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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,

**FISH NORTHWEST'S MOTION TO
INTERVENE**

v.

STATE OF WASHINGTON, et al.,

Noting Date: October 30, 2020

Defendants.

Fish Northwest, by and through its attorneys of record, Joe D. Frawley of Schefter & Frawley, and Joel Matteson, submit this Motion to Intervene and ask the Court to allow Fish Northwest to intervene as a party.

I. INTRODUCTION AND BACKGROUND

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 Defendants 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

1 participating in the allocation of salmon and steelhead in Washington, the treaty tribes and
2 State of Washington have abandoned the process of allocating the harvestable surplus of
3 salmon and steelhead, and the treaty tribes have been allocated tens or hundreds of thousands
4 more salmon and steelhead annually than have the non-treaty fishers of Washington. All of
5 these actions violate this Court's existing injunction the Puget Sound Salmon Management
6 Plan adopted by this Court, and *US v. Washington* and its progeny.
7

8 **II. PARTIES**

9
10 The Petitioner, Fish Northwest, is a Washington State non-profit corporation that advances
11 the interests of its members who include businesses and non-treaty salmon fishers whose
12 interests are directly affected in this case.

13 The Defendants, the original Plaintiff, the United States of America, and the treaty tribes
14 are responsible for co-managing Washington State's salmon resource in compliance with
15 *United States v. Washington* and its progeny, the applicable treaties, the Puget Sound Salmon
16 Management Plan, existing orders of this Court, and applicable laws in a manner that ensures
17 that treaty and non-treaty fishers have equitable access to the salmon and steelhead resources
18 of Washington State.
19

20 **III. EVIDENCE RELIED UPON**

21
22 This motion relies on the Declarations of Curt Smitch, Miranda Wecker, and Patrick
23 Pattillo and the records and files herein.

24 **IV. JURISDICTION**

25 This Court has jurisdiction over the parties and the subject matter under the Court's
26 continuing jurisdiction established in Paragraph 25 of the Court's Permanent Injunction of
March 22, 1974, *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), as modified

1 by the Court on August 24, 1993, *U.S. v. Washington*, 18 F. Supp. 3d 1213 (W.D. Wash.
2 1993) (Paragraph 25)). This continuing jurisdiction has been reserved specifically to hear
3 unresolved issues arising out of the treaties, such as this action. *Id.* at 333.
4

5 After intervention and complying with the procedures of Paragraph 25, as amended by this
6 Court, Fish Northwest intends to file a Request for Determination under the Court's continuing
7 jurisdiction set forth in Paragraph 25 of the Court's Permanent Injunction issued on March 22,
8 1974 in *U.S. v. Washington*, 384 F. Supp. 312, 419 (W.D. Wash. 1974), as modified by the
9 Court on August 24, 1993, *U.S. v. Washington*, 18 F. Supp. 3d 1213 (W.D. Wash. 1993)
10 (Paragraph 25).
11

12 V. BACKGROUND FACTS

13 The Supreme Court has held that “[b]oth sides [treaty tribes and state fishers] have a
14 right, secured by treaty, to take a fair share of the available fish.” *Washington v. Washington*
15 *State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 684-685 (1979).
16 “[A]n equitable measure of the common right should initially divide the harvestable portion
17 of each run that passes through a ‘usual and accustomed’ place into approximately equal
18 treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be
19 satisfied by a lesser amount.” *Id.* at 685.
20
21

22 In recent years, Respondents have not allowed the citizens of Washington to partake
23 in the important meetings that determine the salmon seasons in Washington. The meetings
24 are conducted in secret, the public is not permitted to attend, no representatives of non-treaty
25 interests are allowed to participate, the parties are barred from disclosing what is said at the
26 meetings and the public is shown the results of the negotiations only after the results are
final. Decl. of Miranda Wecker, October 3, 2020, p. 2-8. This practice is a clear violation of

1 this Court's original injunction, which requires that "the state defendants shall not adopt or
2 enforce any regulations that affect the harvest by the tribe on future runs unless there has
3 been a full, fair and **public** consideration and determination in accordance with the
4 requirements of the Washington Administrative Procedures Act and regulations under it."
5 *United States v. State of Wash.*, 384 F. Supp. 312, 416 (W.D. Wash. 1974), *aff'd* and
6 remanded, 520 F.2d 676 (9th Cir. 1975) (emphasis added).
7

8 Coupled with this lack of transparency and the deliberate exclusion of Washington
9 citizens from the North of Falcon season setting process, Defendant WDFW has relied on
10 submitting a joint salmon season package with the treaty tribes in order to obtain approval
11 under the Endangered Species Act ("ESA"). Decl. of Patrick Pattillo, October 1, 2020, p. 3;
12 Wecker Decl., p. 2-4. The "proposed¹" salmon season package is submitted to National
13 Marine Fisheries Service ("NMFS") for consultation under the ESA. *Id.* Because WDFW
14 has decided to not obtain its own ESA approval, opting instead to join the treaty tribes' ESA
15 submission, NMFS has indicated that WDFW will not be granted authorization to conduct
16 salmon fisheries unless and until they agree with the treaty tribes demands. NMFS also
17 indicates that it will, and has, approve(d) tribal fisheries while not allowing non-treaty
18 fisheries to occur.
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22 The result is that WDFW capitulates to whatever harvest allocation the treaty tribes
23 will approve. WDFW has consistently "agreed" to allocations that result in non-treaty fishers
24

25 ¹ The seasons are not truly "proposed" as WDFW claims to the public. In truth, WDFW has acknowledged that
26 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 and public input
is essentially useless.

1 obtaining well under fifty percent of the available harvest of salmon. As a result, the citizens
2 of Washington are not able to “take a fair share of the available fish” as required by this
3 Court’s rulings, the Puget Sound Salmon Management Plan, and the ruling of the Supreme
4 Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,
5 443 U.S. 658, 685 (1979).
6

7 Despite this Court’s previous rulings that the parties are to roughly share the
8 harvestable stock, the treaty tribes and WDFW have not, for a number of years, even
9 calculated how many harvestable fish exist, thereby rendering it impossible to confirm that
10 the required equitable division is being made in accordance with controlling law in *United*
11 *States v. Washington* and violating the various orders of this Court. Decl. of Pattillo, p. 3-5.
12 The treaty tribes and WDFW have abandoned allocating the harvestable fish from runs of
13 Puget Sound chinook and coho salmon. *Id.* This is in direct violation of this Court’s original
14 injunction and the Puget Sound Salmon Management Plan, discussed below, both of which
15 provide that the state defendants *shall* determine the number of harvestable fish in advance of
16 every fishing season. Decl. of Curt Smitch, October 5, 2020, Exhibit A, p. 18; 25-26.
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19 This Court approved the Puget Sound Salmon Management Plan in 1985 (the
20 “PSSMP”). Smitch Decl., p. 2. The PSSMP remains in effect and requires that the treaty
21 tribes and State of Washington consider management methods that provide “flexibility to
22 achieve fair sharing of fish.” *Id.*, Exhibit A at 25. The PSSMP requires that if either party
23 catches more than 5% of their fair share, the party that overharvests shall repay the deficit by
24 transferring a portion of the overharvesting party’s harvest to the party that did not catch their
25 fair share. *Id.* at 25-27. The repayment shall be either 15% of the next year’s share or 25%
26 of the total deficit that was due, whichever is greater. *Id.*

1 The harvest of salmon has greatly favored the treaty tribes in recent years. *Id.*
2 Pattillo Decl., p. 5-6. For example, based on the 2020 “agreement” between the treaty tribes
3 and WDFW, the forecasted catch of Puget Sound Chinook salmon was 111,615 for the treaty
4 tribes and 69,622 for the nontreaty fishers. Of that, the treaty tribes are predicted to harvest
5 5,063 wild Chinook salmon while nontreaty fishers are predicted to harvest 1,706 wild
6 Chinook salmon. *Id.* at 6. This harvest imbalance has existed for years. In 2020, the
7 nontreaty harvest of Puget Sound Chinook is predicted to be roughly 38% of the total
8 harvest. *Id.* In 2019, the nontreaty harvest of Puget Sound Chinook was predicted to be
9 roughly 42% of the total harvest. *Id.* In 2018, the nontreaty harvest of Puget Sound Chinook
10 was predicted to be roughly 43% of the total harvest. *Id.* In 2017, the nontreaty harvest of
11 Puget Sound Chinook was predicted to be 41%. *Id.*

12
13
14 In recent years, the parties have largely abandoned the requirements of Section 10 of
15 the PSSMP. They do not calculate actual harvests following the seasons, they do not apply
16 flexibility to season settings, and the state fishers have been prevented from harvesting
17 anywhere near their fair share.

18
19 As a result of the actions of respondents, the nontreaty fisherman have experienced
20 greatly reduced salmon seasons, resulting in great financial and social harm. For the years of
21 2017, 2018, 2019, and 2020, the nontreaty fishers have harvested an estimated 124,696 less
22 Puget Sound Chinook than the treaty fishers. *Id.* The imbalance is similar for Coho salmon.
23 The members of Fish Northwest have been directly harmed by these actions, including both
24 the management process and the results that the process produces.
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VI. ANALYSIS

A. Fish Northwest Has Standing to Intervene.

Federal law has long recognized associational standing. An association, such as the moving party, Fish Northwest, has standing when (a) the suit is related to an issue that is germane to the organization's purpose; (b) the organization's members would have standing to sue (i.e., there is injury in fact to the members); and (c) the members' participation is not necessary. FRCP 24. All three criteria are met.

An organization may establish representational standing based on injuries to its members by showing that at least one of its members has standing, that the interests at stake are germane to the organization's purpose, and that neither the claim nor the relief requires participation of the organization's individual members. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also Wartch v. Seldin*, 422 U.S. 490 (1975).

Here, Fish Northwest members are adversely affected in a concrete, personal and economic way by WDFW's failure to ensure co-equal sharing of the state's salmon resource in accordance with the precedent established in *United States v. Washington* and this Court's existing orders. Its members are directly and immediately affected by this failure to adhere to this precedent because they are denied co-equal fishing opportunity, and their harm is actual, imminent, concrete and personal as the harm of denied access to the salmon resource has occurred and continues to occur on a daily basis. In fact, currently, the WDFW has not even determined the total number of harvestable fish, making a fair allocation impossible to achieve. Pattillo Decl., p. 3-5.

1 A sharp departure from co-equal sharing of the salmon resource occurs annually. This is
2 no mere speculation or fear of future harm. Rather, the denial of co-equal salmon fishing is
3 ongoing and harming Fish Northwest members. This is important because in *Massachusetts*
4 *v. Environmental Protection Agency*, 549 U.S. 497, 517, 522 (2007) (internal quotation marks
5 omitted), the court held that the plaintiffs had standing despite being members of the public
6 that all were subject to widespread harm because the risk of harm was both “actual” and
7 imminent.” *Id.* at 517, 521. Indeed, the optimal use of the salmon and steelhead resource by
8 all stake holders is a core purpose of Fish Northwest. Decl. of Brett Rosson, October 5, 2020,
9 p. 1-3.
10

11
12 Even the denial of recreational pursuits (here, fishing) give rise to Article III standing.
13 As the court in *Sierra Club v. Morton* observed, “[a]esthetic and environmental well-being,
14 like economic well-being, are important ingredients of the quality of life in our society, and
15 the fact that particular environmental interests are shared by the many rather than the few
16 does not make them less deserving of legal protection through the judicial process.” *Sierra*
17 *Club v. Morton*, 405 U.S. 727, 734 (1972).
18

19 Fish Northwest’s purpose is ensuring the equal and fair access to Washington’s salmon
20 and steelhead stocks. Rosson Decl., p. 1. This case is in large part about fairly allocating
21 access to salmon and steelhead stocks. The members of Fish Northwest include businesses,
22 anglers, and non-treaty recreational fishers who are guaranteed the right to catch a minimum
23 of 50% of the available harvest. While each of these individual members could seek
24 intervention in their own right, since they claim an interest relating to the property or
25 transaction that is subject to this action—the right to the state’s fair share of the available
26 harvest—their individual participation is not required. Fish Northwest can adequately

1 represent their interests in this litigation, because Fish Northwest is an organization created
2 precisely to advance the interests of fishers and businesses to Washington's salmon and
3 steelhead resource.

4
5 **B. Fish Northwest is Entitled to Intervene as of Right Under CR 24(a).**

6 The purpose of Rule 24 is to allow an applicant to protect any interest the applicant may
7 have in the outcome of an action affecting their rights. *See, e.g.,* Amendments to Rules of
8 Civil Procedure, 39 F.R.D., 69, 109-111 (1966) (Advisory Committee Notes to Rule 24
9 stating that Rule 24 enables applicant to protect interest in action); 3B J. KENNEDY & J
10 MOORE, MOORE'S FEDERAL PRACTICE § 24.02 (1987) (Stating that purpose of Rule 24 is to
11 enable applicant to protect interest in action). An applicant can show an interest in the
12 outcome of an action under Rule 24(a)(2) by showing that applicant's interest in the action
13 will be harmed or is being harmed. FED. R. CIV P. 24(a)(2); *see* MOORE'S FEDERAL PRACTICE
14 § 24.07.
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16
17 Besides showing applicant's interest in the action, Rule 24(a)(2) also requires that the
18 request for intervention be timely, that the applicant's interest is impaired if the court does
19 not permit intervention and that the original parties to the action are not adequately protecting
20 the applicant's interest. Here, Fish Northwest's request for intervention is timely because the
21 salmon and steelhead allocation process (to the extent allocation is even addressed) will
22 begin in January of 2021, and intervention is intended to remedy the annual deficiencies in
23 the parties' compliance with the requirements of the treaties, the PSSMP, and this Court's
24 orders. Fish Northwest's interests are clearly not adequately represented by WDFW or the
25 other parties in this litigation. This is particularly true in light of the past years of lack of
26 access and participation in North of Falcon salmon setting processes, and the resultant

1 ongoing disparity regarding allocation of the salmon resource among tribe and non-tribe
2 members in Washington State. Pattillo Decl., p. 4-6; Wecker Decl., p. 3-5.

3 Federal Rule of Civil Procedure 24(a)(2) provides that, “[O]n timely motion, the court
4 must permit anyone to intervene who ... claims an interest relating to the property or
5 transaction that is the subject of the action, and is so situated that disposing of the action may
6 as a practical matter impair or impede the movant’s ability to protect its interest, unless
7 existing parties adequately represent that interest.” FRCP 24(a)(2). In such instances,
8 intervention is a right. Here, Fish Northwest claims an interest relating to the right of co-
9 equal access to Washington’s salmon fishing resource that is the subject of this action. The
10 existing status quo management scheme has resulted in a severely unequal allocation of the
11 Washington salmon and steelhead resource, in contravention of *U.S. v. Washington*, its
12 progeny and this Court’s existing orders (including but not limited to the PSSMP). Without
13 intervention, this ongoing pattern of uneven and inequitable distribution of Washington’s
14 salmon resource will continue such that Fish Northwest’s interests will continue to not
15 receive the protections of co-equal sharing guaranteed in *U.S. v. Washington*. This Court
16 should grant intervention as a matter of right under FRCP 24(a).
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21 **C. The Court Should Permit Fish Northwest to Intervene Under Civil Rule**
22 **24(a)(2) because Petitioner’s Interests are Implicated and Adversely Affected**
23 **by WDFW’s Allocation of the Salmon Resource.**

24 Permissive intervention is authorized where, on timely motion, the person or organization
25 seeking to intervene “has a claim or defense that shares with the main action a common
26 question of law or fact” (FRCP 24(b)(1)(B)) or “is given a conditional right to intervene by a
federal statute” (FRCP 24(b)(1)(A)). As stated above, Fish Northwest and its members claim
that the current administration of the salmon resource in Washington State is not in accord

1 with *U.S. v. Washington* and this Court's existing orders. Thus, permissive intervention
2 should be granted. Indeed, this case is undoubtedly the best forum for an aggrieved party to
3 seek enforcement of the orders of this Court that remain in effect.
4

5 **D. Alternatively, Fish Northwest Should be Permitted to Intervene as a Matter of**
6 **Discretion.**


7 Alternately, Fish Northwest is entitled to permissive intervention under FRCP
8 24(b)(1)(B) which provides that "[o]n timely motion, the court may permit anyone to
9 intervene who ... (B) has a claim or defense that share with the main action a common
10 question of law or fact." Under that rule, if the applicant's claim or defense and the main
11 action have a question of law or fact in common, the Court may permit intervention at its
12 discretion, even where intervention is not of right. Here, Plaintiff's motion is timely as
13 discussed above. Defendants cannot demonstrate any actual prejudice if Fish Northwest is
14 permitted to intervene. The Court should therefore allow permissive intervention if it does
15 not grant intervention as of right.
16

17 **VII. CONCLUSION**
18

19 Fish Northwest members will be, and are currently being, directly and immediately
20 harmed if Fish Northwest is not allowed to intervene. The non-treaty fishers of Washington
21 are currently not allowed to harvest their fair share of the salmon and steelhead resources of
22 Washington. The right to do so is settled, and this Court's existing injunctions, orders, and
23 management plans require it. The existing parties are not following this Court's orders or
24 providing the citizens and fishers of Washington the court-ordered access to their fair share.
25 The status quo management of the salmon resource is not sufficient to protect Fish Northwest's
26 interests.

1 The Court should grant Fish Northwest's motion to intervene as a matter of right under CR
2 24(a) or as a matter of the Court's discretion under CR 24(b). Following intervention, Fish
3 Northwest intends to comply with Paragraph 25 and ultimately will ask the parties, and in
4 particular WDFW, to follow, and this Court to enforce, the existing orders and rulings in this
5 case.
6


7 DATED this 5th day of October, 2020.

8 
9 _____
10 JOE D. FRAWLEY, WSB#41814
11 JOEL D. MATTESON, WSB#40523
12 Attorneys for Petitioner

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on October 5, 2020, I electronically filed the foregoing document
15 with the Clerk of the Court using the CM/ECF system that sends notification of such filing to
16 all parties registered for electronic service with the CM/ECF system.
17

18 SIGNED this 5th day of October, 2020, at Lacey, WA.

19 
20 _____
21 Amanda C. Howard, Legal Assistant
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