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

RICK SNYDER, in his official capacity,

Defendant.

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NOTTAWASEPPI HURON BAND OF THE POTAWATOMI'S BRIEF IN SUPPORT OF ITS MOTION TO INTERVENE AS DEFENDANT

ORAL ARGUMENT REQUESTED

The Nottawaseppi Huron Band of the Potawatomi (the "NHBP") has moved to intervene as of right under Fed. R. Civ. P. 24(a)(2), and, in the alternative, for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B), for purposes of defending against the complaint. The NHBP recently learned that the Governor had been engaged in settlement negotiations with Bay Mills to potentially allow Bay Mills to conduct gaming on the Vanderbilt Parcel, in violation of state and federal law. While NHBP is heartened by the Governor's recent decision to proceed with the filing of a motion for summary judgment, and fully supports the Governor's filing, NHBP's intervention is necessary to ensure adequate protection of its interests. NHBP has a vital interest in the legal and regulatory framework governing the highly regulated Michigan gaming market. The NHBP supports the Saginaw Chippewa Indian Tribe of Michigan's Motion to Intervene (Dkt. 44) and seeks intervention for similar reasons.[1]

BACKGROUND

This case concerns the legality of Indian gaming on lands that the Secretary of the Interior has determined are not Indian lands under the Indian Gaming Regulatory Act (IGRA). As the Governor noted in his answer to Bay Mills's amended complaint, "gaming activities on the Vanderbilt Parcel are not authorized under IGRA, other federal law, or state law." (Dkt. 26, PageID.225 ¶44).

As to federal law, IGRA restricts any gaming under the Act to a defined category of "Indian Lands" and prohibits gaming under the Act on lands acquired after October 1988. *See* 25 U.S.C. § 2703(4); *see also* 25 C.F.R. § 502.12. The U.S. Department of the Interior has

[1] Counsel for the Bay Mills Indian Community has indicated that it opposes this motion. Counsel for the Governor has indicated that it opposes this motion.

determined that "even [under] a liberal construction," the Vanderbilt Parcel is not "Indian lands." BMIC Indian Lands Op. Letter at 16 (December 21, 2010).

As to state law, Michigan does not authorize tribes to conduct gaming other than as authorized under federal law by IGRA, and the only authorized state regulatory regime for tribal gaming is through compacts and the National Indian Gaming Commission ("NIGC"). As the Michigan Gaming Control Board has stated, "Native American tribes are sovereign nations. As such, the State of Michigan does not have general regulatory authority over Indian casinos. Instead, they are regulated primarily by the government of the appropriate tribal community and by the National Indian Gaming Commission. The State of Michigan does have oversight authority over a tribe's compliance with the Tribal-State Class III Gaming Compacts. The compacts are written agreements between the tribal communities and the State and signed by the Governor." Michigan Gaming Control Board website, "About Tribal Casinos," http://www.michigan.gov/mgcb/0,4620,7-120-1380_57138---,00.html (last visited Jan. 24, 2017).

Thus, in reliance on IGRA, both the Michigan Constitution and the 1996 Michigan Gaming Control and Revenue Act exempt Indian tribal gaming from the otherwise limited authorizations of and restrictions on gaming provided under Michigan law. Language added by referendum in 2004 to section 41 of the Michigan Constitution provides that "[n]o law enacted after January 1, 2004, that authorizes any form of gambling shall be effective . . . without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where gambling will take place." This requirement "shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming." Likewise, MCL § 432.203 provides that the 1996 Act authorizes and regulates casino gaming in

certain circumstances, but does not apply to "[g]ambling on Native American land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under [IGRA]." MCL § 432.203(d).

In accordance with IGRA, compacts authorize tribes to conduct gaming only on "Indian Lands." The Michigan-Bay Mills Compact defines "Indian Lands" as:

> (1) all lands currently within the Tribe's Reservation;
> (2) any lands contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; and
> (3) any lands title to which is either held in trust by the United States for the benefit of the Tribe or individual or held by the Tribe or individual subject to restriction by the United States against alienation and over which the Tribe exercises governmental power.

The Compact also specifies that "any lands which the Tribe proposes to be taken into trust by the United States for purposes of locating a gaming establishment thereon shall be subject to the Governor's concurrence power, pursuant to 25 U.S.C § 2719." There is no question that Vanderbilt Parcel is not "Indian Lands" according to this definition. Thus, any gaming on the Vanderbilt Casino would contravene the Michigan-Bay Mills Compact and state and federal law. It would in fact violate criminal prohibitions on unauthorized gambling. The Governor's Answer cites to Michigan's own letter to Bay Mills in which it succinctly informed Bay Mills that "operation of this casino is not authorized by IGRA *and therefore violates state and federal laws* prohibiting gambling, including but not limited to [criminal statutes] MCL 750.301 *et seq*, and 18 USC § 1955." (Dkt. 26, PageID.224 ¶40) (referencing Amended Complaint Exhibit D). The Governor has maintained this position from the inception of this case through the filing of his motion for summary judgment, as well as in related litigation in which the State took legal action to stop Bay Mills from gaming on the Vanderbilt Parcel.

Like all other compacts in Michigan negotiated and signed in the 1990s (including NHBP's), Bay Mills's compact includes a section 9, entitled "Gaming Outside of Eligible Indian Lands," that provides protections for other tribes if the compacting tribe seeks to conduct gaming on additional lands acquired in trust:

> An application to take land in trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

Section 9 was envisioned as a forward-looking mechanism that would both temper the expansion of off-reservation gaming and protect existing tribal gaming facilities from the destabilizing effects of casinos that are located outside of "eligible Indian Lands." Section 9 was, in large part, included in the compact to prevent individual Indian tribes from pursuing efforts to develop off-reservation casinos outside of "eligible Indian Lands." In so doing, section 9 was intended to provide certainty and structure to tribal gaming within Michigan, while ensuring that all tribes in Michigan would not be unduly harmed from off-reservation gaming. By its terms, section 9 is devoted to the protection of third parties: other federally recognized tribes. Thus, the Michigan-tribal compact process has made the compacts interdependent.

Subsequent to the approval of the compact to which Bay Mills is a party, voters in the State of Michigan approved an initiative that amended the Michigan Constitution to authorize casino gaming in City of Detroit. (See http://www.michigan.gov/mgcb/0,4620,7-120-57144_57145-245360--,00.html). In later-approved compacts, including NHBP's, the Governor reinforced section 9 by insisting upon language intended to protect the market for the newly authorized casinos in the City of Detroit by prohibiting those tribes from seeking to have lands

placed in trust for gaming within 150 miles of the City of Detroit. This change made the Michigan-tribal compact process interdependent with the limited authorization (Proposal E), which authorized casino gaming in the City of Detroit.

As the court is aware, this case has been stayed for most of the time it has been pending, while related cases were litigated. On September 23, 2015, the parties stipulated that the first issue to be briefed and resolved is whether the Michigan Indian Land Claims Settlement Act ("MILCSA") "automatically grants a legal status to lands that [BMIC] acquires with funds from its Land Trust that preempts state gaming laws." (Dkt. 21, PageID.100-105). On September 30, 2016, the Court ordered that the stay be lifted. (*See* Dkt. 35, PageID.251). The parties most recently agreed to a further stipulation on November 14, 2016. (Dkt. 37, PageID.256-259).

A letter from the National Indian Gaming Commission dated December 5, 2016 confirmed rumors, of which NHBP first became aware on November 25, 2016, that the Governor was "negotiating a possible agreement related to gaming on the Vanderbilt parcel." (Dkt. 46-8, PageID.251]. The NHBP is now filing its motion to intervene because, as the Governor has asserted, gaming on the Vanderbilt Parcel violates state and federal law, and the NHBP seeks to assure that this position is litigated in a fully adversarial posture.

ARGUMENT

I. THE NHBP MEETS THE STANDARD TO INTERVENE AS OF RIGHT UNDER RULE 24(a)(2)

Under Rule 24(a)(2), "the court must permit anyone to intervene" where four requirements are met: (1) the motion to intervene is timely; (2) the movant "claims an interest relating to the property or transaction that is the subject of the action"; (3) disposition "of the action may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) existing parties do not adequately represent the interest claimed by the movant. Fed. R. Civ.

P. 24(a)(2); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). "Generally, Rule 24(a)(2) is construed broadly in favor of proposed intervenors and we are guided primarily by practical considerations." *Stupak-Thrall v. Glickman,* 226 F.3d 467, 472 (6th Cir. 2000).

A. The Motion is Timely.

This motion is timely because NHBP moved to intervene shortly after learning that the Governor, who previously had adequately represented the interests of NHBP and others similarly situated, was discussing a settlement that could potentially allow illegal gaming in violation of state and federal law.

Timeliness of intervention is evaluated by five factors: "(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990); *see also Blount-Hill v. Zelman,* 636 F.3d 278, 284 (6th Cir. 2011) (no one factor is dispositive; *Jansen* factors are applied in context of all relevant circumstances). Under this standard, the NHBP's motion is timely.

First, although the suit has been pending since 2011, it has not progressed past the pleadings stage, so NHBP is stepping into the case at a time when it can readily participate within the existing schedule.

Second, NHBP is intervening to protect against any non-adversarial resolution of the case that would be contrary to the law and to public policy. The Court will benefit from NHBP being in the case to ensure an adversarial presentation.

Third, the motion was filed as soon as the NHBP learned that the Governor might no longer be adequately protecting NHBP's interests. In *United States v. Detroit Int'l Bridge Co.*, 7 F.3d 497, 513-17 (6th Cir. 1993), the court held that a motion to intervene was timely where the proposed intervenor moved as soon as it learned of a settlement in the case. *Detroit International Bridge* is controlling here. *See also Midwest Realty Management Co. v. City of Beavercreek*, 93 Fed. App'x 782 (6th Cir. 2004) (citing *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 882 (6th Cir. 2000)) (timeliness determined in relation to the intervenor's interests not being adequately represented).

Fourth, there is no prejudice to any party because the NHBP is complying with the existing case deadlines and stipulations by attaching a proposed answer to NHBP's motion to intervene while the question is still ripe.

Fifth, the unusual circumstance militating in favor of intervention is that the Governor has at one point recently at least considered entering into a settlement agreement that would allow gaming that violates state and federal law. *See Shaffer v. Block*, 705 F.2d 805, 808 (6th Cir. 1983) (Secretary of Agriculture was granted intervention subsequent to the filing of the proposed settlement agreement to challenge the proposed settlement agreement as being inconsistent with federal statutes and regulations).

B. The NHBP Claims an Interest in the Subject of this Action.

The interest requirement of Rule 24(a)(2) is to be construed liberally. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). The Sixth Circuit "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO*, 103 F.3d at 1245. It is enough that NHBP "*claims* an interest" satisfying Rule 24; it need not show an entitlement to relief at the intervention stage. *See, e.g., United States v. Los Angeles*, 288 F.3d 391, 396 (9th

Cir. 2002) (intervenor challenging settlement agreement was entitled to be heard on the merits after intervention; denial of intervention on ground that the settlement would be approved in any event was reversible error). Moreover, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State AFL-CIO*, 103 F.3d at 1247. The NHBP's interest in the outcome of this litigation easily meets this generous standard.

The NHBP is engaged in lawful tribal gaming as governed by federal and state law, pursuant to a negotiated compact with Michigan. The NHBP has a direct and profound interest in ensuring that the limited, structured gaming market in Michigan is not undermined by unlawful gaming activities. All NHBP's investments in the Michigan gaming market were made with the expectation that relevant laws and agreements will be enforced; if additional casinos undermine the legal, regulated market by operating contrary to these laws and agreements, NHBP will suffer direct and significant economic hardship. Unless litigation here is fully adversarial, the federal and state laws governing gaming will not be fully protected. *See Shaffer v. Block*, 705 F.2d at 808 (party granted intervention to challenge settlement agreement allegedly in violation of Federal law); *United States v. Azko Coatings of America Inc.*, 719 F. Supp. 571, 579 (E.D. Mich. 1989) (State allowed to intervene to address conflict with certain State law provisions).

The NHBP's interest in defending the legal framework that governs tribal gaming in Michigan supports intervention under Sixth Circuit precedent. In *Michigan AFL-CIO*, the court held that the Michigan Chamber of Commerce had a substantial legal interest for purposes of Rule 24 where the Chamber's interest was to "vindicate the statutory scheme" being challenged. 103 F.3d 1245-47 (citing cases). The NHBP has just such an interest here. Any resolution of this case that allows gaming on the Vanderbilt Parcel would leave these lands in a jurisdictional void

regulated by neither the State nor the federal government. The U.S. Department of the Interior has already determined that MILCSA does not create restricted fee Indian Lands, and allowing Bay Mills to conduct Class III gaming on non-Indian lands contrary to state law harms the NHBP and others conducting legal gaming. Thus, Bay Mills would effectively subject NHBP not only to immediate economic harm from illegal competition, but also to a more general destabilization of the limitations on off-reservation gaming by Indian tribes.

In addition to its concrete interest in the structure of legalized gaming in Michigan, the NHBP has a specific, negotiated property right that would be undermined by Bay Mills in this lawsuit. Section 9 of the NHBP's compact prevents NHBP from expanding tribal gaming in Michigan through § 20 of IGRA unless the Tribe enters into revenue sharing with fellow tribes: this provision in turn relies on identical provisions in the compacts of Bay Mills and other tribes, of which the NHBP is a third-party beneficiary. Because Bay Mills has not entered into a revenue-sharing agreement, and seeks to circumvent that requirement, this suit directly threatens to deprive NHBP and other Michigan tribes of the benefits of their compact Section 9 protections.

Finally, it bears noting that Bay Mills's suit is not a procedural complaint under the Administrative Procedure Act, wherein the plaintiff is the only party directly affected. Here, Bay Mills has sought a declaratory judgment deeming that the Vanderbilt parcel is "Indian Lands" and is not subject to the authority of the State of Michigan. (Dkt. 25, PageID.170). The direct and immediate effect of a settlement would be to alter the rules under which both Bay Mills and NHBP conduct their operations, and to assign economic benefits to Bay Mills while circumventing the contractually required compensation to NHBP.

C. Disposition of this Suit Without Intervention Would Impair the NHBP's Interests.

Under the third intervention prong, "a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied." *Michigan*, 103 F.3d at 1247 (emphasis added). "This burden is minimal" and can be satisfied if a determination in the action may result in "potential stare decisis effects." *Id.*; *see also Purnell*, 925 F.2d at 948; *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011) ("[I]ntervention of right does not require an absolute certainty that a party's interest will be impaired").

As described above, any resolution of this case whereby Bay Mills is permitted to perform gaming on non-Indian lands would not only violate federal and state law but also create instability in the State gaming scheme, leave a jurisdictional void resulting in safety issues, and result in a deleterious precedential effect. *See Michigan*, 103 F.3d at 1214 ("potential stare decisis effects can be a sufficient basis for finding an impairment of interest") (citing *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)). This would impair the NHBP's interests if it were not a party to this suit. As a practical matter, the NHBP can prevent those harms to its claimed interests only by successfully intervening here.

D. The Governor May Not Adequately Represent the NHBP's Interests.

The burden to show that the existing parties to this litigation inadequately represent the NHBP's interests is minimal. *See Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000). A potential intervenor "need not prove that the [existing parties'] representation will in fact be inadequate, but only that it 'may be' inadequate." *Id.* (citations omitted) (emphasis added); *see also Davis v. Lifetime Capital, Inc.*, 560 F. App'x 477, 495 (6th

Cir. 2014) ("The proposed intervenor need show only that there is a potential for inadequate representation.") (citation omitted) (emphasis in original). The NHBP satisfies this burden.

In light of the negotiations of which NHBP has recently become aware, the Defendant in this case, the Governor, may no longer adequately represent the NHBP's interests in this suit. The Governor has at least contemplated a settlement that would allow gaming on the Vanderbilt Parcel, which, under state and federal law, is illegal. Unless NHBP is allowed to intervene, there will be ambiguity in the adversarial posture of the litigation. The interest claimed by NHBP in upholding restrictions of federal and state law, an interest the Governor had until recently never wavered in protecting, is apparently vulnerable. Under a broad construction of Rule 24(a)(2), the NHBP is entitled to intervene to support and ensure the fully adversarial presentation that the issues merit.

II. IN THE ALTERNATIVE, THE NHBP ALSO QUALIFIES FOR AND SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER RULE 24(b)(1)(B).

Alternatively, the NHBP moves pursuant to Rule 24(b)(1)(B) for permissive intervention. For the reasons previously stated, this request is timely. The general provision grants courts discretion to allow anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). And by answering the amended complaint and seeking to prevent the relief that Bay Mills seeks, the NHBP "assert[s] a . . . defense in common with the main action." There are common questions of law and fact between the implications of a settlement and tribal gaming allowed thereunder and the NHBP's interests in its gaming activities and the overarching implications on the tribal gaming structure in the State of Michigan. *See Saginaw Chippewa Indian Tribe of Mich. v. Granholm,* 2007 WL 4118953 (E.D. Mich. 2007) (permissive intervention permitted where the intervening party had a legitimate interest at stake in the litigation that would impact its governmental responsibilities).

These defenses are common to the main action. Further, as previously described, the NHBP has a direct interest in opposing a settlement that affects the NHBP's gaming operations and the legal scheme under which it operates such gaming operations. *Id.* Not only would a settlement affect the NHBP, but it has far reaching implications for all tribes in the State of Michigan that currently operate gaming operations and Michigan tribes that would pursue gaming development as a result of the new law created by such a settlement. Allowing the NHBP to be heard on the issue of the legality of the settlement would promote the orderly administration of justice.

CONCLUSION

Pursuant to Rule 24(a)(2), the NHBP has a right to intervene in this suit to defend against the complaint and oppose an unlawful settlement. Alternatively, the Court should permit the NHBP to intervene for these same purposes under Rule 24(b)(1)(B).

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