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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UTE INDIAN TRIBE OF THE UINTAH &
OURAY RESERVATION,

Plaintiff,

v.

GREGORY D. MCKEE, T & L
LIVESTOCK, INC., MCKEE FARMS, INC.,
AND GM FERTILIZER, INC.,

Defendants.

**MEMORANDUM IN OPPOSITION
TO PLAINTIFF INTERVENOR
NOTICE OF MOTION FOR LEAVE TO
INTERVENE, AND MEMORANDUM
IN SUPPORT INTERVENORS UINTAH
UTAH INDIANS AND TABEQUACHE
COLORADO INDIAN**

Case No. 2:18-cv-00314-CW

Judge Clark Waddoups

Defendants Gregory D. McKee (“**McKee**”), T & L Livestock, Inc. (“**T&L**”), McKee Farms, Inc. (“**McKee Farms**”). and GM Fertilizer, Inc. (“**GM**”) (collectively “**Defendants**”), by and through their undersigned counsel, respond to the *Plaintiff Intervenor Notice of Motion for Leave to Intervene, and Memorandum in Support Intervenor Uintah Utah Indians and*

Tabeguache Colorado Indian (the “**Motion**”),¹ filed by Mary Carol M. Jenkins, Angie Chegup, Tara Amboh and Lynda M. Kozlowicz (the “**Movants**”) as follows.

INTRODUCTION

Movants seek to intervene pursuant to Fed. R. Civ. P. 24, apparently on the basis that they have an interest in the water rights asserted by the Ute Indian Tribe of the Uintah & Ouray Reservation (the “**Tribe**”) in the litigation in the Tribal Court that is not adequately represented by the Tribe before this Court.

The Tribe has already prosecuted this matter to judgment against Defendants in the Tribal Court. Movants had no objection to the Tribe’s prosecution of this matter and have, in fact, endorsed the result obtained by the Tribe in the Tribal Court (the “**Tribal Court Judgment**”).² The Tribe’s Complaint in this matter seeks only recognition, registration, and enforcement of the existing Tribal Court Judgment.³ It does not seek any further substantive relief.

The only issues in this matter are whether the Tribal Court has jurisdiction to enter and enforce the Tribal Court Judgment and whether the Tribal Court afforded Defendants due process. There are no other “rights” to be determined by the litigation before this Court. Movants have failed to articulate any “interest” that might be impaired or inadequately represented without their presence in the litigation and have failed to demonstrate any reason why this Court should permit them to intervene. The Court should deny the Motion.

¹ ECF No. 43.

² *See id.*, p. 4.

³ *See id.*, p. 2, 7-8.

ARGUMENT

I. Movants are Not Entitled to Intervene as of Right Under Fed. R. Civ. P. 24(a).

Federal Rule of Civil Procedure 24(a) provides, in pertinent part:

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.

See Fed. R. Civ. P. 24(a)(2).

Movants do not cite a federal statute giving them an unconditional right to intervene under Rule 24(a)(1). Accordingly, Movants must meet the requirements of Rule 24(a)(2) to intervene as of right. In construing Rule 24(a)(2), the Tenth Circuit has determined that the four main requirements for intervention of right are:

(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties.

Public Serv. Co of N.M. v. Barboan, 857 F.3d 1101, 1113 (10th Cir. 2017).

Under Rule 24(a)(2), Movants bear the burden of proof to show that each of these requirements is met. *See Utah v. Kennecott Corp.*, 232 F.R.D. 392 (D. Utah 2005). Further, “*all four requirements must be met in order to intervene as a matter of right.*” *Id.* at 395 (italics in original). In this matter, Movants have failed to meet their burden of proof on any of the required elements for intervention as of right. Accordingly, the Court should deny the Motion.

A. The Motion is Untimely.

The Tenth Circuit has set forth the following factors to be considered by a court in determining whether a motion for intervention is timely:

[T]he timeliness of a motion to intervene is assessed ‘in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.’

Kennecott, 232 F.R.D. at 395 (quoting *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir.2001)). Application of these factors to the Motion weighs in favor of denial.

Movants made no effort to intervene in this matter before the Tribal Court, although it is clear that they were aware of those proceedings. Movants acquiesced in the Tribe’s prosecution of this matter in the Tribal Court and have expressed their purported agreement with the Tribal Court Judgment.⁴ Movants have failed to show any prejudice to them if this litigation continues without their intervention. Nor have Movants demonstrated any unusual circumstances warranting their intervention at this late juncture. On the other hand, Defendants will be prejudiced by having to respond to duplicative efforts by both the Tribe and Movants, who appear to seek the identical legal result. Applying the timeliness factors outlined by the Tenth Circuit, the Motion is untimely and should be denied.

A. The Motion Fails to Articulate Movants’ Specific Legal or Equitable Interest in the Subject of These Proceedings.

“To qualify for intervention under Rule 24(a), the ‘interest’ asserted in the subject of the litigation must be a specific legal or equitable one.” *Allard v. Frizzell*, 536 F.2d 1332, 1333 (10th

⁴ Motion, ECF 43, p. 2.

Cir. 1976). Rule 24(a)(2) is not a “mechanical rule”; rather, determination of whether the applicant has a sufficient interest to intervene is “highly fact specific” and “requires courts to exercise judgment based on the specific circumstances of the case.” *San Juan County, Utah v. United States*, 503 F.3d 1164, 1199 (10th Cir. 2007). The movant “must have an interest that could be adversely affected by the litigation.” *Id.* However, “practical judgment must be applied in determining whether the strength of the interest and the potential risk of injury to that interest justify intervention.” *Id.* Movants bear the burden of proof in establishing both the strength of their purported interest in the subject of this action and the risk of injury to that issue. *See Kennecott*, 232 F.R.D. at 397. Movants have failed to do so.

Movants assert that they have a legally protectable interest in

ensuring that those water rights are available for the Intervenor’s [*sic*] and individual allottees to develop the Uinta Utah Indian’s trust land base Uinta Valley Reserve, and for Tabeguache Colorado treaty Indian’s [*sic*] to claim Tabeguache Colorado Reserve as their viable homelands.⁵

However, Movants fail to assert any *facts* to show that they, or their Bands, have any interest in the water rights at issue in the action in the Tribal Court. The Tribal Court Judgment did not adjudicate any interest of Movants or their Bands in the Tribe’s water rights. This is an action for recognition and enforcement of an existing Tribal Court judgment that ruled only that Defendants have misappropriated the Tribe’s water. Accordingly, Movants cannot demonstrate that they have legal or equitable interest in the Tribe’s action to enforce the Tribal Court Judgment.

After asserting their interest in unidentified water rights, Movants first argue that “the *United States* has both the governmental interest and the trust interest, in addition to the property

⁵ Motion, ECF 43, p. 10.

interest” in protecting Movants’ trust property and that “the *United States*” meets [the] requirement for intervention as of right under Rule 24(a) (emphasis added).⁶ Citing concern for the effect of this matter on the *Winters* doctrine, Movants further argue that “granting intervention ... would not only bind the United States, but would also comport with principles of judicial economy.”⁷ These may be legitimate reasons for the United States to intervene in this action, but they do not support intervention by Movants. The United States has not sought to intervene, and there is no evidence that Movants are entitled to assert the interests of the United States.

Movants do eventually assert that “[b]ecause this case will impact the Winter [*sic*] Doctrine, and thus has the potential to impact [*sic*] the Intervenor Uinta Utah Indian’s, and Tabeguache Colo. Indian’s, ownership and management of federal lands and water, the outcome of this case, including the potential for appeals by existing parties, warrants the Intervenor intervention.”⁸ However, Movants do not articulate how recognition, registration and enforcement of the Tribal Court Judgment matter will, in fact, “impact” the *Winters* doctrine. Neither have Movants identified any specific federal lands nor any water individually owned or managed by Movants that will be *adversely* impacted by recognition or enforcement of the Tribal Court Judgment against the Defendants.

In fact, pursuant to the *Ute Tribe Business Committee Order of Banishment* (“**Banishment Order**”) entered on December 6, 2018,⁹ Movants’ land assignments were revoked and Movants

⁶ Motion, ECF 43, pp. 10-12.

⁷ *Id.*, p. 12.

⁸ *Id.*, p. 11-12.

⁹ Banishment Order, ECF 43, pp. 30-34.

were barred from obtaining land assignments during the five-year term of their banishment.¹⁰ While Movants are allowed to enter the Reservation for access to their “allotted lands, if any,” and to meet with the Bureau of Indian Affairs concerning their “allotted lands, if any,” no allotted lands were identified in the Banishment Order and none have been identified by Movants.¹¹

At best, Movants have identified only a general interest of their respective Bands in unidentified water for development of the Uinta Valley Reserve and the Tabaquache Colorado Reserve. Movants have provided no evidence that they are entitled to assert the interests of their respective Bands, which have not sought leave to intervene.

Movants have failed to assert a specific legal or equitable interest in the subject of these proceedings – recognition, registration and enforcement of the Tribal Court Judgment – or a risk of injury to that interest sufficient to warrant their intervention in this matter. Movants have failed to carry their burden of proof on the second factor for intervention as of right. The Court must deny the Motion.

B. The Motion Fails to Demonstrate How Movants’ Interest, if Any, Will be Impaired or Impeded as a Practical Matter.

In addition to asserting a specific legal or interest, Movants must offer “concrete evidence demonstrating ... impairment” of that interest. *See Bottoms v. Dresser Indus.*, 797 F.2d 869, 874 (10th Cir. 1986). “Litigation impairs a third party’s interests when the resolution of the legal questions in the case effectively foreclose the rights of the proposed intervenor in later proceedings, whether through *res judicata*, collateral estoppel, or *stare decisis*.” *Ute Distrib. Corp.*

¹⁰ *See* Banishment Order, ECF 43, p. 33, ¶ 17.

¹¹ *See id.*, ¶ 18.

v. Norton, 43 Fed. Appx. 272, 279 (10th Cir. 2002) (citing *Federal Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987)). Assuming for purposes of argument only that Movants have an interest in the subject of this action, Movants have failed to present any concrete evidence that this litigation will foreclose any of their rights in later proceedings. There is no evidence of impairment to justify intervention in this matter.

Although the Motion is not a model of clarity, Movants appear to assert various bases to establish impairment of their interest by the Tribe's prosecution of this matter. First, Movants challenge the Tribe's standing to bring actions in the name of the Tribe because of a "conflict" over the ownership of trust lands of the Uinta Utah Band of Indians and the Tabequache Band of Colorado Indians, who were "force[d]" to move to the Uinta Valley Reserve in Utah.¹² Second, Movants take issue with the Banishment Order, which is not involved in this action, apparently based on the Tribe's ostensible denial of Movants' Sixth Amendment right to counsel in the banishment proceedings.¹³ Finally, Movants assert that "treaty properties will be harmed by IRA Ute Tribe's constantly filing to put Ute Tribe's claims as owners into Uinta Valley Reserve or Colorado Treaty homelands, under IRA's land into trust."¹⁴

Whether Movants' grievances are legitimate or not, none of them are evidence that Movants' interest in enforcing the Tribal Court Judgment against Defendants will be impaired if they are not allowed to participate in this action. If Movants are seeking adjudication of the Tribe's standing to litigate matters relating to Tribal lands, relief from the Banishment Order, or injunctive

¹² Motion, ECF 43, p. 3-5.

¹³ *Id.*, p. 6.

¹⁴ *Id.*, p. 12.

relief precluding further actions by the Tribe to assert ownership claims in the Uinta Valley Reserve or Colorado Treaty homelands, this is not the appropriate case for determination of such claims.¹⁵ Further, recognition, registration, and enforcement of the Tribal Court Judgment will not foreclose any rights of the Movants with respect to those issues in any later proceedings. Movants have failed to carry their burden to show that they have any specific interest that will be impaired or impeded by their absence from this action. The Motion should be denied.

C. The Motion Fails to Establish that Movants' Interest, if Any, is Not Adequately Represented by the Tribe.

Movants assert that “the Ute Tribe does not adequately represent the Intervenor’s [*sic*] interests in this case for at least three reasons.”¹⁶ However, Movants fail to articulate even one reason. Movants acknowledge that they “share[] with the Tribe [an] interest in protecting its water.”¹⁷ However, they do not identify any arguments that the Tribe will fail to make, nor do they assert that the Movants will offer any necessary elements that the Tribe would neglect.¹⁸ *Cf. California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (affirming finding of adequate representation by existing parties); *San Juan County*, 503 F.3d at 1206 (affirming

¹⁵ In determining whether Movants’ interest is “sufficient to justify intervention,” the court should “ask whether intervention is ‘compatible with efficiency and due process.’ One factor to consider is whether an intervenor will interject new issues at trial.” *FDIC v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987) (citation omitted). It is clear from the Motion that Movants have unrelated axes to grind with the Tribe. The likelihood of Movants interjecting these extraneous issues into this matter renders their intervention *incompatible* with efficiency and due process.

¹⁶ Motion, ECF 43, p. 14.

¹⁷ *Id.*, p. 13.

¹⁸ *Id.*

denial of application to intervene where proposed intervenor provided no basis to predict that existing parties would fail to present pertinent evidence or an argument on the merits).

Where, as here, an applicant for intervention and an existing party share “an identical legal objective,” the court “presume[s] that the party's representation is adequate.” *Public Serv. Co. of N.M. v. Barboan*, 857 F.3d 1101, 1113-14 (10th Cir. 2017). “Therefore, absent ‘a concrete showing of circumstances ... that make [the existing party’s] representation inadequate, intervention should be denied.” *City of Stilwell, Okla. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir 1996).

In this case, the Tribe and Movants have a single legal objective – to enforce the Tribal Court Judgment against Defendants. There is a simple binary issue – whether or not the Tribal Court Judgment is enforceable. In filing their Motion, Movants could have no other legal objective than to enforce the Tribal Court Judgment. Accordingly, their interest is *identical* to the Tribe’s interest, and there is a presumption that the Tribe’s representation is adequate. *See San Juan County*, 503 F.3d at 1206.

Movants have identified various unrelated conflicts between themselves and the Tribe. However, as recognized by the Tenth Circuit, the determinative factor is not whether Movants and the Tribe have had adverse interests in the past, but rather whether their interests in this matter are aligned. *See San Juan County*, 503 F.3d at 1206. “[I]rrelevant speculation about and critiques of potential litigation strategies” and “disagreement” with past decisions do not demonstrate that the Tribe is an inadequate representative in this enforcement litigation. *See Kane County, Utah v. United States*, 597 F.3d 1129, 1135 (10th Cir. 2010).

Notwithstanding the conflicts identified by Movants, there are no competing interests or motivations in this case that might cause the Tribe to advocate for anything other than full recognition and enforcement of the Tribal Court Judgment.

Movants have failed to carry their burden of proof to overcome the presumption of adequate representation. The Court should deny the Motion.

II. Permissive Intervention

Movants seek permissive intervention under Fed. R. Civ. P. 24(b)(2), which allows for intervention of a government officer or agency. Since Movants are neither, the Rule provides no basis for their intervention.

However, under Rule 24(b)(1), “[t]he court, in its discretion, may allow intervention where the petitioner (1) makes a timely application, (2) has a separate claim or defense that has a common question of law or fact with the main action, and (3) does not unduly delay or prejudice the rights of original parties.” *Kennecott*, 232 F.R.D. at 398.

As set forth above, the Motion is untimely. Further, Movants have failed to articulate any separate claim or defense that has a common question of law or fact with the Tribe’s action to enforce the Tribal Court Judgment. There is nothing in the Motion to indicate that Movants have any separate claims or defenses relevant to recognition or enforcement of the Tribal Court Judgment that will not be fully and completely advocated by the Tribe. *See Kane County*, 597 F.3d at 1136. Any superfluous issues interjected by Movants will unduly delay resolution of the action and prejudice Defendants’ rights by requiring Defendants to respond to extraneous and irrelevant matter.

Movants have failed to provide any cogent reason why they should be permitted to intervene in this action. This Court should exercise its discretion and deny the Motion.

CONCLUSION

For the reasons set forth above, Defendants request that the Court deny the Motion.

RESPECTFULLY SUBMITTED this 27th day of February, 2019.

SMITH HARTVIGSEN, PLLC

/s/ Clark R. Nielsen _____

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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2019, I electronically filed the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF INTERVENOR NOTICE OF MOTION FOR LEAVE TO INTERVENE, AND MEMORANDUM IN SUPPORT INTERVENORS UINTAH UTAH INDIANS AND TABEQUACHE COLORADO INDIAN** with the Clerk of Court using the CM/ECF system, which caused a true and correct copy of the foregoing to be served upon the counsel of record, including the following:

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I further certify that on this 27th day of February, 2019, I mailed a copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF INTERVENOR NOTICE OF MOTION FOR LEAVE TO INTERVENE, AND MEMORANDUM IN SUPPORT INTERVENORS UINTAH UTAH INDIANS AND TABEQUACHE COLORADO INDIAN** via first-class U.S. mail to the following:

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