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

**THE CORPORATION OF THE
PRESIDENT OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS, a Utah corporation sole; LDS
FAMILY SERVICES, a Utah Non-Profit
corporation,**

Plaintiffs

v.

RJ, MM, BN and LK, individuals,

Defendants

and

NAVAJO NATION

Intervenor.

Case No. 2:16-cv-00453-RJS

MOTION TO INTERVENE

Judge: Robert J. Shelby

Magistrate Judge: Brooke C. Wells

MOTION TO INTERVENE

The Navajo Nation (“Nation”), a sovereign Indian nation, moves pursuant to Fed. R. Civ. P. 24 to intervene as a defendant. Filed with this motion is a proposed Motion to Dismiss. *See* Fed. R. Civ. P. 24(c). The parties have stated their positions on this motion through counsel as follows: Defendants do not oppose this motion and Plaintiffs take no position.

MEMORANDUM OF POINTS AND AUTHORITIES

The Nation moves to intervene as of right, under Fed. R. Civ. P. 24(a)(2), or in the alternative, with permission of the Court under Fed. R. Civ. P. 24(b)(1)(B).

I. THE NATION MEETS THE STANDARD TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2).

A. Rule 24(a)(2).

Under Rule 24(a)(2) an applicant shall be permitted to intervene as of right if: (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 as a practical matter be impaired or impeded; and (4) the applicant’s interest is not adequately represented by existing parties. *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837, 840 (10th Cir. 1996).

B. The Nation’s motion is timely.

“Timeliness is assessed in light of all of the circumstances, including: (1) the length of time since the applicant knew of his interest in the case, (2) prejudice to the existing parties, (3) prejudice to the applicant, and (4) the existence of any unusual circumstances.” *Porter v. Graves*, 597 Fed. Appx. 964, 967 (10th Cir. 2014) (internal quotations omitted).

An action was filed on May 27, 2016 by Defendants in the Window Rock District Court (“Tribal Court”). Plaintiffs filed a Complaint for Declaratory Judgment (Complaint) and a Motion for Temporary Restraining Order/Preliminary Injunction (Motion for Temporary

Restraining Order) in the U.S. District Court of Utah on May 31, 2016. Plaintiffs then filed a Second Amended Complaint for Declaratory Judgment (Amended Complaint) and Amended Motion for Preliminary Injunction (Amended Motion) on June 24, 2016. Defendants filed an Objection to Plaintiffs' Second Amended Motion for Preliminary Injunction and Motion to Dismiss (Objection) on July 11, 2016. A little more than two months have passed since Plaintiffs filed their Complaint in the District Court of Utah. The proceeding is still in its initial stages of litigation.

Based on the fact that this Court has not substantively or substantially engaged the issues of the case, parties will not be prejudiced by the Nation's Motion for Intervention. The period of two months and a couple of weeks it has taken the Nation to file this Motion is a reasonable amount of time for the Nation to become aware of the action, evaluate its interests in the action, and prepare a motion to intervene and proposed motion to dismiss. Based on these facts the Nation's Motion for Intervention is timely.

C. The Nation has an Interest in the Subject of this Action.

To demonstrate an interest relating to the property or transaction which is the subject of the action, under Rule 24(a)(2), an applicant must establish a "direct, substantial, and legally protectable interest that relates to the subject of the action." *Tudor Ins. Co. v. 1st Nat. Title Ins. Agency, LLC*, 281 F.R.D. 513, 518 (D. Utah 2012). The Nation's interest in its jurisdiction and sovereignty are interests that are direct, substantial, and legally protectable interests which relate to the subject of this action.

The Supreme Court has stated "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty." *Nat'l. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). The Plaintiffs argue the Tribal Court lacks

jurisdiction in this matter “because tribal law is unconstrained by federal due process protections, the [Plaintiffs] would be irreparably harmed by being subjected to tribal court jurisdiction.” Plaintiffs’ Amended Motion, at 15. Further, Plaintiffs state they would be “irreparably harmed by having to litigate in a forum where federal law does not authorize tribal jurisdiction over non-Indians and where they would be subject to the loss of their” “First Amendment rights.” *Id.*, at 15, 16. Plaintiffs therefore, request that this Court declare the Nation’s Courts do not have jurisdiction in this matter. Plaintiffs’ Amended Complaint, at 9. Plaintiffs have challenged the Nation’s jurisdiction and therefore have challenged its sovereignty. The Nation has a direct and substantial interest in defending these interests.

The Supreme Court and the Tenth Circuit have protected Indian Tribes’ jurisdiction and sovereignty by ordering litigants to exhaust tribal remedies. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) (“[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction.”) (internal quotations omitted) (internal citations omitted); *see also Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1239 (10th Cir. 2014) (Circuit directed the district court to abate further proceedings until plaintiffs exhaust tribal court remedies). Specifically the Supreme Court believes the examination on whether or not a Tribal Court has jurisdiction should be done in the Tribal Court in the first instance. *Nat’l. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Furthermore, “the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.” *Id.*

Here, Plaintiffs have failed to exhaust tribal remedies. Instead they have filed this action in Utah District Court to argue tribal exhaustion is not required. Plaintiffs’ Amended Motion, at

13-14. The Nation has an interest in requiring litigants challenging its sovereignty to exhaust their tribal court remedies.

In the present case the Tribal Court never had the opportunity to develop a “full record” or to “examine its own jurisdiction” in the “first instance” in accordance with Supreme Court case law. Plaintiffs instead filed in this Court requesting a declaratory judgment that the Nation lacks subject matter jurisdiction with no record for this Court to review. If parties such as the Plaintiffs are allowed to disregard the tribal exhaustion doctrine it directly affects the Nation’s jurisdiction and therefore its sovereignty¹. The Nation’s interest in ensuring parties exhaust tribal remedies is therefore direct, substantial and legally protectable.

a. The Nation meets the Tenth Circuit’s interests Standard under Rule 24(a).

As outlined above, the Nation meets the direct, substantial, and legally protected interest test that is still applied by this Court; therefore the Nation meets the standard for the Tenth Circuit as well. Although the Tenth Circuit previously required that the interest in the proceedings be “direct, substantial, and legally protectable”, *Utah Ass’n of Counties v. Clinton* , 255 F.3d 1246, 1251 (10th Cir. 2001), the Tenth Circuit has stated that the “[direct, substantial, and legally protectable test] misses the point” and that “other interests may also suffice.” *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1193, 1194 (10th Cir. 2007).² The Tenth Circuit clarified, “[t]he central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention.” *Id.*, at 1193. “[D]etermination of a party’s

¹ Plaintiffs assert they should not be required to exhaust tribal court remedies because jurisdiction is plainly lacking. However, as discussed in the attached Motion to Dismiss, the Nation’s jurisdiction is colorable under the alleged facts.

² This Court distinguished *San Juan County* by stating that the more liberal standard for intervention articulated by the Tenth Circuit is appropriate in cases that raise an issue of public interest. *Tudor Ins.Co. v. 1st Nat. Title Ins. Agency, LLC*, 281 F.R.D. 513, 518 (D. Utah Cen. Div. 2012). Therefore, the DSL test still applies unless a public interest is at issue. *See S.E.C. v. Bliss*, 2:15-CV-00098-RJS, 2015 WL 5775170, at *2 (D. Utah Sept. 30, 2015).

right to intervene, is at least in part, a process of equitable balancing.” *Id.* at 1194. “The applicant must have an interest that could be adversely affected by the litigation.” *Id.*, at 1199. “But 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.* However, if an applicant can show that it has an interest that satisfies the “DSL” test then it would “likely justify intervention.” *Id.*, at 1194.

The Nation meets the direct, substantial, and legally protectable interest standard and therefore satisfies the Tenth Circuit’s interest standard. The Tenth Circuit stated that if an applicant can show that it has an interest that satisfies the direct, substantial, and legally protected interest test then it would “likely justify intervention.” *San Juan County, Utah v. U.S.*, 503 F.3d 1163, 1194 (10th Cir. 2007). Because the Nation meets the direct, substantial, and legally protected interest standard, as outlined above, then it would likely justify intervention in this case.

Lastly, the Nation also meets the Tenth Circuit’s more liberal standard because it would be inequitable if the Nation is not permitted to intervene. If the Nation is denied intervention it would be inequitable because its jurisdiction and sovereignty will be affected without the Nation being present. The Nation’s interest in ensuring parties adhere to the tribal exhaustion doctrine could be negatively affected if this Court declares the Tribal Court does not have jurisdiction without the Plaintiffs ever exhausting tribal court remedies. It would be pragmatic to allow the Nation to intervene because the issue of its jurisdiction is an issue of its sovereignty and the Nation should have the opportunity to discuss the issue as an intervening party. Therefore, the Nation should be allowed to intervene under this Court’s as well as the Tenth Circuit’s interest test.

D. The Nation's interest will be impaired or impeded.

The Nation's interest in its jurisdiction will be impaired and impeded if Plaintiffs were to prevail. The Supreme Court stated "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty." *Nat'l. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). Plaintiffs request "[f]or a judgment declaring that the Tribal Court lacks subject matter jurisdiction over the [Plaintiffs] in the Tribal Court Actions." Plaintiffs' Amended Complaint, at 8. If this Court were to grant the request the Nation's jurisdiction and therefore sovereignty would be impaired and impeded.

The Nation's interest in requiring party's to exhaust their tribal remedies will be impaired and impeded if Plaintiffs were to prevail. The Supreme Court of the United States stated their policy is to "provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l. Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Plaintiffs request "[f]or a judgment declaring that the Tribal Court lacks subject matter jurisdiction over the [Plaintiffs] in the Tribal Court Actions." Plaintiffs' Amended Complaint, at 8. However, Plaintiffs have never participated in the Tribal Court proceeding. They have never contested the Tribal Court's jurisdiction in Tribal Court. Rather they immediately filed this suit in Federal Court and request this Court to declare that the Nation's Courts lack subject matter jurisdiction denying the Tribal Court the first opportunity to evaluate the merits of the case.

The Plaintiffs' assertion that being "subjected" to the jurisdiction of the Nation is a violation of their constitutional rights is an attack on the Nation's right to determine the jurisdiction of the cases that are filed in the Tribal Court. The Nation has an interest in seeing that all Plaintiffs, including religious organizations, respect the jurisdiction of its courts. If

Plaintiffs are allowed to operate on the Navajo Reservation without being “subjected” to the jurisdiction of the Nation then the Nation’s interest clearly will be harmed. Such a determination will have lasting effects on whether or not the Nation can adjudicate cases involving institutions such as the Plaintiffs that are located within the territorial boundaries of the Navajo Reservation. Therefore, the Nation’s interest will be impaired and impeded if this Court declares that the Nation’s District Court lacks subject matter jurisdiction without allowing the Tribal Court the first opportunity to determine if it has jurisdiction in accordance with the policy of the United States.

E. The Nation’s interests as a sovereign Indian nation will not be adequately represented by Defendants.

An applicant satisfies this requirement if “the applicant shows that representation of his interest may be inadequate—a minimal showing.” *Tri-State Generation and Transmission Ass’n, Inc. v. New Mexico Pub. Reg. Commn.*, 787 F.3d 1068, 1072 (10th Cir. 2015) (internal citations omitted) (internal quotations omitted). To clarify, the “likelihood of a divergence of interest need not be great to satisfy the requirement.” *Id.*

The Nation and Defendants’ interests “diverge” and therefore satisfies the inadequacy of representation requirement of Rule 24. Defendants assert that the Nation clearly has jurisdiction over the case under the existing factual record. *See* Defendants’ Motion to Dismiss, at 9-13. The Nation’s interest is only in asserting that the Tribal Court should be afforded the opportunity to decide whether or not it has jurisdiction in the first place. As there is no full factual record, the Nation is not asserting that it has jurisdiction at this time. The Nation does not have an interest in the merits of the case, rather the Nation has an interest in protecting tribal exhaustion. The Nation’s and the Defendants’ interests therefore “diverge” and the Nation satisfies the inadequacy of representation requirement.

As also discussed above, the Nation has an interest in defending against challenges to its jurisdiction which is a challenge to its sovereignty. If parties, like the Plaintiff, are allowed to immediately go to federal court without exhausting tribal remedies, then the Nation and other tribes will lose an important aspect of sovereignty, which is the opportunity to decide whether or not it has jurisdiction. The Tribal Court could very well find that it does not have jurisdiction but it was never allowed the opportunity to make that determination. The opportunity and process to determine whether or not the Nation has jurisdiction is what the Nation is interested in. This interest “diverges” from the Defendants’ interest because they are asserting that the Nation clearly has jurisdiction under the existing facts. Therefore, the Nation’s interest will not adequately be represented by Defendants.

II. IN THE ALTERNATIVE, THE NATION ALSO QUALIFIES UNDER RULE 24(b)(1)(B) FOR PERMISSIVE INTERVENTION.

Alternatively, the Nation moves for permissive intervention pursuant to Rule 24(b)(1)(B). The only requirements for permissive intervention are that the motion be timely filed and it contain a claim or defense that shares a common question of law or fact with the main action. Fed. R. Civ. Pro. 24(b)(1)(B). If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention. *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996).

This Court has broad discretion to allow the Nation to intervene permissively and the Nation requests this Court to consider the following in making its determination: (1) the motion is timely, (2) the Nation has a defense that shares a common question of law in that tribal exhaustion is required in this instance, (3) the Nation’s jurisdiction is being challenged and

therefore its sovereignty, (4) whether or not the Nation's interests are adequately represented by the other parties, and (5) the Nation will be adversely affected if intervention is not allowed.

For the reasons mentioned above, the request is timely. The Nation argues that the Plaintiffs in this case should have exhausted tribal remedies before filing in federal court. The issue has been briefed by both parties. The Nation has an interest in ensuring that the tribal exhaustion rule be followed. Plaintiffs have challenged the Nation's sovereignty by asserting that the Nation does not have jurisdiction. Plaintiffs never allowed the Tribal Court to make that determination in the first instance.

The Nation, as mentioned above, asserts that the Defendants will not adequately represent the Nation's interest because they diverge from one another. Defendants argue that the Tribal Court has jurisdiction. Absent a full factual record, the Nation does not assert that the Tribal Court has jurisdiction. Instead, the Nation is arguing that the tribal exhaustion requirement be followed so that Tribal Court be given the opportunity to develop the factual record and decide its jurisdiction in the first instance.

If Plaintiffs and other parties similarly situated are allowed to skirt the tribal exhaustion requirement it would have negative ramifications for the Nation. If the Court declares that tribal exhaustion is not required without the Nation's presence or without the Tribal Court ever having the opportunity to determine its jurisdiction then it would negatively impact the sovereignty of the Nation and go against Congressional and Supreme Court policy of self-determination and tribal self-government.

III. CONCLUSION

Pursuant to Rule 24(a)(2) , the Nation has a right to intervene in this suit. Alternatively, the Court should permit the Nation to intervene under Rule 24(b)(1)(B).

Respectfully submitted this 19th day of August, 2016.

/s/ K. Andrew Fitzgerald

Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that that on the 19th day of August 2016, I a true and correct copy of the foregoing **MOTION TO INTERVENE** to be served electronically on the following:

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