UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 01-3611

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; CLEVE HER MANY HORSES, SUPERINTENDENT, LOWER BRULE AGENCY, BIA
Defendants-Appellees

LOWER BRULE SIOUX TRIBE
Interested Party - Appellant

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

REPLY BRIEF
OF
LOWER BRULE SIOUX TRIBE, INTERESTED PARTY – APPELLANT

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May 3, 2002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CONSTITUTION, STATUTES AND REGULATIONS

I. REPLY REGARDING PERMISSIVE INTERVENTION

The State of South Dakota characterizes the Tribe's argument regarding permissive intervention as follows: "the essence of the Tribe's argument is that if the requisites of Rule 24(b)(2) are met, a district court must grant intervention." State's Brief at 7(emphasis in original). The State's characterization of the Tribe's argument is flat wrong. The Tribe did not argue that the district court was under any obligation to grant its motion for permissive intervention. Rather, the Tribe argued that the court had an obligation to consider factors appropriate to the permissive intervention analysis – factors that are clearly set forth by Fed. R. Civ. P. Rule 24(b)(2). Because the court did not consider or analyze any of the appropriate factors, it abused its discretion in denying the Tribe's motion.

A. The District Court Abused its Discretion in Denying the Tribe's Motion for Permissive Intervention Because it Failed to Consider Any of the Factors Appropriate to a Correct Permissive Intervention Analysis

While a court has discretion to deny permissive intervention, Rule 24(b)(2) clearly indicates that such discretion is not unlimited. The Tribe does agree with the State that Rule 24(b)(2) sets out "mandatory requirements," State's Brief at 7. (emphasis added), with respect to the permissive intervention analysis. Rule 24 plainly states that "in exercising its discretion the court **shall** consider whether the

intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Rule 24(b)(2)(emphasis added).

As this Circuit has recognized, "when used in statutes the word 'shall' is generally regarded as an imperative or mandatory and therefore one which must be given a compulsory meaning." *Stanfield v. Swenson*, 381 F.2d 755, 757 (8th Cir. 1967). *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001)("the word shall is ordinarily the language of command.")(*citing Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

The district court here, however, gave no consideration at all to the "mandatory requirements" in its denial of permissive intervention as it should have. The court's only proffered reason for denying permissive intervention was that "[t]he interests of the proposed intervenors are adequately protected."

B. A Finding of Adequate Representation Is an Inappropriate and Inadequate Basis upon Which to Deny Permissive Intervention in That Such a Finding Does Not Fulfill the Requirement That the Court Consider Whether "Intervention Will Unduly Delay or Prejudice the Adjudication of the Rights of the Original Parties"

The State cites *Allen Calculators Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944) to defend the lower court's exclusive reliance on the adequate representation factor. *Allen*, however, in no way supports an argument that a court

may deny permissive intervention solely on this basis. In *Allen*, the Court reiterated the rule that "in exercising discretion as to [permissive] intervention . . . the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties." 322 U.S. at 141. The Court looked to the adequacy of representation to determine whether intervention would cause delay or prejudice and found that such delay and prejudice would be caused if "a multitude" of members of the public were permitted to intervene. Id. at 142. Here, however, the lower court made no connection between the adequacy of representation and any delay or prejudice that might be caused. To the extent that the lower court did consider any question of delay or prejudice, it found none. Nor could it have, as intervention in this case would cause neither.

C. Failure to Provide Sufficient Basis for a Denial of Permissive Intervention Constitutes Abuse of Discretion

While reversal of a district court's denial of permissive intervention, may be "a very rare bird indeed," it is not an extinct one. *See* State's Brief at 6 (*citing United States v. Pitney Bowes*, Inc., 25 F.3d 66, 73 (2d Cir. 1994). Courts have overturned denials of permissive intervention for precisely the same reason the Tribe is asking this court to overturn the denial of its motion for permissive intervention: failure of the court to adequately consider and support its denial. In

Equal Employment Opportunity Comm'n v. National Children's Center, Inc., 146 F.3d 1042 (D.C. Cir. 1998), the D.C. Circuit Court found that the lower court had abused its discretion in denying permissive intervention where it failed to provide a sufficient explanation for that denial. The Circuit Court stated that the lower court "did not provide . . . a sufficient record to support [the] exercise of its discretion. *See also Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846 (4th Cir. 2001)(holding that a lower court abused its discretion in denying permissive intervention where there wasn't sufficient "reasoning or explanation"). In contrast to these cases, and the case here, the Eighth Circuit case appended by the State exemplifies what does constitute sufficient consideration and analysis for permissive intervention. In *Consolidated Nutrition Marketing Corp. v. Seabord Farms, Inc.*, 2001 WL 842029 (8th Cir 2001)(unpublished opinion) State's Appendix A, this Court upheld a denial of permissive intervention where the lower court provided extensive reasons for doing so. There the "district court denied the motion for permissive intervention because [the intervenor] did not have standing . . . and there was no claim or defense that raised a common question of law or fact." *Id.* at *2. Additionally, the lower court found that intervention would raise significant new issues. *Id.* ("The district court noted that [the intervenor's] motion for permissive intervention raised public interest and First Amendment

issues, while the underlying litigation was a lawsuit between two businesses over breach of contract and tort claims").

Here, there was no analysis or even consideration of relevant factors. The court found that the "Tribe and federal defendants have common questions of law in common" and then without analysis or consideration of any of the appropriate factors, denied permissive intervention. Because the district court denied the Tribe intervention with virtually no explanation, it is difficult to discern the court's underlying rationale, particularly since the court found that the Tribe meets the requirements of permissive intervention. Under Rule 24 and judicial precedent the lower court abused its discretion in not permitting the Tribe to intervene.

II. REPLY REGARDING INTERVENTION AS OF RIGHT

The only question regarding the denial of the Tribe's motion for intervention of right is whether the lower court erred in holding that the United States adequately represents the interests of the Lower Brule Sioux Tribe. To demonstrate the clear inadequacy of the United States' representation, the Tribe reaffirms the argument it made in its opening brief and makes two additional arguments.

A. The United States' Representation of the Tribe's Interests in this Case Are Inadequate Because That Representation Is Not Exclusive to the Tribal Interests, as Is Required Here

In its opening brief, the Tribe pointed out that the United States in this case owes the Tribe the duty to represent its interests as fiduciary. To fulfil this duty, and to represent the Tribe's interests adequately, the United States must act with an undivided duty of loyalty to the interests of the Tribe. Such a level of representation is impossible, here, however, because, as the court held, in addition to representing the interests of the Tribe, the United States is here representing its own sovereign interests and the interests of its citizens *parens patriae.* [1] Because the United States is not acting exclusively in the interests of the Tribe, it is not adequately representing the Tribe as fiduciary. Hence, the Tribe has the right to intervene to ensure that its issues are being represented by parties and attorneys who are acting in the sole interest of the Tribe.

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[1] The Tribe disagrees with the United States' position that the court's holding regarding *parens patriae*, was no more than mere dicta. In the Tribe's view, it could not be clearer that the lower court decided that the United States was acting in furtherance of its sovereign interests and was thus representing the Tribe's interests as *parens patriae.* The United States' characterized the court's reference to the *parens patriae* doctrine as just a "passing reference" United States' brief at 13. While it will be left up to this Court to decide whether the entire paragraph the lower court devoted to the parens patriae doctrine accounted for no more than passing reference, it would like to highlight the fact that the court made no reference to the United States' acting on behalf of the Tribe's interests as fiduciary.

B. The United States' Inconsistent Representation of the Tribe's Interests Is Inadequate Representation

The United States has proven before this very Court that is willing and capable of deserting tribal interests at any point in this litigation. While the United States firmly advocated on behalf of the Tribe and its interests regarding permissive intervention at the district court level, it has now completely reversed its position and has abandoned the Tribe's interests on appeal. This demonstration of the United States' lack of commitment to the interests of the Tribe give the Tribe very little reason to believe that the United States will maintain a consistent position in advocating for its interests. Such unpredictability and inconsistency is clear evidence of inadequacy.

C. The United States' Representation of the Tribe's Interests in *South Dakota I* Illustrates the Inadequacy of the United States' Representation of the Tribe's Interests in the Matter Here

The State is correct that there is a history behind this case. State's Brief at 1-2. This is indeed the second time the question of the trust status of the 91 acres at issue here has been in litigation. In *South Dakota I,* the case in which the trust status of this land was first litigated, the United States made a decision to place the land in trust, then placed the land in trust. Following the conference of trust status, the State parties sued the United States. This Court made final decision in that

case, 69 F.3d 878 (8th Cir. 1995), however, that decision was vacated by the United States Supreme Court. 519 U.S. 919 (1996). The Supreme Court remanded "the matter to the Secretary of the Interior for reconsideration of his administrative decision." On May 14, 1997, the Department of the Interior, Bureau of Indian Affairs published a Notice in the Federal Register which stated that "as of December 24, 1996 . . . the [91 acres] is no longer held in trust by the United States for the benefit of the Lower Brule Sioux Tribe." 62 FR 26551 (May 14, 1997).

Though the proceedings in *South Dakota I* have no direct bearing on the case here, the position and actions of the United States throughout that case demonstrate the true extent of the United States' incapacity to adequately represent the Tribe here.

As noted above, in *South Dakota I*, the Secretary of the Interior took the land into trust. At the moment the 91 acres went into trust the United States acquired legal title to the land. Once legal title of the land was accepted by the United States, under the property clause of the United States Constitution, the power to divest title rested solely with only Congress: "Congress shall have the power to dispose of . . . the . . . property belonging to the United States." U.S. Const. Art. IV., Sec. 3, cl. 2. Congress has never authorized the divestiture of title with respect to the 91 acres. Hence, the Secretary of the Interior lacked any

authority whatsoever to argue for or act on taking the land out of trust. It is unconscionable that the Secretary took a position in *South Dakota I* and took action following remand that so clearly contravened the United States' Constitution and the Tribe's opposition.[2]

The position and actions of the United States in *South Dakota I* rose far above a mere disagreement of litigation strategy as the lower court found. See Opinion at 4, Addendum at 4. The United States' prior position and actions certainly rise to the level of inadequate representation and strongly indicate that here, where the same land is again at issue, that sole representation of the Tribe's interests by the United States is inadequate.

CONCLUSION

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[2] While the Lower Brule Sioux Tribe did support the United States' Petition for Certiorari as Amicus, the Tribe specifically stated in its brief to the Court that:

> The Lower Brule Sioux Tribe agrees that the Court should grant the petition for a writ of certiorari and vacate the Eighth Circuit's Judgment. We also agree that the case should be remanded to the Eighth Circuit without plenary briefing and argument. However, we submit that the Court should not direct the Eighth Circuit to remand the case to the Secretary. No further decision by the Secretary is required or appropriate. Instead, the Eighth Circuit should be permitted to consider the nonconstitutional issues that it did not address. *See* Second Appendix.

For the reasons stated in its opening brief and in this reply brief, the Tribe respectfully requests this Court to reverse the district court's order denying intervention as of right and permissive intervention. The Tribe as a government[3] and title owner of the land in question readily satisfies the requisites for both intervention as of right and permissive intervention and should be heard in this case.

Dated, this 3rd Day of April 2002

Respectfully submitted,

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[3] The Tribe notes that every other government (federal, state, county, and city) with an interest in the outcome of this litigation is participating as a party.

BRIEF LENGTH CERTIFICATION

I, the undersigned counsel, certify that the foregoing Reply Brief of Lower Brule Sioux Tribe, Interested Party – Appellant is no longer than 15 pages and is under the word limitation of 7,000 words established under Fed. R. App. P. 32(a)(7)(B)(3). The word count was calculated using the word count feature of counsel's word processing system (WordPerfect 9.0). This word count does not include the items permitted to be excluded under the rules.

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TRACY A. LABIN

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this day of April 3, 2002 two paper copies and one electronic copy in WordPerfect 9.0 format contained on a 31/2 inch diskette of the foregoing Reply Brief of Lower Brule Sioux Tribe, Interested Party – Appellant and one paper copy of the Tribe's second appendix, was served via U.S. mail, first class, postage prepaid to the following:

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