

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
)	
DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure (Fed. R. Civ. Pro.) and the Local Court Rules (LCvR), Defendants hereby respectfully request that the Court dismiss the Second Amended Complaint in this case (Docket (Dkt.) 86) on the following grounds: pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction, Fed. R. Civ. Pro. 12(b)(6) for failure to state a claim upon which relief can be granted, and Fed. R. Civ. Pro. 12(c) because Defendants are entitled to judgment as a matter of law. In support of their motion, Defendants state the following:

1. Twelve 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, the Santee Sioux Tribe of Nebraska, and the Tlingit and Haida Tribes of Alaska – filed this case on December 26, 2006. Dkt. 1. Plaintiffs filed their First Amended Complaint on April 2, 2007. Dkt. 27. 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. The Motion To Dismiss, which is currently sub judice, seeks 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. Defendants opposed Plaintiffs' motion. Dkt. 64.

4. During oral argument on the Class Certification Motion, 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 have not filed their own trust accounting cases yet and that would like to join this case. *Id.*

5. 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.

6. 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 of the 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 advised Plaintiffs' counsel of their desire to become party to this case. Dkt. 83, Attach. 1, at 2.

7. On December 1, 2008, Plaintiffs filed a motion for leave to file a second amended complaint. Dkt. 83. In their motion, Plaintiffs stated that they had "so moved to amend their complaint to add," as plaintiffs, the twenty-one tribes wishing to join the litigation and that they "[were] not in any way expanding the scope of their original complaint." *Id.*, at 10, 16. In short, other than adding the twenty-one additional tribes, Plaintiffs were not changing any substantive legal or factual allegations that had been set forth in the First Amended Complaint.

8. As indicated by Plaintiffs, the Second Amended Complaint is almost identical, in factual and legal substance, to the First Amended Complaint. Dkt. 83 at 15 (stating, "The [Second] Amended Complaint adds only plaintiffs (and deletes the class certification allegations); otherwise it is identical to the original and first amended complaint.") (emphasis added). Importantly, all of the substantive allegations and the causes of action (Counts I through III) remain pled in the Second Amended Complaint as they were in the First Amended Complaint. *Cf.* Dkts. 1 and 86.

9. Further, the twenty-one newly added plaintiffs, all of whom are represented by the same counsel as the twelve original plaintiffs, "agree to be bound by all proceedings in this action to date." Dkt. 83 at 16 (emphasis added). Further, Plaintiffs stated that "[c]lass certification and dismissal motions have been made and are pending. But Rule 26(a) disclosures have not yet been provided, and no discovery has been taken, let alone scheduled. Defendants thus procedurally are in precisely the same position with

respect to the claims of the original and the added plaintiffs as they are with just the original plaintiffs' claims." *Id.* at 14 (internal citations omitted).

10. The Court granted Plaintiffs' request on December 1, 2008. Dkt. 84. This meant that, under LCvR 15.1, the Second Amended Complaint was deemed filed on December 1, 2008. Dkt. 86. Under Fed. R. Civ. Pro. 12 and LCvR 12, Defendants' response to the Second Amended Complaint is due December 18, 2008.

11. Given that the newly added Plaintiffs have agreed to be bound by all prior proceedings in this action and that the Second Amended Complaint (a) asserts identical substantive factual allegations as the First Amended Complaint; (b) asserts identical substantive legal claims as the First Amended Complaint; and (3) asserts identical causes of action and theories of relief as the First Amended Complaint, Defendants believe that any decision by this Court on their pending Motion to Dismiss (Dkt. 58) will be controlling as to the newly added Plaintiffs and the Second Amended Complaint as to the twelve original Plaintiffs and the First Amended Complaint. Therefore, Defendants hereby respectfully incorporate by reference herein their Motion To Dismiss (Dkt. 58) and request that their Motion To Dismiss be deemed asserted and submitted against the Second Amended Complaint as well. Defendants further submit that, because of 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 the Second Amended Complaint at this time.¹

¹ In the event that Defendants are required to respond further to the Second Amended Complaint after a decision on their Motion To Dismiss, Defendants reserve all rights and defenses that are not addressed in the Motion To Dismiss, as to all Plaintiffs identified in the Second Amended Complaint, including those twenty-one (21) newly added Plaintiffs in this case.

Respectfully submitted this 18th day of December, 2008,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT was served on December 15, 2008 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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