10-2132-cv

United States Court of Appeals

for the

Second Circuit

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, (JOEL ROSE AND ROBERT HEFFERN, AS CO-CHAIRPERSONS), REV. G. STANFORD BRATTON, D. MIN., EXECUTIVE DIRECTOR OF THE NETWORK OF RELIGIOUS COMMUNITIES, THE NETWORK OF RELIGIOUS COMMUNITIES, NATIONAL COALITION AGAINST GAMBLING EXPANSION, PRESERVATION COALITION OF ERIE COUNTY, INC., COALITION AGAINST CASINO GAMBLING IN NEW YORK-ACTION, INC., THE CAMPAIGN FOR BUFFALO, HISTORY ARCHITECTURE AND CULTURE, ASSEMBLYMAN SAM HOYT, ERIE COUNTY LEGISLATOR MARIA WHYTE, JOHN McKENDRY, SHELLEY McKENDRY, DOMINIC J. CARBONE, GEOFFREY D. BUTLER, ELIZABETH F. BARRETT, JULIE CLEARY, ERIN C. DAVISON, ALICE E. PATTON, MAUREEN C. SCHAEFFER, DORA RICHARDSON, AND JOSEPHINE RUSH,

Plaintiffs-Appellees,

vs.

PHILIP N. HOGEN, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NATIONAL INDIAN GAMING COMMISSION, THE NATIONAL INDIAN GAMING COMMISSION, THE UNITED STATES DEPARTMENT OF THE INTERIOR, KEN SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, BARACK OBAMA, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES,

Defendants,

vs.

SENECA NATION OF INDIANS,

Intervenor-Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR INTERVENOR-DEFENDANT-APPELLANT SENECA NATION OF INDIANS

(Continued on inside cover.)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant the Seneca Nation of Indians states that it has no parent corporation and no publicly held corporation owns stock in the Seneca Nation of Indians.

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STATEMENT OF JURISDICTION

The District Court's subject-matter jurisdiction over this case is pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal because the District Court's denial of a motion to intervene is a reviewable final order under 28 U.S.C. § 1291. *See, e.g.*, *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1994).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

On March 31, 2009, the plaintiffs brought suit against various federal defendants challenging their actions in approving a class III gaming ordinance submitted by the Seneca Nation of Indians (the "Nation"). Through their lawsuit, the plaintiffs seek to challenge the existence of the Seneca Nation's sovereign authority over its Buffalo Creek Territory, and to bar the Nation from conducting class III gaming in that Territory. On June 15, 2009—prior to the time that the federal defendants were required to respond to the Complaint—the Nation filed a motion to intervene under Federal Rule of Civil Procedure 24(b) to protect its fundamental sovereign and economic interests that are at stake in the case. On March 30, 2010, the District Court denied the Nation's motion.

Did the District Court abuse its discretion in denying the Seneca Nation of Indians' motion to intervene in a lawsuit challenging the existence of the Nation's sovereign authority over, and its ability to conduct class III gaming in, its Buffalo Creek Territory?

STATEMENT OF THE CASE

The plaintiffs—a self-described "coalition of organizations and individual citizens-voters opposed to commercialized gambling" (J.A. 53 (¶ 2))[1]—are seeking to "permanently enjoin" the operation of class III gaming by the Seneca Nation of Indians (the "Nation") in the Nation's Buffalo Creek Territory in Buffalo, New York, and to "declare [such activity] illegal." J.A. 52 (¶ 1). This action is the latest of three separate lawsuits that the plaintiffs have brought in an effort to bar the Nation from such activities.

The lawsuit is critical to the Nation's welfare and directly impacts its vital interests in its sovereignty, self-determination, and economic development. Yet the Nation is not named as a party, and when the Nation waived its sovereign immunity and moved to intervene, the District Court denied the motion. *See Citizens Against Casino Gambling in Erie County v. Hogen*, No. 09-CV-0291S, 2010 U.S. Dist. LEXIS 30836 (W.D.N.Y. Mar. 30, 2010) (Skretny, C.J.); J.A. 22-51.

The Nation's direct participation as a party is essential to protect its sovereign authority. In the two prior lawsuits involving this casino, the Nation was granted *amicus* status, but that status does not allow the Nation

[1] References to "J.A." are to the Joint Appendix.

the full rights of a party. These rights are particularly significant on appeal, where all agree this case will ultimately be decided. The Nation's motion was timely, filed at the very outset of the case, and was not opposed by the federal defendants. Without oral argument, the District Court denied the motion, leaving the Nation in the untenable position of having its substantial rights determined based on the United States' separate litigation judgment, rather than through its own considered, independent voice. This flies in the face of the Supreme Court's decision in *Arizona v. California*, which emphasizes that "the Indian's participation in litigation critical to their welfare should not be discouraged." 460 U.S. 605, 615 (1983). This appeal follows.

STATEMENT OF FACTS

The Nation conducts class III (or casino-style) gaming in its Buffalo Creek Territory, pursuant to authorizations under the Indian Gaming Regulatory Act ("IGRA"), the 2002 Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York, and the Nation's class III gaming ordinance, amendments to which the Chairman of the National Indian Gaming Commission ("NIGC") expressly approved on January 20, 2009. In this case brought against various federal government officials and agencies, the plaintiffs seek to stop the Nation's gaming operations in the Buffalo Creek Territory, and to obtain a sweeping ruling that the Nation possesses no sovereign authority over that Territory, but must instead submit to the general laws of the State of New York. (The State is not a party to the lawsuit but has instead concurred in the Nation's exercise of sovereign authority over the Buffalo Creek Territory.)

This is the plaintiffs' third suit against the federal government seeking to abrogate the Nation's sovereign rights and to bar class III gaming in the Nation's Buffalo Creek Territory. Their first suit was commenced in the Western District of New York on January 3, 2006 (*Citizens Against Casino Gambling in Erie County v. Kempthorne*, No. 06-CV-0001S (WDNY)) ("*CACGEC I*"). In *CACGEC I*, the Nation participated as an *amicus curiae*

to seek dismissal of the case under Rule 19 of the Federal Rules of Civil Procedure. Unlike this case, in which the Nation has waived sovereign immunity, there the Nation did not. Instead, the Nation contended that it was a necessary and indispensable party because the suit challenged the extent of its sovereign authority, the legality of its casino operation on its territory, and the validity of the Nation-State gaming compact. As a necessary party whose joinder was barred by sovereign immunity, the Nation requested Rule 19 dismissal. The District Court denied that motion, concluding that although the Nation "certainly has an interest" in the legality of its gaming operations on its Buffalo Creek Territory, the federal defendants had a "substantially similar" interest in defending its gaming approvals and that any differences in the federal defendants' litigating positions vis-à-vis the Nation's were insignificant (as discussed below, this latter conclusion has been severely undercut by the subsequent course of these litigations). *See Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 316 (W.D.N.Y. 2007), *amended in part on reconsideration*, 2007 U.S. Dist. LEXIS 29561 (Apr. 20, 2007). Accordingly, the District Court found that the Nation was adequately represented in *CACGEC I* by the federal defendants and thus was not a necessary party. *See id.* at 302, 315-316, 328.

In the same Decision and Order, the District Court vacated in part the NIGC's approval of the Nation's gaming ordinance and remanded the matter to the NIGC to determine whether the Buffalo Creek Territory constitutes "Indian lands" over which the Nation can exercise its sovereign powers within the meaning of the IGRA. *See id.* at 328-329.

Following the District Court's decision in *CACGEC I*, the Nation submitted amendments to its gaming ordinance to the NIGC for approval under IGRA. On July 2, 2007, the NIGC approved the Nation's ordinance amendments, expressly finding that the Buffalo Creek Territory constitutes "Indian lands" over which the Nation enjoys sovereign authority, and that it was acquired as part of a settlement of a land claim so as not to fall within IGRA's Section 20 prohibition against gambling on lands acquired after the Act's effective date ("after-acquired lands"). *See Citizens Against Casino Gambling v. Hogen*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395, at *56-*57 (W.D.N.Y. July 8, 2008). The Nation then opened its Buffalo Creek Casino in the Buffalo Creek Territory in a temporary facility. *See id.* at *57-*58. On July 12, 2007, the plaintiffs filed their second lawsuit against various federal defendants—*Citizens Against Casino Gambling in Erie County v. Hogen*, No. 07-cv-0451S (WDNY) ("*CACGEC II*")—again

seeking to prevent the Nation from constructing and operating a gambling casino on the Buffalo Creek Territory. *See id.* at *57.

Recognizing that "[t]he Nation will be directly affected by the decision" in the case, and noting that the Nation "offers a historical perspective and insights that may not be available from the parties," the District Court granted the Nation's request to participate in *CACGEC II* as *amicus curiae*. Add. 3.[2] The Nation submitted a 60-page amicus brief in support of the federal defendants' motion to dismiss and in opposition to the plaintiffs' motion for summary judgment. Add. 34-94. In its memorandum of law, the Nation provided the court with a detailed history of the Nation's restricted fee land holdings, the federal government's relationship with the Nation, the Seneca Nation Settlement Act of 1990 (the "SNSA"), and the Nation's economic development activities under IGRA. *See id.* In addition to providing an important historical perspective, the Nation also made unique contributions to the legal arguments regarding the proper interpretation of IGRA and the SNSA, and the validity of the NIGC's approval of the Nation's gaming ordinance amendments. *See id.*

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[2] References to "Add." are to the Addendum to the Joint Appendix, which includes selected materials from the *CACGEC II* proceedings for this Court's convenience.

Although the District Court had found in *CACGEC I* that the United States and the Nation were aligned in their litigation positions, events in *CACGEC II* showed this to be untrue. Critically, the Nation disagreed with the federal defendants' position that IGRA's general prohibition against gaming on *trust* lands (lands held in trust for an Indian nation by the United States) acquired after IGRA's 1988 enactment also applies to lands held by an Indian nation in *restricted fee* status.[3] Thus, while the federal defendants contended that gaming at the Buffalo Creek Territory was appropriate because it fell under the settlement of a land claim *exception* to Section 20's general prohibition (25 U.S.C. § 2719), the Nation argued forcefully that Section 20's general prohibition against gaming on after-acquired trust lands does not apply to restricted fee lands like the Buffalo Creek Territory in the first place. *See Citizens Against Casino Gambling*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395, at *172-*173. The Nation also provided a far more thorough rationale for why the Buffalo Creek Territory constitutes "Indian lands" over which it enjoys sovereign power (*id.* at *94-*95), a rationale that the District Court adopted. And finally, as noted by the District Court, certain points that the Nation made in opposing the plaintiffs'

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[3] As discussed further below, the relevant federal agencies ultimately revised their position on the scope of Section 20 of IGRA after due consideration, and now agree with the Nation on this critical point.

arguments were not covered by the federal defendants at all. *See, e.g., id.* at *128-*129 n.49, *147 n.54.

On July 8, 2008, the District Court issued a 122-page Decision and Order in which it vacated the NIGC's approval of the Nation's gaming ordinance amendments. The lower court held that the NIGC correctly concluded that the Nation's Buffalo Creek Territory is "Indian lands" and that its interpretation that Section 20 of IGRA applies to restricted fee lands was a "permissible" one. But the Court also found that the NIGC Chairman's determination that the Buffalo Creek Territory is gaming-eligible because it satisfies IGRA's "settlement of a land claim exception" was erroneous. *See Citizens Against Casino Gambling*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 52395, at *209-*210.[4]

Following the District Court's July 8, 2008 Decision and Order, the plaintiffs filed a motion asking the court to direct the federal defendants to order the permanent closure of the Buffalo Creek Casino. The federal defendants opposed that motion and filed their own motion seeking to

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[4] Both the District Court's January 12, 2007 Decision in *CACGEC I* and its July 8, 2008 Decision in *CACGEC II* are currently on appeal to this Court. Those appeals are scheduled to proceed in tandem, but are currently stayed pending the District Court's resolution of the *CACGEC III* case that is the subject of this interlocutory appeal. *See* Mar. 12, 2010 Order in *Citizens Against Casino Gambling, et al. v. Kempthorne, et al.*, Nos. 07-2610-cv, 08-5219-cv(L), 08-5257-cv(Xap) (2d Cir.).

amend the July 8, 2008 judgment to include a remand to the NIGC to consider two new issues: (i) the Nation's submission of new gaming ordinance amendments to the NIGC on or about July 16, 2008, and (ii) new regulations published by the Department of Interior on May 20, 2008 related to the interpretation of Section 20 of IGRA that would become effective on August 25, 2008. *See Citizens Against Casino Gambling v. Hogen*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 67743, at *2-*3, *15 (W.D.N.Y. Aug. 26, 2008); *see also* J.A. 76 (¶ 84). In the preamble to its new regulation, the Department of Interior interpreted IGRA's Section 20 general prohibition on after-acquired trust lands as being inapplicable to restricted fee lands—consistent with the position that the Nation had taken all along but a departure from the one that the federal defendants had advanced previously in the litigations. *See*, *e.g.*, 73 Fed. Reg. 29354 (May 20, 2008); J.A. 55-56, 76 (¶¶ 10, 84).

The District Court first held that the NIGC and its Chairman must carry out their enforcement duties under IGRA, but noted that it could not divest the NIGC of its discretion concerning the type of enforcement action to take. *Citizens Against Casino Gambling*, No. 07-CV-0451S, 2008 U.S. Dist. LEXIS 67743, at *34-*35. The District Court then denied the federal defendants' motion to amend the judgment. *See id.* at *35. In doing so, the

District Court chastised the federal defendants for failing to alert the court to the new regulations earlier in the case before a decision had been rendered, and labeled the federal defendants' actions "egregious." *Id.* at *27.

Within days of the District Court's August 26, 2010 decision, the NIGC issued a Notice of Violation to the Nation, which the Nation contested through the administrative appeal process. *See, e.g.*, J.A. 76 (¶ 86); Add. 106, 221. In mid-October 2008, the NIGC sought a stay of the administrative appeal based on its intention to appeal the District Court's July 8, 2008 Decision and Order to this Court. *See* J.A. 76 (¶ 86); Add. 106, 221. At about the same time, the Nation complied with the NIGC's request to withdraw its pending gaming ordinance amendments and resubmit an amended version. J.A. 77 (¶ 87); Add. 153, 212-216. Meanwhile, the plaintiffs filed a second motion to enforce the judgment with the District Court, and the Nation submitted a brief and several affidavits in opposition to that motion. Add. 95-218.

On January 20, 2009, the Chairman of the NIGC approved the Nation's latest gaming ordinance amendments, which related specifically to the Buffalo Creek Territory. J.A. 56-57 (¶ 12). On January 30, 2009, the District Court denied the plaintiffs' second motion to enforce the July 8,

2008 judgment as moot in light of the NIGC's approval of the Nation's gaming ordinance amendments. Add. 219-222.

On March 31, 2009, the plaintiffs filed the instant lawsuit to challenge the NIGC's January 20, 2009 approval of the Nation's gaming ordinance amendments (*Citizens Against Casino Gambling in Erie County v. Hogen*, No. 09-0291S (WDNY) ("*CACGEC III*"). J.A. 52-88. In their complaint, the plaintiffs assert three broad claims for relief. First, they claim that the Nation's Buffalo Creek Territory is not "Indian land," and hence that the Nation cannot exercise sovereign authority over it, including—but far from limited to—the approval of gaming operations. J.A. 79-82 (¶¶ 94-109). To support that claim for relief, the plaintiffs allege that the SNSA is unconstitutional in part, that the Tribal-State Compact between the Seneca Nation of Indians and the State of New York does not apply to the Buffalo Creek Territory, and that the Buffalo Creek Territory's designation as restricted fee land does not make it Indian land. *See id.* Second, the plaintiffs claim that even if the Nation's Buffalo Creek Territory is "Indian land," it is subject to IGRA's Section 20 general prohibition against gambling on after-acquired trust land. J.A. 82-84 (¶¶ 110-124). Third, the plaintiffs claim that the Nation's Buffalo Creek Territory does not qualify

for the settlement of a land claim exception to Section 20's general prohibition. J.A. 84-86 (¶¶ 125-135).

In their Prayer for Relief, the plaintiffs requested a judgment (i) invalidating, annulling, and declaring illegal the January 20, 2009 decision by the Chairman of the NIGC approving the ordinance amendments; (ii) declaring the SNSA invalid in part; (iii) declaring the Department of Interior's 2008 regulations interpreting Section 20 of IGRA to be invalid; (iv) declaring that the Nation's Compact with the State of New York does not apply to the Buffalo Creek Territory; (v) enjoining the federal defendants from taking any action to approve any tribal-state compact or gaming ordinance that would permit the Nation to engage in class III gaming in the Nation's Buffalo Creek Territory; and (vi) directing NIGC to permanently halt the Nation's gaming operations on its Buffalo Creek Territory. J.A. 86-87.[5]

As they had done in their prior suits, the plaintiffs named a number of federal defendants to their suit but did not sue the Nation directly. On May 29, 2009, the Nation's Council—the authorized legislative body for the

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[5] In addition to challenging a separate NIGC determination based on new gaming ordinance amendments, and thus involving different facts, the plaintiffs' *CACGEC III* action rests in part on new legal arguments that were not made in *CACGEC I* or *CACGEC II*, including the challenges to the SNSA's constitutionality and to the Tribal-State Compact's application.

Nation—passed a Resolution to Authorize Intervention in *CACGEC III* (the "Resolution") in which it expressly waived the Nation's sovereign immunity with respect to the three claims for relief specified in the plaintiffs' Complaint. J.A. 96 (Resolution at ¶ 1). The Nation's decision to waive immunity and enter the case as a formal party was motivated by the very real differences in legal positions between the Nation and the United States during *CACGEC I* and *II*, and the tortuous litigation path of those cases that left the Nation facing the prospect that it would not be able to engage in significant economic development activity within its own Territory. On June 15, 2009, still within the time for the federal defendants to file their initial response to the Complaint, the Nation filed a motion for permissive intervention under Federal Rule of Civil Procedure 24(b). J.A. 91.

Over nine months later, in a March 30, 2010 Decision and Order, the District Court denied that Motion. J.A. 22-51.

SUMMARY OF THE ARGUMENT

The Nation fully understands that this Court typically defers to district court decisions regarding permissive intervention. But this is the rare case in which a district court's denial of a motion to intervene under Rule 24(b) constitutes an abuse of discretion and must be reversed.

The plaintiffs have doggedly pursued an all out attack on the sovereign status of the Nation's Buffalo Creek Territory and the legality of the Nation's gaming operations undertaken in that Territory. Although that attack is framed as a challenge to the United States' approval process under the Administrative Procedure Act, the undeniable goal is to strip the Nation of its sovereign authority over its Buffalo Creek Territory and to terminate gaming there. The Nation's fundamental interests in the exercise of sovereignty and the conduct of economic development activities on its Territory are at the core of this litigation, but under the district court's ruling the Nation has been denied any independent voice at counsels' table.

Amicus participation is not enough to protect the Nation's interests. Although it participated as an *amicus curiae* in *CACGEC I* and *II*, it became clear to the Nation by the time *CACGEC III* was filed that its active participation as a party—and concomitant waiver of its sovereign

immunity—is necessary to protect its substantial stake in the outcome of this case.

First, the Nation made arguments as *amicus* in *CACGEC I* and *II* that were either not made by its federal defendant counterparts or, even worse, flatly disputed by them. The Nation's participation as an intervenor will ensure that important legal arguments regarding the statutes, regulations, and approvals affecting its sovereign powers and gaming operations in the Buffalo Creek Territory are made in this case and preserved for appeal.

Second, although the Nation does not question the sincerity or vigor with which the federal defendants have defended against the plaintiffs' attacks, there have been missteps along the way that compel the Nation to look out for its own interests. Most notably, the federal defendants failed to advise the lower court or the Nation of a change in the Department of Interior's interpretation of IGRA, which in fact had rendered the Department's construction of the statute consistent with that of the Nation's. That weakened the defense, complicated the record, and outraged the District Court.

Third, the Nation has no ability as an *amicus* to seek a stay of or to appeal an adverse decision, or to participate at argument of an appeal, thus leaving its vital interests in the case to the unreviewable discretion of the

Solicitor General and his or her national appellate strategy at the time. Given the Executive Branch's prior revision to its interpretation of 25 U.S.C. § 2719, having full party rights could be essential for the Nation to vindicate its sovereign and financial interests that are at the heart of this case.

With the Nation now having waived its immunity, there is no rationale for denying it permission to intervene. The Supreme Court has made clear that in cases involving Indian tribes and their vital sovereign and economic interests, permissive intervention should not be discouraged. *Arizona v. California*, 460 U.S. 605, 615 (1983).

Here, the Nation decided to intervene based on the difficulties it had with the government's litigation positions and with the course of prior litigation, not on some allegedly impermissible tactic or strategy, and the Nation has easily met its "minimal" burden of showing the inadequacy of representation. The district court further erred in concluding that the Nation's motion, filed near the very outset of the case, was untimely. There is no support for the court's ruling that the Nation's decision not to intervene in prior cases precludes the Nation from intervening in the current one.

The District Court also committed reversible error in concluding that the Nation's waiver of sovereign immunity as to the claims in this case did not include a waiver of sovereign immunity as to post judgment or

enforcement orders in this case. The Nation fully acknowledges—as it did below—that, if granted intervention, it will be subject to post judgment enforcement orders relating to the claims in the case. The Nation's waiver does not state otherwise, the Nation never argued otherwise, and it follows *a fortiori* that its waiver as to the claims is a waiver as to post judgment enforcement orders on such claims. The district court found issues with the immunity waiver that do not exist, and its error should not be visited on the Nation.

STANDARD OF REVIEW

This Court reviews the denial of a motion to intervene under Rule 24(b) for an abuse of discretion. *See New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1994). "Errors of law or fact may constitute such an abuse." *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 128 (2d Cir. 2001) (reversing lower court's denial of a motion to intervene).

ARGUMENT

I. THE PLAINTIFFS' ATTACK ON THE NATION'S SOVEREIGN AND ECONOMIC INTERESTS PLAINLY WARRANTS THE NATION'S PARTICIPATION IN THIS CASE AS A PARTY.

The Nation's interests in participating in this case as a party are uniquely important. This Court has explained before that district courts have considerable discretion in determining whether to grant a motion for permissive intervention under Federal Rule of Civil Procedure 24(b) and that a decision from this Court reversing a district court's denial of such a motion is "a very rare bird indeed, so seldom seen as to be considered unique." *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) (quoting *United States v. Pitney Bowes*, 25 F.3d 66, 73 (2d Cir. 1994)). But this is one of those rare, unique instances in which a district court's denial of a motion to intervene constituted an abuse of discretion.

The plaintiffs are a coalition of entities and individuals opposed to commercialized gambling generally and the Nation's gaming operations in the Buffalo Creek Territory in particular. J.A. 53, 58-64 (¶¶ 2, 14-31). Though their lawsuit is formally posed as one challenging certain actions of the federal government, the unequivocal goal of the litigation is to extinguish the Nation's sovereignty over its Buffalo Creek Territory and

thereby to shut down the Nation's gaming operations therein. *See* J.A. 52, 57-58 (¶¶ 1, 13).

The plaintiffs' principal claim in this litigation is that lands held in restricted fee status by the Nation do not qualify as "Indian country" over which Indian nations can exercise their governmental powers. *See, e.g,.* J.A. 53 (¶ 3) ("Plaintiffs contend that the Buffalo Parcel is not sovereign Indian land, but sovereign soil of the State of New York"); J.A. 54 (¶ 4) ("If, as Plaintiffs contend, the Buffalo Parcel is not sovereign Indian land, then it remains under the jurisdiction, control and laws of the State of New York"); J.A. 86 (Prayer for Relief ¶ 2) (seeking a declaration "that the Seneca Nation Settlement Act is invalid to the extent that it purports to create 'Indian land' and/or 'restricted fee land,' thereby removing such land from the sovereign control and jurisdiction of the State of New York and its political subdivisions").

This claim is as sweeping as it is incorrect. Unlike Indian nations in other parts of the country, the Seneca Nation does not have land held in trust for it by the United States. Instead, for a number of fundamental historical reasons, the Nation holds restricted fee title to its own lands, and the plaintiffs' claim that such landholdings do not qualify as Indian country strikes at the very heart of Seneca sovereignty.

The plaintiffs secondarily argue that, even if the Nation enjoys some measure of sovereignty over the Buffalo Creek Territory, it cannot conduct a gaming operation on it due to the plaintiffs' construction of Section 20 of IGRA. However, economic development of the Nation's Buffalo Creek Territory, including the operation of a class III gaming facility under the provisions of IGRA, is critical to the Nation's present and long-term ability to provide governmental and social services and employment opportunities to its members, as well as to its fundamental interest in self-determination. As Congress expressly found in enacting IGRA, Indian nations have a strong interest, recognized by federal policy, in "economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). In explaining the major provisions of IGRA, Congress confirmed that "[a] tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents [and] realizing the objectives of economic self-sufficiency and Indian self-determination." S. REP. 100-446, S. Rep. No. 446, 100th Cong., 2nd Sess. 1988, 1988 WL 169811, *13.

It cannot seriously be disputed, then, that this lawsuit directly affects the fundamental interests of the Nation—namely, (i) the deep-seated sovereign interests that it has repeatedly and vigorously defended for

generations, (ii) its significant interests in economic development in its own Territories, and (iii) its interests in charting its own course in providing job opportunities and governmental and health services to Nation members. The Nation surely should be able to speak with its own voice in defending these fundamental interests. *See Arizona v. California*, 460 U.S. 605, 615 (1983) (tribes' interests in litigation involving water of the Colorado basin are critical to their welfare, and their participation as intervenors should not be discouraged); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 547 (2d Cir. 1991) ("as the beneficiary of a substantial sum of money from the federal government, it is manifest that the [Seneca Nation of Indians] has a vital interest in the constitutionality of the [Seneca Nation Settlement Act of 1990]"); *New York Public Interest Research Group, Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350, 352 (2d Cir. 1975) (holding that an association of pharmacists could intervene "since the validity of a regulation from which its members benefit is challenged" and the intervenor likely "will make a more vigorous presentation of the economic side of the argument than would the Regents" who promulgated the statewide regulation).

Participating as an intervenor is the only way that the Nation can properly ensure that its legal positions, unique perspective, and fundamental

interests are adequately represented in the briefing and oral arguments in the court below, and that its appellate rights are safeguarded in the event of an adverse decision. *See John Doe #1 v. Glickman*, 256 F.3d 371, 379 (5th Cir. 2001). Given the critical stakes for the Nation in this litigation, the district court erred in denying it the rights that are available only to parties (and not to *amici*).

II. THE RULE 24(b) REQUIREMENTS ARE MET AND THE DISTRICT COURT'S NUMEROUS ERRORS IN ANALYZING THE NATION'S MOTION TO INTERVENE REQUIRE REVERSAL.

A. The Nation's Interests Are Not Adequately Represented By The Federal Defendants.

Based on its "observ[ation]" that the federal defendants had "staunch[ly] represent[ed]" the Nation's interests in *CACGEC I* and *CACGEC II*, the District Court determined that the Nation's interests in this case are adequately represented. J.A. 49. This was, in the first instance, paternalism of the worst sort. As detailed above, the Nation's fundamental interests in the sovereignty of its Territories are at stake in this case. The Nation should be able to defend its sovereign prerogatives in its own voice, just as should the federal and state governments.

Second, in making its determination, the District Court disregarded the fact that the federal defendants had previously argued in *CACGEC I* and *CACGEC II* that the general prohibition against gaming on after-acquired

trust lands set forth in Section 20 of IGRA also applied to restricted fee lands—a position that sharply conflicted with the one advanced by the Nation as an *amicus curiae* participant. And while the federal defendants have since re-aligned themselves with the Nation's position after the Department of Interior revised its formal interpretation of Section 20 in 2008, the possibility of executive branch shifts on other issues in this case clearly cannot be ruled out. *See Kleissler v. United States Forest Service*, 157 F.3d 964 (3d Cir. 1998) (reversing denial of motion to intervene and finding inadequacy of representation because "[a]lthough it is unlikely that the intervenors' economic interest will change, it is not realistic to assume that the agency's programs will remain static or unaffected by unanticipated policy shifts"); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (same).

Even more surprising about the District Court's adequate representation determination was that it completely ignored its previous excoriation of the federal defendants for not bringing the Department of Interior's new regulations to the court's attention before it issued its July 8, 2008 Decision and Order in *CACGEC II*. It is hard to square the District Court's praise for the federal defendants' "staunch representation" of the

Nation with the court's earlier scolding of those same federal defendants' litigation tactics.

In *New York Public Integrity Research Group*, this Court held as a matter of law that the defendant Regents of the University of the State of New York could not adequately represent the interests of a group of pharmacists in a case challenging a Regents-issued state regulation that prohibited advertising the price of prescription drugs. *NYPIRG*, 516 F.2d at 352. Like the Nation in this case, the pharmacists would have been bound by a judicial determination with respect to the challenged governmental action. Recognizing that the pharmacists "will make a more vigorous presentation of the economic side of the argument than would the Regents," this Court reversed the lower court's denial of the motion to intervene. The same should follow here, and with even greater force, given the fundamental governmental interests of the Nation that are at stake. The federal defendants do not object to the Nation's participation, implying that the Nation "should have an opportunity to make [its] own arguments to protect [its] own interests." *Id.*; *see also National Resources Defense Council v. Costle*, 561 F.2d 904, 912-913 (D.C. Cir. 1977) (following this Court's reasoning in *NYPIRG* and holding that intervenors had met their burden of showing the EPA may not adequately represent their interests); *John Doe*

#1, 256 F.3d at 380-381 (concluding that United States Department of Agriculture's representation may be inadequate to protect the intervenor's interests and thus reversing denial of motion to intervene).

Even under the more rigorous standard for intervention as of right under Rule 24(a), the showing of inadequate representation is a "minimal" one. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (proposed intervenor must only "show[] that representation of his interest may be inadequate" (internal quotation marks omitted)); *Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 425 (5th Cir. 2002) (intervenor's showing that its interests and the defendant's "may diverge in the future, even though, at this moment, they appear to share common ground, is enough to meet [its] burden"). The Supreme Court has made clear that the adequate representation standard under Rule 24(b) is less onerous, especially in cases involving Indian nations. Where the interests critical to the welfare of an Indian nation are at stake, any presumption of adequate representation normally suggested by the involvement of the United States does not apply:

> The States also oppose intervention on grounds that the presence of the United States insures adequate representation of the Tribes' interests. The States maintain that the prerequisites for intervention as of right set forth in [Rule 24(a)] are not satisfied. . . . [I]t is obvious that the Indian Tribes, *at a minimum, satisfy the standards for permissive intervention* set

> forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. . . . Moreover, the Indians are entitled to take their place as independent qualified members of the modern body politic. . . . Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

Arizona v. California, 460 U.S. 605, 615 (1983) (internal quotation marks and citations omitted) (emphasis added).

Like the water rights at issue in *Arizona v. California*, the matters at stake in this action are significant to the Nation's welfare. As discussed above, the plaintiffs' Complaint takes direct and explicit aim at the Nation's territorial sovereignty over its Buffalo Creek Territory, and includes an attack upon the Nation's "vital interest in the constitutionality of the [SNSA]." *Fluent*, 928 F.2d at 547. These interests, in addition to the Nation's sovereign and economic interests in conducting class III gaming in its Buffalo Creek Territory, are matters "critical to [the Nation's] welfare," *Arizona v. California*, 460 U.S. at 615, and as such invoke the Supreme Court's admonition that the Nation's participation as an intervenor in this action should have been welcomed by the district court, not "discouraged." *Id.*

B. The District Court Went Beyond The Bounds Of Permissible Discretion In Holding That The Nation's Motion To Intervene—Filed At The Outset Of The Case—Was Untimely.

The plaintiffs commenced this action on March 31, 2009, and it is undisputed that the Nation promptly filed its motion to intervene within the time allowed for the named defendants to file a responsive pleading or motion. The plaintiffs never contested the timeliness of the Nation's motion in the District Court.

Despite the obvious timeliness of the Nation's motion to intervene, the District Court nevertheless reached out to conclude that the motion was untimely because the Nation had not sought to intervene in the previous cases involving the casino, *CACGEC I* and *CACGEC II*. The District Court surmised that the Nation had "made a calculated decision to forego [sic] the opportunity to participate as a party in" those prior cases, and speculated that the Nation's decision to move to intervene in this case was "nothing more than an attempt to circumvent the consequences of a strategy it no longer wishes to be bound by." J.A. 41.

These gratuitous remarks are supported by neither the facts nor the law. As shown above, the Nation decided to waive its immunity and moved to intervene in this action for a number of valid reasons, including differences with the government's positions that became apparent in the

prior actions—all of which are matters of record—and not for some unidentified or inappropriate tactical reason. By the time that this case was filed, the Nation was convinced that it should represent its own interests in the litigation, and its motion to intervene at the very outset of the case was timely and appropriate. *See United Airlines v. McDonald*, 432 U.S. 385, 394 (1977) (motion to intervene was timely when the intervenor "quickly sought to enter the litigation" once "it became clear" that her interests "would no longer be protected" by the named parties); *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996). At a minimum, as the Supreme Court has held in a similar context, the Nation's "motion[] to intervene [is] sufficiently timely with respect to *this phase* of the litigation," and thus intervention under Rule 24(b) should follow. *Arizona v. California*, 460 U.S. at 615 (emphasis added); *see also id.* at 612 (noting the years of prior litigation related to the intervening tribes' same water rights in which the United States represented their interests); *Heaton*, 297 F.3d at 423 (noting that proposed intervenor's previous participation only as an *amicus curiae* "do[es] not preclude" it "from seeking intervention after the second remand").

Moreover, the Nation is aware of no case in which a motion to intervene has been deemed untimely on the basis of an earlier filing of a

separate lawsuit.[6] Nor is the Nation aware of any other case in which a court held that a proposed intervenor's perceived change in litigation strategy was a valid basis for finding the motion to be untimely.

"The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Sokagon Chippewa Community v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000); *see also John Doe #1*, 256 F.3d at 375 ("The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervener, but rather a guard against prejudicing the original parties by the failure to apply sooner." (internal quotation marks omitted)). The classic example of an untimely intervention motion is when the late-coming proposed intervenor seeks to join a case just as the named parties are reaching a settlement agreement that the proposed intervenor opposes for some reason. There are legions of cases in which courts reject motions to intervene in such circumstances. *See, e.g.*, *In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 199 (2d Cir. 2000) (intervention would "destroy[]" parties' settlement and "send[] them back to the drawing board"); *United States v. Pitney Bowes*, 25 F.3d 66, 72 (2d Cir.

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[6] Notably, the District Court determined that the plaintiffs' challenge to the federal government's January 20, 2009 approval of the Nation's amended gaming ordinance is not barred by *res judicata* principles because a different gaming ordinance was the subject of attack in the plaintiffs' earlier action. J.A. 38-39. This assertion of the differences between the various CACGEC actions cannot be squared with the district court's timeliness ruling.

1994); *Sokagon Chippewa Community*, 214 F.3d at 950. Here, there is no similar concern present.

While recognizing the considerable discretion with which the District Court was entrusted in this matter, that discretion is not limitless. Here, the District Court went far beyond the acceptable bounds of its discretion and committed reversible error in stretching to find the Nation's motion untimely, where the question was not even in dispute.

C. Intervention Will Not Cause Undue Delay Or Prejudice To The Original Parties And The District Court's Contrary Conclusion Was Infected By A Fundamental Misunderstanding Of The Nation's Waiver Of Sovereign Immunity.

Rule 24(b)(3) requires that a district court "consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

With its motion to intervene, the Nation submitted a Resolution duly enacted by the Nation's Council, which expressly waived the Nation's sovereign immunity as "to the adjudication of the three claims raised in the Complaint filed March 31, 2009 (Docket Number 1) in *CACGEC III*," namely:

> (1) whether, as restricted fee lands over which the Nation exerts governmental authority, the Buffalo Creek Territory qualifies as "Indian lands" under IGRA; (2) whether the Territory is subject to the general prohibition found in section 2719 of IGRA

> against gaming on trust lands acquired after IGRA's effective date even though the Territory consists of restricted fee rather than trust lands; and (3) whether, if the Territory is subject to section 2719's general prohibition, class III gaming may nevertheless proceed on it because the Territory was acquired in settlement of a land claim.

J.A. 96. The Resolution further clarifies that the waiver "does not extend to any amendment or supplement to the Complaint, or to any cross-claim, counterclaim, third-party claim, or claim of any other nature that may be filed by any present or future party in *CACGEC III*," and "does not extend to any claim contained in any other case, proceeding, or action that may be deemed related to *CACGEC III* and/or may be consolidated with *CACGEC III*." *Id.*

The waiver is clear and unequivocal—as it must be—and removes the Nation's cloak of immunity with respect to the claims advanced in the lawsuit at the time of the waiver, while retaining the Nation's immunity with respect to any unknown future claims that the plaintiffs might try to include later in the litigation and any claims that might be advanced in other cases. *See id.* Courts have repeatedly held that "a tribe's waiver of sovereign immunity may be limited," *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989), and the waiver here is perfectly appropriate given the information available to the Nation from the plaintiffs' Complaint and the critically important sovereign interests at stake. *See Lac Du Flambeau Band*

of Lake Superior Chippewa Indians v. Norton, 327 F. Supp. 2d 995, 1000 (W.D. Wisc. 2004) (explaining that sovereign "entities may intervene for a limited purpose" and ruling there that the intervening Indian nation's "consent to be sued is limited to a determination of the sole issue on which it moved to intervene. It has not waived its sovereign immunity as it relates to any other issue.").

Despite the straightforward waiver, however, the District Court seemed intent to find complicating factors that simply were not present. At the plaintiffs' urging, the lower court read the Council's Resolution as "permit[ting] the [Nation] to argue defenses, which Plaintiffs will be required to respond to, while remaining insulated from potential post-judgment relief." J.A. 46. The District Court erroneously stated that the Nation's "waiver places the Plaintiffs in the position of litigating against the [Nation], but divests them of post-judgment remedies with regard to the very matters the [Nation] seeks to litigate." *Id.* The District Court's characterization of the Nation not being subject to post-judgment relief is simply wrong, and its tortured reading of the Council's Resolution flatly conflicted with what the Nation represented to the court. *See* J.A. 135 ("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."); J.A. 137 ("The Nation has forthrightly waived its immunity with respect to the case as Plaintiffs have framed it."). Not only did the lower court purport to find a problem with the Nation's waiver where none existed, but its mistake could easily have been avoided if it had held a hearing and posed the question to the Nation's counsel. To reiterate the effect of the Council's Resolution: the Nation has clearly and unequivocally waived its sovereign immunity with respect to the claims advanced in the plaintiffs' Complaint and the Nation recognizes that it will be bound by any court decision as to those claims.

Based on its inexplicable interpretation of the Nation's waiver, the District Court completed its error by concluding that the Nation's limited waiver prejudices the plaintiffs and could lead to potential delay. J.A. 46-47. Had the District Court properly understood the Nation's waiver, it would have realized that permitting the Nation to participate as a party would not prejudice the plaintiffs or delay the case.

Indeed, there is no prejudice to the plaintiffs whatsoever. This is not a case where permitting intervention will disturb a settlement agreement or force the parties to start over with the litigation. *Cf. In re Holocaust Victim Assets Litigation*, 225 F.3d at 199 (intervention would "destroy[]" parties' settlement and "send[] them back to the drawing board"); *Pitney Bowes*, 25

F.3d at 72; *Farmland Dairies v. Commissioner of N.Y. Dep't of Agriculture & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) (noting that the settlement would be "jeopardized" if intervention were allowed "at this late date"). Certainly, the plaintiffs are not any worse off by having the Nation participate as an intervenor—even with the waiver of its sovereign immunity limited to the plaintiffs' three identified claims for relief—than they would be if the Nation did not intervene and thus was not subject to the District Court's jurisdiction at all.

Nor is there any undue delay at issue here. Other federal courts have recognized that where—as here—"the intervention motions [a]re filed near the case outset and the defendant-intervenors said they could abide by the court's briefing and procedural scheduling orders, there [is] no issue whatsoever of undue delay." *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1111 n.10 (9th Cir. 2002).

D. The Plaintiffs Never Disputed That The Nation Would Significantly Contribute To The Full Development Of The Issues In This Case.

Although not contested by the plaintiffs, the District Court took it upon itself to dispute the Nation's contention that it would significantly contribute to the full development of the issues in the case. The court concluded that it had already fully developed the history of Indian land

policy and related statutes in its *CACGEC II* decision and that there was nothing left that the Nation could add to the development of the case. The District Court's conclusion is astounding.

First, the District Court again ignores the consistency of the Nation's position as an *amicus* participant in *CACGEC I* and *II* that Section 20 of IGRA does not apply to restricted fee lands.

Second, the District Court's approach in disputing issues that the plaintiffs themselves concede is especially troubling in this case where the putative intervenor is a separate sovereign entity whose participation is not challenged by the Executive Branch parties to the case and whose complicated relationship with the United States government is historically fragile.

Finally, the Court's conclusion ignores the praise that it previously gave the Nation for raising arguments not covered by the federal defendants (*Citizens Against Casino Gambling*, No. 07-CV-0451S, 2008 U.S. LEXIS 52395, at *128-*129 n.49, *147 n.54) and for providing more thorough and slightly different rationales for why the Buffalo Creek Territory is "Indian lands," which the Court adopted in full in its prior opinion. *Id.* at *94-*95.

E. There Is A Common Question Of Law Or Fact At Issue.

Permissive intervention is appropriate where the intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Here, the Nation seeks to intervene to defend the validity of the rules, statutes, and governmental actions challenged by the plaintiffs. Courts have held such defenses appropriate under Rule 24(b). *E.g.*, *Kootenai Tribe of Idaho*, 313 F.3d at 1110-1111 (holding that the environmental group intervenors had "assert[ed] 'defenses' of the government rulemaking that squarely respond[ed] to the challenges made by plaintiffs in the main action").

Allowing the Nation to intervene will not inject collateral issues into the case. The Nation stands ready to defend against the three claims that the plaintiffs are seeking to litigate. *See* J.A. 79-86 (¶¶ 94-135). Whether or not the Nation's defenses to the plaintiffs' claims align completely with the federal defendants' intended defenses, they undoubtedly share common questions of fact or law as the District Court itself implicitly recognized.

* * *

If a district court were to rule that a State could not intervene in a lawsuit to defend its sovereign interests in its own territory, that would be a stunning conclusion, and would surely be subject to reversal by this Court.

The district court's decision in this case is no less stunning, and should meet the same fate.

CONCLUSION

For the foregoing reasons, the District Court's order denying the Seneca Nation of Indians' motion to intervene should be reversed.

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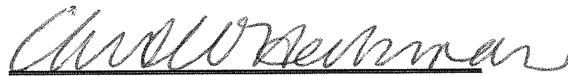

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CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of September, 2010, I electronically filed the foregoing Brief for Intervenor-Defendant-Appellant Seneca Nations of Indians in this action with the United States Court of Appeals for the Second Circuit using the CM/ECF System, which sent notification of such filing to the following:

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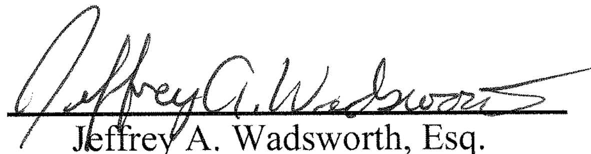

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 8,111 words. This word count excludes the corporate disclosure statement, table of contents, table of authorities, and signatures and certificates of counsel.

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