IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANKTON SIOUX TRIBE, Plaintiff, v. KENNETH L. SALAZAR, Secretary of the Interior, et al., Defendants.	Case No. 1:03-cv-01603-TFH Judge Thomas F. Hogan

PLAINTIFF'S OPPOSITION TO MOTION TO INTERVENE

I. INTRODUCTION

Plaintiff, Yankton Sioux Tribe, opposes intervention of Herman, Mermelstein & Horowitz, P.A., f/k/a Herman & Mermelstein, P.A. (hereafter "HMH") and local counsel Peter K. Tompa, Esq., Bailey & Ehrenberg, PLLC, both as of right and permissively.

II. BACKGROUND

1. On April 22, 2003, Jeffrey M. Herman of HMH and the Chairwoman of the Yankton Sioux Tribal Business and Claims Committee ("B&C Committee") executed a proposed retainer agreement under which HMH would represent the Tribe in this Action (the "Proposed Agreement"). A copy of the Proposed Agreement is attached as Exhibit 1 to Proposed Intervenor's Complaint in Intervention in this Action, Dkt. 69-1 at 5.

2. The B&C Committee is responsible for negotiating the terms of contractual agreements on behalf of the Tribe, subject to final approval by the Yankton Tribe General Council. See Art. IV, Sec. 2 of the Amended By-Laws of the Yankton Sioux Tribal Business and

Claims Committee, which forms part of the Constitution of the Yankton Sioux Tribe, a true and correct copy of which is attached hereto as Exhibit A (hereafter the "By-Laws").

3. In particular, the By-Laws require "[a]ny business in the matter of Tribal claims" to be brought directly to the General Tribal Council for consideration, except in case of "an emergency involving any attorney contract," in which case such contract must be executed in accordance with a pre-existing format. Exhibit A at 9 (By-Laws, Art. IV, Sec. 5).

4. The U.S. Department of the Interior, Bureau of Indian Affairs determined that under the Yankton Constitution, approval of a contract with the Tribe for legal services should be by resolution of the Tribe in General Council designating the Tribal officials authorized to execute the contract on behalf of the Tribe. Exhibit A at 9 (By-Laws, Art. IV, Sec. 5).

5. General Council approval requires notice to and approval of a majority of all eligible Yankton voters in conducting all tribal business other than of a routine nature. Exhibit A at 8 (By-Laws, Art. I).

6. The draft terms of the Proposed Agreement provided for HMH to represent the Tribe in a claim for damages against the United States for breaches relating to tribal trust property and tribal trust accounts. Dkt. 69-1 at 5. The draft terms of the Proposed Agreement provided that HMH was to be retained on a contingency basis and would receive 25% of any recovery from the gross proceeds. Id.

7. The Proposed Agreement contained no waiver of the Tribe's sovereign immunity, either express or implied.

8. At a meeting of the General Council on April 22, 2003, Jeffrey Herman, on behalf of HMH, presented information to the General Council on proposed litigation on behalf of the Tribe. See Yankton Sioux Tribe General Council Meeting Minutes, Apr. 22, 2003 (the "April Minutes"), a true and correct copy of which is attached hereto as Exhibit B.

9. The April Minutes reflect that Mr. Herman, on behalf of HMH, represented to the General Council that he had knowledge of the Yankton Constitution. April Minutes, p. 1.

10. The April Minutes reflect that neither the Proposed Agreement nor its terms were presented to or discussed by the members of the General Council, much less voted on and approved by the General Council in a resolution. See Exhibit B. The April Minutes also reflect that the General Council adopted no resolution designating any Tribal officials authorized to execute any contract on behalf of the Tribe, as required by the Yankton Constitution. Id.

11. On August 8, 2012, the Yankton Sioux Tribe General Council declared the Proposed Agreement null and void for lack of proper approval and execution by the General Council. See Yankton Sioux Tribe General Council, Res. No. 2012-009, a copy of which is attached hereto as Exhibit C.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 24(a) and D.C. Circuit precedent instructs courts to grant intervention as of right to applicants who demonstrate: (1) the timeliness of the motion; (2) a protectable interest relating to the property or transaction which is the subject of the action; (3) an impairment of the applicant's ability to protect that interest; and (4) inadequate representation by the existing parties. Fund for Animals v. Norton, 322 F.3D 728, 731 (D.C. Cir. 2003). The absence of any one factor is fatal to the application for intervention as right. Jones v. Prince George's County, Md., 348 F.3d 1014, 1019 (D.C. Cir. 2003).

In addition, in the D.C. Circuit, an applicant for intervention as of right must establish standing. Wash. Teachers' Union, Local #6 v. AFT, Civ. Action No. 10-1387, 2010 U.S. Dist. LEXIS 112710, *19-20 (D.D.C. Oct. 22, 2010); citing Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1074 (D.C. Cir. 1998). In doing so, an applicant must at minimum show: (1) an injury-in-fact; (2) causation; and (3) redressability. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561

(1992). Specifically, the applicant must have suffered harm that is "concrete and actual or imminent, not conjectural or hypothetical," Environmental Defense v. Leavitt, 329 F. Supp.2d 55, 66 (D.D.C. 2004), and the interest harmed must fall within the zone of interests intended to be protected by the statute. Bennett v. Spear, 520 U.S. 154, 176-76 (1997).

Furthermore, courts have discretion under FRCP 24(b) to allow permissive intervention upon a timely motion showing: (1) an independent ground for subject matter jurisdiction; and (2) a claim or defense with a common question of law or fact with the main action. Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., 146 F.3d 1042, 1046 (D.C. Cir. 1998). Courts must also consider whether the permissive intervention will unduly delay or prejudice the original parties. Id. at 1048; FRCP 24(b)(1)(B).

Finally, intervention "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Advisory Committee Notes to the 1966 Amendments to the FRCP; see also Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE, Vol. 7C, § 1913 at 391-92; Smuck v. Hansen, 408 F.2d 175, 180 (D.C. Cir. 1969) (holding the nature of the applicant's interest "may play a role in determining the sort of intervention which should be allowed."). Therefore, a court granting intervention may limit the intervention as appropriate.

IV. ARGUMENT

A. Tribal Sovereign Immunity Bars Jurisdiction Over HMH's Claims.

HMH's proposed complaint in intervention against the Yankton Sioux Tribe is barred by the doctrine of tribal sovereign immunity. Tribes have long been recognized as possessing a common-law immunity from suit which, like all other aspects of tribal sovereignty, is subject to the plenary control of Congress. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978). The issue of tribal sovereign immunity is jurisdictional

in nature, Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir. 1989), and absent an effective waiver or consent, a court may not exercise jurisdiction over a recognized Indian tribe. Puyallup Tribe, Inc. v. Dep't of Game of State of Washington, 433 U.S. 165, 172 (1977). Waivers of tribal sovereign immunity cannot be implied, but must be unequivocally expressed in Congressional legislation or tribal consent. Santa Clara Pueblo, 436 U.S. at 58. Tribal consent must not only be express, but it must also be duly authorized by tribal law. Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108, 112 (S.D. 1998) ("Without a clear expression of waiver by the Tribe's General Council either before or after the arbitration proceeding, the involvement or purported acquiescence of certain tribal officials cannot waive the Tribe's sovereign immunity"). It is black-letter law that tribes enjoy immunity from suits on contracts, regardless whether those contracts involve governmental or commercial activities, and regardless whether such contracts were made on or off the reservation. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 760 (1998).

Just as HMH is presumed to have understood the requirements of the Constitution of the Yankton Sioux Tribe, so, too, must HMH be presumed to know that under long-established principles of federal Indian law, HMH could not bring suit against the Tribe without an express waiver of sovereign immunity by the Tribe.

Assuming the Proposed Agreement were valid—which it is not—HMH does not and cannot point to any language therein even suggesting a waiver of tribal sovereign immunity for disputes arising under that purported agreement. The four corners of the Proposed Agreement contain no such waiver. HMH also does not, because it cannot, point to any Act of Congress authorizing HMH to bring claims against the Yankton Sioux Tribe, much less assert a lien against trust property held by the United States for the benefit of the Tribe. Neither Congress nor the Tribe elsewhere ever provided such a waiver to HMH. Tellingly, even HMH, which prepared

the Proposed Agreement, did not include a waiver of sovereign immunity within its terms. HMH could have requested such a waiver, just as the Tribe had it within its power to grant such a limited waiver. But like the lack of formal approval of the Proposed Agreement, HMH instead chose to proceed without such a waiver. It would be contrary to law and contrary to the terms of the agreement HMH itself negotiated to allow HMH to undo that choice now.

Nor is there any language in the Proposed Agreement that can be construed as a waiver by the Yankton Sioux Tribe of its sovereign immunity against liens such as to permit HMH to place a lien against tribal property, much less against property held in trust by the United States for the benefit of the Tribe. Absent express authorization by Congress or a tribe's unequivocal consent, tribes are immune from garnishment proceedings. Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood, 361 F.2d 517, 522 (5th Cir. 1966) (denying garnishment based on tribal sovereign immunity); see also United States v. Morris, 754 F. Supp. 185, 187 (D.N.M. 1991) (same); Chewning v. District of Columbia, 119 F.2d 459, 460 (D.C. Cir. 1941) (prevailing rule exempts municipal governments from garnishment unless a statute expressly includes them). The general rule of immunity against garnishment is true even where the governmental entity can sue and be sued. Chewning v. District of Columbia, 119 F.2d at 461. The same principles apply equally to liens on tribal governmental property. See, e.g., Harger v. Dept. of Labor, 569 F.3d 898 (9th Cir. 2009)(noting that sovereign immunity is at issue because the attorney, in essence, sued agencies of the United States, DOL and NIOSH, for money in its possession); and Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993) (holding that the application of Alaska's attorney lien statute was barred by sovereign immunity).

Though a lien "is no more than a charge or encumbrance upon property," 51 Am.Jur. 2d, Liens § 2, here the Yankton Sioux Tribe has not waived immunity against liens. See United States v. Nordic Village, Inc., 503 U.S. 30 (1992) (waivers of sovereign immunity must be

"unequivocally expressed".) Absent a waiver of sovereign immunity, there can be no lien. Grunley Const. v. District of Columbia, 704 A.2d 288 (D.C. 1997).

B. HMH is Not Entitled to Intervention as of Right.

Rule 24(a) "impliedly refers not to any interest the applicant can put forward, but only to a legally protectable one." Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C.Cir. 1984). Thus, a party that seeks to intervene as of right must demonstrate that it has standing to participate in the action. Here, HMH lacks a legally protectable interest upon which to base standing. "[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." City of Cleveland v. NRC, 17 F.3d 1515, 1517 (D.C.Cir. 1994).

1. HMH Has No Protectable Interest Because It Has No Valid Agreement With The Yankton Sioux Tribe.

HMH was not lawfully retained to represent the Yankton Sioux Tribe and therefore has no legally protectable interest. HMH cites to Martens v. Hadley Memorial Hosp., 753 F.Supp. 371 (D.D.C. 1990) in support of its contention that an attorney in a dispute with his client may properly intervene in the action to protect his interest arising from his attorneys' charging lien. 753 F.Supp. at 372. Hadley, however, was premised upon the existence of a valid contingency fee agreement, a fact not present here.

HMH's allegations that the Proposed Agreement was "confirmed by the Yankton Sioux Tribe General Council at a scheduled meeting held on July 26, 2003" (Dkt. 69 at ¶6) is simply untrue. HMH points to no Tribal resolution in evidence thereof, and none exists. The Yankton General Council never duly adopted any resolution approving or "confirming" the Proposed Agreement or any other agreement between HMH and the Tribe. Nor, without more, can HMH rely on the signature of the Yankton Sioux Tribal Chairwoman to the Proposed Agreement, since

a tribe cannot be bound by "the unapproved acts of tribal officials." Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108, 112 (S.D. 1998). In fact, the only time the General Council addressed the Proposed Agreement by resolution was on August 8, 2012, when it declared the Proposed Agreement null and void for lack of proper approval and execution by the General Council. Exhibit C.

The Proposed Agreement was prepared by HMH. Exhibit B at 1. It was presented to the Tribal Chairwoman and signed in South Dakota on lands within the jurisdiction and subject to the laws of the Yankton Sioux Tribe. HMH's Proposed Agreement contains no reference to the General Council or to any General Council action, despite stating that the "TRIBE authorizes the FIRM to undertake and incur such costs as deemed necessary from time to time." Dkt. 69-1 at 5. The Proposed Agreement also does not assert an emergency involving an attorney contract so as to satisfy the exception to General Council approval under Yankton Tribal law. See Exhibit A at 8 (By-Laws, Art. IV, Sec. 5). These insufficiencies could not have been the result of neglect.

On the same day the Proposed Agreement was executed, HMH represented to a meeting of the General Council that HMH was familiar with the provisions of the Yankton Constitution. Exhibit B at 1. HMH must be presumed to have known the requirements that the the Yankton Constitution and the Secretary of the Interior established for a valid attorney contract, just as HMH must be presumed to have known that the Proposed Agreement, in its existing form, was not and could not be properly authorized. Clearly HMH must therefore also be presumed to have chosen to accept these defects rather than press the General Council to act to correct them when HMH had the chance.

According to the Amended Constitution and By-Laws of the Yankton Sioux Tribe, "all Tribal Business other than a routine nature which would involve Indian Legislation shall be voted on by secret ballot." See Amended By-Laws, Art. I, Sec. 1. While the Business and

Claims Committee negotiates the terms of contractual agreements, such contractual agreements shall be subject to the approval of the Tribe (i.e., the General Council). See Exhibit A at 8 (By-Laws, Art. IV, Sec. 2). The only time at which "[a]ny business in the matter of Tribal claims" is not subject to direct General Council approval is in the case of "an emergency involving any attorney contract," in which case a specific contract format – not used by the Proposed Agreement – is prescribed. See Exhibit A at 8 (By-Laws, Art. IV, Sec. 5).

Hence HMH's reliance on the purported Proposed Agreement as proof of its protectable interest is misplaced, since the Proposed Agreement – which HMH prepared with knowledge of Yankton Tribal law – is not a contract in the appropriate form that was duly approved by the General Council as required by Tribal law. Simply stating so does not make it so.

2. HMH Inappropriately Seeks To Adjudicate Claims Unrelated To The Tribe's Claims In This Action.

HMH seeks to inject a contract dispute into this Action, a suit seeking a declaration of certain of the Defendants' fiduciary obligations and an injunction compelling a full and complete accounting of all of the Yankton Sioux Tribe's trust funds. See Dkt. 1. HMH's claims fall far beyond the zone of interests protected by the federal laws at issue in this Action, which prescribe the fiduciary obligations of the United States with respect to the management and care of the trust assets held by the Federal Government for the benefit of federally recognized tribes.

The criterion under 24(a) is whether HMH can intervene in an already pending action, not whether HMH can interject a new cause of action. Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc). HMH has no and can have no interest in the accountings that are the subject of the Tribe's action. An intervenor must be admitted to the proceeding "as it stands." Seminole Nation of Okla. v. Norton, 206 F.R.D. 1, 7 (D.D.C. 2001) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge

those issues or compel an alteration of the nature of the proceeding"). HMH does not seek to join a pending claim in this action, and resolution of the Tribe's claims in this Action would also not provide redress to HMH's claims for monies owed for services provided. Further, HMH's assertion that a settlement in this Action has been approved by referendum vote of the members of the Yankton Sioux Tribe is not true. Dkt. 69-1 at ¶ 6. To date, the Yankton Sioux Tribe has approved no such settlement, and continues to negotiate a resolution of its claims with the United States.

C. HMH's Request For Permissive Intervention Should Be Denied Because it Will Unduly Delay the Original Parties.

HMH's alternative request for permissive intervention under FRCP 24(b) should also be denied. First, HMH's claims against the Tribe are barred by tribal sovereign immunity, and therefore there exist no grounds for jurisdiction over its claims. Second, HMH's claims do not share a common question of law or fact with the Tribe's claims in this Action. HMH's claim is premised on (a) having provided compensable services pursuant (b) to a valid attorney agreement with the Yankton Sioux Tribe containing (c) an express waiver of the Tribe's sovereign immunity allowing suits against the Tribe based on the purported agreement. In other words, HMH's proposed complaint in intervention raises factual issues that go well beyond the scope of the present Action and that the Tribe unequivocally disputes and denies.

HMH's attempt to intervene will therefore require the determination of factual issues that will unduly delay the proceedings in this Action and force the Tribe to defend itself against issues unrelated to its underlying cause of action. For example, the amount owing under any valid contingency agreement – if one existed – remains uncertain since no settlement has been approved in this Action. Uncertainty would remain even after such a settlement, since HMH would not be entitled to amounts attributable to the effort of other attorneys. See Friedman v.

Harris, 158 F.2d 187, 188 (D.C. Cir. 1946) (attorney lien can claim only the value of the services actually performed). Determining the amounts owed would further require inquiries into whether HMH fully or substantially performed under an agreement or contributed substantially to any result obtained. Martens v. Hadley Memorial Hospital, 753 F.Supp. 371, 372 (D.D.C. 1990). Such considerations have no place in the current Action and would only delay its proceedings unduly.

As discussed above, the Yankton Sioux Tribe General Council contends that HMH knows, and has always known, that the Proposed Agreement is invalid under Yankton Tribal Law and that the Tribe has not waived its sovereign immunity for claims relating to that agreement. Permitting HMH to intervene in this matter would simply allow HMH to revisit the terms upon which it elected to continue its representation of the Tribe at a time after that representation had concluded. That effort is untimely to the extent that, given HMH's knowledge, it had ample opportunity to do so before.

V. CONCLUSION

For the reasons discussed above, the Yankton Sioux Tribe respectfully requests that this Court DENY the Motion to Intervene because the Tribe has not waived its sovereign immunity to be subject to liens and there is not a valid retainer agreement.

Respectfully submitted this 21st day of August, 2012.

/s/ Patricia A. Marks

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing **OPPOSITION TO MOTION TO INTERVENE** in this matter was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following recipients:

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