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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

STATE OF OREGON, *et al.*,

Defendants.

No. 3:68-cv-0513-MO

STATE OF IDAHO'S
MEMORANDUM IN SUPPORT OF
JOINT MOTION (ECF 2617)
TO RECONSIDER, ALTER, OR AMEND
THIS COURT'S MARCH 19, 2018
ORDERS PURSUANT TO Fed. R. Civ. P.
59(e) AND 60(b)(6)

The State of Idaho files this memorandum in support of the Joint Motion to Reconsider, Alter, or Amend the Court's March 19, 2018 Orders, filed by the United States, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, Yakama Nation, and Shoshone-Bannock Tribes.

As the Motion stated, the State of Idaho supports the requested relief, including the withdrawal of the Order of dismissal (ECF 2615) and modification of the Order Approving 2018-2027 *United States v. Oregon Management Agreement* (ECF 2614).

The wide discretion of Rule 60(b) is available to courts in "extraordinary circumstances." *Buck v. Davis*, 137 S.Ct. 759, 777-8 (2017) (citation omitted). In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Id.* at 778 (citation omitted).

This case presents such extraordinary circumstances. It directly concerns the actions of three sovereign states, five sovereign tribal entities, and the United States representing the interests of multiple federal agencies. This Court has continued jurisdiction in this case through several preceding management agreements and various court orders, over a nearly 50-year span dating back to the partial judgment entered in 1969.

The Parties reasonably relied on the premise of continued jurisdiction in negotiating their 2018-2027 management agreement for fisheries in the mainstem Columbia River and certain tributaries and related fish production, including provisions in the agreement to resolve disputes. Because of the principles of sovereign immunity and time limitations, the Court's *sua sponte* dismissal without prejudice may have the practical effect of depriving parties of an effective forum to resolve disputes.

The history of Idaho's eventual entry into this litigation is illustrative of the complexities involved. In 1976, Idaho invoked the original jurisdiction of the U.S. Supreme Court to bring suit against the States of Oregon and Washington regarding Idaho's entitlement to an equitable portion of the upriver anadromous fishery of the Columbia River Basin. *State of Idaho ex rel. Evans v. Oregon and Washington*, 444 U.S. 380, 391-2 (1980). In *Evans*, the United States invoked sovereign immunity, and the Court considered whether the United States was an indispensable party, as well as Washington's assertion that relief to Idaho would abrogate the then-effective 5-year agreement in this litigation, as consolidated with *Sohappy v. Smith*. *Evans*, 444 U.S. at 386, 391.

The *Evans* Court viewed Idaho's prospects for intervention in this lawsuit to assert its interests "[S]hould Oregon or Washington seek to reopen negotiations in the *Sohappy* litigation, an attempt by Idaho to intervene in that litigation might meet with more success than an attempt to intervene in the face of an extant 5-year agreement." Idaho ultimately sought intervention in this matter when the then-parties sought to renegotiate the original management plan in 1982, and the Ninth Circuit determined Idaho should be granted intervention as a matter of right. "When granted intervention, Idaho will be able to insure its participation in the negotiations and discussions of a modified plan on the same basis as other participants." *U.S. v. Oregon*, 745 F.2d 550, 553 (9th Cir. 1984).

Based on the substantive and procedural history of this case, it is reasonable for the Parties to anticipate disputes will arise, with some arising in a manner that calls for expedited resolution. It is important to the Parties to foster coordinated, cooperative management to the extent possible, and to provide for the orderly resolution of disputes when necessary. *See, e.g., United States v. Oregon*, 1992 WL 613238 *2 (D.Or. 1992). In negotiating the 2018-2027

Management Agreement, the Parties continued to use a dispute resolution structure based on a fundamental assumption of continued court jurisdiction. Idaho agrees with the requested relief to withdraw or modify the Court's orders that appear to overturn this reasonable assumption; such relief avoids the risk of injustice to the Parties and the risk of undermining confidence in judicial process.

If a concern for docket management prompted the Court's decision, Idaho respectfully suggests that the Court consider alternatives to dismissal presenting less risk of injustice to the Parties at this juncture, such as administrative closure subject to reopener.

DATED this 30th day of April, 2018.

LAWRENCE G. WASDEN
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STATE OF IDAHO

/s/ Kathleen E. Trever
Kathleen E. Trever
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Kathleen E. Trever
KATHLEEN E. TREVER