IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SANDRA THOMAS, TINA THOMAS, MICHAEL NALEWAJA, and ROBERT E. SANDER,

Plaintiffs,

OPINION AND ORDER

96-C-0828-C

v.

UNITED STATES; UNITED STATES DEPARTMENT OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Interior, in his official capacity; ADA E. DEER, Assistant Secretary of the Interior for Indian Affairs, in her official capacity; DR. EDDIE F. BROWN, Former Assistant Secretary of the Interior for Indian Affairs, individually and in his official capacity; and DAVID J. MATHESON, Former Deputy Commissioner of the Bureau of Indian Affairs, individually and in his official capacity,

Defendants,[1]

[1] Plaintiffs have advised the court that Michael Nalewaja, a/k/a Manido-Makwa, died recently and that his personal representative will take over his role in this suit. Defendants Brown and Matheson cannot be sued as individuals in this district and it is questionable whether they can be sued in their official capacities when they no longer hold office. Defendant Deer is no longer in office. The parties should clarify the caption of the case promptly.

and

GAIASHKIBOS; MICHAEL ISHAM, JR; DONALD E. CARLEY; ALFRED TREPANIA; MARGARET DIAMOND; CONSTANCE CORBINE; and EUGENE BEGAY; individually and in their official capacities; and the TRIBAL GOVERNING BOARD ["TGB "] of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians;

Proposed Intervening Defendants.

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This is a civil action for declaratory relief. Pursuant to 25 U.S.C. § 476(d)(2), plaintiffs are asking the court to declare approval of certain amendments to the Constitution of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians voted upon by the trial membership in the Secretarial Election sponsored by the United States Secretary of the Interior on February 1, 1992. In an order entered on March 27, 1998, I dismissed the entire case because I believed that the Tribal Governing Board was an indispensable party to the litigation; it refused to join the suit voluntarily; and it could not be joined against its will because it was immune from suit. On appeal, this decision was reversed and the case was remanded. See Thomas v. United States, 189 F.3d 662 (7th Cir. 1999). Proceedings in this court were stayed pending disposition of plaintiffs' request for a writ of certiorari from the United States Supreme Court, which was denied in October 2000.

The case is before the court now because the tribal board has reversed its earlier position and now seeks to intervene in this suit as a defendant in its own right. In addition, the individual members of the board seek to intervene as individuals and in their official capacities. Plaintiffs oppose the motion to intervene on various grounds. I conclude that the proposed intervenors' motion is untimely and that granting it would cause prejudice to plaintiffs as well as delay in the eventual resolution of the case. However, I will allow the proposed intervenors to submit briefs as amicus curiae.

BACKGROUND

The roots of this controversy go back to the late 1980s when Lac Courte Oreilles members began discussing amendments to their tribe's constitution that would change the requirements for tribal membership and some of the structure of tribal government. Plaintiff Sandra Thomas was named chairperson of a committee to study the suggestions; the committee came up with four proposals, which were circulated among tribal members and submitted eventually to the Bureau of Indian Affairs in the Department of the Interior, for the purpose of calling an election to allow the tribal membership to vote on the proposals.

The Department of the Interior decides when to call an election to amend a tribal constitution and sets the procedures for the election. See 25 U.S.C. § 476 (codifying

procedures). After the Bureau of Indian Affairs reviewed the proposals Thomas had submitted, it approved two of them and called an election to vote on redefining tribal membership and lengthening the terms of office of elected tribal officials. The election took place on February 1, 1992. The voters approved both amendments by large margins.

Under Bureau of Indian Affairs procedures, persons objecting to the election results had three days in which to contest the results. See 25 C.F.R. § 81.22. Along with one member of the tribe, Odric Baker, Tribal Governing Board Chairman Gaiashkibos filed a timely challenge. Despite the challenge, Michael A. Fairbanks, Acting Area Director for the Bureau of Indian Affairs, gave formal approval to the amendments on February 10, 1992. The approval was timely. See 25 U.S.C. § 476(d)(1) (Secretary of Interior has 45 days in which to resolve election contests, conduct independent review and approve or disapprove election results). More than two months later, on April 16 and April 24, 1992, Gaiashkibos wrote to defendant Brown, telling him that the election procedures were unconstitutional and urging him to review the approval of the election results. On April 18, 1992, the tribal board voted not to recognize the new amendments. On April 23 and 24, 1992, plaintiff Thomas wrote to defendant Brown, notifying him of the board's rejection of the amendments, responding to Gaiashkibos's challenges and complaining that the three-day period in which to file election challenges had expired.

On October 7, 1992, defendant Matheson sent Gaiashkibos a formal reply to his April letters, telling him that the governing board had no authority to declare the results of an election void. However, Matheson became convinced from his review of tribal records and Bureau of Indian Affairs regulations that the election was flawed because voters in the February 1 election were not of the same class as the voters who approved the original constitution, which in Matheson's opinion was a prerequisite to a valid election for the Lac Courte Oreilles. He revoked the earlier approval of the election results but held that the bureau was required to hold a new election on the proposed amendments and he directed the local bureau office to make the arrangements for an election in which the only voters would be tribal members who lived on the reservation or who lived off the reservation but had at least one-half tribal blood.

Plaintiff Thomas wrote to defendant Brown, protesting Matheson's decision, but her letter was lost. No one in the bureau has taken any action on Matheson's decision. For approximately three years after it was rendered, the bureau and the governing board discussed a new election without ever calling one. Plaintiffs continued their efforts to persuade Bureau of Indian Affairs officials and the tribal governing board either to accept the election results or hold a new election but they had no success. In October 1996, they brought this suit. On May 19, 1997, the governing board passed a resolution saying that it supported the plaintiffs in the lawsuit but chose not to join the suit "at this time." On November 24, 1997, the board

rescinded the May resolution of support, resolved that it would not become a party to the suit and added that if it were named as an involuntary plaintiff, it would assert sovereign immunity. On November 26, 1997, plaintiffs filed an amended complaint adding the board and its members as defendants.

So far as the record shows, no re-election has been held to date.

OPINION

In their original complaint, plaintiffs alleged six causes of action: 1) for declaratory and injunctive relief pursuant to 25 U.S.C. § 476(d)(2), requiring that the government defendants declare the 1992 amendments valid and enforceable; 2) for declaratory and injunctive relief pursuant to 5 U.S.C. § 706 for the Secretary's alleged arbitrary and capricious action; 3) for compensatory damages from defendants Brown and Matheson in their individual capacities for alleged violations of plaintiffs' constitutional rights; 4) for compensatory damages from the government defendants for their alleged breach of their trust responsibility to the tribe; 5) for a declaration that the tribal defendants violated the Indian Reorganization Act and for compensatory damages and injunctive relief requiring these defendants to abide by and enforce the 1992 amendments; and 6) for compensatory damages pursuant to 42 U.S.C. § 1985(3) from the tribal defendants for their alleged participation in a conspiracy to deprive plaintiffs

of their civil rights. In an order entered on October 14, 1997, I dismissed plaintiffs' third cause of action on the ground that the court lacked personal jurisdiction over defendants Brown and Matheson in their individual capacities; plaintiffs did not appeal this decision. In the same order, I held that the tribal governing board was a necessary party to the litigation because the proposed amendments deal with matters of fundamental importance to the tribe; the governing board might refuse again to enforce the amendments even if the Secretary approved the election results as a consequence of this suit; and the Bureau of Indian Affairs might be exposed to additional litigation over the same election if it approved the 1992 election results and the governing board sued for a reversal of the decision.

The court of appeals held that the litigation could proceed without the governing board. It emphasized the federal nature of tribal elections, which in the court's view, diminished the tribe's interest in the outcome, and it was unpersuaded that there was any risk of incomplete relief if the governing board was not added since the board was legally obligated to recognize the Secretary's decision. Finally, it held that there was no reason to think that the governing board could mount a separate challenge to the Secretary's decision. The court of appeals was critical of the governing board's attempt "to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision to disapprove the election, by taking advantage of Rule 19." Thomas, 189 F.3d at 669. The court added that if the governing

board wanted to advocate for its interest, procedural vehicles existed for doing so, such as a petition to intervene under Fed. R. Civ. P. 24 or participation as an amicus curiae.

The tribal governing board cites this statement from the court of appeals as authority for granting its motion to intervene; plaintiffs downplay it, arguing that the court was stating merely that intervention might be one way in which the governing board could participate, not that the board met all the criteria for intervention at this time. Plaintiffs have the better of this argument. The court's statement is not binding on this court, both because it is dictum (not critical to its decision) and because the issue was not argued or otherwise developed by the parties at the appellate level. It remains necessary to consider the four criteria for intervention set out in Rule 24(a) for intervention as of right: 1) a timely application; 2) a showing that the applicant claims an interest relating to the property or transaction that is the subject of the action; 3) a showing that the applicant is so situated that, as a practical matter, the disposition of the action may impair or impede its ability to protect that interest; and 4) a showing that its interest is not adequately protected by existing parties. See, e.g., Nissei Sangyo America, Ltd. v. United States, 31 F.3d 435, 439 (7th Cir. 1994).

The tribal governing board maintains that its intervention is timely because it filed the motion to intervene before the deadline set by the magistrate judge at the scheduling conference held shortly after the Supreme Court denied the tribe's petition for certiorari in October 2000.

The board adds that it was reasonable for the board to wait until then to file its motion because until the Supreme Court acted, there remained a possibility that the suit would be dismissed because of the tribe's indispensability; moreover, plaintiffs cannot object to the late filing of the motion when they waited more than four years before filing their suit challenging the Secretary's withdrawal of approval of the 1992 election.

The board's arguments are makeshift at best. It neglects to acknowledge that it has known of this lawsuit for over four years. Although the board is correct in pointing out that it would have made little sense for it to try to intervene while the case was on appeal, it had numerous opportunities to intervene while the case was in this court, including a specific invitation from the court to do so. Indeed, its refusal to intervene voluntarily led to the dismissal of this suit and the more than two years of subsequent appeals. This is not acting with dispatch, cf. Atlantic Mutual Insurance Co. v. Northwest Airlines, Inc., 24 F.3d 958, 960 (7th Cir. 1994), or the reasonable promptness that the rule contemplates. See Nissei Sangyo, 31 F.3d at 438 (citing United States v. South Bend Community School Corp., 710 F.2d 394, 398 (7th Cir. 1983)).

Although untimeliness can be a problem for a would-be intervenor, "the most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Charles Alan Wright,

et al., Federal Practice and Procedure: Civil 2d § 1916 (1986). Plaintiffs will be prejudiced if the tribal board is allowed to intervene. The board has indicated that it wants to undertake additional discovery and reopen the stipulation executed by plaintiffs and the federal defendants. In addition, plaintiffs withdrew their claims against the tribe and the individual defendants under § 1985(3) and the Indian Reorganization Act, 25 U.S.C. § 461 et seq. on the understanding that the board would not be held to be a necessary party. If the board and its individual members become parties, plaintiffs cannot be held to their agreement to withdraw their particularized claims against these defendants. They have advised the court that they will reassert these claims, which will necessitate additional, expensive briefing.

The tribe has an interest relating to the subject matter of the litigation, which is whether the government should be required to restore its grant of approval to the results of the 1992 election. Although plaintiffs argue that it is wrong for the board to say that its interest is that of protecting the tribal constitution and the structure of the tribe's governing structure, rather than a challenge to the way in which the Secretary administered an election, their characterization of the board's position is too strained. Plaintiffs are correct that the board is in no better position than plaintiffs to protect the interest of the tribe, but it does not follow that the board has no interest in the outcome of the challenge. The board's interest is not enough to make it a necessary and indispensable party, see Thomas, 189 F.3d at 667-68, but

it is similar to plaintiffs' own interest in the outcome. True, if plaintiffs prevail, the board will simply have to implement changes that are the outcome of the 1992 election and not of this lawsuit, but if plaintiffs do not prevail, the board will not have to make any changes.

This risk that the board may have to implement the changes the voters chose satisfies the third criterion (that it be at risk that its interest will be impaired by the outcome of the litigation). The fourth factor addresses the adequacy of the representation of the intervenor's interests by the existing parties. The board argues that the government will not represent its interest adequately. First, the government changed its position on the board's indispensability in its briefing on the petition for a writ of certiorari; second, the government differs from the tribe as to the *particularized* constitutional grounds on which the election should be invalidated; and third, the board and its members were sued in the district court for monetary damages, leaving them open to liability that the federal officials do not share.

The government's change of position on the issue of indispensability is an inadequate reason to find that they would not represent the board's interests adequately; it was proper for the government to abandon that argument once the court of appeals had rejected it. The government's abandonment of one argument does not show that it has different interests in the case in its present posture or that it is likely to abandon relevant arguments at this stage of the proceedings. The third argument is not particularly persuasive because, as plaintiffs advised

the court of appeals, they do not intend to assert any claims against the board or its members if they are not parties to this action. This leaves the second argument, which is the board's assertion that its position on the legality of the election differs from the government's on the question of absentee voters. The board believes that its constitution prohibits absentee votes except from persons who are hospitalized, in nursing homes or serving in the military; the government defendants believe that the issue is governed by federal law, which permits absentee voting.

Although the board asserts now that it has strong interest in defending its view of the legality of absentee voting, its assertion is difficult to square with its lack of interest in protecting that interest (or any other) when suit was first initiated. I believe the issue can be handled through amicus briefing.

ORDER

IT IS ORDERED that the motion to intervene as defendants filed by proposed intervenors Gaiashkibos, Michael Isham, Jr., Donald E. Carley, Alfred Trepania, Margaret Diamond, Constance Corbine and Eugene Begay, individually and in their official capacities, and the Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians is DENIED. However, I will allow the proposed intervenors to file briefs as amicus

curiae.

Entered this 8th day of January, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge