No. 23-1944

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,
and
BAY MILLS INDIAN COMMUNITY; SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS; LITTLE RIVER BAND OF OTTAWA INDIANS; LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
Intervenors-Appellees,

v.

STATE OF MICHIGAN, and its agents,
Defendants-Appellees,
and
COALITION TO PROTECT MICHIGAN RESOURCES,
f/k/a Michigan Fisheries Resources Conservation Coalition,
Amicus Curiae-Appellant/Cross-Appellee.

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

JOINT RESPONSE OF BAY MILLS INDIAN COMMUNITY, LITTLE RIVER BAND OF OTTAWA INDIANS, AND LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS TO APPELLANT'S OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), the undersigned Tribes take no position, and defer to the discretion of this Court, on whether oral argument would aid the Court's resolution of this case. But the Tribes stand ready to assist the Court by presenting oral argument to address any questions the Court may have about this dispute, and if the Court hears argument, the Tribes would like to participate.

STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(i), this brief expressly incorporates the jurisdictional statement of the United States.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(i), this brief expressly incorporates the statement of the issues presented for review as set forth by the United States.

STATEMENT OF THE CASE

Pursuant to Federal Rule of Appellate Procedure 28(i), this brief expressly incorporates the statement of the case as set forth by the United States.

INTRODUCTION

Six sovereign governments—the United States, the State of Michigan, the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little River Band of Ottawa Indians, and the Little Traverse Bay Bands of Odawa Indians (the "Stipulating Parties")—each with independent legal obligations to protect the Great Lakes fishery, have agreed to the 2023 Great Lakes Fishing Decree, R. 2132 ("Decree" or "2023 Decree"). That Decree is the product of hundreds of virtual and in-person negotiation sessions between 2019 and 2023; thousands of pages of proposals, counterproposals, and counter-counterproposals; the technical expertise and close collaboration of teams of experienced fisheries

biologists and resource management specialists from the U.S. Fish and Wildlife Service, the Michigan Department of Natural Resources (DNR), and the Tribes; and the careful and continuous assessment by each sovereign of its interests, obligations, and priorities.

The district court approved the Decree on August 24, 2023. Order, R. 2131. It did so after years of active involvement in the implementation of the 2000 Consent Decree and more than four years of direct supervision of the parties' negotiations for the 2023 Decree, undertaken in close collaboration with the parties' negotiation facilitator, the Honorable Michael F. Cavanagh, who is a former Chief Justice of the Michigan Supreme Court. The court based its decision on thousands of pages of briefing and expert analysis submitted by the Stipulating Parties, as well as by two objectors, the Sault Ste. Marie Tribe of Chippewa Indians and Appellant, the Coalition to Protect Michigan Resources (Coalition). In addition, the court held two fairness hearings at which the Stipulating Parties and the objectors presented oral arguments on the legal, factual, and scientific bases for their respective positions. Of the two objectors, the Sault Ste. Marie Tribe had argued that the Decree "imposes too many regulations" on tribal fishing, and the Coalition adopted "the opposite view," arguing that the Decree "does not go far enough" in regulating tribal fishing. Opinion, R. 2130, Page ID # 15206.

In its exhaustive and carefully reasoned 139-page opinion, the district court addressed and rejected the objections of the Sault Ste. Marie Tribe and the Coalition, *id*. at Page ID ## 15107–15232, concluding that the Decree strikes an appropriate "medium" between their opposing positions, one that "protects the resource while appreciating the Treaty right," *id*. at Page ID # 15206.

The Coalition urges this Court to reverse the district court's approval of the Decree and send the parties back to the negotiating table. As addressed below, the Coalition's arguments are rooted not in objective fact or accepted fisheries management principles but in a vested institutional hostility towards the Tribes' treaty-guaranteed fishing right. The Coalition was in fact established and exists specifically to oppose vindication of the 1836 Treaty right in this very case.[1] The Coalition, in other words, is the very definition of a single-issue special interest group. As such, it comes to the courts unburdened by the constraints and responsibilities of sovereignty and governance, and with the luxury of advancing absolutist positions based on its own narrow interests.

The Stipulating Parties bear all those constraints and responsibilities and enjoy no such luxury. In 1985, Judge Enslen observed that "[t]he issues presented

[1] *See* Coalition To Protect Michigan Resources, *A Brief History of the Coalition To Protect Michigan Resources*, https://protectmiresources.com/brief-history/ (last visited Feb. 19, 2024) (detailing the Coalition's origins and central purpose as opposing the exercise of tribal treaty rights and the use of gill nets through participation in the *United States v. Michigan* litigation).

are not susceptible of facile and simplistic resolution." *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985).[2] He likened the sovereign parties' prospects of negotiating an agreement outside of litigation to an "impossible dream" and described the challenge as follows:

> [T]he task was formidable…. The standard to be employed in the negotiations was unclear; the weight to be assigned the varying priorities was indefinite; the maximization of the resource had to be viewed from both economic and behavioral vantage points; the resource application was always shifting[.]

Id. at 3080. This description well captures the challenges that the Stipulating Parties have faced the past four years. The United States bears the "solemn obligation" to protect the Tribes' exercise of the "federally created and federally protected" 1836 Treaty fishing right, *United States v. Michigan*, 653 F.2d 277, 278–79 (6th Cir. 1981), yet has independent responsibilities to preserve the fishery on behalf of the people of the United States at large, *see* 16 U.S.C. §§ 742a–754e. The State of Michigan must abide by federal law, including the 1836 Treaty, and at the same time bears public trust responsibilities under the Michigan Constitution to preserve the Great Lakes fishery for all its citizens, including the members of the Coalition as well as its Indian citizens. *See Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005). And the Tribes bear sovereign obligations to ensure a viable

[2] The decision is not available in public legal databases. It appears in the record at R. 1890-1.

fishery seven generations into the future; yet they confront an immediate existential crisis as the dwindling number of their citizens able to endure the hard economic realities of tribal commercial fishing in the twenty-first century portends a thousand-year-old foundation of cultural identity edging toward disappearance.

None of this makes for easy solutions or painless compromise. And all of it is compounded by the fact that today the Great Lakes fishery faces an array of new environmental challenges, including the proliferation of invasive mussels that have impacted the Whitefish harvest on which the Tribes have traditionally relied.[3]

However, with the understanding that no one has a monopoly on knowledge and that the times in which we find ourselves call for humility, shared commitment, and faith in the process whereby diverse perspectives become collective wisdom through *Naakenegewinaan*—an Anishinaabe word meaning "come to a compromise"—the Stipulating Parties did just that over the course of five years.

The Coalition has given this Court no credible basis to reverse the district court, scrap those efforts, and send the parties back to the drawing board. To do so would substitute the judgment of a single-issue special interest group for the

[3] *See, e.g.*, Kurt Williams, *Invasive Mussels Challenge Commercial Whitefish Fishing in the Great Lakes*, Great Lakes Echo (May 30, 2019), https://greatlakesecho.org/2019/05/30/invasive-mussels-challenge-commercial-whitefish-fishing-in-the-great-lakes/.

collective judgment of six sovereigns and their expert agencies, each with bedrock legal obligations to safeguard the fishery and decades of experience cooperatively grappling with the array of interrelated legal, ecological, social, and economic challenges inherent in doing so. Judicial restraint under these circumstances is the better path.[4]

SUMMARY OF THE ARGUMENT

The Tribes signatory to this brief agree with the arguments of the United States. To avoid duplicative briefing, they adopt those arguments. The Tribes limit this brief to the following issues:

First, the Coalition frames this appeal as a contest between tribal fishing under the 1836 Treaty and the public's interests in the viability of the Great Lakes fishery. That is a false dichotomy. While the Tribes' treaty right to fish is not absolute, it is a federally guaranteed right. Its exercise and protection *are* a public

[4] Judicial restraint is particularly appropriate here as the Stipulating Parties included in the 2023 Decree a provision allowing for reconsideration of its terms if the parties' major assumptions about the management framework prove incorrect to the detriment of a party's fishing opportunities or if unforeseen or materially changed circumstances emerge that frustrate the purpose of the Decree. Decree, R. 2132, Page ID ## 15300–15301 (§ XXII). This provision alone defeats the Coalition's repeated speculation that the 2023 Decree will have "disastrous" long-term consequences for the fishery. Indeed, under a similar provision in the 2000 Decree, the parties cooperatively stipulated to numerous adjustments to its terms over the course of the Decree in response to emergent circumstances. *See, e.g.*, Order Amending Consent Decree (July 29, 2015), R. 1844; Order Amending Consent Decree (May 23, 2017), R. 1855; Order Amending Consent Decree (Aug. 3, 2018), R. 1858.

interest and well within the ambit of considerations that animate the State's public trust obligations with respect to the Great Lakes. The State may, in its sovereign capacity, negotiate compromises that impact the relative harvest opportunities of sport fishers in exchange for other terms it deems in the public interest. The Tribes may do likewise with respect to the opportunities of tribal fishers. Both do so subject to mutual and solemn legal obligations to safeguard the fishery.

Second, Judge Enslen's reasoning and analysis in his decision adopting the 1985 Consent Decree is foundational to the law of the case. The Coalition portrays Judge Enslen's decision as (1) limiting the consideration of the 1836 Treaty right to the singular issue of the proper harvest allocation between tribal and state-licensed fishers, and (2) expressing a view of tribal gill net fishing as inherently destabilizing of the fishery and thus uniquely subject to curtailment when necessary to protect the public interest. Judge Enslen's decision nowhere adopts such views about gill net fishing. And it repeatedly underscores that the protection of the treaty right is, along with preservation of the resource, a public interest of the highest order and a central consideration in all stages of the analysis.

Third, the Coalition's arguments regarding the 2023 Decree's additional gill netting areas are without merit. The Coalition offers no credible evidence that the new areas will, as its argument assumes, result in new tribal gill net fishers entering the fishery, thereby increasing fishing pressure. The ranks of tribal gill net fishers

(and their efforts) have been declining for decades, and precipitously in recent years. The new areas will simply spatially redistribute the diminishing cohort of tribal fishers.

The Coalition cites no evidence in the post-1985 co-management era to support its hyperbolic warnings of "disastrous consequences" from the Decree's allowance of new gill net areas. It instead reaches back to events *of the 1970s* that it acknowledges involved "unlimited" and "unregulated" gill net fishing. Such antiquated evidence is wholly irrelevant in the modern context of carefully limited gill net fishing and federal-state-tribal co-management.

Moreover, the Coalition's indignant objections to the new gill net areas under the Decree overlook that, while tribal fishers have been excluded from vast areas of the ceded waters since 1985 and continuing under the 2000 and 2023 decrees, sport fishers have never been subject to such exclusions and may generally fish everywhere. Yet the alleged impacts to the fishery the Coalition warns of could be mitigated just as effectively by limiting sport fishing areas, a fact the Coalition does not appear able to comprehend. Its objections stem from an assumed entitlement to the status quo with no basis whatsoever in the law.

Finally, the Coalition's arguments regarding the information-sharing and enforcement provisions of the Decree are not credible. It warns of the "devastating" impacts from the allegedly inadequate harvest reporting

requirements for tribal fishers while ignoring that under the Decree, the hundreds of thousands of sport fishers who account for nearly fifty percent of the allocated harvest are subject to no reporting requirements at all. The Coalition's objections to the Decree's enforcement provisions (like its objections generally) are rooted in an unfounded fear of tribal overfishing and a reflexive mistrust of tribal governments and tribal fishers for which the Coalition provides not a shred of credible evidence.

ARGUMENT

I. Adoption of the Arguments of the United States

The Tribes signatory to this brief agree with the arguments set forth by the United States in its principal brief, including the United States' jurisdictional arguments regarding the Coalition's alleged right to appeal. To spare this Court duplicative briefing, the Tribes hereby adopt and incorporate the substantive contents of the United States' brief. *See* Fed. R. App. P. 28(i).

II. The Coalition Misconstrues the Rights and Interests at Issue.

The pervasive (if unspoken) assumption of the Coalition's brief is that the objectives of sport fishers are coterminous with the public interest in the Great Lakes fishery, with tribal gill netting an inherent threat to the fishery. The Coalition accordingly presents this case as a zero-sum contest between the rights of the public, on the one hand, and the treaty rights of the Tribes on the other. Thus, the Coalition urges, the State's agreement to terms allowing tribal gill net fishing

in areas previously closed to such fishing "represents a dereliction of the State's Great Lakes public trust responsibility[.]" Affidavit of James E. Johnson, R. 2062-5, Page ID # 12620.

To begin, the district court—in findings not challenged by the Coalition on appeal—rejected the Coalition's conflation of sport fishing with the broader public interest in the Great Lakes as "hypocritical" given the damaging impacts of sport fishing on the ecology, fish, and wildlife of the Great Lakes, affordable solutions to which the Coalition has actively opposed as a financial inconvenience to its members. *See* Opinion, R. 2130, Page ID ## 15231–15232 and n.33.

As for the Tribes' treaty rights, while "not absolute," the "treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government[.]" *United States v. Michigan*, 653 F.2d at 278.

Sport fishers, by contrast, have no assertable rights at stake in this case. *See, e.g.*, *Tallman v. Dep't of Nat. Res.*, 365 N.W.2d 724, 740 (Mich. 1984) ("To fish is a privilege accorded by the State … and not of private right." (citation omitted)). To the contrary, the State of Michigan "serves … as the trustee of public rights in the Great Lakes for fishing," *Glass*, 703 N.W.2d at 64–65, and as such, the State

may "regulate and control," and even "absolutely prohibit," the taking of fish by non-tribal sport fishers "if it is deemed necessary for the protection or preservation, of the public good," *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948) (citation omitted).

Moreover, in discharge of its public trust obligations with respect to the Great Lakes, the State must consider the 1836 Treaty rights of the Tribes. *See* U.S. Const. art. VI, cl. 2; *People v. LeBlanc*, 248 N.W.2d 199, 215 (Mich. 1976). Indeed, because "Indians are citizens of the States in which they reside," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 n.10 (1987), tribal fishers are beneficiaries of the State's public trust obligations no less than sport fishers. And under the law of the case—binding on all parties, including the State—the protection of the 1836 Treaty right is itself an important public interest priority. *See United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (stating that "the public interest would best be served by the protection of these treaty rights" and describing same as an "overwhelming public interest"); *United States v. Michigan*, 508 F. Supp. 480, 492 (W.D. Mich. 1980) ("The public interest clearly favors the protection of these treaty rights…. Enforcement of such rights is a national goal of the highest order[.]" (quotation marks omitted)), *aff'd*, 712 F.2d 242 (6th Cir. 1983).

This is not to say that the parties may not negotiate decree provisions that strike balances, adjustments, and accommodations between tribal and sport fishing. Indeed, they have been doing just that, under challenging circumstances and with a laudable commitment to inter-sovereign comity and cooperation, for close to forty years. But the Coalition's attempt to frame this case as an oppositional conflict between the public interest and tribal rights is simply wrong as a matter of law.

III. The Coalition Misrepresents Judge Enslen's 1985 Decision.

The Stipulating Parties and the Coalition agree that Judge Enslen's decision in *United States v. Michigan*, 12 ILR 3079, in which he identified and weighed the array of factors and principles underpinning his decision to approve the 1985 Consent Decree, is foundational to the law of the case. The decision does not support the Coalition's positions, and the Coalition accordingly seeks to rewrite it as one paying minimal heed to the treaty right and disfavoring the use of gill nets as an inherent threat to the resource. The Coalition first contends:

> Judge Enslen determined that the negotiated decree met the "threshold [allocation] requirements met by the United States Supreme Court" in *Washington v. Fishing Vessel Association*, 443 U.S. 658 (1979) and *thus was not concerned with the recognition of the reserved rights of the Tribes* but rather "the interests of all concerned" groups and the preservation of the resource. [12 ILR] at 3081.

Coalition Br. 7 n.5 (emphasis added). This is a clear distortion of Judge Enslen's decision. He did not find that the 1985 Decree met the *Fishing Vessel* allocation standard and then set aside consideration of the Tribes' treaty right to prioritize

other interests. In fact, as Judge Enslen explained in the very same discussion highlighted by the Coalition, after setting forth the numerous factors that would guide his analysis:

> Of course, each of these factors is not to be given equal weight in making my ruling, and has not received equal weight. Of paramount concern to me *at all times* when sifting through the complex and conflicting evidence has been the desire to reach a fair and equitable decision *in keeping with the reserved rights of tribal fishermen* and the preservation of the resource.

12 ILR at 3081 (emphases added). Indeed, he referred to the protection of the treaty right and the protection of the resource as "my two axis considerations in *all phases* of this litigation," *id*. at 3087 (emphasis added), and as "the major two thesis issues" guiding the court's review, *id*. at 3080; *see also, e.g.*, *id*. at 3079 ("[T]his court's principal concern has been one of preservation: preservation of the treaty reserved rights of the tribal fishers; and preservation of the resource.").

The Coalition's attempt to erase the treaty right as one of Judge Enslen's two paramount priorities goes hand in hand with its efforts (through paraphrasing and text alteration) to portray him as viewing gill netting as an inherent ecological threat. It contends, for example, that Judge Enslen

> recognized … that gillnetting for Whitefish was a particularly problematic method of fishing in the Great Lakes because of the potential that Lake Trout would become incidental bycatch in that process: "Tribal gillnetters [ ] have to be exceedingly careful regarding their incidental catch of lake trout because to exceed that TAC [Total Allowable Catch] would require closure of the commercial whitefish species." *Id.* at 3084.

Coalition Br. 7 (brackets in original). "[P]articularly problematic" is the Coalition's phrase, not Judge Enslen's. His decision will be searched in vain for any suggestion that he viewed gill net fishing as problematic. Indeed, in the quote (partially) reproduced by the Coalition, Judge Enslen was not referring to the inherent nature of gill nets and the consequent need to be "exceedingly careful" in their use, as the Coalition misleadingly asserts. In context, it is clear that he was instead describing what he viewed to be an unfavorable feature of a competing management proposal—i.e., an excessive burden on tribal fishers regarding incidental catch. *See* 12 ILR at 3084. He rejected that proposal in part because of that very feature, *see id*.—a fact obscured by the Coalition's bracketed omission of the word "would," *id*.[5]

The Coalition then states, in a further attempt to bend Judge Enslen's analysis toward its position:

> However, Judge Enslen was confident that the negotiated decree addressed this concern because the management process had clear

[5] The Tribes here do not suggest that great care is not required when gill net fishing. Great care is required in all fishing methods, including sport fishing, particularly in a stressed fishery such as the Great Lakes. The point here is the Coalition's manipulation of Judge Enslen's decision. Judge Enslen—like the numerous state, federal, and tribal fisheries experts that have endorsed the 2023 Decree after years of collaborative analysis—did not share the Coalition's views of gill netting as inherently threatening to the resource. Nor did the district court, which admonished the Coalition to consider "its own practices that harm the environment before raising baseless assertions attacking Tribal gill nets." Opinion, R. 2130, Page ID # 15232 n.33.

> limits that required *gillnet fishing* to be discontinued in the event of the TACs being exceeded.

Coalition Br. 7–8 (emphasis added). Judge Enslen did not single out "gillnet fishing" as the method to be curtailed when necessary, as the Coalition misleadingly suggests. Instead, he stated that "[w]hen TAC's are met or exceeded, the management process is to require that *fishing* be discontinued." 12 ILR at 12087 (emphasis added); *see also id*. at 3090 (reproducing 1985 Decree ¶ 17 ("When the TAC for lake trout is reached …, all large mesh gill netting *and sport fishing* for lake trout shall cease." (emphasis added)).

In sum, the Coalition's portrayal of Judge Enslen's foundational 1985 decision as downplaying the importance of the treaty right and as wary of the ecological threat of gill nets is a false one. This Court will find no support for it in the decision. As addressed next, the Coalition's assessment of the 2023 Decree is likewise unreliable.

IV. The Coalition's Arguments About the Increased Gill Netting Areas Under the 2023 Decree Lack Merit.

The Coalition contends that the 2023 Decree "drastically expands gillnetting to the detriment of the Great Lakes fisheries[.]" Coalition Br. 1. Its principal witness explains that the new areas open to gill netting will result in "disastrous consequences" through "increases in fishing pressure" and an "unleashing of fishing pressure" that "can only accelerate the rate of the fish community's

decline." Johnson Affidavit, R. 2062-5, Page ID ## 12614–12615, 12620. This argument suffers from numerous factual, legal, and logical infirmities.

A. The 2023 Decree Will Not Increase Gill Net Fishing Pressure.

Neither the Coalition nor Mr. Johnson endeavors to explain how the enlarged gill net fishing areas under the 2023 Decree will lead to an increase in gill net fishing pressure, much less a disastrous increase. The Coalition instead asks the Court to accept that assertion on the assumption that expanded areas for gill net fishing will result in more tribal gill net fishers on the water.

To begin, even were the assumption valid, the 2023 Decree contains provisions purpose-built to address the Coalition's concerns about unsustainable increases in fishing pressure. Decree, R. 2132, Page ID ## 15300–15301 (§ XXII. Reconsideration). *See supra* note 4.

More fundamentally, that assumption is divorced from reality. As the Coalition is aware, the ranks of tribal commercial fishers (and their levels of fishing effort) have been declining for decades, coincident with the decline of Whitefish populations caused by invasive mussels. *See* Affidavit of Paul C. Ripple, R. 2085-4, Page ID ## 13045–13047 (¶¶ 14–17). Tribal fisheries managers have steadily reduced harvest limits and harvest regulation guidelines for Whitefish, and tribal fishers have substantially reduced effort or "dropp[ed] out" of fishing altogether. *Id*. at Page ID ## 13046–13047 (¶ 17). Indeed, between 2015 and 2021,

the amount of gill net set by tribal fishers per year declined by roughly *fifty percent*. *Id*.

The Coalition does not acknowledge this stark and highly relevant trajectory, much less explain how the expanded areas for gill netting under the 2023 Decree will reverse it and result in new tribal fishers entering the fishery, as opposed to simply spatially redistributing the existing (and diminishing) cohort of tribal fishers.

B. The Coalition's Reliance on Antiquated Evidence Confirms the Absence of Relevant, Contemporary Evidence for Its Claims.

Even assuming, counterfactually, that the numbers and efforts of tribal gill net fishers were not in decline, the Coalition's apocalyptic predictions of "disastrous consequences in as little as a few months," Johnson Affidavit, R. 2062-5, Page ID # 12614, are fear-mongering ungrounded in fact.

The Tribes have been gill net fishing under the restrictions of co-management decree frameworks for thirty-eight years, beginning with the 1985 Decree. If gill net fishing under such frameworks posed a threat of overfishing as the Coalition warns, the Coalition surely would have pointed the Court to some evidence for that proposition. It has pointed to none, confirming that no such evidence exists. Instead, Mr. Johnson reaches back to events of "1978 and 1979"—the pre-decree era—for his *sole* example of overfishing involving gill nets in the ceded waters, and that example involved what Mr. Johnson acknowledges was an

"unlimited gillnet fishery," Johnson Affidavit, R. 2062-5, Page ID # 12614; *see also* Coalition Br. 31 ("[p]ast events demonstrate" the dangers of "unlimited gill net fishing"). How this antiquated evidence sheds useful light on the strictly limited gill net fishing allowed under the 2023 Decree, neither the Coalition nor Mr. Johnson explain.[6]

To be sure, as this Court has recognized, "the overuse of gill nets could 'deplete the fish resources of the Great Lakes[.]'" *United States v. Michigan*, 68 F.4th 1021, 1024 (6th Cir. 2023) (quoting *Mich. United Conservations Clubs v. Anthony*, 280 N.W.2d 883, 891 (Mich. Ct. App. 1979)). But this proposition is true of the overuse of "[a]ny fishing gear," including sport fishing, Affidavit of Michael Seider, R. 2086-3, Page ID # 13112 (¶ 11), which is why governments regulate it. In *Mich. United Conservations Clubs*, a 1970s case predating the co-management decree era, the Court recognized that "[u]nregulated fishing could and would deplete the fish resources of the Great Lakes" and upheld an injunction against "unregulated" gill net fishing, while striking it down to the extent it applied to gill net fishers not "engaged in unregulated fishing." 280 N.W.2d at 888–89 (citation omitted). No argument can be made that the Tribes will be engaged in unregulated

[6] Such evidence is no more probative of the issues at hand than if the Tribes were to impugn the motives or good faith of the Coalition and its sport fishing constituents by citing evidence of violence and vandalism against tribal fishers from that same bygone era.

or unlimited gill net fishing under the 2023 Decree. The Coalition has accordingly made no such argument.

C. Contemporary Evidence Contradicts the Coalition's Claims About the Effects of Gill Net Fishing on Fish Populations.

The Coalition eschews evidence from the post-1985 decree era because that evidence contradicts the Coalition's position. For example, tribal gill net fishing during that era has been active in each of Lakes Superior, Huron, and Michigan. Of those lakes, invasive mussels have taken hold predominantly in Lakes Huron and Michigan. *See* Ripple Affidavit, R. 2085-4, Page ID # 13046 (¶ 16). In those two lakes, since the onset of the 2000 Decree and coincident with the proliferation of the mussels, Whitefish populations have declined accordingly. *See id*. Yet in Lake Superior, where the invasive mussels have not proliferated, Whitefish populations have remained stable despite active gill netting during that same period. *See id*.; *see also* Seider Affidavit, R. 2086-3, Page ID ## 13114–13115 (¶¶ 15–18). The implication of this natural experiment in the three lakes is clear: Mussels, not gill nets, are impacting fish populations.

D. The Coalition's Objections to Expanded Gill Net Areas Under the 2023 Decree Overlook the Overwhelming Advantages Sport Fishers Enjoy Under the Decree.

The Coalition portrays the expanded gill net areas under the 2023 Decree as an unfair encroachment on sport fishers that will "irreparably harm" them. Coalition Br. 34 (citation omitted). In fact, the spatial, temporal, and gear-based

restrictions on gill netting in the 2023 Decree *far* exceed those on sport fishers, and the Decree's expanded gill net areas are no exception.

Restricting tribal gill net fishers to defined areas and excluding them from fishing elsewhere (which began under the 1985 Decree and continued in both successor decrees) was designed, in part, to reduce conflicts that had been occurring between tribal gill net fishers and those using "sport-fishing gear … in the same area." *United States v. Michigan*, 12 ILR at 3083. The Coalition's vehement reaction to the increased gill netting areas in the 2023 Decree fails to grapple with the fact that the exclusions have always been imposed only on tribal fishers, even though the exclusion of *either* class of fisher (tribal or sport) from an area would eliminate the user conflict problem.

Indeed, from the onset of the decree era, sport fishers have never been subject to a sport-fishing-specific exclusion and can generally fish everywhere within the ceded waters. It is always and only the tribal fisher—the one operating under a federally guaranteed treaty right—who has been the focus of every gear-specific exclusion, and those exclusions cover vast portions of the ceded waters subject to the 1836 Treaty right. This was true under the 1985 and 2000 decrees and remains so under the 2023 Decree. The Coalition's indignant objections to the

2023 Decree's increase in gill net areas, then, are simply objections that an exceptionally one-sided arrangement in its favor has become a bit less one-sided.[7]

Further, the Coalition has no claim that the gill net fishing areas under the 2000 Decree serve as a baseline against which to evaluate the 2023 Decree, though that is another pervasive assumption of its arguments. In fact, the parties to that Decree expressly agreed otherwise:

> This Plan is not intended to identify, nor does it define, the maximum extent of the legal entitlement of the Tribes under the 1836 Treaty. The allocation of treaty harvest opportunities between the Tribes and non-treaty fishers, and the restrictions imposed by this Plan upon treaty fishing, shall be effective only for the duration of this Plan. The Tribes reserve all rights … with respect to … treaty harvest opportunities in the future, and nothing in this Plan shall … create a precedent for future allocation or regulation. Any use or construction of this Plan … as precedent is unauthorized and improper.

2000 Decree, R. 1458, Page ID # 3367 (§ XIII(B) Disclaimers).

Moreover, the Coalition's arguments that expanded gill net areas will necessarily harm "the public interest" by increasing fishing pressure are (in

[7] The disparities of spatial opportunity in favor of sport fishers, including those in the 2023 Decree, are not something the State lawfully could achieve through direct regulation and thus belie the Coalition's claim that the State has not negotiated in the interests of sport fishers. *See United States v. Michigan*, 653 F.2d at 279 (in addition to other strict limitations, state regulation of tribal fishing "must not … favor other classes of fishermen"); *LeBlanc*, 248 N.W.2d at 215 ("Direct regulation of treaty Indian fishing rights is permissible only after the state has proven that it cannot serve conservation by regulating the rights of citizens not possessing treaty fishing rights."); *Mich. United Conservations Clubs*, 280 N.W.2d at 891 (state may "not require the Indians to yield their protected interests in order to promote the welfare of the state's other citizens").

addition to their factual and logical infirmities discussed above) fundamentally blind to the fact that any such increase in fishing pressure and consequent harm to the public interest could be counterbalanced by new spatial exclusions (or other restrictions) applied to sport fishers. Nothing in the law would preclude that. Indeed, sport fishers could, like tribal gill net fishers, be wholly excluded from fishing in vast areas of the ceded waters. *See Zimberg*, 33 N.W.2d at 106 (the State "may … absolutely prohibit" the taking of fish "if it is deemed necessary for … the public good" (citation omitted)). In other words, the same public interests that the Coalition claims would be safeguarded by eliminating the expanded gill net areas under the 2023 Decree could likewise be addressed by new measures to restrict sport fishing, a fact the Coalition seems unwilling or unable to comprehend.[8]

The Tribes have not, to date, advocated for such measures. Nor, despite Judge Enslen's view that the resource should be "shared in a manner which permits full exercise of the treaty right," 12 ILR at 3083, have they ever pressed for the full exercise of the Treaty right as delineated by this Court in 1981, *United States v. Michigan*, 653 F.2d at 278–79. Instead, since 1985 and continuing with the 2000 and 2023 decrees, the Tribes have chosen the path of compromise and cooperation;

[8] If the Coalition's "primary goal is to ensure preservation of the Great Lakes for future generations—for the benefit of all interested groups," as it asserts, Coalition Br. 2—it will presumably be prepared to discuss such measures if this matter is remanded for renegotiation of the Decree as the Coalition requests.

and the State of Michigan, in agreeing to the expanded gill net areas in the 2023 Decree, has compromised in return. After years of intensive collaborative analysis, dedicated fisheries experts from the U.S. Fish and Wildlife Service and the Michigan DNR have endorsed that compromise as protective of the resource. The Coalition has given this Court no basis to substitute its judgment for theirs beyond the hyperbolic and self-interested arguments of a special interest group singularly devoted to maximizing sport fishing opportunities through the suppression of treaty rights, the protection of which is instead properly regarded as "an ancient and well-established responsibility of the national government." *Id.*

V. The Coalition's Arguments About Information Sharing and Enforcement Under the 2023 Decree Are Without Merit.

Like its arguments about expanded gill net areas under the 2023 Decree, the Coalition's arguments about the alleged inadequacies of the Decree's information-sharing and enforcement provisions exemplify the one-sided, special-interest bias that the Coalition brings to this case.

A. Information Sharing

The Coalition contends that the 2023 Decree "fails to collect information necessary to evaluate the health of the Great Lakes fisheries[.]" Coalition Br. 51. Consistent with the unbroken pattern of its brief, its critique is limited to information about tribal gill net fishing. The Coalition decries the alleged inadequacies of what the Decree "requires the Tribes to report" and what "will not

be reported" by tribal fishers. *Id.* at 45–46. The results, the Coalition assures the Court, will be dire: "The consequences of inaccurate data will be devastating to the preservation of the Great Lakes fisheries," *id*. at 45, and will have "a cascading impact over the course of years," *id*. at 47.

Like the Coalition's other predictions of catastrophe, this one lacks all credibility. Every tribal fisher is subject to detailed, regular, and frequent reporting requirements under the 2023 Decree. *See* Decree, R. 2132, Page ID ## 15283–15285 (§ XIV(B) (setting forth detailed twice-monthly reporting requirements for all tribal commercial fishers)); *id.* at Page ID # 15279 (§ XI(E) (monthly reporting requirements for all tribal subsistence fishers). And however deficient the Coalition contends those requirements to be, the hundreds of thousands of state-licensed sport fishers,[9] by contrast, have *no reporting requirements at all* under the 2023 Decree, as was the case under the 2000 Decree. This is so despite that sport fishing accounts for nearly *half* of the allocated fishery; and in several critical lake trout fishing areas, sport fishers may harvest between sixty and ninety percent of it, *see* Decree, R. 2132, Page ID # 15270.

Instead, information about the sport fishing harvest is gathered by the DNR through periodic "creel surveys" conducted at various fishing access sites abutting

[9] *See* Michigan Tech, *Great Lakes States Angler Demographics*, https://www.mtu.edu/greatlakes/fishery/ (last visited Feb. 15, 2024) ("Each year, approximately 1.8 million recreational anglers fish the Great Lakes.").

the ceded waters, where anglers may be asked about their catch by DNR field personnel. *See* Affidavit of David Caroffino, R. 2084-1, Page ID ## 12993–12994 (¶ 11).[10] These surveys do not purport to include more than a small fraction of sport fishers, and—compared to the twice-monthly reporting requirements to which every tribal commercial fisher is subject—the creel surveys are extremely infrequent. For example, the DNR conducts only *one creel survey per year* at Rogers City and at key management units in Lake Superior, *id*. at Page ID # 12996 (¶ 13), despite that the Coalition identifies these areas as critical parts of the fishery, Coalition Br. 42. At Hammond Bay (also identified by the Coalition as critical, *id*.), the DNR conducted only *three* creel surveys "[d]uring the 2000 Consent Decree," which occurred in "2006, 2012, and 2018." Caroffino Affidavit, R. 2084-1, Page ID # 12994. In other words, there were just three angler surveys at Hammond Bay, spaced six years apart, during the entire twenty-year term of that decree.

The Tribes do not here take issue with the State's creel survey method or efforts. The State has agreed in the 2023 Decree to cooperate in good faith with the other parties to consider ways to improve it. *See* Decree, R. 2132, Page ID # 15287 (§ XIV(H)). But the creel survey method for gleaning sport fishing harvest

[10] *See also* DNR, *Creel Clerks & Angler Surveys*, https://www.michigan.gov/dnr/managing-resources/fisheries/creel (last visited Feb. 15, 2024).

information underscores the unreliable special-interest bias the Coalition brings to this case. By any measure, the information gleaned from tribal fishers is vastly more complete, detailed, reliable, and timely than that gleaned from sport fishers, which is negligible by comparison, despite that it accounts for the harvest data for nearly fifty percent of the allocated fishery.

According to the Coalition, though, only the alleged deficiencies in what the tribal fishers must report "will be devastating to the preservation of the Great Lakes fisheries." Coalition Br. 45 (citation omitted). Like the countless other warnings of "devastation" and "disastrous consequences" that pervade the Coalition's brief, these lack all credibility.[11]

B. Enforcement

The Coalition's arguments about the 2023 Decree's enforcement provisions are no more credible. In arguing that the Decree's enforcement mechanisms are inadequate, the Coalition makes no mention of potential problems with enforcement against sport fishers. Its warnings are directed at the Tribes and tribal fishers, despite that the Decree's enforcement mechanisms—and any deficiencies the Coalition contends they have—apply equally to tribal and sport fishers. *See, e.g.*, *id*. at 37 ("If *a Tribe* exceeds its harvest limit of a species by 20%, is there a

[11] Even were there any substance to the Coalition's concerns, they could be addressed by the parties in good faith under the 2023 Decree's reconsideration provision. 2023 Decree, R. 2132, Page ID ## 15300–15301. *See supra* note 4.

violation of the terms of the 2023 Decree?" (emphasis added)); *id*. at 43 ("[T]he Stipulating Parties have agreed to a management framework where *the Tribes* can … not be penalized for overfishing" (emphasis added)); *id*. at 44–45 (district court allowed "the expansion of gillnets without a proper enforcement framework to guard against the possibilities of overfishing").

The Coalition has made no argument, and certainly pointed to no evidence, that tribal fishing is more likely than sport fishing to exceed harvest limits, or that the tribal governments or tribal fishers are less trustworthy than the State government or sport fishers. But these are the clear implications of its one-sided warnings about the Decree's enforcement provisions, as is the case with its one-sided warnings about the allegedly inadequate information reported by tribal fishers. Indeed, the Coalition derides the "trust-but-do-not-verify approach" to tribal reporting under the 2023 Decree as a grave threat to the fishery. *Id.* at 46. The Coalition sees no problem, though, with the same approach when applied to sport fishers under the far less rigorous data collection mechanisms of the creel surveys. That it apparently never even occurred to the Coalition to provide some credible evidence to support these frankly discriminatory positions suggests that the Coalition expects the Court to share in its biased assumptions and send the parties back to the negotiating table to cut back *tribal* fishing areas, tighten up enforcement and penalties against *tribal* fishers, and police the *tribal* catch more

closely through increased reporting demands—all to guard against "devastation" and "disaster" that the Coalition has not come close to credibly establishing.

* * *

The 1836 Treaty fishing right that the Coalition is existentially devoted to suppressing is the supreme law of the land. U.S. Const. art. VI, cl. 2. While not absolute, its protection is a "well-established responsibility of the national government." *United States v. Michigan*, 653 F.2d at 278–79. That includes the judicial branch, which should not curtail those rights in response to the unsubstantiated rhetoric of self-interested parties. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020) ("[D]ire warnings are just that, and not a license for us to disregard the law."). Six sovereigns—the United States, the State of Michigan, and four tribal governments—have reached consensus that the 2023 Decree protects the treaty right and fulfills their own paramount obligations to preserve the resource. Fisheries experts at the United States Fish and Wildlife Service, the Michigan DNR, and the tribal natural resource departments, after years of careful analysis and collaboration in crafting the Decree, concur and have set forth the bases for that concurrence in fair, objective, and scientifically sound reasoning and evidence. The Coalition has provided no credible basis for this Court to doubt the reasonableness of this broad consensus, much less dismantle it, particularly where the Decree expressly allows those sovereigns to come together in good faith and

reconsider its terms in the face of changed or unforeseen circumstances that threaten the fishery.

CONCLUSION

The Tribes respectfully request the Court, if it finds that it has jurisdiction over this appeal, affirm the district court's adoption of the 2023 Decree.

Respectfully submitted on February 20, 2024.

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains not more than 13,000 words. The brief contains 6,989 words.

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

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ADDENDUM – DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28 and 30, the Intervenor/Appellee Tribes designate the following portions of the record on appeal:

Record Entry No.	Description of Entry	Page ID No. Range
1458	2000 Decree	3367
1844	Order Amending Consent Decree (July 29, 2015)	2012–2013
1855	Order Amending Consent Decree (May 23, 2017)	2038–2040
1858	Order Amending Consent Decree (Aug. 3, 2018)	2052–2054
1890-1	*United States v. Michigan*, 12 ILR 3079 (W.D. Mich. 1985)	10797–10811
2062-5	Affidavit of James E. Johnson	12614–12615, 12620
2084-1	Affidavit of David Caroffino	12993–12994, 12996
2085-4	Affidavit of Paul C. Ripple	13045–13047
2086-3	Affidavit of Michael Seider	13112, 13114–13115
2130	Opinion Approving 2023 Fishing Decree	15107–15232
2131	Order of Aug. 24, 2023	15234–15235
2132	2023 Great Lakes Fishing Decree	15270, 15279, 15283–15285, 15300–15301

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