

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
6th Division

GULFSIDE CASINO PARTNERSHIP

APPELLANT

vs.

Case No. 60CV-21-1653

**ARKANSAS RACING COMMISSION, and
LEGENDS CASINO AND RESORT, LLC**

APPELLEES

MOTION TO INTERVENE AND BRIEF IN SUPPORT

Intervenor, Choctaw Nation of Oklahoma, a federally recognized Indian tribe (“Choctaw Nation”), by and through its attorneys, submits this *Motion to Intervene and Brief in Support*, and in support thereof states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background surrounding the issuance of a casino license in Pope County is lengthy and complex and is not recited in its entirety here. Choctaw Nation is only seeking to join in this appeal to challenge the Arkansas Racing Commission’s decision regarding the qualification, or lack thereof, of Legends Casino and Resort, LLC under Arkansas Constitutional Amendment 100. For that reason, Choctaw Nation has only recited the facts relevant to that determination.

On November 6, 2018, a majority of Arkansas voters approved Issue 4, codified as Amendment 100 to the Arkansas Constitution (“Amendment 100”), that authorized casinos and casino gaming in the State of Arkansas. Amendment 100 allows for the issuance of four casino

licenses for the purposes of conducting casino gaming in Arkansas, one of which is for a casino to be located in Pope County, Arkansas. Ark. Const. Amend. 100, §§ 4(j) and (k).

Amendment 100 defines “casino applicant” as “any individual, corporation, partnership, association, trust, or other entity applying for a license to conduct casino gaming at a casino.” Ark. Const. Amend. 100, § 2(b). Amendment 100 states that the Racing Commission shall award a casino license to a *casino applicant* for the casino to be located in Pope County. Ark. Const. Amend. 100, § 4(k). Emphasis added. Amendment 100 requires that all casino applicants for a casino license in Pope County demonstrate experience conducting casino gaming. Ark. Const. Amend. 100, §4(m).

On January 15, 2020, Legends Resort and Casino, LLC (“Legends”) submitted an application to the Racing Commission for the Pope County casino license and asked that its application be accepted as part of the May 2019 application period, after the submission deadline, “for good cause shown,” pursuant to Rule 2.13.4(b) of the Arkansas Casino Gaming Rules. The entity known as “Legends” is an Arkansas limited liability company formed on September 11, 2019. The sole member of Legends Resort & Casino, LLC, is CNB, which, in turn, is the sole member of Cherokee Nation Entertainment, LLC (“CNE”).

The application submitted by Legends on January 15, 2020, provided for only one entity, Legends, as the applicant. CNB was not an applicant on the January 15, 2020, application submitted by Legends.

Legends has never, now or at any other time, presented evidence that it has ever held a casino license in any state or ever engaged in “casino gaming” as defined by Amendment 100. Further, CNB has never, now or at any other time, presented evidence that it has ever held a casino license in any state or ever engaged in “casino gaming” as defined by Amendment 100. CNE

allegedly operates ten casinos in Oklahoma, but CNE contains no ownership interest in nor operates as a member of Legends or CNB.

On April 15, 2020, the Racing Commission held a public meeting and voted to accept the application of Legends as part of the May 2019 application period for “good cause shown,” pursuant to Casino Gaming Rule 2.13.4(b). On May 7, 2020, the Racing Commission met and voided the vote it took on April 15, 2020. After voiding the April 15, 2020, vote, the Racing Commission again voted to accept Legends’ January 2020 application as part of the May 2019 application period “for good cause shown.” As of May 7, 2020, Legends, and only Legends, had an accepted application for casino gaming in Pope County to the Racing Commission under the “good cause shown” exception pursuant to Casino Gaming Rule 2.13.4(b).

On June 20, 2020, Gulfside submitted a letter to the Racing Commission, wherein it alleged that Legends was not a qualified applicant under Amendment 100 because Legends does not have experience conducting casino gaming, as required by Amendment 100. (Amendment 100 states, “The Arkansas Racing Commission shall require all casino applicants for a casino license in Pope County and Jefferson County *to demonstrate experience conducting casino gaming.*” Amendment 100, § 4(m) (Emphasis added)).

On July 28, 2020, the Racing Commission issued a notice of meeting to be held on July 30, 2020, to consider Gulfside’s request for determination regarding Legends’s qualified applicant status under Amendment 100 and Legends’s appeal of the denial of its application. On July 30, 2020, the Racing Commission took up Gulfside’s challenge to the Racing Commission’s finding that Legends was a qualified applicant, and the Racing Commission held a hearing on Gulfside’s motion that Legends was not a qualified applicant because it did not demonstrate experience conducting casino gaming. At the conclusion of the hearing, the Racing Commission found that

Legends met Amendment 100's casino-gaming-experience requirement, based upon CNB's history of gaming experience through CNE.

On February 2, 2021, the Racing Commission approved two sets of Findings of Fact, Conclusions of Law, and Orders. The first reflects the Racing Commission decision that Legends met Amendment 100's casino-gaming-experience requirement, based upon CNB's history of gaming experience through CNE. On March 9, 2021, Gulfside timely filed its appeal of the Racing Commission's decision that Legends met Amendment 100's casino-gaming-experience requirement.

On November 12, 2021, the Racing Commission held a meeting and, based on its prior determination that Legends was a qualified casino applicant, issued a casino license to "Cherokee Nation Businesses, LLC/Legends Resort & Casino, LLC." Unless this Court takes action to reverse the Racing Commission's determination that Legends is a qualified casino applicant, Legends will build and operate a casino in Pope County, Arkansas.

Choctaw Nation owns and operates Choctaw Casino & Resort located in Pocola, Oklahoma, which is less than 100 miles from Pope County. The Pocola casino and a Pope County casino would be in the same geographic market. Choctaw Nation invested millions of dollars in its Pocola location. Choctaw Nation expects that, should Legends operate a casino in Pope County (in violation of Amendment 100), Choctaw Nation will lose at least \$12 million annually in casino gaming revenue. A Pope County casino will be in direct competition with Choctaw Nation's Pocola casino and the operation of a Pope County casino will cause Choctaw Nation to suffer injury to its business and property interests. For this reason, Choctaw Nation seeks judicial review of the Racing Commission's determination that Legends is a qualified casino applicant under Arkansas Constitutional Amendment 100.

LEGAL ANALYSIS

The Arkansas Administrative Procedures Act (“APA”) provides that in cases of adjudication, any person . . . who considers himself or herself injured in his or her person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter.” Ark. Code Ann. § 25- 15-212(a). Appellant, Gulfside, timely filed an appeal of the Racing Commission’s adjudication that Legends met Amendment 100’s casino-gaming-experience requirement. Appellee, Legends, has challenged Gulfside’s standing to pursue this APA appeal and has filed a motion to dismiss, which is pending before the Court. To protect its business and property interests, Choctaw Nation seeks to join in this appeal to challenge Legends qualification under Arkansas Constitutional Amendment 100.

Under the APA, “[i]n its discretion, the court may permit other interested persons to intervene.” Ark. Code Ann. § 25- 15-212(a)(3). Further, an interested person may intervene regardless of whether the person was a party to the underlying administrative proceeding or not. *See Arkansas Bev. Retailers Ass’n v. Moore*, 369 Ark. 498, 256 S.W.3d 488 (2007) (citing *Estes v. Walters*, 269 Ark. 891, 601 S.W.2d 252 (Ark. App. 1980)). Rather, any person “who has been adversely affected or aggrieved by the action of an agency covered by the Act, may seek redress[.]” *Id.* Both the Arkansas Court of Appeals and Supreme Court have interpreted the APA to find standing exists when a person demonstrates “how he or she has already sustained or is immediately in danger of sustaining such an injury as a consequence of the agency’s action. [Footnote omitted.]” *Id.*

In *Estes, supra*, the circuit held that the appellant lacked standing to seek review of the agency’s decision to award a new liquor license because she had not appeared and protested the decision prior to the agency’s action being taken. 269 Ark. at 892-93. The Supreme Court

reversed, finding the circuit court's interpretation "unduly restrictive." *Id.* Specifically, the Supreme Court in *Estes* held that "[i]t is plain that any person who had been adversely affected or aggrieved by the action of an agency covered by the Act, may seek redress. . . ." *Id.* Thus, under *Estes*, Choctaw Nation has standing to seek judicial review of the Racing Commission's action even though it did not appear at the hearing before the Commission as long as it can demonstrate an injury as a consequence of the Commission's action, which, as set forth below, it can.

In *Moore, supra*, the circuit court held that a beverage retailers association lacked standing under the APA to challenge the ABC Board's decision to grant a liquor permit to Sam's Club, concluding that the financial impact on area stores as a result of the decision was insufficient to sustain a finding of standing. 369 Ark. 498, 505. Specifically, in *Moore*, the ABC Board made a decision to approve an application to transfer a liquor permit on behalf of Sam's Club to a location that would be in direct competition with other liquor stores. The circuit court stated that "financial impact on areas stores could not support standing" to challenge the decision. *Id.* The Arkansas Supreme Court disagreed and reversed, holding that the association had standing because they had shown injury and a prejudicial impact on its members in the form of damage to their business and property interests as a result of the ABC Board's action and, thus, they were entitled to a judicial review of the ABC Board's action. *See id.* at 506.

Under the Supreme Court's holding in *Moore*, Choctaw Nation has standing to challenge the Racing Commission's decision that Legends is a qualified casino applicant because Choctaw Nation is immediately in danger of sustaining an injury as a consequence of the Racing Commission's decision. Indeed, as a consequence of the Racing Commission's decision that Legends is a qualified applicant, the Racing Commission has awarded Legends a license that will allow Legends to build and operate a competing casino in the same geographic market where

Choctaw Nation operates. Choctaw Nation estimates that it will lose \$12 million annually in casino gaming revenue as a consequence of the Racing Commission's action. Thus, Choctaw Nation has shown it is in danger of sustaining an injury to its business interests and, therefore, it has standing under *Moore*.

A Legends' Pope County casino would be in direct competition with Choctaw Nation's Pocola casino and will cause Choctaw Nation to lose a significant amount of casino gaming revenue. As such, Choctaw Nation has standing to seek review of the Racing Commission's decision that Legends is a qualified casino applicant and, thus, capable of holding a license under Arkansas Constitutional Amendment 100. *See Moore v. Arkansas Alcoholic Bev. Control Bd.*, 2016 Ark. 422 (holding that liquor store owner had standing to seek review of agency's decision to grant a license for a nearby location that would be in direct competition with proposed new store).¹ A copy of Choctaw Nation's proposed *Petition to Join in Appeal and for Reversal of Adjudication under the Administrative Procedure Act* is attached hereto as Exhibit "A."

Counsel for Choctaw Nation is authorized to represent to the Court that Appellant, Gulfside, consents to its intervention in this matter.

WHEREFORE, Choctaw Nation respectfully requests that they be joined as parties in this matter, allowed to intervene to argue and defend their interests as full parties to this action, and for all other relief to which Choctaw Nation is entitled.

¹ Choctaw Nation asserts that they also have standing to intervene under Rule 24(a) of the Arkansas Rules of Civil Procedure because (1) they have a recognized interest in the subject matter of the litigation; (2) their interest might be impaired by the disposition of the suit; and (3) their interest is not adequately represented by existing parties. *See Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership*, No. CV-20-211 (Feb. 4, 2021). Indeed, given the motion to dismiss filed by Legends asserting that Gulfside lacks standing, Choctaw Nation's interests would no longer be protected if the Court were to determine that Gulfside lacks standing. "If a putative intervenor satisfies all three factors, intervention cannot be denied." *Id.* Thus, under both the APA and Rule 24(a), Choctaw Nation should be permitted to intervene.

Respectfully submitted,

Choctaw Nation of Oklahoma

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the forgoing have been served via the court's electronic filing system on all counsel of record on this the 30th day of November, 2021:



Attorneys for Choctaw Nation of Oklahoma