UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FOREST COUNTY POTAWATOMI COMMUNITY, *a federally-recognized Indian Tribe,*

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

CASE NO. 15-105 CKK

Judge Colleen Kollar-Kotelly

PLAINTIFF'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE BY THE MENOMINEE INDIAN TRIBE OF WISCONSIN AND THE MENOMINEE KENOSHA GAMING AUTHORITY

SCOTT CROWELL (*pro hac vice*)
Crowell Law Offices-Tribal Advocacy Group
1487 W. State Route 89A, Suite 8
Sedona, Arizona 86336
Tel: 425-802-5369
Fax: 509-290-6953
Email: scottcrowell@hotmail.com

DAVID BERNHARDT
(DCB #991472/ DC Court #24475)
Ryan A. Smith (DCB/DC Court #985586)
Brownstein Hyatt Farber Schreck, LLP
1350 I Street, N.W., Suite 510
Washington, DC 20005-3305
Tel: 202-296-7353
Fax: 202-296-7009
Email: dbernhardt@bhfs.com
rsmith@bhfs.com

Of Counsel:
JEFFREY A. CRAWFORD
Attorney General
FOREST COUNTY POTAWATOMI
COMMUNITY LEGAL DEPARTMENT
313 North 13th Street, Milwaukee, WI, 53233
Tel: 414- 847-7750
Fax: 414-847-7721
Email: Jeffrey.Crawford@fcpotawatomi-nsn.gov

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Plaintiff Forest County Potawatomi Community ("Potawatomi") opposes the Motion For Leave To Intervene by the Menominee Indian Tribe of Wisconsin and the Menominee Kenosha Gaming Authority (Doc. 22) (collectively referred to as "Menominee") in Potawatomi's action filed under the Administrative Procedures Act against Defendants United States of America, the United States Department of the Interior, the Secretary of the Interior Sally Jewell, and Assistant Secretary - Indian Affairs Kevin Washburn ("AS-IA") (collectively referred to as the "Federal Defendants").

I. INTRODUCTION

This lawsuit is a dispute over the Department of the Interior's ("DOI") disapproval on January 9, 2015 of a certain gaming compact amendment successfully reached in the fall of 2014 between the State of Wisconsin ("State") and Forest County Potawatomi Community (November 2014 Amendment to the Forest County Potawatomi Community of Wisconsin and State of Wisconsin Class III Gaming Compact) (Doc. 1-1, Ex. A to Complaint) ("Potawatomi 2014 Compact Amendment") to effectuate a provision in the 2005 gaming compact entered into between the State and Potawatomi:

> This November 2014 Amendment to the (2005 Compact) was selected by the Arbitration Tribunal pursuant to the (2005) Compact Section XXII.A.11 to determine the rights, duties and obligations of the State and Potawatomi in the event the Governor of Wisconsin concurs in certain favorable determinations of the United States Secretary of the Interior (Secretary) pursuant to 25 U.S.C. § 2719(b)(1)(A).

The Complaint contends that AS-IA exceeded the limited authority granted to him by the Indian Gaming Regulatory Act 25 U.S.C. §§ 2710 et seq. ("IGRA") to disapprove a gaming compact entered into by a state and an Indian tribe. 25 U.S.C. § 2710(d)(8). IGRA only allows the Secretary of Interior to disapprove a tribal-state compact if the tribal-state compact violates IGRA.

The Menominee seek to intervene in this lawsuit based on a claimed "interest" in opening an off reservation casino in Kenosha, Wisconsin. The parties to the Potawatomi 2014 Compact Amendment at issue in this case are the State of Wisconsin and Potawatomi. The Complaint only challenges AS-IA's disapproval of the 2014 Compact Amendment. The Complaint does not assert any claim with respect to any application by or contract with the Menominee Tribe or the Menominee Kenosha Gaming Authority. No relief is sought in this action against the Federal Defendants regarding any contract or application to which the Menominee Tribe or the Menominee Kenosha Gaming Authority are parties.

The Menominee's Statement of Points and Authority describes a long history of Menominee's unsuccessful applications to open an off-reservation casino in Kenosha, Wisconsin on the Illinois-Wisconsin border, nearly 170 miles from the Menominee Reservation in northern Wisconsin. Menominee's claim of an "interest" in this litigation is based entirely on that history. But that history is not relevant to the actual claim asserted in this case.

The Community disagrees with Menominee's version of that history, which, as we will demonstrate quite clearly, omits key facts, and thus paints a false picture. But, even more important, as it relates to this Motion to Intervene, the history of Menominee's two unsuccessful applications for an off-reservation Kenosha casino has no direct bearing on either the facts or the law relevant to the resolution of this Complaint. This lawsuit is not over the legal and political hurdles Menominee faced when seeking to locate a casino on lands proposed to be taken into trust status in Kenosha, Wisconsin.

Menominee's application to open a casino in Kenosha, Wisconsin was rejected by Wisconsin Governor Scott Walker on January 23, 2015 after AS-IA disapproved the compact amendment at issue in this case. There is no pending Kenosha casino application. Thus,

Menominee has no interest in a Kenosha casino application that can be impacted by this case and Governor Walker's decision is not subject to review in this case.

Menominee goes to great length in its pleading to argue that it should be allowed to construct and operate a gaming facility in Kenosha[1], but that is not at issue either, in the Complaint or Menominee's proposed Answer. What is at issue is whether the Federal Defendants exceeded the limited authority granted by IGRA to disapprove a gaming compact entered into by a state and an Indian tribe. 25 U.S.C. § 2710(d)(8). IGRA only allows the Secretary of Interior to disapprove a tribal-state compact if the tribal-state compact violates IGRA. *Id.* Potawatomi and the State submitted the Potawatomi 2014 Compact Amendment to the AS-IA under 25 C.F.R. Part 293, and the AS-IA disapproved the Potawatomi 2014 Compact Amendment on January 9, 2015.

Applying the legal standards embraced by the D.C. Circuit, Menominee fails to meet all requirements for intervention, except the requirement for timeliness. Overarching in the analysis is that Menominee is seeking in the context of a motion for intervention, redress for its failed efforts to have the Kenosha lands taken into trust for gaming. Intervention in this lawsuit does not protect Menominee's perceived interests.

[1] Potawatomi does not concede the accuracy of the factual statements made by Menominee regarding the Kenosha proposal and they are neither relevant nor properly in the record. However, Potawatomi reserves the right to respond if there is an appropriate context for doing so. *e.g.,* Menominee alleges to lands that are historically exclusively Potawatomi territory.

II. STANDARD FOR INTERVENTION

Potawatomi concurs with Menominee[2] that under Fed. R. Civ. P. 24(a) a motion to intervene as of right turns on four factors: (1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); *Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.*, 840 F.2d 72 (D.C. Cir. 1988); *New Hampshire v. Holder*, 293 F.R.D. 1, 3-4 (D.D.C. 2013); *City of Williams v. Dombeck*, 2000 WL 33675559 (D. D.C. 2000).

Potawatomi further concurs with Menominee that a party seeking to intervene as of right must also demonstrate that it has standing under Article III of the Constitution. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003). Potawatomi agrees with Menominee that Menominee must establish (1) injury in fact; (2) causation; and (3) redressability to establish Article III standing. *Id.* at 732-33; *Dombeck*, at *2 ("the *Mova* Court understood a "legally protectable" interest as one for which the applicant proves "that it has

[2] Menominee notes (Doc. 22-1 at p.6) that it was allowed to intervene in litigation over a decade ago when Potawatomi alleged that the Secretary of the Interior violated NEPA in issuing a Finding Of No Significant Impact (FONSI) regarding Menominee's first Kenosha casino application. *See Forest County Potawatomi Community v. Norton, et al*, No. 1:01-cv-00058-HHK (D.D.C. filed Jan. 11, 2001). Menominee moved to intervene, and Potawatomi did not object. That case challenged Secretary Babbitt's actions directly on Menominee's application for a Kenosha casino, and thus, the Menominee had a concrete interest in the matter in litigation. This is a completely different case. Here, Menominee has no direct interest in the Potawatomi 2014 Compact Amendment, which is the matter in litigation in this lawsuit.

standing to participate in the action."). A would-be intervenor must establish all three factors. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992); *Center for Biological Diversity v. U.S. E.P.A*., 247 F.R.D. 385 (D. D.C. 2011). To establish the existence of an injury-in-fact, a party must show an invasion of a legally protected interest that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.' " *Lujan,* 504 U.S. at 560. Where the alleged injury has not yet occurred, the necessary level of imminence is "somewhat elastic," but requires that the injury be "*certainly* impending." *Id*. at 564, n.2. To establish causation, a party must show that the injury complained of is "fairly ... trace[able] to the challenged action ... and not ... th[e] result [of] the independent action of some third party not before the court." *Id*. at 560. In cases where a chain of causation "involves numerous third parties" whose "independent decisions" collectively have a "significant effect" on plaintiffs' injuries, the Supreme Court and this court have found the causal chain too weak to support standing at the pleading stage. *See Allen v. Wright*, 468 U.S. 727, 759 (1984) (abrogated on other grounds by *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)) (holding that Article III standing requires that a plaintiff allege a harm directly traceable to specific action on the part of the defendant). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan,* 504 U.S. at 561.

Particularly instructive here is *Green v. United States*, 996 F.2d 973 (9th Cir. 1993) wherein the Tulalip Tribes sought to intervene in litigation brought by the Samish Nation regarding the federal recognition of the Samish Nation. The Tulalip Tribes were concerned that such recognition would adversely impact the Tulalip Tribes' treaty fishing rights. Noting that the interest at issue in the litigation was the Samish Nations entitlement to federal recognition

and not treaty fishing rights, the Appeals Court upheld the District Court's denial if Tulalip Tribes' motion to intervene on grounds that Tulalip was seeking to protect a different interest than the one at issue. *Id*. at 977-78.

Menominee notes that the second criteria for intervention and Article III standing are distinct requirements, yet suggests that any party with Article III standing meets the second criteria (Doc. 22 at p.17). That is not the case. The legally protectable interest required by the second criteria must be "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Defenders of Wildlife v. Jackson*, 284 F.R.D. 1, 6 (D. D.C. 2012), *aff'd in part, appeal dismissed in part sub nom. Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317 (D.C. Cir. 2013). The interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit. *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982). The interest must be so direct that the applicant would have "a right to maintain a claim for the relief sought." *Heyman v. Exchange Nat'l Bank of Chicago*, 615 F.2d 1190, 1193 (7th Cir. 1980); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985). An economic stake in the outcome of the litigation, even if significant, is not enough to establish a protectable interest for intervention. *Dombeck*, at *2; *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989).

Permissive intervention under Fed. R. Civ. P. 24(b)(2) requires a showing that the applicant have Article III standing, *Duetsche Bank National Trust v. F.D.I.C.*, 717 F.3d 189. 193 (D.C. Cir. 2013); *Keepseagle v. Vilsack*, 307 F.R.D. 233, 246 (D.D.C. 2014), and that the applicant "has a claim or defense that shares with the main action a common question of law or fact." In considering a motion for permissive intervention, a court should consider "whether parties seeking intervention will significantly contribute to ... the just and equitable adjudication

of the legal question presented." *Aristotle Int'l Inc. v. NGP Software*, *Inc*. 714 F. Supp. 2d 1, 18 (D.D.C. 2010); *Biological Diversity*, 274 F.R.D. at 313. *See also Sierra Club v. McCarthy*, 308 F.R.D. 9 (D.D.C. 2015) (intervention as of right and permissive intervention denied); *In Re Endangered Species Act Section 4 Deadline Litigation*, 277 F.R.D. 1 (D.D.C. 2011) (intervention as of right and permissive intervention denied).

As more fully addressed below, except for timeliness, Menominee fails to meet its burden for intervention.

III. ARGUMENT: MENOMINEE FAILS TO MEET THE CRITERIA FOR INTERVENTION AS A MATTER OF RIGHT AND ARTICLE III STANDING

A. Menominee Does Not Have an Interest in the Transaction that is the Subject of this Lawsuit.

Throughout Menominee's Statement of Points and Authorities in Support of Motion to Intervene (Doc. 22-1), Menominee alludes to its rights under IGRA and the Menominee Compact, but never reveals with any particularity what rights are at risk. Menominee's elusive claims of protectable interests, when broken down as set forth below, do not establish a protectable interest in the transaction which is the subject of this lawsuit. Accordingly, for this reason alone, Menominee should not be allowed to intervene.

1. No tribe under IGRA has a protectable interest to have land taken into trust under the two-part determination process.

IGRA restricts a tribe's ability to govern gaming activities to activities occurring on that tribe's existing Indian lands. 25 U.S.C. §§ 2701-02. IGRA prohibits gaming on lands taken into trust after October 17, 1988. 25 U.S.C. § 2719(a). There are, however, certain exceptions to that prohibition pursuant to which a tribe is entitled to game on after-acquired property, commonly known as the "equal footing exceptions" for restored and newly-recognized tribes and for settlement of aboriginal land claims, 25 U.S.C. § 2719(b)(1)(B). Those exceptions do not apply

to Menominee[3]. Only IGRA's "two-part determination" provision is available for Menominee to qualify lands in Kenosha for gaming under IGRA:

> (25 U.S.C. § 2719(a)) shall not apply when the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. § 2719(b)(1)(A).

The Secretary of the Interior's decision to make the two-part determination is discretionary and the process for its making a two-part determination is set forth in duly-promulgated regulations found in 25 C.F.R. §§ 292.13-24. In the event the Secretary makes the requisite two-part determination, the land does not qualify for gaming unless the Governor of the State concurs in the Secretary's two-part determination. 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. §§ 292.22-23. The Governor has an absolute veto regarding concurrence, which the Governor may exercise for any reason or for no reason at all. *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688 (9th Cir. 1997); *Lac Courte Oreilles Band of Lake Superior Chippewa v. United States*, 367 F.3d 650 (7th Cir. 2004).

Menominee points to the progress it made in its efforts to take the Kenosha lands into trust for gaming, discussed further below, but at no point does such progress vest Menominee with any right to offer gaming on the Kenosha lands. Menominee's application did not rely on any of IGRA's equal footing exceptions. Accordingly, Menominee has no legal basis for any

[3] Although Menominee was terminated and restored (doc. 22-1 at pp.3-4), it is not able to pursue the Kenosha lands under 25 U.S.C. §2719(b)(1)(b)(iii) for two reasons. First, it has been more than 25 years since its restoration in 1973. See, 25 C.F.R. § 292.12(c)(2)(application must be made within 25 years of restoration). Second, Menominee operates an existing casino on its Reservation. See 25 C.F.R. § 292.12(c)(2)(requires that tribe is not gaming on other lands).

expectation that the Kenosha lands would be taken into trust for gaming or a legally protectable interest in some future expectation[4]. The interest must be legally protectable, which means that the interest must be "one which the substantive law recognizes as belonging to or being owned by the applicant" and be "more than merely an economic interest," rather "one which the substantive law recognizes as belonging to or being owned by the applicant," and the prospective intervenor must be the real party in interest in the underlying claim. *Osage Tribe of Indians of Oklahoma v. United States*, 85 Fed. Cl. 162, 170 (2008). The subject matter of this dispute between Potawatomi and Federal Defendants is an alleged abuse of discretion by Federal Defendants in disapproving the Potawatomi's 2014 Compact Amendment and in no way impacts or concerns a legally protectable interest of Menominee.

2. Even if Menominee once had an interest in an ability to conduct off-reservation gaming in Kenosha, that interest no longer exists.

The DOI, on August 23, 2013, did issue a two-part determination for the Kenosha lands, and informed Wisconsin Governor Scott Walker that the land could be taken into trust on behalf of the Menominee for gaming purposes if, and only if, he concurred with the two-part determination. (Doc. 22-2, Ex. 1). Governor Walker sought and obtained the 180-day extension available under 25 C.F.R. § 292.23(b), giving him the one and one-half year maximum time available to make his decision. The time period within which Menominee must obtain gubernatorial concurrence expired on February 19, 2015. Governor Walker, on January 23, 2015, formally informed the DOI in writing that he did not concur with the Secretary of the Interior's two-part determination. (Doc. 22-15, Ex. 14). Menominee's option to purchase the Kenosha

[4] In the entire twenty-eight year history of the IGRA, only eight times has a governor concurred with applications under 25 U.S.C. § 2719(b)(1)(A) (two-part determinations). The expectation of gubernatorial concurrence is extremely low.

lands and its municipal service agreement with the City of Kenosha have since expired. *See* 11th Amendment to Option Agreement between Dairyland Greyhound Park, Inc. et al., and Menominee, dated March 12, 2013, attached as Exhibit A; *See also* Extension Agreement of 2013 between Menominee and City of Kenosha, dated March 27, 2013, attached as Exhibit B. Neither the approved Menominee-Wisconsin Compact, as negotiated and amended in 2000 (Doc. 22-2 Ex. 3)[5], nor the disapproved Menominee-Wisconsin Compact negotiated and amended in 2015 (Doc. 22-14, Ex. 13)[6] provide any right or entitlement for Menominee to conduct gaming on the Kenosha property or otherwise require Governor Walker to concur in the Menominee two-part determination. DOI has informed Menominee that the August 23, 2013 two–part determination is "moot." *See* May 29, 2015 correspondence from AS-IA to Menominee Chairman Besaw, attached as Exhibit C. *See also* June 1, 2015 correspondence from AS-IA to Hon. United States Representative Gwen Moore, attached as Exhibit D.

The Menominee's lands are 170 miles north of the Menominee Reservation where Menominee operates a successful casino. As such, Menominee's current interest in gaming on

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[5] Concurrence. The execution by the Governor of the Compact Amendments of 2000 as contained herein, governing Class III Gaming at the Kenosha facility, does not constitute concurrence by the Governor, ... The ability of the Governor to concur, after execution of the Compact Amendments of 2000, in the Secretarial Determination regarding detriment to the surrounding community is a material and substantial inducement, within the meaning of Section XXXV, to execution of the Compact Amendments of 2000 at the present time.

Menominee 2000 Gaming Compact § XXXIX(C).

[6] WHEREAS, although the Governor has not yet decided to concur in the Secretary's August 2013 Determination and the parties acknowledge that nothing herein constitutes the Governor's concurrence in the Secretary's August 2013 Determination, both parties believe the amendments to the Compact contained herein serve the best interests of both the State and the Tribe

Menominee 2015 Compact Amendment – Preamble.

lands within Potawatomi's 50-mile exclusivity area is no different than any other Wisconsin tribe, or any other tribe in the United States. Allowing intervention by Menominee, in its current status and with its current speculative financial "interest", would set a dangerous precedent for tribes to assert themselves in the compact approval processes of other tribes, thus making a mockery of the government-to-government relationship between the federal government and a tribe, as well as the government-to-government relationship between the state government and a tribe, two foundational elements of IGRA.

3. Menominee's contention that the Potawatomi 2014 Compact Amendment requires Menominee to make payments to either/both the State and Potawatomi is wrong and unsupported by the record.

The Potawatomi 2014 Compact Amendment does set forth payments and reimbursements that the State must make to Potawatomi in the event that the 50-mile exclusivity provision of the 2005 Compact is violated. It does resolve, quantify and provide certainty to both the State and Potawatomi as to past, present and future payments. Potawatomi 2014 Compact Amendment, Section XXXVII.C (agreeing to State's mitigation of adverse impact) (Doc. 22-12 at p. 2); Potawatomi 2014 Compact Amendment, Section XXXVII.E.3 (acknowledging State's obligation to pay and responsibility for timely and full payment) (Doc. 22-12 at p. 4); Potawatomi 2014 Compact Amendment, Section XXXVII.D and E.4 (defining with certainty "annual revenue loss" and providing for good faith estimates in accordance with that definition) (Doc. 22-12 at pp. 2-4). It does not restrict the Governor from concurring in Menominee's two-part determination, or from concurring in the context of any other tribe that may secure a two-part determination for gaming on lands to be taken into trust within the 50-mile exclusivity zone. It does not compel the State to reach an agreement with Menominee to pay the State and/or to pay Potawatomi. It does not restrict the State in any way as to compact terms or conditions that the

State may negotiate with Menominee or any other tribe. The Potawatomi 2014 Compact Amendment merely provides that the State may meet its compact obligation to Potawatomi by distributing funds received from Menominee. Potawatomi 2014 Compact Amendment, Section XXXVII.F (allowing for alternative payment mechanism while reinforcing commitment of State as responsible for payment) (Doc. 22-12 at p. 5).

Menominee is wrong in its representations that the Potawatomi 2014 Compact Amendment requires Menominee to contribute towards the State's financial obligations to Potawatomi. Menominee directs this Court (Doc. 22-1 at p. 9) to Section XXXVII.A of the Potawatomi 2014 Compact Amendment and asserts that it "prohibits" the Governor from concurring. When examined in relation to the remaining procedures contained in the Article, Section XXXVII.A, however, expressly provides that the Governor is able to concur, and lays out the economic obligations that the State will then have to Potawatomi if the Governor concurs with the Menominee two-part determination, and if the Governor concurs, "then an annual Mitigation Payment to the Tribe equal to the Annual Revenue Loss is required...." Potawatomi 2014 Compact Amendment, Section XXXVII.C (Doc. 22-12 at p. 2). Such language is not an express "prohibition." Rather, such language is an express authorization that in no way obligates Menominee, financially or otherwise, to the State or to Potawatomi. Indeed, Menominee submits in support of its Motion to Intervene the January 22, 2015 Report prepared by Mike Huebsch, Secretary of the Wisconsin Department of Administration (Doc. 22-17, Ex. 16) ("Huebsch Report"), which candidly concedes that the State's liability to Potawatomi does not require the State to reach any agreement with Menominee:

> The arbitrated amendment ***required the State*** to make an annual mitigation payment to FCPC, equal to FCPC's lost revenue caused by Menominee competition. Such a payment would be required for the duration of the FCPC Compact set to expire in 2031. Although the arbitrated amendment provided that

> payment by Menominee to FCPC would satisfy the State's obligation, ***it also provided that the State remained responsible for such payment***s. Thus, although the State successfully negotiated a compact amendment with Menominee requiring Menominee to pay FCPC the amount of its annual revenue loss, ***if Menominee were to fail to do so, the State would ultimately be required to make annual payments to FCPC.***

Huebsch Report at pp. 14-15 (emphasis added). At the time Potawatomi and the State consummated the Potawatomi 2014 Compact Amendment, the State had not yet consummated its 2015 compact amendment with Menominee.

The crux of the dispute in the arbitration proceedings arising out of Potawatomi's 2005 Compact was Potawatomi's refusal, as a matter of policy and federal law, to agree to make the State's obligations to Potawatomi conditioned in any way on Menominee's agreement to pay revenue to Potawatomi or to the State. Potawatomi insisted that it had its own government-to-government agreement with the State, and that such agreement stood alone, separate and apart from whatever agreement the State had or might reach with Menominee or any other tribe conducting gaming within the 50-mile exclusivity area. The Potawatomi 2014 Compact Amendment that resulted from the arbitration process (Doc. 1-1) embraced Potawatomi's policy and legal position that the Compact not obligate any third party, including Menominee, in any manner.

Potawatomi was not concerned about the source of funds the State may use, in the lawful exercise of its own sovereign authority, to meet its compact obligations to Potawatomi so long as the State remained contractually liable and responsible to Potawatomi for those payments. This point is further reinforced by Menominee's submission in support of its Motion of the March 12, 2015 letter from AS-IA informing and explaining DOI's disapproval of the Menominee 2015 Compact Amendment (Doc. 22-18, Ex. 17). DOI concluded that Menominee's obligation to

indemnify the State for the State's obligations to Potawatomi was an illegal tax[7]. The State's position in the arbitration proceedings wrongly assumed that the State could reach a lawful compact amendment with Menominee that required Menominee to make such payments. DOI's subsequent disapproval of Menominee's 2015 Compact Amendment reinforces the decision of the arbitration panel. The provisions of the Potawatomi 2014 Compact Amendment, as selected by the arbitration panel, obligate the State to pay Potawatomi regardless of the disapproval of the Menominee 2015 Compact Amendment.

Menominee asserts that it was "forced to negotiate its own compact amendment with the State to accommodate the possibility that FCPC would ultimately be owed mitigation payments." (Doc. 22-1 at pp. 11-12). There is nothing in the record or the information provided by Menominee that supports the contention that Menominee was "forced" to enter into its 2015 Compact Amendment. Menominee executed its 2015 Compact Amendment, presumably as authorized by its governing body. Menominee submitted the 2015 Compact Amendment to DOI pursuant to 25 C.F.R. Part 293 as the product of good-faith negotiations under IGRA and sought DOI's approval of it 2015 Compact Amendment. Nothing in the Potawatomi 2014 Compact Amendment compels or "forces" Menominee to do anything.

Menominee also characterizes its 2015 Compact Amendment as having "acknowledged that the State would not concur in Menominee's Section 20 determination unless Menominee

[7] DOI's March 12, 2015 compact disapproval letter to Menominee also reinforces Potawatomi's position that without the Potawatomi 2014 Compact Amendment in place, allowing the 50-mile exclusivity provision to be breached without compensating Potawatomi for the impact would render all past and current revenue payments by Potawatomi to the State to be illegal taxes. *See Rincon Band v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010). *See also* Huebsch Report at p. 22-23("if this challenge is successful, FCPC would not make future revenue sharing payments and the State could be compelled to refund all past lump sum and revenue sharing payments made by FCPC since 2005").

agreed to fully indemnify" the State. (Doc. 22-1 at p. 12). Even if that is true (which is not evidenced by the Menominee 2015 Compact Amendment or otherwise), such a provision is not the result of action by Potawatomi and did not involve any negotiation with or obligation of Potawatomi. The existence of such a provision was purely the result of actions between Menominee and the State, and all actions taken by Menominee in reaching its 2015 Compact Amendments were taken in the exercise of Menominee's own sovereignty and self-governance.

B. Menominee is Not So Situated that the Disposition of the Action May as a Practical Matter Impair or Impede Its Ability to Protect Its Alleged Interest.

Menominee fails to establish a connection between DOI's disapproval of Potawatomi's 2014 Compact Amendment and the Governor's non-concurrence with Menominee's two-part determination. Menominee alleges that DOI's approval of the Potawatomi 2014 Compact Amendment would have caused Governor Walker to not concur (Doc. 22-1 at p. 2), but the fact of the matter is that even with a disapproved compact, he still did not concur. Menominee's suggestion is illogical and speculates that Governor Walker would not have concurred if the Potawatomi 2014 Compact Amendment had been approved, but the better-reasoned analysis is that Menominee had a much greater chance of securing the Governor's concurrence if DOI had approved the Potawatomi 2014 Compact Amendment.

Menominee submits in support of its motion, two documents prepared by the State that demonstrate the point. First, Menominee provides a January 23, 2015 Press Release from the Governor's Office (Doc. 22-15, Ex. 15) that identifies litigation and indemnity risks to Potawatomi that would have been resolved if the Potawatomi 2014 Compact Amendment had been approved. Indeed, the Press Release expressly attributes the liability risks to the 2005 Compact Amendments negotiated by then-Governor Doyle. Second, Menominee provides the Huebsch Report that goes into greater detail as to the exposure the State has to Potawatomi

because of the disapproval of the Potawatomi 2014 Compact Amendment. The Court's attention is directed to pages 22-23 of the Huebsch Report, as it lays out the State's exposure to Potawatomi that otherwise would have been resolved by the Secretary of the Interior's approval of the Potawatomi 2014 Compact Amendment. In addition to identifying the risks that Potawatomi may prevail against the Federal Defendants in this litigation, the Huebsch Report identifies two additional litigation risks. First, the terms of the 2005 Potawatomi-Wisconsin Compact may obligate the State "to pay FCPC for any losses due to the Kenosha casino." Huebsch Report at p. 22. Second, denying Potawatomi the exclusivity bargained for in the 2005 Compact could result in the fees paid by Potawatomi to the State to be an illegal tax, in which event "the State could be compelled to refund all past lump sum and revenue sharing payments made by FCPC since 2005 obligating the State to pay FCPC". Those same risks of the State's liability remain if the United States prevails in the instant litigation, yet those risks evaporate if the Potawatomi 2014 Compact Amendment is approved. Menominee's interest in this litigation appears to be based on a premise that upholding DOI's disapproval of the Potawatomi 2015 Compact Amendment would result in the State having no financial obligations to Potawatomi, which as is proven by Menominee's own submissions to this Court, is not the case.

Both documents submitted by Menominee also identify many other reasons why the Governor decided not to concur with the Menominee two-part determination, many of which are completely unrelated to the Potawatomi 2014 Compact Amendment[8] and would be unresolved

[8] The Huebsch Report also describes how the different compact provisions in the compacts with other Wisconsin Tribes also are impacted by a gaming operation in Kenosha. (Doc. 22-17, Ex. 16 at p. 14). In June 2015, the United States Government Accountability Office issued a comprehensive report: *Indian Gaming, Regulation and Oversight by the Federal Government, States and Tribes*, which critically describes the process and inconsistent application of standards

by the outcome of this litigation. Menominee's speculative suggestion that it would not have received concurrence in the two-part determination if the Potawatomi 2014 Compact Amendment had been approved is contradicted by its very own evidence provided in support of its motion to intervene. Many of the risks identified in the Huebsch Report to Governor Walker would have been resolved if the Potawatomi 2014 Compact Amendment had been approved, enabling Governor Walker to have the certainty he sought in deliberating on whether to concur in Menominee's two-part determination.

C. Menominee's Alleged Injury Fails to Establish Article III Standing.

Menominee asserts that "Setting aside the Department of the Interior's disapproval of the 2014 Amendment, as FCPC requests, would injure Menominee and the Authority by imposing extra-statutory requirements as a condition of obtaining a two-part determination under Section 20 of the IGRA." (Doc. 22-1 at p. 15). Plaintiffs' disagree. "To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Menominee fails to demonstrate to this Court how either affirming or vacating DOI's decision on the Potawatomi 2014 Compact Amendment will enable Menominee to obtain gubernatorial concurrence on its expired Kenosha application. The Governor has an absolute veto, enabling him to impose whatever conditions he chooses, however unreasonable Menominee believes they may be, on his concurrence. The Governor's conditions are not "extra-statutory." Rather, the

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in Interior's approval of Tribal–State compacts. A copy of the Report is attached as Ex. E, and an Executive Summary Highlights is attached as Ex. F.

ability for the Governor to impose conditions flows from the absolute veto IGRA provides to the Governor. It stands in stark contrast to the Governor's statutory obligation to negotiate in good-faith for a gaming compact on existing trust lands, 25 U.S.C. § 2710(d)(3)(A), which underscores the issue that Menominee alleged injury-in-fact is not "concrete and particularized" and "actual or imminent, but 'conjectural' or 'hypothetical.' " *Lujan*, 504 U.S. at 560.

The harm alleged by Menominee is the result of the Governor's independent decisions. Nothing in the plain language of the Potawatomi 2014 Compact Amendment restricts the Governor from concurring in any tribe's two-part determination for lands to be taken into trust for gaming within the 50-mile exclusivity area. Rather, it sets forth the State's economic obligations to Potawatomi if such gaming occurs. The Governor is able to veto a two-part determination for any reason or for no reason at all. Accordingly, as occurred in the present case, the Governor has authority to establish conditions upon his subsequent concurrence. Moreover, the State's risks of financial obligations to Potawatomi exist with or without the Potawatomi 2014 Compact Amendment in place; hence, the Governor may still require Menominee to indemnify the State as a condition of his concurrence, which he is free to do, and in fact did do after DOI had disapproved the Potawatomi 2014 Compact Amendment.

Finally, no tribe is entitled under IGRA to have land taken into trust for gaming purposes under the two-part determination provision. Hence, Menominee's assertion that it is "burdened" in its "exercise of its rights under IGRA" to pursue a two-part determination is non-sequitur. Accordingly, for each and all of these reasons, Menominee cannot establish any one of the three requirements for Article III standing: injury-in-fact, causation, and redressability.

D. Menominee's Interests are Adequately Represented by the United States.

Menominee's Motion seeks to uphold the DOI's disapproval of the Potawatomi 2014 Compact Amendment, in which its interests are aligned with those of the United States. The only tangible example where Menominee suggests that its position may diverge with the United States is the desire that this case proceed to the merits. *See Seminole Nation of Oklahoma v. Norton*, 206 F.R.D. 1(D.D.C. 2001) (denying Freedmen intervention because the Department of Interior could adequately represent them and additional claims beyond those at issue belong in a separate lawsuit). Menominee does not suggests any basis on which Potawatomi's claims should not proceed on the merits, and ironically, on any such procedural claims, its interests to have the case proceed on the merits are aligned with Potawatomi, which can adequately represent such interests.

Furthermore, Menominee's interests are adequately represented by the Federal Defendants. Movants advance the same ultimate legal objective as the Federal Defendants; to wit: uphold the Secretary of the Interior's disapproval of the Potawatomi 2014 Compact Amendment. This objective is completely aligned with that of the Federal Defendants. *See Knox v. United States*, 759 F. Supp. 2d 1223, 1236 (determining the United States can adequately represent interests of Idaho's Indian Tribes in litigation brought by compulsive gamblers because the "Secretary approved those amendments and hence had every incentive to zealously defend its approval"). Menominee attempts to separate itself from the Federal Defendants by suggesting that they are seeking to protect different interest and objectives, but Menominee fails to demonstrate how that would alter the Federal Defendants' arguments in this litigation. As a practical matter, Menominee and the Federal Defendants have the same ultimate objective in this lawsuit – defending the Secretary of the Interior's decision. Accordingly, the United States can

adequately represent Menominee's interest. *See North Fork Rancheria v. State of California*, 1:15-CV-00419 (E.D. Cal. Order filed August 26, 2015)[9] (finding that Chowchilla failed to establish that the State of California would not adequately represent the interest of the putative intervenor).

IV. PERMISSIVE JOINDER

Permissive joinder should also be denied. The D.C. Circuit has just recently resolved in the affirmative the previously unanswered question of whether permissive joinder should be denied when the movant lacks Article III standing. *Duetsche Bank National Trust* 717 F.3d at 193; *Keepseagle,* 307 F.R.D. 233 at 246. As set forth above, Menominee fails to establish any of the three requirements for Article III standing: injury-in-fact, causation and redressability. Accordingly, the motion for permissive joinder should also be denied.

Even under the prior case law, permissive joinder should be denied. The elusiveness of Menominee's claims of protectable interests regarding intervention as a matter of right, and its preoccupation with Governor Walker's non-concurrence with the Menominee two-part determination, should inform this Court that allowing permissive intervention will result in distraction from the real issues in this APA action: whether the Federal Defendants exceeded the limited authority granted by IGRA to disapprove a gaming compact entered into by a state and an Indian tribe. 25 U.S.C. § 2710(d)(8). IGRA only allows the Secretary of Interior to disapprove a tribal-state compact if the tribal-state compact violates IGRA. *Id.*

Menominee asserts that it will share claims and defenses, as required for permissive intervention, but its analysis only asserts "impacts" without providing the detail or analysis

[9] This recent opinion is not yet posted on Westlaw. A copy of the slip opinion is attached as Exhibit G.

required for permissive intervention. (Doc. 22-1 at p. 21). Menominee claims that it will be economically impacted by the result (Doc. 22-1 at p.15), but as set forth above, such economic interests are not protectable interests justifying intervention. Applying the criteria for permissive intervention set forth above, together with Menominee's failure to establish Article III standing, the Court should decline Menominee's motion for permissive intervention.

V. CONCLUSION

For the reasons set forth herein, the Motion For Leave To Intervene by the Menominee Indian Tribe of Wisconsin and the Menominee Kenosha Gaming Authority should be denied.

RESPECTFULLY SUBMITTED on October 14, 2015,

/s/ Scott Crowell
SCOTT CROWELL
pro hac vice
Crowell Law Office-Tribal Advocacy Group
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336
Phone: 425-802-5369
Fax: 509-290-6953
Email: scottcrowell@hotmail.com

/s/ David Bernhardt
DAVID BERNHARDT
(DCB #991472/ DC Court #24475)
Ryan A. Smith (DCB/DC Court #985586)
Brownstein Hyatt Farber Schreck, LLP
1350 I Street, N.W., Suite 510
Washington, DC 20005-3305
Phone: 202-296-7353
Fax: 202-296-7009
Email: dbernhardt@bhfs.com
rsmith@bhfs.com

OF COUNSEL
JEFFREY A. CRAWFORD, Attorney General
FOREST COUNTY POTAWATOMI
COMMUNITY LEGAL DEPARTMENT

313 North 13th Street
Milwaukee, WI, 53233
Telephone: (414) 847-7750
Facsimile (414) 847-7721
Jeffrey.Crawford@fcpotawatomi-nsn.gov

ATTORNEYS FOR PLAINTIFF
Forest County Potawatomi Community

CERTIFICATE OF SERVICE

In accordance with LCvR 5.3, I certify that on October 14, 2015, I caused a true and correct copy of the PLAINTIFF'S OPPOSITION TO THE MOTION TO INTERVENE BY MENOMINEE, EXHIBITS and PROPOSED ORDER to be served on all parties whom are registered as CM/ECF participants.

/s/ Scott Crowell
SCOTT CROWELL