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16 UNITED STATES DISTRICT COURT  
17  
18 NORTHERN DISTRICT OF CALIFORNIA  
19  
20 (SAN JOSE)

21 OCEANA, INC.,

22 Plaintiff,

23 vs.

24 WILBUR L. ROSS, *In His Official Capacity As*  
25 *Secretary Of Commerce, et al.,*

26 Defendants.

Case No: 5:19-CV-03808-LHK

**CALIFORNIA WETFISH PRODUCERS  
ASSOCIATION'S AND MONTEREY FISH  
COMPANY'S NOTICE OF MOTION,  
MOTION TO INTERVENE PURSUANT TO  
FEDERAL RULE OF CIVIL PROCEDURE  
24 AND MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Hearing Date : November 21, 2019  
Time : 1:30 p.m.  
Courtroom : 8  
Judge : Hon. Lucy H. Koh

Case No: 5:19-cv-03809-LHK

CWPA'S AND MFC'S NOTICE OF MOTION, MOTION TO INTERVENE PURSUANT TO FRCP  
24 AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

**NOTICE OF MOTION AND MOTION TO INTERVENE**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 21, 2019, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located in Courtroom 8 at 280 South 1st Street, San Jose, California, California Wetfish Producers Association (“CWPA”) and Monterey Fish Company Inc. (“MFC”) (collectively, “Proposed Intervenor-Defendants”) will move to intervene as of right as defendants pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, Proposed Intervenor-Defendants move to intervene permissively pursuant to Rule 24(b).

By this motion, CWPA and MFC seek an order granting them leave to intervene as defendants in the above-entitled action. This motion is based on the fact that CWPA and MFC each have protectable interests that will be affected by the outcome of the litigation, which will not be adequately protected by those who are already parties to the litigation.

Upon issuance of an order granting CWPA and MFC leave to intervene, they will file and serve their Answer, a copy of which has been submitted with this motion and is attached as **Exhibit A**.

This motion is based on Rule 24 of the Federal Rules of Civil Procedure, this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of Motion to Intervene, the concurrently filed Declarations of Diane Pleschner-Steele and Salvatore M. Tringali, the attached proposed Answer, a proposed order, all pleadings and papers on file in this action, and upon such matters as may be presented to the Court at the time of the hearing.

Counsel for Proposed Intervenor-Defendants has conferred with counsel for Plaintiffs and Defendants. Plaintiff reserves its position until it has had the opportunity to review this motion. Defendants take no position on the motion to intervene.

Case No: 5:19-cv-03808 LHK

1 Dated: August 8, 2019

Respectfully submitted,

2 NOSSAMAN LLP

3 /s/ Paul S. Weiland

4 Paul S. Weiland (CA Bar No. 237058)

Linda R. Larson (WA Bar No. 9171), *pro hac vice*

5 *application pending*

*Attorneys for Proposed Intervenor-Defendants*

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28 Case No: 5:19-cv-03808 LHK

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF FACTS .....	1
A.	Prior related litigation in this Court. ....	1
B.	Proposed Intervenor-Defendants. ....	3
III.	ARGUMENT .....	5
I.	Proposed Intervenor-Defendants are entitled to intervene as a matter of right. ....	5
A.	Proposed Intervenor-Defendants’ motion for intervention is timely. ....	6
B.	Proposed Intervenor-Defendants have significant legally protectable interests in the subject of this litigation. ....	6
C.	An adverse decision would impair Proposed Intervenor- Defendants’ interests. ....	9
D.	Proposed Intervenor-Defendants’ interests may not be adequately represented by NMFS. ....	11
II.	In the Alternative, Proposed Intervenor–Defendants Should be Permitted to Intervene Permissively. ....	13
IV.	CONCLUSION .....	14

**TABLE OF AUTHORITIES****Page(s)****Federal Cases**

<i>Chiles v. Thornburgh</i> , 865 F.2d 1197 (11th Cir. 1989) .....	11
<i>Cty. of San Miguel, Colo. v. MacDonald</i> , 244 F.R.D. 36 (D.D.C. 2007).....	10
<i>Georgia v. U.S. Army Corps of Eng'rs</i> , 302 F.3d 1242 (11th Cir. 2002) .....	12
<i>Kootenai Tribe of Idaho v. Veneman</i> , 313 F.3d 1094 (9th Cir. 2002), <i>abrogated on other grounds by Wilderness Soc'y</i> , 630 F.3d 1173 .....	13
<i>Ocean Conservancy v. Gutierrez</i> , 394 F. Supp. 2d 147 (D.D.C. 2005) .....	12
<i>Oceana, Inc. v. Bryson</i> , 940 F. Supp. 2d 1029 (N.D. Cal. 2013) .....	2
<i>Oceana, Inc. v. Ross</i> , N.D. Cal. No. 5:16-cv-06784-LHK .....	2
<i>Perry v. Proposition 8 Official Proponents</i> , 587 F.3d 947 (9th Cir. 2009) .....	12
<i>PEST Comm. v. Miller</i> , 648 F. Supp. 2d 1202 (D. Nev. 2009) .....	6
<i>Portland Audubon Soc'y v. Hodel</i> , 866 F.2d 302 (9th Cir. 1989), <i>abrogated on other grounds by Wilderness Soc'y</i> , 630 F.3d 1173 .....	8
<i>Prete v. Bradbury</i> , 438 F.3d 949 (9th Cir. 2006) .....	7, 11, 13
<i>S. Yuba River Citizens League and Friends of the River v. Nat'l Marine Fisheries Serv.</i> , No. 06-2845, 2007 WL 3034887 (E.D. Cal. Oct. 16, 2007).....	12
<i>Sagebrush Rebellion, Inc. v. Watt</i> , 713 F.2d 525 (9th Cir. 1983) .....	7
<i>San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)</i> , 187 F.3d 1096 (9th Cir. 1999) .....	6

Case No: 5:19-cv-03808 LHK

1	<i>Sierra Club v. U.S. Envtl. Prot. Agency</i> ,	
2	995 F.2d 1478 (9th Cir. 1993) .....	8
3	<i>Smith v. Pangilinan</i> ,	
4	651 F.2d 1320 (9th Cir. 1981) .....	7
5	<i>Sw. Ctr. for Biological Diversity v. Berg</i> ,	
6	268 F.3d 810 (9th Cir. 2001) .....	5, 7
7	<i>Trbovich v. United Mine Workers of Am.</i> ,	
8	404 U.S. 528 (1972).....	11, 12
9	<i>United States v. City of Los Angeles, Cal.</i> ,	
10	288 F.3d 391 (9th Cir. 2002) .....	7
11	<i>United States v. Oregon</i> ,	
12	839 F.2d 635 (9th Cir. 1988) .....	7
13	<i>Venegas v. Skaggs</i> ,	
14	867 F.2d 527 (9th Cir. 1989), <i>aff'd sub nom.</i> , <i>Venegas v. Mitchell</i> , 495 U.S. 82 (1990) .....	13
15	<i>WildEarth Guardians v. Nat'l Park Serv.</i> ,	
16	604 F.3d 1192 (10th Cir. 2010) .....	10
17	<i>Wilderness Soc'y v. U.S. Forest Serv.</i> ,	
18	630 F.3d 1173 (9th Cir. 2011) .....	<i>passim</i>
19	<b>Federal Statutes</b>	
20	Magnuson-Stevens Act .....	<i>passim</i>
21	<b>Other Authorities</b>	
22	50 C.F.R. § 600.305(b) .....	11
23	84 Fed. Reg. 13858 (April 8, 2019).....	2
24	84 Fed. Reg. 25196 (May 31, 2019).....	<i>passim</i>
25	<b>Court Rules</b>	
26	Federal Rules of Civil Procedure Rule 24(b).....	13, 14
27	Federal Rules of Civil Procedure Rule 24(a).....	<i>passim</i>

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

CWPA is an organization consisting of long-standing participants in the federal anchovy, sardine and squid fisheries off of the coast of California. These fisheries are referred to as the Coastal Pelagic Species or “CPS” fisheries. For almost 80 years, MFC has processed anchovy, sardine and squid in Monterey, and also is a partner in two fishing vessels that participate in the CPS fisheries. Both entities advocate for sustainable and reasonable management of CPS fisheries, and have been deeply involved in the development of the fishery management plan for CPS species and associated amendments to it. Each has participated in the regulatory process leading to the 2019 National Marine Fisheries Service (“NMFS”) regulation establishing catch specifications for the anchovy fishery that Plaintiff seeks to overturn in this case. 84 Fed. Reg. 25196 (May 31, 2019) (“the 2019 Rule”). CWPA and MFC seek to intervene to protect these interests, which may not be adequately represented without their involvement. Proposed Intervenor-Defendants’ proposed answer and a proposed order are filed concurrently with this motion.

### **II. STATEMENT OF FACTS**

#### **A. Prior related litigation in this Court.**

This case is the latest in a series of cases by Plaintiff challenging federal management of the anchovy fishery under the Coastal Pelagic Species Fishery Management Plan (“CPS FMP”) developed by the Pacific Fishery Management Council (“Council”) pursuant to the Magnuson-Stevens Act (“MSA”). Harvests limits for the anchovy fishery are set through the framework in Amendments 8 and 13 to the CPS FMP. Plaintiff in this case challenges the harvest limits for the 2019–2020 anchovy fishery set by NMFS through the 2019 Rule. Dkt. 1 at 23–30. Plaintiff also appears to challenge the long-standing management framework for the anchovy fishery established by the CPS FMP and its

Case No: 5:19-cv-03808 LHK

1 amendments. *Id.* at 31 ¶ D. Plaintiff seeks to have the Court vacate the 2019 Rule and “the Coastal  
2 Pelagic Fishery Management Plan provisions and regulations that the 2019 Catch Rule implements.” *Id.*  
3 at 31 ¶¶ C, D.

4       The 2019 Rule reflects the agency’s compliance with this Court’s earlier orders issued in a 2016  
5 case, *Oceana, Inc. v. Ross*, N.D. Cal. No. 5:16-cv-06784-LHK (“the 2016 Litigation”), whereby Plaintiff  
6 challenged the reference points used by NMFS to set previous harvest limits for anchovy. In that case,  
7 the Court vacated the overfishing level (“OFL”), acceptable biological catch (“ABC”) and annual catch  
8 limits (“ACL”) for the central subpopulation of northern anchovy set by NMFS pursuant to  
9 Amendments 8 and 13 of the CPS FMP, followed by subsequent orders directing NMFS to establish  
10 new OFL, ABC and ACL limits through rulemaking. 84 Fed. Reg. 13858 (April 8, 2019).

11       The 2016 Litigation followed Plaintiff’s 2011 action challenging various aspects of Amendment  
12 13 to the FMP. *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029 (N.D. Cal. 2013). CWPA and MFC  
13 intervened as defendants in the 2011 case. *Id.*; Declaration of Diane Pleschner-Steele (“Pleschner-Steele  
14 Decl.”) ¶ 14; Declaration of Salvatore M. Trangali (“Trangali Decl.”) ¶ 6. The *Bryson* court found that  
15 the majority of Plaintiff’s challenges to the management framework set by Amendment 13 were  
16 untimely because they were not brought within the MSA’s 30 day statute of limitations. *See* 940 F.  
17 Supp. 2d at 1046–1055 (holding Plaintiff’s challenges to Amendment 13’s treatment of issues related to  
18 ABC, optimum yield (“OY”) and minimum stock size threshold (“MSST”) were untimely and Plaintiff’s  
19 challenge to Amendment 13 alleging violation of MSA’s National Standard 2 was untimely.)  
20  
21  
22

23       In essence, Plaintiff now challenges the adequacy of NMFS’ revised catch specifications and the  
24 process by which they were developed pursuant to Amendments 8 and 13 of the FMP. CWPA and MFC  
25 seek to intervene as defendants because the suit threatens their interests in the sustainable and reasonable  
26 management of the anchovy fishery under the CPS FMP, as well as their participation in the anchovy  
27



1 fishery, and as a practical matter the relief sought by Plaintiff would impair those interests. The two  
2 entities bring an under-represented but valuable industry and socio-economic perspective to the  
3 litigation.

4 **B. Proposed Intervenor-Defendants.**

5 Proposed Intervenor-Defendants are long-standing participants in the federal anchovy fishery,  
6 and have invested millions of dollars in scientific research aimed at better understanding the  
7 sustainable management of the central subpopulation of northern anchovy and other CPS species.

8  
9 CWPA is a non-profit association established in 2004 to promote sustainable fisheries and  
10 foster cooperative research. Voluntary membership in the association includes the majority of wetfish  
11 harvesters and processors operating in California. Pleschner-Steele Decl. ¶¶ 1, 3. CWPA members  
12 currently include 50 vessel owners and 8 processors in the Monterey Bay area and Southern California  
13 who harvest, process, and market the coastal pelagic species covered by the CPS FMP, including  
14 anchovy, which are landed in California. *Id.* ¶ 3. CWPA promotes the common business interests and  
15 conditions of the California wetfish industry. *Id.* ¶ 2. Those business conditions depend on the  
16 sustainable conservation and management of living marine resources within the California Current  
17 Ecosystem. The goals and objectives of CWPA include participating in research to facilitate science-  
18 based management of CPS fishery resources; cooperating with management agencies to develop  
19 management plans for wetfish resources that balance resource conservation and sustainable fisheries;  
20 ensuring continued adequate and appropriate access to fishery resources by CWPA members; and  
21 serving as a liaison between industry sectors, fishery managers, and the public. *Id.* ¶ 6.

22  
23  
24 To this end, CWPA has sponsored collaborative research with state and federal fishery  
25 managers related to CPS species, including anchovy, squid and sardine. *Id.* ¶ 7. Since its inception in  
26 2004, CWPA has invested more than \$3 million in anchovy, sardine and squid research in  
27

1 collaboration with the California Department of Fish and Wildlife and NMFS' Southwest Fisheries  
2 Science Center with most of those expenditures collected from assessments on CWPA members. In  
3 2011, CWPA signed a Memorandum of Understanding with the California Department of Fish and  
4 Wildlife regarding this research partnership that is continuing to be implemented. *Id.* CWPA is  
5 currently sponsoring collaborative field surveys to develop a nearshore biomass estimate for all CPS,  
6 including anchovy. *Id.* ¶ 8 and Ex. 1.

8 MFC, a CWPA member, is a family-owned, multi-generational processing company that has  
9 been processing anchovy in Monterey since 1941. Tringali Decl. ¶ 2. MFC operates a state of the art  
10 processing facility that handles coastal pelagic species exclusively with equipment that cannot be used  
11 to process other species. *Id.* ¶¶ 2, 10. MFC's goal is to maximize the value of CPS species for the local  
12 fleet and to serve the local community and international markets. *Id.* ¶ 2. MFC employs between 100–  
13 150 employees, depending on the season, including processing labor, supervisors, cold storage  
14 workers, shipping and receiving personnel, maintenance engineers, and administrative staff. In  
15 addition to its processing facilities, MFC is a partner in two of the six purse seine vessels that provide  
16 wetfish to the plant. All six vessels rely on wetfish for 100 percent of their landings and income. *Id.*  
17 ¶ 3. Thirty-six fishermen are employed on these vessels. *Id.* MFC depends on the wetfish complex  
18 regulated under the CPS FMP for 100 percent of the species it processes and sells. Anchovy is a  
19 critical part of MFC's business for at least seven months a year. *Id.* ¶ 4. The volume of anchovy  
20 authorized by annual catch specifications is critical for MFC to maintain processing operations and  
21 infrastructure. *Id.* ¶¶ 4, 7–9.

24 Proposed Intervenor-Defendants actively participated in the regulatory process triggered by the  
25 Court's orders in the 2016 case that culminated in the promulgation of the 2019 Rule. Each entity  
26 participated in the Council process. Proposed Intervenor-Defendants reviewed scientific papers,  
27

submitted comments, and advocated for objective and thorough scientific review of the available data related to anchovy catch management levels. Pleschner-Steele Decl. ¶ 11 and Ex. 2; Tringali Decl. ¶ 5 and Ex. 1.

If Plaintiffs are granted the relief they seek in this case—vacatur of the 2019 Rule and portions of the CPS FMP related to anchovy catch specifications—Proposed Intervenor-Defendants will be directly and immediately harmed by this drastic change to the regulatory regime in which they operate. Plaintiffs would lose their present access to the anchovy fishery, and would face a highly uncertain future without the management framework set by the CPS FMP.

### III. ARGUMENT

#### I. Proposed Intervenor-Defendants are entitled to intervene as a matter of right.

Proposed Intervenor-Defendants satisfy the four-part test for intervention as of right under Rule 24(a). Under this test: (1) the motion to intervene 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.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra Club v. U.S. Env’tl. Prot. Agency*, 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) (citations and quotations omitted). 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. Proposed Intervenor-Defendants meet each of the

elements for intervention as of right.

**A. Proposed Intervenor-Defendants' motion for intervention is timely.**

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, 1100–01 (9th Cir. 1999) (citation omitted). The present case is in its very early stages. Proposed Intervenor-Defendants file this motion less than six weeks after the Plaintiff filed its complaint. *See* Dkt 1. Defendants have not yet filed their answer to Plaintiff's complaint. The initial case management conference has been set by the clerk for October 23, 2019. *See* Dkt 14.

This case will be decided on the administrative record, which Defendants have not yet provided, and will likely be resolved upon summary judgment. Proposed Intervenor-Defendants will be prepared to meet whatever scheduling order this Court sets for dispositive motions. There has been no delay or prejudice to opposing parties. The motion is therefore timely. *See, e.g., PEST Comm. v. Miller*, 648 F. Supp. 2d 1202, 1212 (D. Nev. 2009) (holding a motion to intervene is timely when filed during an early stage of the proceedings, there, two months after filing of answer).

**B. Proposed Intervenor-Defendants 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. Here, Proposed Intervenor-Defendants' interests include long-term involvement in and dependence on the fisheries that Plaintiff's lawsuit, if successful, would further restrict.

1 Rule 24(a) does not pose a stringent test:

2 [W]hether an applicant for intervention demonstrates sufficient interest in an action is a  
3 practical, threshold inquiry. No specific legal or equitable interest need be established. It is  
4 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.

5 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (internal quotations, citation and brackets omitted);  
6 *see also Wilderness Soc’y*, 630 F.3d at 1176 (“[T]he operative inquiry should be . . . whether the  
7 ‘interest is protectable under some law,’ and whether ‘there is a relationship between the legally  
8 protected interest and the claims at issue.’” (quoting *Sierra Club*, 995 F.2d at 1484). “[T]he interest test  
9 directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of  
10 lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due  
11 process.” *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 398 (9th Cir. 2002) (internal  
12 quotations and citations omitted).

13 Proposed Intervenor-Defendants’ interests in this lawsuit are evident from their active  
14 involvement in the process leading to the measures disputed in this litigation, including attending  
15 meetings and submitting comments to NMFS related to the development of the 2019 Rule.  
16 Pleschner-Steele Decl. ¶ 11 and Ex. 2; Tringali Decl. ¶ 5 and Ex. 1. These efforts are only the latest  
17 actions in Proposed Intervenor-Defendants’ long-term participation in the development of  
18 management measures for anchovy. Pleschner-Steele Decl. ¶¶ 12–13.

19 Those past efforts extended to intervening in Plaintiff’s lawsuit against NMFS in 2011 that  
20 upheld crucial components of the management framework for anchovy set by Amendment 13 to the  
21 CPS FMP. Pleschner-Steele Decl. ¶ 14; Tringali Decl. ¶ 6. *See United States v. Oregon*, 839 F.2d 635,  
22 638 (9th Cir. 1988) (effect of stare decisis may constitute sufficient impairment of interest to warrant  
23 intervention of right); *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981) (same). Further, the  
24 Ninth Circuit has found that an organization’s support of the measure being challenged is strong  
25 evidence of an interest sufficient for intervention. *See Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir.  
26 2006); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983). In this case, Proposed  
27

Intervenor-Defendants have been actively involved in the process leading to the adoption of the measures contested in this case, including attending meetings of and testifying before the Council, and providing substantive comments on the proposed rule.

Proposed Intervenor-Defendants have taken these steps to protect their concrete “contractual or other legally protectable rights” to engage in and benefit from the commercial fishing industry in the area. *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d 1173 (internal quotation omitted). CWPA members are allowed to fish for anchovy under a federal limited access privilege program. California’s wetfish fleet operates under federal limited entry permits for CPS finfish (65 permits, 55 vessels in 2018) that are restricted by a capacity goal and landing limits. Pleschner-Steele Decl. at ¶4. CWPA has a protectable interest in the rules governing whether, where, and how their members can efficiently conduct their operations and exercise their federal authorizations to fish for anchovy. *See* 16 U.S.C. § 1853a (b)(1) and (5); *Portland Audubon*, 866 F.2d at 309; *Sierra Club*, 995 F.2d at 1482 (interests and rights stemming from existing permits sufficient to support intervention). CWPA members, which include MFC, also have a protectable interest in conducting research to support sound science regarding CPS fisheries and educating the public regarding the results of that research. Pleschner-Steele Decl. at ¶¶ 6–9.

MFC’s vessels have an interest in efficiently conducting their operations and exercising their federal authorizations to fish for anchovy. In addition, MFC’s processing operations are dependent on sustainable management of all CPS stocks, including anchovy. MFC processes all of the CPS stocks, depending on their relative abundance. For example, because the sardine fishery has been closed for several years, MFC depends on anchovy to keep its specialized equipment in use and its staff employed. Tringali Decl. ¶ 8. *See Wilderness Soc’y*, 630 F.3d at 1176 (“[T]he 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)).

1 CWPA and MFC demonstrate protectable interests for the purpose of intervention.

2 C. **An adverse decision would impair Proposed Intervenor-Defendants’**  
 3 **interests.**

4 Rule 24(a) requires that an applicant for intervention as a matter of right be “so situated that  
 5 disposing of the action may as a practical matter impair or impede the movant’s ability to protect its  
 6 interest.” Fed. R. Civ. P. 24(a). Rule 24(a) does not require that the intervenors’ interests would be  
 7 legally impaired; it is enough that the applicant’s ability to protect its interests may be impaired as a  
 8 practical matter. *See Wilderness Soc’y*, 630 F.3d at 1179.

9 Proposed Intervenor-Defendants’ interests would be directly, substantially impaired by an  
 10 adverse decision in this case. CWPA and MFC depend on anchovy harvest levels set at a level that  
 11 results in an environmentally sustainable and economically viable fishery. Virtually all CWPA  
 12 members, including fishermen and processors, rely primarily (more than 80 percent) or solely (100  
 13 percent) on coastal pelagic species for their livelihoods. Pleschner-Steele Decl. at ¶ 19. The wetfish  
 14 fleet harvests all coastal pelagic species in their cycles of abundance. Traditionally when one species is  
 15 not available another species in the wetfish complex comes along to fill the void. This has enabled  
 16 processing plants to stay open and fishermen to harvest fish to supply the markets. Tringali Decl. at  
 17 ¶ 9. Precautionary management in over recent years has placed restrictive harvest limits on all species  
 18 in the wetfish complex, making it more difficult to switch from one species to another as in the past.  
 19 *Id.* The sardine fishery has been closed since the 2015–2016 fishing year. Tringali Decl. at ¶ 8.

20 CWPA fishermen members own very expensive purse seine vessels and highly specialized  
 21 fishing nets. Most of these fishermen cannot participate in other fisheries with their existing boats and  
 22 gear. Further, most other fisheries have restricted access policies that require fishermen to own special  
 23 access permits in order to participate in the fishery. Most CWPA members do not own such permits.  
 24 Pleschner-Steele Decl. at ¶ 21. If CWPA member fishermen lose access to anchovy, or suffer the  
 25 reduced harvest opportunities that will occur if Plaintiff prevails, they could not afford to maintain  
 26 their vessels and equipment. With a significant reduction of income from fishing, many CWPA  
 27 members would not be able to pay their mortgages and could lose their homes. The equity CWPA



1 members have in their nets and gear, as well as in their boats, would become worthless because the  
 2 vessels and gear cannot be used in other fisheries. Pleschner-Steele Decl. at ¶ 22. In addition, with a  
 3 substantial reduction in fishing quotas, vessels would need to lay off their crews. Each vessel employs  
 4 six to as many as nine crewmen, including the skipper, to operate the vessel and skiff and to handle the  
 5 nets. *Id.*

6 If harvest limits for anchovy were reduced even another 10 percent, MFC will be forced to  
 7 sharply restrict or curtail its processing operations. Tringali Decl. at ¶ 9. If harvest levels are reduced  
 8 as Plaintiff seeks, the result will be a critical loss of processing volume and revenue to MFC and a  
 9 serious disruption in the supply of fish from its plant to its customers. Tringali Decl. at ¶ 7.

10 CWPA and MFC also depend on a reasonable, science-based approach to anchovy management.  
 11 If Plaintiff is successful in having Amendments 8 and 13 vacated, they would lose the certainty created  
 12 by the existing management framework. *Id.* CWPA would also lose the benefit of its on-going  
 13 investment in cooperative research projects that collect data important to rational, fact-based anchovy  
 14 management. CWPA's contributions to research are primarily funded through assessments paid by its  
 15 members. Pleschner-Steele Decl. at ¶ 7.

16 Moreover, if Plaintiff is successful and the 2019 catch specifications and/or portions of the CPS  
 17 FMP are remanded to the agency for further action, Proposed Intervenor-Defendants would incur the  
 18 cost of participating in additional rulemaking. Tringali Decl. at ¶ 7; Pleschner-Steele Decl. at ¶ 20. *See*  
 19 *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1199 (10<sup>th</sup> Cir. 2010)("[T]he interest of a  
 20 prospective defendant-intervenor may be impaired where a decision in the plaintiff's favor would  
 21 return the issue to the administrative decision-making process, notwithstanding the prospective  
 22 intervenor's ability to participate in formulating any revised rule or plan."); *Cty. of San Miguel, Colo.*  
 23 *v. MacDonald*, 244 F.R.D. 36, 47 (D.D.C. 2007)(finding intervenors had an impaired interest when the  
 24 relief plaintiff was seeking—vacating a not warranted Endangered Species Act finding on sage  
 25 grouse—would cause the intervenors to expend resources in a new administrative review).

26 These adverse impacts would at the very least constitute a "practical impairment" of Proposed  
 27



Intervenor-Defendants' interests. *See Wilderness Soc'y*, 630 F.3d at 1179.

**D. Proposed Intervenor-Defendants' interests may not be adequately represented by NMFS.**

Proposed Intervenor-Defendants satisfy the final element for intervention. To assess whether a proposed intervenor will be adequately represented by the existing parties, courts consider: (1) whether a present party will undoubtedly make all of the intervenor's arguments; (2) whether a present party is capable of and willing to make such arguments; and (3) whether the intervenor offers a necessary element to the proceedings that would be neglected. *Prete*, 438 F.3d at 956 (citing *Sagebrush Rebellion*, 713 F.2d at 528).

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 citations omitted; emphasis added); *see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (inadequate representation requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate" (citation omitted)). 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. *Prete*, 438 F.3d at 956 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)). Because the Plaintiff's interests are directly adverse to those of Proposed Intervenor-Defendants, the motion to intervene should be granted "unless it is clear that [the government] will provide adequate representation." *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (internal quotations omitted).

Proposed Intervenor-Defendants do not share the federal defendants' multiple, at times conflicting, responsibilities under the MSA. *See* 50 C.F.R. §600.305(b) ("In establishing objectives [for fishery management plans], Councils balance biological constraints with human needs, reconcile past and future costs and benefits, and integrate the diversity of public and private interests. If objectives are in conflict, priorities should be established among them.") Although NMFS and Proposed Intervenor-Defendants share an interest in the validity of the 2019 Rule and the CPS FMP,

1 NMFS has an obligation to consider and serve a broader range of interests and constituents in  
2 defending its actions than Proposed Intervenor-Defendants. “Even where the would-be intervenor has  
3 the same ‘ultimate objective’ as some of the parties, intervention may still be appropriate if its interests  
4 might diverge from those of the existing parties.” *S. Yuba River Citizens League and Friends of the*  
5 *River v. Nat’l Marine Fisheries Serv.*, No. 06-2845, 2007 WL 3034887, \*14 (E.D. Cal. Oct. 16, 2007)  
6 (quoting *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823–24).

7 NMFS must balance a number of competing economic, environmental, scientific, and  
8 conservation interests in its management of the fisheries. *See, e.g., Ocean Conservancy v. Gutierrez*,  
9 394 F. Supp. 2d 147, 158–59 (D.D.C. 2005). As a result, NMFS does not and cannot speak on behalf  
10 of Proposed Intervenor-Defendants, whose interests are to maximize sustainable participation in the  
11 fisheries based on sound science and do not answer to the same range of constituents as NMFS. Where  
12 the government has “the duty to serve two distinct interests, which are related, but not identical,” an  
13 intervenor’s possession of only one of the interests provides sufficient differentiation to support  
14 intervention. *Trbovich*, 404 U.S. at 538–39; *see Georgia v. U.S. Army Corps of Eng’rs*, 302 F.3d 1242,  
15 1259 (11th Cir. 2002) (reversing district court’s denial of a motion to intervene and stating “[w]e do  
16 not believe that a federal defendant with a primary interest in the management of a resource has  
17 interests identical to those of an entity with economic interests in the use of that resource.”)

18 The incongruity between the interests of Proposed Intervenor-Defendants and NMFS is evident  
19 in the 2019 Rule. Although Proposed Intervenor-Defendants share NMFS’ “ultimate objective” in this  
20 lawsuit of upholding the 2019 Rule and associated agency decisions, Proposed Intervenor-Defendants  
21 believe that NMFS’ interpretation of the available data has resulted in extremely precautionary harvest  
22 levels in the 2019 Rule that do not acknowledge or reflect first-hand observations by fishermen  
23 indicating that anchovy is abundant coast-wide. *See Pleschner-Steele Decl.* ¶ 11, Ex. 2; *Tringali Decl.*  
24 Ex. 1; *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950–52 (9th Cir. 2009) (citing  
25 *Arakaki*, 324 F.3d at 1086).

26 Given the nature of Plaintiff’s requested relief in this action, and the inherent divergence  
27

between the interests of Proposed Intervenor-Defendants and NMFS, Proposed Intervenor-Defendants request the opportunity to ensure that their interests will be represented. *See Prete*, 438 F.3d at 956 (burden is satisfied if the applicant shows that representation of its interests may be inadequate) (citing *Sagebrush*, 713 F.2d at 528).

**II. In the Alternative, Proposed Intervenor-Defendants 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), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173. 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 (grant of permissive intervention in part because, in complex case, "presence of intervenors would assist the court").

The threshold legal requirements for permissive intervention are clearly met here. As noted above, this motion is timely and allowing Proposed Intervenor-Defendants to intervene will not delay the litigation: Proposed Intervenor-Defendants seek to intervene as defendants, are not bringing new claims, would submit joint briefs, and would not delay the litigation, alter the factual background around which the claims revolve, or prejudice any party's ability to defend its rights. Further, questions of law or fact are shared with the main parties: Proposed Intervenor-Defendants seek to intervene to address the legal questions raised by Plaintiff, and Proposed Intervenor-Defendants' intervention will revolve around the same factual background and administrative record related to the validity of the 2019 Rule.

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, Proposed Intervenor-Defendants' interests are distinct from that of, and not adequately represented by, NMFS. *See supra* pp.11-13. Instead, Proposed Intervenor-Defendants will bring an important and distinct perspective to the latest episode in this long-running dispute—a perspective that will assist the Court's resolution of the matter. Proposed Intervenor-Defendants 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, Proposed Intervenor-Defendants request permissive intervention.

#### IV. CONCLUSION

For the reasons described above, CWPA and MFC 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: August 8, 2019

Respectfully submitted,

NOSSAMAN LLP

/s/ Paul S. Weiland

Paul S. Weiland (CA Bar No. 237058)

Linda R. Larson (WA Bar No. 9171), *pro hac vice*  
*application pending*

*Attorneys for Proposed Intervenor-Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 8, 2019, I electronically filed the document to which this Certificate of Service is attached with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all counsel of record.

/s/ Paul S. Weiland  
Paul S. Weiland

Case No: 5:19-cv-03808 LHK

# **EXHIBIT A**

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16  
17 UNITED STATES DISTRICT COURT  
18  
19 NORTHERN DISTRICT OF CALIFORNIA  
20  
21 (SAN JOSE)  
22  
23

24 OCEANA, INC.,

25 Plaintiff,

26 vs.

27 WILBUR L. ROSS, *In His Official Capacity As*  
28 *Secretary Of Commerce, et al.,*

Defendants.

Case No: 5:19-CV-03808-LHK

**[Proposed] ANSWER TO COMPLAINT OF  
INTERVENOR-DEFENDANTS**

Intervenor-Defendants California Wetfish Processors Association (“CWPA”) and Monterey Fish Company Inc. (“MFC”) (collectively, “Intervenor-Defendants”), as their answer to the Complaint, state as follows:

### INTRODUCTION

1. The first sentence of Paragraph 1 purports to characterize the Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), a statute that speaks for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation inconsistent with the plain language and meaning of the MSA. Intervenor-Defendants admit that Plaintiffs purport to challenge the National Marine Fisheries Service’s (“NMFS”) May 31, 2019 Catch Rule (“2019 Catch Rule”) and the Coastal Pelagic Species Fishery Management Plan (“Plan”) provisions that rule implements. Intervenor-Defendants state that no response is required to the remainder of Paragraph 1, because it asserts legal conclusions. If a response is required, Intervenor-Defendants deny the remaining allegations set forth in Paragraph 1.

2. Intervenor-Defendants admit that this Court previously issued a ruling in *Ocean v. Ross*, 5:16-cv-06784, 2018 WL 1989575 (N.D. Cal. Jan. 18, 2019), which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations inconsistent with the plan language and meaning of the ruling. Intervenor-Defendants deny the remaining allegations set forth in Paragraph 2.

3. Intervenor-Defendants admit that the 2019 Catch Rule establishes new reference points for the central subpopulation of northern anchovy. Intervenor-Defendants deny the remaining allegations set forth in Paragraph 3.

4. Intervenor-Defendants admit that the 2019 Catch Rule sets an annual catch limit (ACL) of 23,573 metric tons for the central subpopulation of northern anchovy. Intervenor-Defendants deny the remaining allegations set forth in Paragraph 4.

5. The first sentence of Paragraph 5 purports to characterize the MSA, a statute that speaks for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation inconsistent with the plain language and meaning of the MSA. Intervenor-Defendants deny the







1           25.     The allegations in Paragraph 25 purport to characterize the MSA, a statute that speaks for  
2 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
3 inconsistent with the plain language and meaning of the MSA.

4           26.     The allegations in Paragraph 26 purport to characterize the MSA, a statute that speaks for  
5 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
6 inconsistent with the plain language and meaning of the MSA.

7           27.     The allegations in Paragraph 27 purport to characterize the MSA, a statute that speaks for  
8 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
9 inconsistent with the plain language and meaning of the MSA.

10          28.     The allegations in Paragraph 28 purport to characterize the MSA, a statute that speaks for  
11 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
12 inconsistent with the plain language and meaning of the MSA.

13          29.     The allegations in Paragraph 29 purport to characterize the MSA, a statute that speaks for  
14 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
15 inconsistent with the plain language and meaning of the MSA.

16          30.     The allegations in Paragraph 30 purport to characterize the MSA, a statute that speaks for  
17 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
18 inconsistent with the plain language and meaning of the MSA.

19          31.     The allegations in Paragraph 31 purport to characterize the MSA and its implementing  
20 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
21 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
22 implementing regulations.

23          32.     The allegations in Paragraph 32 purport to characterize the MSA and its implementing  
24 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
25 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
26 implementing regulations.

1           33.     The allegations in Paragraph 33 purport to characterize the MSA and its implementing  
2 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
3 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
4 implementing regulations.

5           34.     The allegations in Paragraph 34 purport to characterize the MSA and its implementing  
6 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
7 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
8 implementing regulations.

9           35.     The allegations in Paragraph 35 purport to characterize the MSA and its implementing  
10 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
11 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
12 implementing regulations.

13           36.     The allegations in Paragraph 36 purport to characterize the MSA and its implementing  
14 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
15 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
16 implementing regulations.

17           37.     The allegations in Paragraph 37 purport to characterize the MSA and its implementing  
18 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
19 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
20 implementing regulations.

21           38.     The allegations in Paragraph 38 purport to characterize the MSA and its implementing  
22 regulations, which speak for themselves and contain the best evidence of their contents. Intervenor-  
23 Defendants deny any allegation inconsistent with the plain language and meaning of the MSA and its  
24 implementing regulations.

25           39.     The allegations in Paragraph 39 purport to characterize the MSA, a statute that speaks for  
26 itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
27 inconsistent with the plain language and meaning of the MSA.

**FACTURAL BACKGROUND**

40. With respect to the allegations in the first and second sentences of Paragraph 40, Intervenor-Defendants admit that anchovy are a keystone forage species and are preyed upon by a wide variety of marine wildlife, but otherwise deny the allegations as vague and ambiguous. The allegations in the third sentence of Paragraph 40 purport to characterize unidentified studies of predator diets, which speak for themselves and are the best evidence of their contents. Intervenor-Defendants deny any allegations contrary to their plain language and meaning.

41. The allegations in the first through fourth sentences of Paragraph 41 are vague and ambiguous and Intervenor-Defendants deny them on that basis. The allegations in the fifth sentence of Paragraph 41 characterize the decision removing the brown pelican from the list of species determined to be threatened or endangered under the ESA, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the decision's plain language and meaning. The allegations in the sixth sentence of Paragraph 41 are vague, ambiguous, and speculative, and Intervenor-Defendants deny them on that basis.

42. With respect to the allegations in the first sentence of Paragraph 42, Intervenor-Defendants admit that anchovy are preyed upon by marine mammals, birds, and other fish, but otherwise deny the allegations as vague and ambiguous. The allegations in the second and third sentences of Paragraph 42 purport to characterize an unidentified study, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the study's plain language and meaning.

43. Intervenor-Defendants admit that anchovy are preyed upon by species listed as threatened or endangered under the ESA, but otherwise deny the allegations in Paragraph 43 as vague and ambiguous.

44. With respect to the first sentence of Paragraph 44, Intervenor-Defendants admit that anchovy are eaten by wildlife, but otherwise deny the allegations in the first sentence of Paragraph 44 as vague, ambiguous, and speculative. Intervenor-Defendants are without knowledge or information sufficient to form a belief regarding the truth of the allegations set forth in the second sentence of

1 Paragraph 44 and therefore deny the same.

2 45. The allegations in Paragraph 45 are vague, ambiguous, and speculative, and Intervenor-  
3 Defendants deny them on that basis.

4 46. The allegations in Paragraph 46 are vague, ambiguous, and speculative, and Intervenor-  
5 Defendants deny them on that basis.

6 47. The allegations in the first sentence of Paragraph 47 are vague, ambiguous, and  
7 speculative, and Intervenor-Defendants deny them on that basis. The allegations in the second sentence  
8 of Paragraph 47 purport to characterize unidentified studies, which speak for themselves and are the best  
9 evidence of their contents. Intervenor-Defendants deny any allegations contrary to the studies' plain  
10 language and meaning.

11 48. The allegations in Paragraph 48 are vague, ambiguous, and speculative, and Intervenor-  
12 Defendants deny them on that basis.

13 49. The allegations in Paragraph 49 purport to characterize unidentified studies, which speak  
14 for themselves and are the best evidence of their contents. Intervenor-Defendants deny any allegations  
15 contrary to the studies' plain language and meaning.

16 50. The allegations in Paragraph 50 purport to characterize unidentified studies, which speak  
17 for themselves and are the best evidence of their contents. Intervenor-Defendants deny any allegations  
18 contrary to the studies' plain language and meaning.

19 51. Intervenor-Defendants admit that the central subpopulation of northern anchovy is  
20 managed pursuant to the Coastal Pelagic Species Fishery Management Plan. Intervenor-Defendants  
21 deny the remaining allegations set forth in Paragraph 51.

22 52. The allegations in the first sentence of Paragraph 52 purport to characterize a 2012 study,  
23 which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any  
24 allegations contrary to the study's plain language and meaning. The allegations in second sentence of  
25 Paragraph 52, which purport to characterize "warnings" by unidentified agency and other scientists, are  
26 vague, ambiguous, and speculative, and Intervenor-Defendants deny them on that basis. To the extent  
27 that the allegations in the second sentence of Paragraph 52 purport to characterize what level of fishing  
28

1 of sardine would be “permissible” under the Plan, the Plan speaks for itself and is the best evidence of  
2 its contents. Intervenor-Defendants deny any allegations contrary to the Plan’s plain language and  
3 meaning.

4 53. With respect to the allegations in the first sentence of Paragraph 53, Intervenor-  
5 Defendants aver that, while NMFS (and the Science and Statistical Committee of the Council) presented  
6 an updated stock assessment for Pacific sardine to the Council in April 2015, there was no “error” and  
7 therefore Intervenor-Defendants deny the allegations in the first sentence of Paragraph 53. As to the  
8 allegations in the second sentence of Paragraph 53, Intervenor-Defendants deny that a corrected  
9 assessment revealed the stock was below the minimum level to sustain a fishery. As to the allegations in  
10 the third and fourth sentences of Paragraph 53, Intervenor-Defendants (a) would not characterize the  
11 relatively low stock estimate as an indication that the stock had “failed to recover” because the stock has  
12 not been determined to be “overfished” and (b) deny the fishery was closed as a result of the corrected  
13 assessment or because the population had failed to recover. Intervenor-Defendants admit only that the  
14 directed non-tribal fishery for Pacific sardine – other than the directed fishery for live bait – was closed  
15 from April 2015 (a standard closure because the quota was reached) through June 30, 2016. Intervenor-  
16 Defendants further aver that incidental harvests of Pacific sardine in fisheries that target other species,  
17 harvests of Pacific sardine for live bait, and directed harvest by the Quinault Indian Tribe, were allowed  
18 during the same period. The allegations in the fifth sentence of Paragraph 53 purport to characterize  
19 NMFS’ April 2019 stock assessment, which speaks for itself and is the best evidence of its contents.  
20 Intervenor-Defendants deny any allegations contrary to that assessment’s plain language and meaning.

21 54. The allegations in Paragraph 54 are vague, ambiguous, and speculative, and Intervenor-  
22 Defendants deny them on that basis.

23 55. Intervenor-Defendants admit that the Coastal Pelagic Species Fishery Management Plan  
24 establishes the management framework for commercial fishing for anchovy and deny the remaining  
25 allegations set forth in Paragraph 55.

26 56. Intervenor-Defendants deny the allegations in Paragraph 56.

27 57. With respect to the allegations in the first and second sentences of Paragraph 57,  
28

1 Intervenor-Defendants admit that while the former Northern Anchovy Fishery Management Plan was in  
2 effect, periodic assessments of spawning and total biomass for northern anchovy and updated optimum  
3 yield specifications and catch levels occurred, but otherwise deny the allegations as vague and  
4 ambiguous. The remaining allegations in Paragraph 57 purport to characterize Amendment 5 to the  
5 former Northern Anchovy Fishery Management Plan, which speaks for itself and is the best evidence of  
6 its contents. Intervenor-Defendants deny any allegations as to the contents of that plan that are contrary  
7 to its plain language and meaning.

8 58. With respect to the allegations in Paragraph 58, Intervenor-Defendants admit the change  
9 in the name of the fishery management plan. The remaining allegations in Paragraph 58 purport to  
10 characterize the Plan, which speaks for itself and is the best evidence of its contents. Intervenor-  
11 Defendants deny any allegation inconsistent with the plain language and meaning of the Plan.

12 59. The allegations in Paragraph 59 purport to characterize the MSA, a statute that speaks  
13 for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
14 inconsistent with the plain language and meaning of the MSA.

15 60. The allegations in Paragraph 60 purport to characterize the Plan, a document that speaks  
16 for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
17 inconsistent with the plain language and meaning of the Plan.

18 61. The allegations in the first, third, and fourth sentences of Paragraph 61 purport to  
19 characterize the Plan, a document that speaks for itself and contains the best evidence of its contents.  
20 Intervenor-Defendants deny any allegation inconsistent with the plain language and meaning of the Plan.  
21 Intervenor-Defendants state that no response is required to the second sentence of Paragraph 61, because  
22 it asserts legal conclusions. If a response is required, Intervenor-Defendants deny the allegations set  
23 forth in the second sentence of Paragraph 61. To the extent that the allegations in Paragraph 61 also  
24 purport to characterize the MSA and its implementing regulations, the MSA and those regulations speak  
25 for themselves and contain the best evidence of their contents. Intervenor-Defendants deny any  
26 allegation inconsistent with the plain language and meaning of the MSA and its implementing  
27 regulations.



1           62.     The allegations in Paragraph 62 purport to characterize the Plan, a document that speaks  
2 for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
3 inconsistent with the plain language and meaning of the Plan.

4           63.     The allegations in the first sentence of Paragraph 63 purport to characterize the Plan, a  
5 document that speaks for itself and contains the best evidence of its contents. Intervenor-Defendants  
6 deny any allegation inconsistent with the plain language and meaning of the Plan. Intervenor-  
7 Defendants deny the remaining allegations in Paragraph 63.

8           64.     The allegations in the second and third sentences of Paragraph 64 purport to characterize  
9 various reports, which speak for themselves and are the best evidence of their contents. The remaining  
10 allegations in Paragraph 64 are vague, ambiguous, and speculative, and Intervenor-Defendants deny  
11 them on that basis.

12           65.     The allegations in Paragraph 65 purport to characterize the Plan, a document that speaks  
13 for itself and contains the best evidence of its contents. Intervenor-Defendants deny any allegation  
14 inconsistent with the plain language and meaning of the Plan.

15           66.     The allegations in Paragraph 66 are vague, ambiguous, and speculative, and Intervenor-  
16 Defendants deny them on that basis.

17           67.     The allegations in the first and second sentences of Paragraph 67 are vague, ambiguous,  
18 and speculative, and Intervenor-Defendants deny them on that basis. The allegations in the third  
19 sentence of Paragraph 67 purport to characterize statements of the U.S. Fish and Wildlife Service, which  
20 speak for themselves and are the best evidence of their contents. Intervenor-Defendants deny any  
21 allegations contrary to these statements' plain language and meaning.

22           68.     The allegations in the first sentence of Paragraph 68 are vague, ambiguous, and  
23 speculative, and Intervenor-Defendants deny them on that basis. The allegations in the second sentence  
24 of Paragraph 68 purport to characterize a study by NMFS scientists, which speaks for itself and is the  
25 best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the study's plain  
26 language and meaning.

69. The allegations in Paragraph 69 are vague, ambiguous, and speculative, and Intervenor-Defendants deny them on that basis.

70. The allegations in Paragraph 70 purport to characterize an unidentified 2016 study, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the study's plain language and meaning.

71. The allegations in Paragraph 71 are vague, ambiguous, and speculative, and Intervenor-Defendants deny them on that basis.

72. Intervenor-Defendants admit that NMFS promulgated the 2016 Catch Rule on October 26, 2016. To the extent that the allegations in Paragraph 72 purport to characterize the 2016 Catch Rule, Intervenor-Defendants aver that the 2016 Catch Rule speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the 2016 Catch Rule's plain language and meaning.

73. The allegations in Paragraph 73 characterize Plaintiff's prior complaint, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to that complaint's plain language and meaning.

74. Intervenor-Defendants admit the allegations in the first sentence of Paragraph 74. The remaining allegations in Paragraph 74 purport to characterize this Court's order, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the order's plain language and meaning.

75. Intervenor-Defendants admit that the Court vacated the 2016 Catch Rule and remanded the matter to the agency. The remaining allegations in Paragraph 75 purport to characterize this Court's order, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the order's plain language and meaning.

76. With regard to the allegations in the first sentence of Paragraph 76, Intervenor-Defendants admit that Plaintiffs moved to enforce the January 18, 2018 summary judgment order, but otherwise deny the allegations as vague and ambiguous. The remaining allegations in Paragraph 76 purport to characterize decisions of this Court, which speak for themselves and are the best evidence of

1 their contents. Intervenor-Defendants deny any allegations contrary to the decisions' plain language and  
2 meaning.

3 77. With regard to the allegations in the first sentence of Paragraph 77, Intervenor-  
4 Defendants admit that the Court ordered NMFS to publish and accept comment on a proposed rule, but  
5 otherwise deny the allegations as vague and ambiguous. The remaining allegations in Paragraph 77  
6 purport to characterize the subsequent court schedule, which speaks for itself and is the best evidence of  
7 its contents. Intervenor-Defendants deny any allegations contrary to that document's plain language and  
8 meaning.

9 78. Intervenor-Defendants admit that the 2019 Catch Rule was published on May 31, 2019.  
10 The remaining allegations in Paragraph 78 purport to characterize the 2019 Catch Rule which speaks for  
11 itself and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to  
12 that document's plain language and meaning.

13 79. The allegations in Paragraph 79 purport to characterize the proposed rule announcing the  
14 2019 Catch Rule, which speaks for itself and is the best evidence of its contents. Intervenor-Defendants  
15 deny any allegations contrary to that document's plain language and meaning.

16 80. The allegations in Paragraph 80 purport to characterize comments to the proposed rule  
17 announcing the 2019 Catch Rule submitted by Plaintiff and other unidentified parties, which speak for  
18 themselves and are the best evidence of their contents. Intervenor-Defendants deny any allegations  
19 contrary to the comments' plain language and meaning.

20 81. The allegations in Paragraph 81 are vague, ambiguous, and speculative, and Intervenor-  
21 Defendants deny them on that basis.

22 82. The allegations in Paragraph 82 are vague, ambiguous, and speculative, and Intervenor-  
23 Defendants deny them on that basis.

24 83. Intervenor-Defendants deny the allegations set forth in Paragraph 83.

25 84. The allegations in Paragraph 84 are vague, ambiguous, and speculative, and Intervenor-  
26 Defendants deny them on that basis. The allegations in Paragraph 84 also purport to characterize the  
27 Plan, a document that speaks for itself and contains the best evidence of its contents. Intervenor-  
28

1 Defendants deny any allegation inconsistent with the plain language and meaning of the Plan.

2 85. Intervenor-Defendants admit that that the 2019 Catch Rule sets an annual catch limit  
3 (ACL) and acceptable biological catch (ABC) of 23,573 metric tons for the central subpopulation of  
4 northern anchovy. The remaining allegations in Paragraph 85 are vague, ambiguous, and speculative,  
5 and Intervenor-Defendants deny them on that basis.

6 86. The allegations in Paragraph 86 are vague, ambiguous, and speculative, and Intervenor-  
7 Defendants deny them on that basis.

8 87. The allegations in Paragraph 87 are vague, ambiguous, and speculative, and Intervenor-  
9 Defendants deny them on that basis.

10 88. The allegations in Paragraph 88 are vague, ambiguous, and speculative, and Intervenor-  
11 Defendants deny them on that basis.

12 89. The allegations in the first sentence of Paragraph 89 purport to characterize decisions of  
13 this Court, which speak for themselves and are the best evidence of their contents. Intervenor-  
14 Defendants deny any allegations contrary to the decisions' plain language and meaning. The remaining  
15 allegations in Paragraph 89 are vague, ambiguous, and speculative, and Intervenor-Defendants deny  
16 them on that basis.

17 90. The allegations in Paragraph 90 purport to characterize the Plan, which speaks for itself  
18 and is the best evidence of its contents. Intervenor-Defendants deny any allegations contrary to the  
19 Plan's plain language and meaning.

20 **FIRST CLAIM FOR RELIEF**

21 91. Intervenor-Defendants incorporate their responses to Paragraphs 1 through 90 as if  
22 expressly set forth herein.

23 92. Intervenor-Defendants state that no response is required to Paragraph 92, because it  
24 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
25 required, Intervenor-Defendants deny the allegations set forth in Paragraph 92.

26 93. Intervenor-Defendants state that no response is required to Paragraph 93, because it  
27 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
28

1 required, Intervenor-Defendants deny the allegations set forth in Paragraph 93.

2 94. Intervenor-Defendants state that no response is required to Paragraph 94, because it  
3 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
4 required, Intervenor-Defendants deny the allegations set forth in Paragraph 94.

5 95. Intervenor-Defendants deny the allegations set forth in Paragraph 95.

6 96. Intervenor-Defendants deny the allegations set forth in Paragraph 96.

7 97. Intervenor-Defendants deny the allegations set forth in Paragraph 97.

8 98. Intervenor-Defendants state that no response is required to Paragraph 98, because it  
9 asserts legal conclusions and purports to characterize the MSA and the APA, which speak for  
10 themselves. If a response is required, Intervenor-Defendants deny the allegations set forth in Paragraph  
11 98.

12 99. Intervenor-Defendants state that no response is required to Paragraph 99, because it  
13 asserts legal conclusions and purports to characterize the MSA and the APA, which speak for  
14 themselves. If a response is required, Intervenor-Defendants deny the allegations set forth in Paragraph  
15 99.

16 100. Intervenor-Defendants deny the allegations set forth in Paragraph 100.

17 101. Intervenor-Defendants deny the allegations set forth in Paragraph 101.

18 **SECOND CLAIM FOR RELIEF**

19 102. Intervenor-Defendants incorporate their responses to Paragraphs 1 through 101 as if  
20 expressly set forth herein.

21 103. Intervenor-Defendants state that no response is required to Paragraph 103, because it  
22 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
23 required, Intervenor-Defendants deny the allegations set forth in Paragraph 103.

24 104. Intervenor-Defendants state that no response is required to Paragraph 104, because it  
25 asserts legal conclusions and purports to characterize the Plan, which speaks for itself. If a response is  
26 required, Intervenor-Defendants deny the allegations set forth in Paragraph 104.

27 105. Intervenor-Defendants deny the allegations set forth in Paragraph 105.

1           106. Intervenor-Defendants state that no response is required to Paragraph 106, because it  
2 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
3 required, Intervenor-Defendants deny the allegations set forth in Paragraph 106.

4           107. Intervenor-Defendants deny the allegations set forth in Paragraph 107.

5           108. Intervenor-Defendants deny the allegations set forth in Paragraph 108.

6                                   **THIRD CLAIM FOR RELIEF**

7           109. Intervenor-Defendants incorporate their responses to Paragraphs 1 through 108 as if  
8 expressly set forth herein.

9           110. Intervenor-Defendants state that no response is required to Paragraph 110, because it  
10 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
11 required, Intervenor-Defendants deny the allegations set forth in Paragraph 110.

12           111. Intervenor-Defendants state that no response is required to Paragraph 111, because it  
13 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
14 required, Intervenor-Defendants deny the allegations set forth in Paragraph 111.

15           112. Intervenor-Defendants state that no response is required to Paragraph 112, because it  
16 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
17 required, Intervenor-Defendants deny the allegations set forth in Paragraph 112.

18           113. Intervenor-Defendants state that no response is required to Paragraph 113, because it  
19 characterizes Plaintiff's case and consists of legal conclusions. If a response is required, Intervenor-  
20 Defendants deny the allegations set forth in Paragraph 113.

21           114. Intervenor-Defendants state that no response is required to Paragraph 114, because it  
22 asserts legal conclusions and purports to characterize the Plan, which speaks for itself. If a response is  
23 required, Intervenor-Defendants deny the allegations set forth in Paragraph 114.

24           115. Intervenor-Defendants state that no response is required to Paragraph 115, because it  
25 asserts legal conclusions and purports to characterize the Plan, which speaks for itself. If a response is  
26 required, Intervenor-Defendants deny the allegations set forth in Paragraph 115.

27           116. Intervenor-Defendants state that no response is required to Paragraph 116, because it  
28

1 asserts legal conclusions. If a response is required, Intervenor-Defendants deny the allegations set forth  
2 in Paragraph 116.

3 117. Intervenor-Defendants deny the allegations set forth in Paragraph 117.

4 118. Intervenor-Defendants deny the allegations set forth in Paragraph 118.

5 119. Intervenor-Defendants deny the allegations set forth in Paragraph 119.

6 120. Intervenor-Defendants deny the allegations set forth in Paragraph 120.

7 121. Intervenor-Defendants deny the allegations set forth in Paragraph 121.

8 **FOURTH CLAIM FOR RELIEF**

9 122. Intervenor-Defendants incorporate their responses to Paragraphs 1 through 121 as if  
10 expressly set forth herein.

11 123. Intervenor-Defendants deny the allegations set forth in Paragraph 123.

12 124. Intervenor-Defendants state that no response is required to Paragraph 124, because it  
13 asserts legal conclusions and purports to characterize the MSA, which speaks for itself. If a response is  
14 required, Intervenor-Defendants deny the allegations set forth in Paragraph 124.

15 125. Intervenor-Defendants state that no response is required to Paragraph 125, because it  
16 asserts legal conclusions and purports to characterize the APA, which speaks for itself. If a response is  
17 required, Intervenor-Defendants deny the allegations set forth in Paragraph 125.

18 126. Intervenor-Defendants deny the allegations set forth in Paragraph 126.

19 127. Intervenor-Defendants deny the allegations set forth in Paragraph 127.

20 128. Intervenor-Defendants deny the allegations set forth in Paragraph 128.

21 129. Intervenor-Defendants deny the allegations set forth in Paragraph 129.

22 130. Intervenor-Defendants deny the allegations set forth in Paragraph 130.

23 131. Intervenor-Defendants deny the allegations set forth in Paragraph 131.

24 132. Intervenor-Defendants deny the allegations set forth in Paragraph 132.

25 133. Intervenor-Defendants deny the allegations set forth in Paragraph 133.

**PRAYER FOR RELIEF**

The remainder of the Complaint consists of Plaintiff's demand for relief, which requires no response. If a response is required, Intervenor-Defendants deny that Plaintiff is entitled to any relief.

**AFFIRMATIVE DEFENSES**

1. Plaintiff fails to state a claim upon which relief can be granted.

2. To the extent Plaintiff presents to the Court any issue, contention, or claim which is contrary to a position taken by Plaintiff in prior litigation or administrative proceedings, Plaintiff is waived or estopped from presenting any such issue, contention, or claim.

3. To the extent Plaintiff attempts to adjudicate any issue, contention or claim previously decided against it, Plaintiff is estopped and precluded from presenting any such issue, contention, or claim.

4. Intervenor-Defendants reserve the right to assert such other affirmative defenses as may appear during the course of this litigation.

Dated: \_\_\_\_\_, 2019

/s/ Paul S. Weiland

Paul S. Weiland (CA Bar No. 237058)

Linda R. Larson (WA Bar No. 9171), *pro hac vice*  
*application pending*

*Attorneys for Proposed Intervenor-Defendants*