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 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI'S MOTION TO INTERVENE AS DEFENDANT

INTRODUCTION

The Nottawaseppi Huron Band of the Potawatomi ("NHBP") has moved to intervene after nearly a decade of contentious litigation in this case and the related *Michigan v. Glezen, et al.*, Case No. 1:10-cv-1273-PLM, and after substantial issues have been addressed by appeal, negotiation and stipulation. Seventeen months ago, by agreement, Bay Mills and the Governor identified an issue which, when resolved, could facilitate just, speedy and inexpensive resolution of this case as well as the related case of *Michigan v. Glezen, et al.*, Case No. 1:10-cv-1273-PLM. (PageID.2994.) That issue – and the *only* issue at this stage – is whether §107(a)(3) of the Michigan Indian Land Claims Settlement Act ("MILCSA") automatically grants a legal status to lands that the Bay Mills Indian Community ("Bay Mills") acquires with funds from its Land Trust that preempts state gaming laws. (PageID.102¶5, 100-105.)

NHBP has no legitimate interest in the interpretation of MILCSA. Indeed, NHBP's submission doesn't address the issue presently before the Court, other than to acknowledge its existence. (PageID.579.) Instead, NHBP seeks to intervene to raise new issues. Intervention by NHBP either as a matter of right or by permission should be denied.

I. NHBP DOES NOT MEET THE STANDARD FOR INTERVENTION OF RIGHT.

In order to intervene of right under Fed.R.Civ.P. 24(a)(2), NHBP must show that: 1) its application to intervene was timely filed; 2) it possesses a substantial legal interest in the case; 3) its ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent its interest. *Blount-Hill v. Zeman*, 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). NHBP's motion does not meet any of the elements of the test.

A. NHBP's Motion to Intervene is Untimely.

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 NHBP's intervention in this case.

1. *This Case Has Progressed Too Far to Allow Intervention.*

NHBP appears to ignore the significant and detailed history of this case by failing to acknowledge the years of active litigation in its companion case, *Michigan v. Glezen, et al.*; that is the only possible explanation for NHBP's statement that this case "has not progressed past the pleadings stage", so NHBP "can readily participate within the existing schedule." (PageID.580.) Rather than repeat the detailed history of this dispute, which is elucidated in Bay Mills' response to Saginaw Chippewa Indian Tribe's ("SCIT") motion to intervene, (Page.ID640-43), Bay Mills reiterates that its Class III casino in the village of Vanderbilt (the "Vanderbilt casino") was opened in Otsego County on November 3, 2010. Suit was filed in December, 2010, against the Tribe by the State of Michigan, *Michigan v. Bay Mills Indian Community,* Case No. 1:10-cv-1273-PLM, and by the Little Traverse Bay Bands of Odawa Indians, *Little Traverse Bay Bands of Odawa Indians v. Bay Mills Indian Community*, Case No. 1:10-cv-1278-PLM. Bay Mills' defended these suits through the Sixth Circuit, *Michigan v. Bay Mills Indian Community,* 695 F.3d 406 (6th Cir.

2012), and in the United States Supreme Court in *Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024, 2039 (2014).[1]

After remand, Bay Mills and the State explored "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[.]" (*Glezen*, PageID.2994.) The parties filed a stipulation in each case on September 24, 2015, and agreed that the Governor would file a dispositive motion limited to the following issue:

> 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.) This stipulation also provides that, "Defendant's Motion will not seek disposition of other issues." (PageID.102¶5.) Further, the parties have agreed not to file any other dispositive motions until after the Court has decided the Motion for Summary Judgment contemplated by the Stipulation. (PageID.102¶6) Discovery has also been stayed. (PageID.102¶7.)

Pursuant to this stipulation the Governor filed a motion for summary judgment and supporting brief on January 13, 2017 (PageID.398-538). Bay Mills' response to this motion is due March 17, 2017. Instead of working to proffer this response however, Bay Mills is responding to its second motion by an Indian tribe seeking to intervene in this matter—this time NHBP—who has opted to file its motion two weeks after (January 26, 2017 (PageID.552-554)) the deadline for the State's dispositive motion and just as Bay Mills' scheduled time to brief its response begins.

[1] In *Michigan v. Bay Mills Indian Community*, 695 F.3d at 413-415, 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. *Id*. at 415-416. The U.S. Supreme Court affirmed the decision. 134 S.Ct. at 2039.

NHBP's assertion that its intervention motion is timely, i.e. that "there is no prejudice to any party because NHBP is complying with the existing case deadlines and stipulations by attaching a proposed answer" (PageID.581), is simply not supported by the facts. It has already missed the dispositive motion deadline regarding the only issue pending before the Court. NHBP's intervention at this late stage would not only require a substantial revision of the briefing schedule already in place, but render the terms of the stipulations in these matters unworkable, thereby disrupting the orderly resolution of the substantive issue identified in the Court-approved stipulation between the parties.

2. *The Governor's Dispositive Motion Already Ensures The "Adversarial Presentation" Of The Interpretation Of MILCSA.*

NHBP seeks to intervene as a defendant in order "to protect against any non-adversarial resolution of the case" and "to ensure an adversarial presentation". (PageID.580.) This rationale is belied by the Governor's motion and brief for summary judgment (PageID.398-538), which vigorously challenges Bay Mills' interpretation of MILCSA. The Governor's arguments clearly constitute an "adversarial presentation".

3. *NHBP Knew of the Issues Presented in This Case Since Its Inception.*

NHBP claims that it has an interest "in defending the legal framework that governs tribal gaming in Michigan". (PageID.582.) But NHBP knew or reasonably should have known of the Vanderbilt casino's potential impact on tribal gaming in Michigan when the first complaint was filed in 2010. Yet, rather than intervene right away to protect its supposed interests, NHBP – like SCIT—and unlike the Little Traverse Bay Bands of Odawa Indians– waited seven years before taking action.

4. *Had NHBP Timely Intervened, Its Interests and Positions Could Have Been Anticipated during the Parties' Discussion of Procedural Issues.*

As has already been described, the parties went to extraordinary lengths to identify a manageable issue which, once decided, could facilitate the efficient resolution of the dispute. Further, the parties also identified a procedural path to ensure that the 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 other significant arguments. (PageID.102¶4.) The parties will be prejudiced by NHBP's late intervention and its failure to assert its interests when the parties were establishing the parameters of the stipulation.

5. *Settlement is Not an Unusual Circumstance.*

NHBP contends that it is seeking to intervene at this late date because "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." (PageID.581.) That possibility, by itself, is insufficient to justify intervention. "The mere pendency of settlement negotiations cannot be deemed to trigger such awareness [of inadequate representation]. Only notice of objectionable terms in a proposed settlement will ordinarily suffice." *Midwest Realty Management Co. v. City of Beavercreek,* 93 Fed.Appx. 782, 788 (6th Cir. 2004); *In re Teletronics Pacing Sys. Inc.*, 221 F.3d 870, 882 (6th Cir. 2000). The nonparty must have notice of objectionable terms, which call into question the adequacy of representation of the nonparty and/or the nonparty's ability to protect a substantial interest. Any assertion by NHBP of a remote possibility of settlement is merely conjecture and speculation. There is no settlement or settlement agreement in this case. The cases cited by NHBP are inapposite.

B. NHBP Does Not Have A Substantial Legal Interest In This Case.

A successful 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)).

NHBP argues that its intervention is necessary to protect it from "economic harm from illegal gaming" and that gaming on the Vanderbilt parcel would subject it to "a more general destabilization" of the Michigan gaming market.[2] (PageID.583.) NHBP claims that intervention can be based on an "interest in defending the legal framework that governs tribal gaming in Michigan" (PageID.582.) But the Governor is obviously the appropriate party to make those arguments, not a third party. There exists no case law which allows NHBP to represent the interests of the United States or of the State in this proceeding. The Governor of Michigan – not a third party like NHBP – is clearly the proper party to make these arguments. NHBP has cited no case in which a third party was granted intervention in order to protect the "legal framework" of state law. NHBP's reliance on *Shaffer v. Block*, 705 F.2d 805, 808 (6th Cir. 1983) (Secretary of Agriculture intervened in a case in which Ohio governmental bodies wish to settle challenge to food stamp reduction due to receipt of educational assistance funds) and *United States v. Akzo Coatings of America, Inc.*, 719 F. Supp. 571 (1989) (State of Michigan sought to intervene in CERCLA case to obtain remedies in addition to those provided by federal law) is misplaced. In

[2] "Illegal gaming" aside, NHBP's claims of economic harm are not credible. Vanderbilt is located in Otsego County, hundreds of miles from its gaming operations in Battle Creek. NHBP's suggestion that its gaming operations would be affected by possible gaming activities in Otsego County, is simply unsupportable. It has no protectable legal interest in the subject matter of this litigation purely by this measure.

those cases, the State or the federal government – not a third party – intervened to ensure compliance with state or federal law. Here, the Governor is already a party and is adequately defending the legal framework for gaming in Michigan.

NHBP also argues that it is a "third-party beneficiary" of the 1993 gaming compact between Bay Mills and the State (PageID.201) (the "Bay Mills Compact"). (PageID.583.) The Bay Mills Compact, including Section 9, was the result of a settlement of litigation between then-Governor Engler and the seven Indian tribes in Michigan who were federally-recognized at that time. *See Sault Ste. Marie Tribe of Chippewa Indians, et al. v. Engler*, Case No 1:90-cv-611 (W.D. Mich.). NHBP's interests could not even have been contemplated in 1993, as it was not federally recognized until late 1995.[3] 60 Fed. Reg. 66315-16.

According to NHBP, Section 9 of its own compact affords it a "property right" warranting intervention in this case. (PageID.583.) No violation of the NHBP compact is implicated in this case. To the extent that NHBP complains that its compact has been violated, that matter is appropriately dealt with directly with the contracting party—the State—and not here. This case revolves around differences between Bay Mills and the State about claims under the Indian Claims Commission ("ICC") Act of 1946, 25 U.S.C. §70, *et seq.* and the application of MILCSA. NHBP has no rights or obligations derived from the ICC judgments which are embodied in MILCSA; MILCSA does not apply to any land or interest in land NHBP owned, owns, or may acquire.

[3] Identification of an intended third party beneficiary of a contract is governed by Michigan law. *Taggart v. U.S.*, 880 F.2d 867 (6th Cir. 1989) (Mich.). See also, *U.S. v. Wood*, 877 F.2d 453 (6th Cir. 1989). MCL §600.1405 sets an objective standard. *Shay v. Aldrich*, 487 Mich. 648, 663, 790 N.W.2d 629, 638 (2010). It requires that the parties entering into the contract are clearly aware of the scope of their contractual undertakings—including their obligations to third parties. *Id.*

Even assuming, for purposes of argument, that NHBP is a third party beneficiary to the Bay Mills Compact (PageID.201), Section 9 clearly relates to after-acquired *trust* land acquisitions by Indian tribes for gaming purposes under 25 U.S.C. §2719. Bay Mills asserts that gaming can occur on the Vanderbilt parcel because it is restricted fee lands under 25 U.S.C. §2703(4), subject to the Tribe's governmental control, not because Bay Mills has asked the Secretary (which it has not) to take it into trust under 25 U.S.C. §2719. Section 2719 is not implicated in this case, as is recognized in *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 413 (6th Cir. 2012).

Having no substantive right to protect the legal framework governing tribal gaming in Michigan, no benefits derived from the Bay Mills Compact, or any property interest relevant to this proceeding, NHBP's concern over "general destabilization" of the Michigan gaming market, does not rise to the level of a substantial legal interest it can protect through intervention. 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).

C. NHBP has no Legitimate Interests That Will Be Impaired.

NHBP argues that it will be harmed if Bay Mills games on the Vanderbilt parcel. It has demonstrated no protectable interest, therefore no consideration of such impairment is warranted.

D. NHBP's Asserted Interests Are Adequately Represented.

NHBP asserts that the State may no longer be adequately representing its interests because the "Governor has at least contemplated a settlement that would allow gaming on the Vanderbilt parcel[.]" (PageID.585.) NHBP seeks to intervene in order to avoid "ambiguity in the adversarial posture of the litigation." *Id.* NHBP's fears that the Governor may have "contemplated" a settlement at some point over the course of this litigation – or that he has changed his litigation

position – are put to rest by the Governor's 25-page motion and brief in favor of summary judgment filed on January 13, 2017. As that brief makes clear, NHBP's interests are more than adequately protected by the State of Michigan.

II. 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 adjudication of the original parties' rights."

For the reasons previously stated, NHBP's untimely motion fails the first part of this test; NHBP fails to meet the Rule's other two requirements as well.

First, NHBP has no cognizable claim or defense with respect to the meaning of MILCSA or the status of land purchased with MILCSA funds because NHBP was neither a participant in the legislation's development nor did it have an interest addressed within its provisions. Its argument that it has a common claim or defense is inconsistent with its pleadings, in which NHBP seeks to expand the issues beyond those asserted by the State and Bay Mills. NHBP raises the additional contentions that it is a third-party beneficiary of Section 9 of Bay Mills' Compact, that the NHBP gaming compact somehow conveys a property interest in this litigation, and that Bay Mills is "circumventing the contractually required compensation to NHBP" under that Compact. (PageID.583.) Far from a "common" defense, NHBP seeks to raise new issues that have nothing in common with the threshold question the parties agreed should be answered. Moreover, the parties are expressly precluded from litigating additional issues at this time. NHBP now seeks to intervene to do exactly that – to raise new issues not currently pending before this Court. Permissive intervention should therefore be denied.

CONCLUSION

For the foregoing reasons, Bay Mills requests that this Court **DENY** NHBP's Motion to Intervene as a Defendant.

Dated: February 8, 2017

BAY MILLS INDIAN COMMUNITY

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