UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAY MILLS INDIAN COMMUNITY,

Plaintiff,

Case No. 1:11-cv-00729-PLM

v.

Hon. Paul L. Maloney

GOVERNOR RICK SNYDER,
in his official capacity,

Defendant.

Saginaw Chippewa Indian Tribe of Michigan's Memorandum in Support of Motion to Intervene as Defendant

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For over a decade, across four different cases, and from here to the Supreme Court of the United States and back, the State of Michigan and Governor Snyder have been steadfast in their opposition to off-reservation Indian gaming. And for years, the Saginaw Chippewa Indian Tribe of Michigan relied on that steadfast opposition to protect the Saginaw Tribe's interests in the ongoing litigation. Last month, that changed. Accordingly, the Saginaw Tribe respectfully moves this Court to allow it to intervene in this lawsuit.

Background

Since the inception of Indian gaming, Michigan's leaders have opposed off-reservation gaming. Reed Decl., PageID.301-04, ¶¶ 17–20. Governor Snyder was no different, *id*., PageID.303-04, ¶¶ 19.e., 20, and the Saginaw Tribe relied on that opposition to protect its interests in this litigation, *id*., PageID.304, ¶ 21. But late last year, the Saginaw Tribe learned that Governor Snyder was open to settling this litigation by dropping his opposition to the Vanderbilt casino. *Id*., ¶ 22. Off-reservation gaming at the Vanderbilt Parcel poses a direct threat to Saginaw's longstanding on-reservation gaming and to the governmental programs (of both the Saginaw Tribe and neighboring localities) that the Saginaw Tribe's on-reservation casinos fund. *Id*., PageID.299-300, ¶¶ 6–12. The Saginaw Tribe seeks intervention because it is no longer confident in the Governor's willingness to vigorously defend this suit. The Governor Snyder no longer adequately protects the Saginaw Tribe's interests in this case.

Argument

"[T]he rules governing intervention are 'construed broadly in favor of the applicants,'" and an applicant's burden is "minimal." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (internal citation omitted). Here, the Saginaw Tribe's intervention is appropriate under Rules 24(a) and (b).

I. The Court should allow the Saginaw Tribe to intervene as of right under Rule 24(a).

The Saginaw Tribe may intervene as of right if: (1) its motion is timely; (2) it has a substantial legal interest in the subject matter of the pending litigation; (3) its ability to protect its interest may be impaired by the disposition of the litigation; and (4) the existing parties to the litigation cannot adequately protect its interest. *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (reversing denial of motion to intervene); *see also* Fed. R. Civ. P. 24(b)(1)(B). The Saginaw Tribe meets all four criteria.

A. The Motion to Intervene is Timely.

The timeliness of an intervention motion "should be evaluated in the context of all relevant circumstances." *Jansen*, 904 F.2d at 340. These include: (1) how far the suit has progressed; (2) why intervention is sought; (3) how long the movant knew or reasonably should have known of its interest in the case before seeking to intervene; (4) whether the existing parties will be prejudiced because the movant did not seek to intervene sooner; and (5) whether any "unusual circumstances" weigh in favor of or against intervention. *See id.* The lapse of time between the filing of a complaint and a motion to intervene, however long, must be weighed against these circumstances. *See* 7C Charles A. Wright, Arthur M. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1916 (3d ed. 2016). In this calculus, "[t]he absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important of these circumstances[.]" *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000).

Protecting rights in the event of a settlement is a legitimate purpose for intervention, *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. Appx. 782, 786-87 (6th Cir. 2004), and it is awareness of the need to intervene—not awareness of the suit—that triggers timeliness. *See*

Jansen, 904 F.2d at 341. For example, the *Jansen* intervenors knew for months that a pending suit would affect their rights under a consent decree, but they relied on the City of Cincinnati to represent their interests. *Id.* The intervenors did not learn until *after* discovery was taken and *after* the City filed its response to the plaintiffs' summary judgment motion that the City was not relying on the paragraphs of the consent decree that the intervenors sought to enforce. *Id.* Because "the proposed intervenors filed their motion to intervene as soon as they realized that their interest was not protected," the motion was timely—even though the case was halfway through discovery and in the midst of dispositive briefing. *Id.*

A motion to intervene may be timely even when a suit is well advanced. For example, in a products-liability class action, several class members' motions to intervene were timely even though the case had been litigated for two years and a settlement had been proposed. *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881-82 (6th Cir. 2000). As in *Jansen*, the Sixth Circuit focused on the intervenors' awareness of inadequate representation, recognizing that the intervenors "did not have reason to intervene until *after* they received notice of the settlement and found reason to object." *Id.* at 882. Prejudice to the existing parties is "[t]he most important consideration" in deciding timeliness; where there is none, the motion is usually timely. 7C *Federal Practice and Procedure* § 1916. Thus, courts have allowed intervention four years after a suit was filed when "there were no depositions taken, dispositive motions filed, or decrees entered during the four year period in question." *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3d Cir. 1995), *cited in Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000).

Although pending since 2011, this case "has progressed very little down the 'litigation continuum.'" *Cf. City of St. Louis v. Velsicol Chem. Corp.*, 708 F. Supp. 2d 632, 666 (E.D. Mich.

2010) (concluding that intervention motion was timely when discovery had not yet taken place). It is far less advanced than *Jansen* or *Telectronics*, and like *Mountain Top*, the parties have not even begun discovery. Rather, they *agreed* to frontload a single legal question in a motion for summary disposition that *has not yet been filed*. *See* ECF No. 21 at PageID.102 ¶ 5. And they *agreed* to hold in abeyance all other dispositive motions *and* all discovery, *id.* ¶¶ 6, 7, until after this Court answers that yet-unasked question. Thus, the existing parties will not be prejudiced by the Saginaw Tribe's intervention.

Moreover, the Saginaw Tribe's need to intervene to protect its interests in a potential settlement between the existing parties weighs in favor of finding the motion timely. *Midwest Realty*, 93 F. Appx. at 786–87. The Saginaw Tribe acted quickly as soon the potential-settlement cat fled its proverbial bag. Reed Decl., PageID.304-05, ¶¶ 22-24. Notice of objectionable terms in a settlement triggers the need to intervene, *Midwest Realty*, 93 F. Appx. at 788, but here, the Saginaw Tribe sought intervention even before that point. Like the intervenors in *Jansen* and *Telectronics*, the Saginaw Tribe acted diligently since learning of the need to intervene.

Finally, unusual circumstances weigh in favor of intervention here. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, upon which Bay Mills stakes its novel claim, aimed "to provide a statutory basis for the operation of gaming by Indian *tribes* as a means of promoting tribal economic development, self-sufficiency, and strong tribal *governments*," *id.* § 2702(1) (emphasis added). But Congress did not seek to pit one tribe against another; it offered a comprehensive solution to gaming nationwide that only allows Indian gaming on "Indian lands." According to the NIGC, Bay Mills and the Governor are negotiating (and may ask this Court to bless) an agreement that enshrines off-reservation IGRA gaming expansion *outside of* Indian lands. But "[c]onsent decrees entered in federal court must be directed to protecting

federal interests." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004). The unusual circumstances of this case favor the Saginaw Tribe's intervention so that it can demonstrate why an expanding Indian gaming outside of Indian lands contravenes federal law and federal interests—a point that it appears neither existing party will make. Because each of the five *Jansen* factors demonstrate that its motion to intervene is timely, the Saginaw Tribe respectfully requests that this Court grant its motion to intervene.

B. The Saginaw Tribe has a substantial legal interest in this litigation.

The Sixth Circuit's view of legal interests supporting intervention as of right is "expansive." *Mich. State AFL-CIO*, 103 F.3d at 1245. An intervenor need not possess any specific legal or equitable interest, and the term "interest" in Rule 24(a) "should be construed liberally." *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991) (internal citation omitted). Accordingly, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Mich. State AFL-CIO*, 103 F.3d at 1247. Substantial legal interests include financial interests that may be affected by the litigation. *See, e.g., United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 501 (6th Cir. 1993); *Liberte Capital Grp., LLC v. Capwill*, 126 F. Appx. 214, 219 (6th Cir. 2005); *Velsicol*, 708 F. Supp. 2d at 666. They include the interest of an entity regulated by a statute that the entity helped fashion. *Michigan State AFL-CIO*, 103 F.3d at 1246-47. And they include interests contingent upon proof of a disputed fact. *Purnell*, 925 F.2d at 947-48.

The Saginaw Tribe's interest in intervention is substantial. Because its Isabella Indian Reservation lacks income-generating natural resources and because its tax base is nearly non-existent, the Saginaw Tribe *must* rely on tribal gaming to finance and expand its social, health, education and governmental services programs. Reed Decl., PageID.299, ¶¶ 6–8; *see also Soaring Eagle Casino & Resort v. N.L.R.B.*, 791 F.3d 648, 652 (6th Cir. 2015), *cert. denied*, 136

S. Ct. 2509 (2016). Its casinos increase employment and improve the local economy to the benefit of both Tribal members *and* non-members. Reed Decl., PageID.299-300, ¶¶ 7–10; *cf. Soaring Eagle Casino & Resort*, 791 F.3d at 652 (stating that 7% of Soaring Eagle's employees are members of the Tribe). This effort has become increasingly important as federal and state funding cuts have increased the Tribe's share of its governmental costs. Reed Decl., PageID.299, ¶ 6. And the Saginaw Tribe's gaming—like Bay Mills' gaming—must comply with IGRA, a statute the Saginaw Tribe helped pass. *Id.*, PageID.298, ¶ 3.

Even as the Saginaw Tribe's self-governance costs have increased, it continues to use gaming revenues to fund the governmental efforts of neighboring cities, townships, and counties, and to fund intergovernmental projects with these non-tribal neighbors. *Id.*, PageID.299, ¶ 8. Every spring and fall, the Tribe shares 2% of its net slot revenue with local non-tribal governments—over $140 million to date. *Id.* Those local governments use the casino-revenue grants for their own governmental purposes. *Id.*

Any settlement that authorizes expanded off-reservation gaming directly threatens these governmental funding streams, hamstringing the Saginaw Tribe's ability to provide essential governmental services to its membership and its neighbors. The Saginaw Tribe's interest in this litigation is thus direct, immediate, and concrete. Its financial interest alone supports intervention. *See Detroit Int'l Bridge Co.*, 7 F.3d at 501; *Liberte Capital Grp., LLC*, 126 F. Appx. at 219; *Velsicol*, 708 F. Supp. 2d at 666. That the Saginaw Tribe shares a stake in the regulatory scheme at issue, only strengthens this interest. *See Mich. State AFL-CIO*, 103 F.3d at 1247. Both interests support intervention here.

C. The Saginaw Tribe's interest in this litigation will be impaired absent intervention.

To satisfy the third factor of intervention as of right, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Mich. State AFL-CIO*, 103 F.3d at 1247. The burden is "minimal." *Id.* For example, the potential effect of stare decisis may be sufficient to show impairment. *Id.* Rather than wait on the sidelines until Governor Snyder and Bay Mills sweep IGRA's rug out from under other tribes' feet, the Saginaw Tribe seeks intervention now so that it can fully and fairly address for this Court the question that the NIGC and U.S. Solicitor's office have already decided: the Vanderbilt Parcel is not "Indian lands" eligible for IGRA gaming. *See* Reed Decl., Exs. B, C. Without intervention, the Saginaw Tribe would be left to play catch up, leveling collateral attacks against the Vanderbilt casino (or any other off-reservation casino to come). The law does not require that result. Under *Mich. State AFL-CIO*, the potential operation of stare decisis is sufficient impairment to support intervention.

Moreover, the Vanderbilt casino has been poised to open since 2009, and the parties have kept the status quo through stipulation only. If Governor Snyder, as the only defendant in this lawsuit, consents to the opening of the Vanderbilt casino, that property will draw customers from the Saginaw Tribe's casinos, causing the Saginaw Tribe financial (and consequently, governmental) harm. Reed Decl., PageID.300, ¶ 11. The Court should allow the Saginaw Tribe to intervene to ensure its interests in this litigation are not impaired.

D. The existing parties cannot adequately protect the Saginaw Tribe's interest.

The required showing of inadequate representation is also "minimal" because it is enough for the movant to show that "representation may be inadequate." *Mich. State AFL-CIO*, 103 F.3d at 1247. It "may be enough to show that an existing party who purports to seek the same

outcome will not make all of the prospective intervenor's arguments," or will not appeal an adverse judgment. *Id.* at 1247-48.

Here, the interests of the Governor and the Saginaw Tribe were aligned for a time. But Governor Snyder appears to have abandoned the core defense in this suit: that the Vanderbilt parcel is not "Indian lands" open to IGRA gaming. Moreover, Governor Snyder is unlikely to appeal any settlement with Bay Mills. Unless the Saginaw Tribe is permitted to intervene, there may be no party to carry the Saginaw Tribe's arguments forward on appeal. *Compare id.* at 1248. The Saginaw Tribe need show only the *possibility* of inadequate representation. Here, settlement talks are confirmed and inadequate representation is all but certain, supporting the Saginaw Tribe's intervention as of right.

II. The Saginaw Tribe should be allowed to intervene permissively under Rule 24(b).

Alternatively, the Saginaw Tribe seeks permissive intervention. Under Rule 24(b), a proposed intervenor must demonstrate that: (1) its motion is timely; and (2) it alleges at least one common question of law or fact. *Mich. State AFL-CLO*, 103 F.3d at 1248. The court must also consider any undue delay and prejudice to the original parties, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed. *Id.* Permissive intervention can be proper even where an intervenor's interests are adequately represented by an existing party. *Little Traverse Bay Bands of Odawa Indians v. Snyder*, No. 1:15-cv-850, ECF No. 50, PageID. 570 (W.D. Mich. March 10, 2016).

A. The Saginaw Tribe's motion is timely.

As Section II(A) of this brief demonstrates, the Saginaw Tribe's motion is timely.

B. The Saginaw Tribe alleges common questions of law or fact.

For permissive intervention, the intervenor's claim or defense must also share a question of law or fact in common with the main action. *Mich. State AFL-CLO*, 103 F.3d at 1248. As the Saginaw Tribe's Proposed Answer and Affirmative Defenses demonstrates, it denies many of the same allegations that Governor Snyder has denied, and alleges many of the same affirmative defenses that Governor Snyder advanced earlier in this litigation, necessarily relying on common questions of law and fact. *Compare* ECF No. 26, PageID. 228–30, *with* Intervenor's Answer to First Am. Compl. 18–19. Most notably, the Saginaw Tribe is an intended beneficiary of the Bay Mills Compact, *see* ECF No. 1-3, PageID. 36, ¶ 9, that Governor Snyder has (so far) asserted bars Bay Mills' claims. ECF No. 26, PageID 223. The Saginaw Tribe does not just raise defenses that share common questions of law and fact with the main action; it will pick up where Governor Snyder left off.

C. Permissive intervention will not unduly delay or prejudice the existing parties.

Finally, to decide whether to allow permissive intervention, the court must consider whether intervention "will unduly delay or prejudice the adjudication of the rights of the original parties." *Purnell*, 925 F.2d at 951. As Section II(A) of this memorandum demonstrates, allowing the Saginaw Tribe to intervene in these proceedings would neither unduly delay these proceedings nor prejudice the existing parties. Indeed, "the representation of 'narrower and more parochial interests than the [Governor's] interests at stake in this lawsuit' actually militates in favor of intervention[.]" *Little Traverse*, No. 1:15-cv-850, ECF No. 50, PageID.572 (citation omitted). And the most-likely alternative available to the Saginaw Tribe—waiting until the original parties enter a consent judgment that prejudices the rights of the Saginaw Tribe and then asking this Court to reconsider its final order—would delay the proceedings and prejudice the

parties *more* than allowing the Saginaw Tribe to intervene now. If the Saginaw Tribe's motion is granted, it can brief the federal-law issues that must frame a judgment *before* the Court enters a judgment bearing on those rights, saving the parties and the Court time by litigating the issues fully and fairly on the front end. Thus, in addition to not prejudicing the existing parties, granting the Saginaw Tribe's motion is most protective of the proceedings. As a matter of discretion, the Court should permit the Saginaw Tribe to intervene in these proceedings.

Conclusion

Governor Snyder's departure from his terms-long pledge to oppose expansion of off-reservation gambling was, to put it mildly, a surprise. That's why the Saginaw Tribe sought an out-of-court solution before it sought intervention. But when the Saginaw Tribe could no longer count on Governor Snyder to actively litigate against Bay Mills in this case, the Governor no longer adequately represented the Saginaw Tribe's substantial interests in this case, and the Saginaw Tribe immediately brought the instant motion. The Saginaw Tribe meets the requirements of both Rule 24(a) and (b), and the Court should grant its motion to intervene.

Dated: January 12, 2017

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