In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee Cross-Appellant [23-1944, 23-1971],

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 [23-1944],

v.

STATE OF MICHIGAN, and its agents,

Defendants-Appellees [23-1944],

and

COALITION TO PROTECT MICHIGAN RESOURCES, fka Michigan Fisheries Resources Conservation Coalition,

Amicus Curiae-Appellant Cross-Appellee [23-1944, 23-1971].

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

COALITION TO PROTECT MICHIGAN RESOURCES' BRIEF ON APPEAL

Stephen O. Schultz (P29084)
Christopher S. Patterson (P74350)
David J. Szymanski, Jr. (P86525)
Fahey Schultz Burzych Rhodes PLC
Attorneys for Amicus Curiae-Appellant
Cross-Appellee
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100
sschultz@fsbrlaw.com
cpatterson@fsbrlaw.com
dszymanski@fsbrlaw.com

Dated: December 19, 2023

CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellant Coalition to Protect Michigan Resources certifies that Appellant has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Coalition to Protect Michigan Resources ("Appellant" or the "Coalition") requests oral argument in the present appeal pursuant to 6 Cir. R. 34(a). The Coalition believes oral argument is particularly appropriate in this case provided their representation of "an important segment of the public" who is concerned about the 2023 Great Lakes Fishing Decree ("2023 Decree") establishing a management framework for the fisheries for the next 24 years is adverse to the public interest and implemented by the District Court without proper application of the law. *United States v. Michigan*, 68 F.4th 1021, 1029 (6th Cir. 2023). Oral argument would provide an opportunity for the Coalition to address any questions and assist this Court in the review of the factual record concerning harm to the Great Lakes fishery stocks in the 1836 Treaty Waters and the specific legal errors committed by the District Court in assessing the record, overruling objections, and implementing the 2023 Decree without modification.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1345. The Coalition's appeal involves a final decision of the District Court entered on August 24, 2023. *Westfield Ins. Co. v. Talmer Bancorp*, 545 Fed. Appx. 402, 404 (6th Cir. 2013) (citations omitted) (explaining that entry of a consent judgment is a final judgment). This Court therefore has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Coalition timely filed its claim of appeal on October 20, 2023. Fed. R. App. P. 4(B).

STATEMENT OF ISSUES

There are three issues subsumed in the one question on appeal: did the District Court err in law and abuse its discretion when approving and entering the 2023 Decree? The three issues are as follows:

1. Did the District Court incorrectly apply the law when it placed the burden on the Coalition to demonstrate the 2023 Decree did not satisfy the requisite standards and failed to engage in the appropriate analysis under the law of the case?

2. Did the District Court incorrectly apply the law when it disregarded an expert witness' literature review and the averments of the Coalition's representatives and lay witnesses?

3. Did the District Court abuse its discretion in approving the 2023 Decree when the management framework applicable to the Treaty waters is unenforceable, drastically expands gillnetting to the detriment of the Great Lakes fisheries, fails to require the parties to collect and share complete data, and sets target annual mortality

rates significantly too high considering the biological status of the Great Lakes fisheries?

STATEMENT OF THE CASE

I. The Coalition's Role in this Dispute.

The Coalition is a collection of member organizations formed in 1999 to represent the interests of recreational fishing groups in the Great Lakes. The specific mission of the Coalition is focused on addressing the stewardship of the Great Lakes associated with the exercise of Tribal fishing rights. The Coalition's primary goal is to ensure preservation of the Great Lakes for future generations—for the benefit of all interested groups. The Coalition was granted *amicus curia*e status by the District Court and was permitted limited status with respect to the negotiations towards a successor decree (Order Confirming Amicus Status, R. 1875)[1] and the District Court provided the Coalition with the opportunity to present objections to the 2023 Decree (Amended Scheduling Order, R. 2053).

[1] At the outset, the District Court limited the Coalition's role to "a very narrow, non-adversarial role that does not rise to the level of 'the full litigating status of a named party or a real party in interest'" (Order Confirming Amicus Status, R. 1875, Page ID # 2143). The District Court did not authorize the Coalition to "'initiate legal proceedings, file pleadings, or otherwise participate and assume control of the controversy in a totally adversarial fashion'" (Order Confirming Amicus Status, R. 1875, Page ID # 2143).

II. Background of this Appeal.

A. The Foundation of this Dispute.

The question at the root of this appeal dates back two centuries to the Treaty of Washington ("1836 Treaty") that was signed by several of the predecessors to the party Tribes and the United States Government. The terms of the 1836 Treaty provided that certain Tribes cede some of their lands and waters, encompassing large portions of what is now the State of Michigan and the Great Lakes, to the United States government while reserving certain rights in the ceded territory. Article Thirteenth of the 1836 Treaty ("Article Thirteenth") provides, in pertinent part, "[t]he Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." 7 Stat. 491.

B. The Right to Fish in the Great Lakes is Asserted in Response to Regulations by the State of Michigan.

The United States of America ("United States") on its own behalf and on behalf of the Tribes[2] commenced this litigation on April 9, 1973, in the United States District Court for the Western District of Michigan against the State of Michigan ("State") to assert a tribal right to fish in certain waters of the Great Lakes that

[2] The Tribes involved in this lawsuit presently are the Bay Mills Indian Community ("Bay Mills"), Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe"), Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse"), Little River Band of Ottawa Indians ("Little River Band"), and Little Traverse Bay Bands of Odawa Indians ("Little Traverse Bay Bands") (collectively, the "Tribes").

surrounded the land subject to the 1836 Treaty. The question of whether the Tribes had reserved a right to fish in the Great Lakes within the boundaries of the 1836 Treaty area had not yet been litigated in federal court.

C. The Interpretation of the 1836 Treaty Right to Fish.

District Court Judge Noel Fox issued a decision on May 7, 1979, analyzing the 1836 Treaty. *United States v. Michigan*, 471 F. Supp. 192, 260 (W.D. Mich. 1979). Judge Fox ruled that Article Thirteenth retained and reserved for the Tribes both commercial and subsistence fishing rights on the Great Lakes. *Id*. at 260. The State appealed Judge Fox's ruling to this Court where treaty right was confirmed by this Court, 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).

This Court 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 (1976). The Court did not further analyze how the resource was to be allocated between or managed by the Tribes and the State within the 1836 Treaty waters.

After this Court articulated this standard, the case was remanded to the District Court. The parties then began a series of proceedings that addressed how the resource could be used by both Tribal and State licensed fishers. *See, generally,*

United States v. Michigan, 12 ILR 3079 (W.D. Mich. 1985). In the following years, various proceedings tested the scope and extent of the rights of the Tribes under the 1836 Treaty, particularly for given areas of the 1836 Treaty waters or fishing seasons. *Id.* at 3079-80.

In 1983, the extent of the fishing rights held by the Tribes in the 1836 Treaty was put squarely at issue when the Plaintiff Bay Mills Indian Community filed a motion seeking a declaration that the Plaintiff Tribes were entitled to half of the Great Lakes fish resources. *Id.* at 3079. The position was premised on United States Supreme Court's affirmance of the decision in *Washington v. Fishing Vessel Association*, 443 U.S. 658 (1979) equally dividing the available harvest between treaty and non-treaty user groups. *Michigan*, 12 ILR at 3080-81. However, rather than litigate that position, the parties entered into negotiations to attempt to resolve the issues in a mutually beneficial fashion.

III. Prior Consent Decrees.

A. The 1985 Decree.

The parties, with the direction and assistance of a Special Master, Francis McGovern, and with the involvement of litigating *amici*,[3] negotiated and

[3] The Coalition's predecessor organizations were provided "litigating *amici"* status during these 1983-1985 negotiations, which is a status that was rejected by this Court years later in a similarly named but unrelated case. *See United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991). The Coalition's counsel at the time, Mr. Schultz, was

subsequently entered into the 1985 Great Lakes Consent Decree ("1985 Decree"). *Michigan*, 12 ILR at 3079. The 1985 Decree set forth terms and conditions applicable to tribal and state-licensed fishers for a 15-year term and resolved the allocation and management of the resource under the 1836 Treaty for that timeframe. *Id*. However, after the 1985 Decree was agreed upon by the parties but before it was entered by the District Court, Bay Mills rejected parts of the 1985 Decree, including the previously agreed upon allocations. *Id.* at 3079-80.

District Court Judge Richard Enslen[4] held a limited trial in 1985. *Id.* Based upon the evidentiary record created at trial (including the presentation of live witnesses and argument from the parties), Judge Enslen approved the plans set forth in the proposed decree through an equitable determination the plan accommodated and protected the interests of all concerned to the extent possible. *Id.* at 3081. Judge Enslen stated his paramount concern in reviewing the negotiated decree was "keeping with the reserved rights of the tribal fishermen and the preservation of the resource." *Id.* To assess whether the negotiated decree met this standard, Judge Enslen consulted 15 factors. *Id.* Judge Enslen analyzed a variety of aspects of the disputed decree: the zonal management scheme, issues of social conflict, the

---

selected by the District Court to serve as lead counsel for those parties who ultimately supported this first negotiated decree.

[4] Judge Enslen replaced Judge Fox in 1979.

concerns of a "racehorse" fishery, dispute resolution techniques, enforcement mechanisms, data collection and exchange, health of certain fish species, the lack of predictability and stability of the fishery, allocation of the fishery,[5] concerns related to incidental catch through the use of gillnets, and plans for rehabilitating struggling fish species. *Id.* at 3079-88.

Judge Enslen explained his reasons for arriving at the decision that the negotiated decree was fair and equitable. Perhaps most importantly, Judge Enslen explained that the negotiated decree was designed to set limits for the total allowable catch ("TAC") that would help progress towards the self-sustainability of Lake Trout and Whitefish. *Id.* at 3082. He recognized that Lake Trout and Whitefish "generally inhabit the same waters" in the Great Lakes and 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 would require closure of the commercial whitefish species." *Id.* at 3084. However, Judge Enslen was confident that the negotiated

[5] Judge Enslen determined that the negotiated decree met the "threshold 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. *Id.* at 3081.

decree addressed this concern because the management process had clear limits that required gillnet fishing to be discontinued in the event of the TACs being exceeded. *Id.* at 3086. Judge Enslen explained why the management scheme being enforceable was so critical:

> When TACs are met or exceeded, the management process is to require that fishing be discontinued. One needs excellent management to accomplish this …

In addition to concerns related to self-sustaining TACs and enforceable limits, Judge Enslen discussed the need for data to be shared among all interested groups. *Id.* at 3086. He also determined that social conflict would be greatly reduced because of the zonal plan. *Id.* at 3087. Judge Enslen concluded the negotiated decree was "in the best interests of all tribes involved" and should be implemented in its entirety. *Id.* at 3088.

The 1985 Decree set forth extensive terms to apportion between the State of Michigan and the Tribes the fish stocks available for harvest by Tribal commercial fishers, Tribal subsistence fishers, and State-licensed commercial and recreational fishers. The 1985 Decree proved to be a mutually beneficial management framework for all interested groups and the resource for its 15-year lifespan.

B. The 2000 Decree.

The 2000 Great Lakes Consent Decree ("2000 Decree") followed the 1985 Decree and was entered by the District Court by stipulation of all parties, including

the Coalition as *amicus curiae*, without trial (2000 Decree, R. 1458). Similar to the 1985 Decree, the 2000 Decree continued a roughly 50/50 allocation of the fishery resource, the zonal fishing concept, but, rather importantly, added additional terms to significantly reduce the use of non-selective commercial fishing gear, such as gillnets (2000 Decree, R. 1458, Sections X.A.1 and XX.A.1).

The primary reason for the reduction of gillnets at the time was related to the rehabilitation of Lake Trout and reduction of Lake Trout bycatch. All parties agreed that removing gillnets from the Great Lakes would be a significant step towards their agreed goal of Lake Trout rehabilitation. Rehabilitation was of great concern to all interested groups. In presenting the 2000 Decree for approval by the District Court, the parties and *amici* represented that conversion of gillnets to trap nets would help significantly reduce Lake Trout mortality:

> WHEREAS, the lake trout management regime set forth in section VII of the proposed Consent Decree is based on the following major assumptions … (6) the gill net conversion program described in section X of the proposed Consent Decree will significantly reduce lake trout mortality[.] [(Stipulation for Entry of Consent Decree, R. 1457, Page ID # 3403).]

Section X of the 2000 Decree accomplished the reduction of gillnet use by a contribution from the State of approximately $14,300,000 "[i]n order to reduce the amount of large mesh gill net effort of the Tribes … and to provide fishing opportunities … that do not involve the use of large mesh gill nets…" (2000 Decree, R. 1458, Sections X.A.1 and XX.A.1). The funds provided allowed the State to buy-

out 12 State-licensed commercial trap net fishing operations and give those operations, including large fishing vessels, trap nets and other equipment to the Tribes. In exchange, the Tribes, particularly the Sault Tribe, were required to remove at least 14 million "feet of large mesh gill net effort from Lakes Michigan and Huron by 2003" (2000 Decree, R. 1458, Section X.B).

The 2000 Decree would have expired under its own terms in August 2020, but was extended indefinitely by orders of the District Court while the parties negotiated a successor decree (*see, e.g.,* Order Extending Consent Decree, R. 2014).

IV. The 2023 Great Lakes Fishing Decree.

A. The Process of Arriving at a Successor Consent Decree.

The negotiations towards a successor consent decree began in late-2019, but were significantly hampered by the Covid pandemic, which prevented face-to-face negotiations for two years. The United States, the Tribes, the State, and the Coalition finally began face-to-face negotiation sessions in late 2021 to reach a new successor decree to allocate the resource among the users and establish a management framework for the Great Lakes. Nearly three years into the negotiation process in April 2022, the Coalition began to understand the State was seriously considering proposals presented by the Tribes and the United States that completely disregarded the Coalition's positions, the principles of the 1985 Decree and 2000 Decree, endangered the preservation of the resource, as well as the harvest by the State

recreational users (Brief in Support of Motion to Intervene, R. 1969). While the Coalition had previously attempted to work with the State to explain the problems with many of the proposals, at this stage of the process the State effectively shut the Coalition out of the negotiations and the State continued to negotiate and consider proposals that were a complete seat change from the 1985 Decree and 2000 Decree (Brief in Support of Motion to Intervene, R. 1969, Page ID # 11026).

The Coalition moved in July 2022 to intervene in the case as a full party based on the premise that the State was no longer adequately representing the interests of the Coalition (Motion to Intervene, R. 1964). The District Court denied intervention explaining that the request was untimely, and the interests of the Coalition were sufficiently met as *amicus curiae* because the Coalition would have the opportunity to object to any proposed successor decree (Order Denying Motion to Intervene, R. 1985) (Order Denying Motion for Reconsideration, R. 2018).

The decision of the District Court was affirmed on the basis the Coalition had not demonstrated that the request for intervention was timely. *See United States v. Michigan*, 68 F.4th 1021 (6th Cir. 2023). In the same opinion, however, understanding the positions of the Coalition, this Court stated that the District Court should "seriously consider any objections or evidence showing how the proposed decree may endanger the Great Lakes fisheries." *Id.* at 1030.

The United States, four Tribes, and the State (collectively, "Stipulating Parties") reached an agreement and presented it to the District Court for approval in December 2022 (Stipulation for Entry of 2023 Decree, R. 2042). The District Court ordered the Coalition (and the non-consenting Sault Tribe[6]) to file any objections to the 2023 Decree. The Stipulating Parties were directed to respond (Amended Scheduling Order, R. 2053).

B. The Coalition to Protect Michigan Resources' Objections to the 2023 Great Lakes Fishing Decree.

The Coalition filed objections to the 2023 Decree arguing it should be rejected by the District Court (Coalition's Objections, R. 2062). The objections to the 2023 Decree were premised on the fact that the terms were not fair, adequate, reasonable, in the public's interest, or consistent with the law of the case established during the 1985 Decree, and modified in the 2000 Decree. The Coalition offered evidence in the form of affidavits from several expert witnesses and lay witnesses with personal knowledge of the implementation and success of prior decrees (Supporting Affidavits, R. 2062-2, 2062-3, 2062-4, 2062-5, 2062-6, 2062-7). The evidence provided by the Coalition highlighted the unworkable management framework, lack of enforcement mechanisms, significant risks posed by increased gillnets being used

[6] The Sault Tribe objected to the proposed decree for reasons drastically different than the Coalition, and the Sault Tribe has appealed the District Court's rejection of its objections. The Coalition focuses on its own objections throughout this appeal.

in the Great Lakes, concerns related to the recovering Lake Trout populations and declining Whitefish populations, undefined target annual mortality rates, too infrequent review of harvest limits and target annual mortality rates, and, ultimately, the risks presented to the preservation of the resource. The Coalition explained why the proposal by the Stipulating Parties did not adequately preserve the resource and was not in the public interest. The Stipulating Parties and the Sault Tribe filed responses to the Coalition's objections in early March 2023 (R. 2083) (R. 2084) (R. 2085) (R. 2086). The Coalition was never provided an opportunity to reply to the positions of the Stipulating Parties.[7]

C. The District Court's Review of the 2023 Great Lakes Fishing Decree.

With the objections and all responses pending before the District Court, two days of oral argument were presented to the District Court in late May (Objection Hearing May 24, R. 2119) (Objection Hearing May 25, R. 2120).[8] At the end of the

[7] The District Court previously indicated that it would notify the parties if it were to permit replies (Scheduling Order, R. 2052, Page ID # 12395).

[8] At the outset of the oral argument, counsel for the Coalition, Mr. Steve Schultz, overviewed the history of this dispute which he has been intimately involved in since the 1970s (Objection Hearing May 24, R. 2119, Page ID ## 14431-14442 ("Why do I review this history? Because everybody knows the old saying, those that fail to learn from history are destined to repeat it. And there is a lot of history here that unfortunately we have lost …").

oral argument, the District Court indicated that it was considering opening the record for purposes of expert testimony to resolve some key issues:

> All right. In my previous order, which was filed on April 25, I indicated that if I thought that further expert testimony was required, I would notify you, my words, promptly. I'm not going to make a final decision today. But the issues I'm focusing on, which have been a significant part of the discussion here, have been the harvest limits, the mortality rates, and the gill nets, and what I'll refer to has the gill net bycatch issue, and I'm considering opening up the record for purposes of expert testimony. I recognize that there have been affidavits filed, but it seems to me that the dynamic of direct and cross examination can sometimes be helpful in ferreting out the wisdom of a particular side of the case. [(Objection Hearing May 25, R. 2120, Page ID # 14818).]

One week after the oral argument, however, the District Court reversed course and stated that it would not require expert testimony to resolve any of the competing science, in part because no party made such a request:

> At the conclusion of the hearing, the Court indicated that it would provide the Stipulating Parties, the Sault Tribe, and [the Coalition] with the opportunity to expand the record with expert testimony on the issues of harvest limits, mortality rates, proposed gillnet use expansion, and gillnet bycatch if they so desired. However, no party requested the scheduling of such evidentiary hearing. Upon the Court's review of the objections, responses, and supporting attachments, the Court does not require expert testimony to resolve the objections to the [2023 Decree], especially given that no party requested expansion of the record. [(Order Following Hearing, R. 2114, Page ID # 14376).]

This order was at odds with the record and the Coalition's understanding of the proceedings. At no point in time did the District Court indicate that it would be appropriate for the Coalition, or any other party for that matter, to reopen the record. Rather, the District Court indicated that it would notify the parties of the process.

Instead of opening the record for expert testimony, the District Court ordered all parties and the Coalition to file proposed findings of fact and conclusions of law (Order Following Hearing, R. 2114, Page ID # 14376). All parties and the Coalition filed proposed findings of fact and conclusions of law in mid-July (R. 2123) (R. 2124) (R. 2125) (R. 2126).

The District Court approved the 2023 Decree on August 24, 2023, by overruling all of the Coalition's objections and the Sault Tribe's objection (Opinion Regarding 2023 Decree, R. 2130) (Order Adopting the 2023 Great Lakes Fishing Decree, R. 2131) (Decree, R. 2132). In overruling the objections, the District Court provided the Coalition status to appeal to this Court (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15233 ("Pursuant to the opinion of the Sixth Circuit, the Court will grant [the Coalition] the right to appeal the entry of the Proposed Consent Decree ….")). The Coalition now appeals the District Court's entry of the 2023 Decree.

SUMMARY OF THE ARGUMENT

"For years, seven sovereigns have fought over how to regulate and conserve Great Lakes fisheries. And for good reason. The Great Lakes—and the fish they contain—are an invaluable resource to Michiganders, tribal citizens, and the American people alike." *United States v. Michigan*, 68 F.4th 1021, 1030 (6th Cir. 2023). The 2023 Decree represents an agreement that six of the seven sovereigns

reached to allocate, regulate, and manage Tribal fishing in lakes Michigan, Huron, and Superior for the next 24 years.

The task of evaluating a negotiated decree in this context is one said "not to be envied by the most wise and oracular jurists in this county." *Michigan*, 12 ILR at 3079. Perhaps that is because there are significant consequences if the District Court gets it wrong: "[Consent decrees] often limit the rights of third parties because once the court approves a consent decree, it's difficult to undo. And they risk 'improperly depriving future officials of their designated legislative and executive powers.'" *Michigan*, 68 F.4th at fn 2 (*citing* Douglas Laycock, CONSENT DECREES WITHOUT CONSENT: THE RIGHTS OF NONCONSENTING THIRD PARTIES, 1987 U. Chi. Legal F. 103, 132 (1987)).

A negotiated decree in this context presents the prospect of the most significant consequences imaginable. The approval of a faulty decree by the District Court could result in depleted fish stocks in the Great Lakes fisheries that could take decades, if ever, to rehabilitate. Certainly, the task is not easy and requires finding out how to share and manage the Great Lakes fisheries consistent with the Tribes' right "without diminishing or depleting it." *Michigan*, 12 ILR at 3079. Unfortunately, the District Court profoundly erred in this task, both legally and factually.

Legally, the District Court failed to apply the appropriate standard and consider all relevant evidence. It is well-established law of the case that the parties moving to allocate the Great Lakes fisheries through a negotiated decree have the burden on demonstrating the negotiated decree meets the requisite standards. The District Court applied an opposite burden by requiring the Coalition to demonstrate the 2023 Decree did not meet the requisite standards and in the process failed to analyze the 2023 Decree as a whole. The District Court additionally disregarded evidentiary support showing the 2023 Decree would jeopardize the Great Lakes fisheries. These legal errors—applying the wrong standard and disregarding relevant evidence—result in a legally deficient review of the 2023 Decree. Had the District Court properly reviewed the totality of harm caused by the Decree, the District Court should not have approved it.

Factually, the District Court failed to recognize the harm of the 2023 Decree. The 2023 Decree purports to govern the Great Lakes fisheries through harvest limits, *i.e.,* defined limits on the number of a fish species a party can catch in a year. However, the 2023 Decree fails to explain what kind of deviation from those limits is unacceptable, and, even if overfishing does occur, fails to define any penalties for exceeding harvest limits. Notwithstanding those shortcomings of the management approach, the 2023 Decree drastically expands the non-selective and incredibly efficient method of gillnet fishing throughout lakes Michigan, Huron, and Superior.

At the same time, the 2023 Decree does not require the parties to collect data related to discarded bycatch (*i.e.,* incidentally caught other fish) thus setting the framework for future failure based on inaccurate data. The 2023 Decree fails to address these shortcomings and causes further harm by creating six-year review windows for harvest limits and not even defining target annual mortality rates. The management framework is simply unworkable and will cause harm to the Great Lakes fisheries.

The Coalition requests reversal based on the incorrect application of the law and the abuse of discretion committed by the District Court in reviewing and approving the 2023 Decree.

STANDARD OF REVIEW

This Court reviews a "district court's approval of a consent decree [ ] for an abuse of discretion." *Tenn Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001). "An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made." *United States v. Carroll*, 26 F.3d 1380, 1386 (6th Cir. 1994). An abuse of discretion also exists when the reviewing court concludes that the "district court improperly applie[d] the law or use[d] an erroneous legal standard." *Johnson v. Howard*, 24 Fed. Appx. 480, 489 (6th Cir. 2001). This is because a "district court does not have the discretion to apply the wrong legal standard." *Harper v. BP Exploration & Oil Inc.*, 3 Fed. Appx. 204, 207 (6th Cir. 2001). This Court reviews "de novo whether the district court improperly applied

the law or used an erroneous legal standard[.]" *Id.* (*citing Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822, 824 (6th Cir. 1996).

ARGUMENT

I. The District Court Incorrectly Reviewed the 2023 Decree Under the Law of the Case and the Relevant Standards.

In *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), this Court elaborated on the brief outline of the procedure for approving consent decrees that was provided in *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982). This Court explained that because the nature of consent decrees places the "power and prestige of the court behind the comprise struck by the parties … judicial approval [ ] may not be obtained for an agreement which … contrary to the public interest." *Williams*, at 920. This Court provided that "[n]otice should be given to all individuals who may be affected" by a decree and "[a]ll parties should be afforded a full and fair opportunity to consider the proposed decree and develop a response." *Id.* at 921. To approve a decree, this Court stated that a district court must determine after considering the objections that the "decree is fair, adequate and reasonable" and in the public interest (hereinafter, the "*Williams* Standard"). *Id.*

The law of the case provides additional standards[9] for the District Court to consider in its review of a negotiated decree. *See, generally, Michigan*, 12 ILR at 3083. The law of the case provides a clear standard that must be met before a negotiated decree is entered in this case: the negotiated decree must keep "with the reserved rights of the Tribal fishermen and the preservation of the resource" (hereinafter, "Enslen Standard"). *Id.* at 3081. To assess whether the Enslen Standard has been met, Judge Enslen provided 15 factors to consider (hereinafter, "Enslen Review Factors"):

> Preservation and conservation of the resource; impact of the plans on all three tribes; consistency of the plan with the tribal right to fish and the recognition that the resource is shared; reduction of social conflict; feasibility and methods of implementation; protection of Indian fishermen from discrimination in favor of other classes of fishermen; proximity; access; species of fish stocks available; harvestability of fish stocks; the economic impact on Indian fishermen; stability of the fishery; contaminant levels; management and marketing concerns; and flexibility versus predictability of the fishery. [*Id.*]

"Of course, each of these factors is not to be given equal weight." *Id.*

The law of the case dictates the burden of proof falls on the parties moving for entry of a negotiated decree (*i.e.,* the Stipulating Parties): "The parties supporting each plan carry their own burden of establishing that their plan satisfies the

[9] Additional standards apply because the 2023 Decree is not a typical consent decree and is instead a negotiated decree entered through the equitable power of the District Court. *See Michigan*, 12 ILR at 3079.

appropriate standards." *Id.* at 3081.[10] The appropriate standards in this case are the *Williams* Standard and Enslen Standard, which can be met through consideration of the Enslen Review Factors.

The District Court in this case failed to appropriately review the 2023 Decree for two reasons. First, the District Court incorrectly placed the burden on the Coalition to establish that the 2023 Decree should be rejected by the District Court. The law of the case dictates the burden should have been on the Stipulating Parties to meet the *Williams* Standard and Enslen Standard. Second, the District Court failed to fully evaluate the 2023 Decree based on the Enslen Review Factors and did not consider the totality of the harm presented by the management framework of the 2023 Decree. The law of the case required the District Court to consider the 2023 Decree considering the Enslen Review Factors and evaluate the total management framework.

For these reasons more thoroughly addressed below, the District Court misapplied the relevant standards and burden framework in its review of the 2023 Decree, which are legal errors reviewed de novo by this Court. *See Harper*, 3 Fed. Appx. at 207.

[10] Notably, the District Court agreed the burden was on the Stipulating Parties (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15106). As will be explained, however, the District Court failed to actually view the case from the perspective of the Stipulating Parties having the burden.

A. The District Court Incorrectly Placed the Burden on the Coalition.

The law of the case is clear: "The parties supporting each plan carry their own burden of establishing that their plan satisfies the appropriate standards." *Michigan*, 12 ILR at 3081. However, the District Court placed the burden throughout the entire review process on the Coalition.

To explain, the Stipulating Parties moved for entry of the 2023 Decree without any evidentiary support (Stipulation for Entry of 2023 Decree, R. 2042) and the District Court subsequently ordered the Coalition to file objections to the 2023 Decree (Amended Scheduling Order, R. 2053). The District Court failed to place any burden on the Stipulating Parties but for responding to the Coalition's objections. Put another way, the 2023 Decree was presumed to meet the *Williams* Standard and Enslen Standard and the Coalition was tasked with overcoming that presumption. This is not how the law of the case dictates the District Court should have reviewed the 2023 Decree. *See Michigan*, 12 ILR at 3081. If the District Court had appropriately placed the burden on the Stipulating Parties, a different result would have occurred. This is evident considering the District Court's opinion.

In resolving many of the Coalition's objections, the District Court simply determined the Coalition did not demonstrate enough (*i.e.,* meet its burden):

> [The Coalition] has failed to establish that the increased use of gill nets under the Proposed Decree will be harmful to the fishery.
>
> …

> [The Coalition] has failed to raise a persuasive reason for the Court to reject this much-improved section of the Proposed Decree.
>
> …
>
> Because [the Coalition's] objection to net marking in the Proposed Decree is far too speculative and unsupported, the Court will overrule it. [(Opinion Regarding 2023 Decree, R. 2130, Page ID ## 15214, 15116, 15227).]

The District Court should have considered whether the Stipulating Parties satisfied the requisite standards (*i.e., Williams* Standard and Enslen Standard). Based on the record (discussed more thoroughly below), the Stipulating Parties did not satisfy the relevant standards. Compounding this error was the reluctance of the District Court to hold an evidentiary hearing. Although the District Court thought it may be necessary (Objection Hearing May 25, R. 2120, Page ID # 14818), it never held an evidentiary hearing. The failure of the District Court to hold an evidentiary hearing has been held against the Coalition with the District Court stating the Coalition did not meet its burden on many of its objections. That, however, is a plain misapplication of the law of the case. To the extent that there is uncertainty based on competing science or conflicting evidence, it should have been held against the Stipulating Parties—not the Coalition.

The District Court made an error of law in placing the burden on the Coalition.

B. The District Court Failed to Engage in the Necessary Analysis Under the Enslen Review Standards and Consider the Totality of the Harm Presented by the 2023 Decree.

The District Court mentioned the Enslen Review Standard but subsequently failed to analyze them throughout its opinion related to the 2023 Decree. Instead, the District Court isolated each filed objection and evaluated whether any objection—taken on its own—presented grounds for the District Court to reject the 2023 Decree. The Coalition urged the District Court not to take this approach at the outset of oral argument on its objections by explaining every objection is interrelated:[11]

> MR. SCHULTZ: And to put our position on allocation in context, we really need to address things such as the management scheme, the information sharing, the expansion of gill net opportunities and the like, because all of those are what lead inexorably to the conclusion that the shared resource that has been found by this Court will not ultimately be shared if this decree is adopted.
>
> …
>
> I think it makes for a more structured and reasonable presentation of our objections and how they mean – what they mean and how they fit together if we take it on that way. [(Volume I Hearings on Objections, R. 2119, Page ID ## 14443-14445).]

In fact, throughout the hearing, counsel for the Coalition explained how all of the objections were interrelated (*See e.g.,* Volume I Hearings on Objections, R. 2119,

[11] The District Court had previously provided each objection would be taken one at a time (Order Outlining Objections Hearing, R. 2106, Page ID # 14334) and the District Court intended for the Coalition to start with its objection related to allocation. At the outset of the hearing, this excerpt is where counsel for the Coalition explained all of the objections related to one another and it would make no sense to isolate the Coalition's objection on allocation because it related to all of the other objections, just as all of the objections are related.

Page ID # 14449 ("[A]nd we point this out in the information sharing section, that's why these are all kind of interrelated")). But the District Court failed to ever analyze the entirety of the 2023 Decree; instead, it organized the Coalition's objections into 11 separate headings and dispensed of them one by one.

The law of this case required the District Court to make meaningful findings related to the management framework and critically analyze the Great Lakes fisheries through the Enslen Review Factors. This required the District Court to take the Coalition's objections as a whole and the Stipulating Parties responses and evaluate the 2023 Decree. The District Court committed a legal error by solely analyzing each objection without regard to considering the totality of the 2023 Decree under the Enslen Review Factors.

* * *

The Stipulating Parties carried the burden of demonstrating the 2023 Decree satisfied the *Williams* Standard and Enslen Standard. It was an error of law for the District Court to place the burden on the Coalition to demonstrate that the 2023 Decree did not meet these standards. At the same time, the District Court failed to appropriately analyze the Enslen Review Factors and critically analyze the totality of harm presented by 2023 Decree; it merely took the Coalition's objections one by one and stated on their own they did not warrant rejection of the 2023 Decree. The District Court's misapplication of the burden framework and failure to engage in the

relevant analysis are legal errors reviewed de novo and constitute reversible errors.[12] *Harper*, 3 Fed. Appx. at 207; *See Jackson v City of Cleveland*, 925 F.3d 793, 813 (6th Cir. 2019) ("applying the wrong legal standard constitutes reversible error on abuse of discretion review").

II. The District Court Incorrectly Applied the Law in Reviewing the Coalition's Evidentiary Support.

There are no detailed evidentiary standards when objecting to a consent decree. *See, e.g., Williams*, 720 F.2d 909. There are generally two types of witnesses under the Federal Rules of Evidence: expert witnesses and lay witnesses. *See* Fed. R. Evid. 701-703. Expert witnesses may testify to their opinions based on their qualified knowledge, skill, expertise, training, or education. *Elswick v. Pikeville United Methodist Hosp. of Ky., Inc.*, 50 Fed. Appx. 193, 195 (6th Cir. 2002). Lay witnesses may testify based on their personal knowledge and offer opinions that do not require specialized knowledge or could be reached by an ordinary person. *Heritage Mut. Ins. Co. v. Reck,* 127 Fed. Appx. 194, 199 (6th Cir. 2005).

In the context of this case and the entry of a negotiated decree, Judge Enslen recognized the difficulty of assessing all interested parties' positions in 1985 and

[12] To the extent this Court were not to review these errors de novo, this Court should still arrive at the same conclusion because this Court should have a firm conviction a mistake was made. *Carroll*, 26 F.3d at 1386.

considered the testimony from experts, party representatives,[13] and others with personal knowledge of the case:

> [The Court bases certain findings on] the testimony of witnesses Lumsden, Ebener, Teeple, Tadgerson, Horn, Wright, Eger, Hatch, Skip Parrish and Irma Parish; and Exhibits BMIC 19 and 19, Amici "A," government numbers 11, 12, and 13, and BMIC 23, 24, and 25
>
> …
>
> This finding that the March plan provides for increased cooperation, improved enforcement, and the addition of a dispute resolution technique and forum is based on the March agreement and the testimony of witnesses Horn, Wright and Lumsden. [*United States v. Michigan*, 12 ILR 3079, 3085-86 (W.D. Mich. 1985).]

In other words, Judge Enslen welcomed all types of testimony and considered it in his analysis in arriving at an equitable decision.

The Coalition offered in support of its objections six affidavits and sought to have each respective affiant either qualified as an expert or lay witness but at the same time recognized that the testimony being offered was within the bounds of the law of the case (Coalition's Proposed Findings of Fact, R. 2125, Page ID ## 14981-14984, 15001-15002):

- **Chris Horton** (R. 2062-2): Mr. Horton is a fisheries biologist.
- **James Johnson** (R. 2062-5): Mr. Johnson is a fisheries biologist and has personal and expert knowledge related to the Great Lakes Fishery and prior decrees.

[13] Judge Enslen accepted opinion testimony from party representatives who were not experts on certain topics; this is demonstrated in his opinion where he discusses expert testimony and then lay testimony and opinions as well. *See, generally*, *Michigan*, 12 ILR at 3079.

- **David Borgeson** (R. 2062-4): Mr. Borgeson is a fisheries biologist and has personal and expert knowledge related to the Great Lakes fishery.

- **Frank Krist** (R. 2062-3): Mr. Krist has knowledge and experience in fisheries science and conservation, and has personal knowledge related to the Great Lakes fishery and the use of gillnets.

- **William Winowiecki** (R. 2062-7): Mr. Winowiecki is Captain and President of the Michigan Charter Boat Association and has personally overseen tens of thousands of charter boat runs in the Great Lakes.

- **Scott McLennan** (R. 2062-6): Mr. McLennan is the Mayor of Rogers City who relies on recreational fishing for the City's economy and has knowledge of the past management frameworks.

The District Court qualified as experts James Johnson, Chris Horton, and David Borgeson (Opinion Regarding 2023 Decree, R. 2130, Page ID ## 15206-15207). Frank Krist, Scott McLennan, and William Winowiecki were qualified as lay witnesses (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15207). However, the District Court made two errors of law resulting in relevant evidence being excluded.

First, the District Court disregarded an expert report attached to and incorporated in expert witness James Johnson's affidavit (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15207) (Johnson Affidavit, Exhibit 1, R. 2062-6, Page ID # 12618-12649). The report was authored by Mr. Johnson—a qualified expert—and detailed the scientific support for all conclusions drawn. Second, the District Court erred in disregarding the opinions of the Coalition's lay witnesses (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15207 ("With respect to any opinion

testimony provided in these affidavits, the Court affords it no weight")). The Coalition's lay witnesses offered testimony related to the Enslen Review Factors based on personal knowledge of this dispute, and the testimony should have been considered.

These legal errors, which are expanded on immediately below and reviewed de novo, demonstrate the District Court misapplied the law in its review of the 2023 Decree. *Harper*, 3 Fed. Appx. at 207.

A. The District Court Misapplied the Law by Disregarding the Report Attached to and Incorporated in James Johnson's Affidavit.

Expert reports are generally only required to explain "how" and "why" a result was reached. *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (2010). The Coalition filed affidavits in support of its position and one of its affiants, James Johnson, attached a report to his affidavit that was titled a "Science-Based Analysis of How Proposed Consent Decree Jeopardizes Sustainability of Great Lakes Fishery Resources and the Fishers that Depend on Them" (the "Report") (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12618-12649).

Mr. Johnson averred the Report was a literature review related to the biological status of fish populations of 1836 Treaty Waters of the Great Lakes (James Johnson Affidavit, R. 2062-5, Page ID # 12606). The Report was dated January of 2023 and authored by Mr. Johnson, who is the biologist for the Coalition (Johnson

Affidavit, Exhibit 1, R. 2062-6, Page ID # 12619). The Report highlights the biological setting of the Great Lakes fisheries, the status of fish stocks, the dangers of gillnets, and resource management strategies. It also includes a detailed review of scientific literature discussing appropriate target annual mortality rates and the dangers of increased fishing efforts throughout the Great Lakes. There are more than 40 published pieces of literature cited in the Report. The District Court disregarded the report entirely (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15207). This was an error.

Mr. Johnson clearly explains the conclusions that were reached in the Report. *See CU Interface, LLC*, 606 F.3d at 271 (explaining standards for expert reports). A plethora of relevant literature that was fair for the District Court to consider was the basis for all the conclusions drawn in the Report. In the absence of presenting the Report to the District Court, it is unclear to the Coalition how it could have supplemented its objections with the necessary information.

The District Court's review of the 2023 Decree would have resulted in a different outcome had the Report been considered. This is in part because the Report contains detailed, science-based consequences of the 2023 Decree that are not adequately addressed in the District Court's opinion or by the Stipulating Parties, and further would have impacted the credibility and weight to provide Mr. Johnson's statements (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12638-12642):

- **Lake Trout Rehabilitation in Lake Huron**: Mr. Johnson explains the opening of the Drummond Island Refuge, which was established by interagency consensus in 1985 as part of the rehabilitation effort for Lake Trout in Lake Huron, will increase the exploitation rate on a recovering Lake Trout population and jeopardize the future trajectory of Lake Trout rehabilitation.

- **Lake Trout Rehabilitation in Lake Michigan**: Mr. Johnson explains why the grids surrounding Lake Michigan's Northern Refuge (MM-1, 2, 3, and 5) must have target annual mortality rates set at **40%** and lower or else the development of spawning stocks will be significantly harmed. The target annual mortality rates in the 2023 Decree in these grids is too high at **45%** (Affidavit of Scott Koproski, R. 2086-2, Page ID # 13094).

- **Increased Gillnetting Will Result in Drastic Declines of Populations in Targeted Waters**: Past events demonstrate that unlimited gillnet fishing will result in the killing of local Lake Trout populations because once a lucrative fishery is identified in a local area, the fish population will be intensely targeted. As the fish population declines, more gillnets will be placed in the water until the targeted stock is fished out and no longer sustainable in a local area.

- **Increased Exploitation Rates of Whitefish Will Decimate the Fishery**: The increased efforts towards the extremely depressed Whitefish population will put at risk the future of the species. Science clearly indicates that this will result.

- **Infrequent Review of Harvest Policies Will Have Disastrous Consequences**: The review of harvest policies and mortality targets is not frequent enough provided the status of the Great Lakes fisheries.

These science-based conclusions are simply at odds with the public interest and the preservation of the resource. The District Court failed to understand the biological

support underpinning the Coalition's positions because it wrongly disregarded the Report by Mr. Johnson.

B. The District Court Misapplied the Law by Disregarding Averments by the Coalition's Lay Witnesses and Opinions Not Requiring Special Knowledge.

Lay witnesses can provide opinions that could be reached by an ordinary person. *Heritage Mut. Ins. Co. v. Reck,* 127 Fed. Appx. 194, 199 (6th Cir. 2005). In addition, the law of this case has allowed for testimony by lay witnesses and party representatives to assist the District Court in making an equitable determination related to a negotiated decree. *See, generally, Michigan*, 12 ILR at 3079.

The District Court disregarded all opinions offered by Frank Krist, Scott McLennan, and William Winowiecki (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15207 ("With respect to any opinion testimony provided in these affidavits, the Court affords it no weight"). This not only contradicts the standards for lay witnesses, but fails to appropriately apply the law of the case and the way Judge Enslen reached his decision in 1985.

The opinions offered by Mr. Krist related to the 2023 Decree and the dangers of expanded gillnetting were all relevant for the District Court to consider.[14] His

[14] To be more specific, Mr. Krist details the effects gillnetting would have on specific areas of the Great Lakes throughout his affidavit (Frank Krist Affidavit, R. 2062-3).

opinion related to the 2023 Decree in its entirety was also relevant provided his longstanding familiarity with this dispute:

> With my intense involvement in this long running case and the negotiations of the [ ] Consent Decrees over the last 45 years, I am very concerned about the Proposed Consent Decree as I discussed [in this affidavit]. The proposal is actually not better than the 2000 Consent Decree … the Proposed Consent Decree would actually bring back many of the issues and challenges that faced the Parties before the implantation of the 1985 and 2000 Consent Decrees. During the early 1980s the resource was being depleted in several extensive areas of the Treaty Waters and there was much conflict … The previous Decrees focused on the biology while working to ensure the resource is shared fairly … The outcomes of the previous Decrees were fair to everyone as shown by no serious complaints reaching the court over the last 22 years … A major trade of the recreational fishery was a reduction in the allocation for gill net free zones. Unfortunately, that aspect is no longer a priority … I strongly feel the outcome of the Proposed Consent Decree … would result in a declining fishery for all users. [(Frank Krist Affidavit, R. 2062-3, Page ID # 12556).]

Similarly, the opinions offered by Captain Winowiecki related to marking standards of gillnets and his personal experiences on the Great Lakes were relevant to consider:

> It is my belief [based on personal experience] that unless gillnet marking is enhanced through better marking measures and those who place them in the water are responsible for completing such marking, public safety is jeopardized.
>
> …
>
> I believe the Proposed Consent Decree therefore poses a danger to the charter boat community and other users of the Great Lakes because it inadequately addresses the safety concerns related to unmarked, or marked, but not otherwise shared with the public, gillnets... [(William Winowiecki Affidavit, R. 2062-7, Page ID ## 12656-12657).]

Mayor McLennan additionally provided relevant opinion testimony related to the public interest factors at issue including economic impact to the fishing community in Rogers City:

> Because of the high efficiency of gill netting technique, an expanded gill netting harvest would have an immeasurable impact on Rogers City area fishery and economy. If allowed in the Proposed Consent Decree, gill netting in the area is likely to irreparably harm the sport-fishery, bankrupt Rogers City marina that depends on the fishery, and decimate the local economy that survives on the revenues brought in by visiting sport-fishers. [(Scott McLennan Affidavit, R. 2062-6, Page ID # 12651).]

These opinions should not have been blindly disregarded by the District Court. These opinions went directly to the *Williams* Standard and Enslen Review Factors, namely the recognition that the resource is shared, reduction of social conflict, and the public interest. Notably, the Stipulating Parties failed to address many of these relevant considerations in the evidence that was presented below.[15] Consequently, if the evidence offered by the Coalition related to these factors was considered by the District Court, the result would have been different. The District Court relied on an incomplete record by disregarding these averments.

[15] For instance, the Stipulating Parties offered no witnesses related to the public safety concerns of the marking standards of gillnets, which the Coalition addressed in-depth (*See, e.g.,* Coalition's Objections, R. 2062, Page ID ## 12526-12529). Instead, the Stipulating Parties simply argued the marking standards were sufficient by comparing the 2023 Decree to the 2000 Decree (*See, e.g.,* Stipulating Parties' Proposed Findings of Fact, R. 2124, Page ID ## 14956-14957).

* * *

The District Court erred in disregarding the Report by Mr. Johnson which resulted in excluding relevant evidence and a thorough science-based review of the 2023 Decree. The exclusion of the Report also undermined the credibility that the District Court should have provided to the opinions of Mr. Johnson. Similarly, the District Court erred in disregarding the evidentiary support offered by the Coalition's lay witnesses, much of which was not rebutted with evidence from the Stipulating Parties. These legal errors by the District Court are reviewed de novo and constitute reversible errors.[16] *Harper*, 3 Fed. Appx. at 207.

III. The District Court Abused its Discretion in Approving the 2023 Decree with an Unenforceable Management Framework, Increased Gillnetting Opportunity, Incomplete Information Sharing, and Undefined Target Annual Mortality Rates.

The *Williams* Standard and Enslen Standard collectively require any negotiated decree in this case to be in the public interest and preserve the Great Lakes fisheries. *Williams*, 720 F.2d 909; *Michigan*, 12 ILR at 3079. The standards were not met in this case and the District Court abused its discretion in approving the 2023 Decree.

[16] Again, to the extent this Court were not to review these errors de novo, this Court should still arrive at the same conclusion because this Court should have a firm conviction a mistake was made. *Carroll*, 26 F.3d at 1386.

To explain, the primary mistakes the District Court made in analyzing the 2023 Decree were in relation to the lack of enforcement mechanisms in the management framework, the corresponding issues with increased gillnetting opportunities, and the failure of the parties to require all necessary information to be collected and shared. These mistakes compound one another and demonstrate the 2023 Decree fails to adequately preserve the Great Lakes fisheries, as required under the law of this case. In addition to these mistakes, the District Court erred in not thoroughly analyzing the target annual mortality rates, which are the foundation of the allocation plan, harvest limits, and the other parts of the 2023 Decree.

For these reasons more thoroughly expanded on below, this Court should have a firm conviction the District Court made a mistake in reviewing and approving the 2023 Decree. *Carroll*, 26 F.3d at 1386.

A. The 2023 Decree Does Not Have an Enforceable Management Framework.

The 2023 Decree provides how the parties will manage their respective harvests:

> B. Management of Harvest. The State and the Tribes shall manage their respective fisheries to avoid exceeding their respective annual Harvest Limits as provided … It is the intent [ ] that:
>
> a. Large deviations shall be rare and promptly addressed;

> b. The fishery shall not be overly regulated in response to minor deviations caused by random fluctuations in the fishery or imprecision in assessment methods; and
>
> c. On average neither the State nor the Tribes shall exceed their apportioned harvest opportunities. [Decree, R. 2132, Page ID # 15271, Article VII(B).]

These standards are without any defined terms or qualifying language to help interpret them. The standards seemingly permit deviations ("Large deviations shall be rare … minor deviations caused by random fluctuations") without even as so much explaining what type of deviation is allowed. If a Tribe exceeds its harvest limit of a species by 20%, is there a violation of the terms of the 2023 Decree? The District Court never explained despite acknowledging the language was not "the epitome of crystal clear" (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15229). Instead, the District Court skirted past the issue by saying the language was not "ambiguous enough" to warrant a rejection of the 2023 Decree (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15230).

The Coalition does not know what deviations are problematic under the terms of the 2023 Decree, and neither do the Stipulating Parties or the District Court.[17] The

[17] At oral argument, counsel for the Coalition pointed out no one could define the phrases at issue: "MR. SCHULTZ: We explained our concerns about use of the term large deviations, rare and promptly addressed, on average, landed and other terms. Interestingly, no other counsel stood up and said to you, this is what it means. No one attempted to even clarify that language and explain away the ambiguities" (Objection Hearing May 25, R. 2120, Page ID # 14815).

problem with the lack of a standard related to overfishing is made worse by the lack of any penalties under the 2023 Decree.

There are no penalties under the 2023 Decree in the event the parties exceed their harvest limits. The Stipulating Parties argued that this was by design (Objection Hearing May 24, R. 2119, Page ID ## 14465-14467). That is an absurd contention; there must be standards to stop or deter overfishing when it happens. Although common sense, this was also explained by Chris Horton, a biologist whose opinion was offered in support of the Coalition's objections (Affidavit of Chris Horton, R. 2062-2, Page ID # 12543).

In contrast, the 2000 Decree had safeguards in place to disincentivize parties from exceeding their respective harvest limits. The penalties under the 2000 Decree provided that if a Tribe overfished, it would have its harvest limits reduced and the other parties would have their harvest limits increased:

> 4. If, in any one (1) year, either the State's or the Tribes' deviation exceeds positive fifteen percent (+15%), then:
>
> > a. The exceeding party's (either the State or the Tribes collectively) harvest limit in the following year shall be reduced by the amount in pounds round weight by which its harvest exceeded its harvest limit for the one (1) year in question;
> >
> > b. The other party's harvest limit in the following year shall be increased by the same amount whether or not the other party was also an exceeding party; and

> c. The Exceeding party shall take management action so that its harvest in the following year does not exceed its harvest limit for that year as adjusted … [(2000 Decree, R. 1458, Article VII.B.4).]

These penalties created a deterrent to stop the parties from exceeding their harvest limits because it would penalize the violating parties by reducing their limits. The 2023 Decree does not function in this manner because it fails to define what deviations are acceptable or offer any penalties for an unacceptable deviation.

Issues of enforcement have been present in this case since the 1985 Decree. *Michigan*, 12 ILR at 3086. Judge Enslen explained that it was paramount to adopt a plan that had a management process that was enforceable. *Id.* at 3087.

The District Court seemed concerned about the lack of enforceability at oral argument, and it led to a revealing back and forth related to the Stipulating Parties' position:

> THE COURT: If I understood Mr. Schultz's argument, one of his concerns is that the 15 percent marker is no longer in the language. And his point is that there doesn't appear to be a trip wire, if you will, for purposes of addressing an overharvest because of the lack of the 15 percent. So could you address that for me? [(Objection Hearing May 24, R. 2119, Page ID # 14467.)]

The Stipulating Parties responded to this question explaining that there are other regulations that could protect against overfishing without ever explaining what those regulations consist of or how they are part of the District Court's analysis of the 2023 Decree (Objection Hearing May 24, R. 2119, Page ID ## 14467-14470). The

Coalition pointed this out saying that the argument put forward only adds to the ambiguity:

> MR. SCHULTZ: You asked the question of with the 15 percent penalty gone, where is the trip wire, I believe. And her response was that the State regs and the Tribal regs will address that. If you look at the decree, they are not incorporated in this section of the decree. There is no reference [to them] … there is no indication in the decree that those regs advise as to what should happen if overfishing occurs … so it doesn't solve the ambiguity, it adds to the ambiguity [(Objection Hearing May 24, R. 2119, Page ID ## 14488-14489)].

It is obvious the position of the Stipulating Parties is that there need not be enforceable limits with defined penalties in the 2023 Decree.

The lack of any enforcement mechanisms is especially problematic considering the "prospective provisions of [a] consent decree operate as an injunction." *See Williams*, 720 F.2d at 920 (explaining that when a court enters a consent decree its provisions operate as an injunction). It is fundamental that an injunction explains what is or is not allowed. *See* Fed. R. Civ. P. 65(d)(1)(C) ("providing that injunctive relief must describe in reasonable detail … the act or acts restrained or required."). This Court has addressed how to resolve ambiguities in injunctions. *See Grace v. Center for Auto Safety*, 72 F.3d 1236 (6th Cir. 1996). In *Grace*, this Court explained that ambiguities must be resolved in favor of persons charged with contempt. *Id.* at 1241. In this context, that would mean that any

allegations of overfishing would result in a deviation limit being read in favor of the overfishing party, which is seriously problematic.

In application, the 2023 Decree fails to explain what type of overfishing is allowed, and the District Court entered the 2023 Decree anyway stating it was not "ambiguous enough" to reject. The ultimate result of overfishing of Lake Trout and Whitefish will be undoing 35 years of management and rehabilitation efforts, obviously hurting the public interest and preservation of the resource (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID # 12623). This Court should have a firm conviction that a mistake was made by the District Court in approving the management framework of the 2023 Decree. *Carroll*, 26 F.3d at 1386.

B. The District Court Mistakenly Concluded that the Unenforceable Harvest Limits Would Mitigate Concerns Related to the Expansion of Gillnets and Failed to Recognize the Other Harms of Gillnet Expansion.

The Coalition provided the District Court with a series of maps showing the areas proposed for gillnet fishing in the 2023 Decree (Maps of Expanded Gillnets, R. 2062-3, Page ID ## 12562-12583). The expansion of gillnetting opportunities in cannot be understated:

- **Lake Michigan**: The expansion of gillnets in Lake Michigan includes many grids that have been previously closed to gillnet fishing (see for instance, Grids 308, 309, 519, 815, and 816) while also expanding gillnet fishing closer to established refuge areas.

- **Lake Huron**: The expansion of gillnets in Lake Huron most ominously, from the standpoint of sustainability, opens Drummond Island Refuge to gillnetting and includes Hammond Bay and near Rogers City Harbor (Grid 606) while blocking any migration for fish from the spawning area to other parts of Lake Huron.
- **Lake Superior**: The expansion of gillnets in Lake Superior includes extremely large portions that were previously closed to gillnetting and allowed the less lethal form of fishing through trapnets.

This Court has recognized "evidence suggests that overuse of gill nets could 'deplete the fish resource of the Great Lakes to the extent that they would become non-existent.'" *Michigan*, 68 F.4th at 1024 (citations omitted).

The District Court mistakenly concluded that the **unenforceable** harvest limits would be the defense against the overuse of gillnets.[18] The District Court explicitly stated that harvest limits were the answer in the context of the Coalition's objections to expansion of gillnets:

> In other words, the manner in which the Tribes catch the fish is totally irrelevant because their total harvest is limited … Whether they meet that harvest limit quickly by using the efficient method of gill nets, or whether they meet that harvest limit over time by using less efficient means of fishing, the Tribes are still subject to the same harvest limits regardless of gear used [(Opinion Regarding 2023 Decree, R. 2130, Page ID # 15213)].

The District Court simply viewed the Coalition's objection in isolation and without consideration that the harvest limits were "less than crystal clear" but not ambiguous

[18] This is a perfect example of the District Court failing to read the Coalition's objections as being interrelated.

enough to be rejected (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15229). In effect, the harvest limits are unenforceable.

The Coalition's objection related to unenforceable standards in the 2023 Decree understood in context with the drastic increase in gillnetting opportunity demonstrates that **the Stipulating Parties have agreed to a management framework where the Tribes can fish with incredibly efficient means and not be penalized for overfishing**. Mr. Johnson averred increased gillnetting without set limits flies in the face of the biologic reality of the Great Lakes fisheries: "[v]igilance is required in managing gillnet effort and lack of vigilance can have disastrous consequences in as little as a few months" (James Johnson Affidavit, R. 2062-5, Page ID # 12615). These same sentiments were first put forward in this case by Judge Enslen in 1985 when he stated that Tribal fishermen had to be exceedingly careful regarding the use of gillnets. *Michigan*, 12 ILR at 3084.

Part of Judge Enslen's concerns back in 1985 were related to gillnet fishing for one commercial species (*i.e.,* Whitefish) while incidentally catching another (*i.e.,* Lake Trout). *Michigan*, 12 ILR at 3084. The 2023 Decree presents the opposite issue; Tribal gillnetters have to be exceedingly careful of incidental catch of Whitefish when gillnetting for Lake Trout. However, the 2023 Decree has no requirements that gillnetting for Lake Trout be stopped in the event Whitefish are being overharvested. This is a serious flaw the District Court overlooked.

Further concerns of gillnet expansion include the removal of refuge areas, which are designed to be grids in the Great Lakes that serve as spawning reefs. As just one example, consider the shrinking of the Drummond Island Refuge. The Drummond Island Refuge was established by interagency consensus in 1985 as part of the rehabilitation effort for Lake Trout in Lake Huron (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID # 12638). In both the 1985 Decree and 2000 Decree, the Drummond Island Refuge was designed to allow Lake Trout to spawn and reproduce; to accomplish this, gillnet fishing was prohibited in and around the area (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12632-12638). However, the 2023 Decree drastically changes the Drummond Island Refuge. The 2023 Decree opens fishing opportunity and gillnetting for 10 months of the year, including during the time Lake Trout concentrate at the reef for spawning season (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12638-12639). The opening of this refuge for gillnet fishing cuts against the prior successful work to rehabilitate Lake Trout and will threaten the future population of Lake Trout in Lake Huron (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12638-12639).

Gillnet expansion is simply at odds with the state of the resource, especially considering there are not hard limits or penalties if the parties use this efficient method and overfish. It was a clear mistake for the District Court to allow the

expansion of gillnets without a proper enforcement framework to guard against the possibilities of overfishing.

C. The District Court Did Not Recognize the Concerns of the Coalition Related to Information Sharing.

Judge Enslen explained in 1985 that "[i]t is in the best interests of the resource and all of the parties to improve the gathering and exchange of technical data and to coordinate data collection efforts." *Michigan*, 12 ILR at 3084. The Coalition expressed concerns to the District Court related to inadequate and incomplete information sharing in the terms of the 2023 Decree.

To explain, the 2023 Decree only requires the Tribes to report harvest "landed" (Decree, R. 2132, Page ID ## 15283-15284, Section XIV), but "landed" is defined nowhere in the 2023 Decree. Thus, non-commercial species caught and killed in gillnets, such as Atlantic Salmon, Lake Sturgeon, Splake, Brown Trout, Steelhead and others will not be reported if they are killed in a gillnet and thrown back into the water. Perhaps more importantly, commercial species (*i.e.,* Whitefish or Lake Trout) that are caught and killed but not "landed" will not be tracked. Those dead fish will be assumed alive in the models and overestimate the number of fish available. The consequences of inaccurate data will be devastating to the preservation of the Great Lakes fisheries (Affidavit of James Johnson, R. 2062-5, Page ID ## 12615-12616).

The District Court assumed that this was not an issue as it accepted the Stipulating Parties representation that bycatch will only be 1% of the total catch (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15214). The Coalition strongly disagrees with this minimizing of the concerns related to bycatch:

> Because gillnets are not selective for the bottom-dwelling fish they target, it is important that bycatch that is killed in nets be counted and reported. Validation of bycatch killed (discards) must be validated by scientifically designed on -board studies of bycatch incidence by species so that the untargeted kill … can be estimated and accounted for in models and adjusting catch policy and harvest limits [(Affidavit of James Johnson, R. 2062-5, Page ID ## 12615-12616).]

There are several research papers appended to Mr. Johnson's literature review that further highlight the dangers of bycatch in the Great Lakes and the risk to the Great Lakes fisheries (Johnson Affidavit, Exhibit 1, R. 2062-5, Page ID ## 12643-12649).[19] By failing to collect any data related to bycatch, the Stipulating Parties have presented a trust-but-do-not-verify approach. The approach should have been rejected by the District Court.

The District Court should not have accepted the failed information sharing standards considering the drastic expansion of gillnets and the dangers presented related to bycatch of all species. If all relevant data is not collected, the parties will

[19] See for example the sources titled "Comparison of Catch and Lake Trout Bycatch in Commercia Trap Nets and Gill Nets Targeting Lake Whitefish in Northern Lake Huron" and "Management of commercial fisheries bycatch, with emphasis on lake trout fisheries of the Upper Great Lakes."

be acting on inaccurate data in future models which will form the basis of target annual mortality rates and harvest limits. This will have a cascading impact over the course of years. All bycatch should be accounted for in the 2023 Decree to ensure a sustainable future of the Great Lakes fisheries.

D. The District Court Failed to Critically Analyze the Target Annual Mortality Rates.

Target annual mortality rates represent the allowable kill for a fish species and are used to calculate the harvest limits for Tribal and non-tribal fishers (Affidavit of Scott Koproski, R. 2086-2, Page ID # 13094). The rates that are set are a critical part of the management framework of the Great Lakes fisheries because if they are set at an appropriate level, then fish species can be self-sustaining, *i.e.,* the number of fish in the Great Lakes will grow year after year (Affidavit of James Johnson, R. 2062-5, Page ID # 12610).

The Stipulating Parties submitted the 2023 Decree **without any set target annual mortality rates** and provided that prior to the signing of the 2023 Decree the rates would be set (Decree, R. 2132, Page ID # 15267, Article VII(A)(5)). The District Court opined that the design of the 2023 Decree to not set target annual mortality rates was a feature, not a bug, of the management framework: "[t]he Court endorses the Stipulating Parties' purposeful exclusion of specific mortality rates in the Proposed Decree. Doing so incentivizes the Parties to review the mortality rates

often and make changes when necessary …" (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15221). That view is plainly wrong considering the 2023 Decree is subject to evaluation by the District Court; how could the District Court understand the effect on the fishery without set target annual mortality rates? Furthermore, the idea that the target annual mortality rates can just be changed if it is required is not true because "when necessary" is undefined and there will be decision-stifling disputes surrounding any ambiguous definitions of rates that are "too high."

The 2023 Decree provides that target annual mortality rates can only be changed if there is a "consensus" among all groups (Decree, R. 2132, Page ID # 15269, Article VII(A)(5)(b)). The complexity of this case and the fierce negotiation between the Stipulating Parties to this point makes it entirely unreasonable to think that all parties will agree to lower target annual mortality rates in the future.

The Stipulating Parties, realizing that the lack of target annual mortality rates was an issue, provided the agreed to target annual mortality rates buried in an affidavit: [20]

- **Lake Trout**: Target annual mortality rates were set at MI-5 **42%**, MI-6 **42%**, MI-7 **42%**, MM-123 **45%**, MM-4 **50%**, MM-5 **45%**, MM-67 **45%**, MH-1/2 **45%** [Affidavit of Scott Koproski, R. 2086-2, Page ID # 13094].

[20] The Stipulating Parties also explained that the rates would be calculated using the A-Max method (Affidavit of Scott Koproski, R. 2086, Page ID # 13075), which the Coalition agrees with using. But that method does not overcome the significantly too high of rates set by the Stipulating Parties.

- **Whitefish**: Target annual mortality rates were set at **55%** for all units [Affidavit of Scott Koproski, R. 2086-2, Page ID # 13094].

Still, the Coalition had no opportunity to have its experts critically analyze these rates because the District Court did not provide the Coalition with an opportunity to file a reply. The Coalition offered in its initial filing that target annual mortality rates should be set at **40%** or lower for Lake Trout and **45%** or lower for Whitefish (Affidavit of James Johnson, R. 2062-5, Page ID ## 12610-12629), but the Coalition was only generally stating the appropriate rates because none had been set. [21]

Biologist James Johnson cites scientific literature of Dr. Ji X who determined that the target annual mortality rates are too high over **40%** for Lake Trout, yet that is what the Stipulating Parties agreed to (Affidavit of James Johnson, R. 2062-5, Page ID ## 12610-12611). Mr. Johnson's extensive literature review concluded Lake Trout target annual mortality rates should be below **40%** and Whitefish target annual mortality rates should be below **45%** (Johnson Affidavit, Exhibit 1, R. 2062-

[21] The Coalition was not able to have its biologists critically review the target annual mortality rates set by the Stipulating Parties because they had yet to be produced. So, the Coalition had to just offer general numbers. The District Court stated that the Coalition's "contention that all mortality rates should be set at 40%" was "undeveloped and unsupported" (Opinion Regarding 2023 Decree, R. 2130, Page ID # 15222). But how could the Coalition have been expected to analyze rates they did not know existed? In any event, the Coalition's experts aver that the high target annual mortality rates are too high to produce self-sustaining populations.

5, Page ID # 12629). As explained by counsel for the Coalition at oral argument, it makes no sense to have a **55%** mortality rate for a decimated Whitefish species:

> MR SCHULTZ: Particularly with respect to the collapse of Whitefish, no one stood up and said no, you're wrong, there's lots of fish there … so against this, when you think about Whitefish, you have a 55 percent mortality rate on a species that is virtually totally collapsed, with the expansion of gill nets and the bycatch of Whitefish that is sure to occur while you're pursuing Lake Trout as the principal targeted species … [(Objection Hearing May 25, R. 2120, Page ID # 14816).]

The Stipulating Parties do not dispute the fragile status of Whitefish, yet the mortality rates set and the inevitable concerns of bycatch demonstrate they are uninterested in the harm that could result to the Whitefish species.

Potential faults in target annual mortality rates are likely to go unaddressed for significant periods of time given the infrequent review of harvest limits and target annual mortality rates:

> Furthermore, a review of the target annual mortality rates every six years poses significant challenges for managing fisheries for sustainability. The six-year timeline is not likely to be nimble enough to protect highly targeted fisheries. If populations decline because the mortality target has been set too high for a particular stock, the lack of timeliness in adjusting mortality targets and the resulting harvest limits could result in a depleted stock that could take years, if ever, to rebuild. [(Affidavit of Chris Horton, R. 2062-2, Page ID # 12543).]

The result of too high of target annual mortality rates that are infrequently reviewed are declining Great Lakes fisheries for all.

The District Court, improperly applying the burden analysis, stated the Coalition did not explain the mortality rates with a substantiated basis (Opinion

Regarding 2023 Decree, R. 2130, Page ID # 15222). It was the Stipulating Parties, however, that failed to substantiate the rates that they intend to set in the 2023 Decree by avoiding critical review of them.

* * *

The District Court abused its discretion in approving a negotiated decree to manage the Great Lakes that has an unenforceable management framework, drastically expands gillnet opportunity, fails to collect information necessary to evaluate the health of the Great Lakes fisheries, and intends to set target annual mortality rates significantly higher than appropriate considering the biological setting of the Great Lakes. The entry of the 2023 Decree endangers the Great Lakes fisheries.

CONCLUSION

The District Court applied the wrong standard, relied on an incomplete record, and abused its discretion in approving the 2023 Decree. The Coalition requests that this Court reverse the entry of the 2023 Great Lakes Fishing Decree and order further proceedings under the appropriate standard, based on a complete record, and considering the sustained objections by the Coalition.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Amicus Curiae-Appellant Cross-Appellee

Dated: December 19, 2023

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
David J. Szymanski, Jr. (P86525)
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100

CERTIFICATE OF COMPLIANCE

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

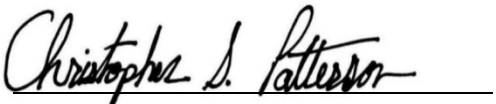
1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This brief contains 12,925 words.

2. This 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.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Amicus Curiae-Appellant Cross-Appellee

Dated: December 19, 2023



Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
David J. Szymanski, Jr. (P86525)
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100

CERTIFICATE OF SERVICE

I certify that on the date set forth below, the foregoing document was served on all parties of record or their counsel of record through the CM/ECF system if they are registered users, or if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below, if applicable).

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Amicus Curiae-Appellant Cross-Appellee

Dated: December 19, 2023

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
David J. Szymanski, Jr. (P86525)
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100

ADDENDUM – DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Amicus Curiae-Appellant, Cross-Appellee, pursuant to Sixth Circuit Rules 28 and 30, designates the following portions of the record on appeal:

Description of Entry	Record No.	Page ID No. Range
Notice of Appeal	2140	15387
Opinion Regarding Approval of 2023 Decree	2130	15095-15233
Order Adopting 2023 Decree	2131	15234-15235
Decree	2132	15236-15339
Amended Scheduling Order	2053	12395-12396
Order Denying Motion to Adjourn Hearing	2106	14332-14351
Order Following Objections Hearing	2114	14375-14378
Order Confirming Amicus Status	1875	2143-2145
2000 Decree	1458	Unknown at this time
Stipulation for Entry of Consent Decree	1457	3401-3414
Order Extending Consent Decree	2014	11957-11958
Brief in Support of Motion to Intervene	1969	11020-11089
Motion to Intervene	1964	10936-10938
Order Denying Motion to Intervene	1985	11662-11686
Order Denying Motion for Reconsideration	2018	11993-11997
Stipulation for Entry of 2023 Decree	2042	12161-12293
Coalition's Objections	2062	12499-12662
SSMT's Response to CPMR's Objections	2083	12938-12948
State of Michigan's Response to CPMR's Objections	2084	12949-13001
Response to CPMR's Objections	2085	13002-13052
US Response to CPMR's Objections	2086	13053-13277
Objection Hearing May 24	2119	14413-14625
Objection Hearing May 25	2120	14626-14821
Scheduling Order	2052	12393-12394
SSMT Proposed Findings of Fact	2123	14828-14860
Stipulating Parties' Proposed Findings of Fact	2124	14861-14974
Coalition's Proposed Findings of Fact	2125	14975-15010

GTB's Supplemental Proposed Findings of Fact	2126	150011-15045
Opinion	1892	10818-10825
Order Outlining Objections Hearing	2106	14332-14351
Affidavit of Chris Horton	2062-2	12536-12545
Affidavit of James Johnson	2062-5	12603-12649
Affidavit of David Borgeson	2062-4	12597-12602
Affidavit of Frank Krist	2062-3	12546-12596
Affidavit of William Winowiecki	2062-7	12653-12662
Affidavit of Scott McLennan	2062-6	12650-12652
Affidavit of Scott Koproski	2086-2	13093-13108

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Amicus Curiae-Appellant Cross-Appellee

Dated: December 19, 2023

Christopher S. Patterson (P74350)
Stephen O. Schultz (P29084)
David J. Szymanski, Jr. (P86525)
4151 Okemos Road
Okemos, Michigan 48864
(517) 381-0100