

Honorable Richard A. Jones  
Honoarable Michelle L. Peterson

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff

vs.

BARRY THOM, et al.,

Defendant-Intervenor

and

ALASKA TROLLERS ASSOCIATION

Defendant-Intervenor

CASE NO: 2:20-cv-00417-RAJ-MLP

**MOTION TO INTERVENE**

NOTE ON MOTION CALENDAR:  
March 26, 2021

**I. Introduction**

The State of Alaska (“State”) moves for intervention as a matter of right as a defendant in this action, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The State seeks to participate fully in the briefing and other proceedings in this case in order to protect the State’s interest in the management of the Southeast Alaska (“SEAK”) chinook fishery, an interest that stands to be significantly impacted by relief Wild Fish Conservancy (“WFC” or “Plaintiff”) seeks

1 in this case. The State has a right to intervene under Fed. R. Civ. Proc. 24(a)(2) because the State  
2 has a significant interest relating to the subject of the action; the disposition of the action may  
3 impair or impede the State's ability to protect its interest; this motion is timely; and the existing  
4 parties may not adequately represent the State's interest. Alternatively, permissive intervention  
5 should be granted under Fed. R. Civ. Proc. 24(b).  
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7 This Motion is supported by the points and authorities discussed below.

## 8 **II. Factual and Procedural Background**

9 At issue in this case is the validity of the biological opinion that considers the effects of  
10 fisheries management in Southeast Alaska, governed in accordance with the Pacific Salmon  
11 Treaty ("Treaty"), on the endangered Southern Resident Killer Whales.  
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13 The Treaty is a bilateral agreement between the United States and Canada for the  
14 purposes of commercial, recreational, subsistence, and tribal fishing arrangements on the border  
15 between Washington and Canada, and on the border between Alaska and Canada.<sup>1</sup> The Treaty  
16 sets harvest limits on salmon fisheries from Alaska down the coast to Oregon and states that each  
17 party shall conduct its fisheries to prevent overfishing, provide for optimum production, and  
18 provide for each Party to receive benefits equivalent to the production of salmon originating in  
19 its waters. In fulfilling their obligations pursuant to the Treaty, the Parties are tasked with  
20 cooperating in management, research, and enhancement. The Treaty is periodically renegotiated,  
21 and the current agreement is in place from 2019 through the 2028.  
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23 The National Marine Fisheries Service ("NMFS") is responsible for management,  
24 conservation, and protection of the nation's marine resources within the United States waters.  
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27 <sup>1</sup> Each country retains jurisdictional management authority of their fisheries but manages them  
28 in a manner that is consistent with the Treaty.

1 Primarily, NMFS manages fisheries within the Exclusive Economic Zone (“EEZ”), which  
2 includes waters from 3 to 200 miles off the U.S. coast. NMFS has delegated certain management  
3 authority in Southeast Alaska to the State of Alaska, as allowed for by the Magnuson-Stevens  
4 Act. To consider the impact of the new ten-year Treaty and the corresponding delegation of  
5 salmon management to Alaska, NMFS prepared the Endangered Species Act (ESA) Section  
6 7(a)(2) Biological Opinion, WCR-2018-10660 (“BiOp”).  
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8 The BiOp specifically examined the effects of delegation of management authority in the  
9 EEZ to the State of Alaska, funding to implement the new 2019 Treaty Agreement in Southeast  
10 Alaska, and funding to address limiting factors affecting Puget Sound Chinook salmon and  
11 Southern Resident killer whales. With respect to the delegation of authority and funding, the  
12 BiOp found that because the SEAK fisheries occur outside the Southern Residents’ range, there  
13 is no potential for direct interaction between whales and fishing vessels or gear (i.e., there is no  
14 overlap in time and space). The section of the BiOp pertinent to this litigation determined that  
15 they were not able to quantify how reductions in prey would impact the Southern Residents.  
16 However, the BiOp found it likely that SEAK fisheries would only rarely have a measurable  
17 impact Southern Resident prey availability.<sup>2</sup> Furthermore, the BiOp stated that the largest salmon  
18 stocks contributing to the SEAK fisheries catch are currently not considered at the top of the  
19 priority prey list for Southern Residents. Moreover, the BiOp describes hatchery and habitat  
20 mitigation efforts that are anticipated to offset some of the loss from all fisheries managed under  
21 the Treaty, including the SEAK fisheries.  
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27 <sup>2</sup> 253, paragraph starting “In, summary”.  
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1 Wild Fish Conservancy filed a lawsuit, charging that NMFS violated both the ESA and  
2 the National Environmental Policy Act (“NEPA”) by adopting and implementing the BiOp. The  
3 State has a vital interest in the continued prosecution of the SEAK EEZ fishery, which the  
4 plaintiffs seek to shut down in this litigation. The State also has an interest in the welfare of its  
5 citizens, including their economic welfare, which is, in part, directly related to its fisheries and  
6 those federal fisheries adjacent to its waters. As detailed herein, the State has a significant  
7 financial stake in the SEAK EEZ fishery and closing the fishery would have a measurable  
8 negative impact on the State’s economic interests. The State’s intervention is timely and would  
9 not cause prejudice or delay to any involved party. Furthermore, as explained below, despite  
10 having similar goals, the above-captioned Defendants do not adequately represent the State’s  
11 interests. Therefore, the Court should allow the State to intervene as a matter of right under FRCP  
12 24(a)(2). Alternatively, if this Court finds the State is not entitled to intervene as a matter of right,  
13 the State should be granted permissive intervention under FRCP 24(b).

### 16 **III. The State Has a Right to Intervene Under Rule 24(a)**

17 The State has a right to intervene under Fed. R. Civ. Proc. 24(a) in order to defend the  
18 State’s interests against the claims asserted by WFC. Rule 24(a)(2) provides that on timely  
19 motion, the court must permit intervention by anyone who:  
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21 “[C]laims an interest relating to the property or transaction that is the subject  
22 of the action, and is so situated that disposing of the action may as a practical  
23 matter impair or impede the movant’s ability to protect its interest, unless  
24 existing parties adequately represent that interest.”

25 When analyzing a motion to intervene as a matter of right under FRCP 24(a)(2), the Ninth  
26 Circuit applies a four-part test: (1) the motion must be timely; (2) the applicant must claim a  
27 “significantly protectable” interest relating to the property or transaction which is the subject of  
28 the action; (3) the applicant must be so situated that the disposition of the action may as a practical

1 matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be  
2 inadequately represented by the parties to the action. *Wilderness Soc. v. U.S. Forest Serv.*, 630  
3 F.3d 1173, 1177 (9th Cir. 2011); (citing *Sierra Club v. US EPA*, 995 F.2d 1478, 1481 (9th  
4 Cir.1993)). Rule 24(a) is construed broadly, in favor of the applicants for intervention. *In re*  
5 *Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 894 F.3d 1030, 1037  
6 (9th Cir. 2018); (citing *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926  
7 (9th Cir. 1990)). Practical and equitable considerations guide courts in determining whether  
8 intervention is appropriate. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir.  
9 2001); *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) ("A liberal  
10 policy in favor of intervention serves both efficient resolution of issues and broad access to  
11 courts.").

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14 **A. The State's Motion is Timely**

15 The test by which courts determine timeliness for intervention requires the consideration  
16 of three factors: (1) the stage of the proceedings at which intervention is sought; (2) the prejudice  
17 that would be suffered by other parties if intervention were granted; and (3) the reason for and  
18 length of the delay in seeking intervention. *State of Alaska v. Suburban Propane Gas Corp.*, 123  
19 F.3d 1317, 1319–20 (9th Cir. 1997). The State's proposed intervention satisfies these timeliness  
20 requirements.

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22 As to the first factor, this motion is being filed at the relative beginning of these  
23 proceedings. While the complaint was filed in March of 2020, as of the date of this pleading no  
24 substantive motions have been filed save the plaintiff's motion for a preliminary injunction that  
25 this Court recently denied. The State intends to fully comply with all schedules and deadlines  
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1 established by this Court. As such, this factor weighs in favor of finding that the State's Motion  
2 to Intervene is timely.

3 Second, the State's participation will not prejudice the other parties. The State has attached  
4 a proposed Answer to Plaintiffs' Complaint contemporaneously with this Motion to Intervene.  
5 The State will endeavor to avoid duplication of issues with other parties. Moreover, given that  
6 this litigation is in its early stages, the State's intervention will not cause undue delay or adversely  
7 impact any parties' rights in this action. This factor also weighs in favor of finding that the State's  
8 Motion to Intervene is timely.  
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10 The third factor also weighs in the State's favor, as granting the Motion to Intervene at  
11 this stage will not cause any delays. Other than the preliminary injunction, no substantive actions  
12 have taken place between the original filing of the Complaint and the State's instant Motion to  
13 Intervene. Thus, the State's Motion to Intervene is timely.  
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15 **B. The State Has a Significantly Protectable Interest in this Case**

16 The second element for intervention as a matter of right requires that the proposed  
17 intervenor demonstrates a "significantly protectable interest" by showing that "the injunctive  
18 relief sought by the plaintiffs will have direct, immediate, and harmful effects upon [its] legally  
19 protectable interest." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818. The Ninth Circuit applies  
20 this broad interest criterion to involve "as many apparently concerned persons as is compatible  
21 with efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)  
22 (citation omitted); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818. It is generally sufficient that  
23 the interest asserted is protectable under some law, and that there is a relationship between the  
24 protected interest and the claims at issue. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818. Here,  
25 the State has several specific and significantly protectable interests in the subject matter of the  
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1 instant dispute. As detailed below, these interests, whether viewed individually or collectively,  
2 satisfy the second element of the intervention analysis.

3 First, the State has a direct economic interest in the results of the instant dispute. The  
4 SEAK salmon fishery has averaged \$806 million in output, \$484 million in gross domestic  
5 product, \$299 million in labor income or wages, and 6,600 full time equivalent jobs. (Declaration  
6 of Vincent-Lang, ¶ 14). The fishing industry is clearly a critical aspect of Alaska's economy. *Id.*  
7 Fishing is also a vitally important part of the social and economic fabric of SEAK coastal  
8 communities. *Id.* Many Alaskans rely on the industry's activities for employment, and the State  
9 and its municipalities collect landing tax revenues from that are subsequently used to provide  
10 services to their citizens. *Id.* at ¶ 15. While the revenue generated is important to Alaska's  
11 economy as a whole, it is particularly important to the Southeast communities in which the  
12 landings occur, as it provides for municipal school districts, school bond debt, utilities, and other  
13 municipal or borough services. *Id.* In addition to the fishery landing tax, municipalities may  
14 impose their own taxes, and commercial fishing operations contribute a share of the motor fuel  
15 and corporate income tax revenues collected by the State. *Id.*

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18 Second, the State has an interest in the management and regulation of its fish and wildlife.  
19 Under Alaska law, responsibility for fisheries management in Alaska is constitutionally vested in  
20 the Alaska legislature under Alaska Const. Art. VIII, § 2, but regulatory authority has been  
21 statutorily delegated to the Alaska Board of Fisheries and administrative authority to the  
22 Commissioner of the Alaska Department of Fish and Game. *See, e.g.,* AS 16.05.010; AS  
23 16.05.020; AS 16.05.050; AS 16.05.060; AS 16.05.221; AS 16.05.241; AS 16.05.251. Subject to  
24 a subsistence priority, the Alaska Board of Fisheries is authorized under state law to allocate  
25 fishery resources among various user groups including personal use, sport, and guided sport  
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1 fisheries, as well as commercial fisheries. AS 16.05.258; AS 16.05.251(e); 5 AAC 39.205.<sup>3</sup> Under  
2 this authority, the Alaska Board of Fisheries has adopted comprehensive fishery regulations for  
3 the SEAK commercial troll fisheries. *See e.g.* 5 AAC 29.001 et seq.

4 Additionally, the federal waters fishery is an important part of the SEAK fishery,  
5 comprising approximately 87 percent of the fishable area. *Id.* at ¶ 12. WFC seeks an injunction  
6 that will close salmon fisheries in the EEZ adjacent to Southeast Alaska. Any such closure will  
7 have significant adverse impacts on the State's economy and its citizens' welfare.

8 Whether the party moving to intervene demonstrates sufficient interest to intervene is a  
9 "practical, threshold inquiry" for which "[n]o specific legal or equitable interest need be  
10 established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); *aff'd Greene v. Babbitt*,  
11 64 F.3d 1266 (9th Cir. 1995). The moving party must demonstrate a "significantly protectable  
12 interest." *Donaldson v. United States*, 400 U.S. 517, 531 (1971), cited in *Southern Christian*  
13 *Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984).

14 This standard clearly is met here. As discussed above, the State has vital interests in the  
15 EEZ fishery off the coast of Southeast Alaska. WFC's requested relief, setting aside the BiOp,  
16 enjoining the EEZ fishery, and enjoining the delegation of authority to manage the EEZ fishery  
17 to Alaska unarguably confer upon the State a significantly protectable interest in this litigation.  
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24 <sup>3</sup> Personal use fishing is intended as a substitute for subsistence fishing and is often permitted in  
25 state nonsubsistence or federal nonrural areas, or in other areas where an adequate demonstration  
26 of customary and traditional use has not been made to support provision of a subsistence priority.  
27 *See, e.g.*, 5 AAC 77.001. Findings that taking or use has been "customary and traditional" are  
28 generally required in order to provide a subsistence preference under either state or federal law,  
and only rural residents are eligible for the federal preference. *See* AS 16.05.258(a); 50 C.F.R. §  
100.5(a)-(b); 50 C.F.R. § 100.16.

Courts have consistently held that rights such as those asserted by the State are sufficient to meet the standards required to intervene as a matter of right. *See, e.g., Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924 (9th Cir.1990) (finding that a City's interests in taxing and regulating contested lands were significantly protectable interests warranting intervention as of right); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 997-98 (8th Cir.1993) (finding that county's and landowners' property values that could be affected by the outcome of the litigation were protectable interests warranting intervention); *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir.1995) (holding that a county asserting proprietary environmental interests in lands adjacent to federal land had standing to challenge the Secretary of the Interior's failure to comply with NEPA); *Sierra Club v. Robertson*, 960 F.2d 83-84 (8th Cir.1992) (finding that a State's asserted interests in fish and wildlife, recreational opportunities, and water quality were sufficient to proceed as plaintiff-intervenor challenging the Forest Service's forest management plan). For the aforementioned reasons, the State has several significantly protectable interests in this dispute and must be able to fully defend the BiOp and the delegation of authority authorizing the State to manage salmon fisheries in the EEZ off the coast of Southeast Alaska.

**C. Disposition of the Action May Impair or Impede the State's Ability to Protect its Interest**

A third criterion for intervention as of right is that the action's disposition may, as a practical matter, impair or impede the intervenor's ability to protect the asserted interest. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d at 1177. The question of impairment is not separate from the question of existence of an interest. *See, e.g., Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). In reviewing this prong, courts look "to the 'practical consequences' of denying intervention, even where the possibility

1 of future challenge to the regulation [remains] available.” *Natural Res. Def. Council v. Costle*,  
2 561 F.2d 904, 909 (D.C. Cir. 1977).

3       Disposition of this action in Plaintiffs’ favor would set aside the BiOp, and the ITS therein,  
4 and lead to the closure of the salmon fishery in the EEZ off the coast of Southeast Alaska for an  
5 unknown amount of time. In addition to the direct impacts such a result would have on Alaska’s  
6 management of its participation in transboundary fisheries, its natural resources and its economy,  
7 as discussed above, disposition of this lawsuit may have far-reaching future consequences to the  
8 State. Pursuant to the principles of res judicata, claim preclusion, stare decisis, and related  
9 doctrines, the effects of the legal and factual determinations made in this litigation may constrain  
10 the State’s ability to defend similar challenges in parallel or subsequent judicial proceedings or  
11 administrative actions. *U.S. ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1396  
12 (9th Cir. 1992); *Fund For Animals, Inc. v. Norton*, 322 F.2d 728, 735 (D.C. Cir. 2003) (finding  
13 disposition of lawsuit impaired intervenor’s ability to protect its interests regardless of whether  
14 intervenor could reverse an unfavorable ruling by bringing a separate lawsuit, noting that “[t]here  
15 is no question that the task of reestablishing the status quo if [plaintiffs succeed] in this case will  
16 be difficult and burdensome.”).

17       In *Sierra Club v. United States*, 995 F.2d 1478 (9th Cir. 1993), the Ninth Circuit rejected  
18 the Sierra Club’s assertion that the City of Phoenix could protect its interests in subsequent  
19 administrative proceedings. The court noted “the relief sought by the Sierra Club would constrain  
20 the EPA, which would not then be free to violate the terms of the declaratory and injunctive relief  
21 in later administrative proceedings.” *Id.* at 1486. The Court also observed the City of Phoenix had  
22 no avenue to administratively appeal the constraints that might be placed on EPA’s regulatory  
23 duties by virtue of an injunction.  
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1 As discussed above, the broad relief plaintiffs seek against the Secretary, if granted, will  
2 impact the State's varied interests in this lawsuit. There is no other venue, forum, or opportunity  
3 available for protection of the State's interests.

4 Without intervention, the State would be facing the same kind of situation here. If  
5 Plaintiff's claims are successful, NMFS would be under constraints imposed by judicial directives  
6 and interpretations in limiting the State's actions under the salmon fishery management plan in  
7 Alaska and the State will have had no say in those directives or interpretations. For these reasons,  
8 the State satisfies the impairment requirement.  
9

10 **D. The Federal Defendants May Not Adequately Represent the State's**  
11 **Interests**

12 If an applicant meets the conditions of timeliness and impairment of interest, intervention  
13 shall be permitted "unless the applicant's interest is adequately represented by existing parties."  
14 Fed. R. Civ. P. 24(a)(2). According to the United States Supreme Court, "[t]he requirement of the  
15 Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and  
16 the burden of making that showing should be treated as minimal." *Trbovich v. United Mine*  
17 *Workers of America*, 404 U.S. 528, 538 n.10, (1972) (citation omitted). In assessing  
18 representation, courts consider (1) whether the present parties' interests are such that they will  
19 undoubtedly make all of the intervenor's arguments; (2) whether the present parties are capable  
20 and willing to make those arguments; and (3) whether the would-be intervenor would offer any  
21 necessary elements to the proceedings that other parties would neglect. *Sw. Ctr. for Biological*  
22 *Diversity*, 268 F.3d at 822. The inquiry should focus on the subject of the action, not just the  
23 particular issues before the court at the time of the motion. *Id.* at 823. Where an applicant for  
24 intervention and an existing party have the same ultimate objective, a presumption of adequacy  
25 of representation arises. *Id.*  
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1 In this case, the State's interest and the federal defendants' interests and legal positions  
2 may be somewhat different. Because the federal defendants do not share the same proprietary and  
3 sovereign interests as the State, they cannot be counted upon to adequately represent the State's  
4 multiple interests. While the federal defendants have an interest in the continued appropriate  
5 prosecution of the SEAK troll fishery in the EEZ, as required by the Fishery Management Plan  
6 ("FMP"), they do not have the same interests in preserving state management for sovereignty and  
7 independent management interests. Also, the federal defendants' concerns about fishery issues  
8 in other parts of the nation could possibly motivate federal interpretations and legal positions that  
9 are detrimental to the State's interests in salmon fisheries in the EEZ off Alaska. Upon  
10 intervention, the State would be able to argue for a narrower judicial focus.

#### 11 **IV. Alternatively, the State Should Be Allowed to Intervene Permissively**

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13 Alternatively, if this Court finds the State is not entitled to intervention as a matter of right,  
14 the State requests permissive intervention under FRCP 24(b). Upon timely filing of a motion, a  
15 court may permit a party to intervene who "has a claim or defense that shares with the main action  
16 a common question of law or fact." FRCP 24(b). In reviewing a permissive motion to intervene,  
17 a court shall consider whether the intervention will unduly delay or prejudice the adjudication of  
18 the rights of the original parties. *Sec. & Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434,  
19 459 (1940).

20  
21 First, the State's motion is timely for the reasons presented in Section A. Second, the State  
22 also satisfies FRCP 24(b)'s commonality requirement. Under governing Ninth Circuit precedent,  
23 applicants meet the requirement for a common question of law or fact when they assert defenses  
24 "directly responsive" to the plaintiffs' claims, as the State has done here. *See, e.g., Kootenai Tribe*  
25 *of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (intervenor environmental group  
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1 seeking to defend Forest Service “roadless” rule granted permissive intervention), *rev’d on other*  
2 *grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Because the State  
3 seeks to defend the challenged federal agency actions, the State’s defenses have questions of law  
4 and fact in common with Plaintiff’s claims and, presumably, Defendants’ defenses to the same.  
5 As a result, in the event this Court finds the State is not entitled to intervention as a matter of right,  
6 the State nonetheless satisfies the elements for FRCP 24(b). As such, this Court should enter an  
7 Order granting the State leave to intervene in this lawsuit.  
8

9       The State meets all the requirements for permissive intervention under this rule. The State  
10 does not anticipate raising any additional issues in the litigation; rather, it hopes to bring the  
11 perspective of the party whose stake in the outcome is perhaps greater than the federal  
12 defendants’. The State’s defenses in this action will address questions of law and fact that are in  
13 common with those already raised. The State has significant interest in, and knowledge of, the  
14 fishery resources in the coastal areas of Alaska; it has much to protect and much to contribute to  
15 the equitable resolution of this case. As discussed above, this motion is timely and the State’s  
16 intervention will not delay the resolution of the case. Also, because the action involves a federal  
17 question, and because the State’s interests derive from the federal question presented, the court  
18 has an independent basis for jurisdiction in this matter.  
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20       Also, the delegation of authority and its attendant regulations were initiated by the North  
21 Pacific Fishery Management Council, upon which the Commissioner of the Alaska Department  
22 of Fish and Game sits by statutory directive. 16 U.S.C. § 1852(b)(1)(A). Thus, the commissioner  
23 has shared responsibility for administration of the FMP provisions of the Magnuson-Stevens Act.  
24 16 U.S.C. § 1852(h)(1). This provides an alternative basis for permissive intervention under Rule  
25 24(b)(2).  
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1       **V.       CONCLUSION**

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3               For the reasons stated above, the State respectfully requests that the court grant this Motion  
4 to Intervene as of right under Rule 24(a), or alternatively, permit the State to intervene under Rule  
5 24(b).

6 Dated: March 9, 2021

NOSSAMAN LLP  
LINDA R. LARSON

7  
8 By: /s/ Linda R. Larson  
9 Linda R. Larson

**CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 2021, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

/s/ Linda R. Larson

Linda R. Larson