims)¹⁰ continued to manage matters related to the Tribes’ ICC claims. The Tribes’ Executive Committee and General Council apparently acquiesced in the Executive Committee (Claims) activity; most likely under the mistaken belief that the Executive Committee (Claims) had such authority, which the Executive Committee (Claims) asserted it did, most notably, if not exclusively, in Klamath Tribal Executive Committee (Claims) Resolution No. 83-2 (Jan. 18, 1983), A221-224 (Klamath Tribes’ Website, Document C).

The Tribes’ ICC claims were concluded in 1982 with a settlement and judgment in *Klamath and Modoc Tribes v. United States*, 1 Cl. Ct. 380 (US Cl. Ct. 1982). The proceeds of the settlement were distributed in 1983.¹¹ From this

¹⁰ See Part II(D) of this Brief, *supra*, regarding the origin of the term “Executive Committee (Claims).”

¹¹ Resolution No. 83-2 also purported to authorize a new contract with ICC claims attorneys, but there is no evidence that it resulted in a contract or in any claims being brought.

judgment, \$533,250 was set aside from the distribution to sustain the Litigation Fund Account. *See* 25 U.S.C. § 565.

While KCC had a role in managing ICC Docket 100 claims, any continued claims management by KCC did not extend to or include bringing “successfully ... [five decades of] tribal claims against the United States on behalf of the final enrollees,” as KCC asserts. *See* Plaintiff-Appellant Brief at 10 & fn 6.¹² No entity but the Tribes has ever brought such claims, and no entity but the Tribes can bring such claims. KCC’s conclusory assertion, Plaintiff-Appellant Brief at 10, that the 1965 Klamath Tribe: Distribution of Judgment Funds Act, “reaffirmed the statutory right of the final enrollees to bring tribal claims against the United States” has no support either in the Act itself or subsequent litigation.

H. The 1986 Restoration Act was Intended to Remedy the Harms of Termination and Should be Broadly Construed to Effect that End

In 1986, Congress enacted the Klamath Indian Tribe Restoration Act. Pub. L. No. 99-398, 100 Stat. 849 (Aug. 27, 1986), *codified at* 25 U.S.C. §§ 566, 566a – 566h. The express purpose of the Restoration Act was to restore “all rights and privileges of the tribe and the members of the tribe” that “may have been diminished or lost” under the 1954 Termination Act. 25 U.S.C. § 566(b). KCC

¹² KCC has not prosecuted “successfully” any claim of the Tribes independent of the Tribes, and the Tribes note that four of the ten cases cited by KCC in fn 6 were litigated by the Tribes with representation from the Native American Rights Fund and without any involvement by KCC.

repeatedly misconstrues the Restoration Act as “limiting” the Tribes’ sovereignty, as preserving certain unspecified aspects of the Termination Act, and, most oddly, as establishing two distinct legal entities: a “restored” Tribe and – by implication – some other entity created at and by Termination that has some continuing legal existence. KCC’s assertions find no support in the Act’s text, and would in fact undermine the Act’s fundamental purpose – the restoration of rights and recognition lost at termination – by retaining some amorphous and undefined termination-era infrastructure that acts to divide the Tribes’ legal interests among at least two (and perhaps more) entities.

The Restoration Act itself contains no limitations on the Tribes’ sovereignty, only keeps those aspects of the Termination Act that are not inconsistent with the Tribes’ restoration, and affirms the legal existence of only *one* Klamath Tribes, whose continuous existence from Termination through Restoration is expressly recognized by 25 U.S.C. § 566a (“The tribe's Constitution and Bylaws shall *remain* in full force and effect and nothing in this Act shall affect the power of the General Council to take any action under the Constitution and Bylaws”) (emphasis added). Even if, *arguendo*, the Restoration Act contained some ambiguous language on this central point, under the longstanding canon of construing remedial statutes liberally, this Court should liberally construe the Restoration Act to attain its remedial ends of restoring the rights and recognition of a single entity – the

Klamath Tribes – and not splintering those rights and recognition among several entities. *See, e.g., Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 562 (1987) (“broad remedial statute” must be given a liberal construction).

I. Authority to Manage the Litigation Fund Account

The funds in the Litigation Fund Account accumulated interest. In 1994 the “Klamath Executive Committee on Claims,” the name by which KCC referred to itself at that time, wanted the accumulated funds in the Litigation Fund Account to be distributed. Lacking authority to authorize such a distribution the Klamath Executive Committee on Claims turned to the Tribes’ Executive Committee, which adopted Resolution No. 94-27 (July 28, 1993), A225-226 (Klamath Tribes’ Website, Document N). That resolution directed the “Bureau of Indian Affairs [to] work with the Klamath Executive Committee on Claims . . . as well as the Chairman of the Klamath Tribe . . . to carry out the request to disburse the . . . trust funds to eligible members.” Klamath Tribes Executive Committee Resolution No. 94-27, at 2. The Tribes’ Executive Committee Resolution No. 94-27 makes clear that authority to distribute the Litigation Fund Account rested with the Tribes’ Executive Committee, not the Klamath Executive Committee on Claims.¹³

¹³ November 2000 amendments to the Tribes’ Constitution changed the official name of the Executive Committee to the “Tribal Council.” Constitution of the Klamath Tribes, Art. VII (Nov. 25, 2000) (Klamath Tribes’ Website, Document O).

J. After KCC Initiates Lawsuit Allegedly on Behalf of Tribes, General Council Properly Authorizes Lawsuit and Bureau of Indian Affairs Requires Tribes to Authorize KCC's Access to Litigation Fund Account for Lawsuit Costs

On May 15, 2004 the General Council adopted a Motion to authorize an already-filed lawsuit. The lawsuit had been brought by KCC in the Tribes' name without the Tribes' authority. *Klamath Tribes and Klamath Claims Comm. v. PacifiCorp*, 2005 WL 1661821 (D. Or. July 13, 2005) (No. CV-04-644- CO), *aff'd*, 268 Fed. Appx. 575 (9th Cir. 2008), *cert. denied*, 555 U.S. 821 (2008). Minutes of the Klamath Tribes General Council Meeting at 5 (May 15, 2004) (Klamath Tribes' Website, Document P) and General Council Resolution 2004-02 (July 24, 2004) (Klamath Tribes' Website, Document R).

In addition to filing the *PacifiCorp* lawsuit, KCC sought payment for the Tribes' attorney in the lawsuit from the Litigation Fund Account. Following a series of exchanges of communication between the Tribes and the Interior Department, including an Interior Solicitor's Memorandum Opinion (Aug. 4, 2004, Klamath Tribes' Website, Document S), it was ultimately determined that any expenditures from the Litigation Fund Account must be authorized by the Tribes and received by the Tribes for any further distribution.

By Resolutions Nos. 2005-02 and 2008-13, the Tribes' Tribal Council (nee Tribes' Executive Committee) authorized the distributions from the Litigation Fund Account. Joint Resolution of the Klamath Tribal Council and Claims

Committee, Resolution No. 2005-02 (Jan. 20, 2005); and, Joint Resolution of the Klamath Tribal Council and the Claims Committee, Resolution No. 2008-13 (Mar. 13, 2008), A234-235 (Klamath Tribes' Website, Document U). Although these Resolutions are styled as "Joint Resolutions" they are in fact executed solely by the Tribal Council.

K. Tribes' Chairman Establishes a Legitimate Committee for the 1954 Final Enrollees

On July 18, 2012 the Tribes' Chairman, pursuant to his constitutional authority, (Constitution of the Klamath Tribes, Art. X, Sec. IV (Nov. 19, 2011)) (Klamath Tribes' Website, Document Y), and in accordance with the direction in General Council Resolution No. 2012-002 (July 14, 2012) (Klamath Tribes' Website, Document Z) established a new entity, "the 1954 Final Enrollees Committee." (Klamath Tribes' Website, Document AA). The 1954 Final Enrollees Committee is comprised of all living members listed on the 1954 Final Roll, and is the only legitimately created and functioning entity for addressing the concerns of those tribal members.

A Steering Committee of three members of the 1954 Final Enrollees Committee was also appointed to convene the first meeting on August 4, 2012. *Id.* At the August 4, 2012 meeting the 1954 Final Enrollees Committee voted to recommend to the General Council that the funds in the Litigation Fund Account be distributed in their entirety. Minutes of the August 4, 2012 1954 Final

Enrollees Committee meeting, at 8. (Klamath Tribes' Website, Document BB). On November 17, 2012 the General Council approved the 1954 Final Enrollees Committee's recommendation to so distribute the Litigation Fund Account. (Klamath Tribes' Website, Document CC).

III. KCC LACKS ARTICLE III STANDING

“[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Kenney Orthopedic, LLC v. United States*, 103 Fed. Cl. 455, 459-60 (Fed. Cl. 2012), *citing Warth v. Seldin*, 422 U.S. 490, 498 (1975). “Standing must be determined ‘as of the commencement of suit.’” *Kenney Orthopedic, LLC v. United States*, 103 Fed. Cl. at 460, *citing Rothe Dev. Corp. v. Dep’t of Defense*, 413 F.3d 1327, 1334 (Fed. Cir. 2005). “The party invoking federal jurisdiction bears the burden of establishing standing.” *Kenney Orthopedic, LLC v. United States*, 103 Fed. Cl. at 460, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555-, 560-61 (1992); *accord Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1351 (Fed. Cir. 2010), *cert. denied*, 131 S.Ct. 92 (2010).

“Standing is a threshold jurisdictional issue that implicates Article III of the Constitution.” *First Annapolis Bancorp, Inc. v. United States*, 644 F.3d 1367, 1373 (Fed. Cir. 2011), *cert. denied*, 132 S.Ct. 2102. The question of standing also goes to this Court’s jurisdiction, and hence this Court “must decide the issue even

though the court below passed over it without comment.” *Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1325 (Fed. Cir. 2009); accord *Samsung Elec. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1378 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 886 (2008) (“the Article III standing requirement ‘must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance’”) (citations omitted).

To establish standing in the CFC

a plaintiff must show [that] it has suffered an ‘injury in fact’ that is . . . concrete and particularized and . . . actual or imminent, not conjectural or hypothetical; . . . the injury is fairly traceable to the challenged action of the defendant; and . . . it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

Sacramento Grazing Ass’n v. United States, 96 Fed. Cl. 175, 189 (Fed. Cl. 2010), citing *Friends of the Earth, Inc. v. Laidlaw Env’tl Serv.*, 528 U.S. 167, 180-81 (2000). A plaintiff must show all three of the standing elements. *Vanguard Recovery Assistance v. United States*, 99 Fed. Cl. 81, 89 & n.9 (Fed. Cl. 2011), citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 561. “Of the three standing requirements, injury-in-fact is the most determinative.” *Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp.*, 482 F.3d 1330, 1337 (Fed. Cir. 2007). For standing purposes, an “injury in fact” is “the invasion of a legally protected interest.” *Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1325 (Fed.

Cir. 2010), *citing Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61; *accord Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283 (Fed. Cir. 2010).

KCC has not shown and cannot show a legally protected interest in the subject matter of this action – the Tribes’ treaty-based water rights. The 1864 Treaty is with the Tribes, not KCC.¹⁴ No federal or tribal law has transferred the Tribes’ water rights to KCC, and thus KCC lacks any legal interest in these sovereign rights of the Tribes.¹⁵ Failure to meet the determinative standing requirement of injury-in-fact is fatal to KCC’s constitutional standing.

¹⁴ The fact that in many cases tribal rights are exercised by individual tribe members, *e.g.*, harvesting Treaty-reserved fish or game, or irrigating with Treaty reserved water, does not alter the basic nature of the rights as being those of the Tribes.

¹⁵ Similarly, assuming *arguendo* that the Litigation Fund Account is a subject matter of this action, the Litigation Fund Account, like treaty water rights, is an asset held in trust by the federal government for the Tribes. Indeed the Litigation Fund Account, like the Treaty, was created solely by government-to-government relations between sovereigns – the Tribes and the United States. No federal or tribal law has transferred any interest in the Litigation Fund Account to the KCC.

CONCLUSION

KCC's position in this action misstates and / or ignores the laws of and applicable to the Tribes. KCC extralegally attempts to co-opt and assert the sovereign rights and property of the Tribes which are the subject matter of this action. This action may not proceed in the absence of the Tribes, who are a necessary and indispensable party, and, further, KCC lacks standing to bring this action. For the reasons stated above herein and in the Answering Brief of Defendant-Appellee, the judgment below should be affirmed.

Respectfully submitted,

/s/ Melody L. McCoy
Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel: (303) 447-8760
Fax: (303) 443-7776
mmccoy@narf.org

Attorney for Amicus Curiae

January 29, 2013

**CERTIFICATE OF COMPLIANCE
WITH TYPE VOLUME LIMITATION**

This brief complies with the type volume limitation set forth in Rule 29(d) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), the brief contains 5460 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared using Microsoft Word 2010 in a proportionally-spaced typeface using Times New Roman, 14-point.

/s/ Melody L. McCoy
Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel: (303) 447-8760
Fax: (303) 443-7776
mmccoy@narf.org

January 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Melody L. McCoy
Melody L. McCoy
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Tel: (303) 447-8760
Fax: (303) 443-7776
mmccoy@narf.org