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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Ruby Gatling,
10 Plaintiff,

No. CV-15-08070-PCT-SMM

ORDER

11 v.

12 United States of America, et al.,
13 Defendants.
14

15 Pending before the court is the Navajo Nation's (the "applicant") Motion for
16 Leave to Intervene as Defendant as of right pursuant to Fed. R. Civ. P. Rule 24(a)(2).
17 (Doc. 47.) Plaintiff does not oppose the motion. Id. Defendant United States of America,
18 who opposes the motion, has responded. (Doc. 50.) The Court has reviewed the briefing
19 and makes the following ruling.

20 **I. BACKGROUND**

21 This case was originally filed in April of 2015 based upon the Federal Torts Claim
22 Act 28 U.S.C. § 2674, the Indian Self-Determination and Education Assistance Act of
23 1975 25 U.S.C. § 450, et seq. "(ISDEAA), and the doctrine of Bivens v. Six Unknown
24 Narcotics Agents, 403 U.S. 388 (1971). (Doc. 1.) On August 24, 2015, Defendant United
25 States subsequently filed a motion to dismiss for lack of jurisdiction and for failure to
26 state a claim (Doc. 12). On January 13, 2016, the Court granted in part and denied in part
27 Defendant United States motion to dismiss. (Doc. 23.) On April 1, 2016, Plaintiff filed an
28 amended complaint (Doc. 39.) On April 29, 2016, Defendant United States filed a motion

1 to dismiss the amended complaint (Doc. 45). On May 24, 2016, the Navajo Nation filed a
2 motion to intervene. (Doc. 47.) On July 1, 2016, the Court granted Defendant United
3 States' motion to dismiss the amended complaint. (Doc. 52.)

4 Remaining in the case are 5 claims against the United States. They are: (1) False
5 Imprisonment for the actions of Yazzie; (2) Negligent Supervision for the alleged False
6 Imprisonment committed by Yazzie; (3) Negligent Supervision for the failure of the
7 Individual Defendants to protect Plaintiff from unreasonable uses of force by other
8 Individual Defendants; (4) Negligent Supervision for the negligence of Individual
9 Defendants in leaving Plaintiff in solitary confinement when she was in need of
10 immediate medical attention; and (5) Negligent Supervision for the failure of Individual
11 Defendants to administer aid to Plaintiff when her injuries had been directly caused by
12 the Individual Defendants. (Id.)

13 The Navajo Nation and the United States are parties to a 638 contract under the
14 Indian Self-Determination and Education Assistance Act. (See Docs. 23; 52 (discussing
15 the relationship between United States and Indian tribes under these contracts)).

16 **II. STANDARD OF REVIEW**

17 Federal Rule of Civil Procedure 24(a) states:

18 On a timely motion, the court must permit anyone to intervene
19 who...claims an interest relating to the property or transaction that is the
20 subject of the action and is so situated that disposing of the action may as a
21 practical matter impair or impede the movant's ability to protect its interest,
22 unless existing parties adequately represent that interest.

23 Fed.R.Civ.P. 24(a)(2). Intervention as of right under Rule 24(a) requires satisfaction of a
24 four-part test: (1) the applicant must file a timely motion; (2) the applicant must have
25 "significantly protectable" interest related to the subject matter of the action; (3) the
26 disposition of the action may practically impair or impede the applicant's ability to
27 protect that interest; and (4) the interest must not be adequately represented by the
28 existing parties in the lawsuit. Wilderness Soc. V. U.S. Forest Serv., 630 F.3d 1173, 1177
(9th Cir. 2011). The party seeking to intervene bears the burden of showing all four
requirements for intervention have been met. United States v. City of Los Angeles, Cal.,

1 288 F.3d 391, 397 (9th Cir. 2001).

2 Rule 24(a) is construed “liberally in favor of proposed intervenor” with the court
3 taking into account practical considerations. Sw. Ctr. for Biological Diversity v. Berg,
4 268 F.3d 810, 818 (9th Cir. 2001). When ruling on a motion to intervene as a matter of
5 right, the court accepts all of the applicant’s non-conclusory allegations as true. Id. at
6 819.

7 **III. DISCUSSION**

8 **A. Intervention as of Right**

9 *Timeliness*

10 This court evaluates three factors to determine whether a motion to intervene is
11 timely: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the
12 prejudice to other parties; and (3) the reason for and length of the delay.” United States
13 ex rel. McGough v. Covington Technologies Co., 967 F.2d 1391, 1394 (9th Cir.1992)
14 (quotations omitted). Delay is measured from the date the proposed intervenor should
15 have been aware that its interests would no longer be protected adequately by the parties,
16 not the date it learned of the litigation. Officers for Justice v. Civil Serv. Comm'n of San
17 Francisco, 934 F.2d 1092, 1095 (9th Cir.1991). Although the length of the delay is not
18 determinative, any substantial lapse of time weighs heavily against intervention. Id. If the
19 court finds that the motion to intervene was not timely, it need not reach any of the
20 remaining elements of Rule 24. United States v. Oregon, 913 F.2d 576, 588 (9th
21 Cir.1990), cert. denied, 501 U.S. 1250, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991).

22 Applicant seeks to intervene a full twelve months after this action was
23 commenced. There has been a motion to dismiss, an amended complaint, a renewed
24 motion to dismiss parts of the amended complaint, and a granting of the renewed motion
25 to dismiss.

26 Parties have been under the impression that the applicant, Navajo Nation, has
27 purposefully preserved sovereign immunity in relation to this case. If the applicant were
28 to be let in, many jurisdictional and immunity issues would arise, and there would be a

1 great delay in discovery as well as a distinct change in how both parties would approach
2 the case.

3 Applicant has not provided a reason for the delay. When the Court granted the
4 first motion to dismiss in January of 2016, the Individual Defendants were dismissed
5 from the action. This indicates that the Navajo Nation had the same reason to intervene
6 then, but delayed until now.

7 Defendant United States did not oppose the motion to intervene based on the
8 timeliness factor. However, the Court nonetheless finds that the Navajo Nation's Motion
9 to Intervene is untimely based on the late stage of the proceeding, the significant
10 prejudice to the other parties, and the lack of reason for the delay.

11 *Significantly Protectable Interest*

12 To demonstrate a significantly protectable interest, the intervenor must establish
13 that (1) its interest is protected under some law and (2) there is a relationship between
14 that legally protected interest and the plaintiff's claims. Sierra Club v. U.S. E.P.A., 995
15 F.2d 1478, 1484 (9th Cir. 1993) abrogated on other grounds, Wilderness Soc. V. U.S.
16 Forest Serv., 630 F.3d 1173 (9th Cir. 2011). By allowing a party with a practical interest
17 to intervene, courts prevent or simplify future litigation that otherwise might occur. See
18 Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1493 (9th Cir. 1995).
19 "[A] party has a sufficient interest for intervention purposes if it will suffer a practical
20 impairment of its interests as a result of the pending litigation." California ex rel. Lockyer
21 v. United States, 450 F.3d 436, 441 (9th Cir. 2006). A sufficient protectable interest in an
22 action for purposes of intervention is a "practical, threshold inquiry." City of Los
23 Angeles, 288 F.3d at 398.

24 The Navajo Nation argues that it has an interest in the United States defending all
25 of Plaintiff's claims. Applicant argues that their interest is protected under the relevant
26 638 contract and that the United States is not following through on their contractual
27 obligations. (Doc. 47 at 3.) Applicant seeks to intervene to uphold these alleged
28 contractual obligations. The Court finds that the United States did not breach the contract

1 because the contract contemplated who the United States must defend when she or he
2 commits an intentional tort. The Court previously found that an SLEC was required in
3 order for the United States to defend those intentional tort actions by a law enforcement
4 officer. (Doc 52.) Section 2680(h) of the FTCA states:

5 Any claim arising out of assault, battery, false imprisonment, false arrest,
6 malicious prosecution, abuse of process, libel, slander, misrepresentation,
7 deceit, or interference with contract rights: *Provided*, That, with regard to
8 acts or omissions of investigative or law enforcement officers of the United
9 States Government, the provisions of this chapter and section 1346(b) of
10 this title shall apply to any claim arising, on or after the date of the
11 enactment of this proviso, out of assault, battery, false imprisonment, false
12 arrest, abuse of process, or malicious prosecution. *For the purpose of this*
13 *subsection, “investigative or law enforcement officer” means any officer of*
14 *the United States who is empowered by law to execute searches, to seize*
15 *evidence, or to make arrests for violations of Federal law.*

16 28 U.S.C. § 2680(h). (emphasis added).

17 “The Deputation Agreement Between Office of Justice Services and the Navajo
18 Nation” indicates that the parties did consider clarifying the confusion about which
19 officers should be treated as “federal” law enforcement officers:

20 The parties further expressly recognize the manifest intent of the Indian
21 Law Enforcement Reform Act to eliminate the uncertainties that previously
22 resulted in the reluctance of various law enforcement agencies to provide
23 services in Indian country for fear of being subjected to tort and civil rights
24 suits as a consequence of the enforcement of carrying out in Indian country
25 of certain federal law. To eliminate such concerns, pursuant to the authority
26 granted by 25 U.S.C. § 2804(a) and (f), *a Tribal Law Enforcement Officer*
27 *who is deputized by the Bureau of Indian Affairs Special Law Enforcement*
28 *Commission will be deemed an employee of Department of Interior for*
purposes of the Federal Torts Claim Act while enforcing or carrying out
laws of the United States covered by this deputation agreement, to the
extent outlined in this agreement.

(Doc. 45-2 at 32.) (emphasis added). An SLEC gives the deputized Tribal Law
Enforcement Officer the power to enforce “all Federal laws applicable within Indian
country” (Doc. 45-2 at 34.) Further, in characterizing officers holding SLECs, the
relevant contract indicates: “Officers holding SLECs are treated as BIA police officers

1 for enforcing Federal Laws.” (Doc. 45-2 at 36.) Indeed, under the section in the contract,
2 “Federal Liability for SLEC Holders” it states: “The SLEC grants the holder specific
3 Federal Authority and responsibility, and as a result places a high level of liability risk on
4 the U.S. government.” (Doc. 45-2 at 48.)

5 The Court granted Defendant United States’ motion to dismiss the claims for and
6 arising out of the intentional torts allegedly committed by Defendants Ashley, Williams,
7 and Greyeyes because it found that those officers did not have SLECs and therefore, were
8 not federal law enforcement officers subject to the intentional tort exception of the
9 FTCA. (Doc. 45.) Defendant Yazzie did have an SLEC, and accordingly, the United
10 States will defend the claims for and arising out of his alleged intentional tort.

11 Based on this, the Court finds that the United States is not foregoing an obligation
12 under the relevant 638 contract because they are not required to defend individual
13 defendants without an SLEC that have committed an intentional tort. In conclusion, the
14 Court finds no interest that is protected by law and therefore no impaired ability to
15 protect that interest.

16 *Inadequate Representation by the United States*

17 In determining whether an applicant’s interests are adequately represented, the
18 Court must consider (1) “whether the interest of a present party is such that it will
19 undoubtedly make all intervenor’s arguments,” (2) “whether the present party is capable
20 and willing to make such arguments,” and (3) “whether the intervenor would offer any
21 necessary elements to the proceedings that other parties would neglect.” State of Cal. v.
22 Tahoe Reg’l Planning Agency, 792 F.2d 775, 778 (9th Cir. 1986) (citations omitted).

23 This Motion to Intervene fails on factors 1 and 2. Furthermore, the 638 contract in
24 question is governed by the Contract Disputes Act. See 25 U.S.C. 450m-1. The ISDEAA
25 mandates that the CDA governs disputes between tribes and the United States over 638
26 contracts. Id. The CDA specifically provides that the tribe file an administrative claim
27 and then file an action in the federal court of claims or federal district court. Id. at (a),(d).
28 The Navajo Nation is able to adequately represent their claims through this method, and

1 therefore it is not necessary that they intervene as a Defendant in this action.

2 **B. Permissive Intervention**

3 Permissive intervention is available to “anyone...who has a claim or defense that
4 shares with the main action a common question of law or fact” when the intervention will
5 not “unduly delay or prejudice the adjudication of the original parties’ rights.”
6 Fed.R.Civ.P. 24(b). Whether to permit intervention in such circumstances is within the
7 Court’s discretion. Id. Here, the applicant is not likely to present arguments that respond
8 and relate directly to Plaintiff’s lawsuit. Rather they are issues relating to applicant’s
9 contract with the United States. Thus, the Court will not allow the applicant to
10 permissively intervene pursuant to Rule 24(b).

11 **IV. CONCLUSION**

12 Accordingly,

13 **IT IS HEREBY ORDERED DENYING** the Navajo Nation’s Motion for Leave
14 to Intervene as Defendant (Doc. 47.)

15 Dated this 5th day of July, 2016.

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Honorable Stephen M. McNamee
Senior United States District Judge