

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**THE VILLAGE OF PENDER,
NEBRASKA, et al.,**

Plaintiffs,

and

STATE OF NEBRASKA,

Applicant for Intervention,

v.

**MITCH PARKER, in his official
capacity as Chairman of the Omaha
Tribal Council, et al.,**

Defendants.

Case No. 4:07CV3101

**REPLY BRIEF IN SUPPORT OF
MOTION OF STATE OF NEBRASKA FOR
LEAVE TO INTERVENE AS PLAINTIFF**

COMES NOW the State of Nebraska, Applicant for Intervention (hereinafter the “State”) and files this Reply Brief in Support of the State’s Motion for Leave to Intervene as Plaintiff. *See* Filing 87.

INTRODUCTION

Defendants filed a brief in opposition on April 15, 2013, correctly identifying the legal standard the Court should use in considering the State’s motion for intervention, but providing little in the way of persuasive legal reasoning which would preclude the Court from granting the State’s motion. *See* Filing 92. Each of Defendants’ arguments will be addressed in turn in this reply.

For the reasons set forth below and in the State’s brief in support of its motion, *see* Filing 88, the State’s motion to intervene should be granted.

ARGUMENT

I. THE STATE IS ENTITLED TO INTERVENTION AS A MATTER OF RIGHT

As an initial matter, Defendants have completely failed to rebut the State's satisfaction of the requirements for intervention as a matter of right: timely application, legally cognizable interest, interest impaired by disposition of action, and interests not adequately represented by existing parties. *See Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997); *See also United States v. Union Electric Co.*, 64 F.3d 1152, 1160 (8th Cir. 1995). Though a full restatement of the contents of the State's brief is unnecessary, this reply will analyze the components of the intervention standard, addressing Defendants' claims in opposition in turn.

A. The State's Application to Intervene is Timely.

The State remains steadfast in its contention that timeliness should in this case be evaluated in the context of the chronology of *this* Court's consideration of the matter. Filing 88 at 4. Simply put, it is *this* Court which has the sole jurisdiction to resolve the question of whether the Omaha Reservation was diminished in 1882 and, no matter Defendants' claim to the contrary, the fact remains that the present litigation *in this Court* has yet to substantially progress. Indeed, Defendants have yet to even file an answer to the operative Second Amended Complaint in this litigation. *See* Filing 88 at 4. More importantly, the State's intervention in no way threatens the Court's schedule for the remainder of this case given that the Court has ordered a briefing schedule for a final resolution to which the State has indicated it will adhere. Filing 88 at 5.

Moreover, as the State described extensively in its opening brief, the timeliness of the State's application to intervene should be evaluated in the context of actions taken by both the federal government and Omaha Tribe which necessitate the State's involvement as a party.

Aside from the federal government's change in policy regarding diminishment, the Department of Justice only recently sent formal notice of its intent to assert federal jurisdiction within Pender as though it is part of the Omaha Reservation. Filing 88 at 9. Further, the Tribe has prematurely demanded fuel tax revenue from the State on the same basis. *Id.* at 8.

Defendants appear to imply these are irrelevant occurrences which have no bearing on whether the State's intervention in this action as an actual party is warranted. To the contrary, these latest actions now necessitate that the State be permitted to defend its significant interests as a litigant in this action.

B. The State Has a Legally Cognizable Interest in the Subject Matter of the Litigation.

Defendants concede that the State has a cognizable interest in the outcome of this litigation, i.e., the extent of the State's jurisdiction in the disputed geographic area in Thurston County. Filing 92 at 6. While Defendants inappropriately point to irrelevant issues in arguing against the State's interest in this proceeding, it is clear that Pender's off-reservation status has been the consistent legal position of the State of Nebraska since well before the current Governor or Attorney General took office. *Affidavit of Ryan S. Post*, Ex. 1; Ex. 2 at 2 ("In summary, the State asserts that the effects of the passage of the [1882] Act and subsequent sales to non-Indians resulted in a diminishment of the reservation..."); Ex. 3 (Attorney General Stenberg expressed the opinion that the Omaha Reservation was diminished, either expressly or de facto, by the United States Congressional Acts of August 7, 1882, 22 Stat. 341 ("1882 Act"), February 28, 1899, 30 Stat. 912 ("1899 Act"), May 11, 1912, 37 Stat. 111 ("1912 Act"), and the subsequent treatment and character of the disputed territory.).

C. The State's Interest May be Impaired by the Disposition of this Action.

Defendants also appear to concede the State has an interest that may be impaired as a result of the litigation. Specifically, Defendants acknowledge “[t]he fact that the State may have to accept the ultimate finding of non-diminishment...” but dispute whether such acceptance gives rise to an “impaired interest” of the State. Filing 92 at 6. But such dispute is a distinction without a difference.

The State articulated specific examples of how its interests in other matters which turn on state-versus-tribal jurisdiction would be affected by the outcome of this litigation. Filing 88 at 11. Both of these issues represent the potential for future contests between the State and the Tribe or federal government which would, without doubt, turn or rest on the outcome of *this* case.

D. The State's Interests May Not Be Adequately Represented by the Existing Parties.

Defendants similarly fail to refute the State's satisfaction of the requirement that an intervention applicant demonstrate that its interests may not be adequately represented by the existing parties. Defendants concede that the requirement that an intervenor not be adequately represented by existing parties “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” Filing 92 at 7 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

Defendants err, however, in focusing only on the fact that the issue being litigated in this case, i.e., whether the disputed area was diminished from the Omaha Reservation in 1882, is that which both existing Plaintiffs and the State seek resolution. Defendants seem to miss that the analysis of this prong of the intervention standard, i.e., adequacy of representation, is conducted

by comparing the interests of the proposed intervenor with the interests of the current parties to the action. Filing 88 at 11 (citing *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992)).

Several alcohol retailers and the Village of Pender cannot adequately represent the full scope of jurisdictional interests of the State of Nebraska within the disputed area. Indeed, the instant question of diminishment pertains to a geographic area far beyond the municipal boundaries of Pender, where all existing Plaintiffs reside. Only the State can adequately represent its interests throughout Thurston County.

Accordingly, the State has more than adequately satisfied all components of the test for whether intervention as a matter of right is warranted.

II. THE STATE SHOULD BE ALLOWED TO PERMISSIVELY INTERVENE

Defendants offer no specific arguments as to why the Court should deny the State permissive intervention in the event it denies intervention as a matter of right. Filing 92 at 7. The State stands by its position that even if intervention as a matter of right is unavailable, it has sufficiently shown that the Court should use its discretion to allow permissive intervention.

The Eighth Circuit has stated that “Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serve’s the judicial system’s interest in resolving all related controversies in a single action.” Filing 88 at 12 (citing *Sierra Club*, 960 F.2d at 86). Given that the Tribe and federal government have indicated their intent to take actions which bear the potential to spark new rounds of litigation subsequent to this matter, the judicial efficiency the *Sierra Club* court had in mind would be well-served by permitting the State to intervene in this action.

CONCLUSION

For all of the reasons set forth in the State's brief and for the reasons set forth in this reply, the State respectfully requests the Court grant its Motion for Leave to Intervene as Plaintiff.

Submitted this 22nd day of April, 2013.

STATE OF NEBRASKA, Applicant for Intervention.

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of Nebraska, using the CM/ECF system, causing notice of such filing to be served upon all parties' counsel of record.

By: s/ David D. Cookson
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