Case No. 17-1362

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BAY MILLS INDIAN COMMUNITY,
Plaintiff,

v.

GOVERNOR RICK SNYDER,
Defendant,

And

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,
Proposed Intervenor-Appellant

ON APPEAL OF DENIAL OF A MOTION TO INTERVENE

REPLY BRIEF OF PROPOSED INTERVENOR SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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I. The district court abused its discretion by erroneously concluding that this case does not concern IGRA.

Bay Mills and Governor Snyder (collectively, the "present parties") struggle mightily to paint this case as a nothing-to-see-here, just-the-two-of-us private dispute. The district court believed them. It ignored the pleadings in front of it to conclude that this case only concerns the Michigan Indian Land Claims Settlement Act ("MILCSA"). It does not. The Saginaw Tribe appropriately sought intervention to protect the careful statutory balance that Congress struck in the Indian Gaming Regulatory Act ("IGRA") and its reliance on that balance to operate its own IGRA-complaint casinos. The federal rules allow the Saginaw Tribe's permissive intervention, and the district court's conclusion that this is a MILCSA-only case was a clearly erroneous abuse of discretion.

A. The pleadings frame an IGRA case.

From top to bottom, this is an IGRA case. Bay Mills' first claim for relief seeks a declaration under IGRA; it does not seek any declaration under MILCSA. Am. Compl., R. 26, Page ID # 170. In response, both the Saginaw Tribe and the Governor pled three different affirmative defenses grounded in IGRA. Governor's Answer, R. 26, Page ID ## 229-30, ¶¶ 6, 7, 9; Saginaw Tribe's Proposed Answer, R. 44-1, Page ID # 295, ¶¶ 6, 7, 9.

But with these pleadings in front of it, the district court concluded that "[t]he underlying lawsuit requires the Court to interpret the MILCSA. . . . *The Court has*

not been asked to interpret any of the Indian gaming statutes[.]" Order Denying Mots. Intervene, R. 69, Page ID # 746 (emphasis added). On the undisputed district court record, this conclusion was clearly erroneous. The underlying suit did not seek any declaration regarding MILCSA, and instead asked "that this Court enter its judgment . . . [d]eclaring that the Vanderbilt Parcel is 'Indian Lands' *as defined in the Indian Gaming Regulatory Act*[.]") (emphasis added). *See* Am. Compl., R. 25, Page ID # 170.

IGRA only allows tribes to game free from state regulation if the facility is on "Indian lands." 25 U.S.C. §§ 2703(4), 2719 (2012). MILCSA *only* matters here because it is the statute Bay Mills hopes to use to shoehorn the Vanderbilt Parcel into *IGRA*'s definition of "Indian lands." Bay Mills' Vanderbilt Casino can *only* happen if the district court rules that the Vanderbilt Parcel is "Indian lands" under IGRA. But no court has ever interpreted IGRA so expansively, and doing so now would upset the careful balance Congress struck when it crafted IGRA. It would also trample on the Saginaw Tribe's reasonable reliance on the plain language of IGRA—a statute the Saginaw Tribe helped craft. Reed Decl., R. 46, Page ID # 298, ¶ 3. By defining this litigation as focused exclusively on Bay Mills' MILCSA means, while completely ignoring Bay Mills' IGRA ends, the district court reached conclusions that were clearly erroneous and abused its discretion.[1]

[1] Bay Mills' curious suggestion that the Saginaw Tribe did not argue this issue

B. The Saginaw Tribe sought intervention to protect IGRA's statutory scheme.

IGRA sets a broad federal presumption that tribes may not conduct gaming on lands they acquire after the date of IGRA's passage. 25 U.S.C. § 2719. Congress was concerned that tribes would purchase land outside their reservations solely to establish casinos. *See* S. Rep. No. 99-493, at 10 (1986). The § 2719 after-acquired "limitations were drafted to clarify that Indian tribes should be prohibited from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises." *Id.*; *see also* 134 Cong. Rec. 25369, 25380 (Sept. 26, 1988) (statement of Rep. Bereuter). To block this possibility, "§ 2719 creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA[.]" *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Mich.*, 369 F.3d 960, 971 (6th Cir. 2004).

Bay Mills urges the opposite presumption here—but only for the select tribes who can purchase land with MILCSA funds. It asks the court to conclude that Congress abandoned its off-reservation concerns and repealed IGRA's protections *sub silentio* to allow just two privileged tribes to bypass § 2719's protections and operate a casino wherever they purchase land—including in

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below is easily dismissed. *See* Saginaw Tribe Mot. Intervene, R. 44, Page ID ## 275-76; Reed Decl., R. 46, Page ID ## 298-305, ¶¶ 3, 12-16, 25; Saginaw Tribe Mem. Supp. Mot. Intervene, R. 47, Page ID ## 380-81, 385-86.

another tribe's backyard. The National Indian Gaming Commission (the agency charged with administering IGRA) has already held this argument up to IGRA and determined that the Vanderbilt Parcel "is not Indian land within the meaning of IGRA[.]" Reed Decl., Ex. C, R. 46-3, Page ID # 342. But Bay Mills refused to abide that agency's determination and asked the district court to revisit this IGRA-interpretation question. The undisputed record demonstrates that if Bay Mills succeeds in its novel theory, the Vanderbilt Casino will siphon revenue away from the Saginaw Tribe's casinos. Reed Decl., R. 46, Page ID # 300, ¶¶ 11, 12. The Saginaw Tribe would be left with no choice but to continue operating under IGRA's limitations, watching as the competition Congress never intended cripples its governmental revenue streams and the police department, elder-care programs, and court those revenues fund.

Plainly, Bay Mills' bid to crack open IGRA's limitation of off-reservation gaming is not just a private beef with the Governor; it upends a regulatory scheme many stakeholders (including the Saginaw Tribe, Reed Decl., R. 46, Page ID # 298, ¶ 3) crafted and have relied on for decades. The IGRA-interpretation declaration Bay Mills seeks will have a very specific and predictable impact upon the Saginaw Tribe. Reed Decl. ¶¶ 11, 12, Page ID # 300. When it reached the clearly erroneous conclusion that this case does not require interpretation of IGRA, the district court ignored that the Saginaw Tribe has a dog in that IGRA-

interpretation fight.

C. The Saginaw Tribe sought intervention to protect its IGRA-compliant governmental revenue stream.

To be sure, the Saginaw Tribe's interest in this case is at least partly pecuniary. But the Saginaw Tribe is no ordinary profit-seeking business; like Bay Mills and the State of Michigan itself, it is a government responsible to its people and responsive to the surrounding community:

> [b]ecause the Saginaw Tribe's Isabella Indian Reservation lacks sufficient income-generating natural resources and because the Tribe's tax base is nearly non-existent, the Tribe must rely on gaming at Soaring Eagle and Eagles Landing to raise the funds necessary to finance and expand its social, health, education and governmental services programs (which benefit Tribal members and non-members), increase employment within the Reservation, and improve the Tribe's on-Reservation economy (also to the benefit of Tribal members and non-members).

Reed Decl., R. 46, Page ID # 299, ¶ 6. To the Saginaw Tribe, illegal competition does not mean decreased dividends for private shareholders; it means cuts to essential governmental services and reduced funding to neighboring non-native governments. *Id*. at Page ID ## 299-300, ¶¶ 7-10.

Bay Mills is in this case for the money, too. It is, after all, the one looking to open an off-reservation casino. And the Governor's approach to this case is similarly driven by dollars. He calls this litigation the key to a compact with Bay Mills. *See* Governors' Br. vii. Compacts, of course, allow states to extract revenue-sharing promises in exchange for commensurate consideration. Historically,

"Indian tribes, in response to their weak bargaining position, have sought off-reservation opportunities to expand the size of a revenue pie that is shrinking as a result of these revenue-sharing agreements." Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 Harv. J. on Legis. 39, 40 (2007). Tribes like Bay Mills seek off-reservation gaming to replace the governmental-revenue shares that states like Michigan demand. But neither party does so in isolation. Here, the Saginaw Tribe is caught in the current as the Governor and Bay Mills each seek to leverage IGRA in different directions.

Neither present party disputes that the Vanderbilt Casino would draw revenue away from the Saginaw Tribe, Reed Decl., R. 46, Page ID # 300, ¶ 12. Under IGRA's careful definition of "Indian lands," this "competition" Bay Mills seeks to engage in—leaping past its reservation boundaries into the Saginaw Tribe's ancestral territory to divert governmental revenue away from the Saginaw Tribe to its own coffers—is not the beneficent invisible hand Adam Smith had in mind. It is illegal competition prohibited by IGRA. The Saginaw Tribe sought intervention to ensure the playing field remains level, using IGRA's proximity-to-reservation limitations to equitably distribute gaming dollars among tribes as Congress intended.

II. The district court erred in collapsing Rule 24(a) into Rule 24(b).

Congress created two paths to intervention: Rule 24(a) mandatory intervention and Rule 24(b) permissive intervention. The district court abused its discretion by conditioning the broader Rule 24(b) standard on meeting the narrower Rule 24(a) test.

A. Congress created separate Rule 24(a) and Rule 24(b) standards for distinct purposes.

Bay Mills concedes that permissive intervention is "distinct" from intervention-of-right, but nevertheless argues that because the Saginaw Tribe did not appeal the district court's decision denying Rule 24(a) mandatory intervention, it necessarily follows that the district court did not abuse its discretion when it also denied Rule 24(b) permissive intervention. Bay Mills' Br. 13-14. Bay Mills is mistaken. Even if the district court's denial of relief under Rule 24(a) is presumed correct, that decision has no bearing on whether the district court abused its discretion in denying permissive intervention under Rule 24(b).

Rules 24(a) and 24(b) are indeed distinct; the application of one standard does not dictate application of the other. Rather, "there are two branches to Rule 24 and the differences between them cannot be ignored." 7C Charles A. Wright, Arthur M. Miller & Mary Kay Kane, Federal Practice & Procedure Civ. § 1902 (3d ed.). The contrary suggestion that Rule 24(b) permissive intervention is a somehow-narrower subset of Rule 24(a) mandatory intervention, Bay Mills' Br.

14-15, makes little sense. Under that interpretation, the narrower mandatory intervention standard would completely engulf the broader permissive intervention, rendering Rule 24(b) superfluous. But this Court must avoid that construction of the rules. *See Howard v. City of Beavercreek*, 276 F.3d 802, 808 (6th Cir. 2002). Instead, a party who cannot intervene as of right may still intervene with the permission of the district court—and is entitled to have the district court follow the law in granting or denying that permission. *See, e.g.*, *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 560 (1974); *Purnell v. City of Akron*, 925 F.2d 941, 951 (6th Cir. 1991). The district court did not do so here.

B. The district court's discretion is not boundless.

"Rule 24 is to be broadly construed in favor of potential intervenors." *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782, 784 (6th Cir. 2004). Rule 24(b) is, and is meant to be, broader than Rule 24(a). But the district court transformed the generous "common question of law or fact" test of Rule 24(b) into the narrow "significant legal interest" test of Rule 24(a). Discretion does not extend so far. "The existence of a zone of discretion does not mean that the whim of the district court governs." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997). A court abuses its discretion if it "applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous

findings of fact." *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 230 (6th Cir. 2003) (quoting *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir.1997)).

C. The district court's failure to follow the Rule 24(b) test was an abuse of discretion.

The present parties argue for a rudderless standard that allows a district court to consider *and avoid* any factor without any statutory guides. But in applying Rule 24(b), "the existence of a zone of discretion does not mean that the whim of the district court governs." *Mich. State AFL-CLO*, 103 F.3d at 1248. The breadth of Rule 24(b) does not grant the district court unlimited discretion to consider—or ignore—whatever it wishes. Far from the "just consider stuff" standard the present parties urge, Rule 24(b) sets clear bounds for the Court's discretion: *if* the motion is timely, *and* the movant alleges at least one question of law or fact in common with the main action, *then* the Court may deny intervention if it will cause delay or prejudice *and* may consider other relevant factors. *See id*. Here, the district court abused its discretion by: (1) substituting a "legal interest" test for the Rule 24(a)'s "common question" factor; and (2) allowing its consideration of standing and adequacy-of-representation concerns (neither of which is required under Rule 24(b)) to overcome the actual Rule 24(b) test.

1. The district court abused its discretion by substituting a legal-interest test for the "common-question of law" factor.

Rule 24(a) requires demonstration of a legal interest in the suit. Fed. R. Civ. P. 24(a). Rule 24(b) does not require a district court to find that an intervenor has any particular interest. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). To the contrary, a district court should not deny Rule 24(b) permissive intervention simply because it believes a proposed intervenor lacks sufficient "interest" in the litigation. Wright & Miller, *supra*, § 1902. Instead, the permissive intervenor must show a question of law or fact in common with the main action. *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967); Fed. R. Civ. P. 24(b)(1)(B).

Here, the district court rejected the Saginaw Tribe's permissive-intervention bid because, in its view, the underlying suit seeks "a declaration regarding MILCSA, not the IGRA" and the Saginaw Tribe is not a MILCSA beneficiary. Order Denying Mots. Intervene, R. 69, Page ID ## 745-46. Setting aside the error of the district court's characterization, *see supra* at § 1(A), Rule 24 does not allow a court to substitute a Rule 24(a) "interest" test for a Rule 24(b) "common question" test under the guise of discretion.

Bay Mills' attempt to rehabilitate the district court's decision on this point misses the mark. It first points to *Reliastar*, where the defendants' creditors moved to intervene to protect their ability to collect judgment funds. *See Reliastar Life*

Ins. Co. v. MKP Invs., 565 F. App'x 369, 372 (6th Cir. 2014). There, the proposed intervenor-creditors had a *separate* dispute with the defendant, and they sought to ensure that the defendant did not lose assets they wanted to recover in a *separate* action. *Id.* at 370-71. The proposed intervenor-creditors articulated no question of law or fact in common with the main action. *Id.* at 374. The only thing the intervenors had in common with the plaintiffs was a desire for the defendants' cash. *Id.* at 374-75. This Court held that having a financial stake in a litigant's assets did not establish a common question of law or fact supporting intervention under Rule 24(b). *Id.*

Bay Mills' reliance on *Reliastar* is misplaced. *See* Bay Mills' Br. 17. The Saginaw Tribe is no mere creditor and does not seek to reach into Bay Mills' bank account *at all*. Instead, it seeks to ensure that a Vanderbilt Casino that would siphon governmental revenue *from the Saginaw Tribe* complies with IGRA—the statute that governs both tribes. The Saginaw Tribe has pleaded defenses that raise issues of fact (e.g. whether gaming will be permitted on the Vanderbilt Parcel) and law (e.g. whether the Vanderbilt Parcel will be treated as "Indian lands" under IGRA) in common with the main litigation. No more is needed to satisfy the commonality element of the Rule 24(b) test.

Remarkably, Bay Mills also protests that the Saginaw Tribe's defenses are *too similar* to the Governor's. Bay Mills' Br. 17-18. Like the district court, Bay

Mills conflates the requirements of Rule 24(b) and Rule 24(a). Similarity in arguments may establish that a proposed intervenor is adequately represented under Rule 24(a). *See* Bay Mills' Br. 24 (citing *United States v. Michigan*, 424 F.3d 438, 444 (6th Cir. 2005)). But inadequate representation is not a prerequisite for permissive intervention. Indeed, Rule 24(b) allows those whose interests may be similar to those of (or even adequately represented by) existing parties to intervene. As the district court reasoned in a different case when it denied mandatory intervention on adequacy-of-representation grounds but nevertheless granted permissive intervention,

> the fact that Applicants share a defense with other parties is not fatal under Rule 24(b). In fact, the plain text of the Rule suggests the opposite: Applicants merely must have a "defense that *shares* with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

Little Traverse Bay Bands of Odawa Indians v. Snyder, No. 1:15-cv-850, R. 50, Page ID # 570 (W.D. Mich. March 10, 2016) (emphasis in original); *see also* Wright & Miller, *supra*, § 1911. The present parties cite no case suggesting that parallel pleadings weigh *against* finding a common question under Rule 24(b), and it is difficult to imagine how they could. Rather, similar answers and defenses helps ensure that intervention will not prejudice the present parties by delaying the proceedings with additional claims or defenses.

Moreover, the cavil that the common questions the Saginaw Tribe asserted are "too general" to allow permissive intervention, Bay Mills' Br. 19, is a

complaint for Congress, not this Court. Fed. R. Civ. P. 24(b)(2). This Court need not decide the hypothetical question of whether *any* tribe might permissively intervene in *any* IGRA-related suit. Bay Mills' Br. 19. Here, the issue is whether the Saginaw Tribe—who would indisputably be directly affected by the Vanderbilt Casino, Reed Decl., R. 46, Page ID # 300, ¶¶ 11-12, and who helped shape IGRA, *id.* at Page ID # 298, ¶ 3—may intervene in a lawsuit that seeks to give Bay Mills IGRA-prohibited gaming rights in the Saginaw Tribe's backyard.

Although not a basis for the district court's decision, the Governor relies on an outdated edition of Black's Law Dictionary to redefine Rule 24(b)(1)(B)'s requirement of a common "claim or defense[.]"[2] He argues that a "defense" must be "a personal response to the claims that have been asserted against that party." Governors' Br. 19. But if intervention were limited to those parties against whom claims have been asserted (namely, joined parties), there could be no intervenor defendants. That is not how Rule 24(b) works. *Cf.*, e.g., *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009) (allowing intervenor to adopt the pleadings of an existing party). Indeed, not even the dictionary stood by this definition. Updated editions clarify that a defense is "[a] defendant's stated reason why the plaintiff or prosecutor has no valid case; esp., a defendant's answer,

[2] Because the Saginaw Tribe does not seek to lodge claims against Bay Mills, the definition of "claims" has no bearing here.

denial, or plea." *Black's Law Dictionary* 482 (9th ed. 2009). The Saginaw Tribe's defenses fall squarely within that updated definition, and the similarity of its answer and the Governor's confirms that the Saginaw Tribe's defenses share questions in common with the main action. Put differently, if the Saginaw Tribe's Proposed Answer does not set forth defenses, then neither does the Governor's. *Compare* Governor's Answer, R. 26, Page ID ## 228-30, *with* Saginaw Tribe's Proposed Answer, R. 44-1, Page ID ## 295-96.

Rule 24(b) "provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact." *Nuesse*, 385 F.2d at 704. "Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention[,]" and "intervention has been allowed in situations where the existence of any nominate 'claim' or 'defense' is difficult to find." *Id.* (internal quotations omitted). The Governor advocates the district court's error, seeking a demonstration of standing to intervene. Governors' Br. 19. But as Bay Mills concedes, this Court has already refused that request. Saginaw Tribe's Principal Br. 23-24; Bay Mills' Br. 31. Instead, common factual questions and legal issues are enough to support permissive intervention, provided there is no undue delay or prejudice to the existing parties' rights. *Nuesse*, 385 F.2d at 704. The district court abused its discretion when it set a higher legal-interest bar for permissive intervention.

2. The district court abused its discretion by eclipsing the Rule 24(b) factors with extraneous factors.

Stepping back from the district court's permissive-intervention analysis, it becomes clear that the district court abandoned the Rule 24(b) test and instead required the Saginaw Tribe to meet factors that are not in the rule. Although its discussion of Rule 24(b)'s common-question requirement was brief, the court was even quieter on the Rule's timeliness requirement. As both present parties concede, the district court failed to address timeliness *at all*.[3] Bay Mills' Br. 20; Governors' Br. 25.

The landscape is this: the Rule 24(b) test requires assessment of timeliness; the district court made none. The Rule 24(b) test requires assessment of whether

[3] The present parties' argument that this case is advanced because it is the latest iteration of a series of suits ignores that the focus of the earlier cases was Bay Mills' immunity from suit. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2028 (2014). As Bay Mills concedes, the earlier cases did not reach the "underlying merits issue[.]" Bay Mills' Br. 6; see also *id* at 20-21. And the remand the Governor requests to resolve this issue, Governor's Br. 16, is unnecessary. *See Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 n.5 (6th Cir. 2000) ("[E]ven if we were to conclude that the district court made no finding regarding timeliness, remand would still be inappropriate[.]"); *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1230 (1st Cir. 1992) ("When, as here, the district court fails to make an explicit timeliness determination, the court of appeals can nevertheless do so, provided that the record is adequately developed."). The present parties voluntarily postponed litigation of the merits of this case (including discovery) until after the yet-undecided summary-judgment motion. Stipulation, R. 21, Page ID # 102 ¶¶ 5, 6, 7. the Saginaw Tribe sought intervention the month after it had actual notice of settlement talks and before resolution of this threshold questions. *Stupak-Thrall*, *In re. Teletronics*, and *Jansen* are controlling. Saginaw Tribe's Principal Br. 15-19; Reed Decl., R. 46, Page ID # 304, ¶¶ 22-24.

the proposed intervenor shares common claims or defenses; the district court replaced that question with an interest requirement. Outside of these two factors, the only question a court must consider in denying permissive intervention is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The present parties attempt to save the district court's decision by squeezing its analysis into this factor. But Rule 24(b)(3) is an ill fit for the district court's reasoning.

a. The district court did not find that the Saginaw Tribe's intervention would cause prejudice or delay.

Bay Mills relies on *Hatton* to argue that the Saginaw Tribe's intervention would cause prejudice. Bay Mills' Br. 11, 13. In that case, the district court found that white parents' belated attempt to intervene to oppose a school-desegregation plan and "to re-litigate the issues heretofore decided by the Supreme Court in its various school desegregation cases" would "unduly delay and prejudice the rights of the present plaintiffs, particularly since the legal position which the intervenors seek to advance is well settled adversely to them." *Hatton v. Cnty. Bd. of Educ.*, 422 F.2d 457, 460-61 (6th Cir. 1970). *Hatton* offered a clear finding of prejudice and undue delay supporting discretionary denial of intervention. Bay Mills similarly relies on *Coalition to Defend Affirmative Action v. Granholm*. Bay Mills' Br. 27. That district court observed that the lower courts were "mere way stations on the judicial road to resolution by courts beyond" and that granting permissive

intervention would "inhibit, not promote, a prompt resolution" because the proposed intervenors might seek to expand the scope of the litigation. 501 F.3d 775, 784 (6th Cir. 2007).

But the district court did not rely on *Hatton* or *Coalition to Defend Affirmative Action.* It made *no finding* that the Saginaw Tribe's intervention would delay this litigation or prejudice the original parties' rights in any way.[4] *Cf. Little Traverse*, No. 1:15-cv-850, R. 50, Page ID # 571. Nor could it. Unlike the proposed intervenors in *Hatton*, the Saginaw Tribe does not seek to relitigate an issue that has come up repeatedly in this (or in any) litigation. Neither (unlike the proposed intervenors in *Coalition to Defend Affirmative Action*) does it seek to dramatically change the scope of the case.

b. The district court relied on extraneous considerations instead of the Rule's prejudice and delay factors.

Rather than follow the Rule 26(b) test, the district court imposed impermissible requirements on the Saginaw Tribe and collapsed the Rule 26(b) test into Rule 24(a). First, the district court refused to allow intervention because "[t]he Saginaw Tribe is neither a party to the MILCSA nor a beneficiary of the

[4] A timeliness decision necessarily includes prejudice considerations. *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (reversing denial of motion to intervene). Because the district court did not make any finding on the *Jansen* factors—including the factor of prejudice to the existing parties—there is no exercise of its discretion for this Court to review. *Mich. State AFL-CIO*, 103 F.3d at 1248 .

MILCSA." Order Denying Mots. Intervene, R. 69, Page ID # 746. Neither is the Governor. But just as the Governor's MILCSA status is beside the point, so is the Saginaw Tribe's. Under Rule 24(b), MILCSA status does not matter to timeliness, common questions, or prejudice. It can only matter to standing or to legal interests under Rule 24(a). Neither is an appropriate basis to deny permissive intervention. *Purnell*, 925 F.3d at 948 (stating that an intervenor "need not possess the standing to initiate a lawsuit"); *see Howard*, 276 F.3d at 808 (discussing interpretation of rules).

Second, the district court held that the Governor's filing of summary-judgment briefing "[a]lso support[ed] the decision to deny permissive intervention[.]" Order Denying Mots. Intervene, R. 69, Page ID # 746. It reasoned, "The Governor has asked the Court to deny the requests in the complaint. And where the existing parties will adequately represent the interests of the potential intervenors, 'the case for permissive intervention disappears.'" *Id.* (quoting *Menominee Indian Tribe of Wis. v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wis. 1996)). Here too, adequacy of representation does not matter to timeliness, common questions, or prejudice. If the active defense of an existing party was enough to defeat permissive intervention, there could be no permissive intervenor-defendants. Ever. Yet the same district court that denied the Saginaw Tribe's permissive intervention on adequacy-of-representation grounds *granted* others

permissive intervention over this same objection just last year, rejecting *Menominee* as "unpersuasive[.]" Bay Mills' effort to distinguish that case on its facts ignores that in *Little Traverse*, this district court did not rely on factual findings to reject *Menominee*. It rejected *Menominee*'s "conclusion that a factor for denial in the text of Rule 24(a) necessitated a denial under Rule 24(b), . . . the Court declines to import a factor from Rule 24(a) into Rule 24(b)." *Little Traverse*, No. 1:15-cv-850, R. 50, Page ID # 570. In this case, the same court did exactly that, ignoring common questions, timeliness, and lack of prejudice, and instead denying Rule 24(b) intervention on Rule 24(a) grounds.

Against this authority, the present parties urge that Rule 24(b)(3) offers district courts a catch-all escape valve allowing denial of permissive intervention for any reason, expressed or otherwise. *See* Bay Mills' Br. 26-27; Governors' Br. 40. That is not the law. Congress set forth the common-question and timeliness factors that courts must consider, and the district court abused its discretion when it substituted other factors.

Coalition to Defend Affirmative Action is not contrary. That court considered the adequacy-of-representation and legal-interest factors *in addition to* finding that intervention would cause delay and prejudice. 501 F.3d at 784. Its consideration of Rule 24(a) factors was added to, not substituted for, the Rule 24(b)[5] analysis—as

[5] Under this Court's precedent, a district court that has considered Rule 24(b)'s

in every other case the present parties cited on this point. *Id; Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015); *Acra Turf Club, LLC v. Zanzuccki*, 561 F. App'x 219, 222 (3d Cir. 2014); *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 955 (9th Cir. 2009).

Permissive intervention does not and should not rise or fall with Rule 24(a) or standing requirements. Congress spelled out rules that district courts must follow. The district court abused its discretion when it substituted Rule 24(a) mandatory-intervention and standing requirements for the permissive-intervention test.

III. Sovereign immunity cannot block defenses to the claim Bay Mills lodged.

Bay Mills' argument that the Saginaw Tribe's intervention is barred by Bay Mills' sovereign immunity, Bay Mills' Br. 15 n.3, is easily answered. The Saginaw Tribe agrees that sovereign immunity bars *counterclaims* against tribal plaintiffs that are outside the scope of that tribal plaintiff's original claims. *United States v. Certain Land Situated in the City of Detroit*, 361 F.3d 305, 307 (6th Cir. 2004) (stating that, where the United States had lodged condemnation proceeding,

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express requirements may also consider additional factors. *See e.g.*, *Stupak-Thrall*, 226 F.3d at 472 (allowing consideration of the Rule 24(b) factors "and any other relevant factors"). This law does not allow a district court to replace 24(b)'s express factors with other factors.

immunity barred intervenor's contract and declaratory claims against the United States); *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194, 1203-04 (D. Ariz. 2016) (discussing circumstances in which sovereign immunity bars counterclaims); 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1917 (3d ed.) (discussing the assertion of "a *claim* against the United States to which it has not consented" (emphasis added)).

But the Saginaw Tribe asserts no claims. It only asks to lodge *defenses* against the lawsuit Bay Mills initiated. "Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *see also Tohono O'odham Nation*, 174 F. Supp. 3d at 1203-04 (summarizing case law). The court must be able to answer the question that Bay Mills asked. Sovereign immunity does not block judicial consideration of defenses against Bay Mills' own claim.

IV. The Governor's motion for summary judgment does not moot the Saginaw Tribe's concerns.

Finally, the present parties argue that because the Governor moved for summary judgment, any danger that the Governor will bargain away IGRA's statutory protection has passed. Bay Mills' Br. 28; Governors' Br. 39; *see also* Order Denying Mots. Intervene, R. 69, Page ID # 746. But it is hardly novel for parties to simultaneously engage in motion practice and settlement talks. And the

Governor's statements to *this* Court confirm that a settlement with Bay Mills is more than a speculative possibility. In his own words,

> the Governor . . . has been in gaming compact negotiations with the Bay Mills Indian Community for several years. Resolving the underlying litigation is an important step toward reaching agreement on a new compact, which the Governor seeks to do in the roughly eighteen months he has left in office.

Governors' Br. 42. The Governor also emphasizes that "this case clears a path" for agreement between the State and Bay Mills upon a "compact that addresses whether Bay Mills can conduct gaming on lands acquired with MILCSA funds[,]" noting that such a compact may be reached by "*[s]ettling or* deciding the claims in this case[.]" *Id.* (emphasis added). His statements leave no room for doubt: a settlement of this action that allows the Vanderbilt Casino to operate is still on the table and will be for at least 18 months—unless the parties resolve their dispute sooner.

To be perfectly clear, the Saginaw Tribe does not seek to derail the Governor's lawful compact negotiations with Bay Mills or any other tribe. It rejects the Governor's contrary speculation as inaccurate and unfounded. *See id.* at 43-44. The Saginaw Tribe well recognizes the importance of IGRA gaming to every tribe in Michigan and across the country. But compact negotiations are not the subject of this lawsuit. Neither Bay Mills' prayer for relief nor the Governor's Answer require this Court to take *any* action on compact negotiations. *See*

generally Am. Compl., R. 25; Governor's Answer, R. 26. Compact negotiations *only* become part of this case *if* the present parties decide to tie settlement of this case to negotiation of a new Bay Mills compact. The Saginaw Tribe has no control over whether the present parties will attempt that end run around IGRA. But the Governor's recent conduct suggests a newfound willingness to "compromise" IGRA's limitations, showing that he inadequately represents the Saginaw Tribe's interests.

To game on the Vanderbilt Parcel, Bay Mills must comply with IGRA. *See* Saginaw Tribe's Proposed Answer, R. 44-1, Page ID ## 290-91. It doesn't. Unlike Bay Mills and the Governor, the Saginaw Tribe is the only party before the Court that (1) will be directly and negatively affected by the operation of the Vanderbilt Casino and (2) has a straightforward, uncompromised interest in litigating to conclusion whether the Vanderbilt Casino complies with IGRA.[6] That is the question that Bay Mills posed in its complaint. Am. Compl., R. 25, Page ID # 170.

[6] The existing parties frame the issues as though a summary-judgment ruling will dispose of the case. That is true only if the district court grants the Governor's motion outright. In that case, the Saginaw Tribe's intervention cannot slow down a disposed-of case. But Bay Mills and the Governor agreed to hold in abeyance all other dispositive motions *and* all discovery, Stipulation, R. 21 at Page ID #102, ¶¶ 6, 7, until after decision of this threshold motion. If the Court allows any part of this case to proceed, the Saginaw Tribe would argue for enforcement of various other provisions of IGRA. And unlike *amicus* status, only participation as a defendant will allow the Saginaw Tribe to appeal any adverse IGRA decision. Neither present party would appeal a negotiated settlement, even if it ran roughshod across IGRA.

That is the question disputed by both the Governor's Answer and the Saginaw Tribe's Proposed Answer. Governor's Answer, R. 26, Page ID # 228; Saginaw Tribe's Proposed Answer, R. 44-1, Page ID # 295. But that is the question the present parties will walk away from if the revenue share is sweet enough. Given the Governor's recent inconsistencies, it is evident that only the Saginaw Tribe is committed to judicial resolution of the novel IGRA question Bay Mills lodged. The district court's refusal to allow permissive intervention because of its blinkered focus on MILCSA to the exclusion of these IGRA issues was an abuse of discretion.

Conclusion

Whether the instant intervention denial is reversed, the district court *will* interpret IGRA before this case is over. It may reach that decision after full litigation on the merits, or may be asked to order a settlement that glosses IGRA with novel interpretations of the law by parties aligned to increase their own revenue. But when that court is faced with the decision of whether to either stay with a steady, consistent interpretation of the law in line with the statute and the administering agency's interpretation of that statute or accept a novel interpretation of IGRA that allows some tribes—but not all—to place a casino on any corner, that decision will affect the Saginaw Tribe. Under these circumstances, the federal rules allow the Saginaw Tribe to intervene permissively and assert its own interests in

keeping all parties within the careful lanes IGRA has carved for Indian gaming.

Dated: June 29, 2017

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Certificate of Compliance

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,109 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it is prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

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Certificate of Service

I certify that on June 29, 2017, I served the above Brief of Proposed Intervenor Saginaw Chippewa Indian Tribe of Michigan upon the Bay Mills Indian Community and upon Governor Snyder, through counsel who have entered appearances in this matter, by means of the Court's ECF system as follows:

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