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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3611

LOWER BRULE SIOUX TRIBE
Proposed Intervenor-Appellant,

STATE OF SOUTH DAKOTA, CITY OF OACOMA, AND LYMAN COUNTY,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR;
NEAL MCCALEB, Assistant Secretary-Indian Affairs;
CORA JONES, Regional Director, Great Plains Regional Office, BIA;
and CLEVE HER MANY HORSES, Superintendent, Lower Brule Agency, BIA,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE FEDERAL APPELLEES

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SUMMARY OF CASE AND STATEMENT REGARDING ORAL ARGUMENT

Appellant Lower Brule Sioux Tribe ("Tribe") sought intervention into a suit brought by Plaintiffs-Appellees, State of South Dakota, City of Oacoma and Lyman County (collectively the "State") challenging the decision of the Federal Defendants-Appellees ("Federal Appellees" or "Interior") approving the Tribe's application to have ninety-one acres of land taken into trust for the purpose of, *inter alia*, developing a cultural center as part of a Native American Scenic Byway proposal. The Secretary's decision was made pursuant to section five of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465, and implementing regulations, 25 C.F.R. Part 151. The State sought judicial review of that federal agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

The district court denied the Tribe's requests for both permissive intervention and intervention as of right. Interior supported the Tribe in its bid for permissive intervention, but opposed the Tribe's request for intervention as of right because the United States adequately can represent the Tribe's interests in this challenge to agency decision making.

If this Court hears oral argument, the Federal Appellees believe that each appellee should be allotted fifteen minutes of argument time.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

____

No. 01-3611

____

LOWER BRULE SIOUX TRIBE
Proposed Intervenor-Appellant,

STATE OF SOUTH DAKOTA, CITY OF OACOMA, AND LYMAN COUNTY,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR;
NEAL MCCALEB, Assistant Secretary-Indian Affairs;
CORA JONES, Regional Director, Great Plains Regional Office, BIA;
and CLEVE HER MANY HORSES, Superintendent, Lower Brule Agency, BIA,
Defendants-Appellees.

____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

____

BRIEF FOR THE FEDERAL APPELLEES

____

OPINION BELOW

The unpublished decision of the district court, the Honorable Richard H. Battey, denying the Tribe's motion for intervention as of right and for permissive intervention appears in the Tribe's Appendix at 1-5.[1]

[1] References in this Brief will be as follows: References to the Tribe's
(continued...)

JURISDICTION

The State of South Dakota, City of Oacoma and Lyman County filed this action against the Department of the Interior and various officials pursuant to the APA, 5 U.S.C. §§ 701-706, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(e), and the following provisions of the United States Constitution: art. I, §§ 1, 8; art. II, §1; art. IV, § 3, 4; amend. X. The district court has jurisdiction over the underlying action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

The Tribe moved to intervene as of right and permissively on July 19, 2001. R. 35. On August 30, 2001, the district court rejected both grounds for intervention by the Tribe. App. 1-5. The denial of a motion to intervene as of right is immediately appealable as a final judgment under 28 U.S.C. § 1291. Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 176 n.1 (8th Cir. 1978). While the denial of permissive intervention is not typically appealable, courts have exercised pendent jurisdiction to consider a district court's denial of permissive intervention where it implicates questions interrelated to those over which the court

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[1](...continued)
appendix will be to "App." References to documents filed in the district court and not reproduced in the Tribe's appendix will be to the district court's record number from the docket sheet preceded by "R." References to the Tribe's brief will be to "Tr. Br."

has direct jurisdiction. See In re Vitamins Antitrust Class Actions, 215 F.3d 26, 31 (D.C. Cir. 2000) (citing Twelve John Does v. District of Columbia, 117 F.3d 571, 574-75 (D.C. Cir. 1997)). The Tribe filed its notice of appeal on October 26, 2001, within the time permitted by FED. R. APP. P. 4(a) and 28 U.S.C. § 2107.

STATEMENT OF THE ISSUE ON APPEAL

Whether the District Court correctly denied the Tribe intervention as a matter of right pursuant to FED. R. CIV. P. 24(a)(2).

Chiglo v. City of Preston, 104 F.3d 185 (8th Cir. 1997)

United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995)

Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001)

State of Connecticut ex rel. Blumenthal v. Babbitt, 899 F. Supp. 80 (D. Conn. 1995).

STATEMENT OF THE CASE AND THE FACTS

This litigation arose from the decision of the Secretary of the Interior ("Secretary") to approve the application of the Tribe to have ninety-one acres of land owned by the Tribe taken into trust pursuant to section five of the IRA. See 65 Fed. Reg. 31594 (May 18, 2000) (Notice of intent to take land into trust); 66 Fed. Reg. 7925-7926 (Notice of Ratification of Decision to take 90.94 Acres of Land, More or Less, Into Trust for the Lower Brule Sioux Tribe of Indians of

South Dakota). The Tribe had requested the Department of the Interior to accept this parcel into trust in furtherance of the Tribe's proposal to develop a cultural center as part of a larger Native American Scenic Byway project.

The Interior Department regulations governing trust acquisition decisions provide that decisions to take land into trust are to be published in the Federal Register and are to state that title will not be acquired in the name of the United States before the expiration of thirty days from the date of the notice. 25 C.F.R. § 151.12(b). The purpose of this thirty-day waiting period is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land into trust for Indian tribes before transfer of title to the property occurs. The State brought suit in the District Court of South Dakota challenging the Secretary's trust acquisition decision within the thirty-day regulatory period. R.1.

In July 2001, the Tribe moved to intervene both as of right and permissively in the district court proceedings. R. 35. The State opposed the Tribe's intervention. The Interior Department opposed intervention as of right because the United States adequately represents the Tribe's interests in this litigation. However, Interior expressly supported the Tribe's motion for permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure. Specifically, we argued below that permissive intervention was appropriate because the Tribe clearly met the

elements of the permissive intervention test. First, there was no question that the Tribe's motion to intervene was timely. The case had not advanced beyond the filing of an Answer by the Federal Defendants. R. 29. Second, there was indisputable commonality between the Tribe's claims and defenses and those of the federal government. The Tribe's papers in support of its motion to intervene, R. 35, 36, asserted both the constitutionality of section five of the Indian Reorganization Act, 25 U.S.C. § 465, and the propriety of the decision to accept the ninety-one acre parcel into trust, issues that are squarely challenged by the State of South Dakota. Finally, we argued that there would be no undue delay or prejudice to the parties if the Tribe was allowed to intervene permissively. App. 9.

The district court denied the Tribe's motion to intervene under FED. R. CIV. P. 24(a)(2) and 24(b). App. 1-5. In denying the Tribe's request for intervention as of right, the district court held that the Tribe was adequately represented by the federal government. App. 4. Although the district court expressly found that the Tribe's motion to intervene was timely, App. 2, and that the Tribe asserted questions of law and fact in common with the federal government, App. 4, the court denied permissive intervention stating only that the Tribe's interests are adequately protected, an element not required in considering permissive intervention. App. 4. This appeal followed.

SUMMARY OF ARGUMENT

The district court's denial of the Tribe's request for intervention as of right should be affirmed because the United States adequately represents the Tribe's interests in having Interior's trust acquisition decision upheld.

To qualify for intervention as of right under FED. R. CIV. P. 24(a), a proposed intervenor must demonstrate (1) an interest in the subject matter of the litigation; (2) that the interest might be impaired by the litigation; and (3) that there is not adequate representation of the interest by an existing party. All three factors must be met to warrant intervention as of right. See Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir. 1997) (citing United States v. Union Elec. Co., 64 F.3d 1152, 1158-59 (8th Cir. 1995)). While the Tribe easily satisfies the first two of the three factors, it cannot demonstrate inadequate representation of its interests by the United States. Because the Tribe cannot satisfy all of the requisite factors, the district court correctly denied the Tribe's request for intervention as of right.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision to deny the Tribe's motion to intervene as of right. United States v. Union Elec. Co., 64 F.3d 1152, 1158 (8th Cir. 1995).

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED THE TRIBE'S MOTION TO INTERVENE AS OF RIGHT

A. The United States adequately represents the Tribe's interests in this action. – The Federal Rules of Civil Procedure provide that,

> Upon timely application anyone shall be permitted to intervene in an action * * * 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.

FED. R. CIV. P. 24(a)(2) (emphasis added). This Court has held that intervention of right is proper under Rule 24(a)(2) where a party shows: (1) a cognizable interest in the subject matter of the litigation; (2) an interest that may be impaired as a result of the litigation; and (3) an interest that is not adequately protected by the existing parties to the litigation. See Chiglo, 104 F.3d at 187 (citing Union Elec. Co., 64 F.3d at 1160). A proposed intervenor must satisfy all three of these factors to qualify for "as of right" intervention. See Chiglo 104 F.3d at 187 (citing Union Elec. Co., 64 F.3d at 1158-59). The district court correctly found that the Tribe failed to meet its burden to show inadequacy of representation by the United States, and thus failed to establish entitlement to intervention as of right. App. 4.

The United States does not dispute that, as the district court found, the Tribe

meets the first two factors for intervention as of right. Significantly, however, the Tribe cannot satisfy the third prong of the test because its interests are adequately represented by an existing party. The United States is defending the challenged agency decision, and in so doing, is adequately representing the Tribe's interest in having that decision upheld. Cf. Southwest Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998) (finding United States adequately represents absent Indian community where government and community share "strong interest in defeating" a challenge to agency action). Here, the Tribe submitted an application to Interior which the Secretary approved. Interior is vigorously defending the Secretary's approval of the Tribe's application. Indeed, it is the government's own decision that is challenged, and the government is in the best position to defend its decision.

The adequacy of representation analysis under FED. R. CIV. P. 24(a) parallels the inquiry under FED. R. CIV. P. 19 regarding necessary parties. See Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) ("In assessing an absent party's necessity under FED. R. CIV. P. 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention as of right under FED. R. CIV. P. 24(a)."); See FED. R. CIV. P. 24, Advisory Committee Notes, 1966

Amendment ("Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(i) on joinder of persons needed for a just adjudication").

Assessing cases under Rule 19, courts have held that where, as here, the interested nonparty is a tribe and the underlying agency action being challenged is premised on the federal government's special relationship with Indian tribes, the likelihood that the United States will adequately represent the Tribe's interests is even stronger. See Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1259-1260 (10th Cir. 2001) (reversing district court's finding that Wyandotte Tribe was indispensable because Secretary's interests in defending her decisions were "substantially similar, if not virtually identical" to those of the Tribe); Washington v. Daley, 173 F.3d 1158, 1167-68 (9th Cir. 1999) (concluding Indian tribes were not necessary parties to State challenge to the Secretary of Commerce's regulation allocating tribes' groundfish catches as Secretary and tribes had virtually identical interests and Secretary could adequately represent tribes).[2]

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[2] The similarity of these two tests presents additional policy considerations arising from the governmental status of federally recognized tribes where tribes seek intervention as of right. A positive determination on a motion to intervene as of right could potentially position a tribe to assert that it meets the indispensable party test in challenges of this type. A tribal assertion of indispensability without a waiver of tribal sovereign immunity from suit could, in turn, result in dismissal of the action thereby precluding judicial review. Such a result plainly is at odds with the Interior Department's trust acquisition regulations found at 25 C.F.R. § 151. In 1996, the

(continued...)

In any event, the Tribe's interests in this case are adequately represented within the meanings of both Rule 19 and Rule 24. As another district court held addressing a similar state challenge to a decision by the Secretary to approve a tribal trust application:

> If a case raises issues in which the United States may adequately represent and protect the Indian tribe involved, then the Indian tribe is not an indispensable party to the action under Rule 19 * * *. [T]he plaintiffs challenge an administrative action taken by the Secretary * * *. Full resolution of the issues presented in this case will require this Court to decide whether the Secretary acted in accordance with law in deciding to accept the property into trust. The Court finds that the Secretary, as Trustee and guardian of the Mashantucket Tribe, will adequately represent the interest of the Mashantucket Tribe.

State of Connecticut ex rel. Blumenthal v. Babbitt, 899 F. Supp. 80, 83 (D. Conn. 1995).

Although some courts have found the United States unable to represent a tribe's interests, those cases – in contrast to this case – have involved conflicting federal obligations to other tribes or inter-tribal conflict that precluded adequate representation by the United States. See, e.g., Cherokee Nation of Oklahoma v. Babbitt, 117 F.3d 1489 (D.C. Cir. 1997) (finding United States could not

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[2](...continued)
Part 151 regulations were specifically revised to provide an opportunity for judicial review of final determinations to approve tribal applications to have land taken into trust by the Secretary. See 25 C.F.R. § 151.12(b).

adequately represent nonparty tribe's interest in suit by another tribe challenging Secretary's decision to extend federal recognition to nonparty tribe); Quileute Indian Tribe v. Babbitt, 18 F.3d 1456 (9th Cir. 1994) (finding United States could not represent two tribes with competing interests in same land); Shermoen v. United States, 982 F.2d 1312 (9th Cir. 1992) (concluding United States had potential conflict of interest in tribal suit challenging act settling disputes between and among two absent tribes and United States). Here, there are no competing tribal interests at stake, nor are there other conflicting federal interests that might compromise the adequacy of the United States' representation of the Tribe such that the Tribe's intervention as of right would be warranted. Thus, this case is exactly the type of action where courts have routinely held that the United States adequately represents the interests of the Tribe. See, e.g., Southwest Ctr., Sac and Fox Nation, Washington v. Daley, and Connecticut v. Babbitt.

Indeed the Tribe has made no showing that its interests are inadequately represented by the United States. Instead, as discussed further below, the Tribe concedes that its interests are aligned with those of the United States, Tr. Br. 11, and, in arguing the district court erred, merely exaggerates (Tr. Br. 22) a discussion by the district court of the *parens patriae* doctrine. As discussed below, however, this dicta regarding the *parens patriae* doctrine cannot overcome the "presumption

of adequate representation" by the trustee agency where, as here, the agency's and Tribe's interests in the ultimate outcome are completely aligned. See, e.g., Chiglo, 104 F.3d at 188 (noting that "if an existing party is charged with the responsibility of representing the intervenor's interests, a presumption of adequate representation arises"). There is simply no divergence between the Secretary's and the Tribe's interests in defending the regularity and constitutionality of the Secretary's authority to acquire land in trust for tribes generally and the exercise of that authority with respect to this Tribe's particular land.

B. The *parens patriae* doctrine is not a basis for finding inadequate representation by the United States. – The Tribe concedes that "[t]he interests of the Tribe and the United States are aligned and the Tribe seeks only to work with the United States to protect the decision to take the 91 acres in trust." Tr. Br. 11. Nonetheless, in support of its contention of district court error as to intervention as of right, the Tribe seizes upon the district court's passing reference to the *parens patriae* doctrine[3] as a purported basis for the inadequacy of representation by the

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[3] According to BLACKS LAW DICTIONARY 1114 (6th ed. 1990), *parens patriae* "literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability," and "is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state, etc."

federal government arguing that the United States cannot act both as *parens patriae* and trustee for the Tribe. Tr. Br. 16-23. In so arguing, the Tribe attempts to convert dicta in the district court's opinion into a holding that the federal government is participating in this case in a *parens patriae* capacity for all citizens. The district court, however, looked to the *parens patriae* doctrine only generally as an aide to its analysis of the Interior Department's role vis-a-vis the Tribe in this litigation. App. 3-4. As the cases referenced by the district court explain, while the burden to show inadequate representation is typically minimal, a proposed intervenor "bears a heavier burden on this factor when a party already in the suit has an obligation to represent the interests of the party seeking to intervene." Union Electric Co., 64 F.3d at 1168 (citing Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1000 (8th Cir. 1993)). The Court in Union Electric Co. cited the situation where a state is party to a suit involving a matter of sovereign interest, and thus presumed to represent the interests of all of its citizens (the paradigmatic *parens patriae* relation), as but one example of presumptively adequate representation by an existing party. See id. at 1168-69.

In this case, the United States is presumed to represent the Tribe adequately because the challenged decision was made pursuant to, and in furtherance of, the special relationship between the United States and federally recognized tribes and

the decision made redounds to the benefit of the Tribe.[4] The Secretary's trust acquisition authority under section five of the IRA has no application to the general citizenry, hence, the Tribe's suggestion that the United States is acting in this case as *parens patriae* for all citizens defies logic.[5] The interest which the Secretary

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[4] Here, the relationship does not, as the Tribe suggests, Tr. Br. 16-23, implicate strict fiduciary obligations. Even allowing the Tribe's broad conception of the federal-tribal relationship, all the conditions for a fiduciary relationship are not present in this case. To date, the land at issue remains in fee status, hence there is no trust *res* over which the Secretary can act as trustee for the benefit of the Tribe. Further, the Secretary's decision to approve the Tribe's application for trust acquisition of the Tribe's ninety-one acres was a discretionary one made pursuant to a range of regulatory factors. See, e.g., Seminole Nation v. United States, 318 U.S. 629 (1943) (finding that a treaty "authorizing" the Secretary to bring suit for the benefit of tribes was part of Secretary's wide discretion in the administration of Indian affairs); Cf. Shoshone-Bannock Tribes v. Janet Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (concluding that "an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty."). The United States Supreme Court has established that "the scope of the United States' duty to an Indian tribe depends on the underlying substantive law giving rise to that obligation." Shoshone-Bannock Tribes, 56 F.3d at 1482 (citing United States v. Mitchell, 463 U.S. 206, 224-25 (1983)); United States v. Mitchell, 445 U.S. 535, 542 (1980). The underlying substantive law at issue here, section five of the IRA, "authorize[s]" the Secretary of the Interior "in his discretion" to acquire in trust land for Indians. See 25 U.S.C. § 465 (emphasis added). Thus, there is no merit to the Tribe's attempt to argue that the Interior Department's trust acquisition regulations impose a higher, mandatory duty on the Secretary. Tr. Br. 19-20. The Tribe's arguments in this regard are, in any event, irrelevant as they are advanced to assert a conflict in the United States' representation that does not exist.

[5] While the federal-tribal relationship has occasionally been described by reference to the *parens patriae* doctrine, it has been in the narrower "guardian

(continued...)

seeks to defend in this litigation is not an interest common to all citizens. The Secretary's interest, just as the Tribe's interest, is to defend the validity of his administrative decision to take this particular parcel of land into trust. In these circumstances, the doctrine of *parens patriae* has no relevance, and the district court did not hold otherwise.

The district court found that "both the federal government and the Tribe are arguing that the 91 acres ought to be held in trust," and that "the Tribal interest is subsumed in the shared interests of the federal government." App. 4. These findings in turn led the district court to conclude that "the Tribe failed to carry its burden of inadequate representation." App. 4. Thus, the district court was narrowly focused on the Government's representation of the Tribe's interests, and did not find that the Secretary, in this litigation, was acting in a *parens patriae* capacity for the general citizenry. Accordingly, there is no merit to the Tribe's claim that the Secretary suffers a conflict between a *parens patriae* and a trustee role in this litigation.

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[5](...continued)
ward" sense rather than the traditional sense of the doctrine. See, e.g., Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960) (describing purpose of the Indian Nonintercourse Act, 25 U.S.C. 177, as prevention of improper disposition of Indian land and as enabling the United States "acting as parens patriae for the Indians" to vacate any dispositions made without the consent of Congress) (emphasis added).

Because the Tribe's interests are adequately represented by the United States, the district court's denial of the Tribe's motion to intervene as of right should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed as to the Tribe's intervention as of right.[6]

Respectfully submitted,

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[6] As described above, the United States supported the Tribe's request for permissive intervention in the district court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), and Eighth Circuit Rule 28A(c) and (d), I, Judith Rabinowitz, certify that the Brief of the Federal Appellees: (1) was prepared using Corel Word Perfect 8.0, is proportionally spaced, has a typeface of 14 points or more, and, according to the Word Perfect word count, contains 3797 words; and (2) that each diskette served with the Brief of the Respondents was scanned for viruses and is virus free.

April 2002

____

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CERTIFICATE OF SERVICE

I, Judith Rabinowitz, certify that on April 29, 2002, copies and diskettes of the Brief of the Federal Appellees were served upon opposing counsel and the proposed intervenor by first class mail, postage prepaid, or as noted, at the following address(es):

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