

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Case No. C70-0912

Plaintiffs,

FISH NORTHWEST’S MOTION TO
CONSOLIDATE UNDER RULE 42(A)

v.

STATE OF WASHINGTON, et al.,

Noted for: June 4, 2021

Defendants.

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The Plaintiff, Fish Northwest (“FNW”) respectfully moves this Court, under Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate *Fish Northwest v. Thom, et al.*, Civil No., 2:21-cv-00570 (W.D. WA filed May 7, 2021) with *United States of America, et al., v. State of Washington, et al.*, Civil No. C70-9213 RSM. FNW requests a subproceeding to adjudicate FNW’s claims in its previously filed Motion to Intervene and its claims alleged in *Fish Northwest v. Thom, et al.*

Rule 42(a) promotes judicial economy by “giv[ing] the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties.” WRIGHT & A. MILLER, FEDERAL

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1 PRACTICE AND PROCEDURE, § 2381 (1971). Rule 42(a) of the Federal Rules of Civil Procedure
2 provides that:

3 When actions involving a common question of law or fact are pending before the court, it
4 may order a joint hearing or trial of any or all of the matters in issue in the actions; it may
5 make such orders concerning proceedings therein as may tend to avoid unnecessary costs
6 or delay. Fed.R.Civ.P. 42(a).

7 This Court should exercise its power of consolidation under Rule 42(a) because the cases
8 are so similar in facts and applicable law, as discussed below, and because doing so will save
9 time and promote efficiency and convenience.

10 **II. THE ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT**

11 Rule 42(a) permits a district court to consolidate separate actions when they involve “a
12 common question of law or fact.” Fed.R.Civ.P. 42(a). Even if there are some questions that are
13 not common, consolidation is still not precluded due to the court’s great interest in promoting
14 efficiency. *Batazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50 (5th Cir. 1981). *See Central*
15 *Motor Co. v. United States*, 583 F.2d 470 (10th Cir. 1978).

16 Common questions of law and fact abound. Both cases involve Washington State salmon
17 harvesting governed by *United States v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974).
18 In this case, *U.S. v. Washington*, this Court confirmed that this Court has retained jurisdiction to
19 determine “how to implement the Tribes’ rights” with respect to Washington State salmon
20 fishing. Order, Dkt. 15029, p. 6 (Ex. 25).

21 When FNW recently moved to intervene in *United States v. Washington*, FNW alleged
22 that the parties were violating the APA, the ESA, and this Court’s existing orders. *See, e.g.*, Dkt.
23 22316. For instance, the parties are refusing to follow the Puget Sound Salmon Management
24 Plan (PSSMP), as this Court specifically ordered in 1985. The PSSMP is an order that this court
25 intended to remain in full force through today and which the parties claim to follow but do not.
26

1 In addition, FNW indicated it was going to file its suit (*Fish Northwest v. Thom, et al.*) to
2 challenge the 2021 salmon seasons for the Treaty Tribes and the state after providing 60 days'
3 notice of intent to sue under the Endangered Species Act ("ESA"). Dkt. 22316. It has now done
4 so.

5 In *Fish Northwest v. Thom*, FNW challenges the violations of the ESA by, among others,
6 National Marine Fisheries Service ("NMFS"); United States Fish and Wildlife Service
7 ("USFWS"); United States Department of Commerce; Bureau of Indian Affairs ("BIA"); and the
8 Washington Department of Fish and Wildlife ("WDFW"). The defendants in *Fish Northwest v.*
9 *Thom* have committed procedural violations of the ESA by using a flawed consultation process.
10 *See* Declaration of Joe Frawley, May 19, 2021, Ex. A (the First Amended Complaint filed and
11 served in *Fish Northwest v. Thom, et al.*)

12 Just as importantly, defendants have committed, and continue to commit, substantive
13 violations of the ESA. Specifically, the parties have, with an annual agreement of all defendants,
14 including the Treaty Tribes, knowingly and intentionally overharvested Puget Sound salmon in
15 violation of the ESA. The harvest has been agreed to, and approved, by NMFS, with WDFW
16 complicity, at rates exceeding the maximum harvest rate at which NMFS has determined can be
17 allowed without jeopardizing the continued existence of Puget Sound salmon. The basis for this
18 agreement is the PSSMP, and the parties are using the PSSMP as a basis to violate the ESA.
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21 Indeed, in its 2020 biological opinion approving harvest by the Treaty Tribes and state
22 fishers, NMFS acknowledged:

23
24 In summary, under the proposed action, the combined ocean and Puget Sound
25 exploitation rates for the 2020 fishing year for one of the 14 management units (Skagit
26 early) and 6 of 22 total populations (Lower Sauk, Upper Sauk, Upper Cascade, Suiattle,
NF Stillaguamish, and White) are expected to be under their [rebuilding exploitation rate]
or [rebuilding exploitation rate] surrogates (Table 34)."

1 Frawley Decl., Exhibit B, p. 243.

2 NMFS' biological opinion acknowledges that Puget Sound salmon are being harvested at
3 a rate greater than allowed under the ESA. Importantly, because the Treaty Tribes harvest far
4 more ESA listed Puget Sound salmon than do non-treaty fishers, the injunction sought by FNW
5 will necessarily have a large impact on the implementation of the Treaty Tribe's rights. FNW
6 intends to seek an injunction within weeks.

7
8 Plaintiff's claims in each case arise out of the State of Washington and the Puget Sound
9 Indian Tribes' co-management of Washington State salmon fisheries. In both cases, FNW, seeks
10 to enjoin unlawful harvesting of salmon and steelhead harvesting in the State of Washington
11 subject to *United States v. Washington*. In both cases, the Treaty Tribes participate with the
12 WDFW and the federal defendants in an uneven allocation of salmon harvesting and in the
13 violation of the ESA. Both cases squarely address the implementation of the Treaty Tribes
14 fishing rights. Importantly, the State of Washington is responsible for using its police power to
15 enforce conservation but has abandoned its responsibilities to its citizens. *See, e.g., Department*
16 *of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973).

17
18 That is why FNW's Motion to Intervene seeks to force the parties to follow existing law.
19 *Fish Northwest v. Thom* seeks to enjoin violation of the ESA, and roughly 80% of the take of
20 ESA listed Puget Sound salmon is by the Treaty Tribes. Compliance with the ESA is not
21 optional and is not possible without reducing the Treaty Tribes take of ESA listed salmon that is
22 occurring based on this Court's orders.

23 **III. THIS COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION**

24 This court has broad discretion in determining whether to grant a motion to consolidate.
25 *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). Consolidation promotes judicial
26

1 economy and convenience by combining in one action, with a single trial, matters sharing a
2 common nucleus of operative law and fact, as here. Combining these cases promotes efficiency
3 and saves time by, for instance, eliminating an extra trial and allowing witnesses to testify in a
4 single action.

5 Consolidation will not delay disposition of the case and will not prejudice any party
6 because consolidation will not impact substantive rights but rather is a procedural efficiency
7 move. Both of the above-mentioned cases are at a very similar, early stage of development.
8 Moreover, the court has not yet ruled on FNW's motion to intervene in *United States v.*
9 *Washington* and FNW has just recently filed its First Amended Complaint in the above-
10 captioned case with no answer yet filed, and no motion pending, on than this motion.
11

12 **IV. CONCLUSION**

13 Because consolidating these two similar and inexorably related cases promotes judicial
14 economy and saves time and does not prejudice any party, FNW requests that this Court grant its
15 motion to consolidate this action, including FNW's Motion to Intervene, with *Fish Northwest v.*
16 *Thom, et al.*
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19 Respectfully submitted,

20 Dated this 19th day of May 2021.

21
22 SCHEFTER & FRAWLEY

23 s/ Joel Matteson
24 JOEL MATTESON
25 WSBA No. 40523
26 Attorney for Plaintiff

s/ Joe Frawley
JOE D. FRAWLEY
WSBA No. 41814
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, 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 19th day of May, 2021, at Lacey, Washington.

By: /s/ Joe Frawley
JOE FRAWLEY
WSBA #41814

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