BENJAMIN C. MIZER
Principle Deputy Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney
UNITED STATES ATTORNEY'S OFFICE
2601 Second Avenue North, Suite 3200
Billings, MT 59101
(406) 247-4633
victoria.francis@usdoj.gov

ERIC R. WOMACK
Assistant Branch Director
JAMES D. TODD, JR.
JOSEPH E. BORSON
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
(202) 514-1944
joseph.borson@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriae*,

Plaintiff,

v.

DARRYL LaCOUNTE, LOUISE REYES, NORMA GOURNEAU, RAY NATION, MICHAEL BLACK, and other unknown individuals in their individual and official capacities,

and

DARWIN ST. CLAIR and CLINT WAGON, Chairman and Co-Chairman of the Shoshone Business Council, in their individual and official capacities.

Defendants.

No. 1:16-cv-11-SPW

FEDERAL DEFENDANTS' OPPOSITION TO PUTATIVE INTERVENORS MOTION TO INTERVENE

I. INTRODUCTION

Putative intervenors' motion to intervene attempts to merge two fundamentally different lawsuits. At its core, the plaintiff's suit is an inter-governmental dispute between the Northern Arapaho Tribe ("NAT"), the Eastern Shoshone Tribe ("EST") and the Bureau of Indian Affairs ("BIA") over the administration of federal contracts governing shared judicial services on the Wind River Reservation. Putative intervenors' suit, by contrast, is an individual due process challenge to proposed changes to Wind River's Tribal Court.

In order to intervene as of right, the Ninth Circuit requires that a putative intervenor have a significant protectable interest relating to the property or transaction that is the subject of the suit. But subject of the NAT's suit is the sovereignty (or contract rights) of the tribe, something the putative intervenors claim no interest in. Nor do the putative intervenors meet the standards for permissive intervention —their proposed complaint does not share operative questions of law or fact with the NAT's complaint, and the purported intervenors have not established that this Court has jurisdiction over them. Accordingly, federal defendants Darryl LaCounte, Director of the Rocky Mountain Region of the BIA, United States Department of the Interior; Louise Reyes, Indian Services Officer of the Rocky Mountain Region, BIA; Norma Gourneau, Superintendent of the Wind River Agency of the BIA; Ray Nation, Assistant Superintendent of the

BIA; and Michael Black, Director of the BIA respectfully oppose putative intervenors' motion to intervene.

II. BACKGROUND

As pled in NAT's complaint, the NAT and the EST reside on the Wind River Reservation, in Fort Washakie, Wyoming. Each Tribe is governed by a separate business council: the Northern Arapaho Business Council ("NABC") and the Shoshone Business Council (the "SBC"). Working together in the past as a Joint Business Council ("JBC"), the Tribes contracted with BIA to share certain services, including the administration of the Shoshone and Arapaho Tribal Court. Compl. ¶¶ 17, 71, ECF No. 1. The NAT allege that the SBC – purportedly with the support and approval of the BIA – are now infringing on its tribal rights. *Id.* ¶¶ 24, 28, 44, 53. Its theory is straightforward: the NAT has a right to administer certain programs, including those concerning the shared tribal court, and the BIA, by issuing contracts to the SBC on behalf of the JBC, has interfered with those rights. *See id.* ¶ 61. The NAT brings suit for injunctive relief, seeking, among other things, the rescission of any contracts entered between the BIA and the JBC, and an injunction "prohibiting Defendants from violating the sovereign rights of the NAT to govern itself." *Id.* ¶¶ C, E. As framed by the NAT, then, the interest at the heart of its complaint is the sovereign (or contract) rights of the NAT, as allegedly infringed by BIA-issued contracts. *See id.* ¶ A (seeking a declaration "[t]hat the

SBC is not authorized to exercise the . . . rights of the NAT without the consent of the NAT"); ¶ E (seeking rescission of contracts concerning shared programs).

Putative intervenors – individual members of both the NAT and EST who have filed or plan to file suit in the Tribal Court – identify a different interest. *See* Mem. Supp. Mot. Intervene ("Intervenors Mot."), at 2, ECF No. 28. They focus on the Tribal Court system, and argue that they are "being irreparably harmed because the Tribal justice system has been materially compromised by [the federal and SBC defendants]," Compl. in Intervention ("Intervenors Compl."), ¶ 1, ECF No. 28-1, hindering their due process rights by depriving them of a judicial forum, *see id.* ¶¶ 53, 55-56. They seek an injunction preventing all changes to the Tribal Court, including any changes to the employment status of the current Tribal Judges or Tribal Court staff. *See id.* ¶ 65. The interest at issue in their proposed complaint, then, is preserving their due process right by maintaining the current structure of the Tribal Court system.

III. ARGUMENT

Federal Rule of Civil Procedure 24(a) and (b) provides for intervention as of right and for permissive intervention. The putative intervenors are not entitled to intervention under either section.

A. Putative Intervenors Have Not Demonstrated They May Intervene as of Right

> A party seeking to intervene as of right must meet four requirements: (1) the applicant must timely move to intervene; (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 situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). The court is "guided primarily by practical and equitable considerations," and all four intervention requirements must be met. *Id.* at 1083. Here, putative intervenors have not demonstrated that they satisfy all four criteria.

Putative intervenors have not shown a protectable interest that is the subject of the action. "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly*, 159 F.3d at 409; *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) ("[the] interest must be related to the underlying subject matter of the litigation"). In this case, putative intervenors appear to claim a "protectable interest" – vested in concepts of due process – in the current structure and personnel of the Tribal Court. *See* Intervenor Mot. at 10 ("Applicants have a

compelling interest, in that the Defendants are attempting to remove current court personnel, including the Chief Judge and Associate Judges, from office, which will at best disrupt Court proceedings and may dismantle the Court system in which Applicants have, or will have, cases."); *see also id.* at 12 ("The 'subject of this case' is the continued existence of the Shoshone and Arapaho Tribal Court where Applicants' cases are filed or will be [filed].").

But the subject of the NAT's complaint is altogether different – as it is pled, it is about the sovereignty (or contractual) rights of the Tribe vis-à-vis the SBC and the federal government, not the due process rights of any individual Tribal members, or even about the Tribal Court itself. *See* Compl. ¶ 1 (alleging that "[d]efendants abuse and exceed their lawful authority by violating the sovereign right of the Northern Arapaho Tribe to self-govern").

The alleged infringement of NAT's rights is not shared by the putative intervenors. While "[c]ontract rights are traditionally protectable interests" that can justify intervention, *Sw. Ctr. for Bio. Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001), putative intervenors do not establish, or even plead, that they are either signatories or contractually designated beneficiaries to any BIA contract with the JBC, the SBC or the NABC. Nor can putative intervenors claim an interest in the sovereignty of the NAT sufficient to justify intervention. Citizens of a sovereign unit lack a legally protected interest in the sovereignty of their jurisdiction. *See*

All. Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996) ("The State of Alaska, as sovereign, and not the plaintiffs, would be the party affronted by interference with its sovereignty. . . . The invasion of the State of Alaska's sovereign interest in the power to regulate an activity within its own territory is not an invasion of a legally protected interest of the [citizens]."") (internal citation omitted); *Bingham v. Massachusetts*, 616 F.3d 1, 6 (1st Cir. 2010) (holding that individual tribal members "do not represent the tribe," and "cannot assert the rights of the tribe, as an entity"). Furthermore, those putative intervenors who are members of the NAT have an undifferentiated interest in the sovereignty of their tribe that is precisely the same as every other tribal member. *See, e.g.*, Intervenors' Mot. at 12 ("The loss of the institutional experience and capability poses a significant risk *for all of the people seeking justice in the Tribal Court*, including Applicants.") (emphasis added). In the Ninth Circuit, however, "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (internal citation omitted).

Nor can putative intervenors rely on the fact that their pending cases in the Tribal Court might be affected by litigation over the management of the Shoshone and Arapaho Tribal Court. "A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself." *Alisal Water Corp.*,

370 F.3d at 920 n.3; *see also Med. Protective Co. v. Erfani*, No. 09-cv-2833, 2010 WL 4569902, at *1 (S.D. Cal. Nov. 5, 2010) ("[T]he mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene . . .") (quoting *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 221 (3d Cir. 2005)). The reason for this principle stems from Rule 24's distinction between having an interest in the *subject matter* of the litigation versus having an interest that is merely relating to the *outcome* of the litigation. The latter interest is much broader, and to allow it to control the size of a case, even in the face of fundamentally different legal issues, would not serve intervention's underlying purpose of "prevent[ing] or simplify[ing] future litigation involving related issues." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002). Putative intervenors thus fail to meet the standard for intervention under Rule 24(a).

B. Putative Intervenors Have Not Met the Standard for Permissive Intervention

Putative intervenors similarly fail to meet the standard for permissive intervention under Rule 24(b). "An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main action; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims." *Donnelly*, 159 F.3d at 412. In this case, purported intervenors' complaint – which

focuses on a due process challenge implicated by a future judicial restructuring – shares neither operative questions of law nor fact with the NAT's complaint, which alleges that the federal defendants and the SBC have infringed upon the sovereign (or contractual) rights of the NAT. *See, e.g.*, *Valley Ctr. Pauma Unified Sch. Dist. v. Interior Bd. of Indian Appeals*, No. 11-cv-1260, 2012 WL 1033576, at *2 (S.D. Cal. Mar. 27, 2012) (rejecting claim that because tribe had a "stake" in the litigation, it shared a common question of law or fact with the parties).

Finally, the putative intervenors fail to plead – much less prove – that this Court has jurisdiction over their claims. To challenge a decision of the BIA, an individual must exhaust administrative remedies before bringing suit in federal court; without such exhaustion, this court lacks jurisdiction. *See Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988); *Timbisha Shoshone Tribe v. Salazar*, 697 F. Supp. 2d 1181, 1188 (E.D. Cal. 2010). Here, there are no allegations in the record that any of the putative intervenors have undertaken any actions at the agency level, much less completed them.

Putative intervenors thus fail to meet the standards for permissive intervention under Rule 24(b).

IV. CONCLUSION

This court should deny the putative intervenors' motion to intervene.

Dated: March 29, 2016

Respectfully Submitted,

BENJAMIN C. MIZER
Principle Deputy Assistant Attorney General
Civil Division

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney

ERIC R. WOMACK
Assistant Branch Director
Federal Programs Branch

s/ Joseph E. Borson
JAMES D. TODD, Jr.
JOSEPH E. BORSON
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch

Attorneys for Federal Defendants

L.R. 7.1(d)(2)(E) CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count requirements of L.R. 7.1(d)(2)(A) . As measured by the word-count function of Microsoft Word, it contains 1,929 words.

s/ Joseph E. Borson
JOSEPH E. BORSON

CERTIFICATE OF SERVICE

I certify that on March 29, 2016, I electronically filed the foregoing filing. Notice of this filing will be sent by email to all parties of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ Joseph E. Borson
JOSEPH E. BORSON