DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians make the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? No

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   Not applicable

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   Not applicable

Kathryn Tierney by MDS — 4/6/06
Attorney for Bay Mills Indian Community — Date

William Rastetter by MDS — 4/6/06
Attorney for Grand Traverse Band of Ottawa and Chippewa Indians — Date

Marc Slonim — 4/6/06
Attorney for Little River Band of Ottawa Indians — Date

James Bransky by MDS — 4/6/06

Attorney for Little Traverse Bay Bands of Odawa Indians — Date

Bruce R. Greene — 4/6/06

Attorney for Sault Ste. Marie Tribe of Chippewa Indians — Date

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued.

TABLE OF CONTENTS, Continued.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, Continued.

STATEMENT OF THE ISSUE

In a case in which this Court previously affirmed the denial of a motion to intervene, on the grounds that the proposed intervenors were adequately represented by the existing defendants, was it an abuse of discretion for the district court to deny a new motion to intervene under the law-of-the-case doctrine, where: (a) the new motion was filed by the same proposed intervenors only 36 days after this Court's previous decision; (b) the issue being litigated in the district court had not changed; and (c) no controlling authority had made a contrary decision?

COMBINED STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. Great Lakes Fishing Rights Litigation.

1. Phase 1 – Existence of the Great Lakes Right.

The United States commenced this case against the State of Michigan on behalf of itself and the Bay Mills Indian Community ("Bay Mills") "to protect the tribe's rights to fish in certain waters of the Great Lakes" and to enjoin State interference with those rights. *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979), *aff'd in part and remanded*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). Bay Mills and the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") intervened and added certain State officials as defendants. *Id.* at 203-04.

The District Court bifurcated the case, limiting the issues to be tried in the first phase to whether the Indians retained fishing rights in the Great Lakes under the Treaty of 1836 (7 Stat. 491) and, if so, whether the State possessed any jurisdiction to regulate the exercise of those rights by treaty tribe members. RE 97 Opinion at 3, JA ___; *see United States v. Michigan*, 471 F. Supp. at 218. The Court reserved for a second phase the determination of which, if any, State regulations could be applied to the Indians in the exercise of any retained Great Lakes fishing rights. RE 97 Opinion at 3, JA ___.[1]

After the Phase 1 trial, the District Court held the plaintiff tribes retained "the right . . . to fish in the waters of the Great Lakes and connecting waters ceded by the Treaty of 1836," *United States v. Michigan*, 471 F. Supp. at 278, and the Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse") intervened as a plaintiff. On appeal, this Court held the "treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty . . . continue to the present day as federally created and federally protected rights." *United States v. Michigan*, 653 F.2d at 278. However, the Court held the State could regulate Indian fishing under

---

[1] Although the Bay Mills and Sault Tribe complaints alleged the Tribes reserved the right to hunt on ceded lands (*see* Brief of Appellants/Proposed Intervenors ("Prop. Int. Br.") at 3-4), no party sought relief regarding *inland* rights in 1976, and the Court's bifurcation order did not provide for future proceedings regarding such rights.

certain circumstances, and remanded the case to the District Court for further proceedings. *Id.* at 279-80.

2. Phase 2 – Implementation of the Great Lakes Right.

Subsequent proceedings in the case concerned the conservation, allocation and management of the Great Lakes fishery resource in the context of implementation of the Tribes' treaty fishing rights. *See, e.g., United States v. Michigan*, 12 Indian L. Rptr. 3079 (W.D. Mich. 1985). In May 1985, the District Court entered a decree that provided for the allocation and management of the resource for a 15-year period. *Id.* at 3089-03. The Little River Band of Ottawa Indians ("Little River") and the Little Traverse Bay Bands of Odawa Indians ("Little Traverse") intervened in 1998 and 1999, respectively, as the parties began to negotiate a replacement for the 1985 decree. The court entered a consent decree governing the Great Lakes fishery in 2000, which is effective for 20 years. RE 1458.

B. Initial References to Inland Rights.

As Proposed Intervenors note (Br. at 3-4), the pleadings filed by the Tribes in the Great Lakes litigation contain some general references to the Tribes' inland rights. However, with the exception of Little Traverse's 1999 complaint, none of the Tribes alleged the State was interfering with its inland rights and none sought

relief with respect to any such interference.[2] In response to Little Traverse's complaint, Defendants asserted that, because of their Eleventh Amendment immunity, the Court lacked jurisdiction to adjudicate tribal claims that exceeded those made by the United States. Answer to Little Traverse Bay Bands of Odawa Indians' Complaint for Declaratory and Injunctive Relief at 17, ¶ 7 (Aug. 31, 1999) (RE 1415). No proceedings were ever conducted with respect to the inland claims made by Little Traverse.

In January 2001, during the final days of the Clinton Administration, the United States forwarded to Defendants a proposed amended complaint seeking broad declaratory and injunctive relief defining the nature and extent of the Tribes' inland rights and the permissible scope of State regulation of such rights, and sought Defendants' consent to its filing. RE 1501 (Brief Exh. 1) Proposed Amended Complaint at 6-8, JA _____. Although Defendants consented on

---

[2] *See* Plaintiff-Intervenor's [Bay Mills] First Amended Complaint for Declaratory and Injunctive Relief (Oct. 23, 1975) (RE 31); Plaintiff-Intervenor Sault Ste. Marie Tribe of Chippewa Indians First Amended Complaint for Declaratory and Injunctive Relief (June 16, 1976) (RE 79); Amended Complaint of Intervenor Grand Traverse Band of Ottawa and Chippewa Indians (Oct. 12, 1979) (RE 386); Little River Band's Complaint for Declaratory and Injunctive Relief (Oct. 8, 1998) (RE 1368); Complaint of Little Traverse Bay Bands of Odawa Indians for Declaratory and Injunctive Relief (June 4, 1999) (RE 1413). When it moved to intervene, Little River stated explicitly that it sought "intervention only with respect to its fishing rights under the 1836 Treaty in the Great Lakes and their connecting waters." Little River Band's Motion to Intervene at 1-2 (Oct. 8, 1998) (RE 1368).

January 18, 2001, the United States did not file the complaint before the new administration took office. RE 1509 (Exh. E) Letter at 1, JA ___.

On February 22, 2001, then Governor Engler wrote to Secretary of the Interior Norton and then Attorney General Ashcroft regarding the United States' proposed amended complaint. *Id.* Governor Engler emphasized the State's longstanding interest in litigating the inland issue, and its belief that no inland rights exist on public *or private* lands:

> [S]ince 1997, state officials have repeatedly urged tribal leaders and federal representatives to join with the state in asking the federal court to definitively address the inland issue. While the state does not agree with federal arguments that *any* inland treaty rights exist, the state recognizes that delay in having this issue adjudicated only exacerbates tension and the possibility of conflict among users of the state's natural resources.

Id. at 1, JA ___ (emphasis added). In addition, Governor Engler requested that the United States modify its proposed complaint in several respects, in order to address concerns raised by "sportsmen's groups and other organizations that have standing as amici in the *United States v. Michigan* case." *Id.* at 2, JA ___. In particular, Governor Engler requested that the United States clarify the complaint "so that it cannot be read to assert any right to trespass *on private property*" or to hunt under tribal regulations *on private lands* open to hunting under State law. *Id.* (emphasis added).

The Tribes are not aware of any response to Governor Engler's letter. In any event, the United States chose not to file the proposed amended complaint.

C. The Current Phase of the Case.

1. The State's Counterclaim.

Defendants formally initiated the current phase of the case on September 17, 2003, when they filed a motion for leave to file a counterclaim against the Tribes.[3] In their motion, Defendants asserted "[t]he parties . . . have . . . a good-faith dispute over the existence of *any* Treaty-reserved usufructuary rights under the 1836 Treaty of Washington apart from the Great Lakes and connecting waters." RE 1463 Motion at 5, ¶ 13, JA ___ (emphasis added). Noting that all of the Tribes had adopted Tribal Codes authorizing their members to engage in inland hunting and fishing activities, Defendants asserted that they "deny such usufructuary rights exist except for on any federal lands that have never passed out of federal control and on which the exercise of those rights is not inconsistent with the purpose for federal ownership." *Id.*

Consistent with their motion, Defendants' counterclaim sought a threshold determination regarding the existence of the Tribes' rights under Article 13th of the 1836 Treaty on both public *and private* lands. In particular, the counterclaim

[3] The District Court granted the motion on November 4, 2003, and the counterclaim was filed on November 5, 2003. RE 1472, 1473.

sought a declaratory judgment that, "[e]xcept for on any federal lands that have never passed out of federal control and on which the exercise of those rights is not inconsistent with the purpose for federal ownership, the 1836 Tribes retain no rights of hunting on the lands ceded, with the other usual privileges of occupancy, because the lands ceded under the 1836 Treaty have been required for settlement." RE 1463 Counterclaim at 7, ¶ 27, JA ___.

On its face, Defendants' counterclaim sought a determination that the Tribes' inland treaty rights have been extinguished on *all* state *and private* lands, since those lands have passed out of federal control. This was consistent with Governor Engler's letter to Secretary Norton and Attorney General Ashcroft, which particularly opposed any treaty rights claim that might affect private lands – even those already required to be open to hunting and fishing under state law.

However, the State's counterclaim did *not* seek a determination of the nature and scope of any treaty rights that did exist. In particular, the counterclaim did *not* seek a determination of: (1) which species may be harvested on lands or waters that are subject to the treaty right (for example, it did not seek a determination whether the Tribes may harvest live or dead timber); (2) whether the Tribes have a right of access to lands or waters that are subject to the treaty right; (3) the scope of Tribal and/or State regulatory authority over tribal members on lands or waters that are subject to the treaty right; or (4) any management or allocation issues with

respect to resources that may be found on lands or waters that are subject to the treaty right.

2. The Tribes' Reply.

The Tribes filed a joint reply to the counterclaim, admitting they "have adopted tribal codes authorizing their members to exercise the Treaty Right on certain inland lands and waters," RE 1477 Reply at 3, ¶ 24, JA ___, but denying the treaty right "is limited to federal lands that have never passed out of federal control and on which the exercise of the Treaty Right is not inconsistent with the purpose of federal ownership." *Id.* at 2, ¶ 1, JA ___. The Tribes' reply did not seek any affirmative relief, but simply requested that the District Court enter judgment against Defendants and in favor of the Tribes on the counterclaim, deny the relief requested in the counterclaim, and retain jurisdiction to provide further necessary or proper relief. *Id.* at 4, ¶¶ 1-3, JA ___.

3. The Case Management Order.

The parties filed a Joint Status Report in which they proposed a litigation management schedule. From the Tribes' perspective, this schedule was necessary to permit them to prepare their case on the merits, and was based on the parties' agreement, as set forth in the Joint Status Report, that "[d]iscovery and trial in this phase of this litigation shall be limited to the issues raised by Defendants'

counterclaim, the Plaintiff-Intervenors' reply thereto, and the United States Supplemental Complaint." RE 1483 Joint Status Report at 5, ¶ 9, JA ___.

At a status conference, counsel for the United States informed the Court that the United States intended to file a supplemental complaint so it could "participate as the plaintiff related to *the issue that the state has raised* in its counterclaim regarding the *existence* of . . . inland treaty hunting and fishing rights." RE 1522 Transcript at 13, JA ___ (emphasis added). Defendants' counsel reiterated Defendants' position that "the land has been required for settlement and that the treaty by itself has, therefore, extinguished the right." *Id.* at 11, JA ___; *see also id.* at 12, JA ___ (asserting Tribes have no more rights "on the vast majority of land"). In making these statements, Defendants' counsel did not exclude private lands but, instead, reaffirmed Defendants' claim that the Tribes' rights did not exist on any state *or private* lands.

Defendants' counsel also reported Defendants had retained and expected to present testimony from at least five expert witnesses, including: a linguist who is an expert in the Chippewa language; two historians, one an expert on United States Indian policy and another an expert on Michigan settlement patterns and Indian understanding; a historic geographer to address land use and the extension of state

laws; and an anthropologist to testify about Indian understanding and Indian culture. *Id.* at 28, JA ___.[4]

The parties anticipated that, even with the use of written expert reports as direct testimony, trial would last 20 days (10 days for Defendants' case and 10 days for the Tribes and the United States). RE 1483 Joint Status Report at 6, ¶ 12, JA ___. The Court issued a Case Management Order on February 23, 2004, adopting the parties' proposed schedule. RE 1484, Order, JA ___.

4. The United States' Supplemental Complaint.

On April 19, 2004, the United States filed a motion for leave to file a supplemental complaint. The United States explained that it did not seek to expand the threshold issue raised in the Defendants' counterclaim, but sought to make sure that the Court's resolution of that issue would be final and binding on all parties:

> Because the United States is not a named party to the Defendants' counterclaim, the United States does not believe it will be bound by the Court's final judgment as to the Defendants' counterclaim. As a result, the United States may be able to bring further action against the Defendants. To avoid the potential continued liability on the part of the Defendants, and *to resolve the issues presented in the Defendants' counterclaim as to the United States*, the United States seeks to file its supplemental complaint.

---

[4] According to the Michigan Department of Natural Resources Grants and Contracts Office, by May 2004 the State had expended over $800,000 on expert witnesses and consultants for the inland case. *See* RE 1509 (Exh. F) E-Mail Messages, JA _____.

RE 1493 Motion at 2-3, ¶ 6, JA _____ (emphasis added). The only relief sought in the supplemental complaint itself is: (1) a declaratory judgment that the Tribes "continue to have treaty-protected rights to hunt, fish, trap and gather on inland lands and waters within the area ceded by the 1836 Treaty that are *not* required for settlement within the meaning of the Treaty"; and (2) the Court's retention of jurisdiction for purposes of enforcing its judgment and providing further necessary or proper relief. RE 1493 Supplemental Complaint at 5, ¶¶ 1-2, JA ___ (emphasis added).

In sum, while the issue framed by Defendants' counterclaim, the Tribes' reply and the United States' supplemental complaint was limited to the threshold question regarding the existence of the Tribes' rights,[5] it plainly encompassed the

---

[5]In Proposed Intervenors' previous appeal, Defendants argued the issue before the District Court includes "the nature and scope of [the Tribes'] rights," including such detailed questions as whether the Tribes' rights include the right to camp on state or private lands for indefinite periods, to gather bark on state or private land, to harvest crops or maple sap on private property, and to use artificial lights to hunt animals at night. *United States v. Michigan*, Sixth Cir. No. 04-1864, Defendants/Counter-Plaintiffs State of Michigan's Final Brief at 3-4, 8-9 (Feb. 9, 2005). However, this expansive description of the issue before the District Court finds no support in the text of Defendants' counterclaim, the Tribes' joint reply or the United States' supplemental complaint. The counterclaim does not raise *any* issue concerning the particular activities encompassed by the Tribes' treaty rights, does not allege the Tribes' are currently exercising their rights in a manner that creates an actual case or controversy with respect to such matters, and does not even disclose Defendants' position on these issues. While such questions may arise in *future* phases of the case, they are not now before the District Court.

question whether those rights existed on public *and private* lands. Defendants alleged that *any* federal conveyance of lands – to the *State or any private party* – by itself terminated the Tribes' Article 13 rights on those lands, and both the Tribes and the United States denied this.

D. Proposed Intervenors' First Motion to Intervene.

1. Proposed Intervenors' Motion and Supporting Brief.

The Michigan Fisheries Resource Conservation Coalition ("MFRCC"), Stuart Cheney, Robert Andrus and the Walloon Lake Trust and Conservacy (collectively, "Proposed Intervenors") moved to intervene. Their motion alleged MFRCC "is a coalition of business, recreation, sportfishing, and land and inland lake preservation associations, whose members are *property owners* whose interests will be directly affected by the outcome of this litigation." RE 1501 Motion at 1, ¶ 2, JA ___ (emphasis added).[6] Similarly, Proposed Intervenors

---

[6] The motion did not otherwise address the purpose, mission or activities of MFRCC or its organizational members. Proposed Intervenors' brief in support of intervention listed the name of each member organization, but likewise provided no information regarding the purpose, mission or activities of those organizations. RE 1501 Brief at 7-8, JA _____. Similarly, while the brief asserted the members of MFRCC's member organizations include "riparians and private landowners with property interests that will be directly affected by the outcome of this litigation," it did not identify who those members are, where their properties are located, or to which of MFRCC's member organizations they belong. *Id.* at 4, JA ___; *see also id.* at 20, JA ___ (asserting that unnamed members of unnamed MFRCC member organizations own lands within the State's commercial forests program).

alleged that the individual applicants for intervention (Stuart Cheney, Robert Andrus, and the Walloon Lake Trust and Conservancy) "are individuals or organizations who *own property* whose interests will be directly affect by the outcome of this case." *Id.* at 1, ¶ 3, JA ___ (emphasis added).

In their supporting brief, Proposed Intervenors argued that the United States and the Tribes had asserted a "usufructuary privilege over . . . [a]ll privately-owned lands within the 1836 Treaty ceded area that are required by law to be open to the public for hunting, fishing, trapping, or gathering," and that resolution of this case would affect "the property rights of the MFRCC's members and the Individual Intervenors." RE 1501 Brief at 5-6, JA ___ (emphasis in original).[7]

---

[7] We understand Proposed Intervenors' reference to "privately-owned lands . . . that are required by law to be open to the public" to refer to lands enrolled under Michigan's Commercial Forests Act (CFA), Mich. Comp. Laws §§ 324.51101 – 324.51120. The Act provides an incentive for the preservation of commercial forests by reducing the property taxes that would otherwise be assessed on such lands. However, enrolled lands can only be used for commercial forestry purposes, and the landowner cannot deny the general public the privilege of hunting and fishing on the lands unless they are closed to hunting or fishing by the State. *See id.* §§ 324.51101(d), 324.51113(1). In their inland hunting and fishing regulations, the Tribes have authorized their members to hunt and fish on such lands. It should be noted, however, that while Proposed Intervenors claimed unnamed members of unnamed member organizations of MFRCC owned CFA lands, it made no showing that either MFRCC or its member organizations were organized for the purpose of representing, or were otherwise authorized to represent, the interests of CFA landowners. *See* note 6 above. And, Proposed Intervenors did not claim that any of the proposed individual intervenors own CFA lands.

Proposed Intervenors also argued they had an interest in a series of claims they "believe[d] that the United States and the Tribes have asserted or may assert." *Id.* These alleged claims involved, for the most part, the nature and scope of the Tribes' rights – issues that were *not* raised by Defendants' counterclaim, the Tribes' joint reply to the counterclaim, or the United States' supplemental complaint – such as: (1) the right to remove live or dead timber (*id.* at 6, ¶¶ 1-2, JA ___); (2) the right to cross private property or trust lands held by conservancies to access inland waters (*id.*, ¶¶ 3-4, 7, JA ___); and (3) the Tribes' right to regulate seasons, bag limits, and methods of harvest on lands and waters that are within the scope of the treaty right (*id.*, ¶¶ 8-12, JA ___). *See also id.* at 13, JA ___ (stating that one purpose of intervention is "to ensure that [Proposed Intervenors'] divergent concerns are protected in the event of a *regulatory phase* addressing usufructuary privileges") and 16, JA ___ (claiming it is necessary "for the Intervenors to participate in the development of *future management measures* for the inland issues," and that this case is the "only forum" in which the Proposed Intervenors can protect their interests "in any *future management and allocation plans*, should that be necessary") (emphasis added).

Although Proposed Intervenors asserted Defendants could not adequately represent their interests, *id.* at 23-25, JA _____, they did not deny Defendants claimed the Tribes had *no* treaty rights on *any* lands that are now or ever have been

in non-federal hands (*including all lands currently in private ownership*), and had assembled a comprehensive team of experts (on whom they had expended over $800,000) to litigate this claim. Nor did Proposed Intervenors identify any arguments they intended to make or witnesses they intend to present with respect to this threshold concerning the existence of the Tribes' rights that Defendants could not or would not offer.

As required by Rule 24(c), Proposed Intervenors submitted "a pleading setting forth the claim or defense for which intervention is sought." *See* RE 1501 Brief at 7, JA ___. The pleading was an answer to the United States' supplemental complaint and asserted, as did Defendants, that the Tribes' inland treaty rights no longer existed. *See* RE 1501 Answer at p. 1 ¶ 4, p. 3 ¶ 1.a-d, JA _____. In addition, however, the pleading asserted, as "affirmative defenses," a series of claims that went beyond the claims asserted in Defendants' counterclaim, the Tribes' joint reply or the United States' supplemental complaint, including claims with respect to the timber, access and regulatory issues discussed above. *See id.* at pp. 3-4, ¶¶ 1.e.(1) - (12), JA _____.

2. The District Court's Order Denying Intervention.

The District Court denied Proposed Intervenors' motion. The Court found the motion untimely for reasons "explained at length" in the Tribes' principal opposition brief, and particularly noted that, before Proposed Intervenors filed their

motion, "the parties and the Court established a schedule for discovery and trial premised on the narrow issue of whether the [Tribes] have retained usufructuary rights on inland property which has passed out of federal control." RE 1518 Order at 2, JA ___.[8] The Court found Proposed Intervenors' "proposed Answer would greatly complicate the suit by requiring adjudication of many proposed Affirmative Defenses, including factually intensive decision making as to the regulation of separate usufructuary rights," and would delay the proceedings by necessitating "prolonged discovery on the regulatory issues raised." *Id.* at 2-3, JA _____.

The District Court did not deny that the threshold issue before the Court involved the existence of the Tribes' rights on state *and private* lands. However, it found Proposed Intervenors' interests in this issue were "adequately represented by Defendants and will not be impaired in the absence of intervention." *Id.* at 3, JA ___.[9] Underscoring the fact that the threshold issue involved both public *and private* lands, the Court emphasized "there is a long and proven history in this suit

---

[8] The District Court's clear definition of the issue in the current phase of the case prompted no response from Defendants. It was not until they filed a brief in this Court that Defendants first sought to broaden the issue in the case far beyond the threshold issue raised in their counterclaim. *See* note 5 above.

[9] Proposed Intervenors acknowledged in their first appeal to this Court that the District Court had found "that the *private property rights* of the Proposed Intervenors [were] adequately represented by the State." *United States v. Michigan,* Sixth Cir. No. 04-1864, Final Brief of Appellants at 14 n.5 (Feb. 9, 2005) (emphasis added).

of the use of *amici curiae* to sufficiently advise the Court of public *and private* interests," and noted that, to grant Proposed Intervenors' motion "would be to issue an open invitation to *all inland property owners* within the area covered by the 1836 Treaty to directly participate." *Id.* (emphasis added).

3. Proposed Intervenors' Appeal.

Proposed Intervenors appealed the denial of their motion to intervene to this Court. Their briefs, oral argument and other submissions emphasized that the case involved the existence of the Tribes' rights on both public *and private* lands, and argued that, as private property owners, Proposed Intervenors had a right to intervene. In making this argument, Proposed Intervenors expressly relied on the Tribes' discovery responses, in which the Tribes confirmed that their inland hunting and fishing regulations – the regulations being challenged by the State – authorized Tribal members to hunt and fish on limited categories of private lands. Proposed Intervenors also relied on deposition testimony of a tribal expert, which addressed the existence of the Tribes' rights on private lands.

At the same time, Proposed Intervenors sought to downplay the management and regulatory issues they had raised in the District Court. They suggested that their "affirmative defenses" raising these issues could be stricken by the District Court or that litigation of such issues could be prohibited by this Court.

The following excerpts from Proposed Intervenors' briefs, oral argument, and subsequent motion to expedite the appeal are illustrative of these points. They are significant here because Proposed Intervenors are making the same arguments, in many cases repeating the same language word-for-word, in their current appeal.

> The results [of this case] could have a major, permanent, and, some would say, catastrophic effect on private property rights . . . . The Appellants' property rights give them the right to participate in responding to claims raised only weeks before their request to intervene. [*United States v. Michigan*, Sixth Cir. No. 04-1864, Final Brief of Appellants at x (Feb. 9, 2005).[10]]

> [The Tribes' usufructuary] rights, if determined to exist, will directly and perpetually affect the property rights of the Proposed Intervenors, who are property owners in the affected area. [*Id.* at 3.]

> The Tribes have claimed the issue before the District court is extremely narrow, but this is a red herring. *Their responses to discovery requests and their claims explicitly claim a right to hunt, fish, trap and gather on privately owned lands and the waters adjacent thereto.* [*Id.* (emphasis added).[11]]

---

[10] The Tribes believe these claims are overblown and irresponsible. Similar Indian treaty rights have been recognized by federal and state courts and exercised for decades in Oregon, Washington, Idaho, Montana, Minnesota, Wisconsin, and Michigan's western Upper Peninsula for some 20 years. No catastrophic effects on private property rights have ensued.

[11] This claim overstated the Tribes' position. As the Tribes' discovery responses made clear, the Tribes' claim usufructuary rights only on those privately owned lands that have not been required for settlement within the meaning of the 1836 Treaty, and they have limited the exercise of such rights to a subset of those lands (those required to be open to the public for hunting or fishing under State law or on which the Tribes or their members obtain the consent of the owner to hunt or fish).

... the scope of this phase of the litigation includes claimed usufructuary rights over: ... All privately-owned lands within the 1836 Treaty ceded area that are required by law to be open to the public for hunting, fishing, trapping, or gathering. [*Id.* at 13 (emphasis in original).]

The underlying litigation will determine for the first time the lands and inland waters on which the Tribes may exercise Treaty rights, if any .... Private property rights are at the heart of this dispute and will be directly affected by the manner in which the District Court resolves this lawsuit. [*Id.* at 14-15.]

There is no doubt that private property rights are at stake. *In the Tribes' responses to discovery requests, they unequivocally state that they seek rights on "... private lands that are open to the public ... under Michigan's Commercial Forest Land Program and private, undeveloped lands on which Tribal members receive permission from the owner [i.e. unposted] to hunt, fish, trap or gather.*" [*Id.* at 15 n.6 (emphasis added).]

Proposed Intervenors have clear property rights that will be affected by this case. [*Id.* at 16.]

... the Proposed Intervenors also awaited the Tribes' Reply to the State's Motion, to determine whether the Tribes would disavow private land claims and claims that might impair riparian rights. The Tribe's Reply is unclear in this regard, but *discovery responses filed on August 27, 2004 directly implicate private property rights*. [*Id.* at 24-25 (emphasis added).]

[I]t cannot be disputed [that Proposed Intervenors have a significant legal interest in this case] as the Tribes claim the right to tread upon any privately owned land that the property owner chooses to open to the public. [n.9] For example, private property owners may choose to enroll their lands as

"commercial forests" under the commercial Forest Act, MCL 324.51102, et seq. In so choosing, private property owners must open their lands to public hunting, which occurs under State regulation. The Tribes now claim a Treaty right to hunt such lands, but without State regulation, thus vitiating part of the basis for the property owners' choice. [*Id.* at 26 & n.9 (emphasis in original).]

.....

Currently, private property owners, including Commercial Forest Land property owners, land conservancy owners, and riparian owners, are not represented in this case. That State has no duty to defend their interests. [*Id.* at 28.]

.....

Courts that have analyzed strikingly similar situations have held that the State's interest does not adequately protect private property owners. Directly on point, in another Treaty right case, the court in Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994 (8th Cir. 1993) was faced with the exact intervention issue presented here. The Court of Appeals there reversed the District Court's denial of intervention .... [*Id.* at 28-29.]

.....

Though the Tribes profess to assert only a narrow Treaty interpretation issue, *their statements assert a broad claim to hunt, fish, trap and gather on privately owned lands and waters.* [*Id.* at 29-30 (emphasis in original).[12]]

.....

Although *the Tribes' recent discovery responses clearly assert the right to hunt, fish, trap and gather on privately owned lands* as part of their Treaty right, if the issues are nevertheless as narrow as the Tribes claim, the *District Court could simply strike Proposed Intervenors' affirmative defenses, or we can simply withdraw them* if they are beyond the scope of the action. ... This *does not change the fact that the Proposed Intervenors have private property interests that are not those of the State.* [*Id.* at 30 (emphasis added).]

.....

[12] As noted above, this was an overstatement of the Tribes' position.

[T]he *Tribes themselves have expanded this case by claiming rights over private property in past pleadings and in recent discovery responses*, where they have stated in relevant part:

> The Tribes answer that they believe they possess an Article 13, 1836 treaty right to hunt, fish, trap, or gather on private lands that are not open to the public for hunting, fishing, trapping or gathering if such lands have not been required for settlement within the meaning of Article 13 of the 1836 Treaty. (emphasis added [by Proposed Intervenors])

The Tribes' discovery responses to the State's second discovery request also admit that the Tribes are already exercising rights on private property. The pertinent response states in relevant part:

> [T]he Tribes limit the exercise of Article 13 rights by their members to: (1) certain public lands that are open to the public for hunting, fishing, trapping or gathering; (2) certain private lands that are open to the public for hunting, fishing, trapping or gathering under Michigan's Commercial Forest Land Program; (3) certain private, undeveloped lands on which tribal members receive permission from the owner to hunt, fish, trap or gather; and (4) certain navigable waters.

[*United States v. Michigan*, Sixth Cir. No. 04-1864, Reply Brief of Appellants at 1-2 (Jan. 20, 2005) (emphasis added).]

.....

As mentioned above, *the Tribes have already claimed rights over private property*. This is a direct assault upon the interest of at least the individual Proposed Intervenors, who are private property owners in the ceded territory, easily meeting the "direct and substantial interest" test. [*Id.* at 4 (emphasis added).]

.....

[T]he Tribes protest over the Proposed Intervenors' defenses provides no basis to deny intervention even if this Court believes they raise claims over which the Tribes have not waived sovereign immunity. The simple solution in such case is to *simply prohibit litigation of such claims* and evaluate the

Proposed Intervenors' interests in light of the claims that are joined in this case. ... Here, *the Tribes and United States have already acknowledged that private property rights "may as a practical matter" be impaired or impeded.* Though they assert (erroneously) that Tribal regulations do not presently permit activity on private lands, they plainly assert the right to change those regulations and they plainly assert a Treaty right over private property. [*Id.* at 7 (italics added; underlining in original).[13]]

.....

Court: How is your position [different] from the State on that general issue? The argument is that they've all been required for settlement unless they've been kept within the federal government.

Schultz [Counsel for Proposed Intervenors]: Our position could be dramatically different in that we're here to defend private property rights, the State is here to address the entire issue both public *and private* ...

Court: How could your position on that one issue conceivably be any different?

Schultz: I will explain it perhaps through referring to the testimony of one of the tribes' experts who testified at deposition and we were not allowed to question this witness so we have to take it from what the State questioned. She was presented with a hypothetical – do the tribes have the right to exercise a treaty right on a lake front cottage – land that a lake front cottage sits on that's occupied 4 months a year and is not occupied the rest of the year? And the expert said – based upon my reading and understanding of the treaty, the answer is yes, the tribes may exercise a treaty right on those lands – on that property owner's property. [RE 1644 (Exh. 2) Transcript at 5, JA ____[14]].

---

[13] The Tribes never asserted their regulations permitted *no* activity on private lands; rather, as explained above, they asserted that their regulations limited activities on private lands to a subset of those lands that had not been required for settlement, namely, lands already required to be open to the public for the activity in question or lands on which the Tribes or their members obtained the consent of the owner.

[14] Proposed Intervenors' use of this deposition testimony was misleading in two respects. First, the Tribes' expert, Professor Susan Gray, testified she personally

continued on next page

In discovery taking place after oral argument, the Tribes admitted that private property rights are at stake in this case. Specifically, the Tribes stated in relevant part:

> "The Tribes believe an Article 13 treaty right applies to private lands if they have not been required for settlement within the meaning of the Treaty."

[*United States v. Michigan*, Sixth Cir. No. 04-1864, Proposed Intervenors' Motion to Expedite Appeal at 1-2 (Aug. 19, 2005)].

4. This Court's Decision Affirming the Denial of Intervention.

Notwithstanding Proposed Intervenors' claim that they were entitled to intervene to protect their private property rights, and their willingness to jettison their affirmative defenses raising regulatory and management issues, this Court affirmed the denial of their motion to intervene. *United States v. Michigan,* 424 F.3d 438 (6th Cir. 2005). Like the District Court, this Court did not deny that the underlying issue in the District Court involves the existence of the Tribes' treaty rights on public *and private* lands. However, the Court held the State adequately represents Proposed Intervenors' interests with respect to this issue. *Id.* at 443-45.

---

considered lakefront property occupied four months of the year to be settled, and simply noted that such uses would not have been contemplated at the time of the treaty, making it difficult to determine *whether* they conformed to a 19th century standard of settlement. RE 1644 (Exh. 5) Deposition Excerpt at 473, JA ___. Second, Proposed Intervenors failed to note that the Tribes have never sought to exercise their inland treaty rights on such lands.

The Court began its discussion of adequacy of representation by summarizing the Proposed Intervenors' argument that the State could not protect their private property interests:

> The proposed intervenors insist that the defendants will not adequately represent their interests because the state's "duty is to the broader public" and it "has no duty to defend their interests" *as private property owners*. They contend that experience verifies that the state cannot adequately defend *private property rights*.

Id. at 444 (emphasis added). The Court evaluated this argument in light of "the claims currently pending before the district court," *id.*, which it described as follows:

> The scope of the issues in the current phase of this litigation was defined by the State of Michigan's counterclaim, which merely sought a declaration that, with the exception of certain federal lands that have never passed out of federal control, the Tribes' treaty-reserved rights to hunt and fish outside the Great Lakes have ceased to exist. Neither the Tribes' answer to this counterclaim nor the United States' supplemental complaint expanded on these issues. Further, the parties' Joint Status Report includes an agreement that discovery in this phase of the litigation would be limited to the issues raised in the parties' respective pleadings. The district court adopted the parties' report and apparently set a January 2006 trial date with the understanding that, initially at least, only the threshold issue concerning the existence of the Tribes' inland treaty rights would be considered.

Id.[15] Notably, the Court did not suggest that the threshold issue was limited to the existence of the Tribes' treaty rights on public lands. Rather, it found that Defendants adequately represented Proposed Intervenors' interests in the threshold issue concerning the existence of the Tribes' rights on public *and private* lands:

> The proposed intervenors have failed to articulate why the State of Michigan's legal representation concerning this issue is inadequate. *The relief requested by the proposed intervenors and the State of Michigan* in their respective pleadings *is nearly identical* in that they both seek a declaration that the Tribes do not retain *any* off-reservation usufructuary rights under the Treaty. The proposed intervenors have not identified any separate arguments unique to them that they would like to make concerning the existence of the Tribes' inland rights, nor have they shown that the State of Michigan would fail to present such arguments to the district court.

Id. (emphasis added).

The Court went on to note that, "[r]ather than identifying any weakness in the state's representation in the current phase of the proceedings, the proposed intervenors seem more concerned about what will transpire *in the future* should the

---

[15] As noted above (*see* note 5), in the brief Defendants filed in Proposed Intervenors' first appeal, Defendants argued the issues before the District Court included detailed questions regarding the nature and scope of the Tribes' rights. Indeed, on this basis, Defendants requested that this Court "reject the Plaintiffs' characterization of the issue before the District Court." *United States v. Michigan*, Sixth Cir. No. 04-1864, Defendants/Counter-Plaintiffs State of Michigan's Final Brief at 12 (Feb. 9, 2005). The Court took note of this request during oral argument, s*ee* RE 1644 (Exh. 2) Transcript at 5-6, JA ____, but plainly rejected it, opting instead to describe the issue before the District Court precisely as it had been described by the District Court. Unfortunately, as noted below (*see* note 18), this has not dissuaded Defendants from continuing their efforts to broaden the issue.

district court determine that the Tribes' inland treaty rights continue to exist." *Id.* (emphasis in original). The Court stated that this concern was apparent when reviewing the affirmative defenses in Proposed Intervenors' proposed answer, "which prematurely seek to inject management and regulatory issues that are not yet before the court." *Id.* The Court recognized that Proposed Intervenors "*may* be legitimately concerned about these future issues, but stated these issues "are not now, and possibly never will be, before the district court." *Id.*; *see also id.* at 445 (reiterating that "proposed intervenors' answer prematurely seeks to inject management and regulatory issues into the current phase of the proceedings")

The Court thus distinguished the issue that is before the District Court, which is concerned only with the question of whether the Tribes' inland treaty rights continue to exist on public or private lands, and as to which there was no indication that the State "will not adequately represent the proposed intervenors' interests," i*d.* at 445, from future regulatory and management issues that might arise concerning the nature and scope of the Tribes' rights, and as to which Proposed Intervenors might not be adequately represented by the State. The Court's conclusion reflected this distinction:

> Although we conclude that the State of Michigan will adequately represent the proposed intervenors' interest in this case, we express no opinion as to the adequacy of the State of Michigan's representation should the scope of the Tribes' usufructuary rights become an issue. Should the litigation proceed that far, the proposed intervenors may renew their motion. The timeliness of such a motion should be judged

from the point in time at which the scope of the Tribes' usufructuary rights, if any, are considered by the district court.

Id. at 445-46.

The Court filed its decision on August 24, 2005. Neither Proposed Intervenors nor Defendants sought rehearing or clarification of the decision.

E. Proposed Intervenors' Renewed Motion to Intervene.

1. Proposed Intervenors' Motion and Supporting Brief.

Proposed Intervenors filed their renewed motion to intervene on September 29, 2005, 36 days after this Court issued its decision affirming the denial of Proposed Intervenors' first motion to intervene. RE 1643 Renewed Motion, JA ____. Proposed Intervenors argued they were entitled to renew their motion to intervene because "the scope of the Treaty right and its application to private property appears to be in issue." *Id.* at 2, JA ___. In their supporting brief, Proposed Intervenors asserted "the scope of the Tribes' rights (i.e., where they will be exercised, if anywhere) is now before the Court. ... Intervenors bring this motion now because through expert testimony and admission, the Tribes claim an unrestricted treaty right to hunt and/or fish on private property." RE 1644 Brief at 1, JA ___.[16]

---

[16] The Tribes have never claimed "an *unrestricted* treaty right to hunt and/or fish on private property." In *defending* against Defendants' claims that their treaty rights have been extinguished, the Tribes have asserted only that they retain such rights
continued on next page

In support of these claims, Proposed Intervenors cited:

-- comments by a Tribal attorney in the oral argument before this Court in Proposed Intervenors' first appeal, in which the Tribal attorney acknowledged that the threshold issue before the District Court involved the existence of the Tribes' rights on public *and private* lands;

-- the discovery document cited by Proposed Intervenors in the Motion to Expedite Appeal that they filed in their first appeal, in which the Tribes acknowledged they believe their treaty rights exist on private lands that have not been required for settlement within the meaning of the treaty;

-- the deposition testimony of Federal and Tribal expert witnesses discussing the existence of the Tribes' treaty rights on private lands, including the excerpt from Professor Gray's testimony that Proposed Intervenors cited in oral argument before this Court in Proposed Intervenors' first appeal; and

-- expert reports prepared by Federal and Tribal expert witnesses discussing the existence of the Tribes' treaty rights on private lands (although Proposed Intervenors asserted these reports had been filed in the District Court on

---

on lands that have not been required for settlement within the meaning of the treaty, and, as discussed above, have further limited the exercise of such rights to a subset of those lands (those required to be open for hunting or fishing or on which Tribal members obtain the consent of the owner). Moreover, the Tribes carefully regulate the exercise of the treaty rights, and recognize the State may also regulate the exercise of the right under certain circumstances.

August 15, 2005, they neglected to note that the reports had been exchanged among the parties and sent to Proposed Intervenors in *October 2004*, three months before Proposed Intervenors filed their reply brief in their first appeal, and six months before oral argument in that appeal). RE 1643 Renewed Motion at 2, JA ___; RE 1644 Brief at 1-2, JA ____.[17]

Proposed Intervenors' renewed motion rested entirely on the claim that the threshold issue before the District Court might encompass the existence of the Tribes' rights on private as well as public lands. As Proposed Intervenors stated, if the issue whether the Tribes' treaty right still exists does not encompass the

[17] Proposed Intervenors attached a variety of discovery documents to a reply brief in support of their renewed motion to intervene, including hunting and fishing regulations adopted by one of the Tribes (Exh. 1) and State incident reports on hunting and fishing activities by tribal members (Exhs. 2-6), some of which were contrary to *tribal* as well as state law. *See* RE 1668 Reply Br. at 3 (citing Exhs. 1-7), JA ___. Proposed Intervenors did not explain, however, how the Tribal regulations or the State incident reports produced in discovery changed the issue in the case as defined in the pleadings. As to the former, Defendants have challenged the Tribes' regulations only to the extent that they authorize tribal members to exercise Article 13 rights on lands the State contends are no longer subject to such rights; they have not otherwise challenged any particular provisions in those regulations (such as the length of tribal deer seasons). As to the latter, Defendants have made no claim against any individual tribal member, and none of the tribal members who are the subject of the incident reports are parties to this case.

question whether the right "applies to any private property ... Intervenors will not pursue this motion." RE 1644 Brief at 2, JA ___ (emphasis in original).[18]

Despite focusing exclusively on the issue whether the Tribes' rights continue to exist on private lands, Proposed Intervenors did not deny that they sought the same relief with respect to this issue as did Defendants, in that they both sought a declaration that the Tribes do not retain *any* off-reservation usufructuary rights on private lands. *See* RE 1643 Proposed Answer at 1 ¶ 4, JA ___ (denying that Tribes have *any* treaty-protected hunting, fishing, trapping or gathering rights on inland lands and waters within the area covered by the 1836 Treaty).[19] Moreover,

---

[18] Proposed Intervenors did not argue that the regulatory and management issues they had sought to interject into the case when they first moved to intervene were now before the District Court. However, in response to Proposed Intervenors' renewed motion, Defendants submitted a brief arguing that the issue before the District Court includes abstract issues concerning "what are [the Tribes'] rights," "the nature and scope of [the Tribes'] rights and privileges" and "what the right and privileges consist of." RE 1659 Brief at 2, 3, 7, JA ___. In making this argument, Defendants made no mention of the District Court's order identifying the issue presented in the current phase of the case, or this Court's definition of the issue in its decision affirming the denial of Proposed Intervenors' first motion to intervene. Nor did Defendants cite any passage in their counterclaim that actually seeks a determination of – or mentions in any way – the "nature and scope" of the Tribes' rights.

[19] The only difference between Defendants' position and Proposed Intervenors' position with respect to the existence of the Tribes' inland Article 13 rights is that Defendants acknowledge that the Tribes may retain such rights on some lands that have been in continuous federal ownership since the time of the treaty. Both, however, claim that right has been extinguished on all State *and all private* lands. Proposed Intervenors have never claimed they would be adversely affected by the

continued on next page

Proposed Intervenors did not identify any separate arguments unique to them that they would like to make concerning the existence of the Tribes' inland rights, and did not show that the State of Michigan would fail to present such arguments. To the contrary, the only arguments Proposed Intervenors identified in their Proposed Answer are *identical* to the arguments set out in Defendants' counterclaim. *Cf. id* at 3 ¶ 1, JA ___ (claiming Article 13 reserved inland usufructuary rights for an indefinite but temporary time period, that the tribal signatories to the treaty understood this, that the time period has now expired, and that the express limitations in the treaty have extinguished the tribes' rights, in that the lands have been required for settlement) *with* RE 1463 Counterclaim at 4-5 ¶¶ 18-21, JA ___ (same).

2. The District Court's Order Denying Proposed Intervenors' Renewed Motion.

The District Court denied Proposed Intervenors' renewed motion to intervene on November 3, 2005. RE 1678 Order, JA ___. The District Court began with this Court's statement that the issue raised by the pleadings is "whether 'with the exception of certain federal lands that have never passed out of federal control, the Tribes' treaty-reserved right [under Article 13 of the 1836 Treaty of

---

existence of the Tribes' rights on the small amount of land that has been in continuous federal ownership, and conceded in oral argument before this Court that they're "very comfortable" with Defendants' position on this point. RE 1644 (Exh. 2) Transcript at 7, JA ___.

Washington] to hunt and fish outside the Great Lakes has ceased to exist.'" *Id.* at 1-2, JA ___. The District Court stated this Court viewed intervention "as currently improper because it would 'prematurely ... interject management and regulatory issues,'" but expressly reserved "Proposed Intervenors' rights to seek later intervention at such time as the scope of the Tribes' usufructuary rights would be at issue." *Id.* at 2, JA ___.

According to the District Court, Proposed Intervenors' renewed motion, filed when the "ink was just dry on [the Sixth Circuit's] Opinion, ... inquires whether usufructuary rights have been made an issue because of expert reports discussing usufructuary rights and discovery responses discussing usufructuary rights." *Id.*, JA ___. However, the District Court also noted that Proposed Intervenors did not seek to intervene if "the scope of the case is not expanded beyond the narrow legal question originally presented (*i.e.*, whether the Treaty right to fish and hunt on state-owned lands and private lands, other than retained federal lands, has been extinguished because, under the Treaty language, the lands were 'required for settlement.')" *Id.*, JA ___.

Concurring with the United States' "fine Memorandum in Opposition," the District Court held the "scope of this suit has not recently changed." *Id.*, JA ___. It explained:

> The pleadings remain the same and remain focused on the legal meaning of the "required for settlement" clause. This narrow legal

> question does not involve any definition of the particular usufructuary rights of the Tribes, even though the historical question of the meaning of the "required for settlement" clause will occur in a context in which actual land usage is likely to form a part of the record for an interpretation of the Treaty language. This does not, however, connote any departure from the narrow legal undertaking presented by the pleadings. As such, there has been no change since the filing of the Court of Appeals' decision and such decision remains the binding law of the case on this issue.

Id. at 2-3, JA ____ (footnote omitted).[20] The Court assumed that, should this suit progress to a later phase involving the parsing of particular rights and management of lands – that is, to a phase addressing the nature and scope of the Tribes' rights – then all parties interested in such determinations (including Proposed Intervenors) would be permitted to intervene. *Id.* at 3 n.2, JA ___.

3. Proposed Intervenors' Motions for Clarification or Reconsideration and for a Stay.

On November 14, 2005, Proposed Intervenors filed a motion for clarification or reconsideration of the District Court's order denying their renewed motion to intervene and an emergency motion for a stay of proceedings. RE 1683 Motion and Brief, JA ___; RE 1685 Emergency Motion, JA ___. In seeking clarification or reconsideration, Proposed Intervenors argued that the District Court, in acknowledging that the narrow legal issue presented in the current phase of the

---

[20] In describing the issue before it, the District Court again rejected Defendants' efforts to broaden the scope of the case to encompass abstract determinations regarding the nature and scope of the Tribes' rights. *See* note 18 above.

case involves the existence of the Tribes rights on state *and private* lands, failed to explain why intervention was denied. RE 1683 Motion and Brief at 1, JA ___. Refusing obdurately to recognize the holdings of both the District Court and this Court that Defendants adequately represent Proposed Intervenors' interests with respect to this issue, Proposed Intervenors threatened both to file another appeal and to repeatedly disrupt the trial of this matter:

> Absent clarification that the Treaty right will not be addressed with respect to its possible existence over "private lands," Proposed Intervenors will be put in the unwarranted position of having to appeal an unclear order and needing to *repeatedly renew their Motion to Intervene at trial whenever private property issues arise.* In addition, Proposed Intervenors will need to *repeatedly ask this Court to affirm that private landowners can relitigate the question of whether "private lands" fall within the term "required for settlement,"* without any application of res judicata or law of the case. In the absence of clarification, Proposed Intervenors will again be required to appeal this Court's Order because of the Court's reference to "private lands" in its Order.

Id. at 2, JA ___ (emphasis added). At the same time, Proposed Intervenors sought to stay the proceedings, either to give them time to prepare for trial (in the event the District Court reconsidered and granted their renewed motion to intervene) or to appeal once again the denial of their motion to this Court. RE 1685 Emergency Motion at 1-2, JA ___.

4. The District Court's Order Denying Proposed Intervenors' Motions for Clarification or Reconsideration and for a Stay.

deposition testimony, and other discovery documents addressing the existence of the Tribes' rights on private lands – documents that were available to and in several cases cited by Proposed Intervenors when they briefed and argued their first appeal to this Court – do not expand upon or otherwise alter this threshold issue. This Court's holding that Defendants adequately represent Proposed Intervenors' interests with respect to this issue is the law of the case, and Proposed Intervenors provide no reasons for departing from it.

ARGUMENT

A. Standard of Review.

The District Court denied Proposed Intervenors' renewed motion to intervene under the law-of-the-case doctrine. This Court reviews a lower court's application of that doctrine under an abuse of discretion standard. *Rouse v. DaimlerChrysler Corp.*, 300 F.3d 711, 715 (6th Cir. 2002).

B. The District Court Did Not Abuse Its Discretion in Applying the Law-of-the-Case Doctrine.

1. Under the Law-of-the-Case Doctrine, This Court's Decision that Defendants Adequately Represent Proposed Intervenors' Interests in the Current Phase of This Case Was Binding on the District Court.

Under the law-of-the-case doctrine, "once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Bowles v. Russell,* 432 F.3d 668, 676

(6th Cir. 2005) (quoting *Int'l Union of Operating Eng'rs. Local Union 103 v. Indiana Const. Corp.*, 13 F.3d 253, 256 (7th Cir. 1994)). Accordingly, "when a case has been remanded by an appellate court, the trial court is bound to 'proceed in accordance with the mandate and law of the case as established by the appellate court.'" *Hanover Ins. Co. v. American Eng'g Co.,* 105 F.3d 306, 312 (6th Cir. 1977) (quoting *Petition of U.S. Steel Corp.,* 479 F.2d 489, 493 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973)).

In Proposed Intervenors' prior appeal, this Court determined:

> (1) the scope of the issues in the current phase of this litigation was defined by Defendants' counterclaim, which merely sought a declaration that, with the exception of certain federal lands that have never passed out of federal control, the Tribes' treaty-reserved rights to hunt and fish outside the Great Lakes have ceased to exist;
>
> (2) Defendants adequately represent Proposed Intervenors' interests with respect to the issue regarding the existence of the Tribes' treaty rights; and
>
> (3) only if the District Court determines that the Tribes' rights continue to exist, and proceeds to a consideration of the scope of those rights, may Proposed Intervenors renew their motion to intervene.

United States v. Michigan, 424 F.3d at 444-46.

Under the law-of-the-case doctrine, these decisions were binding on the District Court. Proposed Intervenors do not contend otherwise.

2. Expert Reports and Discovery Documents Addressing the Existence of the Tribes' Rights on Private Lands Have Not Changed the Issue in the Current Phase of This Case and Provide No Basis for Departing from This Court's Holding that Defendants Adequately Represent Proposed Intervenors' Interests in the Current Phase of this Case.

Proposed Intervenors argue that expert reports and discovery documents addressing the existence of the Tribes' rights on private lands, as well as the District Court's order acknowledging that the existence of the Tribes' rights on state and private lands is in issue, have changed the issue in the current phase of the case and rendered inoperative this Court's holding that Defendants adequately represent Proposed Intervenors' interests. *See, e.g.,* Prop. Int. Br. at 6, 11 n.3, 13-16. There are multiple problems with this argument.

First, from the time Defendants sought leave to file a counterclaim, it has been clear that the counterclaim concerns the existence of the Tribes' rights on *private* as well as public lands. As explained above, Defendants sought a declaratory judgment that the Tribes' rights have been extinguished on *all* lands ceded in the 1836 Treaty with the exception of certain lands that have never left federal ownership. Since *private* lands have, by definition, left federal ownership, Defendants' counterclaim clearly put the existence of the Tribes' rights on such lands at issue.

Second, in denying Proposed Intervenors' first motion to intervene, the District Court confirmed that the issue presented in the current phase of the case involves the existence of the Tribes' rights on public *and private* lands. The Court stated the case was limited to the narrow issue of whether the [Tribes] have retained usufructuary rights on inland property which has passed out of federal control." RE 1518 Order at 2, JA ___. The issue was "narrow" because it did not encompass the multiple regulatory and management issues Proposed Intervenors sought to raise, but it plainly encompassed private lands as one category of "inland property which has passed out of federal control." *Id.* The Court underscored the fact that the threshold issue involved both public *and private* lands in noting that "there is a long and proven history in this suit of the use of *amici curiae* to sufficiently advise the Court of public *and private* interests," and that, to grant Proposed Intervenors' motion "would be to issue an open invitation to *all inland property owners* within the area covered by the 1836 Treaty to directly participate." *Id.* at 3, JA ___ (emphasis added).

Third, in their first appeal to this Court, Proposed Intervenors themselves acknowledged that the issue before the District Court involved the existence of the Tribes' rights on both public *and private* lands. As set forth above, Proposed Intervenors made this point repeatedly in their briefs, oral argument, and motion to

expedite the appeal, often relying on the *same* discovery documents and expert depositions on which they are relying here.

Fourth, in affirming the denial of Proposed Intervenors' first motion to intervene, this Court recognized that the threshold issue before the District Count involved the existence of the Tribes' rights on all lands ceded in the Treaty, "with the exception of certain federal lands that have never passed out of federal control." *United States v. Michigan*, 424 F.3d at 444. Since private lands have passed out of federal control, they are plainly encompassed by the threshold issue in this case. Nothing in this Court's opinion suggests otherwise.

In its opinion, this Court specifically considered and rejected Proposed Intervenors' argument that Defendants "cannot adequately defend private property rights." *Id.* In rejecting this argument, the Court did not find that private property rights were not at issue in the case. Instead, it relied on the fact that Proposed Intervenors sought the same relief as Defendants – a declaration that the Tribes do not retain any off-reservation usufructuary rights under the Treaty. *Id.* The Court explained that applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit. *Id.* at 443-44. The Court held that Proposed Intervenors failed to overcome this presumption, since they were unable to identify "any separate arguments unique to them that they would like to make concerning the existence of

the Tribes' inland rights" or to show that Defendants "would fail to present such arguments to the district court." *Id.* at 444.

In short, the fact that expert reports and discovery documents – all of which were available to Proposed Intervenors when they briefed and argued their first appeal and many of which were actually cited by Proposed Intervenors in that appeal – discuss the existence of the Tribes' rights on private lands does not change the issue in the current phase of the case or provide any basis for departing from this Court's holding that Defendants' adequately represent Proposed Intervenors' interests in that issue. Under this Court's decision, Proposed Intervenors will be entitled to renew their intervention motion only if the District Court finds the Tribes' rights continue to exist and proceeds to a consideration of the scope of those rights. *Id.* at 446.

3. Proposed Intervenors' Reliance on the Eighth Circuit's Decision in *Mille Lacs* is Misplaced.

Proposed Intervenors argue Defendants do not adequately represent their interests because the State cannot adequately protect private property rights. Prop. Int. Br. at 8-10. They rely on the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), in support of this proposition. Notably, this argument is *virtually identical* to the argument Proposed Intervenors made in their first appeal. *See United States v. Michigan*, Sixth Cir.

No. 04-1864, Final Brief of Appellants/Proposed Intervenors at 28-31 (Feb. 9, 2005).

Remarkably, in making this argument, Proposed Intervenors *never mention* this Court's holding, in their previous appeal, that Defendants adequately represent Proposed Intervenors' interests. They do not address the presumption of adequate representation that arises when applicants for intervention have the same objective as an existing party. They do not claim that their objective – establishing that the Tribes' rights have been extinguished on private lands – is any different than Defendants' objectives. They do not identify any separate arguments unique to them that they would like to make. And they do not show that Defendants would fail to present such arguments to the District Court. To the contrary, Proposed Intervenors simply proceed as if this Court had never decided their prior appeal.

Under the law-of-the-case doctrine, this Court will not reconsider a previously decided issue unless one of three "exceptional circumstances" exists. *Coal Resources Inc. v. Gulf & Western Industries*, 865 F.2d 761, 767 (6th Cir. 1989) (quoting *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.*, 761 F.2d 649, 657 (Fed. Cir.), *cert. denied*, 474 U.S. 902 (1985). Although one such circumstance is that "controlling authority has since made a contrary decision of law," *id.*, the *Mille Lacs* decision on which Proposed Intervenors rely *preceded* this Court's decision in Proposed Intervenors' first appeal and is not controlling here.

In *Mille Lacs*, 989 F.2d at 1001, the Eighth Circuit held the State of Minnesota might not adequately represent private landowner interests in an Indian treaty rights case. However, the case was initiated by a tribe seeking a comprehensive adjudication of its treaty usufructuary rights, *id.* at 996, and, although bifurcated by the District Court, *id.*, was not limited to the threshold issue presented in this case regarding the existence of the Tribes' treaty rights. Thus, the holding is not inconsistent with this Court's holding that, with respect to that threshold issue, Defendants adequately represent Proposed Intervenors' interests.

Moreover, unlike *Mille Lacs*, 989 F.2d at 1001, Proposed Intervenors here do not suggest Defendants' interests "may lead [them] to seek no more than that endangered species are protected and that wildlife stocks are preserved at certain levels." Indeed, as Governor Engler's letter demonstrates, Defendants have an active interest in opposing the existence of the Tribes' rights on any private lands and in protecting the State's hunter access programs, including the Commercial Forest Land program, in which Proposed Intervenors are allegedly interested. *See* RE 1509 (Exh. E) Letter at 2, JA ___. While Proposed Intervenors' property interests may give them different *motives* for opposing the existence of the Tribes' treaty rights on private lands, they have failed to demonstrate that those interests will lead them to take any different positions or make any different arguments than Defendants in the current phase of this case. *See Moore's Federal Practice*, §

24.03[4][a][i] at p. 24-43 (3d ed.) (difference as to motive does not establish inadequate representation).

Third, the reasoning in *Mille Lacs* has not been adopted in this Circuit and has been rejected elsewhere. In *Menominee Indian Tribe v. Thompson*, 164 F.R.D. 672, 674 (W.D. Wis. 1996), the court denied three motions to intervene, including motions filed on behalf of landowners, in an action initiated by a tribe for a comprehensive adjudication of its usufructuary rights in eastern and central Wisconsin. The court reasoned that, in the initial phase of the litigation, the State of Wisconsin adequately represented the intervenors' interests. *Id.* at 676. The court's reasoning parallels that of the District Court and this Court in this case:

> At this stage of the litigation, *when the only issue is the determination of the existence of plaintiff's usufructuary rights*, I conclude that these proposed intervenors . . . have not shown that they are entitled to intervene in this action as of right. *Even if their interests might diverge at a later point, as of now they are identical.* The applicants for intervention are seeking exactly what the state is seeking: a judicial determination that plaintiff has no continuing usufructuary rights outside its reservation. The record establishes that the state defendants are pursuing that goal vigorously and effectively. If the litigation proceeds beyond the determination of the existence of the tribe's usufructuary rights and if at such time these proposed intervenors believe that their interests have diverged from those of the state and that they can overcome the presumption of the adequacy of the state's representation of their interests, they will be free to renew their motion.

Id. at 677 (emphasis added).

Like Proposed Intervenors here, proposed intervenors in *Menominee* relied on the analysis in *Mille Lacs*. The court responded:

> With respect, I find this analysis unconvincing. First, it is based on assumptions about risk to land values and natural resources that are wholly speculative. Second, it depends on an artificial view of the state's interest in the litigation. Perhaps in Minnesota the state's overriding concern in a treaty rights case is natural resources and specifically, the protection of endangered species and the preservation of existing levels of wildlife stocks, but I could not make the same characterization of the state of Wisconsin's work in the present litigation – or of its litigation strategy in the *Lac Courte Oreilles* litigation. . . . Rather, the state has pursued the matter of natural resources within the larger context of protecting the interests of its citizens. To the extent that landowners might argue in this case as they did in the *Mille Lacs Band* case that any prospect of depletion of natural resources stocks would reduce the market value of their real estate, the state of Wisconsin's concern for those natural resources and its vigorous defense of them would only inure to the benefit of property owners within the ceded territory.

Id. So here: the State of Michigan's longstanding interest in challenging the existence of the Tribes' inland rights on State *and private* lands, its substantial expenditures in support of such litigation, its comprehensive team of experts, and its advocacy on behalf of landowner interests in hunter access programs all demonstrate it will "adequately, energetically and fairly" represent the Proposed Intervenors' interests in the current phase of this case. RE 97 Opinion at 7, JA ___.

Under these circumstances, Proposed Intervenors' reliance on *Mille Lacs* provides no basis for departing from this Court's holding that Defendants

adequately represent Proposed Intervenors' interests in the current phase of this case.

CONCLUSION

The District Court's Order denying Proposed Intervenors' renewed motion to intervene should be affirmed. This Court should make it clear that Proposed Intervenors will not be permitted to disrupt the trial in this matter by repeatedly renewing their motion to intervene whenever private lands are mentioned. And, it should foreclose any continuing efforts by Defendants to broaden the issue before the District Court in the current phase of this case.

Dated: April 11, 2006.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

Kathryn L. Tierney by MDS

Kathryn L. Tierney
12140 W. Lakeshore Drive
Brimley, MI 49715
(906) 248 3241

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

Aaron Schlehuber
Sault Ste. Marie Tribe of Chippewa Indians
523 Ashmun Street, 3rd Floor
Sault Ste. Marie, MI 49783
(906) 632 2137

Bruce R. Greene
Alice E. Walker
Greene, Meyer & McElroy, P.C.
1007 Pearl St., Suite 220
Boulder, CO 80302
(303) 442 2021

By Bruce R. Greene by MDS
Bruce R. Greene

GRAND TRAVERSE BAY BAND OF OTTAWA AND CHIPPEWA INDIANS

William Rastetter
Of Counsel: Olson, Bzdok & Howard
420 E. Front St.
Traverse City, MI 49686
(231) 946 0044

(231) 946 5241

John Petoskey
Grand Traverse Band of Ottawa and
Chippewa Indians
2605 N. West Bayshore Drive
Peshawbestown, MI 49682
(231) 271 5220

By William Rastetter by MDS
William Rastetter

LITTLE RIVER BAND OF
OTTAWA INDIANS

Marc D. Slonim
Brian C. Gruber
Ziontz, Chestnut, Varnell, Berley &
Slonim
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
(206) 448 1230

By Marc D. Slonim
Marc D. Slonim

LLITTLE TRAVERSE BAY BANDS
OF ODAWA INDIANS

James A. Bransky by MDS
James A. Bransky
9393 Lake Leelanau Dr.
Traverse City, MI 49684

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 11,973 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

Marc D. Slonim
Attorney for Appellee, Little River Band of Ottawa Indians

Appellees Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians' Cross-Designation of Parts of the Record To Be Included in the Joint Appendix (6th Cir. R. 30(b))

Record Entry No.	Title or Description
97	Opinion
1463	Defendants' Motion for Leave to File a Counterclaim
1463	State Defendants' Counterclaim
1477	Plaintiff-Intervenors' Reply to Defendants' Counterclaim
1483	Joint Status Report
1484	Case Management Order
1493	United States Motion for Leave to File Supplemental Complaint
1501	Motion to Intervene and Proposed Answer
1501	Brief of Proposed Intervenors in Support of Motion to Intervene[1]
1501	Answer to United States' Supplemental Complaint

[1] Appellees believe the briefs of Proposed Intervenors (RE 1501, 1644) have independent relevance with respect to the interests asserted and claims made by Appellants in the District Court, and therefore should be included in the Joint Appendix pursuant to 6th Cir. R. 30(f)(1)(E). The two other briefs that Appellees cross-designate (RE 1659 and 1683) also have independent relevance because they demonstrate Defendants' and Proposed Intervenors' position regarding the earlier rulings of this Court and the District Court with respect to intervention and the issues before the District Court.

1501 (Exh. 1)	Proposed Amended Complaint
1509 (Exh. E)	Letter from Governor John Engler to Honorable Gale Norton and Honorable John Ashcroft
1509 (Exh. F)	E-Mail Between Michigan Department of Natural Resources and Michigan Tribal Advocates
1518	Order
1522 (Exh. O)	Transcript of Rule 16 Status Conference before the Honorable Ellen S. Carmody, United States Magistrate Judge
1643	Answer to United States' Supplemental Complaint
1644	Brief of Proposed Intervenors in Support of Renewed Motion to Intervene
1644 (Exh. 2)	Transcript of Sixth Circuit Oral Argument
1644 (Exh. 5)	Transcript of Deposition of Susan E. Gray
1659	Defendants' Brief in Response to Michigan Fisheries Resource Conservation Coalition et al's Renewed Motion to Intervene
1668	Proposed Defendants-Intervenors' Reply Brief
1683	Motion and Brief for Clarification of Order Denying Renewed Motion for Intervention or for Reconsideration
1685	Emergency Motion for Stay of Proceedings
1698	Notice of Appeal

CERTIFICATE OF FILING AND SERVICE

I certify that on April 11, 2006, I filed and served this Proof Brief of Appellees Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians by mailing the signed original Brief by first-class mail, postage prepaid, to the Clerk of the Court, United States Court of Appeals for the Sixth Circuit, 100 East Fifth Street, Room 532, Cincinnati, Ohio 45202-3988, and by mailing by first-class mail, postage prepaid, one copy of the Brief to each of the following:

Kathryn E. Kovacs
Ann Peterson
United States Department of Justice
Environment & Natural Resources
Division
Appellate Section
P.O. Box 23795
Washington D.C. 20026

Steven Miskinis
John Turner
United States Department of Justice
Environment & Natural Resources
Division
Indian Resources Section
P.O. Box 44378 / L'Enfant Plaza
Station
Washington, D.C. 20026-4378

Margaret Mary Chiara, U.S. Attorney
Charles R. Gross, First Assistant U.S.
Attorney

Jennifer L. McManus, Assistant U.S.
Attorney
330 Ionia NW, Room 501
P.O. Box 208
Grand Rapids, MI 49501-0208*l*

Priscilla Wilfahrt
U.S. Department of the Interior
Regional Office of the Solicitor
1 Federal Drive, Room 686
Bishop Henry Whipple Building
Fort Snelling, MN 55111-4007

Aaron Schlehuber
Sault Ste. Marie Tribe of Chippewa
Indians
523 Ashmun Street, 3rd Floor
Sault Ste. Marie, MI 49783

Bruce R. Greene
Greene, Meyer & McElroy
1007 Pearl St., Suite 220

Boulder, CO 80302

Kathryn Tierney
Bay Mills Indian Community Tribal Office
12140 W. Lakeshore Drive
Brimley, MI 49715

James A. Bransky, General Counsel
Little Traverse Bay Bands of Odawa Indians
9393 S. Lake Leelanau Drive
Traverse City, MI 49684

Allie Greenleaf Maldonado
Assistant General Counsel
Little Traverse Bay Bands of Odawa Indians
7500 Odawa Circle
Harbor Springs, MI 49740-9692

William Rastetter
Olson & Bzdok, PC
420 E. Front St.
Traverse City, MI 49686-2614

John F. Petoskey, General Counsel
Grand Traverse Band of Ottawa and Chippewa
Indians
2605 N. West Bayshore Drive
Peshawbestown, MI 49682

Carlos Alvarado-Jorquera
Little River Band of Ottawa Indians
375 River Street
Manistee, MI 49660-0314

Marie Shamraj
Christopher D. Dobyns
Assistant Attorneys General
Environment, Natural Resources and Agriculture Division
P.O. Box 30755
Lansing, MI 48909

Stephen O. Schultz
Peter R. Albertins
Foster, Swift, Collins & Smith PC
313 S. Washington Square
Lansing, MI 48933-2193

Peter W. Steketee
Suite 65
660 Cascade W. Parkway, S.E.
Grand Rapids, MI 49546

Peter W. Strom / Paul L. Strom
Strom & Strom
417 Ludington Street
P.O. Box 714
Escanaba, MI 49829-3923

Heidi A. Reynolds