UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA; J. KEVIN STITT, in his official capacity as Governor of Oklahoma, et al.;	)	
Plaintiffs,	)	
v.	)	Case No. CIV-21-719-F
UNITED STATES DEPARTMENT OF THE INTERIOR; DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, et al.;	)	
Defendants.	)	

REPLY OF MUSCOGEE (CREEK) NATION IN SUPPORT OF MOTION FOR LIMITED INTERVENTION

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REPLY OF MUSCOGEE (CREEK) NATION IN SUPPORT OF MOTION FOR LIMITED INTERVENTION

Proposed Intervenor-Defendant, the Muscogee (Creek) Nation, a federally recognized Indian tribe (the "Nation"), respectfully submits this Reply in support of its motion for limited intervention pursuant to Fed. R. Civ. P. 24 [ECF No. 22] to address the responses filed in opposition thereto by the Plaintiffs [ECF No. 45] and the Federal Defendants [ECF No. 44].

INTRODUCTION & SUMMARY

This case is about jurisdictional rights on the Nation's reservation. The existing parties frame this case as extremely narrow to avoid the Nation's limited intervention, but the Nation's significant interest in the jurisdiction applied on its reservation, even if related to a single statute, is unavoidable. The Plaintiffs have conceded that the Nation's reservation exists, but the Nation still has an interest in this case.

The pleadings reflect that the Nation's jurisdiction is at stake, whether by collateral attacks on *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020), by obscure equitable principles, or by vague congressional abrogation. Although the Plaintiffs appear now to concede many of these points by narrowing the case to the Surface Mining Control and Reclamations Act ("SMCRA"), the Nation still has legal rights under this statute, regardless of whether it ever decides to exercise them. The minimal burden for demonstrating a *possible* impairment of an interest under Rule 24 is easily met by the Nation.

Both existing parties claim that all of the Nation's interests are adequately represented by the Federal Defendants because their interest in having the Nation's reservation qualify as "Indian lands" under the SMCRA means the Federal Defendants would have jurisdiction over the reservation. This argument—already tenuous—lost all merit with the Plaintiffs' concession that they are not contesting the Nation's reservation status.

All issues in this case relate to jurisdiction. The Plaintiffs want to retain their jurisdiction, the Federal Defendants want to confirm their exclusive jurisdiction, and the Nation intervenes to protect its newly confirmed jurisdictional rights. The Nation and existing parties each have their own jurisdictional interests at stake, so the argument that the jurisdictional interests of the Nation are "virtually identical" to those of the Federal Defendants is meritless. The Tenth Circuit makes clear that it is *impossible* for the Federal Defendants to represent the Nation's private jurisdictional interests, because they have a public *obligation* to represent their own jurisdictional interests. The vast difference in interests of the Federal Government and the Defendants would satisfy the highest of standards, especially given the existing parties and the Nation were on opposite sides of the *McGirt* litigation just last year. But only a minimal showing is required to establish inadequate representation, making the proper outcome of this motion straightforward. The Nation's pending motion for limited intervention should be granted.

ARGUMENT & AUTHORITIES

I. DESPITE THE PLAINTIFFS' RECHARACTERIZATION OF THE CASE, THE NATION HAS IMPORTANT SOVEREIGN RESERVATION AND JURISDICTIONAL INTERESTS AT STAKE

While the Federal Defendants concede the point, the Plaintiffs argue that the Nation lacks an interest in the case.[1] The Plaintiffs assert the Nation's interest must be "direct, substantial, and legally protectable" to justify an intervention, but that standard has been rejected by the Tenth Circuit as overly restrictive.[2] Instead, the Nation only needs to "have an interest that could be adversely affected by the litigation."[3] This is a minimal burden the Nation easily meets because it has important sovereign reservation and jurisdictional interests at stake in the case.[4]

To sidestep the Nation's obvious reservation interest in this case and the scope of its accompanying tribal jurisdiction, the Plaintiffs attempt to recharacterize their claims as much narrower than the pleadings reflect. The Plaintiffs insist that *McGirt* is not at issue,

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[1] Pls.' Resp. [ECF No. 45] at 1.

[2] *See San Juan Cnty. v. United States*, 503 F.3d 1163, 1192 (10th Cir. 2007), *abrogated on other grounds by Hollingsworth v. Perry*, 570 U.S. 693, 133 S. Ct. 2652 (2013); *Kane Cnty. v. United States*, 928 F.3d 877, 891 n.20 (10th Cir. 2019) ("Though our court used to require an interest to be 'direct, substantial, and legally protectable,' we abandoned that test in *San Juan County*, finding it 'problematic.'").

[3] *San Juan Cnty.*, 503 F.3d at 1199.

[4] *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1167 (10th Cir. 2017) (granting intervention when additional administrative planning and decision-making "might harm the movant's interest"); *see also Coalition of Arizona/New Mexico Cntys. v. Dep't of Interior*, 100 F.3d 837, 840-44 (10th Cir. 1996) (granting intervention by a photographer that had an interest in protecting an owl under the Endangered Species Act).

yet they seek a declaratory judgment that *McGirt* does not extend beyond the Major Crimes Act—a limitation found nowhere in the Supreme Court's decision.[5]

The Supreme Court determined in *McGirt* that the Nation's reservation fits "any definition" of the term and has never been disestablished.[6] A legally recognized reservation consists not merely of boundaries, but carries inherent sovereign rights, as well as rights affirmed and delegated through federal statutes.[7] These rights include jurisdictional authority, as well as economic benefits.[8] The Plaintiffs are seeking in this

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[5] Pls.' Compl. [ECF No. 1], ¶ 59.

[6] *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452, 2462 (2020).

[7] *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S. Ct. 2378, 2385 (1983) (noting that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory," and that "[b]ecause of their sovereign status, tribes and their reservation lands are insulated in some respects by an historic immunity from state and local control, and tribes retain any aspect of their historical sovereignty not inconsistent with the overriding interests of the National Government.") (internal quotation marks omitted) (citations omitted); *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271 (1959) (recognizing "the right of reservation Indians to make their own laws and be ruled by them").

[8] Jurisdictional authority includes, for example, the powers that allow tribal nations to protect Native American women who are victims of domestic violence under the Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304, to keep tribal families together through the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., and to preserve tribal culture under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. The existence of a recognized reservation can also provide economic benefits such as grants or federal aid for highway safety (*see* 23 U.S.C. § 402(h) (providing highway safety assistance to Indian reservations)), environmental programs (*see, e.g.*, 40 C.F.R. § 35.582 (making water pollution control grants available for tribal programs within an Indian reservation)), historic preservation (*see* 54 U.S.C § 302701 (providing assistance to tribes with programs preserving historic property on Indian reservations)), and homeland security (*see* 6 U.S.C. § 606(a) (making

case a declaratory judgment that would limit Nation's reservation-based rights to the criminal law context.[9] Obviously, these claims would impair the Nation's sovereign interests in its reservation beyond that limitation, so the Nation easily meets the minimal standard for intervention as a matter of right.[10]

Similarly, the Plaintiffs fail to show the Nation lacks an interest in this case by narrowing their claims to a determination of whether the federal government has *exclusive* jurisdiction under the SMCRA.[11] Once again, the Plaintiffs' narrow framing of the issues in their Response directly contradicts their claims in other filings.

In their Motion for Preliminary Injunction, the Plaintiffs argue that obscure and irrelevant equitable principles prohibit any shift in jurisdiction after *McGirt*.[12] Critically, the Plaintiffs admit they are seeking to apply these principles to the Nation.[13] The Nation

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homeland security grants available to tribes that meet Indian country land threshold)), among many others.

[9] Pls.' Resp. [ECF No. 45] at 8.

[10] *See N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012) (granting intervention because tribe had an interest in whether a particular tract of land is or is not Indian country); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 6 (D.D.C. 2008) ("A government's loss of sovereignty over land within its jurisdiction is a legally protectable interest."); *United States v. Questar Gas Mgmt. Co.*, No. 08-CV-167-DAK, 2010 WL 187227, at *2 (D. Utah Jan. 13, 2010) (unpublished) (holding tribe had interest in jurisdictional status of its land sufficient to justify intervention).

[11] Pls.' Resp. [ECF No. 45] at 8.

[12] Pls.' Mot. for Prelim. Inj. & Br. in Supp. [ECF No. 17] at 15-21.

[13] *Id.* at 24 n.1.

has an obvious interest in defending its jurisdiction and in ensuring that the Plaintiffs' meritless assertion is properly discarded.[14]

In a more direct manner, the Plaintiffs dedicate an entire section in their Motion for Preliminary Injunction to arguing that Congress stripped *the Nation* of any authority to regulate surface mining and regulation when it enacted SMCRA.[15] Regardless of whether the Nation ever elects to seek primacy under the SMCRA, preserving its legal authority to do so is a sufficient interest for intervention.[16] The Nation easily meets its minimal burden for demonstrating it has an interest that may be impaired in this case.

II. IT IS IMPOSSIBLE FOR THE FEDERAL DEFENDANTS TO REPRESENT THE NATION'S INTERESTS

The existing parties' characterizations of the Federal Defendants' and the Nation's objectives and interests as being "shared" and "common" completely ignore the Nation's overriding goal—to defend the Nations' jurisdiction within the reservation. In contrast, the Federal Defendants' stated goal is to defend federal jurisdiction under SMCRA.[17] No

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[14] *See supra* note 10.

[15] Pls.' Mot. for Prelim. Inj. & Br. in Supp. [ECF No. 17], § I(A)(2)(a) at 22; *see also id.* at 16-17 (arguing "Congress intentionally removed from tribes, including the Muscogee (Creek) Nation, any extant authority to regulate coal mining and reclamation on Indian lands.").

[16] *See Forest Cnty. Potawatomi Cmty. of Wisc. v. United States*, 317 F.R.D. 6, 15 (D.D.C. 2016) (Indian tribe granted leave to intervene where the United States did not adequately represent the tribe's interests in "preserving their own rights and opportunities, including their specific economic development goals, both under the [Indian Gaming Regulatory Act] and in their capacities as sovereign entities.").

[17] *See Kane Cnty.*, 928 F.3d at 892.

presumption of adequate representation can arise in this case, because the Nation's interests are not the same as those of the Federal Defendants. In fact, the Federal Defendants' public interests create an inherent conflict with the Nation's vastly different sovereign interests, thus making it *impossible* for the Federal Defendants to represent the Nation's interests.[18] Even where interests may intersect on an underlying issue, the Nation can meet its "minimal burden" of showing that the Federal Defendants may not adequately represent its interests.[19]

A. The Defendants' objections to the Nation's motion to intervene and proposed motion to dismiss demonstrate that it has different interests than the Nation.

In a strained effort to portray the Nation's interests as identical to those of the Federal Defendants, the Plaintiffs and Federal Defendants both claim that that the Nation's interest is in seeking "confirmation of OSMRE's actions stripping Oklahoma of its SMCRA regulatory jurisdiction and grant funding."[20] This is not an accurate statement of the Nation's position, as demonstrated by the Nation's proposed motion to dismiss.

Indeed, the Nation seeks limited intervention so it can pursue dismissal under Rule 19 of the Plaintiffs' collateral attacks on the Supreme Court's decision in *McGirt* and the direct attacks on the Nation's jurisdiction. The Federal Defendants object to the Nation's

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[18] *See Utahns for Better Transp. v. U.S. Dep't of Transp*., 295 F.3d 1111, 1117 (10th Cir. 2002); *Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 384 (10th Cir. 1977).

[19] *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001).

[20] Pls.' Resp. [ECF No. 45] at 8-9.

motions because the Federal Defendants' interests plainly are not in protecting the Nation's sovereign reservation and jurisdictional rights, but to confirm their own SMCRA jurisdiction over the Nation's lands.[21] This illustrates the obvious—namely, that the Nation's and the Federal Defendants' interests and objectives diverge substantially. For purposes of the Nation's limited intervention, the fact that the Federal Defendants will not move to have the case dismissed in the Nation's absence demonstrates that the Nation's interests are different, and are not adequately represented by the Federal Defendants.

B. The Nation has sovereign interests that are different from the public interests of the Federal Defendants.

Aside from the differing interests between the Federal Defendants and the Nation in the proposed motion to dismiss, the Federal Defendants' and the Nation's interests vary in other significant respects. First, the Federal Defendants' interest is in protecting their assertion of *federal* jurisdiction under the SMCRA, while the Nation's interest is in protecting its broader *tribal* jurisdiction. Second, the Federal Defendants' interest in the Nation's reservation extends only as far and for as long as necessary to support their assertion of SMCRA jurisdiction—a significant limitation since the Plaintiffs have conceded that the Nation's reservation exists.[22] In contrast, the Nation's interest is in

[21] Defs.' Resp. [ECF No. 44] at 5, n.2.

[22] Pls.' Resp. [ECF No. 45] at 1 ("Proposed Intervenor claims an interest in confirming the reservation holding in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Mot.

protecting its broader sovereign rights that stem from the Supreme Court's confirmation of its reservation in *McGirt*. These interests are unconditional and transcend the SMCRA.[23] The Plaintiffs' and Federal Defendants' argument that these interests are the same is spurious.

The Tenth Circuit makes clear that it is *impossible* for the Federal Defendants to represent the Nation's private interests in this case because they have a public *obligation* to represent *their own* federal interests.[24] Namely, the Federal Defendants must defend their decision to rescind the Plaintiffs' program authority under the SMCRA in favor of asserting their own jurisdiction, even if it negatively impacts the Nation's interests. This conflict is particularly concerning if the case includes settlement discussions.[25] Even if the Federal Defendants stop short of taking such positions, the Federal Defendants' obligation to pursue their own interests means that the Plaintiffs' broader attacks on the

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at 2, but that holding is not contested in this case.") & 7 ("the Plaintiffs do not ask this Court to question the Supreme Court's reservation holding in *McGirt*").

[23] *See supra* note 8.

[24] *See WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) ("We have repeatedly recognized that it is 'on its face impossible' for a government agency to carry the task of protecting the public's interests and the private interests of a prospective intervenor."); *Nat'l Farm Lines*, 564 F.2d at 384 ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation.").

[25] The Plaintiffs and Federal Defendants communicated for several weeks about reaching an agreement to maintain the status quo. Pls.' Mot. to File Oversized Br. [ECF 15] at ¶ 2.

Nation's sovereign jurisdiction and reservation interests will not be adequately defended.[26]

Ignoring these points, both the Plaintiffs and the Federal Defendants make an overriding argument that the Federal Defendants are the only necessary parties because the case relates to an agency action.[27] Both of the existing parties rely on *Sac and Fox Nation of Missouri v. Norton*, which concerned a challenge to the Secretary of the Interior's decision to accept land into trust on behalf of a tribal nation.[28] The court held that the Secretary's interests in defending the agency action were "virtually identical" to those of the proposed intervenor.[29] That case is not applicable here, however, because the Nation's interests are different from those of the Federal Defendants. Significantly, the federal government in *Sac and Fox* was representing an action that it took *on behalf of a tribe*. Here, the agency action is one taken by the Federal Defendants on behalf of their own SMCRA interests, not on behalf of the Nation.[30]

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[26] It is concerning that the Federal Defendants consider the issues in this case to be "narrow legal questions" and consider the Nation's only interest to be whether its reservation qualifies as "Indian lands" under the SMCRA. Defs.' Resp. [ECF No. 44] at 8. The Federal Defendants fail to even acknowledge the Plaintiffs made broader attacks on the Nation's jurisdiction, even if those claims were abandoned in the Plaintiffs' Response.

[27] Pls.' Resp. [ECF No. 45] at 10; Defs.' Resp. [ECF No. 44] at 10.

[28] 240 F.3d 1250, 1253 (10th Cir. 2001).

[29] *Id.* at 1260.

[30] The Plaintiffs also cite *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), but the case is similarly distinguishable because it involved "solely" a decision by the National Indian Gaming Commission to authorize gaming on tribal property and the

The Federal Defendants cite *CDST-Gaming I, LLC v. Comanche Nation*, which involved a non-Indian party's challenge to the jurisdiction of the Court of Indian Offenses over a contract dispute with a tribe.[31] This Court denied the tribe's Rule 19 motion, holding that the tribe's interest in defending the jurisdiction of the Court of Indian Offenses was adequately represented by the Court of Indian Offenses.[32] That case is also distinguishable because the tribe and the existing party had "virtually identical" interests in preserving the court's jurisdiction.[33] Here, the Nation and the Federal Defendants have at stake their own respective jurisdictions, and the Nation seeks to represent its own jurisdictional interests.

The Plaintiffs and Federal Defendants also cite *Southwest Center for Biological Diversity v. Babbitt*, a case from the Ninth Circuit, for the proposition that the federal government alone can support an agency action unless a "conflict of interest" arises with

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court found the interests of the tribe and the agency to be "identical" citing parallels to *Sac and Fox Nation of Missouri*. *See id.* at 1226. Unlike the present case, the claims did not involve a broader attack on the tribe's sovereignty or jurisdictional interests or reservation status. *See id.*

[31] *See* No. CIV-09-521-F, 2011 WL 13112233, at *1 (W.D. Okla. Aug. 8, 2011) (Friot, J.). The Plaintiffs cite *CDST-Gaming I, LLC v. Comanche Nation*, CIV-09-521-F, 2013 WL 12086688 (W.D. Okla. Jan. 8, 2013), where this Court denied intervention as of right due to adequate representation of the tribe's interest, but granted permissive intervention. *Id.* at *3.

[32] *Id.* at *4.

[33] *Id.* (citing *Sac and Fox Nation*, 240 F.3d at 1259).

a proposed intervenor.[34] But, here, there is an inherent conflict because the Nation's interests are different from the Federal Defendants' public obligations.[35] Therefore, even in a case involving an agency action, a differing interest of the Nation and the Federal Defendants is sufficient to demonstrate inadequate representation.[36] Contrary to the Federal Defendants' argument otherwise, this is true even in the Tenth Circuit.[37]

C. The Federal Defendants are not adequate parties for representing the Nation's sovereign and reservation interests.

Although admitting that their obligations are to defend the OSMRE's jurisdiction under the SMCRA,[38] the Federal Defendants nevertheless claim they can adequately defend the Nation's interests. As already addressed, this case is much broader than the Plaintiffs and Federal Defendants assert in their responses. Even on the intersecting issue

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[34] 150 F.3d 1152, 1154 (9th Cir. 1998).

[35] *See id.*

[36] *See Questar Gas Mgmt. Co.*, 2010 WL 187227 (granting tribal intervention in an agency action related to the Clean Air Act because the tribe had sovereign and jurisdictional interests in its reservation claims); *see also Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843 (9th Cir. 2019) (authorizing intervention by tribal corporation to seek dismissal of case involving federal agency action); *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 997-98 (9th Cir. 2020) (authorizing tribal intervention in agency action case finding sufficient "conflict" where plaintiffs asserted claims attacking tribe's federal recognition which was broader than defending the agency action).

[37] *See Utah Ass'n of Cntys.*, 255 F.3d at 1255 (holding government agency's inability to protect both public and private interests in challenge to agency action is sufficient "conflict" to satisfy the "minimal burden of showing inadequacy of representation.") (internal citation omitted).

[38] Defs.' Resp. [ECF No. 44] at 6-7.

of whether the Nation's reservation qualifies as "Indian lands" under the SMCRA, the Federal Defendants are not adequate parties to represent the Nation's interests.

To start, the Federal Defendants failed to address in their response how they are adequate parties to defend the Nation's reservation status after arguing just last year that the Nation's reservation had been disestablished.[39] The Federal Defendants suggest they *must* defend confirmation of the Nation's reservation in this action because they relied upon the Nation's reservation qualifying as "Indian lands" when asserting their own SMCRA jurisdiction.[40] But policies and legal positions can change overnight for a variety of reasons, such as pursuing a different legal strategy or a shift in administrations, so that defense is unsatisfactory.[41] As recognized by the Tenth Circuit, "it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts."[42]

The Plaintiffs also argue that the Nation's concerns about inadequate representation are merely speculative, but the burden is to show that representation "may

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[39] *See McGirt*, 140 S. Ct. 2452 (United States participating as an amicus curiae for Respondent).

[40] Defs.' Resp. [ECF No. 44] at 8.

[41] The possibility of a shift of policy due to a change in the presidential administration is sufficient to show inadequate representation by the United States. *See W. Energy All.*, 877 F.3d at 1169; *Kane Cnty.*, 928 F.3d at 895.

[42] *Utah Ass'n of Cntys.*, 255 F.3d at 1256 (quoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 974 (3d Cir. 1998)); *see also WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 997 (10th Cir. 2009).

be" inadequate and that burden should be treated as "minimal."[43] The Supreme Court has recognized that even a complaint about the performance of an agency is sufficient to warrant intervention.[44] Moreover, a history of adversarial proceedings is an important factor in determining whether representation may be adequate, and the Nation's qualms about the adequacy of the Federal Defendants' proposed representation of its interests are not based on an isolated occurrence.[45]

While the United States and the Nation are able to work cooperatively on many matters, especially on criminal law matters after *McGirt*, the history of the Federal Government's representation on matters related to the Nation's reservation lands and jurisdiction has been less than adequate.[46] The Federal Defendants can only offer bare

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[43] *See Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10, 92 S. Ct. 630, 636 n.10 (1972).

[44] *See id.* at 538-39, 92 S. Ct. at 636-37.

[45] *See, e.g.*, *Coal. of Arizona/New Mexico Cntys.*, 100 F.3d at 845 (finding representation of a conservationist to be inadequate where the Interior failed to protect wildlife in the past, despite statutory obligations to do so); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (holding U.S. Fish and Wildlife Service would not adequately represent the interests of environmental groups in an action challenging the species' protection because FWS had listed the species only after being sued by the environmental groups); *County of Fresno v. Andrus*, 622 F.2d 436, 438-39 (9th Cir. 1980) (holding Department of the Interior would not adequately represent interests of a group of farmers after Interior delayed promulgating rulemaking requested by the farmers); *Mausolf v. Babbitt*, 85 F.3d 1295, 1302-03 (8th Cir. 1996) (relying on the history of litigation between environmental groups and government to conclude that the government would not adequately represent the environmental groups' interests).

[46] Before the 19th century, the Nation had a "right of occupancy over a wide area of land located in a part of the present States of Alabama, Georgia and Mississippi." *United States v. Creek Nation*, 476 F.2d 1290, 1292 (Ct. Cl. 1973) (citing Treaty of

assurances that they will protect the Nation's reservation and sovereign interests, and that there is "no reason to believe" they will not, even in the face of binding precedent that holds the conflicting interests make it impossible to do so.[47] The Nation is not willing to take the Federal Defendants at their word.

Aug. 7, 1790, 7 Stat. 35 (Kappler, 1904, vol. II, at p. 25)). In 1826, the United States had the Nation sign a treaty ceding all of its lands except for a small domain in eastern Alabama. *Id.* (citing Treaty of Jan. 24, 1826, 7 Stat. 286 (Kappler, 1904, vol. II, at p. 264)). "In the 1830s, the Muscogee (Creek) Nation was forcibly removed from the Southeastern United States to land in what is now Oklahoma." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1440-41 (D.C. Cir. 1988); *see also* Treaty of May 24, 1832, 7 Stat. 366 (Kappler, 1904, vol. II, at p. 341); Treaty of Feb. 14, 1833, 7 Stat. 417 (Kappler, 1904, vol. II, at p. 388). In the late 19th century, the United States "embarked upon a program to abolish communal ownership of land in the Indian Territory, by dissolving the tribal form of government and by allotting tribal lands to the individual members of the tribes to the extent necessary and disposing of the remainder to settlers." *McGhee v. Creek Nation*, 122 Ct. Cl. 380, 385 (Ct. Cl. 1952). "Allotment was justified as a means of accomplishing the then current policy of assimilation." *Hodel*, 851 F.2d at 1441 (citing *Felix S. Cohen's Handbook of Federal Indian Law* ch. 2, § C2a, at 128 (1982 ed.)).

Subsequently, Congress passed the Act of May 8, 1906, ch. 2348, 34 Stat. 182 ("Burke Act"), which "gave the Secretary of the Interior the discretion to remove allotted land from trust status and to issue fee simple patents, either upon the death of an Indian allottee or upon a finding that an allottee was 'competent and capable of managing his or her affairs.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1000 (8th Cir. 2010) (citing 34 Stat. at 183). "Between 1916 and 1921, the Secretary used the authority of the Burke Act to remove restrictions on a systematic basis; thousands of patents were issued without Indian application or consent and even over Indian protest. As a result of the policy, four-fifths of the Indians declared 'competent' no longer owned their land by 1928." *Cohen's Handbook of Federal Indian Law* § 16.03[4][b][iii], at 1049 (2012 ed.).

[47] Defs.' Resp. [ECF No. 44] at 10.

III. IN THE ALTERNATIVE, THE NATION'S INTERVENTION SHOULD BE GRANTED ON A PERMISSIVE BASIS

The Federal Defendants concede the Nation has a right to permissive intervention, but the Plaintiffs object on the grounds that an intervenor is required to demonstrate that it "shares with the main action a common question of law or fact" and is adequately represented by the Federal Defendants.[48] Their arguments are merely conclusory. As thoroughly demonstrated in the opening motion and herein, the Nation has a significant interest in the "Indian lands" and jurisdictional questions presented in this case. The Nation's desire to have this case dismissed does not absolve those interests, but supports them.[49]

The Plaintiffs also contend that an intervention will unduly delay or prejudice the adjudication of the case, including the pending motion for a preliminary injunction.[50] None of the existing parties contested the Nation's motion as being untimely, and any delay in the proceedings is nominal compared to the significant prejudice the Nation would suffer from denial of its intervention. Accordingly, in the absence of a grant of intervention as a matter of right, permissive intervention is appropriate.

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[48] Pls.' Resp. [ECF No. 45] at 12.

[49] "The interest of the intervenor is not measured by the particular issue before the court but is instead measured by whether the interest the intervenor claims is *related to the property that is the subject of the action*." *Utah Ass'n of Cntys.*, 255 F.3d at 1252 (emphasis in original).

[50] Pls.' Resp. [ECF No. 45] at 12.

CONCLUSION

The objections by the Federal Defendants and the Plaintiffs are without merit, so the Nation's motion for a limited intervention for purposes of filing its proposed motion to dismiss should be granted, whether by right or permissively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2021, I electronically transmitted the above and foregoing document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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