

No. 22-1946

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

BAY MILLS INDIAN COMMUNITY; SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS; GRAND TRAVERSE BAND OF OTTAWA AND
CHIPPEWA INDIANS; LITTLE RIVER BAND OF OTTAWA INDIANS;
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Intervenors-Appellees

v.

STATE OF MICHIGAN, and its agents

Defendant-Appellee

COALITION TO PROTECT MICHIGAN RESOURCES, fka Michigan
Fisheries Resources Conversation Coalitions

Proposed Intervenor-Appellant

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

**INTERVENOR-APPELLANT COALITION TO PROTECT MICHIGAN
RESOURCES' REPLY BRIEF**

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REPLY-ARGUMENT

Intervenor-Appellant Coalition to Protect Michigan Resources (“Coalition”) replies to Appellees United States of America,¹ State of Michigan, and Sault Ste. Marie Tribe of Chippewa Indians (“Sault Tribe”). The Coalition’s principal brief fully addresses the legal and factual bases establishing its right to intervene. This reply focuses on Appellees’ arguments regarding each element of intervention under Rule 24(a).²

I. APPELLANT IS ENTITLED TO INTERVENTION OF RIGHT.

Rule 24(a) of the Federal Rules of Civil Procedure provides when a party must be permitted to intervene as a matter of right. The Sixth Circuit has interpreted Rule 24(a) as establishing four elements for intervention of right to be granted:

(1) timeliness of the application to intervene, (2) the applicant’s substantial legal interest in the case, (3) impairment of the applicant’s ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

¹ Appellees Bay Mills Indian Community, Grand Traverse Band, Little River Band, and Little Traverse Bay Bands adopted the United States’ Response Brief (Motion to Adopt Brief, R. 57; Order Granting Motion to Adopt Brief, R. 58). In addition, the United States moved to seal its brief and the motion is pending as of the filing of this reply.

² The Coalition is also cognizant of this Court’s order denying the Coalition’s request for a stay pending appeal and the reasons expressed therein for why the Coalition is unlikely to succeed on the merits (Order Denying Motion for a Stay Pending Appeal; Granting in Part Motion to Expedite, R. 56).

When these four elements are satisfied, the district court **must grant intervention**. Fed. R. Civ. P. 24(a). As set forth below, Appellees ignore applicable case law, and the Coalition has established the four elements required for intervention.

A. Timeliness.

The Coalition was timely in seeking intervention because the circumstances warranting and necessitating its intervention did not arise until June 2022 and intervention was sought expeditiously only days later on July 13, 2022 (Motion to Intervene, R. 1964). Appellees argue intervention was not timely for four main reasons: (1) unusual circumstances—the original parties are seven separate sovereigns—militate against intervention; (2) the Coalition knew of its interests and could have intervened at the outset of the litigation; (3) prejudice would result by permitting late-stage intervention; (4) the Coalition’s purpose for intervention is satisfied by its amicus curiae status. These arguments must be rejected by this Court.

1. The sovereign status of the original parties does not provide grounds for the Coalition to be denied intervention by right under Rule 24(a).

Appellees argue the Coalition should be denied intervention because this case is between seven separate sovereigns, which they contend is an unusual circumstance militating against intervention based on timeliness. This Court, in denying the Coalition’s request for a stay pending appeal, summarized the argument:

[T]he district court aptly summarized the unique circumstances present in this case that militate against intervention: the parties are seven sovereigns negotiating the answer to a question that is more than 200 years old about how to share natural resources that belong to all of them at once but none of them completely. Their interests are rooted in a sovereignty that neither CPMR nor other private entity can claim, and their relationships are governed by complex and long-standing treaties and agreements to which neither CPMR nor any other private entity is a party. Allowing a private entity like CPMR to intervene would significantly undermine the ability of these sovereigns to represent and defend the interests of their people [Order Denying Stay; Granting in Part Motion to Expedite, R. 56, Page ID ## 3-4].

The mere fact that this case is between seven separate sovereigns, however, should not serve to bar intervention for, among other reasons: (1) mandatory intervention focuses on the *intervening party*'s rights, which is not impacted by the original parties being separate governments with their own sovereignty; (2) even if the original parties' sovereignty was a relevant consideration, compelling circumstances unique to the Coalition's longstanding involvement warrants intervention.

a. *The sovereign status of the original parties is not relevant under Rule 24(a)(2).*

The Federal Rules of Civil Procedure were promulgated by the Supreme Court under 28 U.S.C. § 2072. “[C]ourts must begin their interpretation of the Federal Rules, as with other laws, ‘with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’” *Violette v. P.A. Days, Inc.*, 427 F.3d 1015 (6th Cir. 2005) (citations omitted). Courts are not “licensed to attempt to soften the clear import of

[the Supreme Court's] chosen words whenever a court believes those words lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985). To go beyond the plain text of a statute to infer the intent or limitation of a rule in the Federal Rules of Civil Procedure would be "a step to be taken cautiously even under the best circumstances." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (citations omitted).

The Supreme Court explicitly differentiated between mandatory and permissive intervention in the Federal Rules of Civil Procedure. Mandatory intervention provides that the district court "**must permit anyone to intervene**" who timely establishes a right to do so under the relevant inquiry. Fed. R. Civ. P. 24(a); *Stupak-Thrall*, 226 F.3d at 471 (explaining the legal standard for mandatory intervention). In contrast, permissive intervention provides that the district court "**may permit anyone to intervene**" who timely establishes the requisite showing under Rule 24(b)(1) or (2), but "[i]n exercising its discretion, the court must consider whether the intervention will . . . **prejudice the adjudication of the original parties' rights.**" Thus, permissive intervention requires a court to consider harm that may prejudice the original parties' rights, but mandatory intervention provides for no such consideration. *United States v. Smith*, 499 U.S. 160, 166-67 (1991) (Explaining that principles of statutory interpretation instruct courts to not create exceptions in addition to those specified by the rule maker). To be clear, if the

Supreme Court thought relevant the potential prejudice of the original parties' rights for purposes of mandatory intervention under Rule 24(a), it would have included the same language that is present in Rule 24(b).

The only consideration of the original parties' rights in the legal standard for mandatory intervention is whether **the timeliness** of the motion would prejudice the parties. See *Stupak-Thrall*, 226 F.3d at 473 (A relevant factor of timeliness is considering "the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene"). There is simply no inquiry into whether intervention would prejudice the original parties' rights or the relationship among the original parties. Sovereignty is not a circumstance relevant to mandatory intervention.

The District Court's analysis similarly erred on this same point raised by Appellees. The District Court and Appellees misapply the plain terms of the rule suggesting these "unusual circumstance" militate against intervention (Order Denying Intervention, R. 49, Page ID ## 45-46), which is a subfactor in the timeliness inquiry. *Stupak-Thrall*, 226 F.3d at 473 (explaining the five relevant factors in determining timeliness). However, the sovereignty of the original parties has nothing to do with the timeliness of the Coalition's intervention, and consideration of it under a subfactor related to timeliness has no support in the Sixth

Circuit.³ 57 A.L.R. Fed. 150 § 7 (summarizing caselaw related to unusual circumstances militating for or against intervention and explaining courts use the inquiry to determine if there are **unusual circumstances that affected the timeliness of the intervention**).

Simply put, Rule 24(a) and Sixth Circuit precedent do not provide the district court with the ability to weigh the rights of the original parties in relation to their sovereign status. The consideration of the sovereignty of the original parties was an abuse of discretion by the district court.

- b. To the extent the sovereignty of the original parties is relevant, compelling circumstances warrant intervention by the Coalition.***

Intervention into disputes solely between sovereigns has been permitted in actions invoking the Supreme Court's original jurisdiction through a showing of compelling circumstances that are unique to the intervening party. *South Carolina v. North Carolina*, 558 U.S. 256, 268-69 (2010). Therefore, to the extent any consideration is provided to the sovereign status of the original parties, a showing of

³ Neither the District Court nor Appellees cite any legal authority supporting the argument the sovereignty of the original parties supports denial of mandatory intervention.

compelling circumstances unique to the Coalition should be the most that is required.⁴

The case *South Carolina v. North Carolina* involved South Carolina bringing an original action against North Carolina to compel equitable apportionment of the Catawba River. *Id.* at 259. The Supreme Court referred the matter to a special master. The special master granted motions to intervene by three nonstate entities. *Id.* South Carolina presented exceptions and the Supreme Court upheld the intervention of two non-sovereign entities, the Catawba River Supply Project (“CRWSP”) and Duke Energy Carolinas (“Duke Energy”).

The Supreme Court stated at the outset of its review that it has “granted leave, under appropriate circumstances, for nonstate entities to intervene as parties in original actions between States for 90 years.” *Id.* at 264 (citations omitted). In this case, the Supreme Court stated intervention was appropriate on a demonstration by the intervening party of a “compelling interest that is unlike the interests of other citizen of the States.” *Id.* at 269. Intervention by CRWSP was permitted on a showing that it was an entity situated in working with both states and needed to intervene to protect “the viability of its operations.” *Id.* at 270. Similarly, Duke

⁴ The standard for a non-sovereign intervening in an action invoking the Supreme Court’s original jurisdiction is presumably higher than that of general intervention. However, without an exact standard under Rule 24(a), if one is to be applied, the Coalition thinks this would be instructive.

Energy was permitted to intervene because through its dams Duke Energy regulated the flow of water into South Carolina and any proposed diversions would affect its obligations under its license. *Id.* at 273.

The Coalition's intervention into this sovereign dispute is similarly appropriate provided its longstanding history in the case, its longtime relationships among the State and Tribes in being a user of the shared resource, the recent circumstances necessitating full party status, and its connection and longtime protection of the resource in dispute between the parties.

2. The timeliness of the Coalition's intervention must be judged by the point in time when it learned of the State's inadequate representation.

The Coalition and Appellees have fundamental differing views as to when the Coalition could have timely sought intervention. Appellees believe, as the District Court stated (Order Denying Intervention, R. 1985, Page ID # 11672), the Coalition could have sought intervention at the outset of litigation. However, the history of this case and prior intervention attempts by the Coalition, which Appellees frequently highlight, establish that efforts of the Coalition to intervene at the early stages of the negotiations would have been futile. This is because throughout the nearly 50-year history of this litigation, this Court and the District Court have denied intervention on the basis the State adequately represented the interests of the Coalition. *United States v. Michigan United Conservation Clubs, Inc.*, 556 F.2d 583

(6th Cir. 1977) (unpublished disposition); *United States v. Michigan*, 460 F. Supp. 637, 638 (W.D. Mich. 1978) (“ . . . the State of Michigan has thus far and will continue to fully and adequately represent the interests of MUCC . . .”); *United States v. Michigan*, 89 F.R.D. 307, 309 (W.D. Mich. 1980); *United States v. Michigan*, 424 F.3d 438, 443-45 (6th Cir. 2005).⁵ Thus, the Coalition had no reason to believe at the outset of the litigation that the District Court would have entertained any argument about adequacy of representation considering the history of this dispute, and an attempt to intervene prior to the breakdown in its relationship with the State would have been a waste of judicial resources.

The issue is therefore determining when the Coalition could have sought timely intervention. The Coalition could not have sought intervention at the outset of litigation when there was a presumption of adequate representation under prior precedent.⁶ Moreover, even though Appellees continually cast the timeline as three years, they ignore the COVID-19 pandemic and the practical impacts that halted in-person meetings and negotiations for some time while the United States as a whole grappled with the pandemic (Frank Krist Supplemental Affidavit, R. 1991, ¶ 3

⁵ As explained in Section I.B.2, this chapter of the dispute is not directly related to the current.

⁶ Note that Appellees also misguide this Court by referencing the timing of the Coalition’s known interests, but that is not the relevant standard for when seeking intervention becomes ripe given the adequacy of representation element.

(explaining negotiations were severely limited in 2019, 2020, and 2021 because they were held via Zoom)). Intervention could have only been appropriately sought by the Coalition when its relationship with the State deteriorated to the point it was clear, in light of prior precedent in this case related to intervention, the State was no longer adequately representing the interests of the Coalition; this happened in June 2022 (Frank Krist Supplemental Affidavit, R. 1991, ¶¶ 14-19 (attesting to the breakdown in relationships that led to the Coalition seeking intervention)). The point of reference based on this record in determining the timeliness of the Coalition's intervention must be June 2022.

This Court has indicated that intervention three years into the dispute may be appropriate when it only becomes apparent that the intervening party's interests are not being adequately represented at a late stage of the proceeding (although as the record now shows below, this proceeding is not at a late stage). The Coalition thoroughly discussed in its principal brief the proposition inherent in *Penick v. Columbus Education Association*, 574 F.2d 889 (6th Cir. 1978) that Judge Boyce explained in his dissent in *Stotts v. Memphis Fire Department*, 679 F.2d 579, 598 (6th Cir. 1982) (Boyce J. dissenting): "I believe that *Penick* stands for the proposition that intervention must be considered and should be allowed in the face of further proceedings which substantially alter the parties' relationship." But there is more support for the proposition that intervention sought after time has passed in

the proceedings may be appropriate. *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013) (“The mere passage of time—even 30 years—is not particularly important to the progress-in-suit factor”); *Ali v. City of Chicago*, 34 F.4th 594, 601 (7th Cir. 2022) (“To be sure, where a party has failed to intervene because she reasonably expected named plaintiffs or other relevant parties to protect her interests, that expectation is relevant to the timeliness inquiry”).

The circumstances necessitating the Coalition’s intervention occurred in June 2022 and the Coalition sought intervention immediately thereafter in July 2022. The District Court ignored prior precedent and abused its discretion in determining intervention could have been sought at the outset of negotiations.

3. The other parties would not have suffered undue prejudice warranting denying intervention had the Coalition been permitted to intervene in July 2022.

The finding of the District Court that Appellees would be prejudiced considering the point to which the suit had progressed was based on the misrepresentations of Appellees that a proposed successor decree would be submitted to the Court by September 30, 2022 (Opinion and Order Denying Intervention, R. 1985, Page ID ## 11672-11673). The District Court abused its discretion in relying on the unsubstantiated assertion by the Parties’ counsel that a consent decree was set to be submitted by September 30, 2022.

In addition, if the result to the progress of the Parties was a concern of the District Court in its timeliness analysis, it should have permitted limited intervention. *United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013) (“But courts are not faced with an all-or-nothing choice between grant or denial: Rule 24 provides for limited-in-scope intervention”) (citing David Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 727 (1968) (“It is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all”)). The Coalition said as much to the Court in its argument for permissive intervention (Coalition’s Brief in Support of Motion to Intervene, R. 1969, Page ID # 11042 (Providing the Coalition would be mindful, if permitted to intervene, of a limitation that it would not be able to relitigate matters already determined)). The District Court could have even limited the Coalition’s intervention to matters solely related to its significant interests in this case. Instead, it abused its discretion finding intervention was untimely.

4. The Coalition’s purpose for intervening is not met as amicus curiae.

Appellees argue the Coalition’s status as amicus curiae fulfills the Coalition’s purpose for intervention. This argument fails to consider the difference between amicus curiae status and having full party status, as well as the history of this case.

It is true, as noted by the State, that this Court holds when a party has the “full opportunity” to participate in a case as an amicus curiae, “the concerns of an entity seeking intervention can be presented with complete sufficiency through [amicus] participation.” *Stupak-Thrall*, 226 F.3d at 476. However, it is equally as true this Court has recognized there is a significant difference between being a litigating party and amicus curiae. *United States v. Michigan*, 940 F.2d 143, 164-66 (6th Cir. 1991) (Explaining the role of amicus curiae assists the court but is not an adversary party involved in the litigation; “[h]istorically, there has been a bright-line distinction between amicus curiae and named parties/real parties in interest in a case or controversy”). The District Court specifically stated the limited role the Coalition would have as amicus when it confirmed the Coalition’s amicus status at the outset of these negotiations: “The Court agrees that traditional amici are limited 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 Regarding Coalition’s Amicus Status, R. 1875, Page ID # 2144). This role simply does not fulfil the Coalition’s purpose in intervening in the lawsuit and protecting its substantial interests (Coalition’s Brief in Support of Motion to Intervene, R. 1969, Page ID # 11037).

The role requires the Coalition to be able to work with the Parties through negotiations to develop terms of a successor consent decree that will protect the Coalition’s interests, many of which are matters of local concern in specific

management units and grids. In its role as amicus curiae, the Coalition is unable to do this because of the actions of the State. The Coalition relies on the State to relay and protect the Coalition's interests in order to have an impact in its position as amicus curiae; the State stopped relaying a position commensurate with the Coalition's interests through the negotiations (Frank Krist Supplemental Affidavit, R. 1991). The ability for the Coalition to object to any proposed consent decree is likewise limited insofar as the District Court is presumably limited in rejecting proposed consent decrees that are "illegal, a product of collusion, or contrary to the public interest." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (explaining standards for a court to review a consent decree). Although the Coalition has filed objections to the Proposed Consent Decree (Coalition's Objections to Entry of Proposed Consent Decree, R. 2062), this does not satisfy its purpose of intervention in July 2022. The Coalition status as amicus curiae does not satisfy its purpose for seeking intervention.

B. Adequate Representation.

The Coalition explained the reason the State was unable to adequately represent its interests: the State revealed that its interests, and what motivated its positions throughout the negotiations, diverged significantly from that of the Coalition. Appellees contend in their responses the State does adequately represent the Coalition for purposes of intervention under Rule 24(a) for four main reasons:

(1) the State has a legal duty to protect the Great Lakes and the public’s right to use them; (2) the Coalition’s prior attempt to intervene in *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005) is similar in all relevant respects; (3) the concerns of the Coalition constitute mere disagreements about negotiating strategy; (4) in any event, the Proposed Consent Decree (Proposed Decree, R. 2042-1) filed in the District Court demonstrates that the Coalition’s objections to the State’s ability to represent the Coalition’s interests were unfounded.

1. The State’s legal duty to protect Great Lakes does not establish adequate representation.

It is true that the State “has a constitutional, statutory, and common-law duty to protect the Great Lakes and the public’s right to use them” (State of Michigan Response, R. 49, Page ID # 29). However, this does not mean the Coalition and the State share the same ultimate objective. *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2204-05 (2022) (Explaining that a presumption that a governmental entity adequately represents the interests of others was likely improper). Throughout the negotiations, the State represented that it was unable to address matters of “local concern” that make up the interests of the Coalition and its members (Frank Krist Supplemental Affidavit, R. 1991, ¶¶ 14-16). The State was focused on arriving at a deal and ignored matters of concern to the Coalition

including an equitable allocation of the fishery, conservation of Lake Trout and Whitefish, and other matters specifically related to the recreational fishing industry.

It is also noteworthy that even though the Tribes argue the State's legal duty to protect the Great Lakes establishes adequate representation, the Tribes were permitted to intervene in this litigation at the outset without establishing that the federal government had failed to fulfil its trust responsibility in the context of the Tribes' 1836 Treaty rights. *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) ("The United States of America is a party plaintiff which brought this suit . . . pursuant to its federal trust responsibility toward those tribes"). Thus, the parties' responses that rely on the State's legal obligation to protect the resource without factual support that the State is actually fulfilling its legal obligation fails to overcome the Coalition's factual record regarding the lack of adequate representation. Intervention in this context has been routine in federal courts.

2. The State's reliance on this Court's denial of intervention in *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005) is inapplicable.

The State's effort to compare this intervention to the Coalition's attempt to intervene rejected by this Court in *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005) is inapposite (State of Michigan Response Brief, R. 49, Page ID ## 35-37).⁷

⁷ This was the Michigan Fisheries Resource Conservation Coalition's attempt to intervene, the Coalition's predecessor.

In that chapter of this dispute, the Tribes’ asserted inland treaty rights and the initial threshold issue was simply whether the Tribes retained such a right. *Id.* at 444. This Court stated “[t]he relief requested by the proposed intervenors and the [State] in their respective pleadings is nearly identical in that they both seek a declaration that the Tribes do not retain any off-reservation usufructuary rights under the Treaty.” *Id.* Thus, what was not present in that appeal—any recognized rights of the Tribes—is present in the Coalition’s current appeal (related to the scope of how recognized rights in the 1836 Treaty Waters are exercised); there was no difference in opinion between the State and the Coalition on that singular issue (they both opposed the assertion of the Tribes’ right to hunt and gather on private property). This Court even explicitly stated “we express no opinion as to the adequacy of the [State]’s representation should the **scope of** the Tribes’ usufructuary rights become an issue.” *Id.* at 446.

To be clear, in this case, the Coalition and the State significantly differ as to the scope of Tribal rights and the exercise of those rights within the 1836 Treaty Waters with other shared users of the resource (including any potential adjudication or consensus reached in a successor decree). Thus, the holding in *Michigan*, 424 F.3d at 438 cannot be construed as a finding of adequate representation.

3. The concerns of the Coalition do not constitute mere disagreement with the State’s negotiating strategy.

Appellees label the Coalition’s divergence with the State on substantial points as being mere “disagreements” not warranting intervention. *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (“A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation”). For example, the State argues the Coalition “disagrees with the State regarding specific, narrow issues that were addressed in negotiations in the few weeks leading up to the filing of its motion . . .” (State of Michigan Response, R. 49, Page ID # 32). However, this minimizes the seriousness of what is at stake in this dispute and that “[w]hile the Treaty, as interpreted by this court, protects tribal fishing rights, the resource is shared by other user groups.” *United States v. Michigan*, 12 ILR 3079, 3079 (W.D. Mich. 1985).

The Coalition disagrees with the State on substantial issues related to the members of the Coalition (Frank Krist Supplemental Affidavit, R. 1991). These local concerns relate to developing a biologically sound management system in administering fishing rights in the Great Lakes across management units and grids that directly impact the Coalition’s members. The concerns include how a resource shared in common will be divided. For example, if gillnets are introduced to new waters, there must be steps in place to ensure that the Coalition’s members can obtain their allocated harvest, the overall resource is maintained as a shared-resource, and

such nets are adequately marked in the water to protect public safety. The Coalition is made up of groups that have intimate knowledge that would help achieve this goal. Another prime example is the appropriate way to set and review target annual mortality rates, which must occur expeditiously to be responsive to protecting the resource. The disagreement on these points far exceeds just negotiating strategy and should not be construed as such.

4. The Proposed Consent Decree demonstrates the Coalition and State diverged on significant issues.

The State points out in its response the Coalition's concerns related to intervention were that the State was abandoning established principles of prior consent decrees (Brief on Motion to Intervene, R. 1969, Page ID # 11025). Now that the Proposed Consent Decree has been submitted to the District Court (Proposed Decree, R. 2042-1, Page ID # 12201), the State argues "[t]he recently filed proposed decree demonstrates that [the] beliefs [of the Coalition] were unfounded and **that the State continued to champion [the Coalition's] interests in the negotiations**" because Lake Trout will be allocated approximately equally between the State and Tribes (State of Michigan Response Brief, R. 49, Page ID # 31 (emphasis added)). However, the Proposed Consent Decree demonstrates just the opposite, and the singular reference that the Proposed Consent Decree will allocate Lake Trout approximately equally between the State and the Tribes is the State's shameful

attempt to skirt the substantial issues within the Proposed Consent Decree (State of Michigan Response, R. 49, Page ID # 31).

The Coalition filed objections precisely related to the above points because the State failed to adequately represent any of these concerns

(Coalition's Objections to Entry of Proposed Consent Decree, R. 2062). The Coalition, to the extent they are relevant on this appeal, offers these summarized points of disagreement related to its objections:

- **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.
- **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 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 and allows for whitefish fishing inconsistent with any effort to rehabilitate that species.
- **WALLEYE AND PERCH:** The Proposed Decree drastically increases gillnet fishing for walleye and perch with no limitations.
- **UNDEFINED TARGET ANNUAL MORTALITY RATES:** The Proposed Decree fails to define target annual mortality rates for Lake Trout and Whitefish, making it impossible 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.
- **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.
- **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.
- **ENFORCEABILITY:** Many provisions of the Proposed Decree regarding fishing limits are vague to the point of being unenforceable. (Coalition's Objections to Entry of Proposed Consent Decree, R. 2062, Page ID ## 12504-12505).

A review of the Proposed Consent Decree reveals all the Coalition's concerns (e.g., abandonment of 50-50 allocation of fishery through zonal approach, an unworkable structure for the usage of gear types, a lack of understanding the resource is shared in common, and failure to protect the Great Lakes fishery through fishing practices based on sound biological considerations) were warranted. There can be no question that any consideration of the Proposed Consent Decree supports the assertion the Coalition was not being adequately represented by the State.

C. Impairment of Interest.

There is no question the Coalition's ability to protect its interests will be impaired absent intervention because the Coalition has since been shut out of any meaningful ability to take part in the negotiations developing the terms of a successor consent decree. Appellees argue that the Coalition's ability to protect its interests will not be impaired because its status as amicus curiae is sufficient and, in any event, because the District Court has been presented with a Proposed Consent Decree the Coalition can no longer obtain the relief it seeks. These arguments fail.

The Coalition's status as amicus is unlikely to allow it to protect its interests because, as explained in Section I.A.4, it is presumably limited in challenging the terms of the Proposed Consent Decree that are "illegal, a product of collusion, or contrary to the public interest." *Williams*, 720 F.2d at 920. Moreover, even though the District Court has provided the Coalition can make these objections, the Coalition is cautiously optimistic of what genuine consideration its objections will receive given the District Court has already implied that a delay by the Coalition asserting its interests may be outweighed by how far the Parties have progressed to reach a final successor decree (Order Denying Intervention, R. 1985, Page ID # 11672 ("Given the broad topics that the Proposed Intervenors' take issue with, the entirety of the successor decree could be at risk. If these broad topics are revisited,

many of the agreed upon terms—the product of intense negotiation and compromise—could vanish, causing further delay”).

The argument that the Coalition can no longer obtain the relief it is seeking also ignores that one of the parties has not agreed to the Proposed Consent Decree. There would be relief available to the Coalition on remand if it were permitted to intervene. Fed. R. Civ. P. 54(b) (Providing “any order or other decisions . . . that adjudicates fewer than all the claims. . . may be revised at any time before the entry of a judgment adjudicating all the claims”); *Sanguine, Ltd. v. U.S. Dep’t of Interior*, 798 F.2d 389, 391-92 (10th Cir. 1986) (Discussing intervention following entry of a consent decree as “a unique situation in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing the opportunity to litigate the merits of the case”). Simply put, the fact the District Court has continued to proceed in receiving, and presumably reviewing, objections should not serve as a bar to appeal the decision of the District Court.

D. Substantial Legal Interest.

The Coalition has a substantial legal interest in this case based on its members having a protectable interest in the natural resource in dispute between the Parties. The specific interest of the Coalition is related to preserving the Great Lakes fishery for its members who rely on the resource as an essential source for their community.

The members of the Coalition have a specific interest in the waters they fish and the health and safety of recreational fishing in those specific communities.

The State has inadequately represented this interest, and intervention is required for the Coalition to protect its interest. Sixth Circuit precedent illustrates a “rather expansive notion of the interest sufficient to invoke intervention of right” in line with this asserted interest and there is not a requirement an intervenor show the “same standing necessary to initiate a lawsuit” or even a “specific legal or equitable interest.” *Purnell v. City of Akron*, 925 F.2d 941, 947 (6th Cir. 1991). Significantly, it is not necessary for the Coalition to demonstrate a property interest to have a substantial legal interest warranting intervention by right under Rule 24(a). *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (“[W]e have repeatedly cited with approval decisions of other courts ‘rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest’”) (citations omitted).

The Coalition cited support for establishing its right to intervene in its principal brief including *United States v. Reserve Mining Company*, 56 F.R.D. 408 (D. Minn. 1972) and *Wineries of the Old Mission Peninsula (WOMP) Association v. Township of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022). Appellees misconstrued the use of each case, however.

Reserve Mining Company, for example, was cited as persuasive authority to illustrate that an expansive view of the interest sufficient to invoke intervention

should include the Coalition's interest in protecting the shared resource (Great Lakes fishery) from harm. The State responded that the holding in *Reserve Mining Company* "was based on an exceptionally broad standard that the court found appropriate given the specific nature of the proceeding" and the Coalition "points to no Sixth Circuit precedent engaging in a similar analysis" (State Response Brief, R. 49, Page ID # 54). However, of course, the Coalition established that the Sixth Circuit takes an expansive view to interests supporting intervention and merely asked this Court to adhere to the view.

Similarly, the Coalition cited *WOMP* to show that the Sixth Circuit recently held an advocacy group to have a substantial interest when there was a statutorily created cause of action to seek remedial relief consistent with the claims at issue in the litigation. The Coalition likened this finding to its statutorily created cause of action "for declaratory and equitable relief against any person for protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." MCL 324.1791(1). The Coalition argued that its members' right to pursue a cause of action against the State if it does not adequately represent the Great Lakes creates a substantial interest in the negotiations dealing with the Great Lakes. Appellees responded arguing that the Coalition is not at risk of forfeiting its MEPA claim, and therefore that cannot be a basis for its substantial interest under State law. However, although the claim may not be

forfeited, a consent decree would bind the State to the terms regardless of any claim under MEPA. Therefore, the Coalition's only opportunity to protect its statutorily created interest is by being permitted intervention into this dispute.

II. APPELLANT IS ENTITLED TO PERMISSIVE INTERVENTION.

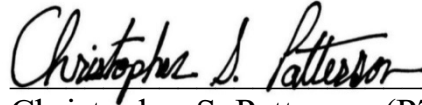
The Coalition asks that if this Court finds that the Coalition was timely in seeking intervention but does not find the Coalition has established the other required elements of intervention by right, this Court finds the District Court abused its discretion in denying permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

CONCLUSION

This Court should find that the District Court abused its discretion in finding that the Coalition was untimely, and determine the Coalition satisfied all four factors warranting mandatory intervention. Alternatively, this Court should find the Coalition was timely in seeking intervention, and the district abused its discretion in denying permissive intervention.

Respectfully submitted,

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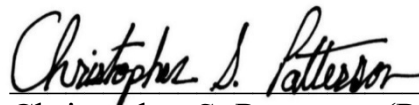
Dated: February 7, 2023

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B)(ii) because it contains 6,474 words. This reply brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type-style requirements of F.R.A.P. 32(a)(6) because this reply brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

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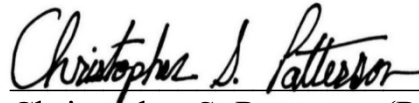
Dated: February 7, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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