THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, *et al.*,

Plaintiffs

09-CV-0291
Hon. William M. Skretny

v.

PHILIP N. HOGEN, *et al.*,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF SENECA NATION OF INDIANS' MOTION TO INTERVENE

Plaintiffs fail to raise a single valid point of fact or law that undermines the Nation's reasonable request for permissive intervention. While the Court has discretion to grant or deny the Nation's motion under Rule 24(b), the Court would commit a clear abuse of that discretion were it to deny the Nation's motion on the bases set forth by Plaintiffs.

1. Plaintiffs first assert that the Court may not grant intervention because "IGRA regulates the conduct of the U.S. Government. It follows that only the governmental agencies and officials who are responsible for complying with the federal requirements can be appropriate defendants to such an action." *See* Docket No. 14 ("Pl. Br.") at 13. Plaintiffs are mistaken. Under well-established law, the requirements for party status at the initiation of a lawsuit and those at the intervention stage are decidedly not co-extensive. In *Trbovich v. United Mine Workers of America*, 404 U.S. 528 (1972), the lower courts had denied intervention because, as Plaintiffs argue here, the intervenor-applicant could not have been an original party to the suit. The Supreme Court reversed, reasoning that the "petitioner seeks only to participate in a pending suit that is plainly authorized by the statute[.]" *Id.* at 532. The Court noted that "[t]he distinction

between intervention and initiation is thoughtfully discussed in Shapiro, Some thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 726-729 (1968)." *Id.* at 536 n.7. There, Professor Shapiro explained:

> [T]here is a difference between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene. . . . The difference . . . *is most evident in the case of one who seeks to intervene on the side of the defendant* in civil litigation. When property owners sue to enjoin a railroad from maintaining storage tracks in a residential neighborhood, a local businessman who is heavily dependent on the use of that trackage may have an important interest to protect and much to contribute to the court's understanding of the case, even though he has no claim that could be asserted against any of the parties and they have none that could be asserted against him.

81 Harv. L. Rev. 721, 726 (1968) (emphasis added); *accord U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor.") (citing *Trbovich* and Shapiro). *See also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) ("[A] permissive intervenor does not even have to be a person who would have been a proper party at the beginning of the suit") (quoting 7C Wright, Miller & Kane, Federal Practice & Procedure § 1911 (1986); *see also id.* (2009 ed.) (same)). In short, Plaintiffs' argument that the Nation may not lawfully participate as an intervening defendant in this action is a clear invitation to this Court to commit reversible error. *See Lipsett v. U.S.*, 359 F.2d 956, 959 (2d Cir. 1966) ("[A]n exercise of discretion based on a misconception of the law is an abuse of discretion").

Plaintiffs' argument that the Nation does not have a defense in common with the main action is likewise flatly wrong. The Nation seeks to intervene to defend the validity of the rules, statutes and governmental actions challenged by Plaintiffs, which is precisely the sort of defense the courts have found sufficient under Rule 24(b). For example, in *Kootenai Tribe*,

environmental groups had been granted permissive intervention to defend a federal regulation. The Ninth Circuit upheld the intervention, noting that the environmental groups had "assert[ed] 'defenses' of the government rulemaking that squarely respond[ed] to the challenges made by plaintiffs in the main action." 313 F.3d at 1110-11. Here, the Nation likewise seeks to respond directly to Plaintiffs' attacks on the governmental actions at issue in this case.

None of Plaintiffs' cases undermines the Nation's argument for permissive intervention. Plaintiffs cite *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), for the proposition that in suits "'brought to require compliance with federal statutes . . . the governmental bodies charged with compliance can be the only defendants.'" Pl. Br. at 13 (quoting *Wade*, 673 F.2d at 185). Such a categorical rule, applied at the intervention stage, would conflict with the clear precedent discussed above. But "*Wade* did not espouse such a rigid position." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 971 (3d Cir. 1998). In distinguishing the Second Circuit's holding in *New York Public Interest Research Group, Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350 (2d Cir. 1975) ("*NYPIRG*"), where (as noted in the Nation's opening brief, Doc. No. 10-3 ("Nation's Br.") at 8) a private entity was permitted to intervene to defend a regulation because "the validity of a regulation from which [the applicant's] members benefit is challenged," 516 F.2d at 352, the *Wade* court limited its holding in terms rendering it inapposite to this case:

> [*NYPIRG*] . . . is distinguishable. Unlike this case, [*NYPIRG*] involved a suit whose result might have invalidated a regulation directly governing the proposed intervenors . . . . By contrast, the holding in the instant case will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors.

673 F.2d at 186 n.6; *see also id.* at 185 ("None of the [government] actions taken, nor the statutory authority called into question in this case, involves the proposed intervenors").

This case clearly fits the *NYPIRG* rather than the *Wade* mold. The Nation seeks to intervene to defend rules and government actions that apply to the Nation's actions and confer benefits on the Nation and its members. *See also Sierra Club v. U.S. Army Corps of Engineers*, 709 F.2d 175, 177 (2d Cir. 1983) (*NYPIRG* permitted intervention because applicants "would have been effectively bound by a judicial determination with respect to the challenged regulation"). *NYPIRG*, which remains controlling precedent in the Second Circuit, *see, e.g., Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001), is directly relevant here, and Plaintiffs have no answer for it.

Habitat Educ. Ctr., Inc. v. Bosworth, 221 F.R.D. 488 (E.D. Wisc. 2004), *see* Pl. Br. at 13, is likewise inapposite. In *Bosworth*, the applicants' interests were "indistinguishable from that of the public at large." *Id.* at 494-95. The Nation's interests obviously differ from those of the general public. And Plaintiffs' assertion that *Pogliani v. U.S. Army Corps of Engineers*, 2004 U.S. Dist. LEXIS 30415 (N.D.N.Y. 2004), applied its rationale to intervention "either as of right *or by permission*," Pl. Br. at 14, is patently false. The court explicitly declined to address any argument for intervention under Rule 24(b) because the applicant had waived it. *See id.* at *5.

Furthermore, it is telling that the cases cited by Plaintiffs on this point each involved the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"), and none involved IGRA. While Plaintiffs baldly assert that suits under NEPA are an "analogous context" to this case, *see* Pl. Br. at 13, courts have noted that the intervention analysis in NEPA cases is unique. *See, e.g., Kleissler*, 157 F.3d at 971 (NEPA intervention cases "seem to suggest that NEPA suits are *sui generis*"). Indian nations are in fact routinely permitted to intervene as defendants in cases strikingly similar to this action. For example, in *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008), a "Tribe was allowed to intervene as a defendant" in an action

challenging the Secretary's decision to take lands into trust for gaming purposes, alleging violations of IGRA and challenging the constitutionality of Congress's delegation of authority to the Secretary to acquire land for the tribe. *Id.* at 27-28. In *TOMAC v. Norton*, 433 F.3d 852 (D.C. Cir. 2006), a tribe was "permitted to intervene . . . on behalf of the Government," *id.* at 858, in an action challenging the Secretary's section 2719 restored lands determination and the constitutionality of the statute by which the Secretary had acquired land for the tribe. *Id.* at 855. In *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), a tribe was permitted to intervene as a defendant in an action against the Secretary and the United States seeking an injunction and "a decision on the merits of their IGRA cause of action to prevent the Secretary from permitting gaming" on the tribe's trust land. *Id.* at 1023. *See also Oregon v. Norton*, 271 F.Supp.2d 1270 (D. Oregon 2003) (Indian nation permitted to intervene in an APA suit to defend Secretary's actions under IGRA). Plaintiffs' protestations that the Nation's intervention is legally foreclosed fly in the face of these decisions, which Plaintiffs nowhere mention.

In sum, Plaintiffs invite the Court to deny the Nation's motion based on a complete misconception of the law. *See Lipsett*, 359 F.2d at 959 ("[A]n exercise of discretion based on a misconception of the law is an abuse of discretion"). This Court should reject that invitation.

2. Plaintiffs next assert that the United States' presence in the case requires this Court (1) to impose a heightened standard on the Nation to demonstrate inadequacy of representation, and (2) to apply that heightened standard as a mandatory requirement. *See* Pl. Br. at 15-19. Again, Plaintiffs misconceive the law on both counts.

To begin with, inadequacy of representation is not a "required showing," Pl. Br. at 17, under Rule 24(b). *See* Nation's Br. at 13. In the cases cited by Plaintiffs regarding an applicant's burden to show inadequacy of representation, *see* Pl. Br. at 16, the courts were

discussing that burden under Rule 24(a). *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001); *Brennan*, 579 F.2d at 191; *U.S. v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984 (2d Cir. 1984); *Envtl. Def. Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); *Washington Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 98 (2d Cir. 1990). The statements quoted by Plaintiffs thus do not speak to the bounds of this Court's discretion under Rule 24(b). *See Kootenai Tribe*, 313 F.3d at 1109.

Plaintiffs also cite *South Dakota v. U.S. Dep't of Interior*, 317 F.3d 783 (8th Cir. 2003), which is a Rule 24(b) case, but which thoroughly undermines Plaintiffs' argument that adequacy of representation is other than a "minimal" and entirely discretionary factor under that provision. There, the district court had denied permissive intervention based on adequacy of representation. In upholding that denial, the Eighth Circuit, after noting its obligation of "great deference" to the district court's Rule 24(b) ruling, explained:

> Although the adequacy of protection *is only a minor variable in the Rule 24(b) decision calculus*, it is not an illegitimate consideration. . . . Thus, although the Tribe has cited authority that probably would have persuaded us to grant the motion if we were the district court ruling on the motion in the first instance, *see Arizona v. California*, 460 U.S. 605, 614-15 (1983), we cannot say that the district court clearly abused its discretion in this case by not granting the motion.

Id. at 787 (emphasis added) (citations omitted).

The Eighth Circuit's reference to *Arizona v. California* is telling. *See* Nation's Br. at 13-14. Plaintiffs contend that *Arizona* is "completely inapposite" on the purported basis that the Court granted intervention due to a conflict of interest between the United States and the Tribes. *See* Pl. Br. at 18-19 ("Here, *in contrast*, there is no conflict of interest" (emphasis added)). This is a gross misrepresentation of *Arizona*'s holding, where the Court unequivocally stated: "We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests . . . or otherwise." 460 U.S. at

627. Notwithstanding the absence of any basis for finding inadequate representation, the Court held that "it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention[.]" *Id.* at 614-15. This holding is impossible to square with Plaintiffs' assertion that this Court may apply a mandatory inadequate representation standard under Rule 24(b).[1]

Undeterred, Plaintiffs also rely on the Second Circuit's decision in *Hooker*, 749 F.2d at 984, in a manner that again betrays a complete misconception of the law. *See* Pl. Br. at 16. The holding in *Hooker* is clear: "[I]n *an enforcement action by a governmental entity suing* as a *parens patriae*, it is proper to require a strong showing of inadequate representation[.]" *Id.* at 987 (emphasis added). This case, of course, is not an action by the government suing as *parens patriae* or in any other capacity. The United States is a defendant. The difference is critical, as the *Hooker* court made clear in rejecting an analogy to *NYPIRG*: "*NYPIRG* was not an enforcement action, but rather an attack by consumers *against* a regulation of the Regents of the University of the State of New York. The proposed intervenors . . . sought to intervene on the side of the Regents to defend the regulation. The State was not acting as a *parens patriae*." *Hooker*, 749 F.2d at 987; *see also U.S. v. Hooker Chemicals & Plastics Corp.*, 101 F.R.D. 451, 457 and n.5 (W.D.N.Y. 1984) (Curtin, J.) (distinguishing *NYPIRG* and stating that "[i]t is not uncommon for courts to depart from the *parens patriae* doctrine when . . . government regulations are challenged and private parties who benefit from such regulations seek to intervene as defendants"), *aff'd*, 749 F.2d 968 (1984).[2]

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[1] It is also impossible to square with Plaintiffs' argument that this Court's prior adequate representation analysis under Rule 19 "is equally applicable to the SNI's motion for permissive intervention under Rule 24(b)." Pl. Br. at 17. *See also Internat'l Design Concepts, LLC v. Saks, Inc.*, 486 F.Supp.2d 229, 234 (S.D.N.Y. 2007) ("[E]ven if Oscar were not a necessary party under Rule 19, permissive intervention is appropriate under Rule 24(b).").

[2] Moreover, where the proposed intervenor is an Indian nation seeking to participate in litigation important to its welfare, a heightened standard of adequate representation based on *parens*

Finally, in addition to being inconsistent with the law, Plaintiffs' adequate representation argument is at war with itself. Plaintiffs assert that the United States has "reversed course [in this litigation], and flouted the authority of this court to the point . . . of contempt of court." *See* Pl. Br. at 11. Plaintiffs simultaneously claim that the Nation should not be permitted to intervene because the United States has been a "staunch . . . advocate" with a "strong track record . . . both in an out of the courtroom." *Id.* at 2, 18. Plaintiffs cannot have it both ways. If Plaintiffs truly believe what they have to say about the United States' conduct in the case thus far, they are being disingenuous at best in suggesting that such representation is adequate for the Nation. If they do not believe what they have to say about the United States' litigation efforts, then they obviously should not be disparaging those efforts in their briefing to this Court.

3. Finally, Plaintiffs misconstrue the Nation's waiver of its sovereign immunity in an effort to convince the Court that the Nation will continue to raise immunity defenses as the litigation unfolds, thereby injecting collateral issues into the case. Pl. Br. at 14-15, 20-22. This is a classic straw man. The Nation has expressly waived its immunity with respect to the three claims raised by Plaintiffs in their Complaint. *See* Nation's Br., Attachment A. That the waiver does not extend to any new claims, including any amendments to the Complaint, does not somehow render it "completely illusory," Pl. Br. at 14, and Plaintiffs' argument to this effect is again based on a misconception of the law. If this Court grants the Nation's motion to intervene, the Nation will automatically become a party to the case and will be subject to Plaintiffs' existing claims. Plaintiffs will not, as their own cited case law makes clear, need to amend their Complaint to accomplish that reality. *See Schneider v. Dumbarton Developers, Inc.*, 767 F.2d

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patriae principles does not apply at all, *regardless* of the government's posture as a defendant or a plaintiff. *See Arizona v. California*, 460 U.S. at 615 n.5 (rejecting the applicability of the classic *parens patriae* case of *New Jersey v. New York*, 345 U.S. 369 (1953)).

1007, 1017 (D.C. Cir. 1985) (intervenor attained party status at intervention without subsequent amendment to complaint); s*ee also, e.g.*, *U.S. v. Calif. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1378 (9th Cir. 1997) (stating that "[a]fter intervention, the parties to the litigation have changed" and that intervenors become parties "*commencing with the granting of the motion to intervene*" (emphasis added)); *County Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 483 (6th Cir. 2002) ("Betzold became a party when the district court granted his motion to intervene on April 12"); *White v. Alabama*, 74 F.3d 1058, 1073 n.49 (11th Cir. 1996) ("Bradford became a party on March 4, 1994, when the district court granted him leave to intervene").

The Nation has sensibly limited its waiver of immunity to the claims presently stated in the case. As a sovereign, it is the Nation's prerogative not to expose itself to additional claims of an amorphous and unpredictable nature (whether such claims would be brought by Plaintiffs, or by others seeking to intervene in the case), and courts have routinely accepted and upheld limited waivers of the sort that the Nation seeks to effect here. *See* Nation's Br. at 2.[3] It is perverse for Plaintiffs to argue that because the Nation has not waived its immunity with respect to additional

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[3] Plaintiffs' efforts to cabin the limited waiver cases cited by the Nation to their specific facts are unavailing. Plaintiffs portray *McClendon* and *Jicarilla* as supporting an Indian nation's right to limit its immunity waiver in a given case not to particular issues, but only as against "future lawsuits" and "subsequent actions." *See* Pl. Br. at 21. Neither case supports that limitation. *McClendon* expressly likened its own holding and that of *Jicarilla* to cases in which "we consistently have held that a tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants *in those actions*." *McClendon v. U.S.*, 885 F.2d 627, 630 (9th Cir. 1989) (emphasis added). *See also Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987) ("[T]he terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain *the suit*." (emphasis added) (internal quotation marks omitted)). Plaintiffs' attempt to distinguish *Lac Du Flambeau Band v. Norton*, 327 F.Supp.2d 995 (W.D. Wisc. 2004), likewise fails. *See id.* at 1000 ("Plaintiffs argue that . . . a party granted leave to intervene makes himself vulnerable to the complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party. Whether this rule is true in general, *it is not true with respect to entities that have sovereign immunity*" (citing *McClendon* and *Jicarilla*) (emphasis added)).

claims in this case, the Nation is somehow seeking to inject additional issues into the litigation. That is precisely what the limited waiver is designed to avoid. The same is true for Plaintiffs' arguments that the Nation has not waived its immunity with respect to Plaintiffs' unspecified claim for "other further and different relief," or that the Nation has not waived its immunity with respect to discovery in a case that, as presently structured, does not call for discovery. The Nation has forthrightly waived its immunity with respect to the case as Plaintiffs have framed it. If Plaintiffs maintain their current action there will be no need for any litigation over the scope of the Nation's waiver. And if Plaintiffs seek to go beyond their current claims, they will not be prejudiced by the fact that the Nation's waiver does not extend to those new claims, as absent intervention Plaintiffs would not be able to state those claims against the Nation in any event.

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Shorn of arguments based either on a fundamental misreading of the law or of the Nation's waiver of immunity, Plaintiffs' opposition to the Nation's intervention motion is reduced to nothing more than empty rhetoric. The Nation has a compelling interest in intervening. The Nation's timely intervention will allow it to participate fully in the case – to lend its unwavering perspective to the issues at hand, to seek a stay or an appeal of any adverse decision by this Court, and to participate on an equal footing if another party appeals a decision. Plaintiffs dispute none of this. Nor do they dispute the fact that their action takes direct aim at the Nation's core sovereign and economic interests. They simply claim that the Nation's request to intervene somehow amounts to "gamesmanship." Pl. Br. at 12. But it is not gamesmanship for the Nation to seek to defend itself, in its own voice, against claims that go to the heart of its sovereignty and its economic well-being. It would be an entirely appropriate exercise of this Court's discretion to allow the Nation to do just that.

DATED this 22nd day of July, 2009.

Respectfully submitted,

/s/ Riyaz A. Kanji

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