UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES, et al.,

Plaintiffs,

v.

STATE OF MICHIGAN, et al.,

Defendants.

Case No. 2:73 cv 26

HONORABLE PAUL L. MALONEY

MEMORANDUM IN SUPPORT OF MOTION BY THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TO EXTEND CONSENT DECREE FOR 90 DAYS PURSUANT TO THIS COURT'S CONTINUING JURISDICTION

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The Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe" or "Tribe") has moved this Court for a ninety-day extension of the Consent Decree entered into by the parties to this case on August 8, 2000 (Dkt. 1458 (8/8/2000)) and due to expire on August 8, 2020 ("2000 Consent Decree"). A ninety day extension is tailored to the amount of delay in negotiations the parties have experienced due to COVID-19, and all parties agree that the 2000 Consent Decree should be extended by at least 90 days. As explained in greater detail below, applicable law does not allow the tribal "exclusive zone" provisions in the 2000 Consent Decree to continue after expiration of the Decree absent agreement of all five tribes, and the Sault Tribe does not agree to such continuation beyond November 6, 2020.

I. INTRODUCTION AND FACTUAL BACKGROUND

For more than 12,000 years, the Chippewa and Ottawa have fished the waters of what are now known as the Great Lakes. Like many tribes, the Chippewa and Ottawa signed treaties ceding their aboriginal homelands to the United States during this country's westward expansion. In 1836, several bands of Chippewa and Ottawa signed a treaty ceding nearly 14 million acres of Chippewa and Ottawa lands to the United States. 7 Stat. 495. In exchange, the bands (now five federally-recognized tribes) reserved the right to fish in the ceded area.

Like many tribes, the signatories of the 1836 Treaty suffered violations of their treaty rights for generations. The tribes' attempts to exercise their treaty rights and the ensuing violations of the tribes' treaty right by state authorities fueled violence and distrust. Finally, in the 1960s and 1970s the dispute reached a breaking point: Michigan authorities repeatedly arrested tribal commercial fishermen, accusing them of violating state fishing laws.

In 1978, the United States sued on its own behalf and as a trustee on behalf of the signatory tribes to the 1836 Treaty. Two successor tribes to the signatories of the 1836 Treaty, the Sault Ste. Marie Tribe of Chippewa Indians and the Bay Mills Indian Community, were

federally recognized at that time, and are the two original intervenor tribes in *United States v. Michigan*. *United States v. Michigan*, 471 F. Supp. 192, 218 (W.D. Mich. 1979).

In the seminal 1979 decision in *United States v. Michigan*, Judge Fox held that the 1836 Treaty reserved the right of the treaty tribes to fish as they always had: "the Ottawa and Chippewa Indians, and the plaintiff Tribes as their successors, reserved an aboriginal right to fish in the waters of the Great Lakes ceded by the Treaty of 1836, which right they may exercise without regulation by the State of Michigan." *Id.* at 216. The Fox opinion further determined that each tribe has a collective and indivisible right to fish in the 1836 ceded waters, as there were never any separate fishing areas for individual tribes within those waters. *See id.* at 259, 280-81.

Largely due to backlash and civil unrest in reaction to the Fox decision, and also to avoid litigation over issues relating to the decision (such as allocation of fish between the state of Michigan and the tribes), the parties in *United States v. Michigan* entered into relatively long-term consent decrees that governed the management of the fisheries. The first Consent Decree (the "1985 Consent Decree") governed from 1985 until 2000. *See United States v. Michigan*, Case No. 2:73-cv-00026-PLM, Dkt. 833 (5/31/1985). On August 8, 2000, this Court approved a second Consent Decree (the "2000 Consent Decree") among the United States, the state of Michigan, and five tribes: the Bay Mills Indian Community, the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, and the Little Traverse Bay Bands of Odawa Indians. Dkt. 1458 (8/8/2000). By its terms, the 2000 Consent Decree is due to expire on August 8, 2020.

Although the Fox decision made clear that the Ottawa and Chippewa possess collective and indivisible fishing rights over the entire treaty-ceded area, by agreement of the parties, both

the 1985 and 2000 Consent Decrees set aside so-called "exclusive zones"[1]—areas within the 1836 Treaty waters where only one or two tribes are allowed to fish. The intent of this intertribal agreement was to allow the more recently federally-recognized tribes an opportunity to develop their fisheries while shielded somewhat from competition by the more established tribes. Thirty-five years after the initial Consent Decree in this case (and twenty years from the most recent adoption), that preferential treatment is no longer necessary because the more recently federally-recognized tribes have had ample time and opportunity to grow their fisheries. Importantly, the 2000 Decree made it clear that the provisions of the Decree did not "create a precedent for future allocation or regulation." 2000 Consent Decree, Dkt. 1458, § XXIII. Indeed, the law requires agreement of all tribes to allocate a resource to which they have an indivisible right.

The Sault Tribe now seeks to extend the 2000 Consent Decree for a period of ninety days principally because of disruptions to the renegotiations of a new decree stemming from the COVID-19 pandemic. The Sault Tribe believes that an extension for the amount of negotiation time lost due to the pandemic (and no longer) is appropriate in this case. Other parties have requested a longer extension. *See* Dkt. ## 1879-80 (6/24/2020).

II. ARGUMENT

A. This Court Has the Inherent Authority to Extend the Consent Decree, Subject to Other Applicable Law.

There is no question that the Court has the power to extend the Consent Decree in this case, subject to applicable law regarding the tribal exclusive zones, discussed in more detail in Section II.B.3 below.

"Consent decrees have elements of both contracts and judicial decrees." *Frew ex rel.*

[1] The 1985 Decree included an exclusive zone for the Grand Traverse Band of Ottawa and Chippewa Indians, which received federal recognition in 1980. The 2000 Decree included exclusive zones for Grand Traverse, the Little River Band of Ottawa Indians (recognized in 1994), and the Little Traverse Bay Bands of Odawa Indians (also recognized in 1994).

Frew v. Hawkins, 540 U.S. 431, 437 (2004) (citing *Firefighters v. Cleveland*, 478 U.S. 501, 519 (1986)). A consent decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). As a result, the Sixth Circuit Court of Appeals has repeatedly held that district courts have continuing jurisdiction to enforce and implement their decrees. *See, e.g., Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Mich. Dep't of Natural Resources*, 141 F.3d 635, 641 (6th Cir. 1998) ("A district court has the jurisdiction to enforce consent decrees. Such decrees are settlement agreements subject to continued judicial policing.") (citing *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017–18 (6th Cir. 1994) and *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (internal quotations omitted)).

Part and parcel of the district court's continuing enforcement power is the power to extend a consent decree in response to changed circumstances. *See, e.g., Chrysler Corp. v. United States*, 316 U.S. 556, 562–63 (1942) (consent decree extended via exercise of modification power); *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995) (parts of consent decree extended via exercise of compliance enforcement power); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 248 (1968) (noting that consent decrees "may be changed upon an appropriate showing"); *Rufo*, 502 U.S. at 383. Importantly, the court's authority to extend a consent decree is also subject to applicable law regarding the decree's contents. As explained in greater detail below, countervailing law prohibits extension of parts of the 2000 Consent Decree that allocate the fishery resource among the five tribes absent agreement of all five tribes.

Here, all parties agree that the 2000 Consent Decree should be extended for at least ninety days. Granting a ninety-day extension of the expiring 2000 Consent Decree due to interruptions from the COVID-19 pandemic falls well within this Court's equitable power.

B. The Court Should Extend the Consent Decree until November 6, 2020.

"A party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. "Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous," "when a decree proves to be unworkable because of unforeseen obstacles," or "when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384–85 (citations omitted). Any proposed extension of the term of a decree must be "suitably tailored" to the changed circumstances. *Id.* at 383; *see also Vanguards*, 23 F.3d at 1020. And, any extension must also satisfy other governing law, including law applicable to inter-tribal allocation of a shared treaty resource.

Given the disruption to state and tribal operations and the attendant delays to Consent Decree negotiations due to the COVID-19 pandemic, an extension of the Consent Decree for a period of ninety days to November 6, 2020 is warranted in this case.

1. The COVID-19 pandemic upended normal operations and negotiations regarding the expiring 2000 Consent Decree.

As recently as March of this year, the parties were diligently working toward negotiating the terms of a new Consent Decree. The emergence of the COVID-19 pandemic interrupted this work. A fair estimate of the cumulative time lost is approximately ninety days, which reflects not only quarantine mandated by the state and tribal governments, but travel restrictions and time required on the part of these governments to administer the situation, as well as related

employment actions, including furloughs and other disruptions in the workplace. Because of these additional challenges attributable to the pandemic, more time is needed to negotiate a new Consent Decree to replace the expiring decree.

By its own terms, the 2000 Consent Decree expires on August 8, 2020, and no portion of the Decree is binding on the parties after that date. *See* 2000 Consent Decree, Dkt. 1458 § XXII(A) ("Upon expiration of this Decree, or if earlier terminated for any reason, the provisions, restrictions, and conditions contained in it shall no longer govern the parties in any manner."). In addition, the Decree and its provisions did not "create a precedent for future allocation or regulation." 2000 Consent Decree, Dkt. 1458, Para XXIII.

To be sure, neither the decisions in *United States v. Michigan* nor other applicable law requires that a Consent Decree be in place at all as long as the parties can manage the fisheries without causing, or threatening to cause, irreparable harm with respect to conservation of the fishery resource. *See United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981). Absent a new Consent Decree binding the parties following the expiration of the 2000 Decree, each party's own regulations would govern: state law would govern state fishing, and tribal and some federal law would govern tribal fishing. *See United States v. Michigan*, 505 F. Supp. 467, 494 (W.D. Mich. 1980) ("The United States, the tribes, and the State [each] have authority to set quotas for fishermen under their jurisdiction."). While nothing prevents the parties from continuing to negotiate in the absence of a decree, for the sake of convenience and continuity and good faith efforts to reach agreement with the other parties, the Sault Tribe is willing to extend the 2000 Consent Decree for a period of ninety days.

2. A ninety-day extension of the Consent Decree is suitably tailored to the delay in negotiations caused by COVID-19.

Because of the loss of approximately ninety days of negotiation time, a ninety-day

extension of the 2000 Consent Decree—and no longer—is the appropriate period for an extension. Sixth Circuit case law recognizes that any modification to a consent decree must further the purpose of the decree "without upsetting the basic agreement between the parties." *Heath v. DeCourcy*, 992 F.2d 630, 634 (6th Cir. 1993). While the turmoil of a global pandemic warrants a brief term extension to recoup the lost negotiation time, any modification of a consent decree must not be undertaken lightly, and no extension beyond that which is actually called for by the circumstances—and by other applicable law—should be granted. *See id.* (citing *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 563 (6th Cir. 1982), *rev'd on other grounds*, 467 U.S. 561 (1984)).

To that end, courts confronting the possibility of extending the term of a consent decree must ensure that the proposed modification is suitably "tailored to resolve the problems created by the change" in circumstances. *Rufo*, 502 U.S. at 391; *see also id.* at 383. An extension to make up for the actual length of the delay in this case is a narrowly-tailored option that both allows for some continuity of the current Decree to reflect the delay and ensures that the parties will remain accountable and diligent in their continuing negotiations toward a new Consent Decree.

Should the parties find that a longer period becomes necessary as the expiration of the ninety days approaches, the parties could request another extension at that time. Case law from within this Circuit supports this approach. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 2:06-CV-896, 2013 WL 4008758, at *12 (S.D. Ohio Aug. 5, 2013) (extending consent decree through only one election cycle instead of the requested two cycles and noting that "another extension of the Consent Decree may be appropriate"); *see also Vanguards*, 23 F.3d at 1020 (determining extension of consent decree for a "relatively short period of time" to be suitably

tailored to the circumstances that warranted the modification).

3. An extension of the Decree as written for longer than ninety days without agreement of all five tribes is not permitted under the 1836 Treaty and other applicable law.

The 2000 Consent Decree provides for "exclusive zones"—areas within the 1836 Treaty waters where only specified tribes are allowed to fish. *See, e.g.*, Dkt. 1458 § IV.A. Absent agreement to inter-tribal allocation by all five tribes, the exclusive zones are not legally permissible because all five tribes have an indivisible right to fish in all of the 1836 ceded waters.

The original 1979 opinion in *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), took pains to emphasize the nature of the five tribes' collective and indivisible right to the 1836 ceded waters. Judge Fox observed that the Ottawa and Chippewa "fished extensively over the entire ceded area" and that "[i]t was not possible before 1836 to draw a precise line on a map showing distinct areas occupied exclusively by either Ottawa or Chippewa." *Id.* at 259, 220. The Ottawa and Chippewa "had the means to cover the entire ceded area and went where the fish were to be found." *Id.* at 259. Thus, the nature of the Ottawa and Chippewa right to the resource is indivisible among the tribes: "the retained aboriginal right is not limited to any geographical area within the ceded area." *Id.* at 259. "The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the bands which signed the treaty. . . . The Indians have a right to fish today wherever fish are to be found within the area of cession." *Id.* at 280.

The exclusive zones in the 2000 Decree were a function of agreement among the five tribes. Indeed, because the 1836 Treaty gives each tribe the right to fish *throughout* the ceded waters, zones that abrogate that right by excluding certain tribes from treaty-secured waters require agreement of all five tribes. Without agreement, such zones are not legally permissible.

This principle finds a corollary in the equitable apportionment doctrine, which applies

where different sovereigns have rights to different areas in which a particular aquatic resource is harvested, and allocation is needed to avoid preemption of a downstream or upstream user. *See, e.g.*, *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983) (approving equitable apportionment as a tool for resolving allocative disputes in the context of upstream and downstream users). The doctrine requires a sovereign seeking apportionment against other sovereigns to first "prove by clear and convincing evidence some real and substantial injury or damage." *Id.* at 1027. Although it appears that the doctrine has not been applied where parties share the same area and resource, the doctrine is still informative here because it underscores the high bar that must be met before a court may allocate a treaty resource among tribes.

The difficulty in meeting the "real and substantial injury or damage" test is illustrated by a number of cases where one sovereign (a state or a tribe) has sought to invoke the equitable apportionment doctrine in attempts to allocate resources in waters subject to a tribal treaty right. Those attempts all failed because the sovereign seeking relief could not meet its burden.

In *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983), Idaho sought an equitable apportionment against Oregon and Washington of the anadromous fish that migrate between the Pacific Ocean and spawning grounds in Idaho. Oregon and Washington had entered into a compact governing fishing in waters that ran through the states. Part of the compact allowed for tribal fishing in accordance with the tribes' treaties. Idaho tried to enter the compact but was rejected. Due to decreased runs of fish since 1973, Idaho asked the court to equitably apportion the fishery. The Supreme Court held that, in order to establish a basis for equitable apportionment, a party "must prove by clear and convincing evidence some real and substantial injury or damage." *Id.* at 1027. According to Idaho, from 1962 through 1980, Oregon and Washington took 83% of the Idaho spring chinook and 75% of the Idaho-origin summer

chinook. *Id.* at 1028 n.12. The Court found that Idaho had not met its standard of proof, because it did not prove that "Oregon and Washington are now injuring Idaho by overfishing the Columbia or that they will do so in the future" or that "Oregon and Washington have mismanaged the resource and will continue to mismanage." *Id.* at 1028. Even though Oregon and Washington had periodically overfished in the past, Idaho "produced no concrete evidence of other mismanagement" and "[t]he record show[ed] no repetition or threatened repetition of [prior mismanagement]." *Id.* at 1029.

In *United States v. Washington*, 573 F.3d 701 (9th Cir. 2009), the Skokomish Tribe sought equitable apportionment of a fishery with three other tribes that had overlapping treaty fishing areas. The Ninth Circuit held that, in order for the court to apportion the resource, Skokomish was required to establish by clear and convincing evidence that other tribes had seriously threatened to cause "real and substantial injury or damage" to it. *Id.* at 707-08. The court explained that "[t]his high burden for pleading and proof" with respect to inter-sovereign allocation "differs from ordinary standing doctrine, because suits between sovereigns require restraint by the courts, and because equitable remedies are discretionary." *Id.* at 707. It emphasized that the Supreme Court "has long held that '[t]he governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.'" *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931)). Because Indian tribes are sovereign entities like states, "[t]he same considerations of federal non-interference in the affairs of other sovereigns . . . apply to our review of the actions of Indian tribes." *Id.* at 708 (internal quotation and citation omitted).

The Ninth Circuit held that the Skokomish Tribe could not "prove by clear and

convincing evidence some real and substantial injury or damage" because it did not claim "any impingement on its ability to obtain whatever fish it claims under the treaty." It thus did not establish "real and substantial injury or damage." *Id.*

Finally, in *United States v. Washington*, 20 F. Supp. 3d 899 (W.D. Wash. 2010 and 2012), the District Court for the Western District of Washington addressed a request for intertribal allocation and "special management units" in the Washington State tribal halibut fishery. Thirteen tribes with different treaty fishing areas participate in this fishery.

In 2010, the Makah Tribe filed a motion asking the court to adopt a halibut management plan that assigned certain percent shares to different tribes. In a brief ruling, the court refused to adopt the plan, noting that "the Court has ruled previously that it does not have jurisdiction over allocation disputes between sovereign Tribes absent the consent of all." *Id.* at 944.

The tribes subsequently went to settlement in what would be a failed attempt to reach agreement to a new halibut management plan, resulting in the tribes separately proposing five different plans to the court. With respect to one plan in particular that proposed to establish "separate management units" ("SMUs") the court noted that "the concept is appealing in theory as a sound fisheries management practice, and potentially offers to each Tribe the ability to make its own decisions about management of its allocated portion of the TAC," but "the SMU's represent an allocation of fish per Tribe, and such allocation is impermissible absent consent of all Tribes." *Id.* at 966.

Even if the equitable apportionment doctrine applied to the 1836 Treaty tribes (it does not), no tribe can show evidence of substantial injury because no tribe "owns" a particular area within the 1836 ceded waters. Like tenants in common, there is no legal basis to exclude any tribe from an area and a resource to which all five tribes have an indivisible right.

Moreover, the rationale for implementing exclusive zones in the first place was to allow time and opportunity for relatively newly recognized tribes to develop their fisheries. Ample time has passed, providing more than enough opportunity to satisfy this goal.

C. In the Event the Court Decides to Extend the Decree for Longer than Ninety Days, the Exclusive Zones Should Be Removed from the Consent Decree and the Five Tribe Management Plan.

Under the 1836 Treaty and other applicable law, exclusive zones cannot be imposed on the tribes absent their consent. Because the Sault Tribe will not consent to the continued existence of exclusive zones beyond the proposed ninety-day extension to the Consent Decree, any extension of the Consent Decree beyond ninety days must excise the exclusive zone provisions. The Sault Tribe will more fully discuss this issue in its response to the other parties' motion for extension.

III. CONCLUSION

For the reasons set forth above, the Sault Tribe respectfully requests that the Court extend the 2000 Consent Decree until November 6, 2020.

Respectfully submitted this 24th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with LCivR 7.3(b)(i), I used Microsoft Word 2010 to calculate that there are 3,841 words contained in this Memorandum.

DATED: June 24, 2020, at Seattle, Washington.

s/Lauren J. Kine
Lauren J. King