UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

File No. 2:73-CV-26

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,

Hon. Paul L. Maloney

Plaintiff-Intervenors,

vs.

STATE OF MICHIGAN, et al.,

Defendants,

JOINT BRIEF IN OPPOSITION TO SAULT STE. MARIE TRIBE'S MOTION TO EXTEND GREAT LAKES FISHING CONSENT DECREE

Plaintiff United States and Plaintiff-intervenors Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians, and Defendant State of Michigan (hereinafter collectively referred to as "Responding Parties") jointly file this memorandum in opposition to Plaintiff-intervenor Sault Ste. Marie Tribe of Chippewa Indians' (hereinafter "Sault Tribe") motion to extend for only 90 days the Great Lakes Consent Decree entered by this Court on August 8, 2000, which expires on August 8, 2020.

The Responding Parties filed a joint motion on June 24, 2020, to extend the Great Lakes Fishing Consent Decree from its current expiration date of August 8, 2020, until December 31, 2020. ECF No. 1879. On that same date, the Sault Tribe also filed a motion seeking an extension of the Decree on its current terms, but no further than November 6, 2020, unless the Decree is modified as Sault Tribe demands. ECF No. 1882.

For the reasons stated in the Responding Parties' memorandum of law accompanying their motion, and for the additional reasons stated below, the Responding Parties respectfully request that this Court deny Sault Tribe's motion.

EXTENSION OF THE DECREE FOR 90 DAYS IS INSUFFICIENT

The Court now has before it two competing motions, both seeking substantively identical relief, though differing as to the duration. The Parties, Sault Tribe included, are unanimous that an extension is necessary. They are likewise unanimous that an extension of the Decree with all its current terms in place is appropriate--at least until November 6, 2020. The only issue before this Court, then (should it agree that an extension is warranted), is whether it is preferable to extend the Decree to November 6 as Sault Tribe proposes, or for an additional 55 days to December 31, as proposed by the Responding Parties.

That issue weighs decidedly in favor of the latter option. As the Responding Parties stated in their motion, "[t]he Covid-19 crisis posed unexpected hardships to the negotiations, requiring several [Consent Decree negotiation] meetings to be canceled as parties needed to divert their attention to issues related to the pandemic." PageID.10669. It is indisputable that the pandemic has, to a degree nearly unprecedented in modern times, diverted time, attention and other scarce resources from governments, and from the myriad agencies, officials, attorneys, administrative staff and others who carry out government functions. Indeed, Sault Tribe agrees that "[g]iven the

disruption to state and tribal operations and the attendant delays to Consent Decree negotiations due to the COVID-19 pandemic, an extension … is warranted in this case." PageID.10685.

However, according to Sault Tribe:

> 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.
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> PageID.10685-10686.

Although it is difficult to imagine any government is now free from COVID-19-related impediments, ninety days may be a "fair estimate of the cumulative time lost" *by Sault Tribe* due to the pandemic, and may be sufficient time *for Sault Tribe* to make up for that lost time. But there is simply no basis to assume that what is sufficient for Sault Tribe is sufficient for other governments involved; and Sault Tribe's argument in favor of ninety days is premised *solely* on that unfounded assumption. There are six other governments involved in these negotiations and the participation of each is necessary for the negotiations to proceed. Each has different constituencies, different governmental structures and functions, and a different array of other obligations and competing priorities that have been affected differently by the upheaval of the pandemic. The Responding Parties have stated to this Court that they need significantly more than ninety days to properly conclude these complex negotiations in light of these unprecedented circumstances, which continue to rapidly unfold and affect the functions of government in diverse and unanticipated ways. For that reason alone the Sault Tribe's motion should be rejected.

Moreover, given that a 90-day extension will be insufficient for six out of the seven parties, limiting an extension to that amount of time is virtually guaranteed to prolong these negotiations even beyond the extension sought by the Responding Parties. This is so because as November 6 approaches and the parties realize they will not finish a Decree by that date, they will need to

secure another extension. The prospect of that exercise makes it even more likely that the parties will not be able to finalize a successor consent decree by December 31, 2020, as all involved will need to divert time and personnel resources to negotiating the subsequent extension and presenting it to this Court, which may result in a second round of motions should consensus not be reached. The Sault Tribe has provided no viable justification for the parties or this Court to hazard such a risk. And none exists.

CONCURRENCE BY THE ALL OF THE PARTIES IS NOT NECESSARY FOR THE COURT TO EXTEND THE DECREE

In addition to its arguments regarding the sufficiency of its proposed extension, Sault Tribe asserts that this Court has no authority to extend the Consent Decree *at all* on its current terms absent the agreement of all parties. It argues that since Sault Tribe only agrees to a 90-day extension, the Responding Parties' motion for an extension until December 31, 2020, cannot be granted. The provisions in the current Consent Decree with which Sault Tribe disagrees establish "zones" within the lakes wherein specific tribes have special rights to fish.[1] PageID.10688.

However, the law says otherwise: a consent decree may be entered, and therefore may also be modified, without unanimous consent of all the parties, if circumstances warrant. *See United States v. Swift & Co.*, 286 U.S. 106, 114, 52 S. Ct. 460, 462, 76 L. Ed. 999 (1932) ("We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent."); *Delaware Valley Citizens' Council for Clean Air v. Com. of Pa.*, 674 F.2d 976, 980 (3d Cir. 1982) (recognizing that a provision in a consent decree that gave the court the power to modify the decree "is merely declaratory of a district court's

[1] The Responding Parties note that Sault Tribe also benefits from exclusive opportunities for its fishers in the 2000 Consent Decree; see §IV.A.1.b.(2)(c) (Bay de Noc in Lake Michigan); §IV.A.2.c. (salmon fishing zone in Lake Huron); and §IV.A.2.d.(2)(b) (southern Lake Huron trap net zone).

inherent power to modify a consent decree, even over the objection of one of the parties."); *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994). Further, the Supreme Court has recognized that a court's modification power includes the extension of a consent decree. *See Chrysler Corp. v. United States*, 316 U.S. 556 (1942)

Further, the applicable law *in this case* is a 1985 opinion and order entered by this Court regarding a challenge by Bay Mills Indian Community to the terms of a comprehensive Consent Decree. *United States v. Michigan*, 12 I.L.R. 3079 (W.D. Mich., May 31, 1985) . For the Court's convenience, a copy is attached hereto as Exhibit 1. There, four parties proposed a zonal plan including a tribal zone that was opposed by another party. The Court adopted the zone concept despite the lack of concurrence and strong opposition by one Tribe, and did so pursuant to an array of equitable considerations that the Court determined were within its authority to take into account, separate from but consistent with the parties' rights in the shared resource under the treaty. *Id*. at 3081. Over Bay Mills' challenge, the court entered the Consent Decree agreed to by the other four parties. That decision was not appealed. Moreover, the zonal plan that was then put in place for fifteen years is similar to the zones included in the 2000 Consent Decree.

As an apparent alternative argument, Sault Tribe suggests that even if this Court has the authority to extend the Consent Decree on its current terms, and thereby authorize the continuance of the tribal zones, it may do so beyond Sault Tribe's preferred timeline only after the other parties have carried an onerous, fact-intensive burden of proof that doing otherwise will result in significant harm to any such party or parties. PageID.10688-10689. This argument likewise lacks merit.

First, this Court has held, again *in this case*, that the burden of proof on parties advocating for or against tribal zones "weighs equally on each advocate[.]" *United States v. Michigan*, 12

I.L.R. at 3081. Sault Tribe makes no effort to describe or explain the harm its fishers may experience if the Court orders the zones to remain in place *a mere 55 days* beyond what Sault Tribe has stated it would agree. Indeed, the extension in question covers a period within which little fishing activity typically occurs (November and December).

Second, assuming *arguendo* that Sault Tribe is correct about the applicable burden of proof, applying that to the issue of tribal zones would require each Plaintiff-intervenor Tribe to establish the nature and extent of harm to that Tribe as a result of continuing or terminating particular zones.[2] Carrying that burden would entail a massive litigation effort involving expert witness testimony on the historic, present, and future state of the Great Lakes fishery; fact development going back decades about the interplay of the existing zones with the fishery; the possibility of preliminary injunction proceedings culminating in a trial on the issue – all of which will paralyze the current negotiations and drag them far beyond – possibly *years* beyond – the December 31 extension the Responding Parties are proposing. Indeed, Sault Tribe's own description of some of the cases it cites in support of its argument demonstrates that these are profoundly complex issues to litigate that can take years to resolve. *See, e.g.,* Sault Tribe Motion PageID.10689-10690 (discussing *Idaho ex rel. Evans v. Oregon*). The parties and Court would incur this significant effort over just 55 days of difference between the parties over zones that have been in place for 20, and in some cases, 35 years.

All parties, including the Sault Tribe, should be motivated to avoid such a highly unwelcome scenario. This may explain the Sault Tribe's suggestion at the end of its brief that it would consent to the Responding Parties' proposed December 31 extension so long as that

[2] Likewise, the State may desire to present evidence pertaining to the zonal plan implemented by this Court's 1985 opinion and order and continued in the 2000 Consent Decree.

extension "excise[s] the exclusive zone provisions" from the Consent Decree. PageID.10692. However, no such surgical excision is realistically possible. Sault Tribe's effort to exact concessions regarding exclusive zones will almost inevitably be met with similar demands from the other parties for the interim imposition of their favored conditions or provisional changes to the terms of the existing Decree with which they have grown dissatisfied.

This is not a practical or sensible approach. Exclusive zones, like all terms of the existing Consent Decree, are presently the very subject of the ongoing, good faith negotiations that *all* parties agree they need more time to properly conclude. The Parties have entered these negotiations to avoid burdening themselves *and this Court* with precisely the kind of costly and protracted litigation that is the inevitable consequence of Sault Tribe's proposal. In other words, Sault Tribe has taken a substantive goal it has for the new Consent Decree outside of the negotiation process and invites dispositive resolution by this Court in a non-dispositive procedural motion, and in a manner that virtually guarantees the breakdown of the negotiations.[3]

This Court should decline to entertain Sault Tribe's attempts to prematurely tee up this issue. All parties, including Sault Tribe, agree that an extension is necessary and this Court has the authority to grant the six Responding Parties' extension until December 31 despite Sault Tribe's objection. Moreover, Sault Tribe has no objection to an extension of the Decree's current

[3] Sault Tribe's motion is styled as a nondispositive procedural request, and the memorandum in support of its motion was accompanied by a certification as to word count under LCivR 7.3(b)(i), which pertains to nondispositive motions. Yet Sault Tribe's assertions regarding the authority of this Court to allocate the fishery resource, the allegedly "indivisible" nature of the treaty right, and applicable burdens of proof fall within the ambit of a dispositive motion under Fed. R. Civ. P. 56, 57 and/or 65. In any case, Sault Tribe failed to substantively address the applicable standards under those rules, and did not support its dispositive arguments with affidavits or other evidence. Accordingly, the Responding Parties respectfully suggest the treaty interpretation issues raised by Sault Tribe are not properly before this Court for decision, and they reserve their right to fully brief and provide the Court with substantive evidence on such issues at an appropriate time.

terms until November 6 and has identified no impairment of its interests that would occur if those terms are extended a mere 55 additional days, and none exists.

ORAL ARGUMENT IS NOT NECESSARY

Finally, Sault Tribe has failed to demonstrate that this controversy presents legal issues that are better presented and understood through oral argument. Responding Parties believe a request for oral argument merely prolongs the period within which the decision as to the extension of the Decree, and the duration of that extension, is unresolved. That uncertainty is not in anyone's interest.

CONCLUSION

For the foregoing reasons, the Responding Parties respectfully request that this Court deny Sault Tribe's motion and grant their joint motion to extend the 2000 Great Lakes Fishing Decree through the end of this year.

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Dated: July 8, 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 2,664 words contained in this Brief.

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