

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

THE NEZ PERCE TRIBE, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 06cv02239-JR
)	
KENNETH L. SALAZAR,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>)	
CADDO NATION OF OKLAHOMA)	
)	
Plaintiff,)	
)	Complaint in Intervention
v.)	Filed on December 1, 2008
)	
KENNETH L. SALAZAR,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>)	
THE KICKAPOO TRIBE IN KANSAS,)	
<u>et al.</u> ,)	
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Plaintiffs,)	
)	Complaint in Intervention
v.)	Filed on December 4, 2008
)	
KENNETH L. SALAZAR,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
<hr/>)	
THE NATIVE VILLAGE OF ATKA)	
)	
Plaintiff,)	
)	Complaint in Intervention
v.)	Filed on December 4, 2008
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KENNETH L. SALAZAR,)	
Secretary of the Interior, <u>et al.</u> ,)	
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**DEFENDANTS' MOTION TO DISMISS
COMPLAINTS IN INTERVENTION,
AND SUPPORTING MEMORANDUM**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.) and the Local Court Rules (LCvR), Defendants hereby respectfully move to dismiss (1) the Complaint in Intervention filed on December 1, 2008 by Caddo Nation of Oklahoma (Caddo Nation) (Docket (Dkt.) 85); (2) the Complaint in Intervention filed on December 4, 2008 by the Kickapoo Tribe in Kansas, the Sault Ste. Marie Tribe of Chippewa Indians, the Shoalwater Bay Indian Tribe, the Skokomish Tribal Nation, the Kaibab Band of Pauite Indians of Arizona, the Lac Du Flambeau Band of Lake Superior Chippewa Indians, the Qawalangin Tribe, and the Aleut Community of St. Paul Island (collectively, the Kickapoo Intervenors) (Dkt. 89); and (3) the Complaint in Intervention filed on December 4, 2008 by the Native Village of Atka¹ (Dkt. 90). The grounds for Defendants' motion are as follows: lack of subject matter jurisdiction under Fed. R. Civ. Pro. 12(b)(1) and 12(h)(3); failure to state a claim upon which relief can be granted under Fed. R. Civ. Pro. 12(b)(6); and Defendants' entitlement to judgment as a matter of law under Fed. R. Civ. Pro. 12(c).

In support of their motion, Defendants state the following:

I. Relevant Procedural Background

1. Eleven Tribes—the Nez Perce Tribe, the Mescalero Apache Tribe, the Tule River Indian Tribe, the Hualapi Tribe, the Yakama Nation, the Klamath Tribes, the Yurok Tribe, the Cheyenne-Arapaho Tribe, the Pawnee Nation of Oklahoma, the Sac and Fox Nation, and the Santee Sioux Tribe of Nebraska—filed this action on December 26,

¹ Caddo Nation, the Kickapoo Intervenors, and the Native Village of Atka are collectively referred to herein as the “Intervening Plaintiffs.”

2006. Dkt. 1. Plaintiffs filed their First Amended Complaint on April 2, 2007. Dkt. 27. The First Amended Complaint named another Tribe—the Tlingit and Haida Tribes of Alaska—as a plaintiff in this suit. Defendants filed their Answer on May 11, 2007. Dkt. 28.

2. On June 16, 2008, Defendants filed a motion to dismiss this case (as well as seven other cases pending before this Court) for lack of jurisdiction (Motion to Dismiss). Dkt. 58. In this Motion to Dismiss, which is currently sub judice, Defendants sought dismissal of all three causes of action asserted by Plaintiffs in the First Amended Complaint. *Id.* Plaintiffs opposed Defendants' motion. Dkt. 66.

3. On June 6, 2008, Plaintiffs filed a motion to certify this case as a class action (Class Certification Motion). Dkt. 53. During oral argument on the Class Certification Motion, which Defendants opposed (Dkt. 64), the Court stated essentially that it was inclined to deny the motion. Dkt. 72, Transcript at 103-104. The Court suggested that Plaintiffs pursue alternative means for including those Tribes that had not filed their own trust accounting cases yet and that would like to join this case. *Id.*

4. Given the Court's comments, Plaintiffs filed a motion on August 8, 2008, for leave to send a court-approved notice to putative class members so as to allow them the opportunity to join this lawsuit. Dkt. 73. On August 26, 2008, the Court issued an Order stating that "counsel should take notice that the Court expects to approve the idea of sending notice and focus their response on what the notice should say." Dkt. 75.

5. As directed by the Court, the parties negotiated the terms of a proposed notice, which they submitted to the Court on September 17, 2008. Dkt. 79. The Court approved the proposed notice on October 15, 2008, and stated that it expected to issue a

formal class certification decision on December 1, 2008. Dkt. 81. Plaintiffs distributed the notice on October 17, 2008. As a result, twenty-one Tribes initially advised Plaintiffs' counsel of their desire to become party to this case. Dkt. 83, Attach. 1, at 2.

6. On December 1, 2008, Plaintiffs filed a motion for leave to file a second amended complaint to add the additional twenty-one Tribes to this case. Dkt. 83. The Court granted Plaintiffs' request on December 1, 2008 (Dkt. 84), and Plaintiffs filed a Second Amended Complaint later that day. Dkt. 86. Other than adding the twenty-one additional Tribes and deleting references to class certification, Plaintiffs did not change any substantive legal or factual allegations that had been set forth in the First Amended Complaint.

7. Given that the First and Second Amended Complaints are virtually identical in all material factual and legal respects, on December 18, 2008, Defendants moved to dismiss the Second Amended Complaint by incorporating by reference their pending Motion To Dismiss the First Amended Complaint. Dkt. 91. On December 22, 2008, the Court denied the motion by Order and stated that "because the second amended complaint makes no new claims, defendants are under no obligation to answer it." Dkt. 92.

II. CADDO NATION'S COMPLAINT IN INTERVENTION

8. On November 26, 2008, Caddo Nation filed its Motion to Intervene and a proposed Complaint in Intervention. Dkt. 82. The Court granted the motion on December 1, 2008 (Dkt. 84) and Caddo Nation's Complaint in Intervention was filed that same day. Dkt. 85.

9. As asserted by the Tribe in its intervention motion, Caddo Nation and Plaintiffs “share common claims against the Defendants.” Dkt. 82 at 3. Moreover, the claims in Caddo Nation’s Complaint in Intervention “involve[] facts, parties and evidence that are the same and similar to this action” (*id.* at 5), and “share common questions of law and fact” (*id.* at 7) with Plaintiffs’ case. The only two counts asserted in Caddo Nation’s Complaint in Intervention seek declaratory and injunctive relief and closely mirror Counts I and II of the First (and Second) Amended Complaint filed by Plaintiffs. *Compare* Dkt. 82 at 25-35 *with* Dkt. 27 at 70-80.

III. KICKAPOO INTERVENORS’ AND NATIVE VILLAGE OF ATKA’S COMPLAINTS IN INTERVENTION

10. On December 3, 2008, the Kickapoo Intervenors filed a motion to intervene and a [Proposed] Complaint in Intervention (Dkt. 87), which the Court granted by Minute Order on December 4, 2008. The Kickapoo Intervenors filed their Complaint in Intervention later that day. Dkt. 89.

11. On December 4, 2008, the Native Village of Atka filed a motion to intervene and a [Proposed] Complaint in Intervention (Dkt. 88), which the Court also granted by Minute Order on December 4, 2008. The Native Village of Atka filed its Complaint in Intervention later that day. Dkt. 90.

12. As stated in their substantively identical motions for intervention, the Kickapoo Intervenors and the Native Village of Atka “share common claims [with Plaintiffs] against Defendants in terms of facts, evidence, and legal theories,” and they have “an interest in both the federal and statutory grounds and the common law basis for the declaratory and other equitable relief sought in this action” by Plaintiffs. Dkts. 87, 88 at pg. 2. With the exception of deleting class certification allegations, the Complaints in

Intervention of the Kickapoo Intervenors and the Native Village of Atka are identical in factual and legal substance to the First Amended Complaint. *Id.*, Dkts. 27, 89-90.

IV. DEFENDANTS' MOTION TO DISMISS

13. As set forth and acknowledged by their intervention motions, the Intervening Plaintiffs' claims against Defendants are substantively similar (and in two of the cases identical) to the claims asserted in the First Amended Complaint. Dkts. 82, 87, 88. Each of the Intervening Plaintiffs have agreed (a) that the claims in intervention share common questions of law and fact with the claims interposed in the First Amended Complaint; (b) that the Intervening Plaintiffs have an interest relating to allegations of, and remedies sought by, the First Amended Complaint; and (c) that the claims in intervention involve the same parties and similar evidence as the claims interposed in the First Amended Complaint. Dkts. 27, 82, 85, 87-90.

14. Like the First Amended Complaint, the Complaints in Intervention allege that Defendants breached their alleged fiduciary and statutory duties and obligations to administer and properly manage Plaintiffs and the Intervening Plaintiffs' trust funds and non-monetary trust assets. Dkts. 27, 85, 89-90. Additionally, the First Amended Complaint and the Complaints In Intervention seek declaratory and injunctive relief relating to Defendants alleged failure to provide full and complete trust fund accountings and to compel Defendants to provide the accountings that Plaintiffs and the Intervening Plaintiffs allege is statutorily mandated.² *Id.*

² Defendants note that the Kickapoo Intervenors and the Native Village of Atka assert a cause of action under the Administrative Procedure Act (APA) that is identical to the APA claim in the First Amended Complaint. That APA claim in the First Amended Complaint is also subject to Defendants' pending Motion to Dismiss. Caddo Nation has not asserted an APA claim.

15. Given that the Intervening Plaintiffs assert virtually identical substantive factual allegations and substantive legal claims as the First Amended Complaint and that they assert common causes of action and theories of relief with the First Amended Complaint, Defendants believe that a decision by this Court on their pending Motion to Dismiss (Dkt. 58) will be controlling or have a substantial impact on the Intervening Plaintiffs and their Complaints in Intervention. Therefore, Defendants hereby incorporate by reference herein their Motion to Dismiss (Dkt. 58), and they respectfully request that their Motion to Dismiss be deemed asserted and submitted against the Complaints in Intervention, as well as the First Amended Complaint. Further, Defendants submit that, because given this filing and the continuing pendency of their Motion to Dismiss, they are not required under the rules to file an Answer or other response to any of the Complaints in Intervention at this time.³

³ In the event that Defendants are required to respond further to any of the Complaints in Intervention, Defendants reserve all rights and defenses that are not addressed in the Motion to Dismiss as to all Intervening Plaintiffs.

In a telephone discussion with undersigned counsel for Defendants on January 16, 2009, counsel for Caddo Nation, Jennifer Henshaw McBee, agreed that, in the event of a denial of the Motion to Dismiss (Dkt. 58), Defendants will have twenty (20) days in which to file an Answer or otherwise respond to Caddo Nation's Complaint in Intervention.

In telephone discussions with undersigned counsel for Defendants on January 16, 2009 and January 27, 2009, counsel for the Kickapoo Intervenors and the Native Village of Atka, Melody McCoy, stated that the Kickapoo Intervenors and the Native Village of Atka oppose Defendants' request for a similar response time. Accordingly, Defendants respectfully request that, if the Court denies the Motion to Dismiss (Dkt. 58), the Court grant Defendants a period of twenty (20) days from the date of the Court's ruling to file an Answer or otherwise respond to the Complaints in Intervention.

Respectfully submitted this 30th day of January, 2009,

JOHN C. CRUDEN
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/s/ Michael D. Thorp

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing DEFENDANTS' MOTION TO DISMISS THE COMPLAINTS IN INTERVENTION, AND SUPPORTING MEMORANDUM was served on January 30, 2009 by Electronic Case Filing or by regular, first-class United States mail, postage pre-paid, and by electronic mail or telefax, unless otherwise noted below, on the following counsel:

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[PROPOSED] ORDER

This matter is before the Court on the Defendants' Motion to Dismiss the Complaints In Intervention (Docket Nos. 85, 89 and 90) filed in this matter. Upon consideration of the motion, the supporting memoranda, the opposing memoranda, the record, and the relevant law, it is on this ____ day of _____, 2009, ORDERED that, for good cause shown, the Defendants' motion is GRANTED. IT IS FURTHER ORDERED that Judgment shall be entered for Defendants.

Dated: _____

JAMES ROBERTSON
United States District Judge