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,

and

STATE OF MICHIGAN, et al.,

Defendants.
_____/

Case No. 2:73-cv-26

HON. PAUL L. MALONEY

COALITION TO PROTECT MICHIGAN RESOURCES' OBJECTIONS TO PARTIES' STIPULATION FOR ENTRY OF PROPOSED CONSENT DECREE (ECF 2042)

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INTRODUCTION

The Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, United States, and State of Michigan (the "Parties") have asked this Court to enter a Proposed Decree (ECF 2042) to replace the 2000 Consent Decree ("2000 Consent Decree"). The Proposed Decree will have profound impacts on the Great Lakes fisheries that will affect negatively both tribal and non-tribal interests and it would bind the Parties for the next 24 years. The Coalition to Protect Michigan Resources ("Coalition") and its members strongly object to this Proposed Decree as it violates the public interest, is biologically unsound, and poses a threat to the fishery resources of the Great Lakes. This Court should reject the Proposed Decree in its present form as discussed below.

The Coalition has had an established, longstanding role as *amicus curiae* in this case. Throughout the nearly 50-year history of this dispute the Coalition or its predecessor organizations have played an active role in helping the Court and the Parties navigate complex negotiations and litigation surrounding the co-management and conservation of the Great Lakes fisheries—a resource shared in common by the Coalition, the Parties, and the public. The Coalition's main purpose is to protect the Great Lakes for generations to come for all that share the resource.

The Coalition believes the Proposed Decree to be a political document based not on sound science but on the commercial or political interests of various parties. (See **Exhibit A**, Affidavit of Christopher Horton, ¶¶ 14-15 (explaining how the federal Magnuson-Steven's Act serves as a model for managing the fisheries within the Proposed Decree.)

The Coalition respectfully asks this Court to give meaningful consideration to its objections and reject this proposed decree, sending it back to the Parties for reconsideration of its fundamental flaws. The specific objections of the Coalition establish that the Proposed Decree is contrary to the public interest and creates a risk of irreparable harm to the Great Lakes fisheries. Set forth below

are the Coalition's specific objections. The main concerns of the Coalition can be summarized, however, in the following points of contention:

- **ALLOCATION OF THE FISHERY**: The Proposed Decree abandons the concept of a roughly equally shared fishery resource and allocates approximately 70% or more of the available harvest to the Tribes, thereby denying the public reasonable access to and opportunities with the Great Lakes fishery within the Treaty waters.

- **GILLNET FISHING**: The Proposed Decree abandons the initiative emphasized in the 2000 Consent Decree to move away from the destructive, lethal, gillnet fished by the tribes and to more selective and far less lethal trap nets. The change from gillnet fishing to trap net fishing was in no small part a reason for the increasing natural reproduction of Lake Trout in the treaty waters of the Great Lakes. The Proposed Decree greatly expands the destructive practice of gillnet fishing and is at odds with the biological capacity of the Great Lakes.

- **LAKE TROUT AND WHITEFISH REHABILITATION**: The Proposed Decree fails to adequately address Lake Trout rehabilitation or the steep decline of whitefish in lakes Huron and Michigan. A collapse of both of these will cause economic extinction of fishing industries and livelihoods.

- **WALLEYE AND PERCH**: The Proposed Decree drastically increases gillnet fishing for the relatively small, finite walleye and perch populations with seemingly no limitations. A collapse of the Walleye and Perch populations will cause economic extinction of fishing industries and livelihoods.

- **UNDEFINED TARGET ANNUAL MORTALITY RATES**: The Proposed Decree fails to define target annual mortality rates for Lake Trout and Whitefish, making it impossible for this Court to determine the impact the Proposed Decree would have on the Great Lakes fishery.

- **REVIEW OF HARVEST LIMITS AND TARGET ANNUAL MORTALITY RATES**: The Proposed Decree fails to frequently review harvest limits and target annual mortality rates. This creates an issue of responsiveness to issues that will inevitably arise through the life of the Proposed Decree. Fishery management has to be more nimble to respond to the changing dynamics of the fishery.

- **INFORMATION SHARING**: The Proposed Decree does not require meaningful total catch reporting. Instead, it only requires limited reporting of a fisher's catch, including only bycatch that is retained. This and other reporting failures will make it impossible to assess the selectivity and bycatch concerns posed by gillnets. It will also be impossible to document and identify when gillnet fishing is presenting a serious threat to a sustainable fishery.

- **NET MARKING**: The Proposed Decree does not adequately address the marking of gillnets, which has been a public safety issue for years and will be exacerbated with expanded gillnet activity.

- **LOCAL CONSULTATION**: The Proposed Decree does not allow local governments and recreational fishing groups to request meetings with the Tribes to address issues of local concern—which was included in the 2000 Consent Decree—and instead gives the State of Michigan an effective veto over local concerns.

- **ENFORCEABILITY**: Many provisions of the Proposed Decree regarding fishing limits are vague to the point of being unenforceable. It contains no method for effectively addressing overfishing.

This Court should reject the Proposed Decree and send the Parties back to the negotiating table to address the objections raised herein.

STANDARD OF REVIEW

"Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their **precise** terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (emphasis added). "A consent decree has attributes of both a contract and of a judicial act." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). The entering of a consent decree "places the power and prestige of the court behind the compromise struck by the parties" and the court is required to "protect the integrity of the decree with its contempt powers." *Id.* A court may therefore not enter a consent decree "for an agreement which is illegal, a product of collusion, or contrary to the public interest." *Id.*

All parties affected by a decree should "be afforded a full and fair opportunity to consider the proposed decree and develop a response" at a hearing. *Id.* at 921. A court should consider whether a "consent decree is consistent with the public interest." *Id.* at 923. "The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable." *Id.* at 921. A court objecting to a consent decree as problematic "should inform the parties of its precise concerns and give them an opportunity to reach a reasonable accommodation."

Id. "In making the reasonableness determination the court is under the mandatory duty to consider the fairness of the decree to those affected, the adequacy of the settlement to the class, and the public interest." *Id.*

ARGUMENT

The crux of the issue in these negotiations and this case is that while the Treaty of 1836, as interpreted, protects tribal fishing rights, the resource subject to that right is shared in common. See *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985) ("While the Treaty, as interpreted by this court, protects tribal fishing rights, the resource is shared by other user groups"); *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981) ("The right of the Indians to engage in gillnet fishing is not absolute"); See also, *Washington v. Fishing Vessel*, 443 U.S. 658 (1979) (Holding the allocation of the fishery disputed between Tribes and the State of Washington provided a 50% maximum for the Tribes and it could be reduced as the Tribes' needs decreased). The Sixth Circuit established that any fishing right of the Tribes asserted as to this shared resource is limited by that shared nature of the resource and the Michigan Supreme Court's holding in *People v. Leblanc*, 399 Mich. 31 (1976):

> As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or other classes of fishermen. [*United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981).]

The difficulty in applying this standard is having the Parties reach an agreement that protects the legal rights of the competing parties without "diminishing or depleting" the treasured resource shared by the Parties. *United States v. Michigan*, 12 ILR at 3079.

To approve this Proposed Decree, this Court must determine that it is not contrary to the public's interest and is fair, adequate, and reasonable. *Williams*, 720 F.2d at 920-23. Fortunately,

this Court is not without law of the case in how to evaluate the Parties' Proposed Decree. In 1985, Judge Enslen set forth 15 factors to determine which of two allocation plans would best protect the interests of all concerned parties:

> 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. [*United States v. Michigan*, 12 ILR 3079, 3081 (W.D. Mich. 1985).][1]

This Court, although only presented with one Proposed Decree and not forced to choose between two plans, should similarly weigh these considerations in evaluating whether the Proposed Decree presented by the Parties is in the public's interest, fair, adequate, and reasonable. See *Williams*, 720 F.2d at 921 ("The ultimate issue the court must decide at the conclusion of the hearing is whether the decree is fair, adequate and reasonable").

I. THE COALITION TO PROTECT MICHIGAN RESOURCES' OBJECTIONS TO THE PROPOSED DECREE.

The Proposed Decree is contrary to the public's interest, does not preserve the Great Lakes fishery and the Parties' rights in that resource. This is despite the fact that according to its introduction the Proposed Decree is supposed to seek "[t]he health and long-term sustainability of the Great Lakes fishery [because it] is vital to the cultural, social, and economic well-being of the Tribes, the State of Michigan, and the United States" (Proposed Decree, Introduction, ¶ 3). The Coalition takes issue with the following provisions of the Proposed Decree:

[1] This Court has previously stated Judge Enslen's 1985 opinion is the "law of this case" (ECF 1982, PageID.10822).

A. The Coalition objects to the Proposed Decree because it abandons the Court's previous holding that the fishery resource is one shared in common with the public.

The 2000 Consent Decree allocated to the Tribes approximately 60% of the available harvest of fishery resources in the Treaty waters of the Great Lakes. As observed by some of the parties previously, this allocation varied from a 50-50% allocation in exchange for gear restrictions and zones that are no longer present in the Proposed Decree. Thus, the starting point for any allocation in litigation or negotiation is a sharing of the resource, essentially a "50-50 split."[2]

Estimates of the allocation now contained in the Proposed Decree approach 70% while gear limitations and zones in the 2000 Consent Decree that permitted State-licensed fishers to obtain their allocation are largely eliminated. One need only consider the major shift in the allocation of whitefish and lake trout to the Tribes in Lake Superior to understand that the 60% allocation for the last 22 years will now approach 70% or more under the Proposed Decree.

The allocation also remains important as it relates to localized impacts of expanded gillnetting in areas where such activity has not been permitted for 35 years. The parties will presumably indicate that various closures during the recreational season will mitigate against the loss of stocks for the recreational fisher to pursue under the State's allocation. However, gillnetting that is permitted prior to the recreational fishing season will degrade the viability of a fishing stock in the area. Even though fish do have tails and travel throughout the water, because of water temperature, natural topographic features, such as reefs, and available food, fish schools can localize and certainly be removed from the fishery under the current proposed allocations. Most recreational fishing ports are also now surrounded by gillnet zones which will deplete the fisheries

[2] The Sault Tribe's recent motion challenging the Court's jurisdiction may well test this "shared resource" concept and holding.

that can backfill after the seasonal gillnet seasons close. Certainly, there is a related issue with sufficient time for fish to migrate into the recreational areas for backfilling to be effective.

Once depleted, the seasonal closure that would allow the recreational fishery to proceed presumes, erroneously, that State recreational fishers can still obtain fish with their available fishing techniques (i.e., hook and line). For example, the Proposed Decree allows large mesh gillnetting to occur from October 1 through May 1 in Grid 519 and year-round large mesh gillnetting in the outer western portion of the bay in the Petoskey area (**Exhibit B**, Affidavit of Frank Krist, ¶ 51). Similarly, large mesh gillnets are proposed to extend deeper into the Grand Traverse Bays (Grids 815 and 816), which will make it extremely difficult for the recreational fishery to have an opportunity to take their portion of the fishery (Exhibit B, ¶¶ 53-55). Such netting in and near recreational fisheries will greatly reduce the number of fish; those declines will cause serious economic hardships and devastating impacts to those communities surrounding well-known fishing ports (Exhibit B, ¶¶ 27, 51). The Coalition objects to the allocation issues that are presented in the Proposed Decree and asks that the Court reject such allocations along with the expansion of gillnet and send these issues back to the Parties for further negotiation.

B. The Coalition objects to the expansion of gillnet fishing in Article IV because it does not align with the objectives of preserving and conserving the resource and will destabilize the fishery.

Gillnet fishing is recognized worldwide in the fishing community as a dangerous practice because it can catch and kill non-targeted species. Expanding gillnet, as fishery biologist David Borgeson of the Michigan Resource Stewards explains, "is, in most cases, a move in the wrong direction" (**Exhibit C**, Affidavit of David Borgeson, ¶ 16). Fishery biologist Jim Johnson, who is also intimately familiar with the Great Lakes fishery, similarly supports the concerns and adverse impacts that are caused by such expansions as shown in the various management units of the ceded

waters (**Exhibit D**, Affidavit of James Johnson, ¶ 12.b; 12.d-f; 12.g.3; 12.i; 12.j.2). This much was recognized in the 2000 Consent Decree which aimed to remove "at least fourteen (14) million feet of large mesh gill net effort from Lakes Michigan and Huron by 2003…" (2000 Consent Decree, Article X(B)). In stark contrast, the Proposed Decree massively expands gillnet fishing into new waters, undoing any of this effort to preserve the fishery resource while seriously jeopardizing the health of the Great Lakes fishery. The expansion of gillnet fishing simply fails to address the limitations of the fishery resource and will severely impact critical fish species as well as the local and tribal economies that rely on the impacted fisheries.

To illustrate the drastic expansion of gillnet fishing under the Proposed Decree, Affiant Frank Krist, current Vice President of the Hammond Bay Area Anglers Association and Chair of the Michigan Department of Natural Resources' ("MDNR") Lake Huron Citizens Fishery Advisory Committee compiled a series of maps (Exhibit B, ¶ 22) showing the areas proposed for gillnet fishing in the Proposed Decree.

Collectively, the terms of the Proposed Decree expand gillnet fishing to a significant area of new water in three of the Great Lakes. The impact the proposed expansion would have in each Great Lake is profound.[3] In allowing such expansions, the Proposed Decree does not adequately address the impacts by such expansion as discussed below, such as regulations related to how gillnets are set and checked and sufficient information reporting to even verify the presumption of the parties that the non-selective nature of gillnets will not impact the fishery (Exhibit C, ¶ 16 (noting that delayed checks and lifting of gillnets even worsens their impact on the fishery); (Exhibit D, ¶ 12.i, 12.j.4, 12.j.6 (noting the lack of the Proposed Decree tracking all fish caught in

[3] In addition to those expanded areas shown through Maps 1-20, the Proposed Decree also allows assessment fishing in Article XV.C, which provides for inadequately regulated gillnet fishing by a commercial fisher using up to 6,000 feet of gillnet for up to three years (Exhibit B, ¶ 43-45).

gillnets by species and number to properly validate and manage the impact of gillnet on the Great Lakes fishery)).

1. Gillnet expansion in Lake Michigan in Article IV(A)(1).

Affiant Krist's maps illustrate the expansion of large and small mesh gillnet zones in Lake Michigan when compared to the 2000 Consent Decree (**Exhibit B**, for example, Maps 1, 2, 3, and 4). The expansion 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 (the principal place of reproduction).[4] The biologist James Johnson indicates this expansion is at odds with the reproduction and sustainability of Lake Trout in Lake Michigan (Exhibit D). Specifically, Johnson states that the Lake Trout recovery programs in Lake Michigan are tenuous as "biological information describes a resource in crisis . . . [with] Lake Trout recovery still in early stages" (Exhibit D, ¶ 10). Johnson states that Lake Trout harvest, as it currently stands, is already too high in the areas where gillnet fishing would be expanded under the Proposed Decree:

> It is my opinion that excessive lake trout harvest is already being permitted around Lake Michigan's Northern Refuge. MM-1, 2, 3 and portions of MM-5 are adjacent to or near the Lake Michigan Northern Refuge. But mortality rates are already too high in MM-1, 2, 3 for the development of spawning stocks. The Proposed Decree would incentivize increased gillnet fishing there, exacerbating the mortality issue. The utility of a spawning refuge is seriously compromised when spawning-age fish are scarce [Exhibit D, ¶ 12(g)(4)].

[4] In other regions of the country, protecting refuge areas in efforts to rebuild a fishery has been critical. See, e.g., Ben Berke, *The Atlantic cod is coming back after strict catch limits greatly decreased numbers*, https://www.npr.org/2022/07/18/1112113037/the-atlantic-cod-is-coming-back-after-strict-catch-limits-greatly-decreased-numb (last accessed January 16, 2023) ("In order to rebuild a stock, you have to sort of preserve those spawners so that they are able to reproduce").

The result of this expanded gillnet fishing will almost guarantee "that mortality rates exceed those necessary for restoration of Lake Trout" (Science-Based Analysis of How Proposed Decree Jeopardizes Sustainability of Great Lakes Fishery Resources and the Fishers that Depend on Them, Exhibit D). Yet, the Proposed Decree would allow this to happen. (Exhibit B, ¶¶ 56-57 (explaining the ambiguous provisions allowing two licenses with a maximum of 6,000 feet each for historic preservation and cultural education yet allowing extensive gear and commercial sale of the catch)). This is against the public's interest, jeopardizes the preservation of the Great Lakes fishery, and does not recognize a resource shared in common (Exhibit C, noting the disincentives of expanding gillnet when balancing the sustainability and economic viability of the resource for all users). Also noteworthy, the Tribal fishing prohibited in Article IV(A)(1)(b) indicates that it is "prohibited south of the line extending from the mouth of the Escanaba River" yet Map 9 included with the Proposed Decree appears to show the opposite (potentially in error).

The Coalition objects to gillnet expansion in Lake Michigan as set forth in Article IV(A)(1) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation.

2. Gillnet expansion in Lake Huron in Article IV(A)(2).

Affiant Krist's maps illustrate a massive increase in large and small mesh gillnet zones along with a significant reduction in the Lake Trout refuge area (the principal place of reproduction) when compared to the 2000 Consent Decree (Exhibit B, Maps 11, 12, and 13).[5] Specifically, the additional waters where gillnet fishing would be permitted in Lake Huron would

[5] Article VI(A)(2)(d)(iii) also seemingly permits Tribal trap net fishing in southern Lake Huron. The provision says the "Tribes may authorize" fishing and the "State shall issue a permit." It is likely the Parties intended fishing in these waters to be permissive, but as written the obligation for the State to issue a permit is mandatory.

be in Hammond Bay and near Rogers City Harbor (Grid 606, which has not previously been subject to gillnet fishing). The only Lake Trout refuge area identified in northern Lake Huron is proposed as being subject to gillnet fishing for more than 10 months of the year and has been reduced in size to less than half the size that has existed since 1985 (Exhibit B, ¶¶ 18-19, 25; Maps 11 and 12). The expansion of gillnet fishing in this area "would severely impact the Lake Trout population in Hammond Bay and the entirety of Lake Huron" (Exhibit B, ¶¶ 23-25).

Johnson states, in no uncertain terms, that "[t]he biological information describes a resource in crisis, with lake whitefish abundance at historic low points and Lake Trout recovery still in early stages in lakes Huron and Michigan" (Exhibit D, ¶ 10). He explains the appropriate approach:

> **The appropriate biological response** is to take a **conservative approach** to setting harvest levels in a new decree that protects the diminished whitefish stocks from overharvest while taking precautionary measures to protect lake trout as the focus of fishing shifts from whitefish to this recovering native species. The Proposed Decree, however, makes available additional fishing opportunities that will heighten harvest pressure on fragile resources . . . The Proposed Decree expands gillnetting opportunities to the detriment of the Great Lakes fishery. **This expansive new gillnetting will increase fishing pressure, enable more efficient targeting of lake trout and walleye, and expand gillnetting into areas and zones where they were not previously allowed. It represents a step backward from the framework of the 2000 Consent Decree**, which directed $14 million to converting nonselective, lethal gillnets to trapnet fisheries [Exhibit D, ¶ 12(a)(b)].

Conservative harvest policy ideally would stay in place and be reviewed annually until Lake Huron shows "signs of stabilization and self-sustainability" (Exhibit D, ¶ 12(j)(3)); (Exhibit A). Likewise, Affiant Horton similarly notes the concerns with expanded gillnetting, and opines that the management framework does not adequately account for such additional gear expansion (Exhibit A, ¶ 25).

The impact of expanded gillnet fishing would also be profound to the recreational fishing community in Rogers City and areas outside of gillnet zones. This is because under the proposed

plan there is no path for Lake Trout to migrate to Rogers City or areas south of Rogers City without coming across gillnets. (Exhibit B, Map 11). Gillnet fishing zones have never been permitted between the refuge area and Rogers City. Krist explains this difference will make it so Lake Trout will not have the same opportunity to migrate into the Hammond Bay and Rogers City area as they have in past decades (Exhibit B, ¶ 27).

In fact, the health of the Lake Trout population in all of Lake Huron is threatened by this change and expanded gillnetting, and recreational fishers are certain to be affected:

> Based on my experience, as the number of fish in the area decline to low levels, anglers lose interest with the slow fishing and move to other ports or just quit fishing. This could cause serious economic hardship and devastate the community of Rogers City [Exhibit B, ¶ 27].

The frustration with this specific expansion is that the Parties, and even Judge Enslen, have previously accepted a zone management scheme where recreational zones or refuge areas were protected from the effects of gillnet fishing. See *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985) ("The court finds the zonal plan superior . . . in protecting the Indian reserved treaty fishing right, preserving and managing the resource, reducing social conflict, stabilizing the fishery, and assuring both federal and state funding"). The expansion of gillnet fishing in Lake Huron eradicates a prudent plan of zone management and puts in serious jeopardy efforts to create and stabilize the Lake Trout population in the Treaty waters of Lake Huron (Exhibit B, ¶¶ 18-21). The expanded use of gillnets near the port of Rogers City also entirely fails to recognize the fundamental assumption that the resource is shared in common.

The expanding Salmon fishery during the 1985 Consent Decree in Lake Huron, and Rogers City, in particular, caused extensive community planning, investment in upgrading the harbor, and maintenance and dredging of the same to support the influx of those attempting to gain access to the fishery (Exhibit B, ¶ 14). The Mayor of Rogers City, Scott McLennan, agrees with Krist on

the impact the Proposed Decree could have on the recreational fishing industry in Rogers City. He finds that expansive gillnet fishing near Rogers City would decimate the local economy:

> Because of the high efficiency of the gill netting technique, an expanded gill netting harvest would have an immeasurable impact on the Rogers City area fishery and economy. If allowed in the Proposed Decree, **gill netting in the area is likely to irreparably harm the sport-fishery, bankrupt the Rogers City marina that depends upon the fishery, and decimate the local economy that survives on the revenues brought in by visiting sport-fishers** [**Exhibit E**, Affidavit of Scott McLennan, ¶ 5 (emphasis added)].

Without question, the Proposed Decree's expansion of gillnet fishing entirely fails to recognize that others share the resource in common, including the recreational fishing industry in Rogers City. Theses change will even threaten the well-documented wild populations of Coho Salmon and steelhead that live in the Ocqueoc River (Exhibit B, ¶ 36). Similar concerns exist regarding the expansion of small mesh gillnets without any effective policy to prevent the collapse of limited local populations of perch and walleye (Exhibit B, ¶¶ 37-39).

The Coalition objects to the expanded gillnet fishing in Lake Huron in Article IV(A)(2) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation based on these concerns.

3. Gillnet expansion in Lake Superior in Article IV(A)(3).

The expansion of large mesh gillnet fishing is proposed for all the 1836 Treaty Waters of Lake Superior (Exhibit B, Maps 16 and 17). Previously, a large portion of these waters was closed to large mesh gillnet fishing and the less lethal use of trap nets was permitted (Exhibit B, Map 16). The State of Michigan's efforts towards reducing mortality rate on fish stocks due to Sea Lamprey predation and over-fishing has been a focus since the 1960s (Exhibit C, ¶ 12). Even in the 1980s, the management of the Michigan fisheries was focused on reducing netting mortality, which produced a better fishery (Exhibit C, ¶ 14). The biological data available relevant to the MI-8

whitefish stock does not establish that additional fishing pressure is appropriate or prudent (Exhibit A, ¶ 25; Exhibit D, ¶ 12). In addition to this expansion, small mesh gill net zones for Walleye and Yellow Perch have also been extended across all the 1836 Treaty Waters of Lake Superior, representing a drastic shift from the 2000 Consent Decree (Exhibit B, Maps 19 and 20). Such expansion would impact an entire species that provides a significant economic value to the local communities and fishing ports (Exhibit B, ¶ 39; see also Exhibit C, ¶ 15-16, speaking to managing and allocating the stocks to encourage the more valued use).

The expansion of small-mesh gillnetting is largely provided to target perch and walleye. Perch and walleye stocks, however, are not sufficient within the 1836 Treaty Waters to sustain direct commercial fishing as set forth in the expanded gillnet areas (Exhibit D, ¶ 12.d; see also Exhibit B, ¶ 41, Maps 19-20, detailing the expansion in Lake Superior of small mesh gillnet zones for walleye and yellow perch).

The Coalition objects to the expanded gillnet fishing in Lake Superior in Article IV(A)(3) and asks that the Court reject such expansion and send this issue back to the Parties for further negotiation.

C. The Coalition objects to Article VII(A)(5) of the Proposed Decree because it fails to establish target annual mortality rates for Lake Trout and Whitefish.

The Proposed Decree provides that **prior to** the signing of the Proposed Decree the Executive Council,[6] in consultation with the Technical Fisheries Committee, shall adopt "target annual mortality rates at a species-specific level and management unit-specific level" (Proposed Decree, Article VII(A)(5)). Affiant Johnson, an expert fisheries biologist with extensive

[6] The Executive Council consists of chairpersons of the Tribes, the Director of the MDNR, and the Secretary of the Interior (Proposed Decree, Article XVII(A)).

experience with the Great Lakes fishery gained during his time working for the MDNR, notes that without a set mortality rate "it is impossible to judge the biological impacts that may ensue" from the Proposed Decree (Exhibit D, ¶ 12(g)(4)). Affiant Horton, another expert fisheries biologist, also explains that even if mortality rates are identified, there is no clear recourse in the Proposed Decree; the rates are not reviewed frequently enough, and target mortality rates and harvest limits need to be reviewed annually (Exhibit A, ¶ 19, 22-24).

Johnson avers that there is extensive literature establishing that the rate chosen will have dramatic impacts on the fishery: "Mortality targets for Lake Trout, if set at 40% or lower, produce harvest policy that favors reproduction—that is self-sustaining Lake Trout populations that are less dependent or independent of stocking (Exhibit D, ¶ 12(g)(1)). Based on his experience and current evaluation of Lake Trout health, Lake Trout in proximity to a "[r]efuge should be targeted for more conservative harvest management, with target mortality rates set at 40% or less and with enforcement and penalties commensurate with the importance of protecting these stocks" (Exhibit D, ¶ 12(g)(4)).

Further, the mortality rate cannot simply be ignored in favor of increased stocking because stocking is not successful in large parts of the Great Lakes, particularly Lake Huron. Lake Huron is almost entirely dependent on natural reproduction of lake trout as stocking is unsuccessful in that lake. Thus, the choice of a mortality rate for Lake Huron is critical to survival of the lake trout fishery **and** for evaluating the impact of the Proposed Decree.

Notwithstanding the critical importance of target annual mortality rates, the Parties have provided that target annual mortality rates will be determined at a later date. Simply put, neither this Court nor the Parties are able to evaluate whether the Proposed Decree aligns with the public interest and will preserve the Great Lakes fishery. The Court cannot enter a consent decree that is

contrary to the public interest and therefore should reject the Proposed Decree until there are standards that can actually be evaluated. See *Williams*, 720 F.2d at 920.

The Coalition objects to Article VII(A)(5) of the Proposed Decree because there are no established target annual mortality rates that would allow for the evaluation of the biological impact that the Proposed Decree would have on the Great Lakes fishery.

D. The Coalition objects to Articles VII(A)(5)-(6) of the Proposed Decree because the terms do not provide a biologically sound review of harvest policies or target annual mortality rates.

The Proposed Decree does not establish a framework for review of target annual mortality rates that will allow it to be flexible to the unpredictability of the fishery, especially considering the proposed expansion of gillnet fishing. A system that cannot respond to changes in the fishery is, again, a recipe for disaster and poses a real threat of irreparable harm to the fishery resource. The terms of the Proposed Decree provide for a review of target annual mortality rates every **six** years (Proposed Decree, § VII(A)(5)(b)) with harvest limits being held in constant for **three** years at a time (Proposed Decree, § VII(A)(6)). (Exhibit B, ¶ 28 (noting that the three-year review has "no in-season adjustments and accountability that ensures that all users have available a fair share of the resource each year."))

Affiant Horton specifically recommends that impacts to the Great Lakes fishery are avoided by adopting annual review of the target mortality rates along with enforceable harvest limits: "In my professional opinion, there should be significant concerns of the proposed management approach in the Proposed Decree for both recreationally and commercially important fish species in the 1836 Treaty waters of Lakes Superior, Michigan, and Huron" (Exhibit A, ¶ 29).

Under the Proposed Decree, mortality rates and harvest limits are not subject to mandatory review and change where conditions or fish populations change (Exhibit A, ¶ 19 (noting that the

biologically based committee should have the authority to constrain catch when annual catch limit quotas must be lowered based on model data or harvesting reporting data); Exhibit D, ¶ 12.j). Rather, **even if** "scientific evidence suggest it is appropriate to do so," mortality rates cannot be changed unless there is "consensus," i.e., unanimous agreement, to change them. (Proposed Decree, § VII(A)(5)(b)(i)). While the Parties may argue that "[i]t is the intention of this subsection that target annual mortality rates will be adaptive" and subject to change "as warranted," every Party has a veto right on a change even if violative of biological necessity (Proposed Decree, § VII(A)(5)(b)(iii)). This lack of a scientific approach to mortality rates and harvest limits in favor of a political approach, i.e., that the Executive Council, not biologists, will set the mortality rates or harvest limits and that any one Party may veto a change regardless of necessity, is a major threat to the sustainability of fishery populations.[7]

Further, there is no remedy in the Proposed Decree for the failure to adopt and adjust mortality rates or harvest limits prior to the time when adverse impacts will be suffered in the fishery. Any party may veto any adjustment to mortality rates or harvest limits and the dispute resolution process set forth in the Proposed Decree does not protect the resource, since it specifically states the "matters identified in the this Decree as requiring consent or agreement of all of the Parties shall not be subject to dispute resolution…" (Proposed Decree, § XVIII(A)(1)).[8] This lack of a meaningful remedy **prior** to actual damage to the fishery puts this Court in the very position that Judge Enslen warned against prior to the approval of the 1985 Consent Decree: having the Court serve as a perpetual "fish master," a role to which the Court is ill-suited in the view of

[8] Even if a dispute resolution process was available to address changes in mortality rates or harvest levels, by the time catch data is collected and verified, demands for a change made and then rejected, and the multi-step process in the dispute resolution system completed, an entire fishing season will have come and gone (Proposed Decree, § XVIII).

Judge Enslen (Exhibit A, ¶ 20 ("The Proposed Decree is not likely to be successful in ensuring the long-term sustainability of the fish stocks in the 1836 Treaty Waters").

Johnson avers that this is wholly insufficient from a biological perspective considering the unpredictability of the Great Lakes fishery:

> Harvest policy and status of the stocks **need to be reviewed at least annually and more frequently where populations are especially depressed**, yet the proposed decree would review harvest policy only every three years and mortality targets every six years. **Such infrequent reviews of harvest policy could have disastrous consequences**. [Exhibit D, ¶ 12(j) (emphasis added).]

The frequent review of harvest policy and mortality targets has been the past routine for the Parties, but this Proposed Decree represents a step backwards (Exhibit A, ¶¶ 23-24).

The potential dangers of the lack of frequent review are compounded by the proposed expansion of gillnet fishing. Both Johnson and Krist aver that gillnet fishing resulting in overfishing can produce disastrous consequences in as little as a few months, as demonstrated by assessment data from the MDNR in 1978-79:

> Vigilance is required in managing gillnet effort and lack of vigilance can have disastrous consequences in as little as a few months. An example of the consequences of a targeted and unlimited gillnet fishery is illustrated by 1978-79 Michigan Department of Natural Resources assessment data from Hammond Bay–Cheboygan areas of northern Lake Huron. **The DNR's assessment fishing there measured an 83% drop in lake trout density between 1978 and 1979**. . . . **A single fall season of gillnetting nearly eliminated the lake trout population there**. **Similarly, a wave of gillnet effort in Grand Traverse Bay in 1979 reduced the lake trout stock there by over 90% in a matter of months**. [Exhibit D, ¶ 12(j)(1) (emphasis added).]

> **Heavy gillnetting** between the fall of 1978 and the spring of 1979 in northern Lake Huron, including Hammond Bay, **caused the lake trout population to plunge precipitously.** The decline in lake trout caused the recreational fishery to decline [Exhibit B, ¶ 11 (emphasis added)].

The Proposed Decree does not have specific terms related to restrictions on boats fishing in many of the expanded gillnet areas and limits per the boat that can be used (Exhibit B, ¶ 28). The lack of terms dictating that there be frequent, necessary reviews of harvest limits and target annual

mortality rates present a significant danger to the Great Lakes fishery (Exhibit A, ¶¶ 24-25; Exhibit D, ¶ 12.j) and, honestly, to tribal and non-tribal interests alike. The proposed terms do not align with preservation of the Great Lakes fishery because the terms are reactive, rather than proactive.

The Coalition objects to the review standards in Article VII(A)(6) because the standards are insufficient to protect the Great Lakes fishery, and ultimately, the availability of the fishery resource to the Tribes and the public. These provisions should be rejected and that these issues be returned to the Parties for further negotiation—especially regarding having annual review of target mortality and harvest limits, review of fisheries stock assessments, and recommendations from outside fisheries experts regarding a better approach to the management framework incorporated in a successor decree. Further discussions should also account for data uncertainty in the stocks and promoting population abundance and sustainability, avoiding harvest goals that are too close to the maximum sustainable yield threshold, and timely evaluation of the fisheries' performance to avoid overfishing impacts for all users (Exhibit A, ¶ 29; Exhibit D, ¶ 12.j).

E. The Coalition objects to Article VII(B) because the management standards related to annual harvest limits are vague to the point of being unenforceable.

The Proposed Decree provides that "[t]he State and the Tribes shall manage their respective fisheries to avoid exceeding their respective annual Harvest Limits" and that "[l]arge deviations shall be rare and promptly addressed" (Proposed Decree, Article VII(B)). This language, without any defined terms or qualifying language, is meaningless. It seemingly permits deviations, but to what extent is completely unclear and unenforceable.

The lack of specificity presumably makes the harvest limits vague to the point of being unenforceable by this Court; this Court cannot accept such language in a consent decree because it will have the responsibility of enforcing the terms of the decree for a 24-year duration without

any guidance from the Decree or the Parties' agreement. In fact, because the "prospective provisions of [a] consent decree operate as an injunction[,]" the lack of such specificity alone should be grounds for rejecting the Proposed Decree. See *Williams*, 720 F.2d at 920 (explaining that when a court enters a consent decree its provisions operate as an injunction); Fed. R. Civ. P. Rule 65(d)(1)(C) (providing that injunctive relief must "describe in reasonable detail . . . The acts or acts restrained or required").

The lack of management standards similarly reveals a lack of feasibility in the plan purported in the Proposed Decree. The Proposed Decree is intended to set limits on what can be fished, but language indicating large deviations shall be "rare" essentially negates that intent (Proposed Decree, Article VII(B)). The language proceeds to indicate "on average neither the State nor the Tribes shall exceed their apportioned harvest opportunities." (*Id*.) Without clearer terms, this Court is only left to guess at what actions are prohibited under the Proposed Decree.

Contrast this bundle of undefined, unenforceable terms with the terms of the 2000 Consent Decree, which had clear, defined terms and consequences that made the mortality and harvest limits established by the Decree clear and enforceable (e.g., 2000 Decree, Article VII(A)(3) [mortality limits] and VII(B) [overharvest consequences]). Parties had a well-defined incentive to comply with the requirements of the 2000 Decree and clear consequences for violations of mortality or harvest limits. The Proposed Decree is ambiguous, contains no deterrents to violation and is wholly unenforceable by the Court.

The Coalition objects to Article VII(B), and the entirety of the Proposed Decree, because the management standards are so vague as to be unenforceable. We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

F. The Coalition objects to the information sharing framework in Article XIV of the Proposed Decree because it omits information necessary to ensure preservation of the Great Lakes fishery.

The provisions of the Proposed Decree regarding information collection, reporting and disclosure are inadequate and unenforceable in several respects that directly affect the fishery. There are several shortcomings in the proposed Decree.

As established above in Section I.A, the Proposed Decree vastly expands gillnet fishing. Gillnets are lethal to any species of a given size that swims into them. The use of this non-selective gear creates a significant concern related to incidental or bycatch of other species (Exhibit C, ¶ 15 (noting that trap nets do not kill non-target fish, which can be discarded and sorted alive as opposed to gillnets killing bycatch). Against this fact, the Proposed Decree only requires the Tribes to report harvest "landed" (Proposed Decree, § XIV(B)). "Landed" is not defined. Thus, non-commercial species caught and killed in gillnets, such as Atlantic Salmon, lake sturgeon, book trout, splake, brown trout, steelhead (rainbow trout) and others are not reported and will not be reported under the Proposed Decree. This is a significant issue with managing the fishery as the Parties are not even attempting to collect the necessary data to validate their presumption that expanded non-selective gillnets will have no harm on the fishery (Exhibit D, ¶ 12(j)(4)). This means the Tribes are not required to report species captured but not retained and returned to the water dead or alive, making it impossible to evaluate the use of gillnets and understand the actual catch and what is happening within the fishery.

One example of how this could play out is with the restrictions on undersized Lake Trout set forth in Article VII(F)(2). The terms provide that all live, undersized Lake Trout shall be released; however, these released fish will never be included in the information sharing (Proposed Decree, § VII(F)(2)), failing to establish the entire picture of the fishery. In contrast to these requirements of the Tribes, State-regulated charter boats operating in 1836 Treaty Waters must

report the number of each species harvested and those that are caught and released (Proposed Decree, § XIV(G)). It is obvious the Tribes know the importance of captured but released catch data, yet the Proposed Decree ignores the responsibility for the Tribes to provide such data.

The flawed reporting requirements in Article VII(F)(2) fail to adequately create a basis of information that will allow the Parties, and the public, to evaluate the health of the Great Lakes fishery. Thus, the Coalition objects to the information sharing provisions in Article VII(F)(2). We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

G. The Coalition objects to Article VIII because it does not provide a workable management framework for other species.

A provision for management of other species is entirely lacking in the Proposed Decree and is greatly needed, especially considering the expanded use of gillnets. For example, Johnson highlights that "[t]he Proposed Decree fails to even address the status of ciscoes in the lower two lakes or the potential impact of expanded small-mesh gillnet fishing on their recovery" (Exhibit D, ¶ 12(e)). This species is "in the early stages of recovery in Lake Michigan and are subject to a stocking-based recovery program in Lake Huron" (Exhibit D, ¶ 12(e)). This is an issue that must be addressed in the Proposed Decree, not as an emerging issue after entry of the decree.

Gillnets are not as-selective as will be suggested by the parties. In addition to fish, loons and diving ducks are threatened by gillnets, and will be caught and killed by the setting of such nets (Exhibit C, ¶ 15; Exhibit D, ¶ i.1). Loons are even listed as "threatened" by the State of Michigan (Exhibit D, ¶ i.1), yet expanded gillnet fishing is proposed. Bycatch of State-threatened lake sturgeon is even more concerning as they are also under consideration for being listed as a federally threatened species (Exhibit D).

Moreover, the allocation of species other than whitefish and Lake Trout between the Tribal and State commercial fishers is completely unstated, and the standards to resolve a dispute over allocation only compounds this issue. Article VIII(I) provides that "[i]f there is an issue of allocation between Tribal and State commercial fishers, there shall be a presumption in favor of Tribal fishers." What "presumption" is intended is unstated and not defined. Understanding that the fishery is a shared resource and roughly split equally, we can only guess at what was intended by this wholly vague statement. This creates a serious issue for this Court in enforcing the terms of the Proposed Decree and for the Parties in resolving the disputes. The standards for the harvest of other species must be definite and clear, without a need for such a "presumption" or this Court's intervention.

In all, the framework in Article VIII addressing other species must be defined to create a manageable standard that can be evaluated by this Court. Until these standards are developed, the Coalition asserts that the framework is so vague and inadequate as to be unenforceable. Absent redrafting to provide an enforceable decision-making process, this section of the Proposed Decree should be rejected. The Coalition requests that these provisions be rejected and returned to the Parties for further negotiation.

H. The Coalition objects to Article VI(C)(3) of the Proposed Decree because it does not provide adequate measures for marking nets, presenting a significant public safety concern.

The marking of gillnets and trap nets has been a public safety issue for years, yet the Proposed Decree does not create adequate marking standards for gillnets despite dramatically expanding gillnet fishing into areas where such nets have not been present for decades. The marking of gillnets presents a major public safety issue that must be addressed prior to entry of any consent decree, and this is not just a matter of "educating the public." The danger that gillnets

pose results from the recreational fisher having the propeller of their motor or fishing cables becoming entangled in the net (Exhibit B, ¶ 30).

To put this objection in context, gillnets are easily portable and movable. They can be thousands of feet in length. They can be set in any direction by a fisher with a 20-foot-long boat. They can drift with changes in current or waves. Notwithstanding, Article VI(C)(3) of the Proposed Decree merely provides that gillnets shall be marked on each end of the netting with a 16"x16" flag at least four feet above the water. There is no limit on the length of a gillnet subject to this requirement. In fact, other portions of the Proposed Decree assume that gillnets may be as much as 6,000 feet long. In the congested waters of inner Grand Traverse Bay, gillnets are limited to 4,500 feet in length.[9] In Little Bay de Noc and Big Bay de Noc, gillnets are limited to 24,000 feet. Due to the narrow areas of the bays, and the extensive expansion of gillnetting proposed, boater safety will remain a serious concern. The 4-foot poles on the ends of the net need not be reflective to radar. While there are other mandates for markings on the surface of the water depending on the depth of the net and the water, such markings can be as small as "one and one-half (1.5) inches [diameter] by four (4) inches [length]" in size (Proposed Decree, § VI(C)(2)(b)). These marking requirements create a significant safety hazard for boaters, and recreational fishers. They simply fail to provide adequate notice of where up to mile long nets are in the water. One need only consider the visibility of a 16-inch square a half mile away in seas with 2-to-4-foot

[9] This Court may take judicial notice on certain facts. *Yeldo v. MusclePharm Corp.*, 290 F. Supp. 3d 702, 708 (E.D. Mich. 2017). This Court should take judicial notice as to the width of the inner Grand Traverse Bay and Bays de Noc. For example, Little Bay de Noc narrows to approximately .7 miles (3,670 feet) at Gladstone, between Saunders Point and Hunters Point. The geographic limits of these narrow areas of water further demonstrate the impacts of walling off an area of the fishery with gillnets.

waves to understand the risk posed by inadequately marked nets.[10] Finally, the net marking provisions in the Proposed Decree set forth no way to know which direction a gillnet may run even if a flag is spotted. Does the net run north, south, east or west?

In addition to the inadequacy of net marking on the nets themselves, there is no requirement that the location of nets set in the Great Lakes be disclosed to boaters, other fishers or to the general public. Thus, nets located one day can be moved the next with no notice to the public who may assume that a net seen one day will be there the next.

Several incidents with gillnets in Lake Huron have occurred over the years. The most tragic of them was an incident in 1993 where three boaters died when "an accident occurred at the Tribal Salmon gillnet zone near Nunns Creek" (Exhibit B, ¶ 32 (b)). The solution, Krist believes, is adequate marking of gillnets in the waters, which is especially important under the Proposed Decree as it expands gillnet fishing zones into hundreds of square miles of recreational fishing waters (Exhibit B, ¶ 33).

Affiant Captain William Winowiecki, President of the Michigan Charter Boat Association, has also had numerous incidents with gillnets on the Great Lakes that have caused damage to his boat and dangerous situations for his crew and customers (**Exhibit F**, Affidavit of William Winowiecki). Based on his experience, he believes that gillnets create a serious public safety concern (Exhibit F, ¶¶ 6(a)-(g)). He believes that because the Proposed Decree expands gillnet fishing into areas that have not been fished with gillnets for decades, it is imperative that there be "adequate marking requirements . . . as well as public information sharing" (Exhibit F, ¶ 11).

[10] There are numerous other hazards posed by gillnets that break free without any intermediate markings, nets that may entangle recreational fishers who have no notice of a net location, an absence of provisions for the immediate removal of drifting nets and the assessment of costs associated therewith and other concerns.

Otherwise, the Proposed Decree "poses a danger to the charter boat community and other users of the Great Lakes" (Exhibit F, ¶ 12). Captain Winowiecki believes the following, which incorporates modern day technology, would establish adequate marking of gillnets:

> In my experience, adequate marking of gillnets **would provide the length of the net, the direction of the net, the owner of the net, and would be visible at a distance.** Adequate marking would also include public information that would give the other users of the resource notice of the grids being fished with gillnets along with GPS coordinates. With the technology available at this time, including the extensive use of cellphones and other similar devices, a phone application or website could be required by the Proposed Decree showing a map of relevant user-identified grids and a location identifying a net is in the location so boats and anglers can avoid those sites. **This is a small feat to save lives of those other users on the Great Lakes that will now more likely be within areas where commercial nets can be set. The wide expansion of the nets is a tremendous concern and safety needs to be taken seriously in the Proposed Decree** [Exhibit F, ¶¶ 9, 10 (emphasis added)].

In its current form, Captain Winowiecki believes the Proposed Decree 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 unknowingly placed gill nets (Exhibit F, ¶ 12).

The seriousness of this issue need only be confirmed with the United States Coast Guard, who objected to any proposal to place gillnets in the Detour Passage. Further, the Court should be concerned about the more effective measures that are available, but not included. For example, in Section IV(A)(1)(f), the Little River Band agreed that it "shall share with MDNR GPS coordinates of nets that are set as soon as possible." These GPS coordinates "may" be made "available to the public to avoid operational conflicts with other users and promote public safety." This statement establishes a number of critical points and a serious issue of public safety. First, net conflict with the public is a real concern recognized by the Little River Band. Second, the technology exists to make GPS coordinates and other location information available in real time. Third, at least the Little River Band and the State see the need to "promote public safety" yet neither the United

States nor any of the other four Tribes are willing to make public safety a priority and the State does not address public safety in any waters other than the Little River Band zone.

There is absolutely no reason that the Parties and the Proposed Decree cannot address these public safety concerns, especially in light of the massive expansion of gillnets into waters that have not seen such nets for decades. The Court should not be deceived by assertions that this is merely a matter of "education." Education cannot cause a 16" square flag a half mile away in 4-foot seas to suddenly be seen.

The Coalition objects to the current standards in Article VI(C)(3) because they are wholly inadequate in addressing the public safety concerns related to gillnets and they may actually create public safety issues if the public believes that nets are marked so as to be visible, when the opposite is the case. We ask that these provisions be rejected and that these issues be returned to the Parties for further negotiation.

I. The Coalition objects to Article XIII(C) because it does not provide a meaningful framework for local consultation, as prior decrees have, and is inconsistent with the recognition that the resource is shared in common.

Provisions of the 2000 Consent Decree allowed local governments and recreational fishing groups to request a meeting with the Tribes to discuss issues of local concern, and the Tribes agreed they would meet upon request. This provision was used sparingly by the public and local governments and served to promote understanding and problem solving. The Proposed Decree, in contrast, has eliminated these provisions and replaces them with terms forcing these groups to ask the State to address concerns with the Tribes, essentially ending local consultation except with the permission of the State. Further, the new provision eliminates the Tribes' previous commitment to meet with local governments or public interest groups (Proposed Decree, Article XIII(C)). Similarly, the 2000 Consent Decree required an annual report regarding Tribal management of the

fishery (see Article XIV of the 2000 Consent Decree), as well as other valuable data regarding catch. The Proposed Decree, however, specifically exempts commercial harvest data from disclosure to "non-parties" allowing little ability for anyone to understand the impacts of the Proposed Decree. (Proposed Decree, XIV.B.4.)

The State's inability and unwillingness[11] to address matters of local concern makes this framework unworkable. In practice, such a system is likely to create responsiveness issues to local concerns regardless of the issues that may arise within a local fishery (overfishing, overall health of the ecosystem, stocking, conflicts between users, the need for improved communication, etc.). This lack of a meaningful local consultation provision does not show a recognition the resource is shared in common nor does it further the preservation and conservation of the fishery. At the same time, the Proposed Decree also makes important data that fishery biologists outside this case would deem relevant and important to the management and study of fisheries, as well as to the public, unavailable for review, verification, and research.

The Coalition objects to Article XIII(C) of the Proposed Decree because it in inconsistent with the concept that the resource is shared in common and it is inconsistent with the reduction of conflict and open communication between those with a clear legal and practical interest in the Great Lakes fishery. The Coalition further objections to Article XIV that makes certain information unavailable to the public. These provisions should be rejected and these issues be returned to the Parties for further negotiation.

[11] The State stated to the Coalition that it does not have time for "local concerns."

CONCLUSION

The Coalition's objections and supporting affidavits and other material[12] establish that this Proposed Consent Decree should not be accepted by this Court because it is contrary to the public interest and it is in no sense fair, adequate, and reasonable to all interested parties. See *Williams*, 720 F.2d at 920-21 (Providing a court may not enter a consent decree "for an agreement which is . . . contrary to the public interest" and a court, prior to entering a consent decree, should evaluate whether it is "fair, adequate, and reasonable"). The main issues with the Proposed Decree are directly related to Judge Enlsen's 15 factor analysis from 1985. See *Michigan*, 12 ILR at 3081 (providing fifteen factors to analyze two proposed allocation plans). The Proposed Decree fails to address the need to conserve declining whitefish and fragile lake trout populations of the lower two lakes, does not adequately preserve and conserve the resource, it fails to recognize that the resource is shared, exacerbates the potential for social conflict, destabilizes the fishery, has an unworkable management scheme, and is not flexible enough for the unpredictability of the fishery. For these reasons, this Court should reject the Parties' Proposed Consent Decree and the Parties should be directed to return to negotiations to formulate a legally and factually supportable agreement, if possible. Finally, the clear merit of the Coalition's objections illustrate the contributions that the Coalition can make to an agreement that preserves the Treaty right while addressing the public interest. This contribution considered with the actions of the State in shutting out the Coalition from the negotiation process warrants a review and revision of the terms

[12] The Coalition's affidavits show that the objections set forth here are supported by the testimony of expert witnesses. If the Court has any question as to the *bona fides* of these experts, the Coalition offers their testimony in support of these objections consistent with F.R.C.P. 26 and F.R.E. 702. Though the Court has not offered the opportunity for a hearing in its previous commitment to hear the Coalition's objections and supporting testimony, the Coalition is prepared to present its proofs at a hearing should the Court so allow.

applicable to the Coalition's involvement in negotiations and subsequent reviews. This Court has in the past permitted Coalition involvement in input, comment, motion practice and briefing related to the negotiation of consent decrees in this matter, all of which contributed to the successful negotiation of the two previous decrees.

WHEREFORE, the Coalition to Protect Michigan Resources respectfully requests this Honorable Court issue an order rejecting the Parties' Stipulation for Entry of Proposed Consent Decree Subject to the Court's Consideration of Objections (ECF 2042).

Respectfully submitted,

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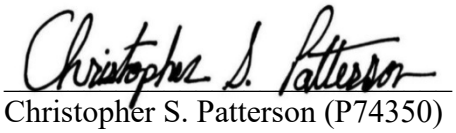

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CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.2

This response brief complies with the type-volume limitation of Local Rule 7.2 because it contains 10,622 words, excluding the parts exempted by Local Rule 7.2(b)(i). This response brief was prepared using Microsoft Word 365.

Respectfully submitted,

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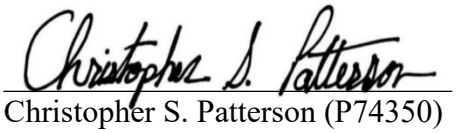

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CERTIFICATE OF SERVICE

I, Kaylin J. Marshall, hereby certify that on the 20th day of January 2023, I electronically filed the foregoing document and any attachments with the ECF system which will send notification of such to all parties of record.

/s/ Kaylin J. Marshall
Kaylin J. Marshall