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 10 **UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF WASHINGTON**

11 STATE OF WASHINGTON,
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 Plaintiff,

13 and

14 STATE OF OREGON,
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 Plaintiff-Intervenor,

16 v.

17 ERNEST MONIZ, Secretary of
 the United States Department of
 18 Energy, and the UNITED
 STATES DEPARTMENT OF
 19 ENERGY,

20 Defendants.
 21
 22

NO. 2:08-cv-05085-RMP

STATE OF WASHINGTON'S
 MOTION TO STRIKE
 PORTIONS OF REVISED
 PROPOSED ORDER

07/09/2015, 6:30 p.m.
 Without Oral Argument

I. RELIEF REQUESTED

1
2 A little more than a month before oral argument, and under the auspice of
3 providing supplemental materials to support its existing Consent Decree
4 proposal, the Department of Energy (Energy) has submitted a “Revised
5 Proposed Order” (ECF No. 149), modifying the 2022 deadline to complete the
6 last nine single shell tank (SST) retrievals in a way that is contrary to both the
7 2010 Consent Decree and Energy’s own Consent Decree modification proposal.
8 As set out below, Energy’s Revised Proposed Order: (1) bypasses Consent
9 Decree’s modification process in a way that diminishes the obligations of
10 Energy and the rights of the State of Washington (State) under the Decree;
11 (2) is not properly before the Court; and (3) prejudices the State by
12 incorporating changes to the Consent Decree that are outside of Energy’s
13 modification motion and have not been briefed, or even previously discussed,
14 by any of the parties.

15 The State respectfully moves this Court to strike that portion of Energy’s
16 Revised Proposed Order related to extending the SST retrieval end date—
17 specifically, page 1, lines 19–20, and page 12, line 20 through page 13, line 4
18 (Milestones B-2, B-3, B-4, and B-5)—and/or issue an order enforcing the
19 Consent Decree’s amendment procedures. In the alternative, the State requests
20 permission to file supplemental briefing and supporting materials regarding the
21 suitability of Energy’s revised proposed Consent Decree amendments.
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II. RELEVANT BACKGROUND

In its May 20, 2015, Order, the Court authorized the parties to submit limited supplemental declarations and supporting materials regarding the “suitability of their respective proposals” to modify the October 25, 2010, Consent Decree. ECF No. 144. Supplemental materials were limited to twenty pages, exclusive of exhibits. *Id.* On June 5, 2015, Energy filed three documents pursuant to the Court’s Order: a declaration from Delmar Noyes (ECF No. 147), a declaration from Thomas Fletcher (ECF No. 148), and a Revised Proposed Order (ECF No. 149).¹ Energy, through its attorney, did not notify the State that a serious risk had arisen regarding its ability to meet the Consent Decree retrievals until less than an hour before submitting its Revised Proposed Order. *See* Declaration of Andrew Fitz in Support of Washington’s Motion to Strike ¶ 3, Ex. A.

Energy’s Revised Proposed Order goes beyond the amendment proposal it submitted to the State and has presented to this Court. Specifically, while Energy’s Motion to Modify Consent Decree maintained the Consent Decree’s 2022 end date for the last nine SST retrievals, *see* ECF No. 76 at 59–60, Energy’s Revised Proposed Order extends all milestones related to the nine

¹ Both the declarations of Mr. Fletcher and Mr. Noyes include a copy of the Revised Proposed Order as exhibits to their respective declarations. *See* ECF Nos. 147-1 and 148-1.

1 retrievals in Tank Farms A and AX by a full year, including the Consent
2 Decree's 2022 end date for these retrievals.² ECF No. 149 at 12–13. No
3 motion or other pleading accompanied the Revised Proposed Order.

4 The Court's 2010 Consent Decree (ECF No. 59) sets out detailed
5 requirements for proposing Consent Decree amendments. Specifically,
6 Sections VII.A and VII.G require the party proposing an amendment to provide
7 the other party written notice of the amendment(s), along with a justification
8 and information as to whether any other requirement of the Consent Decree or
9 the Hanford Federal Facility Agreement and Consent Order (HFFACO) would
10 be impacted. ECF No. 59 at 11, 18. The other party then has ten days to notify
11 the proposing party whether the amendment is acceptable. *Id.* at 11. If the
12 parties are in agreement, the State makes a determination as to whether the
13 amendment is significant and, if so, must take public comment. *Id.* When the
14 parties cannot agree, the Consent Decree requires the parties to invoke the
15 dispute resolution procedures before seeking intervention from the Court. *See*
16 *id.* at 19–20.

17 _____
18 ² Energy's Revised Proposed Order also contains a revision allowing
19 Energy to propose milestones that combine and/or streamline its "critical
20 decision" process. Because this revision simply combines two pre-existing
21 Consent Decree milestones, the State does not believe that this proposed
22 revision triggers the Consent Decree amendment procedures.

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III. ARGUMENT

For the reasons set out below, this Court should reject Energy’s attempt to revise its Consent Decree proposal (and, thus, the Consent Decree) under the guise of supplementing its materials regarding the suitability of its original modification proposal.

A. Energy’s Revised Order Represents A Proposed Amendment To The Schedule That Must Follow Consent Decree Procedures

Energy’s Revised Proposed Order bumps the Consent Decree’s end date for the last nine SST retrievals by one year and represents a more significant deviation from the Consent Decree than its original proposal to simply backload the SST retrieval schedule but still meet the 2022 end date. As a result, the changing of the 2022 end date constitutes a discrete proposal, in and of itself, to amend the Consent Decree that triggers Section VII of the Consent Decree regarding amendment proposals. The State respectfully requests that the Court enforce these procedures.

As noted by this Court in its May 11, 2015, Order, an issuing court’s authority to modify consent decree terms is limited in the context of enforcing a decree. ECF No. 139 at 29 (citing *Sys. Fed’n No. 91, Ry. Emp. Dep’t, AFL-CIO v. Wright*, 364 U.S. 642, 647–52 (1961)). In enforcing a decree, “an issuing court is constrained by the decree’s terms and may not enlarge or diminish a party’s obligations or rights due to changed external conditions.” *Id.* (citing *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 404 F.3d 821, 832 n.6

1 (2005) (noting that, unlike *modifying* a consent decree, when enforcing a decree
2 courts adhere to traditional rules of contract interpretation whereby the court's
3 authority is constrained by the language of the decree).

4 As described above, the Consent Decree places clear obligations on a
5 party proposing revisions, especially revisions impacting the Consent Decree
6 schedule.³ The proposing party must provide a written justification for the
7 proposed revision and allow the other party ten days to review and approve or
8 reject the proposal. ECF No. 59 at 11. If the proposal is agreed upon by the
9 parties and the State determines the revision is significant, the State is obligated
10 to provide the public with a meaningful opportunity to comment on the
11 proposed revisions. *Id.* And, parties may only seek judicial resolution of
12 revision disputes after undertaking the Consent Decree's dispute resolution
13 process, which is designed to foster amicable resolutions to issues over Consent
14 Decree implementation. *Id.* at 12, 20. Allowing Energy to propose an
15 additional schedule revision without following the Consent Decree's
16 procedures, even in the context of an ongoing judicial dispute, constitutes an
17 impermissible diminishment of both Energy's obligations and the State's rights
18 under the Consent Decree that this court should refuse to sanction.

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21 ³ For example, schedule revisions also require a description of impacts to
22 the HFFACO that may flow from the proposal. ECF No. 59 at 18.

1 Requiring compliance with the Consent Decree is not simply an exercise
2 in semantics. Allowing an end run around the Consent Decree process has
3 impacts beyond just the parties to the current dispute. First, following the
4 defined process, crafted specifically to encourage agreement whenever possible,
5 would not be futile. Executing the Consent Decree's revision process will give
6 the State an opportunity to fully review and vet Energy's new proposal, and the
7 justifications therefor that could culminate with the State agreeing that the
8 revision is proper. This would streamline remaining issues for the Court and
9 conserve limited judicial resources.

10 Next, a key component of the Consent Decree process is to ensure that
11 the public is informed of, and has an opportunity to weigh in on, revisions to the
12 Consent Decree. *See* ECF No. 59 at 11, 17. In the event that the State
13 ultimately agreed that the modification is warranted, sanctioning Energy's
14 bypass of the Consent Decree process would impact the State's duty to provide
15 for meaningful public comment on a substantial change to the Consent Decree.

16 For these reasons, the Court should enforce the Consent Decree and issue
17 an Order requiring Energy to follow the Consent Decree's revision procedures.

18 **B. Energy's Revised Order Is Procedurally Deficient And Prejudicial**
19 **To The State**

20 Pursuant to Federal Rule of Civil Procedure 60, this Court has the
21 inherent authority to modify its 2010 Consent Decree. *See also Rufo v. Inmates*
22 *of Suffolk Cnty. Jail*, 502 U.S. 367, 378–80 (1992). However, even if the Court

1 allows Energy to bypass the Consent Decree's modification procedures,
2 Energy's filing of its Revised Proposed Order is not properly before the Court.
3 Generally, the procedure for seeking action from a court, such as substituting an
4 existing pleading or other document, is to submit a written motion stating the
5 grounds for the request and the relief sought. *See* Fed. R. Civ. P. 7(b). Here,
6 Energy presents no motion for substituting its original proposed order. As a
7 result, Energy's Revised Proposed Order is procedurally deficient and should be
8 stricken on that basis alone.

9 Furthermore, Energy's efforts to revise its order—presented for the first
10 time a little more than a month from oral argument on the parties' Consent
11 Decree proposals—should be denied as unduly prejudicial.

12 Although Energy's filing seeks to amend and/or substitute its proposed
13 order, procedurally Energy's efforts here are analogous to seeking to amend a
14 pleading pursuant to Federal Rule of Civil Procedure 15. Similar to a
15 complaint, the parties' original motions to amend and the associated proposed
16 orders were filed at the outset of the present dispute and have served as the
17 benchmark around which all subsequent actions and arguments have been
18 tailored. No party has had an opportunity to provide briefing on Energy's
19 revised proposal, and the parties are limited to filing rebuttals to the
20 supplemental declarations filed on June 5, 2015. Even if the Court allowed
21 supplemental briefing at this point, it is highly unlikely that sufficient time
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1 remains before the July 23, 2015, oral argument to do so without jeopardizing
2 the argument date.

3 Similar to modifying a complaint on the eve of trial, the dual problems of
4 delay and prejudice to the non-moving parties provide for the Court exercising
5 its discretion to strike the revised order and deny amendment. *See Lockheed*
6 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999).
7 The Court should exercise that discretion in this case.

8 **IV. CONCLUSION**

9 Based on the foregoing, the State respectfully requests that this Court
10 strike the identified portions of Energy’s Revised Proposed Order, ECF
11 No. 149, and enter an Order requiring Energy to comply with the Consent
12 Decree’s revision procedures. In the alternative, and if the Court allows Energy
13 to revise its Proposed Order, the State respectfully requests permission to file
14 supplemental briefing and supporting materials regarding the suitability of
15 Energy’s Revised Proposed Order.

16 DATED this 19th day of June, 2015.

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PROOF OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the U.S. District Court using the CM/ECF system which will send notification of such filing to all parties of record as follows:

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DATED this 19th day of June, 2015.

s/ Andrew A. Fitz

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