UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	Case No. 2:73 cv 26 HONORABLE PAUL L. MALONEY

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS' BRIEF IN SUPPORT OF MOTION TO VACATE EXTENSION OF 2000 CONSENT DECREE AND TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS

Oral Argument Requested

INTRODUCTION

The Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") moves to vacate the extension of the 2000 Consent Decree and to dismiss this case based on the lack of Article III jurisdiction and the violation of constitutional separation of powers. At present there is no justiciable live case or controversy before the Court, nor is there a justiciable controversy as to the Sault Tribe or its sovereign decision to not consent to an indefinite extension of the 2000 Great Lakes Consent Decree, ECF No. 1485 ("Consent Decree" or "Decree") or any successor decree. Further, as explained *infra*, continued reliance on a federal consent decree to regulate and manage the Great Lakes fishery violates constitutional separation of powers and exceeds the bounds of federal judicial power.

The 2000 Consent Decree expired by its terms on August 8, 2020, and this Court had no authority under the terms of the Consent Decree, or any Article III jurisdiction, to extend the Decree. Nonetheless, with no party challenging this Court's jurisdiction at that time, the Court ordered several extensions, agreed to by the parties, in the hopes that good faith negotiations would result in a successor consent decree. But it is indisputable that good faith negotiations have come to an end. The other parties have willfully excluded Sault Tribe from negotiations; the United States, as Sault Tribe's *trustee*, has abdicated its duties, in violation of federal law, to preserve Sault Tribe's treaty-guaranteed fishing rights; and this Court has indefinitely extended the Consent Decree over Sault Tribe's objection. See ECF No. 2027. Accordingly, Sault Tribe now exercises its sovereign legislative and executive authority and right to not consent to the indefinite extension of the Consent Decree or any successor decree and self-regulate to the extent necessary to protect and advance its treaty fishing rights.

The original and actual legal controversy involving Sault Tribe and the other parties which gave rise to Article III jurisdiction in the 1970s and 1980s no longer exists and that controversy is,

therefore, now moot. With the expiration of the 2000 Consent Decree, and Sault Tribe's decision to not consent to the indefinite extension of the 2000 Consent Decree or a successor decree, and instead, to implement its own regulatory regime, no challenge to Sault Tribe's authority to self-regulate is ripe for review.

Furthermore, because the other parties have not – and cannot – allege any actual or imminent particularized, concrete injury, and certainly have no basis for alleging wrongdoing at the hands of Sault Tribe, no party has standing to challenge Sault Tribe's exercise of its sovereign authority to not consent to the indefinite extension of the 2000 Consent Decree or a successor decree.

Finally, it is axiomatic that the federal Constitution confers limited authority on each branch of the federal government, and that the powers conferred upon the federal judiciary do not include the regulation and management of the Great Lakes fishery.

For all of these reasons, this Court must dismiss this case based on the lack of Article III jurisdiction and the violation of constitutional separation of powers "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citations omitted).

BACKGROUND AND PROCEDURAL POSTURE OF CASE

In the *U.S. v. Michigan* litigation in the 1970s and 1980s, the federal courts resolved the two discrete questions of law before it: (1) Whether Sault Tribe and four other Michigan 1836 Treaty tribes have federal treaty-guaranteed rights to fish in the Great Lakes, and if so, (2) Whether the State of Michigan may regulate fishing conducted by the five treaty tribes and their members

in the Great Lakes. In the early 1980s, the U.S. Sixth Circuit Court of Appeals conclusively answered both questions. With respect to the first question, the Sixth Circuit ruled:

> The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights. The responsibility of the federal government to protect Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government.

United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981), *cert. denied*, *Michigan v. United States*, 454 U.S. 1124 (1981). With respect to the second question, the Sixth Circuit ruled that the State of Michigan can regulate Indian fishing only if the State can prove that state regulation is "necessary to preserve fish from extinction" or to "prevent irreparable damage to fish supplies or destruction of fisheries." *United States v. Michigan*, 623 F.2d 448, 449-50 (6th Cir. 1980). The Sixth Circuit expanded upon that standard the following year, ruling in 1981 that:

> [I]f Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing.

United States v. Michigan, 653 F.2d at 279.

Ultimately, instead of litigating the viability of state regulation, the five tribes, the United States and the State of Michigan voluntarily entered into two successive consent decrees, the first a 1985 Consent Decree that expired in 2000, and the second, a 20-year Consent Decree that expired by its unambiguous terms on August 8, 2000. This Court has extended the Consent Decree numerous times so that the parties could continue good-faith negotiations.

However, since August of 2022, the other parties have intentionally and in bad faith excluded Sault Tribe from negotiations, all while attempting to bind Sault Tribe to a successor consent decree to which it has never agreed. Accordingly, now that the Consent Decree has expired, Sault Tribe is no longer bound by the 2000 Consent Decree and does not consent to the proposed twenty-four (24) year successor decree.

ARGUMENT

I. THERE IS NO ARTICLE III JURISDICTION AT THIS TIME

A. The 2000 Great Lakes Consent Decree expired by its terms on August 8, 2020, and this Court had no authority under the terms of the 2000 Decree, nor any Article III jurisdiction, to extend the Decree indefinitely over Sault Tribe's objection.

Federal courts are courts of limited jurisdiction and authority, and without jurisdiction, a federal court "cannot proceed at all in any cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) (quotation omitted). Article III, § 2 of the Constitution limits the jurisdiction of federal courts to actual cases or controversies. See *Raines v. Byrd*, 521 U.S. 811, 818 (1997); *Lindke v. Tomlinson*, 31 F.4th 487, 494 (6th Cir. 2022) (affirming trial court's dismissal of case where there was no live case or controversy). It is black-letter law that "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (emphasis added) (quotations omitted); *Midwest Media Property, L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456, 460 (6th Cir. 2007) (an action may present a live case or controversy at the time of filing but subsequent developments may moot the case).

Indeed, the present posture of *U.S. v. Michigan* is analogous in many respects to *Arizonans for Official English*, *supra*, a case in which the parties litigated for years only to have the United States Supreme Court dismiss the case for lack of Article III jurisdiction when the case finally reached the Supreme Court. Notably, in dismissing the case for lack of jurisdiction the Supreme Court emphasized that the litigants and the lower federal courts are not empowered—simply by litigating a matter—to create an Article III controversy where none otherwise exists. In comparison, here, when the 2000 Consent Decree expired on August 8, 2020, it terminated pursuant to unambiguous Decree language which states: "Upon expiration of this Decree . . . the provisions, restrictions and conditions contained in it shall no longer govern the parties in any manner." ECF 1485. By its own terms, the 2000 Consent Decree does not permit the Decree to be extended until such time as a successor decree is entered.

As to the case at large, the original federal question that presented a live case or controversy in 1973 was whether the State of Michigan could regulate Indian fishing in the Great Lakes. But the federal courts have already conclusively adjudicated that question in favor of the tribes, holding that in the absence of "preemptive federal regulations," the State of Michigan can regulate tribal fishing only if the State alleges, and can prove by clear and convincing evidence, that state regulation is "necessary to preserve fish from extinction" or to "prevent irreparable damage to fish supplies or destruction of fisheries." *United States v. Michigan*, 623 F.2d 448, 449-50 (6th Cir. 1980). A justiciable case or controversy—as required for this Court to exercise Article III jurisdiction —will exist only if the State of Michigan (i) first enacts state regulations, and (ii) then attempts to enforce those state regulations against one or more tribes based on a good faith belief that state regulation is "necessary to preserve fish from extinction" or to "prevent irreparable damage to fish supplies or destruction of fisheries." 623 F.2d at 449-50.

Federal jurisdiction does not hinge on the fact that this Court purports to extend the 2000 Consent Decree indefinitely as to all parties. Neither this Court nor the parties can "create" jurisdiction where it does not exist. In fact, Supreme Court precedent imposes a presumption that federal jurisdiction does not exist, and it imposes "the burden of establishing the contrary. . .upon the party asserting [the existence of] jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). *See also Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F3d. 605 (6th Cir. 2008) (similar). Thus, because Sault Tribe is challenging the existence of continued Article III jurisdiction, the burden is now on the other parties to establish the existence of a live justiciable controversy before this Court. And on appeal, the Sixth Circuit Court of Appeals will review the federal jurisdiction issue *de novo*—not under the abuse of discretion standard of review. *Ammex, Inc. v. Cox*, 351 F.3d 697 (6th Cir. 2003).

The Sault Tribe asks the Court to take judicial notice of its own record in this case. For instance, at the court hearing on November 28, 2022, attorneys for the United States, the State of Michigan, and the Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse Tribe") all readily admitted in open court, on the record, that there is no threat to the Great Lakes fishery at this time. Attorneys for all three parties conceded that the issues presented to the Court involve "regulatory details"—not "matters of [fishery] resource impact." *See* Sault Tribe Appendix, 11/28/2022 Hearing Transcript, p. 8:16-17; p. 21:12-24; p. 27:13-15; p. 56:15-20. United States Attorney Marisa Hazell conceded that "conservation of the [fishing stock] resource is not a concern today." *Id.*, 11/28/2022 Transcript, p. 58:6-7. According to Michigan State Attorney Kelly Drake, the purpose of the federal consent decree is not to prevent irreparable harm to the fishery, but rather "to co-manage this shared resource." *Id.*, 11/28/2022 Transcript, p. 21:12-24.

B. This Court has no Article III jurisdiction or legal authority to bind Sault Tribe to the 2000 Consent Decree or any successor consent decree.

This Court has no authority to force any "consent" decree on Sault Tribe over Sault Tribe's objection. Case law is clear that a federal court has no power or authority to approve a consent decree that imposes obligations on a party against that party's consent to the decree. *Columbia Artists Management, Inc., v. United States*, 381 U.S. 348 (U.S. 1965). *See also United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964) (court cannot enter consent decree to which one party has not consented; *Geier v. Alexander*, 801 F.2d. 799, 808 (6th Cir. 1986) (following the foregoing U.S. Supreme Court precedent to hold that a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree).

Here, Sault Tribe agreed to this Court's oversight of a Consent Decree that for twenty years – and only twenty years -- governed how, where, and when the Tribe exercised its treaty fishing right in the Great Lakes. As a sovereign nation in a government-to-government relationship with the other parties to this case, Sault Tribe is under no obligation to agree to a successor decree or agree to be bound by the terms of a now-expired decree that no longer serves the Tribe's treaty-guaranteed rights. In the absence of Sault Tribe's agreement, this Court has no authority, i.e. no Article III jurisdiction, to impose any decree on Sault Tribe.

C. The legal controversy which gave rise to Article III jurisdiction in the 1970s and 1980s no longer exists and that controversy is, therefore, moot.

Because this case is moot, this Court no longer has Article III jurisdiction. *Ermold v. Davis,* 855 F.3d 715, 718-19 (6th Cir. 2017) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.") (citations omitted).

As set forth *supra* at 3-5, the live treaty fishing rights controversy several decades ago centered on two questions of law, (1) whether the Sault Ste. Marie Tribe and four other Michigan tribes have federal treaty-guaranteed rights to fish in the Great Lakes, and if so, (2) whether the State of Michigan may regulate fishing conducted by the five treaty tribes and their members in the Great Lakes. *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981). Both issues have long since been decided and now constitute the law of the case.

In *Local No. 93, International Association of Firefighters, AFL-CIO v. City of Cleveland,* 478 U.S. 501, 510 (1986), the Supreme Court emphasized that "a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute." By the same token, this Court cannot enter a decree that is inconsistent with the law of the case established in the *U.S. v. Michigan* decisions, i.e., that "if Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it." *United States v. Michigan*, 653 F.2d at 279.

Parenthetically, we note that it is incumbent upon counsel to bring to the federal tribunal's attention, "*without delay,*" facts that may raise a question of mootness. *Arizonans for Official English*, 520 U.S. at 67 n.23 (quoting *Board of License Comm'rs of Tiverton v. Pastore,* 469 U.S. 238, 240 (1985) (*per curiam*). Nor is a change in circumstances bearing on the vitality of a case a matter opposing counsel may withhold from a federal court based on counsels' agreement that the case should proceed to judgment and not be treated as moot. *Id.* (citing *United States v. Alaska S.S. Co.,* 253 U.S. 113, 116 (1920); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 721–722 (7th ed.1993)).

As with other challenges to the justiciability of the case, appellate review of questions of mootness is *de novo*.

D. No issue regarding Sault Tribe's self-regulation framework is ripe for judicial review.

Like the doctrine of mootness, the ripeness doctrine defines the limits of this Court's jurisdiction to adjudicate disputes. Just as a case is moot if it is too late for a party to seek judicial intervention, a case is not ripe for judicial review where a party attempts judicial intervention too soon. The requirement of ripeness prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. *Bigelow v. Mich. Dep't of Nat. Res*., 970 F.2d 154, 157 (6th Cir. 1992); *see also NRA of Am. V. Magaw*, 132 F.3d 272, 278 (6th Cir. 1997). ("Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review."). Moreover, a claim is not ripe if it turns on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998).

Relatedly, the requirements relative to ripeness guard against a court's issuing of advisory opinions." *Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232 (6th Cir. 1985); *see also Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493 (6th Cir. 1995) (noting that a court is "obliged under Article III to limit its jurisdiction to ripe cases, to avoid issuing advisory opinions based upon hypothetical situations.").

The ripeness inquiry arises most clearly when, as potentially likely here, litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them. In *Ohio Forestry Ass'n*, *v. Sierra Club*, 523 U.S. 726, 740 (1998), the Supreme Court, unanimously reversing the lower court, holding that the Sierra Club's challenge to a U.S. Forest Service management plan was not ripe where the plan set logging goals, selected the areas suited

to timber production, and determined which probable methods of timber harvest were appropriate, but did not itself authorize the cutting of any trees. The Court stated:

> [R]eview of the Sierra Club's claims regarding logging and clearcutting now would require time-consuming judicial consideration of the details of an elaborate, technically based plan, which predicts consequences that may affect many different parcels of land in a variety of ways, and which effects themselves may change over time. That review would have to take place without benefit of the focus that a particular logging proposal could provide.

In this case, no other party's challenge to Sault Tribe's decision to self-regulate or the regulations themselves is ripe for adjudication because that would necessarily require the Court to deal in hypotheticals. As with the Forestry Association's premature claims in *Ohio Forestry Ass'n*,, here, Sault Tribe is in the process of developing its self-regulation framework and regulations, but these regulations have not yet been adopted through Sault Tribe's legislative and regulatory processes and implemented. Accordingly, any challenge to Sault Tribe self-regulation is not yet ripe for adjudication.

Again, the Sixth Circuit reviews issues of justiciability, such as ripeness, *de novo*. *NRA of Am. v. Magaw*, 132 F.3d 272, 278 (6th Cir. 1997).

E. No party has standing to challenge Sault Tribe's refusal to consent to the indefinite extension of the 2000 Consent Decree and its intent to self-regulate.

The constitutional requirement of Article III standing consists, at a minimum, of three elements. A party seeking to bring a claim must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the opposing party, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330 (U.S. 2016); *see also Gerber v. Herskovitz*, 14 F.4th 500, 505 (6th Cir. 2021) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 559–61 (1992)). The standing requirement allows federal courts to resolve concrete disputes, but it prohibits a federal court from passing "judgments on theoretical disputes that may or may not

materialize." *Saginaw County v. STAT Emergency Med. Servs. Inc.*, 946 F.3d 951, 954 (6th Cir. 2020) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-03 (1998)).

Parties cannot "cannot sue simply to avoid a 'possible future injury.'" *Id.* at 954–55 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Suits based solely on the "mere risk of future harm" cannot establish an injury sufficient for standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 (2021). In other words, federal courts may not opine on theoretical issues that may never come to fruition. *See Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002).

Here, no party to this litigation can meet any of the three necessary prongs to show standing – 1) no party has suffered an actual injury; 2) as a result of Sault Tribe's decision to not consent to an indefinite extension of the Consent Decree or any successor decree and to self-regulate; and as a result, 3) there is no injury for this Court to address.

The Supreme Court has increasingly recognized that because standing and ripeness are based on the same constitutional limitations on the federal courts' jurisdiction, they frequently "boil down to the same question." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (similar). Here, because there is no issue with Sault Tribe self-regulation ripe for adjudication, none of the other parties has standing to challenge Sault Tribe's exercise of its sovereign authority to protect and advance its treaty rights through self-regulation.

II. CONSTITUTIONAL SEPARATION OF POWERS PROHIBITS THE FEDERAL COURT FROM REGULATING AND MANAGING THE GREAT LAKES FISHERY

The federal government is one of enumerated powers, *United States v. Lopez*, 514 U.S. 549, 552 (1995); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), meaning that any exercise of federal power must be authorized by the Constitution. *McCulloch*, 17 U.S. Const. art. 1. The legislative power is vested in Congress, U.S. Const. art. 1, § 1, and expressly includes the

authority to "regulate commerce with . . . Indian tribes." U.S. Const. art. 1, § 8, cl. 3. Under Article I, Congress is vested with exclusive power to enact substantive law, that is, to create, define and regulate substantive rights. U.S. Const. art. 1. The Constitution does not assign any equivalent power to the federal courts. In this way the structure of our federal system prohibits the judiciary from usurping the legislature's function to create substantive law. *See Mistretta v. United States*, 488 U.S. 361, 383 (1989) (Noting that it is a "danger" when the "Judicial Branch [is] assigned [or] allowed [to take on] 'tasks that are more properly accomplished by [other] branches'") (quoting *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988)).

In short, constitutional separation of powers prohibits the federal judiciary from appropriating to itself the power to regulate and manage the Great Lakes fishery. Indeed, congressional action already undertaken, as described *infra*, displaces any authority this federal court might appropriate to itself to regulate federally-protected Indian treaty rights to fish in the Great Lakes. It does so in two ways, first through existing federal regulations which provide a legal framework for administering tribal treaty fishing rights, and secondly, through the enactment of the Endangered Species Act, 16 U.S.C. § 1531 - § 1544, a comprehensive federal act which provides the framework for conserving and protecting endangered and threatened species and their habitats.

As to the former, an entire section of the Federal Code is comprised of federal statutes that govern the regulation of Indian affairs. 25 U.S.C. § 1 - § 5807. And under Title 25, Section 2 and Section 9, Congress has delegated power to the Executive Branch, 25 U.S.C. § 9, and the Commissioner of Indian Affairs in particular, 25 U.S.C. § 2, to enact "such regulations" as may be necessary to manage "all Indian affairs" and all "matters arising out of Indian relations." *See also* 5 U.S.C. § 301 (delegating regulatory powers to the heads of Executive departments).

In turn, the Executive Branch has exercised the power delegated to it by Congress to adopt and implement regulations which govern federally protected Indian treaty fishing rights. Federal regulations currently govern "Indian Fishing in Alaska," 25 C.F.R. § 241, including fishing on the Annette Islands Reserve, 25 C.F.R. §§ 241.1–241.6, and commercial fishing in the Karluk Indian Reservation, 25 C.F.R. §§ 241.5 and 241.6. Federal regulations also govern commercial fishing on the Red Lake Indian Reservation, 25 C.F.R. §§ 242.1 – 242.12, and the Columbia River, 25 C.F.R. §§ 247.1–247.21 and §§ 248.1–248.10. As pertinent here, an administrative framework also already exists for governing "Off-Reservation" Indian treaty fishing. 25 C.F.R. §§ 249.1–249.7.

The second way in which existing federal statutes displace judicial regulation of the Great Lakes fishery in this case is through the Endangered Species Act ("the ESA"), 16 U.S.C. § 1531 - § 1544. As this Court knows, under the Sixth Circuit law of this case, the State of Michigan cannot regulate treaty fishing in the Great Lakes unless the State can prove, by clear and convincing proof, that the Great Lakes fishery will suffer "irreparable harm" in the absence of state regulation. *United States v. Michigan*, 653 F.2d at 279. However, it is quite likely that the ESA preempts, or at least materially impacts, any preemptive attempt on the State's part to regulate for "irreparable harm." The ESA was enacted to protect plant and animal life from extinction as a "consequence of economic growth and development untampered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). The Act establishes a comprehensive legal framework for protecting both "threatened" and "endangered" species as well as the "the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b); 16 U.S.C. § 1533. The ESA is administered by the United States Fish and Wildlife Service and the National Marine Fisheries Service. 16 U.S.C. § 1537(a). The Act requires the Secretary of Interior to maintain and publish

lists of all endangered and threatened species. 16 U.S.C. § 1533(a)(2). The Department's current list of all endangered species and threatened species in the Great Lakes region is published online at the U.S. Fish & Wildlife Service's website, https://ecos.fws.gov/ecp/report/species-listings-by-region-totals, Midwest Region (3) (last visited on December 27, 2022). Pursuant to Rule 201 of the Federal Rules of Evidence, the Sault Tribe asks this Court to judicially notice the federal government's list of threatened and endangered species for the Midwest Region.

In reviewing that list, the Court will see that not a single one of the Great Lakes fish species that are judicially regulated under this Court's 2000 Great Lakes Fishing Consent Decree—or the proposed successor decree—is included on the government's official list of species presently identified as a threatened or endangered species under the ESA.

The federal courts are neither constitutionally empowered—nor practically equipped—to regulate and administer the Great Lakes fishery or the plant and animal life which inhabits the fishery. Indeed, the absurdity of the very proposition is effectively highlighted by the colloquy that occurred between the Court and Michigan State Attorney Kelly Drake at the November 28, 2022 hearing, discussing the sheer speculation that is necessarily inherent in adopting the proposed twenty-four year successor consent decree:

> Attorney Drake: This is a 24-year decree, things are going to change in the next 24 years. There is no question at all that things have changed in the past 22 years since the 2000 consent decree was entered. There might be some dispute about what the causes were for that, but we can set those aside for today. But the reality is that the parties can't anticipate everything. We didn't anticipate in 2000 where we were going to be today. We can't anticipate everything, we can't accommodate everything. So the parties' challenge during these negotiation has been to try to anticipate things and try to make accommodations for things that we can anticipate and can accommodate at this point. But one thing that makes—that seems pretty clear is that the parties cannot make accommodations for things that might happen in the future, but where those accommodations will have negative consequences today…."

To which the Court then remarked:

> The Court: You know what else is going to be different in 24 years, don't you?
>
> Attorney Drake: I'm hoping to be retired.
>
> The Court: It won't be my case [any more].
>
> Attorney Drake: I'm hoping it won't be mine either.

See Sault Tribe Appendix, 11/28/2022 Hearing Transcript, pp. 22:18 – 23:9; p. 24:9-13. As noted above, the entire colloquy serves to highlight the Tribe's jurisdictional and separation of powers concerns.

Certainly, the Sault Tribe is not ignorant or dismissive of the benefits that could flow from the parties' development of a tribal/state/federal compact to address the co-management of the Great Lakes fishery. *See*, *e.g.*, Herbert H. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, Marquette Law Rev., Winter 1952-1953 at 219 (observing that inter-sovereign compacts are an "effective device for the settling of differences between states or regions, and as a means of interstate cooperation in the disputed areas of conservation of natural resources and governmental activities."). At the same time, however, inter-sovereign compacts and federal consent decrees are vastly different legal instruments, with vastly different legal consequences to the parties. And in the end it simply is not the role of the federal judiciary to encourage, or cajole, or coerce parties into developing and agreeing to the terms of an inter-sovereign compact.

CONCLUSION

When jurisdiction is lacking, "the only function remaining to the [federal] court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 94-95; *Ex parte McCardle*, 74 U.S. at 514. There is no live ongoing Article III case or

controversy pending before the Court at this time. Instead, the other parties are seeking to have this Court step outside of its federal judicial function and serve as the chief regulator and administrator of the Great Lakes fishery. This is not the function of a federal court. Article III does not vest the federal judiciary with regulatory and managerial powers. Because there is no live ongoing Article III case or controversy, and because entry of a consent decree that does not remedy any ongoing violation of federal law is tantamount to a violation of constitutional separation of powers, this Court should announce its lack of Article III jurisdiction and dismiss the case. !

Respectfully submitted this 27th day of December, 2022.

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CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that this brief contains 5,130 words, in compliance with W.D. Mich. LCivR 7.3(b). Microsoft Word, Version 2208 was used to generate this word count.

s/ Linda F. Cooper
Linda F. Cooper

CERTIFICATE OF SERVICE

I certify that on December 27, 2022, I caused the foregoing **SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS' BRIEF IN SUPPORT OF MOTION TO VACATE EXTENSION OF 2000 CONSENT DECREE AND TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND VIOLATION OF CONSTITUTIONAL SEPARATION OF POWERS** to be electronically filed with the Clerk of Court using the Court's ECF system which will send notification of such filing to the attorneys of record in this matter.

s/ Linda F. Cooper
Linda F. Cooper