

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

FOREST COUNTY POTAWATOMI  
COMMUNITY,

*Plaintiff,*

v.

SALLY JEWELL,  
in her official capacity as Secretary of the Interior;

KEVIN K. WASHBURN,  
in his official capacity as Assistant Secretary  
of the Interior—Indian Affairs;

*Defendants,*

MENOMINEE INDIAN TRIBE  
OF WISCONSIN,

MENOMINEE KENOSHA  
GAMING AUTHORITY,

*Proposed Defendant-Intervenor.*

Case No. 1:15-cv-00105-CKK  
Judge Colleen Kollar-Kotelly

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**MENOMINEE INDIAN TRIBE OF WISCONSIN’S AND  
MENOMINEE KENOSHA GAMING AUTHORITY’S  
STATEMENT OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO INTERVENE**

The Menominee Indian Tribe of Wisconsin (“Menominee”) and the Menominee Kenosha Gaming Authority (“Authority”) hereby submit this Statement of Points and Authorities in Support of their Motion to Intervene in the above-captioned matter pursuant to Fed. R. Civ. P. 24. Menominee and the Authority seek to intervene in this action as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2) or, alternatively, by permissive intervention pursuant to Fed. R. Civ. P.

24(b). For the reasons set forth below, Menominee and the Authority respectfully request that the Court grant the Motion.

## **I. INTRODUCTION**

Plaintiff's Complaint seeks an order setting aside the disapproval by Defendant Assistant Secretary of the Interior Kevin Washburn of the November 2014 Amendment ("2014 Amendment") to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Class III Gaming Compact ("FCPC Compact"), and ordering that the 2014 Amendment be approved by Defendants or deemed approved. If the 2014 Amendment were approved or deemed approved, it would have a direct and harmful impact on the rights and interests of the Menominee and the Authority in conducting gaming in Kenosha, Wisconsin pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (the "IGRA") and the Menominee Indian Tribe of Wisconsin and State of Wisconsin Gaming Compact of 1992, as amended (hereafter the "Menominee Gaming Compact").

Through this motion, Menominee and the Authority seek to intervene as defendants in this action under Rule 24 of the Federal Rules of Civil Procedure to protect their sovereign interests and to defend their rights under the IGRA and the Menominee Gaming Compact.

## **II. BACKGROUND**

### **A. Menominee**

The Menominee Indian Tribe of Wisconsin is a federally recognized Indian tribe with a reservation ("Reservation") located in Northern Wisconsin. *See* 79 Fed. Reg. 4,748, 4,750 (Jan. 29, 2014). The Reservation shares its exterior boundaries with Menominee County, which ranks highest in unemployment and lowest in community health indicators in the State. *See* Exh. 1, at 6-7 of the attachment thereto. By all measures, Menominee tribal members and their families

and neighbors residing in the Tribe's service area are among the poorest in the State. *Id.* at 9.

Yet in recent years the Menominee Tribal government has been forced to cut back vital programs and services to these communities, like health care and policing, and to curtail hiring and employment, due to chronic underfunding and budget shortfalls. *Id.* at 8, 9.

At one time, Menominee was an economically successful and self-sustaining tribe, able to provide its members with essential services including law enforcement, fire protection, utilities such as telephone and electricity, health care, and schooling, and to ensure an overall quality of life comparable to non-Indians in the area. *Id.* at 3-4. The tribal government and the services it provided were largely funded by the Menominee's sawmill business, which also provided for stable employment on the Reservation. *Id.*

However, apparently due in part to its success, Menominee was one of the first tribes targeted by Congress in the 1950s when federal Indian policy shifted in favor of "termination," meaning the dissolution of the government-to-government relationship between tribes and the United States and, the federal government hoped, tribes as distinct political entities. *See* H.R. Con. Res. 108, 83d Cong. (1953), 67 Stat. B122. The Menominee Termination Act of 1954 officially ended the federal government's trust responsibility to Menominee and its tribal members, and terminated the federal status of the Reservation (creating Menominee County instead). Act of June 17, 1954, 68 Stat. 250 (1954) (codified as amended at 25 U.S.C. §§ 891-902), *repealed by* Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f).

The Menominee Termination Act was a disaster for Menominee. State regulation and taxation suddenly applied as a result of the Act, forcing closure of many tribal governmental services, layoffs at the Menominee's sawmill, and the loss of thousands of acres of former Reservation lands. Exh. 1, at 4-5 of attachment. Unemployment steadily increased, while the

health and welfare of tribal members steadily decreased. *Id.* The Menominee Tribe and its members were cast into poverty, and many tribal members left the Reservation in search of opportunity elsewhere. *Id.* at 5 of attachment.

In 1973, Congress acknowledged the failure of its termination policy and enacted the Menominee Restoration Act, which restored Menominee's federal rights and the federal trust status of much of its former Reservation lands. Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f). Though Menominee has made great efforts to restructure its tribal institutions and services and to rebuild its Reservation economy in response to the damage wrought by termination, the effects have not been easily undone. Exh. 1, at 5-6 of attachment.

Over the years, Menominee has pursued a number of economic development activities. These activities have been limited, however, by the fact that 97 percent of the land on the Reservation is dedicated to Menominee's sustained yield forest and cannot be developed for other economic activities. *Id.* at 26 of attachment. On the roughly 8,000 acres that can be developed for non-forestry purposes, much of that development has already occurred. *Id.* Menominee does operate a casino on its Reservation, which has provided a small amount of much needed revenue to Menominee and its members. But its success has always been limited by its remote location, far from any significant population centers, and it does not generate sufficient revenues to meet governmental funding needs or to stimulate the kind of economic activity needed to lift the community out of poverty. *Id.* at 6 of attachment.

#### **B. Efforts to Conduct Gaming in Kenosha**

Beginning in 1999, Menominee worked towards developing a tribal casino in Kenosha, Wisconsin, to provide revenues sufficient to meet Menominee's unmet needs. More than fifty

percent of Menominee tribal members now live off-reservation, and about ten percent reside in the vicinity of Kenosha. Exh. 1, at 21 of attachment.

Section 20 of IGRA, 25 U.S.C. § 2719, generally prohibits tribes from engaging in any gaming on land acquired after the date of IGRA's enactment (October 17, 1988), with some exceptions. The key exception for this case, commonly referred to as the "two-part determination," applies when the Secretary determines that the proposed gaming would be in the best interest of the Tribe and would not be detrimental to the surrounding community, provided that the Governor of that State concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). In March 1999, Menominee filed an application asking the Secretary of the Interior ("Secretary") to take land in Kenosha into trust under the Indian Reorganization Act, 25 U.S.C. § 465, and to make the "two-part" determination that would—subject to concurrence by the Governor of Wisconsin—allow Menominee to conduct gaming on that land. Exh. 2.

That same year, Menominee chartered the Menominee Kenosha Gaming Authority as the tribal entity authorized to conduct gaming on the land to be acquired in Kenosha.<sup>1</sup> In August 2000, Menominee, the Authority, and the State of Wisconsin also negotiated an amendment to the Menominee Gaming Compact, which authorized the conduct of class III gaming in Kenosha, Wisconsin, pursuant to the IGRA and the Menominee Gaming Compact, subject to the "two-part" determination under Section 20 of the IGRA, 25 U.S.C. § 2719(b)(1)(A). Exh. 3 at 77-78, §XXXIX.<sup>2</sup> That compact amendment was approved by the Secretary of the Interior. *See* 65 Fed. Reg. 62,749 (Oct. 19, 2000).

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<sup>1</sup> The Authority's current charter is available online at <http://www.ecode360.com/12128607>.

<sup>2</sup> As amended in August 2000, the Menominee Gaming Compact stated that the provisions in the compact regarding gaming in Kenosha would expire upon the earlier of the fifth anniversary of gaming in Kenosha, or December 31, 2006. Exh. 3 at 67, §XXVI(2).A. That provision was deleted by a subsequent compact amendment in 2003, however, and the provisions in the Menominee Gaming Compact regarding

On January 11, 2001, FCPC brought an action in this Court against Bruce Babbitt, the then-Secretary of the Interior, alleging that the Department had violated several statutes in processing Menominee's March 1999 application to acquire the Kenosha land in trust. *See Forest County Potawatomi Community v. Norton, et al*, No. 1:01-cv-00058-HHK (D.D.C. filed Jan. 11, 2001). The parties—including Menominee, which had been granted leave to intervene as a Defendant—filed a Stipulation of Dismissal after Menominee withdrew its March 1999 application. Exh. 5.

On July 6, 2004, Menominee filed a new application asking the Secretary to take the Kenosha land into trust for gaming purposes under the Indian Reorganization Act and for a two-part determination under IGRA. Exh. 1 at 1. Menominee submitted compelling evidence that the planned casino would not only produce badly needed revenues to sustain the tribal government and its services, but would also create jobs for Menominee tribal members and others in the vicinity of Kenosha; boost tourism and related economic opportunities throughout the region; and increase employment and economic activity on the Menominee Reservation itself through targeted investment and expansion of Tribal governmental employment. *Id.* at 21-24 of attachment. Menominee entered into an intergovernmental agreement with the City and the County of Kenosha ("IGA") that provided for payments to the local governments in return for the provision of services, among other things, and the City and County strongly supported Menominee's efforts in Kenosha and its application to acquire the land in trust. *Id.* at 27-28, 42-43 of attachment.

On August 23, 2013, Assistant Secretary Washburn made the "two-part" determination. Exh. 1. In his decision, Assistant Secretary Washburn noted that "[b]ased on the documents in

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Kenosha remain in effect. Exh. 4 at 17, ¶ 46. *See* 68 Fed. Reg. 43,366 (July 22, 2003) (2003 compact amendment was deemed approved to extent consistent with IGRA).

the record, the Tribal-State Compact, the IGA, and statements by the Tribe, the City of Kenosha, and the County of Kenosha, we agree that significant benefits will flow to each from the Project and will benefit the relationship among the three governments.” *Id.* at 29 of attachment. As a result of the Department of Interior’s positive determination, Menominee would be permitted to conduct gaming on the Kenosha parcel pursuant to the IGRA once that land were taken into trust, if the Governor of the State of Wisconsin concurred in the Department’s determination. 25 U.S.C. § 2719(b)(1)(A).

### **C. FCPC Opposition to the Kenosha Casino**

FCPC has staunchly opposed Menominee’s efforts in Kenosha, due to the impact FCPC believes the project will have on FCPC’s own casino in Milwaukee, Wisconsin, roughly 40 miles from Kenosha. FCPC’s Milwaukee casino is itself an off-reservation casino—located approximately 216 miles from FCPC’s government headquarters—made possible through a positive two-part determination and concurrence of the State Governor under Section 20 of the IGRA in 1990. Exh. 1 at 49 of attachment. In making its two-part determination with respect to Menominee’s Kenosha parcel, the Department of the Interior carefully considered FCPC’s position but determined that the impact on FCPC’s Milwaukee casino would be limited, that the Milwaukee casino would continue to be successful, and that it would rebound from any negative impact within a few years. *Id.* at 46-51 of attachment.

Further, FCPC attempted for years to use its own gaming compact as a back channel to thwart Menominee’s efforts. The FCPC Compact was first approved in 1992 and has been amended several times. Exh. 6, at 3. An amendment agreed to by FCPC and the governor of Wisconsin in February 2003 originally included an anti-competitive provision that would have relieved FCPC of its obligation to make revenue-sharing payments to the State, and would have

required that some past payments be returned to FCPC, if the State “enters into or authorizes an agreement permitting Class III gaming under the [IGRA] within 50 miles of the Potawatomi Bingo and casino[.]” Exh. 7, at 11-12, ¶ 15.B.3. However, the provision was removed after FCPC was advised by the Secretary of the Interior that she would likely disapprove the amendment as proposed. Exh. 8 at 2 ¶ 3; Exh. 9 at 3; Exh. 6 at 3.

After the provision was removed, the Acting Assistant Secretary – Indian Affairs neither approved nor disapproved the 2003 compact amendments, and by law they were deemed approved to the extent consistent with IGRA. Exh. 9 at 1; 68 Fed. Reg. 24,754 (May 8, 2003).<sup>3</sup> In a letter to FCPC explaining the decision to take no action, the Acting Assistant Secretary – Indian Affairs noted that the anti-competitive provision had been removed and that “we find a provision excluding other Indian gaming anathema to basic notions of fairness in competition and inconsistent with the goals of IGRA.” Exh. 9 at 3.

An amendment to the FCPC Compact in 2005 expressly acknowledged that the anti-competitive provision had been removed from the 2003 amendment “at the insistence of the Assistant Secretary,” and noted that FCPC and the State of Wisconsin had not been able to agree on a replacement provision. Exh. 10 at 1-2. Instead, the 2005 Amendment included a procedure whereby the parties to the agreement would submit to an arbitrator proposed compact amendments specifying the rights and obligations of the parties in the event that the State concurs in a two-part determination as to a tribal casino within 50 miles of the FCPC Milwaukee casino.<sup>4</sup> The arbitrator is then to choose one of the offers. *Id.* at 7, § XXII.A.11. The Secretary

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<sup>3</sup> Under the IGRA, tribal-state gaming compacts are subject to review by the Secretary of the Interior, who may (1) approve them, (2) disapprove them if they are contrary to the IGRA or other law, or (3) take no action on them. 25 U.S.C. § 2710(d)(8). If the Secretary takes no action on a compact within 45 days of its submission, it is considered to have been approved, but only to the extent the terms comply with the IGRA. 25 U.S.C. § 2710(d)(8)(C).

<sup>4</sup> The 2005 Amendment specified certain conditions of the offers, as follows:



declined to expressly approve the 2005 Amendment, allowing it to go into effect by operation of law only to the extent that it is consistent with the terms of the IGRA. *See* 71 Fed. Reg. 5,068 (Jan. 31, 2006).

#### **D. The 2014 Amendment**

In 2014, FCPC and the Governor of Wisconsin entered into the 2014 Amendment (Exhibit 11), as a result of the arbitration process set out in Section XXII.A.11, which was triggered by Menominee's application for a Section 20 determination regarding the Kenosha parcel. Exh. 6 at 1. It is clear from the text of the 2014 Amendment that it was intended to preclude the Governor of Wisconsin from concurring in the Secretary's positive Section 20 determination regarding the Kenosha property unless Menominee agreed to compensate FCPC for any and all lost revenues. Section XXXVII.A of the 2014 Amendment purports to prohibit the Governor of Wisconsin from concurring in any positive determination from the Secretary under Section 20 of the IGRA for land more than 30 and within 50 miles of the FCPC's Milwaukee casino, except as provided in the amendment. Exh. 11 at 1. Section XXXVII.A specifically notes that the Amendment's provisions apply to "[t]he gaming establishment proposed in Kenosha, Wisconsin by the Menominee Indian Tribe of Wisconsin[.]" *Id.*

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The Tribe's last best offer may provide for a reduction in, or refund of, the payments to the State agreed to in section XXXI.G. of the Compact in the event the State concurs in a favorable determination of the Secretary of the Interior pursuant to section 20 of the Act, 25 U.S.C[.] 2719(b)(1)(A), regarding a proposed gaming establishment located within 50 miles of the Tribe's Class III gaming facility in Milwaukee. The State's last best offer will propose a procedure(s) to establish an agreement between, at a minimum, the Tribe and the tribe making application pursuant to section 20 of the Act to have land located within 50 miles of the Tribe's Class III gaming facility in Milwaukee taken into trust for gaming purposes, pursuant to which the Tribe will be compensated for revenues lost due to the operation of the Class III gaming facility located within 50 miles of the Tribe's Class III gaming facility in Milwaukee[.]

Exh.10 at 7-8, § XXII.A.11.

The 2014 Amendment requires that FCPC be paid an annual “Mitigation Payment” equal to the FCPC’s annual revenue loss caused by the competitive tribal facility, and provide that “The State and [FCPC] anticipate that the State will enter into agreements under which the Applicant [i.e., Menominee] will agree to pay the Mitigation Payment required in this Section,” and “Timely payment of a Mitigation Payment in full to [FCPC] by the Applicant [Menominee] satisfies the State’s obligation to make that Mitigation Payment.” Exh. 11 at 3, § XXXVII.E.1. Section XXXVII.F permits the State to request that FCPC negotiate directly with Menominee for payment of the Mitigation Payments. *Id.* at 4. The Mitigation Payments are to continue for the duration of the FCPC Compact. *Id.* at 3, § XXXVII.E.3.

Neither Menominee nor the Authority played any part in the negotiation of the 2014 Amendment, the arbitration that produced it, or any of the preceding amendments to the FCPC Compact. Their interests were not represented in the arbitration process. Given that Menominee’s interests were clearly at stake, however, Menominee submitted comments urging the BIA to reject the 2014 Amendment. Exh. 12. Menominee noted its strong objection to the 2014 Amendment and that it was “designed to make it difficult for Governor Walker to concur in [the Department’s] August 23, 2013 determination by changing the criteria for his review under IGRA.” *Id.* at 1. Specifically, Menominee pointed out that in addition to the two-part determination required under Section 20, the 2014 Amendment creates an extra-statutory requirement that the State guarantee a minimum level of profits to FCPC for business activities that include, but extend far beyond, Class III gaming. *Id.* Menominee also argued that the 2014 Amendment unlawfully enlarges the privileges and immunities enjoyed by FCPC at the expense of the privileges and immunities afforded to Menominee by law at 25 U.S.C. § 476(f), and that it

includes provisions that IGRA does not permit to be included in a class III gaming compact pursuant to 25 U.S.C. § 2710(d)(3)(C). *Id.* at 1-2.

In his January 9, 2015 letter, Assistant Secretary Washburn disapproved the 2014 Amendment, concluding that “IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe’s gaming and other profits when the other tribe was not even at the negotiation table and has not consented to this arrangement.”

Exh. 6 at 2. He explained:

The IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III compact, but it does not authorize states and tribes to negotiate to shift the burden of loss revenues [sic] from existing gaming operations to another tribe without the consent of the other tribe. Although the 2014 Amendment purports to make the State ultimately responsible for collecting the Mitigation Payments, the plain language of the 2014 Amendment and the supporting documents from the Potawatomi and the State demonstrate that, in fact, Menominee would be responsible for making all of the Mitigation Payments intended to protect the Potawatomi’s revenue.

*Id.* at 6. For that and other reasons, the Assistant Secretary found that the 2014 Amendment “violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact.” *Id.* at 8.

#### **E. Menominee 2015 Compact Amendment and Governor’s Non-Concurrence**

On January 13, 2015, FCPC publicly announced its intentions to sue the Department of the Interior to overturn the disapproval of the 2014 Amendment,<sup>5</sup> and it filed this case on January 21, 2015. With the ultimate impact of the 2014 Amendment or any replacement provisions uncertain, and the February 19, 2015 deadline for the Governor’s concurrence in Menominee’s favorable Section 20 determination fast approaching, Menominee was forced to negotiate its own compact amendment with the State to accommodate the possibility that FCPC would ultimately

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<sup>5</sup> See Forest County Potawatomi Tribe to sue BIA over gaming deal, INDIANZ.COM (Jan. 13, 2015), <http://www.indianz.com/IndianGaming/2015/028636.asp>.

be owed mitigation payments like those proposed in the 2014 Amendment. Exh. 13 (hereinafter “Menominee Compact Amendment”). The Menominee Compact Amendment agreed to by Menominee, the Authority, and Governor Walker, and submitted to the Secretary for review and approval, acknowledged that the State would not concur in Menominee’s Section 20 determination unless Menominee agreed to fully indemnify the State in the event that FCPC succeeds in securing a valid right to such payments as a result of the concurrence. *Id.* at 15, § XXXIII.E. Accordingly, the amendment would have required Menominee to indemnify the State if, as a result of litigation, FCPC obtained a judgment that results in the 2014 Amendment becoming effective or the Secretary of the Interior approving the 2014 Amendment, or if a non-appealable order or decision required the State to re-enter arbitration that results in an effective compact amendment requiring the State to pay FCFP as a result of concurrence in Menominee’s Section 20 determination. *Id.* at 13, §§ XXXIII.E.1, E.2.

Notwithstanding the disapproval of the 2014 Amendment, and the protections provided to the State by the provisions of the Menominee Compact Amendment then pending review by the Assistant Secretary in the event the disapproval of the 2014 Amendment was overturned by this Court, Wisconsin Governor Scott Walker did not concur in the two-part determination, and he informed the Department of the Interior as to his non-concurrence. Exh. 14. In a January 23, 2015 press release announcing the non-concurrence, Governor Walker cited to legal exposure caused by the FCPC 2005 Compact Amendment, and the possible “cost of indemnifying FCPC.” Exh. 15. Governor Walker cited to a memorandum prepared by Wisconsin Department of Administration Secretary Michael Huebsch that outlined potential risks to the State, including the risk that FCPC would succeed in this suit and the 2014 Amendment would become effective. Exh. 16. In his memorandum, Secretary Huebsch concluded that if FCPC prevailed in this

lawsuit, the 2014 Amendment “could be ordered into effect, requiring the State to be ultimately responsible for the indemnification of FCPC losses.” *Id.* at 22. Secretary Huebsch also noted that in this lawsuit:

FCPC asserts that BIA preapproved the arbitrated amendment when BIA deemed approved the 2005 amendment which established the amendment arbitration process. Although not a strong argument, if the proposed Kenosha casino is approved and a court subsequently agrees with FCPC’s argument, the State would be obligated to compensate FCPC for any losses due to the Kenosha casino.

*Id.* Secretary Huebsch concluded that the Menominee Compact Amendment would not necessarily fully protect the State, for several reasons, including that it might not be approved by the Secretary of Interior, or that a court might reverse an approval of the compact by the Department. *Id.* at 22-23.

On March 12, 2015, Assistant Secretary Washburn disapproved the Menominee Compact Amendment. Exh. 17. According to Assistant Secretary Washburn, because Governor Walker had failed to concur in the Kenosha two-part determination, Menominee “has lost the benefit of its bargain with the State,” and Menominee’s agreement to pay the State was thereby rendered “an unauthorized tax, fee, charge or other assessment in violation of IGRA.” *Id.* at 2. Disapproval of the Menominee Compact Amendment left intact the existing Menominee Compact, which allows the Authority to conduct gaming pursuant to the compact in Kenosha, subject to a two-part determination. *See supra* at 5-6 n. 2.

### **III. ARGUMENT**

#### **A. Menominee is Entitled to Intervene as a Matter of Right**

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) (internal citations omitted); *see also*, Fed. R. Civ. P. 24(a)(2). In addition, "a party seeking to intervene as of right must 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). As set forth below, Menominee satisfies both the requirements for standing as well as the requirements for intervention as of right under Fed. R. Civ. P. 24(a).

### **1. Menominee has Standing to Intervene in this Case**

In order "[t]o establish standing under Article III, a prospective intervenor – like any party – must show: (1) injury-in-fact, (2) causation, and (3) redressability." *Fund for Animals*, 322 F.3d at 732-33, *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). More specifically,

[W]hen a party seeks to intervene as a defendant to uphold what the government has done, it [must] establish that it will be injured in fact by the setting aside of the government's action it seeks to defend, that this injury will have been caused by that invalidation, and the injury would be prevented if the government action is upheld.

*Am. Horse Prot. Ass'n, Inc. v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001). For example, a putative intervenor satisfied Article III standing requirements when seeking to intervene on the Government's side in an action challenging an administrative regulation, where striking the regulation would harm the intervenor. *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (holding that an association of chemical manufacturers had standing to intervene as defendants in a case involving a challenge to an EPA regulation because intervenors "would suffer concrete injury if the court grants the relief the petitioners seek").

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. Menominee and the Authority have attempted to develop a gaming facility on land in Kenosha since 1999, which efforts have been opposed by FCPC. To game on lands acquired after 1988, Menominee must obtain a two-part determination from the Secretary that (1) the proposed gaming would be in the best interest of the Tribe, and (2) that the proposed gaming would not be detrimental to the surrounding community, and the Governor must concur in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). Overturning the disapproval of the 2014 Amendment would impose extra-statutory requirements on an application by Menominee to acquire trust land in Kenosha for gaming and burden Menominee's exercise of its rights under the IGRA, to its injury.

At best, the 2014 Amendment, if approved, would create an economic burden on Menominee and the Authority if Menominee obtained approval of a Kenosha site. As Assistant Secretary Washburn noted in his decision on the 2014 Amendment, "... Potawatomi's proposed compact amendment goes further than simply obtaining financial guarantees from the State. It seeks to impose a substantial financial burden on the Menominee community, which has among the highest unemployment rates, the highest poverty, and the lowest health indicators of any community in Wisconsin." Exh. 6 at 2.

At worst, approval of the 2014 Amendment would make it impossible for Menominee to obtain the necessary gubernatorial concurrence. This is readily apparent from the injury that Menominee and the Authority have already experienced, when Governor Walker failed to concur

precisely because of the 2014 Amendments and the filing of this lawsuit to overturn the disapproval of the 2014 Amendments. *See* Exhs. 14 and 15.

By frustrating the rights of Menominee and the Authority to pursue gaming under Section 20 of the IGRA, the 2014 Amendment threatens real injury to Menominee's and the Authority's sovereign interests in tribal governance and economic development, among other things. This harm would be directly caused by allowing the 2014 Amendment to go into effect, but would be prevented if the disapproval decision is upheld. Accordingly, Menominee and the Authority have standing to intervene in this action.

## **2. The Application for Intervention is Timely**

The first requirement for intervention as of right pursuant to Rule 42(a) is timeliness. “[T]imeliness is to be 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. AT&T*, 642 F.2d 1285, 1295 (D.C.Cir.1980).

There should be no dispute that Menominee's motion is timely. Defendants have not yet filed an answer. *Fund For Animals*, 322 F.3d at 735 (motion to intervene filed before defendants filed answer was timely); *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 15 (D.D.C. 2010) (intervention in APA case was timely when record had not been filed and briefing schedule for dispositive motions had not been set). The case is at a very early stage and the timing of this Motion does not cause any prejudice to the existing parties. The case has essentially been stayed pending a decision on Defendants' motion to transfer. Menominee and the Authority do not and will not take any position on that pending motion.



**3. Menominee and the Authority Have an Interest in the Subject of the Litigation**

The second factor for intervention is an interest in the subject of the litigation. *Fund for Animals*, 322 F.3d at 731; *Mova Pharm. Corp.*, 140 F.3d at 1074; Fed. R. Civ. P. 24(a)(2).

“[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Am. Horse*

*Prot. Ass’n*, 200 F.R.D. at 157 (quoting *Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

This is a “liberal and forgiving standard,” *Id.* Moreover, a showing by a putative intervenor that it has standing under Article III is sufficient to demonstrate a legally protected interest under Rule 24(a). *Mova Pharm. Corp.*, 140 F.3d at 1076; *Fund For Animals*, 322 F.3d at 735. For the same reasons Menominee has standing to intervene in this action, then, Menominee has an interest in the subject matter of the litigation for purposes of Rule 24(a).

Menominee and the Authority have an obvious interest in the litigation. They have attempted to develop a gaming facility on land in Kenosha since 1999, which efforts have been opposed by FCPC. They have an interest in being able to develop such a facility without the difficulties that would be imposed were the 2014 Amendment approved. Though FCPC has already succeeded once in preventing Menominee and the Authority from opening a casino in Kenosha, by pursuing this lawsuit FCPC is seeking to restrict Menominee’s ability in the future to exercise its rights under Section 20 of the IGRA.

In his January 9, 2015 letter disapproving the 2014 Amendment, Assistant Secretary Washburn specifically discussed Menominee’s interests in the 2014 Amendment, and indicated that the Department considered those interests as part of its decision making process with respect to the 2014 Amendment:

Given that the 2014 Amendment specifically addresses the Menominee, the parties made it impossible for us to avoid that Tribe's interests. The 2014 Amendment, if approved, would place Menominee in a difficult position. The 2014 Amendment contemplates that the State is ultimately is [sic] obligated to make mitigation payments to the Potawatomi to reimburse it for any lost revenue experienced by its Milwaukee Casino, but may pass its payment obligation to the Menominee. If Menominee did not consent to make the Mitigation Payments, for example, the Governor may decline to concur in the Secretary's two part-determination for Kenosha. In light of the requirements of the IGRA, if this obligation was transferred to Menominee in an amended Menominee gaming compact, we would be hard pressed to approve it. We again underscore that the Menominee are not a party to the 2014 Amendment.

Exh. 6 at 8 (emphasis added). Given the direct impact to Menominee and the Authority that would arise if the 2014 Amendment went into effect, Menominee and the Authority satisfy the interest prong necessary for intervention as a matter of right.

#### **4. Disposition of the Action Could Impair Menominee's and the Authority's Ability to Protect Their Interests**

For many of the same reasons, it is clear that disposition of this action may as a practical matter impair or impede the ability of Menominee and the Authority to protect their interests. Fed. R. Civ. P. 24(a)(2). "In determining whether a movant's interests will be impaired by an action, courts in this circuit look to the 'practical consequences' to movant of denying intervention." *Am. Horse Prot. Ass'n*, 200 F.R.D. at 158. *See also, Fund For Animals*, 322 F.3d at 735.

As discussed in the previous section above, the 2014 Amendment would substantially burden the rights and opportunities of Menominee and the Authority under Section 20 of the IGRA and the Menominee Gaming Compact. The practical effect of this action, which challenges the Assistant Secretary's disapproval of the 2014 Amendment, could be to subject Menominee and the Authority to the terms of the 2014 Amendment. As such, disposition of this action could seriously impair the ability of Menominee and the Authority to protect their

interests. *See Wildearth Guardians*, 272 F.R.D. at 14 (finding that the putative intervenor's interests could be impaired and noting, "Simply put, the Bureau's decision below was favorable to [the putative intervenor], and the present action is a direct attack on that decision.")

### **5. The United States Cannot Fully Represent Intervenors' Interests**

To intervene as a matter of right, Menominee and the Authority must also establish that their interests are not adequately represented by existing parties. Fed. R. Civ. P. 24(a)(2). In assessing whether representation by existing parties is adequate, the Supreme Court has held that 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*, 404 U.S. 528, 538 n.10 (1972); *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich*); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (burden is "not onerous").

In this case, Menominee's and the Authority's interests are not adequately represented by the existing parties because, while the federal Defendants' interests may overlap with those of the aspiring intervenors, they may also diverge. The federal government's primary interests in this case are to defend the integrity of the Department's administrative process and to uphold the IGRA. The federal government also acts in its capacity as trustee for all tribes and on behalf of the citizens of the United States. Menominee and the Authority, on the other hand, are concerned with preserving their own rights and opportunities, including their specific economic development goals, both under the IGRA and in their capacities as sovereign entities. Indeed, courts "often conclude[] that governmental entities do not adequately represent the interests of aspiring intervenors" precisely because it is the duty of those governmental entities to broadly represent the interests of the citizenry as a whole. *Fund For Animals*, 322 F.3d at 736. Further,

Menominee and the Authority have financial stakes in the outcome of this case that the federal Defendants do not, and which the federal Defendants cannot prioritize over their broader interests as a federal agency acting in the interests of the United States and all tribes. *Dimond*, 792 F.2d at 192-93.

The fact that Menominee, the Authority and the federal government will defend the disapproval decision, or that the Department's decision was based in large part on the 2014 Amendment's impact on Menominee, does not overcome these representational concerns. *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967) ("The tactical similarity of the present legal contentions of the state bank and the state commissioner does not assure adequacy of representation or necessarily preclude the Commissioner from the opportunity to appear in his own behalf."). Even though the Department of the Interior took the impacts to Menominee into account in disapproving the 2014 Amendment, taking a third party's interests "into account" is not the same as sharing those interests or committing to represent and prioritize them in later litigation. *Fund For Animals*, 322 F.3d at 736. Rather, the possibility that the interests of the federal Defendants and Menominee and the Authority may diverge in the future, even if consistent until now, is sufficient reason to conclude that the interests of Menominee and the Authority are not adequately represented by the existing parties and that Menominee and the Authority should be granted leave to intervene as a matter of right. *Id.*

Furthermore, at this time, it is unknown whether the federal Defendants will defend the challenged decision on its merits, or will interpose procedural or affirmative defenses, such as ripeness or mootness. Menominee and the Authority have an interest in having this case decided on its merits, and will not seek to interpose such defenses (and will oppose them if raised). Having had one attempt at opening a casino in Kenosha shot down due to the 2014 Amendment,

Menominee and the Authority seek a definitive ruling from this Court on the merits of the decision disapproving it.

**B. Alternatively, Menominee and the Authority Should be Allowed to Intervene Permissively**

In the alternative, Menominee and the Authority ask that the Court exercise its discretion to allow it to intervene permissively. Rule 24(b)(2) authorizes permissive intervention for an applicant who timely files a motion when an applicant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b); *see also, Appleton v. FDA*, 310 F.Supp.2d 194, 196 (D.D.C. 2004). “In exercising its discretion, a Court must determine if a proposed permissive intervention ‘will unduly delay or prejudice the adjudication of the rights of the original parties.’” *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 319 (D.D.C. 2007) (quoting Fed. R. Civ. P. 24(b)).

Menominee and the Authority easily satisfy Rule 24(b)(2). Menominee and the Authority move to intervene to defend the disapproval of the 2014 Amendment and to ensure that the disposition of this matter does not infringe on Menominee’s and the Authority’s independent rights under the IGRA and their gaming compact with Wisconsin. The claims and defenses of Menominee and the Authority will share a common question of law or fact with the main action, because the main action already concerns the validity of the 2014 Amendment and its impacts on Menominee and the Authority under the IGRA, as well as the validity of the Department of the Interior’s disapproval of the 2014 Amendment (largely on the basis of its impact to Menominee). *See, e.g.*, Compl. at ¶ 4 (“Defendants’ [sic] err by interpreting the 2014 Compact Amendment as obligating [Menominee] to compensate [FCPC] for lost revenue resulting from a Menominee off-reservation casino in Kenosha”); *see also id.* at ¶¶ 57-59, 61, 63-66, 69, 75. The motion is also timely, and will not unduly delay the adjudication or prejudice

the parties because it is being made before responsive pleadings are due, and raises no additional claims. *Fund For Animals*, 322 F.3d at 735 (motion to intervene filed before defendants filed answer was timely); *Wildearth Guardians*, 272 F.R.D. at 15 (D.D.C. 2010) (intervention in APA case was timely when record had not been filed).

The Supreme Court has held, in the context of ruling on a motion for permissive intervention, that “Indians’ participation in litigation critical to their welfare should not be discouraged.” *Arizona v. California*, 460 U.S. 605, 615 (1983) (holding that tribes should be permitted to intervene in a case in which the United States was representing their interests). In this case, the requested relief would have a direct and significant impact on the welfare of the Menominee Indian Tribe and its people. Menominee and the Authority therefore ask this Court, if it finds no intervention as of right, to exercise its discretion to grant Menominee and the Authority the opportunity to join in the case.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should grant the Motion to Intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, the Court grant should permission to intervene in accordance with Fed. R. Civ. P. 24(b).

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