IN THE 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.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO EDSON G. GARDNER'S MOTION FOR LEAVE TO INTERVENE

I. INTRODUCTION

On March 8, 2003, the Court issued a Minute Entry Order directing the parties in this action to file responses to putative *pro se* Intervenor Edward Gardner's Motion to Intervene within 11 days of the date of the Minute Entry Order. Mr. Gardner's Motion to Intervene was preceded by the filing of Plaintiffs complaint challenging the Defendants' alleged failure to properly implement the Ute Partition and Termination Act, enacted August 27, 1954, P.L. No. 671, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa (1982)) ("the UPA" or "the Act"). Plaintiffs filed their Amended Complaint on January 27, 2003. Defendants filed a Motion to Dismiss the Amended Complaint on May 20, 2003 and Plaintiffs responded with their Memorandum in Opposition on October 6, 2003. Defendants filed their Reply in Support of their Motion to Dismiss on November 11, 2003.

In his Motion to Intervene as a party Plaintiff in this federal civil action, Mr. Gardner

contends that he is entitled to intervene as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure and, in the alternative, that this Court should permit him to intervene pursuant to Rule 24(b). For the reasons more fully set forth, Mr. Gardner's Motion to Intervene should be denied.[1]

II. BACKGROUND

The First Cause of Action in Plaintiffs' Amended Complaint focuses on the 1937 IRA Constitution and By-Laws and the "share and share alike" agreement between the three Bands approved by Congress on August 21, 1951 by Congress. In their Second Cause of Action, Plaintiffs fault Defendants' failure to abide by provision in the Ute Tribe's 1937 Indian Reorganization Act ("IRA") Constitution guaranteeing that none of the three (3) consolidated Bands could take actions against the property rights of a single Band when the Bands became the modernly created entity known as the "Ute Indian Tribe" except in the manner(s) specified in the governing document. The Third Cause of Action is directed towards the misuse of an Act of Congress to eliminate significant and cognizable *pre-UPA* legal rights of the "should have been enrolled" Plaintiffs in violation of their right to Due Process.

Plaintiffs' Fourth Cause of Action raises a fraud scenario where Defendants are accused of proffering false and misleading facts to various Courts of Law to obtain favorable decisions for the Defendants and others not entitled to own property intended by Congress

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[1] Mr. Gardner describes himself as a "Uintah Mix-blood Indian" and an "AUN". "AUN" refers to the "Aboriginal Uintah Nation", a corporation established pursuant to the laws of the State of Utah. AUN list its address as 1219 E. 11000 S., Sandy, UT 840945473. The Amended Complaint does not address any interest claimed by the "AUN" or any of its members. Plaintiffs use "Uinta" in their brief rather than "Uintah".

for the sole benefit of the original terminated Mixed-Bloods. The Fourth Cause of Action is directed toward the 1937 Constitution and the "share and share alike" agreement and the manner whereby Defendants allowed the UPA to overtake and eliminate these two "protective devices" intended to protect Plaintiffs' *pre-UPA* legal interest.

Plaintiffs' Fifth Cause of Action seeks to vindicate injuries sustained when the Defendants breached the "share and share alike" agreement, approved by Act of Congress, and for breach of the UPA in that the Act was misused to eliminate valuable legal rights of all Plaintiffs. The Sixth Cause of Action questions the manner in which the Act was not properly implemented by Defendants to the detriment of Plaintiffs' 5th Amendment Due Process Rights. The Seventh Cause of Action alleges a breach of Defendants' federal trust responsibility toward the Plaintiffs' to insure the vote taken at a March 31, 1954 General Council meeting to expel the original 490 would not breach the 1937 IRA Constitution and By-Laws of the Ute Indian Tribe. Plaintiffs allege that the breach of the 1937 Constitution caused the passage of the Act and that Defendants engaged in a massive coverup to hide their failure to enforce the federally-approved tribal constitution by acts of fraud and other obstructionist tactic so the statute of limitations would run out.

Plaintiffs' Eight Cause of Action seek redress from Defendants' alleged failure to prevent the commingling of vested *pre-UPA* land and other valuable rights and the failure of the United States to provide Plaintiffs with an accounting of their vested property.

III. ARGUMENT

A. INTERVENTION AS A MATTER OF RIGHT.

Rule 24(a)(2) states:

> **(a) 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 existing parties.

Intervention under Rule 24(a) requires "(1) timeliness; (2) a cognizable interest; (3) impairment of that interest; and (4) lack of adequate representation by existing parties" to protect that interest. *Smoke v. Norton*, 252 F.3d 468, 470 (quoting *Williams & Humbert, Ltd. v. W & H Trade Marks, Ltd.*, 840 F2d 72, 74 (D.C. Cir. 1988)). A motion to intervene as a matter of right under Rule 24(a) can properly be denied if the applicant fails to satisfy any of these requirements. *Securities & Exchange Comm'n v. Prudential Securities, Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998). In addition to the requirements for intervention set forth in Rule 24(a)(2), the D.C. Circuit has held that ". . . a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution. *The Fund for Animals, Inc. v. Norton,* 322 F.3d 728, 732 (D.C. Cir. 2003); *Military Toxics Project v. EPA*, 146 F.3d 948, 953 (D.C. Cir. 1998). To establish standing under Article III, a prospective intervenor must show injury-in-fact, causation and redressability. *Fund for Animals*, 322 F.3d at 733.

1. GARDNER DOES NOT SPECIFY A COGNIZABLE INTEREST IN THIS CIVIL PROCEEDING.

In his Memorandum in Support of Motion for Leave to Intervene, Mr. Gardner does not address how he meets the D.C. Circuit's requirement that a potential intervenor demonstrate Article III standing. In discussing the second requirement of Rule 24(a)(2), that the potential intervenor has, ". . .an interest relating to the property or transaction which is

the subject of the action," Gardner identifies the individualized interest he seeks to protect as his right serve as a Ute Tribal Advocate, his right to demand that the Defendants recognize the legal status of Uinta mix-blood Indians in manner required by federal law, his right to full protection of due-process of the Fifth Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution.[2] Putative Intervenor's Motion for Leave to Intervene. These interest are claimed in conclusory terms without accompaniment of the specific legally cognizable interest in the resolution of any disputes alleged in each of the Causes of Action summarized above. Further, Gardner offers nothing to demonstrate an injury-in-fact from any action taken by the Defendants in this regard.

The Third Circuit stated in *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987):

> At the same time, however, to have an interest sufficient to intervene as of right, "the interest must be a 'a legal interest as distinguished from interest of a general and indefinite character'" *United States v. American Telephone and Telegraph Co.,* 642 F.2d 1285, 1292 (D.C. Cir. 1980), *quoting Radford Iron Co. v. Applachian Elec. Power Co.,* 62 F.2d 940, 942 (4th Cir. 1933).

In the Background section of his Memorandum in Support of Motion for Leave to Intervene, Gardner identifies several interest as bases for intervention in this lawsuit. He cites an interest in 25 U.S.C. § 177 and claims that this law cannot abrogate any valid leases, permits or licenses. Without any elaboration on whether he currently holds putative or actual interest in valid leases, permits or licenses, he cannot establish an interest sufficient to intervene as

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[2] Mr. Gardner cites as other grounds for his intervention in the instant case the Commerce Clause of the United States Constitution, failure to issue regulations governing Uinta Mix-blood Indian traders and failure to provide irrigation for Uinta Mix-blood Indian farmers. These matters are not in dispute in the Amended Complaint and will not be addressed here.

of right. Gardner also makes broad reference to the "Uinta Valley treaties", "Treaty of Guadalupe Hidalgo", "Acts of Congress" and an "Executive Order of October 3, 1861". Promoting the continued recognition of Treaties, Acts of Congress and Executive Orders as well as adherence by the Defendants to these subjects is clearly a worthy goal, but Gardner does not explain how the existence of an adjudication on issues dealing with the alleged incorrect implementation of the UPA may as a practical matter impair or impede the his concerns toward promoting the broad matters encompassed within these subjects.

In the Argument section of his Memorandum, p. 2, Gardner cites an interest in occupying the Uinta Valley to the exclusion of others because of his "right as known original Indian title or aboriginal title." He cites an interest in a Department of Interior plan to construct oil and gas lease that would flood Uinta land protected by the Uinta Valley Treaty. Gardner's claimed interest in protecting his rights to original Indian title or aboriginal title are so general in character and unsupported by factual showing that it cannot be an independent basis for intervention as of right under Rule 24(a). Similarly, his claimed interest in plans by the federal government that would result in the flooding of Uinta land rise only to the level of interests that are general and indefinite in nature and character. For these reasons, Gardner has no standing under Article III of the Constitution.

2. GARDNER'S MOTION TO INTERVENE IS UNTIMELY.

Intervention, both as a matter of right and permissive, requires that the application be timely. Fed. R. Civ. P. 24(a), (b). An untimely motion to intervene "must be denied." *NAACP v. New York*, 413 U.S. 345, 365 (1973). "Timeliness is measured from when the prospective intervenor knew or should have known that any of its rights could be directly

affected by the litigation." *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003). Whether a motion to intervene is timely is to be evaluated based on all the circumstances present in the case, including "the time elapsed since the inception of the suit, the purpose for which intervention is sought, 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 at 471 (quoting *United States v. AT & T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). Timeliness "is to be determined by the court in the exercise of its sound discretion[.]" *Associated Builders and Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999)(quoting *NAACP*, 413 U.S. at 366).

It is uncontroverted that Mr. Gardner was well aware that he was listed as a plaintiff on the Amended Complaint filed on January 27, 2003.[3] Accepting this date for the purposes of evaluating whether Gardner was aware on that date that this case was pending, Gardner had almost 1 year to file his motion.[4] Mr. Gardner offers no explanation for his delay in filing his Motion to Intervene other than to make the bald assertion that his Motion was timely. Viewed more stringently, the original Complaint was filed on November 4, 2002 and the Court ordered the parties to respond to Gardner's Motion on March 8, 2004, a period of almost 16 months. There is no doubt that the time elapsed since the inception of the suit is unreasonable under any circumstances.

Next, the purpose Gardner seeks to intervene in this action are not germane to the

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[3] Mr. Gardner did not agree to the terms establishing an attorney-client relationship between Plaintiffs and their Counsel of Record and, thus, he is not a plaintiff in this action although listed as such.

[4] The Motion to Intervene was sent for filing to the Court on or about January 1, 2004.

issues raised by Plaintiffs in their Causes of Action. Plaintiffs' Amended Complaint revolves around the UPA, the 1937 IRA Constitution and Bylaws of the Ute Indian Tribe, the "share and share alike" agreement approved by Congress and other laws intended to protect the *pre*-IRA rights vested in the Uinta Band and in the individual terminated members of the Band: he has not sufficiently articulated a need for intervention as a means of preserving his rights in those "global" generalized concepts cited in his Memorandum.

The probability of prejudice to those already parties in the case is great. Both Plaintiffs and Defendants completed their briefing on Defendants' Motion to Dismiss on November 26, 2003. Mr. Gardner's Motion to Intervene comes 36 days after the close of briefing if January 1, 2004 is used as the date the Motion to Intervene was sent for service on the parties and for filing with the Clerk of the Court. Gardner, the putative intervenor, offers no explanation of why he waited over a month after briefing was closed to file his Motion. Gardner has not cited any case in which the Circuit Court of Appeals for the District of Columbia has overruled a timeliness challenge to a motion to intervene in which the applicant inextricably failed to file his motion well after the time he became aware that his name was listed on the Amended Complaint that purportedly implicated his interest and the date the parties completed their briefing on defendants' motion to dismiss. Gardner does not deny that he did not know that Plaintiffs had filed the Amended Complaint on January 27, 2003. If the Motion to Intervene is granted, Gardner will have succeeded in expanding the scope of the legal and factual issues well beyond those already included in Plaintiffs' Amended Complaint. This expansion will require both parties in this action to re-engage themselves in briefing to address the drastic departure from those legal and factual matters

already briefed Considering all of the circumstances in this case, the Motion to Intervene is untimely.[5]

B. PERMISSIVE INTERVENTION.

Federal Rule of Civil Procedure 24(b) provides that a non-party "may be permitted to intervene" when a non-party's claim or defense and the main action have a "question of law or fact in common." Fed. R. Civ. P. 24(b) "As its name would suggest, permissive intervention is an inherently discretionary enterprise." *E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). "In Order to litigate a claim on the merits under Rule 24(b)(2), the putative intervenor must ordinarily present: (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." *Id.* Courts considering permissive intervention are instructed to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Fed. R. Civ. P. 24(b)(2).

As stated, the law of this Circuit requires a putative intervenor to present an independent ground for subject matter jurisdiction. *Id.* Mr. Gardner argues that he may intervene pursuant to Rule 24(b) by asserting 28 U.S.C. § 1331 as an independent ground for subject matter jurisdiction over his generalized claims arising "under the Constitution, laws, and treaties of the United States." Memorandum in Support of Motion for Leave to Intervene, p. 5. He also cites 28 U.S.C. § 2201 as providing an independent ground for

[5] Other than unsupported and bare conclusory statements about the adequacy of representation requirement, Gardner cites no basis for a legitimate assertion that there is a lack of adequate representation by the existing parties.

subjection matter jurisdiction for a declaration of "rights and obligation under Purchase or grants of lands from Indian Trade and Intercourse Act, 25 U.S.C. 177." *Id.* As set forth above, Gardner claims interest are couched in conclusory terms without accompaniment of the specific legally cognizable interest in the resolution of any of the Causes of Action alleged by Plaintiffs in their Amended Complaint. Gardner, in effect, has no legal claim that involves either Plaintiffs or Defendants in any way remotely related to the scope of Defendant's authority to implement the UPA as intended by Congress, the main issue in Plaintiffs' Amended Complaint.

Further, Plaintiffs are not litigating any issues involving the "Indian Trade and Intercourse Act" and its abrogation of any valid leases, permits or licenses located in lands in the Uinta Valley. Plaintiffs are arguing that Defendants caused the loss of *pre*-UPA vested rights of individual members of the Uinta Band who were terminated by a faulty implementation of the UPA. On the other hand, Gardner seeks permission to intervene because he believes that a variety of laws, statutes and Acts of Congress *other than* the UPA somehow affect his vaguely defined legal interest. This is not, however, a proper justification for permissive intervention. Because Gardner cannot demonstrate that this Court has jurisdiction over any claim or defense he wishes to offer and because any claim or defense he might offer is unrelated to the claims asserted by Plaintiffs, he has not and cannot satisfy the requirements of Rule 24(b).

Gardner's entry by intervention into this case would confuse and not contribute to the development of the underlying factual and legal issues related to the Causes of Action alleged by Plaintiffs in their Amended Complaint. A reading of Gardner's pleadings reflects

his attempt to inject generalized and unsupported factual and legal issues that bear little or no relevance to the UPA and the manner in which the Defendants are alleged to have implemented this Act of Congress. Gardner may possess unique knowledge and personal experience with regard to Uinta Mix-blood Indian rights. However, it is obvious that he does not have a complete understanding of those basic factual and legal issues underlying Plaintiffs' Causes of Action. In this instance, the Court must find that the burden of an additional party will likely cause undue delay and prejudice to the adjudication of the rights of the original parties.

IV. CONCLUSION

For all of the above stated reasons, Mr. Gardner's Motion to Intervene should be denied.

DATE: March 19, 2004

Respectfully submitted,

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Dennis G. Chappabitty, OBA #1617
Attorney for Plaintiffs

PROOF OF ELECTRONIC SERVICE AND SERVICE BY UNITED STATES MAIL

I, Linda C. Amelia, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is P.O. Box 292122, Sacramento, CA 95829.

On March 19, 2004, a true and correct Adobe PDF version of **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO EDSON G. GARDNER'S MOTION FOR LEAVE TO INTERVENE** was served by electronic means upon:

R. ANTHONY ROGERS
General Litigation Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 2004

On this same date, I served on each party listed below a true and correct paper copy of the same document by placing true and correct copies thereof in sealed envelopes, first-class postage thereon fully prepaid and depositing same for collection by the United States Postal Service at Sacramento, CA addressed as follows:

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