No. 22-1946

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

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; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Intervenors-Appellees

v.

STATE OF MICHIGAN, and its agents

Defendant-Appellee

COALITION TO PROTECT MICHIGAN RESOURCES, fka Michigan Fisheries Resources Conversation Coalitions

Proposed Intervenor-Appellant

Appeal from the United States District Court
Western District of Michigan, Northern Division
Honorable Paul L. Maloney

INTERVENOR-APPELLANT COALITION TO PROTECT MICHIGAN RESOURCES' BRIEF ON APPEAL

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
Fahey Schultz Burzych Rhodes PLC
Attorneys for Proposed Intervenor-Appellant
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100

Dated: December 12, 2022

CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Movant-Appellant Coalition to Protect Michigan Resources certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Intervenor-Appellant Coalition to Protect Michigan Resources ("Appellant" or "the Coalition") requests oral argument in the present appeal pursuant to 6 Cir. R. 34(a). Appellant believes oral argument should be permitted because it would aid this Court in adjudicating and understanding the factual circumstances, as well as the Coalition's particular interest and paramount concerns that are not remedied without this Court reversing the District Court's denial of intervention. Appellant also contends oral argument would aid in interpreting intervention standards considered in the Sixth Circuit's recent decision in *Wineries of the Old Mission Peninsula Association v. Township of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022), yet rejected by the District Court as distinguishable in this matter. This Court's precedent, however, is particularly on point where the Coalition represents interests that have overlap with the State of Michigan, but that the State, according to the State's own admissions in briefing before the district, does not protect and advance all of the Coalition's specific legal claims and interests related to its members' concerns about conversation of the resource and advancement of the recreational fishery.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 and § 1345. This Court has subject matter jurisdiction over appeals of orders denying intervention. See *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572 (6th Cir. 2018); *Purnell v. City of Akron*, 925 F.2d 941, 944 (6th Cir. 1991); 28 U.S.C. § 1291. The District Court denied Appellant's request to intervene on August 31, 2022 (Opinion and Order Denying Motion to Intervene, R. 1985) and Appellant's request for reconsideration on October 4, 2022 (Order Denying Motion for Reconsideration, R. 2018). Appellant timely filed its notice of appeal with the District Court on October 19, 2022. See Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

(1) Whether the District Court erred in denying Appellant intervention by right pursuant to Fed. R. Civ. P. 24(a).

(2) Whether the District Court erred in denying Appellant intervention by permission pursuant to Fed. R. Civ. P. 24(b).

STATEMENT OF THE CASE

I. Case Background

A. Origins[1]

The Treaty of Washington ("1836 Treaty") was signed in 1836 by the Ottawa and Chippewa Indian Nations ("Tribes") and the United States Government. Under the terms of the Treaty, certain Tribes ceded some of their lands and waters, encompassing large portions of what is now the State of Michigan ("State") and the Great Lakes, to the United States government while reserving certain rights in the ceded territory. Article 13th of the Treaty provides, in pertinent part: "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." 7 Stat. 491. It is the interpretation of this clause, the subsequent allocation of the fishery between the Tribes and State, and the Coalition's multiple decades of interest and involvement in the State's allocated share and co-management and conservation of the entire fishery that form the basis of this appeal.

B. The Right to Fish in the Great Lakes is Asserted

The United States of America on its own behalf and on behalf of the Tribes commenced this litigation on April 9, 1973, in the United States Court for the

[1] This case has a lengthy history which can only briefly be reviewed on this appeal.

Western District of Michigan against the State of Michigan to protect the Tribes' rights to fish in certain waters of the Great Lakes that surrounded the land subject to the Treaty of 1836. The question of whether the Indians had a right to fish in certain waters of the Great Lakes had not previously before been litigated in federal court. The Bay Mills Indian Community ("Bay Mills Community") intervened in the action in 1974 and the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") intervened in 1975.[2] Around that same time, Michigan United Conservation Clubs ("MUCC") petitioned the District Court to intervene to protect the rights of fishermen and women. MUCC was denied intervention but was permitted to act as an *amicus curiae* and take part in some of the litigation.

C. Interpretation of the 1836 Treaty

District Court Judge Noel Fox issued a decision on May 7, 1979, analyzing the 1836 Treaty. Judge Fox held the 1836 Treaty retained and reserved to the Tribes both commercial and subsistence fishing rights on the Great Lakes through Article 13th. *U.S. v. State of Mich.*, 471 F. Supp. 192, 260 (W.D. Mich. 1979). The State of Michigan appealed Judge Fox's ruling to this Court. The treaty right was confirmed by this Court, but with a holding that differed in significant ways from that of Judge Fox. *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981).

[2] Other Tribes intervened as this dispute progressed.

This Court held that the treaty right of the Tribes was not absolute. *Id.* at 279. Such right was subject to "a rule of reason," and in the absence of federal regulation, such rights were limited by the Michigan Supreme Court's holding in *People v LeBlanc*, 399 Mich. 31 (1976). This Court set forth that standard with approval:

> As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen. [*United States v. Michigan*, 653 F.2d at 279].

After this Court articulated this standard, the case was remanded to the District Court. The parties then began a series of proceedings that ultimately hinged upon how the resource could be used by both the Tribes for subsistence and commercial fishing, and the State for recreational and commercial fishing. Following 1981, various proceedings tested the scope and extent of the rights of the Plaintiff Tribes under the 1836 Treaty, particularly for given areas of the 1836 Treaty waters or fishing seasons.

II. Prior Consent Decrees

A. The 1985 Consent Decree

Judge Richard Enslen replaced Judge Noel Fox as the presiding judge as the parties wrestled with how to co-manage a natural resource within the same waters following this Court's 1981 ruling. During the early 1980s, several proceedings

addressed the application of various federal regulations, the need for closures to protect the fishery resources of the Great Lakes and negotiations between the parties. Finally, in 1983, the extent of the treaty right was put squarely at issue when the Plaintiff Bay Mills Indian Community filed a motion seeking a declaration that the Plaintiff Tribes were entitled to **half** of the Great Lakes fish resources (which was premised on United States Supreme Court's affirmance of a district court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979) equally dividing the available harvest between treaty and non-treaty user groups). Rather than litigate, however, the parties entered into negotiations to see if the issues of allocation could be resolved.

Judge Enslen granted the MUCC and the Grand Traverse Area Sport Fishing Association, a current member of the Coalition, "litigating *amici curiae*" status, which permitted them to participate directly in some proceedings related to the negotiations and disputes over allocating the shared resource among the Tribes and the State. The Michigan Charter Boat Association and the Michigan Steelhead & Salmon Fishermen's Association, two additional members of the Coalition, were also added as "litigating *amici curiae*" when the parties were preparing for the negotiations mentioned above.

The parties, with the direction and assistance of a Special Master, Francis McGovern, and with the involvement of litigating *amici*, negotiated and

subsequently entered into the 1985 Great Lakes Consent Decree ("1985 Consent Decree"), which set forth terms and conditions applicable to tribal and state-licensed fishers for a 15-year term and resolved the question of the extent of treaty rights under the 1836 Treaty for that timeframe. The proposed Consent Decree set forth extensive terms to apportion between the State of Michigan and the Plaintiffs the fish stocks available for harvest by tribal commercial fishers, tribal subsistence fishers, and State-licensed commercial and recreational fishers. The proposed Decree included exclusive zones for fishing by tribal fishers and other zones where tribal commercial fishing would be restricted and recreational fishers could fish without gear and harvest conflicts. Special Master McGovern later wrote about the negotiations that made the 1985 Consent Decree possible. He noted that a consensus was reached, in part, because all of the "key decisionmakers were present in the litigation," including the litigating *amici*.[3]

After the 1985 Decree was agreed upon, one of the tribal parties rejected the parties' agreement. Thereafter, Judge Enslen held a limited trial in 1985[4] and in a subsequent opinion approved of the plan set forth in the negotiated decree. Judge Enslen found that it was "in the best interest of all parties if the resource is shared in

[3] Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 463 (1986).

[4] Though the Coalition's predecessors held only the status of "litigating *amicus curiae*," the District Court directed current counsel here, Mr. Schultz, to serve as lead counsel for those parties and amici supporting the proposed Decree.

a manner which permits full exercise of the treaty right while minimizing conflicts between users." *United States v. Michigan*, 12 I.L.R. 3079, 3083 (W.D. Mich. 1985).

B. The 2000 Consent Decree

The Grand Traverse Area Sport Fishing Association, Michigan Charter Boat Association, and the Michigan Steelhead & Salmon Fishermen's Association were joined by the Hammond Bay Area Anglers Association, and in 1999 organized into the Michigan Fisheries Resource Conservation Coalition ("Fisheries Coalition"). At this time, the 1985 Consent Decree was set to expire, and renewed negotiations were on the horizon. The Fisheries Coalition sought status in the case at this time and was granted *amicus* status by Judge Enslen as the successor to the individual organizations.[5]

In the late 1990s and in 2000, again with the assistance of a special master, the Parties negotiated and executed, and the District Court entered without objection, the 2000 Great Lakes Consent Decree. Like the 1985 Decree, the 2000 Decree continued a roughly 50/50 allocation of the fishery resource, the zonal concept described above, but of significance here, added additional terms to promote the rehabilitation of lake trout and the reduction in the use of non-selective commercial

[5] In 1991, consistent with the Sixth Circuit's decision in *U.S. v. State of Mich.*, 940 F.2d 143 (6th Cir. 1991), Judge Enslen changed the status of the various organizations to *amici curiae*, but in the discretion of the Court, *amici* were still regularly called on to comment on certain motions or pleadings filed by the parties.

fishing gear in the northern Great Lakes of Michigan in furtherance of that rehabilitation.

The rehabilitation of lake trout has been a goal of the federal government and the State, and the Coalition believes, the Tribes for decades. An original predator species in the Great Lakes that had been exterminated by overfishing with commercial gill nets in the 1940s and 1950s, the absence of lake trout and other predators led to a biological imbalance with invasive alewives, which led to environmental catastrophe due to massive alewife die offs in the early 1960s. Gill nets had been banned for State-licensed fishers in the 1960s to further lake trout and predator rehabilitation and numbers, and avoid or reduce the impact of commercial fishing for whitefish with gill nets that also caught large amounts of lake trout and other predator species.

The terms of the 2000 Decree furthered the reduction of gill net use by a Decree-required contribution by the State of approximately $14,300,000 "In order to reduce the amount of large mesh gill net effort of the Tribes … and to provide fishing opportunities … that do not involve the use of large mesh gill nets…." 2000 Consent Decree, Section X.A.1 and Section XX.A.1. The funds provided would permit the State to buy-out twelve (12) State-licensed commercial trap net fishing operations and give those operations, including large fishing vessels, trap nets and other equipment to the Tribes. In exchange, the Tribes, particularly the Sault Tribe,

"shall accomplish removal of at least fourteen (14) million feet of large mesh gill net effort from Lakes Michigan and Huron by 2003…." 2000 Consent Decree, Section X.B.

The funding committed by the State required an appropriation by the Legislature and approved by the Governor. That appropriation was obtained by the State with the assistance and support of the Coalition's predecessor organizations. The requirements of Section X of the 2000 Consent Decree were then implemented and the use of non-selective large mesh gill net in northern Lakes Michigan and Huron was thereafter greatly reduced.

The reduction of large mesh gill net use in the northern Great Lakes contributed to the rehabilitation of the lake trout stocks in the lakes. Commercial fishing mortality of spawning age lake trout was reduced, spawning age lake trout became more prevalent and combined with other biological changes in the lakes, natural reproduction of lake trout began to occur in both Lakes Michigan and Huron as had been the goal for decades.

The Coalition's predecessors participated in the negotiations as did the longstanding *amicus* MUCC. The 2000 Consent Decree sets forth terms and conditions applicable to tribal and state-licensed fishers, to which the Coalition participated through the State and through direct communication with the other Parties. Certain principles agreed to within the 2000 Consent Decree were

paramount to the Coalition's interests and rights, and to the fisheries resources available to all of the Parties and the Coalition and its members.

The 2000 Great Lakes Consent Decree would have expired under its own terms in August of 2020, but has been extended indefinitely by orders of the District Court (Orders Extending the 2000 Great Lakes Fishing Consent Decree, R. 1892, 1903, 1912, 1945, 1963, 2014) while the current negotiations to reach a successor consent decree continue.

III. Coalition to Protect Michigan Resources

As is evident from the factual and case history discussion above, the Coalition to Protect Michigan Resources and its members are organizations serious about protecting recreational fishing on the Great Lakes, its tributaries, inland lakes and waterways. The Coalition's specific mission is to work with the United States Government, Tribes and the State of Michigan to address Tribal fishing rights under the 1836 Treaty. Many of its current members have been involved in past negotiations that resulted in the 1985 Consent Decree, the 2000 Consent Decree, and the 2007 Inland Consent Decree[6]. The Coalition's ultimate goal is to protect the interests of its members by advocating for an equally shared allocation of the fishery

[6] The 2007 Inland Consent Decree is yet another negotiated agreement between the United States, the State and the Tribes addressing the scope and extent of the inland rights of the Tribes under the Treaty of 1836. As was the case with the Great Lakes Decrees, the Coalition was actively involved in the negotiation of that Decree.

consistent with the treaty right as declared by Judge Enslen more than 35 years ago and seek a successor consent decree that preserves the Great Lakes for future generations—for the benefit of all parties involved.

IV. Current Dispute

A. *Amicus* Status

The Coalition began its participation in the current negotiations in August, 2019 when it moved to confirm its *amicus* status (Motion to Confirm Status as *Amicus Curiae*, R. 1865) and simultaneously sought a status conference to notify the Court of progress, or lack thereof, the parties had made towards a successor consent decree. In its motion, the Coalition expressed its concerns the parties had made no meaningful progress in the negotiations:

> CPMR is deeply concerned by the absence of negotiations towards a successor decree. Based on CPMR's previous experience with the negotiation of the Great Lakes Decree and with the Inland Consent Decree, it has previously taken approximately two years to reach a consensus on a Decree to be presented to the Court . . . [a]s of the date of this motion, there have been no substantive negotiations or meetings between the parties, and the parties have no even agreed upon a process or a schedule through which to negotiate a successor decree . . . CPMR is compelled to seek confirmation of its status in the event proceedings before this Court are required and, frankly, to apprise this Court of the need for a status conference to address the parties' positions on initiation negotiations towards a successor Consent Decree, or if such is not to be negotiated, to address the status of this case upon expiration of the current Decree. [Motion to Confirm Status as *Amicus Curiae*, R. 1865, Page ID ## 2070-2071.]

It was after this filing in September, 2019 that the parties began working towards a successor consent decree. The District Court subsequently issued an order denying a status conference, but confirming the Coalition's *amicus curiae* status. (Order Confirming *Amicus* Status, R. 1875). Negotiations progressed slowly from September 2019 until early in 2022 due to a variety of factors—the difficulty of gathering as many as seven sovereigns together, each with its own particular interests, the complexity of the issues, COVID-19, and substantial disagreements. However, through this time the Coalition remained engaged in working towards a successor consent decree believing that it and the State of Michigan shared common goals and interests as had been the case in the negotiation of the 1985 and 2000 Decrees, to wit, the preservation of a roughly equally shared resource, the continued reduction of non-selective gear, and the continued rehabilitation of lake trout stocks, among others.

B. Relationship Breakdowns Between the State and the Coalition

The Coalition was optimistic, but nevertheless concerned, about the State's ability to adequately represent its interests early on. Things changed at a negotiation session on April 20, 2022, when the State relayed to the Coalition certain changes in proposals that would unquestionably cause irreparable harm to the Lake Huron fishery (Affiant Krist Supplement Affidavit, R. 1991, ¶¶ 3-4; Affiant Johnson Affidavit, R. 1992, ¶¶ 31-34 (explaining the potential irreparable harm to the fishery,

particularly lake trout))[7]. The Coalition specifically became concerned because the State completely disregarded input from the Coalition regarding the potential harm that could result if the State proposals were accepted, including the abandonment of reductions in effort using non-selective gill nets and the resulting impact on lake trout rehabilitation. As a result, the Coalition began in May to reach out to counsel for the other parties to discuss these concerning proposals, and some progress was made (Affiant Krist Supplemental Affidavit, R. 1991, ¶ 5).

The parties subsequently met June 8 through 10 to further discuss some of the proposals. The Coalition and the State continued to have significant disagreements during these meetings about the State's response to some of the proposals (Affiant Krist Supplemental Affidavit, R. 1991, ¶ 6). Ultimately, the State rejected protection of the Coalition's interests and shut the Coalition out of the negotiations (as the Court's prior order and the Confidentiality Agreement between the parties required the Coalition to consult with and speak through the State). On June 21, Coalition representatives advised the Mediator of the breakdown in the relationship with the State, which we believe was at this point obvious and intentional to all the parties.

[7] The Coalition has continued its efforts to prevent irreparable harm to the fisheries that began as far back as 1979 when this Court stayed an injunction to protect lake trout in Grand Traverse Bay from imminent destruction. See *United States v. Michigan*, 623 F.2d 448 (6th Cir., 1980).

The negotiations continued on June 28 through June 30, however the State was relentless in its effort to ignore the interests of the Coalition and stated in response to basic concerns raised by the Coalition that the State could "not address local concerns" but had to look at the fishery as a whole (Affiant Krist Supplemental Affidavit, R. 1991, ¶¶ 14-16). Unfortunately, the breakdown in the relationship led to a shouting match between Coalition representatives and the State (Affiant Krist Supplemental Affidavit, R. 1991, ¶ 15). At this point, it was clear the State was no longer interested in representing the interests of the fishery or the Coalition. The State was not focused on continuing the core principles of the 2000 Decree (that were based upon the successful co-management between the parties during the 15-year 1985 Decree) nor in preserving the fishery for future generations.

C. The Coalition Moves to Intervene

Two weeks later, on July 13, 2022, the Coalition moved to intervene in this case as a full party due to "the breakdown in the relationship with the State [getting] to the point that [the Coalition] believe[d] that the Great Lakes fishery resources [were being] threatened through abandonment of sound biological principles that [the Coalition] believe should guide decisions related to the fishery" (Brief in Support of the Coalition's Motion to Intervene, R. 1969, Page ID # 11026). The motion was an obvious response to the Coalition realizing that its status as *amicus*

curiae would no longer allow it to represent its member's interest, as it had been in the past.

The District Court denied the Coalition's request to intervene on August 31, 2022, stating the untimeliness of the Coalition's request to intervene would prejudice the other parties considering the point to which the suit and negotiations had progressed (Order Denying Motion to Intervene, R. 1985, Page ID ## 11672-11674). However, this finding was based on a misrepresentation by the parties opposing the Coalition's intervention that the negotiations had progressed to the point that there would be a proposed successor consent decree submitted to the District Court by September 30, 2022 (Order Denying Motion to Intervene, R. 1985, Page ID ## 11672-11673 ("[a]ll seven parties agree that they can submit a proposed successor decree to the Court by September 30, and they do not want [the Coalition] to delay that deadline")).

To remedy this misrepresentation, which formed the basis of the District Court's findings denying intervention, the Coalition filed a motion for reconsideration on September 16, 2022, with affidavits filed under seal[8] fully

[8] The affidavits were filed in support of the Coalition's motion for reconsideration to correct misrepresentations made by the parties opposing intervention. The affidavits were filed under seal because the opposing parties aggressively alleged the information therein violated a confidentiality agreement signed by the parties for purposes of the negotiations. The District Court granted the motion to seal the affidavits (Order Denying Stay; Granting Motion to File Under Seal, R. 2021) and they are properly in the record before this Court.

explaining the Coalition's basis to intervene (Motion for Reconsideration, R. 1987, Page ID # 11765). The District Court denied the Coalition's motion for reconsideration on October 4, 2022, stating the initial "motion to intervene was untimely, and that conclusion ends the inquiry into whether intervention is proper: it is not" (Order Denying Motion for Reconsideration, R. 2018, Page ID # 11997). The Coalition timely filed a notice of appeal in the District Court on October 19, 2022.

V. Post-Filing Developments[9]

When the District Court denied the Coalition's motion for reconsideration, it had still not yet been presented with a proposed successor decree by the parties (Order Extending 2000 Consent Decree to November 2022, R. 2014, Page ID # 11957). The District Court again accepted party representations that the "'effort[s] ha[ve] resulted in a near final successor decree'" (*Id.*) (altered in original). Upon finding that the "parties are near the end of the negotiation process," the District Court extended the 2000 Consent Decree to November 14, 2022 (*Id.* at Page ID # 11958).

[9] Significant developments have taken place in the District Court since this appeal was filed. Appellant believes it is appropriate for this Court to take judicial notice of the case development post-filing of this appeal because the referenced cites are part of the District Court record, inclusive of its orders and the parties' public filings. Moreover, based on issues arising that have never before been litigated, the Coalition believes it has a basis to once again seek intervention in the District Court.

On November 14, 2022, however, the parties presented no proposed successor decree and instead asked for an indefinite extension of the 2000 Consent Decree (Order Extending 2000 Consent Decree Indefinitely, R. 2027, Page ID # 12020). The District Court, in extending the 2000 Consent Decree indefinitely, reported that the State and "Grand Traverse Band of Ottawa and Chippewa Indians ('Grand Traverse') are at a stalemate in their negotiations regarding Grand Traverse tribal zone provisions" (*Id*. at Page ID # 12021).

On the same day, Plaintiff Sault Tribe filed in the District Court a motion that completely changes the nature of this almost 50-year-old dispute by asserting for the first time that the Sault Tribe will "self-regulate" what otherwise has been a co-managed, shared resource allocated between the Tribes and the State (Sault Tribe Brief in Support of Motion to Enforce, R. 2029, Page ID # 12026). This request has the distinct potential to effectively nullify any new consent agreement between the remaining parties. The Sault Tribe apparently seeks to relegate to itself the allocation and regulation of the Great Lakes fishery, including such issues as allocation of the fishing stocks, fishing zones, and fishing closures (Memorandum in Response to Sault Tribe Motion, R. 2034, Page ID # 12060). The Sault Tribe's motion will be heard initially by the District Court on December 16, 2022.

Moreover, as opposed to a negotiated successor decree, the District Court has since requested briefing and adopted one party's proposal over the other as to a

specific area within the lakes (Order Adopting GTB's Proposal, R. 2040, Page ID # 12149). Since the Coalition is not a party, has been shut out by the State, and the proposals were filed under seal, the Coalition had no opportunity to provide objections or participate in issues impacting the fishery in areas where they fish, including the expansion of gill netting in the GTB proposal (*Id*. at Page ID # 12151).

The developments at the District Court are of deep concern to the Coalition. The developments present issues never before litigated and reveal that the parties have substantial disagreements and are nowhere near a negotiated agreement.

SUMMARY OF THE ARGUMENT

The Coalition has had a longstanding role in this case as *amicus curiae* dating back to the origins of this dispute in the 1970s. Throughout the decades of negotiations, the Coalition and other advocacy groups have played a meaningful part in the negotiations as *amici*, helping the parties reach a consensus on nearly every occasion. The Coalition has sought intervention to gain full party status in these prior negotiations, however, intervention has always been denied because the State has been found to adequately represent the interests of the Coalition and because of the opportunity for the Coalition to otherwise protect its interest as "litigating" or regular *amicus curiae*. This current attempt to intervene is distinctly different than those prior. The State does not and has not represented the Coalition's interest in protecting the equally shared allocations adopted by Judge Enslen in 1985, along with the

related conditions and stipulations from the 1985 and 2000 Decrees that effectuated a co-managed resource that allowed adequate space and availability for the recreational fishery. Similarly, the 2000 Decree further focused on lake trout rehabilitation.

In particular, based on representations by the Parties, the Coalition has a profound belief that the concept of an equally-shared fishery within the treaty waters and the biological principles underpinning the existing 2000 Consent Decree are no longer being followed. Consequently, the Coalition asserts that their interests and the interests of thousands of users of the Great Lakes waters subject to the treaty rights are not being asserted and protected by the State as has been already established as law of the case. Significantly, the status quo for the last 22 years—the 2000 Consent Decree—has maintained the roughly 50-50 allocation of the fishery through a zonal-approach that balances recreational fishing and commercial fishing interests within the same waters by creating recreational and commercial fishing zones, a structure for the usage, times and places of gear types and effort, and protection of Great Lakes spawning areas, refuges, and certain fishing practices through sound biological considerations. The Coalition's members fish within these waters and have substantial interests in preserving these principles against expanded harm to the entire fishery. If the Coalition is not permitted to intervene, and if the Tribes are successful in negotiating a successor decree that does not share the values

of the Coalition, then the Coalition believes that it and the fishery will suffer irreparable harms.

Despite the District Court's rulings, the Coalition timely moved to intervene as soon as it became clear the State was not able or willing to advocate for the interests of preserving the fishery in the negotiations. As of June 30, 2022, the State's relationship with the Coalition was completely fractured due to disagreements over the Coalition's interests. The Coalition timely filed its motion seeking intervention within two weeks following such disagreements.

The Coalition seeks to be granted the right to intervene in the current negotiations because there is no question that the State no longer is willing or able to adequately represent the substantial interests of the Coalition. The State actions and positions create a serious risk to the fishery resource, and the Coalition's status as *amicus curiae* no longer provides it with any meaningful ability to protect its interests. The District Court erred in denying intervention by right because the Coalition was timely, asserted a substantial legal interest, showed the State did not adequately represent that interest, and established that without intervention the Coalition would be impaired from protecting its interests.

Notwithstanding this argument, if this Court were to find that intervention was timely but other factors for intervention by right are not met, this Court should reverse the District Court and grant the Coalition's request for permissive

intervention. Again, the Coalition filed its motion as soon as the State evidenced no interest in representing the Coalition's interests. The Coalition's claimed interest in the management and roughly 50-50 allocation of the fishery resource share common facts and legal issues with the Parties (including those most recently asserted by the Sault Tribe), which is all that is required for permissive intervention. The Parties have argued that intervention would cause prejudice in reaching a negotiated successor decree, and that is a reason for denial of permissive intervention. Yet, it is clear the Parties are at a stalemate on a negotiated successor decree, and accepting the argument prejudice would be suffered by the Parties as a result of the Coalition's intervention constitutes an abuse of discretion by the District Court. If the Coalition is not permitted to intervene by right, this Court should find the Coalition abused its discretion in denying permissive intervention because the Coalition was timely and shares common facts and legal issues with the Parties.

STANDARD OF REVIEW

"A district court's denial of intervention as of right is reviewed *de novo*, except for the timeliness element, which is reviewed for an abuse of discretion." *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999). A district court's denial of permissive intervention is reviewed for an abuse of discretion. *Purnell*, 925 F.2d at 951.

ARGUMENT

I. APPELLANT IS ENTITLED TO INTERVENTION OF RIGHT.

Rule 24(a) of the Federal Rules of Civil Procedure provides when a party may intervene as a matter of right:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Sixth Circuit has interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention of right will be granted:

> (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court. [*Stupak-Thrall v. Flickman*, 226 F.3d 467, 471 (6th Cir. 2000).]

The party moving to intervene has the burden of establishing that the four factors are present. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). "The need to settle claims among a disparate group of affected persons militates in favor of intervention." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

The Coalition demonstrates on appeal the District Court abused its discretion in finding the initial motion to intervene was untimely and the other three factors

required for intervention have been met. For these reasons thoroughly argued below, the Coalition asks this Court to overturn the ruling of the District Court denying it intervention by right under Rule 24(a).

A. Timeliness.

The Sixth Circuit directs courts to consult five factors in determining whether a motion to intervene is timely:

> 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed. [*Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (6th Cir. 1982).]

"No one factor is dispositive, but rather the 'determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Blunt-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (citations omitted). Importantly, the timeliness inquiry should not be limited solely to chronological considerations and the point to which a suit has progressed, but should rather be an evaluation of all the surrounding circumstances. See *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022); *Jansen*, 904 F.2d at 340 ("The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances").

The following consideration of the five factors of timeliness establishes that the District Court abused its discretion in determining intervention was untimely because the Coalition sought intervention just two weeks after the State made clear it was no longer able or willing to adequately represent the Coalition's interests.

1. Purpose for which intervention was sought.

Courts typically examine whether the lack of an earlier motion to intervene should be excused given the intervenor's purpose for intervention. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984). The inquiry is not when the intervenor became aware of its interest, but rather whether considering the purpose underlying intervention is a reason intervention was not sought at an earlier date. *Id.* ("Although this litigation had progressed to final judgment, and [the intervenor] knew of his interest in the litigation for some time, he had no reason to seek intervention prior to the decision of [the other party] not to appeal").

The Coalition's purpose in seeking to intervene arose because its relationship with the State deteriorated to the point there was no question the State would not be willing or able to adequately represent the Coalition's interests. The relationship with the State began to deteriorate in Spring, 2022 but was not completely fractured until June 30, 2022 (Affiant Krist Supplemental Affidavit, R. 1991, ¶¶ 14-19 (attesting to the breakdown in relationships that led to the Coalition seeking

intervention)). The Coalition moved shortly thereafter to intervene on July 13, 2022 (Motion to Intervene, R. 1964).

Intervention was not sought prior to this fracture of the relationship because the Coalition understood through the State's representations that it was representing its interests and was seriously concerned with preserving the fisheries, as opposed to just getting a deal done. Furthermore, had intervention been sought prior to this breakdown in the relationship, the District Court might well have denied intervention on the basis the State adequately represented the Coalition's interest. The Coalition's purpose for intervening arose on June 30, 2022, and the Coalition timely sought intervention just two weeks later on July 13, 2022.

2. Length of time preceding the motion to intervene during which proposed intervenor knew or reasonably should have known of its interest in the case.

This Court has indicated that otherwise late intervention in a lawsuit may be appropriate if it only becomes apparent that the intervening party's interests are not being adequately represented at a late stage of the proceedings. See *Penick v. Columbus Ed. Ass'n*, 574 F.2d 889, 891 (6th Cir. 1978) (Denying intervention but stating "the right of the [proposed intervenor] to seek intervention at a later date [exists] should it become apparent that [proposed intervenor's] interests are not being adequately represented in further proceedings before the District Court"); *United States v. Michigan*, 424 F.3d 438, 446 (6th Cir. 2005) ("The timeliness of [a

motion to intervene] should be judged from the point in time at which [the issue prompting intervention is] considered by the district court").

In *Penick*, the Columbus Education Association sought to intervene in the remedial stage of school desegregation proceedings. *Penick*, 574 F.2d at 890. The district court had already determined that the Columbus and Ohio State Boards of Education were liable for unconstitutional segregation. *Id.* The Columbus Education Association, who represented the Columbus public school teachers, sought intervention to protect the interests of teachers that could be affected by staff changes considering court-mandated desegregation. *Id.* The district court denied intervention finding the interests of the Columbus Education Association were already being adequately represented. *Id.* This Court affirmed the district court's decision but explicitly stated that the Columbus Education Association could "seek intervention at a later date should it become apparent that [its] interests [were] not being adequately represented in further proceedings before the district court." *Id.* at 891.

The Coalition's intervention is that exactly contemplated by this Court in *Penick*. The District Court has denied the Coalition the right to intervene on several occasions because it found another party adequately represented the interests of the Coalition. However, now years into these negotiations, that party is no longer adequately representing the interests of the Coalition (Affiant Frank Krist Supplemental Affidavit, R. 1991 (explaining how the State no longer is able to

represent the interests of the Coalition)). Following *Penick*, this otherwise late intervention is appropriate because it is now obvious the State will not adequately represent the interests of the Coalition. See *Penick*, 574 F.2d at 891; See also *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 598 (6th Cir. 1982) (Boyce J. dissenting) ("I believe that *Penick* stands for the proposition that intervention must be considered and should be allowed in the face of further proceedings which substantially alter the parties' relationship").

The decisions of this Court clearly suggest that this request to intervene should be judged from the context of when the State stopped adequately representing the interests of the Coalition. Notwithstanding, the District Court abused its discretion and considered timeliness from the outset of the negotiations. The District Court specifically stated the Coalition "should have moved to intervene at the beginning of the negotiations" because the Coalition has "known [of] its interests since the beginning of the negotiations, and they should not have waited three years to raise such interests" (Opinion and Order Denying Motion to Intervene, R. 1985, Page ID # 11672). The reasoning by the District Court completely fails to consider the possibility circumstances can change throughout a lawsuit as contemplated in *Penick*. See *Stotts*, 679 F.2d at 598 (Boyce J. dissenting) ("I believe that *Penick* stands for the proposition that intervention must be considered and should be

allowed in the face of further proceedings which substantially alter the parties' relationship").

The Coalition was timely because it only became aware of its need to intervene and protect its interests when its relationship with the State was severed on June 30, 2022, and it sought intervention shortly after on July 13, 2022.

3. Intervention would not prejudice the existing parties.

The District Court stated that the untimeliness of Appellant's request to intervene would prejudice the other parties considering the point to which the suit had progressed (Opinion and Order Denying Motion to Intervene, R. 1985, Page ID ## 11672-11674). However, this finding was based entirely on the misrepresentations of the Parties opposing intervention. The status of the negotiations was misrepresented to the point the District Court stated in its order on August 31, 2022, that **"[a]ll seven parties agree** that they can submit a proposed successor decree to the Court by September 30, and they do not want the [intervention] to delay that deadline" (Opinion and Order Denying Motion to Intervene, R. 1985, Page ID ## 11672-11673) (emphasis added). The representations to the District Court were accepted despite there being no proposed successor decree

and simply based on the "testimony"[10] of the State's attorney during oral argument (Opinion and Order Denying Intervention, R. 1985, Page ID # 11672-11673).

The misrepresentations to the District Court were obvious to the Coalition at the time they were made, and they are now even more obvious considering there has still been no successor consent decree reached as of mid-December. The Coalition filed affidavits under seal in support of its motion for reconsideration to correct these misrepresentations. The affidavits explained in detail why the Coalition intervened in July and how it was extremely unlikely a deal would be reached by September 30, 2022 (Affiant Frank Krist Supplemental Affidavit, R. 1991). However, the District Court refused to consider them because "[e]ven if the Court considered the five affidavits . . . the fact the motion to intervene was untimely still requires the Court to deny the motion to intervene" (Opinion and Order Denying Motion for Reconsideration, R. 2018, Page ID # 11996).

The affidavits specifically explain the timeliness of the Coalition's intervention, and they established it was highly unlikely a deal would ever be reached by September 30, 2022. The refusal to consider the affidavits and fully

[10] The District Court accepted the unsubstantiated testimony of the State's attorney at oral argument as evidence the parties were far along in negotiations (Hearing Transcript on Motion to Intervene, R. 1986).

evaluate the timeliness of the Coalition's intervention was an abuse of discretion by the District Court.

Additionally, even though the proper inquiry in this Court is whether intervention would cause prejudice to other parties when the Coalition sought intervention on July 13, 2022, the Coalition has also sought to minimize any prejudice that may result as a consequence of this appeal. The Coalition sought a stay pending this appeal (Motion for Stay Pending Appeal, R. 19) or alternatively an expedited appeal (Motion for Expedited Appeal, R. 24).

4. The existence of unusual circumstances.

Unusual circumstances—namely COVID-19 and the complexity of the negotiations—support the timeliness of the Coalition's intervention. The negotiations in this matter were slow to start as the result of the pandemic forcing the parties to participate remotely and engage via "Zoom" 50 or more individuals in discussion around complex topics. In fact, it was not until early in 2022 that the parties resumed in-person negotiations and the Coalition was able to fully appreciate the differences in approach between itself and the State. Considering these circumstances surrounding the negotiations, it is understandable the Coalition did not realize its interests were not being adequately represented until almost three years into the negotiation process when the parties began to engage in substantive, face-to-face negotiations.

5. The point to which the suit has progressed.

"The absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important" factors in the timeliness inquiry. *Stupak-Thrall*, 266 F.3d at 475 (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994); see also *NAACP v. New York*, 413 U.S. 345, 365-66 (1973) ("Timeliness is to be determined from all the circumstances . . . the point to which [a] suit has progressed is . . . not solely dispositive"). The proper inquiry looks not to whether there has been a substantial passage of time, but rather whether there has been substantial progress made in the suit. See *Blunt-Hill*, 636 F.3d at 286.

In this case, the parties have some progress towards a successor consent decree, but time has shown that because of fundamental disagreements between the parties, the District Court has been forced to extend the prior consent decree on several occasions (Orders Extending the 2000 Great Lakes Fishing Consent Decree, R. 1892, 1903, 1912, 1945, 1963, 2014). The Sault Tribe has even conceded that the parties have not made substantial progress in a prior filing to the District Court by stating **the parties are not in the final stages of negotiations** (The Sault Tribe Motion, R. 40, ‖ 4). The parties lack of progress has resulted in the District Court **granting an indefinite extension of the 2000 Consent Decree** (Order Extending the 2000 Great Lakes Fishing Consent Decree, R. 2027).

Despite the lack of progress by the parties, in denying intervention the District Court found "[t]his matter has progressed far beyond the point that any other party should be permitted to intervene" (Opinion and Order Denying Motion to Intervene, R. 1985, Page ID # 11674). This was an abuse of discretion. Intervention should only be denied when extensive progress has actually been made in suit, and intervention should not be denied for the mere passage of time. See, e.g., *Mountain Top Condo. Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3rd Cir. 1995) (allowing intervention as of right where four years had passed between the filing of the complaint and the motion to intervene because there was not extensive progress made in the suit).

B. Substantial Legal Interest.

This Court has indicated a "rather expansive notion of the interest sufficient to invoke intervention of right." *Purnell*, 925 F.2d at 947. There is not a requirement an intervenor show the "same standing necessary to initiate a lawsuit" or even a "specific legal or equitable interest." *Id.* The evaluation of substantiality of the interest at play is "necessarily fact specific." *Id.* Moreover, even where the question raised is a close one, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." See *Grutter*, 188 F.3d at 399. In reaffirming its "expansive notion of the interest sufficient to invoke intervention of right," this Court recently permitted a private interest group to intervene in the late stages of a

case. *Wineries of the Old Mission Peninsula (WOMP) Association v. Township of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022).

In *WOMP*, 11 wineries in Peninsula Township alleged that zoning ordinances in Peninsula Township violated the United States Constitution, were preempted by the Michigan Liquor Control Code, and violated the Michigan Zoning Enabling Act. *Id.* at 769-771. Protect the Peninsula, an advocacy group seeking to preserve the nature of the community, sought to intervene to uphold the zoning ordinances at issue. *Id.* This Court held that Protect the Peninsula had a substantial interest in the case because its members had an interest in the ordinances at issue:

> [S]hould the Wineries simply violate the zoning ordinances, some of Protect the Peninsula's members might be able seek injunctive relief under Michigan law absent the Township's willingness to enforce its own laws. That is, these members might be able to do so *if* the ordinances survive this litigation. That the ordinances might not survive is sufficient for Protect the Peninsula to satisfy the substantial-interest requirement of Rule 24(a). [*Id.* at 773.]

In other words, Protect the Peninsula members had a substantial interest in the ordinances at issue because they had recourse under Michigan law to enforce the ordinances.

Like Protect the Peninsula, the Coalition likewise seeks to preserve a natural resource at issue with litigation for which they were otherwise not a party. Although Protect the Peninsula members owned land subject to the regulations at issue, this Court's finding of a substantial interest relied on the statutory creation of a cause of

action to seek remedial relief consistent with the claims at issue in the litigation. The Coalition has a similar substantial interest in a successor consent decree because under the Michigan Environmental Protection Act ("MEPA"), the Coalition has a cause of action against the State if it violates the public trust in protecting the Great Lakes. See MCL 324.1701 *et seq.* Further, the Coalition has a cause of action "for declaratory and equitable relief against **any person** for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1791(1) [Emphasis added.] Currently, the discussion of the Great Lakes fishery resource covered by the 1836 Treaty necessarily relates to the conservation and protection of the fishery. Because the State's agreement permits harm to the fishery, the Coalition similarly has a state cause of action under MEPA. See *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99, 106-07 (1979) ("*MUCC* Decision"). The *MUCC* Decision even reflects such a position taken by one of the Coalition's members regarding the "lethal" and "non-selective" nature of gillnets and its impact on the Great Lakes fishery. *Id.* at 108-09. Like the holding in *WOMP*, the right to pursue a cause of action against the State if it does not adequately represent the Great Lakes creates a substantial interest in negotiations dealing with the Great Lakes.

The case of *Mille Lacs Band of Chippewa Indians v. State of Minnesota, et al.*, 989 F.2d 994 (8th Cir. 1993) provides additional support for the Coalition's

intervention and explains even further the Coalition's substantial interest in a successor consent decree because the Coalition members reside within the treaty area. In *Mille Lacs*, landowners in the originally ceded territory sought to intervene when the Tribes brought an action for declaring their fishing, hunting and gathering rights. *Id.* The court granted the landowners' motion to intervene, stating in relevant part:

> Both the counties and the landowners easily satisfy two of the requirements for intervention as of right. First, both groups have interests in land in the ceded territory. The litigation between the Band and the State of Minnesota will determine Band members' rights to hunt, fish, and gather on land throughout the ceded territory, including land the counties and the landowners own. The result of the litigation also may affect the proposed intervenors' property values. See *Id.* (holding that proposed intervenors' interests in protecting their property values are protectable interests). The parties thus have recognized interests in the subject matter of the litigation. Second, a judgment or settlement favorable to the Band may impair those interests, since it may permit Band members to exercise treaty rights upon the proposed intervenors' land. Even if the Band's rights under the 1837 treaty are limited to public land, a resulting depletion in fish and game stocks may reduce the proposed intervenors' property values. See *Id.* ('[i]n order to prevent what they view as an incipient erosion of their property values, the applicants must participate in this litigation')." [*Mille Lacs Band of Chippewa Indians*, 989 F.2d at 998.]

Simply put, the Eighth Circuit held the intervenor's in *Mille Lacs* had a substantial interest in the litigation because it would permit the Band members to exercise treaty rights related to the intervenor's interests. In this case, a successor consent decree replacing the 2000 Consent Decree appears to allow the Tribes to exercise treaty

rights that may impact the portion of the shared fishery held in trust by the State, and in which the Coalition has a substantial interest in under Michigan law. See MCL 324.1701 *et seq.* (permitting suits to be filed related to activities that impair or destroy the Great Lakes fishery). Furthermore, the same exact interest the Coalition and its members assert in this case have warranted intervention in other relevant cases. See, e.g., *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972).

In *Reserve Mining*, the United States sought to secure abatement of alleged pollution of Lake Superior from the discharge of taconite tailing by a mining company. *Id.* at 412. The Minnesota Environmental Law Institute, a nonprofit whose members were Minnesota residents, alleged they had an interest in protecting Lake Superior from pollution and sought to represent the public interest. *Id.* at 417. The court articulated the substantial interest of these members:

> The interest is not an interest in on-land disposal of taconite tailings, but rather an interest of specific property owners and an interest of the members of these organizations in Lake Superior as a source of drinking water, ***recreation, and conservation***. This is, within the context of this lawsuit, a substantial interest. Viewing this interest in light of the litigation with which the Court is faced, which is, as stated, very much akin to an administrative proceeding, leads the Court to the conclusion that a representation of those interests would be [helpful] to any decision reached by this Court. [*Id.* at 418 (emphasis added).]

Just as the court found an environmental group has an interest in Lake Superior for purposes of "recreation, and conservation," the Coalition has an interest in protecting the shared fishery from destruction, as well as impairment of the Coalition members'

interest in recreation surrounding the fishery. This Court has adopted an expansive notion of interests sufficient to invoke the right of intervention. *Purnell*, 925 F.2d at 947 (Noting this Court's "rather expansive notion of the interest sufficient to invoke intervention of right"). Adhering to this view, this Court should hold the Coalition has a substantial interest in protecting the Great Lakes fisheries similar to the interests and circumstances in *Reserve Mining.*

The Coalition has a substantial interest in a successor consent decree, including the process the District Court is now employing to resolve disputes in narrow areas of the fishery as was discussed in *WOMP*. This Court's precedent also strongly suggests that this Court resolve all close questions related to substantial interests in favor of the intervening party. *Grutter*, 188 F.3d at 399 ("close cases should be resolved in favor of recognizing an interest under Rule 24(a)").

C. Impairment of Ability to Protect Interests.

"A would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied . . . [t]his burden is minimal." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). Thus, a party seeking to intervene only requires a hypothetical showing that the disposition may harm that party's ability to protect its interest. *Purnell*, 925 F.2d at 947.

The Coalition has a substantial interest in the conservation of fishing, boating, and wildlife resources within the Great Lakes and Michigan's inland lakes and

streams. These interests were protected in both the 1985 Consent Decree and the 2000 Consent Decree as these decrees properly reflected the roughly 50-50 equitable allocation and promoted biological sustainability. The Coalition's ability to protect its interests will certainly be impaired if it is not provided the opportunity to intervene in this lawsuit because the State and other parties appear poised to agree to a consent decree that ignores principles of biological sustainability and causes irreparable harm to the fisheries (Affiant Johnson Affidavit, R. 1992, ¶¶ 31-34 (explaining the irreparable harm to the fishery that could result from the negotiations)); (Affiant Krist Affidavit, R. 1993, ¶¶ 23-24 (explaining the potential of irreparable harm to the fishery near Rogers City)); (Affiant Pearson Affidavit, R. 1995 (attesting to the unique geographical circumstances and irreparable harm to the fishery that could result)). The Coalition will be necessary bound by any order of the District Court imposing a new consent decree on the Michigan recreational public. If it is denied intervention, it's rights in the shared public resources of the Great Lakes be directly impacted by a successor consent decree that fails to follow principles of biological sustainability. Moreover, even though early in these negotiations the Coalition has had some ability to protect its interests as *amici*, the parties have stopped sharing documents with the Coalition and no longer have any access to the drafting or discussion of the parties through the State (Affiant Krist Supplemental Affidavit, R. 1991, ¶¶ 16-17).

Simply put, if the current proceedings continue with the Coalition's involvement, then its ability to protect those interests may be impaired. The impairment of the Coalition to protect its interests absent intervention supports intervention.

D. Adequate Representation.

The United States Supreme Court recently reiterated that Rule 24(a) "promises intervention to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that [same] interest.'" *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2195-96 (2022) (citing *Trbovich v. Mine Workers*, 404 U.S. 528 (1972). True, the Sixth Circuit has adopted a presumption of adequate representation when a proposed intervenor and a party in the suit share the "same ultimate objective." *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). However, the Sixth Circuit recently held "overlapping interests do not equal convergent ones for the purposes of assessing representation under Rule 24(a)." *Wineries of the Old Mission Peninsula (WOMP) Association v. Township of Peninsula, Michigan*, 41 F.4th 767, 776 (6th Cir. 2022). And the presumption of adequate representation can be overcome when it is shown the interests of the parties sharing the "same ultimate objective" may diverge through the lawsuit. *Id.*

The *WOMP* case explains what is required to show a government may not adequately represent[11] an advocacy group even if they share the same ultimate objective (although the Coalition disputes that the State and the Coalition have a shared objective as of June 30, 2022). In *WOMP*, as discussed above in Section I.B, the same ultimate objective—upholding the ordinances—was shared by Peninsula Township and Protect the Peninsula. *Id.* at 774-75. However, this Court stated that the "adequacy of representation can change during a lawsuit depending on the representative party's underlying incentives for litigating the case" and "the Township [faced] the possibility of damages" while "Protect the Peninsula's members do not." *Id.* at 776-77. Thus, it was not "difficult to see how the two entities' interest could diverge" and the possibility of inadequate representation was present. *Id.* at 777. The holding in the *WOMP* case stands for the proposition that the government's larger interests in representing the masses weighs in favor of letting an association representing a segment of those interests become a party.

The State has argued that the Coalition shares a similar ultimate objective with the Coalition in preserving the Great Lakes, however, it is not difficult to see how these interests have diverged and inadequate representation exists. Throughout the

[11] Note, the Sixth Circuit has explicitly rejected the *parens patriae* doctrine, which requires a stronger showing of inadequate representation when a government agency is involved. See *Grutter v. Bollinger*, 188 F.3d at 397-98.

negotiations, the State must consider political ramifications, how the negotiations may impact a wider State-Tribal relationship[12], negotiate federal funding, and determine State funding. The Coalition has no such considerations. The additional interests of the Tribe may provide incentive at times for the State to give concessions to the Tribes, thus presenting a situation of inadequate representation. See, e.g., *WOMP*, 41 F.4th at 776 (explaining how the Township's incentive to avoid money damages presents a situation of inadequate representation).

The State has, in fact, all but conceded to the Coalition it is unable to represent local concerns involved in a successor consent decree. The State specifically indicated in negotiations that it is unable to address "local concerns" and must look at the fishery as a whole (Affiant Krist Supplemental Affidavit, R. 1991, ¶¶ 14-16), and the State said as much in its opposition to the Coalition's original motion to intervene (State's Response to Motion to Intervene, R. 1973, Page ID # 11326-11327). The divergence on issues is akin to those present in *WOMP*, where Peninsula Township said it could not address the individual concerns of its residents. See *WOMP*, 41 F.4th at 776 (explaining the Township was "limited in how much it could

[12] See, e.g., "Gov. Whitmer Attends State-Tribal Summit in Sault Ste. Marie, Appoints First Tribal Citizen Ever to Michigan Court of Appeals," Press Release of Governor Gretchen Whitmer, December 6, 2022, https://www.michigan.gov/whitmer/news/press-releases/2022/12/06/gov-whitmer-attends-state-tribal-summit.

do to represent the interests of individual citizens" and instead focused on macro level issues). The mere concession by the State that it disagrees with the Coalition on some issues is sufficient to find that adequacy of representation is lacking. *Id.* at 777 ("There is certainly a 'potential' for inadequate representation here") (citing *Grutter*, 188 F.3d at 400.

The District Court essentially refused to consider the divergence on these issues providing "divergence on small issues does not amount to inadequate representations" (Opinion and Order Denying Intervention, R. 1985, Page ID # 11679). However, the finding that local concerns or narrow issues are small interests not warranting intervention is plainly wrong. See *WOMP*, 41 F.4th at 775 (explaining the argument that because the Township could not represent interests on a micro level like Protect the Peninsula could the Township was unable to adequately represent Protect the Peninsula). Moreover, while some of the interests of the Coalition may be characterized as local concerns, they are not in any way issues of small significance but rather are issues related to the preservation of the Great Lakes as a whole.

Without question, the potential of inadequate representation is present between the Coalition and the State on many critical issues, even though they may share some of the same ultimate objectives. This potential of inadequate representation supports intervention by right under Rule 24(a).

II. APPELLANT IS ENTITLED TO PERMISSIVE INTERVENTION.

Rule 24(b) of the Federal Rules of Civil Procedure provides when a district court may grant permissive intervention:

> (b) Permissive Intervention.
> (1) In General. On timely motion the court may permit anyone to intervene who:
> (A) is given a conditional right to intervene by a federal statute; or
> (B) has a claim or defense that shares with the main action a common question of law or fact.

This Court has interpreted Rule 24(b) as requiring as a perquisite to permissively intervene that the proposed intervenor "establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). If these two requirements are met by the proposed intervenor, a court must "then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Id.* A district court's denial of intervention is reviewed for an abuse of discretion. *Id.*

The Coalition filed its motion as soon as the State evidenced no interest in representing the Coalition's interests. The Coalition's claimed interest in the management and conservation of the Great Lakes fishery shares a common nexus with the parties' legal claims and negotiated resolutions regarding the scope of the treaty right (and amicably settled for 35 years) under the 1836 Treaty. While the

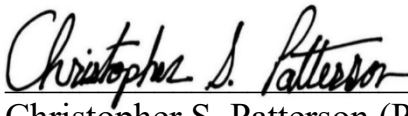
parties have submitted such intervention would cause prejudice, the record reflects that the Parties are at a stalemate on a negotiated successor decree, and the District Court has resorted to a court process to settle disputes by court order. The Coalition, if granted permissive intervention, would participate in that process no different than the current parties who oppose each other's positions. Thus, no prejudice would result. As a result, if this Court finds the Coalition to be timely in seeking intervention but does not find the Coalition has established the other required elements of intervention by right, the Coalition requests this Court find the District Court abused its discretion in denying permissive intervention.

CONCLUSION

This Court should find that the District Court abused its discretion in finding that the Coalition request to intervene was untimely, and determine, consistent with the Court's recent ruling in *Wineries of the Old Mission Peninsula (WOMP) Association v. Township of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022), that the Coalition satisfied all four factors warranting mandatory intervention. Alternatively, this Court should find that the Coalition was timely in seeking intervention, and even if one or more other factors for mandatory intervention are lacking, the Coalition's claims share with the main action's common questions of law and fact. This Court should then find that the District Court abused its discretion in not granting to the Coalition permissive intervention.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Proposed Intervenor-Appellant



Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
cpatterson@fsbrlaw.com
sschultz@fsbrlaw.com

Dated: December 12, 2022

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements.

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This brief contains 11,202 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Proposed Intervenor-Appellant

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
cpatterson@fsbrlaw.com
sschultz@fsbrlaw.com

Dated: December 12, 2022

CERTIFICATE OF SERVICE

I certify that on the date set forth below, the foregoing document was served on all parties of record or their counsel of record through the CM/ECF system if they are registered users, which will send notification of such filing to all counsel of record, or if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below, if applicable).

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Proposed Intervenor-Appellant

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
cpatterson@fsbrlaw.com
sschultz@fsbrlaw.com

Dated: December 12, 2022

ADDENDUM

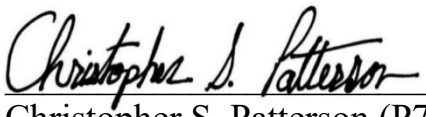
Appellant, pursuant to Sixth Circuit Rules 28 and 30, designates the following portions of the record on appeal:

Description of Entry	Record No.	Page ID No. Range
Notice of Appeal	2019	11998-11999
Opinion and Order Denying Motion to Intervene	1985	11662-11686
Order Denying Motion for Reconsideration	2018	11993-11997
Opinion	1892	10818-10825
Order	1903	10843-10844
Order	1912	10858-10859
Order Extending Great Lakes Consent Decree	1945	10909-10911
Order Granting Motion to Extend Great Lakes Fishing Consent Decree	1963	10934-10935
Order Extending 2000 Consent Decree to November 2022	2014	11957-11958
Motion to Confirm Status as *Amicus Curiae*	1865	2067-2080
Order Confirming *Amicus* Status	1875	2143-2145
Affiant Krist Supplemental Affidavit	1991	Filed Under Seal
Affiant Johnson Affidavit	1992	Filed Under Seal
Brief in Support of the Coalition's Motion to Intervene	1969	11020-11089
Order Denying Stay; Granting Motion to File Under Seal	2021	12003-12007
Motion for Reconsideration	1987	11764-11768
Order Extending 2000 Consent Decree Indefinitely	2027	12020-12022
Sault Tribe Brief in Support of Motion to Enforce	2029	12026-12043
Memorandum in Response to Sault Tribe Motion	2034	12055-12064
Order Adopting GTB's Proposal	2040	12147-12159

Motion to Intervene	1964	10936-10939
Affiant Krist Affidavit	1993	Filed Under Seal
Affiant Pearson Affidavit	1995	Filed Under Seal

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Proposed Intervenor-Appellant



Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
cpatterson@fsbrlaw.com
sschultz@fsbrlaw.com

Dated: December 12, 2022