IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Prairie Band Potawatomi Nation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 5:24-cv-4066-KHV-RES
	)	
Jackson County Sheriff Tim Morse,	)	
	)	
Defendant.	)	

Plaintiff's Reply in Support of its
Motion for Leave to Amend Complaint

The Nation provides this reply brief in support of its Motion for Leave to Amend Complaint (Dkt. #27). The Court has denied the Defendant's motion to dismiss the Nation's requests for declaratory judgment on the Sheriff's lack of authority to interfere with the Nation's exercise of its civil-regulatory jurisdiction and lack of civil jurisdiction over certain civil matters on the Reservation. Order, 14 (Dkt. #25). In his response brief (Dkt. #29), the Defendant does not allege any prejudice to himself from the granting of the Motion.

The Defendant's only argument for denying the Motion is that it is futile. (*Id.* at 1 (citing *U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009)). The Motion is not futile because the amended complaint merely adds allegations supporting the Nation's existing standing to seek permanent injunctive relief. The new allegations supporting an ongoing controversy come directly from the Sheriff's own pleadings and, therefore, could not have been made previously (because they did not exist). Am. Compl., 20–23 (Dkt. #27-2).

While the Nation's Complaint alleges facts sufficient to support standing for injunctive relief, allowing the Nation to add the Sheriff's statements demonstrating ongoing harm to the Nation addresses the issues raised by the Court regarding standing to seek such relief. Order, 16 (Dkt. #25). "[T]he most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading." *Zack v. Hartford Life and Accident Ins. Co.*, No. 01-2430-JAR, 2002 WL 538851, at *2 (D. Kan. Mar. 20, 2002) (citing 6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice And Procedure § 1474, at 523 (2d ed.1990)). Here, the Nation does not view its Complaint as defective but seeks to add allegations taken from the Sheriff's own pleadings to demonstrate ongoing harm.

Rule 15(a) specifies that the Court "should freely give leave when justice so requires." Fed. R. Civ. P. 15. However, "when the proposed amended complaint would be subject to dismissal," the "court properly may deny a motion for leave to amend as futile . . . .". *Perez v. City and Cnty. of Denver*, No. 23-1057, 2023 WL 7486461, at *3 (10th Cir. Nov. 13, 2023) (citing *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997) (finding that the district court thoroughly considered the allegations contained in the proposed amended complaint before denying leave)).

Defendant Morse bears the burden of showing that the amended complaint is futile. "As the party opposing amendment, Defendant bears the burden of establishing its futility." *Anderson v. PAR Elec. Contractors, Inc.*, 318 F.R.D. 640 (D. Kan. 2017) (citing *Neonatal Prod. Grp., Inc. v. Shields*, No. 13–2601–DDC–KGS, 2015 WL 1957782, at *2 (D. Kan. Apr. 29, 2015)); *see also Corp. Stock Transfer, Inc. v. AE*

Biofuels, Inc., 663 F. Supp. 2d 1056, 1061 (D. Colo. 2009) ("The non-moving party bears the burden of showing that the proposed amendment is . . . futile . . . .").

The Defendant bases his futility claim on a lack of ongoing violations or a real or immediate threat of future injury. (Dkt. #29, 1–2). Yet, the Defendant does not explain how the additional allegations to the complaint would be futile. The Tenth Circuit has explained that for an amendment to be futile, it must be "*patently obvious* that the plaintiff could not prevail on the facts alleged." *Lucas v. Bd. of Cnty. Commissioners of Cnty. for Larimer Cnty. Colorado*, No. 22-1259, 2023 WL 8271988, at *3 (10th Cir. Nov. 30, 2023) (emphasis added) (quoting *Cohen v. Longshore*, 621 F.3d 1311, 1314 (10th Cir. 2010) (finding the district court erred in denying plaintiff's motion to file an amended complaint)). The new allegations show that the Sheriff believes he did nothing wrong and plans to continue acting in the same manner. Am. Compl., 20–23 (Dkt. #27-2). They demonstrate the threat of ongoing harm such that it cannot be "patently obvious" that the Nation could not prevail on its claims for injunctive relief.

The Defendant appears to argue that the Nation's claims to ongoing or future harm are mere speculation. (Dkt. #29, 1–2). But the proposed amended complaint plainly alleges that Defendant Morse will continue interfering with the Nation's exercise of its civil-regulatory jurisdiction and exercising civil jurisdiction within the Reservation that he does not have. (Dkt. #27, ¶¶ 70, 90–92). These allegations are tethered to Defendant's actual statements in pleadings in this matter.

To demonstrate the supposed futility of the Nation's proposed amended complaint, Defendant Morse also argues that he has civil jurisdiction over the Reservation: "Aside from the Kansas Act, Kansas' admission as a State conferred 'civil jurisdiction' upon state and county officials." (Dkt. #29, 3). But he provides no legal support for this view. In denying the motion to dismiss, this Court has already recognized that nothing gives the Sheriff civil jurisdiction over the Reservation. Order, 10 n.5 (Dkt. #25). Neither the federal courts, nor Congress, has ever expressly recognized the Defendant's claimed authority to interfere with the Nation's exercise of its civil-regulatory jurisdiction or his claimed civil jurisdiction within the Reservation.

Defendant's citations do not give him civil jurisdiction over the Reservation or over Indians within the Reservation. (Dkt. #29, 4). Indeed, the cases deal with exclusively with *criminal* jurisdiction, a *non-Indian* federal reservation, *taxation* of fee lands, and tribal court jurisdiction over state officials pursuing an *off-reservation* crime. *See Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636 (2022) (considering a state's criminal—not civil—jurisdiction over non-Indians); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) (considering a state's authority over a military camp in Arkansas); *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 498 (1946) (considering state criminal jurisdiction over a murder committed by one non-Indian against another non-Indian); *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 264 (1992) (considering state in rem authority over fee land; "Although such a fee patent would not subject its Indian owner to

plenary state jurisdiction, fee ownership would free the *land* of "all restrictions as to sale, incumbrance, or taxation.") (emphasis in original); *Nevada v. Hicks*, 533 U.S. 353 (2001) (considering tribal court jurisdiction over civil claims against state officials investigating an off-reservation crime with a tribal-court-approved warrant). None of the cases support the Sheriff's contention that he has civil jurisdiction over the Reservation or over Indians within the Reservation. They certainly do not support his contention that he can interfere with the Nation's exercise of civil-regulatory jurisdiction within the Reservation.

Defendant Morse also argues that Indian reservations in Kansas are subject to civil jurisdiction of the state because they are located within the state. This is not the law. As explained in our previous briefing, Indian nations maintain their sovereign authority over their reservation land, which gives them the right to enact their own laws to regulate business within their boundaries. *See*, *e.g.*, Resp. to Mot. to Dismiss, 6–11 (Dkt. #16). Nothing allows the Defendant to use his statutorily conferred criminal jurisdiction to interfere with the Nation's exercise of its civil-regulatory jurisdiction. Indeed, Congress has provided a vehicle for states to assume civil jurisdiction over Indian tribes, but that requires tribal consent, which the Nation has not given. 25 U.S.C. § 1322(a).

No court has ever ruled that the Nation's 1846 Treaty authorized the incorporation of its Reservation into Kansas—an entity that did not even exist at the time. The Treaty promised the Reservation would be the Nation's "land and home

forever." Treaty with the Potawatomi Nation, art. 4, 9 Stat. 853 (1846) (emphasis added).

CONCLUSION

Granting the Motion would cause no prejudice to the Defendant. The additional allegations support the Nation's standing to seek permanent injunctive relief by showing the threat of ongoing harm. Because leave to amend should be freely given and because it is not "patently obvious" that amended complaint would be futile, the motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 10, 2025, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

s/ Jere Sellers

ATTORNEYS FOR PLAINTIFF