IN THE SUPREME COURT OF GUAM

ALICIA G. LIMTIACO, ATTORNEY GENERAL OF GUAM, OFFICE OF THE ATTORNEY GENERAL OF GUAM,
Petitioner-Appellee,

v.

DEPUTY DIRECTOR JOHN P. CAMACHO, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DEPARTMENT OF REVENUE AND TAXATION OF THE GOVERNMENT OF GUAM; ARTEMIO B. ILAGAN, IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF REVENUE AND TAXATION OF THE GOVERNMENT OF GUAM,
Respondents-Appellees,

GUAM MUSIC, INC., A GUAM CORPORATION,
Applicant for Intervention, Real Party in Interest-Appellant.

OPINION

Cite as: 2009 Guam 7

Supreme Court Case No.: CVA08-010
Superior Court Case No.: SP0141-08

Appeal from the Superior Court of Guam
Argued and submitted March 6, 2009
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Presiding Justice[1]; MIGUEL S. DEMAPAN, Justice *Pro Tempore*; ALEXANDRO C. CASTRO, Justice *Pro Tempore*.

MARAMAN, J.:

[1] Applicant for Intervention-Appellant Guam Music, Inc. ("GMI") appeals the Superior Court's denial of its motion to intervene. GMI seeks to intervene in Superior Court case number SP0141-08 in which the Attorney General of Guam requested and received a writ of mandamus. The writ commanded the Guam Department of Revenue and Taxation ("the DRT") to revoke licenses for gaming machines that had been operated by GMI. For the reasons set forth below, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On about May 29, 2008, the DRT sent a notice to GMI that it would not be renewing the licenses for GMI's gaming machines. The DRT Director, in consultation with the Attorney General ("AG"), had determined the machines being licensed to GMI were actually illegal gambling devices. GMI then attempted to pay the licensing fees anyway, but the DRT refused payment. GMI sought a Petition for Writ of Mandate in the Superior Court requesting that the licenses issue. In the Petition, GMI argued that 5 GCA § 9212 prevents the DRT from making an order adversely affecting the rights of GMI while the administrative hearing process is pending.

[3] In the meantime, the Acting Governor of Guam issued a directive to the Director of the DRT, ordering him to issue the licenses to GMI. The licenses were issued the same day. GMI,

[1] Chief Justice Robert J. Torres and Associate Justice F. Philip Carbullido recused themselves from this matter. Justice Maraman as the senior member of the panel was designated Presiding Justice.

apparently confident that the Acting Governor's order effectively resolved the issue, moved to dismiss its Petition for Writ of Mandate on July 8th.

[4] The AG was undeterred. In response to the Acting Governor's letter, the AG issued her own demand letter to the DRT which threatened to "compel [the] DRT to perform its regulatory duties." Appellant's Excerpts of Record ("ER"), tab 7 (Letter from the AG to Director, DRT, July 3, 2008). On July 11th, she filed a Petition for Writ of Mandamus in the Superior Court to compel the DRT to revoke GMI's licenses. The AG's Petition for Writ of Mandamus is the underlying case in which GMI seeks to intervene. Twenty days later, while the AG's Petition was pending, GMI's original Petition for Writ of Mandamus was denied because GMI "advised the court that it no longer wishes to go forward with the pre-emptory [sic] writ and rest[ed] without putting on any evidence . . . ." ER, tab 4 at 2 (Order after Hr'g, July 31, 2008). Meanwhile, the DRT attempted to file an answer to the AG's Petition, which was rejected because it was not verified under oath. On August 18th, the Superior Court issued a Decision and Order granting the AG's Petition for Writ of Mandamus and ordering GMI's licenses to be revoked.

[5] Four days later, GMI filed a Motion to Intervene and for a Stay of Enforcement of the Order Entered in August 18, 2008 in SP0141-08.[2] The Motion was denied September 10, 2008. GMI then filed a timely notice of appeal.

II. JURISDICTION

[6] GMI contends that this court has jurisdiction over an appeal from the Decision and Order of September 10, 2008, apparently because it was a final judgment. Appellant's Br. at 1 (Dec. 9,

[2] The text of this motion was not included as part of the Excerpts of Record.

2008) (citing 7 GCA §§ 3107, 3108 (2008) and 48 U.S.C. §§ 1421-1, 1421-3). The question is whether denial of a motion to intervene is a "final judgment" for purposes of appeal.

[7] According to federal case law, the denial of a motion to intervene is treated as a final, appealable judgment. *See Marino v. Ortiz*, 484 U.S. 301, 304 (1988); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987); 7C Wright, Miller & Kane, *Federal Practice & Procedure* § 1923 (2005 Supp.) ("Any denial of intervention should be regarded as an appealable final order"). By analogy to the federal case law, this court has jurisdiction to hear this appeal.

III. STANDARD OF REVIEW

[8] A denial of a motion to intervene as of right is reviewed *de novo*. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). The court's decision on the issue of timeliness, however, is reviewed for abuse of discretion. *Id.*; *but see League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997) (reviewing a timeliness determination *de novo* where the lower court disposed of the issue with a curt, single-sentence answer).

[9] In contrast, permissive intervention "is wholly discretionary with the [lower] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470-71 (5th Cir. 1984) (quoting 7C Wright & Miller, *Federal Practice and Procedure* § 1913 at 551).

IV. DISCUSSION

[10] Rule 24(a) of the Guam Rules of Civil Procedure provides a method by which a party may intervene in a case as a matter of right:

Rule 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and 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, unless the applicant's interest is adequately represented by existing parties.

Guam R. Civ. P. ("GRCP") 24(a). An applicant for intervention must satisfy the following four criteria before a motion to intervene can be granted: (1) the motion to intervene must be timely; (2) the applicant must have a "significantly protectable interest" relating to the property or transaction that is the subject of the suit; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *League of United Latin Am. Citizens*, 131 F.3d at 1302; *Nw. Forest Res. Counsel v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). These factors are construed broadly in favor of intervention. *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996); *Donnelly*, 159 F.3d at 409.

A. Timeliness of the Motion to Intervene

[11] Timeliness is a threshold requirement for application to intervene as a matter of right. *League of United Latin Am. Citizens*, 131 F.3d at 1302; *see also NAACP v. New York*, 413 U.S. 345, 369 (1973). If a motion to intervene is not timely, the court need not consider the other factors in denying intervention. *Washington*, 86 F.3d at 1503. The United States Supreme Court

has stated that "[t]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York*, 413 U.S. at 366.

[12] In determining whether a motion to intervene is timely, the Ninth Circuit considers three factors: (1) the stage of the proceedings at the time the applicant seeks to intervene; (2) the prejudice to the other parties if the motion is granted; and (3) the reason for and length of the delay. *League of United Latin Am. Citizens*, 131 F.3d at 1302; *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). Post-judgment motions to intervene are not necessarily untimely, and have been allowed when made before the time to appeal has run. *See United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394-95 (9th Cir.1992); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977).

1. Stage of the Proceedings

[13] The Superior Court based its decision to deny intervention almost entirely on the issue of timeliness. ER, tab 27 at 3-6 (Dec. & Order, Sept. 10, 2008). The critical issue appeared to be the first factor of the timeliness analysis—that is, the fact that the "stage of the proceedings" was in the post-judgment phase when GMI moved to intervene. *Id.* The court relied on language from *Pellegrino v. Nesbit* which stated that "[i]ntervention should be allowed even after a final judgment *where it is necessary to preserve some right which cannot otherwise be protected.*" 203 F.2d 463, 465 (9th Cir. 1953) (emphasis added); ER, tab 27 at 4 (Dec. & Order) (emphasis added). The court then found the motion to intervene untimely because GMI failed to make a showing that intervention was necessary to preserve a right that cannot be otherwise protected. ER, tab 27 at 4 (Dec. & Order).

[14] Although the present case is now in the post-judgment phase of the proceedings, denial of the motion to intervene is not a foregone conclusion. An examination of the case law reveals that, in general, post-judgment interventions are tolerated when a party with interests similar to the applicant's fails to take further action. One example is *United States ex rel. McGough v. Covington Technologies Co.*, which involved a *qui tam* action against several corporations with government contracts. 967 F.2d at 1393. In a *qui tam* action, the government is allowed to intervene after sixty days only upon showing of good cause. *Id.* at 1392; *see also* 31 U.S.C. § 3730(c)(3) (2009). The private plaintiff in *McGough* agreed to a stipulation dismissing a suit with prejudice against one of the defendant corporations. *Id.* at 1393. After judgment had been rendered against the remaining defendant, the government attempted to intervene for the purpose of appealing the earlier stipulated dismissal. *Id.* The plaintiff, having voluntarily agreed to the stipulated dismissal, presumably had no interest in appealing. The motion to intervene was granted on appeal. *Id.* at 1397.

[15] In *Yniguez v. Arizona*, the plaintiffs successfully convinced a U.S. District Court that Arizona's new constitutional amendment making English the official language was facially unconstitutional. 939 F.2d 727, 729-30 (9th Cir. 1991). The defendant-Governor, who had opposed the amendment during her election campaign, publicly announced that she had no intention of appealing. *Id.* at 730. The group Arizonans for Official English moved to intervene so that they could prosecute an appeal. *Id.* On appeal, the motion was granted. *Id.* at 740.

[16] In *Pellegrino v. Nesbit*, a case cited by the Superior Court, a corporation sued its employees to recover short-swing profits resulting from the corporation's own options agreements. 203 F.2d at 465. The lower court held the corporation to be estopped from recovering profits because it had itself drafted the options agreements. *Id.* The corporation's

board of directors, who may have been "reluctant to bring suit against its own beneficial owners, directors or officers", *id.* at 467, announced that it would not pursue an appeal. *Id.* at 465. Shortly thereafter, the stockholder who had urged the board to pursue the original case moved to intervene. *Id.* at 465. The denial of the motion to intervene was reversed on appeal. *Id.* at 469.

[17] Finally, the United States Supreme Court addressed a similar issue in *United Airlines v. McDonald*, 432 U.S. 385 (1977). There, certain female employees brought an equal protection suit against United Airlines arguing that the policy of requiring female stewardesses to remain single (while allowing male stewards to marry) was unconstitutional. *Id.* at 387. After final judgment against United on the issue of liability, one would-be plaintiff attempted both to intervene and to class certify all employees who had been fired as a result of the discriminatory policy. *Id.* at 389-90. The district court denied her motions as untimely and she appealed. *Id.* at 390. The original plaintiffs, who had already received a favorable judgment, presumably had no motivation to appeal and enlarge the number of plaintiffs. The Court of Appeals reversed the motion to intervene and allowed class certification. *Id.* at 390. The Supreme Court affirmed. *Id.* at 396.

[18] At oral argument before this court, the Deputy Attorney General admitted that DRT has agreed to comply with the writ of mandamus. Digital Recordings at 10:40 (Oral Argument, Mar. 6, 2009). From this we conclude that the present case is conceptually similar to the abovementioned cases in that the would-be intervener is left without a party willing to mount a post-judgment challenge. Because the DRT has essentially resigned itself to obeying the writ, GMI makes a good argument that intervention is "necessary to preserve some right which cannot otherwise be protected." *Pellegrino*, 203 F.2d at 465. Thus, the fact that the motion to intervene

occurred post-judgment does not necessarily require this court to find that the motion was untimely.

2. Prejudice to the Other Party

[19] In determining whether granting a motion to intervene will prejudice the other party, the Ninth Circuit has recognized that "additional delay [due to a motion to intervene] is not alone decisive (otherwise *every* intervention motion would be denied out of hand because it carried with it, almost [by] definition, the prospect of prolonging the litigation.)" *League of United Latin Am. Citizens*, 131 F.3d at 1304 (emphasis in original). In *League of United Latin American Citizens*, the applicants for intervention filed their motion almost twenty-seven months after the initial complaints were filed but before final judgment. *Id.* at 1301. On appeal, the court found that the motion to intervene, if granted, would be prejudicial in that it would occur "at a time when the litigation was, by all accounts, beginning to wind itself down . . . ." *Id.* at 1304. The court was concerned that additional motions and discovery requests could cause prejudicial delay. *Id.*

[20] Here, in contrast, the litigation is finished—only the post-judgment challenges remain. At this point there is no possibility of additional discovery, so it is difficult to conceive of any significant prejudice that might result from allowing intervention. The AG's principle argument for prejudice is that if intervention is granted "there will be two separate cases going at the same time to resolve the same issues . . . ." Appellee's Br. at 21 (Jan. 8, 2009). However, the other case, *Guam Music, Inc. v. Ilagan*, SP0219-08 (Super. Ct. Guam) (filed Nov. 13, 2008), does not even name the AG as a party, and therefore no prejudice to the AG can result from that case. At oral argument, the Deputy Attorney General also made the additional arguments that: (1) intervention may subject the DRT to lawsuits by other machine operators; and (2) intervention

may cause the final judgment to be reopened. *See* Digital Recording at 10:52-10:54 (Oral Argument). Again, the DRT's potential problems are not to be attributed to the AG. As to the second point, the AG's preference for the passive, post-judgment response of the DRT does not amount to prejudice. The AG has therefore failed to make a showing of prejudice, which weighs against a finding of untimeliness.

3. The Reason for and Length of the Delay

[21] Next, we examine the reason for and length of the delay. GMI argues that its motion to intervene was filed only three days after final judgment, and that the DRT's pending motions could have subsequently vacated that judgment. Appellant's Br. at 20. GMI also argues that at the time the AG filed the present case, GMI's own petition for writ of mandamus was still before the court. *Id.* at 21. In response, the AG argues, among other things, that GMI is a sophisticated party, that GMI was aware all along that the present case was pending before the court, and that neither the AG nor the DRT had a duty to join GMI and other gaming machine owners as interested parties. Appellee's Br. at 12-19.

[22] The AG cites to *Farmland Dairies v. Commissioner of New York State Department of Agriculture and Markets*, 847 F.2d 1038 (2d Cir. 1988). In *Farmland Dairies*, an out-of-state milk producer alleged that New York's Commissioner of Agriculture and Markets was giving preferential treatment to in-state milk producers. *Id.* at 1040-41. The district court eventually issued a memorandum sustaining Farmland's commerce clause claim. *Id.* at 1041. Farmland then settled with the defendants. *Id.* at 1042. At the final settlement hearing, several New York milk dealers moved to intervene. *Id.* at 1039, 1042. The denial of the motion was affirmed on appeal, in part because the milk dealers had "intervened and participated fully in the state administrative hearings on Farmland's four-county application." *Id.* at 1044-45.

[23] The present case is distinguishable from *Farmland* in that the milk producers in *Farmland* sat on their rights for approximately six months. *Id.* at 1042. By contrast, the present case proceeded from petition to final judgment in less than forty days. Moreover, GMI's interest in intervening did not become urgent until just eighteen days before final judgment, when its separate petition for writ of mandamus was dismissed. While parties must be diligent in protecting their interests, we are not prepared to hold that the modest delays present here were manifestly unreasonable. All of the cases cited by the parties and upholding the denial of a motion to intervene involve significantly longer delays. *See Assoc. Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1253-54, 1256 (D.C. Cir. 1999) (intervention sought eleven months after filing and several weeks after decision); *Atl. Mut. Ins. Co. v. Nw. Airlines, Inc.*, 24 F.3d 958, 961 (7th Cir. 1994) (intervention sought fifteen months after filing and three months after decision); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061-62 (9th Cir. 1997) (intervention sought several years after filing and nearly three months after decision); *League of United Latin Am. Citizens*, 131 F.3d at 1304 (intervention sought twenty-seven months after filing); *NAACP v. New York*, 413 U.S. at 346 (intervention sought four months after filing); *Washington*, 86 F.3d at 1502 (interventions sought two to six years after filing).

[24] As for the reason for the delay, GMI's co-counsel, Attorney F. Randall Cunliffe, submitted an affidavit explaining the relevant events. ER, tab 24 (Cunliffe Aff., Sept. 4, 2008). The affidavit can be summarized as follows: (1) Cunliffe was advised by the DRT's attorney that the DRT would be filing a motion to join GMI in the petition as an indispensable party; (2) Cunliffe was off-island from August 4 to August 22, 2008; and (3) upon returning to Guam, Cunliffe was made aware the motion to join GMI had not been filed at the request of the

Governor. *Id.* at 2. GMI filed its motion to intervene the day of Cunliffe's return, at which point the Decision and Order granting the writ was already four days old. Appellant's Br. at 15.

[25] From the Affidavit, we conclude that GMI's reasons for the delay are twofold: (1) Cunliffe was relying on representations that the DRT intended to join GMI as an indispensible party; and (2) Cunliffe was off-island and unaware that GMI had not been joined. While neither of these reasons is sufficient to excuse a hard deadline, the truth is that as a practical matter, travel *does* make it somewhat more difficult to communicate, and attorneys often *do* rely on the representations of friendly counsel. Given the nebulous requirement that a motion to intervene be "timely," the lack of a hard deadline, and the relatively short time period involved, a reasonable attorney could have relied on the DRT's representations under the circumstances. Certainly, GMI wasted no time filing the motion to intervene once the petition was granted and it became clear that the DRT could not or would not join GMI as an indispensible party. After examining all the relevant circumstances, we find that the reason for and length of the delay weigh in favor of a finding that the motion to intervene was timely filed.

[26] Finally, we note that all the factors relevant to determining whether intervention is timely are to be construed broadly in favor of intervention. *Washington*, 86 F.3d at 1503; *Donnelly*, 159 F.3d at 409. The Superior Court did not broadly construe the factors in favor of intervention when it emphasized only the fact that the motion to intervene was filed after the Decision and Order was issued. Our own review of the factors reveals that the motion to intervene was, in most respects, timely. Although we do not substitute our own judgment for that of the Superior Court in abuse-of-discretion review, we have in this case a "definite and firm conviction" that the Superior Court "committed clear error of judgment" in weighing the relevant factors. *People v. Tuncap*, 1998 Guam 13 ¶ 12. The court's determination that the intervention was untimely is

therefore reversible error. However, an applicant for intervention as a matter of right must also satisfy the other requirements of GRCP 24(a), which we now review *de novo*. *See Donnelly*, 159 F.3d at 409.

B. "Significantly Protectable Interest"

[27] An applicant must demonstrate that it has a "significant protectable interest" in the litigation to merit intervention. *Donnelly*, 159 F.3d at 409. To demonstrate such an interest, the applicant must establish: (1) "the interest [asserted] is protectable under some law," and (2) there is a "relationship between the legally protected interest and the claims at issue." *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).

[28] GMI points to a number of "interests" it has in the present case including: (1) due process rights under the Administrative Adjudication Law, 5 GCA § 9100 (2008) *et seq.*; (2) property interests in the gaming machine licenses; and (3) business interests related to the licenses. Appellant's Br. at 22. In response, the AG argues that GMI's interests are merely "economic interests" that are not "significantly protectable" for purposes of establishing the right to intervene. Appellee's Br. at 24-25. Of course "economic interest" is a term of art in this area of law, as virtually every pecuniary interest is "economic" under the plain meaning of the word.

[29] To illustrate the difference between an "economic" and a "significantly protectable" interest, the AG cites to two cases. The first is *Nikon Corp. v. ASM Lithography B.V.*, where optics manufacturer Zeiss sought to intervene in a patent infringement case brought by Nikon, another optics manufacturer. 222 F.R.D. 647, 648 (D. Cal. 2004). The defendant company made photolithography equipment using optics supplied by Zeiss.[3] *Id.* In fact, the defendant

[3] Although not explicitly stated in the opinion, one can assume from the posture of the case that the optical components supplied by Zeiss did not themselves infringe on Nikon's patents.

company was Zeiss's only customer, so the two were likely to "stand and fall together." *Id.* Even so, the court found that Zeiss's interests were merely "economic" and therefore not sufficiently protectable for purposes of intervention as of right. *Id.* at 650-51. Zeiss *was* allowed to intervene permissively, however. *Id.* at 651.

[30] The AG also cites to *Medical Liability Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006 (8th Cir. 2007). There, a plaintiff suing a nursing home sought to intervene in a declaratory judgment suit between the nursing home and its insurance provider. *Id.* at 1007-08. The court concluded that the intervenor's "only interest here is to ensure that the defendants in her state lawsuit have sufficient resources to satisfy any judgment she might obtain against them. This interest is too remote and indirect to qualify as a cognizable interest under Rule 24(a)(2)." *Id.* at 1008.

[31] A case more on point is *Sierra Club v. EPA*, 995 F.2d 1478. In *Sierra Club*, the City of Phoenix sought to intervene in a case involving a Clean Water Act lawsuit brought by the Sierra Club against the EPA. *Id.* at 1480. The Sierra Club was attempting to force the EPA to reduce pollution emitted by wastewater treatment plants to which the EPA granted licenses. *Id.* at 1480-81. In finding that the City of Phoenix had a sufficiently protectable interest in the lawsuit, the court stated:

> The City of Phoenix . . . owns the wastewater treatment plants and the permits. These interests are rights connected with the City's ownership of real property and its status as an EPA permittee. Such rights are among those traditionally protected by law . . . .

Id. at 1482. Here too, GMI had former rights in its gaming licenses which were connected to its ownership of property, i.e. the gaming machines, and its status as a licensee. Moreover, GMI's profits are directly related to its ability to obtain licenses and legally operate its machines. Those licenses are protected under the regulatory licensing scheme implemented by the DRT, and the

status of those licenses is the central issue in the present case. GMI therefore has a "significantly protectable interest" in this case.

C. Impairment of GMI's Ability to Protect its Interests

[32] Next, one must examine whether the DRT's defense against revocation of the licenses would impair or impede GMI's ability to protect the licenses. *See Donnelly*, 159 F.3d at 409. The Superior Court believed, as indicated in a footnote, that GMI's motion to intervene would fail to meet this test—that is, "the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect [its] interest." *Sierra Club*, 995 F.2d at 1481; ER, tab 27 at 5 n.3 (Dec. & Order). According to the Superior Court, GMI had conceded that its "remedy lies not in its intervention in this action but by independently asserting it[s] rights which continue to be unaffected by this order." ER, tab 27 at 5 (Dec. & Order).

[33] Presumably, the remedy referred to by the court is GMI's ability to seek an administrative hearing or petition for another writ of mandamus. In fact, GMI has apparently sought both of these remedies.[4] However, the test is not whether a party's remedies are completely foreclosed—rather, this court must consider whether those remedies are impaired or impeded by not allowing intervention. *See Sierra Club*, 995 F.2d at 1486 (noting that the applicant for intervention could have pursued additional administrative or judicial proceedings, but also finding that the applicant's ability to protect its interests was impaired).

[34] The AG attempts to distinguish *Sierra Club* by arguing that the interests of the City of Phoenix, as applicant for intervention in that case, would have been impaired because it would have to follow any new EPA rules resulting from a judgment. Appellee's Br. at 23. GMI, the

[4] GMI filed a notice of defense with the DRT regarding revocation of its licenses. Appellant's Br. at 7. We also take judicial notice that GMI filed another petition for writ of mandamus against the DRT after this appeal was taken. Appellee's Br. at 6-7.

argument goes, is not similarly impaired, as demonstrated by its ability to bring its own writ petition before the court. *Id.* However, revocation by mandamus would certainly impair GMI's interests in its licenses and, more importantly, impede its ability to seek its own writ of mandamus. This is because the court in a subsequent proceeding might find itself bound by the law of the case or *res judicata.* In fact, it is not even clear that GMI would have an administrative remedy with the DRT once a superior tribunal (that is, the Superior Court) makes a final determination that revocation is essentially a ministerial duty.[5] *Cf. Duenas v. Guam Election Comm'n*, 2008 Guam 1 ¶ 31 (petitioner for mandamus relief must show a "clear, present, and usually ministerial duty on the part of the respondent" (quoting *Bank of Guam v. Reidy*, 2001 Guam 14 ¶ 13)). For these reasons, we find that GMI's interests will be impaired if it is not allowed to intervene in the present case and seek a more favorable resolution.

D. Inadequate Representation by the DRT

[35] In determining whether the DRT can adequately represent GMI's interests, a court must consider: (1) "whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments"; (2) "whether the present party is capable and willing to make such arguments"; and (3) "whether the intervenor would offer any necessary elements to the proceedings that the other parties would neglect." *Cal. v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). On the other hand, "[a] mere difference of opinion concerning the tactics with which litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party or who are formally represented

[5] Alas, such procedural oddities are inevitable when one fails to proceed in an orderly fashion through regular administrative channels. We also note that the existence of an administrative law remedy might be at odds with the requirement that a writ of mandamus be issued where there is "not a plain, speedy and adequate remedy in the ordinary course of law . . . ." 7 GCA § 31203 (2005); *Dep't of Agric. v. Civil Serv. Comm'n.*, 2007 Guam 21 ¶ 37. However, the writ of mandamus itself is not currently before this court.

in the lawsuit." *Jones v. Prince George's County, Md.*, 348 F.3d 1014, 1020 (D.C. App. 2003) (quoting 7C Wright & Miller, *Federal Practice and Procedure* § 1909, at 344 (2d ed.1986)).

[36] Because the DRT filed a defective answer, GMI argues that the court essentially granted a *de facto* default judgment in favor of the AG. Appellant's Br. at 24-25. GMI therefore claims that the DRT has failed to adequately represent GMI's interest in obtaining a hearing on the merits of its administrative law claims. *Id.* The AG argues that GMI's arguments amount to a complaint about how the DRT handled the case, not a difference in position on the underlying issues. Appellee's Br. at 24. Although we agree that the DRT's trial mistake does not demonstrate an inability to represent GMI's interests, we are troubled by the significant differences between GMI's interests and those of the DRT.

[37] GMI argues that the DRT's goal is to prevent GMI's licenses from being reissued. Appellant's Br. at 24. As evidence of this, GMI points to a License/Registration Non-Renewal Notice that the DRT sent to GMI and other licensees stating that the licenses would not be reissued. *Id.* at 6. The DRT also refused to accept payment for the licenses. *Id.* at 7. In fact, the DRT's only major concern, and the reason it argued against the writ, is that the writ might deny GMI and others administrative due process. *See id.* at 9, 11, 22.

[38] In its brief, GMI declared its intention of raising additional arguments not raised by any other party. *Id.* at 25. These include:

> (1) denial of due process; (2) asserting that the writ was issued improperly because it was granted by default in violation of 7 GCA § 31205; (3) it was issued without notice to or inclusion of an interested party, the real party in interest, and/or an indispensible party; (4) challenging the writ and judgment as void under 7 GCA Rule 60; (5) seeking reconsideration of the writ and judgment under 7 GCA Rule 59; and (6) challenging the petition on the merits and after the presentation of evidence at a trial on the petition.

Id. GMI is almost certainly correct in asserting that the DRT will not raise these arguments, as the DRT has apparently decided to obey the court's mandate. Because the DRT is unwilling to

make any of GMI's arguments, or even institute further proceedings, GMI will not be adequately represented in the absence of intervention.

V. CONCLUSION

[39] The Superior Court abused its discretion in finding that the motion to intervene was untimely. After weighing the other factors *de novo*, we conclude that GMI's motion to intervene as a matter of right should have been granted. As a result, the issue of permissive intervention need not be addressed. The Superior Court's Decision and Order denying the motion to intervene is hereby **REVERSED**. The case is **REMANDED** to the Superior Court for whatever further proceedings are still available to the parties.

MIGUEL S. DEMAPAN
MIGUEL S. DEMAPAN
Justice, *Pro Tempore*

ALEXANDRO C. CASTRO
ALEXANDRO C. CASTRO
Justice, *Pro Tempore*

KATHERINE A. MARAMAN
KATHERINE A. MARAMAN
Presiding Justice