UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,

Plaintiff,

v.

BAY MILLS INDIAN COMMUNITY,

Defendant

AND

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff,

v.

BAY MILLS INDIAN COMMUNITY

Defendant.

Case No. 1:10-cv-01273-PLM
Case No. 1:10-cv-01278-PLM

(Consolidated Case No. 1:10-cv-01273-PLM)

HONORABLE PAUL L. MALONEY

RESPONSE REGARDING MOTION TO AMEND COMPLAINT AND JOIN ADDITIONAL PARTIES

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INTRODUCTION

The State of Michigan (State) initiated the present lawsuit in order to enjoin the Bay Mills Indian Community (Bay Mills) from operating a gaming facility on the Tribe's land in Vanderbilt, Michigan. The basis for the initial complaint was its claim that the Indian Gaming Regulatory Act, 25 U.S.C. §2701, *et seq.* (IGRA) authorized the State to sue the Tribe for violating its Tribal-State Gaming Compact because the Vanderbilt parcel owned by the Tribe was not "Indian Lands" and therefore not eligible for gaming. In its response, Bay Mills challenged the State's claim that IGRA abrogates the sovereign immunity of Bay Mills, as IGRA requires as a precondition to abrogation that the contested gaming occur on "Indian Lands"—the existence of which the State disputes.

The State freely acknowledges that its proposed amended complaint is designed to ensure that sovereign immunity of Bay Mills does not cause dismissal of this case. The State thus seeks to add as defendants the individual members of the Bay Mills Executive Council, which is the Tribe's elected governing body.[1] Also sought to be added is the Bay Mills Tribal Gaming Commission (Gaming Commission), a separate regulatory body established by tribal law to oversee gaming conducted within Bay Mills' jurisdiction, as well as the members of the Gaming Commission.

Apparently the State believes the addition of the Gaming Commission and its members as defendants allows it to claim that Bay Mills has waived its sovereign immunity in the Bay Mills Gaming Ordinance (Gaming Ordinance), ECF No. 67-4, by blithely asserting that the Gaming

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[1] Because Bay Mills recognizes the ability of a party to add parties is given freely by the Court when issues of law and fact are common to the relief sought, Bay Mills does not oppose the amendment of the State's complaint to add members of the Bay Mills Executive Council in their official capacity. Bay Mills reserves its right to contest the propriety of maintaining Executive Council members in this lawsuit by other motion.

Commission and Bay Mills are the same legal entity and that the purported waiver applies to both. The State contends that this Court has the authority to so interpret the Gaming Ordinance, even though by so doing the Court would impermissibly intrude upon the authority of Bay Mills to enact and interpret its own laws, just as other sovereigns.

The State's proposed amended complaint also seeks a further interpretation by this Court of tribal law in its allegations that the Gaming Commission has violated the Gaming Ordinance, a contention which requires this Court to further ignore tribal self-government by not only defining, but creating tribal law, in derogation of the rights and responsibilities of tribal legislative and judicial systems to carry out those functions.

For the reasons provided herein, this Court should decline to allow the State to add claims reliant on the interpretation of tribal law, and deny the State's request to add the Gaming Commission and its members as defendants.

ARGUMENT

I. The State's proposed amendments alleging causes of action against the Tribe's Gaming Commission and its members are based solely on tribal law.

Amendment of pleadings after the first responsive pleading is permissible with the Court's leave and should be freely granted "when justice requires". Fed. R.Civ.P. 15(a).[2] Despite this liberal standard, "a court is not obliged to grant an amendment simply upon a party's motion." See *Johnson v. Ventra Group, Inc.*, 124 F.3d 197 (6th Cir. 1997). "A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes,

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[2] When a party seeks to add new parties and new claims, both the joinder provisions of Fed.R.Civ.P. 20(a) and the amendment provisions of Fed.R.Civ.P. 15(a) apply. *Price v. Caruso*, 2007 WL 2914232 (W.D. Mich.), citing *Chavez v. Illinois State Police*, 251 F.3d 612, 632-33 (7th Cir. 2001); and *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F. 3d 611, 618 (4th Cir. 2001).

results in undue delay or prejudice to the opposing party, or would be futile." *Crawford v Roane*, 53 F3d 750, 753 (6th Cir. 1995); see also *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). A proposed amendment is "futile" and does not warrant granting leave to amend a complaint, if it would not withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6). *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

The State's proposed amended complaint relies heavily on tribal law, specifically the Gaming Ordinance, as providing causes of action justiciable in this Court in this case, and thereby permitting joinder of the Gaming Commission and its members as defendants. A simple recitation of the averments containing reference to the Gaming Ordinance illustrates this point; they are numbered as noted in the proposed complaint:

> 4. Defendant Bay Mills Indian Community Tribal Gaming Commission (Tribal Commission) is a governmental subdivision and arm of Bay Mills created by Section 4 of the Bay Mills Gaming Ordinance (Gaming Ordinance)... to operate for the sole benefit and interest of Bay Mills.
>
> 5. Individual unknown Members of the Bay Mills Indian Community Tribal Gaming Commission are officials of Bay Mills appointed by the Bay Mills Executive Council pursuant to the Gaming Ordinance, §4.11(A)(Tribal Officials.)...
>
> 14. The Gaming Ordinance permits Bay Mills to conduct Class III gaming only on "Indian lands" as defined in Section 2.30 of the Gaming Ordinance...
>
> 15. The Gaming Ordinance only permits the operation of casinos owned by Bay Mills....
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> 16. Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos operated by Bay Mills.
>
> 17. The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law.
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> 33. Bay Mills waived any sovereign immunity of the Tribal Commission for actions not in respect of lands within the exterior boundaries of Bay Mills' Reservation when it adopted the Gaming Ordinance, including specifically §§ 4.7 and 4.18(Y).
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> 34. The Tribal Commission and Bay Mills are alter egos, as evidenced in part by Bay Mills' absolute control over the Tribal Commission (see Gaming Ordinance generally); therefore this waiver also extends to Bay Mills.
>
> 52. Section 5.5(A) of the Gaming Ordinance restricts operation of any Tribal casino to Indian lands which are defined in Section 2.30 of the Gaming Ordinance to mean: "(A) all lands within the limits of the Reservation of the Bay Mills Indian Community; and (B) all lands title to

which is either held in trust by the United States for the benefit of the Bay Mills Indian Community or held by the Bay Mills Indian Community subject to restriction by [the] United States against alienation and over which the Tribe exercises governmental power."

53. Section 5.5(A) of the Gaming Ordinance also restricts operation of any Tribal casino to Indian lands that comply with Section 20 of IGRA, 25 U.S.C. §2719.

54. For the reasons stated in paragraphs 22-28 above, the land on which the Vanderbilt casino is situated is not "Indian lands" as defined in the Gaming Ordinance.

56. The operation of Class III gaming at the Vanderbilt casino therefore violates the *Gaming Ordinance* which is Tribal law and therefore violates Section 4(C) of the Bay Mills Compact.

65. The Class III gaming conducted by Defendants at the Vanderbilt casino also violates IGRA because, for the reasons stated in Count II of this Complaint, this gaming is not authorized by a duly enacted Tribal ordinance.

75. Because the licensing and continued operation of the Vanderbilt Casino violated the *Gaming Ordinance* which requires that licenses be issued only to gaming establishments that are located on Indian lands, Council Members that authorized and operate the casino, and the Tribal Officials that approved the license for the Vanderbilt Casino and allowed its continuing operation exceeded their authority under Tribal law and they are therefore subject to prospective relief Ordered by this Court. [emphasis added]

ECF No. 67, *Motion to Amend Complaint*, Attachment 1, *Proposed Amended Complaint*.

Its reliance is misplaced, as the causes of action which are founded on tribal law are subject to the "tribal exhaustion rule" established by the United States Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (federal question jurisdiction) and in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) (diversity jurisdiction). In general, the rule requires federal courts to abstain from hearing claims that Indian tribes have exceeded their civil regulatory or adjudicatory authority until the plaintiff has first exhausted those claims in a tribal court. Abstention is required whether or not a proceeding is pending in the tribal court concerning the same subject matter. *See, e.g., Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.2d 21 (1st Cir. 2000); *Smith v. Moffett*, 947 F.2d 442 (10th Cir. 1991).

The exhaustion requirement has even been applied to the United States when it sued members of the Crow Tribe to collect penalties for grazing cattle on tribal land without a permit; the Government was directed to tribal court to adjudicate the alleged trespass. *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992).

The purpose of this requirement is carefully explained by the United States Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe, supra* at 856-857:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

The recognized exceptions to this requirement are (1) where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or (2) where the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal action. *National Farmers Union, supra*, at 857. None of the exceptions are present in this case.

The tribal exhaustion doctrine is a principle of comity, which requires federal courts to dismiss, or abstain from deciding, cases in which a party asserts that a tribal forum possesses concurrent jurisdiction. Deference is required, because "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual Ins. Co. v. LaPlante, supra* at 16.

As a result, federal courts defer to tribal courts' interpretation of tribal law, and review its factual findings under a clearly erroneous standard. *See, e.g., Prescott v. Little Six, Inc.,* 387 F.3d 753 (8th Cir. 2004) [tribal court's holding that no benefit plans created requires deference]; *Stock West Corp. v. Taylor (Stock West II)* , 964 F.2d 912 (9th Cir. 1992) [tribal law establishing immunity from suit for officers and employees in performance of official duties must be first interpreted by the tribal courts]; *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) [tribal court holding that it had personal jurisdiction over non-Indians under tribal constitution given deference].[3]

This same deference is accorded to a tribal court determination as to the existence of a waiver of sovereign immunity by the Tribe pursuant to tribal law. *Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 992 (8th Cir. 1999), *cert. denied*, 529 US. 1099 (2000); *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994).

To the extent that the proposed amendments to the State's Complaint rely on tribal law for causes of action, they are futile. This court should dismiss the claims against the proposed Commission and member defendants under the standards of Fed.R.Civ.P. 12(b)(6), due to the plaintiff's failure to exhaust remedies available in the tribal forum. At the very least, comity considerations require that the claims against the Gaming Commission and its members must be stayed until such time as the tribal court interprets the Gaming Ordinance's provisions. Based on these circumstances, it is an unreasonable and unnecessary waste of the limited resources of the Court to permit amendment of the complaint and joinder of additional defendants, and thereafter stay or dismiss the proceedings for failure to comply with the tribal exhaustion doctrine.

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[3] In contrast, tribal court determinations of federal law are reviewed *de novo. Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994).

II. Joinder of the Gaming Commission and its members is improper where no joint, several, or alternative relief is sought amongst defendants and the relief requested does not arise from the same transactions or occurrences.

Fed.R.Civ.P. 20(a) provides that additional defendants may be joined to an existing action if a right to relief asserted against them, jointly, severally, or in the alternative, arises out of the same transaction or occurrence alleged in the complaint and if there are questions of law or fact common to all the defendants. Such joinder must be "on just terms". Fed.R.Civ.P. 21.[4] Because the right to relief asserted against the proposed and existing parties must be joint, several, or alternative in nature, a determination of misjoinder of parties is therefore warranted when no relief is demanded from one or more of the parties joined. *Coalition to Defend Affirmative Action v. Regents of University of Michigan*, --- F.3d ----, 2011 WL 2600665 (6th Cir. 2011); see also *Letherer v. Alger Group*, L.L.C. 328 F.3d 262, 267 (6th Cir. 2003), citing *Glendora v. Malone*, 917 F.Supp. 224, 227 n. 3 (S.D.N.Y.1996) ("Clearly, the court may rely on Rule 21 to delete parties that have no connection to the claims asserted.").

As discussed in Section I., above, the proposed amended prayers for relief requesting that the Gaming Commission be enjoined from permitting Class III gaming should not be allowed as a matter of comity to the Bay Mills Tribal Court.[5] Accordingly, the permissible prayers for relief relate only to the operation of the gaming facility at Vanderbilt. As has already been recognized

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[4] Though the Federal Rules of Civil Procedure do not define misjoinder as a term, the law of this Circuit provides that misjoinder of parties occurs when a party fails to satisfy the conditions for permissive joinder under Fed.R.Civ.P. 20(a). *Coalition to Defend Affirmative Action v. Regents of University of Michigan*, --- F.3d ----, 2011 WL 2600665 (6th Cir. 2011).

[5] The State's initial prayers for relief formerly sought only to enjoin Defendants from conducting Class III gaming at the Vanderbilt Casino. The State now proposes to enjoin Defendant's from "permitting and conducting Class III gaming thereon." ECF No. 67, Attachment 1, prayer for relief, counts I-IV, VI; compare with *ECF No. 1, Complaint,* prayers for relief, all counts.

by the State, the Gaming Ordinance establishes the Gaming Commission as a regulator of gaming activities while Bay Mills' executive body operates the gaming enterprises subject to the Gaming Ordinance and the rules of the Gaming Commission. See ECF No. 67, Attachment 1 at ¶¶16 ("Bay Mills created the Tribal Commission when it adopted its Gaming Ordinance which authorizes the Tribal Commission to approve and regulate all casinos . . ."), 17 ("The Tribal Commission has the authority to close Tribally owned casinos that violate federal and/or Tribal law."), and 21 ("The Bay Mills Executive Council, through the Tribal Council Members, made the decision to open and operate the Vanderbilt Casino.").[6] Accordingly, any relief requesting the injunction of gaming operations is relief which cannot be provided by actions of the Gaming Commission or its members—it simply has no operational control of the gaming operations. As no relief is properly demanded of the Gaming Commission or its members in this instance, their joinder would be improper and inclusion in this suit on these terms unjust.

Notwithstanding that the State's proposed amended prayers for relief as they relate to the licensure actions of the Gaming Commission are improper; the State's proposed amended prayers for relief are internally incompatible, rending joinder impossible. For joinder to be proper under Fed.R.Civ.P. 20(a), the relief requested must be such that it is joint, several, or alternative in nature. As discussed above, the Gaming Commission has no operational responsibility concerning the gaming facility in Vanderbilt. Further, the executive body of Bay Mills cannot enforce or license gaming activities. Because the proposed relief requested seeks to enjoin both the permitting and operation of gaming in Vanderbilt, neither portion of such relief

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[6] The State's mashing of the two entities by reference their collective reference as "alter egos" (¶34 in its proposed Amended Complaint) fails to account for these differences in form, function and authority, contradicting its own recognition of these differences on the face of its complaint.

can be jointly or severally held against each proposed defendant directly. Instead, a portion of the prayer for relief proposed to be sought from this Court can be independently sought from each in their respective capacities, but neither may be held nor could comply with such order that holds them severally liable for the totality such relief. Such impossibility evidences the variant nature of the claims against the current and proposed parties. Given these circumstances joinder is improper.

The disjunctive nature of the relief requested by the State in its proposed amended complaint also highlights the separate and distinct transactions and occurrences that give rise to its grievances. As against the Bay Mills Executive Council, the State seeks relief from this Court to enjoin their operations at Vanderbilt. As against the Gaming Commission, the State seeks to enjoin its licensure of the facility itself. This is so, as the Gaming Commission has taken an agency action of licensure according to tribal law, while the Bay Mills Executive Council operates the gaming facility pursuant to that license, IGRA and a State-tribal gaming compact.

The State's forum to contest the licensure action of the Gaming Commission and its members is in the tribal justice system, as a matter of tribal law and federal comity granted by this Court to the Bay Mills Tribal Court. The State's concerns over the Bay Mills Executive Council operations at Vanderbilt are rightly to be presented to this Court. The joinder of parties here as proposed by the State is simply a misplaced effort to commingle these disparate issues in a single action.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Bay Mills Indian Community respectfully requests that this Court enter an Order:

DENYING the State's Motion to Amend its Complaint as proposed in ¶4 of ECF No. 67-1 by adding the Bay Mills Indian Community Tribal Gaming Commission;

DENYING the State's Motion to Amend its Complaint as proposed in ¶5 of ECF No. 67-1 by adding the individual members of the Bay Mills Indian Community Tribal Gaming Commission;

DENYING the State's Motion to Amend its Complaint as proposed in ¶¶14, 15, 16, 17, 33, 34, 52, 53, 56, 57, and 75 of ECF No. 67-1, by adding claims derived from the provisions of tribal law.

DENYING the State's Motion to Amend its Complaint as proposed in Counts IV, V, and VI of ECF No. 67-1, to the extent that such averments include the Bay Mills Indian Community Tribal Gaming Commission and its members as "defendants."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5th, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

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