

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The Tribe's "Statement of the Facts and Statement of the Case" unfortunately obscures the length of time that this case has been in litigation. See Opening Brief, Lower Brule Sioux Tribe, Interested Party-Appellant (hereinafter TB), p.3. The controversy actually originated in "March 1990, [when] the Tribe submitted an application under 25 U.S.C. § 465" requesting that 91 acres in and around Oacoma be taken into trust by the Secretary of the Interior. See South Dakota v. Department of Interior, 69 F.3d 878, 880 (8th Cir. 1995), vacated, 519 U.S. 919 (1996). The State and the City of Oacoma opposed the acquisition but the Assistant Secretary approved it in December 1990. Id.

The State and the City then appealed to the Interior Board of Indian Appeals and the Tribe participated at that time. According to the opinion of the Board, "Briefs were filed by the Appellants, the Area Director, and the Tribe." State of South Dakota and Town of Oacoma v. Aberdeen Area Director, Bureau of Indian Affairs, 22 IBIA 126, 128 (June 12, 1992) (emphasis added). The Board of Indian Appeals sua sponte dismissed the appeal because it had no jurisdiction to review a decision by the Secretary of the Interior. 22 IBIA at 129.

In July of 1992, the State and City filed an action in Federal District Court challenging the acquisition. While the litigation was proceeding, in November of 1992, the Secretary of the Interior took title to the lands in trust for the Tribe. The Tribal President, Mr. Jandreau, was deposed in the litigation, but the Tribe did not attempt to participate as a party or as an amicus curiae. The district court ultimately ruled against the position of the State and City, but this Court reversed. State of South Dakota v. Department of Interior, 69 F.3d 878 (8th Cir. 1995). This Court found that the statute authorizing the taking of land into trust was unconstitutional as it delegated legislative power to the Executive Branch. The United States thereafter petitioned for a Writ of Certiorari. The Petition was granted, and the decision of this Court vacated, over the vigorous dissent of Justices Scalia, O'Connor, and Thomas. Department of Interior v. South Dakota, 519 U.S. 919 (1996). The Tribe participated as amicus curiae in procuring the GVR order from the Supreme Court.

In 1997, the Tribe filed a new or amended application to take the very same land in trust. See South Dakota and Oacoma v. United States, Civ. 00-3026, Administrative Record (hereinafter AR) at 23-24. On March 13, 1998, the State (AR 325 et seq.), and the city and county replied. AR 619 et

seq. The Tribe submitted a formal response to the arguments of the State, City, and County on May 20, 1998. See AR 774-798. On May 12, 2000, the Secretary of the Interior made a "final" decision to place the land into trust. AR 1406. Notice was published on May 18, 2000, 65 Fed. Reg. 31594 (2000). On June 16, 2000, the State, City, and County filed the present action in federal district court.

Thereafter, the United States determined that its environmental analysis may have been inadequate and engaged in what it apparently asserts was a more comprehensive environmental review of the planned acquisition. On January 26, 2001, the United States issued what it characterized as a "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." 66 Fed. Reg. 7925 (January 26, 2001). The "ratification" was issued as part of the last minute flurry of actions (many now disputed) of top Department of Interior officials before the change in administrations.

On March 19, 2001, the State, City, and County filed an Amended Complaint, reflecting the response to the newest actions of the Department of the Interior and refining their earlier Complaint. Pursuant to the court's Order of April 20, 2001, the Plaintiffs and Defendants on June 6, 2001,

filed an eight-page "Report of Planning Meeting." On April 26, 2001, the United States filed its Answer to Amended Complaint.

On July 16, 2001, the court issued a Scheduling Order. The Tribe moved to intervene on July 23, 2001. After briefing, the District Court, on August 30, 2001, denied the Tribe's Motion to Intervene as a Matter of Right and the Tribe's Motion for Permissive Intervention. See Appendix to TB at 1-5.

## SUMMARY OF THE ARGUMENT

The Lower Brule Sioux Tribe argues that the District Court committed reversible error when it declined to authorize its intervention in this case.

First, the Tribe contends that the District Court should have granted permissive intervention. Both the Circuit Court for the District of Columbia and the Circuit Court for the Fifth Circuit have interpreted Rule 24(b)(2) to provide that if an applicant meets three mandatory requirements, the district court "may" allow intervention but is not required to do so. See E.E.O.C. v. National Children's Center, Inc., 146 F.3d 1042, 1048 (D.C. Cir. 1998); Bush v. Viterna, 740 F.2d 350, 359 (5th Cir. 1984). In this case, the district court stated a substantial reason to deny intervention, i.e., the applicant was adequately represented by the United States. This conclusion is unassailable on the facts and the Tribe does not even attempt to identify a factual basis on which to overcome that decision. Case law indicates that this Court's review of a district court's decision on permissive intervention is "particularly deferential," United States v. City of New York, 198 F.3d 360, 367 (2d Cir. 1999) and that "[r]eversal of a district court's denial of permissive intervention is a very rare bird indeed . . . ." United States v. Pitney

Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994). Given this scope of review, the trial court should certainly be sustained.

Second, the Tribe contends that the District Court erred as a matter of law in denying intervention as of right. FRCP Rule 24(a). In support of this argument, the Tribe launches a complex argument based upon the apparent theory that there is an inherent conflict every time the United States, in defending a decision of one of its agencies, acts in both a sovereign and trustee capacity with regard to a tribe. No court has ever adopted this theory, as far as can be seen. In any event, the Tribe ultimately admits that the real question is not whether there is a legal disability of the United States, but whether the federal representation is "adequate." TB 23, n.4. The history of this litigation strongly supports the trial court's finding of adequate representation, and the Tribe in this Court makes no factual argument to the contrary. The decision on intervention of right should be affirmed.

#### ARGUMENTS

##### I

THE DISTRICT COURT DECISION DECLINING TO ALLOW PERMISSIVE INTERVENTION SHOULD NOT BE REVERSED

- A. The Scope of Review by this Court of a Motion for Permissive Intervention Is Abuse of Discretion.

The formal scope of review by the Court of denial of a motion for permissive intervention is abuse of discretion. Curry v. Regents of the University of Minnesota, 167 F.3d 420, 422 (8th Cir. 1999).

B. Reversal of a District Court's Determination on a Motion for Permissive Intervention is Rare Under the Abuse of Discretion Standard.

The courts of appeal have made it abundantly clear that the "abuse of discretion" standard vest very great latitude in the district courts with regard to motions for permissive intervention. For example, the Second Circuit, in United States v. City of New York, 198 F.3d 360, 367 (2d Cir. 1999) stated:

We review a district court's ruling on permissive intervention for abuse of discretion, and our review in this area is particularly differential.

That same circuit, in even more direct terms, has stated:

Reversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique.

United States v. Pitney Bowes, Inc., 25 F.3d 66, 73 (2d Cir. 1994). Likewise the Fifth Circuit stated in 1984 that it had "never reversed a denial of permissive intervention under Rule 24(b) solely for an abuse of discretion, and such a decision by any federal appellate court has been termed

'so unusual as to be almost unique.'" Bush v. Viterna, 740 F.2d 350, 359 (5th Cir. 1984) (quoting New Orleans Public Service v. United Gas Pipe Line Company, 732 F.2d 452, 471 (5th Cir. 1984)). Finally, this Court, in an unpublished opinion, has itself referred to the Pitney Bowes, supra, as indicating that "reversal of denial of motion for permissive intervention is 'very rare.'" Consolidated Nutrition Marketing Corp. v. Seaboard Farms Inc., 2001 WL 842029 \*2 (8th Cir. 2001) (unpublished opinion) (attached as Appendix A).

C. Permissive Intervention Is Discretionary, Not Mandatory, With the District Court.

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. According to TB 14, "The District Court clearly did not base its denial of permissive intervention on the appropriate factors, and hence, clearly abused its discretion in denying intervention and should be reversed."

The Tribe misunderstands the governing law. Rule 24(b)(2) sets out three mandatory requirements; if those mandatory requirements are met, the district court "may" allow intervention but it is not required to allow it. In E.E.O.C. v. National Children's Center, Inc., 146 F.3d 1042, 1048 (D.C. Cir.), the court found:

Our conclusion that Grier satisfied all of the requirements of Rule 24(b)(2) does not compel the holding that the district court committed reversible error in denying her motion to intervene. Rule 24(b) vests district courts with considerable discretion, providing that the court "may" allow intervention if the requirements of the rule are met. Fed.R.Civ.P.24(b). Districts courts have the discretion, in other words, to deny a motion for permissive intervention even if the movant established an independent jurisdictional basis, submitted a timely motion, and advanced a claim or defense that shares a common question with the main action. A district court's exercise of this discretion, however, is not free from review. As we stated above, the denial of a motion to intervene will be reversed if the district court committed an abuse of discretion.

Similarly, the Fifth Circuit, in Bush v. Viterna, 740 F.2d at 359 states that "[p]ermissive intervention is wholly discretionary with the district court even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." See also Seaboard Farms, 2001 WL 842029 \*2 (unpublished).

D. The District Court Adequately Identified a Substantial Reason for Denying Permissive Intervention in This Case.

The district court determined that permissive intervention should not be granted because the "interests of proposed intervenors are adequately protected." Order Denying Intervention at 4, Addendum to TB. The Tribe insists that "reliance on the adequate representation factor is particularly outrageous. . ." TB 13. However, the

decision of the United States Supreme Court in Allen Calculators Inc. v. National Cash Register Company, 322 U.S. 137 (1944) undermines the Tribe's argument. In Allen Calculators, the Court indicated that a primary concern of the permissive intervention rule was the difficulty of dealing with intervenors when it was unnecessary to do so.

The Court found:

The rule provides that, in exercising discretion as to intervention of this character, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court. The record here discloses the parties produced all the data they and the court thought was available upon the issues of this case. Moreover, the court invited the Government to call the appellant's president to testify as to its knowledge concerning the issues.

Allen Calculators, 322 U.S. at 141-42. The Court in Allen Calculators thus found that, if the party seeking intervention was adequately represented, intervention could be denied in the discretion of the court; to do so would prevent the cumulation of proofs and arguments "without assisting the court."

The Court further emphasized that adequate representation was central to its decision on permissive intervention when it found:

Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and the parties were adequately represented, the action of the court denying the intervention should not be reviewed.

Allen Calculators, 322 U.S. at 142 (emphasis added).

In sum, a denial of permissive intervention is to be overturned only in the very rare case. The United States Supreme Court has found that, if a party is adequately represented by an existing party, it is reasonable to deny permissive intervention. The Tribe here has had adequate representation by the United States and there is every indication that this will continue. The district court's decision thus should be upheld.

## II

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

### A. Scope of Review.

The scope of review by this Court of a denial of intervention of right is de novo. Curry, 167 F.3d at 422.

### B. The Court Below Correctly Found That the Tribe Would be Adequately Represented.

This Court, in Curry, 167 F.3d at 422, set out the rule regarding when intervention of right would be allowed:

Upon timely application, a party seeking intervention of right must establish that it: "(1) ha[s] a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties."

The Tribe at TB 8-9 premises its present attack on the theory that its interests "are not being adequately represented in the litigation . . . ." (emphasis added). The District Court found to the contrary, Tribal Addendum at 4, and record of this controversy easily defeats any claim that the United States will not continue to adequately and vigorously defend the interests of the Tribe.

This issue originally came before this Court in State of South Dakota v. United States Department of Interior, 69 F.3d 878 (8th Cir. 1995). The decision was adverse to the United States and, in response, the United States asked for rehearing and told this Court that the case "presents an issue of grave constitutional dimension and exceptional public importance . . . ." State of South Dakota and City of Oacoma v. United States Department of Interior, Appellees' Petition for Rehearing With Suggestion for Rehearing en banc, No. 94-23, 44 at 1. (Excerpt attached at Appendix B.) After this Court denied rehearing, the United States petitioned for

a Writ of Certiorari, and told the Supreme Court that the ruling below presented an issue of "fundamental importance" and that the decision below had invalidated a "core provision of the IRA." United States Department of Interior v. State of South Dakota and City of Oacoma, Petition for Writ of Certiorari No. 95-1956, at 16, 17. (Excerpts attached as Appendix C.) As noted, the United States did ultimately obtain a GVR order, sending this case back to its beginnings. United States Department of Interior v. South Dakota, 519 U.S.919 (1996). The vigorous defense of the tribal position by the United States in the prior litigation is itself strong evidence that the United States will continue that defense.

The Tribe's brief, in the main text, seems to imply that a "per se" conflict exists whenever the United States seeks to defend an administrative action in favor of Tribe and when it acts in both a sovereign and trustee capacity. See TB at 16-24. However, the Tribe ultimately admits, albeit in a footnote, that the question is not one of legal conflict but of factual conflict. The Tribe acknowledges at TB 23, n.4, that

the question here is not whether the United States' representation is legal, but rather, if it is adequate. (emphasis added)

In this, the Tribe is surely correct. The Tribe, however, has made no factual argument here that

representation of tribal interests by the United States has been or will be inadequate.

In Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998) the Court of Appeals for the Ninth Circuit examined and rejected a similar argument in the context of Rule 19:

The district court also suggested, without elaboration or explanation, the possibility of conflict arising from the federal government's potentially inconsistent responsibilities under its trust obligations and the applicable environmental laws. Neither the district court nor any of the parties has explained how such a conflict might actually arise in the context of Southwest's suit. They identify no argument the United States would not or could not make on the Community's behalf, and suggest no "necessary element" the Community alone could present. To the contrary, because the federal government shares the Community's strong interest in defeating Southwest's ESA and NEPA claims and ensuring that the AACC becomes available for use as soon as possible, the government will be an effective representative of the Community's interests in the adjudication of Southwest's ESA and NEPA claims.

(Emphasis added.) As in Southwest Center, the Tribe here makes no showing that there is an argument that the United States cannot or will not present. Indeed, the Tribe does not even make an attempt to do so.

The Tribe's discussion of the adequate representation prong furthermore omits reference to the rule that

when a government entity is a party and the case concerns a matter of sovereign interest, the

government is presumed adequately to represent the interest of the public. This presumption may be rebutted by a strong of inadequate representation . . . .

Curry, 167 F.3d at 423. As noted above, the United States has strongly signaled its intent to vigorously contest this matter through all levels of the courts, including the United States Supreme Court. The Tribe has not rebutted this "presumption" by a "strong showing of inadequate representation . . . ." Curry, 167 F.3d at 423. Its argument must fail.

CONCLUSION

For the foregoing reasons, the Plaintiffs/Appellants respectfully request that the Court affirm the decision of the Court below.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of Brief of Plaintiffs-Appellees State of South Dakota and Lyman County, one copy of the Certificate of Compliance, and a computer diskette containing the brief text in the matter of State of South Dakota, City of Oacoma, and Lyman County v. United States Department of Interior et al and Lower Brule Sioux Tribe, were served by United States mail, first class, postage prepaid upon:

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Dated this \_\_\_\_ day of April, 2002.

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