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Attorneys for Shoshone Business Council Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Northern Arapaho Tribe,
for itself and as *parens patriae*

Plaintiff,

v.

Darryl LaCounte, Louis 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

Civil Action No.
CV-16-00011-BMM

SHOSHONE BUSINESS COUNCIL DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

individual and official capacities,

Defendants.

Defendants Darwin St. Clair, Jr., and Clinton D. Wagon ("Shoshone Business Council Defendants") submit the following points and authorities pursuant to Local Rule 7.1(d)(1)(B)(ii), in opposition to Will Enos' and Antoinette Jorgenson's ("Applicants") motion to intervene (ECF Doc. No. 27).

1. INTRODUCTION

The Applicants are trying to mix two different lawsuits. They have failed, however, to demonstrate entitlement to intervene or grounds for permissive intervention.

The Northern Arapaho Tribe (NAT) sued over a contract dispute with the Bureau of Indian Affairs (BIA), alleging that NAT's sovereign rights were harmed. Complaint ¶¶ 17, 24, 28, 53, 61, 71. The Applicants do not claim to be parties to the contracts in question or claim to have any sovereign rights. Instead, the Applicants purport to sue over speculative due process and equal protection injuries that may be suffered if a Tribal Court contract is not performed as they would like. *Id*. ¶53, 55-56.

Applicant's motion to intervene makes more sense when seen for what it really is—an effort to shore up weaknesses in NAT's ability to identify irreparable

harm. NAT struggled to identify irreparable harm in its motion for preliminary injunction. *See* ECF Doc. No. 40. Applicants have focused on being 'irreparably harmed because the Tribal Justice system has been materially compromised." *Id*. ¶ 1. Applicants parrot NAT's ambiguous claim to deprivation of 'privileges and immunities guaranteed to them by law', and seek "[d]eclaratory judgment that all actions taken by SBC acting as [Joint Business Council] (JBC) are null and void." *Id*. ¶¶ Prayer for Relief, A, B. Mirroring NAT's effort to eviscerate the current contract, Applicants have sought relief beyond allegations about the Tribal Court. Like NAT, Applicants broadly seek to invalidate "all actions taken by SBC acting as JBC."

Coordinating with NAT to help demonstrate irreparable harm is interesting, but it does not meet the standard for intervention under the Federal Rules. Regardless of whether Applicants seek intervention of their own volition or are simply puppets propped up by NAT in an effort to gain litigation advantage, the intervention standard is not met.

2. ARGUMENT

Applicants fail to show that intervention is appropriate under the standards of intervention of right of Rule 24(a)(2) or permissive intervention pursuant to Rule 24(b)(1)(B).

a. <u>The Applicants are Not Entitled to Intervention.</u>

In order to intervene as a matter of right under Fed. R. Fed. R. Civ. P. 24(a)(2):

> (1) The motion must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 841 (9th Cir. 2011). All four requirements must be met. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). Applicants fail to meet this standard.

No Significantly Protectable Interest Related to the Claims in the Case

"The requirement of a significantly protectable interest is generally satisfied when "the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Arakaki v. Cayetano*, 324 F.3d at 1084. The Applicants' interest must be related to the underlying subject matter of the litigation. *United States v. Alisal Water Corp*., 370 F.3d 915, 920 (9th Cir. 2004).

There is not a sufficient relationship between the legal protected interest, if any, of the Applicants and NAT's claims. The Applicants claim a due process or equal protection interest in the current structure and personnel of the Tribal court.

Motion to Intervene, at 10. This interest is distinctly different than NAT's contract and sovereignty claims.

An applicant for intervention as a matter of right satisfies the relationship requirement "only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998). Here, if NAT were granted relief, NAT would be operating the Tribal Court without input from the Eastern Shoshone Tribe (under NAT's contract application that was denied), and the Applicants would have no certainty about any particular structure or personnel at the Tribal Court.

Applicants suggest that it is necessary to intervene in order to protect their right to "be allowed access to justice in a Tribal Court staffed with capable, competent, and experienced Tribal personnel and operated by both Tribes," and contend that this right is protected by the Indian Civil Rights Act (ICRA) and the Shoshone and Arapaho Law and Order Code (S&A LOC). ECF Doc. No. 28, pg. 9, 10, 12. However, these are not interests protected by ICRA or the S&A LOC.

Applicants have confused their interest in the outcome of the case, with a legally protectable interest in the subject matter of the case. The Applicants are obviously interested in the outcome, but do not have an interest in the subject matter—review of agency action under the Indian Self Determination and Education Assistance Act. Pub. L. 93-638. To grant intervention to individuals

interested in the outcome creates dangerous precedent allowing anyone that receives 638 contract services to join contract litigation as parties.

Disposition will not Impede Applicants' Ability to Protect their Interest.

Applicants maintain that the Court's disposition could result in Applicants being "precluded from pursuing their claims in the current Shoshone and Arapaho Tribal Court." ECF Doc. No. 28, pg. 13. However, Applicants fail to sufficiently explain why they would be precluded from being able to pursue their claims in the current Shoshone and Arapaho Tribal Court or why either another replacement Court run by the Joint Business Council, NAT, EST, or the BIA would impair or impede Applicants' ability to protect their tort claims.

Even assuming as true Applicants' incredible claim that disposition by this Court could result in the complete "dismantle[ment]" of the Shoshone and Arapaho Tribal Court, Applicants readily admit that most of them already have a current, although less than favorable, forum to bring their tort claims.

Applicants' Interest is Adequately Represented by NAT

There are three factors to consider when determining the adequacy of representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Arakaki v. Cayetano, 324 F.3d at 1086. (*citing California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)). "The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties." *Id.*

"When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *Id*. "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." "Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.*

The interests of Applicants and NAT are so aligned that there should be a presumption of adequacy of representation, which Applicants must overcome by a compelling showing. The requested relief in Applicants' proposed Complaint in Intervention is the same as that asked for by NAT. Specifically, both parties seek (1) a declaratory judgment invalidating certain actions of the JBC and (2) a preliminary and permanent injunction for certain matters related to awarding and management of 638 contracts.

With regard to the first factor identified by Court in *Arakaki*, Applicants' interests will be adequately represented by NAT. The only justification that Applicants give on why NAT's interest are not directly in line with Applicants'

relates to more speculation on the future possibility that "[t]he suit implicates broad sovereign interests of the NAT, including territorial jurisdictional claims which **may** be broader and substantially different than the interests of Applicants to this case." (emphasis added). The suggestion that NAT's interests are broader than Applicants' does not overcome the presumption that Applicants' interests are contained within NAT's potentially broader interests.

With regard to the third factor identified by Court in *Arakaki*, Applicants have not offered any arguments of what they would add to the proceedings that NAT or any other party would neglect. Applicants have thus failed to carry their burden.

Applicants cannot show that they have a significant protectable interest related to the claims in this case. Nor can they show that disposition of this case will impede their ability to protect their interest. Finally, Applicants cannot show that their interest is not adequately represented by NAT. Therefore, Applicants are not entitled to intervene as a matter of right.

b. Permissive Intervention is Improper.

Permissive intervention is improper as well. It requires: "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Freedom from Religion Found., Inc.*, 644 F.3d at 843.

Applicants have failed to show an independent ground for jurisdiction or a common question of law and fact between the Applicants' claim and the main action.

Both subject matter and personal jurisdiction are absent. Shoshone Business Council Defendants are protected by tribal sovereign immunity. *See Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013) *cert. denied*, 133 S. Ct. 2829 (2013). Federal courts lack subject matter jurisdiction over internal tribal government disputes, including subject matter jurisdiction to oversee activities and disputes between the EST and NAT. *Eastern Shoshone Tribe v. Northern Arapaho Tribe*, 926 F. Supp. 1024 (D. Wyo. 1996).

The Declaratory Judgment Act is not a grant of jurisdiction to the federal courts. 28 U.S.C. § 2201. Likewise, the Indian Civil Rights Act is not a grant of jurisdiction to the federal courts over the claims at hand. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[1] Further, 28 U.S.C. §§ 1331, 1343, and 1362 do not give Applicants an "independent" ground for jurisdiction. Finally, this Court cannot have jurisdiction over Applicants' claims because they have not exhausted their administrative remedies, and without exhaustion the Court lacks jurisdiction. Faras v. Hodel, 845 F.2d 202, 204 (9th Cir. 1988).

[1] ICRA provides no federal cause of action in federal cases, except for habeas corpus actions. This is not a habeas corpus proceeding.

Applicants do not share a common question of law or fact just because they have an interest in the outcome or a 'stake' in the litigation. A federal court has rejected a claim that a stake in litigation demonstrates a common question of law or fact in *Valley Ctr. Pauma Unified School Dist. V. Interior Bd. of Indian Appeals*, 2012 WL 1033576 at 2 (S.D. Cal., 2012).

c. <u>The Relief Applicants Seek is Not Available</u>.

Applicants complain of violations under the Indian Civil Rights Act (ICRA), presumably under the due process requirements of ICRA contained in 28 U.S.C. §§ 1301-1304. However, the United States Supreme Court has held that ICRA "does not impliedly authorize actions for declaratory or injunctive relief against either the Tribe or its officers." *Santa Clara Pueblo v. Martinez*, 43 U.S. 49, 72 (1978). The relief requested by the Applicants would run against both EST and NAT. The Supreme Court found it highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief in the federal court to secure enforcement of §1302." *Id*. at 68-69.

3. CONCLUSION

Based on the foregoing points and authorities, the Applicant's Motion to Intervene should be DENIED.

Dated this 28th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE contains 1940 words, excluding caption, and certificates of service and compliance, as measured by the word-count function of Microsoft Word.

ECHO HAWK & OLSEN, PLLC

/s/ Mark Echo Hawk
Mark A. Echo Hawk

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE was electronically filed this 18h day of March, 2016. 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.

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