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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

BANK OF THE SIERRA, a California corporation,

Plaintiff,

v.

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian tribe, and CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, a wholly owned economic arm of the Tribe,

Defendants.

No. 1:14-cv-01044-AWI-SAB

PICAYUNE RANCHERIA'S OPPOSITION TO MOTION TO RE-OPEN CASE AND VACATE ORDER AND TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY

Date: December 15, 2014
Time: 8:30 a.m.
Location: Courtroom 2, 8th floor

INTRODUCTION

On July 2, 2014, plaintiff, Bank of the Sierra ("Bank") filed a complaint with this Court interpleading the funds that the Bank had on deposit to the credit of the Picayune Rancheria of Chukchansi Indians ("Tribe") with the Court, pursuant to the Federal Rule of Civil Procedure ("FRCP") Rule 22.

On October 10, 2014, the Bank and the Tribe, represented by the McDonald Tribal Council ("Tribal Council"), entered into a stipulation ("Stipulation") pursuant to which the Bank voluntarily dismissed the action. Under the terms of the Stipulation, the Clerk of the Court is

required to return the funds that the Bank interplead with the Court to the Bank, placing the Bank and the Tribe in the position that they were in prior to the filing of the lawsuit.

On October 27, 2014, the Court entered an order ("Order") directing the parties to comply with the terms and conditions of the Stipulation.

On November 7, 2014, a group calling itself the Unification Council ("Lewis Faction"), composed of individual members of the Tribe who were not elected to the Tribal Council at a duly constituted election conducted under the Tribal Constitution, filed a motion ("Motion") to re-open in this case for the sole purpose of vacating the Order entered by the Court and dismissing the case that already had been dismissed. The Lewis Faction seeks this relief on the grounds that it is the lawful governing body of the Tribe that had to be joined as an indispensable party, pursuant to Rule 19 of the FRCP, but, because the Lewis Faction represents the Tribe, and the Tribe enjoys sovereign immunity from suit, the Lewis Faction, on behalf of the Tribe, cannot be joined and the case must be dismissed again.

In this brief the Tribe shall demonstrate that: (1) the Lewis Faction failed to file and meet the requirements of the appropriate motion based on FRCP Rule 24; (2) in order to determine whether the Lewis Faction has a protectable interest that would permit it to intervene in this case, the Court would have to determine who is the lawful governing body of the Tribe; (3) the Court has no jurisdiction or authority to determine who the lawful governing body of the Tribe is and therefore, must deny the Lewis Factions' Motion; (4) even if it is assumed, for argument's sake, that the Lewis Faction is the lawful governing body of the Tribe, which it is not, its interests are adequately represented by the Tribal Council, which has obtained all the relief that the Lewis Faction is requesting in its Motion, and therefore, intervention is not required; and (5) Rule 60 of the FRCP is not a proper basis for setting aside the Order, since the Lewis Faction knew about the filing of the lawsuit, had an opportunity to participate as a party to the suit but refused to do so

long before the entry of the Order, and the Bank and Tribal Council never misrepresented any facts to the Court in the Stipulation for entry of the Order.

Based upon these arguments, as more fully discussed below, the Lewis Faction's Motion must be denied.

I.

THE MOTION FAILED TO MEET THE REQUIREMENTS OF RULE 24.

The Lewis Faction has filed a motion to re-open the current case, to vacate the Court's order of dismissal, and to dismiss for failure to join an indispensable party. In doing so, the Lewis Faction has failed to file and meet the requirements of the appropriate motion for seeking relief from this Court: a motion to intervene pursuant to Fed. R. Civ. Proc. 24. This distinction is not merely technical. Rule 24 includes specific requirements that, if not met, are grounds for denial of a motion to intervene.

Rule 24 of the FRCP ("Rule 24") permits persons who are not parties to a lawsuit to intervene in the litigation. Intervention will come into play only when the existing parties have chosen not to include the absent party, and the motion to intervene is timely. Rule 24(a), (b)(1), and (b)(3). As the Declaration of Don J. Pool In Response to Motion to Re-open Case and Vacate Order and to Dismiss for Failure to Join an Indispensable Party ("Pool Declaration"), filed herewith, reveals, the Lewis Faction was informed of the existence of this action at the time that it was filed, when legal counsel for the Bank a attempted to serve the summons and complaint on the attorneys who are now seeking intervention on behalf of the Lewis Faction. Those attorneys refused to accept service on behalf of their clients. Pool Declaration, p. 2, ¶¶ 3-6. Thus, the alleged need for intervention arose from the Lewis Faction's tactical decision not to participate, not the Bank's failure to join them.

In order to intervene, furthermore, the absent party must serve and file a motion with the

Court in which the action is pending. *See*, *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089 (8th Cir. 1988). The motion must state the grounds upon which intervention is sought. *Spring Constr. Co. v. Harris*, 614 F.2d 374 (4th Cir. 1979).

A review of the cases which have interpreted the "pleading" requirement of Rule 24(c) reveals a split of authority. Some courts have adopted a liberal approach holding that if the alleged defect in the pleading is adequately cured without prejudice to the party opposing intervention, noncompliance with the strict requirements of Rule 24(c) would not bar intervention. *Spring Constr. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1979).

However, the majority of federal courts have adopted a strict view, and hold that a motion to intervene is properly denied when not accompanied by a pleading. *Hirshorn v. Mine Safety Appliances Co.*, 186 F.2d 1023 (3d Cir. 1951) (per curium); *Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941); *Bachrach v. General Inv. Corp.*, 29 F.Supp. 966, 968 (S.D.N.Y. 1939). According to this strict approach, the accompanying pleading must conform with Rule 7(a) of the FRCP so that the parties to the action may understand the intervenor's claims or defenses. *Sanders v. John Nuveen and Co.*, 463 F.2d 1075, 1082 (7th Cir. 1972), cert. denied, 409 U.S. 1009 (1972).

The Ninth Circuit tends towards the more liberal approach where the failure to comply with the Rule 24(c) requirement for a pleading is a "purely technical" defect which does not result in the "disregard of any substantial right" and the court was otherwise apprised of the grounds for the motion to intervene. *Shores v. Hendy Realization Co.*, 133 F.2d 738, 742 (9th Cir. 1943); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009). However, the strict approach may still be applicable where the court also finds a substantive reason why intervention should not be permitted. *Beckman Indus. v. International Ins. Co.*, 966 F.2d at 474, citing 7C Charles A.

Wright, Arthur R. Miller, Mary K. Kane, *Federal Practice and Procedure* § 1914 at 415 (2d Ed. 1986).

The Lewis Faction did not file "a pleading that sets out the claim or defense for which intervention is sought," pursuant to Rule 24(c). As will be discussed in the remaining portions of this brief, there are a number of substantive reasons why intervention should not be permitted. By failing to file a pleading that sets out their defenses to the Bank's claims, the Lewis Faction apparently hopes to obscure that fact.

II.

THE LEWIS FACTION ONLY HAS A PROTECTABLE INTEREST IN THIS CASE REQUIRING ITS JOINDER IF IT IS THE LAWFUL GOVERNING BODY OF THE TRIBE BUT THE COURT LACKS JURISDICTION TO RESOLVE THAT ISSUE.

Intervention is governed by Rule 24 of the FRCP. Rule 24 is broadly construed in favor of intervention to prevent or simplify future litigation on related matters. *United States v. City of Los Angeles*, 288 F. 3d 391, 397-398 (9th Cir. 2002) (citations omitted). It is determined primarily on "practical and equitable considerations." *Id.*, (citing *Donnelly v. Glickman*, 159 F. 3d 405, 409 (9th Cir. 1998)).

Rule 24 of the FRCP governs when a party may intervene in an action:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
> (1) is given an unconditional right to intervene by a federal statute; or
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.
> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or

> (B) has a claim or defense that shares with the main action a common question of law or fact.

A. Lewis Faction Does Not Qualify For Intervention As Of Right.

The Ninth Circuit Court of Appeals applies a four-part test to determine whether intervention is warranted under Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001) (internal quotations omitted). The Lewis Faction cannot meet this standard.

First, as was discussed above, the Lewis Faction's motion is not timely. The Lewis Faction has been aware of this lawsuit since it was filed and refused to participate. It cannot wait until the suit has been settled and a judgment entered and then claim that intervention is necessary because they were not joined.

Second, the Lewis Faction cannot be found to have a protectable interest in this matter. In its Memorandum of Points and Authorities in support of its motion to intervene ("Lewis Brief") the Lewis Faction describes the reasons why it is necessary for the Lewis Faction to intervene in this case:

> Applying the four factions to be the considered under Rule 19(b), it is clear that this case cannot move forward without (a) naming the members of the Lewis Tribal Council and the Unification Council in their official capacities **because they are the only officials who can appear on behalf of the Tribe, and (b) proving that such Council members have authorized and expressed a clear wavier of the Tribe's immunity from suit through an official act of the Tribe**.

Lewis Brief, p. 7, lls. 16-20.

In other words, by intervening, the Lewis Faction is seeking an order from this Court that it is the lawful governing body of the Tribe with the authority to assert the Tribe's sovereign immunity from suit. This, the Court cannot do, consistent with federal law.

It is well established that a federal court lacks "jurisdiction to intervene in tribal membership disputes." *Lewis v. Norton*, 424 F. 3d 959, 960 (9th Cir. 2005).

The federal court's lack of authority to intervene in tribal membership disputes also extends to the determination of the legitimacy of tribal governments. *See, e.g., In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation,* 340 F. 3d. 749, 766 (8th Cir. 2003) ("Jurisdiction does not exist to resolve an intra-tribal leadership dispute.") The Ninth Circuit has decided that federal courts lack jurisdiction over a case "whenever the dispute involve[s] the exercise of the tribe's responsibility for self-government." *R. J. Williams Co. v. Fort Belknap Housing Authority,* 719 F. 2d 979, 983 (9th Cir. 1983). This is true not only because the courts would effectively be determining the membership disputes by determining which government is legitimate, but because Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia,* 31 U.S. 515 (1832); *see United States v. Mazurie,* 419 U.S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Indian tribes remain a "separate people, with the power of regulating their natural internal and social relations." *United States v. Kagama,* 118 U.S. 375, 381-382 (1886). They have a power to make their own substantive law in internal matters. *See Roff v. Burney,* 168 U.S. 218 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations). And they also have the exclusive authority to enforce their own law and settle their own disputes in their own forums. *See, e.g., Williams v. Lee,* 358 U.S. 217 (1959). As separate sovereigns pre-existing the United States Constitution, tribes are unconstrained even by the Constitution's limitations on federal or state authority. *See, e.g., Talton v. Mayes,* 163 U.S.

376, 384 (1986) (Fifth Amendment does not "operat[e] upon" the "powers of local self-government enjoyed" by the tribes).

In order to determine whether the Lewis Faction has the right to intervene in this case, this Court would have to determine that the Lewis Faction is the governing body of the Tribe, with the authority to act in the name of the Tribe, and that the Tribal Council, that entered into the Stipulation, is not the governing body of the Tribe. Under applicable federal law, this Court has no jurisdiction to make such a determination.

> Jurisdiction to resolve internal tribal disputes, interpret tribal constitutions and law, and issue tribal membership determinations lies with Indian tribes and not in the district courts. *See, United States v. Wheeler,* 435 U.S. 313, 323-36, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978) (noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory" and holding that a tribe possessed the power to punish its members for violations of tribal laws) (quoting *United States v. Kagama,* 118 U.S. 375, 381, 30 L. Ed. 228, 6 S. Ct. 1109 (1886)); *Runs After v. United States,* 766 F. 2d 347, 352 (8th Cir. 1985) (holding that the district court lacked jurisdiction to resolve "disputes involving questions of interpretations of tribal constitution and tribal law")(citations omitted); *Smith v. Babbit,* 100 F. 3d 556, 559 (8th Cir. 1996) (holding that the district court lacked jurisdiction to hear what, in effect was an appeal by individuals from an adverse tribal membership determination by a tribe). **We have characterized an election dispute concerning competing tribal councils at this type of non-justiciable intra-tribal matter**. *See Goodface v. Grassrope,* 708 F. 2d 335, 339 (8th Cir. 1983) ("The district court overstepped the boundaries of its jurisdiction interpreting the tribal constitution and bylaws and addressing the merits of the election dispute.").

In re: Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litigation, 340 F. 3d. 749, 763-764 (8th Cirl. 2003). See also, *Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs,* 439 F. 3d 832, 835 (8th Cir. 2006); *Attorneys Process and Investigation Services Inc.v. Sac & Fox Tribe of the Mississippi in Iowa,* 609 F. 3d 927, 943 (8th CIrl. 2010); *Goodface v. Grassrope,* 708 F. 2d 335, 335, 338 n. 4 (8th Cir. 1983); *Shotbull v. Looking Elk,* 677 F. 2d 645, 650 (8th Cir. 1982).

Because the Court has no jurisdiction to rule of the issue of whether the Lewis Faction is the lawful governing body of the Tribe with the authority to act on behalf of the Tribe, the Lewis Faction cannot demonstrate that it has a significant protectable interest that it claims will be impaired if it is denied intervention.

Finally, the Lewis Faction does not qualify for intervention because their interests are adequately represented by the Tribal Council. The Lewis Faction is seeking to intervene for the sole purpose of re-opening the case so that it can then assert the Tribe's sovereign immunity and have the case dismissed. Lewis Brief, pp. 6-8. The interests the Lewis Faction seeks to protect, is its interest in ensuring that the Tribe is not sued without its consent and that the funds deposited with the Clerk of the Court are returned by the Clerk to the Bank and not to the Tribal Council. That is the exact relief that the Tribal Council obtained in this case by signing the Stipulation and having the Court enter the Order pursuant to the Stipulation. The Stipulation and Order grants the Lewis Faction all of the relief it seeks by moving to intervene in this action: dismissal of the action and the return of the funds to the Bank.

The Lewis Faction has therefore, been adequately represented in this case by the Tribal Council and the Lewis Faction's interests have been adequately protected by the entry of the Order, pursuant to the Stipulation. The Lewis Faction's interests in this case have been fully protected by the Order, and as a result, the Lewis Faction is not eligible to intervene in this case.

B. The Lewis Faction Does Not Qualify For Permissive Intervention.

The same considerations that disqualify the Lewis Faction from intervention as of right, disqualify the Lewis Faction from permissive intervention. The Court cannot determine whether the Lewis Faction has a protectable interest in this case that makes it eligible to intervene and the interests it claims to have in this case are adequately protected by the existing parties to the lawsuit.

Moreover, permitting the Lewis Faction to intervene would be highly prejudicial to the Tribal Council, because it would require that the Court determine that the Lewis Faction, rather than the Tribal Council, is the lawful governing body of the Tribe with the right to exercise and assert the Tribe's sovereign interests. It would deprive the Tribal Council of its right, as the lawful governing body of the Tribe, to represent the Tribe in all litigation against the Tribe, including the Tribal Council's right to assert the Tribe's sovereign immunity, make and consider offers of settlement and to settle litigation under the terms that it has determined are in the best interests of the Tribe.

Finally, permitting the Lewis Faction to intervene will afford the Lewis Faction absolutely no additional relief than that which has already been obtained by the existing parties to the action: dismissal of the lawsuit and returning the funds to the Bank. The only practical result of permitting the Lewis Faction to intervene be would that the Court's judicial resources would be wasted and the existing parties to the litigation would be needlessly required to spend time and money in responding to the Motion. [1]

III.

THERE WAS NO SURPRISE OR FRAUD IN THIS CASE THAT WARRANTS RE-OPENING THE CASE OR SETTING ASIDE THE ORDER.

The Lewis Faction argues that this Court should set aside its Order and re-open this case pursuant to Rule 60 of FRCP, based upon "surprise" and "fraud". Specifically, the Lewis Faction claims: (1) it was surprised by the entry of the "judgment" because "it was not even served notice of the proceedings and only became aware of the status of this case after its received notice of the Order on October 31, 2014, Brief, p. 9, lls. 2; and (2) that the existing parties to the litigation

[1] Another purpose might be served. The attorneys for the Lewis Faction would be able to bill their clients for additional hours spent on filing the motion to intervened dismiss and having it heard. Undersigned counsel hopes that was not the motivating factor behind the filing of the motion to re-open.

committed a "fraud" on the Court by not apprising the Court of the existence of the Lewis Faction and its alleged interests in this case. ("Regardless of that clear knowledge, Plaintiff failed to notify this Court of the absence of the Lewis Tribal Council…".) Brief, p. 9, lls. 26-28.

The Court can give short shrift to both of these arguments. First, the Tribal Council is surprised that the Lewis Faction was surprised by the entry of the judgment. The Lewis Faction, through its attorneys of record, was well aware of the filing of the lawsuit and of the relief the Bank was seeking in this case. Soon after the filing of the lawsuit, the Bank's attorney Don Pool, contacted Richard Verri, one of the attorneys of record for the Lewis Faction in this case, and advised him about the filing of the lawsuit and of the nature of the case. Pool Declaration, p. 2, ¶ 5. The Lewis Faction was well aware of the lawsuit and the relief that the Bank was seeking.

Rather than voluntarily accept service on behalf of the Lewis Faction, the Rosette Law Firm never accepted service or otherwise participated in the litigation. Pool Declaration, p. 2, ¶ 6. If the Lewis Faction believed that it needed to intervene, it could have easily obtained a copy of the summons and complaint from the Court's Clerk, and filed a motion to intervene without accepting service.

Instead, the Lewis Faction chose not to accept service, ignored the lawsuit and now, only after the Court has issued an order dismissing the case, has decided to attempt to intervene. Clearly, the Lewis Faction knew that the existing parties to the lawsuit would proceed to litigate the case. Yet the Lewis Faction intentionally did nothing to protect their clients' alleged interests. Such conduct simply does not amount to "surprise" within the meaning of Rule 60.

Lastly, no fraud or misrepresentations were perpetrated upon the Court by the Bank or Council. There was simply no reason to apprise the Court of the existence of the Lewis Faction because the Stipulation negotiated by the parties does not in any way prejudice the Lewis Faction or affect their rights, since the Stipulation and this Court's Order entered pursuant to the

Stipulation afford the Lewis Faction the exact relief that they are seeking with the filing of the Motion: **dismissal of the lawsuit and a return of the funds deposited with the Court to the Bank.**

No fraud was perpetuated on the Court or the Lewis Faction. No misrepresentations were made to the Court by the parties to the litigation. Instead, a successful outcome to the litigation was obtained with the dismissal of the lawsuit and a return of the parties, including the Lewis Faction, to the positions they were in prior to the filing of the lawsuit: no lawsuit is on file and the Bank has possession of the funds.

Because the Lewis Faction was informed about the filing of the lawsuit, had the opportunity to participate or to file the current Motion with the Court prior to the entry of the Order dismissing the lawsuit, intentionally refused to participate in the lawsuit, and obtained, by the entry of the Order, all of the relief they seek by filing the Motion, no "surprise" or "fraud" has occurred in this case that could be the basis for granting the Motion under Rule 60.

CONCLUSION

This Motion is frivolous.[2] Even if the Court assumes, for argument's sake, that the Lewis Faction is permitted to intervene, file a motion to dismiss based on sovereign immunity, and have the motion to dismiss granted, that would not afford the Lewis Faction any more relief than it will obtain under the Order. The case has been dismissed and the funds will be returned to the Bank.

The Lewis Faction has no protectable interests in this case. This Court has no jurisdiction to determine whether it has a protectable interest. The present parties to the litigation adequately represented the Lewis Faction by obtaining all of the relief that the Lewis Faction could possibly

[2] Given the Court's Order requiring an expedited briefing schedule the Tribal Council did not have time to file a motion requesting sanctions against the Lewis Faction's attorneys for filing a frivolous motion. However, there is nothing that would prevent the court, *sue sponte*, from imposing sanctions upon the Lewis Faction's attorneys by requiring them to pay for the costs and attorney's fees that the Bank and Tribal Council have incurred in defending this frivolous motion.

obtain through the granting of a motion to dismiss based on sovereign immunity.

For these reason and the reasons stated above the Motion should be denied.

Dated: November 26, 2014

RAPPORT AND MARSTON

/s/ Lester J. Marston

By: _____
Lester J. Marston, Attorneys for Defendant Picayune Rancheria of Chukchansi Indians

CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of Rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the foregoing with the Clerk of the United States District Court for the Eastern District of California by using the CM/ECF system on November 26, 2014.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I hereby certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by placing a true copy thereof enclosed in a sealed envelope, First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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/s/ Brissa De La Herran
Brissa De La Herran