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 al.,

Defendants.

REPLY MEMORANDUM OF ONEIDA NATION IN SUPPORT OF MOTION TO INTERVENE

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INTRODUCTION

Proposed Intervenor Oneida Nation ("Nation") makes this reply to Plaintiff Village of Hobart's ("Village") Response in Opposition to the Nation's Motion to Intervene as Defendant ("Village Opposition"). The Village correctly observes that this is an action under the Administrative Procedures Act ("APA"), with the accompanying limitations of court review of the Administrative Record ("AR") only under the arbitrary and capricious standard, absent an extraordinary showing. *St. Vincent Medical Group v. US Dept. of Justice,* 71 F.4th 1073, 1074-75 (7th Cir. 2023) (review conducted through "highly deferential lens").[1] The Nation accepts these limitations and moves to intervene to assert its unique interests in the subject matter of the litigation, i.e., its fee title ownership of the eight (8) Parcels that are the subject of the action, the immunity of those fee Parcels from Village regulatory authority as on-Reservation Nation land, and its beneficial ownership of the Parcels once placed into trust. In opposing the Nation's motion, the Village relies on incorrect legal standards, arguments that are premature, and arguments that lack authority.

[1] Unfortunately, the Village does not itself abide by these limitations, even in its briefing on this procedural issue. For example, the Village claims the Nation has paid the Village millions of dollars in tax revenue as a result of multiple lawsuits between it and the Nation. *See* Village Opposition at 2, n. 2. Not only is this claim undocumented, it is also presumably beyond the AR which only involves the eight Parcels at issue. As a result, this unsubstantiated claim is irrelevant.

ARGUMENT

I. THE NATION IS ENTITLED TO INTERVENTION BY RIGHT.

The Nation moved to intervene under Rule 24(a) by right, which requires the demonstration of four elements: (1) the application must be timely; (2) the proposed intervenor has a claim or interest in the property or subject matter of the suit; (3) the disposition of the suit would impair the proposed intervenor's ability to protect that interest as a practical matter; and (4) an existing party does not adequately represent the interests of the proposed intervenor. *Bost v. Illinois State Board of Elections,* 75 F. 4th 682, 686 (7th Cir. 2023). The Village challenges only one of the four elements – whether Defendants adequately represent the Nation's interests in this action. Village Opposition at 3-10.[2] But the Village misunderstands the Nation's unique interests, interests that raise legal and factual issues in common with Defendants but are dependent upon the unique nature of divided interests in trust property. Further, the Nation has interests independent of Defendants, interests that relate to the claim and issue preclusive effect of judgments in earlier cases involving the Nation and the Village. The Nation has pled these interests as affirmative defenses in its proposed answer, and Defendants have not raised these

[2] The Village does not deny the timeliness of the Nation's motion, but does suggest the Nation's motion was tardy, if not untimely, and the timing on the motion was inappropriately "coordinated" with Defendants. Village Opposition at 3, n. 3. The Nation's motion was filed three months after the action was commenced and on the same date as the first responsive pleading in the action was due. The Village fails to explain or cite any case law why the Nation's proposed answer is somehow tardy under these circumstances. Further, the Nation acknowledges its shared interests with Defendants, a commonality of interests that the Village insists is sufficient basis alone to deny the Nation's motion to intervene. As a result, coordination between Defendants and the Nation is not only appropriate but serves to highlight that the Nation's participation as a party will not delay or complicate this litigation.

affirmative defenses. *See* A.1. and 2., below. Because of these unique and independent interests, Defendants cannot adequately represent the Nation's interests. *See* B, below.

A. The Nation has unique and independent interests.

1. The Nation's property interests in the Parcels are in common with Defendants and unique in nature.

The Village appears to concede the Nation has property interests in the Parcels that present issues of law and fact in common with this action. *See* Village Opposition at 4. The common issues are plainly set forth in the Nation's proposed answer. *See* Nation's Answer, ¶¶ 11, 18, 19, 20, 30, 31, 40, 43, 46-51. The Nation currently owns the Parcels in fee title, and has immunity from Village regulation of the Parcels as a consequence of their location within the Oneida Reservation,[3] and the Nation will be the beneficial owner of the Parcels once placed into trust by the United States. The Nation's interest as beneficial owner arises under the same federal law and regulations the Village challenges in this action. To the extent the Village succeeds in its claims against Defendants, the Village succeeds against the Nation as the applicant for trust acquisition of the Parcels. At the same time, the Nation's property interest as beneficial owner gives the Nation the exclusive right of use and occupancy of the Parcels, a property interest in the Parcels that is distinct from that of the United States. *F. Cohen's Handbook of Federal Indian Law* (2012 ed.), § 15.03 (Supreme Court has historically described the interests of the United States as fee owner and tribes as beneficial owners in trust property as "split" between the two.). This divided property interest in the Parcels supports both the commonality of issues of

[3] Among other things, the Village alleges it holds jurisdiction over the Nation's fee lands, until and unless that land is placed into trust. ECF No. 1, ¶11. This allegation is contrary to the judgment in *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020).

law and fact here as well as the "unique" interests on the part of the Nation required in the Seventh Circuit. *Planned Parenthood of Wisconsin v. Kaul,* 942 F.3d 793, 798 (7th Cir. 2019) (intervenor's interest must be based on a right that belongs to the intervenor rather than an existing party).[4]

As the Nation demonstrated in its Opening Memorandum, the Nation has other unique interests at stake in this action. *See* Opening Memorandum at 5-6. The Nation, as a government, has authority to make decisions regarding the use, development, and regulation of its trust land for the welfare of tribal members. These decisions are determined by reference to the Nation's own Constitution and laws, as well as the needs and welfare of tribal members. Defendants do not share this interest. The Nation also has a governmental interest in the integrity of the Memorandum of Understanding ("MOU") with the Midwest Regional Office, Bureau of Indian Affairs, which the Village also challenges in this action. ECF No. 1, ¶¶ 27-39, 95-102. While Defendants have an interest in defending this MOU, the Nation has a distinct governmental interest in defending its authority to make decisions in its capacity as a government representing the welfare of its members regarding the use of federal funds it receives under the Indian Self Determination and Education Assistance Act under which the Nation negotiated the MOU. *See*

[4] The Village relies primarily on *Sokaogon Chippewa Community v. Babbitt,* 214 F.3d 941 (7th Cir. 2000), to avoid this obvious conclusion. But the would-be intervenor in that case was not the tribe applying for trust acquisition, and claimed no interest in the land at all. Instead, it alleged the casino development planned for the land would diminish profits from its own, competing casino. *Id.* at 946-47. As a result, the Seventh Circuit upheld the district court's decision to deny intervention, there being no common issue of law or fact in the subject of the action. *Id.* The only other case cited by the Village on this issue is *Shipley v. Chicago Board of Election Comm'rs,* 947 F.3d 1056 (7th Cir. 2020). Village Opposition at 4. But *Shipley* did not involve Rule 24 at all, but whether an issue had been waived on appeal as undeveloped. *Id*. at 1063.

25 U.S.C. § 5301 *et seq*. These are precisely the common yet unique interests necessary to support intervention by right. *Bost,* 75 F.4th at 686-87; *Planned Parenthood.*

2. The Nation has interests at stake that are wholly independent of Defendants' interests.

As demonstrated in the Nation's opening memorandum, the Nation has an interest in the preclusive effect of two earlier federal judgments — *Oneida Tribe of Indians of Wisconsin v. Village of Hobart,* 732 F.3d 837 (7th Cir. 2013) (the "Stormwater Case"), and *Oneida Nation v. Village of Hobart,* 968 F.3d 664 (7th Cir. 2020) (the "Big Apple Fest Case"). *See* Opening Memorandum at 1-2. These cases reflect the long-running, core dispute between the Nation and the Village over the legitimacy of the Nation's governance over its territory, and both involved many of the same claims and issues raised by the Village here.

The Stormwater Case was another battle in the "ongoing conflict between the Oneida Tribe of Indians of Wisconsin and the Village of Hobart over the regulatory control of the land situate within their common boundaries." 891 F.Supp.2d 1058, *aff'd,* 732 F.3d 837. The specific battle involved the Village's claimed authority to regulate or tax the Nation's trust land on the Reservation for the purpose of stormwater regulation.[5] Among other things, the Village alleged the Nation was ineligible for trust land under the IRA as not under federal jurisdiction in 1934, and the United States lacked authority under the IRA to remove land from state jurisdiction on unspecified grounds. Case No. 10-cv-137, ECF No. 4 (Village Answer &

[5] As originally filed, the United States was not a party to the action. The Village interpleaded the United States, alleging the United States was obliged to pay the stormwater charges in the event the Nation itself was not required to pay the charges. 891 F. Supp.2d at 1060. This Court dismissed the Village's third-party complaint for lack of subject matter jurisdiction. *Id.* at 1071.

Affirmative Defenses). Ultimately, this Court ruled the attempted stormwater charge constituted an impermissible tax on trust land. 891 F. Supp.2d at 1069.[6] Because these claims overlap with claims made here, the Nation affirmatively pleads all elements of claim preclusion in its proposed answer.[7] This defense bars the Village from raising claims it raised or could have raised in the Stormwater Case respecting the Nation's eligibility for trust land under the IRA and the constitutionality of the IRA. ECF No. 11-1, Affirmative Defense II, ¶ 9. In addition, the Nation affirmatively pleads issue preclusion in its proposed answer. This defense bars the Village from relitigating claims respecting the Nation's eligibility for land-into-trust and unconstitutionality of the IRA as raised, fully litigated, and necessary to the judgment in the Stormwater Case.[8] Thus, the Nation has pled all elements of both claim and issue preclusion arising from the Stormwater Case.

Similarly, the Big Apple Fest Case was another "episode in the on-going dispute between the Oneida Nation and the Village of Hobart over land use regulation and control." 371 F. Supp.3d 500, 503, *rev'd in part,* 968 F.3d 664. The specific context was the Village's attempt to apply its special events ordinance to the Nation's trust and fee land on the Oneida Reservation.

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[6] In its conclusion in the Stormwater Case, this Court anticipated continuing disputes between the Nation and the Village on these issues: "As suggested above, this is not the first case over which this Court has presided between the Tribe and the Village, and it is unlikely to be the last." 891 F. Supp.2d at 1071.

[7] Claim preclusion has three elements: identity of parties, identity of claims, and final judgment on the merits. *Daza v. State,* 2 F.4th 681, 683-84 (7th Cir. 2021).

[8] Issue preclusion has four elements: the issue of fact or law was the same in the prior action and the second action; the issue was actually litigated in the prior action; the determination on the issue was essential to the judgment in the prior action; and the party against whom the defense is asserted was fully represented in the prior action. *Dexia Credit Local v. Rogan,* 629 F.3d 612, 628 (7th Cir. 2010).

As before, the Village alleged the Nation was ineligible for trust land under the IRA, the Reservation no longer existed for jurisdictional purposes, and the Village could exercise regulatory authority over the Nation's fee and trust land, even if the Reservation boundaries remained extant. This Court ruled the Reservation had been diminished and the Village possessed jurisdiction over the Nation's fee lands, and the Village lacked its claimed authority to regulate the Nation's trust land. The Nation appealed on the Reservation boundary issue, but the Village did not cross-appeal on its claimed authority to regulate the Nation's trust land. The Seventh Circuit reversed on the Reservation boundary issue, holding that the Nation's trust and fee land remained Indian Country within the meaning of 18 U.S.C. § 1151(a), and are therefore immune from regulation by the Village. Again, because of the overlapping claims, the Nation affirmatively pleads all elements of claim preclusion in its proposed answer, and this defense bars the Village from raising claims it did or could have raised respecting its claimed jurisdiction over the Nation's trust and fee lands. *Daza*, 2 F.4th at 683. The Nation also affirmatively pleads all elements of issue preclusion in its proposed answer, and this defense bars the Village from relitigating whether it has jurisdiction over the Nation's fee land on the Reservation as raised, fully litigated, and necessary to the judgment in the Big Apple Fest Case. *Dexia Credit Local*, 629 F.3d at 628.

The Village fails to refute the Nation's well-pleaded affirmative defenses arising from the Stormwater and Big Apple Fest Cases as a basis for intervention by right for four reasons.

First, the Village prematurely addresses the merits of the Nations' affirmative defenses. On a motion to intervene, the court accepts the allegations supporting the motion as true. *State of Illinois v. City of Chicago,* 912 F.3d 979 (7th Cir. 2019). Since the Village does not challenge

the sufficiency of the Nation's allegations to state affirmative defense of claim or issue preclusion, the Court need not address the merits of the defenses in the narrow confines of a motion to intervene.[9]

Second, the Village applies the wrong legal standard in its attempt to address the merits of the Nation's claim preclusion defenses. The Village argues that claim preclusion is not available because the claims asserted here by the Village were not decided in those cases. Village Opposition at 6-8. But the Village overlooks that, if the elements of claim preclusion are present as the Nation has alleged, claim preclusion operates to bar not only the claims raised in the suit but also claims that could have been raised. *Daza,* 2 F.4th at 683-84; *Lim v. Central DuPage Hospital,* 972 F.3d 758, (7th Cir. 1992) . As a result, claims that were raised or could have been in those cases – such as the Nation's eligibility for trust land under the IRA and the constitutionality of the IRA – can be barred regardless of whether actually decided in them. The claim identity requirement does not avoid this result, as the Village argues. *See* Village Opposition at 6. The essence of this action and the earlier suits are the same – the validity of the Nation's trust land and the Village's claimed authority to regulate the Nation's trust and fee land on the Reservation. These on-going disputes between the Nation and the Village are but variations on the same legal theme presented in different contexts.[10] Because a different

[9] The time restraints and page limitations that apply to briefing on motions to intervene simply do not permit the parties to address the merits of well-pleaded, complex preclusive affirmative defenses.

[10] Indeed, the Village relies upon the same historical events in them all. According to the Village, the determinative events occurred between 1891 with allotment of the Reservation and 1934 with the implantation of the IRA on the Oneida Reservation. *Compare Carcieri* Log, 57 IBIA *with* 968 F.3d at 669-71.

judgment in this action on the Nation's eligibility for trust land or the constitutionality of the IRA would impair or destroy the rights established in the Stormwater and Big Apple Fest Cases, there is sufficient identity of the claims between those cases and this action for purposes of claim preclusion. *See* 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 4407 (3d ed. 2008).

Third, the Village asserts the Nation's claim preclusion defenses are misplaced because they would not dispose of all the claims made by the Village here. *See* Village Opposition at 8. But the Village cites no authority for this proposition because there is none. This is simply not the law governing the availability of claim preclusion.

Fourth, the Village fails altogether to even respond to the Nation's well-pleaded issue preclusion defenses arising from the Stormwater and Big Apple Fest Cases. As discussed above, the Nation pleads all the elements of the defenses in its proposed answer. If these elements are present, the prior judgment bars relitigation of the issue, even in a different claim. *Dexia Credit Local,* 629 F.3d at 628. As a result, the Nation's independent interests in the claim and issue preclusion defenses meet the Rule 24(a)(2) requirement of an interest in the property or transaction that is the subject of this action and that may be impaired in the Nation's absence.

B. Defendants do not adequately represent the Nation's multiple interests.

The Seventh Circuit recently analyzed the adequacy of representation issue in *Bost*. The Court concluded that a three-tiered rule applies. 75 F.4th at 688. A default rule applies when there is no notable relationship between a party and the would-be intervenor, and this requires only a showing that the party may not adequately represent the intervenor. An intermediate standard applies if a party and the would-be intervenor have the same goal in the action, which

requires a showing of some conflict between a party and the would-be intervenor. Finally, the strictest standard applies where a party is a government charged by law with a legal obligation to protect the interests of a proposed intervenor, and this requires a showing of gross negligence or bad faith. *Id.* at 688-90. Without citation to any case law in this Circuit, the Village insists the United States' relationship as trustee to the Nation establishes the adequacy of Defendants' representation of the Nation's interests. Village Opposition at 6-8. But this is not consistent with the rule in this Circuit.

The highest tier of review discussed in *Bost* is the closest to the Village's analysis, i.e., because of the United States' trust obligation, it is charged by law to protect the Nation's interests. The Village's argument does not meet this highest tier, though. First, the Village fails to identify a law, as opposed to a general trust relationship, that charges Defendants with the obligation to defend the Nation's "split" property interest in the Parcels and its unique governmental interests at stake here. *See* A.1. above. Second, even if Defendants' general trust relationship is sufficient to give rise to a legal obligation to protect the Nation's property and governmental interests, the general trust relationship creates no such obligation to protect the Nation's independent interests in its affirmative defenses arising from the preclusive effect of the Stormwater and Big Apple Fest Cases. Indeed, Defendants have not pleaded these as affirmative defenses.[11] There is conflict, then, between Defendants and the Nation, at least with respect to these affirmative defenses. *Bost,* 75 F.4th at 688; *Planned Parenthood,* 942 F.3d at 799.

[11] The United States was not a party to the Big Apple Fest Case and identity of parties is, in most cases, a bar against use of claim preclusion. *But see Chicago Truck Drivers v. Century Motor Freight,* 125 F.3d 526, 531 (7th Cir. 1997) (defensive use of claim preclusion may be permitted in some circumstances). The Village interpleaded the United States in the Stormwater Case, but

Certainly, there is a notable relationship between the Nation and Defendants and the Nation shares the goals of Defendants in this action. The interests of the Nation and Defendants are not identical, though, and Defendants cannot and do not purport to adequately represent all the Nation's interests here. As a result, the Defendants cannot adequately represent the Nation's interests and the Nation should be allowed to intervene by right under Rule 24(a)(2).

II. AT A MINIMUM, THE NATION IS ENTITLED TO PERMISSIVE INTERVENTION, NOTWITHSTANDING THE PRESENCE OF ITS TRUSTEE AS DEFENDANTS.

The Village resists permissive intervention for two reasons. First, according to the Village, the Nation raises no questions of law or fact in common with this action as required for permissive intervention under Rule 24(b)(1)(B). *See* Village Opposition at 10-11. Second, the Village claims delay and prejudice resulting from permissive intervention by the Nation. *Id.* at 11-12. Neither argument is credible.

A. The Nation indisputably raises issues in common with the main action.

The Village makes a fantastical argument that there are no issues in common by pretending that the Nation asserts only its interests in the affirmative defenses of claim and issue preclusion. *See* Village Opposition at 10 ("...the Nation's proposed defense of claims preclusion does not share a common question of law or fact with this APA case."). As established above, this is simply wrong. The Nation's interests here are direct property interests, as the present fee

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the third-party complaint was dismissed for lack of jurisdiction. As a result, the issues for which the Nation seeks issue preclusion were not actually determined as between the United States and the Village. *Dexia Credit Local,* 629 F.3d at 628. For these reasons, it is doubtful Defendants could assert claim or issue preclusion against the Village arising from the Stormwater and Big Apple Fest Cases.

title owner and as the proposed beneficial owner of the Parcels once placed into trust, and as the government with authority to make decisions regarding use, development and regulation of the Parcels. *See* A.1., above. Many of these property and governmental interests rely upon the trust acquisition of the Parcels by Defendants, thus raising multiple legal issues in common with the main action that are sufficient to support permissive intervention.

The Supreme Court considered similar circumstances in *Arizona v. California,* 460 U.S. 605 (1983). There, the Indian property at issue was federally reserved water rights held by five tribes of the Colorado River basin, tribal property rights which are subject to the same protective federal trust responsibility as tribal real property held in trust by the United States. The United States had already intervened in the action to assert the tribes' interests and the tribes sought to intervene to assert the same interests. The state parties objected to the tribes' motion to intervene on the ground that the United States adequately represented the tribal interests. The Supreme Court granted permissive intervention to the tribes, reasoning as follows:

> [I]t is obvious that the Indian tribes, at a minimum, satisfy the standards for permissive intervention set out in the Federal Rules. The Tribes' interests in the waters of the Colorado River basin have been, and will continue to be, determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment...accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

Id. at 614-15. As the Nation has demonstrated, the Parcels are no less critical to the welfare of the Nation and its members than the federally reserved water rights at issue in *Arizona v. California.* The Nation will likewise be bound by the judgment in this action by Defendants' participation as a party. *Id.* This is sufficient to meet the standard of permissive intervention.

B. The presence of the Nation will not prejudice the Village, but the Nation's absence will prejudice the Nation.

The Village objects to permissive intervention on manufactured claims of prejudice that do not bear up under scrutiny. *See* Village Opposition at 11-13. As the Village itself observes, this is an APA action that challenges the federal agency decision to place the Parcels into trust for the Nation. The Nation does not propose to expand any of the issues that the Village itself has raised as bases for that challenge. To the contrary, the Nation intends to defend against the Village's claims, and proposes to assert affirmative defenses to claims and issues that the Village has repeatedly made in other litigation to the extent those same claims and issues are raised by the Village here. There is no authority, and the Village cites none, for the Village's assertion that the mere presence of the Nation without more will prejudice review under the APA. *See* Village Opposition at 12.

Similarly, there is no basis for the Village's speculation that the Nation's presence may result in the need for additional discovery. The Village correctly observes that review in an APA case is generally limited to the AR. The Nation accepts this limitation and foresees no circumstances here that might warrant discovery by any party, including the Nation as an intervening defendant. And the Nation's affirmative defenses raise questions of law for which no discovery is required. Simply stated, the Nation accepts this action as the Village pleads it and seeks intervention only to defend interests that are plainly placed into jeopardy by the action. Further, the Nation accepts the parties' proposal to this Court regarding the schedule on compilation of the AR. And the Nation is prepared to accept this Court's schedule on briefing of the Village's claims. Thus, the Nation's presence will not delay this litigation.

On the other hand, the Nation has considerable experience in litigating against the Village on many of the claims the Village asserts again here. In the Nation's absence, this Court will be deprived of the Nation's experience in litigating these issues. And in the Nation's absence, the Nation's strong interest in a final resolution and judgment thereon will not be heard. In the end, there is little, if any, to be lost and much to be gained by the Nation's presence in this action, and the Nation's intervention will serve the interests of judicial economy as well as justice.

CONCLUSION

For the reasons stated herein and in the Nation's Opening Memorandum, the Nation respectfully requests the Court grant its Motion to Intervene as Defendant.

Dated: March 21, 2024.

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