LIST OF ATTACHMENTS

Attachment 1	Southern Utah Wilderness Alliance v. Bureau of Land Mgmt., No. 2:96CV836C (D. Utah July 20, 2000), slip opinion
Attachment 2	Transcript of First Deposition of Leonard Huarte, March 5, 2008 (excerpts)
Attachment 3	Transcript of Second Deposition of Leonard Huarte, June 9-10, 2010 (excerpts)
Attachment 4	Transcript of Bernard Pedersen, June 9-10, 2010 (excerpts)
Attachment 5	Transcript of Ron Chegwidden, March 5, 2008 (excerpts)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,	:	
Plaintiffs,	:	ORDER
vs.	:	
BUREAU OF LAND MANAGEMENT, et al.,	:	Civil No. 2:96-CV-836C
Defendants.	:	

The Southern Utah Wilderness Alliance ("SUWA") filed this action claiming that San Juan County, Garfield County, and Kane County conducted unauthorized road construction on dirt roads across land managed by the Bureau of Land Management ("BLM") in an effort to render the lands ineligible for wilderness designation and that the BLM failed to halt the illegal road construction. This matter is before the court on: (1) the State of Utah and the Utah School and Institutional Trust Lands Administration's (collectively "the State") motion to intervene as parties plaintiff, and (2) the United States' motion to dismiss the counterclaims filed against it by counterclaim plaintiffs San Juan County and Garfield County (collectively "the Counties"). On April 3, 2000, the court conducted a hearing on these motions. Having fully considered the arguments of counsel, the submissions of the parties and applicable legal authorities, the court denies the State's motion to intervene and grants the United States' motion to dismiss the counterclaims.

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Background

The factual and procedural background of this much-litigated case is complex; the court will set forth only the background that is relevant to its rulings on the motions before the court.

Analysis

I. Motion to Intervene

On December 12, 1996, the State filed a motion for leave of the court to intervene as parties plaintiff either as a matter of right, pursuant to Federal Rule of Civil Procedure 24(a)(2), or with the court's permission, pursuant to Federal Rule of Civil Procedure 24(b).

A. Intervention as a Matter of Right

To intervene as a matter of right, an applicant must:

> (1) submit a timely application to intervene, (2) demonstrate an interest in the property or transaction [that is the subject of the underlying lawsuit], (3) show that the intervenor's ability to protect such interest might be impaired, and (4) demonstrate that the interest is not adequately represented by the existing parties.

In re Kaiser Steel Corp., 998 F.2d 783, 790 (10th Cir. 1993). The first three elements are met: First, the State's application to intervene was filed in 1996, early in the litigation; second, the State has an interest in the subject of the lawsuit -- the construction and maintenance of roads across land managed by the BLM; and third, the decision reached in this case could affect the State's road construction and maintenance activities in other areas managed by the BLM. However, the fourth element is not satisfied; the State has not demonstrated that its interest is not adequately represented by the Counties.

The State argues that because the Counties do not have jurisdiction over the entire state highway system and are not responsible to ensure that trust lands can be accessed, the Counties and the State's interests differ. This argument is not persuasive. Although the State's

motivations may be broader than the Counties, the positions taken by the Counties completely align with the State's positions on the issues. The Counties have vigorously litigated the issues raised in this case and there is no evidence that the Counties will not continue to litigate this matter fully.

Because the final element is not met, mandatory intervention is not warranted.

B. Permissive Intervention

An applicant unable to meet the criteria of intervention as a matter of right may still be permitted to intervene, pursuant to Rule 24(b), if: (1) the application is timely; (2) the applicant's claim or defense and the main action have a question of law or fact in common; and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. See Fed. R. Civ. P. 24(b).

Again, the State does not satisfy all of the elements necessary to intervene. The first two elements are met: The application was timely and the State, if permitted to intervene, would raise a question of law in common with the action before the court. However, the third element is not satisfied. Allowing the State and to intervene as a plaintiff would unduly prejudice the adjudication and complicate the issues raised by SUWA.

The State seeks to intervene as a plaintiff, even though its position on the issues is directly opposite to that of SUWA.[1] Having SUWA and the State both appear as plaintiffs, as if they were on the same side of the issues, is certain to cause confusion and complications. Also, allowing the State to intervene would unduly prejudice SUWA by expanding the scope of the litigation from the few road segments identified in the complaint to other roads that traverse

[1]The State explains that it chose to intervene as plaintiffs, rather than defendants, because it is opposes the positions taken by the BLM.

federal land.

Accordingly, the State's motion to intervene is denied.

II. Motion to Dismiss Counterclaims

The United States has filed claims against the Counties alleging that the road work performed on the road segments at issue constituted a trespass on federal lands. In addition to filing an answer to the United States' claims, the Counties filed counterclaims against the United States alleging: (1) ultra vires actions, (2) violation of the separation of powers, (3) mandamus, (4) violation of the Administrative Procedure Act ("APA"), (5) violation of the Tenth Amendment, (6) violation of Congressional moratorium, and (7) to quiet title. The Counties brought the first six counterclaims pursuant to the APA;[2] the counterclaims to quiet title are brought pursuant to the Quiet Title Act ("QTA").[3]

The United States has moved, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), for dismissal of all counterclaims on the following grounds: (1) the United States has

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[2] Generally, except where a party challenges an agency action as violating federal law–be it a statute, regulation, or constitutional provision–that has been interpreted as conferring a private right of action, or where a particular regulatory scheme contains a specialized provision for obtaining judicial review of agency actions under the scheme, review under a framework statute such as the APA is the sole means for testing the legality of federal agency action.

Clouser v. Espy, 42 F.3d 1522, 1527 n.5 (9th Cir. 1994).

[3]The United States initially argued that because there has been an administrative determination that the Counties have not established R.S. 2477 rights-of-way on the road segments at issue, the counterclaims to quiet title must be brought under the APA, rather than the QTA. However, the Counties asserted their counterclaims before an administrative determination had been made. Therefore, the counterclaims to quiet title were brought pursuant to the QTA.

not waived sovereign immunity for the counterclaims alleging ultra vires actions and violations of the separation of powers doctrine, the APA, the Tenth Amendment, and a Congressional moratorium; the action for mandamus fails to state a claim upon which relief can be granted; and the Counties failed to satisfy the requirements for bringing suit under the QTA.

Standard of Review

> The resolution of a motion to dismiss is determined by assessing the legal sufficiency of the allegations as they are contained within the four corners of the complaint. The motion should only be granted if it appears that the [party asserting the claim] can prove no set of facts supporting [the] claim that would entitle [the party] to the relief sought. However, it must be noted that motions to dismiss are not favored because of their harshness and the court should aspire to effectuate the spirit of the liberal rules of pleading while also protecting the interests of justice.

Cornelisen v. Gunnarson, 24 F.Supp.2d 1246 (10th Cir. 1998) (internal quotations and citations omitted).

A. Counterclaims Alleging Ultra Vires Acts and Violations of the Separation of Powers Doctrine, the APA, the Tenth Amendment, and a Congressional Moratorium

Actions against the United States or its agencies are barred by federal sovereign immunity in the absence of an express waiver by Congress. See Block v. North Dakota, 461 U.S. 273, 280 (1983). If Congress waives sovereign immunity, the terms of the waiver defines the federal courts' jurisdiction to entertain the suit. See United States v. Dalm, 494 U.S. 596, 608 (1990). "[A] waiver of sovereign immunity must be strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute." Fostvedt v. United States, 978 F.2d 1201, 1202 (10th Cir.1992). According to the Counties, the APA provides a waiver of sovereign immunity for all of the counterclaims, except the quiet title

action.

Under the APA, sovereign immunity is waived for claims brought against the United States in federal court if: (1) the person bringing suit claims to have suffered harm because of final agency action (or inaction); (2) non-monetary relief is sought; (3) there is no other adequate remedy in a court; (4) the agency action challenged is not committed to the agency's discretion by law; and (5) there is not another statute that forbids the relief sought. See 5 U.S.C. §§ 701(a), 702, 704. Although there is a strong presumption in favor of reviewability of agency action, see McAlpine v. United States, 112 F.3d 1429, 1432 (10th Cir. 1997), sovereign immunity has been waived pursuant to the APA only if all of the above requirements are met.

1. Harmed by final agency action or inaction

To satisfy this element, the harm claimed by the Counties must have resulted from final agency action (or inaction). See 5 U.S.C. § 704. The Supreme Court has held that for an action to be considered a "final agency action," two conditions must be satisfied:

> First, the action must mark the "consummation" of the agency's decisionmaking process–it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

The Counties allege, among other things, that the BLM threatened the Counties with trespass actions, issued an administrative notice of trespass, and filed a lawsuit challenging the Counties' rights to maintain the roads at issue without first obtaining permission from the BLM. (See, e.g., Garfield County's Counterclaim Against the United States ¶ 60.) The issuing of an administrative notice of trespass and the filing of the lawsuit consummated the BLM's decisionmaking process and are actions from which legal consequences flow. Accordingly, the

two conditions are met.

2. Nonmonetary relief sought

It is undisputed that the Counties seek declaratory and injunctive relief, not monetary relief.

3. No other adequate remedy available

The United States argues that the Counties have an adequate remedy in court without asserting the counterclaims. According to the United States, the counterclaims alleging ultra vires acts and violations of the separation of powers doctrine, the APA, the Tenth Amendment, and a Congressional moratorium can be asserted by the Counties as defenses in the trespass action. The United States is correct. For example, even if the counterclaim for ultra vires acts is dismissed, the court will have to consider whether the actions taken by the BLM (including the filing of trespass actions and requiring the Counties to obtain permission before improving roads on federal land) are beyond the statutory and regulatory authority of the BLM. (See Garfield County's Answer to United States' Compl. at 9.) Likewise, the Counties' allegations that the BLM violated the separation of powers doctrine, the Tenth Amendment, the APA, and a Congressional moratorium can be raised as defenses to the action for trespass. Therefore, these counterclaims must be dismissed.

B. Mandamus

Mandamus relief is an extraordinary remedy, and "is appropriate only when the person seeking relief can show a duty owed to him by the government official to whom the writ is directed that is ministerial, clearly defined and peremptory." Carpet Linoleum & Resilient Tile Layers v. Brown, 656 F.2d 564, 566 (10th Cir. 1981). "The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt." Prairie Band of

Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

The Counties have not identified a duty owed them by the United States which is ministerial, clearly defined and peremptory, and so plainly prescribed as to be free from doubt. The Counties are requesting that the BLM stop doing what it has been doing, not start doing certain acts. Accordingly, the counterclaims for mandamus are dismissed for failure to state a claim upon which relief may be granted.

C. Quiet Title

The QTA provides a limited waiver of sovereign immunity of the United States by permitting the United States to be named as a defendant in a civil action to adjudicate disputed title of real property in which the United States claims an interest. See 28 U.S.C. § 2409a(a). The conditions Congress imposed in the QTA upon the waiver of sovereign immunity from suit "must be strictly observed and exceptions thereto are not to be implied." Stubbs v. United States, 620 F.2d 775, 779 (10th Cir. 1980). One such condition is that the claim must "set forth with particularity the nature of the right, title, or interest which the [party] claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. § 2409a(d).

The Counties have failed to plead "with particularity" the circumstances under which they acquired R.S. 2477 rights-of-way in the road segments. Instead, the Counties have merely pled that the road segments at issue have been maintained by the Counties and used by the public continuously and without interruption since prior to October 21, 1976, and that the lands traversed by the road segments had not been reserved for public uses prior to October 21, 1976. (See Garfield County's Counterclaim Against the United States ¶¶ 57-59, 62-64, 66-67, 69, 72-74; San Juan County's Counterclaim Against the United States ¶¶ 59-61.) These conclusory

assertions do not provide relevant details regarding the creation of the rights-of-way claimed -- such as to when, how and under what circumstances the road segments were created or maintained. See Washington County v. United States, 903 F.Supp. 40, 42 (D. Utah 1995)("Plaintiff alleges that it . . . 'acquired its rights-of-way through public use, by County construction and maintenance of the rights-of-way or both.' . . . [T]hese conclusory allegations do not identify 'with particularity' . . . 'the circumstances under which' any property interest was acquired. . . . Accordingly, . . . plaintiff has failed to comply with the conditions and requirements . . . by which the United States consents to suit in quiet title actions.").

Because the Counties failed to comply with the conditions and requirements of bringing an action under the QTA, the United States has not waived its sovereign immunity. Accordingly, the counterclaims to quiet title are dismissed without prejudice.

Order

The court hereby orders as follows:

1. The State of Utah and the Utah School and Institutional Trust Lands Administration's motion to intervene is DENIED; and

2. The United States Motion to dismiss the counterclaims filed by Garfield and San Juan Counties is GRANTED. The counterclaims to quiet title are DISMISSED WITHOUT PREJUDICE,[4] all other counterclaims are DISMISSED WITH PREJUDICE.

[4]The Counties are granted leave to file a motion to amend the counterclaim to quiet title.

DATED this 20 day of July, 2000.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

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United States District Court
for the
District of Utah
July 21, 2000

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:96-cv-00836

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