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THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Case No. C70-9213

Plaintiffs,

**REPLY TO TREATY TRIBES AND
U.S. OPPOSITION TO MOTION TO
INTERVENE**

v.

STATE OF WASHINGTON, et al.,

Defendants.

Noted for October 30, 2020

I. INTRODUCTION

The parties characterize Fish Northwest simply as an entity wanting a bigger share of the harvest. That is false. Fish Northwest seeks to intervene to enforce the rights of its members to a legal process. None of the responses even attempt to deny that the current parties are in blatant violation of this Court’s rulings, the existing injunction, the basic premise of fair sharing and the Puget Sound Salmon Management Plan (PSSMP). Fish Northwest has legally protectable interests under the Endangered Species Act (ESA), the Administrative Procedures Act (APA), and the right of equal protection.

The parties are actively working together to exclude public involvement. While WDFW claims that it has “concerns” with the process, it actively works with the Treaty

1 Tribes to exclude the public by “feeding” the Treaty Tribes information and corroborating
2 with the Treaty Tribes concerning efforts in state court to open the process to the public.¹

3 The existing parties are working together to violate this Court’s orders and the
4 interests of Fish Northwest. A state court cannot enforce this Court’s orders.² The only
5 Court with the ability to enforce this Court’s orders is this Court, and it is abundantly clear
6 that the existing parties do not plan to seek redress for their own violations. If Fish
7 Northwest is not allowed to intervene to enforce this Court’s rulings and existing orders,
8 there can be no remedy.
9
10

11 II. ARGUMENT

12 A. Fish Northwest is Not Seeking to Argue For Any Specific Season Setting, Any 13 Specific Allocation, or to Change How Management is *Supposed* to Occur Based on the 14 PSSMP and this Court’s Orders.

15 The responding parties seek to raise the specter of Fish Northwest injecting a myriad of
16 new issues into this litigation. To the contrary, Fish Northwest’s claims seek simply to
17 enforce the decisions already made by this Court, to enforce the process already ordered by
18 this Court and to enforce procedural rights that already exist.³ The PSSMP, prior orders, and
19 appellate decisions confirm the basic premise of equal sharing, and Fish Northwest has no
20 intention of re-litigating the issue. Instead, as described below, Fish Northwest intends to
21 address the process deficiencies that violate existing law and this Court’s orders.
22

23 B. Fish Northwest Will Challenge The Consultation Process Used by Plaintiff USA 24 to Approve Fishing Seasons Under the ESA. Pursuant to 16 USC § 1540 (the Citizen’s 25 Suit Provision of the ESA) and the APA, Fish Northwest has a Protectable Legal Interest.

26 ¹ Importantly, WDFW argues in state court that it uses the process currently in place, including excluding the public from North of Falcon, because it is “required to do so under federal law.” Frawley Decl., Exhibit D, p. 47.

² WDFW concedes this point. See State of Washington’s Brief in Opposition, Dkt. No. 22308, p. 5, note 2.

³ Including, for example, this Court’s previous orders to comply with the Administrative Procedures Act and to have public consideration of the harvest sharing.

1
2 For the past few years (since 2014),⁴ NMFS has granted single year approval for tribal
3 fisheries, and WDFW fisheries so long as WDFW complies with the Treaty Tribes' demands,
4 under Section 7 of the ESA. Section 7 provides for consultation among federal agencies based
5 on a proposed "federal action." Relevant to this case, the alleged "federal action" is the Bureau
6 of Indian Affairs (BIA) "authority to assist with the development and implementation of the
7 co-managers" salmon seasons.⁵ Declaration of Joe Frawley, October 30, 2020, Exhibit A at p.
8 18. Other federal actions alleged include actions by National Marine Fisheries Service
9 (NMFS) and United States Fish and Wildlife Service (USFWS). None of the actions apply
10 only to the treaty tribes.
11

12
13 Importantly, not every federal action can trigger Section 7 consultation. "Section 7 and the
14 requirements of this part apply to all actions in which there is discretionary Federal
15 involvement or control." 50 CFR § 402.03. "Where an agency has no ability to prevent a
16 certain effect due to its limited statutory authority over the relevant actions, the agency cannot
17 be considered a legally relevant 'cause' of the effect, and the agency action therefore should
18 not be considered "discretionary" actions subject to Section 7. *Defendants of Wildlife v. U.S.*
19 *Environmental Protection Agency*, 420 F.3d 946, 963 (quoting *Dep't. of Transp. v. Public*
20 *Citizen*, 541 U.S. 752, 770 (2004)) (overruled on other grounds).
21

22
23 BIA does not exercise control of the fisheries, is not the "cause" of the taking of listed
24 species during treaty fisheries, and is nothing more than a convenient vehicle for the parties to
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⁴ As is demonstrated by the Declaration of Patrick Pattillo, this is a recent development that has only occurred in the past few years. Fish Northwest has not waited decades to bring this challenge. The process only began being used in 2014, it took a number of years for the process to fail to the point it has today, and the process is implemented annually. Fish Northwest's challenge is timely.

⁵ No such authority or involvement exists.

1 attempt to trigger Section 7 of the ESA. A federal “action” was created in 2014 to allow fishing
2 to go forward when the parties failed to timely complete multi-year fisheries plan. Fish
3 Northwest will seek a determination that the BIA consultation is unlawful and intends to seek
4 to preliminarily and permanently enjoin the practice.⁶ In the alternative, Fish Northwest will
5 seek a declaratory judgment determining whether the federal actions, which apply to fisheries
6 that are both treaty and non-treaty, can trigger Section 7. In short, Fish Northwest will seek to
7 have the Section 7 consultation process apply to both state and treaty fisheries or to no fisheries
8 because, as described below, this current process has been weaponized against the citizens of
9 Washington.
10
11

12 **C. The Current Season Setting Process Is Weaponized Against the Citizens of**
13 **Washington.**

14 While the parties argue that WDFW adequately represents the interest of the citizens of
15 Washington, WDFW itself acknowledges that there are “concerns” with the season setting
16 process and outcomes. None of the parties bother to deny that they are in violation of the
17 PSSMP, do not calculate harvestable shares, do not share the harvest fairly and exclude the
18 public from the process.
19

20 Incredibly, the current situation was created and is maintained intentionally. As described
21 above, the parties violate the ESA by creating a dubious federal action to avoid having to
22 submit a multi-year plan. The parties, and in particular the Treaty Tribes and USA, have now
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26 ⁶ Fish Northwest will be challenging the ESA process implemented by the parties prior to the 2021 salmon season, whether in this case or elsewhere, and expects that all parties to this litigation will want to be heard in that litigation. Because of that fact, and because, as acknowledged by all parties, this Court has retained jurisdiction to address issues concerning the implementation of the Treaty Tribe’s fishing rights, those claims are entirely appropriate for adjudication in this case. *See, e.g.*, Treaty Tribes’ Opposition to Motion to Intervene, Dkt. No. 22310, p. 12 (“the issue before this Court is ... how to implement the Tribes’ rights.”).

1 weaponized the Section 7 consultation process. The 2016 season setting process is an
2 illustrative example.

3 During the 2016 North of Falcon process, WDFW attempted to lobby for a two week catch
4 and release salmon fishery in a portion of Puget Sound. Frawley Decl., Exhibit B, p. 24-27.
5 The Treaty Tribes rejected the fishery (in violation of this Court’s order to work cooperatively
6 and exercise management flexibility), and the negotiations reached an impasse. *Id.* at 27-29.
7 NMFS, through the alleged BIA action, approved the Treaty Tribes’ seasons, WDFW was not
8 granted authorization for its seasons, and the result was the Treaty Tribes went fishing (some
9 prior to ESA consultation) and the non-treaty citizens of Washington did not. *Id.* at 29-33.
10

11 To further clarify that WDFW would be forced to capitulate if it wanted authorization from
12 NMFS in 2017, Barry Thom, the Regional Administrator for the Department of Commerce,
13 sent a letter to WDFW explicitly stating that no fishing would occur absent agreement.
14 Frawley Decl., Exhibit C. Mr. Thom acknowledges that “NOAA Fisheries was able to address
15 the 2016 Treaty Indian fisheries through ESA section 7 consultation in the absence of an
16 agreement because of the connection with the BIA’s action.” *Id.* at p. 5. To make it clear that
17 WDFW must capitulate, Mr. Thom writes that “[w]ithout association with a federal action,⁷
18 the non-Indian Puget Sound fishery would not be eligible for a section 7 consultation and
19 timely authorization under the ESA.” *Id.*
20
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23 The results of this process are predictable. The Treaty Tribes negotiate as would be
24 expected when one party holds all the cards. WDFW “negotiates” the seasons with no leverage
25

26 ⁷ This statement intentionally ignores the great many other federal actions related to state fisheries including funding, approving, and monitoring that federal agencies undertake annually. The motive for not considering those actions, and only the alleged actions of BIA, is clear: to ensure that one side has leverage over the other. The message is clear that NMFS controls the process and WDFW will only gain approval by capitulating to the treaty tribes’ demands.

1 and a gun to its head. The “agreement” is whatever the Treaty Tribes tell WDFW is acceptable.
2 The end result is that negotiations occur in secret, the public is locked out, no record of the
3 discussions is made, and the Treaty Tribes catch hundreds of thousands more salmon than the
4 non-treaty fishers.
5

6 III. CONCLUSION

7 It is abundantly clear that WDFW is not representing the interests of Fish Northwest. It
8 does not bother to calculate or seek a fair share of the harvest, it does not calculate the harvest
9 after the season, it does not exercise the dispute resolution procedures already in place, it does
10 not seek relief from this Court, and it actively works with the Treaty Tribes to thwart citizen
11 efforts to gain transparency and involvement in the process. WDFW has done nothing to
12 rectify the ESA authorization process “concerns” it apparently agrees exist. WDFW excludes
13 citizens from the season setting process and works to preserve the current system. WDFW has
14 been actively working WITH the treaty tribes to exclude the public from the seasons setting
15 process. During oral argument in a state court proceeding concerning the Administrative
16 Procedures Act, counsel for WDFW discussed “feeding” information concerning the litigation
17 to the treaty tribes and having consulted with them. Frawley Decl., Exhibit D, p. 34-35.
18
19

20 Fish Northwest has legally protectable interests under the ESA, the APA, and its rights of
21 equal protection. The process issues arose with a change to the permitting process in 2014 and
22 have worsened in recent years. Fish Northwest’s motion to intervene seeks to enforce
23 protectable legal interests that are not being protected, and the motion is timely.⁸
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⁸ Attached as Appendix A is a draft Request for Determination. The Motion to Intervene set forth the current issues, and the issues may likely change following Fish Northwest’s delivery of a Notice of Intent to Sue under the ESA, compliance with the Paragraph 25 procedures and the Court’s ruling. Fish Northwest does not object to the parties being granted an additional response if they believe they have been prejudiced.

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DATED this 30th day of October, 2020.

/s/ Joe D. Frawley
JOE D. FRAWLEY, WSB#41814
JOEL D. MATTESON, WSB#40523
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system that sends notification of such filing to all parties registered for electronic service with the CM/ECF system.

SIGNED this 30th day of October, 2020, at Lacey, Washington.

By: /s/ Amanda C. Howard
Amanda Howard, Legal Assistant

APPENDIX A

THE HONORABLE RICARDO S. MARTINEZ

**UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

FISH NORTHWEST, a Washington non-profit corporation,
Petitioner,

v.
STATE OF WASHINGTON, DIRECTOR KELLY SUSEWIND, et al.,
Respondents.

Case No. C70-9213

Subproceeding No.

FISH NORTHWEST’S REQUEST FOR DETERMINATION

INTRODUCTION

Fish Northwest is a non-profit entity representing a number of individuals and entities concerned with the conservation of salmon and steelhead, in the season setting process used by Respondents to set salmon seasons in Washington State to implement this Court’s prior rulings, and in the harvest of salmon and steelhead. In recent years, the citizens of Washington, including those represented by Fish Northwest, have been barred from participating in the allocation of salmon and steelhead in Washington, the treaty tribes and State of Washington have abandoned the process of allocating the harvestable surplus of salmon and steelhead, and the treaty tribes have been allocated tens or hundreds of thousands more salmon and steelhead

1 annually than have the non-treaty citizens of Washington. All of these actions violate this
2 Court’s existing injunction and the Puget Sound Salmon Management Plan.

3 **I. JURISDICTION, VENUE, AND DISPUTE RESOLUTION**

4 1.1 Jurisdiction and venue are proper in this Court pursuant to Paragraph 25 of the Permanent
5 Injunction, as later modified by this Court.

6 1.2 Fish Northwest [has complied] with the meet and confer and mediation requirements of
7 Paragraph 25.
8

9 **II. FACTS AND LAW**

10 2.1 The Supreme Court has held that “[b]oth sides [treaty tribes and state fishers]
11 have a right, secured by treaty, to take a fair share of the available fish.” *Washington v.*
12 *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 684-685
13 (1979). “[A]n equitable measure of the common right should initially divide the harvestable
14 portion of each run that passes through a ‘usual and accustomed’ place into approximately equal
15 treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be
16 satisfied by a lesser amount.” *Id.* at 685.
17

18 2.2 In recent years, Respondents have not allowed the citizens of Washington to
19 partake in the important meetings that determine the salmon seasons in Washington. The
20 meetings are conducted in secret, the public is not permitted to attend, no representatives of non-
21 tribe interests are allowed to participate, and the parties are barred from disclosing what is said at
22 the meetings. This practice is a clear violation of this Court’s original injunction, which requires
23 that “the state defendants shall not adopt or enforce any regulations that affect the harvest by the
24 tribe on future runs unless there has been a full, fair and **public** consideration and determination
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26

1 in accordance with the requirements of the Washington Administrative Procedures Act and
2 regulations under it.” Injunction paragraph 12 (emphasis added).

3 2.3 Coupled with this lack of transparency and the deliberate exclusion of
4 Washington citizens from the North of Falcon season setting process, Respondent Washington
5 Department of Fish and Wildlife (“WDFW”) has relied on submitting a joint salmon season
6 package with the treaty tribes in order to obtain approval under the Endangered Species Act
7 (“ESA”). The “proposed¹” salmon season package is submitted to National Marine Fisheries
8 Service (“NMFS”) for consultation under the ESA. Because WDFW has decided to not obtain
9 its own ESA approval, opting instead to join the treaty tribes’ ESA submission, NMFS has
10 indicated that WDFW will not be granted authorization to conduct salmon fisheries unless and
11 until they agree with the treaty tribes demands. NMFS also indicates that it will, and has,
12 approve(d) tribal fisheries while not allowing non-treaty fisheries to occur. The federal nexus
13 relied on upon by NMFS and BIA is not legally sufficient and is done in violation of the ESA.
14 The process has been implemented in order to strong arm the State in into agreement.
15
16

17 2.4 The result is that WDFW capitulates to whatever harvest allocation the treaty
18 tribes will approve. WDFW has consistently “agreed” to allocations that result in non-treaty
19 fishers obtaining well under fifty percent of the available harvest of salmon. As a result, the
20 citizens of Washington are not able to “take a fair share of the available fish” as required by this
21 Court’s rulings, the Puget Sound Salmon Management Plan, and the ruling of the Supreme Court
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25 ¹ The seasons are not truly “proposed” as WDFW claims to the public. In truth, WDFW has
26 acknowledge that no “meaningful” changes to the seasons can occur after the “proposal” is
submitted to NOAA for consultation under the ESA. After the seasons are finalized, WDFW
begins the public comment period under the Washington Administrative Procedures Act. By that
time, no “meaningful” changes can occur.

1 in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S.
2 658, 685 (1979).

3 2.5 Despite this Court’s previous rulings that the parties are to roughly share the
4 harvestable stock, the treaty tribes and WDFW have not, for a number of years, even calculated
5 how many harvestable fish exist, thereby rendering it impossible to confirm that the required
6 equitable division is being made in accordance with controlling law in *United States v.*
7 *Washington* and violating the various orders of this Court. The treaty tribes and WDFW have
8 abandoned allocating the harvestable fish from runs of Puget Sound chinook and coho salmon.
9 This is in direct violation of this Court’s original injunction and the Puget Sound Salmon
10 Management Plan, discussed below, both of which provide that the state defendants *shall*
11 determine the number of harvestable fish in advance of every fishing season.
12

13 2.6 This Court approved the Puget Sound Salmon Management Plan in 1985 (the
14 “PSSMP”). The PSSMP remains in effect and requires that the treaty tribes and state of
15 Washington consider management methods that provide “flexibility to achieve fair sharing of
16 fish.” The PSSMP requires that if either party catches more than 5% of their fair share, the party
17 that overharvests shall repay the deficit by transferring a portion of the overharvesting party’s
18 harvest to the party that did not catch their fair share. The repayment shall be either 15% of the
19 next year’s share or 25% of the total deficit that was due, whichever is greater.
20

21 2.7 The harvest of salmon has greatly favored the treaty tribes in recent years. For
22 example, based on the 2020 “agreement” between the treaty tribes and WDFW, the forecasted
23 catch of Puget Sound Chinook salmon was 111,615 for the treaty tribes and 69,622 for the
24 nontreaty fishers. Of that, the treaty tribes are predicted to harvest 5,063 wild Chinook salmon
25 while nontreaty fishers are predicted to harvest 1,706 wild Chinook salmon. This harvest
26

1 imbalance has existed for years. In 2020, the nontreaty harvest of Puget Sound Chinook is
2 predicted to be roughly 38% of the total harvest. In 2019, the nontreaty harvest of Puget Sound
3 Chinook was predicted to be roughly 42% of the total harvest. In 2018, the nontreaty harvest of
4 Puget Sound Chinook was predicted to be roughly 43% of the total harvest. In 2017, the
5 nontreaty harvest of Puget Sound Chinook was predicted to be 41%.

6
7 2.8 In recent years, the parties have largely abandoned the requirements of Section 10
8 of the PSSMP. They do not calculate actual harvests following the seasons, they do not apply
9 flexibility to season settings, and the state fishers have been prevented from harvesting anywhere
10 near their fair share.

11 2.9 As a result of the actions of respondents, the nontreaty fisherman have
12 experienced greatly reduced salmon seasons, resulting in great financial and social harm. For the
13 years of 2017, 2018, 2019, and 2020, the nontreaty fishers have harvested an estimated 124,696
14 less Puget Sound Chinook than the treaty fishers. The imbalance is similar for Coho salmon.

15
16 2.10 The actions of and processes employed by the parties violate the ESA, the federal
17 Administrative Procedure Act, the Washington State Administrative Procedures Act, and the
18 rights of equal protection enjoyed by Fish Northwest and its members.

19 **III. DEMAND FOR JUDGMENT**

20 3.1. Declaratory Judgment. Pursuant to Paragraph 25 of this Court's original injunction,
21 as modified by this Court, and the PSSMP, Petitioner seeks a determination from the Court and
22 declaratory judgment that the parties must calculate the number of harvestable fish prior to each
23 season, must cooperatively manage in good faith to allow both treaty and state fisheries to
24 achieve, as much as possible within conservation constraints, catch of each party's fair share of
25 the harvestable surplus, that the citizens of Washington have the right to participate actively in
26

1 that process, and the federal defendants must not implement a process that operates to bar either
2 the treaty or state defendants from accessing their fair share of the harvestable surplus. Petitioner
3 seeks injunctive relief requiring the parties to comply with the Court's determination.

4 3.2 Injunctive Relief.

5 3.2.1 Plaintiff seeks an injunction requiring the State of Washington to comply
6 with Paragraph 17 of the Permanent injunction and the PSSMP, to calculate the number
7 of harvestable fish as soon as practicable before each season (which has recently been
8 January and February of each year), to share the number of harvestable fish with the
9 parties and the citizens of Washington, and to employ a process that complies with the
10 ESA and APA.

11 3.2.2 Plaintiff seeks an injunction requiring the State of Washington to allow the
12 citizens of Washington to meaningful participation in the allocation and season setting
13 processes, and specifically requiring a process that allows the citizens to be present, the
14 discussions and negotiations to be public, that a record of the discussions and
15 negotiations be made and publicly available and that the WDFW take whatever additional
16 action, such as obtaining federal authorization of nontreaty fisheries under the ESA
17 independent of the tribes' permitting process, necessary and proper to comply with
18 *United States v. Washington*, the PSSMP, *Passenger Vessel*.

19 3.2.3 Plaintiff seeks an injunction requiring the State of Washington to calculate
20 the actual harvest of salmon by each party for the years of 2010 through 2020.

21 Thereafter, Plaintiff asks the Court to enforce the PSSMP.

22 3.2.4 Plaintiff seeks an injunction requiring the State of Washington to comply
23 with and follow the processes outlined in the PSSMP, including the schedules found in
24

1 Section 6, moving forward and to do so in a public, transparent manner consistent with
2 the Washington Administrative Procedure Act, the Federal Administrative Procedure Act
3 and the Washington Open Public Meetings Act.

4 3.3 Injunctive Relief – Department of Commerce. Plaintiff seeks an injunction
5 requiring the Department of Commerce, through National Marine Fisheries Service, to authorize
6 and implement salmon seasons for both the treaty tribes and State of Washington consistent with
7 the ruling under this Request for Determination, this Court’s prior rulings, the requirements of
8 the ESA, *Passenger Vessel*, the PSSMP, the federal and state APA, and other applicable law.
9 This includes ensuring that any management plan adopted by the Department of Commerce
10 ensures that all parties have access to their fair share of the harvestable surplus, timely
11 processing any permit applications submitted by the State of Washington, and public
12 involvement as required by the ESA, APA, and due process.
13
14

15 RESPECTFULLY SUBMITTED this ____ day of _____, 2020 at Lacey,
16 Washington.

17 _____
18 Joe D. Frawley, WSBA # 41814
19 Attorney for Fish Northwest
20

21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on _____, 2020, I electronically filed the foregoing
23 document with the Clerk of the Court using the CM/ECF system which will send notification of
24 such filing to all parties registered for electronic service with the CM/ECF system.
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SIGNED this ____ day of _____, 2020, at Lacey, Washington.

By: _____
Amanda Howard, Legal Assistant