

Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Class III Gaming Compact (“2014 Amendment”), but does not involve review of the decision of Wisconsin Governor Scott Walker failing to concur in the “two-part” determination by Assistant Secretary Washburn as to the Menominee’s proposed casino in Kenosha, Wisconsin. According to FCPC, Menominee and the Authority could have no interest in this case because of that non-concurrence and because Governor Walker’s action is not directly at issue in this case.

FCPC’s brief ignores Menominee and the Authority’s obvious interest in affirming the Assistant Secretary’s challenged decision disapproving the 2014 Amendment, and the impact a reversal of that decision will have on them. Menominee and the Authority have demonstrated a long-standing and continuing interest in developing a gaming facility under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (“IGRA”) in Kenosha, as evidenced by the long history set out in their memorandum of Points and Authorities submitted in support of their motion. The 2014 Amendment at issue in this case was itself the product of an arbitration triggered because of the Menominee two-part determination, Men. Ex. 6, at 4 (“the Department’s two-part determination triggered the negotiation and dispute resolution process under the [FCPC] 2005 Amendment”); the 2014 Amendment referred to the Menominee Kenosha Facility as an “Applicant Facility” subject to the terms of the 2014 Amendment, Men. Ex. 11 at 1, ¶ 2 (amending Compact § XXXVII.A); Menominee submitted its views to Assistant Secretary Washburn concerning the 2014 Amendment, arguing for disapproval of the amendment, Men. Ex. 12; in disapproving the 2014 Amendment, Assistant Secretary Washburn noted the impact the 2014 Amendments would have on Menominee, Men. Ex. 6, at 2, 8-9; and, in announcing his non-concurrence in the Menominee two-part determination, Governor Walker referenced the 2014 Amendment and this litigation. Men. Ex. 15 (referencing Men. Ex. 16).

In the decision challenged by FCPC in this case, Assistant Secretary Washburn stated that the 2014 Amendment “seeks to impose a substantial financial burden on the Menominee community...,” Men. Ex. 6 at 2, and further that “[i]f Menominee did not consent to make the Mitigation Payments [due to FCPC under the 2014 Amendment], for example, the Governor may decline to concur in the Secretary’s two part-determination for Kenosha.” *Id.* at 8. FCPC takes issue with these and other findings in the decision regarding the Menominee in its Complaint (*e.g.*, Compl. ¶ 63; *see also id.* ¶¶ 64-69) and in its Opposition to the Intervention Motion (*e.g.*, FCPC Opp’n. Br. at 15-17), but in reviewing this motion, the Court cannot resolve the underlying dispute between FCPC and Defendants, or factual disputes between it and putative intervenors; rather, it “must accept as true all material allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor.” *Nat’l Parks Conservation Ass’n v. U.S. E.P.A.*, 759 F.3d 969, 973 (8th Cir. 2014). FCPC’s Complaint belies any assertion that Menominee has no interest in this case, as it mentions Menominee 44 times.¹

Menominee and the Authority’s long-standing efforts to develop a gaming facility in Kenosha cannot be simply ignored as being irrelevant, as FCPC asserts (FCPC Opp’n. Br. at 3, n. 1). Further, these efforts demonstrate Menominee and the Authority’s unique interest in this case, and belie FCPC’s assertion that “Menominee’s current interest in gaming [within 50 miles of FCPC’s Milwaukee casino] is no different than [that of] any other Wisconsin tribe, or any tribe in the United States.” (FCPC Opp’n. Br. at 10-11). Other tribes in Wisconsin have not tried to game within 50 miles of FCPC’s Milwaukee facility, have not moved to intervene in this case, are not mentioned in the 2014 Amendment or in Secretary Washburn’s decision at issue, and are mentioned only briefly in FCPC’s complaint. (Compl. ¶ 24 (Milwaukee Indian School

¹ See Menominee Exhibit 18, filed with this Reply, which is a copy of the complaint in this action, with every mention of Menominee highlighted.

“served Indian children from all of the Wisconsin tribes”); ¶ 30 (same); ¶ 27 (Ho-Chunk and Oneida casinos were nearest to FCPC’s Milwaukee casino on March 7, 1991); ¶ 31 (“Compacts [were] amended in 1998 with other Wisconsin Tribes”); ¶ 32 (2002 and 2003 negotiation of compact amendments with Wisconsin tribes); and ¶¶ 40 and 41 (litigation concerning FCPC 2003 Compact Amendment and similar compacts with other Wisconsin tribes).

There is no question that a decision by this Court to overturn Assistant Secretary Washburn’s decision would, as a practical matter, seriously impede the efforts of Menominee and the Authority regarding the development of a Kenosha casino.

I. Menominee is Entitled to Intervene as a Matter of Right

FCPC agrees as to the applicable standards for a motion to intervene as a matter of right, but challenges whether Menominee and the Authority can demonstrate standing, and three of the four factors under Fed. R. Civ. P. 24(a)(2). (FCPC concedes that the motion is timely.)

Menominee and the Authority do meet all of the requirements.

A. Menominee and the Authority Have Standing to Intervene, and an Interest in the Case

FCPC contests that a showing of Article III standing is sufficient to meet the “interest” requirement of Rule 24(a), (FCPC Opp’n. Br. at 6), but it does not address the cases cited in Menominee’s memorandum of Points and Authorities supporting this point. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (“Upjohn need not show anything more than that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a).”); *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (“Our conclusion that the NRD has constitutional standing is alone sufficient to establish that the NRD has ‘an interest relating to the property or transaction which is the subject of the action,’”) (citing *Mova Pharm.*, 140 F.3d at 1076). As this Court noted in *Wildearth*

Guardians v. Salazar, 272 F.R.D. 4, 13 at n. 5 (D.D.C. 2010) (Kollar-Kotelly, J.), “In most instances, the standing inquiry will fold into the underlying inquiry under Rule 24(a): generally speaking, when a putative intervenor has a ‘legally protected’ interest under Rule 24(a), it will also meet constitutional standing requirements, and *vice versa*.” *Accord, Am. Horse Prot. Ass’n, Inc. v. Veneman*, 200 F.R.D. 153, 157 (D.D.C. 2001) (“[I]t is impossible to conjure a case in which an intervenor would have constitutional standing to intervene but not have a sufficient ‘interest in the litigation’ to justify intervention under Fed.R.Civ.P. 24(a)(2).”).

FCPC acknowledges (FCPC Opp’n. Br. at 4) that 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 (quotation omitted). More specifically,

[W]hen a party seeks to intervene as a defendant to uphold what the government has done, it [must] establish [1] that it will be injured in fact by the setting aside of the government’s action it seeks to defend, [2] that this injury will have been caused by that invalidation, and [3] the injury would be prevented if the government action is upheld.

Am. Horse Prot. Ass’n, 200 F.R.D. at 156. *Accord, Wildearth Guardians v. Salazar*, 272 F.R.D. at 13. These elements have all been demonstrated here.

As shown in Menominee and the Authority’s earlier memorandum, granting FCPC the relief it requests in this case—namely, setting aside the Department of the Interior’s disapproval of the 2014 Amendment—would injure Menominee and the Authority by overturning a favorable administrative action sought by Menominee and which benefitted Menominee.

Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n, 788 F.3d 312, 317 (D.C. Cir. 2015) (“Our cases have generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit.”). Overturning the disapproval would harm Menominee and the Authority by

imposing additional non-statutory hurdles as a condition of obtaining a gubernatorial concurrence of a two-part determination under Section 20 of the IGRA (25 U.S.C. § 2719(b)(1)(A)), which would as a practical matter impede their efforts to develop a gaming facility on land in Kenosha, efforts which have been ongoing since 1999. The 2014 Amendment and this litigation led, in large part, to Governor Walker's non-concurrence. A reversal of the decision disapproving the 2014 Amendment would make it difficult if not impossible to obtain a concurrence in the future. Even if a reversal did not make it impossible to obtain a concurrence, it could make it extremely costly to the Menominee. This constitutes legal injury to Menominee and the Authority even if it is uncertain whether a reversal of the decision could lead to a concurrence in the future. *Crossroads Grassroots Policy Strategies*, 788 F.3d at 317 (“[E]ven where the possibility of prevailing on the merits after remand is speculative, a party seeking to uphold a favorable ruling can still suffer a concrete injury in fact.”).

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005), the court held that Plaintiff Lac du Flambeau Band (“LDF”), a Wisconsin Indian tribe, had standing to challenge an action by the Department of the Interior allowing a Ho-Chunk Nation gaming compact with Wisconsin to take effect to the extent consistent with the IGRA without action by the Department. LDF challenged a provision in the compact that provided that the governor would not concur in a two-part determination regarding any tribe in Wisconsin if the Ho-Chunk notified the State that the operation of the new tribal casino would cause a substantial reduction in revenues at Ho-Chunk's casinos, unless the State had entered into an indemnification agreement with Ho-Chunk to compensate it for the reduction (or the matter was in arbitration). *Id.* at 494. The court found that LDF had standing, and that the competitive disadvantage it alleged it would have in obtaining a two-part determination met the injury

requirement for standing: “LDF alleges that the Secretary’s passive approval of the compact places it at a competitive disadvantage when seeking state approval for off-reservation gaming. This clearly amounts to a concrete injury.” *Id.* at 497.

Because Menominee and the Authority have demonstrated constitutional standing, they meet Rule 24(a)’s interest requirement. *See supra* at 4-5. A discussion of that rule’s requirement, however, only serves to underscore that intervention as of right should be allowed in this case. Under Rule 24(a), “intervenors of right need only an ‘interest’ in the litigation—not a ‘cause of action’ or ‘permission to sue.’” *Jones v. Prince George’s Cnty., Maryland*, 348 F.3d 1014, 1018 (D.C. Cir. 2003). “[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.*

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. Their efforts suffered a setback this year when Governor Walker failed to concur in the two-part determination, in no small part due to the 2014 Amendment and this suit to overturn the disapproval decision. Menominee and the Authority have an interest in the disapproval decision being upheld so that the 2014 Amendment will not further impede their efforts to develop a Kenosha facility.

B. Plaintiff’s Arguments on Standing and Interest Must be Rejected

1. The Governor’s Discretion under IGRA

FCPC argues that Menominee and the Authority have no standing and no interest in this case because no tribe is entitled to have trust lands acquired for gaming subject to the two-part

determination, and because under IGRA the governor may “veto” the Secretary of the Interior’s two-part determination, or impose any conditions he wants upon a concurrence. (FCPC Opp’n. Br. at 7-9, 17-18). Although Menominee and the Authority do not agree that the Governor has unfettered discretion in deciding whether to concur,² the Court need not decide that issue. Menominee and the Authority need not demonstrate the right to a two-part determination to show standing or an interest in this suit. Menominee and the Authority have shown that a reversal of the disapproval decision at issue in this case will have an impact on them by making it more difficult and significantly more expensive for Menominee to obtain a two-part determination. That is all that is required to meet the standing/interest requirement for intervention.

Though no tribe has an entitlement to a positive two-part determination under the IGRA, Menominee and the Authority do have a right to request a determination under the two-part process, and to a determination as to whether its application meets the two-part test. In *Wildearth Guardians*, 272 F.R.D. 4, non-profit environmental organizations sued the Secretary of the Interior and various agencies challenging their decision to authorize leases of certain lands for coal mining. This Court granted Antelope Mining Company, a prospective bidder, leave to intervene. Antelope’s interest was shown by Antelope’s request to the agencies that tracts be offered for bids, and its stated intention to bid. *Id.* at 9. Antelope, of course, had no “right” to a

² Under the IGRA two-part determination provisions, 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, the governor of the state is asked whether he concurs in the Secretary’s determination. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.22(c). IGRA does not authorize the governor to inject other considerations. The cases cited by FCPC—*Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688 (9th Cir. 1997); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004), (FCPC Opp’n. Br. at 8)—are not to the contrary. Those cases involved constitutional challenges to the statutory requirement that the governor concur. In *Lac Courte Oreilles Band*, after the district court rejected their constitutional challenge, the plaintiffs sought to amend their complaint to add a claim that the governor relied on improper factors in failing to concur, but the district court denied the motion as being out of time and the Seventh Circuit affirmed. 367 F.3d at 668-69.

lease as such, but only the right to apply for one. *See also id.* at 15 (holding that NMA, a coal mining trade group, also had an interest and a right to intervene). *See also Settles v. U.S. Parole Comm’n*, 429 F.3d 1098, 1103 (D.C. Cir. 2005) (recognizing that a party has standing to bring an action to enforce a procedural right—here, having a representative at a parole hearing—without having to show that correction of the procedural right will result in a different outcome); *City of Waukesha v. E.P.A.*, 320 F.3d 228, 235-36 (D.C. Cir. 2003). Here, similarly, Menominee and the Authority can seek the necessary approvals for the Kenosha casino, and the outcome sought by FCPC in this case could significantly impact Menominee’s chances of success in doing so. As recognized in *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d at 497, “This clearly amounts to a concrete injury.”

Further, Governor Walker’s non-concurrence was not due to a decision “independent” of the 2014 Amendment (FCPC Opp’n. Br. at 18). In his press release announcing the non-concurrence, Governor Walker cited the possible “cost of indemnifying FCPC,” Men. Ex. 15, and to a memorandum prepared by his Secretary of Administration that outlined potential risks to the State, the first of which was the risk 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.” Men. Ex. 16 at 22. Governor Walker’s non-concurrence due to the 2014 Amendment was by no means surprising to FCPC. Assistant Secretary Washburn stated in his decision disapproving the amendment: “If Menominee did not consent to make the Mitigation Payments [due to FCPC under the 2014 Amendment], for example, the Governor may decline to concur in the Secretary’s two part-determination for Kenosha.” Men. Ex. 6 at 8.

In effect, like the parties opposing a tribe’s standing to challenge a gaming compact in *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d at 497, FCPC “point[s] to

a number of contingencies that, as [FCPC] see[s] it, could prevent [Menominee] from being harmed by the Tribal–State compact....”. The court in LDF rejected these arguments, stating:

This argument misperceives the nature of the injury for standing purposes.... “[T]he ‘injury in fact’ is the inability to compete on an equal footing.” ... [T]he harm lies in “the denial of equal treatment,” in this case, being forced to seek approval under the cloud created by the amended compact. The possibility that Wisconsin might reject LDF’s application for legitimate reasons is therefore irrelevant to the standing analysis.

Lac du Flambeau Band of Lake Superior Chippewa Indians, 422 F.3d at 497-98 (quoting *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

2. Whether Menominee’s Interest Still Exists

Menominee’s interests continue even though Governor Walker failed to concur in the two-part determination. Menominee and the Authority’s opening brief details their efforts starting in 1999 to develop a Kenosha casino. Those efforts did not stop when Menominee’s initial land into trust application was withdrawn in 2001 (Men. Ex. 5), when the Department of the Interior initially disapproved Menominee’s application in 2009 (Men. Ex. 1 at 1 of attached memorandum, or pdf p. 8), or when Governor Walker failed to concur. Menominee continues to assert an interest in a Kenosha casino, just as FCPC continues its efforts to ensure that such a casino never be developed, through this case and in other ways.³ The Menominee Gaming Compact has an extant provision authorizing the conduct of Class III gaming in Kenosha pursuant to the IGRA, subject only to the two-part determination. Men. Ex. 3 at 77-78, § XXXIX.

³ As FCPC noted in its Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Transfer Venue in this action (Doc. 20), FCPC is litigating another case against federal defendants to obtain the record of decision governing the Menominee two-part determination. *Id.* at 7-8. In that memorandum, FCPC states: “the Disapproval Letter at issue in this lawsuit makes express reference to the Secretary of Interior’s record regarding the very same decisions at issue in the FOIA litigation [namely, the Menominee two-part determination]” *Id.*

3. Terms of the 2014 Amendment

FCPC spends several pages of its opposition brief taking issue with Menominee's characterization of the 2014 Amendment. (FCPC Opp'n. Br. at 11-15). For example, FCPC argues that "Menominee is wrong in its representations that the Potawatomi 2014 Compact Amendment requires Menominee to contribute towards the State's financial obligations to Potawatomi." (FCPC Opp'n. Br. at 12). As Menominee and the Authority noted in its opening brief, however, Menominee's characterization is supported by Assistant Secretary Washburn's decision at issue in this case, which stated: "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." Men. Ex. 6 at 6. FCPC takes issue with this and other similar findings in the decision in its Complaint (*see e.g.*, Compl. ¶ 63), but the Court cannot resolve the allegations of the Complaint. On a motion to intervene, this Court "must accept as true all material allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor." *Nat'l Parks Conservation Ass'n*, 759 F.3d at 973. *Accord*, *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819-20 (9th Cir. 2001) ("the district court erred by not accepting the allegations and evidence submitted in support of their motion to intervene. ...a district court is required to accept as true the non-conclusory allegations made in support of an intervention motion.") (citing, *inter alia*, *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981)), cited with approval in *Wildearth Guardians*, 272 F.R.D. at 9.

Further, that Menominee and the Authority support the findings in the decision at issue in this case, and that FCPC finds itself arguing the underlying merits of its case in an attempt to

prevent Menominee and the Authority from intervening, actually serve to support Menominee and the Authority's position that they have an interest in this case.⁴

4. Economic Interest

FCPC argues that “[a]n economic stake in the outcome of the litigation, even if significant, is not enough to establish a protectable interest for intervention.” FCPC Opp’n. Br. at 6. The cases they cite for that proposition, however, are bad law and should not be followed. To the extent they are viable at all, they should be limited to cases seeking to enforce the National Environmental Policy Act (“NEPA”). In *Portland Audubon Soc. v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the court affirmed the denial of a motion to intervene in a NEPA case. While acknowledging that putative intervenors had an economic interest in the case, the court affirmed, holding that “NEPA provides no protection for the purely economic interests that they assert.” *Id.* at 309. The court did not stop there, however—it followed its holding from an earlier case (*Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982)) that only government entities may be defendants in a NEPA action and hence, private parties cannot intervene in such actions at all. *Id.* The Ninth Circuit has since abrogated that holding. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1180 (9th Cir. 2011).

City of Williams v. Dombeck, 2000 WL 33675559 at *2 (D.D.C. 2000), also denied intervention in a NEPA case on the grounds that putative intervenors asserted an economic

⁴ To the extent FCPC disputes other facts that are not at issue in the decision before the Court or the Complaint, Menominee and the Authority rest on the facts as stated in their opening memorandum and supporting exhibits. Many of the factual issues raised by FCPC are simply irrelevant side issues. For example, FCPC assert that “DOI concluded that Menominee’s obligation [in its 2015 compact amendment] to indemnify the State for the State’s obligations to Potawatomi was an illegal tax.” (FCPC Opp’n. Br. at 13-14) (footnote omitted). This is not only irrelevant, but incomplete and misleading. As noted in our opening memorandum, it was because Governor Walker had failed to concur in the Kenosha two-part determination that Assistant Secretary Washburn found that Menominee “has lost the benefit of its bargain with the State,” and that Menominee’s agreement to pay the State was thereby rendered “an unauthorized tax, fee, charge or other assessment in violation of IGRA.” Men. Ex. 17 at 2.

interest that was outside the zone of interests protected by NEPA. In applying the zone of interest standards to a putative intervenor, *Dombeck* is contrary to the law of this Circuit and should not be followed. The D.C. Circuit has held, “the zone of interests test should no longer apply to intervening defendants.” *Crossroads Grassroots Policy Strategies*, 788 F.3d at 319 (putative intervenor must establish only Article III standing, not prudential standing).

FCPC also cites to dictum in *Osage Tribe of Indians of Oklahoma v. United States*, 85 Fed. Cl. 162, 170 (2008), stating that an interest must be “more than merely an economic interest” for a party to intervene under Claims Court Rule 24(a), citing *American Maritime Transport, Inc. v. United States*, 870 F.2d 1559, 1562 (Fed. Cir. 1989), but both *Osage Tribe* and *American Maritime Transport* denied intervention because the putative intervenor could not demonstrate a legally protectable interest for a host of reasons. *Osage Tribe*, 85 Fed. Cl. at 170-72 (putative intervenors were not the real party in interest, and they “do not have a legally protectable interest in a dispute concerning a trust relationship to which they are not a party.”); *Am. Mar. Transp.*, 870 F.2d at 1562 (“The interest of an applicant non-party having no privity claim in a contract, the terms of which are disputed by the parties to it, also has not been recognized as legally protectable....”).

In any event, an economic interest can be a protectable interest for purposes of intervention. *See e.g. Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (insurance company’s interest was financial; further, insurance company’s interests would not be adequately represented by defendant District of Columbia because “State Farm ... is seeking to protect a more narrow and ‘parochial’ financial interest not shared by the citizens of the District of Columbia”). Further, the interests of Menominee and the Authority are not merely financial; they are procedural—namely, their interest in applying for and obtaining a two-part

determination—and governmental. *See* 25 U.S.C. § 2702(1) (The stated purpose of IGRA is “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments....”); Men. Ex. 1 at 24-27 of attached memo., or pdf pp. 31-34 (Menominee tribal programs that would benefit from Kenosha casino).

5. *Greene v. United States*

Greene v. United States, 996 F.2d 973 (9th Cir. 1993), identified by FCPC as “[p]articularly instructive,” (FCPC Opp’n. Br. at 5), is not relevant here. In *Greene*, the court denied intervention where putative intervenors sought to protect rights that were not at issue in the case—unlike here, where Menominee and the Authority seek to defend Assistant Secretary Washburn’s decision and have demonstrated how a reversal of that decision would impact them. The court in *Greene* held that putative intervenors’ treaty fishing rights would not be affected by a decision in plaintiff Samish Tribe’s federal recognition case because whatever treaty fishing rights Samish had were not dependent upon federal recognition and would not be impacted by recognition. *Greene*, 996 F.2d at 976-77. Further, putative intervenors had not demonstrated how recognition of the Samish would in any way undermine the stare decisis effect of earlier treaty fishing litigation favorable to putative intervenors. *Id.* at 977-78.

C. Disposition of the Action Could Impair Menominee’s and the Authority’s Ability to Protect Their Interests

FCPC asserts, incredibly, that this action is contrary to the interests of Menominee and the Authority because Menominee and the Authority would in fact be in a much greater position for obtaining a gubernatorial concurrence if the 2014 Amendments are in effect. (FCPC Opp’n. Br. at 15-16. FCPC also notes that “even with a disapproved compact, [Governor Walker] still did not concur.” (FCPC Opp’n. Br. at 15.) As Menominee and the Authority have

demonstrated, 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* Exs. 14 and 15; *see* Men. Points and Authorities at 12-13.

FCPC directs the Court's attention to Wisconsin Secretary of Administration Huebsch's report. *See* Men. Ex. 16. According to FCPC, the report details "two additional litigation risks," which according to FCPC, "evaporate if the Potawatomi 2014 Compact Amendment is approved." (FCPC Opp'n. Br. at 16.) The first such risk, however, has to do with FCPC's alternative argument, made in Count II of its Complaint in this case, that Defendants had a ministerial duty to approve the 2014 Amendment under the terms of the 2005 Compact Amendment. *Compare* Men. Ex. 16 at 22 (second bullet point)⁵ with Compl. ¶ 83. As such, that issue will be decided in this action, and does not constitute an additional risk, as implied by FCPC.⁶

As to the second litigation risk, FCPC refers to a possible claim that the payments made to the State by FCPC under its 2005 Compact Amendments could be held to constitute an illegal tax, thus ending further payments and possibly requiring refunds of past payments. (FCPC Opp'n. Br. 16, discussing Men. Ex. 16 at 22 (fourth bullet point)). The Huebsch report, however, states that "The State does not believe FCPC will prevail on this claim." Men. Ex. 16 at 22 (fourth bullet point).

FCPC further asserts that the Huebsch report identifies "many other reasons" for the Governor's non-concurrence (FCPC Opp'n. Br. at 16-17), but that is an exaggeration, and it is

⁵ In discussing this first litigation risk in its brief, FCPC misquotes language in the report as follows: "to pay FCPC for any losses due to the Kenosha casino." (FCPC Opp'n. Br. at 16.) Nowhere does that language appear on that page of the report. We assume this is a misquote, and that what was referred to was language reading "to compensate FCPC..." in the second bullet point.

⁶ We note further that the report characterized this as "not a strong argument." Men. Ex. 16 at 22 (second bullet point).

clear from the evidence previously discussed that the 2014 Amendment and this litigation were very important to the Governor's non-concurrence. In any event, even if there may be other impediments to the pursuit of a Kenosha casino by Menominee and the Authority that may not be addressed by this case, that fact does not undercut the very real interest that Menominee and the Authority have in an affirmance of the decision disapproving the 2014 Amendment.

Just as Menominee and the Authority meet the redressability requirement for standing, *see supra* at 5-7, 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). "Simply put, the [Department of the Interior's] decision below was favorable to [the putative intervenors], and the present action is a direct attack on that decision." *Wildearth Guardians*, 272 F.R.D. at 14.

D. The United States Cannot Fully Represent Intervenors' Interests

FCPC seeks to overcome the well-established rule that governmental entities generally cannot represent "the more narrow and parochial financial interest' of a private party," *Wildearth Guardians*, 272 F.R.D. at 15 (quoting *Fund for Animals*, 322 F.3d at 737), through reliance upon inapposite cases. In *Seminole Nation of Oklahoma v. Norton*, 206 F.R.D. 1 (D.D.C. 2001), putative intervenor sought to raise issues that "far exceed[ed] the scope of the questions of law presently before the Court," *id.* at 10, and argued (understandably) that as to those issues, the federal defendants would not adequately represent their interests. *Id.* at 9-10. The court ruled that such issues were not before the court, and therefore that the supposed failure of the federal defendants to represent those interests was irrelevant. *Id.*

Knox v. United States Dept. of the Interior, 759 F. Supp. 2d 1223, 1236 (D. Idaho 2010), did not involve a motion for intervention under Rule 24, but rather an issue of whether tribes

were necessary parties under Rule 19(a). A different standard applies under Rule 19(a) and 24(a). Under Rule 24(a), to intervene as a matter of right, a putative intervenor “need not prove that representation by the Secretary *is* inadequate but need show merely that it *may* be; and that the burden of making that showing should be treated as minimal.” *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972). By comparison, in *Knox*, the court noted that “To prevail on a claim that the United States cannot adequately represent the [absent] Tribe’s interest, the Secretary must not only identify the alleged conflict but demonstrate how such a conflict might actually arise under the facts of the case.” *Knox*, 759 F. Supp. 2d at 1236.

Finally, in *North Fork Rancheria v. State of California*, 1:15-CV-00419-AWI-SAB (E.D. Cal. Aug. 26, 2015) (FCPC Ex. G), the court rejected the putative intervenor’s motion to intervene as a defendant because it disagreed with the putative intervenor’s unusual argument that the defendant would not actually defend the action. FCPC Ex. G at 9 (“Despite the [putative intervenor’s] concerns that the State is putting forth a false defense – all the while secretly intending to fail... – there is no evidence before this Court that anything of the like is taking place.”). Menominee makes no such claim in this case, but asserts that its interests may diverge from the federal government’s during the course of this litigation.

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

FCPC opposes permissive intervention on the grounds of lack of standing (FCPC Opp’n. Br. at 20-21), but as shown above, *supra* at 4-14, Menominee and the Authority have demonstrated standing for purposes of this motion. Even if they did not, however, this Court could grant permissive intervention, contrary to FCPC’s argument. It is true that in *Keepseagle v. Vilsack*, 307 F.R.D. 233, 245-46 (D.D.C. 2014), the district court, after noting that the D.C. Circuit has held it was an open question whether standing was required to intervene permissibly,

held that the issue had been resolved in *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013), where the D.C. Circuit stated: “It is therefore circuit law that intervenors must demonstrate Article III standing.”⁷ What was at issue in *Deutsche Bank*, however, was intervention as of right, not permissive intervention. *See id.* at 191. As the *Keepseagle* court noted, in *Deutsche Bank*, Judge Silberman wrote separately to state that the rule requiring standing operates in all cases, including permissive intervention, *Deutsche Bank*, 717 F.3d at 195, but apparently he wrote separately because there were not three votes for this proposition. (Judge Silberman also wrote the majority opinion.) We have found no other court that requires standing for permissive intervention.

Standing should not be required of a party seeking to intervene permissively, at least not where, as here, the party is intervening as a defendant and the plaintiff has standing and so the Court has jurisdiction over the action. *See In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 2004 WL 405886, at *22 (S.D.Tex. Feb. 25, 2004) (noting a split among the circuits about the relationship of the Article III standing requirement and permissive intervention under Rule 24(b)). Rule 24 specifically requires that a party seeking to intervene as a matter of right show an interest in the litigation, but does not require the same of a party seeking to intervene permissively. Yet, as discussed *supra* at 4-5, the interest requirement is largely the same as the standing requirement. Thus, requiring standing to intervene permissively essentially reads the interest requirement into Rule 24(b), rendering meaningless the Rule’s distinction between intervention as of right and permissive intervention.

Apart from arguing standing, FCPC asserts that permissive intervention should be denied because the only issue in this case is the decision disapproving the 2014 Amendment.

⁷ The court in *Keepseagle* also noted that putative intervenors had not opposed defendant’s argument that standing was required for permissive intervention. *Keepseagle*, 307 F.R.D. at 246, n. 6.

Menominee and the Authority agree that that is the issue in this case, as evidenced by their motion and supporting memorandum, and their proposed Answer to the Complaint, in which they assert no affirmative defenses and raise no new claims, but only serve to defend the decision disapproving the 2014 Amendment. Thus, Menominee and the Authority have a “defense that shares with the main action a common question of law or fact...” Fed. R. Civ. P. 24(b). Moreover, FCPC has not even argued that the proposed intervention would unduly delay the case or prejudice the adjudication of its rights.

CONCLUSION

For the foregoing reasons, as well as those stated previously, 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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