UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v.

Case No. 2023-cv-1511

UNITED STATES DEPARTMENT OF THE INTERIOR, *et seq.*,

Defendants.

VILLAGE OF HOBART, WISCONSIN'S RESPONSE IN OPPOSITION TO ONEIDA NATION'S MOTION TO INTERVENE AS DEFENDANT

This action arises from the biased, unconstitutional, and arbitrary actions of the federal agency defendants.[1] It seeks judicial review, under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, *et seq.* and the United States Constitution, of an agency decision issued by the Interior Board of Indian Appeals ("IBIA"), which arose from the appeal of a decision made by the Acting Midwest Regional Director, Bureau of Indian Affairs ("BIA") on January 19, 2017, to accept lands into trust by the United States for the Oneida Nation (the "Nation") that are located within the Village of Hobart, Wisconsin (the "Village"). (Dkt. 1, Compl. ¶ 1.) It also challenges the constitutionality of the Indian Reorganization Act of 1934, 25 U.S.C. § 5101, *et seq.* (the "IRA") and the constitutionality of 25 C.F.R. § 1.4, both of which the IBIA admittedly lacked

[1] Together the United States Department of Interior, Deb Haaland, in her capacity as the United States Secretary of Interior, the Bureau of Indian Affairs, Tammie Poitra, in her capacity as the Midwest Regional Director of the Bureau of Indian Affairs, the Acting Midwest Regional Director of the Bureau of Indian Affairs, and the Interior Board of Indian Appeals are the referred herein as the "Federal Defendants."

authority to adjudicate. (*Id.* ¶ 5.) As part of its relief, the Village seeks to vacate the Federal Defendants' decisions to have real property located within the Village placed into trust by the United States for the benefit of the Nation. (*Id.* ¶ 2 & Requested Relief.)

Now, months after the Village filed this lawsuit seeking judicial review, the Nation seeks to intervene (Dkt. 11, the "Motion") in this case even though it arises solely from actions taken by federal agencies. But, the Nation's claimed reasons for intervention are without merit or justification; especially when the Federal Defendants adequately represent the Nation's interests.

As in the cases the Nation cites to in its Motion, its purposes for seeking to intervene in this lawsuit are two-fold: (1) to force the Village to litigate yet again with the Nation and incur unnecessary legal fees[2] and (2) to enlarge its claimed sovereign authority by improperly attempting to expand the scope of earlier federal rulings on unrelated issues. But, the 2-on-1 advantage the Nation wishes to create against the Village should not be allowed by the Court. The focus of this lawsuit is not the Nation or other federal lawsuits. Rather, it is about the Federal Defendants and their bias, unconstitutional, and arbitrary actions when deciding to accept land into trust for the benefit of the Nation.

Because the Nation fails to meet the requirements for intervention as a matter of right or by permission, the Court should deny the Nation's Motion to Intervene.

[2] In its proposed Answer, the Nation affirmatively alleges that "the Village expends a large portion of its annual budget on legal expenses over land use disputes with the Nation, which revenues would otherwise be available to fund Village services . . . ." (Dkt. 11-1, ¶ 47.) Since 2008, however, because of the Village's efforts concerning challenges to the Nation's fee-to-trust acquisitions, like the present case, and the Village's defense of various lawsuits filed by the Nation against the Village, the Nation has paid several millions of dollars of tax revenue that absent the Village's efforts would have been lost. That is needed revenue for not only the Village, but also the State, County, and local school districts. Because of that substantial amount of money the Nation was forced to pay over the years, it is no wonder the Nation is once again looking to engage in litigation with the Village by forcing itself into this case.

LEGAL STANDARD

Federal Rule of Civil Procedure 24 governs a non-party's request to intervene in a case. Under the Rule, a non-party must timely[3] move to intervene either by: (1) right or (2) permission.

Intervention of right under Federal Rule of Civil Procedure 24(a) requires a Court to grant a non-party's motion if the non-party: "(1) is given an unconditional right to intervene by a federal statute"; or "(2) 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 existing parties adequately represent that interest*." (emphasis added).

Permissive intervention under Federal Rule of Civil Procedure 24(b), on the other hand, permits a Court to allow a non-party to intervene if the non-party: "(A) is given a conditional right to intervene by a federal statute;" or "(B) has a claim or defense that shares with the main action a common question of law or fact." When considering a request for permissive intervention, the Court "*must consider* whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3) (emphasis added).

ARGUMENT

I. The Nation Does Not Have a Right to Intervene Because the Federal Government Adequately Represents the Nation's Interests.

"Intervention of right will not be allowed unless all requirements of the Rule are met." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000) (denying tribe's motion

[3] The Village filed this lawsuit on November 10, 2023. (Dkt. 1.) The Nation moved to intervene on February 15, 2024 – over 3 months after the Village filed its Complaint against the Federal Defendants and after the Federal Defendants requested an extension to respond to the Complaint. (*See* Dkts. 1, 9, and 11.) The Nation waited until the same day the Federal Defendants' responsive pleading was due to move to intervene, despite having known about the lawsuit since November 2023. (Dkt. 12 at 9.) In a coordinated effort, it waited months to file its Motion. While *per se* not untimely, contrary to what the Nation argues, the Nation did not move "at the earliest opportunity." (*Id.*)

to intervene in APA case). Here, the Nation fails to demonstrate that its interests are not adequately represented by the Federal Defendants in this APA case. Thus, the Nation fails to satisfy one of the mandatory requirements for intervention as a matter of right under Federal Rule of Civil Procedure 24(a) and its Motion on those grounds must denied.

A. The Nation provides no support for its argument that its self-governance interests under the IRA are not adequately represented by the Federal Defendants.

The Nation concedes its interests are "generally aligned" with the Federal Defendants. (Dkt. 12 at 11.) Despite its concession, the Nation generally claims the Village's "attacks go to the core of the Nation's self-governance, and the Nation has a profound interest in defending against them." (*Id.* at 10.) But, the Nation does not explain why the Federal Defendants are not able to represent the Nation's claimed interests. And, "not all interests give rise to a right to sue[.]" *Sokaogon Chippewa Comm*, 214 F.3d at 946.

The Village has not sued the Nation and the Nation cannot bring direct claims against the Village because this is an APA case arising from federal agency actions. The Nation generally argues that its interests are "distinct" from the Federal Defendants. (Dkt. 12 at 11.) But, the Nation provides no argument why the Federal Defendants are not able to assert or adequately represent the Nation's claimed interests. The Nation provides no argument how it would protect those interests differently in this case – apart from its attempt to assert two defenses based on claim preclusion. Because the Nation fails to support or develop its generalized grievances, the Court should disregard them. *Shipley v. Chi. Bd. of Elec. Comm'rs*, 947 F.3d 1056, 1062-63 (7th Cir. 2020) ("Arguments that are undeveloped, cursory, and lack supporting authority are waived.").

B. The Village's claims based on agency actions are not precluded by prior Seventh Circuit decisions.

First, even if claim preclusion did apply to certain claims, the Federal Defendants are more than capable of raising it as they are "trustees" for the Nation. And, regardless of who may attempt to assert that defense, claim preclusion does not apply in this case as the elements of claim preclusion are not met.

"The doctrine of claim preclusion, also known as res judicata, applies to bar a second suit in federal court when there exists: (1) an identity of the causes of actions; (2) an identity of the parties or their privies; and (3) a final judgment on the merits." *Bernstein v. Bankert*, 733 F.3d 190, 226 (7th Cir. 2013) (internal quotations omitted). "With respect to the first element, a claim is deemed to have 'identity' with a previously litigated matter if it is based on the same, or nearly the same, factual allegations arising from the same transaction or occurrence." *Id.* (internal citations omitted). "With respect to the second, whether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." *Id.* (internal citations omitted). Finally, with respect to the third element, "the traditional rule is that a judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." *Id.* (internal citations omitted).

The Nation's legal argument for intervention is limited to two affirmative defenses – both based on alleged claim preclusion – citing two cases involving the Nation and the Village: *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) (*"*Special Event Ordinance Action*"*) and *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837 (7th Cir. 2013) ("Stormwater Ordinance Action*"*). Because neither of those cases involved federal agency action or APA claims

or constitutional claims concerning fee-to-trust acquisition under the IRA or a final judgment on the merits of those issues, claim preclusion does not apply.

i. There is not an identity of causes of actions between this APA case and the Stormwater Ordinance Action and Special Event Ordinance Action.

The claims in this case involve agency review and constitutional claims stemming from agency decisions to accept land into trust under the IRA. The claims are not about a stormwater ordinance or a special event ordinance. "Federal law defines a 'cause of action' as a core of operative facts which give rise to a remedy." *Bernstein*, 733 F.3d at 226. "[T]he test for an 'identity of the causes of action' is whether the claims arise out of the same set of operative facts or the same transaction." *Id.* While the Village raised certain arguments before the federal agency that refer to jurisdictional conflicts stemming from the facts and *issues* concerning the stormwater and the special event ordinance cases, the Village's claims in this case are completely different and distinct than the claims brought by the Nation against the Village in those cases. The claims in those cases and the claims in this case did not arise out to the same operative facts or the same transaction, namely the other cases did not involve a decision to accept land into trust.

In the Stormwater Ordinance Action, the Nation filed a lawsuit against the Village seeking declaratory and injunctive relief concerning the Village's authority to impose charges under its stormwater management ordinance. *Oneida Tribe,* 732 F.3d at 838. The Seventh Circuit reasoned that "[t]he question in th[at] case [was] whether the federal government has authorized the Village of Hobart to assess fees on Indian lands in the village (or taxes . . .) to pay for its stormwater management program." *Id.* at 839. The Seventh Circuit held the Clean Water Act did not authorize the Village to impose stormwater management charges upon property held in trust by the United States for the benefit of the Nation. *Id.* at 840-41.

Similarly, in the Special Event Ordinance Action the Nation initiated against the Village it challenged the authority of the Village to enforce its special events permit ordinance. *Oneida Nation*, 968 F.3d at 667. The Village counterclaims for declaratory relief, included the argument that the Nation's reservation was diminished. *Id.* at 672. Ultimately, the Seventh Circuit held the Village lacked authority to enforce the special event ordinance and that the Nation's reservation was not diminished. *Id.* at 667-68.

Neither of those cases involved APA claims or constitutional challenges to the IRA or other regulations based on agency actions in a fee-to-trust acquisition process, which the Nation now claims are barred. Indeed, the Seventh Circuit in *Oneida Nation* already told the Nation the issues concerning the IRA were not decided in that case:

> The Nation tells us that it would because holding the Nation to the *Stevens* judgment might call into question its ability to organize under the Indian Reorganization Act. . . . **We need not resolve definitively whether holding the Nation to the 1933 judgment would endanger the trust status of the parcels it acquired after the passage of the Indian Reorganization Act.** The Nation does not describe precisely why this would be the case.
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> . . .
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> We have reason to question the Nation's argument. The Interior Board of Indian Appeals has in the past noted—in response to an argument made by the Village—that the Nation would have been under federal jurisdiction in 1934 even if the Nation were not in occupation of a reservation. *Village of Hobart v. Midwest Regional Director*, 57 IBIA 4, 32, 46 n.27 (2013). **And before the district court, the Nation argued the opposite of what it does on appeal, citing the Indian Reorganization Act.** See 25 U.S.C. § 5108 ("The Secretary of the Interior is hereby authorized ... to acquire ... any interest in lands ... *within or without existing reservations* ... for the purpose of providing land for Indians." (emphasis added)); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) **(trust land counts as "validly set apart" land for tribal immunity purposes even if it is not formally within the bounds of an established reservation),** citing *United States v. John*, 437 U.S. 634, 648–49, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

Oneida Nation, 968 F.3d at 687 & fn.17. Here, by moving to intervene in this case and attempting to assert claim preclusion, what the Nation is improperly attempting to do is enlarge the holdings of previously litigated cases concerning Village ordinances, which have nothing to do with agency review issues. Because the Stormwater Ordinance Action and the Special Event Ordinance Action do not share an identity of causes of action as this case, the Nation's claim preclusion argument fails.

ii. There is no final judgment on the merits that preclude all the Village's APA and constitutional claims in this case.

Neither the Stormwater Ordinance Action or the Special Event Ordinance Action decided whether the IRA is unconstitutional as applied in this case. Moreover, even if it were to apply, claim preclusion on the issue of the constitutionality of the IRA would not dispose of all the Village's other claims against the Federal Defendants under the APA or 25 C.F.R. § 1.4. Meaning, the Nation's alleged defense would only apply to part of the case. Because the Nation's alleged defense of claim preclusion would not dispose of all the claims and because there has been no final judgment on the merits on any of the Village's claims, the Nation's request to intervene fails.

C. The Federal Defendants are trustees on behalf of the Nation and adequately represent the Nation's interests.

Even if claim preclusion would apply, the Federal Defendants and the Nation are privies on all issues such that the Federal Defendants could assert a claim preclusion defense. And, due to the parties' unique trust relationship, the Federal Defendants adequately represent the Nation's interests under the IRA.

It is a bedrock principle of Federal Indian law that the United States, including its federal agencies, such as the Bureau of Indian Affairs, serves as a trustee for Indian tribes. *See e.g.*, 25 U.S.C. § 5108 (describing "[t]itle to any lands . . . 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 . . . ."); *Seminole Nation v. United States*, 316 U.S. 1049, 1054 (1942) (reasoning the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards."); *Coast Indian Comm. v. United States*, 550 F.2d 639, 652-53 (Ct. Cl. 1977) (describing trustee relationship and that "[t]he United States [including its agents of the BIA], when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards" and a "trustee is under a duty to exercise due care and prudence to preserve the trust property.").[4] As part of this role, the United States has "fiduciary obligations . . . in the management and operation of Indian lands and resources." *United States v. Mitchell*, 463 U.S. 206, 226 (1983). Indeed, the very issues in this case concern the Federal Defendants' authority and actions taken during the fee-to-trust process under the IRA to acquire land "for the benefit of" the Nation. Given the Federal Defendants' trustee status and as the fiduciary for the Nation's interests, the Federal Defendants can raise the alleged defense of claim preclusion (to the extent it has any merit, which it does not) because the Nation and the Federal Defendants are privies to one another.

[4] *See also* "Why Tribes Exist Today in the United States – What is the federal Indian trust responsibility?" https://www.bia.gov/frequently-asked-questions (last accessed March 7, 2024) ("The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831). Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law. The **federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect** tribal treaty rights, lands, assets, and resources, **as well as a duty to carry out the mandates of federal law with respect to American Indian** and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.") (emphasis added).

The Nation claims it has a "strong interest in defending the judgments in earlier cases from collateral attack" (Dkt. 12 at 10), but regardless of that interest, those judgments do not preclude the Village's claims against the Federal Defendants here. And even if they did there is nothing to suggest the Federal Defendants, as a trustee of the Nation, are not fully capable of making that same argument to protect the Nation's interests. In fact as the trustee of the Nation and given the fiduciary duties that relationship creates, the Federal Defendants are obligated to advance any argument that it believes benefit its ward, i.e., the Nation.

II. The Court Should Not Permit the Nation to Intervene.

A. The Nation's proposed defense of claim preclusion does not share common questions of law and fact with the Village's agency review claims.

For the same reasons that intervention as a matter of right is not proper, the Court should also not permit the Nation to intervene in this case under Federal Rule of Civil Procedure 24(b)(1)(B) and (3) because the Nation's proposed defense[5] of claim preclusion does not share a common question of law or fact with this APA case.[6] For a Court to allow permissive intervention, the party seeking to intervene must demonstrate that it has a "claim or defense that has a question of law or fact in common with the main action." Fed. R. Civ. P. 24(b)(1)(B). Permissive

[5] The Nation also argues in its Motion that the Village lacks standing. While the Nation does not raise standing as an affirmative defense in its proposed Answer, the Nation argues in its Motion that the Village's alleged lack of standing gives the Nation's grounds for subject matter jurisdiction for permissive intervention. The Nation's argument, however, fails to consider two issues: (1) that standing is a jurisdictional defense that the Federal Defendants have raised in their Answer (i.e., the Federal Defendants represent those interests), and (2) a standing defense prevents the Court from considering the issues on the merits. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Therefore, despite the Nation conceding the Court has jurisdiction, and therefore, the Village's standing, the Nation's standing argument (if true) would negate the Court's need to review the Nation's arguments of claim preclusion.

[6] The Nation's argument, among others, that "[o]bviously, the Nation's defenses share common questions of law and fact with the claims advanced by the Village" (Dkt. 12 at 13), is nothing more than a conclusory allegation, which the Court need not accept when considering a motion to intervene. *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (reasoning the court does not accept as true conclusory allegations in a motion to intervene).

intervention is "wholly discretionary and will be reversed only for abuse of discretion." *Sokaogon Chippewa Comm.*, 214 F.3d at 949.

Because the Nation does not seek to advance its own claims in this case (because it has none) to claim permissive intervention, it must present a defense. But, as stated previously, the defense the Nation seeks to advance fails as this case is about agency review and the constitutionality of federal statutes and regulations passed by Congress. It is not about issues involving Village ordinances or whether the Nation's Reservation has been diminished. Indeed, the alleged defense that the Nation seeks to assert in this litigation is not even an issue the Court need decide here as that "argument was not addressed in the underlying final agency decision." *See Legend Lake Property Owners Association Inc. v. United States Department of Interior*, Case No. 23-CV-480, 2024 WL 449287, at *6 (E.D. Wis. Feb. 6, 2024) (declining to address alternative argument in APA case as the issue was not addressed by agency). Because the Nation's defense fails to include a common issue of law or fact with this case, the Court should deny the Nation's request for permissive intervention.

B. The Nation's intervention will unduly prejudice the adjudication of the review of the agency action.

Another reason the Court should not permit the Nation to intervene is the resulting prejudice. When reviewing a request for permissive intervention, the Court must also 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). Because this matter is about agency review for land to

be acquired into trust,[7] the Nation's intervention will only serve to prejudice the adjudication of the issues between the Village and the Federal Defendants. With the Nation's inclusion, the Village will be forced to respond to separate briefing from another party, that raises separate arguments on issues that are not proper for adjudication in the APA context. It is indisputable that it is only the Federal Defendants' agency actions that are at issue in this case. Therefore, it is they who then must argue their actions were not arbitrary, erroneous, an abuse of discretion, not in accordance with the law, or biased under the APA and the IRA. Put another way, to the extent there is any interest of the Nation that is implicated by the Village's claims, the Federal Defendants must argue the same things as the Nation would in order to defeat them. Accordingly, the Nation's interests are adequately represented and a second-party only serves to unduly prejudice the adjudication of an agency's review.

Similarly, the Nation's participation may unnecessarily cause additional discovery in a matter in which discovery is generally limited to the administrative record. *See* Fed. R. Civ. P. 26(a)(1)(B) (providing that an action for review of an administrative record is exempt from initial disclosure requirements); *Sokaogon Chippewa Comm. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 929 F. Supp. 1165, 1172 (W.D. Wis. 1996) ("Generally, judicial review of an agency's decision is limited to the administrative record prepared in connection with that decision. Courts are precluded from considering evidence that the agency never had a chance to review and from creating an evidentiary record different from that before the agency. Accordingly, in all but exceptional cases, discovery in cases brought under the APA is limited to materials

[7] The Nation acknowledges this action is limited, despite its contentions to the contrary. In its proposed Answer, the Nation admits that "only the eight Parcels, consisting of 21 separate tax parcels and approximately 499 acres, are relevant as being the subject of the Complaint." (Dkt. 11-1, ¶ 19.) Similarly, in their Answer, the Federal Defendants agree that "[a]ny applications submitted by the Tribe pertaining to lands other than the Property at issue here are still pending with the agency, not final agency action, and thus outside the scope of this suit." (Dkt. 17, ¶ 19.)

contained in the administrative record." (internal citations omitted)), *on reconsideration in part*, 961 F. Supp. 1276 (W.D. Wis. 1997) (allowing extra-record discovery and examination of agency personnel where "strong showing" of improper influence on agency decision was met). The Nation concedes this point: "[T]his is an APA case and the Court's review is limited to the administrative record." (Dkt. 12 at 15.) Therefore, because the Nation concedes it generally would not be part of discovery, it is unclear exactly why the Nation believes its participation would advance the case.

Ironically, the Nation contends it "merely seeks to defend against the Village's claims[,]" but the Village's claims have been brought against the Federal Defendants based upon the Federal Defendants' agency actions and review. What the Nation really seeks to do is expand unrelated, federal decisions beyond their holdings, unnecessarily complicate this case, duplicate efforts that will need to be taken by the Village, and raise litigation costs for the Village. This latest attempt by the Nation to engage in litigation with the Village should not be permitted; particularly when this is an APA case involving federal agency action, not action by the Nation or the Village.

CONCLUSION

For the foregoing reasons, the Court should deny the Nation's motion to intervene.

Dated: March 7, 2024.

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