UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

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, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Plaintiff-Intervenors,

v

STATE OF MICHIGAN, et al.,

Defendants.

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

COALITION TO PROTECT MICHIGAN RESOURCES' AND BAY DE NOC GREAT LAKES SPORTS FISHERMEN'S BRIEF IN SUPPORT OF MOTION TO INTERVENE

ORAL ARGUMENT REQUESTED

Dated: July 13, 2022

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INTRODUCTION

The Coalition to Protect Michigan Resources ("CPMR")[1] and Bay de Noc Great Lakes Sports Fishermen ("GLSF")[2] (jointly, "Intervenors") seek intervention to protect the natural resources of the state of Michigan and to defend and assert the rights of recreational users, as well as Intervenors' members' rights, in the full and fair enjoyment of the natural resources of the Great Lakes. A portion of the waters and resources of the Great Lakes are subject to rights conferred by the Treaty of 1836, but those rights are not unlimited. Intervenors assert that the resources of the Great Lakes covered by the treaty are shared roughly equally between those with rights under the treaty and the citizens of the state of Michigan. In particular, the Intervenors have a profound belief that the concept of an equally-shared fishery within the treaty waters and the biological principles underpinning the existing 2000 Consent Decree are no longer being followed. The Intervenors assert that their interests and the interests of thousands of users of the Great Lakes waters subject to the treaty rights are being imminently threatened by the actions of the Parties.[3]

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[1] CPMR has set forth its member organizations in detail in ECF 1865, PageID.2067-77.

[2] GLSF moved on October 9, 1998 for permission to participate in this action as "*litigating amicus curiae.*" ECF 1369, PageID.4234-4245. The Court denied that status in light of the Circuit Court's decision in *United States v. Michigan,* 940 F.2d 143, 163-64 (6th Cir., 1991.) However, the Court indicated it was inclined to grant traditional *amicus curiae* status, and subsequently granted that status by order accepting the stipulation of the parties dated April 2, 1999. ECF 1388, PageID.4135.

[3] As discussed further below, the Intervenors' ability to discuss in greater detail the threat to the natural resources of the state, including the fisheries resources within the treaty waters, is significantly limited by a Confidentiality Agreement between the Parties. These Intervenors are currently *amicus curiae* in this case and are permitted to observe negotiations between the Parties on condition that they abide by the limitations on disclosure contained in the Confidentiality Agreement. A copy of the original Confidentiality Agreement, which has been extended by the Parties, is attached hereto as **Exhibit A**.

CPMR has sought intervention previously in order to protect its particular interests that were directly affected by the negotiated resolution that resulted in prior consent decrees entered in this matter. While prior efforts to intervene were denied, the Sixth Circuit recognized that circumstances may change as to the specific scope of this case, warranting this Court to grant Intervenors full party status. See (ECF 1748, PageID.1288-95). Such changed circumstances have occurred during negotiation of a successor decree to the 2000 Decree.

The 2000 Decree established a "roughly 50-50" allocation of the Great Lakes fishery within those waters covered by the Treaty of 1836. Significantly, the status quo for the last 22 years, the 2000 Consent Decree has maintained the roughly 50-50 allocation of the fishery through a zonal-approach that balances recreational fishing and commercial fishing interests within the same waters by creating recreational and commercial fishing zones, a structure for the usage, times and places of gear types and effort, and protection of Great Lakes spawning areas, refuges, and certain fishing practices through sound biological considerations. Intervenors fish within these waters and have substantial interests in preserving these principles against expanded harm to the entire fishery. We have a substantial belief that State of Michigan does not share our concern as we see it.

With the Court extending the 2000 Consent Decree by order, the Parties have been negotiating toward a successor decree. Under agreement of the parties, and order of this Court, Intervenors have been allowed to be present in this process, but their participation through the State of Michigan has been significantly limited. Intervenors have not enjoyed the same facilitative and cooperative relationship with the State as Intervenors have had in past negotiation. Unfortunately, the cooperative relationships and interests that has had this Court deny Intervenors party status in the past no longer exist. Over the past two years, the State's interest and willingness to allow Intervenors participation in this matter has waned, so much so, that in the past two months

involving the most intense negotiations between the parties, the Intervenors have been shut-out of the process through the State due to the State's unwillingness to consult with Intervenors, to discuss strategies and approaches, and on occasion, by taking actions that undermined efforts by Intervenors to discuss issues directly with other Parties.

Intervenors assert that the breakdown in the relationship with the State has gotten to the point that Intervenors believe that the Great Lakes fishery resources are threatened through abandonment of sound biological principles that we believe should guide decisions related to the fishery, abandonment of the roughly 50-50 allocation of the fishery set forth in the 2000 Decree, and abandonment of terms from the 2000 Decree that have allowed tribal commercial and state recreational fisheries to coexist for decades. On this basis, Intervenors assert that the State lacks the same interest and purpose as do we, the Intervenors, to conserve and protect the Great Lakes fishery.[4]

Matters of tantamount importance to Intervenors may soon be before this Court as the parties indicated at the June 14, 2022 status conference that the "parties are approaching consensus" on a tentative settlement. This is a settlement to which Intervenors are not being permitted to be a direct or indirect and substantive participant through the State.[5] Thus, Intervenors now move to intervene so they may fully participate and protect those rights and interests of their members and the Great Lakes fishery. Those rights and interests were set forth,

[4] This is not to say that the State and its Department of Natural Resources ("MDNR") and Intervenors disagree on every point. The MDNR is an organization of dedicated professionals who serve the interests of the recreational public admirably in many, many respects. In this particular case, however, Intervenors believe that the State is taking actions that do not serve the public interest and threaten the natural resources of the State.

[5] As noted above, Intervenors could offer support for this allegation in great detail, but for the demands of the Confidentiality Agreements between the Parties and between the Intervenors and the State.

in part, in the 2000 Consent Decree. For example, the 2000 Consent Decree provided over $14 million dollars for gear conversion and expansive commercial fishing opportunities for the Tribes, which had the added benefit of promoting lake trout rehabilitation and reducing gear conflict.

Intervenors perceive that those benefits are being weakened and lost. Intervenors meet the requirements under Fed. R. Civ. P. 24 for intervention by right and by permission, and respectfully request that the Court issue an order granting Intervenors defendant party-status.

BACKGROUND

This case began on April 9, 1973, when the United States commenced litigation in the United States Court for the Western District of Michigan against the State of Michigan. The United States asserted the Bay Mills Indian Community's right to fish in certain waters of the Great Lakes, with such right alleged by virtue of the Treaty with the Ottawa and Chippewa Nation of 1836 (the "1836 Treaty"). The Bay Mills Indian Community intervened in the action in 1974, and the Sault Ste. Marie Tribe of Chippewa Indians intervened in 1975. Around the same time, current CPMR member Michigan United Conservation Clubs ("MUCC") petitioned this Court to intervene, which was denied, but MUCC was permitted to act as an *amicus curiae*.

On May 7, 1979, Judge Noel Fox issued a decision analyzing the 1836 Treaty as a contractual agreement, holding that it retained and reserved to the Bay Mills Indian Community and the Sault Ste. Marie Tribe of Chippewa Indians both commercial and subsistence fishing rights on the Great Lakes. *U.S. v. State of Mich.*, 471 F. Supp. 192, 260 (W.D. Mich. 1979). In 1980, the State of Michigan appealed Judge Fox's ruling to the Sixth Circuit Court of Appeals. Ultimately, the treaty right was confirmed by the Sixth Circuit Court of Appeals, but with a holding that differed in significant ways from that of Judge Fox. *United States v. Michigan*, 653 F.2d 277

(6th Cir., 1981). The Sixth Circuit held that the treaty right of the Tribes was not absolute. *Id.* at 279. Such right was subject to "a rule of reason," and in the absence of federal regulation, such rights were limited by the Michigan Supreme Court's holding in *People v LeBlanc*, 399 Mich. 31; 248 N.W.2d 199 (1976). The Sixth Circuit set forth that standard with approval:

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

At roughly the same time, another CPMR member, the Grand Traverse Area Sport Fishing Association, represented by current counsel for CPMR, was added as an intervenor-appellant for purposes of a separate issue involving an injunction prohibiting gillnet fishing in Grand Traverse Bay issued by a state circuit court. In light of new federal regulations issued by the Secretary of Interior concerning Indian fishing in the Great Lakes, the Sixth Circuit remanded the initial State appeal back to District Court for consideration of the effect of the new federal regulations. *U.S. v. State of Mich*., 623 F.2d 488 (6th Cir., 1980).

In 1981, Judge Richard Enslen granted the MUCC and the Grand Traverse Area Sport Fishing Association "litigating *amici curiae*"*"* status (both are current members of CPMR), which permitted them to participate directly in some proceedings. From 1981 to 1984, these proceedings included addressing annual closures and overharvesting of the Great Lakes fisher.

Between 1983 and 1984, while the Parties prepared for the negotiations that would ultimately lead to a 1985 Great Lakes Consent Decree, litigating *amici curiae* status was also granted to the Michigan Charter Boat Association and the Michigan Steelhead & Salmon Fishermen's Association, both current members of CPMR. In 1985, Judge Enslen approved of a plan that included exclusive zones over the objections of one of the parties, holding that it was "in

the best interest of all parties if the resource is shared in a manner which permits full exercise of the treaty right while minimizing conflicts between users." *United States v. Michigan*, 12 I.L.R. 3079, 3083 (W.D. Mich. 1985.); see also (ECF 1892, PageID.10823 (This Court's July 24, 2020 Opinion holding that Judge Enslen's 1985 decision is "law of the case")). With the direct involvement of litigating *amici*, the Parties negotiated and subsequently entered into the 1985 Great Lakes Consent Decree, which set forth terms and conditions applicable to tribal and state-licensed fishers for a 15-year term.[6]

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

As expiration of the 1985 Great Lakes Consent Decree approached, the Grand Traverse Area Sport Fishing Association, Michigan Charter Boat Association, and the Michigan Steelhead & Salmon Fishermen's Association were joined by the Hammond Bay Area Anglers Association, and in 1999 organized into the Michigan Fisheries Resource Conservation Coalition ("MFRCC"). The MFRCC was granted *amicus* status by Judge Enslen as the successor to the individual organizations. Following creation of the MFRCC, CPMR was later formed as a successor organization representing the same organizations, and others who had the same interests as the MFRCC members. In the late 1990s and in 2000, again with the assistance of a Special Master, the Parties negotiated and executed, and the Court entered, the 2000 Great Lakes Consent Decree.

[6] We note that the 1985 Decree was rejected by the Bay Mills Indian Community after being executed by the Parties, including the *amici*. In a subsequent trial, counsel for the Intervenor Coalition, Mr. Schultz, was selected by the Court to serve as "lead counsel" to organize and coordinate the presentation of proofs by those parties who continued to support the 1985 Decree even though the Coalition's predecessor organization was not a full party to the case.

CPMR participated in the negotiations as did the longstanding *amicus* MUCC. The 2000 Great Lakes Consent Decree would have expired under its own terms in August of 2020, but has been extended by order of this Court.

The 2000 Consent Decree sets forth terms and conditions applicable to tribal and state-licensed fishers, to which Intervenors participated through the State and through direct communication with the other Parties. Certain principles agreed to within the 2000 Consent Decree were paramount to Intervenors' interests and rights:

1. The 2000 Consent Decree continued from the 1985 Decree the equitable roughly 50-50 allocation of the Great Lakes fishery.
2. The 2000 Consent Decree maintained certain zonal limitations on gear and effort to provide for a recreational fishery to coexist within the same waters as a commercial fishery.
3. The 2000 Consent Decree relied upon sound biology to address fishing during vulnerable periods of the season and in sensitive locations, such as spawning closures or on refuges. Issues of sound biology persist today. In particular:
    a. Lake whitefish recruitment (reproduction) has been in steady decline since approximately 2000 and lake trout reproduction is tenuous, but sustaining, in Lake Huron. Lake trout reproduction in Lake Michigan is measurable but very low and the population there is supported by a significant stocking program. The status of whitefish and lake trout in Lake Superior, by contrast, is quite stable. The whitefish recruitment decline in lakes Huron and Michigan is described in a recent Great Lakes Fishery Commission peer-reviewed publication (http://www.glfc.org/pubs/misc/2021-01.pdf) as follows: "The 2003 to 2012 year-

classes, produced at high levels of adult abundance, experienced the greatest declines in recruitment. The number of recruits per kilogram of spawners declined 76-80% in Lakes Michigan and Huron."

> Declines in recruitment of Lake Whitefish to the fishery were preceded by sizable declines in growth and condition of harvestable-sized fish in Lakes Michigan, Huron, and Ontario. Declines in Lake Whitefish growth began in the late 1990s after non-native dreissenids (Dreissena polymorpha and D. bugensis) became established in the early 1990s …. Since then, invasive mussels have played a huge role in restructuring Great Lakes food webs …. The establishment of massive populations of dreissenids has affected every life stage of Lake Whitefish and altered its dynamics to the detriment of the populations and fisheries in all Great Lakes, except Superior where dreissenids are rare.

This steady, sustained decline in reproduction has inevitably led to a similar decline in harvest. Whitefish harvest in some whitefish management units, WFH-05 (the Rockport area of Lake Huron) for example, declined to near zero in 2020.

b. The underlying issues for lake trout are quite different than lake whitefish; lake trout seem to be less vulnerable to food web alteration caused by dreissenid mussels. Lake trout are instead more vulnerable to overharvest and the impacts of sea lampreys. The combined effects of harvest and sea lampreys are the principal cause of lake trout mortality rates exceeding target levels in Lake Michigan. A recent peer-reviewed manuscript published in the North American Journal of Fisheries Management (https://afspubs.onlinelibrary.wiley.com/doi/10.1002/nafm.10338) describes survival of various groups of stocked lake trout as follows: "Survival of both age-groups was lowest for fish stocked in the Northern [Lake Michigan] Refuge, where the age structure was truncated due to fishery harvest and Sea Lamprey predation."

Mortality rates generally exceed 40% and often 50% in Lake Michigan, whereas there is general agreement among the scientific community that total mortality of less than 40% is necessary for there to be sustainable levels of reproduction. Recent findings in Lake Huron suggest mortality rates of less than 30% may be necessary for hatchery-origin lake trout to reproduce. These issues should predicate negotiations and the Parties' approach to harvest management.

c. Lake trout concentrate prior to spawning and will be especially abundant in the Northern Lake Huron (Drummond Island) Refuge during October. The Drummond Island Refuge appears to support the largest successfully spawning lake trout population of the lower Great Lakes, which in turn has been foundational in the rehabilitation of lake trout in Lake Huron. Extreme care must be taken with this rehabilitated population that required decades of work and millions of dollars in stocking and sea lamprey control to benefit all users of the Great Lakes, including tribal commercial and state licensed fishers. The current fall spawning closure (November 6 through November 29) is based on the spawning time of whitefish. For lakes Michigan and Huron, lake trout peak spawning is from October 15-November 15. Lake trout concentrate in a relatively limited area before spawning during late September and October. There are very finite spawning locations for lake trout; thus, the lake trout that occupy millions of acres of lakes Huron and Michigan during other times of year are concentrated on these few spawning sites during fall and are exceptionally vulnerable to fishing gear. The State prohibits recreational fishers from pursuing lake trout this time of year.

Furthermore, note that the Joint Strategic Plan for Management of Great

Lakes Fisheries, to which the State is signatory along with other states, tribes, the Province of Ontario and the U.S. and Canadian federal governments (signed under the auspices of the Great Lakes Fishery Commission) addresses the Lake Huron fishery. The State and others have agreed to avoid unilateral actions and to instead work collaboratively, as they did in the designation of the Drummond Island Refuge. Any changes to the refuge would be unilateral action in violation of the intent of the Strategic Plan and of significant concern to Intervenors.

Intervenors believe such concerns are not presently being addressed in a biologically sustainable manner.[7]

4. The 2000 Consent Decree provided millions of dollars for the tribal conversion from non-selective gillnets to trap nets, which had the effect of significantly reducing lake trout mortality in aid of reestablishing lake trout as a self-sustaining species that could then be pursued by fishers.

While the Intervenors have a substantial interest in maintaining these principles in a successor decree, Intervenors believe that the Parties, including the State through who the Intervenors must generally participate, are not following these principles, which, if true, presents a significant risk to the Great Lakes resource. Such actions clearly and negatively impact Intervenors' substantial interests in the fishery, necessitating the instant motion.

ARGUMENT

I. The Proposed Intervenors Are Entitled to Intervene as of Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides in pertinent part: "On timely

[7] The terms of the Parties' Confidentiality Agreement prevent Intervenors from providing a detailed discussion of these biological issues.

motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). The purpose of the provision is to avoid a rash of lawsuits on related questions "by involving as many apparently concerned persons as is compatible with efficiency and due process." *Coalition of Arizona/New Mexico Counties v. Dep't. of the Interior*, 100 F.3d 837, 841 (10th Cir., 1996). Applying this reasoning, "[t]he need to settle claims among a disparate group of affected persons militates in favor of intervention." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir., 1990).

The Sixth Circuit Court of Appeals has interpreted Rule 24(a) as establishing:

> [F]our elements, each of which must be satisfied before intervention as of right will be granted: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court. [*Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir., 1997); *aff'd* 215 F.3d 1327 (6th Cir., 2000).]

A. Defendant State of Michigan Cannot Adequately Protect Intervenors' Interests.

The law favors intervention because the applicant has a "minimal" burden to show inadequate representation. *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. ___, slip op. at 13 (June 23, 2022) (**Exhibit B**). It is sufficient that the movant prove that representation *may* be inadequate. *Michigan State AFL-CIO*, 103 F.3d at 1247. Under this rationale, Intervenors need show only there is a *potential* for inadequate representation. *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir., 1999). Moreover, the Sixth Circuit has rejected the *parens patriae* doctrine, which requires a stronger showing of inadequacy when a governmental agency is involved as the existing defendant. *Grutter*, 188 F.3d at 397-98 ("[T]his circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved").

The United States Supreme Court recently reiterated that the bar for showing that current parties do not adequately represent the interest of proposed intervenors is "only a minimal challenge." *Berger,* 597 U.S. ___, slip op. at 13. While the Supreme Court did not answer the question of whether a presumption is appropriate where a private litigant, like Intervenors, seeks to defend interests alongside the government, the Court was highly critical of presumptions regarding adequate representation—especially those in cases involving the government. *Id.* at 14-15. The Court was further dissuaded that freely allowing such intervention would "'make trial management impossible'" or cause a "proliferation of motions to intervene." *Id.* at 17 (internal citation omitted).

At the last status conference before this Court, six of the parties appeared before this Court indicating that they "are approaching consensus" related to a successor consent decree. (ECF 1962, PageID.10929.) The proposed resolution from the current settlement discussions will likely involve numerous matters affecting the Intervenors' interest, including those issues addressed in the 2000 Decree: the roughly 50-50 allocation of the fishery; the framework for managing the shared fishery; the framework for the rehabilitation of lake trout; and the creation of those rules and principles that have minimized gear and social conflict. The Intervenors' interests are not addressed by the other Parties and representation by the State has been clearly inadequate with respect to these issues.[8]

Intervenors and the State diverge on a number of their positions; the Intervenors find that the differences with the State will lead to a detrimental impact to the Great Lakes fishery as set forth above. Intervenors have specific interests that are now challenged by the Parties.

[8] Again, the Confidentiality Agreement and the joint defense agreement with the State prevent further discussion in the Brief of the precise issues between the parties.

Intervenors have individual interests in preserving the principles long agreed to within the 2000 Consent Decree that extend beyond the State's apparent interest. See *Mille Lacs Band of Chippewa Indians*, 989 F.2d at 1001. Therefore, Intervenors meet this requirement. Intervention should be granted.

B. Intervenors' Motion to Intervene is Timely.

In determining timeliness, the Court would ordinarily consider all of the case-specific circumstances, including: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of its interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after it knew or should have known of its interest in the case, promptly to apply for intervention; and (5) the existence of unusual circumstances mitigating against or in favor of intervention. *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524, 531 (6th Cir., 1993); *United States v. Detroit International Bridge Co.*, 7 F.3d 497, 503 (6th Cir., 1993). The timeliness factors are discussed below.

1. The Suit has not Progressed to a Point that Warrants Denial of this Intervention Application.

Intervenors have moved quickly to assert their interests and satisfy the Rule 24 timeliness requirement in light of the information learned through the Court's status conferences and the State's unwillingness to involve Intervenors in the current negotiation discussions. This motion and brief are filed shortly after it became clear to Intervenors that the State was unwilling to work with Intervenors and as it became clear that the State did not share Intervenors' belief

in preserving the principles in the 2000 Consent Decree. Further, even if accurate as to the status of negotiations, the actual succeeded decree has not yet been drafted and the time and opportunity remains to resolve these issues before completion of a successor Consent Decree.

2. Intervenors' Purposes for Seeking Intervention Support a Grant of Intervenor Status.

This prong of the timeliness analysis typically examines only whether the lack of an earlier motion to intervene should be excused, given the proposed intervenor's purpose—for example, when the proposed intervenors seek to intervene late in the litigation to ensure an appeal. See *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir., 1984). Here, Intervenors seek to address matters directly affecting their interests in the current negotiation discussions. Intervenors have also attempted to intervene previously, but this Court has denied such relief on the grounds that Intervenors are adequately represented by the State. As recently learned by Intervenors and set forth herein, this is no longer the case.

C. Although Intervenors have Long Known of their General Interest in this case (And Have Participated Accordingly to the Fullest Extent Possible in the Litigation to Date), the State's Lack of Representation and Collaboration with Intervenors Only Recently Has Been Made Known.

As noted previously, Intervenors have served as a "litigating amici" or an amicus curiae in the 1836 Treaty litigation and were constructively involved in the mediated negotiations and litigation that led to the 1985 and 2000 Consent Decrees governing the allocation, management, and regulation of the fisheries within the 1836 Treaty waters. While Intervenors have participated in the current negotiations through the State, only recently did Intervenors' relationship with the State deteriorate to the extent that Intervenors' interests are now divergent and unrepresented.

D. Intervention Would Not Prejudice the Existing Parties.

Delay in seeking intervention is significant under Rule 24(a) only to the extent it results in prejudice to the existing parties. 7A Wright and Miller, *Federal Practice and Procedure*, § 1916 at 573-76. Here, the Parties agreed to terms in the 1985 and 2000 Consent Decrees directly affecting the Intervenors' rights. The Parties cannot claim prejudice where intervention is sought to defend those rights. Intervention should be granted.

E. Unusual Circumstances Favor Intervention.

Additional circumstances strongly favor intervention here. Intervenors would be severely prejudiced if intervention were denied, given the scope of the issues now defined by current negotiation discussions that vary from the principles agreed to in the 2000 Consent Decree. Given the Court's continuing and comprehensive jurisdiction in this case, this is the only forum in which Intervenors can protect their rights as the State has no interest in working with Intervenors to address Intervenors' interests in protecting Michigan's valued and substantial Great Lakes fishery. Prejudice to the applicant is an important factor in determining timeliness under Rule 24. *Stotts v. Memphis Fire Dep't.*, 679 F.2d 579, 592 (6th Cir., 1982) (court must consider "whether the applicant will be harmed if he is not allowed to intervene"), *cert. denied*, 459 U.S. 969 (1982); see *United Airlines v. McDonald*, 432 U.S. 385, 395-96 & n. 16 (1977) (applicants' interest in "hav[ing] their day in court" supports determination of timeliness); *NAACP v. New York*, 413 U.S. 345, 368-69 (1973) (considering whether denial of intervention would prejudice applicants). Thus, intervention is proper as the Intervenors are not adequately represented by the State and have no other direct means to participate in the outcome of the case.

F. Intervenors Have a Significant Legal Interest in this Case.

Rule 24(a) requires that an applicant for intervention have a direct and substantial interest in the litigation that is significantly protectable. *Purnell v. City of Akron*, 925 F.2d 941, 947 (6th Cir., 1991). The Sixth Circuit adopts a "rather expansive notion of the interest sufficient to invoke intervention of right." *Id.* The Rule does not require the Intervenors to "have the same standing necessary to initiate a lawsuit" nor requiring "a specific legal or equitable interest." *Id.* The evaluation of substantiality of the interest at play is "necessarily fact-specific." *Id.* Moreover, even where the question raised is a close one, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir., 1999).

Importantly, the case of *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, *et al.*, 989 F.2d 994 (8th Cir., 1993) is directly on point, and instructive, as Intervenors' rights will be affected by this case. In *Mille Lacs*, landowners in the originally ceded territory sought to intervene when the Tribes brought an action for declaring their fishing, hunting and gathering rights. The court granted the landowners' motion to intervene, stating in relevant part:

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

As shown above with respect to the Intervenors and the current discussion regarding a

possible settlement, Intervenors have similar interests here.

The renegotiation of the 2000 Consent Decree will inevitably have far-reaching implications for Intervenors, their member organizations and their constituents, as it will directly impact local fisheries, recreational fishing opportunities across the State and industries and interests related to the same. Under state law, the Michigan's Environmental Protection Act demonstrates that Intervenors have significant interests in filing suit related to activities that impair or destroy the Great Lakes fishery. MCL 324.1701 *et seq.*; *Michigan United Conservation Clubs v. Anthony*, 90 Mich. App. 99, 106-07; 280 N.W.2d 883 (1979) ("MUCC Decision"). The MUCC Decision even analyzed the factual record regarding the "lethal" and "non-selective" nature of gillnets and its impact on the Great Lakes fishery. *Id.* at 108-09.

Given their membership's extensive ties to fishing, boating and conservation organizations within Michigan, Intervenors' member organizations span the state and represent the interests of potentially hundreds of thousands who regularly use and enjoy the Great Lakes, including those waters identified in the 1836 Treaty. Intervenors' have a vast degree of expertise and insight on the biology of the Lakes, the impact of anglers and recreational fishers affecting lake trout, salmon, and whitefish, the impact of various approaches to harvest limits, public safety concerns related to certain manners of fishing, the rehabilitation of fish populations and the management of shared resources among the interested parties.

In addition to the property interests identified in the *Mille Lacs* litigation, Intervenors include those individuals who operate charter operations and fish recreationally within the water covered by the Treaty, which interests will be greatly impacted by the proposed substantive principles of any settlement.

The outcome of this case will have a direct and immediate impact on hundreds of thousands

of current and future members of Intervenors and their member organizations. The predominate areas of concern for Intervenors' member organizations are the conservation of fishing, boating and wildlife resources within the Great Lakes and Michigan.

G. Intervenors' Ability to Protect Their Interest Will be Impaired if They Are Not Permitted to Intervene.

To satisfy the impairment test, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied . . . This burden is minimal." *Michigan State AFL-CIO*, 103 F.3d at 1247. Thus, the test requires only a hypothetical showing that the disposition *may* harm an intervenor's ability to protect its interests. *Purnell*, 925 F.2d at 947. Here, Intervenors have specific interests reserved in the 2000 Consent Decree through Intervenors successful ability to work with the Parties through the State. The 2000 Consent Decree properly reflects the roughly 50-50 equitable allocation, provisions that maintain the coexistence of commercial and recreational fisheries in the same waters, and promotes biological sustainability. Intervenors, involved in the negotiations of the 1985 Consent Decree and the 2000 Consent Decree, worked tirelessly to help develop these provisions alongside the State and other Parties[9]. Having been previously involved and having maintained their continued involvement, Intervenors have a substantial interest that will be impaired if the current proceedings continue without Intervenors' involvement.

II. Permissive Intervention Is Also Appropriate.

Alternatively, Fed. R. Civ. P. 24(b) provides for permissive intervention where the applicant submits a timely application and the applicant's claim or defense and the main action

[9] Amici's predecessors were signatories to the 1985 and 2000 Decrees and supported their terms.

have a question of law or fact in common. In either case, the rules governing intervention are construed broadly in favor of the applicant for intervention. *Id*. at 1246.

In addition to meeting the requirements for intervention as of right, Intervenors have met those requirements establishing a basis for a discretionary grant of permissive intervention. Rule 24(b) provides that a court may grant intervention if Intervenors have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Construing the rules on intervention broadly in favor of the applicant, and in view of the facts unique to this particular case, Intervenors' motion should be granted. *Michigan State AFL-CIO*, 103 F.3d at 1246. "Of course, permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration." *Id*. Intervenors are mindful of this limitation and will adhere to it in their participation in this litigation.

CONCLUSION AND RELIEF

The Court should grant the Motion to Intervene as of right under Rule 24(a) or, in the alternative, it should grant permissive intervention under Rule 24(b) for Intervenors to be defendant parties in this case.

Respectfully submitted,

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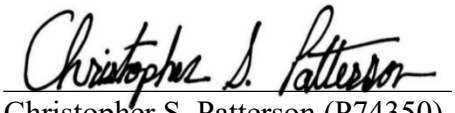

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is drafted in compliance with the Motion to Exceed Word Count which specifically requests this Court to accept this Brief even though it exceeds the permitted 4,300 words. This Brief's Word Count is 6,279 words. I prepared this Brief on Microsoft Word and relied upon its word count function for the purposes of this certificate of compliance.

Respectfully submitted,

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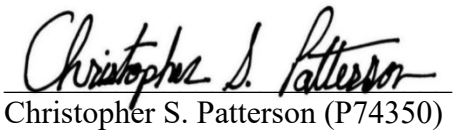

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CERTIFICATE OF SERVICE

I, Kaylin J. Marshall, hereby certify that on the 13th day of July, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

/s/ Kaylin J. Marshall
Kaylin J. Marshall