

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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| THE NEZ PERCE TRIBE, <i>et al.</i> , |) | |
| |) | |
| |) | |
| Plaintiffs, |) | No. 06cv02239-JR |
| |) | |
| v. |) | |
| |) | |
| DIRK KEMPTHORNE, |) | |
| Secretary of the Interior, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
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**PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION TO DEFENDANTS’
MOTION FOR A REMAND AND STAY OF LITIGATION**

Pursuant to this Court’s order of August 23, 2007 (Doc. #39), Plaintiffs hereby file this supplemental opposition to Defendants’ Motion for Remand and Stay of Litigation of August 1, 2007 (Doc. # 37). Plaintiffs’ points and authorities set forth herein are not covered in the principal opposition briefs filed October 1, 2007 in, *inter alia*, *Ak-Chin Indian Community v. Kempthorne*, No. 06-2245 (Doc. # 22) and *Osage Tribe of Indians v. Kempthorne*, No. 04-0283 (Doc. # 51).

Plaintiffs are very concerned that Defendants’ Motion for a Remand and Stay of Litigation is nothing more than a concerted and broad effort to limit or avoid judicial declaration and enforcement of Defendants’ fiduciary obligations. At least two named Plaintiffs in this action, the Nez Perce Tribe and the Pawnee Nation of Oklahoma, also have actions involving their trust accounts and funds pending in the U.S. Court of Federal Claims (CFC): *Nez Perce Tribe v. United States*, No. 06-910 (Fed. Cl. filed Dec. 28, 2006) and *Pawnee Nation of Oklahoma*, No. 07-02 (Fed.

Cl. filed Jan. 3, 2007).

As stated most clearly in a “Proposed Scheduling Order” filed quite recently by Defendants in another tribal trust accounts and funds action in the CFC, *Round Valley Indian Tribes v. United States*, No. 06-0900 (Fed. Cl. filed Dec. 27, 2007), Defendants intend their requested remand – which they claim is necessary for them to prepare a tribal historical accounting plan (and perhaps some actual accountings) – to affect not only the proceedings in tribal trust claims before this Court, but also such claims in the CFC.

Further according to Defendant, this historical accounting plan and the individual Tribal accountings, in particular, the one for Plaintiff, are likely to have an effect on Plaintiff’s trust accounting and trust mismanagement claims herein. Defendants (sic) shall provide periodic reports, as appropriate, to the Court and Plaintiff herein about the status of Interior’s preparation and presentation of its historical accounting plan and the individual accounting for Plaintiff. Based on those periodic reports, the Court will determine whether and how to proceed with respect to the effects of the accounting plan and Tribal accounting, if any, on the proceedings in this case.

Round Valley Indian Tribes v. United States, No. 06-0900, Defendant’s Proposed Scheduling Order at ¶ 13 (Fed. Cl. filed Aug. 28, 2007) (Doc. # 16). This Proposed Scheduling Order, a copy of which is attached hereto as Exhibit 1, shows that a goal of securing a remand in cases in this Court is to reduce Defendants’ CFC case obligations to nothing more than “periodic reports.”

Moreover, as Plaintiffs stated in their First Amended Complaint at ¶ 52 (filed April 2, 2007) (Doc. # 27), only seven months ago, even as they were preparing to ask this Court for a litigation “time-out” to develop a “plan” for accountings which they admit are owed to Plaintiffs, Defendants were asking Congress to relieve them of any and all tribal “historical accounting obligations.” See “Key Facets of Acceptable Indian Trust Reform and Settlement Legislation,” attached to Letter from Secretary of the Interior Dirk Kempthorne and Attorney General Alberto Gonzales to The Honorable

Byron Dorgan, Chairman, Committee on Indian Affairs, United States Senate (Mar. 1, 2007), copy attached hereto as Exhibit 2.

For the above stated reasons as well as those set forth in the principal opposition briefs filed October 1, 2007, Plaintiffs oppose Defendants' Motion for a Remand and Stay of Litigation.¹ Pursuant to LCvR 7(c), a proposed Order is submitted herewith.

DATED this 22nd day of October, 2007

Respectfully submitted,

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¹ Should this Court find that a remand and stay is appropriate, Plaintiffs respectfully ask that they be granted an opportunity to address to the Court the issue of whether such remand or stay necessarily precludes discovery on class related issues and even the merits of class certification. "Initial class rulings may be made before, after, or simultaneously with the disposition of other motions" including non-dispositive motions and dispositive motions. 3 Alba Conte and Herbert Newberg, *Newberg on Class Actions* § 7:15 (4th ed. 2002).

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2007, a true and correct copy of the foregoing PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR A REMAND AND STAY OF LITIGATION was served by Electronic Case Filing or by regular first class U.S. mail, postage pre-paid, on the following counsel:

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