IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Plaintiff, v. RYAN ZINKE, Secretary, United States Department of the Interior, et al., Defendants.	Case No. 1:18-cv-02035-TNM

NOTTAWASEPPI HURON BAND OF THE POTAWATOMI'S MOTION TO INTERVENE AS A DEFENDANT

The Nottawaseppi Huron Band of the Potawatomi ("NHBP") hereby moves to intervene as a defendant to contest the complaint brought by the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") in this case. NHBP owns and operates a casino gaming facility on its Reservation lands in Calhoun County, Michigan. Revenues generated by casino operation provide ninety-five percent (95%) of the funding upon which NHBP's government operations depend, including programs that provide critical health and general welfare services to NHBP citizens. NHBP is one of the federally recognized Indian tribes in Michigan whose interests were acknowledged by Interior officials and who were permitted to participate in the proceedings before Interior that led to the decision on review here. For the same reasons that NHBP participated in those proceedings—to protect, from illegal competition, its economic and sovereign interest in lawful gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA")—NHBP satisfies the standard for intervention as of right.[1]

[1] Undersigned counsel discussed this motion with counsel for all parties. The United States does not oppose the motion. The Sault Tribe opposes the motion.

By applying to have these parcels taken into trust for purposes of gaming, the Sault Tribe has flouted limits it and other tribes, including the NHBP, agreed to in their tribal-state gaming compacts with the state of Michigan. The Sault Tribe improperly seeks to leverage the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143, 111 Stat. 2652 (1997) ("MILCSA"), into carte blanche to locate casinos anywhere in Michigan (or, for that matter anywhere in the United States), in circumvention of IGRA's provisions limiting Indian casinos to existing reservations. The Sault Tribe argues that so long as it, in its sole and unreviewable discretion, determines that a piece of land was purchased with interest from its MILCSA-created "Self-Sufficiency Fund," it can locate a casino on that land—land anywhere in the United States. According to the Sault Tribe, *any* land purchase that increases its land holdings qualifies for such treatment and would be an eligible site for gaming. It seeks to put casinos in far-flung locations at great distances from its reservation lands and in competition with other tribes' casinos. This includes one, the Sibley Parcel, on NHBP's aboriginal lands. NHBP's historic territory includes Detroit and Huron Township, the location of the Sibley Parcel. The other location, in the City of Lansing, is located in Ingham County, which is one of the core market areas from which NHBP's on-reservation casino draws patrons. Allowing the Sault Tribe to locate casinos without geographical restrictions would undermine the limits in IGRA and would give the Sault Tribe an undue, crushing competitive advantage in the gaming market in Michigan and beyond, to the detriment of other Michigan tribes, including the NHBP.

In the decisions that resulted in rejection of the applications here, Interior correctly recognized that an overly broad reading of MILCSA would result in expansion of the gaming market in Michigan and elsewhere that Congress never considered or intended. In reaching its conclusion, Interior heard from the tribes who would be most affected by the Sault Tribe's

strategy, including NHBP. On review of Interior's decision, the NHBP is entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2), or, in the alternative, should be allowed permissive intervention under Fed. R. Civ. P. 24(b)(1)(B).

BACKGROUND

The NHBP and the Sault Tribe are both among the tribes in Michigan that conduct gaming activities under IGRA. IGRA requires, among other things, that a tribe conducting gaming activities do so "only on 'Indian lands' within its jurisdiction," as defined by the statute. *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 462 (D.C. Cir. 2007) (citing 25 U.S.C. § 2710(b)(1), (d)(1)(A)(I)). "[G]aming regulated under IGRA may not be conducted on lands the Secretary acquired in trust for a tribe after October 17, 1988, unless one of the exceptions applies." *Id*. The exceptions, which appear in § 20 of IGRA (25 U.S.C. § 2719(b)), are rarely applied, and the Sault Tribe has not established and cannot establish that an exception applies here. Neither of the applications nor the complaint addresses this point; instead they all assert that the Sault Tribe will conduct such gaming under § 20 of IGRA, without articulating any legal basis for doing so. The Sault Tribe has attempted to justify its applications by asserting that it will conduct these gaming activities on the sites, and that is the threat these applications pose to other gaming tribes in Michigan and particularly NHBP. Interior found no need to address the legality of gaming on these sites in its rulings below, relying instead on other grounds for rejecting the applications, but the threat of illegal gaming pervades these applications.

A further limitation under IGRA is that casino-style or "Class III" gaming may be conducted only pursuant to a valid tribal-state compact entered into between the tribe conducting the gaming and the state in which the gaming activities are to occur. *See* 25 U.S.C. § 2710(d)(1).

Although such compacts are bilateral rather than multilateral, states sometimes negotiate similar or identical terms for compacts with multiple tribes within the state, to put the tribes on a level playing field. The compact between Michigan and the Sault Tribe was entered into as a result of a 1993 consent judgment between the State of Michigan and multiple tribes that required each of the tribal parties and the State to enter into identical tribal-state compacts simultaneously. NHBP entered into a substantially similar tribal-state compact in 1999. Like all other compacts in Michigan negotiated and signed in the 1990s (including NHBP's), the Sault Tribe's compact includes a Section 9, entitled "Off-Reservation Gaming," that provides protections for other tribes if the compacting tribe seeks to conduct gaming on additional lands acquired in trust:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

Sault Tribe Compact § 9. (Copies of the Sault Tribe and NHBP compacts are attached here as Exhibits A and B.) By its terms, Section 9 is devoted to the protection of Michigan's "other federally recognized Indian Tribes." Each tribe is a third-party beneficiary of the others' compacts. Section 9 prohibits the Sault Tribe from submitting the applications at issue here seeking to have lands taken into trust for gaming purposes. The Sault Tribe has not obtained the requisite "prior written agreement" and does not claim to have done so. Applications such as those at issue here, for trust acquisitions of lands to be used for off-reservation gaming, are prohibited by Section 9 without such an agreement. In Section 9, the Sault Tribe expressly agreed that tribes like NHBP have a cognizable contractual interest in preventing these applications from even being filed, much less granted.

Indeed, the State of Michigan sought and the United States District Court for the Western District of Michigan granted an order enjoining the Sault Tribe from proceeding with the applications without first obtaining a tribal revenue-sharing agreement as required by Section 9 of the compact. On appeal, the Sixth Circuit reversed, finding the State's claims against the Sault Tribe were either barred by sovereign immunity or not yet ripe. On ripeness, the Court held, "The issue of whether class III gaming on the casino property will violate IGRA if the Tribe's MILCSA trust submission is successful is not ripe for adjudication because it depends on contingent future events that may never occur." *State of Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013). The Sault Tribe's applications here, and this lawsuit seeking to reverse Interior's rejection of the applications, are in furtherance of its plan to remove the contingencies identified by the Sixth Circuit, and to complete the violations of Section 9 that were the subject of Michigan's prior suit. NHBP is moving to intervene to prevent this violation by defending Interior's decision to refuse to take these lands into trust. As NHBP will show if allowed to intervene, Interior's properly circumscribed interpretation of MILCSA is consistent with Section 9 of the Sault Tribe's compact (which was already in effect in 1997 when MILCSA was enacted).

ARGUMENT

I. THE NHBP MEETS THE STANDARD TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2)

Under Rule 24(a)(2), "the court must permit anyone to intervene" where four requirements are met: (1) the motion to intervene is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) disposition "of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and

(4) existing parties do not adequately represent the interest claimed by the movant. Fed. R. Civ. P. 24(a)(2); *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008).

In considering a motion to intervene, the Court takes as true the well-pleaded allegations of the complaint. *See Secs. & Exch. Comm'n v. Prudential Secs. Inc.*, 136 F.3d 153, 156 n. 4 (D.C. Cir. 1998). The Court similarly takes as true "well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001); *see Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) ("[M]otions to intervene are usually evaluated on the basis of well pleaded matters in the motion, the complaint, and any responses of opponents to intervention."); *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 8–9 (D.D.C. 2016).

As shown below, NHBP meets the requirements of Rule 24(a)(2) and is therefore entitled to intervene as of right.

A. The Motion is Timely

This motion is timely. Timeliness is "judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)); *accord Karsner*, 532 F.3d at 886. This motion to intervene is timely because it is being filed only a few months after the complaint was filed, and shortly after the United States answered the complaint. *See Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *accord Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 13. Further, the administrative record will not be filed for two more months. By filing the motion soon after the answer was filed and attaching a proposed answer to the complaint, NHBP

has ensured that no party is prejudiced because the case will not be delayed by the motion. Other than entering a scheduling order on the parties' motion (which NHBP will follow if allowed to intervene), the Court has taken no action yet, so no one is prejudiced. *See Karsner*, 532 F.3d at 886. The motion to intervene is necessary for NHBP to protect the same interests in preserving legal restrictions on Indian gaming that NHBP asserted before Interior, and no party can claim surprise that NHBP seeks to continue its participation in this case.

B. The NHBP Claims an Interest in the Transaction that is the Subject of this Action

NHBP claims an interest in the transaction that is the subject of this case, namely, Interior's decision to deny the Sault Tribe's land-into-trust applications for purposes of gaming. It claimed such an interest in the proceeding below and continues to assert it here: to keep the Sault Tribe from obtaining trust status for casino sites within NHBP's aboriginal lands that would blatantly breach Section 9 of its compact and would harm NHBP's lawful gaming activities in a regulated market.

Under the plain terms of Rule 24(a)(2) it is enough that NHBP "*claims* an interest" here; it need not show an entitlement to relief at the intervention stage. "[A] determination of the merits of [a proposed intervenor's] claim is not appropriate at this threshold stage." *Am. Tel. & Tel. Co.*, 642 F.2d at 1291. The interest requirement is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

In this circuit, a party seeking intervention as of right must show Article III standing, and such a showing of "constitutional standing is alone sufficient" to satisfy the requirement of Rule 24(a)(2) of "an interest relating to the property or transaction which is the subject of the action." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *accord Mova Pharm.*

Corp. v. Shalala, 140 F.3d 1060, 1076 (D.C. Cir. 1998). "Where a party seeks to intervene as a defendant in order to uphold or defend an agency action, it must establish: (a) that it would suffer a concrete injury-in-fact if the action were to be set aside, (b) that the injury would be fairly traceable to the setting aside of the agency action, and (c) that the alleged injury would be prevented if the agency action were to be upheld." *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 11(citations omitted). These elements are present here.

The competitive injury NHBP will suffer if the Sault Tribe is allowed to expand to the gaming sites at issue here gives it standing to defend Interior's decision refusing to bring the lands into trust. If the Sault Tribe puts casinos in the Huron Township and in Lansing, NHBP would lose approximately 30 percent of the market for its FireKeepers casino in Battle Creek—nearly $100 million annually in gross revenue—and would have to lay off nearly 500 employees.

In *Forest County Potawatomi*, a similar case, this Court had no trouble concluding that a tribe who would suffer a competitive injury in the gaming market if an agency decision against a competing tribe were overturned had standing to intervene to defend the decision. The Plaintiff Forest County Potawatomi Community (FCPC) sought to overturn Interior's decision rejecting a compact amendment. The amendment would have required Wisconsin to compensate the FCPC if the Governor were to concur under IGRA in a decision for a competing gaming tribe to have land taken into trust for gaming purposes within 30 to 50 miles of the tribe's existing casino. This Court held that a competing tribe, the Menominee, had standing and a sufficient interest to intervene, because a decision overturning the agency's determination "would put the Menominee at a 'competitive disadvantage when seeking state approval for off-reservation gaming.'" *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 12 (quoting *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir. 2005)). "Such an alteration in

competitive conditions 'clearly amounts to a concrete injury.'" *Id.* (citing *Lac du Flambeau*, 422 F.3d at 497, and *Clinton v. City of New York*, 524 U.S. 417, 433 (1998)). "The [Supreme] Court routinely recognizes probable economic injury resulting from [government actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]." Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994).

Furthermore, here causation and redressability are also present because NHBP "would be 'injured in fact by the setting aside of the government's action it seeks to defend, . . . this injury would have been caused by that invalidation, and the injury would be prevented if the government action is upheld.'" *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 13 (citation omitted). Allowing the Sault Tribe to breach Section 9 of its compact to have these lands brought into trust for purposes of gaming would harm competing gaming tribes' position by enabling the Sault Tribe to put competing casinos in their markets. This harm is redressable by a decision upholding Interior's refusal to take these parcels into trust.

C. Disposition of this Suit Without Intervention Would Impair the NHBP's Interests

NHBP meets the third element for intervention as of right because NHBP "is so situated that disposing of [this] action may as a practical matter impair or impede [its] ability to protect its interest" in the gaming market in Michigan. Fed. R. Civ. P. 24(a)(2). Whether a proposed intervenor meets this standard is determined by "looking to the 'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735 (remanding with directions to grant intervention as of right); *accord Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 14 (quoting *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977)); *see also Reporters LLC v. United States Dep't of Justice*, 307 F.R.D. 269, 278–79 (D.D.C. 2014); *Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 158 (D.D.C. 2001). Under these

precedents and the terms of Rule 24(a)(2), it is adequate to show that impairment is possible (that it "may" occur), and the burden is minimal.

Here, intervention is necessary to protect against severe practical consequences if intervention were denied. NHBP could be economically devastated by the relief the Sault Tribe seeks here. If this Court were to grant the relief that the Plaintiff seeks and vacate the agency's decision, NHBP would be exposed to the unfair competitive disadvantage of Sault Tribe having the lands at issue here taken into trust for gaming purposes. Thus, because the agency decision challenged here was favorable to NHBP, and because this action is an "attack" on that decision, "disposition of this action could seriously impair the ability of the [NHBP] to protect their interests." *Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 14. Here, "the practical accommodation" is to grant intervention, because NHBP's, "involvement may lessen the need for future litigation to protect [its] interests." *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977).

D. The Defendants Do Not Adequately Represent the NHBP's Interests

The burden to show that the defendants inadequately represent the NHBP's interests is minimal and is easily met here. This requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *accord, e.g.*, *Fund For Animals,* 322 F.3d at 735–36. A proposed intervenor "ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee." *Fund For Animals,* 322 F.3d at 735–36 (quoting *Am. Tel. & Tel. Co.*, 642 F.2d at 1293) (internal quotation marks and citation omitted). Here, the NHBP's interests are not adequately represented by the defendants because the United States does not seek to protect NHBP's gaming interests; is not a beneficiary of Section 9 of the compact, which

the Sault Tribe has breached here by submitting these applications; and has not asserted NHBP's interests in its aboriginal lands.

In this Circuit, because the government must defend the interests of the public as a whole, it is rarely deemed an adequate representative of narrower interests such as the gaming interests of the NHBP. As the D.C. Circuit has explained, "we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Fund for Animals,* 322 F.3d at 736; *accord Forest Cty. Potawatomi Cmty.*, 317 F.R.D. at 10–11 (applying *Fund for Animals* "[w]here, as here, one of the existing parties is a governmental entity."). "A government entity . . . is charged by law with representing the public interest of its citizens," by contrast with an intervenor who "is seeking to protect a more narrow and 'parochial' financial interest not shared by" all the defendant government's citizens; the government "would be shirking its duty were it to advance this narrower interest at the expense of its representation of the general public interest." *Fund For Animals,* 322 F.3d at 736–37 (quoting *Dimond v. District of Columbia,* 792 F.2d 179, 192–93 (D.C. Cir. 1986)).

NHBP asserts interests here that the defendants cannot adequately protect. For example, although Interior determined that MILCSA is authority for mandatory trust acquisition where the statutory requirements are met, NHBP disagrees. NHBP opposes on that additional ground the mandamus relief that the Sault Tribe seeks here.

Additionally, Interior did not address NHBP's argument that the Sault Tribe's trust acquisition requests could not even be considered by Interior unless and until the Sault Tribe satisfied the condition prescribed in Section 9 of its tribal-state compact.

Further, the Sault Tribe argued below that the Indian canon of construction applied to statutory interpretation in this case, namely, that statutory ambiguities must interpreted in favor

of tribes. *See* Doc. 1-2 at 10 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). It renews this argument here. *See* Complaint ¶ 77. The NHBP's presence in this case will defeat application of this canon. That is because this canon is "rooted in the unique trust relationship between the United States and the Indians," *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), and "[t]he government owes the same trust duty to all tribes," *Confederated Tribes of Chehalis Indian Reservation v. State of Wash.*, 96 F.3d 334, 340 (9th Cir. 1996), the canon does not apply if its application would adversely affect the interests of another tribe. *See id.* Because the defendants owe the same trust duties to the Sault Tribe and to NHBP, they are not well-placed to argue such issues if NHBP is not allowed to intervene as of right. The defendants may be reluctant to make general statements about the scope of their trust duties to NHBP, while NHBP has no such qualms. To address the Indian canon of construction if NHBP were not allowed to intervene, the defendants would have to articulate how NHBP's interests are adversely affected by the Sault Tribe's interpretation of MILCSA, while still owing trust duties to the Sault Tribe and representing the interests of the American public as a whole. They did not do so below and cannot be counted on to do so here.

In sum, under Rule 24(a)(2), the NHBP is entitled to intervene.

II. IN THE ALTERNATIVE, THE NHBP ALSO QUALIFIES FOR AND SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER RULE 24(b)(1)(B)

Although the NHBP's right to intervene here is clear, the NHBP moves in the alternative for permissive intervention under Rule 24(b)(1)(B). Under that rule, intervention may be permitted whenever an 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)(B). The D.C. Circuit looks at three elements: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action." *E.E.O.C.*

v. Nat'l Children's Ctr., Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998). However, the D.C. Circuit has adopted "a flexible reading of Rule 24(b)," and has "eschewed strict readings of the phrase 'claim or defense,' allowing intervention even in 'situations where the existence of any nominate 'claim' or 'defense' is difficult to find." *Nat'l Children's Ctr.*, 146 F.3d at 1046 (quoting *Nuesse*, 385 F.2d at 704); *accord Textile Workers Union of America, CIO v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) (en banc) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases."). Essentially, whether to grant permissive intervention under Rule 24(b) boils down to whether "there is a sound reason to allow it." *Textile Workers*, 226 F.2d at 768; *accord Nat'l Children's Ctr.*, 146 F.3d at 1045–46.

NHBP meets all three relevant criteria here. This motion is timely for the reasons set forth above. The court has independent jurisdiction of NHBP's answer in intervention because this is a federal question case and NHBP defends the same decisions under federal law as those challenged in the complaint. *See* Wright et al., 7C *Fed. Prac. & Proc. Civ.* § 1917 (3d ed.) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant nor is there any problem when one seeking to intervene as a plaintiff relies on the same federal statute as does the original plaintiff."). And by seeking to defend Interior's decisions denying the Sault Tribe's applications, and answering the amended complaint, the NHBP asserts a "defense . . . in common with the main action." *Id.*

Further, as previously described, the NHBP has a direct interest in defending Interior's decisions that differs from Interior's interest in its own decision-making. *Id.* The complaint would have wide-ranging effects for all tribes in the State of Michigan that currently operate gaming operations. Allowing the NHBP to be heard on the legality of Interior's decisions would

provide needed perspective, contribute to the development of the issues, and promote the orderly administration of justice.

CONCLUSION

Pursuant to Rule 24(a)(2), the NHBP has a right to intervene in this suit to oppose the complaint. Alternatively, the Court should permit the NHBP to intervene under Rule 24(b)(1)(B).

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