

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Case No. C70-9213

Plaintiffs,

DECLARATION OF MIRANDA
WECKER

v.

STATE OF WASHINGTON, et al.,

Defendants.

MIRANDA WECKER declares under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am over 18 years of age and competent to testify, and make this declaration based upon my own personal knowledge.

2. I served on the Washington Fish and Wildlife Commission from 2005 until 2017. From 2009 until 2015, I served as chair of the Commission. My qualifications for appointment to the Commission included six years working as an attorney for the Council on Ocean Law in Washington DC, five years working for sustainable development organizations in the Pacific Northwest and twenty years leading a marine research program for the University of Washington on the Olympic Peninsula. I was a member of the Washington Bar Association and earned a JD

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1 and an LLM in Marine Law and Policy from the University of Washington School of Law. I am
2 now retired.

3 3. In 2008, on behalf of the Commission, fellow commissioner Connie Mahnken and
4 I attended almost all meetings of the North of Falcon (“NOF”) process, analyzed its workings, and
5 provided my observations and recommendations for improvement to the Commission. The reason
6 for this effort was that the Commission had received numerous complaints about the NOF process
7 and its outcome from constituents and some from within the Department. We were encouraged
8 by the Governor to take our leadership role and responsibility in the Department very seriously.
9 The recent past had been difficult years with charges of fiscal mismanagement, policy controversy,
10 periods of large-scale employee layoffs, and inconsistent leadership. As one component of our
11 Commission’s charge, we undertook to re-evaluate the substance and scope of the delegation
12 agreement with the Director. During that process, I became familiar with the inherent difficulties
13 and contradictions encountered in reconciling the statutory roles and responsibilities assigned to
14 the commission with the day-to-day practice of the Department in making hundreds of important
15 and detailed natural resource conservation and use decisions. The establishment of a commission
16 of citizens from various parts of the state to oversee the Department and serve as the policy setting
17 body was enacted following a referendum. The import of the people’s choice was that, with regard
18 to fish and wildlife issues, the people wanted to see governance by a multi-party body of fellow
19 citizens whose process of decision-making was more accessible, responsive, and not hidden and
20 mysterious. Many states have long had commissions that serve in similar capacities for similar
21 reasons. It suggests that fish and wildlife issues are of a unique and profound personal importance
22 to people.
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1 4. The first few meetings were preliminary meetings held before the actual
2 negotiations over catch allocation began. I vividly recall a very heated discussion between the
3 treaty tribes and WDFW, principally through then Director Anderson, regarding whether Larry
4 Carpenter would be allowed to be an “observer” during the negotiations. At the time, the general
5 public was not allowed to partake in the negotiations and no record was made of the
6 negotiations. This point was not up for debate.

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8 5. Mr. Carpenter, who is now a WDFW commission member, had apparently been
9 publicly critical of the North of Falcon proceedings the prior year and had talked too publicly
10 about what had occurred at those meetings. The treaty tribes demanded, and enforced,
11 confidentiality and discretion. No information about the negotiations was to be disclosed until
12 after an agreement was reached and sent to National Marine Fisheries Service for finalization.
13 The other observers, who had not publicly discussed what occurred, were not objected to.
14 Director Anderson, who had a close relationship with Mr. Carpenter, negotiated for Mr.
15 Carpenter’s inclusion as an observer. Ultimately, Mr. Carpenter was allowed to be an observer
16 but only after he pledged not to disclose what occurred during the negotiations.

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18 6. Many of the harvest agreements were reached by regional level staff assigned to
19 the various geographic areas. Observers, and obviously the public, were not permitted to attend
20 these negotiations. These agreements were then put into the overall fisheries package for
21 approval by the treaty tribes and the lead negotiator for the state (at the time, that was either
22 Patrick Pattillo or Director Anderson). In later years, during my time on the commission, Patrick
23 Pattillo was the chief negotiator.

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25 7. The secrecy surrounding North of Falcon has resulted in broad public distrust
26 among the citizens of Washington. WDFW conducts North of Falcon in such a manner that

1 meetings are not public as required by the Open Public Meetings Act and then, once those
2 meetings are held and the agreement reached, the “proposed” rule package is not in any true
3 sense subject to change as it goes through the Administrative Procedures Act process.

4 8. The inherent contradictions presented by the approach taken by the Washington
5 Department of Fish and Wildlife in carrying out the necessary rule making by our part-time
6 citizen commission were nowhere more obvious and perplexing than with regard to the annual
7 adoption of rules and regulations flowing from the North of Falcon fisheries harvest negotiations.
8 The contradictions related to what could be called the “authenticity of delegation to a single
9 decision-maker who is not subject to OPMA” and the other related to what could be seen as a
10 self-contradictory process for making and incorporating decisions made into the rules affecting
11 citizens.
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13 9. With regard to the delegation of duties and powers for negotiation of agreements
14 with the tribes to the Director, I viewed the delegation as less problematic during the years in
15 which Director Phil Anderson- the recipient of the delegation and the one who exercised
16 authentic control in overseeing the NOF process. Clearly there was no multi-party decision-
17 making body in charge. However, when Jim Unsworth became Director, the delegation of power
18 and duties became more inauthentic and misleading. In early 2015, Dr. James Unsworth became
19 Director the Department. It was well understood that he lacked any background in fisheries
20 management. During those years, my last on the Commission, it was clear that Dr. Unsworth
21 had adopted a management philosophy of reliance on staff for most decisions. He was open and
22 clear with the Commission at that time that he would not attempt to become proficient and
23 knowledgeable about salmon management. Instead he would rely on the NOF team. When
24 providing monthly reports to the Commission, he typically asked staff to summarize the status of
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1 NOF negotiation and important developments. When asked questions, he would then ask staff to
2 provide answers. During the years in which a Director so completely delegated his powers and
3 duties, the decision-making power appeared to be more diffused throughout the NOF team. As a
4 multi-party team to whom the duties and powers in fact resided, I questioned whether the Open
5 Public Meetings Act would once more become operative with regard to decision-making.
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7 10. The second problematic aspect of the NOF procedure related to the way in
8 which the agreements reached through NOF were incorporated into the Washington
9 Administrative Code that gave the appearance of consistency with the relevant procedural laws.
10 The commission retained its statutory role in promulgating rules. The inherent contradiction lay
11 in the practical reality that the negotiated package was not in any real sense subject to change
12 following approval of the NOF list of agreed fisheries. The essential policy decisions on
13 conservation emphasis, conservation burden sharing, and harvest allocation were already
14 embedded in the PFMC-approved List of Agreed Fisheries agreement and not subject to
15 modification. Public frustration consistently was fostered by the perception that the rule making
16 process that followed the completion of the NOF negotiation appeared to offer the public an
17 opportunity to provide comment. It appeared that the commission had a role in making the final
18 decisions regarding what rules would govern fishing and that those rules would be adopted in
19 full view of the public. The reality however was clear that the fisheries policy decisions have
20 been decided through the NOF negotiation and the PFMC approval process conducted pursuant
21 to the Endangered Species Act. The reality is that PFMC was not going to go back and redo the
22 ESA approval process based on input received by the public after the agreement was reached.
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24 11. The commission is allowed to delegate its powers and duties to the Director.
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26 When the commission delegates its powers to a sub-committee, the subcommittee takes on the

1 obligation to conduct decision-making consistent with procedural laws that apply to the
2 commission. The importance of the transparency of government has been repeatedly reaffirmed
3 in policy pronouncements across government agencies. Under the Department's current
4 practice, the commission delegation to the Director means negotiation and decision making take
5 place without compliance with the Open Public Meetings Act. Rulemaking to effectuate those
6 decisions is done consistent with OPMA, but no significant changes are possible at that stage. In
7 this arena of great significance, the delegation of authorities and the disconnect between
8 decisions and rulemaking are seen as perhaps the only way to practically get the job of complex
9 negotiations done. But it is also be viewed by the public as a deft way to avoid the greater
10 degree of transparency specifically imposed by law on commission-led agencies. In some cases,
11 the diminishment of transparency is of little consequence. In this case, I believe the lack of
12 transparency has serious consequences.

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15 12. Recent declines in salmon runs have given rise to heightened public concern with
16 all the factors that affect populations. My experience in observing the NOF process led me to
17 conclude that this highly complex fisheries management approach is unlikely to contribute to
18 recovery of depleted runs, or to maintaining healthy runs. The process is dominated by user
19 groups competing for allocations of the harvest. Blame for failure to reverse declines is easily
20 assigned to other factors affecting fish populations. None of this is understood by the larger
21 public, in part because the real negotiations occur behind closed doors. The decline in wild
22 salmon and steelhead runs and lack of recovery of weak stocks has been a long-standing and
23 seemingly irreversible trend with very few exceptions. This fact should call into question the
24 sufficiency of current fisheries management approaches.

1 13. This decline has taken place despite a rhetorical commitment to “sustainable”
2 yield. This decline has taken place despite the investment of hundreds of millions of dollars in
3 habitat improvement. Decline has taken place in areas where human alteration of the landscape
4 has been relatively minimal including the Olympic Peninsula. Many streams on the Olympia
5 Peninsula are found in Olympic National Park, and the habitat remains intact. In these areas,
6 long term decline is also underway. These widespread, chronic conservation failures call into
7 question the sufficiency of the mechanism for accountability.

9 14. Past efforts at increasing the transparency of NOF decision-making were
10 problematic. Tribal co-managers agreed to allow a limited number of pre-approved individuals
11 serve as observers to attend some of the NOF meetings. The pre-approval process in 2008
12 included a pledge by observers to refrain from making public comments critical of the NOF
13 process or its outcome. Even so, these official observers were not allowed to attend the meetings
14 in which final negotiations took place. The Department operated then under the assumption that
15 it could not demand that sovereign tribal governments allow the degree of transparency and
16 openness in the NOF process that state administrative procedure laws expect of our state
17 agencies. Viewed from a different perspective, the Department was being forced to accept less
18 transparency than our laws may demand. If the Department did not capitulate, it faced the very
19 real prospect that NMFS would not approve its seasons and the State of Washington would not
20 be able to conduct fisheries.

23 15. Rather than accept a lesser standard of openness and transparency in a process of
24 such consequence and importance to the public, I came to believe that current practice should
25 find ways to conform and satisfy the state’s transparency laws. Just as the tribes seek approval
26 of NOF agreements by their tribal councils in accordance with their process, the Washington

1 commission's approval could be obtained in accordance with its process without evading the
2 transparency sought by the majority who voted for the referendum. The apparent disconnection
3 between the actual closed-door decision-making and the subsequent open and transparent rule
4 making process could be resolved. This would allow an open and transparent system throughout
5 with greater public understanding of decision-making and opportunity for holding participants
6 accountable for the consequences of those decisions.
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9 DATED this 3rd day of October, 2020.

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13 MIRANDA WECKER