No. 23-1931

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BAY MILLS INDIAN COMMUNITY; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; LITTLE RIVER BAND OF OTTAWA INDIANS; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervenors-Appellees,

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervenor-Appellant,

v.

STATE OF MICHIGAN, and its agents,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

Kelly M. Drake (P59071)
Assistant Attorney General
Counsel of Record
Attorney for Defendants-Appellees
Environment, Natural Resources, and Agriculture Division

P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to 6th Cir. R. 34(a), the State takes no position, and defers to the discretion of this Court, on whether oral argument would aid the Court's resolution of this case. But counsel stands ready to assist the Court by presenting oral argument to address any questions that the Court may have about this dispute, and if the Court hears argument, the State would like to participate.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1345. This Court has jurisdiction over this case as an appeal from a final decision of a district court, 28 U.S.C. § 1291, and as an appeal of an interlocutory order modifying an injunction. 28 U.S.C. § 1292(a)(1). The district court's order entering the 2023 Great Lakes Fishing Decree was entered August 24, 2023. (R. 2131, Page ID ## 15234–15235.) Because the United States is a party, the time for filing a notice of appeal was 60 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(B). The Sault Ste. Marie Tribe of Chippewa Indians timely filed its notice of appeal on October 16, 2023. (R. 2138, Page ID ## 15381–15383.)

STATEMENT OF ISSUES PRESENTED

The district court has equitable authority and continuing jurisdiction to enter orders to effectuate the original ruling in this case affirming the tribal treaty-reserved right to fish in the areas of the Great Lakes ceded in the 1836 Treaty of Washington. The district court's principal concern in adopting management orders related to treaty resources is to preserve the tribal treaty right and the fishery resource. The district court entered the 2023 Great Lakes Fishing Decree after concluding that it will protect the tribal treaty right and the resource, despite the Sault Tribe's and an amicus curiae's objections.

1. Did the district court properly enter the 2023 Great Lakes Fishing Decree as an exercise of its equitable authority and continuing jurisdiction to protect the tribal treaty right and the fishery resource?

2. Did the district court properly extend the duration of the 2000 Consent Decree?

INTRODUCTION

The 2023 Great Lakes Fishing Decree (2023 Decree or Decree) governs the management, allocation, and regulation of the Great Lakes fishery in waters ceded by the Ottawa (Odawa) and Chippewa (Ojibwa) nations to the United States in an 1836 treaty. The Decree is essential for the protection of the resource and the treaty right into the future. It is the product of more than three years of arduous negotiations between the seven sovereign governments that are parties, with the final product endorsed by six parties. The Sault Ste. Marie Tribe of Chippewa Indians (Sault Tribe) did not stipulate to the Decree's entry, objected to it in the district court, and now challenges it on appeal. By doing so, the Sault Tribe seeks to undo a management order that was supported by the United States, the State of Michigan, and four of the Sault Tribe's fellow tribes—an order that has already gone into effect and is being implemented.

Sault Tribe first challenges the district court's unremarkable decision to enter a management order rather than a permanent injunction to ensure treaty fishing rights and protect the Great Lakes fishery, as it has done repeatedly and properly for decades. Sault Tribe

not only ignores the law of the case on this point, but it forfeited this argument by failing to raise it in the district court, while actively engaging in the district court's thoughtful and comprehensive objection procedures without ever suggesting that the court should have engaged in an injunction procedure. Sault Tribe also raises a moot and irrelevant argument by contending that the district court erred when it extended the 2000 Consent Decree a seventh time while the parties negotiated the 2023 Decree, ignoring the fact that Sault Tribe had joined the request to extend the 2000 Consent Decree six previous times during the same negotiations.

More importantly, Sault Tribe's arguments reveal its true objective, which is to escape the constraints of the Decree and regulate its treaty fishery without considering and accommodating the interests of the other six parties. Allowing the Sault Tribe to operate outside the Decree would endanger the very things the Decree is meant to protect, putting at risk the Great Lakes fishery and the treaty rights of the other four tribes that are parties.

If this Court considers the merits of Sault Tribe's arguments, it should affirm entry of the 2023 Decree. The district court found that

the Decree respects and promotes the tribal treaty right while also preserving the Great Lakes fishery and recognizing the shared nature of the resource. The district court appropriately entered the Decree based on its equitable authority to manage the treaty resource, and its continuing jurisdiction to implement and enforce its order recognizing the treaty right.

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 in which they ceded approximately 14 million acres of land in what is now Michigan, along with adjacent areas of the Great Lakes. Treaty of Washington, 7 Stat. 491 (Mar. 28, 1836) (1836 Treaty). The ceded area covers approximately the northern third of Michigan's Lower Peninsula and the eastern half of the Upper Peninsula. *United States v. Michigan*, 471 F. Supp. 192, 202 (W.D. Mich. 1979) (map roughly depicting ceded area). Under 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." 1836 Treaty, Article Thirteenth.

In 1973, the United States brought this action against the State of Michigan,[1] asserting that 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. In May 1979, District Court Judge Noel Fox recognized a treaty-guaranteed right to fish in Great Lakes waters for subsistence and commercial purposes. *Michigan,* 471 F. Supp. 193. This Court affirmed. *United States v. Michigan,* 653 F.2d 277, 278 (6th Cir. 1981) ("The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights.").

The district court also retained continuing jurisdiction "of this case for the life of this decree to take evidence, to make rulings and to issue such orders as may be just and proper upon the facts and law, and in the implementation of this decree." *Michigan,* 471 F. Supp. at 281. This Court has broadly interpreted this retention of jurisdiction to allow the district court to issue orders necessary to protect the resource and

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

the treaty right. *See*, *e.g.*, *Michigan*, 653 F.2d at 280. The district court has exercised this continuing jurisdiction multiple times through the years to enter orders managing the treaty resource. *See United States v. Michigan,* 12 I.L.R. 3079, 3089 (W.D. Mich. May 31, 1985)[2] ("On numerous occasions subsequent to this court's opinion referred to in paragraph 2, the parties have invoked the court's continuing jurisdiction to resolve controversies and disputes among themselves. Those controversies and disputes have involved primarily conservation closures necessitated by the threat of overharvest of various fish stocks."). (*See also* Op., R. 2130, Page ID ## 15098–15103.)

For example, in 1981, the district court ordered the tribal regulations that had adopted prior federal regulations to remain in place to protect the fishery upon the lapse of the federal regulations "in aid of its jurisdiction to determine the rights of the parties under treaties of the United States." *Michigan*, 653 F.2d at 279–80. In 1982, the district court approved tribal regulations over the objection of the

[2] This opinion and order entering the 1985 Decree was reported in the August 1985 edition of the Indian Law Reporter (I.L.R.). A copy of the decision appears in the record at R. 833 and in the Sault Tribe's appendix at A081.

State to protect the resource, improve implementation, and bring regulations in line with changes in the fishery. (Order, R. 2076-1, Page ID # 12803.) In 1983, the district court entered multiparty regulations via the stipulation of the parties. (Order, R. 2080-1, Page ID # 12883.) And in 1984, the district court found its continuing jurisdiction and equitable authority included the power to allocate the resource in addition to adjudicating and entering regulations where either the resource or the exercise of the treaty right is threatened. (*Id.*, Page ID ## 12890–12891.)

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 comprehensive, long-term decrees agreed to by all or most of the parties. The first decree was entered in 1985 and 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. *Michigan*, 12 I.L.R. at 3079. The district court held a limited trial aimed at determining whether the original proposed decree, the alternative plan, or neither "provided the

fairest management plan for the Great Lakes." *Id.* The district court ultimately adopted the original proposed decree as an exercise of its continuing jurisdiction. *Id.* at 3088.

The seven parties negotiated a successor to the 1985 Decree that was entered on August 8, 2000. (2000 Consent Decree, R. 1458, Page ID # 3216.) The 2000 Consent Decree had a twenty-year term and was set to expire in August 2020. The seven parties began negotiations for a successor to the 2000 Consent Decree in fall 2019. The district court extended the 2000 Consent Decree multiple times during those negotiations. (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 # 10934; R. 2014, Page ID # 11957; R. 2027, Page ID # 12020.) The first six times that extensions were sought, Sault Tribe joined the motion for an extension, did not oppose the motion, or sought an extension of a different duration than what the other parties sought. (R. 1882, Page ID ## 10677–10678 (sought shorter extension); R. 1901, Page ID ## 10836–10839 (joined motion); R. 1909, Page ID ## 10850–10853 (same); R. 1944, Page ID # 10908 (no objection to the motion); R. 1962, Page ID ## 10929–10933 (joined motion); R. 2006, Page ID

11925–11927 (sought longer extension).) In November 2022, the district court extended the 2000 Consent Decree "until all objections to a proposed successor decree have been adjudicated." (Order, R. 2027, Page ID # 12022.) Sault Tribe did not join this final motion (Cert. Regarding Concurrence, R. 2026, Page ID # 12018) and sought reconsideration of the district court's order granting the extension. (Motion, R. 2046, Page ID ## 12360–12363.)

C. The 2023 Decree

On December 11, 2022, six of the seven parties (Stipulating Parties) submitted a stipulation for entry of a successor to the 2000 Consent Decree. (Stipulation for Entry, R. 2042, Page ID ## 12161–12166.) The Sault Tribe did not join the stipulation. (*Id.*)

The district court provided the parties, including Sault Tribe, and amici curiae an opportunity to file objections to the proposed decree. (Scheduling Order, R. 2052, Page ID ## 12393–12394; Am. Scheduling Order, R. 2053, Page ID ## 12395–12396.) Sault Tribe filed objections, to which the Stipulating Parties and amicus curiae Coalition to Protect Michigan Resources (CPMR) filed responses. (R. 2077, Page ID ## 12804–12823; R. 2095, Page ID ## 13634–13651; R. 2096, Page ID

13652–13679; R. 2103, Page ID ## 14011–14065; R. 2104, Page ID ## 14117–14166.) CPMR also filed objections to the proposed decree that all seven parties, including Sault Tribe, responded to.[3] (R. 2062, Page ID ## 12499–12534; R. 2083, Page ID ## 12938–12948; R. 2084, Page ID ## 12949–12983; R. 2085, Page ID ## 13002–13027; R. 2086, Page ID ## 13053–13091.)

The district court held a two-day hearing on the objections, at which attorneys for the Stipulating Parties, Sault Tribe, and CPMR presented argument. (Minutes of Hr'g, R. 2110, 2113, Page ID ## 14373, 14374; 5/24/23 Hr'g Tr, R. 2119, Page ID ## 14413–14625; 5/25/23 Hr'g Tr, R. 2120, Page ID ## 14626–14821.) Following the hearing, the district court directed the parties and CPMR to file proposed findings of fact and conclusions of law. (Order Following Objections Hr'g, R. 2114, Page ID ## 14375–14378; Order Extending Time, R. 2117, Page ID # 14410.) The Stipulating Parties, Sault Tribe, Grand Traverse Band of Ottawa and Chippewa Indians, and CPMR each filed proposed findings of fact and conclusions of law. (R. 2123,

[3] CPMR has separately appealed entry of the 2023 Decree, No. 23-1944, and the United States cross-appealed, No. 23-1971.

Page ID ## 14828–14860; R. 2124, Page ID ## 14861–14974; R. 2125, Page ID ## 14975–15010; R. 2126, Page ID ## 15011–15016.)

On August 24, 2023, the district court issued its 139-page opinion overruling all objections and approving entry of the 2023 Decree. (R. 2130, Page ID ## 15095–15233.) The district court considered and rejected each objection and found that "approval and entry of the Proposed Decree is in the best interest of the fishery, the Parties, and the *amici*" because the Decree "respects and promotes Tribal fishing rights and opportunities, yet it also preserves the Great Lakes fishery and recognizes the shared nature of the resource." (*Id.* at Page ID # 15097.) The district court's order adopting the 2023 Decree was entered the same day. (R. 2131, Page ID ## 15234–15235.) In that order, the district court also dismissed as moot Sault Tribe's motion seeking reconsideration of the November 2022 order extending the 2000 Consent Decree for a seventh time. (*Id.,* Page ID # 15235.) The 2023 Decree has a 24-year term that expires on August 24, 2047. (2023 Decree, R. 2132, Page ID # 15301, § XXIII.A.)

STANDARD OF REVIEW

The district court's entry of the 2023 Great Lakes Fishing Decree is reviewed for an abuse of discretion. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 687, modified sub nom. *Washington v. United States,* 444 U.S. 816 (1979) (recognizing the district court's "exercise of its discretion" in apportioning the treaty resource); *United States v. Washington,* 157 F.3d 630, 642 (9th Cir. 1998) (reviewing for abuse of discretion the district court's apportionment of the treaty resource and entry of a management order). Even if the 2023 Decree is viewed as a permanent injunction, the abuse of discretion standard still applies. *Audi AG v. D'Amato,* 469 F.3d 534, 550 (6th Cir. 2006).

The district court's decision to extend the 2000 Consent Decree also is reviewed for an abuse of discretion. *Vanguards of Cleveland v. City of Cleveland,* 23 F.3d 1013, 1017 (6th Cir. 1994) (citing *Lorain NAACP v. Lorain Bd. of Educ.,* 979 F.2d 1141, 1147–48 (6th Cir. 1992)).

"An abuse of discretion occurs when a district court 'commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly

erroneous findings of fact.'" *King v. Harwood,* 852 F.3d 568, 579 (6th Cir. 2017) (quoting *Info-Hold, Inc. v. Sound Merchandising, Inc.,* 538 F.3d 448, 454 (6th Cir. 2008)). The district court's findings of fact are reviewed for clear error. *See Chesnut v. United States,* 15 F.4th 436, 441 (6th Cir. 2021); Fed. R. Civ. P. 52(a)(6). Also, this Court reviews de novo whether the district court improperly applied the law or used an erroneous legal standard. *Miller v. State Farm Mut. Auto. Ins. Co.,* 87 F.3d 822, 824 (6th Cir. 1996).

SUMMARY OF ARGUMENT

This Court should affirm because the district court did not abuse its discretion by approving entry of the 2023 Decree. The district court appropriately entered the 2023 Decree as a management order pursuant to its equitable powers and continuing jurisdiction to implement and enforce its original 1979 decision recognizing the treaty fishing right. Sault Tribe forfeited its argument that an injunction analysis or procedures applied to the district court's consideration of the 2023 Decree because Sault Tribe did not raise that issue below. But even if the Decree were viewed as a permanent injunction, it would meet the standard for injunctive relief. The Decree also is not a consent

decree because not all parties agreed to it, and for that reason, Sault Tribe's arguments about entry of a consent decree are irrelevant.

In addition, Sault Tribe's challenge to the district court's final extension of the 2000 Consent Decree is moot because that extension has expired. At any rate, the extension was appropriate to address a significant change in circumstances because allowing the decree to lapse and create a regulatory gap would have been detrimental to the public's interest in protecting the treaty right and the resource. Also, the extension was suitably tailored in light of the status of the parties' negotiations for a successor to the 2000 Consent Decree.

ARGUMENT

I. The district court did not abuse its discretion when it entered the 2023 Decree as an exercise of its equitable authority and continuing jurisdiction.

The district court entered the 2023 Decree not as a permanent injunction or as a consent decree, but as a management order to implement and enforce its original 1979 decision recognizing the tribal treaty right. Sault Tribe asserts for the first time on appeal that the district court was required to invoke the standards and procedures for entry of injunctive relief in considering the Decree. Sault Tribe

forfeited this argument by not raising it below. However, even if this Court considers the argument, the district court did not abuse its discretion because entry of the 2023 Decree was a proper exercise of the district court's equitable authority and continuing jurisdiction to protect the treaty right and the scarce treaty resource.

A. Sault Tribe forfeited any argument that the district court was required to apply the procedures or standard for injunctive relief by not raising the issue in the lower court.

Sault Tribe participated in the district court's objection process without asserting that the court was required to follow the procedures for entry of a permanent injunction or that an injunction analysis applied. Because it did not raise these matters below, Sault Tribe cannot assert error now.

An appellate court ordinarily will not address new arguments raised for the first time on appeal. *Ohio State Univ. v. Redbubble, Inc.*, 989 F.3d 435, 443 (6th Cir. 2021) (quoting *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 590 (6th Cir. 2002)). Unpreserved claims are either forfeited or waived. Forfeiture is a party's "failure to make the timely assertion of a right," while waiver "is the intentional relinquishment or

abandonment of a known right." *Ohio State,* 989 F.3d at 443 (quoting *United States v. Petlechkov*, 922 F.3d 762, 767 (6th Cir. 2019)).

Although this Court has discretion to entertain issues not raised before the district court, it exercises that discretion "only in exceptional cases or when application of the rule would produce a plain miscarriage of justice." *Ohio State,* 989 F.3d at 445 (quoting *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 528 (6th Cir. 2014) (cleaned up). In deciding whether to exercise its discretion to hear forfeited issues on appeal, this Court considers the following factors: "(1) 'whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts;' (2) 'whether the proper resolution of the new issue is clear and beyond doubt;' (3) 'whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice;' and (4) 'the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court.' " *Johnson v. Ford Motor Co.,* 13 F.4th 493, 504 (6th Cir. 2021) (quoting *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996)).

Months before the Stipulating Parties filed a proposed decree, the district court indicated that it would establish a process to consider and resolve objections to it. (*See, e.g.,* Op. and Order Denying Mot. to Intervene, R. 1985, Page ID # 11681.) Ultimately, that process allowed the parties and amici curiae to file objections, file responses to the objections, participate in a two-day hearing, and file proposed findings of fact and conclusions of law. (Am. Scheduling Order, R. 2053, Page ID ## 12395–12396; Minutes of Hr'g, R. 2110, 2113; Order Following Objections Hr'g, R. 2114, Page ID ## 14375–14378.) This process took six months from the filing of the first objections to the filing of proposed findings of fact and conclusions of law. (CPMR Obj., R. 2062, Page ID ## 12499–12534; GTB Prop. Findings, R. 2126, Page ID ## 15011–15016.) Sault Tribe participated in each stage of the process. Sault Tribe filed objections to the proposed decree (R. 2077, Page ID ## 12804–12823), responded to CPMR's objections (R. 2084, Page ID ## 12949–12983), participated in the objections hearing (5/24/23 Hr'g Tr, R. 2119, Page ID ## 14413–14625; 5/25/23 Hr'g Tr, R. 2120, Page ID ## 14626–14821), and filed proposed findings of fact and conclusions of law. (R. 2123, Page ID ## 14828–14860.) However, at no time during

this six-month process did Sault Tribe suggest that the district court had to follow a different procedure that applied to permanent injunctions.

In addition, Sault Tribe never asserted that the district court must engage in an injunction analysis. Sault Tribe argued below, as it does on appeal, that the district court could not enter the 2023 Decree as a consent decree because it lacked authority to impose a consent decree against a non-consenting party. (*See, e.g.,* Sault Objections, R. 2077, Page ID # 12806–12808.) It also argued that the 2023 Decree's limitations on tribal treaty fishing exceeded what the State could impose under the conservation necessity standard (*id.* at 12805–12806), which the district court determined was not relevant to its decision, (*see* Op., R. 2130 at Page ID # 15110). However, Sault Tribe did not suggest in any filing or at the hearing that an injunction analysis should apply to the district court's consideration of the proposed decree or the objections.

Because Sault Tribe did not oppose the objection process and did not assert that an injunction analysis applied, it forfeited those arguments for appeal. This is not a rare situation that warrants

consideration of a forfeited issue because Sault Tribe had ample notice of the procedures the district court intended to follow and time to raise any objections it had to those procedures but did not do so. For these same reasons, a plain miscarriage of justice will not result if the issues are not considered. Further, as discussed *infra,* Argument I.C, the 2023 Decree meets the standard for injunctive relief. This Court should decline to address these forfeited issues.

B. The district court properly entered the 2023 Decree as a management order.

If this Court determines that Sault Tribe did not forfeit this issue concerning whether the district court should have followed the procedures to enter a permanent injunction, then it should still hold that the district court did not abuse its discretion in entering the 2023 Decree. Over the past fifty years, the district court has exercised its equitable authority to issue management orders regulating and allocating the Great Lakes fishery to protect the tribes' treaty rights and preserve the resource. The district court's exercise of this authority is in furtherance of its continuing jurisdiction, which it retained "for the life of this decree to take evidence, to make rulings and to issue such

orders as may be just and proper upon the facts and law, and in the implementation of this decree." *Michigan,* 471 F. Supp. at 281. The district court properly relied on these same bases for its continuing authority to enter the 2023 Decree.

The 2023 Decree was far from the first instance when the district court entered a management order rather than a permanent injunction. In the first several years after the 1979 decision, the district court exercised its continuing jurisdiction and equitable powers to enter numerous management orders regulating and allocating the fishery, and at times it did so over party objections. *See*, *e.g.*, *Michigan,* 653 F.2d at 279 (affirming district court order retaining federal regulations governing the fishery); *United States v. Michigan,* 534 F. Supp. 668, 669 (W.D. Mich. 1982) (granting a motion to adopt proposed tribal regulations); (Order, R. 2076-1, Page ID # 12803 (approving tribal regulations over the objection of the State); Order, R. 2080-1, Page ID # 12833 (entering multiparty regulations on the parties' stipulation); *see also Michigan,* 12 I.L.R. at 3089 (noting the parties had "[o]n numerous occasions" "invoked the court's continuing jurisdiction to resolve controversies and disputes among themselves," involving "primarily

conservation closures necessitated by the threat of overharvest of various fish stocks"); Op., R. 2130, Page ID ## 15098–15103.)

Then in 1985, the district court, after providing the parties with an opportunity to be heard, exercised its equitable authority and continuing jurisdiction to enter a decree that allocated and regulated the resource—and it did so over a party's objection. *See Michigan,* 12 I.L.R. 3079. The district court stated that its authority to enter the 1985 Decree derived from two sources. The first was its "powers as a court of equity." *Id.* (citing *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975)). The second was Supreme Court precedent that "endorse[d] the court's power to allocate a fishery in order to effectuate a treaty." *Michigan,* 12 I.L.R. at 3080 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, modified sub nom. *Washington v. United States*, 444 U.S. 816 (1979)).

The district court's entry of the 2023 Decree is supported by these same two sources of authority. The 2023 Decree is simply the latest in a long line of management orders intended to implement and enforce the district court's 1979 decision recognizing the tribal treaty right. The district court's exercise of that authority in this most recent chapter of

the litigation is supported by longstanding case law concerning Indian treaty rights to scarce natural resources that recognize a district court's equitable authority to apportion or manage that resource. *See Fishing Vessel Ass'n*, 443 U.S. at 685–86 (recognizing the district court's authority to apportion the treaty resource); *United States v. Winans*, 198 U.S. 371, 384 (1905) (holding that "adjustment and accommodation" of tribal treaty fishing rights "was a matter for judicial determination"). Indeed, this Court has previously acknowledged the district court's "jurisdiction to determine the rights of the parties under treaties of the United States" in this case. *Michigan*, 653 F.2d at 280.

In considering the 2023 Decree and the objections to it, the district court weighed the factors that guided the court in 1985 to determine whether the Decree protected the tribal treaty right and the fishery and whether it recognized the shared nature of the resource. The district court's "principal concern" was "one of preservation: preservation of the treaty-reserved rights of the tribal fishers; and preservation of the resource." *Michigan,* 12 I.L.R. at 3079 (Page ID # 2111). Several factors informed the analysis in 1985:

> Preservation and conservation of the resource; impact of the plans on all [the] tribes; consistency of the plan with the

> tribal right to fish and the recognition that the resource is shared; reduction of social conflict; feasibility and methods of implementation; protection of Indian fishermen from discrimination in favor of other classes of fishermen; proximity; access; species of fish stocks available; harvestability of fish stocks; the economic impact on Indian fishermen; stability of the fishery; contaminant levels; management and marketing concerns; and flexibility versus predictability of the fishery.

Id. at 3081 (Page ID # 2113). The court need not give these factors equal weight; rather, the court must strive for "a fair and equitable decision in keeping with the reserved rights of the tribal fishermen and the preservation of the resource." *Id.*

Sault Tribe argues that these fifteen factors were inapplicable to the district court's consideration of the 2023 Decree and that the court was required instead to undertake an injunction analysis. (Sault Appeal Br. 33–34.) However, Sault Tribe has previously asserted *in this case* that an injunction analysis does not apply to requests for orders implementing and protecting the district court's prior decree. (Memo. of Points & Authorities, Sault Appendix, A022 ("Although the plaintiffs are not conceeding [sic] that the law regarding the issuance of preliminary injunction applies to a request to implement and protect a prior decree . . . ."); (*id.* at A016-A017); *see also Eubanks v. CBSK Fin.*

Grp., Inc., 385 F.3d 894, 897 (6th Cir. 2004) (discussing the doctrine of judicial estoppel).

The law of the case makes clear that an injunction analysis does not guide the district court's decision in considering entry of a management order. The law of the case also supports the district court's approach to analyzing a management order regarding *this* treaty resource (the Great Lakes fishery in the 1836 Treaty ceded waters) and *these* treaty rights (the right to fish in the 1836 Treaty ceded waters). *See Michigan,* 12 I.L.R. 3079. The district court did not abuse its discretion by entering the 2023 Decree when it followed the well-trod path in this longstanding case.

C. Even if the 2023 Decree is viewed as a permanent injunction, it meets the standard for injunctive relief.

Even if this Court views the 2023 Decree as a permanent injunction, the outcome for Sault Tribe is the same. Under the analysis for either a management order or a permanent injunction, the objective is to protect the tribal treaty-reserved fishing right and the fishery resource. Repackaging the 2023 Decree as a permanent injunction

would not lead to a different result because the Decree fulfills those protective goals under either standard.

A party seeking a permanent injunction must demonstrate that (1) it has suffered irreparable injury, (2) there is no adequate remedy at law, (3) the balance of hardships between the movant and non-movant favors an equitable remedy, and (4) it is in the public's interest to issue the injunction. *Audi AG v. D'Amato*, 469 F.3d 534, 550 (6th Cir. 2006) (citing *eBay Inc., et al. v. MercExchange, LLC,* 547 U.S. 388 (2006)). The 2023 Decree meets all four of these factors.

First, the irreparable injury to be addressed under an injunction analysis is harm to the tribal treaty right and the fishery resource. Likewise, the "principal concern" in analyzing a management order is protection of the treaty right and the resource. *Michigan,* 12 I.L.R. at 3079 (Page ID # 2111). Accordingly, the fifteen factors that informed the district court's decision in entering the management order in 1985 would also apply to the first factor of the injunction analysis. The district court considered those factors here and determined that they weighed in favor of entry of the 2023 Decree.

Second, no adequate remedy at law exists if the tribes' treaty rights or the resource are impaired or lost. Legal remedies cannot compensate for the loss or impairment of tribal treaty rights. *Mille Lacs Band of Chippewa Indians v. Minnesota,* 952 F. Supp. 1362, 1385 (D. Minn. 1997) (citing *United States v. Washington,* 384 F. Supp. 312, 404 (W.D. Wash. 1974) ("injunctive relief is the appropriate remedy in treaty rights cases given the unique nature of the rights and the inability to quantify damages"). And because loss of the resource means consequent loss of the treaty right, legal remedies cannot compensate for damage to or loss of the resource.

Third, the district court balanced the hardships between the Stipulating Parties and Sault Tribe as part of the objection process. Sault Tribe filed objections to the 2023 Decree that described the hardships it would face if the 2023 Decree were entered. The Stipulating Parties were given the opportunity to respond to those objections. The parties participated in a two-day hearing concerning the objections, and then they filed proposed findings of fact and conclusions of law. In its opinion, the district court methodically considered and rejected each of Sault Tribe's 139 objections to the

Decree. The court entered the 2023 Decree because it concluded that the balance of hardships favored the Decree's entry. (Op., R. 2130, Page ID # 15097 (concluding that the 2023 Decree was "in the best interest of the fishery, the Parties [including Sault Tribe], and the amici")).

Fourth and finally, consideration of the public interest was expressly incorporated into the district court's objection procedures. *See Williams v. Vukovich,* 720 F.2d 909, 920–24 (6th Cir. 1983) (requiring consideration of whether a proposed decree is "consistent with the public interest."). The public interest here favors protecting the tribal treaty right *and* the resource, and the district court entered the 2023 Decree because it concluded that the Decree would preserve both.

To the extent Sault Tribe asserts that the district court did not follow the procedural requirements for entry of a permanent injunction, Sault Tribe has not identified those procedures in its brief. Nor has it explained how a different procedure would have led to a different result. As discussed, Sault Tribe had ample opportunity to present its concerns to the district court through the objection process. And yet, it chose not to present evidentiary support for its objections and did not request an evidentiary hearing on the objections. (Order, R. 2114, Page ID

14376; Op., R. 2130, Page ID # 15106–15107 ("Unlike the Stipulating Parties and *amicus*, the Sault Tribe did not support its positions with affidavits from expert witnesses or other documentary evidence."); 5/25/23 Hr'g Tr., R. 2120, Page ID # 14820 ("The issue then will be whether you want to come back to court for live testimony.").) Sault Tribe has not demonstrated that a different procedure was warranted, nor that it even had an interest in following that procedure in the district court.

Whether the 2023 Decree is considered a management order or an injunction, the district court's primary goal was to ensure that the tribes can meaningfully exercise their reserved treaty rights and that the resource is protected from depletion. Reframing the analysis in terms of a permanent injunction would not lead to a different result for the treaty right, the resource, or this appeal.

D. The 2023 Decree is not a consent decree, but even if it were, its entry was not an abuse of discretion.

The State agrees with Sault Tribe that the 2023 Decree is not a consent decree because all parties did not consent to it. (Sault Appeal Br. 29.) The district court also acknowledged that the Decree could not

be a consent decree because all seven parties did not agree to it. (*See* Op., R. 2130, Page ID # 15108 (citing Black's Law Dictionary (11th ed. 2019).) However, the basis for the district court's entry of the Decree was not the parties' consent, but rather the court's equitable authority to manage a scarce treaty resource and its continuing jurisdiction to implement its 1979 decision. For that reason, the consent decree case law that Sault Tribe relies on is inapposite.

First, as discussed, the district court was not required to follow the procedures for entry of a consent decree over a party's objection because it entered the 2023 Decree as a management order concerning a scarce treaty resource. *See supra,* Arg. I.B. Nonetheless, the district court borrowed this Court's procedures for approving consent decrees to manage objections to the Decree. *See Vukovich,* 720 F.2d at 920–24. Those procedures are intended to provide interested third parties "a full and fair opportunity to consider the proposed decree and develop a response." *Id.* at 921. Under those procedures, the court holds a "reasonableness hearing" to consider objections and then determines "whether the decree is fair, adequate, and reasonable," *id.*, and "consistent with the public interest." *Id.* at 923. Accordingly, the

district court here provided notice and an opportunity for the submission of written objections to the Decree (*see* Order, R. 2053, Page ID # 12396), held a two-day hearing on the objections (Order, R. 2114, Page ID # 14376), and allowed objectors to file proposed findings of fact and conclusions of law, (*id.*)

Because the 2023 Decree is not a consent decree, the district court also was not required to hold a trial prior to entering it. In considering a decree governing the exercise of tribal treaty rights, the district court may limit the hearing regarding objections "to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *United States v. Oregon,* 913 F.2d 576, 582 (9th Cir. 1990) (quoting *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir. 1977)). An objecting party does not have a broad right even to a quasi-trial, but only to an "opportunity to 'air its objections' at a reasonableness or fairness hearing." *Oregon,* 913 F.2d at 582. Sault Tribe was granted that opportunity here.

Even if the 2023 Decree could be considered a consent decree, the institutional consent decree cases that Sault Tribe cites are distinguishable. In those cases, the courts entered consent decrees in the first instance based on the parties' consent. *See Local No. 93, Int'l*

Ass'n of Firefighters, AFL-CIO C.L.C. v. Cleveland, 478 U.S. 501 (1986) (adjudicating consent decree to resolve initial litigation over a civil rights violation); *United States v. Hialeah,* 140 F.3d 968 (11th Cir. 1998) (same); *White v. Ala.,* 74 F.3d 1058 (11th Cir. 1996) (same); *United States v. Miami,* 664 F.2d 435 (5th Cir. 1981) (same). In this case, the district court entered the Decree to implement and enforce a *prior* decree based on continuing jurisdiction. Sault Tribe does not cite any cases where a court entered a decree pursuant to its continuing jurisdiction, and certainly none where a court entered a management order regulating and allocating a resource that serves tribal treaty rights.

Also, this is not a situation where the conditions that gave rise to the litigation have subsided and a consent decree no longer serves its intended purpose. Sault Tribe quotes case law holding that a federal court "must exercise its equitable powers to ensure that when the objects of the decree have been obtained, responsibility for discharging [a government's] obligations is returned promptly to the [government] and its officials." (Sault Appeal Br. 48 (quoting *Frew v. Hawkins,* 540

U.S. 431, 442 (2004)).) However, the objects of the management orders in this case have not been obtained.

The impetus for the district court's management orders is protection of the tribal treaty right and the resource that right depends on. Impacts from invasive species, climate change, and other factors have unfortunately caused the treaty resource to become more scarce in the past fifty years; the scarcity of fish in the Great Lakes and the conditions that make them scarce have not abated. Thus, the need for management orders continues, as they allow for responsiveness to changes in the resource over time to ensure the tribal treaty right remains meaningful and that the shared resource is preserved.

Finally, Sault Tribe asserts that the 2023 Decree could not have been entered as a consent decree because it does not further the objectives of the 1836 Treaty, as required under federal law. (Sault Appeal Br. 43 (citing *Frew,* 540 U.S. at 437).) Sault Tribe argues that rather than advance the tribes' exercise of the treaty right, the 2023 Decree unreasonably restricts those rights and imposes more restrictions on the tribes than on the State. (Sault Appeal Br. 43–44.)

The mere fact that the 2023 Decree imposes limitations on the tribal treaty right does not, in and of itself, mean that the Decree fails to advance the objectives of the 1836 Treaty. To the contrary, the district court's primary focus in considering entry of the Decree was protecting both the treaty right and the resource on which that treaty right depends, which requires a balance rather than favoring tribal rights over the resource. Because the treaty resource is scarce and is shared by the tribes and the State, the district court concluded that use of the resource must be limited to ensure its continued viability and that the burden of those limitations must be borne by all users, including the tribes—four of which agreed to entry of the Decree. As it did below, Sault Tribe makes a broad statement claiming that the Decree is unfair because it imposes restrictions on the tribes, but it fails to analyze those limits in light of the resource's scarcity or its shared nature.

Relatedly, Sault Tribe argues that entry of the 2023 Decree as a consent decree was improper because it imposes more restrictions on the tribes than on the State. However, this argument misapprehends the regulation of State fishers under the Decree. In most cases, State

commercial fishers are subject to the same, if not more restrictive, regulations as tribal commercial fishers. (*See, e.g.,* 2023 Decree, R. 2132, Page ID ## 15258–15261, § IV.C (describing areas closed to commercial fishing for all parties).) And often when a provision does not apply to the State, it is because State fishers are subject to an absolute prohibition while the tribal rights are merely limited rather than barred. (*See, e.g.,* 2023 Decree, R. 2132, Page ID ## 15265–15266, § VI.C.3.a (establishing requirements for marking gill nets, which State commercial fishers are prohibited from using).) Similarly, with respect to recreational fishing, tribal and State fishers are subject to identical regulations, except that tribal fishers do not need a license to recreationally fish. (2023 Decree, R. 2132, Page ID # 15261, § V.B.)

Sault Tribe's argument also disregards the history and the current status of State commercial fishing in 1836 Treaty waters. When this case began in the 1970s, the State had dozens of commercial fishers operating in treaty waters. The State commercial operations were substantial enough that the tribes filed a motion in 1983 seeking to reduce the State's harvest to 50 percent of the available catch to allow the tribes a meaningful fishing opportunity. (Mot., R. 2075-5, Page ID

12766.) Before the 1985 Decree took effect, the State had 55 licensed commercial fishers actively operating in 1836 Treaty waters. (Aff. of Thomas M. Goniea, R. 2103-3, Page ID # 14079, ¶ 3.a.) Approximately half those licenses were eliminated after the 1985 Decree was entered. (*Id.* at Page ID ## 14079, 14080, ¶¶ 3.a, 3.c (55 active licenses in 1984 compared with 28 in 1986).) *See also Bigelow*, 727 F. Supp. at 348 (noting that the 27 plaintiffs "were allowed to retain their licenses but pursuant to this Court's order, were not allowed to harvest any fish"). Today, fewer than ten State commercial fishing licenses actively operate in 1836 Treaty waters. (*Id.* at Page ID # 14080, ¶ 4.)

Further, today's State commercial fishing operations are substantially limited by the terms of the 2023 Decree. State commercial fishing is allowed only within 50 miles of four ports in 1836 Treaty waters. (2023 Decree, R. 2132, Page ID ## 15257–15258, § IV.B.1.) Also, the 2000 Consent Decree allowed the State to add commercial fishers in certain areas, but the 2023 Decree eliminates that ability, meaning the State cannot issue any additional commercial fishing licenses in 1836 Treaty waters. (*Id.*)

To the extent the regulations for State commercial fishers in the 2023 Decree may seem less burdensome, it is because of the limited State commercial fishery and the fact that a single government participates in that fishery, compared to the much larger, five-party tribal commercial fishery.

* * *

In sum, the district court properly entered the 2023 Decree as a management order to protect the tribal treaty right and the resource. The 2023 Decree is not a permanent injunction, and Sault Tribe forfeited any argument regarding that issue by not raising it before the district court. Further, the Decree is not a consent decree because all parties did not agree to it. However, even under the injunction or consent decree analyses, the district court did not abuse its discretion by entering the 2023 Decree. This Court should affirm.

II. The district court did not abuse its discretion in extending the 2000 Consent Decree pending consideration of a successor management order.

If this Court concludes that the district court did not abuse its discretion in entering the 2023 Decree (which it should, for the reasons discussed above), it need not reach Sault Tribe's argument regarding

the district court's final extension of the 2000 Consent Decree. But if this Court considers the argument, it should reject it as moot because the extension that Sault Tribe complains of expired long ago. Further, even if the issue were not moot, extending the 2000 Consent Decree was not an abuse of discretion, and continuing to hold Sault Tribe subject to its terms is both equitable and necessary.

A. The extension of the 2000 Consent Decree that Sault Tribe challenges has expired, making this issue moot.

Sault Tribe's challenge to the final extension of the 2000 Consent Decree should be dismissed as moot. This Court only has jurisdiction to hear cases or controversies and does not have the power to adjudicate disputes that are moot. U.S. Const. art. 3, § 2, cl. 1; *In re Kramer,* 71 F.4th 428, 438 (6th Cir. 2023) (citing *Hanrahan v. Mohr,* 905 F.3d 947, 960 (6th Cir. 2018)). A " 'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *In re Kramer,* 71 F.4th at 438 (quoting *Powell v. McCormack,* 395 U.S. 486 (1969)). To determine whether an issue is moot, this Court asks whether it would "make a difference to the legal interests of the parties" if it granted the relief sought. *Hanrahan,* 905

F.3d at 960 (citation omitted). If a ruling from this Court would not affect the legal interests of the parties, an issue is moot, and this Court lacks jurisdiction to consider it. *In re Kramer,* 71 F.4th at 438 (citing *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.,* 365 F.3d 435, 458 (6th Cir. 2004)).

Sault Tribe's challenge to the final extension of the 2000 Consent Decree presumes that reversing entry of the 2023 Decree would resurrect the 2000 Consent Decree. In other words, if this Court reverses the district court's decision and remands for further proceedings, Sault Tribe expects the 2000 Consent Decree will once again govern the parties. However, the district court's order extended the 2000 Consent Decree only "until all objections to a proposed successor decree have been adjudicated[.]" (Order, R. 2027, Page ID # 12021.) That extension ended once the district court heard and decided the objections, which was final when the district court issued its opinion and order entering the 2023 Decree. A reversal of that decision

would not revive the extension and put the 2000 Consent Decree back into effect.[4]

Because the extension of the 2000 Consent Decree has expired, this Court cannot grant any effective relief to Sault Tribe regarding that extension. Therefore, this issue should be dismissed as moot. *See In re Kramer,* 71 F.4th at 438.

B. Extending the 2000 Consent Decree was appropriate and suitably tailored to the changed circumstances.

If this Court deems Sault Tribe's challenge to the final extension of the 2000 Consent Decree to be justiciable, then that challenge fails because the extension was appropriate.

A consent decree "is a hybrid of a contract and a judicial act." *Universal Settlements Int'l, Inc. v. Nat'l Viatical, Inc.*, 568 F. App'x 398, 404 (6th Cir. 2014). It is "a settlement agreement subject to continued judicial policing." *Vanguards of Cleveland v. City of Cleveland,* 23 F.3d

[4] The six Stipulating Parties endorsed the entry of the 2023 Decree. If this Court reverses and remands, that reversal should be only as to Sault Tribe, and an emergency management order should be entered binding Sault Tribe to the 2023 Decree to ensure that the tribal treaty right and the resource remain protected pending further proceedings. *See generally Michigan,* 653 F.2d 277.

1013, 1017 (6th Cir. 1994) (quoting *Vukovich,* 720 F.2d at 920) (internal quotation marks omitted).

A district court's authority to enforce a consent decree includes the power to extend it "in response to changed circumstances." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 380 (1992); *United States v. United Shoe Machinery Corp.,* 391 U.S. 244, 248 (1968); *Chrysler Corp. v. United States,* 316 U.S. 556, 562–63 (1942). A party seeking modification bears the burden of establishing that a significant change in circumstances warrants the modification. *Rufo,* 502 U.S. at 383. In considering a proposed modification to a decree, a significant change in circumstances can include: (1) "when changed factual conditions make compliance with the decree substantially more onerous," (2) "when the decree proves to be unworkable because of unforeseen obstacles," or (3) "when enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384. The proposed modification also must be "suitably tailored" to the changed circumstance. *Id.* at 383. In addition, a modification of a consent decree must further the decree's purpose without upsetting the parties' basic agreement. *Heath v. DeCourcy,* 992 F.2d 630, 634 (6th Cir. 1993).

In this instance, the extension of the 2000 Consent Decree was justified by a change in circumstances because enforcement of the decree without modification—that is, allowing it to lapse and creating a regulatory gap—would have been detrimental to the public interest in protecting both the resource and the tribal treaty right. The extension also was suitably tailored to the changed circumstances given the status of the parties' negotiations for a new decree, and the modification furthered the decree's purpose without upsetting the parties' basic agreement.

During the negotiations that led to the 2023 Decree, the district court extended the 2000 Consent Decree seven times. The first six orders combined to extend the 2000 Consent Decree for more than two years, from August 2020 to November 2022. Each of those six times, Sault Tribe joined the motion for an extension, did not oppose the motion, or sought an extension of a different duration than what the other parties sought. (R. 1882, Page ID ## 10677–10678 (sought shorter extension); R. 1901, Page ID ## 10836–10839 (joined motion); R. 1909, Page ID ## 10850–10853 (same); R. 1944, Page ID # 10908 (no

objection to the motion); R. 1962, Page ID ## 10929–10933 (joined motion); R. 2006, Page ID ## 11925–11927 (sought longer extension).)

In granting the first extension, the district court stated it was "extremely concerned with allowing the Decree to expire and leaving a regulatory gap in the 1836 Treaty fishing waters." (R. 1892, Page ID # 10821.) The district court noted that "[i]f the Decree ends without a successor agreement, the basic agreement between the parties is more than upset; it is nonexistent." (*Id.* at 10822.) The court worried that if the 2000 Consent Decree ended without a successor decree, "the parties would devote substantial resources to litigating immediate concerns via numerous motions for temporary restraining orders and preliminary injunctions." (*Id.* at Page ID # 10822.) The district court concluded, "At this time, the Court finds that the parties' energy would be better directed at negotiating a successor Decree." (*Id.*) In sum, the district court extended the 2000 Consent Decree to ensure that the tribal treaty right and the resource that supports it remained protected while the parties directed their efforts toward a successor agreement.

The subsequent extensions were similarly motivated. The parties sought further extensions because, despite their expectations and best

efforts, they were unable to finalize a proposed successor decree to present to the district court before each extension was set to expire. These additional extensions were needed to ensure that the treaty right and the resource remained protected.

The final extension—the one that Sault Tribe challenges—arose from the same type of changed circumstances that drove each prior extension. The penultimate extension expired on November 14, 2022. When the six parties requested that extension in September 2023, they sought additional time for "the undersigned parties [to] secure formal governmental approval of a successor consent decree." (Page ID # 11931.) From that request, it was clear that the parties were working to finalize a proposed decree to submit to the district court.

When it became clear that the parties would not meet that deadline, the Stipulating Parties moved for another extension, explaining that they had "reached consensus on a successor decree" except for a few items that unexpectedly remained unresolved between the State and the Grand Traverse Band. (Mot., R. 2025, Page ID # 12014.) Their motion also noted that all seven parties, including Sault Tribe, "had conditionally agreed to a significant portion of the

successor decree, though the Sault [Tribe] . . . maintained objections to certain provisions." (*Id.*) Finally, the motion stated that additional time was needed for the supporting parties to obtain formal approval for the proposed decree. (*Id.*)

Enforcement of the 2000 Consent Decree without modification—that is, without an extension of the expiration date—would have been detrimental to the public interest. *See Rufo,* 502 U.S. at 384. Like the 2023 Decree, the 2000 Consent Decree governed the regulation, management, and allocation of the Great Lakes fishery in the 1836 Treaty area. Without an extension, the 2000 Consent Decree would have lapsed, leaving the fishery without a regulatory framework. The district court's opinion adopting the 1985 Decree described the potential consequences of leaving such a regulatory gap, noting that the years following the 1979 decision affirming the treaty right and before the 1985 Decree was entered were "marred by hard feelings, social discord, occasional violence, stipulated court-ordered closures of large portions of the three affected Great Lakes, political posturing, protraction of the instant litigation, some outward manifestations of racism, and concern over the future of Michigan's greatest resources, her people and her

natural bounty." *United States v. Michigan,* 12 I.L.R. 3079, 3079 (1985). Each extension of the 2000 Consent Decree—including the final one—was aimed at preventing a regulatory gap between expiration of that decree and entry of a successor decree to avoid similar outcomes.

The final extension of the 2000 Consent Decree also was suitably tailored to the changed circumstances. *See Rufo,* 502 U.S. at 383. The order extending the 2000 Consent Decree established a process for the district court to resolve the outstanding issues if the State and Grand Traverse Band could not reach agreement by a date certain. (Order, R. 2027, Page ID ## 12021–12022.) The district court also scheduled a status conference with all parties to be held after those issues were resolved. (*Id.* at Page ID # 12022.) And of course, the extension was not open-ended or unconditional. It was conditionally time-limited "until all objections to a proposed successor decree have been adjudicated." (*Id.* at Page ID # 12022.)

The expectation when the final extension was granted was that resolution of the outstanding issues between the State and Grand Traverse Band would allow six parties to finalize and present a proposed decree to the district court, after which the district court

would establish a process to address objections. And that is exactly what happened. The district court issued an order on December 2, 2022, resolving the outstanding issues. (Order, R. 2040, Page ID ## 12147–12159.) Only ten days later—the day before Sault Tribe filed its motion for reconsideration (R. 2046, Page ID ## 12360–12363)—six parties filed the 2023 Decree as a proposed decree with a stipulation for entry of the same. (Stip. for Entry, R. 2042, Page ID ## 12161–12166; Proposed Decree, R. 2042-1, Page ID ## 12167–12232.) Then, at a status conference later that week, the district court established a process and timeline for consideration of objections to the proposed decree. (Minutes, R. 2049, Page ID # 12388; Amend. Scheduling Order, R. 2053, Page ID ## 12395–12396.) By extending the 2000 Consent Decree until the objection process was complete, the district court eliminated the need for additional motions for extensions while it considered the proposed decree and adjudicated objections to it.

Importantly, this extension supported the parties' bargain. Sault Tribe claims that the extension wreaked havoc on the parties' bargain because they agreed to a specific duration for the 2000 Consent Decree and Sault Tribe no longer consented to being bound by its terms. (Sault

Appeal Br. 56–58.) However, this argument focuses on only one provision of the 2000 Consent Decree: the expiration date. Of course, the parties' bargain was much broader. It resolved how they would work together to manage, regulate, and allocate the fishery in the 1836 Treaty waters. The final extension of the 2000 Consent Decree maintained the parties' bargain and prevented a regulatory gap while the proposed decree was finalized and considered by the district court. After all, as the district court noted in granting the first extension of the 2000 Consent Decree in July 2020, "[i]f the Decree ends without a successor agreement, the basic agreement between the parties is more than upset; it is nonexistent." (Op., R. 1892, Page ID # 10822.)

Those same concerns make it both equitable and necessary to continue to bind Sault Tribe to a decree if this Court should remand for further proceedings. It is clear from Sault Tribe's brief that it desires to operate its treaty fishery free of the restraints and limitations imposed by judicial management orders. (Sault Appeal Br. 50 ("It is time to return to Sault Tribe the responsibility of making its own legal and policy decisions and regulating its own Treaty fishing activities."); *id.*, 62 ("The District Court abused its discretion by indefinitely extending

the 2000 Consent Decree, rather than returning to Sault Tribe the responsibility of making its own policy decisions and regulating its own Treaty fishing activities.").) But allowing Sault Tribe to operate outside the district court's management orders would undermine the very purpose for which the management orders are put into place and put the resource, the other tribes' treaty rights, and the State's interests at risk. If the resource were sufficiently abundant to fulfill the treaty right and preserve future shared uses, then management orders would not be needed. It is because of the resource's scarcity that the district court has acted to allocate the resource and regulate the parties' use of it. Allowing one of the parties to avoid those orders threatens what the orders seek to protect.

This is especially so if the party that is no longer bound by the court's orders is Sault Tribe. Sault Tribe is by far the largest tribal user of the resource and the largest commercial user overall. (Memo. in Opp. to Mot., R. 1887, Page ID ## 10772–10773; Dec. of Brad Silet, R. 1889, Page ID # 10780, ¶ 3.) Allowing Sault Tribe to operate its fishery independent of the other parties and of the district court's management orders threatens the other tribes' ability to exercise their treaty rights

and threatens the State's interests in the resource. Essentially, Sault Tribe is asserting its sovereignty at the expense of that of the other tribes and the State.

Because the final extension of the 2000 Consent Decree was warranted by a significant change in circumstances and was suitably tailored to address those changed circumstances, the district court did not abuse its discretion in extending the decree.

CONCLUSION AND RELIEF REQUESTED

For these reasons, this Court should affirm the district court's order approving entry of the 2023 Decree.

Respectfully submitted,

/s/ Kelly M. Drake

Assistant Attorney General
Counsel of Record
Attorney for
Defendants-Appellees
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek@michigan.gov

Dated: May 31, 2024

CERTIFICATE OF COMPLIANCE

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

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 9,959 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

/s/ Kelly M. Drake
Assistant Attorney General
Counsel of Record
Attorney for
Defendants-Appellees
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek@michigan.gov

CERTIFICATE OF SERVICE

I certify that on May 31, 2024, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Kelly M. Drake

Kelly M. Drake
Assistant Attorney General
Counsel of Record
Attorney for
Defendants-Appellees
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664
drakek@michigan.gov

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
2000 Consent Decree	08/08/2000	R. 1458	3216–3400
Motion to Extend Great Lakes Fishing Consent Decree to December 31, 2020	06/24/2020	R. 1879	10664–10667
Joint Brief in Support of Motion to Extend Great Lakes Fishing Consent Decree to December 31, 2020	06/24/2020	R. 1880	10668–10673
Motion by the Sault Ste. Marie Tribe of Chippewa Indians to Extend Consent Decree for 90 Days Pursuant to This Court's Continuing Jurisdiction	06/24/2020	R. 1882	10677–10678
Memorandum in Support of Motion by the Sault Ste. Marie Tribe of Chippewa Indians to Extend Consent Decree for 90 Days Pursuant to This Court's Continuing Jurisdiction	06/24/2020	R. 1883	10679–10693

Memorandum of the Sault Ste. Marie Tribe of Chippewa Indians in Opposition to the State of Michigan, United States, and Four Tribes' Motion to Extend Great Lakes Fishing Consent Decree to December 31, 2020	07/08/2020	R. 1887	10767–10775
Joint Brief in Opposition to Sault Ste. Marie Tribe's Motion to Extend Great Lakes Fishing Consent Decree	07/08/2020	R. 1890	10786–10795
Op. and Order [extending 2000 Consent Decree to December 31, 2020]	07/24/2020	R. 1892	10818–10825
Motion to Extend Great Lakes Fishing Consent Decree to June 30, 2021	12/04/2020	R. 1901	10836–10839
Order [extending 2000 Consent Decree to June 30, 2021]	12/08/2020	R. 1903	10843–10844
Motion to Extend Great Lakes Fishing Consent Decree to December 31, 2021	05/27/2021	R. 1909	10850–10853
Order [extending 2000 Consent Decree to December 31, 2021]	06/04/2021	R. 1912	10858–10859
Motion and Memorandum to Extend Great Lakes	11/15/2021	R. 1941	10899–10902

Fishing Consent Decree to June 30, 2022			
Order [directing Sault Tribe to file a response to R. 1941]	11/16/2021	R. 1943	10906–10907
Response of the Sault Ste. Marie Tribe of Chippewa Indians to the Motion to Extend Great Lakes Fishing Consent Decree to June 30, 2022	11/17/2021	R. 1944	10908
Order Extending the Great Lakes Fishing Consent Decree	11/29/2021	R. 1945	10909–10911
Motion and Memorandum to Extend Great Lakes Fishing Consent Decree to September 30, 2022	06/27/2022	R. 1962	10929–10933
Order Granting Motion to Extend the Great Lakes Fishing Consent Decree	06/28/2022	R. 1963	10934–10935
Motion of the Sault Ste. Marie Tribe of Chippewa Indians to Extend 2000 Consent Decree	09/16/2022	R. 2006	11925–11927
Motion and Memorandum to Extend Great Lakes Fishing Consent Decree to November 14, 2022	09/23/2022	R. 2009	11931–11934
Response to Sault Ste. Marie Tribe of Chippewa	09/23/2022	R. 2011	11937–11940

Indians' Motion to Extend 2000 Consent Decree			
Sault Ste. Marie Tribe of Chippewa Indians' Response and Non-Councurrence [sic] in Opposition to United States' Motion to Extend Decree until Novemeber [sic] 14, 2022	09/27/2022	R. 2012	11941–11946
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