

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2004 WL 1774556 (D.Or.)
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City of Eugene v. IGI Resources, Inc.D.Or.,2004.Only the Westlaw citation is currently available.

United States District Court,D. Oregon.
CITY OF EUGENE, an Oregon municipal corporation, Plaintiff,
v.
IGI RESOURCES, INC., an Idaho corporation authorized to conduct business in Oregon, Defendant.
No. Civ. 04-492-HO.

Aug. 5, 2004.

[Jens Schmidt](#), Harrang Long Gary Rudnick, PC, Eugene, OR, for Plaintiff and Counter Defendant.

[Bruce A. Rubin](#), Miller Nash LLP, Portland, OR, for Defendant.

[Kevin M. Koliner](#), Miller Nash LLP, Portland, OR, for Defendant and Counter Claimant.

[Eric R. Todderud](#), Heller Ehrman White & McAuliffe LLP, Portland, OR, for Amicus.

ORDER

[HOGAN, J.](#)

*1 Weyerhaeuser Company seeks to intervene as of right or with permission in this lawsuit filed by the City of Eugene to collect revenue taxes allegedly owed by IGI Resources, Inc. (IGI), a vendor of natural gas operating in the City.

Background

Weyerhaeuser buys natural gas from IGI under commodity purchase contracts. Weyerhaeuser received an invoice in the amount of \$278,963.32 from IGI on March 4, 2004 for "Eugene Tax Paid for January 2000-March 2002." Exhibit to Meyer Aff. Weyerhaeuser alleges in its proposed answer and counterclaim that it may be liable for all or a portion of the City's tax imposed on IGI. Weyerhaeuser's Director of Energy Management avers that Weyerhaeuser disputed its liability to IGI in a letter dated April 27, 2004. Weyerhaeuser's proposed counterclaim alleges that Weyerhaeuser is entitled to a declaration that the

City's tax on IGI's revenues is unlawful.

Discussion

I. Intervention as of Right

A person has a right to intervene when his application is timely, he has a significantly protectable interest related to the property or transaction involved in the lawsuit, disposition of the lawsuit may adversely affect this interest unless he can intervene, and the existing parties do not adequately represent his interest. [Fed.R.Civ.P. 24\(a\)\(2\)](#); [Arakaki v. Cayetano](#), 324 F.3d 1078, 1083 (9th Cir.2003). Plaintiff concedes that Weyerhaeuser's application is timely. At a minimum, Weyerhaeuser claims a monetary interest protected by the law of contracts. Because Weyerhaeuser does not concede its contractual liability for taxes imposed on IGI's sales, it is a fair question whether Weyerhaeuser's interest and the transaction involved in the lawsuit are sufficiently related to support intervention as of right. Cf. [United States v. Union Elec. Co.](#), 64 F.3d 1152, 1162 (8th Cir.1995) (intervention as of right may be based on interest that is contingent upon outcome of lawsuit in which applicant seeks to intervene).

Weyerhaeuser argues that it if cannot intervene, its interest may be impaired by the precedential effect of the disposition of this lawsuit. *Stare decisis* may satisfy the impairment requirement if the pending litigation is a case of first impression and the applicant can show that the precedential effect is clear. [Sierra Club v. Glickman](#), 82 F.3d 106, 109 (5th Cir.1996); [Green v. United States](#), 996 F.2d 973, 977 (9th Cir.1993). Weyerhaeuser does not address these factors, but simply argues that if it cannot intervene, it will be prevented from presenting its arguments against the tax. That is true of every unsuccessful applicant.

Finally, Weyerhaeuser does not demonstrate that IGI will not adequately represent its interest. Although IGI has billed Weyerhaeuser for the tax, IGI and Weyerhaeuser have the same objective in this litigation, so that a weak presumption of adequate representation is created. [Arakaki](#), 324 F.3d at 1086. Courts

consider whether the interest of a party is such that it will undoubtedly make all of the applicant's arguments; (2) whether the party is capable and willing to make such arguments; and (3) whether the applicant would offer any necessary elements to the proceeding that the party would neglect. *Id.* Weyerhaeuser recites these factors, but provides no analysis. Weyerhaeuser argues only that because IGI expects reimbursement from Weyerhaeuser, IGI may have less incentive to litigate the legality of the tax, so "it cannot be said that IGI 'undoubtedly' will pursue every argument against" the tax. Weyerhaeuser's Memo. at 11. This is speculation. Weyerhaeuser has provided no information upon which to evaluate the adequacy of representation using the factors identified in *Arakaki*. Weyerhaeuser's letter to IGI disputing its contractual liability should give IGI plenty of incentive to litigate, especially because the tax is imposed directly against IGI.

*2 Weyerhaeuser has not made a sufficient showing that it has a protectable interest related to the main action that may be impaired if it cannot intervene, and that IGI will not adequately represent its interest. Weyerhaeuser has not demonstrated it has a right to intervene.

II. Permissive Intervention

Upon timely application an applicant may be permitted to intervene when its claim or defense and the main action have a question of law or fact in common, and if it also proves an independent basis for jurisdiction over its claims. [Fed.R.Civ.P. 24\(b\)\(2\)](#); [Donnelly v. Glickman, 159 F.3d 405, 412](#) (9th Cir.1998). Plaintiff concedes that Weyerhaeuser's defenses and counterclaim share common questions of law or fact with the main action. The City disputes Weyerhaeuser's assertion that diversity jurisdiction provides an independent jurisdictional basis for permitting Weyerhaeuser to intervene. The requirement of an independent jurisdictional ground applies to the proposed permissive intervention in the first instance, and to causes of action asserted by the applicant. [Blake v. Pallan, 554 F.2d 947, 956](#) (9th Cir.1975).

Independent grounds for jurisdiction over Weyerhaeuser's defenses and counterclaim are lacking be-

cause Weyerhaeuser lacks standing. There is no allegation in the notice of removal or Weyerhaeuser's proposed answer that Weyerhaeuser may be directly liable to the City for the tax (City's first claim), or that Weyerhaeuser has violated a municipal ordinance (City's second claim). The City's third claim and Weyerhaeuser's counterclaim seek declarations concerning the legality of the tax. Claims for declaratory relief between the City and Weyerhaeuser are not ripe. Jurisdiction to award declaratory relief depends on the existence of a substantial controversy of sufficient immediacy. [Aydin Corp. v. Union of India, 940 F.2d 527](#) (9th Cir.1991). Weyerhaeuser's assertion that in the future it might be held contractually liable to reimburse IGI for the tax (a proposition it admittedly disputes) is speculative. See [Aydin, 940 F.2d 527](#) (enforceability of yet to be awarded arbitral award not of sufficient immediacy to satisfy case and controversy requirement of Article III, where applicant sought declaratory relief). The tax may be declared unlawful in this proceeding, and Weyerhaeuser may prevail in a subsequent proceeding to determine contractual liability. Weyerhaeuser has not met its burden to allege facts demonstrating imminent injury. See [Schmier v. United States Court of Appeals for the Ninth Circuit, 279 F.3d 817, 821](#) (9th Cir.2002).

Weyerhaeuser may represent its interests in this lawsuit as amicus curiae.

Conclusion

For the foregoing reasons, Weyerhaeuser's motion to intervene [# 11] is denied; Weyerhaeuser may participate in this lawsuit as amicus curiae.

IT IS SO ORDERED.

D.Or.,2004.

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Briefs and Other Related Documents ([Back to top](#))

- [2004 WL 3338089](#) (Trial Pleading) Answer, Affirmative Defenses, and Counterclaims (May 2004) Original Image of this Document (PDF)
- [6:04cv00492](#) (Docket) (Apr. 09, 2004)

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- [3:04cv00492](#) (Docket) (Apr. 09, 2004)

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