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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA, *et al.*,	No. 3:68-cv-0513-MO
Plaintiffs,	STATE OF WASHINGTON'S RESPONSE TO JOINT MOTION TO RECONSIDER, ALTER, OR AMEND THIS COURT'S MARCH 19, 2018 ORDERS PURSUANT TO Fed. R. Civ. P. 59(e) AND 60(b)(6)
v.	
STATE OF OREGON, *et al.*,	
Defendants.	

POSITION ON THE REQUESTED RELIEF

The State of Washington (Washington) joins its sister states of Idaho and Oregon, the Plaintiff-Intervenor Treaty Tribes, and the Plaintiff United States of America, in asking this Court to grant the requested relief set forth in the Joint Motion now before this Court (ECF 2617). Washington writes separately to express its own views on the merits of granting the requested relief. Nothing in those views reflects any qualification or contingency with regard to Washington's support.

DISCUSSION

Washington supports the requested relief principally on the basis that it will promote continued progress towards fisheries that are developed and implemented with full adherence to mutual treaty fishing rights. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (holding that both treaty and non-treaty fishermen have a duty to restrain their harvest objectives because "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish.").

The working relationship between the States and Tribes, as they exercise their respective governmental powers to implement fisheries, has been referred to elsewhere, and in *United States v. Oregon* management agreements, as "co-management." [1] *See, e.g.*, 1988 Columbia River Fish Management Plan § IV.E.a ("purpose of this section is to promote effective tribal/state co-management"), approved by this Court in *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990). Washington believes that a strong and enduring co-management relationship has developed amongst the parties to *United States v. Oregon*. But we recognize that the co-management relationship remains a work in progress – for all concerned – and thus take seriously the moving parties' sense that continuing jurisdiction remains important to the ongoing development and success of co-management.

With respect to continuing jurisdiction as a general matter, we reflect back upon the origins of both this case, and the related litigation in *United States v. Washington*. Continuing jurisdiction

[1] The phrase "co-management" does not appear in the October 10, 1969 judgment of this Court, as amended, or the final adjudication orders of the federal court in *United States v. Washington*, 384 F. Supp. 322 (W.D. Wash. 1974). The adoption of a cooperative or co-management relationship is first described in a stipulated order entered in *United States v. Washington* – the "Stipulation and Order Concerning Co-Management and Mass Marking" (Dkt. # 16159, attached here as Exhibit A). Paragraphs 1.2 to 1.5 of that stipulation describe the basis for adopting a co-manager approach to fisheries. Paragraph 1.6 expresses a desire to continue evolving a productive co-manager relationship. Paragraphs 1.7, *et seq.*, describe the procedural obligations the parties adopted to carry out these ideals. Washington submits that the series of Management Agreements the parties have agreed upon in *United States v. Oregon* reflect a cooperative or co-management approach to fishery implementation in the *United States v. Oregon* case area.

was necessary in the years immediately following the judgments entered in both Washington and Oregon district courts. Washington has not forgotten, nor should anyone forget, the history that led the Ninth Circuit to remark that "[t]he state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees." *Puget Sound Gillnetters Ass'n v. U. S. District Co*urt, 573 F.2d 1123 (9th Cir. 1978). We have grown from that past and the State has fully embraced the need to implement treaty rights as a distinct obligation of its fishery management. *See, e.g., Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn. 2d 939, 949-50, 603 P.2d 819 (1979) ("All allocative regulations implementing Indian treaty rights are to be fully enforced by state officials") Thus, we have had nearly two decades of litigation-free co-management in the *United States v. Oregon* fishery management area.[2]

So why is continuing jurisdiction necessary, or at least advisable?

Washington agrees that this Court has the ability to enforce the terms of the newest Management Agreement adopted as a consent decree (ECF 2614). In that respect, Washington concurs in that portion of the United States Memorandum in Support of the Joint Motion addressing this subject – (ECF 2618, Section IV.A, pp. 6-9). The more difficult issue seems to be whether the parties have, and/or need, the ability to invoke continuing jurisdiction as a means to address matters within the original complaint and pre-trial order, but outside the application of the terms of the Management Agreement adopted as a consent decree – i.e., case-wide continuing jurisdiction.

[2] Washington appreciates the balanced presentation contained in the moving parties' memoranda acknowledging that, in some few instances, this Court's continuing jurisdiction was needed to restrain tribal parties. *See, e.g.*, Treaty Tribes' Memorandum (ECF 2619) at 7, citing to *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1982).

The United States and Treaty Tribes assert that the existence of general case-wide continuing jurisdiction is the very reason there have been so few disputes. By implication, the absence of such continuing jurisdiction might portend an upswing in disputes. We might also attribute the absence of disputes to real progress on a durable and meaningful co-management relationship – fishery management rooted in the case law, court orders, and agreements regarding implementation of treaty fishing rights. Development of that relationship has also been aided by the institutional structures and practices associated with implementation of the various Management Agreements. *See, e.g.*, Section I.C of the Management Agreement – "*United States v. Oregon* Framework" (ECF 2607-1).

It is not important to determine which paradigm about the absence of disputes is more accurate. Clearly, some of the parties still do not have complete confidence that co-management can continue to work well, and indeed strengthen, without some ability to seek this Court's intervention if needed. Furthermore, the lack of any opportunity to prepare for the absence of case-wide continuing jurisdiction appears to have added uncertainty to the co-management relationship, and comes at a time where the next few years will require cooperation based upon as much confidence as we can muster.

Accordingly, Washington supports the Joint Motion and requested relief – not out of any belief that more disputes are around the corner, but out of a sense that, for now at least, continuing jurisdiction provides a context in which the parties have begun to thrive in their co-manager responsibilities, and some more time is needed for that relationship to fully develop.

In closing, Washington does not endorse continuing case-wide jurisdiction without end. Article III courts were not created to act as permanent special masters of fisheries. Cases end. Nevertheless, we also appreciate the position taken by the Tribes in *United States v. Washington*

when Judge Rothstein proposed a sunset order. They correctly observed that the Pacific Northwest treaty fishing litigation was essentially institutional reform litigation. *Unites States v. Washington* - Dkt. # 13234, pp. 6-7. That kind of litigation has an arc, sometimes lengthy, requiring both actual reform, and confidence in the implementation of that reform. Accordingly, Washington sees the wisdom in allowing some more time to pass to ensure the majority of the parties have confidence we have arrived at a stable end to the litigation.

Recognizing that a return of case-wide continuing jurisdiction gives us an opportunity to confidently continue the arc of institutional reform, all the parties should embrace the need for progress along this arc of reform, and its desired end state – a point where a stable co-management relationship exists, and respect for each party's interest guides us towards agreement. The parties should not assume continuing jurisdiction will always exist. Nor is that necessarily desirable. Indeed, Washington has some concern that continuing to frame the evolving co-manager relationship within the context of an adversarial proceeding may, at some point, actually hinder that progress.

We also appreciate the practical concerns that arise if sovereign immunity impedes access to courts where future disputes arise. But those issues are not insoluble. Parties can work out agreements over time to waive their immunity if that is beneficial. However, those considerations were not part of the mediation that led to the newest Management Agreement. Nor were they given an opportunity to be carefully and deliberately addressed by the parties in anticipation of this Court's unexpected dismissal of the case. Instead, those matters can and should be evaluated going forward, perhaps in the context of negotiations for the next Management Agreement.

Finally, Washington believes the parties should consider implementation of a pre-filing dispute resolution mechanism. While that kind of pre-filing process exists for disputes arising

within the context of the Management Agreement (*See* Parts I.C.6 and I.D; ECF 2607-1; pp. 13-16), it does not exist for matters arising outside the Management Agreement, but within the scope of the original pre-trial order.[3] To be clear, Washington's support for the requested relief is not contingent upon adding such an element, but we think it would be wise to do so. Washington believes all parties to *United States v. Oregon* are committed to improved procedural mechanisms. Collectively, we have always been better served by deliberate and careful action. Rather than suggest a specific set of pre-filing requirements here, this Court could encourage the parties to draft a proposal for extending the dispute resolution procedures of the Management Agreement as a pre-filing requirement to any future proceeding in *United States v. Oregon*.

CONCLUSION

The State of Washington respectfully asks this Court to grant the requested relief.

SUBMITTED this 7th day of May, 2018.

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[3] All the parties in *United States v. Washington* proposed the addition of such pre-filing requirements as part of their response to Judge Rothstein's proposed sunset order. Judge Rothstein subsequently implemented such a provision. *See United States v. Washington*, 18 F. Supp. 3d 1172, 1213 (Aug. 24, 1993 Order Modifying Paragraph 25 of Permanent Injunction; Paragraph 25(b) – pre-filing obligations).

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered with the CM/ECF system and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants.

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DATED this 7th day of May 2018, at Olympia, Washington.

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Exhibit A

ORIGINAL

FILED ENTERED
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APR 28 1997
AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

The Honorable Barbara J. Rothstein

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WESTERN WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Cause No. 9213
Subproceeding No. 96-3

STIPULATION AND ORDER CONCERNING CO-MANAGEMENT AND MASS MARKING

1. Stipulation.

1.1. The purpose of this Stipulation is to reaffirm and help clarify established principles and guidelines affecting management of fisheries resources subject to the authorities and obligations of the various Washington treaty tribes and, on behalf of the State of Washington, the Washington Department of Fish and Wildlife ("WDF&W"). This Stipulation does not precisely define nor does it create, expand, or diminish any party's[1] legal rights or jurisdictions, provided, however, that procedural rights are created by paragraphs 1.7, 1.8, and 1.9.

1.2 The WDF&W and each of the signatory Washington treaty tribes have

[1] "Party," as used in this stipulation, means only the signatories to this stipulation, not all parties to United States v. Washington.

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independent and differing authorities, mandates and responsibilities for developing an implementing management programs to protect, enhance, and utilize fish and wildlife resources in a sustainable manner within their respective jurisdictions.

1.3 The WDF&W has certain responsibilities for managing fish and wildlife resources and non-treaty fisheries within the boundaries of the state and adjacent to the Washington coast. This jurisdiction and responsibility must be exercised in conformity with the state's obligations to comply with treaty Indian fishing rights reserved by the tribes by federal treaty and/or defined by federal court decisions and orders. The treaty tribes have certain responsibilities for managing fish and wildlife resources and treaty fisheries within their reservations and certain fisheries resources and treaty fisheries within and/or passing through their respective usual and accustomed areas. This jurisdiction and responsibility also must be exercised in conformity with rights reserved by federal treaty, as interpreted by federal court decisions and orders.

1.4 The overlapping nature of their respective jurisdictions and authorities creates a co-management relationship between the state and the treaty tribes in the sense that: WDF&W and the respective tribes have certain authorities that potentially pertain to the same fisheries resource, there is a need for all parties to cooperate in the discharge of their respective authorities, certain federal court orders prescribe cooperative and coordinated fishery management actions and activities, and generally, the application of state law to treaty fisheries is preempted unless such application is in compliance with applicable federal court orders. Various state/tribal plans and intertribal plans and numerous federal court orders prescribe how the WDF&W and the tribes are to exercise their respective authorities. These plans and court orders reflect the fact that actions taken by one party often can affect other parties, and that the multi-jurisdictional nature of management can lead to conflicts between the parties.

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1.5 To minimize such conflicts, and to promote effective and efficient management of those fish and wildlife resources that are subject to both state and tribal management, the WDF&W and tribes have developed a cooperative management approach to the exercise of their respective authorities. The approach was developed and must be maintained based on the principles of government-to-government relationships. Its successful implementation depends upon joint planning, regular consultation, explicit objectives, and agreed data to foster consistent and coordinated management programs, while respecting the legitimate decision-making authorities of each party.

1.6 WDF&W and the treaty tribes shall continue to refine this cooperative approach to further increase efficiencies, improve resource management, reduce conflict between objectives, and avoid the need to resort to judicial or other third party dispute resolution mechanisms. It is expected that the cooperative approach will continue to resolve the majority of issues. Because the WDF&W and the treaty tribes have legitimate prerogatives in the exercise of their authorities and conduct of their fisheries, disputes between competing or coexisting objectives or conflicting interpretations of applicable law sometimes may arise.

1.7 Before taking any fisheries management action which would reasonably be expected to affect another party's fisheries any party shall give reasonable written notice of the action to each affected party. Notice shall be considered reasonable if it provides adequate time under the existing circumstances for any affected party to notify the proponent that the particular issue is disputed, and allow time for a request for dispute resolution as provided in this document, as well as application to the court for relief as contemplated by the provisions of the court's August 23, 1993 Order Modifying Paragraph 25 of Permanent Injunction.

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1.8 The WDF&W and tribes shall, prior to taking any disputed action affecting another party, attempt a voluntary resolution of any dispute which the routine cooperative planning process described above fails to anticipate or adequately resolve. They shall refer the dispute to policy representatives designated by the affected tribes and the WDF&W. Any party may request a policy meeting on an issue in dispute upon timely, reasonable and written notice of the existence of the dispute to all affected parties. Utilizing support staff as they may desire, they will attempt promptly to resolve the dispute, utilizing a government-to-government approach.

1.9 No party shall take any action regarding the management of its fisheries which would reasonably be expected to affect another party's management of its fisheries without agreement of that party or without first following the dispute resolution procedures contained in paragraphs 1.7 and 1.8 of this Stipulation, Provided, however, that harvest management regulatory actions or intertribal agreements already subject to existing cou orders shall comply with those orders, rather than this paragraph.

1.10 In the event that the WDF&W and treaty tribes are unable voluntarily to resolve a dispute in accordance with paragraph 1.8, a party may resort to judicial review and resolution, pursuant to rules and procedures previously established by the federal court.

1.11 To foster the continued vitality and refinement of this cooperative management approach, the Director of the WDF&W and tribal representatives will conduct an annual meeting to be held no later than May 15 of each year, unless otherwise agreed by all parties. The agenda for discussion shall include, but not necessarily be limited to, the following:

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1.11.1 Evaluating the effectiveness of the previous year's harvest management plans and practices in meeting established management objectives;

1.11.2 Considering new and/or reviewing ongoing management processes, planning activities, policies, and practices;

1.11.3 Review the previous year's habitat, enhancement, enforcement, and other fisheries management programs;

1.11.4 Establishing priorities and action plans for management activities for the coming year;

1.11.5 Identifying any disagreements to be resolved by policy and/or technical subgroups;

1.11.6 Identifying ways to improve the cooperative working relationship in the coming year; and

1.11.7 Other issues, as jointly agreed.

1.12 In dealing with federal and international fisheries management entities, including, but not limited to the Pacific Salmon Commission or its successor-in-interest, the parties shall be guided by this document and the co-management principles enunciated herein, and shall cooperatively develop regulatory or management actions which are consistent with federal court orders in *U.S. v. Washington* and *Hoh v. Baldrige*.

1.13 The parties hereby agree to the Coho Mass Marking and Selective Fisheries Implementation Plan ("Implementation Plan"), attached hereto as Exhibit A and incorporated herein by reference.

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1.14 The undersigned parties agree to jointly request that the court adopt th Stipulation and Implementation Plan as an order of the court.

DATED this 28th day of April, 1997.

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ORDER

1. The court has jurisdiction over the subject matter of this subproceeding.

2. The court has examined the foregoing Stipulation and the attached "Coho Mass Marking and Selective Fisheries Implementation Plan." The court finds that the Stipulation and Implementation Plan represent a fair and equitable settlement of the disputes in this subproceeding.

3. The Stipulation and "Coho Mass Marking and Selective Fisheries Implementation Plan" are hereby adopted as a court order and incorporated herein. This Order is binding on the signatories to the Stipulation and shall be enforceable by them in the same manner and same respect as any other district court order in this case. In the event that the continuing jurisdiction of the court in *United States v. Washington* shall be terminated, then the court retains such jurisdiction as is necessary to enforce the terms of this Agreement.

4. This order binds all parties which signed the Stipulation, including the State of Washington. However, the provisions concerning the notice and dispute resolution of actions reasonably expected to affect fisheries, shall, at this time, apply only to the Washington Department of Fish & Wildlife or its successor-in-interest, and any other state agency which may in the future be assigned any of the current functions of the Department, whether by legislative, judicial or executive action, and to other state agencies carrying out fisheries management functions pertaining to fin fish. This order is not intended to affect the claims of the treaty tribes that all departments of Washington state government should be bound by similar provisions. This order is without prejudice to those claims or positions being raised or advocated in the future.

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5. This is a final order in this subproceeding. The agreed preliminary injunction, and the Order Modifying Temporary Restraining Order and Establishing Schedule dated December 24, 1996, are hereby dissolved and replaced by this order. This subproceeding is deemed complete.

DONE IN OPEN COURT this 28th day of April, 1997.

Barbara Jacobs Rothstein
Hon. Barbara Jacobs Rothstein
United States District Judge

Presented by:

MORISSET, SCHLOSSER, AYER & JOZWIAK

By: _____
Mason D. Morisset WSBA #273
Counsel for The Tulalip Tribes

STATE OF WASHINGTON

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