UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

PUEBLO OF SAN FELIPE, a federally recognized Indian tribe,	)	
***Plaintiff*,**	)	
	)	**Case No. 23-cv-00296-JB-LF**
v.	)	
DEBRA HAALAND, Secretary of the Interior, et al.,	)	
Defendants,	)	
PUEBLO OF SANTA ANA, a federally recognized Indian tribe,	)	
Applicant-Intervenor-Defendant.	)	

PUEBLO OF SANTA ANA'S REPLY IN SUPPORT OF ITS MOTION FOR LIMITED INTERVENTION IN ORDER TO FILE MOTION TO DISMISS (DOC. 32)

The Pueblo of Santa Ana ("Santa Ana"), by and through its counsel, submits this Reply in support of its Motion for Limited Intervention in Order to File Motion to Dismiss (Doc. 32) ("Motion").

I. INTRODUCTION

The Pueblo of San Felipe ("San Felipe") filed this case against a list of Federal Defendants, seeking to challenge, mainly under the Administrative Procedure Act, a number of actions taken by various of those defendants. Those actions finally (and correctly) resolved, in favor of Santa Ana, a century-old overlap between the lands of Santa Ana and the survey of the San Felipe Pueblo Grant. Santa Ana was not named as a party to the case, and could not have been named due to its sovereign immunity from suit. Santa Ana has now filed a Motion for

Limited Intervention in Order to File Motion to Dismiss (Doc. 32), by which it seeks leave of the Court to intervene in the case solely for the purpose of asking the Court to dismiss the case based on the fact that Santa Ana is a required party that cannot be joined due to its sovereign immunity. San Felipe filed a response to that motion (Docs. 33, 34) ("Response"), by which it concedes much of Santa Ana's argument in support of its request to intervene, but opposes the motion on grounds that, as will be shown, are utterly without merit.

II. ARGUMENT

A. San Felipe's Claim That Santa Ana Lacks a "Legally Cognizable Interest" in the Litigation is Completely Misplaced, Besides Being Wrong.

In its response, San Felipe does not contend that Santa Ana's motion is untimely, and it concedes that there is "no question" that Santa Ana claims an interest in this litigation. Response at 3.[1] San Felipe, however, argues that Santa Ana has no "legally cognizable interest in the case, because it failed to intervene in *United States v. Algodones Land Co.*, 52 F. 2d 359 (10th Cir 1931), the quiet title action brought by the United States on behalf of San Felipe under the provisions of the Pueblo Lands Act, Act of June 7, 1924 , 43 Stat. 636 ("PLA"), and because of its failure to file an independent action under the PLA. Response at 4-5.[2] On its face, this claim

[1]San Felipe contends that Santa Ana has no interest in San Felipe's Second, Fourth and Fifth Claims, because those claims only relate to the United States' payment of monies in a trust account to Santa Ana, and seeks that amount of money from the United States, not from Santa Ana. While true, as San Felipe admits, *see* Complaint at ¶ 138, the funds in the account were to be held pending resolution of title to the Former Overlap, and thus San Felipe can prevail on those claims *only* if it prevails on its First and Third claims, that it has better title to the Former Overlap. Thus, San Felipe could not proceed with those claims if the First and Third Claims were dismissed.

[2]San Felipe also claims that Santa Ana lacks standing because of its failure to challenge the final decree in *United States v. Brown*, No. 1814 Equity (D.N.M. May 31, 1929) (San Felipe mistakenly gives the date as 1931). This is puzzling. *Brown* was the quiet title action brought by the United States under the PLA on behalf of Santa Ana with respect to the El Ranchito tract. The final decree says nothing whatever about excepting any lands overlapped by the San Felipe

is simply wrong. As the Tenth Circuit said in a case on which San Felipe relies, *United States v. Thompson*, 941 F.2d 1074, 1075 (10th Cir. 1991), Congress established the Pueblo Lands Board "to examine and resolve *non-Indian claims to Pueblo lands*." (Emphasis added.) *See also Pueblo of Santa Ana v. Baca*, 844 F. 2d 708, 709 n. 1 (10th Cir. 1988) ("The Pueblo Lands Act, however, was intended only to oblige non-Indians to prove claims to Pueblo land. Pueblos could only file suit *in response to claims made against them by non-Indians*." (Emphasis added.)) There was no authority under the PLA for a Pueblo to file suit to claim land that was also claimed by another Pueblo. And Santa Ana is not bound by any decision in the *Algodones Land Co.* case, and was under no obligation to intervene into that case.

But regardless of their merit, San Felipe's claims are completely inappropriate in this setting, because they impermissibly "presuppose[] Plaintiff['s] success on the merits" of its claim. *See Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999).

This Circuit recognizes that sufficient support for intervention as of right and Article III standing are often coterminous. *See Kane Cty. v. United States*, 928 F.3d 877, 889 n. 14 (10th Cir. 2019). Because the "interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard," courts do not reach the merits of a claimed interest prior to affording a prospective intervenor party status, even when the interest is of "such magnitude" as to satisfy Article III standing. *Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000). In the similar context of a Rule 19 joinder inquiry, the Tenth Circuit has unequivocally stated that "'[T]he underlying merits of the litigation are irrelevant.'" *Davis ex rel. Davis v. United States*,

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Grant survey. Even if this argument were properly made in this context, its premise is totally lacking.

343 F.3d 1282, 1291 (10th Cir. 2003) (quoting *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001)).[3]

San Felipe's entire argument against both Santa Ana's standing to intervene and Santa Ana's interest in the Former Overlap requires the Court to go to the merits of San Felipe's spurious claims: that San Felipe has the better title to the Former Overlap (despite the ruling in the *Baca* case, which San Felipe oddly fails to discuss, or even cite). As the Tenth Circuit has made clear, a claim that a party lacks sufficient interest to intervene because its position on the merits fails, is "irrelevant." What is relevant in the consideration of a motion to intervene is that Santa Ana "claims an interest," and that that interest will be seriously harmed if the Federal Defendants' administrative actions are overturned. Those actions cleared a cloud over Santa Ana's title to the Former Overlap, and undoing those actions would restore that cloud, essentially rendering the tract unusable. Finally, Santa Ana's potential injury is "fairly traceable" to San Felipe's attempt to have title determined in its favor, and the Court may prevent this injury by upholding the Federal Defendants' actions. *Lujan v. Defs. of Wildlife,* 504 U.S.555, 560-61 (1992).

Thus, without doubt, Santa Ana has both Article III standing and a palpable interest in the litigation, and should be allowed to intervene as of right in this action.

[3] A number of courts have noted that, "[i]ntervention of right pursuant to Rule 24(a) is 'a kind of counterpart to Rule 19(a)(2)(i).'" *See, e.g., Glancy v. Taubman Centers*, Inc., 373 F.3d 656, 669 (6th Cir. 2004) (citing Fed.R.Civ.P. 24(a), 1966 Advisory Comm. Notes); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 386 U.S. 129, 134 n. 12, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); *Pujol v. Shearson/Am. Express, Inc.*, 877 F.2d 132, 135 (1st Cir. 1989) (noting similarity between Rule 19(a)(2)(i) and Rule 24(a)(2)).

B. An Adverse Ruling in This Case Would Plainly Impair Santa Ana's Interest.

Under Rule 24(a)(2), an applicant must establish that without intervention, an adverse ruling may "as a practical matter" impair or impede its interest in the subject matter of the case.

Applicants are granted intervention when they "have an interest that could be adversely affected by the litigation." *Kane Cty.,* 928 F.3d at 891. The interest element has been described as "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) (citing *San Juan Cty. V. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007).

As to the question of impairment, the Tenth Circuit has recognized that the interest and impairment requirements of Rule 24(a)(2) are intertwined. *Fed. Deposit Ins. Corp. v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987); *see Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341, 1345 (10th Cir. 1978) ("the question of impairment is not separate from the question of existence of an interest"). Establishing the potential impairment of an interest "presents a minimal burden," and such an impairment may be "contingent upon the outcome of [ ] litigation," *Kane Cty., Utah*, 928 F.3d at 891 (citations omitted). That standard is easily satisfied here, where San Felipe seeks to have the Court overturn the Federal Defendants' administrative actions that cleared the cloud from Santa Ana's title and to have the title to the Former Overlap determined in San Felipe's favor. Even though Santa Ana would not be bound by such a judgment (which would directly conflict with this Court's and the Tenth Circuit's decisions in the *Baca* case), its title to the Former Overlap would be thrown back into question, and its ability to make use of the tract would be stymied, as it has been for the past twenty years.

San Felipe's argument that in the event of a judgment in San Felipe's favor, Santa Ana could protect its interests by petitioning Congress, is sheer fantasy.[4] And even if future proceedings were available to Santa Ana, that is not a bar to Santa Ana participating in the current litigation. *See Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977) ("It is not enough to deny intervention under [Rule] 24(a)(2) because applicants may vindicate their interests in some later, albeit more burdensome, litigation.") After all, "the interest of a prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would return the issue to the administrative decision-making process, notwithstanding the prospective intervenor's ability to participate in formulating any revised [decision]." *WildEarth Guardians, 604* F.3d at 1199..

Thus, the potential for future proceedings may be fairly interpreted as *supporting* Santa Ana's intervention, because that prospect demonstrates that its interests are threatened by the current action.

[4]Presumably in support of this laughable proposition, San Felipe cites *United States v. De la Paz Valdez de Conway*, 175 U.S. 60 (1899), for the assertion that Congress has sole authority "to alter the boundary between the pueblos." Response at 6. That is manifestly *not* the holding of *Conway*. The case arose out of a Court of Private Land Claims ("CPLC") decision confirming the Cuyamungue Grant, north of Santa Fe, although the area confirmed largely overlapped the grants of the Pueblos of Nambé and Pojoaque, which had been confirmed by Congress in 1858 (in the same Act that confirmed the San Felipe Pueblo Grant). The Court's decision avoids deciding whether the grantees or the Pueblos held better title; it merely held that under the act creating the CPLC, the court should except from any confirmation lands that had already been disposed of by the United States, such as the lands patented to the two Pueblos, since the United States could not dispose of its interest in land twice, to different patentees. (As the Court said, "nothing is better settled by this court than that a patent issued by the United States to lands which they do not own is a simple nullity." 175 U.S. at 68.) The passage cited by San Felipe only says that Congress has sole and unreviewable discretion to determine the "validity" of any title acquired under a prior sovereign; it says nothing about congressional authority over grant boundaries. *Id*. at 67. The Court made clear that where lands confirmed by Congress or the CPLC do conflict, it is up to the courts to resolve the dispute. *Id.* at 70.

C. Santa Ana's Interests Will Not be Adequately Represented by the Federal Defendants.

Finally, San Felipe claims that intervention is unnecessary because the Federal Defendants adequately represent Santa Ana's interest in the litigation. San Felipe cites several cases for the proposition that "this Court presumes representation is adequate when 'the objective of the applicant for intervention is identical to that of one of the parties[.]'" (citing *Tri-State Generation & Transmission Ass'n, Inc. v. New Mexico Pub. Regulation Comm'n*, 787 F.3d 1068, 1072 (10th Cir. 2015); *see also Tudor Ins. Co. v. 1st Nat. Title Ins. Agency, LLC*, 281 F.R.D. 513, 519 (D. Utah 2012)). Response at 7. While that argument would be correct *if* the objectives are indeed identical, these cases are inapposite to the litigation at hand. In *Tri-State Generation*, the would-be intervenor filed an answer with nearly identical defenses as the defendant's in that action, and filed a proposed response to a motion for summary judgment that presented "essentially the same arguments" with no "additional information." 787 F.3d at 1071. In *Tudor*, the district court determined that the would-be intervenor did not even have a legally protectable interest because it only had a "contingent interest in the insurance proceeds," and the party defendant adequately represented its interest because its position was identical, that the plaintiff pay the maximum coverage. 281 F.R.D. at 517-18.

Neither of these cases nullifies the Tenth Circuit's case law that for "a proposed intervenor to establish inadequate representation by a representative party, 'the possibility of divergence of interest need not be great,' and this showing 'is easily made' when the representative party is the government." *Kane Cnty*., 928 F.3d at 894 (citing *Nat. Res. Def. Council*, 578 F.2d at 1346 and *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1254) (10th Cir. 2001)). *Kane County*, decided four years after *Tri-State*, found that the would-be intervenor's interests were divergent enough from the government's to warrant intervention because "the

United States must consider internal interests, such as the efficient administration of its own litigation resources." *Id*. at 895. Here, the Federal Defendants do not adequately represent Santa Ana's interest in the litigation, and even if Santa Ana would support some of the Federal Defendants' positions, the fact that Santa Ana's position on a key issue diverges from the Federal Defendants' position in this action is sufficient to show their representation to be inadequate.

As Santa Ana noted in its Motion, at 11-12, the Federal Defendants in their Motion to Dismiss (Doc.29), at 2, 12 and 26-28, stated that the United "recognizes" that San Felipe has good title to the portions of Private Claims 4, 5 and 6 that extend into the Former Overlap, and that there was "no dispute" (at least as between the United States and San Felipe) as to title to those tracts. This position, as Santa Ana stated, is flat wrong, and is highly prejudicial to Santa Ana, and clearly demonstrates that the United States cannot adequately represent Santa Ana's interests in this case.

San Felipe, of course, asserts that it does have good title to these portions of the private claims, and that since the United States is not disputing that assertion, the title to these tracts is not at issue in this case. Therefore, San Felipe argues, any disagreement between the United States and Santa Ana on this issue is irrelevant to Santa Ana's Motion. Response at 12-14. San Felipe is equally wrong. In fact, the ownership of these portions of P.C.s 4, 5 and 6 was determined by the 2013 Tompkins Opinion, and that determination was made manifest by the resurvey of the south boundary of the San Felipe Pueblo Grant (notwithstanding the fact that the surveyor, at San Felipe's insistence, showed the boundaries of the private claims on the survey plat).

In the Pueblo Lands Board proceedings, the Board dealt with one Pueblo at a time, and heard and considered claims by non-Indians to tracts within that Pueblo's boundaries. As San

Felipe noted in its Complaint, at ¶¶ 106, 107 and 110, the Board decided to hear claims that extended into the Former Overlap in its proceedings concerning San Felipe, based on its mistaken belief that San Felipe had superior title to that tract.[5] Four private claims were ultimately confirmed that extended into the Former Overlap, P.C.s 4, 5, 6 and 101 (the private claim that was the subject of the *Baca* litigation brought by Santa Ana in 1981), and patents were issued for each of them. But as the PLA states, at Sec. 13, any such patent "shall have the effect only of a relinquishment by the United States and the said Indians." They were, in other words, mere quitclaims of the interests of the Pueblo against which the claims were made, and of the United States as its trustee.

In 2013, in Opinion M-37027, Interior Solicitor Hilary Tompkins determined that Santa Ana, not San Felipe, held superior title to the Former Overlap, just as this Court and the Tenth Circuit had held in the *Baca* litigation, and directed that the resurvey be undertaken to eliminate the overlap, and to place the south boundary of San Felipe's "Grant"[6] on the north boundary of Santa Ana's patented El Ranchito tract. But that meant that, as the Interior Board of Land Appeals ("IBLA") held in rejecting San Felipe's appeal of the resurvey, the portion of San Felipe's south boundary that was moved was "restored to its true original position." *Pueblo of San Felipe*, 190 IBLA 17, 32 (April 5, 2017). Consequently, these federal actions establish that San Felipe never had *any* ownership interest in lands south of Santa Ana's north boundary, *i.e.*, in

[5]In a Supplemental Report discussed in San Felipe's Complaint at ¶ 120, that was issued by the Board on June 30, 1931, after it held, at Santa Ana's request, a special hearing on the overlap dispute, the Board stated it had no jurisdiction to decide the dispute, but that it did not appear from the evidence "that Indians of San Felipe have ever, in the memory of any living Indian, been in actual possession of the tract," but that the tract "was included in land purchased by the Santa Ana Indians," and that "so far back as the memory of any living Indian, the Santa Ana Indians have been in possession of the land in conflict, and have cultivated all of the tract. They have never been disturbed in this possession." Supp. Report at 2-3.

[6]See Santa Ana's Motion at 2 n.2.

the Former Overlap, and thus, to the extent that the patents to P.C.s 4, 5 and 6 purported to convey San Felipe's "interest" (or that of the United States as its trustee) in lands within the Former Overlap, they are simply void. Again, as the Supreme Court said in *Conway*, "nothing is better settled by this court than that a patent issued by the United States to lands which they do not own is a simple nullity." 175 U.S. at 68. That was exactly the ruling of this Court and the Tenth Circuit in the *Baca* case: Baca held a deed that purported to convey lands within the Former Overlap, but that deed derived from a patent to a private claimant in the San Felipe proceedings before the Pueblo Lands Board, just as San Felipe's deed does. The fact that, as both courts held, Santa Ana was the clear owner of the lands within the Former Overlap, Baca's deed, to that extent, was void. The same must be true as to San Felipe's deed from Louis Ilfeld. (*See* Response at 13.)

In short, contrary to San Felipe's claim (and the United States' apparent belief) that title to the portions of P.C.s 4, 5 and 6 within the Former Overlap are not at issue in this case, they most certainly are. The federal actions that San Felipe attacks necessarily determined their title as well as that of the rest of the tract, and San Felipe's claims potentially jeopardize Santa Ana's title to those parcels, just as they threaten to undermine its long-established title to the entire Former Overlap. But it is clear that the Federal Defendants' statements supportive of San Felipe's claim to title to these tracts establishes that those defendants cannot fairly or adequately represent Santa Ana's interests in this case.

D. San Felipe's Claims of "Extreme Prejudice" are Not Grounds to Deny Santa Ana's Motion

San Felipe makes a last-ditch effort to block Santa Ana's clear right to intervene, claiming it will suffer "extreme prejudice" from Santa Ana's intervention. San Felipe seems to concede that if Santa Ana is allowed to intervene for the purpose of filing a motion to dismiss San

Felipe's Complaint for failure and inability to join a required party, that motion should be granted. But the "prejudice" that San Felipe claims it will suffer would only arise if the Court determined that San Felipe should prevail on the merits of its claims. That argument is improper, for the same reasons that San Felipe's argument that Santa Ana lacks standing is unwarranted, as set forth in Sec. II(A), *supra*. The Court should not determine any issue on a motion to intervene by looking to the merits of the plaintiff's claims. The merits are "irrelevant." *Davis ex rel. Davis*, 343 F.3d at 1291 (quoting *Citizen Potawatomi,* 248 F.3d at 998).

III. CONCLUSION

For the reasons set forth above, and those set forth in its Motion, Santa Ana urges that its Motion for Limited Intervention be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply in Support of Motion for Limited Intervention was filed electronically with the Clerk of the Court on the 6th day of October, 2023, using the CM/ECF system, and that all ECF registrants of such system in this case received electronic copies thereof.

/s/ Richard W. Hughes
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