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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,	UNITED STATES' MEMORANDUM IN SUPPORT OF JOINT MOTION TO RECONSIDER, ALTER, OR AMEND THIS COURT'S MARCH 19, 2018 ORDERS PURSUANT TO Fed. R. Civ. P. 59(e) or 60(b)
v.	
STATE OF OREGON, *et al.*,	
Defendants.	ORAL ARGUMENT REQUESTED

I. INTRODUCTION

On March 19, 2018, this Court issued an "Order Approving 2018-2027 *United States v. Oregon* Management Agreement" ("*Order Approving*") (ECF 2614) and an

"Order Dismissing Case Without Prejudice" ("*Order Dismissing*") (ECF 2615). Pursuant to Rule 59(e), or in the alternative 60(b), the United States seeks clarification and/or reconsideration to resolve potential ambiguities associated with the Court's Orders. The United States thus supports the request for relief in the joint motion, but writes separately to present its views to the Court.

II. BACKGROUND

The case now styled *United States v. Oregon* is the outgrowth of the consolidation of two cases filed in 1968, *Sohappy v. Smith*, No. 68-409 (D. Or.), and *United States v. Oregon*, No. 68-513 (D. Or.). These suits were brought against the State of Oregon to protect treaty fishing rights and establish the scope of the State's authority to regulate tribal off-reservation fishing on the Columbia River and its tributaries. Complaint, Request for Relief ¶ 1 (a) (Attachment A).

These cases arise out of four treaties known as the 1855 Stevens and Palmer Treaties entered into between the United States and four Indian tribes living along the Columbia River and its tributaries in what is now the States of Oregon, Washington, and Idaho. In September 1968, the United States filed suit against the State of Oregon seeking a judgment and injunction to enforce Indian off-reservation fishing rights in the Columbia River Basin. *United States v. Oregon*, No. 68-513, Pretrial Order ¶ 11 p. 24 (Attachment B). The Confederated Tribes and Bands of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm

Springs Reservation of Oregon intervened in *United States v. Oregon* as plaintiff-intervenors. *Id.*

In 1969, this Court entered declaratory judgment in favor of the United States and the four Tribes. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). The Court held that these Tribes have rights protected by the 1855 Palmer and Stevens treaties to take fish from usual and accustomed places on the Columbia River and its tributaries, and that the State of Oregon had only limited regulatory authority to the extent needed to effectuate conservation principles. *Id.* at 906-07. It also found that the Tribes were entitled to a "fair share" of the available harvest. *Id.* at 910-11.

The final judgment was not appealed, and this Court expressly retained jurisdiction to enforce its order. The Judgment provides:

> The court retains jurisdiction of the matters in suit herein for disposition of the remaining claims of the parties or to grant further or amended relief upon application of any of the parties. Any party at any time may apply to the court for a subsequent modification of any provision of this decree where the continued application of the decree has become inequitable or impracticable, but this right shall not affect the finality of the decree with respect to times prior to any such modification.

1969 Judgment ¶ 4 (Attachment C) ("Judgment").

Subsequently, in 1974, the State of Washington intervened to challenge the Judgment and Order. Over Washington's objection, this Court modified its original order to clarify that the Tribes were entitled to "50% of the available harvest" and again retained jurisdiction. *See* May 10, 1974, Order Amending Judgment of

October 10, 1969 (Attachment D). Washington appealed and the Ninth Circuit affirmed this Court's Judgment and Order. *Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

A. Fishery Management: 1969-2008

Between 1970 and 2008, after numerous emergency injunction motions and at the strong urging of a number of district court judges, the parties negotiated a series of fishery management plans. *United States v. Oregon*, 718 F.2d 299, 302 (9th Cir. 1983); *United States v. Oregon*, 699 F. Supp. at 1469. In 2008, the parties agreed upon a new ten-year management agreement ("2008-2017 Management Agreement"). From 2008-2017, the parties operated under the terms of the 2008-2017 Management Agreement, which had also been approved and entered as a stipulated court order. ECF 2545. During this ten-year timeframe, there were two disputes that involved this Court's attention. *See* ECF 2502; ECF 2547, *United States v. Oregon*, No. CIV. 68-513-KI, 2008 WL 3834169, at *1 (D. Or. Aug. 13, 2008),), *aff'd sub nom., United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010) (dispute between the Yakama and Colville Tribe over fishing at Icicle Creek (a tributary to the Columbia River); ECF 2589 (dispute among Nez Perce, Umatilla, and NMFS regarding Shoshone-Bannock tribal fishing plan).

C. Recent Activity

In anticipation of the expiration of the 2008-2017 Management Agreement, the parties participated in a mediation with Senior Ninth Circuit Judge, Edward Leavy to negotiate a new agreement. ECF 2607 at 3. Throughout this entire process, all of the parties negotiated their respective terms based on the assumption that this Court would retain jurisdiction over the new Management Agreement. ECF 2607-1 at 7 ("This Agreement will be submitted as a stipulated order in *United States v. Oregon*, Civil No. 68-513-MO (D. Or.). If approved by the Court, this Agreement shall be binding on the Parties as a decree of the Court.").

Upon completion of these documents, the parties presented this Court with a joint motion to approve the 2018-2027 Management Agreement and proposed order. The format and substance of both the joint motion and proposed order was nearly identical to those presented to and adopted by the Court in 2008. *Compare,* ECF 2544, *with* ECF 2607.

On March 19, 2018, the Court issued the *Order Approving* (ECF 2614) and *Order Dismissing* (ECF 2615). However, in the *Order Approving*, the Court modified Paragraph 3 from the language proposed by the parties, and then issued the second *Order Dismissing*, which dismissed the case without prejudice.

III. STANDARD OF REVIEW

A. Rule 59(e)

Rule 59(e) authorizes motions to alter or amend judgments. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928 29 (9th Cir. 2000). Rule 59(e) motions may be

granted if the Court is presented with newly discovered evidence, or if the Court committed clear error in its original decision, to prevent manifest injustice or to account for an intervening change in controlling law. *Circuit City Stores v. Mantor*, 417 F.3d 1060, 1063 n.1 (9th Cir. 2005); *Hasrell v. State Farm*, 187 F. Supp. 2d 1241, 1244 (D. Haw. 2002) (citations omitted).

B. Rule 60(b)

Rule 60(b)(6) provides that the Court may relieve a party from a final judgment or order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Courts typically apply Rule 60(b)(6) only in circumstances that are not addressed by the first five numbered clauses of the Rule. *See Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996) (citation omitted); *see also American Games v. Trade Prods.*, 142 F.3d 1164, 1167-70 (9th Cir. 1998) (equitable balancing test, rather than an "exceptional circumstances" test, applies to Rule 60(b) motions made at the district court level, as "[g]iven the fact-intensive nature of the inquiry required, it seems appropriate that a district court should enjoy greater equitable discretion when reviewing its own judgments").

IV. DISCUSSION

A. The Court's Order Approving 2018-2027 *United States v. Oregon* Management Agreement (ECF 2614) Should be Clarified and Amended.

The United States interprets the *Order Approving* as allowing the parties to return to this Court by filing a motion, under the existing case number, and seek resolution of any dispute the parties may encounter when implementing the 2018-2027 Management Agreement ("Management Agreement"). However, there is some language in Paragraph 3 in the *Order Approving* that could be read to create ambiguity on this point. Therefore, we respectfully request clarification and amendment of Paragraph 3, as requested in the joint motion.

The Supreme Court in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994), explained that a court may retain jurisdiction to enforce the terms of an agreement, even after a case is dismissed. In that case, the Supreme Court found that the court lacked jurisdiction over a contract dispute because there was no recitation of continuing jurisdiction and the terms of the agreement were not incorporated into an order. *Id.* ("The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."). Thus, the Supreme Court provided two hallmarks of continuing jurisdiction to ensure compliance with an agreement after a

case is dismissed: (1) recitation of continuing jurisdiction; or (2) incorporation of agreement terms into a court order.

Because this Court incorporated the terms of the Management Agreement into a court order in Paragraph 2 of the *Order Approving*, it appears that there is ancillary jurisdiction to enforce the terms of the Management Agreement. ECF 2614 at 1 ("The 2018-2027 *United States v. Oregon* Management Agreement is hereby approved and adopted as an Order of the Court."). This also appears to be the Court's intent. *See* Transcript p. 6, line 6-11 (ECF 2616). However, Paragraph 3 in the *Order Approving* could be read to create ambiguity.

Paragraph 3 provides in pertinent part: "The Court terminates its continuing jurisdiction in this case. This matter is dismissed without prejudice to re-opening this matter in the event a dispute arises concerning the parties' Management Agreement that requires judicial review." ECF 2614 at 2. The language in the first sentence, expressly disclaiming retained jurisdiction, creates ambiguity whether there is ancillary jurisdiction to enforce the terms of the Management Agreement because it contradicts one of the hallmarks announced in *Kokkonen,* 511 U.S. at 381 ("such as a provision 'retaining jurisdiction' over the settlement agreement . . . ."); *but see* ECF 2614 at 2. While the second sentence seems to address this issue, there is tension between the first and second sentences in Paragraph 3, thereby creating some ambiguity.

Although incorporation of the Management Agreement into the order in Paragraph 2 fulfills one of the *Kokkonen* hallmarks of retained jurisdiction, and thus the United States interprets the order as retaining jurisdiction, with an agreement of this importance and scale, the United States seeks clarification and amendment so that there is no future confusion. The Management Agreement is anticipated to last for ten years, and while there is no doubt as to the good faith intent of the present parties, differing opinions may emerge with the passage of time. Thus, the United States seeks clarification and amendment of the language in Paragraph 3 to ensure that the Court has retained jurisdiction to enforce the terms of the Management Agreement, should that become necessary.

B. The Court's Order Dismissing Case Without Prejudice (ECF 2615) Should be Clarified and Amended.

With respect to the *Order Dismissing*, there is also ambiguity whether the Court has terminated continuing jurisdiction as provided for in the October 10, 1969, Judgment, as amended on May 10, 1974. *See* Attachments C, D. The United States seeks clarification on the effect of the order dismissing this case without prejudice.

As an initial matter, whether the Court retains jurisdiction over the Judgment in this case is a distinct and much larger issue than whether there is jurisdiction to ensure compliance with the Management Agreement. The Judgment in *United States v. Oregon*, 68-cv-513, encompasses issues beyond the harvest and production measures agreed upon in the Management Agreement because the case

and associated Judgment are about treaty fishing rights and the continued protection of those treaty rights. *Sohappy v. Smith*, 302 F. Supp. at 903-904 (seeking "a decree of this Court defining their treaty right 'of taking fish at all usual and accustomed places' on the Columbia River and its tributaries . . . ."). For example, enforcement of the Judgment necessarily involves the geographical scope of these treaty fishing rights, potential disputes among Tribes regarding usual and accustomed fishing places, and fishery management actions in tributaries to the Columbia River that lie outside the Management Agreement, but that potentially affect the fair and equitable sharing of the resource. *See e.g. United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1982) (enjoining a Yakama spring chinook fishery on a tributary to the Columbia); *United States v. Oregon*, 718 F. 2d 299 (9th Cir. 1983) (injunction against an attempt to restrict geographical area of treaty fishery); *Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (Yakama and Wenatchi Band share joint fishing rights at the "Wenatshapam Fishery" on Icicle Creek); *United States v. Oregon*, Order of September 2, 1977, ECF 322 (enjoining commercial fishing of nonparties), *affirmed on appeal, Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123 (1978), *vacated on other grounds sub nom., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

The Court may not have been aware of these issues, as resolution of these broader treaty issues often occur without this Court's review and, in recent memory,

the parties have worked hard and successfully to avoid bringing these issues to the Court's attention. But the *Order Dismissing* may have in advertently affected implementation of the Judgment by dismissing the case without prejudice, which could deprive the parties of an available forum to resolve treaty fishing disputes.

This Court stated at the telephonic hearing that "if a dispute does arise concerning the current agreement, or if in effectuating the next agreement, if there is a need to do so and the parties request the intervention of the Court, then there is a readily available mechanism to do so, which of course I will entertain." Transcript p. 6, line 12-16. Based on the Court's statement, the United States does not understand the Court to be terminating jurisdiction with the respect to enforcement of the Judgment, *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (federal courts retain inherent power and jurisdiction to enforce their own judgments), but it is unclear what "available mechanism" the Court had in mind in order to elevate disputes for judicial review. *Id.* If the Court is contemplating a new complaint with a different case number as the procedural "mechanism," that is very problematic because of the sovereign immunity concerns discussed below. *Infra* B.1. If, however, the Court intended to simply administratively close this case and retain jurisdiction such that the parties would be able to file a motion to resolve future disputes regarding the Judgment, then the United States' concerns are not as significant. Thus, as requested in the motion, the parties seek clarification that "there continues to be a

judicial forum for civil resolution of the disputes that arise affecting the Treaty fishing rights that are subject matter of case 68-513." Joint Mot. at 2.

1. Because of Sovereign Immunity and Related Doctrines, Terminating Continuing Jurisdiction Would Effectively Deprive the Parties of a Forum in which to Decide Treaty Fishing Rights Issues.

Sovereign immunity principles and related doctrines complicate whether the Tribes and/or States can seek judicial review against one another to resolve fishery disputes. Under existing case law, sovereign immunity principles typically preclude a Tribe from seeking relief against a State (and vice versa) when disputes arise without the involvement of the United States. *Puyallup Tribe v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172 (1977) (finding the Tribe's claim of immunity against the State in a fishing context "well founded."); *Kiowa Tribe of Oklahoma v. Mfg. Techs.,* 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997) ("Tribe's suit, accordingly, is barred by Idaho's Eleventh Amendment immunity unless it falls within the [*Young*] exception this Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities."). And disputes involving two or more States challenging each other, may be required to invoke the original jurisdiction of the Supreme Court. U.S. Const. art. 3, § 2, cl. 2. These sovereign immunity and jurisdictional

principles are particularly problematic in the unique area of fishery management where disputes arise among these sovereigns under compressed time constraints.

Most fishery disputes are difficult to predict and usually arise in response to emerging or real time information. As Judge Belloni, in this case, recognized:

> As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. *Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.*

Sohappy v. Smith, 302 F. Supp. at 911 (emphasis added). Because fishery management issues arise quickly, resolution requires a readily available forum. The United States believes that in this unique context of multiple sovereigns and real-time fishery management, the reasons enunciated by Judge Belloni as support for the retention of continuing jurisdiction to enforce the Court's Judgment remain just as valid today as they did in 1969.

Unlike other circumstances, the retention of continuing jurisdiction in this case to effectuate the Judgment is unique in that all of the parties are sovereigns and none objects to the requested relief in the joint motion. While each sovereign will write separately to present its views to the Court, all of the States (Idaho,

Oregon, Washington) and Tribal sovereigns agree that the Court should clarify and amend the existing orders, thereby allowing the parties to continue their good working relationships in the area of Columbia River fishery management. Moreover, the rights of these sovereigns are adequately protected because any party may withdraw from the Management Agreement in accordance with applicable terms. ECF 2607-1 at 11 (paragraph I(B)(8)(b)). This is not a situation where continuing jurisdiction is imposed over the strenuous objection of a party.

Nor is this unique confluence without precedent. In *United States v. Washington*, Judge Boldt retained jurisdiction due to the unique circumstances of multiple sovereigns and fishery management issues. *United States v. Washington*, 459 F. Supp. 1020, 1048 (W.D. Wash. 1978) ("The court has, however, expressly retained continuing jurisdiction to assure implementation of the court's rulings and to deal with environmental issues and other relevant matters. "), *aff'd*, 645 F.2d 749 (9th Cir. 1981). This case is still active today. Indeed, at one point in those proceedings, the district court proposed to sunset continuing jurisdiction, but after briefing from the parties, decided against that course of action. *United States v. Washington*, 70-cv-09213 (W.D. Wash.), ECF 13292 at 1 (June 23, 1993) ("The court declines to enter the proposed 'sunset order' . . . and will retain jurisdiction.").

Continuing jurisdiction to enforce the Judgment is essential to the effective management of these fisheries and related production measures. A readily available forum ensures timely resolution of quickly emerging disputes, but more

importantly, the very existence of judicial oversight encourages the parties to comply with the Court's orders and has thus minimized the number of disputes brought to this Court's attention.

For most of the last decade, the parties have been able to resolve their disputes without resorting to Court intervention, and a large part of the willingness to work together without active litigation stems from the backstop of the Judgment and availability of this Court. Without that availability, it is unclear how a sovereign may react if there is a potential dispute, especially when they can retreat behind sovereign immunity principles.

The parties in this case have developed remarkably good working relationships and are committed to finding solutions for the resource. However, the parties bring this unique willingness to find common ground on difficult issues in this case, in part because judicial review is a backstop. In this unique context, it is important to maintain continuing jurisdiction in this case. Thus, the United States seeks clarification that this forum will remain available should the parties encounter a dispute when implementing the Judgment of this Court.

V. CONCLUSION

The Court should grant and provide the requested relief in the joint motion.

Dated: April 16, 2018.

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CERTIFICATE OF SERVICE

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

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