UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al.,	)	
Plaintiffs,	)	
v.	)	No. 1:02 CV 2156 (RWR)
GALE NORTON, Secretary of the Interior, et al.	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF EDSON G. GARDNER, *PRO SE*, TO INTERVENE

Defendants, officials of the U.S. Department of the Interior sued in their official capacities, submit their Memorandum of Points and Authorities in Opposition to the Motion of Edson G. Gardner, *Pro Se*, to Intervene, basing their opposition on (1) Mr. Gardner already being a named Plaintiff in this case represented by Plaintiffs' attorney of record[1/]; (2) the untimeliness of his requested intervention, coming well after the parties – including Mr. Gardner – have fully briefed Defendants' Motion to Dismiss; and (3) the numerous issues Mr. Gardner would raise beyond the scope of the Amended Complaint. The motion should be denied.

THE NATURE OF THE CASE

On November 4, 2002, four named Plaintiffs and "Other Individually Named Persons,"

[1/]In his own opposition to the Gardner motion, Plaintiff's attorney of record states that the Movant did not agree to an attorney-client relationship and thus should not be a party though listed on the Amended Complaint as such. Plaintiffs' Opposition to Gardner Motion to Intervene, p. 7, n.3. There may be a question whether the attorney's obligation to his client can be readily ended simply by so saying, especially when there is an admission that Mr. Gardner was "listed" as plaintiff.

represented by Dennis Chappabitty, attorney of record, filed the original Complaint here. On January 27, 2003, Mr. Chappabitty filed an Amended Complaint ("AC"), this time naming 29 pages of Plaintiffs. Among the additional named complainants was the Edson G. Gardner, whose address was there shown as P.O. Box 472, Fort Duchesne, UT 84026." AC, p. 14.

The issues raised in the Amended Complaint concern various features or federal implementation of the Ute Partition and Termination Act, enacted August 27, 1954, 25 U.S.C. §§ 677-677aa ("the UPA" or "the Act"). The UPA provides for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah ("the Tribe"), between those members who remained members, which the UPA referred to as "full-blood" members (or "full-bloods") and those 490 members whom the UPA terminated from federal supervision and trust relationship and referred to as "mixed-bloods." 25 U.S.C. § 677.[2/]

Plaintiffs allege that they are individuals whose status derives from their relationship as "one of the 490" "mixed-blood" members of the "Uinta Band," or as a descendant from a person classified by the Federal Defendants as among the "originally labeled 490," as well as an undetermined number of persons "who were not denominated as 490 'mixed-blood' members" of the Uintah Band, but who were born prior to the publication of the termination proclamation in 1961. AC, ¶¶ 16-18. Plaintiffs allege that attempts to terminate their status as "Indians" generally, and "mixed-blood" members of Uinta Band within the Ute Tribe specifically, were defective and they therefore claim to retain their status as Indians and as members of the Uintah Band to this day. Id., ¶ 3.

[2/] "The Act was one of a series of termination statutes enacted primarily in the years 1954-1956." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 132, n.1 (1972).

In this case Plaintiffs challenge Defendants' implementation of the UPA, including the constitutionality of its application. There are even suggestions in the Amended Complaint that Plaintiffs may be challenging the constitutionality of the UPA.

Defendants moved to dismiss the Amended Complaint on May 20, 2003; Plaintiffs filed their Opposition thereto on September 6, 2003; and Defendants submitted their Reply to the Opposition on November 26, 2003.

On January 1, 2004, Edson G. Gardner, "Attorney Pro Se," served a Motion to Intervene in this case, together with a "Brief for Declaratory Relief," but accompanied by no proposed intervenor's complaint, as required by Rule 24(c), Fed.R.Civ.P.

THE ISSUES RAISED IN THE AMENDED COMPLAINT

Plaintiffs sue for redress of alleged wrongs Defendants have committed against them resulting in Plaintiffs' "premature, incorrectly implemented and unlawful termination of the federally-recognized 'Indian' status of each individual plaintiff as a member of the Uinta Band of Utes ('Uinta Band'), a separate and independent Band of Ute Indians" of the Uinta and Ouray Reservations, Utah. AC, ¶ 1. Plaintiffs also claim Defendants caused them "the loss of their ownership and interest in federal trust property" that Defendants should have retained in trust until "their special status as 'Indians' and members of the Uinta Band was 'terminated' in accordance with laws passed by Congress and the intent behind the various 'termination' laws. . . ." *Id.*, ¶ 2.

The redress Plaintiffs seek takes many forms and is expressed in eight separate causes of action:

1. Plaintiffs seek declaratory judgments that Defendants incorrectly implemented

and executed the UPA towards Plaintiffs thereby rendering their termination void and that they remain fully entitled to continued federal Indian programs and benefits. *Id.* ¶ 3 and Prayer First Count, p. 61.

2. Plaintiffs ask for a declaration that they are entitled to restoration of their status and privileges, and immunities and to their rights to land, water rights and other valuable property of the Uinta Band. *Id.*, Prayer in Second Count, pp. 61-62.

3. Plaintiffs who claim they were born before and living at the time of the 1961 termination proclamation required by the UPA but who were not on the final roll of the 490 "mixed-bloods" seek a declaration that they "retained their status at all times in the un-extinguished tribal sovereign entity knows as the 'Uinta Band' pursuant to custom and tribal law mandating that a child born of parents who are members of a tribe retain their tribal identity at the time they are born" and that their membership status "never ceased to exist." *Id.*, Third Count, p. 62.

4. All the Plaintiffs seek a declaration that the past and current actions of federal officials and employees in "the purported" termination of the trust status of the lands and the Indian status of the mixed-blood people" under the UPA were and are contrary to Acts of Congress, Executive Orders and the federally-approved Constitution and By-laws of the Ute Indian Tribe of the Uinta and Ouray Reservation and continue to deprive Plaintiffs of their "aboriginal status" and federal rights. *Id.*, Fourth Count, p. 62-63.

5. Plaintiffs also ask for a finding that Defendants' conduct and failure to follow unspecified federal statutes has caused each plaintiff damages in the amount of $10,000, plus interests and costs. *Id.*, Fifth Count, p. 63.

6. Plaintiffs also seek a ruling that the allegedly illegal extinguishment of their tribal status violates the Fifth Amendment of the U.S. Constitution entitling them to submit to Defendants damages – in an unspecified amount – for their claimed loss of their continuing rights in the Tribe from date of judgment back until the date the UPA became effective. *Id.*, Sixth Count, p. 63.

7. Plaintiffs seek damages of $3,000,000 per plaintiff for breach of trust in terminating the "mixed bloods." *Id.*, Seventh Count, pp. 63-64.

8. Finally, Plaintiffs seek an accounting of all proceeds of money due and owing them and set aside for them under the "share and share alike" provision of the Act of Congress of August 21, 1951 and an accounting of all sums "classified as 'offsets' by the defendant [sic] and charged against" when plaintiffs "were duly enrolled members of the Uinta Band. *Id.*, Eighth Count, p. 64. (Emphasis added.)

THE ISSUES RAISED IN THE GARDNER MOTION TO INTERVENE

At the outset, the motion to intervene makes certain that the movant is the same Edson G. Gardner as is listed among Plaintiffs on page 14 of the Amended Complaint: both show the identical mailing address of P.O. Box 472, Ft. Duchesne, UT 84026.

Movant does not state clearly or specifically exactly what complaints he himself has against these named Defendants. The only allegations to Mr. Gardner himself in the motion to intervene ("MLI") are that:

1. "Amicus[3/] Gardner, AUN, Uintah Mix blood [sic] was terminated from being Ute

[3/]Movant for intervention repeatedly calls himself "amicus" but nonetheless never asks for amicus-only status.

Tribal Advocate because of federal supervision, and Uintah Valley Treaty was abrogate [sic] by Ute Tribal Chief Judge licenses *Gardner, AUN, Mix-blood Indian v. Ute Tribal Court Chief Judge, et al.,* 36 Fed. Appox. 927 (10th Cir. Utah 2002), Ute Tribal Chief Judge Discriminated against Uintah Mix-blood Indian as recognized practicing Indian advocate." MLI, pp. 1-2.

2. He is "born citizen of the United States and of the State of Utah" and is entitled to the "full protection" of the due process clause of the Fifth Amendment and of the Fourteenth Amendment of the U.S. Constitution. *Id.*, p. 2.

3. He claims an "interest in subject matter of litigation by virtue of Uintah Valley land status," that his interests will be impaired or impeded if he cannot intervene, that he has "question of law or fact in common with the main action," and that his "input" will add value to the case. *Id.*, pp. 3-4.

Without any reference to himself, however, he goes on to allege that the Defendant, Secretary of the Interior Norton, specifically, failed to (a) regulate under the Commerce Clause of the U.S. Constitution by issuing regulations "governing Uintah Mix-blood Indian traders," (b) provide irrigation to "Uintah Mix-blood farmers, while providing for UDC non-Indian behavior borders on shocking," and (c) "recognize the legal status of Uintah Mix-blood Indians in manner provided by federal law." *Id.*, p. 2.

No more allegations of harm or injury specific to the Mr. Gardner or anyone else can be found on page 2 of his Memorandum in Support of the Motion for Leave to Intervene, except for an unexplained heading suggesting that he wants to enjoin an alleged Interior Department plan to "flood Uintah land protected by Uintah Valley Treaty ("Mem."), though there are several general assertions suggesting perceived wrongs to "Uintah Mix-blood" persons.

The Memorandum does assert that his intervention is not untimely because the Court has not yet decided Defendants' Motion to Dismiss the Amended Complaint and that he has a right to intervention under Rule 24(a), Fed.R.Civ.P., or he should alternatively be permitted to intervene pursuant to Rule 24(b).

ARGUMENT

A party seeking to intervene in an existing case must satisfy the requirements or Rule 24, Fed.R.Civ.P. either as of right, under Rule 24(a) or permissively under Rule 24(b). Rule 24(a) states:

> **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by exiting parties.

Rule 24(b) states, in pertinent part:

> **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Mr. Gardner's motion to intervene cannot satisfy the conditions of either part of Rule 24. Both parts make clear that the question of the timeliness of the prospective intervention is particularly and initially important.

I. MR. GARDNER HAS NOT SHOWN THAT HE SATISFIES ALL THE REQUIREMENT OF RULE 24(a) FOR INTERVENTION OF RIGHT.

A party seeking to intervene of right pursuant to Rule 24(a) must demonstrate satisfaction

of four requirements that: his application to intervene is timely; he has an interest relating to the property or transaction that is the subject of the action; that disposition of the case without his participation may, as a practical matter, impair or impede that interest; and no existing party to the action adequately represents the applicant's interests. *The Fund for Animals Inc. v. Norton*, 322 F.3d 728, 731-2 (D.C. Cir. 2003); *Jones v. Prince George's County Maryland*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998). The law of this Circuit further establishes that a party seeking to intervene as of right "must [also] demonstrate that it has standing under Article III of the Constitution." *Fund for Animals Inc.*, 332 F.3d at 731-2; *Jones*, 348 F.3d at 1017; *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-4 (D.C. Cir. 2003), *petition for cert. filed*, 72 USLW 3513 (Feb. 5, 2004).

A. The Motion to Intervene Is Not Timely and, If Granted, Would Unduly Prejudice the Existing Parties.

"Timeliness is measured from when the prospective intervenor 'knew or should have known that any of its rights would be directly affected by the litigation.'"*Roeder*, 333 F.3d at 233. Timeliness is also measured by considering the elapsed time since the start of the suit, the purpose of the intervention, "the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (quoting *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). If a motion is untimely, the court does not need to address the other intervention factors. *Assoc. Builders and Contractors Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999).

The Gardner motion is very untimely, and he offers no basis for arguing otherwise or justifying delay. The existing parties fully submitted all their extensive briefs addressing Defendants' Motion to Dismiss before the end of November 2003, concluding a period

stretching over several months. The movant utters not a word to justify his lengthy delay in presenting to the Court his own positions, whatever they may be, while the parties' work was being prepared and filed.

In this instance, permitting Mr. Gardner's late intervention would constitute unjustified prejudice to both parties. They have presented their cases on the motion to dismiss in extensive legal briefing. Without objection, the movant's position was set forth in those briefs by his attorney of record and was addressed twice in Defendants' opening and reply briefs on the pending dispositive motion. Granting intervention would afford him another opportunity to brief any of the same issues again and would require a repetitious round of additional briefing by the parties.

The Gardner motion does not satisfy the timeliness requirement.

B. The Gardner Motion to Intervene Does Not Demonstrate Any Interest Sufficient to Satisfy Fed. R. Civ. Pr. 24(a)(2) That Would Be Impaired by Resolution of the Pending Action as Between the Original Parties.

A party seeking to intervene as of right must demonstrate standing under Article III of the Constitution. *Fund for Animals Inc.*, 332 F.3d at 731-2.

Although, as discussed below, Mr. Gardner's motion does appear to raise some issues that are beyond the scope of the Amended Complaint but that therefore may not be introduced by any intervention, he has made no showing that his own interests would be impaired or impeded if the case is resolved without his intervention.

By the same token, he is in no better position than the other named Plaintiffs to avoid the defenses raised in the motion to dismiss, particularly the statute of limitations and the *res judicata* issues. Standing in the same shoes as the other existing complainants, his claims here

are both time-barred and issue-precluded. Motion to Dismiss, pp. 8-21.

In fact, in Mr. Gardner's case, he has independently litigated and lost any argument that he has a different status as a so-called Uintah Mix-blood than any other of the Plaintiffs. *See Gardner v. United States*, 25 F.3rd 1056* (10th Cir. 1994) (Attachment A hereto) (*unpublished opinions are not binding precedent "except under the doctrines of law of the case, res judicata, or collateral estoppel," 10th Cir. Rule 36.3). There, Mr. Gardner challenged his prosecution for traffic offenses in State court rather than the Ute Tribal Court by arguing that the UPA had not terminated the trust status of *descendants* of the original 490 terminated Ute mixed blood members. The Tenth Circuit rejected his assertions by interpreting the UPA to have intended to terminate the descendants, as well as the original 490 Indians and by holding that the Act also required "full blood" status for Ute Tribal members thereafter. 25 F.3d 1056*, pp. 3-4 of Attachment A hereto.

C. The Prospective Intervenor Would Impermissibly Raise New and Different Issues from Those in the Amended Complaint.

In his motion to intervene Mr. Gardner suggests he would raise other issues different from those that may have been raised in the Amended Complaint.

It is well-settled that an intervenor must take the litigation as he finds it and may not change the issues framed between the original parties. *Illinois Bell Telephone Co. v. Federal Communication Comm'n*, 911 F.2d 776 (D.C. Cir. 1990); and *United States v. City of New York*, 179 F.R.D. 373 (E. D. N. Y. 1998), *aff'd*, 198 F.3d 360 (2nd Cir. 1999). The rules do not allow a person to intervene in order to raise new issues or issues which are outside the scope of those framed by the original parties to the main suit. *Time-Warner Entertainment Co., L.P. v. Federal Communications Comm'n*, 56 F.3d 151, 202 (D. C. Cir. 1995), *cert. denied*, 516 U.S. 1112

(1996) ("*Time-Warner*").

Mr. Gardner has raised in his motion papers an apparent allegation of his being improperly removed as Uintah Tribal Advocate by suggested actions of tribal court judges. MLI, pp. 1-2. Regardless of Defendants' evident lack of connection to such events, the removal issue is not raised in the Amended Complaint. The movant also hints at issues regarding Defendants' actions in failing to protect Uintah interests by not issuing certain regulations, by not providing certain irrigation, by planning to flood certain lands, and by issuing land patents to third parties in an unauthorized manner, among other general charges.. *Id.*, pp. 1-3. Defendants do not read the Amended Complaint or Plaintiffs' response to the motion to dismiss as raising any issues along those lines in this case. To the extent Plaintiff seeks to expand the suit with different issues, his application should also be denied.

II. PERMISSIVE INTERVENTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24(B) WOULD PREJUDICE THE RIGHTS OF THE ORIGINAL PARTIES AND SHOULD NOT BE ALLOWED.

Under Rule 24(b), permissive intervention is an "inherently discretionary enterprise" and requires the applicant to establish: (1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action. *E.E.O.C. v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). Rule 24(b) also directs the court to consider if the intervention will unduly delay or prejudice the adjudication of the rights lf the original parties.

The permissive intervention rule allows Mr. Gardner no additional basis for success on his motion that has not already been discussed and disposed of in Part I. of this memorandum.

He cannot justify such discretionary intervention on these facts.

CONCLUSION

For the foregoing reasons, Defendants pray that the Court deny Mr. Gardner's motion to intervene

Dated this 2nd day of April, 2004.

Respectfully submitted,

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By: _____/s/_____
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CERTIFICATE OF SERVICE

I, R. Anthony Rogers, hereby certify on this 2nd day of April, 2004, that I have caused the foregoing **Defendants' Memorandum of Points and Authorities in Opposition to Motion of Edson G. Gardner, *Pro Se*, to Intervene** to be served upon Edson G. Gardner, pro se, by United States mail, first-class postage prepaid, at his address:

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in addition to the electronic service upon Plaintiffs' attorney of record.

_____/s/_____
R. Anthony Rogers