

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,

FISH NORTHWEST'S RESPONSE TO
STATE OF WASHINGTON'S BRIEF IN
OPPOSITION TO FISH
NORTHWEST'S MOTION TO
INTERVENE

v.

STATE OF WASHINGTON, et al.,

Noted For: October 30, 2020

Defendants.

I. INTRODUCTION

This court should permit FNW to intervene because FNW has demonstrated through its declarations that the State's current process of salmon resource management does not comply with, or even make possible compliance with, the controlling law of *United States v. Washington* regarding fair and co-equal sharing. By failing to comply with controlling federal law, the State denies its citizens, including FNW members, procedural due process regarding their fishing permits. This has led to an estimated 124,696 less Puget Sound Chinook for citizens than for treaty fishers. Pattillo Decl. p. 5-6.

II. ARGUMENT

A. This court should grant intervention as a matter of right under FRCP 24(a)(2) because the State is not complying with federal law and, in the process, is violating FNW's members' procedural due process rights.

1 Intervention should be granted because FNW members' interest in co-equal
2 sharing of the salmon resource with the tribes is impaired by the WDFW's
3 mismanagement of the salmon resource including the State's recent failure to even
4 calculate the harvestable number of fish. Pattillo Decl., p. 3. Neither the State nor the
5 tribes even try to argue that the process is fair or that the division is equitable. In fact,
6 the State appears to agree that the current management is cause for concern. State
7 Opp. Dkt. 22308, 6: 5-6. The State's failure to count fish makes compliance with federal
8 law impossible, except by accident, because one cannot fairly allocate what one does
9 not count.
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11 **(1) FNW members' interest in the salmon resource is protectable because**
12 **that interest is rooted in FNW members' procedural due process rights.**

13 The State contends, however, that FNW's interest is not protectable because
14 fishing is a privilege granted to the individual by the state in the form of a license. But in
15 *Foss v. National Marine Fisheries Service*, 161 F.3d 584 (1998), the 9th Circuit found
16 that there was a protectable interest in a fishing permit because it was a "legitimate
17 claim of entitlement" rather than "an abstract desire" or "unilateral expectation." *Foss*,
18 161 F.3d at 586. In reaching this conclusion, the 9th Circuit analogized to
19 *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994), where
20 the court found that applicants for licenses to operate amusement games had
21 protectable property interests because of the significant statutory restriction on the city's
22 discretion to issue the licenses. *Foss* at 588.
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24 Similarly, while the State has managerial authority, that authority is not
25 unbounded but must comply with the federal co-equal sharing mandate of *United States*
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1 *v. Washington* which preempts any contrary State action under the Supremacy Clause.
2 Specifically, the Supreme Court has held that the “right of taking fish” is “in common
3 with all citizens of the Territory” and that this “right” constitutes an “equal opportunity” for
4 “individual Indians, along with non-Indians, to try to catch fish....” *Washington v. Fishing*
5 *Vessel Assn.*, 443 U.S. 658 (1979) at 659.

6 FNW members’ interest in procedural due process is violated by the State not
7 even calculating the harvestable number of fish subject to the co-equal sharing mandate
8 of *United States v. Washington* as well as by the State’s deliberate exclusion of its
9 citizens, including members of FNW, from pre-allocation notice, participation, or
10 opportunity to be heard, all requirements of procedural due process. *See, e.g., Bell v.*
11 *Burson*, 402 U.S. 535 (1971); *Matthews v. Eldridge*, 424 U.S. 319 (1976).

12 In providing due process, the State must also adhere to its Administrative
13 Procedures Act which was created to “provide greater public ... access to administrative
14 decision making.” RCW 34.05.001 (legislative intent). But instead of fair public access to
15 administrative decision making as required under the Administrative Procedures Act,
16 WDFW North of Falcon meetings are conducted in secret; the public is not permitted to
17 attend; no representatives of non-treaty interests are allowed to participate; the parties
18 are barred from disclosing what is said at the meetings; and the public is shown the
19 results of the negotiations only after the results are final and irreversible. Decl. of
20 Miranda Wecker, October 3, 2020, p. 2–8. This plainly contradicts the Court’s original
21 jurisdiction that requires that “the state defendants shall not adopt or enforce any
22 regulations that affect the harvest by the tribe on future runs unless there has been a
23 full, fair and public consideration and determination in accordance with the requirements
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1 of the Washington Administrative Procedures Act and regulations under it.” *United*
2 *States v. State of Wash.*, 384 F. Supp. 312, 416 (W.D. Wash. 1974), aff’d and
3 remanded, 520 F.2d 676 (9th Cir. 1975).

4 **(2) This Court’s previous denials of intervention are distinguishable from**
5 **FNW’s interest and motion.**

6 The State contends that this case is just like previous failed attempts to
7 intervene. But FNW seeks to intervene for wholly different reasons. In *Purse Seine*, for
8 instance, the movant sought a specific order that salmon harvested in Alaska be
9 counted against the citizen harvest. Here, by contrast, FNW does not seek a specific
10 allocation but only that the State comply with due process and federal law by counting
11 the harvestable number of fish.

12 **B. Intervention is necessary to protect FNW members’ interest in procedural**
13 **due process required to ensure compliance with federal law.**

14 There are no viable alternatives to judicial intervention, as discussed below.

15 **(1) No legislation is required for the State to comply with federal law and**
16 **ensure due process.**

17 The State suggests that the concerns it shares with FNW over WDFW’s
18 mismanagement of the salmon resource are best addressed through legislative rather
19 than judicial action. State Opp. 1:25. But the applicant does need a new law to enforce
20 the existing law.

21 Nevertheless, the State points to its statutory mandate under RCW 77.04.012 in
22 support of its claim that intervention should be denied. But the statutory mandate does
23 not alter the State’s obligations to comply with controlling federal law. As the Supreme
24 Court put it, “Any state law prohibition against compliance with the District Court’s
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1 decree cannot survive the command of the Supremacy Clause and the State ... may be
2 ordered to prepare a set of rules that will implement the court's interpretation of the
3 parties' rights even if state law withholds from them the power to do so." *Washington v.*
4 *Fishing Vessel Assn.*, 443 U.S. 658 (1979) at 659-660.

5 **(2) Alternative dispute resolution is a false option because the State is**
6 **deliberately excluding citizens from meaningful participation or access to**
7 **the salmon setting season process.**

8 The State refers to a "potential cooperative planning and management process"
9 (State Opp. 6: 20–23) in support of its claim that intervention is not required. But given
10 the State's deliberate and ongoing exclusion of its citizens from access to and
11 participation in the salmon-setting process, voluntary alternative dispute resolution is a
12 false option. In fact, the State's claimed willingness to engage in "cooperative planning
13 and management" is belied by its own assertions in its opposition papers, that citizen
14 participation would only "disrupt an already complex planning process." State Opp. 9:
15 17-20.
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17 And while the State's vaguely alludes to how, "[a]t some point, the Tribes and
18 the State of Washington may decide that it is necessary to institute some new
19 subproceeding challenging North of Falcon outcomes or planning," it is not up to the
20 State and the tribes to determine alone whether their actions comply with federal law.
21 That's akin to two lions and a lamb voting on what's for dinner. Instead, federal law (i.e.,
22 *United States v. Washington* and the related PSSMP, which requires an equitable
23 adjustment for temporary deviations from equal sharing), due process, and the State
24 and Federal Administrative Procedures Act must be complied with.
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1 **C. Motion is timely.**

2 The timeliness factor is treated more leniently with intervention as of right than
3 with permissive intervention. *United States v. Oregon*, 745 F. 2d 550, 552 (9th Cir.
4 1984). The State concedes that *recent* issues are cause for concern (“[t]he State shares
5 some of [FNW’s] concerns about the North of Falcon process and recent outcomes.”)
6 State Opp., Dkt. 22308, 6: 5-6. But then a few pages later the State argues that FNW’s
7 related motion is untimely. But as FNW stated in its moving papers (FNW Mot. Dkt.
8 22285, 6: 22–23), the State’s failure to calculate the harvestable surplus is of recent
9 origin. Moreover, earlier intervention was not possible because the state has kept secret
10 the forecasted catches and harvest. Decl. of Miranda Wecker, October 3, 2020, p. 2–8.

11 **D. In the alternative, the court should grant permissive intervention in the**
12 **interests of justice because the state is manifestly not complying with**
13 **federal law or due process.**

14 Permissive intervention empowers the Court to reach the right result in the
15 interests of justice and the interests of judicial economy. The State is not comply with
16 federal law. This court is the watchdog of federal law. Intervention is necessary because
17 it is unreasonable to assume the State will voluntarily do tomorrow what it deliberately
18 refuses to do today.

19 **III. CONCLUSION**

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21 For the foregoing reasons, FNW’s motion to intervene should be granted. Dated
22 this 30th day of October, 2020.

23
24 /s/ Joel Matteson
25 JOEL MATTESON, WSBA #40523
26 JOE FRAWLEY, WSBA # 41814