

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 MCCALED, 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

**OPENING BRIEF
OF
LOWER BRULE SIOUX TRIBE, INTERESTED PARTY – APPELLANT**

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SUMMARY AND STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellees, the State of South Dakota, City of Oacoma, and Lyman County (hereinafter “State”), are challenging the final decision of the defendants, United States Department of Interior; Neal McCaleb, Assistant Secretary for Indian Affairs; Cora Jones, Regional Director Great Plains Regional Office, BIA; and Cleve Her Many Horses, Superintendent, Lower Brule Agency, BIA (hereinafter, “United States”) to take approximately 91 acres of land (hereinafter “91 acres”) in trust for the Lower Brule Sioux Tribe (hereinafter “Tribe”). The Tribe, who owns the 91 acres in fee, made application to have the land taken in trust in 1997. In 2000 the United States made its final decision to take the land in trust and reaffirmed that decision in 2001. The final decision was made pursuant to Section 465 of the Indian Reorganization Act, 25 U.S.C. § 465, and its regulations.

Section 465 provides for the taking of land in trust for Indians specifically for the purpose of protecting the land. As the very survival of tribes depends on a sufficient homeland base, trust protection of the land base is essential. The Lower Brule Sioux Tribe applied for the protection of trust status for the 91 acres, which had been part of its aboriginal land and original reservation, for the purpose of ensuring the continued development and sustenance of the Tribe and its future generations. The Tribe has a direct interest in the United States’ final decision

regarding the trust status of this 91 acres, and hence, has a direct interest in this litigation. There is no doubt that the outcome of this litigation could negatively impact the Tribe if the court reverses the United States' decision to take the 91 acres in trust.

The Tribe here moved both for intervention as of right and permissive intervention because the issues involved in this litigation are of such fundamental importance to the Tribe. On August 30, 2001, the District Court issued an Order Denying Intervention (hereinafter "Order"), in which it denied both the Tribe's motions for permissive intervention and intervention as of right. The Tribe respectfully appeals to this Court to overturn these decisions and grant intervention.

To most effectively present their position, the Tribe requests twenty (20) minutes for the presentation of oral argument.

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JURISDICTIONAL STATEMENT

The State invoked the jurisdiction of the District Court under the following provisions of the United States Constitution: Article I, Sections 1 and 8; Article II, Section 1; Article IV, Sections 3 and 4; and the Tenth Amendment. In addition they invoked jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706; the National Environmental Policy Act 42, U.S.C. §§ 4321 et seq.; the federal question statute, 28 U.S.C. § 1331; and under 28 U.S.C. §§ 2201-2202. *See* Amended Complaint at 1-2, Tribe’s Appendix (*Tr. App.*) at 6-7.

This appeal arises from a final order of the United States District Court for the District of South Dakota Central Division (Hon. Richard H. Battey) denying the Lower Brule Sioux Tribe’s Motion for Intervention as of Right and Permissive Intervention. *See* Order; *Tr. App.* at 1-4. The denial of intervention as of right is a “final decision” on the merits and this Court has jurisdiction to review under 28 U.S.C. § 1291. *See, e.g., Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519 (1947); *Donnelly v. Glickman*, 159 F.3d 405 (9th Cir. 1998). This Court has provisional jurisdiction to review the denial of permissive intervention for abuse of discretion. *See Lucas v. McKeithen*, 102 F.3d 171 (5th Cir. 1996); *Curry v. Regents Of the University of Minnesota*, 167 F.3d 420 (8th Cir. 1999). *See also In Re Vitamins Antitrust Class*, 215 F.3d 26 (D.C. Cir. 2000)

(Court may exercise its pendent jurisdiction to review denial of permissive intervention where the basis for intervention as of right and permissive intervention is the same).

Notice of Appeal was timely filed by the Tribe on October 26, 2001, as required by Fed. R. App. P. 4(a).

APPLICABLE STANDARDS OF REVIEW

The Court reviews *de novo* a denial of intervention as of right. *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080 (8th Cir. 1999) and reviews denial of permissive intervention for abuse of discretion. *Curry v. Regents of the University of Minnesota*, 167 F.3d 420 (8th Cir. 1999).

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in denying the Lower Brule Sioux Tribe's Motion for Permissive Intervention as a defendant under Fed. R. Civ. P. 24(b) where the Court held that the Tribe and Federal defendants have questions of law in common and that the application was timely; where intervention would neither delay nor prejudice the adjudication of the rights of the original parties; where the United States – the named defendant– supported the Tribe's

permissive intervention; and where such denial would contravene the United States' policy of supporting tribal participation in matters that affect them.

- *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967)
- *Crumble v. Blumenthal*, 549 F.2d 462 (7th Cir 1977)
- *Citizens for an Orderly Energy Policy v. County of Suffolk*, 101 F.R.D. 497 (D.N.Y.,1984)
- *Arizona v. California*, 460 U.S. 605 (1983)

2. Whether the District Court erred in finding that the United States could adequately represent the Tribe's interests and hence, erred in denying the Lower Brule Sioux Tribe's Motion to Intervene as of Right under Fed. R. Civ. P. 24(a)(2).

- *NRG Company v. United States*, 24 Cl.Ct. 51 (1991)
- *Nevada v. United States*, 463 U.S. 110 (1983)
- Treaty of Oct. 14, 1865 with the Sioux – Lower Brule Band, Art. 5, reprinted in *Laws and Treaties* (Charles J. Kappler, ed.) (1904). Vol. II at 885
- Indian Reorganization Act, 25 U.S.C. §§ 461 et. seq.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Defendant-Intervenor, the Lower Brule Sioux Tribe (hereinafter, "Tribe")

owns, in fee, 91 acres of land in South Dakota (hereinafter “91 acres”). In 1997 the Tribe made application to the United States to have this land placed in trust under 25 U.S.C. § 465 and the applicable regulations. On May 18, 2000 the Secretary of the Interior made a final decision to place the land in trust and on January 26, 2001 ratified that decision. *See* 65 Fed. Reg. 31594 (May 18, 2000)(Notice of intent to take land into trust) and 66 Fed. Reg. 7925-02, 2001 WL 60758 (F.R.), (January 26, 2001)(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). Plaintiffs-Appellees, the State of South Dakota, et. al, (hereinafter “the State”) challenged this final decision of the Department of the Interior. The State’s amended complaint stated that “[t]his is an action for injunctive and declaratory relief challenging the action of the Defendants relating to the acquisition of certain land in trust status in central South Dakota This civil action for declaratory and injunctive relief seeks to prevent the United States Department of the Interior, the Assistant Secretary, and the Area Director, from taking certain land constituting approximately ninety one acres outside the limits of the Lower Brule Reservation into trust on behalf of the Lower Brule Sioux Tribe.” Amended Complaint paragraphs 1 and 13. *Tr. App.* at 6,8.

The Tribe moved for permissive intervention in this case pursuant to Fed. R.

Civ. P. Rule 24(b), which states, “upon timely application anyone may be permitted to intervene in an action . . . [w]hen an applicant’s claim or defense and the main action have a question of law or fact in common.” Rule 24(b)(2). Here, the District Court held that the Tribe met each of these factors. It held that the Tribe’s application was timely, *See* Order at 2, *Tr. App.* at 2, and that “the Tribe and federal defendants have common questions of law in common.” Order at 4, *Tr. App.* at 4. The District Court, however, abused its discretion and denied the Tribe’s motion for permissive intervention. *Id.* at 4.

The Tribe also moved to intervene as a defendant as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), which states 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).

As the Eighth Circuit has clearly stated, in addition to requiring a timely application, Rule 24(a)(2) establishes a “tripartate test” for determining the appropriateness of intervention. Under this test a party is entitled to intervene if: “(1) [the party has] a recognized interest in the subject matter of the primary

litigation, (2) . . . his interest might be impaired by the disposition of the suit, and (3) . . . his interest is not adequately protected by the existing parties.” *Planned Parenthood of Minnesota v. Citizens for Community Action*, 558 F.2d 861, 869 (8th Cir. 1977). Where all these requirements are met, intervention as of right must be granted. *See sierra Club v. Robertson*, 960 F.2d 83 (8th Cir. 1992)(noting that timely intervention should be granted where three conditions are met); *Karuk Tribe v. United States*, 28 Fed. Cl. 694(noting that court “must permit intervention” where three criteria are met).

The Tribe argued below that all requirements of intervention as of right had been met. As to the first three, the District Court correctly agreed: The District Court held that the motion to intervene was timely, that the Tribe had a recognized interest in the subject matter of the litigation, and that the Tribe’s interest might be impaired by the disposition of the suit. Order at 2-3, *Tr. App.* at 2-3. On the question of adequate representation, the final element in the analysis, however, the District Court erred and held against the Tribe, finding that under the doctrine of *parens patriae*, the United States adequately represented the interests of the Tribe. *Id.* at 3-4.

SUMMARY OF ARGUMENT

A. Permissive Intervention

A court may properly exercise its discretion and deny permissive intervention if an application is untimely, if the applicant's claims or defenses have no questions of law or fact in common with those of the main action, or if the intervention would unduly delay or prejudice the adjudication of the rights of the original parties. In this case, none of these conditions exist. Nonetheless, the District Court, relying on the very "minor factor" of adequate representation, denied the Tribe's motion for permissive intervention as defendant in this action. It did so even against the support of the existing defendant, the United States, to permit the intervention of the Tribe. *See* Federal Defendants Response to Motion of Lower Brule Sioux Tribe to Intervene at 1-2; *Tr. App.* at 9-10.¹

By denying permissive intervention without analyzing factors pertinent to that decision, and by disregarding the policy of the United States to allow the participation of the Tribe, which was evidenced both by the United States' support of the Tribe's motion and declarations of the United States Supreme Court in a

¹ The Tribe submits the Federal Defendants Response to Motion of Lower Brule Sioux Tribe to Intervene in its appendix solely to confirm the United States' support of its motion for permissive intervention.

similar circumstance, the District Court so clearly abused its discretion in denying the Tribe's motion for permissive intervention that reversal of that decision here is required.

B. Intervention as of Right

Where the following four factors are met, a court must grant intervention as of right: (1) where there is a timely application; (2) where the intervenor has an interest in the litigation; (3) where the intervenor's interest might be impaired by the litigation; and (4) where the intervenor's interests are not adequately protected by the existing parties. As the four factors are met by the Tribe here, the District Court erred by denying the Tribe intervention as of right.

The United States has a duty to represent the interests of the Tribe in this litigation as its fiduciary, which means that it owes the Tribe an undivided duty of loyalty and must act solely on behalf of the tribal interests in this litigation. The United States is entirely incapable of adequately acting as the Tribe's trustee in this case, however, if it is representing not only the Tribe's interests, but its own sovereign interests and the interests of all its citizens in its capacity of *parens patriae*. As the District Court held that the United States is indeed acting in its capacity as *parens patriae* in this case, *a fortiori*, it cannot adequately represent the

interests of the Tribe as its fiduciary. Because the Tribe's interests are not being adequately represented in this litigation, the District Court erred in denying intervention as of right and that denial should be overruled by this Court.

ARGUMENT

I. THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION IN DENYING THE TRIBE'S MOTION FOR PERMISSIVE INTERVENTION

A. The District Court Abused its Discretion by Ignoring Pertinent Factors for Determining Permissive Intervention and Basing its Denial on One Impertinent Factor

Fed. R. Civ. P. 24(b) specifically sets forth two factors for a court to consider in exercising its discretion to permit intervention: “[i]n 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). The District Court here, however, considered neither delay nor prejudice in denying the Tribe's motion for permissive intervention. Rather, the court ignored these factors, abused its discretion, and based its decision to deny intervention on a highly inappropriate factor.

1. No Delay or Prejudice Would Be Caused by the Tribe's Intervention in this Case

As held in *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), “[w]hile permissive intervention may be denied in order to avoid the likelihood of undue delay, here the District Court’s denial of intervention was not put on that ground; it was not seriously argued by appellees and the factual situation does not support it.” 385 F.2d at 182. *See also Crumble v. Blumenthal*, 549 F.2d 462 (7th Cir 1977)(reversing District Court’s denial of permissive intervention where the court could “find no evidence that permitting the [applicants] to intervene will prejudice the rights of any of the parties.”).

Significantly, to the extent that the District Court did consider any question of delay or prejudice, it found none. The District Court looked at the questions of delay and prejudice its evaluation of timeliness. Citing the Eighth Circuit, the District Court explained that one of the factors for determining timeliness is “how much prejudice the delay in seeking intervention may cause other parties if intervention is allowed.” Order at 2, *Tr. App.* at 2 (citing *United States v. Union Electric Co.*, 64 F.3d 1152 (8th Cir. 1995)). As Moore’s Federal Practice points out, “[a] discretionary denial of a permissive intervention request may be related to judicial resolution of the equally discretionary issue of timeliness.” § 24.10[2][a]. In this case, the District Court found that the application for intervention was timely. Implicit in this holding is the conclusion that little to no prejudice or delay

existed.

Had the District Court done an even more extensive analysis of delay or prejudice, as it should have, the conclusion that the Tribe's intervention would cause neither delay nor prejudice would only have been strengthened. Case law provides example of instances where a court properly denied permissive intervention because it would have caused delay or prejudice. Intervention could, for example, cause delay or prejudice where "the interests of plaintiffs and proposed intervenors 'are in direct opposition,' resulting to prejudice to existing parties" *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Or, intervention could "unduly delay or prejudice adjudication of rights of original parties, who had agreed to settle suit and . . . [intervenors] would have revived the disputed issues that the parties had agreed to put aside" *New York News v. Kheel*, 972 F.2d 482, 487 (2nd Cir. 1992). Or, intervenors could "prejudice the rights of original parties by delaying the case with additional discovery." *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1995).

None of these, or any other factors of delay or prejudice would be caused by the Tribe's intervention in this case, however. The 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. The United States has confirmed

and continues to confirm this alliance through its support of permissive intervention. Also, the Tribe's intervention will not revive any disputes already resolved. Indeed, no issues have yet been decided in this case, save the District Court's decision to disallow additional discovery – an order which the Tribe fully supports. *See Tr. App.* at 11-12. Obviously, since the Tribe supports this order, it will not be seeking any additional discovery and will cause neither delay nor prejudice in this regard either. Finally, any delay caused by intervention would certainly be no more “undue” nor prejudicial than any other delays in this case. To date, the parties have not seemed opposed to delay. Among them they have agreed to numerous extensions of time and have even moved the District Court to stay proceedings pending this appeal. *See Tr. App.* at 13-18. Indeed, any delay in this action is quite the opposite of prejudicial in that it only extends the time that the 91 acres is not in trust – a state of affairs that is favorable to plaintiffs in that the entire purpose of their suit is to keep the 91 acres out of trust. *See Tr. App.* at 8.

2. In the Absence of Delay or Prejudice, Adequacy of Representation Is Not a Sufficient Basis upon Which to Deny Permissive Intervention

The only reason the District Court gave for denying permissive intervention was that the “interests of the proposed intervenors are adequately protected.”

Order at 4; Appendix at 4. It was a clear abuse of discretion for the District Court to base its denial on this one factor. This factor is not one of the factors that Rule 24(b) indicates should be considered in permitting intervention. Rather, as discussed above, undue delay or prejudice are the only factors indicated under the Rule. Indeed, “[i]t is well-settled that the principle consideration in either granting or denying an application for permissive intervention is ‘whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.’” *Citizens for an Orderly Energy Policy v. County of Suffolk*, 101 F.R.D. 497 (D.N.Y. 1984)(emphasis added). Although some courts have, in addition to looking at the primary factors of undue delay and prejudice, looked to the issue of adequate representation in the context of permissive intervention, this factor is “a minor factor at most.” *Id*; *United States v. Columbia Pictures, Inc.*, 88 F.R.D. 186 (D.N.Y., 1980).

The District Court’s reliance on the adequate representation factor is particularly outrageous in this case, as those deemed by the court capable of representing the Tribe’s interests – the federal defendant’s themselves – fully supported the Tribe’s permissive intervention. *Tr. App.* at 9-10.

As held in *Neusse*, “[w]hile reversal of the denial of permissive intervention is not often warranted, there is undoubted jurisdiction to enter such an order where

the District Court has not followed the appropriate standard or approach in exercising its discretion.” 385 F.2d at 182. Here, 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.

B. The District Court Also Abused its Discretion by Disregarding the United States’ Firm Policy, as Expressed Both in this Case and by the Supreme Court, of Allowing Indians to Participate in Matters That Affect Them

The District Court’s order runs completely afoul of the Supreme Court’s support of the permissive intervention of tribes in cases where the United States represents tribal interests. On this point, the Supreme Court has stated, “Indians are entitled to take their place as independent qualified members of the modern body politic. Accordingly, the Indians’ participation in litigation critical to their welfare should not be discouraged.” *Arizona v. California*, 460 U.S. 605, 613 (1983)(citations omitted).

There is no question that this litigation involves a matter “critical to the welfare” of the Tribe. The Tribe owns the 91 acre parcel in fee and has a final decision by the United States to have that parcel taken into trust for the Tribe. Trust status directly and substantially affects the Tribe. First, vested property rights in tax exemption accompany trust status. Indeed, § 465 of the Indian

Reorganization Act expressly states that “[t]itle to any lands or rights acquired pursuant to sections . . . 465 . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.” 25 U.S.C. § 465 (emphasis added).

Second, in addition to vesting of property rights, once land is taken into trust by the United States under § 465, there is strong evidence that the land becomes Indian country, a status which vests a tribe with certain jurisdictional rights and divests the State of others. *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993); *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 and 446 (1975); Felix S. Cohen, *Handbook of Federal Indian Law*, 28, 29-31 (1982 ed.).

It was an abuse of discretion for the District Court to deny the Tribe the ability to participate in this litigation where so many of their interests are at stake – particularly when the United States clearly supported, and continues to support the Tribe’s permissive intervention. Hence, this Court should reverse the District Court and permit the Tribe to intervene.

II. THE DISTRICT COURT ERRED IN DENYING THE TRIBE’S MOTION TO INTERVENE AS OF RIGHT. IF THE UNITED STATES REPRESENTS THE TRIBE AS *PARENS PATRIAE*, AS THE District Court HELD, A *FORTIORI*, IT CANNOT REPRESENT THE INTERESTS OF THE TRIBE AS ITS TRUSTEE, AND HENCE ITS REPRESENTATION OF THE TRIBE IS INADEQUATE

A. By Making its Final Decision to Take the Land in Trust for the Tribe, the Federal Government Assumed an Affirmative Fiduciary Duty to the Tribe to Protect That Decision

The United States has an undisputed general trust responsibility toward Indian tribes. *United States v. Mitchell*, 463 U.S. 206, 226 (1983). *See also Blue Legs v. United States*, 867 F.2d 1094 (8th Cir 1989). Indeed, the federal Indian trust relationship is the cornerstone of federal Indian law and is a unique relationship that has long been recognized by the Supreme Court, Congress, and the Judicial Branch. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Kagama*, 118 U.S. 375, 384 (1886); *Nat’l Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Under the trust relationship, the United States “has charged itself with moral obligations of the highest responsibility and trust.” *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). Common law fiduciary duties apply and remain even when Congress has imposed conflicting representational duties on the

federal government. *Arizona v. California*, 460 U.S. 605, 626-27 & n.20.

(1983)(noting that tribes might sue the government for breach of fiduciary duties when the government fails to represent tribes adequately).

Here, the combination of the general trust duty, the Tribe's Treaty of 1965, the provisions of the Indian Reorganization Act, the regulations promulgated thereunder, and the Secretary's action in making a final decision in favor of the Tribe created a duty in the United States to represent the interests of the Tribe as its fiduciary in this litigation.²

As with other tribes, the foundation of the trust relationship between the Lower Brule Sioux Tribe and the United States traces to mutual promises guaranteed through treaties. In 1965, the Lower Brule Sioux Tribe signed a treaty with the United States in which it agreed to cease hostilities against the United States in exchange for the promise of trust protection by the United States. Specifically, the United States promised to the Lower Brule Sioux Tribe that:

Should any individual, or individuals, or portion of the Lower Brule band of Dakotas, or Sioux, represented in Council, desire hereafter to locate

² The document or documents creating or demonstrating the existence of a trust relationship need not "say in specific terms that a trust or fiduciary relationship exists or is created The existence vel non of the relationship can be inferred from the nature of the transaction or activity." *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980).

permanently upon any part of the lands claimed by the said band, for the purpose of agriculture or other pursuits, it is hereby agreed by the parties to this treaty that such individual or individuals shall be protected in such location against any annoyance or molestation on the part of whites or Indians.

Treaty of Oct. 14, 1865 with the Sioux – Lower Brule Band, Art. 5, reprinted in *Laws and Treaties* (Charles J. Kappler, ed.) (1904). Vol. II at 885.

The language and history of the Indian Reorganization Act, 25 U.S.C. §§ 461 et. seq. (IRA), only bolsters the promise of trust protection contained in the treaty. At the root of the trust relationship is the United States’ “obligation to insure the survival of tribes.” American Indian Policy Review Comm’n, 94th Cong., Final Report 126 (Comm. Print 1977). The IRA was passed by Congress in 1934 specifically for the purpose of fulfilling the United States’ trust obligation to ensure the cultural and economic survival of Indian tribes. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)(quoting H.R. Rep. No. 1804, 73rd Cong. 2d Sess., 1 (1934)(Congress intended to “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”). The intent of Congress articulated through 25 U.S.C. § 465 is sufficient to support the conclusion that when the Secretary made a final decision under that statute, a trust duty as to that decision arose between the United States and the Tribe. *See, e.g., White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977),

aff'd 581 F.2d 697 (8th Cir. 1978)(looking to statutes regarding Indian health the court stated that “[w]e think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians”).

Finally, under the regulations, when the United States made its final decision to take 91 acres of land in trust for the Tribe, all discretion with respect to the decision was exhausted – a fact which strongly supports the conclusion that the federal government assumed the duty to protect that decision in litigation solely as the fiduciary for the Tribe.

The Regulations contain the following mandatory language guiding the Secretary’s actions following a final determination to take land in trust for an Indian tribe:

Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register . . . a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

25 CFR § 151.12 (emphasis added). Indeed, as required, the Department of the Interior published in the Federal Register “Notice of Final Agency Action to Take 90.94 Acres of Land, More or Less, Into Trust for the Lower Brule Sioux Tribe of Indians of South Dakota.” 65 Fed. Reg. 31594 (May 18, 2000). This Notice

stated that, “On April 6, 2000, the Assistant Secretary-Indian Affairs made a final determination that the United States will accept 90.94 acres of land, more or less, in trust for the Lower Brule Sioux Tribe of Indians of South Dakota.” *Id.* (emphasis added). Because of the mandatory nature of this language, the Secretary’s ability or discretion to change her mind about taking the 91 acres into trust status is limited and the United States is obligated to defend that decision as the Tribe’s trustee.

B. As Fiduciary, the United States Is Obligated to Act Solely in the Interests of the Tribe

The parameters of the United States’ duty to the Tribe in this situation are defined at minimum by case law and two fundamental duties of trust law – the duty of loyalty and the duty to defend actions. As courts have held, where a fiduciary duty exists, the standard by which the United States’ action will be judged, “is not mere reasonableness, but the highest fiduciary standards.” *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct.Cl. 1981), *cert. denied*, 456 U.S. 989 (1982). *See also United States v. Mason*, 412 U.S. 391, 398 (1973); *Red Lake Band v. United States*, 17 Cl.Ct. 362 (1989); *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl.Ct. 660, 678 (1986). As for basic principles of trust law, “[p]erhaps the most fundamental duty of a trustee is that he must display throughout the administration

of the trust complete loyalty to the interests of the beneficiary and must exclude . . . all consideration of the interests of third persons.” George G. Bogert & George T. Bogert, *Law of Trusts and Trustees* § 543 at 217-19 (2d rev. ed. 1993)(emphasis added); Restatement (Second) of Trusts § 170 (1959). Under the duty to defend actions, “the trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate . . .” Restatement (Second) of Trusts, § 178.

Under these two principles of trust law, the United States is bound here to represent the interests of the Tribe and defend its final decision to take the 91 acres of land in trust solely as the Tribe’s trustee. *Cf. Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 426 (Cl.Ct. 1991)(holding that United States had trust obligation to represent tribal water interests in litigation).³

C. Because the United States Is Representing the Tribe’s Interests as *Parens Patriae* in this Case, it Is Unable to Fulfill its Fiduciary Duty to Represent the Tribe as Trustee and Hence, its

³ This brief renders no opinion regarding whether the contours of the fiduciary duty here would include subjecting the United States to a suit for money damages in the event of a breach of duty. It only demonstrates that the United States has taken on the affirmative duty to represent the Tribe as trustee in the litigation, in a way somewhat similar to the way the United States takes on the affirmative trust duty to provide services to Indians. *See, e.g., Blue Legs v. United States*, 867 F.2d 1094, 1100 (8th Cir 1989); *White v. Califano*, 437 F.Supp. 543 (D.S.D. 1977), *aff’d* 581 F.2d 697 (8th Cir. 1978).

Representation Is Inadequate

In this case the District Court found that the United States was representing the Tribe's interests, not as trustee, but as *parens patriae*. See Order at 3-4, *Tr. App.* at 3-4. Where the government is acting as *parens patriae*, it is acting in a matter of sovereign interest and is acting in the interests of all its citizens, or the public at large. See *United States v. Union Electric*, 64 F.3d 1152 (8th Cir 1995); *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997).

There is a clear distinction between the United States acting as trustee and acting as sovereign. Courts have plainly stated: "It is obvious that [the United States] cannot simultaneously (1) act as trustee for the benefit of the Indians . . . as it thinks is in their best interest, and (2) exercise its sovereign power In any given situation in which [the United States] has acted with regard to Indian people, it must have acted either in one capacity or the other. [The United States] can own two hats, but it cannot wear them both at the same time." *NRG Company v. United States*, 24 Cl.Ct. 51 (1991)(citing *Three Affiliated Tribes of Fort Berthold Reservation v. United States*, 182 Ct. Cl. 543 (1968), 390 F2d 686 (Ct.Cl. 1968). See also *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980)(affirming court of claims opinion, 220 Ct. Cl. 442, 601 F.2d 1157, that United States, in dealing with Indians, can act either as guardian derived from its plenary power to

control Indian affairs, or under fundamental sovereign power). As the Supreme Court recognized in *Nevada v. United States*, 463 U.S. 110, 128 (1983), “the Government cannot follow the fastidious standards of a private fiduciary” where, in addition to representing tribal interests, it represents other interests as well.⁴

Here, the United States assumed the obligation to act as the Tribe’s trustee when it made the final decision to take the land in trust for the Tribe. As the District Court determined, however, the United States is not acting in its capacity as fiduciary in this case. Rather, the court held that the United States is acting as *parens patriae*, or parent of the state, whereby it represents its sovereign interests and the interests of all of its citizens. As the United States is clearly unable to perform the duty of fiduciary and represent the sole interests of the Tribe if it is acting as *parens patriae*, the United States is not adequately representing the Tribe’s interests. The District Court thus erred in denying the Tribe’s motion to intervene as of right and should be reversed.

⁴ As *Nevada* clearly held, the United States may legally represent tribal interests as it simultaneously represents other interests in litigation. However, the question here is not whether the United States’ representation is legal, but rather, if it is adequate. As *Nevada* demonstrated, legal representation is not necessarily adequate representation. See *Nevada*, 463 U.S. at n.14 (noting that tribe had brought and settled a collateral damages claim against the United States for inadequate representation in that case).

CONCLUSION

Because the District Court abused its discretion in denying the Tribe's motion for permissive intervention, this Court should reverse the District Court's order and permit the Tribe to intervene in this action. Alternatively, or additionally, because the District Court erred in denying the Tribe's motion to intervene as of right, this Court should reverse the District Court's order and grant the Tribe intervention as of right.

Dated, this 14st Day of February 2002

Respectfully submitted,

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BRIEF LENGTH CERTIFICATION

I, the undersigned counsel, certify that the foregoing Opening Brief of Lower Brule Sioux Tribe, Interested Party – Appellant is under the word limitation of 14,000 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.

TRACY A. LABIN

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this day of February 14, 2002 two paper copies and one electronic copy in WordPerfect 9.0 format contained on a 3 1/2 inch diskette of the forgoing Opening Brief of Lower Brule Sioux Tribe, Interested Party – Appellant and one paper copy of the appendix, was served via U.S. mail, first class, postage prepaid to the following:

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