No. 220160

IN THE

Supreme Court of the United States

UTAH,

Plaintiff,

v.

UNITED STATES,

Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

REPLY IN SUPPORT OF MOTION TO INTERVENE

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The Ute Indian Tribe of the Uintah and Ouray Reservation (the Ute Indian Tribe) files this reply in support of its motion to intervene.

INTRODUCTION

The Ute Indian Tribe's motion to intervene provides a detailed and correct discussion of three independent and very substantial interests that the Ute Indian Tribe would have at stake if this Court were to grant Utah's motion for leave to file Utah's currently proposed complaint.

Utah's primary response is that the Tribe "has no interest" because Utah will not prevail on its latest attempt to terminate the Ute Indian Tribe and to wrest control of tribal lands from the Tribe or United States. *E.g.*, Utah Resp at 5 (admitting that Utah cannot "credibly claim that land within the boundaries of the Uintah and Ouray Reservation are" public lands as defined in the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785. (FLPMA). While the Tribe appreciates Utah's proffered concession,[1] the issue in a motion to intervene is not who will ultimately prevail on the claims.

1. The Tribe appreciates Utah's concession, but does not appreciate the tone in which the concession is stated. Utah paternalistically asserts the Tribe does not understand that basic principles of federal Indian law will defeat Utah's claim. Utah also pejoratively asserts that the Tribe's carefully worded parsing of Utah's complaint is "unmoored," etc. To the contrary, the Tribe's motion to intervene noted that Utah's allegations regarding Ute lands was doomed to failure. The Tribe discussed that the law in favor of the Tribe and the fact that the United States and Utah were united in support of some of Utah's fanciful arguments supported the Tribe's motion to intervene if this Court were to permit Utah to file its currently proposed complaint, so that the Tribe's legally supported arguments would prevail.

It is instead whether the movant has a sufficient interest in a claim pled. *South Carolina v. North Carolina*, 558 U.S. 256 (2010); *Arizona v. California*, 460 U.S. 605, 614 (1983) (tribes permitted to intervene in original jurisdiction case because their water rights were at stake in the case); *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 436 (2017); Fed. R. Civ. Proc. 24.

Even though, as the Tribe showed, Utah's complaint plainly pleads that the United States unconstitutionally retains ownership of 1,500,000 acres of land on the Uncompahgre Reservation, Utah makes the conclusory assertion that the Tribe has no interest at stake.

Similarly, even though the Tribe discussed in detail that the Tribe has been litigating against the United States and Utah regarding ownership rights of those same 1,500,000 acres of lands for over six years, Utah's sole response is to repeat its conclusory assertion that the Tribe has no interest at stake.

And also similarly, even though the Tribe called out Utah's attempt to hide through misleading elisions Utah's request for a precedential interpretation of Utah's disclaimer of interest in Indian lands, Utah's response merely repeats its conclusory mantra that the Tribe has no interest at stake because Utah will not prevail on that argument.

The Tribe's motion to intervene is plainly warranted by the claims pled in the complaint. If this Court grants

Utah's motion for leave to file, the Court should also grant the Ute Indian Tribe's motion to intervene.

DISCUSSION OF LAW

I. The Tribe has a sufficient interest regarding Utah's claim that the United States unconstitutionally owns 1,500,000 acres of land, because the Tribe asserts the United States owns or should own those same lands in trust for the Tribe.

In its motion to intervene, the Ute Indian Tribe set out simple and logically correct arguments.

Premise 1: Utah's proposed complaint seeks a holding that the United States must give up ownership of public lands which BLM currently administers under the FLPMA.

Premise 2: BLM and Utah team up to claim that 1,500,000 acres of land on the Uncompahgre Reservation are public lands subject to BLM administration under the FLPMA.

Premise 3: The Tribe claims those 1,500,000 acres are *not* public domain lands subject to BLM administration under the FLPMA. In the related District Court suit, the Tribe on one side and BLM and Utah united on the other have been litigating whether those 1,500,000 acres are or should be held as public lands subject to BLM administration under the FLPMA.

Conclusion:[2] If this Court were to grant Utah's motion for leave to file the proposed complaint, the Tribe has a sufficient interest in intervening because the Tribe claims the Tribe is the beneficial owner of 1,500,000 acres, and Utah places continued federal ownership of those lands directly at stake in this case.

In its response, Utah is forced to concede that ***if*** this case could result in an order of this Court applicable to those 1,500,000 acres, then the Tribe has a right to intervene. In its response, Utah asserts the Tribe's lands are not at stake, and that even if the lands were at stake, this Court would reject Utah's claims regarding those lands.

Utah's response is without merit. Utah's own map, attached as Exhibit 4 to Utah's proposed complaint, shows in bright red the land that *Utah* claims the United States unconstitutionally owns. 1,500,000 acres of land on the Uncompahgre Reservation are shown in red. Tribe's Mot., Ex. A. Both in its proposed complaint in this Court and in its arguments in the related pending District Court suit, Utah claims those 1,500,000 acres are public domain lands, owned by the United States in fee. *Ute Indian Tribe v. Utah*, D.D.C. case 1:18-cv-00546 Dkt.105 (joining onto the United States' assertion, D.D.C. Dkt. 103-1, that all federally owned lands on the Uncompahgre Reservation are "public domain lands"). The Tribe contends it is the beneficial owner of those same lands. Therefore, and as

2. The Tribe's primary argument from these premises is that this Court should deny Utah's political and quixotic motion for leave to file, so that the Tribe, Utah, and the United States can complete the long-running District Court litigation regarding ownership interests in the 1,500,000 acres.

expressly stated in section 3 of the relevant Act of June 15, 1880, 21 Stat. 199 ("1880 Act"), those lands are not public domain lands. The Tribe's claim of beneficial ownership of 1,5000,000 acres of land is a sufficient interest for purposes of intervention. QED.

Utah also defines in words the land that would be *directly* at stake: and administered by BLM under the FLPM. Compl. ¶¶40, 54, prayer for relief ¶B. Utah and the United States both claim that the 1,500,000 acres fit within that definition because, they claim, the United States owns those lands in fee.

In its opposition to the Tribe's motion to intervene, Utah now muddies up the issue it seeks to present. The understanding of the Tribe and of seemingly all of the amicus supporting Utah is that Utah was challenging continued federal ownership of land by BLM under FLPMA. Now, contrary to its requested relief and contrary to its own map, Utah asserts that BLM management of those lands and other lands under FLPMA *is* proper and unassailable. Utah may well be cutting off its nose to spite its face. Regardless, the Tribe claims the right to continued federal ownership on behalf of the Tribe, and Utah's complaint asserts the United States cannot continue to own those same lands.

As the Tribe further discussed, Utah chose to intervene in *Ute Indian Tribe v. Utah*, D.D.C. case 1:18-cv-00546 precisely so that Utah could join forces with the United States to argue the 1,500,000 acres fit within Utah's definition of federal public lands. Now that Utah

appears poised to lose that case,[3] it seeks to shift the issue to this Court.

Utah goes one step further and asserts that if the very same issue that the Tribe has been litigating for six years is brought before this Court, the Tribe would not even have an interest in the issue and the Tribe should not be allowed to be heard in this Court. The Tribe has a substantial interest in protecting the litigation that the Tribe filed years ago, allowing that prior filed action to proceed to its impending conclusion.

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3. In its response to the Tribe's motion to intervene, Utah asserts that it has not lost or conceded most of the issues in the related District Court and Court of Claims suits. Utah's conclusory assertion likely is immaterial to the Tribe's motion to intervene, but Utah's assertion is also incorrect. Through years of litigation, the Tribe successfully narrowed the District Court and Court of Claims suits down to the legal question of whether the Tribe received "compensable title," i.e. the right to the proceeds if the United States sells land or interests in land on the Uncompahgre Reservation. *E.g.*, D.D.C. Dkt.103-1 at 9 (United States admits that the merits now turns solely on whether the Tribe had a right to proceeds from the sale.) Unfortunately for Utah and the United States, when they admitted that the case tuns on "compensable title," they failed to realize that the 1880 Act expressly provides the Tribe with the right to proceeds from the sale, i.e. compensable title. The 1880 Act expressly states that proceeds from the sale of the land or interest in the land on the Uncompahgre Reservation "*shall be deposited in the Treasury as now provided by law for the benefit of the said Indians. . . .*" 1880 Act §3. The right to proceeds from sale of the land is the definition of tribal compensable title. In the District Court and the Court of Claims, the United States and Utah are now dependent upon an argument which is flatly contrary to section 3 of the 1880 Act.

The Tribe's interest is particularly acute here because the other two parties to Utah's motion for leave to file are both on the same side—asserting that the 1,500,000 acres are federal public lands. Notably, the United States did not oppose the Tribe's motion to intervene, and Utah did not even argue that the United States can adequately represent the Tribe's interests.

Under the complaint that Utah has submitted—the complaint it is currently asking this Court to accept—approximately 1,500,000 acres of land that the Tribe claims to be beneficial owner of would be at stake. Under that complaint—the complaint at issue—the Tribe has a substantial interest.

II. The Tribe has a substantial interest in opposing Utah's request for a precedential decision which would, if accepted by this Court, do away with Reservations in Utah.

Utah's response also seeks evades the other elephant in its proposed complaint—that in addition to the lands that would be *directly* at stake, Utah includes in its proposed complaint a request that this Court issue a precedential interpretation that Section 3 paragraph 2 of Utah's Enabling Act requires the United States to relinquish trust ownership of ***all*** Indian lands in the State. Utah expressly, albeit oxymoronically, argues that when Utah *forever* disclaimed interest to federal public lands and tribal lands, this Court must interpret "forever" to mean "temporarily and now expired."

In its motion to intervene, the Tribe provided a detailed discussion of Utah's attempt to hide this issue

within Utah's proposed complaint. Utah's only response is the road less taken. Utah asserts the Tribe has no interest because Utah will not prevail on its oxymoronic interpretation of Utah's disclaimer over Indian lands. Utah admits that federal law firmly establishes that the disclaimer in Utah's Enabling Act is permanent, valid, and enforceable. The terms upon which Utah agreed to join the Union are not, as Utah now claims, unconstitutional.

The Tribe has only located one other case where a *plaintiff* has made a similar argument—that its argument is so bad that there is no need for intervention by the party that would be harmed if the bad argument were to prevail. *Ctr. for Biological Diversity v. Kempthorne*, No. CV08-8117-PCT-NVW, 2009 WL 10673068, at *4 (D. Ariz. Jan. 16, 2009)

In that case, the United States had issued an order withdrawing federal lands from new private ownership claims. That withdrawal was "subject to valid existing rights," including rights under mining laws. The Center for Biological Diversity filed a complaint in which it alleged, inter alia, that two mining companies did not have existing rights.

The mining companies moved to intervene. Like Utah here, the Center for Biological Diversity argued that despite Plaintiff's allegation that the mining companies did not have an interest, the withdrawal order established that any interest the mining companies had was preserved. The Court correctly rejected the argument, holding the standard for intervention is not whether the intervener will prevail or lose. It is instead focused on whether the proposed intervenor has a sufficient stake in the issue pled.

Her, the Tribe does have a sufficient interest. In fact, the Tribe literally has an existential interest. If Utah were to prevail (as both Utah and the Tribe agree Utah will not) then this Court's precedent would require the United States to relinquish title to all federal fee and trust title on the Tribe's Reservation.

CONCLUSION

For all of the above reasons, if the Court were to grant Utah's motion for leave to file, the Court should also grant the Tribe's motion to intervene.

Respectfully submitted,

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