

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,)	
Plaintiff,)	No. 2:73-cv-26
)	
and)	Honorable Paul L. Maloney
)	
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,)	
Plaintiff-Intervenors,)	
)	
-v-)	
)	
STATE OF MICHIGAN, et al.,)	
Defendants.)	
_____)	

OPINION

This matter is before the Court on competing motions to extend the Great Lakes Fishing Consent Decree (Decree ECF No. 1458; Motions ECF Nos. 1879, 1882). Four tribes, the United States, and the State of Michigan seek to extend the Decree’s current expiration date from August 8, 2020 to December 31, 2020 (ECF No. 1879). The Sault Ste. Marie Tribe of Chippewa Indians seeks to extend the Decree only until November 8, 2020 (ECF No. 1882). For the reasons to be explained, the Court will extend the Decree until December 31, 2020.

In 1979, this Court affirmed the existence of an off-reservation fishing right in the portions of the Great Lakes ceded to the United states in the 1836 Treaty of Washington.

United States v. State of Michigan, 471 F. Supp. 192 (W.D. Mich. 1979) (citing 7 Stat. 491). That right is held by the tribal successors to the Ottawa and Chippewa signatories of the 1836 Treaty. For the past 20 years, the 2000 Great Lakes Fishing Decree has provided the governing framework for fishing in the 1836 Treaty waters (ECF No. 1458). But that Decree is set to expire on August 8, 2020, and when it expires, there will be no governing framework in place to protect the rights of the parties (*see id.* at § XXII(A)).

With the Decree's expiration on the horizon, the parties began negotiations regarding a successor agreement in September 2019. The coronavirus pandemic unexpectedly upended these negotiations in March of 2020. Some sessions were canceled at the onset of the crisis, but negotiations do appear to have resumed remotely. The negotiations have not proceeded as quickly as hoped, though, and in March, the parties stipulated to the appointment of a mediator to help them reach a resolution (ECF No. 1876). The Court granted that stipulation (ECF No. 1877). Even with the mediator's assistance, the parties have not reached agreement on most of the issues presented in the current Decree, and all parties agree that negotiations will not conclude before the current decree expires. Thus, they seek to amend and extend the present Consent Decree to avoid a regulatory gap while a successor agreement is negotiated. Six of the seven parties seek to extend the decree until December 31, 2020.

The Sault Ste. Marie Tribe disagrees with the majority's request, arguing that the coronavirus pandemic only upended negotiations for about 90 days, so a 90-day extension is all that is warranted. Moreover, the Sault Ste. Marie Tribe argues that the exclusive fishing zones established in the Decree cannot be continued without unanimous consent, and the

Sault Ste. Marie Tribe does not consent to their existence. If the Decree is extended beyond 90 days, the Sault Ste. Marie Tribe argues that it must be extended absent the provisions that establish exclusive fishing zones.

As a procedural note: The Coalition to Protect Michigan Resources (“CMPR”) seeks leave to file an *amicus* brief (ECF No. 1886) opposing the Sault Ste. Marie Tribe’s request and supporting the extension until December 31, 2020 (or later). However, CMPR did not comply with Local Rule 7.1(d), so the motion must be denied on that procedural ground. *See, e.g., Harshaw v. Bethany Christian Services*, No. 1:08-cv-104, 2014 WL 11530764, at *1-2 (W.D. Mich. July 2, 2010).

Turning to the merits of the present motions: “A district court has the jurisdiction to enforce consent decrees. Such decrees are settlement agreements subject to continued judicial policing.” *Grand Traverse Band of Ottawa & Chippewa Indians v. Director, Michigan Dep’t of Natural Resources*, 141 F.3d 635, 641(6th Cir. 1998) (internal quotation marks and citations omitted). Part of that inherent enforcement power is the power to extend a consent decree in response to changed circumstances. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); *Chrysler Corp. v. United States*, 316 U.S. 556, 562-63 (1942). The Court may do so over the objection of a party. *See, e.g., Vanguard of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994). Any modification of 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). The 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. An extension in the term of a decree must be “suitably tailored” to the changed circumstances. *Id.*

After consideration of the issue, the Court finds that an extension to December 31, 2020 is suitably tailored to the present circumstances. First, the coronavirus pandemic has drastically altered life for all parties involved. While the Sault Ste. Marie Tribe feels that it is back to functioning at full capacity after a 90-day interruption from the pandemic, the Court cannot conclude that all the remaining parties are also back to “normal.” Moreover, there is no way to know if the situation will get better or worse between now and November. There is a possibility that Governor Gretchen Whitmer’s “stay at home” orders will continue, and the parties may not be able to meet in person again for quite some time. While this is not fatal to their negotiations, it certainly is illustrative of the fact that the pandemic is not an interruption that can be neatly “tailored” to any specific length of time.

Second, a majority of the parties report that negotiations are proceeding slowly, and it is now clear that part of the reason that the parties have been unable to reach agreement is the Sault Ste. Marie Tribe’s position regarding the exclusive fishing zones. The other parties argue that if the Court decides this issue on the merits today, breakdown of the negotiations is “virtually guarantee[d].” (ECF No. 1980 at PageID.10792). This is a large factor in the Court’s decision to extend the Decree: The Sault Ste. Marie Tribe presents nuanced, fact-heavy issues that are impossible to evaluate at this stage, and the Court is not interested in issuing a decision on the merits of an issue that is still being negotiated.

Third, the Court is extremely concerned with allowing the Decree to expire and leaving a regulatory gap in the 1836 Treaty fishing waters. Any modification must not “upset[]

the basic agreement between the parties.” *Heath*, 992 F.2d at 634. If the Decree ends without a successor agreement, the basic agreement between the parties is more than upset; it is nonexistent. Should that occur, the Court is concerned that the parties would devote substantial resources to litigating immediate concerns via numerous motions for temporary restraining orders and preliminary injunctions. Given that the Western District of Michigan is still without a fourth judge and given the Court’s closure in March and April of this year, the Court’s capacity to handle such motions expeditiously is extreme limited. The Court expects to be in trial for most of the remainder of 2020; there is little time for such fact-intensive motions to be heard on its docket. At this time, the Court finds that the parties’ energy would be better directed at negotiating a successor Decree.

Thus, the Court will extend the present consent Decree until December 31, 2020. Doing so requires evaluation of the Sault Ste. Marie Tribe’s request that the exclusive zones be removed from the Decree. The Court declines to do so for several reasons. First, unanimous consent is not necessary to extend a consent decree. *Vanguards of Cleveland*, 23 F.3d at 1018. This is underscored by the law of this case: in 1985, Judge Enslen adopted a plan that included exclusive zones over the Bay Mills Tribe’s objections to that plan and the exclusive zones. *United States v. Michigan*, 12 I.L.R. 3079 (W.D. Mich. May 31, 1985). In doing so, Judge Enslen held that it was “in the best interest of all parties if the resource is shared in a manner which permits full exercise of the treaty right while minimizing conflicts between users,” which the exclusive zones did *Id.* at 3083. While the Sault Ste. Marie tribe now disputes what the full exercise of their treaty rights are, at present, it is in the best interest

of all parties to continue to exercise their treaty rights as outlined in the Decree, to minimize conflict, and to focus on negotiating a new Decree.

Second, and regarding the scope of the Sault Ste. Marie Tribe's treaty rights: It is not clear to the Court that the law states that the tribes each possess the right to access all of the 1836 Treaty waters, as the Sault Ste. Marie Tribe suggests. The Sault Ste. Marie Tribe relies on Judge Fox's 1979 opinion in *United States v. Michigan*, 71 F. Supp. 192 (W.D. Mich. 1979). However, that opinion was appealed, and the Sixth Circuit issued a short opinion that appears to have rendered much of Judge Fox's opinion dicta. *United States v. State of Michigan*, 653 F.2d 277, 279 (6th Cir. 1981). This question of law will have a cascade of consequences, and it is not fully briefed in this procedural motion. Therefore, the Court declines to make changes to the consent Decree at this time based on these grounds.

In any event, the burden of proof weighs equally on both parties when evaluating proposed fishery management plans. *United States v. Michigan*, 12 I.L.R. at 3081. Judge Enslen made a number of findings in support of the exclusive fishing zones, ultimately concluding that a zonal plan "provides for greater availability and predictability, greater harvests for treaty fishers, without the obvious social conflict, early closures, ineffective enforcement and management, and without the uncertainty [of other plans]." *Id.* at 3085. The Sault Ste. Marie Tribe has not presented *any* proof that they will be harmed by the continuation of the exclusive zones beyond their proposed extension of November 8, 2020, and as such, has not presented sufficient proof to counter Judge Enslen's findings. Thus, the Sault Ste. Marie Tribe has not met the burden of proof necessary for the Court to modify any provisions of the Decree outside of its expiration date.

For these reasons, the Court will postpone the expiration of the Decree to December 31, 2020. Should the ongoing negotiations lead the parties to believe that a further extension is necessary, they are free to request that extension. Any such requests must be filed no later than December 10, 2020. The Court will entertain all updated reports from the mediator, but the Court requests one report no later than August 31, 2020.

ORDER

IT IS HEREBY ORDERED that the 2000 Great Lakes Fishing Decree is hereby amended: the final sentence of § XXII(A) shall now read “The Decree shall expire on December 31, 2020.”

IT IS FURTHER ORDERED that the Joint Motion to Extend the Decree (ECF No. 1879) is **GRANTED**.

IT IS FURTHER ORDERED that the Sault Ste. Marie Tribe’s Motion to Extend (ECF No. 1882) is **DENIED**.

IT IS FURTHER ORDERED that the CMPR’s motion to file an *amicus* brief (ECF No. 1886) is **DENIED**.

IT IS FURTHER ORDERED that the Mediator shall file with the Court updated reports as frequently as deemed appropriate in his discretion, but the Court will order receipt of the next interim report no later than August 31, 2020.

IT IS FURTHER ORDERED that any further extension requests shall be filed no later than December 10, 2020.

IT IS SO ORDERED.

Date: July 24, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge