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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE DISTRICT OF NEVADA**

20 BATTLE MOUNTAIN BAND OF THE TE-MOAK
21 TRIBE OF WESTERN SHOSHONE INDIANS,

Case No. 3:16-cv-0268-LRH-WGC

22 *Plaintiff,*

23 v.

24 **REPLY MEMORANDUM IN**
25 **SUPPORT OF MOTION TO**
26 **DISMISS COUNTERCLAIM**

27 UNITED STATES BUREAU OF LAND
28 MANAGEMENT and JILL C. SILVEY, in official
capacity as Bureau of Land Management Elko District
Manager,

Defendant.

I. INTRODUCTION

In its motion to dismiss and brief in support, Dkts. 82, 83, the Battle Mountain Band of Te-Moak Tribe of Western Shoshone Indians (hereinafter the “Band”) set forth two clear, independent bases for dismissal of Carlin’s Counterclaims. First, the Band is a sovereign, and Carlin has neither pled nor proven a waiver of the Band’s sovereign immunity from suit. Second, contrary to core

procedural law, Carlin's "counterclaims" are not claims against the Band at all, but would instead be cross-claims against the United States. What Carlin really wants is to challenge the Bureau of Land Management's (BLM) April 25, 2016 federal decision (which Carlin inexplicably refers to as merely a "letter") determining that seven new and expanded traditional cultural properties (TCPs) were eligible for the National Register of Historic Places (National Register) under Section 106 of the National Historic Preservation Act (NHPA).

Having been called out on its obvious legal errors, Carlin unfortunately digs in. Instead of bringing a claim challenging the federal decision finding the TCPs eligible for the National Register, Carlin asserts that it can sue the Band and require the Band to go to the expense of litigating the decision on behalf of the United States. Carlin does this even though it cites no case in support of its claim that there is an applicable waiver of the Band's sovereign immunity from the "counterclaim." Even if one were to give Carlin the benefit of the doubt when it originally filed these counterclaims, there is no longer any question that Carlin is frivolously asserting counterclaims against the Band.

II. THE BAND HAS SOVEREIGN IMMUNITY FROM SUIT, AND THE BAND'S SUIT AGAINST THE BLM DOES NOT WAIVE THAT SOVEREIGN IMMUNITY TO CLAIMS BY CARLIN.

A. THE BAND HAS NOT WAIVED SOVEREIGN IMMUNITY FOR ANY CLAIM BY THE INTERVENING DEFENDANT.

The Band did not bring any claims whatsoever against Carlin. It therefore has not opened itself up to any claims by Carlin. *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940) (United States brought action on its own behalf and on behalf of a tribe against a surety for a coal company. The coal company's claims in intervention against the United States were barred by sovereign immunity.). Carlin does not cite a single case that supports its assertion that a non-party can intervene in the case, and then use its own intervention to waive a sovereign's immunity.

Instead Carlin openly relies upon an incorrect assertion that there is no difference between defendants and intervening defendants. Demonstrating its lack of good faith in its response, Carlin

1 bases that assertion upon an open misrepresentation of 7C Wright & Miller, Federal Practice &
 2 Procedure Civil §1920. That section of Wright and Miller is expressly and unequivocally limited to
 3 discussion of the intervenor's status related to claim brought by the original plaintiff—not additional
 4 claims brought by an intervenor. In Section 1920, Wright & Miller expressly states: “Whether there
 5 are any limits on the extent to which the intervenor can broaden the scope of the litigation by raising
 6 new claims is considered in” Section 1921. Section 1921 then discusses that there are numerous
 7 limitations and complexities, and in part inconsistent court decisions, regarding an intervenor's ability
 8 to expand the case through counterclaims or cross claims.
 9

10 However, and most importantly, Section 1921 does not specifically address the very narrow
 11 issue presented here—whether a plaintiff waives sovereign immunity to an intervening defendant's
 12 attempt to expand the case. Under both the general law of sovereign immunity and the few specific
 13 applications of that general law to analogous facts, a sovereign does not waive its immunity to an
 14 intervenor's attempted expansion of a case; and in fact a sovereign does not waive sovereign immunity
 15 to even an original defendant's attempt to expand a case through counterclaims. *E.g. U.S. Fidelity &*
 16 *Guar. Co.* 309 U.S. 506
 17

18 **B. THE BAND DID NOT WAIVE SOVEREIGN IMMUNITY FOR CARLIN'S ATTEMPT TO**
 19 **EXPAND THE CASE TO LITIGATE CARLIN'S ASSERTION THAT BLM'S APRIL 25, 2016**
 20 **DECISION IS INVALID.**

21 The Band, of course, understands that it has waived sovereign immunity to arguments that
 22 BLM will make in defense. But as Carlin admits, the litigation exception to sovereign immunity is
 23 limited to “issues necessary to decide the Tribe's lawsuit.” Carlin Resp. at 3 (emphasis added).
 24

25 Recognizing this limitation on the scope of the Band's waiver, Carlin implausibly asserts that
 26 to decide the Band's claims, this Court would need to determine whether the action taken by BLM on
 27 April 25, 2016 is valid. But the Band is not disputing BLM's action, the Band did not raise any issue
 28

1 with BLM's action, and the Band does not have any dispute with BLM's action. BLM issued its
2 decision, and the Band is not, in the current suit, challenging BLM's decision.

3 In fact, the reason Carlin brought this challenge to BLM's April 25, 2016 decision is precisely
4 because that claim was not within the scope of the Band's claims. If it were within the scope, there
5 would have been no reason to assert it as a counterclaim or cross-claim. The Band has not waived its
6 sovereign immunity to being made a defendant in an action challenging BLM's decision.
7

8 **III. CARLIN'S ATTEMPT TO CHALLENGE BLM'S APRIL 25, 2016 DECISION WOULD BE A CROSS-
CLAIM AGAINST BLM, NOT A COUNTERCLAIM AGAINST THE BAND.**

9 In its opening brief, the Band discussed why Carlin's assertion that BLM's April 25, 2016
10 decision was void for lack of "statutory or regulatory authority," "procedurally flawed," and
11 "improper" is not a claim against the Band. Carlin provides no meaningful response. Instead Carlin
12 digresses into a discussion of Rule 19, and to its standard diatribe that tribal people attempting to
13 protect their sacred sites, religious activities and culture are "obstructing" Carlin's ability to destroy
14 those sacred and cultural resources.
15

16 Carlin's counterclaim makes it clear that its dispute is with BLM's April 25, 2016 decision.
17 Carlin wants to overturn that decision. As the Band discussed, and as Carlin has not meaningfully
18 contested, that is a claim against BLM. Carlin has not moved to amend or to recast its mislabeled
19 counterclaim as a cross-claim; and while the Band's view is that any attempt to amend would have
20 been futile, we need not consider that issue because Carlin instead decided to dig in on its assertion
21 that BLM's decision, and the State Historic Preservation Officer's concurrence, to find seven new and
22 expanded TCPs as eligible for the National Register is a claim against the Band. It is not a claim
23 against the Band. The Band took no action here that could be the subject of a claim.
24
25

26 **CONCLUSION**

27 It is Carlin, not the Band, which wants to challenge the BLM's April 25, 2016 decision to find
28 seven new and expanded TCPs eligible for the National Register. There may be a procedural path for

1 Carlin to make such a challenge, but that path is not a “counterclaim” against the Band. Carlin should
2 know this, and likely does know this, but Carlin does not want to take on BLM directly for fear it
3 might undermine other litigation positions. Carlin’s attempt to avoid the truth of the matter has
4 resulted in this frivolous “counterclaim” suit.

5 **Respectfully submitted this 22nd day of November, 2016.**

6
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2016, I electronically filed the foregoing
REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM with
the Clerk of the Court and served on all parties of record using the CM/ECF System.

/s/ Ashley Klinglesmith