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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

State of Alaska

Plaintiffs,

v.

National Marine Fisheries Service,

Defendant.

Case No. 3:23-cv-00032-SLG

**MEMORANDUM IN SUPPORT
OF MOTION TO INTERVENE
BY CENTER FOR BIOLOGICAL
DIVERSITY**

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, the Center for Biological Diversity (“the Center”) moves to intervene as a defendant in this action challenging the National Marine Fisheries Service’s (“NMFS”) designation of critical habitat for the Arctic subspecies of the ringed seal, *Pusa hispida hispida* (“ringed seal”) and the Beringia distinct population segment (“DPS”) of the Pacific bearded seal, *Erignathus barbatus nauticus* (“bearded seal”). The Center meets the criteria for intervention as of

State of Alaska v. Nat’l Marine Fisheries Serv.,
Case No. 3:23-cv-00032-SLG

right because the motion is timely, the Center has a “significantly protectable” interest in Endangered Species Act (“ESA”) protections for ringed and bearded seals, the disposition of this matter will impair the Center’s ability to protect those interests, and the existing parties do not adequately represent the Center’s interests. *See* Fed. R. Civ. Pro. 24(a)(2). Indeed, the Center has a longstanding interest in the conservation of the ringed seal and bearded seal, wrote the petitions that led to the eventual listing of both species, spurred the protection of the seals’ critical habitat, and has previously intervened in litigation regarding the listing of the species to protect its interests in these seals. Alternatively, the Center seeks permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

FACTUAL BACKGROUND

The ringed and bearded seal are dependent on Arctic sea ice. *See* 77 Fed. Reg. 76,706, 76,709 (Dec. 28, 2012) (ringed seal listing decision); 77 Fed. Reg. 76,740, 76,742 (Dec. 28, 2012) (bearded seal listing decision). Sea ice is the only surface where ringed and bearded seals give birth, nurse pups, and haul out to complete their annual molt; it also allows mothers close access to food while nursing, and provides a safe place for pups to gain experience diving and hunting away from predators. 77 Fed. Reg. at 76,709; 77 Fed. Reg. at 76,742–43. Ringed seals not only require sea ice for their essential life functions, but also need deep snow in which to dig caves to rest and give birth; without snow caves, ringed seal pups freeze to death or are eaten by predators. 77 Fed. Reg. at 76,709. Diminishing sea ice is the greatest threat to both species.

The Center has a long history of advocacy on behalf of both the ringed and bearded seal. In May 2008, the Center submitted a formal, detailed petition to list three seal species, including ringed and bearded seals, under the ESA, based largely on the threat that sea ice loss from climate change poses to the species' continued existence. *E.g.*, 77 Fed. Reg. at 76,706. The Center also requested critical habitat designation concurrent with listing under the ESA. *Id.* On September 4, 2008, NMFS published a 90-day finding that the petition presented substantial scientific or commercial information indicating that the listing the ice seals may be warranted, initiated a 60-day public comment period, and continued its status review. 73 Fed. Reg. 51,615 (Sept. 4, 2008).

On September 9, 2009, the Center filed suit challenging NMFS's failure to issue a 12-month finding on the Center's petition to list the seals. 77 Fed. Reg. at 76,706. Pursuant to a settlement agreement, NMFS agreed to make 12-month findings for ringed and bearded seals no later than November 2010; and in December 2010, NMFS issued 12-month findings proposing to list four subspecies of the ringed seal, including the Arctic ringed seal, and two DPSs of the bearded seal, including the Beringia DPS. 75 Fed. Reg. 77,476 (Dec. 10, 2010) (ringed seals), 75 Fed. Reg. 77,496 (Dec. 10, 2010) (bearded seals).

After NMFS failed to finalize the listings within one year as required by the ESA, the Center sued NMFS and in 2012, NMFS published a final rule listing the four subspecies of ringed seals and the two DPSs of bearded seals as threatened under the ESA. 77 Fed. Reg. at 76,706 (ringed seals), 77 Fed. Reg. at 76,740 (bearded seals). In addition to impacts from oil and gas development, hunting, and toxic contamination,

State of Alaska v. Nat'l Marine Fisheries Serv.,

Case No. 3:23-cv-00032-SLG

Case 3:23-cv-00032-SLG Document 12-1 Filed 04/25/23 Page 3 of 20

NMFS found that the seals' primary habitat—sea ice—is declining throughout the species' range due to climate change and will continue to do so for the foreseeable future. 77 Fed. Reg. at 76,708; 77 Fed. Reg. at 76,743–44. The agency thus concluded that both species are “likely to become endangered within the foreseeable future.” 77 Fed. Reg. at 76,728; 77 Fed. Reg. at 76,758. Both listing decisions stated that the agency was not designating critical habitat concurrently with listing but would propose to do so in a future rulemaking. 77 Fed. Reg. at 76,706; 77 Fed. Reg. at 76,740.

Subsequently, the State of Alaska, the Alaska Oil and Gas Association and American Petroleum Institute, and the North Slope Borough filed lawsuits in the District of Alaska challenging the agency's decisions to protect the Arctic ringed seal and the bearded seal Beringia DPS. *See Alaska Oil and Gas Ass'n v. Nat'l Marine Fisheries Service*, Case No. 4:14-cv-00029-RRB, 2016 WL 1125744, at *1. (D. Alaska Mar. 17, 2016) (ringed seal); *Alaska Oil and Gas Ass'n v. Nat'l Marine Fisheries Service*, Case No. 4:13-cv-00018-RRB, 2014 WL 3726121, at *1 (D. Alaska July 25, 2014) (bearded seal).¹ The Center sought and was granted intervention in both cases. *See Alaska Oil and Gas Ass'n*, 2016 WL 1125744, at *1 n.2; *Alaska Oil and Gas Ass'n*, 2014 WL 3726121, at *1 n.2.

The district court ruled for the plaintiffs in both cases, but the Ninth Circuit reversed, holding that NMFS's findings—that the Arctic ringed seal and bearded seal

¹ The plaintiffs also challenged the listing of the bearded seal Okhotsk DPS, which is found in the Sea of Okhotsk off the coasts of Japan and Russia, but the court held the plaintiffs did not have standing to challenge the listing of this DPS. *Alaska Oil and Gas Ass'n*, 2014 WL 3726121, at *3–4.

Beringia DPS are likely to become endangered within the foreseeable future—were reasonable and supported by the record. *Alaska Oil and Gas Ass’n v. Ross*, 722 Fed. Appx. 666, 668 (9th Cir. 2018) (ringed seal); *Alaska Oil and Gas Ass’n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016) (bearded seal).

In March 2019, Plaintiff and others filed a petition to delist the Arctic ringed seal under the ESA. 85 Fed. Reg. 76,018, 76,018–19 (Nov. 27, 2020). NMFS denied the petition in November 2020. *See id.* In November 2022, Plaintiff and the North Slope Borough challenged NMFS’s denial of the delisting petition. *See Alaska v. Nat’l Marine Fisheries Serv.*, Case No. 3:22-cv-00249-JMK, 2023 WL 2789352, at *1 (D. Alaska Apr. 5, 2023). The Center sought and was granted intervention in that case as well. *Id.*

Also in 2019, following NMFS’s failure to comply with its non-discretionary obligation to timely designate critical habitat for the Arctic ringed seal and bearded seal Beringia DPS, the Center sued NMFS in District Court in Alaska to force it to do so. *Ctr. for Biological Diversity v. Ross*, Case No. 3:19-cv-00165-JWS, ECF No. 1 (D. Alaska filed June 13, 2019). The parties subsequently entered into a court-approved stipulated settlement agreement under which NMFS agreed to issue proposed critical habitat determinations for both species by September 2020; and, to the extent NMFS issued proposed rules to designate critical habitat, issue final determinations by September 2021. *Id.*, ECF No. 15 at 3–4.

Following an amendment to the stipulated settlement agreement that extended NMFS’s deadlines by six months, NMFS published separate proposed rules to designate critical habitat for the Arctic ringed seal and bearded seal Beringia DPS in January 2021.

86 Fed. Reg. 1452 (Jan. 8, 2021) (ringed seal); 86 Fed. Reg. 1433 (Jan. 8, 2021) (bearded seal). The agency issued final critical habitat designations for the Arctic ringed seal and the bearded seal Beringia DPS in April 2022. 87 Fed. Reg. 19,232 (Apr. 1, 2022) (codified at 50 C.F.R. § 226.228) (ringed seal); 87 Fed. Reg. 19,180 (Apr. 1, 2022) (codified at 50 C.F.R. § 226.229) (bearded seal). In doing so, the agency protected areas that it determined contain the “physical or biological habitat features essential to the conservation” of the Arctic ringed seal bearded seal Beringia DPS that “may require special management or protection.” *See, e.g.*, 87 Fed. Reg. at 19,235; 87 Fed. Reg. at 19,184. NMFS also noted that the designation of critical habitat provides benefits to the species beyond those provided by listing alone, benefits that are important as both species “increasingly experience the ongoing loss of sea ice and changes in ocean conditions associated with climate change.” *See* 87 Fed. Reg. at 19,245; 87 Fed. Reg. at 19,193.

On February 15, 2023, Plaintiff filed this action under the ESA, 16 U.S.C. §§ 1531–1544, and the Administrative Procedure Act, 5 U.S.C. §§ 501-706, challenging both critical habitat designations. Plaintiff requests, *inter alia*, an order vacating the critical habitat for the ringed and bearded seal and an order enjoining NMFS from taking any action to enforce the critical habitat. NMFS filed their answer yesterday, April 24, 2023, Answer ECF No. 11, and there has otherwise been no substantial activity in the case since it was filed.

ARGUMENT

I. Legal Standard

Federal Rule of Civil Procedure 24(a)(2) provides:

State of Alaska v. Nat’l Marine Fisheries Serv.,
Case No. 3:23-cv-00032-SLG

Case 3:23-cv-00032-SLG Document 12-1 Filed 04/25/23 Page 6 of 20

On a timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Thus, to be granted intervention of right, the movant must show four requirements are satisfied: (1) the motion for intervention "is timely;" (2) the movant "has a significant protectable interest relating to the property or transaction that is the subject of the action;" (3) the movant is situated such that "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest;" and (4) the movant's interest "may not [be] adequately represent[ed]" by the existing parties in the lawsuit. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation omitted).

These four requirements "are broadly interpreted in favor of intervention." *Id.*; see also *State of California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) (The Ninth Circuit "construe[s] Rule 24(a) liberally in favor of potential intervenors."); *United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002) ("A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." (citation omitted)). Under this test, courts should grant intervention to "as many apparently concerned persons as is compatible with efficiency and due process." *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citation omitted); see also *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967) (stating that Civil Rule 24 was "obviously designed to liberalize the right to intervene in federal actions").

Rule 24(b) also provides that the court may permit anyone to intervene who submits a “timely motion” and “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). “In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

II. The Center Is Entitled to Intervene

The Center satisfies each of the four elements of the Rule 24(a) test and qualifies for intervention as of right. Alternatively, the Court should allow the Center to intervene under Rule 24(b).

A. The Center Satisfies the Test for Intervention as of Right

The Court should grant the Center intervention as of right. The Center’s motion to intervene is timely; it has a sufficiently protectable interest in the subject of this case; disposition of this matter may impair that interest; and no party adequately represents the Center’s interests.

1. The Center’s Motion to Intervene Is Timely

The Ninth Circuit considers three criteria in determining whether a motion to intervene is timely: (1) the stage of the proceedings, (2) whether the existing parties would be prejudiced, and (3) the reason for any delay in moving to intervene. *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990).

The Center has moved to intervene in a timely manner. Plaintiffs filed this case on February 15, 2023, Complaint for Declaratory and Injunctive Relief, ECF No. 1, and other than NMFS’ filing of their answer, no substantial activities have occurred in the *State of Alaska v. Nat’l Marine Fisheries Serv.*,

case since that time. The Center is prepared to meet any schedule imposed in this case. Therefore, no prejudice, delay, or inefficiency will result from the Center's intervention, and the Center's motion is timely. *See, e.g., Citizens for Balanced Use*, 647 F.3d at 897 (finding a motion to intervene timely where it was made "less than three months after the complaint was filed and less than two weeks after the [agency] filed its answer go the complaint" and thus "made at an early stage of the proceedings"); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (noting that there was no prejudice to the parties because the motion to intervene came before any substantive rulings were made).

2. The Center Has a Significantly Protectable Interest in the Subject of This Action

Second, the Center has a "significant protectable interest" in the challenged agency decisions. *Citizens for Balanced Use*, 647 F.3d at 897. "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a 'practical, threshold inquiry,'" and the applicant does not have to establish a "specific legal or equitable interest." *Id.* (citation omitted). The "applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims at issue." *Id.*; *see also Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011) (same); *Cnty. of Fresno*, 622 F.2d at 438 (noting the Ninth Circuit has "rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest."). This "interest test" is not an exacting requirement; a prospective

intervenor's interest is sufficient "if it will suffer a practical impairment of its interests as a result of the pending litigation." *Lockyer*, 450 F.3d at 441.

The critical habitat designations for the ringed and bearded seals are the subjects of this action. The Center has significantly protectable interests in the conservation of ringed and bearded seals, and in maintaining critical habitat protections for both species, as manifested by its efforts to, for example, (1) obtain the ESA listings for both species, (2) defend those listings when challenged by Plaintiff, and (3) secure critical habitat protections for the ringed seal and the bearded seal. Indeed, in recently granting the Center's motion to intervene in a case challenging NMFS's denial of a petition to delist the Arctic ringed seal, a court recognized "the integral role the Center played in" securing the ESA listing of the species. *Alaska*, 2023 WL 2789352, at *4. The same is true of the Center's efforts to secure critical habitat protections for both ringed seals and bearded seals.

The Center filed the original petition to list the ringed and bearded seal in 2008, after which the Center twice filed suit against NMFS to compel the species' listing. Wolf Dec. ¶¶ 11, 13; 77 Fed. Reg. at 76,706–07. NMFS acted only after advocacy and legal action by the Center. *See id.* The Center filed comments at every stage of the process in support of the listing. Wolf Dec. ¶¶ 12–13. The Center also intervened to defend the agency's decision to list the ringed and bearded seal when challenged by Plaintiff. Wolf Dec. ¶¶ 14–15; *Alaska Oil and Gas Ass'n*, 2016 WL 1125744, at *1; *Alaska Oil and Gas Ass'n*, 2014 WL 3726121, at *1 n.2.

The Center also took action to secure the critical habitat designations at issue in this case. In 2019, when the agency had yet to timely designate critical habitat as required by the ESA for either species, the Center sued NMFS to compel it to comply with these mandatory duties. Wolf Dec. ¶ 17; *Ctr. for Biological Diversity*, Case No. 3:19-cv-00165-JWS, ECF No. 1. Following a court-approved stipulated settlement agreement between the parties, NMFS published proposed rules to designate critical habitat for the Arctic ringed seal and bearded seal *Beringia* DPS in January 2021, 86 Fed. Reg. at 1452; 86 Fed. Reg. at 1433 . The Center submitted detailed comments on both proposed designations. Wolf Dec. ¶ 17. NMFS ultimately issued the final critical habitat designations in April 2022. 87 Fed. Reg. at 19,232; 87 Fed. Reg. at 19,180.

Courts have recognized that “[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995); *see also Coal. of Ariz./N.M Cntys. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (a party with a “persistent record of advocacy for [the environmental] protection[s]” adopted by an agency that were subsequently challenged in court has a “direct and substantial interest” sufficient “for the purpose of intervention as of right”).

As in *Idaho Farm Bureau*—in which the court granted an environmental group intervention as of right in a suit challenging the listing of endangered species, where the group had “filed a suit to compel [the agency] to make a final decision on the proposed listing rule,”—the Center’s interest in the ringed sealed and bearded seal critical habitat designations extends beyond “support” for the designation. 58 F.3d at 1397–98; *see also*

Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) (reversing the denial of intervention of an environmental group seeking to defend a regulation where its prior lawsuit was “probably the reason for the current regulations”).

The Center has written numerous public comments in support of ESA protection for the ringed and bearded seals and their habitat and has taken legal action to compel listing and the designation of critical habitat for both species. The Center thus has a right to intervene in this case to protect the critical habitat designation that it helped obtain through previous advocacy and litigation.

In addition to its efforts that resulted in listing and protection of critical habitat, the Center and its members and staff have longstanding professional and personal interests in the conservation of the ringed seal. *See* Wolf Dec. ¶¶ 18–21; Steiner Dec. ¶¶ 3–5, 8–9, 14–15, 17–18. These members travel to Alaska’s Arctic to enjoy, study, photograph, and observe the seals; and intend to continue to do so. *See* Wolf Dec. ¶ 18; Steiner Dec. ¶¶ 16–18.

Courts have repeatedly found similar interests in endangered wildlife to be protectable and sufficient in considering motions to intervene from conservation organizations. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (recognizing the applicant’s interest “in the preservation of birds and their habitats”); *Idaho Farm Bureau*, 58 F.3d at 1398 (recognizing applicant’s interest in an endangered species and its habitat); *Alaska v. Lubchenco*, Case No. 3:10-cv-00271-TMB, 2011 WL 13151984, at *1 (D. Alaska Mar. 9, 2011) (granting intervention to environmental organizations in a case involving a challenge to biological opinion

containing restrictions on fishing to protect Stellar sea lions where the organizations “have previously sought to influence and compel the federal government to take measures to protect Stellar sea lions, including through legal action.”).

Indeed, the Center has regularly been granted intervention in cases involving the protection of ESA-listed species in Alaska, including the ringed seal, the bearded seal, and the polar bear. *See Alaska*, 2023 WL 2789352, at *4 (granting the Center’s motion to intervene in a case challenging NMFS’s negative 90-day finding on a petition to delist the Arctic ringed seal, noting the Center’s “interests in the [species’] listing and conservation”); *Alaska Oil and Gas Ass’n v. Pritzker*, 840 F.3d at 675 n.1 (stating the Center was granted intervention in a case challenging the listing of the bearded seal under the ESA); *Alaska Oil and Gas Ass’n v. Jewell*, 815 F.3d 544, 553 (9th Cir. 2016) (describing procedural history of case challenging critical habitat designation for the polar bear, noting the Center intervened to defend the designation).

3. A Ruling in Plaintiff’s Favor May Impair or Impede the Center’s Ability to Protect Its Interests

An applicant for intervention as of right must 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)(2) (emphasis added). In determining whether the action would impair an applicant’s interests, courts look to the relief requested. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001)..

Typically, after finding that a proposed intervenor has a significant protectable interest in the subject of the case, courts should “have little difficulty concluding that the

disposition of th[e] case may, as a practical matter, affect [that interest].” *Lockyer*, 450 F.3d at 442; *see also City of Los Angeles*, 288 F.3d at 401 (noting third factor considers whether disposition of the action “‘may’ impair rights . . . rather than whether the [disposition] will ‘necessarily’ impair them” (citation omitted)). The same holds true here.

If Plaintiff is successful, the critical habitat designations for both the ringed and bearded seals could be vacated, depriving both species of important protections not provided by any other law—protections the Center has worked for years to secure. *See* Complaint, ECF No. 1, Prayer for Relief at 35–36. These include, for example, the requirement that all federal agencies consult with NMFS to ensure any action they authorize, fund, or carry out is not likely to result in the adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

The Ninth Circuit has long determined that conservation organizations such as the Center are entitled to intervene as of right where, as here, the litigation threatens harm to wildlife and other natural resource values that are important to the organization’s mission and where the organizations have worked to protect those values. *See, e.g., Sagebrush Rebellion*, 713 F.2d at 528 (affirming the granting of intervention to the National Audubon Society, and finding “no serious dispute” where “[a]n adverse decision . . . would impair the society’s interest in the preservation of birds and their habitats.”).

Indeed, courts have regularly found that lawsuits challenging protections under the ESA would impair the interests of environmental groups that have advocated for such protections if these groups are not permitted to intervene. In *Idaho Farm Bureau*, for *State of Alaska v. Nat’l Marine Fisheries Serv.*,

example, the Ninth Circuit held that a decision resulting in the delisting of a snail “would impair [environmental-group intervenors’] ability to protect their interest in the Springs Snail and its habitat.” 58 F.3d at 1398; *see also Coalition of Ariz./N.M. Cnty.*, 100 F.3d at 844 (environmental group-intervenor’s interest in Mexican spotted owl would, “as a practical matter,” be impaired by a ruling to delist the owl “by the *stare decisis* effect of the district court’s decision, not to mention the direct effect of a possible permanent injunction”); *Alaska*, 2023 WL 2789352, at *8 (finding that “a decision ordering NMFS to reconsider [its] 90-day Finding [denying the plaintiffs’ delisting petition] would” impair the Center’s interests by “require[ing] the Center to expend resources, time, and energy to defend the outcome for which it has long advocated—or risk losing that outcome altogether.”). The relief sought by Plaintiff in this case similarly threatens to impair the Center’s interests.

4. The Existing Parties May Not Adequately Represent the Center’s Interests.

To satisfy the fourth factor, the Center need only show that the existing parties “may not adequately represent [its] interest.” *Citizens for Balanced Use*, 647 F.3d at 898 (emphasis added); *see also Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). “The burden of showing inadequacy of representation is ‘minimal.’” *Citizens for Balanced Use*, 647 F.3d at 898 (citation omitted).

In evaluating the adequacy of representation, the Ninth Circuit considers: “(1) whether the interest of a present party is such that it will undoubtedly make all of [the movant’s] arguments; (2) whether the present party is capable and willing to make such

arguments; and (3) whether [the movant] would offer any necessary elements to the proceedings that other parties would neglect.” *Id.* “The ‘most important factor’ . . . is ‘how the [movant’s] interest compares with the interests of existing parties.’” *Id.* (citation omitted). In other words, evaluating this factor, “the focus should be on the ‘subject of the action,’ not just the particular issues before the court at the time of the motion.” *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (citation omitted).

Plaintiff—who seeks to overturn the critical habitat designations for the ringed and bearded seal—clearly does not represent the Center’s interests. NMFS does not adequately represent the Center’s interests either.

Although the Ninth Circuit has stated that there is an assumption of adequacy of representation when the government is acting on behalf of a constituency that it represents, *Citizens for Balanced Use*, 647 F.3d at 898, the Supreme Court has recently cast doubt on any such presumption, stressing instead that this factor generally presents proposed intervenors “with only a minimal challenge.” *Berger v. North Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2203 (2022); *see also Alaska*, 2023 WL 2789352, at *9–10 (finding NMFS did not adequately represent the Center’s interests in conserving the ringed seal). The Center easily satisfies this “minimal” burden here.

While the immediate objective of the Center is presumably shared with NMFS—*i.e.*, upholding NMFS’s critical habitat designations for the ringed and bearded seal—the Center and NMFS’s interests are not “identical” and do not “overlap fully.” *Berger*, 142 S. Ct. at 2204 (cleaned up). Indeed, “[t]he Ninth Circuit has acknowledged that a federal agency, such as [NMFS], ‘is required to represent a broader view than the more, narrow, *State of Alaska v. Nat’l Marine Fisheries Serv.*,

parochial interests’ of a proposed [intervenor].” *Ctr. for Biological Diversity v. Zinke*, Case No. CV-18-00047-TUC-JGZ, 2018 WL 3497081, at *4 (D. Ariz., July 20, 2018) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc’y*, 630 F.3d at 1178–80); *see also John Doe No. 1 v. Glickman*, 256 F.3d 371, 381 (5th Cir. 2001) (government agency may not adequately represent interests of public interest animal welfare group “given . . . [agency’s] duty to represent the broad public interest”).

In responding to Plaintiff’s claims and request for relief, NMFS will likely be balancing various interests, including cordial relations with the State of Alaska, as well as environmental protections. The Center, on the other hand, as a conservation organization dedicated to the preservation of endangered species and their habitats, will be narrowly focused on the conservation of the ringed and bearded seal and protection of their most important habitat areas. Additionally, in defending this case, NMFS will likely focus on how this Court should defer to the agency’s critical habitat determinations and the narrow scope of review of an agency action under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2). Conversely, the Center will likely focus on the importance of critical habitat designations to the recovery of ESA-listed species, and the conservation measures required for ringed and bearded seals to survive in the fact of climate change. In other words, the agency’s “representation of the public interest may not be ‘identical to the individual parochial interest’ of a particular group just because ‘both entities occupy the same posture in the litigation.’” *Citizens for Balanced Use*, 647 F.3d at 899 (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)).

Moreover, the Ninth Circuit has recognized that an important factor in finding inadequacy of representation is where there is a history of adversarial proceedings between the proposed intervenor and the party upon which the proposed intervenor must rely. *See Idaho Farm Bureau Fed'n*, 58 F.3d at 1398 (finding federal agency would not adequately represent environmental group where the challenged agency decision was compelled by that group's prior litigation); *Cnty. of Fresno*, 622 F.2d at 439 (finding "further reason to doubt" that the Department of the Interior would fully protect intervenor's interest in a rulemaking because "the Department began its rulemaking only reluctantly after [the proposed intervenor] brought a law suit against it"); *see also Coal. of Ariz./N.M. Cntys.*, 100 F.3d at 845 (agency's "ability to adequately represent [the movant] . . . is made all the more suspect by its reluctance in protecting the [species], doing so only after [the movant] threatened, and eventually brought, a law suit to force compliance with the Act").

As described above, the Center has repeatedly had to sue NMFS to obtain the ringed and bearded seal listing and the protection of their critical habitat. Given this history, it is unlikely that NMFS will make identical arguments or even represent the Center's interests in this case.

Further, in the past, after facing industry opposition to a listing decision, NMFS has on occasion withdrawn or altered the listing decision. *See Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 931 (D. Or. 2007) (challenge to NMFS's withdrawn listing decision for Oregon Coast coho). Such past practice supports the Center's belief that NMFS's

defense of the ringed and bearded seal critical habitat is not likely to be wholly consistent with the Center's interest in protecting the current habitat protections.

In sum, the Center "will bring a unique perspective to this lawsuit and add to the dialogue in a meaningful manner." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, Case No. CV-12-08176-PCT-SMM, 2016 WL 3638128, at *4 (D. Az. June 10, 2016). The Court should therefore grant the Center intervention as of right.

B. Alternatively, the Center Should Be Granted Permissive Intervention

If the Court denies intervention as of right, the Center request in the alternative leave to intervene by permission under Rule 24(b). This rule permits intervention where an applicant's claim or defense poses questions of law or fact in common with the existing action and the application is timely and will not delay or prejudice the proceedings. Fed. R. Civ. P. 24(b)(1)(B), (3). The test for permissive intervention imposes an even lower burden on movants than the test for intervention as of right because it eliminates the requirements relating to interests and adequacy of representation. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108–09 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d at 1177–78, 1180.

The Center meets this test. The Center has been extensively involved in efforts to ensure critical habitat designations for the ringed and bearded seals. The Center seeks to intervene shortly after Plaintiff filed this case; and the granting of the motion will not delay this case or prejudice either Plaintiff or NMFS. The Center intends to respond directly to Plaintiff's challenges to the lawfulness of NMFS's critical habitat designations — *i.e.*, the Center intends to assert common defenses of law and fact with the existing

action. *See* [Proposed] Answer of Intervenor-Defendant Center for Biological Diversity to Plaintiffs' Complaint. Thus, the Center satisfies the standards for permissive intervention.

CONCLUSION

For the foregoing reasons, the Center has a right to intervene under Federal Rule of Civil Procedure 24(a) as a defendant in this case. In the alternative, the Court should permit the Center to intervene as a defendant pursuant to Rule 24(b).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this brief contains 5,287 words, excluding items exempted by Local Civil Rule 7.4(a)(4).

/s/ Kristen Monsell

Kristen Monsell