

The Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY, a Washington  
non-profit corporation,

Plaintiff,

v.

BARRY THOM, in his official capacity as  
Regional Administrator of the National Marine  
Fisheries Service; CHRIS OLIVER, in his  
official capacity as the Assistant Administrator  
for Fisheries of the National Marine Fisheries  
Service; NATIONAL MARINE FISHERIES  
SERVICE; WILBUR ROSS, JR., in his official  
capacity as Secretary of the United States  
Department of Commerce; and UNITED  
STATES DEPARTMENT OF COMMERCE,

Defendants.

and

ALASKA TROLLERS ASSOCIATION,

Intervenor-Defendant  
Applicant.

No. 2:20-cv-0417-MLP

**UNOPPOSED MOTION TO INTERVENE  
BY ALASKA TROLLERS ASSOCIATION**

**NOTING DATE: April 23, 2020**

**I. MOTION TO INTERVENE**

Pursuant to Fed. R. Civ. P. 24(a), Alaska Trollers Association, organized in Alaska as a  
non-profit trade association for professional salmon trollers and salmon-related businesses,  
respectfully moves to intervene as of right as Defendant in the action brought by Plaintiff Wild  
Fish Conservancy. In the alternative, Alaska Trollers Association moves to intervene

1 permissively as Defendant pursuant to Fed. R. Civ. P. 24(b). Counsel for Alaska Trollers  
2 Association conferred with counsel for Plaintiff and Defendants and they stated they will not  
3 oppose this Motion to Intervene in this action. Plaintiff Wild Fish Conservancy does not oppose  
4 the requested intervention but requests the setting of appropriate conditions. *See* Fed. R. Civ. P.  
5 24(a) Advisory Committee Note on 1966 Amendment (“An intervention of right under the  
6 amended rule may be subject to appropriate conditions . . .”). Specifically, the Conservancy  
7 requests that the intervention order extend the page limits of LCR 7 for the Conservancy when  
8 responding/replying to two separate briefs filed by Federal Defendants and Intervenor by an  
9 additional 66% of the applicable limit (e.g., for a brief with a 12-page limit, an additional eight  
10 pages would be permitted). Intervenor-Defendant Applicant agreed with that condition while  
11 Defendants took no position on the Motion to Intervene or on the Plaintiff’s requested page  
12 extension proposal. Accordingly, this Motion to Intervene is unopposed, but the proposed Order  
13 granting intervention provides for the eight-page extension requested by Plaintiff and agreed to  
14 by Intervenor-Defendant Applicant.

## 15 II. INTRODUCTION

16 On March 18, 2020, Wild Fish Conservancy (“WFC”) filed a Complaint in this Court  
17 against the National Marine Fisheries Service (“NMFS”) and its Regional Administrator Barry  
18 Thom, as well as Wilbur Ross, the Secretary of Commerce, the federal cabinet department in  
19 which NMFS is housed. The Complaint contends that NMFS has violated Section 7 of the  
20 Endangered Species Act (“ESA”) and its implementing regulations “by adopting and  
21 implementing the 2019 SEAK BiOp and its incidental take statement and by continuing to  
22 authorize and manage salmon fisheries in the Exclusive Economic Zone (EEZ) of Alaska without  
23 ensuring that such fisheries will not jeopardize the continued existence of the endangered  
24 Southern Resident Killer Whale...”. The Complaint further alleges that Defendants violated the  
25 ESA and National Environmental Policy Act (“NEPA”). Plaintiff seeks a declaration that the  
26 Defendants have violated Section 7 of the ESA, as alleged, and seeks a mandatory injunction

1 from the Court "... setting aside NMFS's 2019 SEAK BiOp and incidental take statement ... and  
2 enjoining" ... NMFS from authorizing take associated with the salmon fisheries in the EEZ of  
3 Alaska "until NMFS complies with the ESA and NEPA and further seeks to enjoin any salmon  
4 fishery in the SEAK EEZ.

5 Because of the allegations in the Complaint and the remedy sought and as explained  
6 below, Applicant fully satisfies the standard for intervention as of right under Rule 24(a) of the  
7 Federal Rules of Civil Procedure. In the alternative, Applicant satisfies the standard for  
8 permissive intervention under Rule 24(b).

### 9 III. APPLICANT

10 Applicant Alaska Trollers Association ("ATA") is a non-profit organization  
11 headquartered in and doing business in the State of Alaska, representing the interests of  
12 Southeast Alaska commercial salmon trollers. ATA's commercial fishing boat owner-operator  
13 members participate in the Southeast Alaska commercial troll salmon fishery, harvesting salmon  
14 for local, national and international consumers. Decl. of Amy Daugherty at ¶ 2; Decl. of Tad  
15 Fujioka at ¶ 15.

16 Plaintiff asks the Court to order "additional mitigation measures to reduce the risk of  
17 insufficient prey abundance and availability" for the affected orcas, and, presumably, the  
18 measures sought would include restrictions on the commercial salmon harvest. If so, ATA  
19 would be directly harmed by the remedy sought by Plaintiff. The additional mitigation measures  
20 Plaintiff asks the Court to impose will have a significant economic impact on the Applicant, its  
21 member family businesses, and on the small Southeast Alaska rural fishing-dependent  
22 communities from which they operate. The commercial salmon fishery in Southeast Alaska is  
23 one of the state's oldest and respected industries and has been long committed to sustainable  
24 harvest and fishery management policies. It supports countless family wage jobs in Southeast  
25 Alaska in coastal communities where such jobs are rare. ATA represents about 350 working  
26 commercial fishing industry business boat operations, mostly family owned and operated, which,

1 in turn, employ directly as crew members and indirectly thousands of employees in SE Alaska .  
2 Decl. of Amy Daugherty at ¶ 2; Decl. of Paul Olson at ¶ 13.

3 ATA has been working for many years to mitigate, and as much as feasible avoid, the  
4 very kinds of potential conflicts between commercial fishing operations and marine mammals,  
5 including Southern Resident Killer Whales, that are complained of in this action. Decl. of Amy  
6 Daugherty at ¶ 9.

7 Applicant is a fishing industry-based, non-profit organization whose members use and  
8 enjoy Southeast Alaska’s abundant marine resources and make all or part of their living  
9 sustainably harvesting those marine resources. ATA and its members have also been in the  
10 forefront of protecting and restoring these marine resources through habitat restoration,  
11 participation in the administrative process, and through litigation. *Id.*

12 Applicant and its commercial fishing family members also have a strong marine resource  
13 conservation ethic as well as significant incentives to reduce potential conflicts between  
14 commercial fishing activities and non-target marine wildlife. Applicant and its members also  
15 derive recreational, scientific, aesthetic, and other personal benefits from the existence in the  
16 wild of Southeast Alaska’s marine resources (including other whales and orcas) through wildlife  
17 observation, study, and photography, as well as aesthetic enjoyment. Decl. of Amy Daugherty at  
18 ¶ 10.

19 Based upon Applicant’s demonstrated interest in protecting marine resources (including  
20 orcas), as well as its strong incentive to minimize the potential for conflicts between commercial  
21 fisheries and other non-target marine resources (including Southern Resident Killer Whales) and  
22 their ongoing stake in the outcome of this litigation, this Court should allow its intervention.

#### 23 IV. ARGUMENT

##### 24 A. APPLICANT IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

25 The Federal Rules of Civil Procedure provide the following:

26 “On timely motion, the court must permit anyone to intervene who: .... (2)  
Claims an interest relating to the property or transaction that is the subject of the

1 action, and is so situated that disposing of the action may as a practical matter  
 2 impair or impede the movant's ability to protect its interest unless existing parties  
 adequately represent that interest.”

3 Fed. R. Civ. P. 24(a). This rule is to be “construed broadly in favor of the applicants.” *Idaho*  
 4 *Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9<sup>th</sup> Cir. 1995) (citing *United States v.*  
 5 *Oregon*, 913 F.2d 576, 587 (9<sup>th</sup> Cir.1990)); *see also Arakaki v. Cayetano*, 324 F.3d 1079, 1083  
 6 (9<sup>th</sup> Cir. 2003) (“Rule 24 traditionally receives liberal construction in favor of applicants for  
 7 intervention.”). *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9<sup>th</sup> Cir.  
 8 2009).

9 An applicant for intervention as of right must demonstrate the following:

10 (1) the intervention application is timely; (2) the applicant has a “significant  
 11 protectable interest relating to the property or transaction that is the subject of the  
 12 action”; (3) “the disposition of the action may, as a practical matter, impair or  
 impede the applicant's ability to protect its interest”; and (4) “the existing parties  
 may not adequately represent the applicant's interest.”

13 *Prete v. Bradbury*, 438 F.3d 949, 954 (9<sup>th</sup> Cir. 2006) (quoting *United States v. Alisal Water*  
 14 *Corp.*, 370 F.3d 915, 919 (9<sup>th</sup> Cir. 2004)). Practical considerations guide courts in applying this  
 15 test. *See* Fed. R. Civ. P. 24, advisory committee's note (“If an [applicant] would be substantially  
 16 affected in a practical sense by the determination in an action, he should, as a general rule, be  
 17 entitled to intervene[.]”). In the present case, Applicant satisfies each of the necessary elements  
 18 for intervention of right under Rule 24(a).

19 **B. Applicant's Motion for Intervention Is Timely.**

20 If a motion for intervention is filed prior to judgment in a case, courts examine three  
 21 factors to determine timeliness: (1) the stage of the proceedings at which an applicant seeks to  
 22 intervene; (2) the prejudice to the existing parties if intervention is allowed; and (3) the reasons  
 23 for and length of the delay. *California Dep't of Toxic Substances Control v. Commercial Realty*  
 24 *Projects, Inc.*, 309 F.3d 1113, 1119 (9<sup>th</sup> Cir. 2002) (citing *United States v. Washington*, 86 F.3d  
 25 1499, 1503 (9<sup>th</sup> Cir.1996)).

26 Under this test, Applicant's motion is clearly timely. Only about five weeks have passed

1 since WFC filed its complaint, and this action is in its early stages. No administrative record has  
2 yet been filed. As of the date of this filing, a Motion for Preliminary Injunction was just filed  
3 and is presently noted for May 8, 2020. This Motion to Intervene is, therefore, urgent.  
4 Applicant will abide by any briefing schedule set by this Court and does not anticipate seeking  
5 any independent discovery. Nor does Applicant anticipate inserting any new causes of action or  
6 new issues that would unduly delay relief. Under these circumstances, intervention will not  
7 prejudice the existing parties or delay the proceedings. *Cf. Navajo Nation v. Superior Court of*  
8 *State of Wash. for Yakima County*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999) (allowing  
9 Yakima Nation to intervene eight months after the complaint was filed, even though additional  
10 discovery and delay was anticipated, because “discovery has not been completed and a trial date  
11 has not yet been set.”).

12 **C. Applicant Has a Significant Interest in the Subject Matter of This Action.**

13 Rule 24(a) requires an applicant for intervention to possess a significant interest relating  
14 to the property or transaction that is the subject matter of the litigation. This “interest test” is not  
15 a rigid standard. *Fresno County v. Andrus*, 622 F.2d 436, 438 (9<sup>th</sup> Cir. 1980). Rather, it is “a  
16 practical guide to disposing of lawsuits by involving as many apparently concerned persons as is  
17 compatible with efficiency and due process.” *Id.* (quoting *Nuesse v. Camp*, 385 F.2d 694, 700  
18 (D.C. Cir. 1967)). Thus, “[t]he requirement of a significantly protectable interest is generally  
19 satisfied when ‘the interest is protectable under some law, and that there is a relationship  
20 between the legally protected interest and the claims at issue.’” *Arakaki*, 324 F.3d at 1084  
21 (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9<sup>th</sup> Cir. 1993)).

22 Applicant’s members are professional commercial fishing families who hold valid fishing  
23 permits to participate in Southeast Alaska’s commercial troll salmon fisheries, and do so to  
24 harvest salmon for their livelihood. Decl. of Amy Daugherty at ¶ 2; Decl. of Tad Fujioka at ¶ 3.  
25 There is thus a clear relationship between the Applicant’s members’ legally protected interests in  
26 making their living by salmon fishing and the Plaintiff’s request that this Court order “prey

1 abundance and availability for Southern Resident killer whales.” In effect, Plaintiff seeks to  
2 further limit Southeast Alaska’s salmon harvests. It is well accepted that such an economic  
3 interest is sufficient for purposes of intervention. *See, The Wilderness Society v. U.S. Forest*  
4 *Service*, 630 F.3d 1173, 1179 (9<sup>th</sup> Cir. 2011 (*en banc*)).

5 Applicant's missions include preservation and restoration of habitat for commercially  
6 fished species, as well as promoting biological and economic sustainability in all commercial  
7 fisheries. Decl. of Amy Daugherty at ¶¶ 4-9. The Applicant has already played a central role in  
8 efforts to reduce (and as much as feasible, to eliminate), conflicts between commercial ocean  
9 fishing gear and marine mammals. For example, ATA and its members have submitted  
10 comments to federal and state agencies on these issues, have provided testimony and evidence in  
11 government hearings, and have worked closely with government agencies as part of efforts to  
12 protect salmon and their habitat and ensure the fishery is environmentally sustainable. Decl. of  
13 Amy Daugherty at ¶¶ 5-9. It is also well accepted that such conservation interests are sufficient  
14 for purposes of intervention. *See Sagebrush Rebellion*, 731 F.2d at 526-28 (finding  
15 environmental groups’ “environmental, conservation and wildlife interests” sufficient for  
16 intervention as a matter of right). Applicant’s economic and livelihood interests in the Southeast  
17 Alaska commercial troll salmon fishery that Plaintiff seeks to curtail, and also its own long-term  
18 conservation efforts to limit other conflict problems with marine sea life generally, both would  
19 satisfy the “protectable interest” requirement of Rule 24(a). *See also U.S. v. Aerojet General*  
20 *Corporation*, 606 F.3d 1142, 1149 (9<sup>th</sup> Cir. 2010).

21 **D. Applicant’s Interest May Be Impaired As a Result of This Litigation.**

22 An applicant for intervention as of right must be “so situated that disposing of the action  
23 may as a practical matter impair or impede the applicant’s ability to protect its interest.” Fed. R.  
24 Civ. P. 24(a) (emphasis added). This impairment requirement should be viewed “as a practical  
25 matter” and “is not limited to consequences of a strictly legal nature.” *Forest Conservation*  
26 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1498 (9<sup>th</sup> Cir. 1995) (quoting *Natural Res.*

1 *Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10<sup>th</sup>  
2 Cir. 1978)); *see also* Fed. R. Civ. P. 24, advisory committee's notes. ("If an absentee would be  
3 substantially affected in a practical sense by the determination made in an action, he should, as a  
4 general rule, be entitled to intervene.").

5 Here, Applicant easily meets the third requirement for intervention as of right. WFC  
6 filed its Complaint for the express purpose, among other relief, of curtailing or closing down  
7 commercial ocean salmon fishing in southeast Alaska under the ESA. Should Plaintiff succeed,  
8 many of Applicant's commercial fisher members' economic interests in the harvest and  
9 marketing of salmon would greatly suffer as a direct result. Decl. of Paul Olson at ¶ 19; Decl. of  
10 Tad Fujioka at ¶¶ 13-15. Such a potential economic injury is clearly sufficient to satisfy the  
11 "impairment" requirement for intervention as of right. *See U.S. v. Alisal Water Corporation*, 370  
12 F.3d 915, 919, 58 Fed. R. Serv. 3d 562 (9<sup>th</sup> Cir. 2004 ("to trigger a right to intervene ... an  
13 economic interest must be concrete and related to the underlying subject matter of the action."))

14 **E. Applicant's Interests Are Not Adequately Represented.**

15 The final requirement for intervention as of right is a showing that the existing parties to  
16 the litigation may not adequately represent Applicant's interests. *See, e.g., Prete, supra*, 438  
17 F.3d at 956 (9<sup>th</sup> Cir. 2006). In determining whether Applicant's interests are adequately  
18 represented by the present parties, this Court should consider "whether [a present party] will  
19 undoubtedly make all of the intervenor's arguments, whether [a present party] is capable of and  
20 willing to make such arguments, and whether the intervenor offers a necessary element to the  
21 proceedings that would be neglected." *Id.* (quoting *Sagebrush Rebellion*, 713 F.2d at 528)  
22 (brackets in original) (emphasis added). To satisfy this fourth requirement, an intervenor need  
23 only make the "minimal" showing "that representation of its interests 'may be' inadequate . . ."  
24 *Id.* (quoting *Sagebrush Rebellion*, 713 F.2d at 528) (ellipses in original). In determining whether  
25 an applicant's interests are adequately represented, this Court should focus on "the 'subject of  
26 the action,' not just the particular issues before the court at the time of the motion." *Southwest*



1 *Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9<sup>th</sup> Cir. 2001).

2 In the present case, none of the present parties adequately represents Applicant's  
3 interests. WFC has already petitioned the court to order further mitigation measures to increase  
4 prey (salmon) abundance, which can only mean further curtailment of the Southeast Alaska  
5 ocean troll salmon fishery. The National Marine Fisheries Service ("NMFS"), on the other hand,  
6 is the regulatory agency with primary responsibility for enforcing the Endangered Species Act  
7 ("ESA") in ocean water fisheries, but does not have the first-hand experience or knowledge that  
8 the hands-on commercial fishing participants have about what will, as a practical matter, work  
9 (or not work) as to gear modification, time and area limitations and other potential mitigation  
10 measures to help reduce these conflicts, and thus to represent fishing industry interests as  
11 effectively and knowledgeably as the commercial fishing men and women themselves.  
12 Accordingly, neither Plaintiff nor federal Defendants adequately represent Applicant's interests  
13 in the subject matter of this litigation. This is more than sufficient for intervention. *Trbovich v.*  
14 *United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 30 L. Ed. 2d 686, 15  
15 Fed R. Serv. 2d 1083 (1972).

16 **V. APPLICANT SATISFIES STANDARDS FOR PERMISSIVE INTERVENTION.**

17 As detailed above, Applicant meets all of the requirements for intervention as of right  
18 under Rule 24(a). However, if this Court denies Applicant's intervention as of right, Applicant  
19 should alternatively be granted permission to intervene under Rule 24(b). This Rule provides for  
20 permissive intervention when an applicant "has a claim or defense that shares with the main  
21 action a common question of fact or law." Fed. R. Civ. P. 24(b). In determining whether to  
22 allow permissive intervention, this Court should consider "whether the intervention will unduly  
23 delay or prejudice the adjudication of the original parties' rights." *Id.*, 24(b)(3). In addition, this  
24 Court should examine whether Applicant's participation "will significantly contribute . . . to the  
25 just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd.*  
26 *of Educ.*, 552 F.2d 1326, 1329 (9<sup>th</sup> Cir. 1977).

1 Here, as discussed above, Applicant's intervention will not cause any delay or prejudice  
2 the existing parties to the case. In addition, Applicant's expertise in the science and practical  
3 mechanics surrounding salmon fisheries could well contribute to the resolution of this case.  
4 Given the importance of the issues involved in this case, the stake Applicant has in the fate of  
5 these valuable fisheries, and the early stage of the litigation, this Court should, in the alternative,  
6 allow its permissive intervention. The courts have adopted a liberal policy in favor of  
7 intervention, recognizing that intervention can foster judicial efficiency by preventing or  
8 simplifying future litigation involving related issues. *City of Los Angeles*, 288 F.3d at 397-98.  
9 Here, the interests of judicial economy and efficiency are furthered through consideration of  
10 ATA's interests and, consequently, granting intervention is appropriate.

## 11 VI. CONCLUSION

12 Applicant respectfully asks the Court to allow intervention as of right under Rule 24(a)  
13 because (1) Applicant's motion to intervene is timely, and Applicant will abide by any briefing  
14 schedule set by the Court; (2) Applicant has a significant interest in the subject matter of this  
15 case; (3) Applicant's interest may be impaired if intervention is not allowed; and (4) none of the  
16 existing parties adequately represent Applicant's interests. However, if the Court decides that  
17 the Applicant has not satisfied the requirements of Rule 24(a), Applicant asks the Court to  
18 exercise its broad discretion and allow Applicant to intervene pursuant to Rule 24(b). Such an  
19 exercise of discretion is justified because inclusion of Applicant will not delay the case or  
20 prejudice the existing parties and may facilitate prompt resolution of this controversy.

## 21 CONSULTATIONS WITH COUNSEL

22 Prior to this filing, Counsel for the Applicant has consulted with the lead Counsel for the  
23 Wild Fish Conservancy ("WFC") as Plaintiff and with Fred Turner and Coby Howell, counsel  
24 for Defendants. As set forth at the beginning of this Motion, Plaintiff Wild Fish Conservancy  
25 does not oppose the requested intervention but requests the setting of appropriate conditions. *See*  
26 Fed. R. Civ. P. 24(a) Advisory Committee Note on 1966 Amendment ("An intervention of right

1 under the amended rule may be subject to appropriate conditions . . .”). Specifically, the  
2 Conservancy requests that the intervention order extend the page limits of LCR 7 for the  
3 Conservancy when responding/replying to two separate briefs filed by Federal Defendants and  
4 Intervenor by an additional 66% of the applicable limit (e.g., for a brief with a 12-page limit, an  
5 additional eight pages would be permitted). Defendants stated they would “take no position” on  
6 this motion or the requested page extension. Accordingly, this Motion is unopposed, and the  
7 Proposed Order granting intervention includes the Reply brief-page extension requested by  
8 Plaintiff.

9 DATED: April 23, 2020.

10  
11 s/ Thane W. Tienson  
12 Thane W. Tienson, WSBA #13310  
13 Email: ttienson@lbbblawyers.com  
14 *Attorneys for Intervenor-Defendant Applicant*  
15 *Alaska Trollers Association*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2020, I served the foregoing UNOPPOSED MOTION TO INTERVENE BY ALASKA TROLLERS ASSOCIATION on the following individual(s):

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- by the Court's CM/ECF system to the email addresses listed above
- by facsimile pursuant to the fax numbers listed above
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s/ Kathy Baker  
Kathy Baker, Legal Assistant to Thane W. Tienson  
Attorneys for Intervenor-Defendant Applicant  
Alaska Trollers Association