No. 17-1362

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MILLS INDIAN COMMUNITY,

Plaintiff-Appellee,

v.

RICK SNYDER, Governor, in his official capacity,

Defendant-Appellee,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,

Proposed Intervenor-Appellant.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Paul L. Maloney

# GOVERNOR SNYDER'S RESPONSE IN OPPOSITION TO THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN'S MOTION TO EXPEDITE APPEAL

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## INTRODUCTION

The Saginaw Chippewa Indian Tribe of Michigan (Saginaw Tribe) moves to expedite this interlocutory appeal concerning intervention pursuant to Fed. R. App. P. 2. There is no pressing concern or good cause to expedite the appeal. The Saginaw Tribe argues that its appeal might become moot if the parties settle or the district court decides Michigan Governor Rick Snyder's pending motion for summary judgment before a decision in the appeal. However, the Saginaw Tribe caused its own time problems by waiting more than five years after the Bay Mills Indian Community (Bay Mills) sued to file its motion to intervene. At this late date, shortening the briefing period would unfairly prejudice Michigan Governor Rick Snyder. The court should deny the motion.

## STATEMENT OF THE CASE

This litigation seeks to resolve whether Bay Mills may conduct gaming on lands it purchased in Vanderbilt, Michigan with funds provided under the Michigan Indian Land Claims Settlement Act, (MILCSA), Pub. L. No. 105-143, 111 Stat. 2652 (1997), despite state laws prohibiting off-reservation gaming. The State of Michigan and

Bay Mills brought parallel lawsuits to resolve this same issue. See *Bay Mills v. Snyder*, No. 1:11-cv-00729 (W.D. Mich. filed July 15, 2011); *State of Michigan v. Glezen*, No. 1:10-cv-01273 (W.D. Mich. filed *sub nom State of Michigan v. Bay Mills* Dec. 21, 2010). The State's case progressed first, with a tribal sovereign immunity issue ultimately reaching the Supreme Court. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

After the Supreme Court's decision, the parties in both lawsuits entered into connected stipulations that defined a key MILCSA issue to decide with a motion for summary judgment. (MILCSA Stipulation, RE 21, Page ID # 100-105; 1:10-cv-01273 Stay Stipulation, RE 222, Page ID # 3028-3032.) The parties chose to stay the State's case while litigating the MILCSA issue in Bay Mills' lawsuit (this case). The MILCSA stipulation set a briefing schedule and established other terms to make the litigation more efficient and less burdensome. (MILCSA Stipulation, RE 21, Page ID # 100-105.) The district court entered stipulated orders staying the State's case and setting the parties on a path to address the present MILCSA issue on September 24, 2015.

(MILCSA Order, RE 22, Page ID # 108; 1:10-cv-01273 Stay Order, RE 223, Page ID # 3035-3036.)

Over the next fifteen months, Bay Mills and Governor Snyder agreed to extend the briefing schedule on the MILCSA issue six times. (Stipulations to Extend Briefing Schedule, RE 28, Page ID # 233-234; RE 30, Page ID # 237-238; RE 33, Page ID # 245-246; RE 36, Page ID # 252-253; RE 39, Page ID # 261-262.) On December 7, 2016, Bay Mills and the Governor entered into their final stipulation extending the briefing schedule. (Stipulation to Extend Briefing Schedule, RE 41, Page ID # 267-268.) The court set January 13, 2017, as the deadline for the Governor to move for summary judgment on the pre-defined MILCSA issue. (Order, RE 42, Page ID # 271-272.)

Less than twenty-four hours before Governor Snyder would file his motion for summary judgment on the MILCSA issue, the Saginaw Tribe moved to intervene in this case. (Intervention Motion, RE 44, Page ID # 274-277.) Almost two weeks later, the Nottawaseppi Huron Band of the Potawatomi (NHBP) also moved to intervene. (Intervention Motion, RE 58, Page ID # 552-554.) Neither tribe has an interest in the litigation, nor a common claim or defense. *See* Fed. R. Civ. P. 24(a) and

(b) (grounds for intervention). Rather, both tribes seek to veto any settlement that might give Bay Mills – their competitor – an advantage in the Michigan gaming market. The district court denied both motions to intervene on March 8, 2017. (Intervention Order, RE 69, Page ID # 740-749.) More than three weeks later, the Saginaw Tribe filed its notice of appeal. NHBP has not yet filed a notice of appeal.

Bay Mills and the Governor have filed all their briefs on the stipulated MILCSA issue. (Snyder Motion for Summary Judgment, RE 53, Page ID # 398-400; Bay Mills Response Brief, RE 70, Page ID #750-781; Snyder Reply Brief, RE 81, Page ID # 862-876.) The parties are now awaiting oral argument.

## ARGUMENT

### I. There is no pressing need to expedite this appeal.

The Saginaw Tribe argues that it is entitled to expedite this appeal under Fed. R. App. P. 2, which provides, "On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." The Advisory Committee Notes from 1967 explain, "The primary

purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules."

Each case that the Saginaw Tribe cites involved a pressing concern that justified expediting the appeal. For instance, in *Rosen v. Goetz*, 410 F.3d 919, 922-925 (6th Cir. 2005), the Sixth Circuit expedited an appeal in which as many as 323,000 Tennessee residents could lose Medicaid coverage under the disenrollment procedures challenged in the lawsuit. In *Bd. of Trustees of Ohio State Univ. v. U.S. Dep't of Educ.*, No. 88-3266, 1988 WL 63199 (6th Cir. June 22, 1988), the Sixth Circuit expedited an appeal because the district court's order would have forced the U.S. Department of Education to award the contested five-year, $30 million grant before the appeal was decided. Likewise, in *Hightower v. West*, 430 F.2d 552, 552 n.1, 553-54 (5th Cir. 1970), the Fifth Circuit expedited a school desegregation appeal to render a decision in July 1970 because the case concerned a desegregation plan for the upcoming 1970-71 school year.

There are no similarly urgent circumstances in this case. The Saginaw Tribe is primarily concerned that the underlying case might settle before this appeal is done. But the Saginaw Tribe is simply speculating about a potential settlement. Every case involves at least the potential for settlement while an appeal is pending. *See, generally, Apple v. Miami Valley Prod. Credit Assoc.*, 804 F.2d 917, 919 (6th Cir. 1986) (appellants settled with one appellee while appeal was pending). If the mere potential for settlement were enough to justify expediting an appeal, all appeals would be expedited. Yet, Fed. R. App. P. 2 does not contemplate expediting all cases. *See* 6 Cir. R. 31(c)(2)(A) (limited class of appeals automatically expedited).

More importantly, the Governor has already filed a motion for summary judgment on the pre-defined MILCSA issue. Contrary to the Saginaw Tribe's arguments, this motion is not poised to establish whether off-reservation gaming is legal across Michigan. The portions of MILCSA at issue in this case relate only to Bay Mills. The outcome of this case will have no effect on any other federally-recognized tribe, including the Saginaw Tribe.

Further, regardless of the district court's substantive decision, the Saginaw Tribe will not suffer unfair prejudice if the decision on the Governor's motion for summary judgment comes while this appeal is pending. If the district court *grants* the Governor's motion for summary judgment, it would dispose of this case fully and establish that the land Bay Mills purchases with MILCSA funds are not automatically eligible for gaming. In that event, the district court will have ruled *in favor* of the legal position that the Saginaw Tribe advocates. While the Saginaw Tribe's efforts to intervene might be technically moot in those circumstances, it will suffer no harm from what amounts to a victory in the underlying case.

If the district court *denies* the Governor's motion for summary judgment, the parties will proceed to litigate a variety of other issues in this case. Those issues include whether the property in Vanderbilt consolidates and enhances Bay Mills' landholdings as required in MILCSA § 107(a)(3). In that event, the Saginaw Tribe's appeal will not be moot because this Court may still decide the appeal before the district court resolves the underlying case.

Finally, there is no immediate threat that Bay Mills will conduct gaming on its property in Vanderbilt no matter how the district court decides the Governor's current motion for summary judgment. The parties stipulated that Bay Mills not conduct gaming at Vanderbilt until after the district court decides the summary judgment motion *and* all appeals are exhausted. (MILCSA Stipulation, RE 21, Page ID # 103, ¶ 9.) That stipulation is enforced by the district court's order. (Order, RE 22, Page ID # 108.) There is more than enough time to decide this interlocutory appeal with a routine schedule.

## II. The Saginaw Tribe has failed to demonstrate good cause to expedite this appeal.

A party that moves to expedite an appeal "must show good cause to expedite." 6 Cir. R. 27(f). There is no good cause to expedite this appeal because the Saginaw Tribe is the architect of its own time crunch. Bay Mills and the Governor set and re-set the briefing schedule on the pending motion for summary judgment *six times* over the course of fifteen months. Each of those stipulations and the resulting orders were matters of public record and provided the Saginaw Tribe many months to move to intervene. Yet, the Saginaw Tribe waited until the

very last moment to file its motion to intervene, letting weeks pass even after it claims it first became aware of a potential settlement (that never happened) in the fall of 2016.

The Saginaw Tribe then waited another three weeks after the district court denied intervention to file its appeal. The Saginaw Tribe could have sped up the timeline for this appeal simply by filing its notice of appeal sooner. The Saginaw Tribe cannot expect the Governor to rush drafting his brief when the Saginaw Tribe has always moved at a leisurely pace in connection with this case.[1]

The Saginaw Tribe claims that it would shoulder most of the burden of speeding up the briefing in this appeal. However, under the schedule it proposes, the Saginaw Tribe will have a total of 49 days from when the district court denied its motion to intervene to draft its brief, or 26 days from the notice of appeal. In contrast, the Governor

[1] NHBP poses a more significant timing problem for the Saginaw Tribe. On April 4, 2017, NHBP filed a motion in the district court to clarify the order denying intervention, evidently to give itself more time to decide whether to file an immediate appeal. (Motion to Clarify, RE 78, Page ID # 855.) If the district court denies the motion and NHBP appeals, the Sixth Circuit may consolidate the cases, forcing the Saginaw Tribe to wait for the NHBP appeal to be briefed before it receives a decision. See Fed. R. App. P. 3(b)(2).

would have only 23 days from when it receives the Saginaw Tribe's brief to draft and file a response. The standard 30-day briefing period for appellees in Fed. R. App. P. 28.1(f)(2) passes very quickly. The Governor would be prejudiced by shortening that briefing period by almost 25% as the Saginaw Tribe proposes.

Even if the parties to the appeal had an equal number of days for briefing, there is no good cause to shorten the briefing schedule. As of today, there are just about two months before the Governor's brief is due on June 15. Briefing in this case will be done quickly even with the routine schedule.

## CONCLUSION AND RELIEF REQUESTED

The Saginaw Tribe has failed to establish any pressing need to expedite this appeal. Nor has it established good cause to expedite the appeal. Accordingly, Governor Snyder respectfully asks that the court deny this motion.

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Dated: April 13, 2017

## CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 5,200 words. This document contains 1,959 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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## CERTIFICATE OF SERVICE

I certify that on April 13, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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