No. 22-1946

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

BAY MILLS INDIAN COMMUNITY, et al.,
Intervenors-Appellees,

v.

STATE OF MICHIGAN, and its agents,
Defendant-Appellee,

and

COALITION TO PROTECT MICHIGAN RESOURCES,
fka Michigan Fisheries Resources Conservation Coalition,
Proposed Intervenor-Appellant.

Appeal from the U.S. District Court for the Western District of Michigan,
No. 2:73-cv-26 (Hon. Paul L. Maloney)

UNITED STATES' RESPONSE BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 6th Cir. R. 34(a), Plaintiff-Appellee United States takes no position, and defers to the discretion of this Court, on whether oral argument would aid the Court's resolution of this case.

INTRODUCTION

This appeal arises out of Proposed-Intervenor's most recent effort to intervene in litigation that commenced 50 years ago. In 1973, the United States, later joined by the Bay Mills Indian Community, Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians (collectively, "Tribes"), sued the State of Michigan to secure the Tribes' fishing rights in the Great Lakes arising from the 1836 Treaty of Washington. Rather than litigate every issue in this complex case, the parties stipulated to the entry of decrees in 1985 and 2000 governing the scope of the tribal fishing right and the allocation of the available catch between the Tribes and the State. Beginning in September 2019, the parties began an intensive process of negotiations to reach a new decree.

Proposed-Intervenor, a non-tribal recreational fishing organization whose members fish pursuant to state law, participated in these recent decree negotiations as amicus curiae, and its member organizations have participated in this case as amici since 1976. Notwithstanding this longstanding involvement including nearly *three years* of amicus participation in the most recent round of decree negotiations, Proposed-Intervenor moved to intervene in the case in July 2022. It sought additional rights in decree negotiations, just as the parties were finalizing

negotiations [redacted] The district court denied Proposed-Intervenor's motion to intervene, and indeed it has similarly denied Proposed-Intervenor and its member organizations intervention in this case seven times over the past five decades. Shortly after the denial of Proposed-Intervenor's recent motion to intervene, the parties concluded decree negotiations and the new proposed Decree was submitted to the district court for approval.

This Court should affirm the denial of intervention. Proposed-Intervenor fails to demonstrate that it is entitled to intervene as of right. The district court did not abuse its discretion when it held that Proposed-Intervenor's motion to intervene was untimely, which alone is sufficient for this Court to affirm the district court's denial of intervention. Proposed-Intervenor also does not meet its burden to show it has a direct, substantial interest in the case, that disposition of the case absent intervention would impair its ability to protect its interests, or that the State's representation of Proposed-Intervenor's interests is inadequate. Nor can Proposed-Intervenor demonstrate that the district court abused its discretion in denying permissive intervention.

STATEMENT OF JURISDICTION

(A) The district court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1345, and 1362, because the United States and Tribes' claims arise under

the laws, treaties, and constitution of the United States. *United States v. Michigan*, 471 F. Supp. 192, 217 (W.D. Mich. 1979).

(B) This Court has appellate jurisdiction under 28 U.S.C. § 1291, because Proposed-Intervenor appealed from the district court's denial of its motion to intervene and motion for reconsideration. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987).

(C) The district court entered its order denying intervention on August 31, 2022, Order, RE 1985, PageID#11662, and its order denying reconsideration on October 4, 2022. Order, RE 2018, PageID#11993. Proposed-Intervenor filed its notice of appeal on October 18, 2022. Notice, RE 2019, PageID#11998. This appeal is timely under Fed. R. App. P. 4(a)(1).

(D) The district court's order denying Proposed-Intervenor's motion to intervene and order denying Proposed-Intervenor's motion for reconsideration are immediately appealable. *See Stringfellow*, 480 U.S. at 377.

STATEMENT OF THE ISSUES

1. Whether Proposed-Intervenor meets its burden of demonstrating the four required criteria for intervention as of right, when:

    a. the district court concluded that Proposed-Intervenor filed an untimely motion to intervene three years after learning of its interests in the case;

b. Proposed-Intervenor has no property rights in the fishery, and its only interests are general interests in preserving the fishery and hypothetical claims against the State;

c. Proposed-Intervenor has asserted its interests through longstanding amicus participation; and

d. Proposed-Intervenor's ability to fish derives from the State, a party that has represented Proposed-Intervenor's interests throughout the 50-year history of this case.

2. Whether Proposed-Intervenor demonstrates that the district court abused its discretion when it denied permissive intervention based on timeliness and prejudice.

STATEMENT OF THE CASE

A. Historical background

This case concerns the Ottawa and Chippewa, two distinct but interrelated peoples that have historically resided on lands now within the State of Michigan. *United States v. Michigan*, 471 F. Supp. at 220. Over time, the Ottawa and Chippewa developed a sophisticated commercial gill net[1] fishery in the upper

[1] A gill net is "a net, suspended vertically in the water, whose meshes catch entering fish by the gills." The Random House College Dictionary (Revised ed. 1980).

Great Lakes, which by the early nineteenth century had become a "vitally important resource for the[ir] survival." *Id.* at 224 (internal quotations omitted).

In 1836, the United States began to negotiate a cession of Ottawa and Chippewa lands to the United States. *Id.* at 227. Representatives of the Ottawa and Chippewa negotiated with the United States under circumstances that the district court noted were profoundly unequal, opaque, and asymmetrical. *See id.* at 229–230.

The 1836 Treaty of Washington, signed by representatives of the Ottawa and Chippewa and the United States, provided for the cessation of nearly all Ottawa and Chippewa territory in the area that is now the State of Michigan, including certain waters of Lake Michigan, Lake Superior, and Lake Huron. *Id.* at 202, 231–32; *see* Treaty with the Ottawa, Mar. 28, 1836, 7 Stat. 491. In exchange, the Ottawa and Chippewa received various annuities and lump-sum payments. *United States v. Michigan*, 471 F. Supp. at 234–35. They also reserved, among other things, several small land reservations, exclusive use of specific fishing grounds in the Great Lakes, and a right to hunting and the "usual privileges of occupancy" on all ceded lands. *Id.* at 233–35.

B. Litigation background

In 1973, the United States initiated this litigation to secure the rights of the Bay Mills Indian Community, a federally recognized tribal organization and a

successor in interest to the Ottawa and Chippewa signatories of the 1836 Treaty, to fish in waters of the Great Lakes. *Id.* at 218. The United States' complaint requested that the State of Michigan be enjoined from interfering with the Tribe's right to fish in Great Lakes treaty waters, as confirmed by, *inter alia*, the 1836 Treaty of Washington. *Id.* The Bay Mills Indian Community soon intervened in 1974, and the Sault Ste. Marie Tribe of Chippewa Indians, another successor in interest to the signatories of the 1836 Treaty, intervened in 1975. *Id.* at 203–04.

After a lengthy bench trial, the district court ruled for the United States and the Tribes, although it deferred consideration of the request for injunctive relief. *See id.* at 278–81. It established that the United States had repeatedly recognized the Ottawa and Chippewa's aboriginal title, or "right to occupy and use" their lands, which included "the right to fish" on waters of the Great Lakes. *Id.* at 255–56. Applying the deferential canons of Indian treaty construction, *see Jones v. Meehan*, 175 U.S. 1 (1889), the district court held that the Tribes did not cede these rights through the 1836 Treaty, and in fact had "impliedly reserved a right to fish commercially and for subsistence in the ceded waters of the Great Lakes." *Id.* at 258. The court also concluded that this right to fish was essentially unlimited

within waters of the Great Lakes ceded under the Treaty, and that the State of Michigan did not have "any right" to regulate such fishing. *Id.* at 259, 270.[2]

On appeal, this Court confirmed that the 1836 Treaty reserved Indian fishing rights, but held that the Treaty did not necessarily preclude all state regulation. *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981). The Court described how the Indian fishing right is "subject to the type of state regulation outlined by the Michigan Supreme Court in *People v. LeBlanc*, 399 Mich. 31 (1976)." *Id.* Under *People v. LeBlanc*, any regulations restricting the fishing right "(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." *Id.*

After this Court's remand, the Tribes moved in the district court to allocate fishery resources within ceded treaty waters. *United States v. Michigan*, 12 Indian L. Rep. 3079 (W.D. Mich. 1985). To avoid litigating the Tribes' motion requesting that the district court itself adjudicate the allocation of fishery resources, the parties entered negotiations mediated by a court-appointed Special Master. *Id.* at 3079–80. These negotiations resulted in a stipulation by the parties to the entry

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[2] The Grand Traverse Band of Ottawa and Chippewa Indians, another successor in interest to the signatories of the 1836 Treaty, intervened in the case in 1979. *United States v. Michigan*, 12 Indian L. Rep. 3079, 3089 (W.D. Mich. 1985).

of a decree that allocated the fishery among the State and Tribes by lake, zones, species, and catch limits. *Id.* at 3089–93. The Bay Mills Indian Community later changed course to object to the decree and submitted an alternative fishery management proposal. *Id.* at 3079. In May 1985, the court rejected the Bay Mills Indian Community's alternative and entered the proposal the parties had previously agreed on, effective for a term of fifteen years. *Id.* at 3079, 3093.

With the 1985 Decree set to expire in 2000, the federal, state, and tribal parties entered "extensive mediated negotiations" regarding a successor decree. Stipulation, RE 1457, PageID#3402.[3] On stipulation of the parties, the district court approved and entered the Decree on August 8, 2000, effective for a term of 20 years. 2000 Decree, RE 1458, PageID#3216. The 2000 Decree differed from the 1985 Decree in that it created dynamic harvest limits for some species of fish based on target mortality rates, *id.* at PageID##3256, 3266, provided for the State-financed conversion of many tribal gill net fishers to trap net fishing, *id.* at PageID#3328, and adjusted the allocation of fishery resources between the Tribes and the State. *Id.* at PageID##3265–73.[4]

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[3] The Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians, successors in interest to the 1836 Treaty, joined the case in 1998 and 1999, respectively, on unopposed motions to intervene after federal recognition. Order, RE 1371, PageID#4226–27; Order, RE 1412, PageID#3988.

[4] Unlike gill nets, trap nets are discrete fish traps that do not stand vertically in the water.

C. Proposed-Intervenor's repeated attempts at intervention

Proposed-Intervenor is a recreational fishing "coalition," which is composed of various sportfishing member organizations. Opening Br., RE 44, at 18. These groups represent non-tribal, recreational fishers who fish in the Great Lakes pursuant to state law. Proposed-Intervenor and its member organizations have unsuccessfully sought to intervene in this case seven times in the district court and three times on appeal over the past fifty years.

In 1976, at the earliest stages of this case, the Michigan United Conservation Club (MUCC), a member organization of Proposed-Intervenor, moved to intervene based on an alleged "right to fish in the Great Lakes." Tr., RE 1970-2, PageID#11118.[5] The district court denied intervention because, among other reasons, the State adequately represented MUCC's interests, and instead granted MUCC amicus curiae status. Order, RE 1970-3, PageID##11192–93. This Court affirmed. *United States v. Michigan United Conservation Clubs, Inc.*, 556 F.2d 583 (6th Cir. 1977). In 1978, MUCC sought reconsideration of the district court's denial of its motion to intervene. Order, RE 1970-4, PageID#11196. The district court again denied intervention, for the reasons set forth in its prior 1976 order. *Id.*

[5] MUCC is a member organization of Proposed-Intervenor. *See* Br., RE 1970-1, PageID#11096.

MUCC and Grand Traverse Area Sport Fishing Association (GTASFA), another member organization of Proposed-Intervenor, then moved to intervene in 1980, on the grounds that the case had entered a new phase and the State could no longer represent MUCC's interests. *United States v. Michigan*, 89 F.R.D. 307, 309 (W.D. Mich. 1980).[6] The district court denied the motion, held that the State adequately represented these groups' interests, and granted the groups amicus status. *Id.* at 309–10.

MUCC, GTASFA, and other groups again sought to intervene in negotiations leading up to the entry of the 1985 Decree. Br., RE 1970-5, PageID##11203–05; *United States v. Michigan*, 12 Indian L. Rep. at 3089. The district court reserved decision on these motions, and allowed MUCC and the other parties to participate in negotiations as amici. *Id.* The organizations ultimately decided "not to pursue" intervention. *See* Tr. and Rulings, RE 1352, PageID#4736.

In 1998, as the expiration of the 1985 Decree began to approach, GTASFA again moved to intervene. Mot., RE 1346, PageID##4832–36. The district court denied the motion as untimely, holding that allowing its intervention "portends

[6] GTASFA is a member organization of Proposed-Intervenor. *See* Opening Br., RE 44, at 13.

only prejudice, confusion and chaos for the enforcement of the Consent Decree." Tr. and Rulings, RE 1352, PageID##4735–36.

In 1999, the district court granted GTASFA's motion to withdraw as amicus and substitute in its place Proposed-Intervenor. Order, RE 1404, PageID##4028–29. Proposed-Intervenor initially gained amicus status as the "Michigan Fisheries Resources Conservation Coalition," but later changed its name to "Coalition to Protect Michigan Resources." Order, RE 1783, PageID##1462–63.

In 2004, Proposed-Intervenor, joined by several individuals and a conservation organization, moved to intervene in the case regarding a dispute over inland hunting and fishing rights under the 1836 Treaty. Mot., RE 1501, PageID##2747. The district court denied intervention because of Proposed-Intervenor's unreasonably long delay in filing the motion, the State adequately representing Proposed-Intervenor's interests, and Proposed-Intervenor's "long and proven history in this suit of the use of amici curiae." Order, RE 1518, PageID##2512–13. This Court affirmed. *United States v. Michigan*, 424 F.3d 438, 443–45 (6th Cir. 2005).

In 2005, Proposed-Intervenor renewed its motion to intervene, arguing that the State no longer adequately represented its interests because the scope of the suit had expanded. Mot., RE 1643, PageID##391–93. The district court denied the motion, holding that the scope of the suit had remained the same. Order, RE 1678,

PageID##964–65. Proposed-Intervenor appealed to this Court. Notice, RE 1698, PageID#1053. During the appeal, Proposed-Intervenor again moved to intervene in the district court. Mot., RE 1748, PageID#1290. The district court concluded that it lacked jurisdiction over this motion because of the pending appeal. Order, RE 1772, PageID##1439–40. This Court later granted Proposed-Intervenor's motion to voluntarily dismiss its appeal. *See* Order, RE 1800, PageID#1797.

D. Negotiation of the proposed Decree

In August 2019, with the expiration of the 2000 Decree on the horizon, Proposed-Intervenor moved for the district court to "confirm" its status as amicus curiae and apprised the court "of the need for a status conference." Br., RE 1865, PageID#2070. The district court confirmed Proposed-Intervenor's status as amicus, holding that it was limited to "observer" status, or "a very narrow, non-adversarial role that does not rise to the level of 'the full litigating status of a named party or a real party in interest,'" and denied additional relief. Order, RE 1875, PageID#2144 (quoting *United States v. Michigan*, 940 F.2d 143, 165–66 (6th Cir. 1991)).

In September 2019, the seven named parties, as well as Proposed-Intervenor, began in-person meetings to negotiate a successor decree. *See* Order, RE 1892, PageID#10819; Order, RE 1985, PageID#11670. Soon after, Proposed-Intervenor signed a confidentiality agreement as part of its participation as amicus in decree

negotiations. Agreement, RE 1966-2, PageID##10974–75. The agreement stated that, upon its execution, an amicus "shall be considered an observer consistent with the amici's role in the negotiations of the 2000 Decree and in accordance with the October 8, 2019, order of the United States District Court for the Western District of Michigan." *Id.* Thus, consistent with the district court's prior orders, the agreement confirmed that Proposed-Intervenor's role as amicus would be that of an observer, Order, RE 1875, PageID#2144, and involve "providing information about natural resources, conservation and the views of its members" to benefit the court and parties. Order, RE 1404, PageID#4029.

Proposed-Intervenor attended all in-person negotiations until March 2020, when the coronavirus pandemic resulted in some negotiation sessions being canceled. *See* Order, RE 1985, PageID#11670; Order, RE 1892, PageID#10819. Also in March 2020, the parties stipulated to the appointment of a mediator to help in "facilitating the settlement process" and reaching a successor decree. Stipulation, RE 1876, PageID#2147.

Negotiations resumed remotely, *see* Order, RE 1892, PageID#10819, [redacted]. Regular in-person negotiations with all parties and amici, including Proposed-Intervenor, resumed in 2022. *See* Mot., RE 1962, PageID#10930. Proposed-Intervenor participated in all resumed in-person

negotiation sessions through June 2022. *See id.*; Order, RE 1985, PageID##11670–71. Proposed-Intervenor also fully exercised its rights as amicus by meeting individually with the parties and the court-appointed mediator outside of scheduled negotiation sessions, both in person and over the phone. *Id.*

Proposed-Intervenor alleges, by improperly citing to confidential affidavits that this Court should not consider, [redacted]. *See* Opening Br., RE 44, at 21–22.[7] [redacted], Proposed-Intervenor joined an in-person meeting between the parties to "tie up some loose ends" on August 15, 2022, in Traverse City, Michigan, received a redacted working copy of the proposed Decree, and continued to meet individually with the parties and mediator. Order, RE 1985, PageID##11670–71.[8]

[redacted]

[7] This Court should not consider the affidavits because they contain disclosures of information barred by the confidentiality agreement signed by Proposed-Intervenor, and Proposed-Intervenor improperly submitted the affidavits with its motion for reconsideration. *See infra*, pp. 26–28. Proposed-Intervenor also failed to seal its brief when it describes this information contained in the affidavits. *See* 6th Cir. R. 28(d).

[8] [redacted] The affidavit was filed under seal in the district court and does not contain a PageID#.

[redacted]

E. Proposed-Intervenor's latest motion to intervene

On July 13, 2022, after nearly three years of participating in negotiations as amicus, Proposed-Intervenor filed a motion to intervene seeking the ability to participate in the negotiations as a party-defendant. Mot., RE 1964, PageID##10936–37. The motion highlighted Proposed-Intervenor's disagreement with the State's recent strategy and tactics in decree negotiations. *See* Opening Br., RE 44, at 22–23. All parties in the litigation, including the United States, opposed the motion. *See* Resp., RE 1970-1, PageID#11093; Resp., RE 1972, PageID#11301; Resp., RE 1973, PageID#11314; Resp., RE 1974, PageID#11339.

The district court denied the motion, holding that Proposed-Intervenor failed to meet the requirements for intervention as of right or permissive intervention. Order, RE 1985, PageID##11668–85. It explained that "untimeliness . . . is the most compelling reason to deny the Proposed Intervenor['s] motion to intervene," *id.* at PageID#11668, held that Proposed-Intervenor "failed to meet [its] burden in proving any of the four elements necessary for intervention of right," *id.*, and similarly made findings that Proposed-Intervenor was not entitled to permissive intervention. *Id*. at PageID##11681–82.

Proposed-Intervenor moved for the district court to reconsider, relying on affidavits that included characterizations of confidential settlement proposals, discussions, meetings, status conferences, and draft decree language. Br., RE 1988, PageID##11780–83. The United States opposed the docketing of these materials, even under seal, because disclosing the affidavits to the district court violated the confidentiality agreement that Proposed-Intervenor signed with the parties. Resp., RE 2015, PageID#11959; Agreement, RE 1966-2, PageID##10973–75. Proposed-Intervenor also moved for a stay, requesting an order barring the district court's entry of a final decree pending the district court's consideration of the motion for reconsideration, or in the alternative, until Proposed-Intervenor "exhaust[ed] [its] right to appeal." Mot., RE 1997, PageID#11887.

The district court denied the motion for reconsideration without relying on Proposed-Intervenor's confidential affidavits, finding that none of Proposed-Intervenor's allegations about misrepresentations presented a "palpable defect" in the intervention order's conclusion that Proposed-Intervenor's motion was untimely. Order, RE 2018, PageID##11993–96. It also denied the motion to stay,

again declining to rely on the confidential affidavits. Order, RE 2021, PageID#12004.[9]

Proposed-Intervenor appealed to this Court from the denial of its motion to intervene and the denial of its motion for reconsideration. Notice, RE 2019, PageID#11998. It then moved for a stay pending appeal barring the district court's future entry of a successor decree, Mot., RE 19, at 1, and in the alternative an expedited appeal. Mot., RE 24, at 1. This Court has not yet ruled on these motions.

F. Recent developments in the district court

In its order denying intervention, the district court provided that after the parties submit a proposed Decree, it will formally adjudicate party and amici objections to the Decree on the record. Order, RE 1985, PageID#11681. In November 2022, in consideration of this process and on motion of six of the seven parties, the district court extended the expiration of the 2000 Decree "until all objections to a proposed successor decree have been adjudicated." Order, RE 2027, PageID##12021–22.

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[9] The district court granted Proposed-Intervenor's motion to file the affidavits under seal only to ensure that the affidavits "are not viewable by the public." Order, RE 2021, PageID#12004. It took no position on whether Proposed-Intervenor "violated the Confidentiality Agreement by composing and filing these affidavits," and denied the motion to stay. *Id.*

The process for finalizing a successor decree is currently in progress. On December 2, 2022, the district court adjudicated the State's and the Grand Traverse Band's competing management proposals for one zone of the fishery, the Grand Traverse tribal zone, and ordered the parties to incorporate the Grand Traverse Band's proposal into the proposed Decree. Order, RE 2040, PageID##12147–59.[10] On December 11, 2022, all parties other than the Sault Tribe stipulated to the entry of the proposed Decree. Stipulation, RE 2042, PageID#12161. The submission of the proposed Decree represented the culmination of the parties' negotiations.

The only step left in the decree finalization process is for the district court to adjudicate the remaining party and amici objections to the proposed Decree. *See* Order, RE 2053, PageID#12396. Relevant here, the Sault Tribe filed a notice indicating it did not consent to the proposed Decree, Notice, RE 2045, PageID#12357, and must file objections by February 10, 2023. Order, RE 2059, PageID#12492. Amici, including Proposed-Intervenor, must file substantive objections to the proposed Decree by January 20, 2023. Order, RE 2053, PageID#12396. The Sault Tribe also filed a "Motion to Vacate Extension of 2000 Consent Decree and to Dismiss for Lack of Subject Matter Jurisdiction," RE 2055, PageID#12398, which claims, among other things, that the district court lacks

[10] The court's adjudication of these competing proposals reflected its prior entry of the 1985 Decree over the objections of the Bay Mills Indian Community. *See United States v. Michigan*, 12 Indian L. Rep. at 3079.

jurisdiction to enter the proposed Decree. This motion has no current effect on ongoing district court proceedings regarding the proposed Decree, and the United States will file its response in opposition to the motion no later than February 10, 2023. *See* Order, RE 2059, PageID#12492.[11]

SUMMARY OF ARGUMENT

1. Proposed-Intervenor is not entitled to intervene as of right on any of the four required factors:

a. The district court did not abuse its discretion when it concluded that Proposed-Intervenor's motion was untimely. Proposed-Intervenor moved to intervene in this half-century-old case only after the parties had made substantial progress in negotiations and nearly three years after Proposed-Intervenor learned of its asserted interests in this case. Allowing intervention at this late hour would severely prejudice the parties by unsettling nearly three years of negotiations and causing further delay in finalizing a decree. Unusual circumstances also weigh against intervention because Proposed-Intervenor is not a sovereign entity with law enforcement powers like the current parties, each of which carries the burden of enforcing the Decree. Moreover, although [redacted]

[11] The Sault Tribe withdrew its prior "Motion to Enforce Great Lakes Fishing Consent Decree," RE 2028, PageID#12023. *See* Notice, RE 2044, PageID#12354. The Sault Tribe also filed a motion for the district court to reconsider its extension of the 2000 Decree, Mot., RE 2046, PageID#12360, which does not affect the district court's separate process for entry of the proposed Decree.

[redacted] do not deprive Proposed-Intervenor of the amicus rights it has consistently used throughout this case to represent its interests.

b. Proposed-Intervenor fails to demonstrate a direct, substantial interest in this case. It lacks a property interest in the fishery, its interest in preservation of the fishery resource is indistinguishable from the public interest and subsumed within the State's control of the fishery, and Proposed-Intervenor's claim that it may bring its own future standalone environmental lawsuit against the State does not constitute a cognizable interest.

c. Proposed-Intervenor cannot show that its ability to protect its asserted interests would be impaired without intervention. Proposed-Intervenor has protected its interests by exercising its rights as amicus. Proposed-Intervenor also expressly sought intervention to gain increased rights in negotiations, but those negotiations have now concluded. Similarly, even if Proposed-Intervenor prevails on appeal, it would not gain any right to block the entry of the proposed Decree.

d. Proposed-Intervenor fails to overcome the presumption that the State adequately represents its interests. The State is legally obliged to preserve the fishery here because it holds the fishery in public trust. Proposed-Intervenor's allegations about the State's hypothetical political concerns, [redacted]

[redacted], do not demonstrate any adverse interest sufficient to show inadequate representation.

2. Proposed-Intervenor fails to demonstrate that the district court's denial of permissive intervention was an abuse of discretion. This Court should affirm the district court's denial of permissive intervention on timeliness alone, and the district court did not otherwise abuse its discretion by concluding that allowing permissive intervention would prejudice the parties.

STANDARD OF REVIEW

This Court reviews the district court's denial of a motion for intervention as of right de novo, except that it reviews the district court's conclusions as to timeliness for abuse of discretion. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). The Court reviews the district court's denial of a motion for permissive intervention "for clear abuse of discretion." *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654, 656 (6th Cir. 1970).

To the extent Proposed-Intervenor appeals from the district court's denial of its motion for reconsideration, this Court also reviews that decision for abuse of discretion. *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 691 (6th Cir. 2012).

ARGUMENT

I. Proposed-Intervenor fails to establish that it is entitled to intervene as of right.

Intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2) requires a proposed intervenor to establish: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest. *United States v. Michigan*, 424 F.3d at 443. "The proposed intervenor must prove each of the four factors; failure to meet one of the criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). Here, Proposed-Intervenor fails to meet its burden as to each of these four criteria.

A. The district court did not abuse its discretion in holding that Proposed-Intervenor's motion to intervene was untimely.

This Court has set forth five factors which are "particularly probative" in determining the timeliness of intervention: (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 Dep't*, 679 F.2d 579, 582 (6th Cir. 1982). "The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

This Court reviews the district court's conclusion that Proposed-Intervenor's motion was untimely for abuse of discretion. *Stotts*, 679 F.2d at 582; *see* Order, RE 1985, PageID#11668. "A court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Phelan v. Bell*, 8 F.3d 369, 372 (6th Cir. 1993) (internal quotations omitted). For this Court to find an abuse of discretion, it must be "firmly convinced that a mistake has been made." *Stough v. Mayville Cmty. Sch.*, 138 F.3d 612, 614 (6th Cir. 1998). Proposed-Intervenor's arguments as to timeliness fail to meet this high bar.

1. Amicus participation fulfills Proposed-Intervenor's asserted purpose for intervention.

As to the first factor for timeliness, "the purpose for which intervention was sought," *Stotts*, 679 F.2d at 582, Proposed-Intervenor argues that it moved to intervene in order to represent its interests in decree negotiations. *See* Opening Br., RE 44, at 32. But the district court correctly recognized that Proposed-

Intervenor has always had an opportunity to represent its interests in negotiations as amicus. *See* Order, RE 1985, PageID#11670. Proposed-Intervenor fails to establish that the district court's reasonable analysis amounts to an abuse of discretion.

Simply put, Proposed-Intervenor's amicus rights satisfy its claimed purpose for intervention. In the district court and now on appeal, Proposed-Intervenor argues that it seeks intervention because, on account of its relationship with the State, it cannot "adequately represent [its] interests" in decree negotiations. Opening Br., RE 44, at 32. But as the district court rightly concluded, Proposed-Intervenor's purpose for intervention "has been met through [its] amic[us] status." Order, RE 1985, PageID#11670. Where there is a "full opportunity" to participate in the case as amicus, "the concerns of an entity seeking intervention can be presented with complete sufficiency." *Stupak-Thrall*, 226 F.3d at 475; *see also Blount-Hill v. Zelman*, 636 F.3d 278, 287–88 (6th Cir. 2011); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987). Proposed-Intervenor had such an opportunity here, given that it has participated extensively in decree negotiations both by joining official negotiation sessions and meeting individually with the parties and mediator. *See* Order, RE 1985, PageID##11670–71. Indeed, there has been a "long and proven history in this suit of the use of amici curiae," Order, RE 1518, PageID##2512–13, which Proposed-Intervenor detailed in its own intervention

brief. *See* Br., RE 1969, PageID##11028–29. Proposed-Intervenor's failure to specifically address on appeal why its *amicus participation* does not allow it to "represent [its] interests," Opening Br., RE 44, at 32, is alone sufficient to conclude that the district court did not abuse its discretion.

Proposed-Intervenor argues that [redacted] Opening Br., RE 44, at 32. But Proposed-Intervenor continued to exercise its amicus rights even after [redacted]. It continued to meet with the parties and mediator, attended an official meeting between the parties in August 2022, and received a redacted working copy of the proposed Decree. *See supra*, p. 14. [redacted] did not suddenly deprive Proposed-Intervenor of amicus curiae rights it has consistently exercised throughout this case. The district court did not rely on any "clearly erroneous findings of fact," *Phelan*, 8 F.3d at 373, when it examined the record and concluded that Proposed-Intervenor had ample opportunity to represent its interests as amicus.

To the extent Proposed-Intervenor objects to [redacted],

Proposed-Intervenor has always known that its amicus rights do not necessarily include the ability to participate in every aspect of decree negotiations. The district court limited Proposed-Intervenor's amicus participation to that of an "observer," or a "very narrow, non-adversarial role," Order, RE 1875, PageID#2144, and previously described Proposed-Intervenor's amicus role as merely "providing information about natural resources, conservation and the views of its members." Order, RE 1404, PageID#4029. Proposed-Intervenor's motion is not timely because it now realizes that its amicus rights are not as expansive as it desires. It has long known the parameters of its amicus participation. And in any event, Proposed-Intervenor as amicus has the very same opportunity to present objections to the proposed Decree as the non-consenting party Sault Tribe. *See* Order, RE 2053, PageID#12396.

Proposed-Intervenor's arguments [redacted] also fails for independent reasons. [redacted], but the Court should disregard the affidavit because Proposed-Intervenor filed it in direct violation of the confidentiality agreement signed by the parties and amici, including Proposed-Intervenor. The confidentiality agreement expressly provides that "statements, disclosures, and representations made by any party . . . or amicus" shall not be reported or disclosed "to anyone not a Party,"

which includes this Court, without "the prior consent of all the other Parties." Agreement, RE 1966-2, PageID#10974. Although filed under seal, the affidavit here discloses statements and representations made during settlement discussions to the Court, without the consent of all parties.[12] *See* Opening Br., RE 44, at 32. This violation of the agreement cuts against its core purposes, such as preventing the courts from weighing in on the substance of negotiations, avoiding bias in future proceedings, and encouraging parties to freely communicate. Accordingly, it is not appropriate for the Court to consider the affidavit here.

Relatedly, the Court should disregard the affidavit because, as a procedural matter, "a motion for reconsideration may not be used to raise issues that could have been raised in the previous motion." *Evanston Ins. Co.*, 683 F.3d at 692 (internal quotations omitted); *see also Shah v. NXP Semiconductors USA, Inc.*, 507 F. App'x 483, 495 (6th Cir. 2012). As the district court held in its denial of Proposed-Intervenor's stay motion, *see* Order, RE 2021, PageID#12005, Proposed-Intervenor flouted this rule by submitting several affidavits, including the one at issue here, with its motion for reconsideration. *See* Mot., RE 1987, PageID#11766. The information in the affidavit was available when Proposed-

[12] The United States opposed the filing of the affidavit under seal in the district court, *see* Resp., RE 2015, PageID#11959, and did not consent to Proposed-Intervenor filing the affidavit. Resp., RE 2017, PageID#11986; Tr., RE 1986, PageID#11754 ("The United States was never contacted about our consent to [a filing under seal].").

Intervenor first moved to intervene. Proposed-Intervenor should have attached any affidavit to its initial motion to intervene, Mot., RE 1964, PageID#10937, rather than using its reconsideration motion as an attempt to expand the record and get a second bite at the apple.

2. Proposed-Intervenor seeks intervention three years after learning of its interests and when there has been substantial progress in the case.

Two similar factors in this Court's analysis of timeliness are "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," and "the point to which the suit has progressed." *Stotts*, 679 F.2d at 582. The district court properly concluded that these factors weighed against timeliness because Proposed-Intervenor knew of its interests in this case nearly three years before moving to intervene and made its motion as the parties prepared to submit a proposed Decree after nearly three years of strenuous negotiations. Order, RE 1985, PageID##11672–74. Proposed-Intervenor's arguments to the contrary fail to demonstrate an abuse of discretion.

As the district court held, intervention is untimely because Proposed-Intervenor knew of its asserted interest in the case for nearly three years before its current application for intervention. *See id.* at PageID#11672. An applicant must "intervene promptly after discovering their interest in the litigation." *Blount-Hill*,

636 F.3d at 285. In August 2019, Proposed-Intervenor moved to confirm its status as amicus in upcoming negotiations about a successor decree, at which time it asserted its interests in "the conservation of fishing, boating and wildlife resources" within the Great Lakes. Br., RE 1865, PageID#2075. But it did not move to intervene until July 2022, at which time it asserted these *exact same interests* in the case. *See* Br., RE 1969, PageID#11041 ("conservation of fishing, boating, and wildlife resources"). Proposed-Intervenor's decision not to move to intervene for nearly three years while it was aware of its interests in the case weighs strongly against timeliness. *See Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 367–68 (1973) (affirming denial of intervention where applicants failed "to take immediate affirmative steps to protect their interests").

Similarly, as emphasized by the district court, Proposed-Intervenor's motion to intervene is untimely because it came at the close of negotiations and as the parties planned to enter a successor decree. The "point to which the suit has progressed" weighs against intervention "if the litigation has 'made extensive progress in the district court before the appellants moved to intervene.'" *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001) (internal quotations omitted). Proposed-Intervenor moved to intervene in July 2022, after nearly three years of strenuous decree negotiations, involving hundreds of hard-fought issues.

Order, RE 1985, PageID#11680. At that time, the parties [redacted] expected to submit it for approval before the 2000 Decree's expiration on September 30, 2022. *See* Order, RE 1963, PageID#10934. On these facts, the district court correctly concluded that the "matter has progressed beyond the point that any other party should be permitted to intervene." Order, RE 1985, PageID#11674. Indeed, this Court strongly disfavors intervention at such a late stage of decree negotiations. *See United States v. Tennessee*, 260 F.3d at 592–93 (denying intervention when court had conditionally approved but not yet finalized settlements); *Stotts*, 679 F.2d at 581–84 (denying intervention after decree had been "preliminarily approved" but had not been finalized).

Proposed-Intervenor's argument that intervention is timely because of the parties' alleged "lack of progress" in finalizing a proposed Decree, *see* Opening Br., RE 44, at 39, demonstrates no abuse of discretion by the district court. Proposed-Intervenor emphasizes that the district court granted an "indefinite extension" of the 2000 Decree in a November 2022 order and cites the Sault Tribe's November 2022 motion stating that the parties are "not in the final stage of negotiations." Opening Br., RE 44, at 39. But these arguments cannot demonstrate that the district court relied on any "clearly erroneous findings of fact." *Phelan*, 8 F.3d at 373 (internal quotations omitted). They refer to

developments in November 2022, which were not before the district court when it denied intervention in August 2022, Order, RE 1985, PageID#11662, and denied reconsideration in October 2022. *See* Order, RE 2018, PageID#11993.

Even if this Court considers post-decisional events, those subsequent developments belie Proposed-Intervenor's claims. The parties' decree negotiations were "in the final stage" at the time the district court denied intervention because the proposed Decree was entered just several months later. *See* Stipulation, RE 2042, PageID#12161. There was also no truly "indefinite extension" of the 2000 Decree, because the 2000 Decree expires on the district court's "entry of a successor Decree," Order, RE 2027, PageID#12021, which will likely occur in the coming months when the district court approves the recently-submitted proposed Decree. *See* Stipulation, RE 2042, PageID#12161.

Nor can Proposed-Intervenor demonstrate that the district court abused its discretion based on its creative reading of *Penick v. Columbus Education Association*, 574 F.2d 889 (6th Cir. 1978). Proposed-Intervenor argues that under *Penick*, untimely intervention may be appropriate if "the intervening party's interests are not being adequately represented at a late stage of proceedings." Opening Br., RE 44, at 33. But in *Penick*, the Court denied intervention "without prejudice to the right of [proposed-intervenor] to seek intervention at a later date should it become apparent that [its] interests are not being adequately represented

in further proceedings." 574 F.2d at 891. The Court never ruled on whether such future intervention would be granted, and only included this dicta in its ruling because it foresaw particular factual circumstances in which the litigation *could* affect the proposed-intervenor's interests. *Id.* Such fact-specific dicta does not demonstrate Proposed-Intervenor had a right to intervene here, nor does it demonstrate that the district court abused its discretion by improperly applying the law or using an erroneous legal standard. *See Phelan*, 8 F.3d at 373.

In fact, this Court ordinarily denies intervention when a proposed intervenor belatedly asserts that its interests have changed or are no longer adequately represented. In *United States v. Tennessee*, the Court denied intervention as untimely, although the movant asserted that it only "recently became apparent" during final settlement negotiations that its interests were not adequately represented. 260 F.3d at 593. The Court similarly denied intervention as untimely in *Stotts*, when the movants alleged that the first time they learned of their interests in the suit was after a draft settlement decree had been posted for public comment. 679 F.2d at 581–84.[13] Here too, the Court need not accept Proposed-Intervenor's belated assertion that its interests were not "adequately represented." Opening Br., RE 44, at 33. And in any event, Proposed-Intervenor's arguments that the State

[13] Proposed-Intervenor cites the dissent in *Stotts*, but the dissent is not precedential. *See* Opening Br., RE 44, at 35–36 (citing *Stotts*, 679 F.2d at 585).

failed to adequately represent its interests in this case fail for reasons discussed below. *See infra*, pp. 49–54.

3. Allowing intervention would prejudice the original parties and cause unreasonable delay.

The Court next assesses "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." *Stotts*, 679 F.2d at 582. Considering the parties' progress during decree negotiations, the district court correctly held that the parties would be "severely prejudiced" by granting Proposed-Intervenor's motion to intervene. Order, RE 1985, PageID#11673. Contrary to Proposed-Intervenor's arguments, the district court did not rely on alleged "misrepresentations" or abuse its discretion in reaching this conclusion. Opening Br., RE 44, at 36.

As the district court held on the facts in the record before it, allowing intervention at the late stage sought by Intervenor would have "severely prejudiced" the existing parties by potentially delaying entry or forcing renegotiation of a successor decree. Order, RE 1985, PageID##11672–73. Proposed-Intervenor moved to intervene in July 2022, after nearly three years of negotiations between the parties on hundreds of different issues, some of which took years to resolve, and months of efforts to draft a successor decree. *See supra*, pp. 28–30. If Proposed-Intervenor had been allowed to intervene at that point,

while the parties were in the final stages of negotiations, its rights as a party would have included "initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion." *United States v. Michigan*, 940 F.2d at 165. Accordingly, the district court properly concluded that should it permit Proposed-Intervenor's intervention, "the entirety of the successor decree could be at risk," and "many of the agreed-upon terms—the product of intense negotiation and compromise—could vanish, causing further delays." Order, RE 1985, PageID#11672. The scale of prejudice under these circumstances should not be underestimated, given the parties' monumental efforts during decree negotiations. Further delay would also harm the parties because the fishery has changed rapidly since the entry of the 2000 Decree and needs updated management. *See* Mot., RE 1970-1, PageID#11104.

Contrary to Proposed-Intervenor's arguments, the district court did not reach its conclusion about prejudice "based entirely on [] misrepresentations of the Parties opposing intervention," nor did it abuse its discretion as it assessed the facts in the record. Opening Br., RE 44, at 36. Proposed-Intervenor's primary contention is that the district court's analysis of prejudice notes that "all seven parties agree that they can submit a proposed successor decree to the Court by September 30," and that intervention would "severely diminish[]" the parties' likelihood of meeting that deadline. Order, RE 1985, PageID#11672. But the

district court's analysis did not rely on any "clearly erroneous findings of fact," *Phelan*, 8 F.3d at 373, because in August 2022, at the time the district court issued its order, the parties had planned to submit a proposed Decree before September 30, when the 2000 Decree was set to expire. *See* Order, RE 1963, PageID#10934. Proposed-Intervenor's assertion that that the parties' alleged misrepresentations are now "obvious" because "there has still been no successor consent decree reached as of mid-December," raises no facts that were before the district court at the time it assessed intervention. Opening Br., RE 44, at 37.[14]

In any event, the district court's conclusion about prejudice is still valid given the recent developments in the district court. The district court noted that intervention created the possibility of prejudice because negotiations were coming to a close after the "intense negotiation and compromise" of the parties. Order, RE 1985, PageID#11672. This reasoning still applies now that the parties submitted the Decree on December 11, 2022, less than 90 days after their original goal of submitting the Decree on September 30, 2022. *See* Order, RE 2014, PageID#11957; Stipulation, RE 2042, PageID#12161. And the fact that the parties have now concluded negotiations and submitted a proposed Decree does not eliminate the risk of prejudice. To be sure, receiving party status would *not* give

[14] Proposed-Intervenor's assertion is also no longer accurate because the parties submitted the proposed Decree on December 11, 2022. Stipulation, RE 2042, PageID#12161.

Proposed-Intervenor the right to unilaterally veto the existing proposed Decree. *See infra*, p. 48. But Proposed-Intervenor may still use the tools available to parties to attempt to thwart or stall entry of the Decree, which surely qualifies as prejudicial.

In addition, the district court did not abuse its discretion when it denied Proposed-Intervenor's motion for reconsideration. Proposed-Intervenor argues that the district court's order on reconsideration should have considered its affidavits as to the prejudice issue, because the affidavits allegedly establish [redacted] and therefore Proposed-Intervenor's belated intervention would not prejudice the parties. *See* Opening Br., RE 44, at 37. But it was not an abuse of discretion for the district court to decline to consider these affidavits as to issues involving timeliness, given that Proposed-Intervenor's reconsideration motion did not make "any argument refuting the Court's conclusion [in its intervention order] that the motion to intervene was untimely." Order, RE 2018, PageID#11996. Nor could the affidavits have met the reconsideration standard of demonstrating a "palpable defect," W.D. Mich. L. Civ. R. 4(a), in the district court's intervention order, [redacted]. *See supra*, p. 35. Finally, the confidentiality agreement signed by Proposed-Intervenor, as well as Proposed-Intervenor's failure

to file its affidavits with its initial motion to intervene, barred the district court's consideration of the affidavits on reconsideration. *See supra*, pp. 26–28.[15]

4. Unusual circumstances weigh against intervention.

There are "unusual circumstances militating against . . . intervention," *Stotts*, 679 F.2d at 582, because this case concerns the allocation of fishery resources between seven sovereigns, each of which have authority to regulate the fishery. The United States, the State, and the five Tribes also exercise police power, and have accordingly carried the burden of enforcing the prior decrees. *See* 2000 Decree, RE 1458, PageID##3247–58, 3316–23; *United States v. Michigan*, 12 Indian L. Rep. at 3091. Allowing Proposed-Intervenor to participate as a party now would be the first time in the 50-year history of this case that a non-governmental entity, which has no right to fish independent of the State nor power to enforce a decree, could assert its interests as a party on equal footing with these sovereign powers. Given the diminished responsibilities and rights of Proposed-Intervenor in this case, the district court correctly held that "only sovereigns must be allowed party-status in this matter." Order, RE 1985, PageID#11673.

[15] Proposed-Intervenor argues that it sought to alleviate prejudice by moving for a stay pending appeal and alternatively an expedited appeal. Opening Br., RE 44, at 38. This Court ruled on neither motion. A stay would compound prejudice by further delaying approval of the proposed Decree in the district court.

Proposed-Intervenor does not dispute this conclusion of the district court on appeal.

Proposed-Intervenor instead asserts that the unusual circumstances of the COVID-19 pandemic warrant intervention. *See* Opening Br., RE 44, at 38. It argues that given the pandemic, it "did not realize its interests were not being adequately represented until amongst three years into the negotiation process when the parties began to engage in substantive face-to-face negotiations." *Id.* As an initial matter, Proposed-Intervenor never argued in the district court that COVID-19 presents an unusual circumstance supporting timeliness, and thus forfeited the argument for appeal.[16] *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1011 (6th Cir. 2022). More to the point, these arguments about COVID-19's effect on the parties' negotiations do not demonstrate any abuse of discretion by the district court, because the district court concluded that Proposed-Intervenor was aware of its interests "*at the beginning of negotiations*" in August 2019, before the pandemic. *See* Order, RE 1985, PageID#11672 (emphasis added). In any event, Proposed-Intervenor participated in six months of in-person negotiations from September 2019 through March 2020 prior to the pandemic, online negotiations

[16] Proposed-Intervenor mentioned in its reconsideration motion that "Zoom conferences . . . severely limited the value of negotiations in 2020 and 2021," Mot., RE 1988, PageID#11780, but never argued that such circumstances presented unusual circumstances supporting timeliness.

during the pandemic, and resumed in-person negotiations in 2022 as the pandemic began to wane. *See supra*, pp. 12–14. It had ample time to become apprised of its interests and move to intervene, notwithstanding the pandemic.

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Considering all these aforementioned factors, the district court did not abuse its discretion in holding that Proposed-Intervenor's motion to intervene was untimely. This Court need not go any further in its analysis and should affirm the district's denial of intervention on untimeliness alone. To the extent the Court considers the remaining intervention factors, Proposed-Intervenor fails to meet its burden to demonstrate it is entitled to intervene as of right for the reasons discussed below.

B. Proposed-Intervenor lacks a substantial interest in this action.

To intervene as of right, Rule 24(a) requires an "interest relating to the property or transaction that is the subject of action." Fed. R. Civ. P. 24(a)(2). It is not the case that "any articulated interest will do." *Coal. to Def. Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007). An interest sufficient for intervention must be "direct," "substantial," and "significantly protectable." *Grubbs*, 870 F.2d at 346. Proposed-Intervenor fails to demonstrate an interest sufficient for intervention because it has no property interest in the fishery, lacks any authority independent of the State to fish, asserts only generalized, non-

specific interests in this case, and improperly relies on a hypothetical future legal claim against the State as an interest.

First, Proposed-Intervenor's lack of any property right in the fishery weighs strongly against its ability to demonstrate a direct, substantial interest in this case. The State holds title to the submerged lands of the Great Lakes "in trust for the people of the state, that they may . . . have liberty of fishing therein." *Illinois Cent. RR v. Illinois*, 146 U.S. 387, 452 (1892). Michigan law also provides that "animals Ferae naturae are not objects of private ownership, but rather belong to the State, which in effect holds the fish in a trust for all of the people of the State in their collective capacity." *Aikens v. State Dep't of Conservation*, 387 Mich. 495, 502 (1972). Due to these well-established rules, Proposed-Intervenor's members participate in the fishery solely based on the State's permission, and not based on any individual property right. *See People v. Collison*, 85 Mich. 105, 108 (1891) ("To fish is a privilege accorded by the state, and the question of individual enjoyment is one of public privilege, and not of private right."). Because "[i]nterests in property are the most elementary type of right that Rule 24(a) is designed to protect," *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 772 (6th Cir. 2022) (internal quotations omitted), Proposed-Intervenor's connection to this matter based on the State's

discretionary permission, rather than a property interest in the fishery, weighs against a finding that it has a direct, substantial interest in the case.

Proposed-Intervenor's reliance on the out-of-circuit case *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994 (8th Cir. 1993), to support intervention is inapposite, because Proposed-Intervenor has no property interest in the fishery here. *See* Opening Br., RE 44, at 43. In *Mille Lacs*, the Eighth Circuit permitted various landowners to intervene in the Mille Lacs Band of Chippewa's suit against the State of Minnesota because the suit concerned band members' hunting and fishing rights *on the landowners' own property*, and permitting such hunting and fishing "may affect the proposed intervenors' property values." 989 F.2d at 998. As the district court already held below, Proposed-Intervenor's reliance on *Mille Lacs* is error because Proposed-Intervenor has no property interest in the Great Lakes fishery that is the subject of this suit. *See* Order, RE 1985, PageID#11675.[17]

[17] Proposed-Intervenor interprets *Mille Lacs* far too broadly to hold that a proposed intervenor has a direct, substantial interest in a case whenever another party "exercise[s] treaty rights related to the intervenor's interests." Opening Br., RE 44, at 43. Yet Proposed-Intervenor's own block-quote of *Mille Lacs* cuts directly against this reading of the case. *Mille Lacs* allows intervention based on the "land the [proposed-intervenors] own," *id.* (quoting *Mille Lacs*, 989 F.2d at 998), rather than some other, intangible interest, such as a possible future claim against the State. *See id.* at 44.

Second, Proposed-intervenor's generalized interests in the fishery do not qualify as direct, substantial interests sufficient for intervention. Proposed-Intervenor asserts an interest in "the conservation of fishing, boating and wildlife resources." Opening Br., RE 44, at 45–46. And it repeatedly claims interests in the 1985 Decree, 2000 Decree, and any successor decree, which at bottom are interests in preserving the State's share of the fishery resource. *See* Opening Br., RE 44, at 18–19, 22, 26–29, 42–43.[18]

But "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quoting *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)). As the district court noted, "every Michigan citizen has the same rights in using the Great Lakes fishery." Order, RE 1985, PageID#11674. Thus, Proposed-Intervenor's interest in protecting the State's share of the fishery, stemming from its members' ordinary public use of this resource, is too general to support intervention as of right. *See Westlands Water Dist. v. United States*, 700 F.2d 561, 562–63 (9th Cir. 1983) (affirming denial of intervention based on an interest in water shared by "a

[18] Proposed-Intervenor was not, and will not, be a party to or exercise any rights under these decrees. *See United States v. Michigan*, 12 Indian L. Rep. at 3089–93; 2000 Decree, RE 1458, PageID##3216–3336; Proposed Decree, RE 2042-1, PageID##12167–12232.

substantial portion of the population of northern California"); *see also Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (holding that organization's interest was "so generalized it will not support a claim for intervention of right."). Similarly, Proposed-Intervenor's generalized interests are subsumed within the State's license allowing Proposed-Intervenor's members to participate in the fishery. Generalized interests derivative of state permission are not direct or substantial. *See People v. Collison*, 85 Mich. at 108 ("To fish is a privilege accorded by the state . . . .").

In addition, Proposed-Intervenor's comparison of its general interests in "protecting the shared fishery," Opening Br., RE 44, at 44, to the interests of intervenors in *United States v. Reserve Mining Company*, 56 F.R.D. 408 (D. Minn. 1972), an out-of-circuit district court case, is inapt. In *Reserve Mining*, the district court did not allow intervention based on generalized "recreation, and conservation" interests alone, but also the "interest of specific property owners . . . ." *Id*. at 418. Proposed-Intervenor lacks a similar individualized property interest here in the fishery which would allow intervention. *See supra*, pp. 40–41.

Third, Proposed-Intervenor's argument that it has a substantial interest in the case based on "a cause of action against the State," Opening Br., RE 44, at 42, misreads *Wineries*, 41 F.4th 767. In *Wineries*, this Court held that a landowner

organization could intervene in a group of wineries' challenge to a township's zoning ordinances. *Id.* at 769. The Court primarily held that the landowner organization had a substantial interest in the litigation because striking down the zoning ordinances would impact the property interests of the landowner organization's members. *Id.* at 772–73. To illustrate the extent of this interest, the Court explained that without the zoning ordinances, the landowner organization's members would be unable to protect their property interests by bringing nuisance claims and requests for injunctive relief against the wineries' possible future violations of the challenged zoning ordinances. *Id.* at 773.

Proposed-Intervenor argues that it has a substantial interest in this litigation, like the landowner organization in *Wineries*, 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." Opening Br., RE 44, at 42 (citing MCL § 324.1701). But *Wineries* noted the availability of nuisance claims and injunctive relief to illustrate how that litigation threatened to foreclose landowner organization members' opportunity to bring claims to protect their property interests under the challenged zoning ordinances. *See* 41 F.4th at 773. Here, Proposed-Intervenor is not at risk of forfeiting its MEPA claim because of the outcome of this suit, nor does the MEPA claim protect any property interest or other direct, substantial interest that is the subject of this case. Accordingly,

Proposed-Intervenor's standalone cause of action against the State under MEPA does not provide it with a direct, substantial interest in the litigation.[19]

We also note that *Wineries* is part of a series of decisions recognizing that property owners often have a substantial interest in zoning litigation sufficient to intervene as of right. *See* 41 F.4th at 773 (citing *Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861 (8th Cir. 1977); *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867, 874 (6th Cir. 1975) (vacated and remanded on other grounds)). Because Proposed-Intervenor is not a property owner, and this case does not concern zoning, *Wineries* does not apply to the question of whether Proposed-Intervenor has a substantial interest in this case.

C. Proposed-Intervenor's ability to protect its interests will not be impaired in the absence of intervention.

To obtain intervention, Proposed-Intervenor's must also show that disposing of the action "may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2). Although this Court has at times held that "this burden is minimal," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997), it has similarly acknowledged that such interpretations do "not mean

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[19] Proposed-Intervenor cites *Michigan United Conservations Clubs v. Anthony*, 90 Mich. App. 99 (1979), solely to demonstrate that plaintiffs have brought MEPA claims against the State related to fishery management. *See* Opening Br., RE 44, at 42. Such a claim, even if available, confers no direct, substantial interest sufficient for intervention as of right.

that Rule 24 poses no barrier to intervention at all." *Stupak-Thrall*, 226 F.3d at 472. Even assuming Proposed-Intervenor has substantial interests in this litigation, which it does not, disposing of this action in the absence of Proposed-Intervenor's participation as an intervenor will not impair its ability to protect its interests.

As described *supra*, pp. 23–28, Proposed-Intervenor may protect its interests in this suit through participation as amicus curiae. Proposed-Intervenor and its members have used amicus participation to represent their interests in this litigation and corresponding decree negotiations since at least 1976. *See supra*, pp. 9–12. Proposed-Intervenor even concedes on appeal that it has had the "ability to protect its interests as *amici*" in this case. Opening Br., RE 44, at 46. Disposition of this action in the absence of Proposed-Intervenor's intervention will not impair Proposed-Intervenor's interests because of this longstanding amicus participation.

Proposed-Intervenor's contention that the parties have recently impaired its ability to represent its interests as amicus misinterprets the facts in the record. [redacted] The Court need not reach this argument because it relies on a confidential affidavit that the Court should not consider. *See supra*, pp. 26–28. But even if it does, Proposed-Intervenor participated in

negotiation sessions through June 30, 2022, [redacted], conferenced with the parties and mediator throughout negotiations, and reviewed a redacted draft of the proposed Decree before it was submitted to the district court. *See supra*, pp. 12–14. [redacted] But Proposed-Intervenor may now object to the proposed Decree in the district court based on its role as amicus. *See* Order, RE 2053, PageID#12396. Proposed-Intervenor has had ample opportunity to represent its interests through its continuous exercise of amicus rights.

Proposed-Intervenor's interests also would not be impaired in the absence of intervention because it can no longer obtain the relief it seeks as an intervenor. Proposed-Intervenor expressly sought intervention in the district court to gain increased participation rights in the parties' decree negotiations. In its motion to intervene, Proposed-Intervenor complained of "the State's unwillingness to involve Intervenors in the current negotiation discussions," Br., RE 1969, PageID#11036–37, and on reconsideration protested the "undermining" of its "ability to participate in the negotiation process." Br., RE 1988, PageID#11774. Yet the negotiation process that Proposed-Intervenor sought to participate in concluded when the parties stipulated to the entry of the proposed Decree on December 11, 2022. *See Stipulation*, RE 2042, PageID#12161. Thus, disposing of this action would not

impair Proposed-Intervenor's interests because the negotiations in which Proposed-Intervenor sought increased rights have ended.[20]

Similarly, Proposed-Intervenor argues on appeal that its ability to protect its interests will be impaired without an opportunity to intervene "because the State and other parties appear poised to agree to a consent decree." Opening Br., RE 44, at 46. This argument appears to assume that intervention would allow Proposed-Intervenor to block the entry of the proposed Decree. *See id.* To the contrary, the district court may enter the proposed Decree over the objections of a party based on its continuing jurisdiction over this case, as it has done previously. *See United States v. Michigan*, 653 F.2d at 279 (holding that the district court may impose regulations over the fishery "in aid of its jurisdiction to determine the rights of the parties under treaties of the United States."); *United States v. Michigan*, 12 Indian L. Rep. at 3088 (adopting 1985 Decree over the objections of Bay Mills Indian Community). Because allowing intervention would not provide Proposed-Intervenor with the additional rights it appears to seek—the ability to halt the entry of the proposed Decree—Proposed-Intervenor fails to demonstrate how denying intervention would impair its ability to protect its interests.

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[20] Should the district court approve and enter the proposed Decree, as it has done with prior proposed decrees, any possibility of Proposed-Intervenor participating in decree negotiations will disappear at that time. *See* Order, RE 2053, PageID#12396.

D. The State adequately represents Proposed-Intervenor's interests.

To intervene as of right, a proposed intervenor carries the burden of establishing that "the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d at 443; *see* Fed. R. Civ. P. 24(a)(2). If the applicant for intervention shares "the same ultimate objective" as a party to the suit, the applicant must "overcome[e] the presumption of adequate representation." *Bradley*, 828 F.2d at 1192 (internal quotations omitted). The State adequately represents Proposed-Intervenor's interests because it is legally required to preserve fishery resources held in public trust. Proposed-Intervenor fails to overcome the presumption of the State's adequate representation by raising speculation about the State's political motivations, incorrect analogies to the *Wineries* case, and disagreements with the State's litigation tactics.

The State adequately represents Proposed-Intervenor's interests based on its legal trust obligations and record of representation throughout this litigation. Proposed-Intervenor asserts general interests in the fishery here, such as conserving "fishing, boating, and wildlife resources," Opening Br., RE 44, at 45–46, and maintaining decree provisions that it believes will benefit the fishery and preserve recreational fishing access. *See id.* The State has a legal duty to preserve its fishery resources held in public trust. *See Bott v. Comm'n of Nat. Res. of State*

of Mich. Dep't of Nat. Res., 415 Mich. 45, 103 (1982) (holding that the State has an obligation to preserve "the public right of . . . fishing"); *see also Glass v. Goeckel*, 473 Mich. 667, 676 (2005). And the State has consistently acted in line with these legal obligations by vigorously negotiating to preserve the fishery and recreational fishing opportunities throughout this suit. *See* Order, RE 1985, PageID#11680 ("The State has certainly been more than diligent in negotiation while considering the interest of protecting the Great Lakes fishery."). Accordingly, this Court and the district court combined have held at least *seven* times that Proposed-Intervenor or its individual member organizations failed to carry the burden of demonstrating that the State's representation is inadequate. *See supra*, pp. 9–12. The Court should continue to hold the same here.

Because of the State's legal obligation to protect fishery resources held in public trust, the State and Proposed-Intervenor share the same "ultimate objective." *United States v. Michigan*, 424 F.3d at 444. As a result, Proposed-Intervenor must overcome a presumption that the State adequately represents its interests. *Id.* To overcome the presumption, Proposed-Intervenor may show among other things that the State has or represents "an interest adverse to the proposed intervenor." *Bradley*, 828 F.2d at 1192.

Proposed-Intervenor argues that the State's political interests are adverse to Proposed-Intervenor, but this is pure conjecture, which fails to overcome the

presumption of adequate representation. Specifically, Proposed-Intervenor alleges that the State must consider "political ramifications," the "State-Tribal relationship," and federal and state funding, and has an unsubstantiated "incentive . . . to give concessions to the Tribes." Opening Br., RE 44, at 49. As an initial matter, Proposed-Intervenor forfeited this argument by failing to raise it in the district court. *See Bannister*, 49 F.4th at 1011. In any event, no evidence in the record suggests that the State would weigh these hypothetical political considerations to the detriment of Proposed-Intervenor, particularly given that the State is legally bound to protect the fishery resources it holds in public trust. Proposed-Intervenor's reference to the Governor's press release is also a non-sequitur, entirely unconnected to this case. *See* Opening Br., RE 44, at 49 n.12. These conclusory allegations hardly demonstrate that the State and Proposed-Intervenor's interests have "parted significantly and irreconcilably," such that Proposed-Intervenor can overcome the presumption of adequate representation. *Bradley*, 828 F.2d at 1193.

Moreover, Proposed-Intervenor's claim of political differences highlights the impropriety of intervention as a party in this lawsuit as a mechanism to address possible political disagreements among various interested entities within the State. Elections and administrative accountability within the State, rather than party intervention, are meant to address these political differences.

Nor can Proposed-Intervenor overcome the presumption of adequate representation by analogizing the State's alleged political concerns to the *Wineries* case. In *Wineries* this Court permitted a landowner organization to intervene in several commercial wineries' challenge to a township's zoning ordinances because, although the landowner organization and township shared the "same ultimate objective" in the litigation, the township had "interests adverse" to the landowner organization. 41 F.4th at 774. Whereas the township had a significant incentive to settle the litigation because it needed to protect the public fisc and faced the threat of up to $200 million in damages, the landowner organization was focused solely on protecting its members' property interests. *Id.* at 774–75. Here, by contrast, Proposed-Intervenor offers only vague and conclusory allegations about the State's political considerations, not a demonstrated, quantified incentive adverse to Proposed-Intervenor's asserted interests. Indeed, this Court distinguished *Wineries* from an earlier stage of this very case, because *Wineries* presented the unique circumstances of "the stick of damages and the carrot of settlement." *Id.* at 776 (citing *United States v. Michigan*, 424 F.3d at 444).

Similarly, Proposed-Intervenor cannot overcome the presumption of adequate representation based on any alleged concession of the State. Proposed-Intervenor again attempts to analogize this case to *Wineries*, where the Court allowed the landowner organization to intervene, in part, because the township

"readily conceded" that it could not represent the landowner organization's interests. *Id.* at 775. But contrary to Proposed-Intervenor's arguments, *see* Opening Br., RE 44, at 49 (citing Br., RE 1973, PageID##11326–27), the State made no similar concession here. The State merely highlighted in a district court brief that it differed from Proposed-Intervenor on certain topics of negotiation strategy. *See* Br., RE 1973, PageID#11327 (discussing how "Proposed Intervenors' frustration that the State's positions, following years of negotiation, do not perfectly align with their preferred outcomes.").[21]

Indeed, Proposed-Intervenor's arguments about divergence on "narrow issues," "micro level" interests, and "local concerns," can properly be understood to refer to its disagreements with the State on negotiation tactics. Opening Br., RE 44, at 50. Just as "a mere disagreement" over litigation strategy "does not, in and of itself, establish inadequacy of representation," *Bradley*, 828 F.2d at 1192,

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[21] Proposed-Intervenor also cites one of its affidavits in support of the claim that [redacted] The Court should disregard the affidavit because it violates the confidentiality agreement signed by Proposed-Intervenor and contains materials that should have been raised in Proposed-Intervenor's motion to intervene. *See supra*, pp. 26–28. In addition, the affidavit's [redacted]

Proposed-Intervenor's mere disagreement with Proposed-Intervenor on negotiation strategy here does not amount to inadequate representation.

***

For all these reasons, Proposed-Intervenor fails to meet its burden to establish that it is entitled to intervene as of right.

II. Proposed-Intervenor fails to demonstrate that the district court's denial of permissive intervention was an abuse of discretion.

Proposed-Intervenor also appeals from the district court's denial of its motion for permissive intervention pursuant to Fed. R. Civ. P. 24(b). "To intervene permissively, a proposed intervenor must 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 at 445. "Once these two requirements are established, the district 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.* "The denial of permissive intervention should be reversed only for clear abuse of discretion by the trial judge." *Purnell v. City of Akron*, 925 F.2d 941, 951 (6th Cir. 1991).

On the threshold issue of timeliness, Proposed-Intervenor fails to demonstrate that the district court's denial of permissive intervention amounts to an abuse of discretion. The district court held that its analysis of timeliness "necessarily defeats the Proposed Intervenors' opportunity for permissive

intervention." Order, RE 1985, PageID##11681–82. As explained *supra*, Proposed-Intervenor cannot demonstrate that the district court's analysis of timeliness is an abuse of discretion because: (1) Proposed-Intervenor has always been able to represent its interests in this case as amicus; (2) Proposed-Intervenor moved to intervene after nearly three years of progress in the case despite being aware of its interests; (3) intervention would severely prejudice the current parties, and (4) unusual circumstances weigh against intervention. *See supra*, pp. 22–39. Accordingly, this Court should affirm the district court's denial of permissive intervention on timeliness alone.

Even setting aside the inability to establish timeliness, Proposed-Intervenor still fails to demonstrate that the district court's denial of permissive intervention amounts to a clear abuse of discretion. The district court denied permissive intervention in part based on prejudice, holding that allowing Proposed-Intervenor to participate as a party would "derail years of extensive, complicated negotiations." Order, RE 1985, PageID#11682. Proposed-Intervenor argues that prejudice would be minimal because *at this stage of the case*, if allowed to intervene, it would only participate in a court-mediated objection process alongside other parties. *See* Opening Br., RE 44, at 52. But this argument is irrelevant to whether the district court abused its discretion *at the time it denied intervention*. *See Phelan*, 8 F.3d at 373. Nevertheless, the argument is incorrect on the merits.

As a party, Proposed-Intervenor could gain rights including "initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion." *United States v. Michigan*, 940 F.2d at 165; *see also* Order, RE 1875, PageID#2144. Given the scope of these rights, even a court deciding this issue today de novo could reasonably conclude that allowing Proposed-Intervenor to intervene would prejudice the current parties.[22]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying Proposed-Intervenor's motion to intervene, Order, RE 1985, PageID##11662–86, and order denying Proposed-Intervenor's motion for reconsideration. Order, RE 2018, PageID##11993–97.

[22] Proposed-Intervenor also argues it is entitled to permissive intervention because its general interest in this case "shares a common nexus with legal claims and negotiated resolutions regarding scope of treaty right." Opening Br., RE 44, at 51. But a "nexus" is not a "*claim or defense* that shares with the main action a common question of law or fact," which is required for permissive intervention pursuant to Fed. R. Civ. P. 24(b) (emphasis added).

Respectfully submitted,

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January 17, 2022
90-2-0-712

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,562 words according to the count of Microsoft Word, excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1). I further certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

/s/ *Benjamin Richmond*
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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Benjamin Richmond*
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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 28 and 30(g), the United States designates the following portions of the record on appeal:

Description	RE	Page ID #
GTASFA Motion to Intervene	1346	4832-4838
Transcript of Hearing on Motions, Rulings	1352	4717-4806
Order Granting Intervention for Little River Band	1371	4226-4229
Order Granting Substitution of Party	1404	4028-4032
Order Granting Intervention for Little Traverse Bay	1412	3988-3992
Stipulation for Entry of Consent Decree	1457	3401-3414
2000 Consent Decree	1458	3216-3400
Proposed-Intervenor's Motion to Intervene and Proposed Answer	1501	2731-2783
Order Denying Motion to Intervene	1518	2511-2516
Proposed-Intervenor's Renewed Motion to Intervene and Proposed Answer	1643	388-394
Order Denying Renewed Motion to Intervene	1678	963-965
Notice of Appeal	1698	1050-1053
Proposed-Intervenor's Third Motion to Intervene	1748	1288-1298
Order Denying Third Motion to Intervene	1772	1439-1440
Order Granting Motion to Substitute	1783	1462-1463
Sixth Circuit Order Dismissing Appeal	1800	1797
Proposed-Intervenor's Motion to Confirm Status as Amicus Curiae	1864	2064-2066
Brief in Support of Motion to Confirm	1865	2067-2080
Order Regarding Proposed-Intervenor's Motion	1875	2143-2145
Stipulation on Appointment of Mediator	1876	2146-2150
Opinion Extending Consent Decree	1892	10818-10825
Order Extending Consent Decree	1963	10934-10935
Proposed-Intervenor's Motion to Intervene	1964	10936-10939
Confidentiality Agreement	1966-2	10972-10977
Brief in Support of Motion to Intervene	1969	11020-11045
United States and Tribes' Response in Opposition to Motion to Intervene	1970-1	11093-11116
Transcript of Hearing	1970-2	11117-11184

Opinion Denying MUCC Motion to Intervene	1970-3	11185-11194
Order Denying MUCC Motion to Intervene	1970-4	11195-11196
Renewed Motion of MUCC to Intervene	1970-5	11197-11207
Sault Tribe Response in Opposition to Motion to Intervene	1972	11301-11313
Michigan Response in Opposition to Motion to Intervene	1973	11314-11338
Grand Traverse Band Response in Opposition to Motion to Intervene	1974	11339-11393
Opinion and Order Denying Motion to Intervene	1985	11662-11686
Transcript of Hearing on Motion to Intervene	1986	11687-11763
Proposed-Intervenor's Motion for Reconsideration	1987	11764-11768
Brief in Support of Motion for Reconsideration	1988	11769-11788
Proposed-Intervenor's Motion to File Under Seal	1989	11789-11791
Sealed Supplemental Krist Affidavit	1991	n/a
Proposed-Intervenor's Motion to Stay Entry of Decree	1997	11886-11889
Order Extending the Decree	2014	11957-11958
United States and Tribes' Response in Opposition to Motion to File Under Seal	2015	11959-11966
United States and Tribes' Response in Opposition to Motion for Reconsideration	2017	11976-11992
Order Denying Motion for Reconsideration	2018	11993-11997
Notice of Appeal	2019	11998-11999
Order Denying Stay; Granting Motion to File Under Seal	2021	12003-12007
Order Extending the Decree	2027	12020-12022
Sault Tribe Motion to Enforce	2028	12023-12025
Order Regarding Tribal Zone	2040	12147-12159
Stipulation for Entry of Proposed Decree	2042	12161-12166
Proposed Decree	2042-1	12167-12232
Sault Tribe Notice to Withdraw Motion to Enforce	2044	12354-12356
Sault Tribe Notice of Non-Consent to the Decree	2045	12357-12359
Sault Tribe Motion for Reconsideration of Extension of Decree	2046	12360-12363
Amended Scheduling Order	2053	12395-12396
Sault Tribe Motion to Vacate Extension of Decree and Dismiss for Lack of Subject Matter Jurisdiction	2055	12398-12401
Order Granting Motion to Extend Deadlines	2059	12492

ADDENDUM: UNPUBLISHED DISPOSITION

Pursuant to Fed. R. App. P. 32.1(b), 6th Cir. R. 28(b), and 6th Cir. R. 32.1(a), the United States includes a copy of the unpublished order in *United States v. Michigan United Conservation Clubs, Inc.*, 556 F.2d 583 (6th Cir. 1977), as an addendum to this brief, because the order is "not available in a publicly accessible electronic database." 6th Cir. R. 32.1(a).

NO. 76-2176

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA :
Plaintiff-Appellee
BAY MILLS INDIAN COMMUNITY :
Plaintiff-Intervenor-Appellee
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS :
Plaintiff-Intervenor-Appellee
STATE OF MICHIGAN, ET AL. :
Defendants-Appellees
v. : ORDER
MICHIGAN UNITED CONVSEVATION CLUBS, INC. :
Petitioner for Intervention-Appellant :

- - - - - - - - - - - - - - - -

Before: PECK and LIVELY, Circuit Judges, and GUY,* District Judge.

This appeal, perfected from an order of the district court denying petitioner-appellant's petition for intervention, has been submitted on the briefs and oral arguments of counsel. Being fully advised in the premises, the Court concludes that the record before us does not establish that petitioner-appellant's interest, if any, under Rule 24(a)(2), Federal Rules of Civil Procedure, is not adequately represented by existing parties. It having been further concluded that the district court did not abuse its discretion in denying permissive intervention under Rule 24(b)(2),

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman

John P. Hehman, Clerk of Court

*Honorable Ralph B. Guy, Jr., United States District Judge for the Eastern District of Michigan, Southern Division, sitting by designation.