

No. 01-17489

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RUSSELL MEANS,  
Petitioner-Appellant,

v.

NAVAJO NATION, a federally recognized Indian tribe; HONORABLE RONALD  
YAZZIE, Chief Justice of the Navajo Nation; HONORABLE RAY GILMORE,  
Judge of the Judicial District of Chinle, Navajo Nation (Arizona)

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MOTION TO INTERVENE AS OF RIGHT

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The United States of America hereby moves, pursuant to 28 U.S.C. § 2403 and Rule 44 of the Federal Rules of Appellate Procedure, to intervene as of right for the purpose of defending the constitutionality of 25 U.S.C. § 1301(2). The grounds for this motion are as follows:

1. 25 U.S.C. 1301(2) is a provision of the Indian Civil Rights Act. Section 1301(2) provides for “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”

2. This is an action for habeas corpus brought by Russell Means, who is a member of the Oglala Sioux Tribe, against the Navajo Nation. The Navajo Nation

has charged Means with certain misdemeanor offenses, and he contends that section 1301(2) is not effective in reinstating the Nation's criminal jurisdiction over persons who are members of other Indian tribes because the legislation is inconsistent with equal protection and due process rights issuing from the United States Constitution.

3. Under 28 U.S.C. § 2403, when the constitutionality of an Act of Congress is drawn into question in a case to which the United States is not a party, the court hearing the case "shall certify such fact to the Attorney General." The Court has issued such a certification in this matter.

4. Section 2403 provides that the courts "shall permit the United States to intervene for presentation of evidence \* \* \* and for argument on the question of constitutionality," and that the United States "shall, subject to the applicable provisions of law, have all of the rights of a party \* \* \* to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." Intervention under Section 2403 is permissible "at any stage of the proceeding," including at the appellate level. See Wallach v. Lieberman, 366 F.2d 254, 258 n.9 (2d Cir. 1966); Yniguez v. Arizona, 939 F.2d 727, 739 (9th Cir. 1991).

5. The United States wishes to exercise its right under 28 U.S.C. § 2403 to intervene to defend the constitutionality of section 9658 as applied in this case. As an intervenor, the United States wishes to brief and argue the constitutional issues

presented by these appeals. The United States believes that its participation as an intervenor will assist the Court in the ultimate resolution of the constitutional issues in this case.

6. The United States has also intervened as of right in another case presenting a similar challenge, Morris v. Tanner, No. 03-35922 (9th Cir.). The opening and answering briefs in that case have been filed; the reply brief is due to be filed on September 15, 2004.

7. The United States' brief as intervenor is filed with this motion.

For the foregoing reasons, the United States moves to intervene as of right for the purpose of defending the constitutionality of 25 U.S.C. 1301(2).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that, on December 15, 2004, a copy of this Motion to Intervene was sent by first class United States mail to counsel at the following addresses:

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