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,

vs.

STATE OF MICHIGAN, et al.,

Defendants,

File No. 2:73-CV-26

Hon. Paul L. Maloney

RESPONSE OF THE UNITED STATES, BAY MILLS INDIAN COMMUNITY, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, AND LITTLE RIVER BAND OF OTTOWA INDIANS IN OPPOSITION TO THE COALITION TO PROTECT MICHIGAN RESOURCES' AND BAY DE NOC GREAT LAKES SPORT FISHERMEN'S MOTION TO INTERVENE

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On July 13, 2022, Proposed-Intervenors, the Coalition to Protect Michigan Resources ("CPMR") and Bay De Noc Great Lakes Sport Fishermen ("GLSF"), moved to intervene as party-defendants for the purpose of negotiating the successor consent decree to the 2000 Great Lakes Fishing Decree ("Decree"). Mot. to Intervene, ECF No. 1964, 2:73-cv-00026 PageID.10936 (July 13, 2022); Br. in Supp. of Mot. to Intervene, ECF No. 1966-1, 2:73-cv-00026 PageID.10946 (July 13, 2022) ("Brief"). Proposed-Intervenors' Motion comes at the final stage of nearly three years of extensive negotiations, during which time they have directly and comprehensively participated as *amicus curiae* and their recreational fishing interests, which derive from the State's right to regulate the fishery and allocate its share, have been adequately represented by the State of Michigan. Despite this fact, they move to intervene because they now claim that their interests are not being sufficiently taken into account. However, Proposed-Intervenors' request is fundamentally untimely, would severely delay the resolution of negotiations and prejudice the parties if granted, and ultimately fails to support their claim that their interests are not being adequately represented. For the reasons stated herein, the United States, Bay Mills Indian Community, Little Traverse Bay Bands of Odawa Indians, and Little River Band of Ottawa Indians request that this Court deny Proposed-Intervenors' Motion.[1]

BACKGROUND

Throughout the history of this case, Proposed-Intervenors and related recreational hunting and fishing organizations[2] have sought intervention on seven separate occasions in this Court and three times on appeal to the Sixth Circuit. Each time, intervention has been denied and

[1] Remaining Plaintiffs, the Grand Traverse Band of Ottawa and Chippewa Indians and Sault Ste. Marie Tribe of Chippewa Indians, file separately, though concur in this motion.

[2] Proposed-Intervenors' Motion discusses how previous *amicus curiae* who have sought intervention are either current member groups of CPMR and GLSF or closely related to CPMR and GLSF. Brief, 2:73-cv-00026 PageID.10953-10955.

continued *amicus curiae* participation found sufficient to protect Proposed-Intervenors' interests in both negotiations and litigation.

1976 Intervention and Appeal: Proposed-Intervenor member, Michigan United Conservation Clubs ("MUCC"), sought intervention in the initial litigation of the tribes' treaty fishing right by asserting a right to fish in the Great Lakes, raising claims the State had not asserted, and arguing that the State could not represent its interests because the State represented the broader interests of its constituents. Ex. 1, Tr. of Proceedings, at 1, 8, 11, 15–16 (June 27, 1976). This Court denied intervention on the grounds that the State's representation of its citizens' interests was adequate and that any divergent legal strategies could be presented to the State and this Court through *amicus curiae* participation. Ex. 2, Op. at 6-8 (July 30, 1976). The Sixth Circuit affirmed. *See United States v. Michigan*, 89 F.R.D. 307, 307-08 (W.D. Mich. 1980) (hereinafter "1980 Op.").

1978 Intervention: MUCC sought reconsideration of intervention, presenting the same arguments, which the Court denied. Ex. 3, Order (Jan. 23, 1978).

1980 Intervention: MUCC sought intervention for a third time on the grounds that prior participation in a Sixth Circuit appeal was implied evidence of intervention, that the case had entered a new phase, and that the State no longer adequately represented their interests in that phase. 1980 Op., 89 F.R.D. at 307-08. This Court rejected each of these arguments and denied intervention, finding particularly that MUCC's interests were adequately represented as citizens with common public rights held by the State and as *amicus curiae*. *Id.* at 308-10.

1983 Intervention: MUCC sought intervention in decree negotiations concerning harvest allocation, asserting a right to fish held in public trust by the State, though claiming the State's regulation of various user groups created a "conflict" in its representation. Ex. 4, Renewed Mot.

to Intervene at 3-4, P. & A. at 2-3 (Jan. 5, 1983). These motions were eventually withdrawn in favor of continued participation as *amicus curiae*. Tr. and Order, ECF No. 1352, 2:73-cv-00026 PageID.4735-4736 (Feb. 12, 1998) (stating Proposed-Intervenors' choice in 1985 was made "wisely . . . to concentrate on working with the parties in resolving the fishing issues in the 15 years allotted to all the sides.").[3]

1998 Intervention: Proposed-Intervenor member, the Grand Traverse Area Sport Fishing Association, moved to intervene, asserting an interest based on their assent to the 1985 Decree and arguing again that the State's broad representation of its citizens' interests was insufficient. Mot. to Intervene, ECF No. 1346, 2:73-cv-00026 PageID.4835-4837 (Jan. 23, 1998). The Court denied the motion as untimely because it was not sought until years after Proposed-Intervenors decided to participate as *amicus curiae*, and intervention would "portend only prejudice, confusion, and chaos for the enforcement of the decree through the mechanism placed before the court." Tr. and Order, ECF No. 1352, 2:73-cv-00026 PageID.4735-4736 (Feb. 12, 1998).

2004 Intervention and Appeal: Proposed-Intervenor members, the Michigan Fisheries Resource Conservation Coalition, private recreational fishers, and Walloon Lake Trust and Conservancy, sought intervention into litigation of the tribes' inland treaty rights, asserting property interests in hunting and fishing, claiming that the State did not adequately represent

[3] Around this time, Proposed-Intervenor member MUCC also opposed the intervention of the Indian Commercial Fishermen Association based on reasoning that directly contradicts their arguments here. *See* Ex. 5, Br. of MUCC, Inc. in Supp. of its Resp. in Op. to Mot. to Intervene of the Indian Commercial Fishermen Association, at 2–5 (May 7, 1985) (asserting (1) the motion was untimely because it was filed ten years after the case began and after a draft consent decree had been completed but not yet finalized, (2) that the Association had no independent right to the fishery because it was held by the tribes and the United States, (3) that the Association's interests could be raised directly to their tribal governments, and (4) that the Association's interests were adequately represented by the tribes). Intervention was denied for the Indian Commercial Fishermen Association, though they were permitted to participate as *amicus curiae*. Ex. 6, Tr. at 57-68 (May 15, 1985).

their interests in the 2000 Decree and thus would not here, and stating that denial would be prejudicial because no other forum existed in which to raise their concerns. Br. in Supp. of Mot. to Intervene, ECF No. 1501, 2:73-cv-00026 PageID.2756-2771 (Apr. 27, 2004). The Court denied intervention, finding that the request was untimely sought after it had already ordered a discovery schedule and narrowed trial issues, that the request would complicate and prolong the suit, that proposed-intervenors were adequately represented by the State, and that intervention would improperly "issue an open invitation to all inland property owners . . . to directly participate." Order, ECF No. 1518, 2:73-cv-00026 PageID.2512-2516 (June 15, 2004). The Court emphasized that proposed-intervenors' interest were also adequately represented through the "long and proven history in this suit of the use of *amicus curiae* to sufficiently advise the Court of public and private interests." *Id.*, 2:73-cv-00026 PageID.2513 (June 15, 2004). The Sixth Circuit affirmed. *United States v. Michigan*, 424 F.3d 438, 443-45 (6th Cir. 2005).

2005 Intervention and Appeal: Proposed-Intervenors renewed their motion to intervene on the grounds that the scope of the case had broadened. Renewed Mot. to Intervene and Proposed Answer, ECF No. 1643, 2:73-cv-00026 PageID.391-394 (Sept. 29, 2005). The Court disagreed and denied intervention. Order, ECF No. 1678, 2:73-cv-00026 PageID.963-965 (Nov. 3, 2005). Proposed-Intervenors appealed but later moved to voluntarily dismiss their appeal. Order, No. 05-2685 (Nov. 4, 2007).

2007 Intervention: Most recently, Proposed-Intervenors moved to intervene in the inland consent decree negotiations, asserting nearly verbatim each of the arguments presented today. Third Mot. to Intervene, ECF No. 1749, 2:73-cv-00026 PageID.1354-1363 (Feb. 16, 2007). The Court denied intervention because it lacked jurisdiction to rule while Proposed-Intervenors' appeal of the 2005 Order was pending. Order, ECF No. 1772, 2:73-cv-00026 PageID.1439-1440

(May 14, 2007). Nonetheless, the Court noted the motion was "unusual because it was filed during the course of negotiations which, according to the parties, are likely to result in a binding Consent Decree." *Id.*

ARGUMENT

Here too, this Court should deny Proposed-Intervenors' Motion and find that their interests are adequately represented by both the State and through *amicus curiae* participation. Proposed-Intervenors' Motion cannot satisfy *any* of the requirements for Rule 24 intervention. The Motion fails to meet the standard for intervention of right under Rule 24(a) because the request is untimely, Proposed-Intervenors' interests are adequately represented, and their interests will not be impaired if the Motion is denied. Nor does Proposed-Intervenors' Motion meet the standard for permissive intervention under Rule 24(b) because it would unquestionably delay and prejudice negotiations. Finally, Proposed-Intervenors' Motion fails to comply with the basic procedural requirements of Rule 24(c). Accordingly, the Court should deny Proposed-Intervenors' request.

I. Proposed-Intervenors cannot meet the standard for intervention of right.

The Sixth Circuit applies a four-prong test to determine whether an applicant should be granted intervention of right. The applicant must prove: (1) their request to intervene is timely, (2) they have a substantial legal interest in the case, (3) their ability to protect their legal interests will be impaired without intervention, and (4) the existing parties will not adequately represent their interests. *United States v. Michigan*, 424 F.3d at 443–44. Failure to satisfy any one of these requirements mandates that intervention of right be denied. *Id.*

A. Proposed-Intervenors' Motion is untimely.

Proposed-Intervenors' Motion comes at the end of an arduous but productive three-year negotiation process, and calls into question the vast majority of topics in the negotiated successor decree based on Proposed-Intervenors' claim that its interests diverge from the State's. Such a request is fundamentally untimely and fails to meet the first requirement of Rule 24(a) intervention of right.

To determine whether intervention is timely, courts consider five factors: (1) the purpose for which intervention is sought; (2) the length of time preceding the application for intervention during which the proposed-intervenor knew or reasonably should have known of their interest in the case; (3) the prejudice to the original parties due to the proposed-intervenors' failure to apply for prompt intervention; (4) the existence of unusual circumstances militating against or in favor of intervention; and (5) the point to which the suit has progressed. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 582 (6th Cir. 1982). "If untimely, intervention must be denied." *Id.*

i. The purpose of Proposed-Intervenors' Motion is unsubstantiated and inappropriate.

Proposed-Intervenors state that the purpose of their intervention is to "address matters directly affecting their interests in the current negotiations" because the State is no longer adequately representing them. Brief, 2:73-cv-00026 PageID.10963. However, as *amicus curiae*, this reasoning is self-defeating. Where a party has had the opportunity to fully and meaningfully participate as *amicus curiae*, the assertion of one's interests has already been carried out. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 476 (6th Cir. 2000) (finding that the presentation of views as *amicus curiae* in court already met the movants' justification for intervention). Proposed-Intervenors have had and will continue to have the opportunity to directly address their own

interests in negotiations. They have been present at all in-person meetings from September 2019 through June 30, 2022; they have met individually with parties both in person and over the phone; and they have met with the mediator Justice Cavanagh both in person and over the phone. Proposed-Intervenors' Motion further details how their *amicus* status has allowed them to maintain influence and protect their interests since 1976. Brief, 2:73-cv-00026 PageID.10953-10956.

Despite this ongoing participation, Proposed-Intervenors' Motion frames their role as *amicus curiae* as though it has effectively ended. Brief, 2:73-cv-00026 PageID.10967 ("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' continued involvement."). No party is suggesting that this *amicus* status cease, and Proposed-Intervenors are free to discuss their concerns with the parties and the mediator as they have done persistently since negotiations began.

Even assuming Proposed-Intervenors' participation has, by itself, been insufficient to address their concerns, the State represents their interests in this matter because it holds the fishery in trust for the public and maintains an affirmative legal obligation to act for "the preservation of the public right of … fishing" in the Great Lakes. *Bott v. Comm'n of Nat. Res. of State of Mich. Dep't of Nat. Res.*, 327 N.W.2d 838, 861 (Mich. 1982); *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948) ("[W]ild game and fish belong to the state and are subject to its power to regulate and control; [] an individual may acquire only such limited or qualified property interest therein as the state chooses to permit."). Proposed-Intervenors Motion' fails to demonstrate how the State's representation of their interests has recently become inadequate.

While the details of Proposed-Intervenors' concerns are properly the subject of the Confidentiality Agreement, which prohibits the disclosure of "statements, disclosures, and representations made by any Party, attorney, or other participant or amicus," Proposed-Intervenors nonetheless violated the agreement to assert that State has "abandon[ed] sound biological principles that [they] believe should guide decisions related to the fishery, abandon[ed] the roughly 50-50 allocation of the fishery set forth in the 2000 Decree, and abandon[ed] terms from the 2000 Decree that have allowed tribal commercial and state recreational fisheries to coexist for decades." Brief, 2:73-v-00026 PageID.10952; *see* Brief, Ex. A, ECF No. 1966-2, 2:73-cv-00026 PageID.10973-10975. In essence, Proposed-Intervenors take issue with the State's approach to the vast majority of concepts being negotiated in this case. But their assertion that the State is suddenly not adequately representing their interests on these broad topics, despite the fact that it has been doing so over the last three years, is illogical.

As Proposed-Intervenors are aware through their direct participation, the parties have been forging agreements in principle on numerous topics of significant importance throughout the negotiation process. Negotiation principles and the resulting agreements have been crafted through thoughtful deliberation, and have not suddenly changed in recent weeks. Yet, at no time in the preceding years have Proposed-Intervenors sought intervention, and they admittedly agree on the resolution of multiple issues. *See* Brief, 2:73-v-00026 PageID.10952 ("This is not to say that the State and its Department of Natural Resources ("MDNR") and Intervenors disagree on every point."). Only now, as the parties reach the final stage in drafting efforts, do Proposed-Intervenors assert that the State has failed to represent their interests on nearly every topic. But Proposed-Intervenors' frustrations with the State in the moment do not demonstrate the State's inability to provide adequate representation.

If it is not the case that Proposed-Intervenors are dissatisfied with the State's approach on the whole, then this Motion is before the Court because they are dissatisfied with the State's approach on one or a few discrete matters. If so, their objective here is not in seeking to "address" their interests, but to wield a veto power over the parties in derogation of the negotiation process. Proposed-Intervenors in effect ask this court to grant them the power to end negotiations and litigate if their demands are not sufficiently incorporated. Seeking to intervene to use this power is inappropriate, counterproductive, and ultimately legally unjustified.[4] This Court has already determined that Proposed-Intervenors' role is "a very narrow, non-adversarial role that does not rise to the level of 'full litigating status of a named party or a real party in interest.'" Order, ECF No. 1875, 2:73-cv-00026 PageID.2144 (Oct. 8, 2019). The circumstances here do not warrant overruling or revisiting this Court's prior determination.

In sum, Proposed-Intervenors' Motion fails to demonstrate how its claimed purpose justifies the timing of their request. And their attempt to intervene for the purpose of forcing the other parties to acquiesce to their positions is plainly inappropriate.

ii. Proposed-Intervenors seek intervention at the end of a three-year process, during which time their interest in negotiations has been clear.

Intervention in the final stages of consent decree negotiations is strongly disfavored, even where a movant asserts a recent divergence of interests demonstrating inadequate representation.

[4] Proposed-Intervenors state, correctly, that further details about their concerns are subject to the Confidentiality Agreement. Brief at n.3, n.5, n.7, n.8, 2:73-v-00026 PageID.10950, 10952, 10959, 10961. The bounds of this agreement also reveal why Proposed-Intervenors' Motion is improper. Addressing the merits of any specific concerns would make public all negotiating positions that have been arrived at through a careful balancing of interests, inherently exerting undue influence on negotiations through both public and judicial scrutiny. Such specific concerns should be addressed through the negotiation process.

United States v. Tennessee, 260 F.3d 587, 592-93 (6th Cir. 2001) (denying untimely intervention after settlements were conditionally approved but not finalized, despite movant's assertion that they only recently became aware that their interests were not adequately represented); *Stotts*, 679 F.2d at 583-84 (6th Cir. 1982) (denying untimely intervention after a draft decree had been prepared but not finalized, despite the fact that movants learned their interests were unrepresented upon the posting of the draft decree); *S.H. v. Stickrath*, 251 F.R.D. 293, 298 (S.D. Ohio 2008) (denying intervention in the final month of three-year-long negotiations for a comprehensive and detailed regulatory scheme after the movant claimed to be "taken by surprise" at the breadth of agreement). Proposed-Intervenors' Motion is patently untimely because they seek intervention as negotiations come to the close of a three-year process, during which time their interest in negotiations has been clear.

As this Court and Proposed-Intervenors are aware, deliberations on the complicated issues at stake in the successor decree have required years to resolve, with hard-fought compromise forged under extremely challenging circumstances, including a deadly pandemic and a rapidly changing fishery. The parties now approach the final two months of that difficult process, during which time they must finalize the language of a successor decree. Joint Mot. for Extension, ECF No. 1962, 2:73-cv-00026 PageID.10929-10930 (June 27, 2022). Proposed-Intervenors assert that their request is timely because "the actual succeeded decree has not yet been drafted and the time and opportunity remains to resolve these issues before completion of the successor Consent Decree." Brief, 2:73-cv-00026 PageID.10963. But Proposed-Intervenors' belief that their sweeping concerns can be resolved during the waning weeks of the extension ignores the complex reality of this process and is wholly unrealistic.

Proposed-Intervenors then argue that their request is timely because they only recently became aware that their interests have diverged from the State. For the reasons stated previously, Proposed-Intervenors' assertion of broad divergent interests does not align with their claim to have only recently become aware of their disagreements with the State; and to the extent they rely on narrower disputes, this does not demonstrate inadequate representation, but rather Proposed-Intervenors' attempt to acquire an inappropriate, strategic power over negotiations and to strong-arm the parties through the threat of litigation.

Despite their claim of "recent disagreements," Proposed-Intervenors' interest in negotiations has also been clear from the beginning. This is evidenced through their successful request for this Court to reaffirm their status as *amicus curiae* at the start of negotiations, in which they asserted the same substantial interests as in their present motion. *Compare* Coalition to Protect Michigan Resources' Br. in Supp. of Mot. to Confirm Status as Amicus Curiae, ECF No. 1865, 2:73-cv-00026 PageID.2075 (Aug. 16, 2019) ("The predominant areas of concern for Intervenors' member organizations are the conservation of fishing, boating, and wildlife resources within the Great Lakes of Michigan"); *with* Brief, 2:73-cv-00026 PageID.10967 (including this language verbatim). Proposed-Intervenors made a deliberate decision not to seek greater involvement at that time. *See* Br. in Supp. of Mot. to Confirm Status as Amicus Curiae, 2:73-cv-00026 PageID.2079 ("CPMR wants to make sure that it at least has the status of an *amicus curiae*," but not moving to intervene). And nothing has changed that warrants such untimely intervention today.

iii. Intervention would cause undue delay and prejudice to the parties.

Intervention at this stage will also cause undue delay and prejudice the completion of negotiations. Over the course of *years*, substantial and nearly complete progress has been made,

and the final months of negotiations are necessary to resolve remaining disagreements and finalize the language of the successor decree. Intervention would provide Proposed-Intervenors with the opportunity to return to square one to assert their "newly realized interests," threatening hard-fought consensuses, injecting uncertainty into all progress, and delaying the resolution of negotiations by months if not years.

Concerns over delay are compounded because intervention would, for the first time in the Decree's nearly forty-year history, insert a private entity with no legal right to the fishery as a named party to this case, potentially requiring the restructuring of the Decree to incorporate interests separate to, though entirely derived from, the State's rights.[5] This outcome is legally unprecedented and functionally unworkable. The Decree codifies the parties' shared responsibilities for sustainable management of the fishery resource, and each party is a direct participant in its implementation.[6] These considerations weigh heavily in the balance of negotiations, and the Decree provisions are tailored to be workable for each governing body in the interests of their constituents and the sustainability of the fishery. Allowing private entities whose members exploit the resource, but do not carry the regulatory burden of the Decree or have legal mechanisms to enforce it, to assert interests on an equal playing field with sovereign government parties would fundamentally alter resource management. And inserting such parties after three years of Decree negotiations, and forty years of Decree implementation, would work great prejudice on the process.

[5] Proposed-Intervenors' argument that they possess private rights to the fishery is addressed in detail in Section I(B).

[6] Such implementation includes biological assessments, allocation, stocking, law enforcement, information sharing, funding, and dispute resolution to ensure and enforce sustainable management of the fishery resource.

Finally, Proposed-Intervenors' Motion itself prejudices the negotiation process through its numerous breaches of the parties' Confidentiality Agreement.[7] The Confidentiality Agreement states in relevant part:

> 10. Except as otherwise required by law or by agreement of the Parties, proceedings under this Agreement, including statements, disclosures, and representations made by any Party, attorney, or other participant or amicus in the course of such discussions shall be confidential and shall not be reported, recorded, placed in evidence, or disclosed to anyone not a Party.
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> 11. Except as otherwise provided for in this Agreement, the Parties and amici shall not disclose to any person not bound by this Agreement, including but not limited to the media, any information regarding the substance of the Parties' proposals, responses to proposals, or discussions, unless the Party seeking to disclose obtains the prior consent of all other Parties. The Parties and their principals, tribal members, and the government decision-makers and amici and their individual members shall not make statements to the media regarding the substance of the Parties' proposals, responses to proposals, or discussions, unless all the Parties agree to the statement.

Brief, Ex. A, 2:73-cv-00026 PageID.10974. The parties have relied upon the Confidentiality Agreement to facilitate frank and productive exchanges of proposals, which if disclosed to the public or the Court, could hinder progress by subjecting the parties to public scrutiny based on a misleading or imbalanced narrative.

In violation of the Confidentiality Agreement, Proposed-Intervenors' Motion discusses what they represent as the State's present positions[8] and discloses the content of status hearings that

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[7] Because this Response is subject to the Confidentiality Agreement, it does not comment on the accuracy of these positions, which the Court has been apprised of during status hearings and through mediator Justice Cavanagh. The United States discussed the parties' confidentiality concerns with Proposed-Intervenors prior to their filing, but critical concerns went unaddressed in the final filed brief.

[8] The following passages present violations of the Confidentiality Agreement:

- 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." Brief, 2:73-cv-00026 PageID.10950.
- 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 the abandonment of sound biological principles that we believe should guide decisions related to the fishery,

were conducted off-the-record for the purpose of allowing the parties to speak candidly about confidential topics. Proposed-Intervenors' breach extends beyond the Motion, however. On the day of filing, CPMR member organization Michigan United Conservation Clubs published a press release containing the aforementioned content. *See* Nick Green, *Angling, conservation organizations file motion to intervene in ongoing consent decree*, Michigan United Conservation Clubs, (July 13, 2022).[9] And Proposed-Intervenors have provided interviews to multiple local news outlets who disseminated this same information and sought comment from parties to the Decree. Scott McCallen, *Conservation groups sue to intervene in federal, Indian, consent decree negotiations*, The Center (July 14, 2022);[10] Zahra Ahman & Kelly House, *Michigan anglers fear fishing deal with tribes could hurt their interests*, Bridge Magazine (July 14, 2022); [11] Alan Campbell, *No faith in fish talks*, Leelanau Enterprise (July 21, 2022) (Ex. 7). Proposed-Intervenors even admit that this disclosure was done with the intent to shape public opinion. Campbell, *supra* (quoting CPMR Board Member, Bill Winowiecki: "We have to tell the public that we cannot support the proposals in the decree from what we have seen. This [motion] is basically a last-ditched [sic] effort to let us in the negotiations and see what happens.").

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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. Brief, 2:73-cv-00026 PageID.10952.

- Intervenors perceive that the Parties, including the State through who the Intervenors must generally participate, are not following [the principles of the 2000 Consent Decree]. Brief, 2:73-cv-00026 PageID.10959.
- . . . This motion and brief are filed shortly after . . . it became clear that the State did not share Intervenors' belief in preserving the principles in the 2000 Consent Decree. Brief, 2:73-cv-00026 PageID.10963.

[9] https://mucc.org/angling-conservation-organizations-say-state-is-not-protecting-its-interests-in-ongoing-negotiations/

[10] https://www.thecentersquare.com/michigan/conservation-groups-intervene-in-federal-indian-consent-decree-negotiations/article_73b63b8a-03aa-11ed-af2e-5b0633d39527.html

[11] https://www.bridgemi.com/michigan-environment-watch/michigan-anglers-fear-fishing-deal-tribes-could-hurt-their-interests

This disregard for the Confidentiality Agreement and the impact this breach has at this critical stage demonstrates a lack of good faith and an intent to resort to improper means to influence negotiations. If allowed to intervene, Proposed-Intervenors' participation has the potential to derail discussions as the parties work to finalize a successor decree. The significant delay and prejudice that would result from intervention weighs strongly against granting Proposed-Intervenors' Motion.

iv. Unusual circumstances weigh against intervention.

Proposed-Intervenors finally assert that unusual circumstances are present because Proposed-Intervenors have no other forum in which to assert their interests in "protecting Michigan's valued and substantial Great Lakes fishery." Brief, 2:73-cv-00026 PageID.10964. For the reasons stated above, Proposed-Intervenors' interests are already represented *in this forum* by their direct participation as *amicus curiae* and through the State, which holds the legal interest Plaintiff-Intervenors seek to protect. Nonetheless, Proposed-Intervenors' assertion that there is no other forum in which they may vindicate their interests is also unsubstantiated. In *Stotts v. Memphis Fire Department*, the Sixth Circuit expressly held that the court's "continuing jurisdiction to modify the . . . Decree should its operation become unreasonable" was an unusual circumstance that weighed strongly *against* intervention. 679 F.2d at 585.[12] Proposed-Intervenors may seek to intervene through this same avenue in the future if a justiciable claim affecting an asserted right arises. Until then, Proposed-Intervenors can and have participated directly in negotiations to protect their interests.

[12] Proposed-Intervenors cite to the non-binding dissent to support their argument, though they erroneously represent it as the opinion of the court. Brief, 2:73-cv-00026 PageID.10964.

In sum, Proposed-Intervenors' Motion is untimely. The stated purpose of intervention–that their interests are newly unrepresented–is unsubstantiated. Proposed-Intervenors have long known whether their interests were being addressed, yet only now, at the conclusion of a three-year process, do they seek to intervene. Intervention would unduly delay and severely prejudice the negotiations process. And unusual circumstances weigh against intervention. For failure to timely move alone, Proposed-Intervenors' Motion should be denied.

B. Proposed-Intervenors' interests are adequately represented by the State of Michigan, and their interests will be not be impaired if intervention is denied.

Even if Proposed-Intervenors' Motion were timely, they cannot satisfy the remaining Rule 24(a) requirements. Proposed-Intervenors fail to prove that their ability to protect their interests will be impaired without intervention or that existing representation by the State is inadequate.

At the outset, Proposed-Intervenors assert that their substantial legal interest in this case is a purported property right to fish in the Great Lakes. Brief, 2:73-cv-00026 PageID.10965-10966. They base this assertion entirely on *Mille Lacs Band of Chippewa Indians v. Minnesota*, where the court allowed a group of landowners to intervene in a case concerning treaty hunting and fishing rights. 989 F.3d 994, 998 (8th Cir. 1993). There, intervention was granted because the assertion of the treaty right would potentially be exercised "upon the proposed-intervenors' land" and could "affect the proposed-intervenors' property values," *id.*, not because of a purported property interest in fish and game. Unlike the landowners in *Mille Lacs*, Proposed-Intervenors do not claim a right based on access to real property and they cannot demonstrate a property right to the mere use of the fishery resource, the State's share of which is held in trust for the people. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Aikens v. State Dept. of Conservation*, 198 N.W.2d 304, 307-08 (Mich. 1972) *citing People v. Soule*, 213 N.W. 195, 197

(Mich. 1927) ("The wild game and fish within its confines belong to the state. No private ownership or private property rights are involved in this inquiry.").[13] Proposed-Intervenors' interests here are entirely derivative of the State's right to a share of the fishery; and it is long-settled that private individuals hold no property interest in the Great Lakes.

However, Proposed-Intervenors also assert that their members, as anglers and charter boat operators, have a general interest in the conservation of fishing, boating, and wildlife resources. Brief, 2:73-cv00026 PageID.10966-10967. Even assuming that Proposed-Intervenors' interest in their continued recreational use of the fishery meets the Rule 24(a) test for "substantial legal interest," this interest only exists through State permitted access to the fishery and is contained within the State's right, not independent of it. As a result, Proposed-Intervenors must show that their interests are not sufficiently represented by the State of Michigan. They cannot do so; nor can they show that their broad interests in maintaining an equitable and sustainable fishery, which are doubtless shared by the State, will be impaired if intervention is denied.

When a party seeking intervention "share[s] the same ultimate objective as a party to the suit," that intervening party must overcome the presumption that their interests are adequately represented. *United States v. Michigan*, 424 F.3d at 444. As *amicus curiae*, Proposed-Intervenors are active, continuous participants in negotiations. Brief, 2:73-cv-00026 PageID.10963, 10967. They have themselves demonstrated a long history of sufficiently representing their interests through this mechanism in both litigation and negotiations. Brief, 2:73-cv-00026 PageID.10953-

[13] Proposed-Intervenors' use interest, which turns on a future determination as to how the State opts to allocate its share of the available Great Lakes catch, further cannot be equated to the tribes' rights, which are legally protected under the 1836 Treaty of Washington. *See People v. LeBlanc*, 248 N.W.2d 199, 214 n.17 (Mich. 1976); *Bigelow*, 727 F.Supp. at 352-53 (holding that recreational fishers do not have a property right to fish in the ceded waters and thus state regulation of the fishery did not violate equal protection, whereas the tribes' right to the fishery was assured under the 1836 Treaty).

10956 (detailing the history of *amicus* participation); and Brief at n.9, 2:73-cv-00026 PageID.10968 ("Proposed-Intervenors' predecessors were signatories to the 1985 and 2000 Decrees and supported their terms."). Likewise, there is a "long and proven" history of adequate representation by the State in this case. Order, ECF No. 1518, 2:73-cv-00026 PageID.2513 (June 15, 2004). The States' representation of Proposed-Intervenors' interests has to date continued to build on this history, as the State has negotiated to preserve recreational fishing opportunities in accordance with its legal obligation to do so. Proposed-Intervenors' sweeping assertions of inadequate representation in recent weeks only reveal an improper attempt to strong-arm the parties into acquiescing to their demands at the eleventh hour of negotiations. This inappropriate purpose cannot justify intervention of right.

In sum, this Motion is before the Court not because Proposed-Intervenors' interests are inadequately represented, either by themselves or the State, but because they seek to control the course of negotiations. But Proposed-Intervenors' Motion is untimely, will work great prejudice on the final months of negotiations, and denial will not impair their interests, which remain adequately represented. Thus, intervention of right under Rule 24(a) should be denied.

II. Proposed-Intervenors cannot meet the standard for permissive intervention.

In determining whether to grant permissive intervention, the Court, among other things, "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2). For the reasons discussed in Section I(A)(iii), this Court should deny permissive intervention because it will serve to delay the settlement of negotiations by months, if not years, greatly prejudicing both the process and the parties. Settlement efforts will, at worst, completely derail, and at best, stall and face ongoing distraction while Proposed-Intervenors leverage their new status as a party in negotiations. Thus,

this Court too should deny Proposed-Intervenors' request for permissive intervention under Rule 24(b).

III. Proposed-Intervenors' Motion fails to comply with Rule 24(c).

Finally, Rule 24(c) requires that "a motion to intervene . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). This rule serves to provide parties with notice of a proposed-intervenors' arguments and positions. *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 314-15 (6th Cir. 2005). While the Sixth Circuit has taken a lenient approach to this standard, it still requires that, if no pleading is attached, the motion itself assert a claim or defense with a common question of law and fact as in the main action. *Id.*

The inappropriate scope and nature of Proposed-Intervenors' Motion is reflected in their failure to comply with Rule 24(c).[14] Proposed-Intervenors' request to intervene in negotiations without limitation does not and cannot comply with Rule 24(c) because there are no specific claims or defenses on which they seek relief. Rather they seek to exert wholesale influence over consent decree negotiations and scrutinize nearly every aspect of fishery management to ensure broad principles are being engaged to their satisfaction. This lack of compliance with Rule 24(c) is not inconsequential. Such nebulous intervention fails to provide the parties with any notice of what issues Proposed-Intervenors expect to address, opening up all progress to potential deterioration. Thus, Proposed-Intervenors' Motion should be denied under Rule 24(c), as well.

[14] Proposed-Intervenors' prior attempts to intervene have complied strictly with this requirement. Mot. to Intervene and Proposed Answer, ECF No. 1501, 2:73-cv-00026 PageID.2735-2740 (Apr. 27, 2004); Renewed Mot. to Intervene and Proposed Answer, ECF No. 1643-8, 2:73-cv-00026 PageID.447-453 (Sept. 29, 2005).

CONCLUSION

For the foregoing reasons, the Court should deny CPMR and GLSF's Motion for Intervention.

Respectfully Submitted,

UNITED STATES OF AMERICA

Dated: July 27, 2022

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CERTIFICATE OF COMPLIANCE WITH LCivR 7.3(b)

I hereby certify that this Response in Opposition is drafted in compliance with the concurrently filed Motion to Exceed Word Count, which requests this Court's permission to file this Response in excess of the word count dictated by Local Civil Rule 7.3(b)(i). This Response in Opposition is 5,829 words and was prepared using Microsoft Word and its word count function.

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