No. 22-1946

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

BAY MILLS INDIAN COMMUNITY; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPEWA INDIANS; LITTLE RIVER BAND OF OTTAWA INDIANS; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervenors-Appellees,

v.

STATE OF MICHIGAN, and its agents,

Defendants-Appellees,

and

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

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The State respectfully requests oral argument. Appellant is a coalition of fishing, boating, and conservation groups that seeks party status in a case in which all seven parties are sovereign governments. Appellant's motion to intervene came nearly three years into the parties' negotiations for a consent decree, as those discussions were winding down and the parties worked to finalize agreement language. The outcome of this appeal has significant implications for the State of Michigan and the other governments and their efforts to reach a new decree. Oral argument will assist this Court in understanding the factual context of Appellant's motion and will aid the Court in adjudicating the legal issues, including why the analysis in *Wineries of the Old Mission Peninsula Association v. Township of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022), does not support intervention.

JURISDICTIONAL STATEMENT

The State does not contest CPMR's jurisdictional statement.

STATEMENT OF ISSUES PRESENTED

Appellant moved to intervene nearly three years into negotiations among seven sovereign governments for a successor agreement governing state and tribal fisheries in Great Lakes waters ceded in an 1836 treaty. To intervene as of right, a proposed intervenor must show: (1) its motion to intervene is timely; (2) it has a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede its ability to protect its legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenor's interest. A movant seeking permissive intervention must at a minimum file a timely motion and have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

1. Did the district court properly deny Appellant intervention as of right under Fed. R. Civ. P. 24(a)?

2. Did the district court properly exercise its discretion in denying Appellant permissive intervention under Fed. R. Civ. P. 24(b)?

INTRODUCTION

The seven sovereign governments that are parties in this case—the United States, the State of Michigan, and five federally recognized tribes—have spent more than three years negotiating a successor to the 2000 Great Lakes Consent Decree. That decree governs the regulation, allocation, and management of state and tribal fisheries in Great Lakes waters ceded to the United States by the tribes' political predecessors in an 1836 treaty. Although not mentioned in Appellant's brief, last month six of the seven parties concluded their negotiations and presented a proposed successor decree to the district court.

Although Appellant Coalition to Protect Michigan Resources (CPMR) participated in the decree negotiations as amicus curiae, it suddenly claimed last summer—nearly three years into negotiations—that it should be permitted to intervene because the State of Michigan[1] no longer represented its interests. The motion was inherently untimely. It was also unfounded. CPMR's claimed interest is in preserving the fishery resource, and by asserting that the State does not

[1] "State of Michigan" or "State" will be used to refer to Defendants-Appellees collectively.

adequately represent that interest, CPMR essentially asserts, without support, that the State has abandoned its legal duty to protect the Great Lakes and the rights of its citizens to use that resource. In reality, CPMR's motivation to intervene was its disagreement with certain positions the State took in negotiations. CPMR sought party status to gain leverage to control the State's positions and ultimately to sway the negotiation outcome through a unilateral veto power. These are inappropriate grounds for intervention.

The district court properly determined that CPMR failed to establish any of the four factors for intervention of right and that untimeliness was the primary reason to deny the motion. The district court also correctly credited CPMR's amicus curiae status as affording it ample opportunity to protect its own interests, including through an opportunity to file objections to the proposed successor decree and have them considered by the district court. The district court's denial of the motion to intervene must be affirmed.

STATEMENT OF THE CASE

A. The treaty right

In 1836, the Ottawa and Chippewa nations of Indians entered into a treaty with the United States. Treaty of Washington, 7 Stat. 491 (Mar. 28, 1836) (1836 Treaty). Under Article First of the treaty, the bands ceded approximately 14 million acres of land in what is now Michigan, along with adjacent areas of the Great Lakes. The ceded area covers approximately the northern third of Michigan's Lower Peninsula and the eastern half of the Upper Peninsula. Under Article Thirteenth of the treaty, the bands reserved "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."

In 1973, the United States brought this action against the State of Michigan on behalf of itself and the Bay Mills Indian Community. The United States asserted that Article Thirteenth of the 1836 Treaty reserved to the signatory tribes and bands the right to fish in the areas of the Great Lakes ceded under that treaty and sought an injunction to prohibit the State from interfering with that right. Bay Mills and the Sault Ste. Marie Tribe of Chippewa Indians, which are political

successors in interest to tribes or bands that signed the 1836 Treaty, intervened as Plaintiffs. On May 7, 1979, District Court Judge Noel Fox ruled that the Plaintiffs-Intervenors had a treaty-guaranteed right to fish in the areas of the Great Lakes ceded to the United States in the 1836 Treaty, for subsistence and commercial purposes. 471 F. Supp. 193 (W.D. Mich. 1979). Shortly thereafter, the Grand Traverse Band of Ottawa and Chippewa Indians intervened as a Plaintiff. On July 10, 1981, this Court affirmed the treaty right and held that the State may not regulate the exercise of tribal fishing except as necessary as a conservation measure. 653 F.2d 277 (6th Cir. 1981).

B. The 1985 and 2000 Consent Decrees

Since the mid-1980s, the regulation, allocation, and management of the fisheries in the 1836 Treaty waters has been governed by consent decrees. The first was entered in 1985 and had a fifteen-year term that expired May 31, 2000. (1985 Decree, R. 833.) That decree originally was presented to the court on consent of all parties, but one tribal party later withdrew its consent and put forward an alternative plan.[2]

[2] The district court's opinion and order entering the 1985 Decree was reported in the August 1985 edition of the Indian Law Reporter (I.L.R.).

United States v. Michigan, 12 I.L.R. 3079, 3079 (W.D. Mich. May 31, 1985). The district court held a limited trial aimed at aiding the court in deciding whether the original proposed decree, the alternative plan, or neither "provided the fairest management plan for the Great Lakes." *Id.* CPMR's predecessors participated in the negotiations of the original decree and in the evidentiary hearing as "litigating amicus curiae." *See id.* at 3089. As CPMR notes, the district court directed one of its current attorneys to serve as lead counsel at the trial for the parties and amici supporting the proposed decree.[3] (CPMR Appeal Br. 6.)

During the pendency of the 1985 Decree, two additional tribes gained federal acknowledgment and intervened as Plaintiffs in this case: the Little River Band of Ottawa Indians in 1998 and the Little Traverse Bay Bands of Odawa Indians in 1999. (Orders, R. 1371, 1412.)

The seven parties negotiated a successor to the 1985 Decree that was entered on August 8, 2000. (2000 Decree, R. 1458, Page ID # 3216.) Again, CPMR's predecessors participated as amicus curiae in the

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A copy of the decision is in the district court record at R. 1870-1, Page ID # 2111.

[3] This Court subsequently rejected the concept of "litigating amicus curiae" in an unrelated but identically named case. *See United States v. Michigan,* 940 F.2d 143, 164–66 (6th Cir. 1991).

negotiations. (*Id.* ("The parties, with the involvement of *amici curiae*, have engaged in extensive mediated negotiations . . ."); *see also* Stipulation, R. 1440, Page ID # 3563 ("The parties have conferred with counsel for amici curiae and are authorized to state that they support the foregoing proposal.").) The 2000 Decree had a twenty-year term, but it was extended by the district court while the parties continued to work toward a successor decree. (Orders, R. 1892, Page ID # 10818; R. 1903, Page ID # 10843; R. 1912, Page ID # 10858; R. 1945, Page ID # 10909; R. 1963, Page ID # 109345; R. 2014, Page ID # 11957; R. 2027, Page ID # 12020.) Most recently, the district court extended the 2000 Decree indefinitely, "until all objections to a proposed successor decree have been adjudicated." (Order, R. 2027, Page ID # 12022.)

CPMR also participated as amicus curiae in the negotiations for the 2007 Inland Consent Decree, which addresses treaty rights in the inland portions of the 1836 Treaty ceded area. (2007 Inland Decree, R. 1799, p. 6, ¶ E ("Representatives of Amici Curiae [listing amici curiae, including CPMR] . . . attended the Parties' settlement discussions and support the Parties' efforts to settle the Parties' respective claims

regarding Inland Article 13 Rights on the terms and conditions set forth in this Decree.").)

C. Amici curiae's prior attempts to intervene

Almost since the beginning of this litigation, CPMR or its predecessor groups have sought party status. Michigan United Conservation Clubs, a CPMR member, first sought intervention in 1975, only two years after this case was filed. (Motion, R. 34.) Overall, CPMR, its fellow amicus group Bay de Noc Great Lakes Sports Fishermen, Inc. (GLSF),[4] or their predecessors have moved to intervene at least seven previous times, most recently in 2007. (2007 Motion, R. 1748; *see also* Brief in Opposition to Motion to Intervene, R. 1970-1, Page ID ## 11095–11099 (summarizing prior intervention attempts).) Intervention was always denied, and this Court affirmed multiple times. *See*, *e.g.*, *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005).

[4] Bay de Noc Great Lakes Sports Fishermen, Inc. joined CPMR's motions to intervene, for reconsideration, and for stay in the district court. (Motions, R. 1964, Page ID # 10936; R. 1987, Page ID # 11764; R. 1997, Page ID # 11886.) However, that group did not join this appeal or file a separate appeal.

D. CPMR's amicus curiae role during the current negotiations

Although CPMR and its predecessor organizations have repeatedly been denied party status, they have participated in this case as amicus curiae for decades: CPMR member MUCC was granted amicus curiae status in 1976. (Order, R. 80.) In August 2019, as the parties prepared to begin negotiations for a successor to the 2000 Consent Decree, CPMR moved the district court to affirm its amicus curiae status (Mot. to Confirm Status as Amicus Curiae, R. 1864, Page ID # 2064) and in its brief requested a status conference. (Br. on Mot. to Confirm Status as Amicus Curiae, R. 1865, Page ID ## 2071–2072.) The Grand Traverse Band and the Sault Tribe filed responses to CPMR's motions, arguing among other things that the motion did not present a justiciable issue or provide a basis for reopening the case. (GTB Response, R. 1870, Page ID # 2105; Sault Response, R. 1871, Page ID # 2126.) The district court agreed that no justiciable issue was presented and so simply "acknowledge[d] that CPMR is listed as an amicus in this case." (Order, R. 1875, Page ID # 2145.) The court also declined CPMR's invitation to call a status conference, noting that

CPMR, as an amicus curiae, "may not 'jump start' continued proceedings in this case." (*Id.* at Page ID # 2144.)

In its amicus curiae role, CPMR participated in the parties' negotiations for a successor to the 2000 Decree over the past three years. CPMR attended and observed in-person and virtual negotiation sessions. The group caucused with the State during breakout sessions in negotiations. It also met and talked by phone with the State, with the other parties, and with the mediator about both the substance and the process of the negotiations. Even after what CPMR characterizes as a breakdown in its relationship with the State, CPMR attended in-person negotiations.

E. The district court proceedings

In July 2022, as the parties neared completion of a successor agreement, CPMR and GLSF sought intervention—marking the eighth time an amicus curiae group had done so. (Motion, R. 1964, Page ID # 10936.) The groups asserted that intervention at that late stage was appropriate because their relationship with the State had broken down and the State no longer adequately protected their interests. (*Id.* at Page ID # 10937.) A Confidentiality Agreement, which both amici

curiae signed (Confidentiality Agreement, R. 1969-1, Page ID # 11050), protected the substance of the negotiations from public disclosure. Accordingly, the motion to intervene offered little detail to support the allegations of inadequate representation (although the parties viewed some statements in amici curiae's filings as violating the confidentiality obligation). (Br. on Mot. to Intervene, R. 1969, Page ID ## 11024 n.3, 11026 n. 5, 11033 n.7, 11035 n.8; *but see* U.S. et al Response to Motion to Intervene, R. 1970-1, Page ID ## 11107–11108 and n.8.) Faithfulness to the Confidentiality Agreement impeded the parties' response to the amici curiae's allegations. (U.S. et al Response to Motion to Intervene, R. 1970-1, Page ID # 11107 n.7; State Response, R. 1973, Page ID # 11324.)

While the intervention motion was pending, this Court issued its decision in *Wineries of the Old Mission Peninsula Ass'n v. Twp of Peninsula,* 41 F.4th 767 (6th Cir. 2022), in which it reversed the district court's denial of a local advocacy group's motion to intervene. The district court allowed additional briefing to address that decision. (Order, R. 1978, Page ID # 11517.) Following oral argument, the district court denied the motion to intervene. (Order, R. 1985, Page ID

11662.) The district court concluded that CPMR did not satisfy any of the factors for intervention as of right, but it found that "the untimeliness of the motion is the most compelling reason to deny" the motion. (*Id.* at Page ID # 11668.)

CPMR moved for reconsideration, providing to the court for the first time affidavits that it claimed offered factual support for its intervention request. (Motion, R. 1987, Page ID # 11764; Affidavits, R. 1991–1996.[5]) Although the affidavits were filed under seal, they contained information that was clearly protected from disclosure under the Confidentiality Agreement, and the parties protested that the affidavits were untimely and that their submission to the court violated the agreement. (Response of U.S. et al to Motion for Reconsideration, R. 2017, Page ID ## 11984–11987.) The district court denied reconsideration, and in so doing declined to consider the untimely filed and improper affidavits.[6] (Order, R. 2018, Page ID # 11993.) The

[5] These affidavits were filed under seal, so the Page ID # is unavailable.

[6] The district court granted CPMR's motion to file the affidavits under seal, but only because "the confidential nature of the parties' settlement negotiations and the existence of their Confidentiality Agreement" led the court to conclude that allowing the affidavits "to be viewable by the public is not appropriate." (Order, R. 2021, Page ID # 12004.)

district court also denied CPMR's motion for a stay. (Order, R. 2021, Page ID # 12003.)

F. This appeal and subsequent proceedings

CPMR appeals from the denial of its motion to intervene and its motion for reconsideration. CPMR moved this Court for a stay or for expedited consideration of this appeal. This Court has not ruled on those motions.

After the filing of this appeal, and the day before CPMR filed its appeal brief, six of the seven parties submitted a proposed successor decree to the district court, along with a stipulation for entry of the decree. (Stipulation, R. 2042, Page ID # 12161; Proposed Decree, R. 2042-1, Page ID # 12167.) The parties had previously represented to the court that a proposed decree would be filed by September 30, 2022. (Order Denying Mot. to Intervene, R. 1985, Page ID # 11665.) The delay was primarily related to an impasse between the State and one of the tribal parties on minor issues that required the district court's intervention to resolve. (Order Extending the 2000 Decree, R. 2027, Page ID # 12020; Order Regarding Grand Traverse Tribal Zone, R. 2040, Page ID # 12147.)

On December 16, 2022, the district court held a scheduling conference at which counsel for all seven parties and counsel for CPMR participated. (Minutes, R. 2049, Page ID # 12388.) At that conference, the district court established a procedure under which any amici curiae, including CPMR, and the party that did not join the stipulation will be offered an opportunity to file substantive objections to the proposed decree. (Order, R. 2053, Page ID # 12395.) That process will play out over the next few months, with CPMR's objections due January 20, 2023, and responses to those objections due March 6, 2023.[7] (*Id.*) As mentioned, the district court ordered that the 2000 Decree remains in effect "until all objections to a proposed successor decree have been adjudicated." (Order, R. 2027, Page ID # 12020.)

SUMMARY OF ARGUMENT

To intervene as of right, a proposed intervenor must show: (1) its motion to intervene was timely; (2) it has a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the

[7] On January 13, 2023, the district court granted the parties' request to extend the deadlines for Sault Tribe's objections to February 10, 2023, and for the other parties' responses to those objections to April 17, 2023. (Order, R. 2059, Page ID # 12492.)

action may impair or impede its ability to protect its legal interest; and (4) the parties to the litigation cannot adequately protect its interest. Failure to establish even one factor requires denial of the motion. CPMR did not establish any of these factors. The motion to intervene, filed nearly three years into consent decree negotiations among seven sovereign governments, was inherently untimely. CPMR's interests are adequately represented by the State, which holds the legal interest in the Great Lakes and the fishery resource on behalf of the public and has a legal obligation to protect them. Also, CPMR's role as amicus curiae sufficiently protects its interest in this case. The untimeliness of CPMR's motion also precluded permissive intervention. The district court's denial of CPMR's motion to intervene must be affirmed.

ARGUMENT

I. CPMR is not entitled to intervention as of right.

Rule 24(a) of the Federal Rules of Civil Procedure governs intervention as of right. Because CPRM has not asserted that a federal statute gives it an unconditional right to intervene, Fed. R. Civ. P. 24(a)(1), CPMR must demonstrate that:

> (1) the motion to intervene is timely; (2) the proposed intervenors have a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenors' ability to protect their legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenors' interest.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990); *see also* Fed. R. Civ. P. 24(a)(2). "'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.'" *United States v. Michigan,* 424 F.3d 438, 443 (6th Cir. 2005) (quoting *Grubbs v. Norris,* 870 F.2d 343, 345 (6th Cir. 1989)).

A district court's denial of intervention as of right based on timeliness is reviewed under the abuse-of-discretion standard. *See In re Auto. Parts Antitrust Litig., End-Payor Actions,* 33 F.4th 894, 900 (6th Cir. 2022) (citing *Grutter v. Bollinger,* 188 F.3d 394, 398 (6th Cir. 1999)). An abuse of discretion will only be found if this Court is convinced that the district court misapplied the law, relied on clearly erroneous factual findings, improperly applied the law to the facts, or made a clear error of judgment. *In re Auto. Parts Antitrust Litig.,* 33 F.4th at 900 (citing *Pittington v. Great Smoky Mountain Lumberjack*

Feud, LLC, 880 F.3d 791, 799 (6th Cir. 2018)). The remaining factors for intervention as of right under Rule 24(a)(2) are reviewed de novo. *Grubbs,* 870 F.2d at 345.

Because the district court properly held that CPMR failed to meet any of the four factors, its denial of the motion to intervene must be affirmed.

A. CPMR's interests are adequately represented by the State.

This Court has held that timeliness is a threshold issue for intervention. *Blount-Hill v. Zelman,* 636 F.3d 278, 284 (6th Cir. 2011) (citing *NAACP v. New York,* 413 U.S. 345, 365 (1973)). The district court pointed to the untimeliness of CPMR's motion as "the most compelling reason" to deny intervention (Order, R. 1985, Page ID # 11668), and CPMR begins its analysis with that factor. (CPMR Appeal Br. 23.) However, CPMR's argument regarding timeliness is based on an unfounded assertion that after nearly three years of negotiations the State suddenly no longer adequately represents its interests in this case. For that reason, the State will address the adequate representation factor first.

CPMR bears the burden of proving that its interests are inadequately represented by the State. *Michigan,* 424 F.3d at 443 (citing *Meyer Goldberg, Inc. v. Goldberg,* 717 F.2d 290, 293 (6th Cir. 1983)). "This burden has been described as minimal because it need only be shown 'that there is a *potential* for inadequate representation.'" *Michigan,* 424 F.3d at 443 (quoting *Grutter,* 188 F.3d at 400). However, CPMR must also "overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *Michigan*, 424 F.3d at 443–44. The district court correctly concluded that CPMR failed to satisfy this factor because the State adequately represents the group's interests.

In moving to intervene, CPMR identified its interest in negotiations as seeking "to conserve and protect the Great Lakes fishery," and it claimed that the State no longer represented that interest because of a purported breakdown in the relationship between CPMR and the State that closely predated the filing of its motion. (Br. on Mot. to Intervene, R. 1969, Page ID # 11026.) CPMR claimed that this purported breakdown in the relationship led it to "believe that the Great Lakes fishery resources are threatened" by the State's positions

in negotiations, including "abandonment of sound biological principles that we believe should guide decisions related to the fishery." (*Id.*)

As an initial matter, CPMR contends that the district court's disregard of the affidavits filed with the motion for reconsideration caused it to erroneously conclude that the State continues to adequately represent CPMR's interests. However, "[a] party may not introduce evidence for the first time in a motion for reconsideration where that evidence could have been presented earlier." *Shah v. NXP Semiconductors USA, Inc.*, 507 F. App'x 483, 495 (6th Cir. 2012). The affidavits themselves demonstrate that they could have been submitted earlier, as the information was available to CPMR well before it filed its intervention motion, and all but one affidavit was offered by members of the movant organizations. (Affidavits, R. 1991–1996.) CPMR claims the affidavits were offered to correct the parties' misrepresentations to the district court regarding the status of negotiations and how close they were to finalizing a proposed decree. (CPMR Appeal Br. 15 n.8, 29.) But again, the affidavits themselves refute this assertion because they contain information far beyond that purpose. Additionally, CPMR's excuse for the late filing is unavailing. Essentially, CPMR

claimed that it could not file the affidavits with its motion to intervene because the parties asserted that doing so would violate the confidentiality agreement, yet somehow CPMR was free to commit that violation by filing the affidavits with its motion for reconsideration. The district court appropriately declined to consider new evidence that was untimely filed. (Order Denying Stay and Granting Motion to Seal, R. 2021, Page ID ## 12004–12005.) This Court should do the same.

With or without the affidavits, CPMR failed to establish that the State does not adequately represent its interests. The State and CPMR share an interest in protecting the Great Lakes and their fishery, which heightens CPMR's burden in establishing this factor. *See Michigan*, 424 F.3d at 443–44 (holding a presumption of adequate representation arises when a proposed intervenor and a party share the same ultimate objective). But for the State, this interest goes further: The State has a constitutional, statutory, and common-law duty to protect the Great Lakes and the public's right to use them. Michigan's Constitution declares the "conservation and development of the natural resources of the state" to be "of paramount public concern in the interest of the health, safety and general welfare of the people." Mich. Const. art. IV,

§ 52. The Michigan Supreme Court has held, "Under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public." *Glass v. Goeckel,* 703 N.W.2d 58, 64 (Mich. 2005). "The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Id.* at 64–65 (citations omitted). The Michigan Department of Natural Resources (DNR) is the state agency charged with the duty to "protect and conserve the natural resources of this state," including "foster[ing] and encourag[ing] the protection and propagation of game and fish." Mich. Comp. Laws § 324.503(1). By claiming that the State is not adequately representing its interests, CPMR effectively accuses the State of abandoning its public trust duty and the principles of sound biological management that guide the State in carrying out that duty. CPMR's contention that the State is no longer fulfilling its obligations in this regard is baseless.

CPMR's assertions are meant to obscure the real impetus for its motion to intervene. The list of areas where it claimed disagreement with the State is telling. CPMR's brief in support of its motion to

intervene asserted that it had a "substantial belief" that the State did not "share [its] concern" on the following subjects:

> 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.

(Br. on Mot. to Intervene, R. 1969, Page ID # 11025.) The recently filed proposed decree demonstrates that these beliefs were unfounded and that the State continued to champion these interests in the negotiations. (*See, e.g.*, Proposed Decree, R. 2042-1, Page ID # 12201 ("Lake Trout shall be allocated approximately equally between the State and the Tribes[.]".) But in effect, CPMR claimed to disagree with the State about nearly every major topic to be addressed in a successor decree. If that were the case, it should have been apparent that the State was not representing CPMR's interests in these negotiations from the beginning, not just as negotiations were winding down. CPMR denied this: "While Intervenors have participated in the current negotiations through the State, *only recently* did Intervenors' relationship with the State deteriorate to the extent that Intervenors'

interests are now divergent and unrepresented." (Br. on Mot. to Intervene, R. 1969, Page ID # 11037 (emphasis added); *see also id.* at Page ID # 11026 n.4 ("This is not to say that the State and its Department of Natural Resources ('MDNR') and Intervenors disagree on every point.").)

This acknowledgment shows that CPMR and the State do not diverge on broad interests, but rather that CPMR disagrees with the State regarding specific, narrow issues that were addressed in negotiations in the few weeks leading up to the filing of its motion. The timing of the motion, after nearly three years of negotiations, supports this conclusion. Tellingly, CPMR phrased its concern about the State's representation of its interests in terms of negotiating positions: "Intervenors and the State diverge on a number of *their positions*[.]" (*Id.* at Page ID # 11035 (emphasis added).) Rather than fear that its interests are not being represented, CPMR instead is displeased with the State's positions on narrow issues. The only "breakdown" in the relationship is CPMR's frustration that the State's positions, following years of negotiation, did not perfectly align with their preferred outcomes.

Just as disagreement about litigation strategy "does not, in and of itself, establish inadequacy of representation," *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987), disagreement on negotiating positions does not demonstrate that CPMR's interests are inadequately represented by the State. In any negotiation, no party attains everything it wants. That truth is amplified when seven sovereign governments are trying to reach agreement on complex and sensitive issues. But the give and take of negotiations does not mean that CPMR's interests are not being represented.

Finally, this case is easily distinguishable from *Wineries of the Old Mission Peninsula Ass'n v. Twp of Peninsula,* 41 F.4th 767 (6th Cir. 2022). In that case, local wineries sued a township challenging the validity of certain zoning ordinances that restricted the types of services the wineries could provide. *Id.* at 769–70. An association of property owners who resided in the township sought to intervene in the action to help defend the zoning ordinances and protect their property interests. *Id.* at 770–71. The district court denied intervention (1:20-cv-1008 R. 108), and this Court reversed. *Wineries,* 41 F.4th at 769, 777. This Court concluded that although the township and the association

"currently share the 'same ultimate objective,' " *id.* at 744 (quoting *Michigan,* 424 F.3d at 443–44), the township might not adequately represent the association's interests at some point in the future because (1) the township conceded as much and (2) the township was facing a significant damages claim that could cause its interests to diverge from the association's in the future. *Id.* at 775–76. The facts of this case do not support a similar finding.

The township in *Wineries* "readily conceded that it was limited in how much it could do to represent the interest of individual citizens implicated by this lawsuit, such as the interest in maintaining the value of certain properties." *Id.* at 775. "As the Township explained, it was 'not legally permitted or able to represent those specific interests on the micro level to the extent that [the association] is able to do so.'" *Id.* The township even went so far as to seek joinder and concurrence in the association's intervention motion. (1:20-cv-1008 ECF 47.)

In this case, the State has not conceded any divergence of interest with CPMR or an inability to protect CPMR's interests. On the contrary, the State views its interests as aligned with CPMR's. The State's acknowledgment of disagreements with CPMR was not a

concession that it could not represent their interests on a "micro level." *Wineries,* 41 F.4th at 775. As explained, the divergence exists on specific positions being taken in negotiations, not on the interests being represented. The State continues to adequately represent CPMR's interests, even if the positions taken are not the ones CPMR would choose.

Further, an important consideration in *Wineries* was the fact that the township faced significant potential damages in the lawsuit, and its obligations to its citizens and to protect the public coffer could cause the township's incentive to litigate the case to wane. 41 F.4th at 776. But similar circumstances do not exist here. The State does not face a damages claim in this case, and this case is in a "settlement" posture, not a litigation posture, with the parties spending the past three-plus years negotiating a successor decree. The fact that the parties were close to concluding those negotiations and were working to finalize language for a successor decree when CPMR filed its motion worked *against* CPMR's efforts to intervene, not in favor of them.

Notably, in discussing the "carrot of settlement" and the "stick" of damages that the township faced in *Wineries*, this Court distinguished

that case from an earlier proceeding in *this case*. There, this Court affirmed denial of intervention to some of CPMR's predecessors during litigation regarding inland usufructuary rights. *Wineries,* 41 F.4th at 776 (citing *Michigan,* 424 F.3d 443–44). The proposed intervenors in that earlier proceeding similarly insisted that the State "will not adequately represent their interests because the state's 'duty is to the broader public' and it 'has no duty to defend their interests as property owners.'" *Michigan,* 424 F.3d at 444. They claimed that "experience verifies that the state cannot adequately defend private property rights." *Id.* But this Court rejected this argument. As it explained in *Wineries*:

> That possibility [of damages being awarded against the township] places this case at odds with the facts of the cases on which the Wineries rely to support their position, *United States v. Michigan* and *Jordan v. Michigan Conference of Teamsters Welfare Fund.* In *Michigan,* the United States sought a declaratory judgment against Michigan concerning the interpretation of a treaty regulating usufructuary rights of several American Indian tribes. 424 F.3d at 442. Both the proposed intervenors—a collection of landowners—and Michigan sought the same end in response, a declaration that these tribes lacked those rights. *Id.* at 444. Recognizing that this convergence boded ill for their motion to intervene, the proposed intervenors argued that "experience verifies that the state cannot adequately defend private property rights." *Id.* We were unconvinced, explaining that the proposed intervenors had failed to

> demonstrate that Michigan's incentive to litigate the case would flag over time. *See id*. Present here is what was absent in *Michigan*—the stick of damages and the carrot of settlement.

Wineries, 41 F.4th at 776. What was absent then is absent now. There is no reason to think that the State's motivation with respect to these negotiations will "flag over time" because the State has legal duties to protect the Great Lakes resource and the public's right to use it. *See* Mich. Const. art. IV, § 52; *Glass,* 703 N.W.2d at 64; Mich. Comp. Laws § 324.503(1). The only way the State's motivation would change is if the State abandoned those duties, and CPMR has not demonstrated—and cannot demonstrate—that that has happened or will happen.

Because the State adequately represents Proposed Intervenors' interests, the district court properly denied intervention as of right.

B. The motion to intervene was untimely.

Although the district court concluded that CPMR failed to meet any of the four factors for intervention as of right, it found "the untimeliness of the motion" to be "the most compelling reason to deny" it. (Order, R. 1985, Page ID #11668.) Timeliness is a threshold issue for intervention. *Blount-Hill,* 636 F.3d at 284 (citing *NAACP,* 413 U.S. at 365). An untimely motion must be denied. *United States v. City of*

Detroit, 712 F.3d 925, 930 (6th Cir. 2013). When considering the timeliness of an intervention motion, the court should consider all the circumstances, including:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen, 904 F.2d at 340.

The district court properly exercised its discretion in concluding that a motion for intervention filed near the conclusion of a three-year negotiation was untimely and that CPMR did not meet its burden with respect to this factor.

1. The purpose for the motion does not support intervention.

CPMR sought intervention "to address matters directly affecting their interests in the current negotiation discussions" that they claimed the State was no longer adequately representing. (CPMR Brief, R. 1969, Page ID # 11037.) As discussed, the State disputes that it no longer adequately represents CPMR's interests. However, even without

the State's representation, CPMR would have an avenue to communicate its interests and have them considered: its status as amicus curiae.

This Court has held that where a party has had the "full opportunity" to participate in a case as an amicus curiae, "the concerns of an entity seeking intervention can be presented with complete sufficiency through [amicus] participation." *Stupak-Thrall v. Glickman,* 226 F.3d 467, 476 (6th Cir. 2000). This Court would have reached that conclusion "[e]ven if the [proposed intervenors'] concerns were different from those of" the defendants. *Id.* In other words, amicus curiae status can be sufficient to protect a movant's interest in a lawsuit. *See Blount-Hill,* 636 F.3d at 287–88 (affirming denial of intervention but finding that proposed intervenors "are not without a voice" because the district court permitted them to appear as amici curiae); *Bradley,* 828 F.2d at 1194 ("[T]he district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case. This would allow the district court the benefit of hearing proposed intervenors' concerns and views, as well as the

benefit of [counsel's] expertise, before it rules on issues in the advanced remedial phase of this desegregation action.").

CPMR has participated in the negotiations as amicus curiae since the beginning—and even earlier, as the State engaged with the amici curiae about a successor decree years before negotiations began. Since 2019, CPMR as amicus curiae has attended in-person and virtual negotiation sessions, caucused with the State during negotiation sessions, met and talked by phone with the State outside negotiation sessions, met and talked by phone with other parties, and met and talked by phone with the mediator. CPMR retains its status as amicus curiae and as such already has an avenue for expressing its concerns and making its interests known.

That avenue remains open even now that a proposed decree has been presented to the district court. The district court has established a process through which CPMR, as an amicus curiae, can file objections to the proposed decree. (Order, R. 2053, Page ID # 12395.) The district court has extended the 2000 Decree "until all objections to a proposed successor decree have been adjudicated" (Order, R. 2027, Page ID # 12021), indicating that a successor decree will not be entered until

CPMR's objections are given due consideration. This process will allow CPMR to raise its concerns about any provisions in the proposed decree, including those it views as risking irrevocable biological harm to the fisheries, and to have those concerns addressed by the district court if warranted. CPMR's purpose for its motion, to "address matters directly affecting their interest" (Br. on Mot. to Intervene, R. 1969, Page ID # 11037), is met through its status as amicus curiae. This purpose does not support intervention.

2. CPMR's interest in this case was known throughout the three-year negotiation.

In reviewing this factor, a court evaluates "how long the intervenor took to move after it knew or should have known that its interests in the case were implicated." *In re Auto. Parts Antitrust Litigation,* 33 F.4th at 902 (citing *Stupak-Thrall,* 226 F.3d at 477). "More precisely, we ask when the intervenor should have known that the parties in the case would not protect its interests." *In re Auto. Parts Antitrust Litigation,* 33 F.4th at 902 (citing *Cameron v. EMW Women's Surgical Ctr., P.S.C.,* 142 S. Ct. 1002 (2022)). Intervention as consent decree negotiations near conclusion is disfavored, even if the proposed

intervenor claims that its interests were adequately represented until recently. *See United States v. Tennessee,* 260 F.3d 587, 592–93 (6th Cir. 2001) (affirming the denial of an untimely motion to intervene where the movant filed its motion after settlements were conditionally approved but not finalized, despite the movant's assertion that it had only recently become aware that its interests were not adequately represented).

CPMR's interest in this case has existed all along. CPMR or its predecessors have participated in this case as amici curiae since the 1970s and have been involved in all three prior consent decree negotiations. (CPMR Appeal Br. 5–6, 9–11.) With respect to the current negotiations, CPMR has known of its interest since at least August 2019, before negotiations began, when it moved to confirm its amicus curiae status. (Motion, R. 1864, Page ID # 2064.) CPMR stated in that motion, "The outcome of this case will have a direct and immediate impact on hundreds of thousands of current and future members of CPMR and its member organizations, so CPMR has a substantial interest in the outcome of this litigation." (*Id.* at Page ID # 2065, ¶ 5.)

CPMR asserts that intervention nearly three years into negotiations was warranted because its interests were being represented until shortly before it filed its motion. But as discussed, this assertion is unfounded. CPMR's claim is based on affidavits that were untimely filed, contained improperly disclosed confidential information, and were appropriately disregarded by the district court. Moreover, this alleged change in circumstances is belied by the true nature of CPMR's disagreement with the State. CPMR's concern is not that the State suddenly failed to represent its interests. Rather, the group was displeased with certain of the State's positions and is seeking party status to prevent entry of a negotiated agreement that reflects such positions. That does not justify intervention at this late stage of the process.

3. Intervention at this stage would gravely prejudice the parties.

The district court understood that allowing a third party to intervene late in negotiations had the potential to undermine the progress that had been made toward a successor decree. This was especially so considering the range of grievances CPMR identified:

"Given the broad topics that the Proposed Intervenors' [sic] take issue with (*see* ECF No. 1969 at PageID.11026), the entirety of the successor decree could be at risk. If these broad topics are revisited, many of the agreed-upon terms—the product of intense negotiation and compromise—could vanish, causing further delays." (Order, R. 1985, Page ID # 11672.) The district court concluded that if CPMR were allowed to intervene, "the likelihood that the parties will agree upon a proposed successor decree by September 30 is severely diminished." (*Id.*)

CPMR claims that the district court's conclusion that its motion was untimely was based on the parties' misrepresentations of the status of negotiations and how close they were to submitting a proposed decree. (CPMR Appeal Br. 29.) CPMR asserts that the affidavits filed with its motion for reconsideration "established it was highly unlikely a deal would ever be reached by September 30, 2022" and that the district court abused its discretion in not considering the affidavits and not fully evaluating the timeliness of the intervention motion. (*Id.* at 29–30.) As discussed, the district court properly disregarded the untimely filed affidavits.

Further, the parties' failure to file a proposed decree by September 30 does not diminish the prejudice that would result from intervention. The representations made at the hearing on CPMR's motion were accurate: The current decree was set to expire at the end of September, and a proposed decree was expected to be filed by that time. In reality, it took the parties until mid-December to file the proposed decree—a delay of less than three months in a process that has taken more than three years. The extra time that the parties needed to finalize the proposed agreement does not change the fact that granting CPMR's motion to intervene would threaten the finality of that agreement. Indeed, last month's filing of a proposed decree, which CPMR fails to acknowledge in its brief, lends more credence to the district court's concerns.

4. Unusual circumstances militate against intervention.

As the district court noted, this case is unusual because "it involves seven different sovereigns as separate parties." (Order Denying Mot. to Intervene, R. 1985, Page ID # 11673.) To date, only federal and tribal governments and the State of Michigan and its bodies

and officials have been parties to this case. Granting CPMR intervention would give party status to a non-governmental entity for the first time in the nearly fifty years this case has been pending. Moreover, it would have the effect of elevating CPMR's interests and concerns over those of all other Michigan citizens, who have an equal right to the Great Lakes resource and the fishery at issue in these negotiations. Allowing CPMR to intervene would potentially open the doors for "any individual citizen or interest group from the State of Michigan or one of the Native Tribes" to intervene. (*Id.*) The district court correctly concluded that "only sovereigns must be allowed party-status in this matter." (*Id.*)

5. By the time CPMR moved to intervene, negotiations had progressed to a point that warranted denying intervention.

CPMR filed its motion nearly three years into negotiations. The parties began discussions toward a successor decree in September 2019, and aside from a temporary disruption at the beginning of the Covid-19 pandemic, those discussions continued either in person or virtually until a proposed decree was presented to the district court last month.

But more important than how long the negotiations had been underway was how close they were to conclusion. *See Stupak-Thrall,* 226 F.3d at 475 ("The absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important of these circumstances. A more critical factor is what steps occurred along the litigation continuum during this period of time."). When CPMR filed its motion, the parties had indicated to the district court that they were close to wrapping up their discussions and were entering the final drafting stage for a successor decree. (Motion to Extend 2000 Decree, R. 10929, Page ID ## 10929–10931.) Even though it took the parties slightly longer than anticipated to finalize the proposed decree, by any measure CPMR sought intervention at the final stage of "the litigation continuum." *Stupak-Thrall,* 226 F.3d at 475. At this late phase, adding new parties to the process would threaten to disrupt the progress that has been made toward a successor decree, which counsels against intervention.

In sum, the district court properly concluded that CPMR's motion was untimely in light of "'all the circumstances' " of this case. (Order, R. 1985, Page ID # 11674 (quoting *NAACP,* 413 U.S. at 365).)

C. CPMR does not have a substantial legal interest in this case that supports intervention.

Rule 24(a)(2) requires a potential intervenor to "claim[] an interest relating to the property or transaction that is the subject of the action[.]" Fed. R. Civ. P. 24(a)(2). This provision requires a "significant interest." *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007). Although this Court had adopted " 'a rather expansive notion of the interest sufficient to invoke intervention of right,' " that "does not mean that any articulated interest will do." *Id.* at 780 (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). An intervenor need not have the same standing necessary to initiate the lawsuit. *See Tennessee,* 260 F.3d at 595. "T]he inquiry into the substantiality of the claimed interest is necessarily fact specific." *Miller,* 103 F.3d at 1245.

The district court correctly held that CPMR did not meet its burden of proving that it had a substantial legal interest in this case. (Order, R. 1985, Page ID # 11674.) The court stated that while CPMR may have some interest in conserving the Great Lakes fishery, it was questionable whether that interest was substantial, given that every Michigan citizen had the same rights to use the resource. (*Id.*) The

court also noted that even if this were a substantial interest, it was represented by the State. (*Id.* at Page ID ## 11674–11675.) In addition, the court rejected CPMR's claimed property interest in the Great Lakes fishery, noting that the State of Michigan owns the fishery and holds it in trust for the public. (*Id.*)

On appeal, CPMR compares itself to the proposed intervenors in several cases where the interest in the matter was found to be substantial. But each of those cases is distinguishable.

CPMR relies heavily on this Court's decision in *Wineries*. The district court considered the *Wineries* decision in denying CPMR's motion to intervene and distinguished the case on five grounds, including the substantial legal interest factor. The district court found that while the proposed intervenor in *Wineries* had a property interest in the land adjacent to the wineries at issue that would be directly affected by the litigation, CPMR has no such property interest. (Order, R. 1985, Page ID # 11684.) The Great Lakes and the fishery resource are held in trust by the State of Michigan on behalf of all its citizens, and CPMR's members, like all Michigan residents, may only take fish from the Great Lakes with a license granted by the State. (*Id.*)

CPMR attempts to characterize the proposed intervenor's interest in *Wineries* as similar to its own by stating that the proposed intervenor's members "had a substantial interest in the ordinances at issue because they had recourse under Michigan law to enforce the ordinances." (CPMR Appeal Br. 33.) CPMR claims that its members similarly have an interest in "preserv[ing] a natural resource at issue" and also could bring a state-law cause of action. (*Id.* at 33–34.) This argument falters in two respects.

First, CPMR's characterization omits the fact that the proposed intervenor's members in *Wineries* had recourse under state law to enforce the zoning ordinances *because* they owned land adjacent to the property at issue. Again, CPMR and its members have no property right in the Great Lakes or the fish.

Second, CPMR's ability to bring an action under the Michigan Environmental Protection Act (MEPA), Mich. Comp. Laws § 324.1701 *et seq.*, has nothing to do with any interest in this case. MEPA allows "[t]he attorney general *or any person*" to bring an action for declaratory and equitable relief to protect "the air, water, and other natural resources and the public trust in these resources from pollution,

impairment, or destruction." Mich. Comp. Laws § 324.1701 (emphasis added). Therefore, CPMR could bring a claim under MEPA even if it had no interest in these negotiations, as could "any person." Mich. Comp. Laws § 324.1701. The very breadth of the statute's reach cuts against CPMR's argument. If anyone can bring an action under MEPA, then CPMR's ability to bring a MEPA claim does not demonstrate a substantial interest that warrants intervention.

Further, unlike in *Wineries*, CPMR's ability to bring a MEPA claim is not endangered by this litigation. In *Wineries*, the outcome of the litigation could have affected the proposed intervenor's members' ability to bring nuisance claims because those claims depended on the zoning ordinances that were being challenged. In this case, MEPA is not being challenged. The outcome of these negotiations has no bearing on the validity of MEPA or CPMR's legal ability to bring a claim under that statute.

CPMR also points to two cases from other circuits that are similarly unavailing. CPMR cites *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), as demonstrating that CPMR has a "substantial interest in a successor decree because the

Coalition members reside within the treaty area." (CPMR Appeal Br. 34–35.) However, CPMR inaccurately characterizes the interest of the proposed intervenors in *Mille Lacs* as deriving from the possibility that the litigation "would permit the Band members to exercise treaty rights related to the intervenor's interests." (CPMR Appeal Br. 35.) In fact, the proposed intervenors in that case were landowners, and one of the issues in the case was whether tribal members could exercise treaty hunting and fishing rights on private property. *See Mille Lacs,* 989 F.2d 994 at 998. As the district court summarized, "the [Eighth Circuit] did not hold that the landowners had a property interest in the right to hunt and fish; rather, the landowners clearly had a property interest *in their own land* that may have been affected by the result of the litigation." (Order, R. 1985, Page ID # 11675.) *See Mille Lacs,* 989 F.2d at 998 ("The result of the litigation also may affect the proposed intervenors' property values. 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. . . .") (internal citation omitted). CPMR members do not have similar property interests here.

CPMR also relies on *United States v. Reserve Mining Co.,* 56 F.R.D. 408 (D. Minn. 1972), in which the United States brought an abatement action related to the discharge of taconite tailings into Lake Superior. Fifteen entities sought intervention, including the states of Michigan and Wisconsin, several local municipalities, business groups, and environmental groups. *Id.* at 411. The environmental groups' interest in the case was identified as "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." *Id.* at 418. In finding this interest sufficient to support intervention, the court did not rely on the substantial legal interest standard established by this Court. Instead, the court applied a much broader standard in light of the unique nature of the action, stating that Rule 24(a)(2) may "'require other than literal application in atypical cases.'" *Id.* at 413 (quoting *Nuesse v. Camp,* 385 F.2d 694, 700 (1967)). The court noted that in an abatement action brought under the Federal Water Pollution Control Act, 33 U.S.C. § 1160(g)(1), to secure

abatement of alleged pollution, the statute specified a "multiplicity of factors" that the court must consider in determining whether applicable water quality standards had been violated, including transcripts and decisions from related administrative proceedings. *Reserve Mining,* 56 F.R.D. at 413. Given this, the court likened its role to that "of an administrative tribunal [rather] than a court in an ordinary adversary civil case." *Id.* The court concluded "that the 'interest' requirement *in the context of this environmental case*, should be viewed as an inclusionary rather than exclusionary device," that "a representation of [the environmental groups'] interests would be helpful to any decision reached by this Court," and that those interests were substantial "*within the context of this lawsuit*[.]" *Id.* (emphasis added); *see also id.* at 418 (applying this analysis to the environmental groups' motions).

Accordingly, the court's determination in *Reserve Mining* that the environmental groups had a substantial interest was based on an exceptionally broad standard that the court found appropriate given the specific nature of the proceeding. CPMR points to no Sixth Circuit precedent engaging in a similar analysis. And even if such precedent existed, CPMR has pointed to no special circumstances in this case to

warrant broadening the substantial legal interest standard or finding a substantial interest here.

The district court correctly concluded that CPMR failed to satisfy this factor.

D. CPMR's ability to protect its interest will not be impaired if intervention is denied.

CPMR argues that its ability to protect its interests will be impaired without intervention "because the State and other parties appear poised to agree to a consent decree that ignores principles of biological sustainability and cause irreparable harm to the fisheries." (CPMR Appeal Br. 38.) CPMR again relies on its untimely affidavits, which this Court should ignore. And again, the State refutes the claim that a successor decree will abandon the principles CPMR identified. The proposed decree that was filed with the district court demonstrates that CPMR's fears were unfounded and that the State adequately represented CPMR's interests in the negotiations. (*See* Proposed Decree, R. 2042-1, Page ID # 12167.)

But even if CPMR still has concerns, intervention is not necessary for the group to protect its interests. CPMR retains its amicus curiae

role, and no party has suggested terminating that status. The district court has established a process through which CPMR, as an amicus curiae, will be able to communicate its concerns by filing objections to the proposed decree and have those objections considered by the district court. CPMR has the ability to protect its interest without intervention.

II. CPMR is not entitled to permissive intervention.

CPMR also seeks permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. A court has discretion to grant permissive intervention on a timely motion to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "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." *Michigan*, 424 F.3d at 445 (citing *Miller,* 103 F.3d at 1248); *see also* Fed. R. Civ. P. 24(b)(3). The denial of permissive intervention is reviewed for abuse of discretion. *Michigan,* 424 F.3d at 445.

As with intervention as of right, timeliness is a threshold issue for permissive intervention. *Blount-Hill,* 636 F.3d at 284 (citing *NAACP,*

413 U.S. at 365). For the reasons discussed, CPMR's motion was untimely, and permissive intervention must be denied.

Further, granting permissive intervention would cause undue delay and prejudice to the parties. At the time CPMR sought to intervene, the parties were nearing completion of a successor decree and working to finalize language. A proposed successor decree has now been filed with the district court, and a process has been established for CPMR to file objections to the proposed decree. (Scheduling Order, R. 2053, Page ID # 12395.) Introducing a new party at this point would almost certainly derail the progress that has been made and reopen issues that had been deemed resolved, prejudicing the parties who have worked for more than three years on a new agreement. In fact, derailing that progress seems to be the very point of the motion to intervene. The district court properly exercised its discretion in denying permissive intervention (Order, R. 1985, Page ID ## 11681–11682), and its ruling must be affirmed.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the district court's denial of the motion to intervene must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 9,668 words.

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CERTIFICATE OF SERVICE

I certify that on January 17, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellees, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Amici Curiae's Motion to Intervene	07/13/2022	R. 1964	Page ID ## 10936–10939
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