

HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SWINOMISH INDIAN TRIBAL  
COMMUNITY,

Plaintiff,

v.

ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

No. 2:18-cv-00598-RSL

MOTION TO INTERVENE BY  
TAYLOR SHELLFISH  
COMPANY, INC.

NOTING DATE: August 17, 2018

**I. MOTION TO INTERVENE**

Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, Taylor Shellfish Company, Inc. (“Taylor Shellfish”), a Washington corporation, respectfully moves to intervene as of right as a defendant in the action brought by Plaintiff Swinomish Indian Tribal Community (“Swinomish Tribe”). In the alternative, Taylor Shellfish moves to intervene permissively as a defendant pursuant to Rule 24(b). Counsel for Taylor Shellfish conferred with counsel for the Swinomish Tribe, the Army Corps of Engineers (“Army Corp”), and the National Marine Fisheries Service (“NMFS”). The Swinomish Tribe does not oppose this motion and the Army Corps and NMFS currently take no position on it.

1 **II. BACKGROUND**

2 Taylor Shellfish is a fifth-generation, family-owned company headquartered in  
3 Shelton, Washington. First Declaration of Diane (“Cooper Decl.”) ¶ 3. Taylor Shellfish has  
4 grown shellfish on Washington State shorelines for over 120 years and currently cultivates  
5 oysters, clams, geoduck, and mussels. *Id.* Taylor Shellfish employs approximately 900  
6 people, including over 700 people in the State of Washington, and it controls  
7 approximately 15,000 acres of tidelands in the State for shellfish farming. *Id.* ¶ 4. Over  
8 2,300 of those acres are in North Puget Sound. *Id.* ¶ 8.

9 In 2007, the Army Corps issued Nationwide Permit (“NWP”) 48, authorizing,  
10 pursuant to Section 10 of the Rivers and Harbors Act (“RHA”), 33 U.S.C. § 403, and Section  
11 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344, certain activities necessary for the  
12 continued operation of existing commercial aquaculture farms. Reissuance of Nationwide  
13 Permits, 72 Fed Reg. 11092, 11190-91 (Mar. 12, 2007). NWP 48 is a type of general permit  
14 that authorizes certain shellfish operations without requiring an individual permit application.  
15 *Id.*; 33 U.S.C. § 1344(e). On February 21, 2012, the Army Corps reissued NWP 48,  
16 extending authorization to both existing and certain new commercial aquaculture activities.  
17 Reissuance of Nationwide Permits, 77 Fed. Reg. 10184, 10280-81 (Feb. 21, 2012). The  
18 Army Corps reissued NWP 48 in 2017, again covering existing and new farms. Issuance and  
19 Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1995096 (Jan. 6, 2017).

20 In 2016, the Seattle District completed a programmatic Endangered Species Act and  
21 Magnuson-Stevens Fishery Management and Conservation Act consultation  
22 (“Programmatic Consultation”) with the West Coast Region of NMFS and the U.S. Fish  
23 and Wildlife Service (“USFWS”) Washington Fish and Wildlife Office. Cooper Decl. ¶ 7.  
24 The Programmatic Consultation covers certain shellfish activities in Washington State inland  
25 marine waters, including in North Puget Sound. *Id.*

1 Pre-construction notifications (“PCNs”) have been submitted to the Seattle District of  
2 the Army Corps for all shellfish farms controlled by Taylor Shellfish in North Puget Sound  
3 requesting verification that the farms are authorized by NWP 48 and covered by the  
4 Programmatic Consultation. *Id.* ¶ 9. Taylor Shellfish has received letters from the Seattle  
5 District Army Corps verifying that certain of the company’s shellfish beds in North Puget  
6 Sound are authorized by NWP 48 and covered by the Programmatic Consultation. *Id.* ¶ 10.  
7 Some of the beds covered by these verification letters contain native eelgrass, and some of  
8 the areas containing eelgrass are fallow. *Id.* PCNs for Taylor Shellfish’s remaining North  
9 Puget Sound shellfish farms are currently pending at the Army Corps. *Id.* ¶ 11.

10 In its Complaint, the Swinomish Tribe alleges the Corps violated the Clean Water  
11 Act, the National Environmental Policy Act, and the Administrative Procedure Act in  
12 reissuing NWP 48 in 2017, and it further alleges NMFS violated the Endangered Species Act  
13 (“ESA”) in issuing a programmatic biological opinion (“PBO”) associated with the  
14 Programmatic Consultation. ECF No. 1 at 16-29. The Swinomish Tribe’s allegations and  
15 causes of action are based on concerns regarding the impacts of shellfish aquaculture in  
16 North Puget Sound, and it requests that this Court, among other things, declare the Corps’  
17 and NMFS’s actions violated these laws; vacate NWP 48 as applied to native eelgrass beds  
18 in North Puget Sound; vacate the Corps’ environmental assessment (“EA”) and finding of no  
19 significant impact (“FONSI”) in fallow areas in North Puget Sound with native eelgrass  
20 beds; and vacate the PBO and take limit as applied to shellfish aquaculture operations in  
21 areas with native eelgrass beds in North Puget Sound. *Id.* at 29-30.

22 The relief requested by the Swinomish Tribe, if fully granted, would result in  
23 substantial hardship to Taylor Shellfish. Cooper Decl. ¶ 12. If the Swinomish Tribe’s  
24 challenge is successful, Taylor Shellfish could be required to spend significant resources to  
25 obtain individual Corps permits for all of its operations in North Puget Sound, or to wait until

1 there is another general permit available that covers Taylor Shellfish’s commercial shellfish  
2 operations. *Id.* Additionally, Taylor Shellfish could be required to spend significant resources  
3 undergoing individual ESA consultation for all of its operations in North Puget Sound. *Id.*

4 **III. ARGUMENT**

5 **A. Taylor Shellfish Is Entitled to Intervene as a Matter of Right.**

6 Courts use a four-element test for determining when intervention as of right under  
7 Rule 24(a) is warranted:

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

12 *Wilderness Soc’y v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra*  
13 *Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), abrogated on other grounds by  
14 *Wilderness Soc’y*, 630 F.3d at 1178-80 (abandoning the “federal defendant” rule  
15 recognized in *Sierra Club* that limited intervention with respect to NEPA claims)). *See*  
16 *also* Fed. R. Civ. P. 24(a). The test is applied liberally in favor of potential intervenors.

17 A liberal policy in favor of intervention serves both efficient resolution of the  
18 issues and a broadened access to the courts. By allowing parties with a  
19 *practical* interest in the outcome of a particular case to intervene, we often  
20 prevent or simplify future litigation involving related issues; at the same  
time, we allow an additional interested party to express its views before the  
court.

21 *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002) (internal  
22 quotations and citations omitted; emphasis in original).

23 Taylor Shellfish meets all four elements for intervention as of right.  
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1           **1. Taylor Shellfish’s motion is timely.**

2           In determining whether a motion to intervene is timely, courts consider three  
3 factors: (1) the stage of the proceedings; (2) whether the parties would be prejudiced; and  
4 (3) the reason for any delay in moving to intervene. *United States v. Oregon*, 913 F.2d  
5 576, 588 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). Here, the Swinomish  
6 Tribes’s Complaint was filed recently, on April 24, 2018, and Defendants filed their  
7 answer on July 13, 2018. Moreover, this motion is being filed prior to this Court making  
8 any substantive rulings, and, as a result, it will not prejudice any party. *Nw. Forest Res.*  
9 *Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (motion to intervene filed before  
10 any substantive rulings does not prejudice existing parties); *PEST Comm. v. Miller*, 648 F.  
11 Supp. 2d 1202, 1212 (D. Nev. 2009) (timely when filed two months after the defendant’s  
12 answer in an early stage of the proceedings).

13           **2. Taylor Shellfish has significantly protectable interests in the subject of this**  
14 **litigation.**

15           The requirement that an applicant for intervention possess an interest relating to  
16 the property or transaction that is the subject matter of the litigation does not impose a  
17 stringent test, and an applicant does not need to demonstrate a “specific legal or equitable  
18 interest.” *Wilderness Soc’y*, 630 F.3d at 1179 (citing *Cty. of Fresno v. Andrus*, 622 F.2d  
19 436, 438 (9th Cir. 1980)). Rather, this requirement is “primarily a practical guide to  
20 disposing of lawsuits by involving as many apparently concerned persons as is compatible  
21 with efficiency and due process.” *Id.* (internal quotations omitted). It is enough for an  
22 applicant for intervention to demonstrate that it has an interest protectable under some  
23 law, and that there is a relationship between that interest and the claims at issue. *Id.* (citing  
24 *Sierra Club*, 995 F.2d at 1484). A prospective intervenor “has a sufficient interest for  
25 intervention purposes if it will suffer a practical impairment of its interests as a result of

1 the pending litigation.” *Id.* (quoting *California ex rel. Lockyer v. United States*, 450 F.3d  
2 436, 441 (9th Cir. 2006)).

3 Taylor Shellfish has significantly protectible interests in the subject of this litigation.  
4 As the Ninth Circuit held in *Sierra Club*, an applicant for intervention who holds regulatory  
5 approvals that are challenged in an action and has property rights in facilities associated with  
6 the approvals has significantly protectible interests that support intervention. *Sierra Club*,  
7 995 F.2d at 1482, 1485-86 (permit holder entitled to intervene as a matter of right in  
8 action that would change terms of a CWA Section 402 permit). Taylor Shellfish has  
9 property interests in commercial shellfish farms in North Puget Sound, including areas that  
10 contain eelgrass and are fallow, and the Army Corps has issued letters for some of these  
11 farms verifying they are authorized by NWP 48 and covered by the Programmatic  
12 Consultation. Cooper Decl. ¶¶ 8, 10. Moreover, Taylor Shellfish currently has pending at the  
13 Army Corps additional PCNs requesting verification that shellfish farms the company  
14 controls in North Puget Sound are authorized by NWP 48 and covered by the Programmatic  
15 Consultation. *Id.* ¶ 11. Some of the areas that are pending verification contain eelgrass, and  
16 some of the areas containing eelgrass are fallow. *Id.* The Swinomish Tribe’s complaint  
17 requests, among other things, that the Court vacate NWP 48 as applied to native eelgrass  
18 beds in North Puget Sound, vacate the Corps’ EA and FONSI as applicable to implementing  
19 NWP 48 in fallow areas in North Puget Sound with native eelgrass beds, and vacate NMFS’s  
20 PBO issued as part of the Programmatic Consultation as applied to shellfish aquaculture  
21 operations in areas with native eelgrass beds in North Puget Sound. ECF No. 1 at 29-30.  
22 Thus, Taylor Shellfish has regulatory and property interests that are directly implicated in  
23 this action and are sufficient to meet the “significant protectable interest” test.

24 Taylor Shellfish also has significant economic and business interests at stake in this  
25 action. Cooper Decl. ¶¶ 5, 8. Taylor Shellfish has purchased and leased areas in North Puget



1 Sound implicated by this action for the purpose of engaging in commercial shellfish farming  
2 activities. *Id.* ¶ 8. Taylor Shellfish takes its legal responsibilities very seriously and has spent  
3 significant time, resources, and money securing regulatory approvals for its north Puget  
4 Sound shellfish farms. *Id.* ¶¶ 5, 8. The inability to cultivate shellfish on its North Puget  
5 Sound properties, whether leased and owned, would significantly and adversely impact  
6 Taylor Shellfish's business and economic interests, *Id.* ¶ 8, further supporting this motion.

7 **3. Disposition of this case in the Swinomish Tribe's favor will harm Taylor  
8 Shellfish's interests.**

9 Rule 24(a) requires that an applicant for intervention be so situated that the  
10 disposition of the action may as a practical matter impair or impede its ability to protect its  
11 interests. In its Complaint, the Swinomish Tribe requests declaratory and injunctive relief  
12 that includes vacating NWP 48 as applied to native eelgrass beds in North Puget Sound, the  
13 Corps' EA and FONSI as applicable to implementation of NWP 48 in areas in North Puget  
14 Sound with native eelgrass beds, and the PBO and take limit as applied to shellfish  
15 aquaculture operations in areas with native eelgrass beds in North Puget Sound. ECF No. 1 at  
16 29-30. Intervention as of right is particularly appropriate, where, as here, the relief sought  
17 is injunctive. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th  
18 Cir. 1995), abrogated on other grounds by *Wilderness Soc'y*, 630 F.3d at 1178-80  
19 (Intervention is particularly appropriate where injunctive relief requested would "directly  
20 and immediately affect legally protected interest" should the relief be granted).

21 Disposition of this case in the Swinomish Tribe's favor will harm Taylor Shellfish's  
22 regulatory, property, business, and economic interests. It would harm Taylor Shellfish's  
23 property and regulatory interests because the Swinomish Tribe has requested the Court to  
24 vacate NWP 48 and NMFS's PBO issued as part of the Programmatic Consultation with  
25 respect to native eelgrass beds in North Puget Sound, and the Army Corps has issued letters

1 verifying that farms controlled by Taylor Shellfish are authorized by NWP 48 and covered  
2 by the Programmatic Consultation. ECF No. 1 at 29-30; Cooper Decl. ¶ 10. Taylor Shellfish  
3 has additional farms in North Puget Sound containing native eelgrass pending verification  
4 from the Army Corps. Cooper Decl. ¶ 11. In addition, should this Court grant the  
5 Swinomish Tribe's requests for relief, Taylor Shellfish could be required to obtain individual  
6 Corps permits for its farms in North Puget Sound or await a new general permit. *Id.* ¶ 12.  
7 Either option would substantially impact Taylor's interests. *Id.* As recently noted by the  
8 Supreme Court, the Army Corps' permitting process impacts the legal rights of individual  
9 landowners because it "can be arduous, expensive, and long" to navigate, potentially  
10 including expensive environmental analyses in addition to the standard permit application.  
11 *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1815 (2016) (citing  
12 *Rapanos v. United States*, 547 U.S. 715, 721 (2006)). Taylor Shellfish could also be required  
13 to undergo individual ESA consultation for its North Puget Sound farms, which would  
14 similarly require significant time and resources. Cooper Decl. ¶ 12. Thus, Taylor Shellfish's  
15 interests will be impaired if judgment is granted to the Swinomish Tribe.

16 **4. Taylor Shellfish's interests are not adequately represented by Defendants.**

17 Taylor Shellfish's interests are directly contrary to the relief requested by the  
18 Swinomish Tribe, and they are sufficiently different from the Corps and NMFS, the only  
19 defendants named in this lawsuit, to warrant intervention. In demonstrating Taylor  
20 Shellfish's interests are not adequately represented by Defendants, Taylor Shellfish bears a  
21 low burden and need show only that its interests are sufficiently different from existing  
22 parties and that representation by those parties "may be" inadequate. *Trbovich v. United*  
23 *Mine Workers of Am.*, 404 U.S. 528, 538 n. 10 (1972). The Court considers whether:

- 24 (1) the interests of a present party to the suit are such that it will  
25 undoubtedly make all of the intervenor's arguments; (2) the present



1 party is capable of and willing to make such arguments; and (3) the  
2 intervenor would not offer any necessary element to the proceedings  
that the other parties would neglect.

3 *Cty. of Fresno*, 622 F.2d at 438-39.

4 Here, Taylor Shellfish has direct property, regulatory, business, and economic  
5 interests in this lawsuit. *Supra* at 5-7. These interests differ from those of Defendants, who  
6 are agencies charged with administering the CWA, NEPA, and the ESA. Taylor  
7 Shellfish's private interest, as opposed to the government's "public" interest, is sufficient  
8 to justify intervention. *Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994); *Cty. of*  
9 *Fresno*, 622 F.2d at 438-39. Taylor Shellfish's interests are exactly the type of private  
10 interest that do not belong to the general public and are most likely to lead to inadequate  
11 representation by the existing parties. *See Forest Conservation Council*, 66 F.3d at 1499  
12 ("Inadequate representation is most likely to be found when the applicant asserts a  
13 personal interest that does not belong to the general public.") (citation omitted).

14 Furthermore, Taylor Shellfish has substantial expertise and experience in shellfish  
15 aquaculture, Cooper Decl. ¶ 3, which could be crucial should this Court consider granting  
16 the injunctive relief requested by the Swinomish Tribe. Injunctive relief is an equitable  
17 remedy that requires this Court to engage in a balance of harm analysis. *Forest*  
18 *Conservation Council*, 66 F.3d at 1496. Parties seeking to intervene in these types of  
19 matters should be allowed to do so to share their unique expertise and knowledge and to  
20 present "unusual circumstances" that would "[w]eigh against the injunction sought" and to  
21 "assist the court in fashioning the appropriate scope of whatever injunctive relief is  
22 granted." *Id.* For these reasons, Taylor Shellfish's interests in these issues will not be  
23 adequately represented by Defendants.

1 Taylor meets all four elements for intervention as of right under Rule 24(a), and the  
2 Court should grant its request to intervene as a defendant in this proceeding.

3 . **B. Alternatively, Taylor Shellfish Should Be Allowed to Intervene Permissively.**

4 Courts have broad discretion to grant permissive intervention. *Smith v. Pangilinan*,  
5 651 F.2d 1320, 1325 (9th Cir. 1981). Permissive intervention should be allowed under Rule  
6 24(b) if the applicant establishes: “(1) it shares a common question of law or fact with the  
7 main action; (2) its motion is timely; and (3) the court has an independent basis for  
8 jurisdiction over the applicant’s claims.” *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir.  
9 1998) (citing *Nw. Forest Res. Council*, 82 F.3d at 839). Neither the inadequacy of  
10 representation, nor a direct interest in the subject matter of the action need be shown.  
11 *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002), abrogated on  
12 other grounds by *Wilderness Soc’y*, 630 F.3d at 1178-80 (quoting 7C WRIGHT, MILLER &  
13 KANE, FEDERAL PRACTICE AND PROCEDURE § 1911, 356-63 (2nd ed. 1986)).

14 The legal thresholds for permissive intervention are met here. Taylor Shellfish seeks  
15 to intervene to defend the Army Corps’ reissuance of NWP 48 in 2017 and use of this permit  
16 in North Puget Sound, along with NMFS’s issuance of the PBO as applied in North Puget  
17 Sound. Because these are the decisions and documents challenged by the Swinomish Tribe,  
18 Taylor Shellfish satisfies the first and third threshold requirements. *See PEST Comm.*, 648 F.  
19 Supp. 2d at 1214. Also, as set forth above, Taylor Shellfish’s motion is timely. *Supra*, at 5.  
20 Therefore, Taylor Shellfish meets the standards for permissive intervention.

21 Additionally, the considerations guiding the Court’s exercise of its discretion weigh  
22 in favor of intervention. The courts have adopted a liberal policy in favor of intervention,  
23 recognizing that intervention can foster judicial efficiency by preventing or simplifying  
24 future litigation involving related issues. *City of Los Angeles*, 288 F.3d at 397-98. Here, the  
25 interests of judicial economy and efficiency are furthered through consideration of Taylor

1 Shellfish’s interests to avoid the costs and delay of an additional lawsuit, should disposition  
2 of this action affect NWP 48 verifications for Taylor Shellfish’s North Puget Sound farms.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Taylor Shellfish respectfully requests that this Court grant  
5 its motion to intervene as a matter of right pursuant to Rule 24(a), or, in the alternative,  
6 permissively pursuant to Rule 24(b).

7 DATED this 2nd day of August, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of filing to all parties registered in the CM/ECF system for this matter.

DATED: August 2, 2018.

s/ Sarah Fauntleroy  
Sarah Fauntleroy, Legal Assistant