No. 19-55021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCEANA, INC.,

Plaintiff-Appellee,

v.

WILBUR ROSS, in his official capacity of Secretary of the United States Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NATIONAL MARINE FISHERIES SERVICE,

Defendants-Appellants,

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, NO. 2:17-cv-05146-RGK-JEMx

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STATE OF WASHINGTON'S UNOPPOSED MOTION TO INTERVENE

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The State of Washington seeks leave to intervene in this action as a Plaintiff-Intervenor-Appellee for the purposes of the present appeal. Washington should be permitted to intervene as of right because this case directly impacts Washington's substantial interests in: (1) a proposed fishery regulation crafted, in part, by Washington in its capacity as a permanent member of the Pacific Fishery Management Council (Pacific Council); (2) endangered and threatened species that frequently transit Washington waters, including sperm whales, fin whales, humpback whales, loggerhead sea turtles, and green sea turtles that are protected under Washington law, Wash. Admin. Code 220-610-010; 220-200-100; and (3) NMFS's responsibilities in reviewing future fishery regulations proposed by the Pacific Council. These interests are protected by the Magnuson-Stevens Act and the Administrative Procedure Act and are not adequately represented by the existing parties.

Washington's motion to intervene is timely under the circumstances of this case. This case has potential impacts that extend beyond the current dispute over the drift gillnet rule itself. The full scope of those impacts became apparent only after the Defendants filed their summary judgment briefing and the district court issued its ruling in the case. Washington sought—and was granted—participation as *amicus curiae* within weeks of Defendants' briefing, and

Washington's motion to intervene now comes only 11 working days after Defendants-Appellees' appeal of the district court ruling. The existing parties will not be prejudiced by Washington's intervention. Washington presented its legal arguments to the district court in its amicus brief, and Washington does not seek to raise new issues or factual contentions in the case. As is evident by the district court's ruling, this case is critically important to Washington as a Pacific Council member and a state whose fisheries fall within the Council's jurisdiction. Washington respectfully requests that this Court grant intervention.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The California Drift Gillnet Fishery and Bycatch

The California drift gillnet fishery, which primarily targets swordfish, has been managed by the Pacific Council through a fishery management plan since 2004. Declaration of Michelle Culver (Culver Decl.) ¶ 4 (Attached as Exhibit A). Boats participating in the fishery deploy nets that form a vertical wall in the water column that entangle swordfish as they swim into the net. *Id.* Drift gillnets, however, indiscriminately catch other non-target species, including turtles, whales, and other marine mammals, that become entangled in the net and

[1] Washington contacted counsel for Plaintiff-Appellee Oceana and for Federal Defendant-Appellants. Both parties indicated that they do not oppose Washington's intervention on appeal.

frequently die. *Id.* ¶ 5. The incidental catch of non-target species is commonly referred to as "bycatch."

Concerns over growing use of drift gillnets on international waters led the United Nations to adopt a moratorium on the use of large-scale driftnets beyond the exclusive economic zone of any nation. *See* 16 U.S.C. § 1826(b)(5); *Humane Soc'y of U.S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001). In implementing the moratorium, Congress found that "the continued widespread use of large-scale driftnets beyond the exclusive economic zone of any nation is a destructive fishing practice that poses a threat to living marine resources of the world's oceans …." 16 U.S.C. § 1826(b)(1).

Many areas within the exclusive economic zone of the United States have been closed to drift gillnet fishing in response to concerns about impacts on non-target species. Washington has not allowed drift gillnets, except for a limited experimental fishery targeting swordfish and thresher shark, which was authorized from 1986 through 1988. Culver Decl. ¶ 7. During that time, the interactions between the experimental fishery and protected species—namely leatherback sea turtles and several marine mammal species—resulted in a termination of the fishery in 1988. Through a partnership with the Pacific Council, Washington's prohibition on drift gillnets in waters north of the

Washington/Oregon border now is codified in state and federal law. *See* 50 C.F.R. § 635.71(a)(17); Atlantic Swordfish Fishery; Mgmt. of Driftnet Gear, 64 Fed. Reg. 4055 (Jan. 27, 1999) (codified at 50 C.F.R. pt. 630); 50 C.F.R. § 660.713(d)(8); Wash. Admin. Code 220-355-080(2).

Although the California drift gillnet fishery remains open, it is subject to strict time and location restrictions in an effort to limit bycatch impacts from the fishery. *See e.g.*, 50 C.F.R. § 660.713; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, 81 Fed. Reg. 70,660 (Oct. 13, 2016). To protect endangered leatherback and loggerhead sea turtles, a large area off the California coast extending north to Cape Falcon, Oregon is seasonally closed to the fishery. 50 C.F.R. § 660.713(c). Driftnet gear also must meet certain criteria, including length limitations on the nets, 50 C.F.R. § 660.713(b), and the use of acoustic deterrent devices to try to minimize bycatch. Yet, despite these regulatory efforts to decrease bycatch rates in the California drift gillnet fishery, bycatch, particularly of protected species, remains a significant public concern. *See* Culver Decl. ¶ 8.

B. The Pacific Council's Process for Developing the Proposed Rule

In response to stakeholder comments, in 2012, the Pacific Council began considering ways to help minimize the California drift gillnet fishery's impacts

on protected species. *Id.* Over the next several years, the Pacific Council weighed various approaches to regulation, including an all-out elimination of drift gillnet gear. *Id.* Public comments during this time overwhelmingly supported shutting down the fishery. *Id.*

By 2014, the Pacific Council had identified several policy objectives for managing the California drift gillnet fishery, including using "hard caps" as a mechanism to reduce bycatch. *Id.* ¶ 9. "Hard caps" are species-specific limits that when met triggers a fishery closure for the remainder of the season. *Id.*

On September 23, 2016, the Pacific Council transmitted to NMFS its proposed regulation to implement a two-year rolling hard caps for certain high priority species, including fin, humpback, and sperm whales; leatherback, loggerhead, olive ridley, and green sea turtles; short-finned pilot whales; and common bottlenose dolphins. *Id.* ¶ 11. The proposed regulation required the immediate temporary closure of the California drift gillnet fishery if any of the hard caps were met or exceeded for any of the protected species. *Id.* By proposing the hard cap regulation, the Pacific Council sought to increase incentives to reduce bycatch in the fishery and limit the number of interactions between the fishery and protected species. *Id.* ¶ 9.

On October 13, 2016, NMFS published the proposed hard cap regulation in the Federal Register for public comment, indicating NMFS's affirmative determination that the proposed regulation met the standard set forth in section 1854(b) of the Magnuson-Stevens Act. 81 Fed. Reg. 70,660. Consistent with the Pacific Council's recommendation the proposed regulation sought to implement an immediate closure of the drift gillnet fishery when observed mortality or injury to high priority species—including fin, humpback, and sperm whales; leatherback, loggerhead, olive ridley, and green sea turtles; short-fin pilot whales; and bottlenose dolphins—meets or exceeds the established hard cap for any of these species during a rolling two-year timeframe. *Id.* at 70,660–61. Following closure of the comment period on November 28, 2016, the Secretary did not promulgate a final regulation within 30 days as required by 16 U.S.C. § 1854(b)(3).

Instead, on June 12, 2017, NMFS withdrew the proposed regulation, stating that "[a]s a result of its analysis of the effects of the proposed rule, NMFS has decided that the changes covered in the proposed rule from 2016 are not warranted at this time. Therefore NMFS is withdrawing the proposed rule …." Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet

Fishery, 82 Fed. Reg. 26,902 (June 12, 2017). Plaintiff Oceana, Inc., immediately filed suit challenging that reversal.

In the summer of 2018, and at a very early stage of the litigation, the parties filed cross-motions for summary judgment. Due to the Defendants' broad assertion of authority in reviewing proposed fisheries regulations, Washington sought—and received—permission to participate as *amicus curiae* in support of Oceana. The District Court ultimately found in Oceana's favor, citing Washington's statutory analysis. Because Washington, as a member of the Pacific Council, has a significant interest in the process by which NMFS receives and approves (or disapproves) of regulations proposed by regional fisheries councils, as well as a significant interest in what NMFS's obligations are regarding the California drift gillnet regulation, Washington now seeks permission to intervene as Plaintiff-Appellee.

II. ARGUMENT

Although neither the Rules of Appellate Procedure nor the Ninth Circuit's local rules articulate a standard for granting a motion to intervene on appeal, appellate courts generally apply Federal Rule of Civil Procedure Rule 24. *See Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007); *see also Int'l Union, UAW, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) (acknowledging

that "the policies underlying intervention [pursuant to Rule 24] may be applicable in appellate courts.").[2]

Under CR 24(a)(2), a party may intervene as of right if: "(1) it has a significant protectable interest relating to the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent its interest." *Apoliona*, 505 F.3d at 965 (internal quotations omitted); *See also* Fed. R. Civ. P. 24(a)(2). Courts generally liberally construe the intervention standard and ground their analysis in "practical considerations" rather than "technical distinctions." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

A. Washington Meets the Significant Interest, Impairment of Interest, and Inadequate Representation Prongs of the Intervention Analysis

Washington meets the first three elements for intervention as of right under CR 24. First, a proposed intervenor has a "significant protectable interest" where it can show an interest protected under some law and that there is a

[2] CR 24 requires a motion to intervene to be accompanied by a pleading setting out the claim or defense for which intervention is sought. Fed. R. Civ. P. 24(c). It is unclear whether such a pleading is required or indeed makes sense in the context of appellate intervention. However, out of an abundance of caution, a Complaint in Intervention is attached hereto as Exhibit B.

relationship between the interest and the plaintiff's claims. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). As a permanent member of the Pacific Council and one of the parties involved in crafting the regulation at issue in this case, *see* Culver Decl. ¶¶ 3, 8–11, Washington has a significant interest in: (1) ensuring that NMFS does not exceed its statutory authority in reviewing proposed regulations; (2) preventing unreasonable delay in the implementation of fishery management plans and regulations; and (3) clarifying NMFS's responsibilities to timely review this and future regulations proposed by the Pacific Council. Washington also has a significant interest in the finalization of the drift gillnet regulation because Washington spends considerable resources to protect the marine species that will directly benefit from implementation of the proposed drift gillnet rule. Culver Decl. ¶ 13. These interests are protected by the plain language of the Magnuson-Stevens Act,[3] as actionable pursuant to the Administrative Procedure Act,[4] and squarely covered by Plaintiff's claims. Accordingly, Washington has an important interest in this case.

Second, where a party "would be substantially affected in a practical sense by the determination made in an action, [it] should, as a general rule, be entitled

[3] 16 U.S.C. § 1801 *et seq.*
[4] 5 U.S.C. § 500 *et seq.*

to intervene." *Berg*, 268 F.3d at 822 (*quoting* Fed R. Civ. P. 24 advisory committee's notes). Here, disposition of this case will substantially affect Washington's ability to protect its interests. As Washington stated in its *amicus* brief below, Congress considered—and rejected—the very interpretation of the Magnuson-Stevens Act advanced by NMFS in this case. *See* ECF No. 99, at 19–20 (discussing Congress' rejection of a proposal to allow NMFS to tentatively approve regulations proposed by regional fisheries councils because of concerns over delaying approval). Congress did so to avoid precisely the kind of delays and confusion that NMFS's actions here have caused. *See id*. If the Court agrees with NMFS's interpretation of its responsibilities under the Magnuson Stevens Act, Washington will experience further delays in implementation of the drift gillnet rule and may face additional delays by NMFS in implementing fishery management plans and regulations proposed by the Pacific Council in the future. In addition, delayed reduction in incidental catch of threatened and endangered species in the drift gillnet fishery directly impacts Washington through detrimental impacts to state-protected marine species.[5]

[5] Because Washington does not intend to seek relief not requested by Plaintiff-Appellee Oceana, Washington need not establish Article III standing. *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1234 (9th Cir. 2017). Nevertheless, Washington's interest in the case, which will be irreparably harmed if NMFS's unlawful decision is allowed to

Third, the existing parties do not—and cannot—adequately represent Washington's interests. To demonstrate inadequate representation, prospective intervenors need only satisfy the "minimal" burden of showing that representation of its interests by existing parties "may be" inadequate. *Berg,* 268 F.3d at 823; *citing Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). Here, Plaintiff-Appellee does not adequately represented Washington's interest. While Oceana has a substantial interest in protecting the marine species impacted by the drift gillnet rule, Oceana does not—and indeed cannot—fully represent the same long-term interest in the relationship between NMFS and the Pacific Council, including the processes by which NMFS will review and approve or deny proposed fishery regulations in the future. As noted, because this case has potential impacts that extend beyond the current dispute over implementation of the drift gillnet rule, only the Pacific Council or a permanent member thereof fully represents this interest.[6]

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stand, also satisfies the elements of Article III standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (stating elements of standing).

[6] Furthermore, Defendant-Appellants obviously do not adequately represent Washington's interest because Defendant-Appellants took the very action that Washington argues was unlawful.

In sum, Washington has a significant, protectable interest that is not adequately represented by the parties.

B. Washington's Intervention Motion Is Timely

Washington also satisfies the timeliness element of intervention. In determining whether a motion to intervene is timely, courts consider "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 940 (9th Cir. 2016) (*citing United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)). To determine timeliness, the court must consider "all of the circumstances of a case" and not focus only on the date a party seeking intervention became aware of the litigation." *Legal Aid Soc'y of Alameda Co. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980). The "mere lapse of time" does not foreclose a motion to intervene. *Apoliona*, 505 F.3d at 965 (*citing Alisal Water Corp.*, 370 F.3d at 919). Under this standard and the circumstances of this case, Washington's motion to intervene is timely.

First, while certainly less frequent than motions to intervene at the trial court, this Court has repeatedly granted motions to intervene on appeal in similar circumstances where significant state interests stand to be impacted by the litigation. *See, e.g.*, *Peruta*, 824 F.3d at 941 (granting the State of California's

motion to intervene for purposes of seeking *en banc* rehearing); *Apoliona*, 505 F.3d at 966 (granting the State of Hawaii's motion to intervene for panel rehearing and petition for panel rehearing *en banc* after participating as *amicus*). As a result, the fact that Washington seeks to intervene at this stage in the litigation is not dispositive. *See id.* Furthermore, even on appeal the case remains (in a practical sense) at a relatively early stage. Because the questions in this case are purely legal ones with no disputed issues of material fact, the parties did not engage in discovery or any other pre-trial matters that courts have found to be unduly complicated by the addition of a party. Indeed, except for some wrangling over the administrative record, the activity in the case can be summarized as: Plaintiff filed its case in July 2017, the Court set a briefing schedule in April 2018, and the case was decided on motions practice in October 2018. Notably, the parties do not dispute the key facts in this case. Order Re Summary Judgment, ECF No. 102, at 4. Accordingly, Washington's intervention in this case will not disrupt the flow of the case.

Second, and for similar reasons, the exiting parties will not be prejudiced by Washington's participation on appeal. Indeed, neither party opposes Washington's intervention motion. Washington's intervention will not cause any delays in the proceedings. Only 11 working days have passed since Appellants

filed their appeal, and Appellants' opening brief is not due until April 15, 2019—ample time for the intervention motion to be resolved without impacting the briefing schedule. Additionally, because this case involves an undisputed administrative record and pure issues of law, Washington's intervention will not introduce any new factual matters or expand the scope of the case or the issues on appeal—a situation this Court has previously determined favors intervention. *See Apoliona*, 505 F.3d at 965. And, because Washington participated below as *amicus curiae*, both its position in the case and its legal arguments have been fully briefed and are already well-known by the existing parties.

Finally, under the totality of circumstances in this case, Washington's delay in seeking intervention is reasonable. The "crucial date for assessing the timeliness of a motion to intervene is when proposed intervenors should have been aware that their interests would not be adequately protected by the existing parties." *Smith v. LA Unified School Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (reversing the denial of intervention approximately twenty years after filing and seventeen years after resolution and entry of a consent decree). Thus, "[a] would-be intervenor's delay in joining the proceedings is excusable when the intervenor does not know or have reason to know that [its] interests might be adversely affected by the outcome of litigation." *Apoliona*, 505 F.3d at 965.

In this case, while the Plaintiff's lawsuit focused exclusively on the proposed drift gillnet regulations, the district court entered a broad ruling based on an interpretation of the statute that defines the process NMFS must follow when it comes to fishery regulations proposed by regional councils. As a result, Washington was not fully aware of its need to vigorously defend the district court's proper interpretation of NMFS's obligations under the Magnuson-Stevens Act until the ruling was made and Defendant-Appellees appealed that ruling.

Alternatively, and at the *earliest*, Washington did not fully know the potential adverse impacts to the approval of future fisheries regulations until the Defendants submitted briefing on the cross-motions for summary judgment on June 20, 2018, and the full breadth of their arguments were made apparent. In light of Defendants' broad assertions, Washington sought leave from the district court to file an *amicus* brief that addressed NMFS's overly-expansive reading of the Magnuson-Stevens Act and that highlighted legislative history directly refuting NMFS's reading of the Act. Although Washington did not seek to intervene at that time, such intervention likely would have caused more prejudice to Defendant-Appellee's by delaying resolution of the summary judgment

motions. *See Apoliona*, 505 F.3d at 965 (considering "practical result" of intervention on appeal).

Thus, as in *Apoliona*, "it cannot be said that the state ignored the litigation or held back from participation to gain tactical advantage[,]" such that granting intervention would be inappropriate. *See id*. at 966. Instead, Washington appropriately participated as *amicus* below and, when the need to assert its interests became fully clear following the district court's decision and Defendant-Appellants' decision to appeal, Washington filed the present motion to intervene within days of Defendants' appeal of that decision. Under the circumstances, Washington's motion is timely and should be granted.

III. CONCLUSION

For the foregoing reasons, the State of Washington respectfully requests that this Court grant its motion to intervene as Plaintiff-Intervenor-Appellee in this case. Washington has a significant, protectable interest in the outcome of the litigation that is not adequately represented by the parties. Furthermore, while Washington's motion comes on appeal, Washington's request for intervention is proper given the circumstances of this case. The parties will not be prejudiced by Washington's participation, and, because the full scope and impact of the case

was not apparent until Federal Defendants' appeal of the district court decision, Washington's delay in seeking intervention is not unreasonable.

RESPECTFULLY SUBMITTED this 23rd day of January, 2019.

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EXHIBIT A

No. 19-55021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OCEANA, INC., Plaintiff-Appellee, v. WILBUR ROSS, in his official capacity of Secretary of the United States Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NATIONAL MARINE FISHERIES SERVICE, Defendants-Appellants.	DECLARATION OF MICHELE CULVER

I, MICHELE CULVER, declare:

1. I am over the age of 18, competent to be a witness herein, and make this declaration in that capacity. I state the following based upon my personal knowledge.

2. I currently serve as the Intergovernmental Ocean Policy Manager of the Washington Department of Fish and Wildlife (WDFW), a position I have held since November 2016. I have been employed with WDFW since 1994, first as an upland game bird biologist and later as a marine fisheries manager.

I also oversee the management of Washington's halibut fisheries, including fisheries in Puget Sound, and other state-managed fisheries in Washington coastal waters, such as Dungeness crab.

3. The State of Washington is a permanent, voting member of the Pacific Fishery Management Council (Pacific Council). The Pacific Council is one of eight regional fishery councils established by the Magnuson-Stevens Conservation and Management Act (MSA), which sets policies and standards for West Coast fisheries and the protection of marine species and habitat. WDFW is the agency designated in the MSA to serve on the Pacific Council, and I have filled that role on behalf of WDFW since 2006.

4. The California drift gillnet fishery, which primarily targets swordfish, has been managed by the Pacific Council through a fishery management plan since 2004. Participating fishing boats deploy nets that form a vertical wall in the water column that entangles swordfish as they swim into the net.

5. In addition to swordfish, however, drift gillnets also entangle many other non-target species, frequently resulting in mortality. The mortalities of these non-target species is known as "bycatch." Because drift gillnets capture anything large enough to get entangled in the net, the bycatch

in this fishery includes a large host of species, including fish, whales, dolphins, sea turtles, and sea birds.

6. Many of these species are protected under the Marine Mammal Protection Act or Migratory Bird Treaty Act, and some are listed as threatened or endangered under the Endangered Species Act and Washington state law. For example, drift gillnets have documented mortality of numerous high priority species, including: fin, humpback, sperm, and short-finned pilot whales; leatherback, loggerhead, olive ridley, and green sea turtles; and bottlenose dolphins.

7. Because of its impacts on protected marine life, Washington has not allowed drift gillnets, except for a limited experimental fishery targeting swordfish and thresher shark, which was authorized from 1986 through 1988. The interactions with protected species—namely leatherback sea turtles and several marine mammal species—resulted in a termination of the experimental drift gillnet fishery in 1988. In the absence of a federal fishery management plan, Washington extended its prohibition on the use of drift gillnet gear in Pacific Ocean waters adjacent to the state out to 200 miles offshore; however, with the development of the fishery management plan by the Pacific Council in the 2000-2003 timeframe, this state prohibition was at-risk. To address our

concern that drift gillnet fisheries may be allowed through the federal fishery management plan off Washington, WDFW worked through the Pacific Council process to successfully secure a prohibition on drift gillnets in state and federal waters north of the Washington/Oregon border in federal fishing regulations, which National Marine Fisheries Service (NMFS) promulgated in 2004.

8. In response to stakeholder comments, in 2012, the Pacific Council began considering ways to help minimize the California drift gillnet fishery's impacts on protected species. Over the next several years, the Pacific Council weighed various approaches to regulation, including an all-out elimination of drift gillnet gear. Comments from the public during this time overwhelmingly supported shutting down the California drift gillnet fishery.

9. By 2014, the Pacific Council had identified several policy objectives for managing the West Coast swordfish fishery, including increasing observer coverage to improve the accounting of bycatch and protected species interactions, limiting the number of protected species interactions in the fishery, and using "hard caps" as a mechanism to reduce bycatch. "Hard caps" are essentially species-specific limits; reaching or exceeding a hard cap for one or more species triggers a fishery closure for the remainder of the season. The intent of using hard caps to reduce protected species interactions was twofold:

1) to provide an incentive for drift gillnet fishers to voluntarily change their fishing practices to avoid or minimize protected species interactions, and 2) to ensure that the number of protected species interactions in the fishery were limited. The penalty for reaching a hard cap—in this case, a closure of the fishery for the remainder of the season—needs to be significant to provide the incentive to not reach it.

10. In September 2015, after considering multiple alternatives, and taking into account the estimated impacts of those alternatives on the fishery participants and stakeholder input, I made a motion, which passed unanimously, for the Pacific Council to adopt the "two-year rolling hard caps" approach based on observed mortality or injury as its final preferred alternative. Under this system, onboard fishery observers would record the number of animals killed or injured each fishing season; those numbers would be added across two fishing seasons with the two-season total compared against the hard cap value. If the two-season total reached or exceeded the species-specific hard cap value, then the fishery would close for the remainder of the current season and would not reopen until the two-year total was less than the hard cap value. The two-year rolling hard cap values adopted by the Council were two each of fin whales, humpback whales, sperm whales, leatherback sea turtles,

loggerhead sea turtles, olive ridley sea turtles, and green turtles, and four each for short-finned pilot whales of the California-Oregon-Washington stock, and bottlenose dolphins.

11. On or around September 23, 2016, the Pacific Council formally transmitted a description of its final preferred alternative to the NMFS, which included the two-year rolling hard caps for certain high priority species described above. The proposal required the temporary closure of the California drift gillnet fishery if any of the hard caps were met or exceeded for any of the protected species. The rule was designed to both protect non-target species and increase incentives for participants in the California drift gillnet fishery to engage in practices that reduce bycatch overall.

12. NMFS published the proposed hard cap rule in the Federal Register on October 13, 2016. In doing so, NMFS stated its affirmative determination that the proposed regulation met the standards set out in the Magnuson-Stevens Act. However, NMFS did not issue a final regulation within 30 days of the closure of the comment period, as the Act requires. Rather, on June 9, 2017, NMFS sent a letter to the Pacific Council indicating that NMFS was reversing its prior affirmative determination on the proposed

regulation. NMFS formally withdrew the proposed regulation on June 12, 2017.

13. Washington has a significant interest in the benefits provided to the species protected by the proposed hard cap rule. Many of the high priority species identified in the rule are migratory in nature and frequent Washington waters, including humpback and sperm whales, sea turtles (leatherback, loggerhead, and green), and other marine animals. Many of these species are also listed as endangered or threatened under Washington law, and WDFW, as a result, spends significant resources to protect these species and their habitats through the Pacific Council process and state efforts. As noted, Washington has prohibited the use of drift gillnets in coastal waters for decades because of the adverse impacts to these protected species and the hard-cap regulation is the best mechanism to ensure their protection. The hard-cap regulation will limit drift gillnet interactions with protected species, and likely reduce bycatch overall, if it is implemented. NMFS's reversal of its affirmative decision on the proposed rule means that neither the anticipated reduction of bycatch of protected species, nor Washington's burden of protecting these species, will be lessened.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2019, in Olympia, Washington.

Michele Culver

EXHIBIT B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

OCEANA, INC.,

Plaintiff,

v.

WILBUR ROSS, in his official capacity as Secretary of the U.S. Department of Commerce; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

NO. 2:17-cv-05146 RGK-JEMx

THE STATE OF WASHINGTON'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. In this action, the State of Washington challenges a decision by the Secretary of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS) to withdraw a regulation proposed by the Pacific Fishery Management Council (Pacific Council) to limit the incidental catch (bycatch) of endangered, threatened, and other high priority marine species by the California drift gillnet fishery. Defendants' actions find no support in the Magnuson Fishery Conservation and Management Act of 1976, as amended by the Sustainable Fisheries Act of 1996, 16 U.S.C. § 1854 (collectively the "Magnuson-Stevens Act") and, thus, violates the Administrative Procedure Act (APA), 5 U.S.C. § 706.

2. The Magnuson-Stevens Act seeks to establish sustainable fishing practices that protect the long-term viability of fisheries and limit exploitation of marine resources for short-term economic gain. As part of this effort, the Act creates a unique federal/regional regulatory partnership that authorizes eight regional fishery management councils to formulate fishery management plans for their respective jurisdictions and to develop necessary or appropriate regulations to implement those plans. The Secretary of Commerce's role in this management regime, which the Secretary delegated to NMFS, an agency within NOAA, is limited

to making an affirmative or negative determination that the plans and regulations are consistent with applicable law.

3. In 2012, the Pacific Council began a multi-year effort to address bycatch of high priority marine species by the California drift gillnet fishery. After extensive public process and policy deliberations, the Pacific Council proposed a regulation establishing hard caps on bycatch of certain high priority species, which would temporarily shut down the fishery once the caps were met. After review, NMFS made an affirmative finding of consistency and published the proposed rule in the Federal Register in October 2016. Months later, however, NMFS withdrew the proposed regulation, claiming new concerns over short-term economic impacts from the hard cap requirement. NMFS's withdrawal is contrary to the Magnuson-Stevens Act and a violation of the APA.

II. JURISDICTION AND VENUE

4. The district court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States); 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to Plaintiff); and 5 U.S.C. §§ 704, 706 of the APA.

5. Venue is proper in the district court pursuant to 28 U.S.C. § 1391(e) because Defendants are officers or employees of the United States or agencies thereof, and a substantial part of the events giving rise to this claim occurred in this

district. In addition, venue is proper under 28 U.S.C. § 1391(e) because Plaintiff State of Washington seeks to join the action originally filed in this Court by Plaintiff Oceana. *See* Complaint for Declaratory and Injunctive Relief, *Oceana Inc. v. Ross, et al.*, Case No. 2:17-cv-05146 (C.D. CA July 12, 2017).

III. PARTIES

6. Plaintiff State of Washington is a sovereign entity and brings this action to protect its own sovereign and propriety rights and as *parens patriae* on behalf of its affected citizens and residents. The Attorney General is the chief legal advisor to the State of Washington. The Attorney General's powers and duties include acting in federal court on matters of public concern. This challenge is brought pursuant to the Attorney General's independent constitutional, statutory, and common law authority to bring suit and obtain relief on behalf of the State of Washington.

7. Washington has a significant interest in Defendants' unlawful withdrawal of the proposed rule. Under the Magnuson-Stevens Act, Congress provided certain states a direct role on regional fishery management councils to help shape federal fishery rules. Because Washington's fisheries are within the jurisdiction of the Pacific Council, Washington, through its designated regulatory agency the Washington Department of Fish and Wildlife, is a permanent voting member of the Pacific Council. In this capacity, Washington participated directly in crafting the proposed hard cap regulations that Defendants withdrew. Washington,

thus, has a vested interest in ensuring that NMFS properly adheres to the Magnuson-Stevens Act's procedures for review of regional councils' fishery management plans and implementing regulations—both as related to the proposed hard cap regulations and as precedence for other regulations that may be proposed by the Pacific Council in the future.

8. Washington also has a significant interest in benefits provided to the species targeted for protection by the proposed hard cap rule. Many of the species vulnerable to bycatch under the California drift gillnet fishery are migratory in nature and frequent Washington waters, including humpback and sperm whales, loggerhead and green turtles, and other marine animals. Because many of the impacted species, including sperm whales, fin whales, humpback whales, loggerhead sea turtles, and green sea turtles, are listed as endangered or threatened under Washington law, Wash. Admin. Code § 220-610-010; 220-200-100, Washington expends significant resources protecting these species and their habitat. Washington's efforts are undermined by bycatch in the California drift gillnet fishery, particularly when Washington has for decades prohibited the use of drift gillnets in state coastal waters because of the adverse impacts to non-target species. If implemented, the hard cap regulation will likely decrease bycatch rates. As a result, NMFS's reversal of its affirmative decision on the proposed rules means that

neither the anticipated reduction of bycatch of protected species, nor Washington's burden of protecting these species, will be lessened.

9. Defendant Wilbur Ross is named in his official capacity as the Secretary of the United States Department of Commerce. The Secretary is charged with implementation of the Magnuson-Stevens Act and is responsible for the violations alleged in this case. The Secretary has the ultimate duty and authority to issue the relief requested in this complaint.

10. Defendant NOAA is an agency within the United States Department of Commerce with supervisory responsibility over the NMFS. The Secretary delegated responsibility to NOAA to implement and enforce the Magnuson-Stevens Act, which in turn delegated that responsibility to NMFS.

11. Defendant NMFS is an agency within the United States Department of Commerce that has been delegated the responsibility to implement the Magnuson-Stevens Act and to ensure that the requirements of the Act are followed and enforced.

IV. STATUTORY BACKGROUND

12. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law; [or] without observance of procedure required by law." 5 U.S.C. § 706. The APA defines "agency action" to include "the whole or a part of

an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id*. § 551(13).

13. The Magnuson-Stevens Act is the primary regime for managing fisheries in United States waters. 16 U.S.C. §§ 1801-1884. Among other things, the Act seeks to ensure a sustainable fishery through the conservation and management of fishery resources off the coast of the United States. 16 U.S.C. § 1801(a)(6).

14. As part of this effort, the Act established regional fishery management councils "to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision" of fishery management plans and proposed regulations to implement such plans. 16 U.S.C. §§ 1801(b)(5); 1852, 1853. The Act thus requires regional councils to prepare fishery management plans with measures to prevent overfishing and promote a stable fishery and further authorizes regional councils to submit proposed regulations to NMFS that the councils deem necessary to implement fishery management plans or amendments. 16 U.S.C. § 1853.

15. NMFS must review and approve regulations proposed by regional councils. *Id.* § 1854.

16. Specifically, section 1854 provides that upon a regional fishery council's transmittal of a proposed regulation to NMFS, NMFS must evaluate the proposed regulation and determine whether it is "consistent with the fishery

management plan, plan amendment, [the Magnuson-Stevens Act], and other applicable law." *Id.* § 1854(b)(1).

17. Within 15 days of initiating the evaluation process, the Act requires NMFS to make an affirmative or negative determination on the proposed regulation. *Id.*

18. If NMFS's determination is affirmative, NMFS "shall publish" the regulations for public comment in the Federal Register. *Id.* § 1854(b)(1)(A). Within 30 days after the end of the comment period, NMFS "shall promulgate final regulations." *Id.* § 1854(b)(3). However, NMFS "shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations." *Id.*

19. If NMFS's determination is negative, NMFS "shall notify the Council in writing of the inconsistencies and provide recommendations on revisions that would make the proposed regulations consistent with the fishery management plan, plan amendment, [the Magnuson-Stevens Act], and other applicable law." *Id.* § 1854(b)(1)(B).

20. The statute does not allow any other options for the Secretary's review of a proposed regulation.

V. STATEMENT OF FACTS

A. The California Drift Gillnet Fishery and Bycatch

21. The California drift gillnet fishery operates out of a number of central and southern California ports, including Los Angeles, Santa Barbara, and Morro Bay, and targets swordfish and thresher sharks.

22. To catch these target species, fishing boats deploy specially designed nets that form a vertical wall in the ocean and entangle swordfish and thresher sharks as they swim into the net.

23. Drift gillnets, however, cannot distinguish between the species targeted by the fishery and other non-target species, including turtles, whales, and other marine mammals, that become entangled in the net. Although some of the non-target species may be retained and sold or kept, most bycatch is discarded as injured or dead.

24. Concerns over growing use of drift gillnets on international waters led the United Nations to adopt a moratorium on the use of large-scale driftnets beyond the exclusive economic zone of any nation. *See* 16 U.S.C. § 1826(b)(5); *Humane Soc'y of U.S. v. Clinton*, 236 F.3d 1320, 1322 (Fed. Cir. 2001). In implementing the moratorium, Congress found that "the continued widespread use of large-scale driftnets beyond the exclusive economic zone of any nation is a destructive fishing

practice that poses a threat to living marine resources of the world's oceans …." 16 U.S.C. § 1826(b)(1).

25. Many areas within the exclusive economic zone have also been closed to drift gillnet fishing in response to concerns about its impacts. The use of driftnet gear is prohibited in the Atlantic tuna and swordfish fisheries and off the Washington Coast. *See* 50 C.F.R. § 635.71(a)(17); Atlantic Swordfish Fishery; Mgmt. of Driftnet Gear, 64 Fed. Reg. 4055 (Jan. 27, 1999) (codified at 50 C.F.R. pt. 630); 50 C.F.R. § 660.713(d)(8); Wash. Admin. Code § 220-355-080(2). Oregon has also closed its drift gillnet fishery program.

26. Although the California drift gillnet fishery remains open, it is subject to strict time and location restrictions in an effort to limit bycatch impacts from the fishery. *See e.g.*, 50 C.F.R. § 660.713; Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, 81 Fed. Reg. 70,660 (Oct. 13, 2016). To protect endangered leatherback and loggerhead sea turtles, a large area off the California coast extending north to Cape Falcon, Oregon is seasonally closed to the fishery, and these restrictions are extended during El Niño events. 50 C.F.R. § 660.713(c). Driftnet gear also must meet certain criteria, including length limitations on the nets, 50 C.F.R. § 660.713(b), and the use of acoustic deterrent devices to try to minimize bycatch. In addition, NMFS places observers on drift

gillnet fishery vessels to monitor bycatch, but, due to funding constraints, observers monitor only about 30 percent or less of the drift-gillnet fleet.

27. Despite these past regulatory efforts to decrease bycatch rates in the California drift gillnet fishery, bycatch remains a concern, particularly for endangered and threatened species and marine mammals.

28. Between 2001 and 2015, bycatch from the fishery included approximately six humpback whales, nine sperm whales, more than twelve leatherback turtles, twenty loggerhead sea turtles, fourteen short-fin pilot whales, and more than six bottlenose dolphins.

B. The Pacific Council's Process for Developing the Proposed Rule

29. In 2012, the Pacific Council began considering ways to mitigate bycatch in the California drift gillnet fishery and asked NMFS to determine the next steps for establishing hard take caps for endangered and threatened sea turtles.

30. Over the next several years, the Pacific Council engaged in several wide-ranging discussions on the status and future prospects of the California drift gillnet fishery, including potentially transitioning the fishery to full federal management under Magnuson-Stevens Act authority and ultimately eliminating drift gillnet gear.

31. In response to these discussions, the Pacific Council received thousands of public comments and signatures encouraging the Pacific Council to phase out the

drift gillnet fishery and transition to a more sustainable fishery. Limited comments supported retaining the drift gillnet fishery.

32. In 2014, as part of its consideration of the future of the California drift gillnet fishery, and more broadly the West Coast swordfish fishery, the Pacific Council enumerated several policy objectives for managing the West Coast swordfish fishery, including using hard caps to reduce bycatch of high priority species, increasing observer coverage on vessels to help facilitate implementation of hard caps and other bycatch reduction efforts, and supporting collaboration between stakeholders to develop alternative fishing gears, conduct research to further minimize bycatch in the drift gillnet fishery, maintain a viable domestic West Coast highly migratory species fishery, and reduce capacity in the drift gillnet fishery through buyouts and other incentives. The hard caps were a key part of implementing this policy.

33. In September 2015, after considering a variety of alternatives through the environmental review process, the Council adopted a final preferred alternative for management of the drift gillnet fishery that included two-year rolling hard caps for high priority species based on observed mortality or injury.

34. On or around September 23, 2016, the Pacific Council transmitted to NMFS its proposed regulation to implement two-year rolling hard caps for certain high priority species, including fin, humpback, and sperm whales; leatherback,

loggerhead, olive ridley, and green sea turtles; short-finned pilot whales; and common bottlenose dolphins. The proposed regulation required the immediate temporary closure of the California drift gillnet fishery if any of the hard caps were met or exceeded for any of the protected species. By proposing the hard cap regulation, the Pacific Council intended to protect certain non-target species and increase incentives to reduce bycatch in the fishery.

35. On October 13, 2016, NMFS published the proposed hard cap regulation in the Federal Register for public comment, indicating NMFS's affirmative determination that the proposed regulation met the standard set forth in section 1854(b) of the Magnuson-Stevens Act. Consistent with the Pacific Council's recommendation the proposed regulation sought to implement an immediate closure of the drift gillnet fishery when observed mortality or injury to high priority species—including fin, humpback, and sperm whales; leatherback, loggerhead, olive ridley, and green sea turtles; short-fin pilot whales; and bottlenose dolphins—meets or exceeds the established hard cap for any of these species during a rolling two-year timeframe. 81 Fed. Reg. at 70,660-61.

36. Following closure of the comment period on November 28, 2016, the Secretary did not promulgate a final regulation within 30 days as required by 16 U.S.C. § 1854(b)(3).

37. Instead, on June 12, 2017, NMFS withdrew the proposed regulation, stating that "[a]s a result of its analysis of the effects of the proposed rule, NMFS has decided that the changes covered in the proposed rule from 2016 are not warranted at this time. Therefore NMFS is withdrawing the proposed rule …." Protected Species Hard Caps for the California/Oregon Large-Mesh Drift Gillnet Fishery, 82 Fed. Reg. 26,902 (June 12, 2017).

38. NMFS's Regional Administrator stated in a letter to the Pacific Council dated June 9, 2017, that NMFS had made a negative determination on the proposed regulation, reversing the agency's previous position. The letter explained that the reversal was based on NMFS's new determination that the proposed rule would have caused significant adverse economic effects not previously identified and that the proposed regulation would offer little new protection to high priority species.

39. NMFS's withdrawal did not comply with the procedures set forth in section 1854 of the Magnuson-Stevens Act.

40. NMFS's unlawful withdrawal of the proposed regulation has caused irreparable harm to Washington and its residents. In particular, NMFS's unlawful action harms Washington's interest, as a member of the Pacific Council, in ensuring that NMFS properly adheres to the Magnuson-Stevens Act's procedures for review of regional councils' proposed fishery management plans and implementing regulations—both in this case and as precedence for other regulations that may be

proposed by the Pacific Council in the future. In addition, NMFS's unlawful actions harm Washington's interest in reducing bycatch of threatened and endangered species, including sperm whales, fin whales, humpback whales, loggerhead sea turtles, and green sea turtles that are protected under Washington law, Wash. Admin. Code § 220-610-010; 220-200-100, that migrate to Washington's waters and that Washington expends significant resources to protect. These harms are ongoing and will continue absent the relief requested in this action.

FIRST CLAIM FOR RELIEF

Administrative Procedure Act: Withdrawal of Proposed Hard Cap Regulation Exceeded Defendants' Authority Under the Magnuson-Stevens Act

41. Washington realleges and incorporates by reference each of the allegations set forth in the preceding paragraphs.

42. Section 706(2) of the APA directs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C).

43. The Magnuson-Stevens Act requires the Secretary to evaluate proposed regulations transmitted by the Pacific Council and determine within 15 days whether the regulation is "consistent with the fishery management plan, plan amendment, [the Magnuson-Stevens Act], and other applicable law." 16 U.S.C. § 1854(b)(1).

44. The Secretary can make an affirmative or negative determination. *Id.*

45. Upon an affirmative determination, the Secretary "shall publish" the regulations for public comment in the Federal Register. *Id*. § 1854(b)(1)(A). Within 30 days after the end of the comment period, "[t]he Secretary shall promulgate final regulations." *Id.* § 1854(b)(3).

46. "The Secretary shall consult with the Council before making any revisions to the proposed regulations, and must publish in the Federal Register an explanation of any differences between the proposed and final regulations." *Id.*

47. Defendants did not follow the procedure set forth by the Magnuson-Stevens Act. Following the public comment period, NMFS did not promulgate the proposed regulations within 30 days or consult with the Pacific Council before making revisions to the proposed regulations.

48. Defendants' withdrawal of the proposed hard cap regulation exceeds Defendants' authority under the Magnuson-Stevens Act and violates the APA and thus should be held unlawful and set aside.

SECOND CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Withdrawal of Proposed Hard Cap Regulation Was Arbitrary and Capricious and Contrary to Law

49. Washington realleges and incorporates by reference each of the allegations set forth in the preceding paragraphs.

50. Section 706(2) of the APA directs courts to "hold unlawful and set aside agency actions, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

51. Defendants violated the Magnuson-Stevens Act and the APA by arbitrarily, capriciously, and unlawfully withdrawing the proposed hard cap regulation. Accordingly, NMFS's withdrawal of the proposed hard cap rule should be held unlawful and set aside.

PRAYER FOR RELIEF

The State of Washington respectfully requests that this Court:

1. Issue a declaratory judgment that Defendants violated the Administrative Procedure Act and the Magnuson-Stevens Act by withdrawing the Pacific Council's proposed regulation;

2. Order Defendants to take action consistent with the Magnuson-Stevens Act;

3. Award Washington its costs, expenses, and reasonable attorneys' fees on appeal;

4. Award such other relief as the Court deems just and proper.

DATED this 23rd day of January, 2019.

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FOR THE NINTH CIRCUIT

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