IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
OF WISCONSIN, RED CLIFF BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS
and SAKAOGON CHIPPEWA COMMUNITY
(MOLE LAKE BAND OF LAKE SUPPERIOR
CHIPPEWA INDIANS),

Plaintiffs,

OPINION AND ORDER

02-C-0553-C

v.

UNITED STATES OF AMERICA,
U.S. DEPARTMENT OF THE INTERIOR,
THE HONORABLE GALE NORTON,
Secretary of the Department of the Interior,
and JAMES H. McDIVITT, Deputy Assistant
Secretary/Indian Affairs,

Defendants,

and

SCOTT McCALLUM, Governor of the
State of Wisconsin,

Defendant-Intervenor.

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This is a civil action for declaratory relief in which plaintiffs allege that the gubernatorial concurrence requirement in the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A), is unconstitutional and a congressional breach of trust. The Act precludes most gaming on land acquired in trust for an Indian tribe after October 17, 1988, unless one of several exceptions applies. The pertinent exception permits gaming provided that (1) the Secretary of the Interior determines that it is in the best interests of the tribe and not detrimental to the surrounding community and (2) the governor concurs in that determination. Id. Specifically, the litigation in this case stems from Governor Scott McCallum's refusal to concur with the Secretary of the Interior's determination that the proposed off-reservation gaming facility would be in the best interest of the Indian tribes and would not be detrimental to the surrounding community. Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

On May 10, 2001, plaintiffs filed this complaint in the District Court for the District of Columbia. On July 16, 2001, the State of Wisconsin and Governor McCallum filed a motion to intervene while the case was pending in that court. On July 19, 2001, that court granted intervention as to the governor during a status conference because plaintiffs did not oppose his intervention. On September 13, 2002, the court transferred the case to this district pursuant to 28 U.S.C. § 1404(a) without deciding whether the state would be allowed to intervene.

Presently before the court is the outstanding portion of the motion to intervene as it relates to the state. The state seeks to intervene as a matter of right or, alternatively, permissively. See Fed. R. Civ. P. 24(a) and (b). For the reasons stated below, the motion to intervene by the state will be denied as to an intervention of right and granted as to permissive intervention.

OPINION

A. Intervention of Right

Absent a statute conferring a right of intervention, four requirements must be met to intervene as of right: (1) timely application; (2) a claim of interest relating to the property or transaction that is the subject of the action; (3) a danger that disposition of the action may as a practical matter diminish the applicant's ability to protect that interest; and (4) existing parties must not be adequate representatives of the applicant's interest. See Fed. R. Civ. P. 24(a)(2); see also Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 945-46 (7th Cir. 2000); Building and Construction Trades Dept. v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Plaintiffs contend that the state has no legally protected interest in this lawsuit because (1) Congress granted power to the "governors," not the "states" and (2) states generally do not have Article III standing to litigate the validity of federal statutes. It is unnecessary to address these contentions because the state fails to explain how the

governor, an existing party to this lawsuit, will not represent its interests adequately. In briefs in support of their motion to intervene, the state and governor argue that their interests would not be represented adequately by the federal defendants. This might well be true. However, the District Court for the District of Columbia granted intervention as to the governor in his official capacity three days after the proposed intervenors filed their motion. In light of the governor's successful intervention, the state fails to explain in its reply brief how its interest would not be represented adequately by the governor, a now-existing party to the lawsuit. (In fact, at the time the proposed intervenors filed their brief in support of the motion to intervene, the state was aware that plaintiffs had indicated that they would not oppose intervention by the governor.) Instead, the state argues at length that a suit against the governor in his official capacity is in fact a suit against the state. See Hafer v. Melo, 502 U.S. 21, 25 (1991) ("[s]uits against state officials in their official capacity . . . should be treated as suits against the State"); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984) ("The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."); Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 697 (9th Cir. 1997) ("When the Governor exercises authority under [the Indian Gaming Regulatory Act], the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law."). I agree. However, such an

argument undercuts the state's position because it illustrates that for all intents and purposes the governor's presence in the lawsuit means that the state is a party as well. In any event, I will deny the state's motion to intervene as of right because the state has failed to show that the governor will not represent its interests adequately.

B. Permissive Intervention

Permissive intervention is allowed "[u]pon timely application . . . when an applicant's claim or defense and the main action have a question of law or fact in common." See Fed. R. Civ. P. 24(b); see also Sokaogon, 214 F.3d at 949. In order to intervene under Rule 24(b)(2), a would-be intervenor must present: (1) a timely motion; (2) an independent ground for subject matter jurisdiction; and (3) a claim or defense that has a question of law or fact in common with the main action. See EEOC v. National Children's Center, Inc., 146 F.3d 1042, 1046 (D.C. Cir. 1998); Security Insurance Co. of Hartford v. Schipporeit, 69 F.3d 1377, 1381 (7th Cir. 1995).

First, the state's motion to intervene is timely because it was filed on July 16, 2001, a little more than two months after plaintiffs filed their complaint. Timeliness is required to prevent prejudice in the adjudication of the rights of the existing parties. See National Children's Center, 146 F.3d at 1047; see also NAACP v. New York, 413 U.S. 345, 365-66 (1973). Moreover, plaintiffs have not suggested that the motion is untimely or that

intervention by the state at this stage of the proceedings will prejudice them in any way. Second, subject matter jurisdiction exists because this lawsuit falls under federal question jurisdiction. See 28 U.S.C. § 1331. Third, the defenses asserted in the state's proposed answer share the same questions of law and fact at issue in plaintiffs' complaint. Because these requirements have been met, intervention under Rule 24(b)(2) becomes entirely discretionary. See National Children's Center, 146 F.3d at 1046; Schipporeit, 69 F.3d at 1381.

However, the fact that the governor has intervened successfully lingers in the background, making it perplexing why the state argues that it must defend its own interest as to the validity of the Indian Gaming Regulatory Act. Nevertheless, plaintiffs fail to address the state's permissive intervention argument. Instead, plaintiffs assert only that the state does not have a legally protected interest, which is irrelevant. A legally protected interest is not necessary for permissive intervention. Moreover, plaintiffs fail to explain the impact of the state's intervention on their rights given the fact that the governor has been allowed to intervene. See Schipporeit, 69 F.3d at 1381 ("In exercising that discretion, the court must give some weight to the impact of the intervention on the rights of the original parties."). Frankly, it is difficult to see how plaintiffs' rights might be compromised by state intervention when the governor is already a party to the lawsuit. In that same vein, it is difficult to see how the state's interest will not be protected given the governor's

intervention. Both perspectives are reinforced by the fact that the state and governor have filed joint motions to intervene and to transfer.

Despite the fact that plaintiffs and the state both fail to explain the implications of the state's presence (or lack thereof) given the governor's intervention, I will exercise discretion and grant the state's motion to intervene permissively. Although the state's presence appears redundant, proceeding in this fashion seems to be the most prudent and efficient course of action given the claims at issue in this litigation. See Confederated Tribes of Siletz Indians, 110 F.3d at 692 (court allowed both governor and state to intervene in lawsuit challenging gubernatorial concurrence requirement in Indian Gaming Regulatory Act).

ORDER

IT IS ORDERED that the motion to intervene by the State of Wisconsin is DENIED as to an intervention of right and GRANTED as to permissive intervention.

Entered this 20th day of November, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge