UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN 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, -v- STATE OF MICHIGAN, et al., Defendants.	)	No. 2:73-cv-26 Honorable Paul L. Maloney

OPINION AND ORDER DENYING MOTION TO INTERVENE

The Coalition to Protect Michigan Resources ("CPMR") and Bay de Noc Great Lakes Sports Fishermen ("GLSF") (collectively, "the Proposed Intervenors"), who currently have *amici curiae* status, have moved to intervene in this matter (ECF No. 1964). All seven parties oppose the motion. As the Court indicated at the hearing held on the motion on August 25, 2022, the Court will deny the motion to intervene.

I. Facts

Although the case number of this matter indicates that the case is nearly fifty years old, in reality, the roots of this case reach back to 1836 when the Grand Traverse Ottawas

and Chippewas[1] first signed a treaty with the United States to protect their commercial subsistence fishing rights in the waters off the Leelanau Peninsula. In 1855, the same parties signed a second treaty protecting reservations on the shores of Lake Michigan and Grand Traverse Bay.

In 1979, Judge Fox confirmed the rights secured in the 1836 and 1855 treaties, and those rights are held by the successors of the Ottawa and Chippewa signatories of the 1836 treaty. *See United States v. Michigan*, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *mod. in part*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981). On appeal, the Sixth Circuit held that Native Americans' treaty rights are not absolute. Rather, any "state regulations restricting Indian fishing rights under the 1836 treaty . . . (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." *Michigan*, 653 F.2d at 279.

In 1983, the Grand Traverse Band of Ottawa and Chippewa Indians moved, as an intervenor-plaintiff, to allocate the fishery resources between themselves and the State of Michigan. During the proceedings that followed, the parties and numerous *amici curiae*[2] sought to resolve the conflicts between Native and non-Native interests regarding the management and allocation of the Great Lakes fishery, while respecting the Tribes' treaty

[1] The Grand Traverse Ottawas and Chippewas were the predecessors to Intervenor-Plaintiff Grand Traverse Band of Ottawa and Chippewa Indians.

[2] Proposed Intervenor CPMR's current member, Michigan United Conservation Club, was granted *amicus* status in 1975 (*see* ECF No. 1966-1 at PageID.10953), and Proposed Intervenor GLSF was granted *amicus* status on April 2, 1999 (ECF No. 1388).

rights. In 1985, after extensive negotiations, the parties reached an agreement regarding the allocation of the Great Lakes fishery and signed a stipulation for entry of a consent judgment. This Court adopted the consent judgment, and it remained effective for fifteen years. On August 8, 2000, the parties again stipulated to the entry of another consent decree ("the 2000 Consent Decree"), to remain effective for twenty years (*see 2000 Consent Decree*, ECF No. 1458 at PageID.3334-35, ¶ XXII.A). Since the entry of the 2000 Consent Decree, the parties, with *amici curiae*, have stipulated to several amendments (*see* ECF Nos. 1733, 1742, 1767, 1790) and several modifications (*see* ECF Nos. 1812, 1815, 1817, 1838, 1844, 1848, 1855, 1858).

In 2019, CPMR—one of the Proposed Intervenors presently moving to intervene—moved to "confirm" its *amicus* status and to "apprise this Court of the need for a status conference" (ECF Nos. 1864, 1865). Two of the Intervenor-Plaintiffs—the Grand Traverse Band of Ottawa and Chippewa Indians and the Sault Ste. Marie Tribe of Chippewa Indians—opposed CPMR's motion on the grounds that it presented no justiciable issues and that no party had objected to CPMR's continuing status as an *amicus curiae* (ECF Nos. 1870, 1871). No other party responded. This Court confirmed CPMR's *amicus* status but denied the motion in all other respects (ECF No. 1875). Specifically, the Court noted 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'" (*Id.* at PageID.2144 (quoting *United States v. Michigan*, 940 F.2d 143, 165-66 (6th Cir. 1991))). As such, the Court held that CPMR may participate in the case as a traditional *amicus*, but it may not "jump start" proceedings in the case (*Id.*).

Since September 2019, the seven parties, with the *amici*, have been diligently negotiating a new successor decree to follow the 2000 Consent Decree. Although the 2000 Consent Decree was set to expire on August 8, 2020, this Court extended the expiration date of the decree several times so that the parties could collegially negotiate a successor decree. After the most recent extension, the 2000 Consent Decree will now expire on September 30, 2022 (ECF No. 1963). Throughout the three-year negotiation process, the Court held regular status conferences with the parties and facilitative mediator to encourage successful negotiations. At the June 2022 status conference, the parties indicated that they were nearing the end of negotiations and expected to begin the drafting process shortly. They maintain that they will present a proposed final draft to the Court before the September 30 expiration date.

Presently, almost three years since the Court confirmed CPMR's *amicus* status, the Proposed Intervenors seek intervention to gain full-party status (ECF No. 1964). They seek to "protect the natural resources of the State of Michigan and to defend and assert the rights of recreational users, as well as Intervenors' members' rights, in the full and fair enjoyment of the natural resources of the Great Lakes" (ECF No. 1969 at PageID.11024). Although no party has questioned their *amici* status, the Proposed Intervenors seek to be involved in the final negotiations and drafting of the successor decree beyond how they are permitted to do so as a mere "observer." They believe that, in the potential successor decree, "the concept of an equally-shared fishery within the treaty waters and the biological principles underpinning the existing 2000 Consent Decree are no longer being followed" (*Id.*). The Proposed Intervenors allege that they have been "shut out" of the negotiations among the

seven parties for the last two months, and they move to intervene so that they have a seat at the table during final negotiations and the drafting of the successor decree (*Id.* at PageID.11026).

As thoroughly outlined in the United States' response to the motion to intervene, the Proposed Intervenors or their predecessor organizations have moved to intervene in this matter on seven separate occasions, and three times on appeal to the Sixth Circuit (ECF No. 1970-1 at PageID.11095-99). The Proposed Intervenors have never been given more than *amici* status; only temporarily were two of CPMR's current members given "litigating *amici curiae*" status from 1981 to 1984, which permitted them to participate directly in proceedings involving narrow issues, such as annual closures and overharvesting of the fishery (ECF No. 1969 at PageID.11028). Since 1976, this Court and the Sixth Circuit have found *amici curiae* participation to be sufficient to protect the Proposed Intervenors' interests in negotiations and litigation. In 2007, when Judge Enslen most recently denied a motion to intervene in this matter, he noted that "[t]he motion is unusual because it is filed during the course of negotiations which, according to the parties, are likely to result in a binding Consent Decree" (ECF No. 1772).

All seven parties oppose the Proposed Intervenors' motion. They argue that the motion is untimely, that the Proposed Intervenors' interests are already adequately represented by the State of Michigan, that the Proposed Intervenors' interests will not be impaired if the motion is denied, and that the Proposed Intervenors failed to comply with Rule 24(c) because they did not attach a proposed answer to their motion.

II. Legal Standard

Rule 24 of the Federal Rules of Civil Procedure governs intervention. Subpart (a) authorizes for intervention as of right, which requires a court to allow intervention when either of two situations exist: (1) the party is given an unconditional right to intervene by a federal statute, or (2) the party claims an interest in the property or transaction that is the subject of the lawsuit and resolution of the matter would impair or impede the party's ability to protect his or her interest. Fed. R. Civ. P. 24(a). To intervene under Rule 24(a)(2), the intervenor must establish four elements: "(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." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The party requesting intervention bears the burden of proving each element and "failure to meet one of the criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

Subpart (b) of Rule 24 authorizes permissive intervention, where a court may permit a party to intervene when either (1) the party is given a conditional right to intervene by a federal statute, or (2) when the party has a claim or defense that shares a common question of law or fact with the main action. Fed. R. Civ. P. 24(b). Decisions to grant or deny intervention under subpart (b) fall within the Court's discretion. *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 784 (6th Cir. 2007).

Finally, under subpart (c) of Rule 24, a motion to intervene must be "accompanied by a pleading that sets out the claim or defense for which intervention is sought." However,

the Sixth Circuit has taken a lenient approach to this rule, holding that a proposed-intervenor's failure to attach a pleading is not grounds to deny the motion to intervene if the motion itself asserts the claim or defense for which intervention is sought. *See Providence Baptist Church v. Hillandale Comm. Ltd.*, 425 F.3d 309, 314-15 (6th Cir. 2005).

III. Intervention of Right

The Proposed Intervenors first seek to intervene as a matter of right under Rule 24(a)(2). The Court finds that the Proposed Intervenors have failed to meet their burden in proving any of the four elements necessary for intervention of right.

A. Timeliness

In regard to the first element of intervention of right, timeliness of the motion to intervene, the Court finds that the Proposed Intervenors have failed to meet their burden in proving that their motion was timely. Courts consult five factors in determining whether a motion to intervene is timely:

> 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed.

Stotts v. Memphis Fire Dep't, 679 F.3d 579, 582 (6th Cir. 1982). If a motion to intervene is untimely, it must be denied. *Id.* In the Court's opinion, the untimeliness of the motion is the most compelling reason to deny the Proposed Intervenors' motion to intervene.

1. Purpose for Which Intervention Was Sought

The Proposed Intervenors seek to intervene to "address matters directly affecting their interests in the current negotiation discussions" based on their claim that the State is no longer adequately representing their interests (ECF No. 1969 at PageID.11037). While the Proposed Intervenors take the position that they want to participate in the final negotiations and drafting of the successor decree to address specific, narrow topics (or "micro-level interests": a term they used at the August 25 hearing), their brief asserts the Proposed Intervenors' intent to address extremely broad and important interests in the successor decree (*see* ECF No. 1966-1 at PageID.10952; No. 1969 at PageID.11026). Nevertheless, the Proposed Intervenors clearly wish to have a say in the drafting of the successor decree.

The Sixth Circuit has held that where a party has had the "full opportunity" to participate in a case as an *amicus*, "the concerns of an entity seeking intervention can be presented with complete sufficiency through [*amicus*] participation." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 476 (6th Cir. 2000). And the Circuit would have reached this conclusion "[e]ven if the [proposed intervenors] concerns *were different* from those of" the defendants. *Id.* In other words, *amicus curiae* status can certainly be sufficient to protect a movant's interest in a lawsuit. *See Blount-Hill v. Zelman*, 636 F.3d 278, 287-88 (6th Cir. 2011) ("Although we hold that proposed Intervenors may not participate as parties in this litigation, proposed Intervenors are not without a voice—the district court previously permitted proposed Intervenors to appear as *amici curiae* in a decision that is not before this Court."); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) ("[T]he district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel]

to appear as amicus curiae in the case. This would allow the district court the benefit of hearing proposed intervenors' concerns and views, as well as the benefit of [counsel's] expertise, before it rules on issues in the advanced remedial phase of this desegregation action.").

To the extent that the Proposed Intervenors wish to participate in final negotiations and drafting the successor decree, their wish to participate has been met through their *amici* status. The Proposed Intervenors concede that they have been present during the negotiation process for the past few years until they were allegedly "shut out" in mid-July (ECF No. 1969 at PageID.11025-26). The State's brief asserts that the

> Proposed Intervenors have had a role in the negotiations as amici curiae since the beginning of these negotiations—and even earlier, as the State engaged with them about a successor decree years before negotiations began. Since 2019, Proposed Intervenors as amici curiae have attended in-person and virtual negotiation sessions, caucused with the State during negotiation sessions, met and talked by phone with the State outside negotiation sessions, met and talked by phone with other parties, and met and talked by phone with the mediator.

(ECF No. 1973 at PageID.11330). The United States' brief makes similar assertions: the Proposed Intervenors "have been present at all in-person meetings from September 2019 through June 30, 2022; they have met individually with parties both in person and over the phone; and they have met with the mediator [retired] Justice Cavanaugh both in person and over the phone" (ECF No. 1970-1 at PageID.11101).

Moreover, at the August 25 motion hearing, the State shed some light on the Proposed Intervenors' claim that they have been "shut out" of negotiations—this claim turned out to be completely unsubstantiated. The parties informed the Court that the last negotiation sessions occurred on June 28, 29, and 30: sessions that the Proposed Intervenors

attended. The parties asserted that they had a meeting the week of August 15, 2022, in Traverse City to "tie up some loose ends," and the Proposed Intervenors conceded that they were also present at that meeting due to their *amici* status. The State asserted that it was more than willing to caucus with the Proposed Intervenors at all of these meetings, but the Proposed Intervenors failed to consult with the State. If the Proposed Intervenors took issue with the potential resolutions at negotiations, they needed to seek out the State, not the other way around. It is not the State's duty to ensure that the Proposed Intervenors are satisfied. As the State put it, the Proposed Intervenors "shut themselves out."

As of now, the parties are in the drafting stage of the successor decree. While the Proposed Intervenors may not be involved in actively drafting the language of the successor decree, they certainly have not been "shut out." In fact, the Proposed Intervenors have received a redacted working copy of the successor decree. The State went to great lengths to receive consent from the other six parties in providing the Proposed Intervenors with the working draft. As *amici*, the Proposed Intervenors should be more than satisfied with the efforts of the State in making sure that they are involved in the finalization of the successor decree.

Given the Proposed Intervenors' extensive participation in this case as *amici*, their purpose for intervention—to "address matters directly affecting their interests"—has sufficiently been met through their *amici* status (ECF No. 1969 at PageID.11037).

2. Length of Time Preceding the Motion to Intervene During Which the Proposed Intervenors Knew or Reasonably Should Have Known of Their Interest in the Case

At the time the Proposed Intervenors moved to intervene, the seven parties—and the Proposed Intervenors as *amici*—had been negotiating a successor decree for almost three years, and they were only two months away from drafting and presenting a successor decree to the Court. If the Proposed Intervenors were interested in becoming a party, they should have moved to intervene at the beginning of negotiations. Instead, CPMR merely moved to confirm its *amicus* status (ECF No. 1864). The Proposed Intervenors have known their interests since the beginning of negotiations, which they have been involved in, and they should not have waited three years to raise such interests. *See United States v. Tennessee*, 260 F.3d 587, 592-93 (6th Cir. 2001) (affirming the denial of an untimely motion to intervene where the movant filed its motion after settlements were conditionally approved but not finalized, despite the movant's assertion that it had only recently become aware that its interests were not adequately represented). This factor also weighs against timeliness.

3. Prejudice to the Original Parties

In the Court's judgment, the potential prejudice to the original parties is clear—if the Court permitted the Proposed Intervenors to intervene, the likelihood that the parties will agree upon a proposed successor decree by September 30 is severely diminished. Given the broad topics that the Proposed Intervenors' take issue with (*see* ECF No. 1969 at PageID.11026), 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 delays. All seven parties agree that they can

submit a proposed successor decree to the Court by September 30, and they do not want the Proposed Intervenors to delay that deadline. The Court agrees with the parties that they will be severely prejudiced if the motion to intervene is granted.

4. The Existence of Unusual Circumstances

This case is unusual in that it involves seven different sovereigns as separate parties. 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? The State argues that if the Court grants the motion, "intervention would have the effect of elevating Proposed Intervenors' interests and concerns over those of all other Michigan citizens, who have an equal right to the Great Lakes resource and fishery at issue in these negotiations" (ECF No. 1973 at PageID.11334). The Court agrees with the parties—only sovereigns must be allowed party-status in this matter.

5. The Point to Which the Suit Has Progressed

"If the litigation has 'made extensive progress in the district court before the appellants moved to intervene' then this factor weighs against intervention." *Tennessee*, 260 F.3d at 592. The current decree expires on September 30, 2022. Proposed Intervenors filed their motion only two months before the current decree expires, despite the fact that negotiations have been occurring since September 2019. Looking at the "litigation continuum," the

parties are near the "finish line." *See Glickman*, 226 F.3d at 475. This matter has progressed far beyond the point that any other party should be permitted to intervene.

In sum, given "all the circumstances" of this case, the Proposed Intervenors' motion is untimely. *See Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 366 (1973). Based on the Proposed Intervenors' failure to establish that their motion is timely, the Court can deny the motion on this basis alone. *See Grubbs*, 870 F.2d at 345.

B. Substantial Legal Interest

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. The Sixth Circuit has "opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Miller*, 103 F.3d at 1245. For example, an intervenor need not have the same standing necessary to initiate the lawsuit. *Tennessee*, 260 F.3d at 595. Notably, "[t]he inquiry into the substantiality of the claimed interest is necessarily fact specific." *Miller*, 103 F.3d at 1245.

The Proposed Intervenors assert two legal interests. First, they seek to "conserve and protect the Great Lakes fishery" in the absence of the State's interest in doing so (ECF No. 1969 at PageID.11026). Second, they assert a property interest in their right to fish the Great Lakes (*Id.* at PageID.11039).

While the Proposed Intervenors may have some interest in "conserv[ing] and protect[ing] the Great Lakes fishery," (*Id.* at PageID.11026), whether that interest is "substantial" is questionable, considering every Michigan citizen has the same rights in using the Great Lakes fishery. But even if this interest is "substantial," for the reasons stated below

in Section III.D, the State contends that it also possesses this interest. Thus, this interest is already represented by the State of Michigan.

Second, the Proposed Intervenors cite to *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993) for the proposition that they have a property right to fish the Great Lakes. In *Mille Lacs*, the Eighth Circuit granted a group of landowners' motion to intervene in a case concerning treaty hunting and fishing rights being exercised on the landowners' land. *Id.* at 998. Yet, the court did not hold that the landowners had a property interest in the right to hunt and fish; rather, the landowners clearly had a property interest *in their own land* that may have been affected by the result of the litigation. *Id.* ("The result of the litigation also may affect the proposed intervenors' property values. The parties thus have recognized interests in the subject matter of the litigation. Second, a judgment or settlement favorable to the Band may impair those interests, since it may permit Band members to exercise treaty rights upon the proposed intervenors' land. . . .") (internal citation omitted). Here, the Proposed Intervenors do not have a property interest in the Great Lakes fishery. Rather, the State of Michigan owns the fishery, which it holds in trust for the public. *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); Mich. Comp. Laws §§ 324.48702(1), 40105. As such, the Court finds that the Proposed Intervenors do not have a substantial legal interest, or a property interest, in the right to fish the Great Lakes.

In sum, the Proposed Intervenors may have a substantial interest in this litigation if they seek to protect and conserve the Great Lakes fishery. But even if this is a substantial legal interest, this interest is likely represented by the State of Michigan for the reasons explained below in Section III.D.

C. Impairment of the Interest

"To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Miller*, 103 F.3d at 1247. Although this burden is "minimal," this burden "does not mean that any articulated interest will do." *Id.*; *Granholm*, 501 F.3d at 780. 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.

The Proposed Intervenors argue that their interest in conserving the Great Lakes fishery will be impaired if they are not permitted to intervene because the Proposed Intervenors want to preserve many provisions of the 2000 Consent Decree—the 50-50 equitable allocation, provisions that maintain the coexistence of commercial and recreational fisheries in the same waters, and the promotion of biological sustainability—that the State allegedly does not seek to preserve (to the extent that the Proposed Intervenors would like) in the successor decree (*see* ECF No. 1969 at PageID.11041).

These broad interests will certainly not be impaired if the Proposed Intervenors are not permitted to intervene. Although the Court has not yet had the benefit of reviewing the proposed successor decree (because it is not yet drafted), and the parties have not articulated exactly what terms the successor decree will contain (because they are bound by a confidentiality agreement), the Court finds the Proposed Intervenors' bold allegations that the State has abandoned these interests to be utterly unfounded. The State vehemently opposes the Proposed Intervenors' allegations that they have abandoned these interests and that they no longer wish to protect the Great Lakes fishery. Rather, the State *has a duty* to

protect these resources, and given the State's contentions at the August 25 hearing that it and the Proposed Intervenors share the same objective in protecting the fishery, the Court has no doubt that the State has abided by, and will continue to abide by, its statutory duties to conserve and protect the Great Lakes fishery.

Accordingly, the Proposed Intervenors have failed to prove that their broad interests in protecting and conserving the Great Lakes fishery will be impaired absent their intervention.

D. Adequacy of Representation

The Proposed Intervenors' burden for proving that they are inadequately represented by a party in this lawsuit is "minimal because it need only be shown 'that there is a *potential* for inadequate representation.'" *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005) (quoting *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999)). However, "applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit." *Id.* at 443-44.

The Proposed Intervenors claim that the State no longer represents their interests in preserving the Great Lakes fishery because of the purported breakdown in their relationship. The Proposed Intervenors assert that they have "substantial belief" that the State does not "share [their] concern" regarding

> the roughly 50-50 allocation of the fishery through a zonal-approach that balances recreational fishing and commercial fishing interests within the same waters by creating recreational and commercial fishing zones, a structure for the usage, times and places of gear types and effort, and protection of Great Lakes spawning areas, refuges, and certain fishing practices through sound biological considerations.

(ECF No. 1969 at PageID.11025). Further, at the August 25 hearing, the Proposed Intervenors asserted that although they may have been adequately represented by the State in this case in the past, they are no longer being adequately represented because the Proposed Intervenors' "micro-interests" are not being adequately represented. However, it is not entirely clear to the Court what these so-called "micro-interests" are.

Conversely, the State vehemently "refutes such allegations in the strongest of terms" (ECF No. 1973 at PageID.11325). The State notes that it has a duty to preserve these resources held in public trust and that "the principles of sound biological management . . . guide the State in carrying out that duty" (*Id.*). *See Glass v. Goeckel*, 703 N.W.2d 58, 64 (Mich. 2005) ("Under longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public."). The State strongly asserts that it has not abandoned these statutory duties.

Moreover, the State asserts that because the Proposed Intervenors claim to disagree with the State about "nearly every major topic to be addressed in the successor decree," it should have been apparent to the Proposed Intervenors that the State did not adequately represent their interests back at the beginning of negotiations (ECF No. 1973 at PageID.11326). Yet, the Proposed Intervenors also state that "only recently" did their relationship with the State deteriorate to the extent that their interests are now unrepresented (ECF No. 1969 at PageID.11037). This acknowledgement shows that the Proposed Intervenors and the State do not diverge on broad interests, but rather, that the Proposed Intervenors disagree with the State on specific, narrow issues that were only recently

addressed in negotiations. And at the hearing, the Proposed Intervenors appeared to be concerned with "micro-interests," or minor topics in the successor decree, that the State allegedly is not concerned with.

The Court recognizes that the parties and *amici* are bound by a confidentiality agreement, which prevents them from disclosing "any information regarding the substance of the Parties' proposals, responses to proposals, or discussions" as to the successor decree (*see* ECF No. 1970-1 at PageID.11107). Thus, the Proposed Intervenors are prevented from specifically asserting how exactly the State no longer adequately represents their interests, given that the Proposed Intervenors are unable to disclose to the Court the proposals and agreed-upon terms in the successor decree. However, the Court will assume *arguendo* that the State and the Proposed Intervenors have diverged on certain "micro-interests." In other words, even if the State is adequately representing the Proposed Intervenors' broad interests—i.e., 50-50 allocation of the fishery, preservation of the fishery, gear restrictions, and usage of biological data, for example—the Court will assume that the State and Proposed Intervenors have differences in the resolution of specific, narrow issues addressed in the successor decree. With this assumption, the Court need not get into the particulars of these "micro-interests," which will allow the parties and *amici* to adhere to the confidentiality agreement.

But divergence on small issues does not amount to inadequate representation. *See Tennessee*, 260 F.3d at 592 (noting that divergence on interests at the end stages of litigation do not justify intervention). More importantly, divergence on outcomes does not suggest a divergence in interests. As counsel for the Little River Band of Ottawa Indians explained,

the parties and *amici* have been negotiating hundreds of issues for the last three years, and every party involved must compromise. No party is going to be completely satisfied with the successor decree, and they have all been making "difficult choices" to create a final successor degree that all seven sovereigns can agree upon. The Proposed Intervenors knew that the State would be making these difficult choices; it is unrealistic for the Proposed Intervenors to suggest that the State is no longer adequately representing the Proposed Intervenors' interests merely because they are not getting everything they want in the successor decree. *See id.* (finding that "the opportunity to participate in the implementation of the settlement agreements, to advocate and protect the regulatory and economic interest of community providers and to assure that sufficient other resources are provided in the community in a timely manner" are "not compelling" interests that would justify intervention). The Court finds no basis in the Proposed Intervenors' assertions that the State is not adequately representing the Proposed Intervenors biological and conservationist "micro-interests." The State has certainly been more than diligent in negotiating while considering the interest of protecting the Great Lakes fishery. Therefore, the Proposed Intervenors have failed to establish that the State is not adequately representing their interests in this case.

Finally, the Proposed Intervenors assert that "this is the only forum in which Intervenors can protect their rights as the State has no interest in protecting Michigan's valued and substantial Great Lakes fishery" (ECF No. 1969 at PageID.11038). Thus, they argue that, given this inadequate representation, they must be permitted to intervene, as it is their only option to assert their interests. However, the United States refutes this assertion (ECF No. 1970-1 at PageID.11109). It argues that, if a justiciable claim affecting an asserted right

arises in the future under the successor decree, the Proposed Intervenors can then seek to intervene through the same avenue in the future. The Court agrees with the United States that the Proposed Intervenors have alternative options to assert their interests in this matter. Upon the presentation of the proposed successor consent decree to the Court, the Court will permit all parties and *amici* to file objections to the proposed decree. If the Proposed Intervenors wish to object to any provision of the proposed successor decree, the Court will consider their objections before finalizing and signing the decree.

In sum, given that the Proposed Intervenors have failed to meet their burden on all elements—especially the timeliness element—of intervention, the Court finds that they do not have a right to intervene in this matter under Rule 24(a)(2). Accordingly, their motion to intervene as a matter of right is denied.

IV. Permissive Intervention

The Proposed Intervenors alternatively seek permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). "To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *Michigan*, 424 F.3d at 445. But if a proposed intervenor's arguments mirror the positions already advanced by one of the parties, permissive intervention is not proper. *See Kirsch v. Dean*, 733 F. App'x 268, 279 (6th Cir. 2018). Finally, if a proposed intervenor would complicate the case by raising additional fact-intensive issues, permissive intervention should be denied. *See Michigan*, 424 F.3d at 445.

The Court will exercise its discretion and deny the Proposed Intervenors' motion to permissively intervene. The untimeliness of the motion necessarily defeats the Proposed

Intervenors' opportunity for permissive intervention. Further, the State has asserted that it not only adequately, but that it completely represents the Proposed Intervenors' interests; there is no need for the Proposed Intervenors to intervene. Finally, if the Proposed Intervenors were permitted to intervene, they could derail years of extensive, complicated negotiations. Accordingly, the Court will, in its discretion, deny Proposed Intervenors' motion to permissively intervene as well.[3]

V. Inapplicability of the *Wineries* Decision

The Sixth Circuit's decision in *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula*, 41 F.4th 767 (6th Cir. 2022) appears to break new ground in permitting interest groups to intervene in lawsuits involving governmental entities and regulatory schemes. In *Wineries*, the proposed intervenors, Protect the Peninsula, Inc. ("PTP"), moved to intervene as a defendant to help the defendant Peninsula Township defend certain zoning ordinances. The plaintiffs, eleven wineries on Old Mission Peninsula, opposed the motion. Although this Court originally denied PTP's motion to intervene, the Sixth Circuit reversed and permitted them to intervene. *See generally id.* Because the Sixth Circuit's opinion in *Wineries* was issued following the Proposed Intervenors' filing of their motion to intervene in this case, the Court asked the parties for additional briefing regarding the *Wineries* case

[3] The last reason the parties ask the Court to deny the motion to intervene is due to Proposed Intervenors' failure to comply with Fed. R. Civ. P. 24(c). As noted above, Rule 24(c) requires a motion to intervene to be "accompanied by a pleading that sets out the claim or defense for which intervention is sought." The Proposed Intervenors failed to include a proposed answer in their motion to intervene (*see* ECF No. 1964). However, the Sixth Circuit has construed this rule leniently, and it has urged courts not to deny a motion to intervene solely for a movant's failure to comply with Rule 24(c). *See Providence Baptist Church*, 425 F.3d at 314-15. As such, although the Proposed Intervenors' failure to attach a proposed answer is, on its own, not a sufficient reason to deny the motion, their failure to do, so coupled with their failure to meet their burden under Rule 24(a) or (b), supports the Court's conclusion that their intervention in this matter is improper.

and how it applies to this litigation (ECF No. 1978). After considering the parties' and Proposed Intervenors' briefings (ECF Nos. 1979, 1982, 1983) and their arguments at the August 25 hearing, the Court finds that there are five important reasons why the *Wineries* decision is distinguishable from the present matter.

First, in *Wineries*, timeliness of PTP's motion to intervene was not contested. In *Wineries*, this Court denied PTP's motion to intervene based on the other three elements of intervention of right, not because the motion was untimely. Further, the Sixth Circuit did not address timeliness in its opinion, given that the plaintiffs previously conceded that the motion was timely. *See Wineries*, 41 F.4th at 771 n.1. Conversely, in the present matter, timeliness is certainly contested, and it is the most compelling reason for the Court to deny the Proposed Intervenors' motion.

Second, in *Wineries*, the Township not only conceded that it did not adequately represent PTP's interests, but it even went as far as joining in the motion to intervene. Here, no party has conceded that the Proposed Intervenors' interests are not adequately represented by the State; they all refute such an assertion. All seven parties assert that the State adequately represents the Proposed Intervenors' interests and oppose the motion to intervene, where in *Wineries*, the Township expressly consented to PTP's intervention.

Third, in this case, the Proposed Intervenors already have *amici* status and can participate in certain proceedings with limitations. In *Wineries*, PTP did not have *amici* status, and it did not participate in settlement negotiations. The Proposed Intervenors, on the other hand, have participated in negotiations and have been able to play a role in reaching

a successor decree. Further, they will have the opportunity to object to and comment on the proposed successor decree.

Fourth, while the Sixth Circuit found that PTP could intervene partly because they possessed a property interest in the adjacent land to the Wineries and these interests would likely be directly affected by the litigation, *see id.* at 772-73, the Proposed Intervenors in this matter have no such property interest. They have no property interest in the Great Lakes or its fishery; instead, they may fish the Great Lakes—like every other resident in Michigan—upon the granting of a license from the State. The Proposed Intervenors' interests are far less apparent in this case than PTP's interests in *Wineries.*

Fifth and finally, while the possibility of damages "looms large" in *Wineries*, no money damages are sought in the present case. *Id.* at 776. In fact, the possibility of damages was one reason why the Sixth Circuit distinguished *Wineries* from *United States v. Michigan*, the 2005 appeal of the Proposed Intervenors' predecessors, who also sought to intervene in this case and were denied by Judge Enslen:

> That possibility places this case at odds with the facts of the cases on which the Wineries rely to support their position, *United States v. Michigan* and *Jordan v. Michigan Conference of Teamsters Welfare Fund*. In *Michigan*, the United States sought a declaratory judgment against Michigan concerning the interpretation of a treaty regulating usufructuary rights of several American Indian tribes. 424 F.3d at 442. Both the proposed intervenors—a collection of landowners—and Michigan sought the same end in response, a declaration that these tribes lacked those rights. *Id.* at 444. Recognizing that this convergence boded ill for their motion to intervene, the proposed intervenors argued that "experience verifies that the state cannot adequately defend private property rights." *Id.* We were unconvinced, explaining that the proposed intervenors had failed to demonstrate that Michigan's incentive to litigate the case would flag over time. *See id.* Present here is what was absent in *Michigan*—the stick of damages and the carrot of settlement.

Id. To quote the Sixth Circuit, what is "[p]resent here is what was absent" in *Wineries*: there is no possibility of damages in this case—where the parties have solely been focused on negotiating a successor decree—which could prevent the parties from settling. *Id.*

Therefore, there are several reasons why the present matter is distinguishable from the *Wineries* decision. The Court need not permit the Proposed Intervenors to intervene merely because the Sixth Circuit permitted PTP to intervene in *Wineries*.[4]

VI. Conclusion

For all these reasons, the Court finds that intervention is improper. The Court will deny the Proposed Intervenors' motion to intervene.

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[4] The Proposed Intervenors also argue that *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191 (2022) is persuasive as to the Proposed Intervenors' contention that the fact that the seven parties in this case are all sovereigns, while the Proposed Intervenors are not, does not necessarily render intervention improper. The Court disagrees and finds *Berger* to be entirely distinguishable from the present matter. In *Berger*, the North Carolina legislature passed a bill making the requirements to vote more stringent. Although the governor vetoed the bill, the legislature responded by overriding the veto, and the bill became effective in December 2018. The following day, the plaintiffs sued the governor and members of the State Board of Elections ("the Board"), arguing that the law violated the United States Constitution. North Carolina's attorney general assumed responsibility for defending the Board. Like the governor, the state attorney general did not support the law in question. The legislative leaders of the North Carolina House of Representatives and Senate soon moved to intervene, pursuant to a North Carolina law that expressly allowed them to do so, to defend the law. While the district court and the en banc Fourth Circuit both found that intervention was improper because there was a presumption that the legislative leaders' interests were already adequately represented by the attorney general, the Supreme Court reversed. The Supreme Court found that the existing parties did not adequately represent the legislative leaders' interests because the Board, represented by the attorney general, did not seek to uphold the law, unlike the legislative leaders.

The present matter is distinguishable for several reasons. First, the legislative leaders in *Berger* had an express right to intervene based on a North Carolina law, *see* N.C. Gen. Stat. Ann. § 1–72.2 (2021), which is not the case here. Second, in *Berger*, while the intervenors sought to uphold the law in question, the attorney general did not. Here, the State of Michigan has not asserted that it will not abide by the consent decree; rather, it seeks to negotiate and uphold a successor consent decree that all seven parties can agree upon. Third and finally, while the Proposed Intervenors argue that *Berger* essentially allows for non-sovereigns to intervene in cases alongside sovereigns, that assertion does not paint the whole picture. While North Carolina chose "to divide its sovereign authority among different officials and authorize their participation in a suit challenging a state law," via a state law, Michigan has not done so. *See Berger*, 142 S. Ct. at 2203. Michigan has not "divided its sovereign authority," nor given the Proposed Intervenors any sovereign authority via a state law, unlike the movants in *Berger*. For these reasons, the Court finds that *Berger* is unpersuasive and does not support the Proposed Intervenors' proposition that they are entitled to intervene in this case among sovereigns.

ORDER

IT IS HEREBY ORDERED that the Proposed Intervenors' motion to intervene (ECF No. 1964) is **DENIED**.

IT IS SO ORDERED.

Date: August 31, 2022

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge