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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:10-cv-00271-TMB
	)	
JANE LUBCHENCO, *et al.*,	)	
	)	
Defendants.	)	
	)	

**MOTION TO INTERVENE BY OCEANA, INC. AND GREENPEACE, INC.
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24**

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24(a), Oceana, Inc. ("Oceana") and Greenpeace, Inc. ("Greenpeace") move to intervene as of right as defendants. In the alternative, Oceana and Greenpeace move to intervene permissively as defendants pursuant to Rule 24(b).

Oceana and Greenpeace are conservation organizations with longstanding interests in the responsible management of fisheries in the North Pacific ecosystem and in the protection of endangered marine species, including Steller sea lions. Both organizations have advocated extensively for sustainable management of important sea lion prey species, including Atka mackerel, Pacific cod, and pollock, as well as measures necessary to protect sea lions, and both have engaged extensively in the process leading up to the biological opinion and interim final rule that are challenged in this litigation. Oceana and Greenpeace seek to intervene to protect these interests, which may not be adequately protected without their involvement. Intervenor-Defendants' proposed answer and a proposed order are attached.

Counsel for Intervenor-Defendants has conferred with counsel for Plaintiff and Defendants and is not authorized to convey those parties' position on this motion.

BACKGROUND

The Bering Sea/Aleutian Islands and Gulf of Alaska regions support extensive commercial fisheries, important shipping channels, vibrant communities, and vital marine resources. In particular, the Aleutian Islands ecosystem is one of the most vibrant and complex ocean environments in the world. The endangered Steller sea lion plays an important role as a top predator in this ecosystem.

The western stock of Steller sea lions has declined by almost ninety percent. *See* Ex. 3 at 13 (Bi. Op. at xxiii). Although there are indications that the population may be growing in some regions, it continues to decline rapidly in the western Aleutians and is declining less

dramatically, or is at best stable, in the central Aleutians and the central Gulf of Alaska. Ex. 3 at 13–14, 47c–d, 58 (Bi. Op. at xxiii–iv, 337–38, Tbl. 3.1b). Even in areas where the population may have grown, growth has been inconsistent—with the majority of the increase happening between 2000 and 2004—and, in many areas, not statistically significant. *See* Ex. 3 at 45, 47c, & 57–58 (Bi. Op. at 331, 337 & Tbls. 3.1a–b). The revised Recovery Plan for the Steller Sea Lion establishes very clear demographic criteria for recovery. To be considered for delisting, the population must have "increased (statistically significant) for 30 years (at an average annual growth rate of 3%), based on counts of non-pups (i.e., juveniles and adults)." Ex 4 at 18 (Recovery Plan at V-21). In addition, the population also must be stable or increasing "in at least 5 of the 7 sub-regions[;] . . . [t]he population trend in any two adjacent sub-regions can not be declining significantly[; and the] population trend in any sub-region can not have declined by more than 50%." *Id.*

The population is not meeting these criteria and may not be able to withstand further fragmentation if portions of the population go extinct. *See* Ex. 3 at 45, 47c, 47e–f, 48 (Bi. Op. at 331, 337, 339–41); Ex. 4 at 16–17 (Recovery Plan at V-14–V-15). The National Marine Fisheries Service (NMFS) has recognized that, because the causes of the population's declines are not fully understood, the steep, sixteen percent annual declines of the 1980's could happen again and lead to extinction. Ex. 4 at 17 (Recovery Plan at V-15). In addition, based on the most recent data available, natality (a measure of birth rates) continues to decline across the population with rates in some areas thirty-six percent lower than in the 1970's, before the steep population declines. Ex. 3 at 41–42, 48, 59 (Bi. Op. at 84–85, 341, Tbl. 3.7). The lower natality could also hinder the population's ability to meet long-term recovery goals. Ex. 3 at 47f (Bi. Op. at 340).

Since the mid-1990's, American Oceans Campaign, which eventually merged into Oceana, and Greenpeace have engaged with NMFS and the North Pacific Fishery Management Council to advocate that the North Pacific fisheries be managed sustainably and in a way that ensures protection of Steller sea lions. Ex. 3 at 32 (Bi. Op. at 4); Ex. 1 at 2 (LeVine Decl. ¶ 6). NMFS, however, consistently failed to consider adequately the need for limitations on the North Pacific fisheries that target the prey of the Steller sea lion and only after a series of legal challenges from these groups, and an injunction against fishing in sea lion critical habitat for a period of time, did NMFS begin to acknowledge the full scope of the problem and to impose more protective measures. *See Greenpeace v. NMFS*, 55 F. Supp. 2d 1248, 1265 (W.D. Wash. 1999) (remanding biological opinion that, instead of considering impact on endangered species, looked to what level of fishing would be consistent with past fishery practices); *Greenpeace v. NMFS*, 80 F. Supp. 2d 1137, 1149–50 (W.D. Wash. 2000) (biological opinion's assessment of several individual fisheries' effects on sea lions was inadequate because the cumulative impact of fisheries was not considered); *Greenpeace v. NMFS*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining groundfish fishing in sea lion critical habitat until NMFS produced adequate biological opinion); *Greenpeace v. NMFS*, 237 F. Supp. 2d 1181, 1199, 1203 (W.D. Wash. 2002) (remanding biological opinion because NMFS failed to justify its breakdown of critical habitat into zones, and failed to show that fishing outside the zones would not affect fish in the zones). By 2003, NMFS had produced a supplemental biological opinion with expanded sea lion conservation measures. Ex. 3 at 33 (Bi. Op. at 5). Though Oceana and Greenpeace had reservations about the adequacy of the agency's analysis and the measures it adopted, the organizations did not challenge that ultimate version of the biological opinion, instead opting to allow the measures to go forward and evaluate their success over time.

NMFS reinitiated formal consultation in 2006 to evaluate changes in management and new information gained since the previous consultation. Ex. 3 at 29 (Bi. Op. at 1). On December 8, 2010, NMFS released a biological opinion analyzing the effects on Steller sea lions of the authorization of groundfish fisheries under the Bering Sea/Aleutian Islands and Gulf of Alaska groundfish fishery management plans. Ex. 3 at 31 (Bi. Op. at 3); Compl. ¶ 69, Dkt. No. 1 at 17. In the opinion, NMFS concludes that the authorization of the groundfish fisheries under the plans is likely to cause jeopardy to Steller sea lions and adversely modify their critical habitat. *See* Ex. 3 at 52 (Bi. Op. at 345) (conclusion with respect to jeopardy); Ex. 3 at 55 (Bi. Op. at 348) (conclusion with respect to adverse modification).

According to this biological opinion, the previously imposed restrictions may be partly successful in slowing the decline of sea lions, but they have not been sufficient to eliminate the risk of extinction or to allow for recovery. *See* Ex. 3 at 49 (Bi. Op. at 342). Thus, the biological opinion explains that although a variety of factors may be contributing to the decline of sea lions, the groundfish fisheries, including the pollock, Atka mackerel, and Pacific cod fisheries, are likely competing with sea lions for the same fish, reducing the prey field for sea lions and causing chronic nutritional stress. *See* Ex. 3 at 49–53 (Bi. Op. at 342–46). Specifically, NMFS finds that the competition between commercial groundfish fisheries and sea lions may be sufficient to jeopardize Steller sea lions and adversely modify their critical habitat by depleting prey resources. Ex. 3 at 52, 55 (Bi. Op. at 345, 348). NMFS's conclusion focuses on the effects of fishing for Atka mackerel and Pacific cod in the western and central Aleutians because these are the most important prey species for sea lions in the areas that have shown the steepest population declines over the past decade. *See* Ex. 3 at 51–52, 54–55 (Bi Op at 344–45, 347–48)

To address these problems, NMFS proposed a reasonable and prudent alternative that leaves the current sea lion protection measures in place and, in addition, prohibits fishing for Atka mackerel and Pacific cod in the far-western Aleutian Islands and limits these fisheries near critical habitat in the western part of the central Aleutians. Ex. 3 at 25–26 (Bi. Op. at xxxv–vi). By reducing competition with fisheries, these measures are designed to increase the availability of important prey species for sea lions in the areas that have shown the steepest declines. Ex. 3 at 27 (Bi. Op. at xxxvii). The biological opinion does not include any new restrictions on fishing outside of these areas, even though natality has continued to decline across the entire range of the western population of Steller sea lions. *See* Ex. 3 at 59 (Bi. Op. at Tbl. 3.7).

With the final biological opinion, NMFS released an interim final rule that will implement the reasonable and prudent alternative. *See* Fisheries of the Exclusive Economic Zone Off Alaska; Steller Sea Lion Protection Measures for the Bering Sea and Aleutian Islands Groundfish Fisheries Off Alaska, 75 Fed. Reg. 77,535 (Dec. 13, 2010) (to be codified at 50 CFR Pt. 679). NMFS waived the 30-day notice period, and the rule went into effect January 1, 2011 to govern the January fisheries; it will remain in effect until it is replaced with a final rule. *Id.* at 77,537.

Oceana and Greenpeace have provided substantial input regarding the current biological opinion. The organizations submitted extensive written comments on the draft biological opinion and presented written and oral testimony to the North Pacific Fishery Management Council advocating for stronger sea lion protection measures. *See* Ex. 5 (Oceana & Greenpeace Comments). The organizations argued that, at a minimum, the proposed measures were necessary, and further argued that additional measures may be necessary to address reduced natality across the population. *Id.* Additionally, Oceana submitted extensive comments to the

North Pacific Fishery Management Council, has attended meetings of the Council's Steller Sea Lion Mitigation Committee, and has been involved in the process through which NMFS sets catch levels for Steller sea lion prey species, including Atka mackerel and Pacific cod. Ex. 1 at 2–4 (LeVine Decl. ¶¶ 6–9). Oceana scientists and lawyers scrutinized the documents prepared by NMFS and the science underlying them and have been engaged in active correspondence with agency and NPFMC staff. Ex. 1 at 3–4 (LeVine Decl. ¶ 9). Similarly, over the past several years Greenpeace has attended North Pacific Fisheries Management Council meetings and provided the Council and its committees with testimony about interactions between Steller sea lions and commercial fishing. Ex. 2 at 1, 4 (Hocevar Decl. ¶¶ 1, 10). Greenpeace members sent over 10,000 comments to NMFS advocating for more stringent sea lion protection measures. Ex. 2 at 3–4 (Hocevar Decl. ¶ 10).

On December 14, 2010, the State of Alaska initiated this case with a complaint alleging violations of the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370h, the Magnuson Stevens Act (MSA), 16 U.S.C. §§ 1801–1891d, the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601–612, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 500, 551-559, 701–706. Compl. ¶ 2, Dkt. No. 1 at 2. In essence, these claims challenge the adequacy of NMFS's reasonable and prudent alternative and the process by which it was implemented. Oceana and Greenpeace now seek to intervene as defendants because the suit threatens the organizations' interest in sustainable management of North Pacific fisheries, Steller sea lions, and marine conservation, and because the organizations bring an under-represented, but valuable, conservation perspective to the litigation.

ARGUMENT

I. OCEANA AND GREENPEACE ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Oceana and Greenpeace satisfy each element of the four-part test for determining when intervention as of right under Rule 24(a) is warranted. Under this test,

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Wilderness Soc'y v. U.S. Forest Serv., No. 09-35200, __ F.3d __, 2011 WL 117627 at *2 (9th Cir. Jan. 14, 2011) (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993); *see also* Fed. R. Civ. P. 24(a). The test is applied "liberally in favor of potential intervenors," and a court's analysis "is 'guided primarily by practical considerations,' not technical distinctions." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quoting *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986)). When ruling on a motion to intervene, "[c]ourts are to take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true . . . ." *Id.* at 820.

The organizations meet each of the elements for intervention as of right.

A. <u>Oceana and Greenpeace's Motion For Intervention Is Timely.</u>

To assess timeliness, courts look to (1) the stage of litigation, (2) the prejudice to other parties, and (3) the reason for and length of any delay. *San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999). In the present case, Oceana and Greenpeace file this motion within weeks of Alaska's filing of the complaint, before

Defendants have filed their answer or the administrative record, before a schedule has been set, and before the Court has issued any substantive orders. There has been no delay or prejudice to opposing parties. The motion is therefore timely. *See id.* (finding motion timely when filed twelve weeks after basis for intervening occurred); *see also, e.g.*, *PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212 (D. Nev. 2009) (timely when filed during an early stage of the proceedings, there, two months after filing); *Nikon Corp. v. ASM Lithography B.V.*, 222 F.R.D. 647, 649-50 (N.D. Cal. 2004) (timely when no dispositive motions have been decided, despite moving to intervene mid-discovery).

B. Oceana and Greenpeace Have Significant Legally Protectable Interests in the Subject of This Litigation.

The second prong of the intervention test, the "protectable interest" requirement, is also satisfied. Rule 24(a) requires that an applicant for intervention possess an interest relating to the property or transaction that is the subject matter of the litigation. It does not pose a stringent test:

> [W]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established. It is generally enough that the interest asserted is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.

Sw. Ctr. for Biological Diversity, 268 F.3d at 818 (internal quotations, citation and brackets omitted); *see also Wilderness Soc'y*, 2011 WL 117627 at *3 ("the operative inquiry should be whether the 'interest is protectable under some law' and whether 'there is a relationship between the legally protected interest and the claims at issue.'") (quoting *Sierra Club*, 995 F.2d at 1484). The Ninth Circuit has consistently approved environmental groups' "intervention of right on the side of the federal defendant in cases asserting violations of environmental statutes." *Wilderness Soc'y*, 2011 WL 117627 at *4; *see also Haw. Longline Ass'n. v. NMFS*, 281 F. Supp. 2d 1, 11 (D.D.C. 2003) (conservation groups possess sufficient interest to be granted intervention of right

to defend biological opinion affecting fisheries management plan). "[T]he interest test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]" *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 398 (9th Cir. 2002) (internal citation omitted).

Oceana and Greenpeace have interests in the subject of this action, including specific interests in the protection of Steller sea lions and the North Pacific ecosystem. Oceana and Greenpeace are marine conservation organizations with longstanding commitments to protecting the North Pacific ecosystem, and both organizations have focused efforts on preserving endangered species—including efforts aimed at the survival and recovery of Steller sea lions. *See supra* at 3, 5–6. Oceana has been heavily involved in advocating for sustainable ocean management that supports vibrant communities and includes healthy populations of sea lions as well as sustainable fisheries by advocating at the agency level and by contributing to scientific research and educating the public. Ex. 1 at 2–3 (LeVine Decl. ¶¶ 5–6, 8). Likewise, Greenpeace has been involved in sea lion protections for over twenty years, beginning with the original 1989 petition to list the Steller sea lion as endangered. Ex. 2 at 3 (Hocevar Decl. ¶ 8–9). Greenpeace has frequently provided input to agencies involved in this litigation and has undertaken scientific expeditions in areas affected by this litigation. Ex. 2 at 3–4 (Hocevar Decl. ¶¶ 10–11). Moreover, Oceana's and Greenpeace's interest here is clarified by the injunctive relief sought by Plaintiffs—a bar against conservation measures these groups believe are important. *See, e.g.*, *Forest Conservation Council v. US Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995) *overruled on other grounds by Wilderness Soc'y*, 2011 WL 117627 at *1 (courts look to the merits of the

action as well as the nature of the injunctive relief sought in determining whether intervenors have an interest in the subject of the action).

Further, individual members of Oceana and Greenpeace have interests in sustainable management of the North Pacific ecosystem, including the survival and recovery of the Steller sea lion. Oceana's Alaska members include conservationists, fishermen, and scientists. Ex. 1 at 2 (LeVine Decl. ¶ 5). They rely on a healthy Bering Sea/Aleutian Islands ecosystem—one supporting Steller sea lions—for wildlife observation and photography, scientific studies, and subsistence. Ex. 1 at 5 (LeVine Decl. ¶ 12). Similarly, Greenpeace's members use and enjoy the regions potentially affected by this litigation for subsistence, recreation, wildlife viewing, education, scientific, aesthetic and spiritual reasons, including the observation and study of Steller sea lions. Ex. 2 at 4 (Hocevar Decl. ¶ 12).

The above interests are protectable under statues such as the ESA, NEPA, MSA, and APA. *See Wilderness Soc'y*, 2011 WL 117627 at *4 (noting trend of allowing environmental groups to intervene when asserting violations of environmental statutes); *see also, e.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (APA requires only that the plaintiff be in the "zone of interests" of the statute violated); *Nuclear Info. and Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) (it is "well settled" that environmental harms fall within the zone of interest of NEPA); *Greenpeace*, 55 F. Supp. 2d at 1248 (Greenpeace and American Oceans Campaign, which later merged into Oceana, able to bring NEPA and ESA suit in similar situation); *Haw. Longline Ass'n.*, 281 F. Supp. 2d at 11 & n.19 (similarly situated parties granted intervention in ESA litigation).

Further, the Ninth Circuit has found a public interest group's support of the measure being challenged to be strong evidence of an interest sufficient for intervention. *See Prete v.*

Bradbury, 438 F.3d 949, 954 (9th Cir. 2006); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983). In this case, the organizations have been actively involved in the process leading to the adoption of the measures disputed in this litigation, including attending meetings of, and testifying before, the North Pacific Fishery Management Council, providing substantive comments on the biological opinion, and taking part in the process leading to establishment of catch levels for Steller sea lion prey species. Ex. 2 at 3–5 (Hocevar Decl. ¶¶ 9–10, 14); Ex. 1 at 2–4 (LeVine Decl. ¶¶ 6–9).

Accordingly, Oceana and Greenpeace demonstrate protectable interests for the sake of intervention.

C. An Adverse Decision Would Impair Oceana's and Greenpeace's Interests in Steller Sea Lions and the Marine Ecosystem.

Rule 24(a) requires that an applicant for intervention as a matter of right be "so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." Fed. R. Civ. P. 24(a). Rule 24(a) does not require that the intervenors' interests would be legally impaired; it is enough that the applicant's ability to protect its interests may be impaired as a practical matter. *See Wilderness Soc'y*, 2011 WL 117627 at *3; *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988).

Oceana's and Greenpeace's interests, and the interests of their members, would be impaired by an adverse decision in this case. Oceana and Greenpeace believe that measures contested in this action are necessary to allow for survival and recovery of the western population of Steller sea lions, *see* Ex. 2 at 3 (Hocevar Decl. ¶ 7); Ex. 1 at 4 (Levine Decl. ¶¶ 12, 14), and the measures were imposed by NMFS because the agency found them necessary to avoid adverse modification of sea lion critical habitat and jeopardy of the species. Ex. 3 at 52, 55 (Bi. Op. at 345, 348). Reversing those measures would impair the organizations' and their

members' interest in preserving Steller sea lions and promoting the overall health of the marine ecosystem supporting sea lions.

Further, because this case challenges aspects of NMFS ability to promulgate the measures in question, the *stare decisis* effects of an adverse decision could limit the agency's ability to take similar measures in the future. This would have the practical effect of making it harder to protect the interests asserted by Oceana, Greenpeace, and their members. *See Wilderness Soc'y*, 2011 WL 117627 at *3 (interest sufficient if result of pending litigation practically impairs the interest); *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981) (effect of *stare decisis* may constitute sufficient impairment of interest to warrant intervention of right).

D. Oceana's and Greenpeace's Interests May Not Be Adequately Represented by the Government.

The organizations satisfy the final element for intervention because NMFS may not adequately represent their interests. To assess this element, courts consider:

> whether a present party will undoubtedly make all of the intervenor's arguments, whether a present party is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected. The burden of showing inadequacy of representation is minimal and is satisfied if the applicant shows that representation of its interests may be inadequate . . . .

Prete, 438 F.3d at 956 (internal quotations and brackets omitted) (citing *Sagebrush Rebellion*, 713 F.2d at 528). The overall question is how the proposed intervenor's "'interest compares with the interests of existing parties,'" and courts ensure that the two parties' interests are not identical. *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Where the government has "the duty to serve two distinct interests, which are related, but not identical," an intervenor's possession of only one of the interests provides sufficient differentiation to support intervention. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538–39 (1972).

Oceana and Greenpeace have different interests and different ultimate objectives than the federal defendants. NMFS is unusually situated in this case because it represents both the expert agency responsible for protecting the species and the action agency responsible for managing fishing. 75 Fed. Reg. at 77,536. Indeed, Dr. James Balsiger, who signed the biological opinion, is also ultimately responsible, as the administrator for the Alaska Region, for authorizing fisheries under the fishery management plans. Ex. 3 at 1 (Bi. Op.). Thus, the same agency that is defending the protections implemented for endangered Steller sea lions also is managing the fisheries that are contributing to the decline and failure to recover of the Steller sea lion population. In fact, as the history of litigation surrounding Steller sea lions demonstrates, NMFS has sometimes been unwilling to implement the necessary restrictions on fishing to protect sea lions. Greenpeace and American Oceans Campaign were therefore forced to resort to litigation to ensure that NMFS would meet its obligations to manage fisheries sustainably and protect sea lions. *See supra* p. 3.

Oceana and Greenpeace do not share the federal defendants' dual, at times conflicting, responsibilities and, instead, have as their ultimate objective in this litigation the protections of the Steller sea lion and the health of the marine ecosystem. This focus on conservation is particularly necessary here because it is the focus of the ESA, the statute driving the biological opinion and its reasonable and prudent alternative. *See* 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . .").

The organizations' focus on the health and conservation of the marine ecosystem is a sufficient basis for differentiating them from the agency's dual responsibilities to warrant

intervention of right. *See Trbovich*, 404 U.S. at 538–39 (allowing intervention where intervenor possessed solely one of government's two related duties); *Sagebrush Rebellion*, 713 F.2d at 528 (finding, where the government had an imputed conflict, that "the intervenor offers a perspective which differs materially from that of the present parties to this litigation."). The distinction also suggests that NMFS might not be likely or willing to make arguments that Oceana and Greenpeace may make. For example, in defending the need for the actions suggested in NMFS's biological opinion, Oceana or Greenpeace are free to highlight evidence that the situation is actually graver even than that acknowledged by NMFS's regulation.

Oceana's and Greenpeace's interests—sustainable management and conservation and the preservation of species—are central to this case, and are not identical to NMFS's interests. Therefore, the organizations should be allowed to intervene to raise arguments supporting this important focus and perspective.

II. IN THE ALTERNATIVE, OCEANA AND GREENPEACE SHOULD BE PERMITTED TO INTERVENE PERMISSIVELY

Rule 24(b) of the Federal Rules of Civil Procedure allows permissive intervention where an applicant's claim or defense, in addition to being timely, possesses questions of law or fact in common with the existing action. *See also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110–11 (9th Cir. 2002) (imposing same) *overruled on other grounds by Wilderness Soc'y*, 2011 WL 117627 at *1 (9th. Cir. Jan. 14, 2011). Once that threshold is passed, the Ninth Circuit has recognized that permissive intervention should be granted where it will not unduly delay or prejudice the adjudication of an existing party's rights, where the movant's interest is not adequately represented by an existing party, and where judicial economy will benefit from the intervention. *Venegas v. Skaggs*, 867 F.2d 527, 530–31 (9th Cir. 1989), *aff'd sub nom.*, *Venegas*

v. Mitchell, 495 U.S. 82 (1990); *see also Kootenai Tribe*, 313 F.3d at 1111 (affirming intervention granted due to complex case where "presence of intervenors would assist").

The threshold legal requirements for permissive intervention are clearly met here. As noted above, this motion is timely and allowing Oceana and Greenpeace to intervene will not delay the litigation. *See supra* p. 7–8. Further, questions or law or fact are shared with the main parties: Oceana and Greenpeace seek to intervene to address the legal questions raised by Alaska, and the organizations' intervention will revolve around the same factual background, the biological opinion, the reasonable and prudent alternative, and subsequent regulation. The organizations' intervention as defendants, not bringing new claims, would neither delay the litigation nor alter the factual background around which the claims revolve. The organizations meet the requirements for permissive intervention.

The Court should grant permissive intervention because the considerations guiding the Court's exercise of its discretion weigh in favor of intervention. As demonstrated above, Oceana and Greenpeace's interest is distinct from that of, and not adequately represented by, NMFS. *See supra* p. 12–14. Further, seeking to intervene as defendants, the organizations will not delay the litigation by bringing additional claims, and their intervention will not prejudice any party's ability to defend its rights. Instead the organizations bring an important and distinct perspective to a complicated case—a perspective that will assist the Court's resolution of the matter, furthering judicial economy. Steller sea lion preservation has a long and involved history. NMFS has been working on this biological opinion for over four years, and on Steller sea lion preservation for over eighteen years. Ex. 3 at 11–12 (Bi. Op. at xxi–xxii). Oceana and Greenpeace have been intimately involved in this process throughout much of that time, indeed, including Greenpeace's participation in the initial petition to list Steller sea lions as endangered.

Ex. 2 at 3–4 (Hocevar Decl.¶¶ 8–10); Ex. 1 at 2–3 (LeVine Decl. ¶¶ 6–8). The organizations' scientists and policy specialists have contributed specifically to the process leading to the challenged biological opinion. Ex. 2 at 3–4 (Hocevar Decl. ¶ 10); Ex. 1 at 3–4 (Levine Decl. ¶ 9). They are well positioned to present the legal and factual bases for NMFS's action from conservation and ecosystem management perspectives, without the potentially conflicting duty of fisheries management.

Oceana and Greenpeace will represent interests in this litigation that may not otherwise be represented, and their participation will contribute to the equitable resolution of this conflict. Accordingly, the organizations request permissive intervention.

CONCLUSION

For the reasons described above, Oceana and Greenpeace respectfully request that the Court grant their motion to intervene as defendants as a matter of right pursuant to Rule 24(a), or, in the alternative, permissively pursuant to Rule 24(b).

Dated this 2nd day of February, 2011.

Respectfully submitted,

s/ Katharine Glover

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2011, a copy of foregoing MOTION TO INTERVENE BY OCEANA AND GREENPEACE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24, with attached EXHIBITS, PROPOSED ANSWER, and PROPOSED ORDER, was served electronically on Bradley Edward Meyen, Murray Dov Feldman, John H. Martin, and Daniel Joseph Pollak.

s/ Katharine Glover

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TABLE OF EXHIBITS

Ex. No.	Description
1	Declaration of Michael LeVine, Oceana, Inc.
2	Declaration of John Hocevar for himself and Greenpeace, Inc.
3	National Marine Fisheries Service, Endangered Species Act – Section 7 Consultation, Biological Opinion Regarding the Authorization of Groundfish Fisheries Under the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area/ Authorization of Groundfish Fisheries under the Fishery Management Plan for Groundfish of the Gulf of Alaska/ State of Alaska Parallel Groundfish Fisheries (Nov. 24, 2010) (excerpts)
4	National Marine Fisheries Service, Recovery Plan for the Steller Sea Lion, Eastern and Western Distinct Population Segments (*Eumetopias jubatus*), Revision (March 2008) (excerpts)
5	Oceana, Greenpeace, *et al*., Comments on the Draft Biological Opinion (Sep. 3., 2010)