No. 22-1946

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

Defendant-Appellee

COALITION TO PROTECT MICHIGAN RESOURCES

Proposed Intervenor-Appellant

Appeal from the United States District Court, Case No. 73-cv-26-PLM
Western District of Michigan, Northern Division
Honorable Paul L. Maloney

INTERVENOR-APPELLEE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS' RESPONSE BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Intervenor-Appellee Sault Ste. Marie Tribe of Chippewa Indians (SSM) certifies that SSM has no parent corporation and no publicly held corporation owns 10% or more of its stock. SSM is a federally recognized Indian tribal government.

DATED this 17th day of January 2023.

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STATEMENT OF THE CASE

The District Court properly denied the eleventh-hour motion to intervene filed by Coalition to Protect Michigan Resources (herein "CPMR" or "Proposed-Intervenors"). Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11662-11685. This Court should affirm the District Court.

A. This Litigation, Pending for Nearly Fifty Years, Addresses Indian Treaty Rights and Is Properly Limited to the Sovereign Parties.

This case commenced nearly fifty years ago when the United States filed suit against the State of Michigan to confirm and protect Indian treaty rights to fish in the waters of the Great Lakes pursuant to the 1836 Treaty of Washington. *United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979) Indian tribes possessing such treaty rights, including the Sault Ste. Marie Tribe of Chippewa Indians (SSM), subsequently intervened. *Id.* at 203-204.

A complete history of the five decades of this litigation is not necessary to resolve this appeal. In brief summary, in 1979 Judge Noel Fox of the U.S. District Court of the Western District of Michigan affirmed the Indian treaty right:

> The mere passage of time has not eroded, and cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians have a right to fish today wherever fish are to be found within the area of cession as they had at the time of cession a right established by aboriginal right and confirmed by the Treaty of Ghent, and the Treaty of 1836. The right is not a static right today any more than it was during treaty times. The right is not limited as to the species of fish, origin of fish, the purpose of use or the time or manner

> of taking. It may be exercised utilizing improvements in fishing techniques, methods and gear.

Id. at 280-81. On appeal, this Court affirmed the Indian treaty right and further held that the State carries a very heavy burden to justify any regulation of the Indian treaty right. *United States v. Michigan*, 653 F.2d 277 (6th Cir. 1981):

> As provided in [*People v. LeBlanc*, 399 Mich. 31 (1976)], any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.
>
> Thus, if Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing. . . .
>
> The District Court shall consider and decide in accordance with the principles outlined herein and in [*LeBlanc*], the questions of necessity and irreparable harm. Only upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation of gill net fishing.

Id. at 279.

In 1985, the sovereign parties negotiated and entered into a proposed consent decree to address treaty fishing and associated fishery allocation and management for a 15-year period. Following hearing on an objection by the Bay

Mills Indian Community, the consent decree was approved by the District Court. *United States v. Michigan*, 12 I.L.R. 3079, 3083 (W.D. Mich. 1985). The 1985 Consent Decree was time-limited and not intended to create any precedent, expressly stating that: "Upon expiration of the terms of this agreement, or if earlier terminated for any reason, the provisions, restrictions, and conditions contained herein shall no longer govern the parties in any manner whatsoever." *Id.* at 3093.

Prior to expiration of the 1985 Consent Decree, the sovereign parties again negotiated a new agreement, which was approved by the Court and entered as a consent decree in 2000. Like its predecessor, the 2000 Consent Decree was time limited and not intended to create any precedent. The 2000 Consent Decree provides that "nothing in this Decree shall . . . create a precedent for future allocation or regulation." 2000 Consent Decree, R. 1458, Page ID #3335. "Any use or construction of this Decree to limit, prejudice, or otherwise affect such rights or claims or to use such as precedent is unauthorized and improper." *Id.* The 2000 Consent Decree added: "Upon expiration of this Decree, or if earlier terminated for any reason, the provisions, restrictions, and conditions contained in it shall no longer govern the parties in any manner." *Id.* The 2000 Consent Decree was scheduled to expire in August 2020 but was extended by District Court order on multiple occasions during negotiations on a successor decree.

B. Proposed-Intervenors and their Predecessors Have Unsuccessfully Sought Intervention on Numerous Occasions.

During the five-decade span of this case, Proposed-Intervenors and their predecessors have unsuccessfully attempted to intervene on multiple occasions. In November 1975, Proposed-Intervenor member, Michigan United Conservation Clubs ("MUCC") sought intervention in the initial litigation of the tribes' treaty fishing rights. *See United States v. Michigan*, 89 F.R.D. 307 (W.D. Mich. 1980) (recapping prior intervention efforts). The District Court denied the motion to intervene, instead allowing the filing of an amicus brief. *Id.* at 307-08. This Court affirmed. *Id.* In 1978, MUCC sought reconsideration of intervention in the District Court, which the District Court denied. *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 . . . ").

In 1980, MUCC again sought intervention, arguing that the case had entered a new phase and that the State of Michigan no longer adequately represented its interests in that new phase. *United States v. Michigan*, 89 F.R.D. 307, 309 (W.D. Mich. 1980). The District Court disagreed, finding particularly that MUCC's interests were adequately represented by the State. The Court again granted amicus status but denied intervention.

In 1998, Proposed-Intervenor member, the Grand Traverse Area Sport Fishing Association, moved to intervene, again arguing that the State's representation was inadequate. The District Court denied the motion, because it was not sought until years after Proposed-Intervenors decided to participate as amicus curiae. Transcript, R. 1352, Page ID #4736. The Court explained:

> The request for the Association to intervene now is an attempt to insert as a party one who was not a party when the Consent Decree to be enforced was signed, approved, and thereby to disrupt the consensus that lead to the Agreement and which has been the focus of enforcement efforts. The attempt portends only prejudice, confusion and chaos for the enforcement of the Consent Decree and the workings of the Dispute Resolution Mechanism in this matter . . . Accordingly, the Motion to Intervene is denied as untimely.

Id.

In 2004, in the context of the litigation of the tribes' inland treaty rights, the District Court again denied intervention to Proposed-Intervenors' predecessor groups, which intervention was again based on a theory that the State of Michigan would not adequately represent their interests. Order, R. 1518, Page ID #2511-2516. Judge Enslen found (with emphasis added):

> The interests of the Proposed Intervenors are adequately represented by Defendants and will not be impaired in the absence of intervention. This is particularly so since there is a long and proven history in this suit of the use of *amici curiae* to sufficiently advise the Court of public and private interests. *To do otherwise, would be to issue an open invitation to all inland property owners within the area covered by the 1836 Treaty to directly participate. A surer recipe for a delayed and unworkable suit is difficult to imagine*.

Id., at Page ID #2513. This Court affirmed. *United States v. Michigan*, 424 F.3d 438, 443-45 (6th Cir. 2005). The District Court found the motion to be untimely and that the State would continue to adequately represent the Proposed-Intervenors' interests. *Id.* at 443. On appeal, this Court addressed only the adequate representation issues and concluded that the State was an adequate representative of the Proposed-Intervenors' interests. *Id.* at 444-445.

Proposed-Intervenors renewed their motion to intervene in 2005, arguing that the scope of the case had broadened. Motion to Intervene, R. 1643, Page ID #388-394. The District Court disagreed and again denied intervention. Order, R. 1678, Page ID #963-965. In 2007, Proposed-Intervenors again moved to intervene in the inland consent decree negotiations, and were again denied. Order, R. 1772, Page ID #1439-40.

C. The Most Recent Intervention Attempt Again Fails to Meet the Standards for Intervention.

Over three years ago, on August 16, 2019, Proposed-Intervenors filed a motion to confirm their status as amicus curiae in this litigation. Motion to Confirm Status, R. 1864, Page ID #2064-2066. In their motion, Proposed-Intervenors represented that CPMR's involvement in this litigation (as a successor organization) dated back to 1979. CPMR sought to confirm its status as amicus curiae due to the "rapidly approaching" expiration of the 2000 Consent Decree. *Id.*

At that time, CPMR expressed its deep concern regarding the "absence of negotiations towards a successor decree." *Id.* CPMR did not seek to intervene as a party at that time.

Negotiations regarding a successor consent decree began in September 2019. On October 8, 2019, the District Court entered an order acknowledging CPMR's status as amicus curiae and confirming 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, R. 1875, Page ID #2143-2145. The Court confirmed that "Amici may not 'initiat[e] legal proceedings, fil[e] pleadings, or otherwise participat[e] and assum[e] control of the controversy in a totally adversarial fashion." *Id.* Following the Court's order, and its discussion of CPMR's limited role as amicus, CPMR did not move to intervene.

The current consent decree was originally scheduled to expire in August 2020, but in July 2020, parties moved to extend the expiration date, which the District Court granted. Opinion, R. 1892, Page ID #10818-10825. At that time, in July 2020, parties filed briefs regarding their views on the status of consent decree negotiations and the need for additional time to negotiate. CPMR sought leave to file an amicus brief to provide its views on the appropriate duration of any extension of the consent decree. Although it was clear that negotiations on the decree would continue for the foreseeable future, CPMR did not seek intervention.

Nor did they seek intervention in 2021 or the first half of 2022 despite the fact that negotiations continued, and the expiration date of the consent decree was continued more than once.

On July 13, 2022, Proposed-Intervenors belatedly filed their motion to intervene that forms the basis for this appeal, which recited largely the same inadequate representation arguments that had been made and denied by this Court and the District Court on multiple occasions over the past fifty years. Motion to Intervene, R. 1964, Page ID #10936-10939. On August 31, 2022, the District Court denied the motion, finding that Proposed-Intervenors failed to establish any of the required elements for intervention of right. Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11662-11686. The motion was untimely; Proposed-Intervenors failed to establish a substantial legal interest that could be impaired if intervention were denied; and Proposed-Intervenors failed to show they were inadequately represented by the State of Michigan. *Id.* For similar reasons, the Court also denied permissive intervention. *Id.* at Page ID #11681-11682. Following the Court's denial of Proposed-Intervenors' motion for reconsideration, this appeal followed. This Court should affirm the District Court's denial of intervention.

SUMMARY OF ARGUMENT

Since this case began nearly fifty years ago, Proposed-Intervenors and their predecessors have sought to intervene as parties on seven separate occasions in the District Court. Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11666. Three times they have presented the intervention issue to this Court on appeal. *Id.* On each occasion, the District Court and this Court have denied the Proposed-Intervenors' (and their predecessors) multiple attempts to intervene as parties. Proposed-Intervenors have effectively participated as amici curiae (not parties) for the duration of this case and through the negotiation and implementation of two consent decrees, as well as current negotiations of a successor decree. Participation as amicus curiae remains adequate and appropriate.

Proposed-Intervenors cannot succeed on appeal here. The District Court correctly found that Proposed-Intervenors failed to meet any of the elements required for intervention. Opinion and Order Denying Motion to Intervene, R. 1985, Page ID# 11668. Untimeliness is a critical defect and, in the District Court's view, the "most compelling reason to deny the Proposed Intervenors' motion to intervene." *Id.* This case has been pending for approximately fifty years. The Proposed-Intervenors filed for intervention three full years after commencement of negotiations of a successor Consent Decree and with only months to go before the current consent decree expired.

In addition to the gross untimeliness, Proposed-Intervenors cannot show any legally protected interests at risk of impairment that warrants their intervention. Nor can they show that the State of Michigan (after fifty years of adequate representation in this proceeding) has become an inadequate representative of their interests. Mere disagreement with negotiating tactics, case strategy, or certain draft terms of a successor decree is not sufficient to establish inadequate representation – especially where the District Court and this Court have repeatedly and consistently held the State to be an adequate representative.

This litigation is between sovereign governments; the state of Michigan, the United States and the five Sovereign Tribes. Each of the government parties has regulatory, management and enforcement powers. Proposed-Intervenors do not. As it has been for the past five decades, this case should remain between the sovereign representatives.

In 2004, District Judge Enslen recognized that granting intervention to the Proposed-Intervenors' predecessors was a sure recipe for a delayed and unworkable suit. Order, R. 1518, Page ID #2513. Judge Enslen was correct. In addition to the fact that Proposed-Intervenors do not meet the standard for intervention, allowing intervention here would effectively open the doors to every private citizen that claims a generalized interest in fish within the Great Lakes. *Id.* The federal, state, and tribal sovereigns are the only appropriate parties – they are,

have been, and will remain adequate representatives of their respective tribal and non-tribal constituent groups. Proposed-Intervenors are not governments and have no regulatory authority. The District Court property denied intervention and this Court should affirm.

ARGUMENT

A. Proposed-Intervenors Cannot Meet the Standard for Intervention of Right.

This Court applies a four-prong test to determine whether an applicant should be granted intervention of right. The applicant must prove that: (1) their request to intervene is timely; (2) they have a substantial legal interest in the case; (3) their ability to protect that legal interest will be impaired without intervention; and (4) the existing parties will not adequately represent their interests. *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005). Failure to satisfy any one of those requirements mandates that intervention of right be denied. *Id*. Here, Proposed-Intervenors fail to satisfy any of the required elements.

1. Untimeliness Defeats the Proposed-Intervenors' Intervention Request.

The District Court properly found that "the untimeliness of the [intervention] motion is the most compelling reason to deny the Proposed Intervenors' motion to intervene." Opinion and Order, R. 1985, Page ID #11668. This Court reviews the District Court's determination of untimeliness under an abuse of discretion standard. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471-72 (6th Cir. 2000). The

District Court is in the best position to assess whether a motion to intervene is timely in the context of all the relevant circumstances of the particular case before it. *Id.* at 479. The timeliness determination is made by the District Court "in the exercise of its sound discretion: unless that discretion is abused, the [district court's ruling] will not be disturbed on review." *Id.*, quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973). Here, the District Court carefully evaluated all the relevant factors and circumstances surrounding the untimeliness of the current intervention motion in the context of this complicated and unique proceeding. Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11668-11674. The District Court did not abuse its discretion in determining the current motion to intervene is untimely; this Court should affirm denial of intervention.

Over three years ago, on August 16, 2019, CPMR filed a motion to confirm its status as amicus curiae in this litigation. Motion to Confirm Amicus Status, R. 1864, Page ID #2064. In its motion, CPMR represented that its involvement in this litigation (as a successor organization) dated back to 1979. CPMR sought to confirm its status as amicus curiae due to the "rapidly approaching" expiration of the 2000 Great Lakes Consent Decree. *Id.*, Page ID #2064. At that time, CPMR expressed its deep concern regarding the "absence of negotiations towards a successor decree." *Id.*, Page ID #2065. But CPMR did not seek to intervene as a party at that time.

Negotiations regarding a successor consent decree began in September 2019. On October 8, 2019, the District Court entered an order acknowledging CPMR's status as amicus curiae and confirming 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, R. 1875, Page ID #2144. The District Court confirmed that "Amici may not 'initiat[e] legal proceedings, fil[e] pleadings, or otherwise participat[e] and assum[e] control of the controversy in a totally adversarial fashion." *Id.* Following the Court's October 8, 2019, order and its discussion of CPMR's limited role as amicus, CPMR did not move to intervene.

The current consent decree was originally scheduled to expire in August 2020, but in July 2020, parties moved to extend the expiration date, which the District Court granted. Opinion, R. 1892, Page ID #10818. At that time, in July 2020, parties filed briefs regarding their views on the status of consent decree negotiations and the need for additional time to negotiate. CPMR sought leave to file an amicus brief to provide its views on the appropriate duration of any extension of the consent decree, which request was denied due to CPMR's failure to comply with Local Rule 7.1(d). Although it was clear that negotiations on the decree were continuing in earnest and would continue for the foreseeable future, CPMR did not seek intervention at that time. Nor did CPMR seek intervention at any time in 2021 or

the first half of 2022 despite the fact that negotiations continued, and the expiration date of the consent decree was extended more than once.

Although it has been fully on notice and apprised of the status of the consent decree negotiations and its interests in those negotiations, CPMR waited three full years before seeking intervention at this stage of the proceedings.[1] The current stage of the proceedings is only the latest in a case that has been pending for nearly 50 years. At no time during that 50 years has the District Court or this Court granted intervention to Proposed Intervenors or their predecessors despite many requests.

As the District Court noted: "This matter has progressed far beyond the point that any other party should be permitted to intervene." Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11674. The District Court properly rejected Proposed-Intervenors' request to intervene at this late stage. CPMR's motion was not timely and, for that reason alone, was properly denied.

2. Proposed-Intervenors Lack a Substantial Legal Interest to Support Intervention.

In denying intervention, the District Court found that: "Even if the Proposed Intervenors' motion to intervene was timely, they have failed to meet their burden in proving that they have a substantial legal interest in this matter." Opinion and

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[1] This current stage of the proceedings is only the latest in a case that has been pending for nearly 50 years. At no time during that 50 years has the Court granted intervention to Proposed-Intervenors or their predecessors, despite many requests.

Order, R. 1985, Page ID #11674. The Court found that "[w]hile the Proposed-Intervenors may have some interest in 'conserv[ing] and protect[ing] the Great Lakes fishery,' whether that interest is 'substantial' is questionable, considering every Michigan citizen has the same rights in using the Great Lakes fishery." *Id.* The Court further correctly ruled that the Proposed-Intervenors, as members of the public, have no property right in the Great Lakes fishery that could support intervention. *Id.*, at Page ID #11675. In addition to the untimeliness of the intervention request, the lack of a substantial legal interest is sufficient grounds, standing alone, to deny intervention here.

In claiming a substantial interest, Proposed-Intervenors rely on *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994 (8th Cir. 1993), but that case is readily distinguishable because the proposed-intervenors in that case were landowners concerned with the prospect of Indian treaty hunting and fishing on their own properties. *Id.* at 998. In the present case, the Proposed-Intervenors have no comparable property interests at issue.

Proposed-Intervenors have no property right in the Great Lakes fishery resource. The Proposed-Intervenors' generalized interest in preserving fish or the ability to catch fish is not in and of itself sufficient to permit intervention of right, especially when the State of Michigan is representing those same interests on behalf of the people of the State. The Proposed-Intervenors' lack of any property

interest also distinguishes this case from the situation in *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula*, 41 F.4th 767 (6th Cir. 2022), a case where the intervenors had property interests that could be impaired by the litigation at issue. *Id.* at 771-773.[2]

Proposed-Intervenors also allege an interest in preserving agreements and principles that exist in the 2000 Consent Decree. But such an interest does not support intervention. The 2000 Consent Decree was not intended to last forever – rather it was expressly time limited. The 2000 Consent Decree expressly provides that "nothing in this Decree shall . . . create a precedent for future allocation or regulation." 2000 Consent Decree, R. 1458, Page ID #3335. "Any use or construction of this Decree to limit, prejudice, or otherwise affect such rights or claims or to use such as precedent is unauthorized and improper." *Id.* Proposed-Intervenors' asserted interest in continuation of specific provisions or principles of the 2000 Consent Decree into a future decree provides no legal basis for intervention. The District Court properly denied intervention.

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[2] As the District Court noted in its Opinion and Order Denying Intervention, R. 1985, Page ID #11682-11685, numerous other factors distinguish this case from the *Wineries* case. For example, timeliness was not in dispute in *Wineries*. 41 F.4th at 771. Further, in *Wineries*, the Township conceded that it could not adequately represent the intervenors' interests. *Id.* at 774-777. The case at bar is readily distinguishable from *Wineries*.

3. Proposed-Intervenors Cannot Show That Their Interests Will Be Impaired Absent Their Intervention.

Regarding the impairment of interest element of the intervention test, the District Court found: "As with the first two elements of intervention of right, the Proposed Intervenors have also failed to meet their burden as to the third factor [impairment of interest]." Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11676. The failure to show a substantial legal interest at risk of impairment means that the third element of intervention (impairment of that substantial interest) cannot be met. That is, since Proposed-Intervenors have no substantial legal interest, they cannot suffer any impairment.

Even if Proposed-Intervenors had a substantial legal interest, denial of intervention does not threaten such interest. For over forty years, Proposed-Intervenors and their predecessors have actively and effectively participated in this litigation in their court-approved role as amici curiae – a status that they continue to retain. In addition, their interests are adequately represented and protected by the State of Michigan. There is a long and proven history of adequate representation of Proposed-Intervenors by the State in this case. Finally, to the extent that a successor Consent Decree is negotiated and agreed to by all parties, it will need to be reviewed and approved by the Court and amici can seek leave to

present their views to the District Court through written amicus briefing. *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 584 (6th Cir. 1982).

The District Court has expressly stated that, before it enters any final successor decree, it will give all the parties and the Proposed-Intervenors (in the long-standing role as amicus curiae) the opportunity to submit objections to the proposed successor decree. Order Denying Motion to Stay, R. 2021, Page ID #12006-12007. Thus, Proposed-Intervenors will have the opportunity to voice their concerns regarding the successor decree to the District Court.

4. Proposed-Intervenors Cannot Show That the State of Michigan Is An Inadequate Representative of Their Interests.

Proposed-Intervenors disagree with some aspects of the State's handling of this litigation and related negotiations, but their disagreements do not show that the State is inadequately representing their interests as citizens of the State of Michigan in this proceeding. And even if Proposed-Intervenors did establish inadequate representation, that is only one element of the intervention test and not enough, standing alone, to support their intervention.

Proposed-Intervenors have certain specific interests which may vary from other citizens in the State of Michigan, and which may vary from interests of one or more sovereign tribes and their respective constituents. The fact that all these various constituent groups may have, in general, an interest in the outcome of some

aspect of the negotiations and litigation here does not mean that each of these constituent groups is entitled to intervene as a party or that the State is inadequately representing Proposed-Intervenors here.

For fifty years, the sovereign parties have participated as adequate representatives of their respective constituent groups. The District Court and this Court have repeatedly found that the State of Michigan adequately represents the interests of the Proposed-Intervenors and their predecessors. *See, e.g., United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (affirming denial of MUCC's intervention request because State of Michigan was adequate representative of its interests); Order, R. 1518, Page ID #2513 (June 15, 2004) (denying intervention to CPMR predecessor organization in part because the "interests of the Proposed Intervenors are adequately represented by [the State]"); *United States v. Michigan*, 89 F.R.D. 307, 308-309 (W.D. Mich. 1980) (finding denial of intervention to MUCC, as affirmed by the Sixth Circuit, to be law of the case and finding that "throughout these proceedings MUCC and its members are adequately represented by the State"); *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"). Considering the numerous times that Proposed-Intervenors (and their predecessors) have attempted to intervene as parties, the present disagreement is not the first time that some elements of the State's handling

of the litigation have failed to satisfy the Proposed-Intervenors. But Proposed-Intervenors' dissatisfaction with the State in certain aspects does not entitle them to intervention as of right.

Rejecting a prior intervention attempt by CPMR's predecessor groups, District Judge Enslen recognized that intervention of private interests would be disastrous for the conduct of this litigation:

> The interests of the Proposed Intervenors are adequately represented by Defendants and will not be impaired in the absence of intervention. This is particularly so since there is a long and proven history in this suit of the use of *amici curiae* to sufficiently advise the Court of public and private interests. *To do otherwise, would be to issue an open invitation to all inland property owners within the area covered by the 1836 Treaty to directly participate. A surer recipe for a delayed and unworkable suit is difficult to imagine*.

Order, R. 1518, Page ID #2513 (emphasis added). The District Court again correctly denied intervention here.

5. This Case Should Remain Solely Between Sovereigns.

The District Court's Opinion and Order Denying Intervention noted the unusual circumstances present in this case, which "involves seven different sovereigns as separate parties." Opinion and Order Denying Motion to Intervene, R. 1985, Page ID #11673. The Court explained: "If the Court granted the motion to intervene, it would be the first time that a non-governmental entity, with absolutely no regulatory or police power, would be given party-status in this matter in the case's nearly fifty-year history. If the Court allowed the Proposed

Intervenors to intervene, what would stop any individual citizen or interest group from the State of Michigan or one of the Native Tribes from intervening." *Id.* The Court firmly declared: "The Court agrees with the parties – only sovereigns must be allowed party-status in this matter." *Id.*

The District Court is correct. The Proposed-Intervenors' pleadings and declarations submitted in support of intervention show how cumbersome, unwieldy, and unmanageable this litigation would become if party-status expanded beyond sovereigns to the various constituent groups. For fifty years, this case has proceeded with sovereigns acting as adequate representatives of their respective tribal and non-tribal constituent groups. While disagreements may exist between the sovereigns and their respective constituents on some topics, that does not mean that the sovereigns are inadequate representatives (for purposes of intervention analysis) or that this litigation should be opened (especially at this very late stage) to non-sovereign constituents who have a wide range of varying perspectives on how certain issues should be resolved.

B. The Court Properly Denied Permissive Intervention.

The Court also properly denied permissive intervention. Denial of permissive intervention is reviewed for abuse of discretion. *Stupak-Thrall*, 226 F.3d at 472. Timeliness is a necessary element of permissive intervention under Federal Rule of Civil Procedure 24(b). *Michigan*, 424 F.3d at 445. Here, as discussed above, the

motion to intervene was not timely and, for that reason alone, denial of permissive intervention was appropriate. In addition, the District Court reasonably and properly exercised its discretion in denying permissive intervention because the State adequately represents the Proposed-Intervenors' interests and because intervention would unreasonably complicate the case and prejudice the existing parties. For fifty years, this case has been adjudicated between the sovereign representative governments. The District Court and this Court have time and again denied intervention of citizen groups. The result here should be no different. This Court should affirm in full the District Court's denial of intervention.

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's denial of intervention.

Respectfully submitted this 17th day of January, 2023.

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,137 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated this 17th day of January, 2023.

s/ Mason D. Morisset

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification and a copy of such filing to the attorneys of record in this case.

Dated this 17th day of January, 2023

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ADDENDUM – DESIGNATION OF DOCUMENTS

6 Cir. R. 30(g)

Intervenor-Appellee, pursuant to 6. Cir. R. 30(g), designates the following portions of the record on appeal:

Description of Entry	ECF Record No.	Page ID # Range
Transcript	1352	4717-4806
Consent Decree	1458	3216-3400
Order	1518	2511-2516
Motion to Intervene	1643	388-394
Order	1678	963-965
Order	1772	1439-1440
Motion to Confirm Status as Amicus Curiae	1864	2064-2066
Order	1875	2143-2145
Opinion	1892	10818-10825
Motion to Intervene	1964	10936-10939
Opinion and Order Denying Motion to Intervene	1985	11662-11686
Order Denying Motion to Stay	2021	12003-12007

DATED this 17th day of January, 2023.

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