IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

NORTHERN ARAPAHO TRIBE, for itself and as *parens patriea*, 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, Chariman and Co-Chairman of the Shoshone Business Council, in their individual and official capacities, Defendants.	CV-16-11-BLG-BMM **ORDER**

I. SYNOPSIS

Applicants Will Enos, Antoinette Jorgenson, and their minor children Cody Armajo, Matthew Blasé Thunder, and Garret Goggles have filed a Motion to Intervene as Plaintiffs (Doc. 27) in this matter. Applicants are individual members of the Northern Arapaho Tribe ("NAT") and members of the Eastern Shoshone Tribe ("EST"). Applicants each have filed or plan to file different suits in the

Tribal Court. These Tribal Court claims appear unrelated to one another. Applicants argue that Federal Rule of Civil Procedure 24(a)(2) requires intervention. In the alternative, Applicants argue that their intervention should be allowed permissively under Federal Rule of Civil Procedure 24(b)(1)(B). Applicants should not be allowed to intervene under Rule 24(a)(2) or 24(b)(1)(B).

II. BACKGROUND

EST and NAT share the Winder River Reservation. Each tribe governs itself by the vote of tribal membership or by vote of each tribe's elected business council. *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 744 (10th Cir. 1987). NAT and EST, with the help of the Bureau of Indian Affairs (the "BIA"), established the Joint Business Council ("JBC"). The tribes worked together through the JBC to contract with the BIA and share certain services.

NAT withdrew its participation from the JBC in September 2014. NAT alleges that the Shoshone Business Council (the "SBC") with the BIA's approval, has infringed on NAT's tribal rights. (Doc. 1 at 7.) The Complaint alleges that the SBC continues to operate the JBC and hold themselves out to third parties as having authority to act for both tribes. (Doc. 1. 14-21.) The Complaint alleges that the SBC has used the JBC to move shared property, transfer federal and tribal funds from a joint account to accounts solely controlled by the SBC, make important employment and personnel decisions that have affected both tribes, and

misappropriate shared self-designation contracts. (Doc. 1 at 11-21.) NAT seeks injunctive relief prohibiting the alleged violation of their sovereign rights and rescinding of the contracts between the BIA and the JBC, among other relief.

III. DISCUSSION

Federal Rule of Civil Procedure 24 allows for intervention as a right and permissive intervention.

A. Intervention of Right

The Court must permit intervention when the putative intervenor meets four requirements: (1) the applicant timely must move to intervene; (2) the applicant must possess a "significantly protectable interest relating to the property or transaction" in 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) an already existing party must not adequately represent the applicant's interest. *Arakaki v. Cavetano*, 324 F.3d 1078, 1083 (9th Cir 2003) (citing *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)).

Applicants have failed to show that they possess a "significantly protectable interest" that represents the "subject of the action." *Id.* An applicant possesses a significant protectable interest if it asserts an interest protected by law and a relationships exists between its legally protected interest and the plaintiff's claims. *Donnelly*, 159 F.3d at 409 (9th Cir. 1998). The interest must be "related to the

underlying subject matter of the action. *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004).

The Ninth Circuit has determined that a "mere interest in property that may be impacted by litigation" fails to act as "a passport to participate in the litigation itself." *Id*. at 920 n3. A contrary holding would allow anyone with an interest in the property of a party to a lawsuit to intervene in litigation. *Id*. The intervenor must have an interest in the "subject of the action" rather than an interest merely in the outcome of the litigation. Fed. R. Civ. P. 24(a)(2).

The issues that NAT seeks to adjudicate in its Complaint and the Applicants' protected interest appear to diverge. Applicants argue that they possess a protectable interest in maintaining the current structure and personnel of the Tribal Court. (Doc. 28 at 10.) Applicants assert that they possess "a compelling interest in defending their right to pursue a judicial remedy on behalf of themselves and their family members." The Complaint alleges that the SBC along with the BIA have infringed on NAT's sovereign and contractual rights.

Applicants do not share the alleged infringement on NAT's rights. Applicants do not assert that they represent a party to a BIA contract. Applicants do not assert any involvement or relation with the JBC. Applicants merely allege that "the outcome [of this action] will determine whether [they] will be allowed to access justice in a Tribal Court." (Doc. 28 at 9.) Applicants appear to have

confused their interest in the outcome of the case with a legally protectable interest in the subject of the action.

Furthermore, Applicants cannot claim that they possess a legally protected interest in NAT's sovereignty. Members of the tribe do not represent the tribe and cannot assert the rights of the tribe. *Bingham v. Massachusetts*, 616 F.3d 1, 6; *see also All. Against IFQs v. Brown*, 84 F.3d 343, 352 (9th Cir. 1996). Applicants have demonstrated a general interest in the outcome of this action. Applicants state in their briefing that "[t]he loss of the institutional experience and capability poses a significant risk for all of the people seeking justice in the Tribal Court, including Applicants." (Doc. 28 at 12.) A court should not base intervention as of right on "an undifferentiated, generalized interest in the outcome of an ongoing action." *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). Applicants have not shown that they should be entitled to intervention.

B. Permissible Intervention

A court may allow intervention when the applicant can show that (1) the applicant's claim "shares a common question of law or fact with the main action; (2) the applicant makes a timely motion; and (3) the court possesses "an independent basis for jurisdiction over the applicant's claims." *Donnelly*, 159 F.3d at 412.

The Applicants' Motion to Intervene seeks to assert their "right to maintain their suits in the current functioning Tribal Court." (Doc. 28 at 19.) Applicants have failed to show how this claim shares common questions of fact or law with the claims alleged in the Complaint. The Complaint alleges that the SBC and the BIA have infringed upon NAT's contractual and sovereign rights. The Court recognizes that the outcome of the current action may impact the structure and operation of the Tribal Court. The Applicants' "stake in the outcome of the [action] does not constitute permissible grounds for intervention." *Valley Ctr. Pauma Unified Sch. Dist. V. Int. Bd. Of Int. Bd. of Indian Appeals of the U.S. Dept. of the Int.*, 2012 WL 1033576, at *2 (S.D. Cal. Mar 27, 2012).

Furthermore, Applicants have not asserted that this Court possesses jurisdiction over their claims. When a party challenges a decision of the BIA it must exhaust administrative remedies before filing a suit in federal court. *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988). The federal court lacks jurisdiction until the party has exhausted the administrative appeal procedure. *Id.* This appeal procedure represents a jurisdictional prerequisite to judicial review. *Id.*; 25 C.F.R. § 2.3(b).

Courts construe the intervention rule broadly in favor of putative intervenors. Courts reason that intervention promotes a policy in favor of "simplify[ing] future litigation involving related issues." *U.S. v. City of Los*

Angeles, Cal., 288 F.3d 391, 398 (9th Cir. 2002). Allowing Applicants to intervene would not serve that policy.

Accordingly, **IT IS ORDERED** that Applicants' Motion to Intervene (Doc. 27) is **DENIED**.

DATED this 4th day of April, 2016.

Brian Morris
United States District Court Judge