IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:11-cv-00243-REB-CBS

CENTER FOR BIOLOGICAL DIVERSITY, *et al*.,

Plaintiffs,

v.

JOSEPH PIZARCHIK, *et al*.,

Defendants, and

BHP NAVAJO COAL COMPANY

Intervenor-Defendant

THE NAVAJO NATION'S AMENDED LIMITED MOTION TO INTERVENE

The Navajo Nation ("Nation") hereby moves this Court for leave to limitedly intervene in this action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure only for the limited purposes of establishing that this action cannot proceed in the Nation's absence and filing an Amended Motion to Dismiss pursuant to Rules 19 and 12(b)(7). The Nation has attached its Amended Motion to Dismiss as Exhibit "A" to be filed after intervention, as-well-as the Declarations in Support of these Motions of its President and Professor Charles Cicchetti as Exhibits "B" and "C" respectively. The Nation does not waive its sovereign immunity, nor any other defense or objection with its Amended Motions. The Nation and its more than 300,000 members have substantial interests relating to this action. These interests may be impaired with the disposition of this action, but will not be adequately represented by the existing parties. Therefore, the

Nation's limited intervention only to file an Amended Motion to Dismiss is appropriate. Accordingly, the Nation moves this Court for leave to limitedly intervene in this action pursuant to Rule 24 to protect its interests, but only to file its Amended Motion to Dismiss pursuant to Rules 19 and 12(b)(7). In the alternative, the Nation requests this Court to grant its permissive intervention pursuant to Rule 24(b) for the same purpose.

INTRODUCTION AND FACTUAL BACKGROUND

The Nation is a sovereign, and like the United States, foreign Nations, States, and Territories, the Nation possesses immunity from suit. *E.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). The Nation has standing to bring its claims as a sovereign and on behalf of its members pursuant to the doctrine of *parens patriae*. *E.g., Pueblo of Isleta ex rel. Lucero v. Universal Constructors, Inc*., 570 F.2d 300, 302-303 (10th Cir. 1978) (citations omitted). The Navajo Nation is the largest Indian Nation—both in terms of land area and membership—within the United States. The Nation has more than 300,000 enrolled members, and the majority live on-reservation. Geographically, the Nation is slightly larger than the State of West Virginia, and shares territory with the states of Arizona, New Mexico and Utah. Unfortunately, the Nation is one of the two poorest areas within the United States. The unemployment rate hovers around 50%, and approximately 37% of the Nation's population lives below the poverty level. (Cicchetti Aff. ¶ 9).

The Nation's interests[1] are promoted with the various direct and indirect incomes from the BHP Navajo Coal Company's ("BNCC") operation, which is located entirely within the Nation's boundaries. (Shelly Aff. ¶ 3). The Nation collects approximately $33 million in royalties and $11 million in taxes annually from the BNCC. (Cicchetti Aff. ¶¶ 21-22). The BNCC is a major employer here, and approximately 87% of the BNCC's employees are Native American. (Cicchetti Aff. ¶ 10). (Although not all of these Native Americans are Navajos, the surrounding demographics and the law of averages make the inference reasonable that nearly all of these Native American employees are Navajos.) Furthermore, the Nation's members who receive income from the BNCC are largely responsible for the already anemic multiplier effects in the Nation's economy. (Cicchetti Aff. ¶¶ 26, 35). The BNCC's employees and the employees of associated service and good providers contribute more than $60 million in income to the Nation's depressed economy. (Cicchetti Aff. ¶¶ 22-26, 35). Shuttering the BNCC's operation would extinguish these incomes, and have a substantial deleterious impact on the Nation and many Navajo people. (Cicchetti Aff. ¶¶ 11, 24, 20-30, 37-38); (Shelly Aff. ¶¶ 6-8).

Consistent with promotion of the Nation's best interests, on September 7, 2010, the United States Federal Government's Office of Surface Mining Reclamation and Enforcement and Department of the Interior (collectively the "United States") renewed the BNCC's Federal Permit No. NM-0003F ("Permit") for the Navajo Mine. However, despite the vital importance of the Permit to the Nation's interests, Plaintiffs challenge

[1] "The Nation's interests" refers to the combined interests of the Nation and its membership.

the renewal of the existing Permit with this action. In their Complaint, Plaintiffs allege that the United States incorrectly renewed the BNCC's existing permit. Amended Complaint for Review of Federal Agency Action at 2-3, 4, 12, 17, *Center for Biological Diversity, et al. v. Joseph Pizarchik, et. al., and BHP Coal Company*, No. 1:11-cv-00243-REB-CBS (D. Colo. Feb. 17, 2011) ("Complaint"). Plaintiffs request that this Court "[v]acate and remand the Permit [and] [e]njoin all activities carried out pursuant to the Permit until such time as OSM has fully complied with the ESA . . . ." (Compl. at 18, ¶¶ 3-4.) Plaintiffs' challenge, therefore, threatens a catastrophic result: the extinguishment of the Nation's incomes and injury to its economy. Accordingly, the Nation seeks to limitedly intervene in this action, but only to file its Amended Motion to Dismiss.

ARGUMENT

I. The Nation's limited intervention pursuant to Rule 24(a)(2) only to file its Motion to Dismiss pursuant to Rules 19 and 12(b)(7) is appropriate.

Tribal Nations possess sovereign immunity, and cannot be joined in litigation without their express consent. *See, e.g., Kiowa Tribe of Okla.,* 523 U.S. at 754; *Fletcher,* 116 F.3d at 1324. Federal courts routinely grant sovereigns' limited interventions to file Rule 19 and 12(b)(7) objections. The Supreme Court of the United States recently held that an absent interested sovereign (that had been dismissed from an action because of its sovereign immunity) had the right to limitedly intervene and have an action dismissed pursuant to Rule 19. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 861-864, 868-869, 873 (2008). Here, as in *Pimentel*, although the Nation seeks leave to intervene to protect its interests, the Nation is a sovereign. And because

of its immunity from suit, the Nation cannot be joined. Accordingly, the Nation's limited intervention to file its Amended Motion to Dismiss pursuant to Rules 19 and 12(b)(7) is appropriate pursuant to *Pimentel*.

Likewise, many federal courts have approved of tribes', states', countries', and territories' limited interventions pursuant to Rule 24(a) to assert Rule 19 objections. *See United Keetoowah Band of Cherokee Indians v. United States*, 480 F.3d 1318, 1323 (Fed. Cir. 2007) (noting tribe's "limited intervention" to seek dismissal pursuant to Rule 19(b); reversing on merits of Rule 19(b) analysis); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 495 (7th Cir. 2005) (same); affirming dismissal on other grounds); *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V*., 391 F.3d 871, 875, 878 (7th Cir. 2004) (same concerning Hong Kong corporation; reversing on the merits of Rule 19(b) analysis); *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 519-520, 522 (9th Cir. 1998) (same concerning states; affirming denial of motion as moot); *Fitzgerald v. Unidentified Wrecked & Abandoned Vessel*, 866 F.2d 16, 17-18 (1st Cir. 1989) (same concerning Puerto Rico; affirming dismissal), *overruled on other grounds*, *California v. Deep See Research, Inc*., 523 U.S. 491, 501-509 (1998). Similar to these cases, the Nation seeks to intervene only to file it Amended Motion to Dismiss, which is made pursuant to Rules 19 and 12(b)(7). Like numerous federal cases, the Nation's limited intervention in this action is appropriate.

II. The Nation's Rule 24 intervention in this matter is appropriate.

Within the Tenth Circuit, traditionally, Rule 24 is liberally construed in favor of those seeking intervention. *WildEarth Guardians v. U.S. Forest Serv.,* 573 F.3d 992, 995 (10th Cir. 2009); *see also Sanguine, Ltd. v. U.S. Dep't of Interior,* 736 F.2d 1416, 1418 (10th Cir. 1984) (allowing Indian land owners to intervene even after district court's entry of judgment). Courts within the Tenth Circuit apply a four-factor test for intervention pursuant to Rule 24(a)(2). Pursuant to this test, the applicant may intervene if:

> (1) the application is "timely"; (2) "the applicant claims an interest relating to the property or transaction which is the subject of the action"; (3) the applicant's interest "may as a practical matter" be "impair[ed] or impede[d]"; and (4) "the applicant's interest is [not] adequately represented by existing parties. *Utahns for Better Transp. v. U.S. Dep't of Transp*. 295 F.3d 1111, 1115 (10th Cir. 2002) (brackets and punctuation in original) (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001)).

Because it satisfies this four-factor test, the Nation's intervention in this action is appropriate.

A. The Nation's Motion to Intervene is timely.

A motion to intervene filed at an early stage of a case that does not prejudice existing parties is considered timely. *See, e.g.,Utah Ass'n of Counties,* 255 F.3d at 1250 ("The timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances'") (quoting *Sanguine,* 736 F.2d at 1418). This action is in its

infancy—the Amended Complaint and Answers have only recently been filed.[2] This Court's permitting the Nation to intervene for the purpose of filing its Amended Motion to Dismiss and representing its interests at this very early stage will not prejudice the existing parties' legally cognizable rights. Accordingly, this Amended Motion to Intervene is timely, and the Nation satisfies this first factor.

B. The Nation has protectable interests here.

As the Tenth Circuit has stated, "[t]he threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *Utahns for Better Transp.*, 295 F.3d at 1115. The Nation may take action as a sovereign and on behalf of its members pursuant to the doctrine of *parens patriae*. *E.g., Pueblo of Isleta ex rel. Lucero*, 570 F.2d at 302-303 (citations omitted). Here, the United States' renewal of the existing Permit is for operations located wholly within the Nation. The BNCC—as a major employer in an area with extremely high unemployment—has a workforce comprised of approximately 87% Native Americans, with the vast majority being Navajos. Moreover, the Nation draws a substantial portion of its income from royalties, taxes, fees and other revenues attendant to the BNCC's operation. The Nation uses this income to provide necessary government services. The BNCC continuing its operation will maintain employment of the Nation's membership and the Nation's income of tens of millions of dollars annually. Accordingly, the Nation has significant economic interests relating to this action's disposition, which wholly satisfies the second factor.

[2] Answer at 15, *Center for Biological Diversity, et al. v. Joseph Pizarchik, et. al., and BHP Coal Company*, No. 1:11-cv-00243-REB-CBS (D. Colo. Apr. 8, 2011); BHP Navajo Coal Company's Answer to Plaintiffs' Amended Complaint for Review of Federal Agency Action at 36, *Center for Biological Diversity, et al. v. Joseph Pizarchik, et. al., and BHP Coal Company*, No. 1:11-cv-00243-REB-CBS (D. Colo. Mar. 21, 2011).

C. The Nation's protectable interests relating to the subject of this action may be impaired or impeded by this action's disposition.

The issue of whether a sufficient interest exists is not separate from the issue of whether an action may impair that interest. *See Utah Ass'n of Counties*, 255 F.3d at 1253. As the Tenth Circuit has stated, "[t]o satisfy [the impairment factor] of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *WildEarth Guardians*, 573 F.3d at 995 (quoting *Utah Ass'n of Counties*, 255 F.3d at 1253) (internal quotation marks omitted). A would-be intervenor satisfies the impairment factor when it establishes a court's decision *may* adversely impact future mining. *Wildearth Guardians*, 573 F.3d at 995-996.

This Court's disposition of this action may adversely impact future mining if this Court rules for Plaintiffs. This could entirely extinguish the Nation's associated incomes. And more widely, this would further cripple the Nation's entire economy. In light of its minimal burden to satisfy the applicable test, the possible impairment of the Nation's substantial interests is a particularly compelling reason to permit the Nation's intervention in this action. Accordingly, because this action's disposition may adversely impact future mining and injure the Nation's many economic interests, the Nation satisfies its minimal burden and meets the third factor.

D. Existing parties will not adequately represent the Nation's interests.

The Supreme Court has held that this inadequate representation factor is satisfied when representation of an interest "'*may be*' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*,

404 U.S. 528, 538 n. 10 (1972) (emphasis added). Likewise, the Tenth Circuit has expressly noted the burden is minimal to show inadequate representation. *Utahns for Better Transp*., 295 F.3d at 1117 (citing *Utah Ass'n of Counties*, 255 F.3d at 1254; and *Sanguine,* 736 F.2d at 1419). The Nation's burden, therefore, is minimal.

Neither the BNCC nor the United States will adequately represent the Nation's interests, largely because these interests are not the same. The Nation is the lessor of the land the BNCC's mining operation is conducted on, with the BNCC as lessee. Beyond the manifest difference in the interests of a lessor and lessee, the Nation is a sovereign with profound interests in its homelands, where its people have resided since time immemorial. The BNCC's business interests as a private company are plainly not the same in character or degree. Moreover, the BNCC could—hypothetically—operate elsewhere if the Permit is adversely impacted by this action's disposition. The Nation does not have the option to leave, and cannot instantaneously re-employ its members nor magically improve its anemic economy if the Permit is adversely impacted. Accordingly, because the BNCC's financial interests are not congruent—in character or degree—with the Nation's profound interests, the Nation's interests cannot be adequately represented by the BNCC.

Similarly, while the United States is ostensibly the Nation's fiduciary, it will not adequately represent the Nation's interests. Unless it is a certainty that existing parties—namely, the United States'—interests are virtually identical, a tribal sovereign's interests will not be adequately represented. *See Northern Arapaho Tribe v. Harnsberger*, 660 F.Supp.2d 1264, 1281 (D. Wyo. 2009) (citing *Sac and Fox Nation of*

Mo. v. Norton, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (quotation marks and citations omitted) (stating proposition in context of adequate representation serving to mitigate prejudice to tribe's interests in Rule 19 analysis). Moreover, as other cases have demonstrated, sovereigns' interests are often divergent, and the United States does not necessarily adequately represent Indians' unique interests. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999 (10th Cir. 2001) (acknowledging possible diversity of interests, and because tribe was not a party, affirming dismissal); *Sanguine*, 736 F.2d at 1419 (finding that the federal government may have inadequately represented Indian land owners' interests and allowing intervention). It is not a certainty the sovereigns' interests are identical in this action. Furthermore, like the BNCC, the United States lacks the Nation's same profound interests associated with the land, lease, and Permit. Because its interests here are not congruent with the Nation's, the United States cannot have the same incentive—translated into the same motivation—to pursue the Nation's representation as the Nation does.

Instead, the Nation knows and appreciates its interests best. The Nation best understands the character and degree of its interests and their representation. Thus, the Nation representing its own interests in this critical action is most prudent. Therefore, because the Nation's burden for satisfying this fourth factor is minimal, and because the Nation meets this minimal burden, the Nation satisfies all four factors of the test for intervention in this action.

Accordingly, as in numerous federal cases, the Nation's intervention to represent its interests as a required party and seek dismissal pursuant to Rules 19 and 12(b)(7) is

appropriate. Furthermore, the Nation meets its minimal burden and satisfies the test applied by courts within the Tenth Circuit for intervention. Therefore, this Court's granting the Nation's Amended Motion to Intervene pursuant to Rule 24 for the limited purpose of filing its Amended Motion to Dismiss pursuant to Rules 19 and 12(b)(7) is appropriate in this action. Alternatively, this Court's granting the Nation's permissive intervention pursuant to Rule 24(b) for the same purpose is appropriate.

CONCLUSION

For the reasons set forth above, the Nation moves this Court for leave to limitedly intervene pursuant to Rule 24, but only for the purpose of filing its attached Amended Motion to Dismiss pursuant to Rules 19 and 12(b)(7), and other such relief as this Court deems just and proper.

CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCivR 7.1.A

Counsel hereby certifies that the Navajo Nation conferred with Brad Bartlett, counsel for Plaintiffs, Walter Stern, counsel for the BNCC, and John Martin, counsel for the United States by phone and email to resolve this disputed matter prior to filing. Although Mr. Bartlett would not oppose the Nation's intervention and participation as a full party, Mr. Bartlett does object to intervention solely for the purpose of filing an Amended Motion to Dismiss. Defendants' and Intervenor-Defendant's counsel did not oppose the amendment and filing of this Amended Motion, but did reserve the right to file a response as necessary.

Respectfully submitted this 14th day of June, 2011.

NAVAJO NATION DEPARTMENT OF JUSTICE

s/ *Brian L. Lewis*

Brian L. Lewis
BIA Club Building
Post Office Box 2010
Window Rock, Navajo Nation (Arizona) 86515
Telephone: 928/871-6933 / Fax: 928/871-6200
blewis@nndoj.org

Attorney for the Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2011, I electronically filed the foregoing **THE NAVAJO NATION'S AMENDED LIMITED MOTION TO INTERVENE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys' E-mail addresses:

Brad A. Bartlett
brad.bartlett@frontier.net

John H. Martin, III
john.h.martin@usdoj.gov

Timothy B. Jafek
timothy.jafek@usdoj.gov

Walter E. Stern
western@modrall.com

Maria O'Brien
mobrien@modrall.com

Daniel J. Dunn
dan.dunn@hoganlovells.com

Jennifer Biever
Jennifer.biever@hoganlovells.com

s/ *Brian L. Lewis*
Brian L. Lewis