UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR,

DEB HAALAND, in her official capacity as
United States Secretary of the Interior,

Case No. 23-cv-1511

BUREAU OF INDIAN AFFAIRS,

TAMMIE POITRA, in her official capacity as
the Midwest Regional Director,
Bureau of Indian Affairs,

ACTING MIDWEST REGIONAL DIRECTOR,
Bureau of Indian Affairs, and

INTERIOR BOARD OF INDIAN APPEALS,

Defendants.

ONEIDA NATION'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT

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INTRODUCTION

Plaintiff Village of Hobart (the "Village") seeks declaratory and injunctive relief under the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 701-706, vacating decisions of the Interior Board of Indian Appeals (the "IBIA") upholding Notices of Decision (the "NODs") issued by Bureau of Indian Affairs (the "BIA") to acquire eight properties (the "Parcels"), consisting of 21 tax parcels, of fee land owned by the Nation (the "Nation") within the Oneida Reservation in trust pursuant to the Indian Reorganization Act (the "IRA"), 25 U.S.C. §§ 5101-5128, and implementing regulations found at 25 C.F.R. Part 151.[1] Among other things, the Village claims the section of the IRA authorizing the Secretary of the Interior to acquire land in trust for Indians is unconstitutional under various provisions of the United States Constitution because trust acquisition supposedly strips the Village of jurisdictional control over the land; the Nation is not eligible for the administrative fee-to-trust process because it was not under federal jurisdiction in 1934 within the meaning of the IRA; the BIA is biased against the Village and violated its due process rights; and the BIA's actions were arbitrary and capricious and otherwise not in accordance with the law.

The Nation moves to intervene in this action because the Village's claims are distinctly prejudicial to the Nation's governmental and property interests and implicate the Nation's ability to govern its Reservation and to protect its lands from future alienation by conveying them in trust to the United States. In addition, the Village previously raised and/or litigated and lost several of its claims, and the Nation has a fundamental interest in defending prior judgments in its favor from collateral attack. *See Oneida Tribe of Indians of Wisconsin v. Village of Hobart*,

[1] The BIA revised and renumbered the applicable regulations effective January 11, 2023. 88 Fed. Reg. 86222, Dec. 12, 2023. The references in this Memorandum are to the version of the regulations in effect at the time the BIA issued the NODs.

732 F.3d 837 (7th Cir. 2013), and *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020). The Nation has an interest that is distinct from that of the United States in obtaining finality as to these perennial Village claims, either through preclusive effect of earlier judgments or litigation of them here. The Court should therefore grant the Nation's motion to intervene.

BACKGROUND

The IRA authorizes the Secretary of the Interior to acquire land in trust for Indians, 25 U.S.C. § 5108, and the Secretary has delegated this authority to the BIA. The BIA has promulgated regulations governing the exercise of this discretionary authority. *See* 25 C.F.R. Part 151. Pursuant to the regulations, the BIA considers the interests of state and local governments, like the Village, when evaluating an application by an Indian Tribe to have land acquired in trust. *Id*. at § 151.10.

In 2006, the Nation submitted applications to the Midwest Regional Office of the BIA to have the eight Parcels at issue acquired in trust. The Village submitted comments on the Nation's applications and objected to trust acquisition of the Parcels. The BIA processed the applications, and in 2010, the Midwest Regional Director issued five NODs to acquire the Parcels in trust. The Village appealed each of the NODs to the IBIA, and in 2013, the IBIA consolidated the appeals, affirmed the NODs in part, vacated the NODs in part, and remanded the NODs to the Regional Director. The IBIA rejected the majority of the Village's claims, including the Village's claim the Nation is ineligible for land in trust under the IRA, and directed the BIA to give further consideration to the Village's complaints about alleged jurisdictional problems and conflicts of land use, loss of tax revenue, and compliance with environmental laws. The IBIA also directed the BIA to consider the Village's claim, first made on appeal to the IBIA, that the BIA is biased as a result of a Memorandum of Understanding (the "MOU") between the

BIA and the Nation regarding the processing of fee-to-trust applications. *See Village of Hobart, Wisconsin v. Midwest Regional Director*, *Bureau of Indian Affairs*, 57 IBIA 4 (2013) (*Hobart I*).

Following remand, the BIA again solicited and received comments from the Village, and in 2017, the then-Acting Regional Director issued a NOD to acquire the eight Parcels in trust. The Village appealed the NOD to the IBIA, and in September of 2023, the IBIA rejected the Village's claims and affirmed the NOD. *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, *Bureau of Indian Affairs*, 69 IBIA 84 (2023) (*Hobart II*). The IBIA specifically recognized the Nation as an interested party, and the Nation fully participated in the proceedings before the IBIA.

The Village now seeks review by this Court under the APA, and the Nation seeks to intervene in order to protect its interests. The Defendants consent to permissive intervention. The Village was asked to consent to the Nation's intervention and has not responded.

ARGUMENT

I. The Court Should Grant the Nation's Motion to Intervene

Intervention provides a mechanism for non-parties to protect interests that might otherwise be "adversely affected" by the outcome of litigation. *Illinois v. City of Chicago*, 912 F.3d 979, 985 (7th Cir. 2019). Rule 24 of the Federal Rules of Civil Procedure provides two separate avenues for intervention — intervention of right and permissive intervention. Rule 24(a) describes when a district court "must" allow a party to intervene. Rule 24(b) addresses when a district court "may" allow a party to intervene. In either case, the Rule is to be "liberally construed" in favor of potential intervenors "in order to avoid a multiplicity of suits and settle all related controversies in one action." *Clark v. Sandusky*, 205 F.2d 915, 919 (7th Cir. 1953)*; see also* 20 James W. Moore, *Moore's Federal Practice* § 24.03[1][a] (3d ed. 2020) ("Rule 24 is to be construed liberally…and doubts should be resolved in favor of the proposed intervenor."). In

considering a motion to intervene, courts "must accept as true the non-conclusory allegations of the motion." *Illinois*, 912 F.3d at 984 (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)).

A. The Nation Meets the Requirements for Intervention of Right.

Rule 24(a)(2) states, "On timely motion, the court must permit anyone to intervene who…claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). A movant must meet four requirements: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Illinois*, 912 F.3d at 984 (citations omitted).

1. The Nation's motion is timely.

Rule 24 requires a motion to intervene to be timely, but does not specify time limits. "The purpose of the requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal. As soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene." *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7th Cir. 1989) (quoting *United States v. South Bend Community School Corp*., 710 F.2d 394, 396 (7th Cir.1983)). In determining timeliness, courts consider four factors: (1) the length of time the intervenor knew or should have known of his or her interest in this case, (2) the prejudice to the original parties caused by the delay, (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances. *South v. Rowe*, 759 F.2d 610, 612 (7th Cir.1985) (citation omitted).

It cannot reasonably be disputed that the Nation's motion to intervene is timely. The Nation first learned of the case when the Village filed its Complaint in November of 2023, and the Nation is seeking to intervene on the date the Defendants are required to file their Answer. The Nation has moved at the earliest opportunity to protect its interests, and its substantial and distinct interests will be prejudiced if its motion is denied. As there has been no delay, there can be no prejudice resulting from a delay.

2. The Nation has profound interests at stake in the litigation.

A proposed intervenor's "interest relating to the property or transaction" under Rule 24(a)(2) must be "direct, substantial, and legally protectable." *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1972) (citation omitted). The Nation has a direct, substantial, and legally protectable interest in both the property and transaction at issue. The Nation owns the eight Parcels at issue in fee, and it has applied to have them taken into trust for the benefit of the Nation as provided for in the IRA and implementing regulations.

As the Court is aware, the implementation of the General Allotment Act of 1887 (GAA) on the Oneida Reservation resulted in the loss of title to the majority of the land reserved for the Nation under the 1838 Treaty with the Oneida. *See, e.g., Oneida Nation v. Village of Hobart*, 968 F.3d 664, 669-671 (7th Cir. 2020). This pattern of land loss was not unusual across reservations in the United States, and in 1934 Congress enacted the IRA to remedy the harmful effects of allotment and to promote tribal self-governance. *Id*. at 671. Two of the central features of the IRA are the grant of discretionary authority to the Secretary to acquire land for Indians, and authorization for Tribes "to organize and adopt constitutions with a congressional sanction of self-government." *Id*. ("Congress passed the [IRA] not only to stem the loss of Indian land holdings…but also to give tribes the opportunity to re-establish their governments and land holdings.").

The Village's claims include not only a broad attack on the constitutionality of the IRA, but also a specific challenge to the Nation's eligibility to benefit from the administrative fee-to-trust process established pursuant to the IRA, and, by extension, the propriety of the Nation's re-organization under the IRA. They rest upon the assertion the Village possesses jurisdictional control over fee land owned by the Nation on the Reservation, and upon the assertion the Nation was not under federal jurisdiction in 1934. These attacks go to the core of the Nation's self-governance, and the Nation has a profound interest in defending against them. In addition, the Village invoked these claims against the Nation in *Oneida Tribe* and *Oneida Nation* and the Village lost these cases, on those precise or other grounds. Indeed, these have become stock claims made by the Village against the Nation, as this protracted litigation demonstrates. The Nation has a strong interest in defending the judgments in earlier cases from collateral attack and putting these perennial claims to rest.

Finally, the Village challenges the legality of the Memorandum of Understanding between the Nation and the BIA regarding the reprogramming of federal funding for the Nation to facilitate the processing of fee-to-trust applications. According to the Village, the reprogramming of federal funding violates the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5301, et seq. The Nation has a vital interest in the proper interpretation and application of the ISDEAA to its self-governance compacts with the BIA and the Indian Health Service. The Nation also has a strong interest in maintaining its Memorandum of Understanding with the BIA.

3. The Nation's interests may be adversely affected.

The Nation's interests clearly may be adversely affected by the outcome of this case. From a practical perspective, an order enjoining the United States from processing the Nation's fee-to-trust applications and from acquiring land in trust for the Nation, as requested by the

Village, would have the same effect as an order requiring the Nation to withdraw its applications and enjoining the Nation from filing future applications. In addition, a determination the Nation was not under federal jurisdiction in 1934, or that the Village possesses jurisdictional control over fee land owned by the Nation on the Reservation, would undermine the finality of the judgments in *Oneida Tribe* and *Oneida Nation*, negatively impact the Nation's self-governance, and threaten the Nation's ability to place land elsewhere on its Reservation in trust. Such determinations would likely lead to future litigation and thus a multiplicity of suits.

4. The Nation's interests are not adequately represented.

While the Nation's interests are generally aligned with the Defendant's interests, the Nation also has distinct interests above and beyond those of the Defendants. The Village's claims threaten the Nation's ability to have land taken into trust anywhere within its Reservation, and have broader implications for the Nation. If the Nation were not under federal jurisdiction in 1934, as the Village claims, the Nation would be ineligible not only for trust acquisition of the eight Parcels at issue in this case, but also for trust acquisition of any land within its Reservation. In addition, the Nation's reorganization under the IRA could be drawn into question.

The Defendants also are not in a position to assert all of the defenses available to the Nation. In particular, the Defendants are not able to raise the defense of claim preclusion based upon the final judgment in *Oneida Nation*, because the United States was not a part to that case. Claim preclusion bars a plaintiff from asserting claims that could have been raised and decided in a prior action, even if they were not actually litigated. If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). In order for claim preclusion to apply, there must be an "identity of parties,"

meaning that the same parties or their privies must be involved in both actions. *See, e.g., Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (7th Cir. 2000). Because the United States was not a party in *Oneida Nation*, the Defendants cannot now assert the defense of claim preclusion based upon the final judgment in that case.

B. The Nation Meets the Requirements for Permissive Intervention.

Rule 24(b) states, "On timely motion, the court may permit anyone to intervene who… has a claim or defense that shares with the main action a common question of law or fact," and requires the court to consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B) and (3). Accordingly, in order to intervene under Rule 24(b), a proposed intervenor must present: (1) a timely motion, (2) a claim or defense that has a question of law or fact in common with the main action, and (3) an independent ground for subject matter jurisdiction. *See Security Insurance Co. of Hartford v. Schipporeit, Inc.,* 69 F.3d 1377, 1381 (7th Cir. 1995); *Heartwood, Inc., v. U.S. Forest Serv., Inc.,* 316 F.3d 694, 701 (7th Cir. 2003).

As discussed above, it cannot reasonably be disputed that the Nation's motion is timely. Thus, only the remaining two factors and potential delay or prejudice the adjudication of the rights of the original parties require further discussion.

1. The Nation is asserting defenses that have questions of law or fact in common with the main action.

It is "apparent" that an intervenor's claims or defenses and a party's claims have common questions of law and fact when they are "based upon the same transactions." *Peterson Builders, Inc. v. A.C. Hoyle Co.*, 163 F.R.D. 550, 552 (E.D. Wis. 1995). In addition, an intervenor's claims or defenses based upon an agreement to which it is a party "obviously" share a common

questions of law or fact with an action based upon that agreement. *City of Chicago v. Federal Emergency Management Agency*, 660 F.3d 980, 986 (7th Cir. 2011).

The Nation intends to contest the claims for relief asserted by the Village in its Complaint on the grounds the claims lack merit, based on prior litigation between the Nation and the Village and authority from other courts involving the United States and/or other tribal parties. As is clear from the Nation's proposed Answer, the defenses asserted by the Nation are based on the same transactions the Village is challenging and directly dispute the legal basis of the Village's claims. Obviously, the Nation's defenses share common questions of law and fact with the claims advanced by the Village.

2. There are grounds for subject matter jurisdiction.

"[P]ermissive intervention as a defendant in a federal question lawsuit ordinarily causes no jurisdictional problem, because the intervenor normally also advances a federal question…" *National Union Fire Ins. Co. of Pittsburgh v. Continental Illinois Corporation*, 113 F.R.D. 532, 538 (N.D. Ill. 1986) (citation omitted). The Village has invoked federal question jurisdiction to assert claims based upon the United States Constitution and federal statutes. In its proposed Answer, the Nation admits the Court possesses jurisdiction over the Village's claims, contests the Village's interpretation of the Constitution and federal statutes, and asserts defenses based upon the Constitution and federal common law, *e.g.*, lack of standing and the preclusive effect of prior federal court judgments. The Court therefore possesses jurisdiction to hear both the Village's claims and the Nation's defenses to those claims.

3. The Nation's Intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

In considering a motion for permissive intervention, a court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Fed. R. Civ. P. 24(b)(3). These considerations are balanced against the potential prejudice to the proposed intervenor from denial of the motion and the interests of judicial economy in avoiding a multiplicity of suits. *EEOC v. St. Regis Corp.,* 2001 WL 1911025, *1 (N.D. Ill. 2001).

Prejudice to the adjudication of the rights of the original parties may arise where they "have invested time and effort into settling a case" prior to the filing of the motion to intervene. *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991). Courts have also found prejudice where intervention would add new questions of fact to the litigation, could lead to a torrent of motions from other parties seeking intervention, would increase the scope and length of discovery, or would increase the length and complexity of trial. *See, e.g., Coburn v. DaimlerChrysler Services of North America, LLC*, 218 F.R.D. 607, 610-611 (N.D. Ill. 2003).

Prejudice to a proposed intervenor if intervention is denied may arise from a multiplicity of litigation with conflicting results, or in which the proposed intervenor is burdened by an unfavorable ruling in litigation in which it was not allowed to participate.

> The reasons for avoiding a multiplicity of suits are plain. Multiple lawsuits tax judicial resources and frustrate efforts to achieve consistent results in similar cases. Furthermore, multiple lawsuits could gravely prejudice the rights of some plaintiffs through the operation of stare decisis. A plaintiff could be prejudiced by the precedential impact of an unfavorable decision in another lawsuit, closely related to his, but in which he was excluded from participation and therefore could not control.

St. Regis Corp. at *1.

When there is a commonality of interests in the defenses raised, the motion to intervene is filed promptly, and the intervenor agrees to respond to the plaintiff's filings on the same timeline as the named defendants, permissive intervention is appropriate. *Trump v. Wisconsin Elections Comm'n*, 2020 WL 7230969, *3 (E.D. Wis. 2020). This is especially the case where the proposed intervenor can "contribute key perspectives and complete the development of the

issues." *Id*. Intervention is also appropriate when the proposed intervenor is "well-versed in the subject matter of the issues to be tried" and intervention will not delay the proceedings. *Vollmer v. Rent-A-Center, Inc*., 2001 WL 578262 (S.D. Ill. 2001). *See also PAC for Middle America v. State Board of Elections*, 1995 WL 571893 (N.D. Ill 1995). Finally, where it is possible an original party could be disadvantaged, but it is certain a proposed intervenor would be prejudiced by being denied access, the "court should err on the side of granting intervention." *St. Regis Corp.* at *2.

Allowing the Nation to intervene will not add to the length or complexity of the litigation, as the Nation merely seeks to defend against the Village's claims and is not asserting claims against the Village. The Nation's interests are generally aligned with those of the Defendants and the Nation does not propose to add new or unrelated matters to the litigation. Neither will the Nation's presence impact discovery since this is an APA case and the Court's review is limited to the administrative record. Conversely, intervention will benefit the Court's consideration of the issues involved, because the Nation is well-versed in the subject matter and will add key perspectives and complete the development of the issues. Intervention will also avoid the potential for a multiplicity of suits, and the prejudice to the Nation of having issues central to its self-governance determined in its absence.

CONCLUSION

For the foregoing reasons, the Court should grant the Nation's Motion to Intervene as Defendant.

Respectfully submitted this 15th day of February, 2024.

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