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The Honorable Brian A. Tsuchida

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

SKAGIT COUNTY DIKE, DRAINAGE,  
AND IRRIGATION IMPROVEMENT  
DISTRICT NO. 12,

Plaintiff,

v.

NATIONAL MARINE FISHERIES  
SERVICE; DEPARTMENT OF  
COMMERCE; GINA RAIMONDO in her  
official capacity as Secretary of Commerce;  
JANET COIT in her official capacity as the  
Assistant Administrator for NOAA  
Fisheries,

Defendants.

Case No. 2:23-cv-01954-BAT

**SWINOMISH INDIAN TRIBAL  
COMMUNITY'S MOTION TO  
INTERVENE**

NOTE ON MOTION CALENDAR:  
December 13, 2024

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1 INTRODUCTION

2 Tidegates constructed in the Skagit River basin to promote and control estuary drainage  
3 have resulted in destruction, damage, and blocked access to large swaths of Skagit estuary  
4 habitat, in turn adversely affecting threatened Chinook salmon. The Swinomish Indian Tribal  
5 Community (“Swinomish” or “the Tribe”) have, for millennia, centered salmon—particularly  
6 Chinook salmon—in their subsistence, cultural, and spiritual practices. The National Marine  
7 Fisheries Service (“NMFS”) concluded that replacement of the tidegates at issue in this case,  
8 associated with No Name Slough of the Skagit River estuary, was likely to jeopardize threatened  
9 Puget Sound Chinook Salmon<sup>1</sup> and endangered Southern Resident Killer Whale<sup>2</sup> populations  
10 and required either implementation of alternatives or mitigation measures. *See* Plaintiff’s First  
11 Amended Complaint ¶ 65, ECF 23. Plaintiff, Skagit County Dike, Drainage, and Irrigation  
12 Improvement District No. 12 (“District 12” or “Plaintiff”), challenged NMFS’ findings and seeks  
13 to vacate and remand the Biological Opinion for NMFS to reconsider. *See* Plaintiff’s First  
14 Amended Complaint, Prayer for Relief ¶ 4, ECF 23 (July 1, 2024).

15 Swinomish move to intervene as defendants pursuant to Federal Rule of Civil Procedure  
16 24 to defend the Biological Opinion and the required mitigation provisions. Intervention as of  
17 right should be granted because Swinomish meets all the criteria under Rule 24(a). In the  
18 alternative, this Court should grant permissive intervention under Rule 24(b).

19 Parties to the case take no position on this motion for intervention.  
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23 <sup>1</sup> 64 Fed. Reg. 14,308 (Mar. 24, 1999) (listed as threatened under the Endangered Species Act).  
24 <sup>2</sup> 70 Fed. Reg. 69,903 (Nov. 18, 2005) (listed as endangered under the Endangered Species Act).

1 BACKGROUND

2 The Swinomish Tribal Community is a federally recognized Indian tribe and political  
3 successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott.  
4 Edwards Decl. ¶¶ 2, 4. Among other things, the Treaty reserved fishing, hunting and gathering  
5 rights and established the Swinomish Reservation on Fidalgo Island, situated immediately west  
6 of District 12. *Id.* The Swinomish Reservation sits at the mouth of the Skagit River, the largest  
7 river system draining to Puget Sound and the only river in the Lower 48 states that still has all  
8 species of wild Pacific salmon spawning in its waters. Since time immemorial, the Swinomish  
9 Tribe and its predecessors have occupied and utilized vast areas of land and water in the Skagit  
10 River system, the Samish River system, and throughout the Northern Salish Sea to support the  
11 Swinomish way of life. *Id.* ¶¶ 3, 8.

12 As a sovereign tribal government and as an adjudicated co-manager of fisheries and  
13 aquatic resources with the State of Washington, Swinomish plays a key role in ensuring habitat  
14 protection and restoration within the Skagit River Basin. *Id.* ¶ 6. Land use change, habitat loss,  
15 pollution, and other external factors have caused Swinomish’s salmon harvest to decline  
16 precipitously in the past decades. *Id.* ¶¶ 6-7. In the Skagit River watershed and the delta in  
17 particular, approximately 85% of historic estuary habitat has been destroyed and altered by the  
18 extensive use of tidegates and the resulting draining of lands for intensive agriculture. Biological  
19 Opinion at 54, 70; Edwards Decl. ¶ 12. The lack of sufficient estuary habitat is a primary  
20 limiting factor in Skagit Chinook salmon recovery. *Id.* at 27; *see also* Edwards Decl. ¶¶ 12-13;  
21 Skagit River System Cooperative & WA Department of Fish & Wildlife, Skagit River Chinook  
22 Recovery Plan at 45-48 (2005). Besides adversely affecting habitat, the existence and operation  
23 of tidegates harm, injure, and kill Chinook salmon. Skagit County Public Works, Samish Bay  
24 Watershed Water Quality Monitoring Project Final Report (2004-2020). Tidegates further

1 adversely affect threatened Chinook salmon when they must be repaired and replaced due to the  
2 significant amount of in-water work and construction required, and because the repair and  
3 replacement indefinitely prolongs the limited access and resulting isolation for Chinook to  
4 habitat, and maintains poor water quality conditions caused by tidegates. Biological Opinion at  
5 78.

6 Because of the primacy of salmon to Swinomish’s subsistence and cultural practices, and  
7 because of the Tribe’s efforts to protect fishing rights reserved by Treaty, the Tribe has long been  
8 involved in matters concerning the tidegates in the Skagit. Edwards Decl. ¶¶ 9-12. After failed  
9 attempts to negotiate solutions out of court, Swinomish successfully challenged the unpermitted  
10 replacement of tidegates as violations of the Clean Water Act and the Endangered Species Act  
11 (“ESA”). *Swinomish Indian Tribal Cmty. v. Skagit Cty. Dike Dist. No. 22*, 618 F. Supp. 2d 1262  
12 (W.D. Wash. 2008). The resulting 2010 Tidegate and Fish Initiative (“TFI”) Agreement  
13 required that, *prior to* seeking construction permits from the Army Corps of Engineers, tidegate  
14 projects obtain habitat restoration credits to offset adverse impacts to Chinook salmon. *See*  
15 Biological Opinion at p. 1. Swinomish monitored implementation of the TFI Agreement through  
16 its Oversight Committee and challenged deficiencies, such as the improper reinterpretation of a  
17 tidegate replacement or major repair as an “operational improvement” that would not require  
18 habitat restoration credits. As a result, the Tribe filed a 60-Day Notice of Intent to Sue the Corps  
19 and NOAA Fisheries on September 9, 2021. Both federal agencies agreed with the Tribe’s  
20 position and withdrew programmatic ESA coverage for Skagit dike districts. Biological Opinion  
21 at pp. 2-3. The agencies directed after-the-fact permits be sought for two large tidegate  
22 replacements that had failed to secure the estuary habitat restoration credits agreed to in the TFI  
23 prior to seeking a Corps permit or engaging in construction. *Id.* There is a clear pattern of  
24

1 behavior by the dike districts that only Swinomish has sought accountability for over the past  
2 two decades.

3 Furthermore, Swinomish has expended effort and resources to restore fish habitat and  
4 healthy salmon populations in the Skagit Basin. The Tribe co-founded the Skagit River System  
5 Cooperative (SRSC), a fisheries and environmental science and research consortium with the  
6 Sauk Suiattle Indian Tribe. *Id.* ¶ 12. SRSC co-authored the Skagit Chinook Recovery Plan with  
7 the Washington Department of Fish & Wildlife after Chinook salmon were listed as threatened.  
8 *Id.* SRSC research has illuminated the fundamental importance of healthy estuary habitat for  
9 salmonid populations and necessary mitigation actions to help protect salmonids and habitat. *Id.*  
10 ¶¶ 12-14. The diligent work of SRSC scientists and biologists has confirmed the extent of harm  
11 caused by tidegates to Chinook salmon, for instance by confirming anywhere from a 4:1 to 800:1  
12 difference in the number of juvenile Chinook salmon outside the tidegate versus behind the  
13 tidegate. *Id.* ¶ 14.

14 The current case initiated by District 12 concerns the continuing obligation of the federal  
15 agencies and the diking districts to comply with federal environmental laws, and Swinomish has  
16 a significant interest in ensuring that compliance as it directly affects Swinomish Treaty rights,  
17 culture, and livelihoods. In December 2023, Plaintiff challenged NMFS's failure to complete  
18 ESA § 7 consultation with the U.S. Army Corps of Engineers regarding District 12's proposed  
19 tidegate replacement project. *See generally* Complaint for Affirmative Declaratory Relief, ECF  
20 1 (Dec. 19, 2023). District 12 also sought a preliminary injunction ordering NMFS to complete  
21 consultation, which this Court granted. Order Granting Plaintiff's Motion for Preliminary  
22 Injunction, ECF 15 (Mar. 8, 2024). NMFS completed a draft Biological Opinion, received  
23 comments from several stakeholders, including Swinomish, and issued a final Biological  
24



1 Opinion. *See* Biological Opinion, App’x 4 (response to comments). NMFS found that the  
2 tidewater replacement project on No Name Slough was likely to jeopardize the continued  
3 existence of listed Chinook salmon and Southern Resident killer whales and to adversely modify  
4 their designated critical habitats. Biological Opinion at 124. Therefore, NMFS provided a  
5 reasonable and prudent alternative to avoid jeopardy that consists of generating a minimum of  
6 275 restoration credits and restoring a minimum of 8.6 acres of estuary habitat within the Skagit  
7 Bay/Padilla Bay area, as well as reasonable and prudent measures to minimize incidental take.  
8 *Id.* at 125, 144. In July 2024, Plaintiff filed an amended complaint challenging the findings and  
9 recommendations in the Biological Opinion and asking this Court to vacate and remand to  
10 NMFS for a new Biological Opinion. Plaintiff’s First Amended Complaint, Prayer for Relief at  
11 ¶¶ 3-4. Swinomish now moves to intervene.

#### 12 LEGAL STANDARD

13 In considering a motion for intervention as a matter of right under Federal Rule of Civil  
14 Procedure 24(a)(2), the Ninth Circuit evaluates whether (1) the application is timely; (2) the  
15 applicant has a “significantly protectable” interest relating to the transaction that is the subject of  
16 the litigation; (3) the applicant is so situated that the disposition of the action may, as a practical  
17 matter, impair or impede the applicant’s ability to protect its interest; and (4) the applicant’s  
18 interest is inadequately represented by the parties before the court. *See Sw. Ctr. for Biological*  
19 *Diversity v. Berg*, 268 F.3d 810, 817-18 (9th Cir. 2001). The rule is liberally construed to favor  
20 intervention. *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011).  
21 Allowing interested persons to participate serves “both efficient resolution of issues and  
22 broadened access to the courts” and can prevent future related litigation. *United States v. City of*  
23 *Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002).

1 ARGUMENT

2 I. SWINOMISH IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

3 Swinomish meets all four requirements for intervention as a matter of right.

4 A. Swinomish's Motion for Intervention is Timely.

5 To determine whether a motion to intervene is timely, courts consider the totality of the  
6 circumstances, with a focus on the stage of the proceedings, potential for prejudice to other  
7 parties, and the reason for any delay in moving to intervene. *United States v. Alisal Water Corp.*,  
8 370 F.3d 915, 921 (9th Cir. 2004). While initially challenging NMFS's failure to complete a  
9 Biological Opinion, Plaintiff has now filed an amended complaint that challenges the Biological  
10 Opinion itself. Without undue delay respecting this new stage of the proceedings, Swinomish  
11 seeks intervention prior to summary judgment briefing. No substantive rulings have been made  
12 on the issue of adequacy and accuracy of the Biological Opinion, and the Tribe is prepared to  
13 follow the stipulated case schedule. Thus, no existing party would suffer prejudice from granting  
14 intervention. *See Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996)  
15 (finding no prejudice because no substantive rulings yet issued); *PEST Comm. v. Miller*, 648 F.  
16 Supp. 2d 1202, 1212 (D. Nev. 2009), *aff'd*, 626 F.3d 1097 (9th Cir. 2010) (finding intervention  
17 timely where party filed prior to summary judgment and met response and cross-motion  
18 deadlines). This motion is timely.

19 B. Swinomish Has Protectable Interests in This Action.

20 Rule 24(a)(2) requires the applicant for intervention to have an interest in the subject of  
21 the action. This requirement is "primarily a practical guide to disposing of lawsuits by involving  
22 as many apparently concerned persons as is compatible with efficiency and due process."  
23 *Wilderness Soc.*, 630 F.3d at 1179 (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th

1 Cir. 1980)). A movant must show that the interest asserted is protectable under some law and  
2 that there is a relationship between that interest and the claims at issue. *Id.* The Tribe and its  
3 members hold substantial sovereign, cultural, and environmental interests in the subject of this  
4 action. *See* Edwards Decl. ¶ 15.

5 Anadromous fish, including Chinook salmon, have played a central role in the Tribe's  
6 subsistence, economy, culture, spiritual framework, and overall way of life for millennia.  
7 Edwards Decl. ¶ 8-10. The Tribe has adjudicated Treaty rights that include the right to fish for  
8 Chinook salmon at usual and accustomed sites throughout the Skagit River system. *Id.* ¶ 8.  
9 Despite expending significant effort and resources to protect and restore native fish habitat in the  
10 Skagit Basin, the Tribe has witnessed the precipitous decline of Puget Sound Chinook salmon in  
11 recent years, and has watched its members' livelihood deteriorate as fishing runs have  
12 plummeted and fishing seasons have been shortened and closed. *Id.* ¶¶ 3, 6-7, 10. The loss of  
13 fishing opportunities has strained the Tribe's cultural lifeline and diminished Tribal members'  
14 overall wellbeing. *Id.*

15 The sovereign interests of Swinomish in its Treaty rights are directly affected by the  
16 tidegates in the Skagit Basin and, more specifically, by this District's challenge to NMFS's  
17 jeopardy findings and mitigation requirements. *Id.* ¶ 15; *see Klamath Irrigation Dist. v. U.S.*  
18 *Bureau of Reclamation*, 48 F.4th 934, 944 (9th Cir. 2022) (finding that suit challenging federal  
19 agency's operating procedures for irrigation project implicated tribe's legally protected interests  
20 in Treaty fishing rights). Moreover, the Tribe as *parens patriae* has a quasi-sovereign interest in  
21 protecting the reserved rights of its members and the related livelihood, health, cultural, and  
22 spiritual effects of enjoyment of those rights. *See* Edwards Decl. ¶¶ 5-7, 10-11 (Tribe's  
23 members, impacts, recovery efforts); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,

1 458 U.S. 592, 607 (1982) (describing *parens patriae* interests in health and wellbeing of  
2 residents); *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1117 (S.D. Cal. 2008)  
3 (permitting Tribe’s suit as *parens patriae*); *see also Miccosukee Tribe of Indians of Fla. v.*  
4 *United States*, 680 F. Supp. 2d 1308, 1315 (S.D. Fla. 2010) (finding Tribe’s “interest in its ability  
5 to preserve its culture and way of life is a paradigmatic example of an interest that goes beyond a  
6 proprietary or private interest, and affects the general well-being of a sufficiently substantial  
7 segment of Tribe members”). To protect the rights of its members to fish at the usual and  
8 accustomed sites, Swinomish has an interest in protecting the estuary habitat that is necessary to  
9 support the exercise of those rights.

10 Because Treaty rights connect Tribal culture and natural resources, the Tribe holds  
11 environmental conservation interests directly affected by tidegates and this litigation. It is for  
12 this reason that Swinomish has long participated in government processes and litigation  
13 concerning tidegates to promote its interests in salmon population and habitat recovery in the  
14 Skagit Basin, including by holding a position on the TFI Oversight Committee for over a decade  
15 and providing comments last spring to NMFS’s Biological Opinion. It is well established that  
16 environmental interests and active participation in processes concerning relevant federal actions  
17 are sufficient for purposes of intervention as a matter of right. *See, e.g., Sagebrush Rebellion,*  
18 *Inc. v. Watt*, 713 F.2d 525, 526-27 (9th Cir. 1983); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d  
19 1392, 1398 (9th Cir. 1995).

20 C. Swinomish’s Interests May Be Impaired as a Result of This Litigation.

21 A ruling in favor of Plaintiff could decrease protections for salmonids throughout the  
22 watershed and delay or decrease habitat restoration already identified by NMFS as necessary to  
23 the recovery of Chinook salmon in the Skagit. A proposed intervenor must show that the  
24

1 disposition of an action “*may*, as a practical matter,” impede its ability to protect its interests.  
2 Fed. R. Civ. P. 24(a)(2) (emphasis added). This burden is minimal; an applicant need only show  
3 that impairment of their legal interest is possible if intervention is denied. *City of Los Angeles*,  
4 288 F.3d at 401. Moreover, the court’s analysis of this factor “is not limited to consequences of  
5 a strictly legal nature.” *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1497-98  
6 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d  
7 1173 (9th Cir. 2011).

8         The TFI Agreement was reached by farmers, landowners and government agencies after  
9 the decision in *Swinomish Indian Tribal Community v. Skagit County Dike District No. 22* to  
10 allow for more streamlined permitting and compliance with the applicable law. Through the TFI  
11 Oversight Committee, the Tribe monitored compliance with the Agreement and the attendant  
12 Biological Opinion. When the Tribe identified problems with the Agreement’s implementation  
13 because the requirements of the Biological Opinion to secure estuary habitat credits prior to  
14 receiving tidegate construction permits were being ignored, NMFS determined that there the  
15 implementation gaps were significant enough to withdraw programmatic ESA coverage.  
16 Without programmatic ESA coverage, all new tidegate construction permits required individual  
17 project-based review under the ESA. Consequently, NMFS developed a new Biological Opinion  
18 for tidegate replacement specific to Plaintiff District and the project at issue in this litigation.  
19 Plaintiff now seeks to vacate and remand the Biological Opinion with directives that decrease or  
20 modify the habitat mitigation measures the Service has recommended to avoid jeopardy to listed  
21 species, including to decrease the number of habitat restoration credits District 12 must obtain  
22 prior to proceeding with tidegate replacement. The reduced protection that Plaintiff seeks  
23 threatens salmon and reduces estuarine habitat recovery, running counter to best science and  
24

1 Swinomish’s work to ensure habitat restoration and enforcement of the ESA in tidegate  
2 replacement and repair, thereby directly impairing the Tribe’s Treaty rights that enshrine its  
3 members’ subsistence, cultural, and spiritual practices. Edwards Decl. ¶¶ 12-15.

4 D. Swinomish’s Interests Are Not Adequately Represented.

5 As a sovereign with significant interests in the Skagit watershed, Swinomish’s rights and  
6 interests are not adequately protected by the existing defendant. The final requirement for  
7 intervention as of right is a “minimal” showing that the existing parties to the litigation “may”  
8 not adequately represent the Proposed Intervenor’s interests. *Trbovich v. United Mine Workers*,  
9 404 U.S. 528, 538 n.10 (1972); *Sagebrush Rebellion*, 713 F.2d at 528. To make this  
10 determination, courts consider whether: (1) an existing party will *undoubtedly* make all the  
11 intervenor’s arguments; (2) the party is capable of and willing to make such arguments; and (3)  
12 the intervenor would offer any necessary element to the proceedings that would be neglected.  
13 *County of Fresno*, 622 F.2d at 438-39.

14 No existing party adequately represents Swinomish’s interests. Plaintiffs of course hold  
15 directly adverse interests. Defendants are government officials or agencies that must balance  
16 competing interests in determining their policy and litigation positions, including interests  
17 adverse to the Tribe. *See Trbovich*, 404 U.S. at 538-39 (union member’s interests not adequately  
18 represented because government duties to serve union *and* public interest may not dictate same  
19 approach); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823 (presumption of adequacy  
20 overcome where government and private sector interests may diverge); *Californians For Safe &*  
21 *Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (interests of  
22 union “potentially more narrow” than interests of general public, thus inadequately represented  
23 by state agencies).

1           Though there is a presumption of adequate representation by the federal government  
2 where a party seeks to intervene on the same side, *Arakaki v. Cayetano*, 324 F.3d 1078, 1086  
3 (9th Cir. 2003), it is overcome here for two central reasons: Swinomish and Defendants do not  
4 “share[] the same interest” in this matter, *id.*, and federal agencies’ prior actions indicate  
5 potential that they will not vigorously represent the interests of Swinomish.

6           First, Swinomish and Defendants do not “share[] the same interest” in this matter.  
7 Swinomish is a sovereign government, holds reserved rights to hunt, fish, and gather, and is an  
8 adjudicated co-manager of fisheries and aquatic resources with the State of Washington. *United*  
9 *States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Therefore Swinomish is in a unique  
10 position concerning matters that jeopardize protected salmonid populations in the estuary, and its  
11 interests are “more narrow and parochial than the interests of the public at large.” *Californians*  
12 *For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998).  
13 Moreover, the Tribe’s sovereign interest in the resources necessary to fulfill its Treaty rights  
14 “differs in a meaningful sense” from the federal Defendants’ interest in compliance with  
15 environmental laws such as the ESA. *See Klamath Irrigation Dist.*, 47 F.4th at 944-45  
16 (analyzing adequacy of representation under Rule 19’s same standard). The Defendant Service  
17 is tasked with assessing jeopardy to species listed under the ESA that may arise from federal  
18 action. In contrast, Swinomish holds a near-existential stake in ensuring adequate mitigation for  
19 tidewater replacement projects, given the urgent need to ensure adequate and appropriate  
20 mitigation of jeopardy impacts to priority salmonid habitat in the Skagit Basin. *See Edwards*  
21 *Decl.* ¶ 10; *Arizona v. California*, 460 U.S. 605, 614-15 (1982) (holding U.S. not adequate  
22 representative of Tribes in litigation “critical to their welfare”); *Dine Citizens Against Ruining*  
23 *Our Env’t v. Bureau of Indian Affs.*, 932 F.3d 843, 855 (9th Cir. 2019) (noting divergence in  
24

1 interest with tribe where federal defendants had interest in defending analyses but not outcome,  
2 in analysis of Rule 19's analogous adequacy of representation requirement). No other party to  
3 the litigation is similarly situated or holds the same sovereign and environmental interests. *Cf.*  
4 *Arakaki*, 324 F.3d at 1087-88 (denying intervention because there was similarly-situated  
5 intervenor and because defendants had specific statutory and constitutional obligations to protect  
6 interests of party seeking intervention).

7 Second, federal agencies' prior actions indicate the potential that they will not vigorously  
8 represent the interests of Swinomish. The Defendant Service only undertook the initial 2008 TFI  
9 Biological Opinion after legal action by Swinomish. Subsequently, it was the Tribe that brought  
10 to light the substantial non-compliance issues with the TFI's implementation in recent years,  
11 prompting the Defendant and the Corps to adopt a case-by-case approach to biological  
12 assessment. Where the government defendant has been similarly laggard or reluctant,  
13 representation has been found inadequate. *See Citizens for Balanced Use v. Montana Wilderness*  
14 *Ass'n*, 647 F.3d 893, 899-900 (9th Cir. 2011); *County of Fresno*, 622 F.2d at 437; *Idaho Farm*  
15 *Bureau Fed'n*, 58 F.3d at 1398.<sup>3</sup>

16 II. ALTERNATIVELY, PROPOSED INTERVENORS SATISFY THE STANDARDS  
17 FOR PERMISSIVE INTERVENTION.

18 1. Alternatively, this Court should grant permissive intervention because Swinomish  
19 has "a claim or defense that shares with the main action a common question of law or fact" and  
20 the intervention will not "unduly delay or prejudice the adjudication of the original parties'  
21 rights." Fed. R. Civ. Proc. 24(b)(1), (3). And Swinomish is a sovereign nation holding

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22 <sup>3</sup> Further, it is not uncommon that federal agencies may reconsider positions and may cease  
23 defending a prior decision after an administration change, the precise situation here. Swinomish  
24 has a right to intervene to ensure that its interests are represented even if NMFS were to change  
25 its position.



1 adjudicated Treaty rights that are indisputably harmed by the core issue in this litigation. *See*  
2 *Arizona v. California*, 460 U.S. at 615 (finding that, at a minimum, permissive intervention was  
3 appropriate because Tribes’ “participation in litigation critical to their welfare should not be  
4 discouraged”).

5       2. The Tribe’s defenses are factually and legally related to the main action. It seeks  
6 to defend NMFS’s Biological Opinion and ensure the fulfillment of the TFI Agreement’s Skagit  
7 Chinook Recovery Plan goals to restore fish habitat and fully mitigate impacts to estuary habitat.  
8 While Swinomish may advance arguments that differ from the government defendants’, their  
9 defenses are unquestionably related. And intervention will not prejudice any of the existing  
10 parties or delay the proceedings. Moreover, the Tribe “will significantly contribute . . .to the just  
11 and equitable adjudication of the legal questions presented.” *Spangler v. Pasadena City Bd. of*  
12 *Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Swinomish’s specialized knowledge of fisheries  
13 management in the Skagit Basin, their extensive and long history of ensuring that tidegate  
14 replacement complies with applicable federal laws, and experience engaging in the process for  
15 ensuring habitat restoration to offset adverse impacts from tidegate damage will aid the  
16 resolution of this litigation. *See Sagebrush Rebellion*, 713 F.2d at 528 (noting specialized  
17 expertise and differing perspective of environmental nonprofit seeking intervention).

#### 18 CONCLUSION

19 For the reasons set forth above, Swinomish respectfully requests that this Court grant its  
20 motion to intervene as of right, or, in the alternative, for permissive intervention.

21 DATED: November 21, 2024.

22 Respectfully submitted,

23 /s/ Noelia Gravotta

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