The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUGET SOUNDKEEPER ALLIANCE, et al., Plaintiffs, v. The UNITED STATES DEPARTMENT OF THE NAVY, et al., Defendants.	NO. 3:17-cv-05458-RBL STATE OF WASHINGTON'S MOTION TO INTERVENE **Note on Motion Calendar:** **April 5, 2019**

I. INTRODUCTION

In 2016, the United States Navy announced its intention to tow a decommissioned former aircraft carrier, the ex-USS INDEPENDENCE, from its moorage in Sinclair Inlet to Brownsville, Texas, for dismantling. In doing so, the Navy also announced a plan to blast the hull of the ex-INDEPENDENCE with high-powered water jets and scrubbers to remove marine debris. Both before and during the hull-cleaning event, the State of Washington, the Environmental Protection Agency, and the Suquamish Tribe each raised significant concerns over the hazards of performing this work without proper environmental controls. The Navy ignored these concerns and repeatedly downplayed the potential impacts, assuring federal, state, and tribal regulatory agencies that impacts from the hull cleaning would be minimal.

The Navy's assurances were wrong. Starting in June of 2017, Washington repeatedly requested the results of sediment sampling the Navy conducted both before and after the in-water

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cleaning of the ex-INDEPENDENCE. After months of those requests being either rebuffed or ignored, Washington finally obtained the sampling results in October 2018 when they were provided to the Plaintiffs in this case. The sediment sampling data confirmed Washington's initial concerns: significant metals loading occurred during the work on the ex-INDEPENDENCE that caused—and continues to cause—violations of Washington's Water Quality Standards.

Washington now seeks to protect its interest in abating the harms to a critical water body that continue to flow from the hull cleaning of the ex-INDEPENDENCE and seeks to prevent additional harms from other hull-cleaning activities that are already planned. As set out below, Washington satisfies all the elements necessary for intervention and respectfully requests that this Court grant its timely motion to intervene.

II. FACTUAL BACKGROUND

On or around the summer of 2016, the Navy made a determination to tow a decommissioned former vessel, the ex-USS INDEPENDENCE, to Brownsville, Texas, for dismantling. Proposed Complaint in Intervention ¶ 6.6 (Washington Complaint). Before doing so, the Navy initiated a required consultation with the National Marine Fisheries Service (NMFS) to ensure that the towing would not jeopardize endangered or threatened species, or result in the destruction or adverse modification of critical habitat. *Id*. During this consultation, NMFS recommended that the Navy minimize the risk of transporting potentially invasive species by removing barnacles and other marine debris through hull cleaning. Washington Complaint ¶ 6.8. While the Navy agreed to perform the cleaning work, it declined to adopt NMFS's other recommendations to minimize the effects of the hull cleaning by deploying multiple environmental control measures. *Id*.

In addition to NMFS's concerns, both the Washington Department of Ecology and the Environmental Protection Agency (EPA), along with the Suquamish Tribe, expressed strong reservations about the Navy's plan to perform the work on the ex-INDEPENDENCE in-water

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due to metals contained in the "anti-fouling" paint covering the hull. Washington Complaint ¶ 6.9. In response, however, the Navy downplayed impacts and asserted that metals loading from the cleaning would be minimal. Washington Complaint ¶ 6.8. The Navy began in-water hull cleaning of the ex-INDEPENDENCE on January 6, 2017, without an NPDES permit and without implementing any measures to contain the debris. Washington Complaint ¶¶ 6.10-11.

At EPA's request, the Navy performed sediment sampling underneath the ex-INDEPENDENCE both before and after its hull cleaning effort. Washington Complaint ¶ 6.13. Because the results of this sampling would either confirm or refute the Navy's assertion that only a minimal amount of contaminants were released, Washington sought the raw data from this sampling immediately after it was performed. Declaration of Allyson Bazan at ¶¶ 3-4 (Bazan Decl.). Starting in June 2017 and continuing well into 2018, Washington sent both written and verbal requests for the sediment sampling data. *Id*. at ¶¶ 4-5. Citing the ongoing litigation, however, the Navy refused each of these requests or simply did not respond. *Id*. Finally, in late October 2018, Washington received a draft report on the sediment sampling that included the raw sampling data and that had been provided by the Navy to the Plaintiffs in the current lawsuit. *Id*. at ¶ 6. Washington immediately began an effort to analyze the data, which concluded in approximately late November 2018. *Id*. at ¶ 6.

After completing its evaluation of these results, Washington moved swiftly to initiate legal action. Washington filed its Notice of Intent to Sue Under the Clean Water Act letter on January 17, 2019. Washington Complaint ¶ 2.5. Washington now brings the current Motion to Intervene on the first day following the required 60-day notice period. Washington has conferred with counsel for Plaintiffs who do not oppose this motion and with counsel for Defendants who reserves its position and will respond to the motion.

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III. ARGUMENT

A. Legal Standard.

The Ninth Circuit has established a four-part test for courts to use when evaluating a motion to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2): (1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and, (4) the applicant's interest must be inadequately represented by the parties to the action. *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir. 1990); *see also* Fed. R. Civ. P. 24(a)(2). In general, courts liberally construe this standard in favor of intervenors. *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006). Additionally, the intervention standard is to be grounded in "practical considerations" rather than "technical distinctions." *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

As set out below, Washington meets each of these elements and respectfully requests that the Court grant intervention in this case. *Berg*, 268 F.3d at 818.

B. Washington's Motion Is Timely Because the Case Remains at a Very Early Stage, There is no Prejudice to the Parties, and Washington's Delay was Reasonable.

Washington's motion to intervene satisfies the timeliness requirement of intervention. Courts typically consider three factors in determining timeliness: (1) the stage of the proceedings; (2) prejudice to existing parties; and (3) the length of and reason for delay. *Navajo Nation v. Superior Court of Wash.*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999). The mere passage of time does not render a motion to intervene untimely; rather, "[t]imeliness is to be determined from all the circumstances" of a case and does not require a party to "move to

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intervene immediately." *U.S. ex rel. McGough v. Covington Tech. Co.*, 967 F.2d 1391, 1395 (9th Cir. 1992), *citing NAACP v. New York*, 413 U.S. 345, 366 (1973). By this measure, Washington's motion is timely.

First, while the case was filed in June of 2017, the case remains at a very early stage of the proceedings. No case schedule or trial date exists, and the parties have yet to conduct discovery. In addition, the parties are not engaged in any settlement negotiations. Indeed, the only significant activity in the case thus far was an effort by the Defendants to dismiss the case on procedural grounds, which was denied. ECF 28. In practical effect, the proceedings remain at the nascent litigation stage of only a complaint having been filed and an answer given.[1]

Second, because the case is at such an early stage, Washington's participation in this case will not cause prejudice to the existing parties. The prejudice required to defeat a motion to intervene does not result from the addition of a party that might make the litigation more complex or difficult. *See Smith v. L. A. Unified Sch. Dist.*, 830 F.3d 843, 857 (9th Cir. 2016). Instead, courts in the Ninth Circuit look only to whether the delay in seeking intervention would cause serious and significant disruptions to work already expended by the parties to a case. *Id.*, *citing Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) (in determining prejudice "the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case.").

Almost by default, this type of prejudice only arises in cases that are at a significantly more advanced stage than the current case. For example, the Ninth Circuit has found prejudice where intervention would disrupt delicately balanced, multi-party settlements negotiated over long periods of time. *See, e.g., United States v. Oregon*, 745 F.2d 550, 552-53 (9th Cir. 1984). The Court has also found prejudice when intervention is sought after resolution of a case, such

[1] Technically, there have been two complaints and one answer. The Defendants filed their Motion to Dismiss in lieu of an answer to the original complaint, and this Court granted a subsequent request by Plaintiffs to amend the complaint after denying Defendants' motion.

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as entry of a consent decree, where the addition of a party would "create havoc and postpone the needed relief." *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978). There is no such "delicate balance" to be disrupted in this case where, as mentioned above, the litigation has yet to get seriously underway. *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369 (D. Ariz. 2010) (finding no prejudice and allowing intervention six months after amended complaint was filed where the parties had not yet met for a scheduling conference).

Washington's addition also would not expand the current scope of the litigation. Washington's federal claim is identical to that of the current Plaintiffs and is based on the same set of factual circumstances. And, while Washington seeks to have the Court exercise supplemental jurisdiction over its state Water Pollution Control Act claim, that claim is premised on the same factual and legal underpinnings of the federal claim (i.e., exceedances of state water quality standards and unpermitted discharges) and the relief Washington seeks for its state law claim is coextensive with the relief for its federal claim.[2] Indeed, had Washington filed an independent lawsuit rather than the current motion to intervene, the Court *sua sponte* (or any one of the parties) would be well within bounds to consolidate the actions. There is no prejudice.

Finally, Washington's decision to seek intervention now is reasonable. As with other factors related to timeliness, the timing of a motion to intervene is judged under the totality of the circumstances, including whether new any information or a change in circumstances brought the intervening party's interests into starker relief. *See Smith*, 830 F.3d at 861. Courts have also excused lengthy delays in moving to intervene where the first and second timeliness factors weigh in favor of intervention, especially where "the existing parties' concerns have little to do

[2] Washington also notified Defendants of its intent to file suit alleging that the discharge of solid waste from the ex-INDEPENDENCE constitutes an eminent and substantial endangerment to the environment prohibited by the Resource Conservation and Recovery Act (RCRA). Because the notice period for RCRA actions against the federal government is 90 days rather than the 60 days required under the Clean Water Act, that claim is not included in the proposed Complaint in Intervention. Because the RCRA claim is based on the same operative facts and circumstances as Plaintiffs' Clean Water Act claim, however, Washington may seek to assert the RCRA claim in the current lawsuit for the sake of judicial economy if the Court grants Washington's Motion to Intervene.

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with timeliness." *See, e.g.*, *Oregon*, 745 F.2d at, 552 (granting intervention 16 years after initiation of the original action).

Here, Washington was aware of the Navy's actions at the time this case was filed in June 2017, and indeed joined the EPA in alerting the Navy to potential harms associated with in-water cleaning work and urged the Navy to undertake environmental controls. However, suing a branch of the United States military is an action that Washington takes very seriously and takes here only after careful deliberation. As set out above, Washington spent months requesting the data that would allow it to assess the harm caused by the Navy's actions and was only recently able to obtain that data.[3] As a result, the scope of the harm to state resources flowing from the Navy's actions was not made clear until—*at the earliest*—late 2018 when Washington finally obtained the results of the Navy's sampling efforts and was able to have state experts review that data and confirm the environmental impacts. Washington moved swiftly after the completion of its state expert review to send its Notice of Intent letter as required by the Clean Water Act, and the current intervention motion comes immediately following the 60-day notice period.

Under the totality of the circumstances, and especially in light of the early stage of the proceedings and the lack of prejudice to the parties, Washington's delay in seeking intervention is reasonable, and its request to intervene is timely.

C. Washington Has a Significantly Protectable Interest in the Subject of This Litigation That May Be Impaired by Disposition of the Case.

A party seeking intervention must establish a significantly protectable interest and be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest. *Scotts Valley Band of Pomo Indians*, 921 F.2d at 926. Because Washington's significantly protectable interest in the waters and biota of the Sinclair

[3] Washington was not dilatory in seeking the Navy's sampling data. Washington sent its first request for the data on June 20, 2017, with multiple verbal and written follow-up requests continuing well into 2018. Bazan Decl. at ¶¶ 4-5.

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Inlet and the regulation of decommissioned former aircraft carriers may be impaired by the outcome of this case, Washington meets both elements in this case.

An intervenor has a significantly protectable interest where the interest "is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). This is not a bright-line rule and no specific legal or equitable interest is required. *Fresno County v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). Instead, "[i]t is enough that the interest is protectable under any statute[,]" which need not even be the statute under which the litigation is brought. *Id*. *citing Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). Here, there should be little question that Washington's interests satisfy this standard. Washington has a significant interest in protecting its natural resources—including the waters, plants, fish, and other species of the Sinclair Inlet, which Washington holds in trust for its residents.[4] Well beyond a mere "relationship" to the current lawsuit, Plaintiffs' action is expressly based on detrimental and potentially long-lasting impacts to those same natural resources. This interest is protected by numerous laws, including the Clean Water Act (which forms the basis of Plaintiffs' claims) and the Washington Water Pollution Control Act. Washington, therefore, has a significantly protectable interest.

Washington's interests may also be impaired by disposition of this case. Impairment is generally found where the interest asserted may be "substantially affected in a practical sense by the determination made in an action[.]" *See* Fed. R. Civ. P. 24 advisory committee's notes. Here, Washington's interests here may be substantially impacted on at least two fronts. First, resolution of Plaintiffs' claims will undoubtedly require this Court to determine the extent to which the "Vessels of the Armed Forces" amendments to the Clean Water Act apply to decommissioned, former aircraft carriers. Because Washington has multiple decommissioned former aircraft carriers and other floating crafts moored in Washington waters, resolution of this case has the

[4] In fact, as owner of the resources in question, Washington's interests are superior to those of Plaintiffs when it comes to the waters and biota of the state.

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potential to significantly impact how these floating crafts, including the ex-USS KITTY HAWK, are regulated in the future. Second, disposition of this action will likely involve a determination on the actions necessary to abate and/or remedy the past and ongoing releases of metals from the sediments in and around where the ex-INDEPENDENCE was cleaned. As steward of the resources both in and around Naval Base Kitsap, including the sediments immediately adjacent to the facility, Washington has a significant interest in ensuring appropriate and effective remedial efforts are undertaken.[5]

D. Washington is Not Adequately Represented by the Existing Parties.

Neither the Navy nor Plaintiffs adequately represent Washington's interests in this case. In determining adequacy of representation, courts generally "consider whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect." *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (citations omitted). This is a "minimal" showing, with the applicant required to show only that representation of its interests "may be inadequate." *Berg*, 268 F.3d at 823; *citing Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). Washington meets this standard.

Washington's interests are not adequately represented in this case. To begin with, because the Washington Pollution Control Act does not contain a citizen suit provision, Washington is the *only* entity that can claim the Navy's actions violate the Act. *See, generally,* Chapter 90.48 .[6] Thus, even if the Plaintiffs were willing to make all of Washington's arguments, they are incapable of doing so. Additionally, even when it comes to the federal Clean Water Act claim, there should be little question that Washington maintains a broader set of interests and

[5] For the reasons set out in this Section, Washington also has standing to bring its claims.

[6] While this claim shares a common nucleus of operative fact with the federal Clean Water Act claims, and rests (in part) on exceedances of standards adopted as part of Washington's EPA-approved Clean Water Act program, it represents a discrete cause of action that arises independent of federal Clean Water Act jurisdiction.

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perspectives than the existing parties because it seeks to protect the interest of the public as a whole. *See Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992) (finding that a state's interests diverged from plaintiff's for purposes of intervention because state governments are "obligated to represent the interests of all [their] citizens."). Indeed, while there is certainly commonality between Washington and the Plaintiffs when it comes to the general desire to abate the harms caused by in-water cleaning of the ex-INDEPENDENCE, Washington's need to address a broader set of interests may place it at odds with the Plaintiffs as to how best that abatement should occur. To those ends, Washington's presence in this case, and its long regulatory experience—including regulation of federal facilities—will offer elements to the proceedings that other parties do not possess.

E. Washington Also Satisfies the Requirements for Permissive Intervention.

Washington meets the standard for intervention as of right set out in Fed. R. Civ. P. 24(a)(2), and Washington respectfully requests that the Court grant intervention on those grounds. However, Washington also meets the standards for permissive intervention set out in Fed. R. Civ. P. 24(b)(1)(B) and Fed. R. Civ. P. 24(b)(2)(B).

Under Fed. R. Civ. P. 24(b)(2)(A), permissive intervention may be granted where an applicant establishes: (1) a common question of law or fact with the main action; (2) timely motion; and (3) the court's independent basis for jurisdiction over the applicant's claims. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). As with intervention as of right, permissive intervention must also take into account "whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id*. As set out above, these elements are met in this case: Washington's proposed claims involve the same questions of law and fact as the Plaintiffs', Washington's motion is timely, and there is no prejudice to the parties. Because Washington's claims arise out of the same federal statute as Plaintiffs', and this Court has supplemental jurisdiction over Washington's state law claim, the Court also has an independent basis for jurisdiction. Thus, the Court may grant intervention under Fed. R. Civ. P. 24(b)(2)(A).

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Additionally, under Fed. R. Civ. P. 24(b)(2)(B), "the court may permit a federal or state government officer or agency to intervene if a party's claim or defense is based on … any regulation, order, requirement, or agreement issued or made under the statute or executive order." In general, this requires the applicant to: "(1) file a timely motion, (2) be a federal or state governmental officer or agency, (3) administer the statute, executive order, or regulation at issue, and (4) not cause undue delay or prejudice . . . ." *Coffey v. C.I.R.*, 663 F.3d 947, 951 (8th Cir. 2011).

These elements are also met. The Washington Attorney General's Office is clearly a state governmental officer or agency and, again, Washington's motion is timely and will not result in prejudice to the parties. The case also involves a statute and regulations administered by Washington. The Clean Water Act is administered jointly by the EPA and the states through the concept of "cooperative federalism." To those ends, the Clean Water Act requires states with authorized programs, such as Washington, to develop water quality standards designed to protect and enhance the waters within a state's territorial jurisdiction. *See,* generally,33 U.S.C. § 1313. The EPA and an authorized state also share concurrent enforcement authority when it comes to violations of Clean Water Act provisions. Because Plaintiffs' case is based upon violations of EPA-approved state water quality standards and Clean Water Act permitting requirements, the case involves a claim that is based on a statute and regulations that Washington is authorized to administer. *See* Fed. R. Civ. P. 24(b)(2)(B). Intervention pursuant to Fed. R. Civ. P. 24(b)(2)(B) is also proper.

IV. CONCLUSION

Washington is entitled to intervene as of right and should be allowed to do so as a matter of judicial economy. As the D.C. Circuit has stated, "[t]he decision whether intervention of right is warranted . . . . involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending." *Smuck v.*

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Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969). Allowing intervention in this case accomplishes the goal of judicial economy without creating unneeded complexities. There is no question that Washington's claims arise within the identical set of circumstances forming the basis of this case. And, because the existing litigation is at a very early stage, there is no prejudice to the parties. Indeed, had Washington filed an independent action, it likely would have been subject to consolidation. Additionally, and to the extent the Court does not grant intervention as of right, Washington also meets the requirements for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2). For these reasons, and under either basis, Washington respectfully requests that the Court grant its Motion to Intervene.

DATED this 20th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2019, I filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record

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