UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BAY MILLS INDIAN COMMUNITY,

Plaintiff,

v.

GOVERNOR RICK SNYDER,
in his official capacity,

Defendant.

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

HONORABLE PAUL L. MALONEY

ORAL ARGUMENT REQUESTED

BAY MILLS INDIAN COMMUNITY'S RESPONSE TO SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S MOTION TO INTERVENE AS DEFENDANT

The Saginaw Chippewa Indian Tribe ("SCIT") admits that it has sat by and watched the parties to the instant litigation and its related case *Michigan v. Glezen, et al.*, Case No. 1:10-cv-1273-PLM, progress through discovery, injunction and appeal "from here to the Supreme Court of the United States and back." PageID.377. Now, after the better part of a decade, when substantial issues have been addressed by appeal, negotiation and stipulation, and one day before the parties were to finally move on to litigating the gravamen of these cases, SCIT has moved to intervene.

Intervention by SCIT under Fed.R.Civ.P. 24(a)(2) or (b) should be denied. SCIT has delayed too long and the parties' efforts to resolve this matter have come too far to justify intervention. SCIT has no legitimate interest in the interpretation of the Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143, 111 Stat. 2652 (1997) ("MILCSA"). Inclusion of SCIT would only upset the substantial progress made by the parties to move this case forward.

I. SCIT's MOTION TO INTERVENE IS UNTIMELY AND MUST BE DENIED.

"An application for permissive or intervention of right must be timely. If untimely, intervention must be denied." *Mich. Ass'n for Retarded Citizens v. Smith,* 657 F.2d 102, 105 (6th Cir. 1981), citing *NAACP v. New York,* 413 U.S. 345, 365 (1973). A timely petition is required for either intervention as of right or by permission. Therefore, the untimeliness of SCIT's motion is fatal to its intervention under either Fed.R.Civ.P. 24(a)(2) or (b).

The Sixth Circuit has adopted a multi-factor test for determining timeliness, including: (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. *Jansen v. City of Cincinnati,* 904 F.2d 336, 340 (6th Cir. 1990). Each of these factors weighs against SCIT's intervention in this case.

A. This Case Has Progressed Too Far to Permit Intervention.

On November 3, 2010, Bay Mills opened its Class III casino in the village of Vanderbilt (the "Vanderbilt casino") in Otsego County. The State filed suit against Bay Mills on December 21, 2010, for declaratory and injunctive relief to enjoin gaming activity on the Vanderbilt parcel. *See, Michigan v. Bay Mills Indian Community,* Case No. 1:10-cv-1273-PLM.[1] SCIT found no reason to join these proceedings either as a party or *amicus curiae*. Bay Mills challenged the action on sovereign immunity grounds, PageID.456. It also asserted that the land on which the Vanderbilt casino is located was purchased by Bay Mills using MILCSA funds, as authorized by §107(a)(3) of MILCSA, such that they became restricted in fee[2] by operation of law.[3] *Id.*

After this Court granted a preliminary injunction, PageID.1321-1338, Bay Mills appealed to the Sixth Circuit. PageID.1028. While the appeal was pending, the parties initiated discovery and obtained a trial date of July 17, 2012. PageID.1102-6. As discovery continued, this Court granted leave for the State to amend its complaint to add additional tribal defendants. PageID.1323-25. The Amended Complaint was filed on August 9, 2011. PageID.1434.

[1] PageID.1. The case was consolidated with *Little Traverse Bay Bands of Odawa Indians v. Bay Mills Indian Community,* Case No. 1:10-cv-1278-PLM, which was filed the day after the State's suit and which likewise challenged the conduct of gaming on land purchased with MILCSA funds. PageID.28.

[2] There are many federal statutes that apply to tribally owned restricted fee lands, especially in the area of criminal laws. *See e.g.,* 18 U.S.C. § 1151. Under another federal statute, the Indian Gaming Regulatory Act (IGRA), restricted fee lands over which Bay Mills exercises governmental control are Indian lands eligible for gaming. 25 U.S.C.§ 2703(4)(B); 2710(b)(1) and (d)(1).

[3] This provision further provides that "[a]ny land acquired from the Land Trust shall be held as Indian lands are held." PageID.457-466. Bay Mills maintains that this language in MILCSA authorizes Bay Mills to conduct class III gaming on its Vanderbilt parcel under the provisions of the Indian Gaming Regulatory Act. *Id.*

On July 15, 2011—the same day the State filed for leave to amend its complaint (PageID.1320)—Bay Mills filed the instant suit against Governor Snyder, in both his official and individual capacity, seeking declaratory relief from the failure to acknowledge the status of the Vanderbilt parcel under federal law as Indian lands over which the Tribe exercised governmental authority. PageID.1-6. SCIT still took no action to participate in these proceedings as a party or *amicus*.

Proceedings in both cases were stayed pending a decision on Bay Mills' interlocutory appeal. (Case No. 1:10-cv-1273-PLM, PageID.2369 and Case No. 1:11-cv-729-PLM, PageID.90). In *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 413-415 (6th Cir. 2012)[4], the Sixth Circuit held that §2710(d)(7)(A)(ii) of IGRA does not abrogate the sovereign immunity of an Indian tribe from an unconsented suit alleging that gaming does not occur on Indian lands. The Court further held that Bay Mills had not waived its sovereign immunity, vacated the preliminary injunction, and remanded for further proceedings. *Id.* at 415-416.

Upon remand, plaintiff Little Traverse Bay Bands of Odawa Indians ("LTBB") dismissed its action voluntarily. PageID.2389. Thereafter, the State and the named defendants briefed motions to dismiss, which revolved around the application of the *Ex parte Young* doctrine to tribal officials, and whether Bay Mills was a necessary and indispensable party under Fed.R.Civ.P. 19. Briefing continued even after the State filed a petition for a writ of certiorari on October 23, 2012, although no further action was taken in the trial court after all briefs were filed.

[4] SCIT did not seek to participate.

On June 24, 2013, the State's petition was granted, __ U.S.__, 133 S.Ct. 2850.[5] In *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024, 2039 (2014), the Supreme Court affirmed the decision of the Sixth Circuit and remanded for further proceedings.

On February 23, 2015, this Court received the remand from the Sixth Circuit. PageID.2663. The parties filed thereafter a joint status report by which they agreed to a revised case schedule. PageID.2667-75. The State filed a second amended complaint on May 1, 2015, in order to conform its contents to the directives of the Supreme Court decision, Page ID.2677, 2891-2905, resulting in a new case name of *Michigan v. Glezen, et al.* On June 16, 2015, the parties requested an amended schedule, because they sought to "explore means to simplify the issues before the Court, including presenting a manageable issue that—once decided—could facilitate the just, speedy and inexpensive disposition of this matter". PageID.2994. Still, and again, SCIT sat silent.

After significant negotiation and with substantial concessions made on both sides, a stipulation was filed in each case on September 24, 2015. For *Glezen* this meant dismissal of individual capacity claims, relinquishment of defendants' defenses based on *Ex parte Young*, a stay of the case pending disposition of a motion for summary judgment and/or dismissal on the pleadings in *Snyder*, and agreement to maintain the status quo during that adjudication. Page ID.3028-32. For the instant case (*Snyder*), the parties stipulated to the dismissal of the individual capacity claims and waiver of defenses under *Ex Parte Young*, as well as the filing of an amended complaint by Bay Mills to conform to the Supreme Court's decision, and agreed that Snyder would file a motion for summary judgment or on the pleadings limited to the following issue:

[5] *See* Brief for the National Congress of American Indians, the National Indian Gaming Association, the Affiliated Tribes of Northwest Indians, the Council for Athabascan Tribal Governments, and 51 Federally Recognized Indian Tribes [including SCIT] as Amici Curiae in Support of Respondents, *Michigan v. Bay Mills Indian Community*, No. 12-515 (U.S. Oct. 31, 2013).

> Does the Michigan Indian Land Claims Settlement Act, §107(a)(3), automatically grant a legal status to lands that the Bay Mills Indian Community acquires with funds from its Land Trust that preempts state gaming laws?

PageID.102¶5, 100-105. The terms of the parties' stipulation and briefing schedule were incorporated in an order of the court entered that same day. PageID.108. Here again, put on full notice of the issue before the Court, SCIT saw no need to intervene. Pursuant to the September, 2015 timetable, as subsequently modified, the Governor filed a motion for summary judgment, PageID.398-400, and supporting brief, PageID.401-538, on January 13, 2017. Finally, SCIT moved to intervene on January 12, 2017, just one day before the Governor's dispositive motion deadline (PageID.271-2) thereby ensuring the most disruption to the orderly resolution of the primary substantive issue identified in the stipulation between the parties.

B. A Speculative Fear of Competition is No Basis for Intervention.

SCIT's alleged interest is based on nothing more than its unsubstantiated fear that a gaming facility on the Vanderbilt parcel may compete with SCIT's down-state gaming facilities more than one hundred miles away. PageID.380-81 and PageID.298, 300, ¶¶ 5, 11, and 12. These contingent concerns about future economic competition do not justify SCIT's intervention at this late stage in the case. Moreover, if the operation of the Vanderbilt facility were capable of actually negatively impacting its coveted gaming revenues, SCIT should be able to produce evidence of such injury occurring during the time the facility was in operation in 2010-11, rather than an bald prediction that harm will occur in the future.

C. At the Very Least, SCIT Knew or Should Have Known That This Case Involves Gaming Since Its Initiation.

As already discussed, SCIT knew or reasonably should have known of the Vanderbilt casino's potential economic impact when the first complaint was filed in 2010. Yet, rather than intervene early on, SCIT waited seven years, watching from the sidelines as the case progressed,

and even joining an amici curiae brief in support of Bay Mills when the case was before the Supreme Court. SCIT continued to sit on the sidelines while the parties negotiated the terms of the stipulation narrowing the issues before this Court in September 2015.

D. Had SCIT Timely Intervened, Its Interests and Positions Would Have Been Anticipated and Accounted While the Parties Were Establishing the Framework of its Stipulation.

As has already been described, the parties went to extraordinary lengths to identify a manageable issue which, once decided, could facilitate an efficient resolution of the dispute. Further, the parties also identified a procedural path to ensure that issue could be resolved directly, by foregoing arguments and defenses such as those related to the *Ex Parte Young* doctrine, Fed.R.Civ.P. 19 issues, and the scope of available remedies, among others.

E. Settlement Is Not an Unusual Circumstance.

SCIT's claim of "unusual circumstances" that justify its late intervention is that it "is no longer confident in the Governor's willingness to vigorously defend this suit," PageID.377, based upon its belief that "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." PageID.380. SCIT further contends that it has "acted diligently since learning of the need to intervene." PageID.380. SCIT relies on *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. Appx. 782 (6th Cir. 2004), in support of the timeliness of its motion; however, in *Midwest Realty*, the existing parties had reached a settlement containing terms the intervenors found objectionable. Here, there is no settlement, and, *a fortiori*, there are no terms.

II. SCIT Does Not Meet Fed.R.Civ.P. 24(a)(2)'s Standard for Intervention of Right.

In order to intervene by right under Rule 24(a)(2), SCIT must show that: "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the

existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011). "The proposed intervenor *must prove each of the four factors;* failure to meet one of the criteria will require that the motion to intervene be denied." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005) (emphasis added) (quotation omitted). SCIT's motion is not timely, for the reasons previously described; it also fails the other three elements of the test for intervention of right.

A. SCIT Does Not Have A Substantial Legal Interest In This Case.

A proposed intervenor "must have a direct and substantial interest in the litigation," *Grubbs v. Norris*, 870 F.2d 343, 346 (6th Cir. 1989), such that it is a "real party in interest in the transaction which is the subject of the proceeding." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997)).

The only interest that is advanced by SCIT in this litigation is financial; it argues that gaming by Bay Mills on its Vanderbilt parcel may threaten SCIT's bottom line. PageID.382. As this Court has held, an "economic interest, without any reference to substantive law is insufficient. *United States v. ABC Indus.*, 153 F.R.D. 603, 607 (W.D. Mich. 1993). See, *United States v. Tennessee*, 260 F.3d 587, 596 (6th Cir. 2001) and *Blount-Hill v. Board of Educ. of Ohio*, 195 Fed. Appx. 482, 486 (6th Cir. 2006). Accordingly, SCIT's financial concerns do not constitute a significant legal interest in the subject matter of this litigation.

Further, SCIT has no significant interest, legal or otherwise, in the statute that is the focus of this case: MILCSA. SCIT is not an entity whose claims under the Indian Claims Commission Act of 1946, 25 U.S.C. §70, *et seq.*, were honored and funds appropriated in payments through

MILCSA.[6] It has no rights or obligations derived from that federal law and MILCSA does not apply to any land or interest in land SCIT owned, owns, or may acquire.

Finally, the alleged harm "cannot be contingent or speculative." *United States v. ABC Indus., supra.* SCIT's assertion that it may experience an impact to its "northern market" (PageID.300¶11) if Bay Mills opens a gaming facility on the Vanderbilt parcel is unsubstantiated and far too speculative to qualify as a direct and substantial interest in the litigation.

B. SCIT's Have No Legitimate Interests That Will Be Impaired.

SCIT's argument is that it will be harmed if Bay Mills games on the Vanderbilt parcel. However, as discussed above, that harm is does not constitute a substantial legal interest. No consideration of such impairment is therefore warranted.

C. SCIT's asserted interests are adequately represented.

The threshold issue currently before the Court is the application of State gaming laws to land acquired by Bay Mills with MILCSA funds. SCIT asserts that the State is no longer adequately representing its interests because the State is no longer "steadfast in its opposition to off-reservation Indian gaming." PageID.377¶1. This statement is contravened by the State's 25-page brief vigorously challenging Bay Mills' interpretation of MILCSA and requesting summary judgment filed on January 13, 2017. SCIT's interests are therefore more than adequately protected by the State of Michigan.

III. PERMISSIVE INTERVENTION IS NOT WARRANTED.

Under Rule 24(b), "the court may permit anyone to intervene who" files a "timely motion" and "has a claim or defense that shares with the main action a common question of law or fact," provided "the court . . . consider[s] whether the intervention will unduly delay or prejudice the

[6] SCIT is expressly held not to be a participant by §105(e)(2) of MILCSA.

adjudication of the original parties' rights." For the reasons previously stated, SCIT's untimely motion fails the first part of this test; SCIT fails to meet the Rule's other two requirements as well.

First, SCIT has no cognizable claim or defense with respect to the meaning of MILCSA or the status of land purchased with MILCSA funds. Its argument that it has a common claim or defense is belied by the lack of SCIT governmental authority over the Vanderbilt property which is the subject of this dispute, nor does there exist any right or obligation derived from MILCSA provisions applicable to SCIT. To the contrary and as previously highlighted, SCIT's interests are explicitly excluded. See, fn. 6.

Instead, SCIT seeks to expand the issues beyond those asserted by the State and Bay Mills, as SCIT contends it will not just raises defenses that share common questions of law and fact with Governor Snyder, but it will "pick up where Governor Snyder left off". SCIT raises the additional contentions that Section 9 of Bay Mills' Compact has been violated, and seeks to "demonstrate why an [sic] expanding Indian gaming outside of Indian lands contravenes federal law and federal interests." PageID.385, PageID.381. Far from a "common" defense, SCIT seeks to raise new issues that have nothing in common with the threshold question the parties agreed should be answered and are precluded from litigating at this time.[7] SCIT now seeks to intervene to do exactly that – to raise new issues not currently pending before the Court. Permissive intervention should therefore be denied.

[7] Per the court-approved stipulation, "Defendant's Motion will not seek disposition of other issues." PageID.108.

CONCLUSION

For the foregoing reasons, Bay Mills requests that this Court **DENY** the Saginaw Chippewa Indian Tribe of Michigan's Motion to Intervene as a Defendant.

Dated: January 26, 2017

BAY MILLS INDIAN COMMUNITY

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