RESPONDENT APPENDIX
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ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS IN *KLAMATH IRRIGATION ET AL. v. UNITED STATES ET AL.* GRANTING INTERVENTION (FEBRUARY 28, 2005)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

KLAMATH IRRIGATION DISTRICT, ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant,

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR FISHERIES RESOURCES, THE WILDERNESS SOCIETY, KLAMATH FOREST ALLIANCE, OREGON NATURAL RESOURCES COUNCIL, WATERWATCH OF OREGON, NORTHCOAST ENVIRONMENTAL CENTER, and SIERRA CLUB,

Defendant-Intervenor-Applicants.

No. 01-591 L

Takings and contract case involving waters of the Klamath Basin; Motion to intervene, as of right, under RCFC 24(a)(2); 1966 amendments to

Fed. R. Civ. P. 24(a); Practical impairment; Impact of *stare decisis* in impairing or impeding putative intervenor's interests; Types of "interests" covered by RCFC 24(a); Commercial fishing interests; *American Maritime*– proper interpretation; Rejection of artificial barriers to intervention as devoid of substance; Adequate representation; Intervention of PCFFA allowed.

Before: Francis M. ALLEGRA, Judge.

ORDER

ALLEGRA, Judge:

In the case *sub judice*, a group of water districts and individual farmers seek just compensation under the Fifth Amendment, as well as damages for breach of contract, owing to restrictions placed by the U.S. Bureau of Reclamation on the use, for irrigation purposes, of the water resources of the Klamath Basin of southern Oregon and northern California. Eight organizations—Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, The Wilderness Society, Klamath Forest Alliance, Oregon Natural Resources Council, WaterWatch of Oregon, Northcoast Environmental Center, and the Sierra Club—have moved for leave to intervene in this action under RCFC 24(a)(2). These organizations all have been involved in recent disputes involving the waters of the Klamath Basin, *see, e.g.*, *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Ore. 2001); *Pacific Coast Federation of Fishermen's Ass'ns v. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001). They assert varying interests relating to the allocation and ownership of that water, which interests, they contend, may be

impacted by this litigation. Defendant takes no position on this motion, but plaintiffs vigorously oppose it, asseverating that intervention of any of these organizations, either as of right or via permission, is not authorized by RCFC 24.

As originally adopted in 1937, Rule 24(a) of the Federal Rules of Civil Procedure provided for intervention of right only in two limited circumstances: when "the applicant is or may be bound by a judgment in the action" or "is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof." Fed. Rule Civ. Proc. 24(a)(2) and (3) (1937). In 1966, the scope of the rule was substantially expanded. In explaining this change, the Advisory Committee noted that the earlier wording of the rule was "unduly restricted" and prone to "poor results," finding instead that "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." Advisory Committee's Notes on 1966 Amendments to Fed. Rule Civ. Proc. 24, 28 U.S.C. App., p. 756. Toward that end, it deleted the "bound by a judgment" language to "free[ ] the rule from undue preoccupation with strict construction of *res judicata*," and "imported practical considerations" into the rule by no longer requiring that the property at issue be held in the custody of the court or an officer thereof. *Id.*[1] The version of Rule 24(a)(2) that emerged from

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[1] Various courts had held that the "bound by a judgment" language applied only where a decree in the pending litigation would be "*res judicata* of the rights sought to be protected through intervention." *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 21 (1951); *see also Sam Fox Publ'g Co., Inc. v.*

this amendatory process has, with minor modifications not pertinent herein, survived to this day and forms the basis, *haec verba*, for RCFC 24(a)(2). The latter rule reads:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

By way of further analogy to the Federal Rules, the findings required by RCFC 24(a)(2) are identical to those required by RCFC 19(a)(2), dealing with joinder of persons needed for just adjudications, revealing an obvious symmetry between these two gatekeeper provisions.[2]

Reflecting the breadth of the 1966 amendments, courts interpreting the newer version of Rule 24(a)(2)

United States, 366 U.S. 683, 694 (1961). By comparison, although intervention under former Rule 24(a)(2) was authorized only if there was a fund or other property subject to the control or disposition of the court, many courts broadly construed this requirement, to the point where the 1966 Committee's Notes indicated that some courts "virtually disregarded the language of this provision." *See* Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, 7C Federal Practice and Procedure (hereinafter "Federal Practice and Procedure") § 1907 at 261 (2d ed. 1986).

[2] The same findings are also required to certify a class under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, but that provision finds no corollary in this court's rules.

generally have concluded that "the requirements for intervention are to be construed in favor of intervention." *Am. Maritime Transp., Inc v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989).[3] These and other courts, often noting that the rule was modified to divorce it from strict *res judicata* considerations, have repeatedly concluded that the potential for generating adverse precedent, applicable in other related cases under the doctrine of *stare decisis*, may "as a practical matter impair or impede" an applicant's ability to protect an interest relating to the property or transaction which is the subject of the action. *See Freeman v. United States*, 50 Fed. Cl. 305, 309 (2001) ("When analyzing this element, the court has considered the impact of *stare decisis*."); *Anderson Columbia Envtl., Inc. v. United* States, 42 Fed. Cl. 880, 882 (1999) ("The potential *stare decisis* effect of a decision often supplies the 'practical impairment' required by Rule 24(a)."); *see also Stone v. First Union Corp.*, 371 F.3d 1305, 1309-10 (11th Cir. 2004) ("the potential for a negative *stare decisis* effect 'may supply that practical disadvantage which warrants intervention of right'" (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989)); *Coalition of Arizona/New Mexico Counties for*

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[3] *See also Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, we construe Rule 24(a) liberally in favor of potential intervenors."); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999) ("Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor."); *Federal Savings & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) ("any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors"); *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (Rule 24 should be "broadly construed in favor of potential intervenors").

Stable Econ. Growth v. Dept. of Interior, 100 F.3d 837, 844 (10th Cir. 1996) ("the *stare decisis* effect of the district court's judgment is sufficient impairment for intervention under Rule 24(a)(2)"); *Oneida Indian Nation of Wisc. v. State of New York*, 732 F.2d 261, 265 (2d Cir. 1984). In assessing the practical impact of *stare decisis*, court have looked not only to the likely ultimate disposition of a case, but also to potential subsidiary factual and legal findings. *See, e.g., FDIC v. Jennings*, 816 F.2d 1488, 1492 (10th Cir. 1987) (noting that under Rule 24(a), *stare decisis* considerations apply to rulings on a "legal point" or "factual issues").

This court must also focus on the nature of the "interest relating to the property or transaction which is the subject of action" that is required for intervention of right under RCFC 24(a)(2). Several decisions of the Supreme Court shed light on what is a qualifying "interest." In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Court, citing the Advisory Committee Notes as evidence that "some elasticity was injected" into the new rule, *id.* at 134 n.3, held that a private business with an interest in the solvency of a corporation to be formed pursuant to a consent decree could intervene in the antitrust suit considering that decree, thereby suggesting that the term "interest" is not limited to particular property interests, but includes economic interests threatened by a ruling. Five years later, in *Donaldson v. United States*, 400 U.S. 517, 531 (1971), the Court held that a taxpayer could not intervene of right in a proceeding to enforce a summons against a third party, concluding that the phrase "interest" "obviously" means "a significantly protectable interest." More recently, Justice O'Connor, in her concurring opinion

in *Diamond v. Charles*, 476 U.S. 54, 75 (1986), stated that the "significantly protectable interest" required under *Donaldson* is a "direct and concrete interest that is accorded some degree of legal protection."

These decisions, though informative, hardly occupy the field, leaving to lower courts the task of mapping further the contours of what is meant by an "interest." Numerous courts, including the Federal Circuit, have risen to that task in observing that such an "interest" must be direct, substantial, and legally protectable. *See American Maritime*, 870 F.2d at 1561; *see also, e.g., Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1246 (6th Cir. 1997); *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1509 (11th Cir. 1988); *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982).[4] Not surprisingly, many of the cases in 4 which a sufficient "interest" has been found under Rule 24(a)(2) involve readily identifiable interests in land or other property. *See* Federal Practice and Procedure § 1908 at 272-75 (citing numerous cases); *see also Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970) ("Interests in property are the most elementary type of right that Rule 24(a) is designed

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[4] The court does not mean to suggest that these cases represent unanimity on this point, with some courts certainly adopting a more relaxed definition of "interest" and others espousing a stricter view. *See* Brian Hutchings, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in Sierra Club v. City of San Antonio*, 43 Vill. L. Rev. 693, 714-19 (1998) (discussing cases across the spectrum); *see also Harris v. Reeves*, 946 F.2d 214, 219 (3d Cir. 1991) (noting that "an exact definition of the kind of interest justifying intervention remains elusive and that courts [have] described the level of interest required as 'significantly protectable,' 'legally protectable,' and 'direct' as opposed to contingent or remote.").

to protect."). But, as Judge Posner has reminded, Rule 24(a) "does not require that the intervenor prove a property right, whether in the constitutional or any other sense." *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989); *see also Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001) ("Rule 24(a)(2) requires not a property interest, but, rather, 'an interest relating to the property or transaction which is the subject of the action.'"). Thus, other types of interests have been found to justify intervention, among them economic and business interests, as well as those involving access to public resources or the enforcement of statutory rights conferred by Congress, provided these interests were legally protectable and not contingent. *See, e.g.*, *Cascade Natural Gas*, 386 U.S. at 134-35; *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002); *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977); *New York Public Interest Research Group, Inc. v. Regents of the University of the State of New York*, 516 F.2d 350, 351-52 (2d Cir. 1975).

With these principles as reference points, the court concludes that at least one of the applicants is entitled to intervene in this case, as a matter of right: the Pacific Coast Federation of Fishermen's Associations (the PCFFA), a group of 25 West Coast fishermen's organizations representing approximately 3,000 small commercial fishermen, most of whom derive all or part of their income from Pacific salmon that spawn in the waters of the Klamath Basin. In the court's view, the PCFFA possesses a legally protectable interest involving the water of the Klamath

Basin that is "related to the property or transaction" at issue, one that lies in maintaining access to that water and ensuring that it is allocated in a fashion that promotes its fishing interests. One looking for evidence of the nexus between that interest and this litigation need go no further than the motion filed by plaintiffs herein which urges this court to find that they have a property interest in the waters of the Klamath Basin. A finding that such a property interest exists undoubtedly would impair or impede PCFFA's ability to claim, in the future, that the same waters should be used in a less-restricted or unrestricted fashion that promotes their fishing interests. And it is no answer to assert, as plaintiffs have, that the Endangered Species Act (ESA), 16 U.S.C. §§ 1531, *et seq.*, requires the Bureau of Reclamation to protect endangered fish in the Klamath Basin, whether or not its actions occasion a taking. To the contrary, there is indication neither that the ESA is designed to protect commercial fishing interests of the sort asserted by the PCFFA, *see* 16 U.S.C. §§ 1532(3), 1533(f), nor that the steps required by the ESA are so clearly identified as to dictate the Bureau's choices in accomplishing the goals of that statute. Indeed, with commendable candor, government counsel has admitted that a finding by this court that plaintiffs are entitled to just compensation would cause the Bureau of Reclamation to think twice before allocating water to fishing interests at the expense of further irrigation, potentially causing the Bureau to allocate less water to the former interests than it might otherwise.[5]

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[5] *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 335 (1997) ("How the government executes the ESA depends

The interests that link the PCFFA to this case thus are central, rather than collateral; they are not contingent. They are similar to those successfully invoked by intervenors in other cases involving limited water resources. *See, e.g., Georgia v. Army Corps of Engineers*, 302 F.3d 1242, 1251-52 (11th Cir. 2002) (Florida permitted to intervene in dispute involving water allocation in order to protect endangered and threatened species and the stock of fish and seafood available for harvest); *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1996) (trade association representing farmers allowed to intervene in suit to cut off federal subsidies to those who pumped water from an aquifer because of potential impact on access to irrigation water); *see generally, New Jersey v. New York*, 283 U.S. 336, 342-43 (1931) (stating that an interstate river "offers a necessity of life that must be rationed among those who have power over it"). And, by all indications, they are the exact interests that prompted the United States District Court for the District of Oregon to allow PCFFA to intervene in the related proceedings there involving the Klamath Basin. *See Kandra*, 145 F. Supp. 2d at 1192; *Kandra v. United States*, Minute Entry of Order Granting Motion to Intervene, No. 01-6124-TC (D. Ore. Apr. 26, 2001).

In the court's view, it is also beyond peradventure that the disposition of this case "may as a practical matter impair or impede the applicant's ability to protect" its interest. For one thing, there is the distinct possibility that other courts, under *stare*

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not on prior decisions alone, but also on how the government and property owners believe courts will resolve future takings claims.").

decisis, would credit any findings adverse to PCFFA made here (particularly if those findings were affirmed by the Federal Circuit). And even were this not true, PCFFA's interests could be impaired or impeded to the extent that the United States, via the doctrines of *res judicata* or collateral estoppel, was prohibited from relitigating in other fora questions involving plaintiffs' entitlement to the water in question. In other words, although the interests of the United States and PCFFA do not entirely coincide, they considerably overlap—certainly enough to give rise to the distinct possibility that a ruling against the United States would have significant impacts on the allocation of the water in the Klamath Basin and corresponding negative impacts on PCFFA's fishing interests. That the precise relationship between the availability of such water and the health of the Pacific fisheries remains debatable does not render PCFFA's interest "contingent." To rule otherwise would be tantamount to requiring PCFFA to prove what might be the entirety of its case elsewhere in order to intervene here, a proof requirement that runs counter to the general thrust of courts in construing the new version of Rule 24(a) in favor of intervention. *See, e.g.*, *Brennan*, 260 F.3d at 129 ("an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention"); *Turnkey Gaming Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (9th Cir. 1999) ("An application for intervention cannot be resolved by reference to the ultimate merits of the claim the intervenor seeks to assert unless the allegations are frivolous on their face.").

In arguing to the contrary, plaintiffs dwell on that portion of *American Maritime*, which states that "[i]ntervention is proper only to protect those interests which are "of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment."" 870 F.2d at 1561 (quoting *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (quoting *Smith v. Gale*, 144 U.S. 509, 518 (1892)). But, at the outset, it is critical to note that, read in context, the quoted language was employed merely to define what is an "interest" within the meaning of RCFC 24(a)—the *ratio decidendi* of the Federal Circuit's opinion—and surely was not intended as *obiter dicta* commentary on that portion of the rule which requires a court to decide whether the disposition of the action "may as a practical matter impair or impede the applicant's ability to protect that interest." Were this court to subscribe to plaintiffs' more sweeping construction of this language, it would have to conclude that the Federal Circuit intended to emasculate the changes wrought by the 1966 amendments, and did so indirectly, in the guise of defining what is an "interest" within the meaning of the new rule. If plaintiffs are correct, the Federal Circuit could scarcely have selected a worse case for this proposition than *AT&T*, *supra*. There, the D.C. Circuit, quoting liberally from the 1966 Advisory Committee notes, broadly applied the practical impairment requirement of the rule in granting intervention status to parties whose only claim was that enforcement of a discovery order against a third party would compromise their defense of an entirely

separate action. *AT&T*, 642 F.2d at 1291-93.[6] Notably, in an earlier opinion, that same court, sitting *en banc* in *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), explicitly rejected the notion that the term "interest," as used in the new version of Rule 24, could be construed narrowly so as effectively to reinstate the "bound by" language of the prior rule, stating that it would be unfortunate "to allow the inquiry to be led once again astray by a myopic fixation upon 'interest.'" *Id.* at 179. In light of these considerations, not to mention the plain wording of the rule and the wealth of authority construing it, the court has no hesitation in concluding that the language employed in *American Maritime* was intended only to emphasize that qualifying interests under RCFC 24(a)(2) must not be indirect or contingent, and not to preclude a finding of practical impairment based, for example, upon the application of *stare decisis*. To accept plaintiff's contrary contention is to rise above its source and eviscerate the rule.

Nonetheless, several decisions in this court have read the quoted language in *American Maritime* broad-

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[6] Notably, the Supreme Court's decision in *Smith*, cited both in *American Maritime* and *AT&T,* did not involve some predecessor to the current intervention rules, but rather section 90 of the Dakota Code of Civil Procedure, which simply provided for intervention where an applicant had "an interest in the matter in litigation." *Smith*, 144 U.S. at 517. Thus, the only common strand between section 90 and Rule 24(a) was the use of the word "interest;" the former did not have a practical impairment requirement like the latter. Perhaps because of this, Justice Stewart, in his dissent in *Cascade Natural Gas*, indicated that the language in *Smith* is "of limited use in deciding particular cases" involving Rule 24. *Cascade Natural Gas*, 386 U.S. at 145 (Stewart, J., dissenting).

ly and restrictively—but only in mistakenly erecting artificial barriers to intervention. For example, while expressing nominal adherence to the practical impairment language of RCFC 24(a), at least two decisions have suggested that applicants must show that legal "repercussions . . . are certain to develop if plaintiffs succeed." *Hage v. United States*, 35 Fed. Cl. 737, 741 (1996); *see also Karuk Tribe of California v. United States*, 27 Fed. Cl. 429, 431 (1993). To be sure, along with predictability and consistency, certainty is one of the core values of the law, indeed, one of the pillars that supports the doctrine of *stare decisis*. But, no Federal law of which this court is aware has ever imposed certainty as a requirement of proof, particularly at the outset of litigation—and RCFC 24(a) is no exception, as it only requires that the disposition of the case "may" impede or impair an applicant's interests. *Hage*, *Karuk Tribe* and any other case requiring more than this basic, threshold showing require too much, and run counter to the overwhelming weight of authority. *See United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) ("the relevant inquiry is whether [the action] 'may' impair rights 'as a practical matter' rather than whether [it] will 'necessarily' impair them."); *Sierra Club v. Glickman*, 82 F.3d 106, 109 (5th Cir. 1989) (reading the term "may" as requiring only that an interest "potentially" be impaired or impeded).

Other cases have flipped the Federal Circuit's teaching that RFC 24 "be construed in favor of intervention," *American Maritime*, 870 F.2d at 1561, on its head, holding instead that intervention in this court is "disfavored" because this court is one of "limited" jurisdiction. *See, e.g.*, *Freeman v. United*

States, 50 Fed. Cl. 305, 308 (2001); *Anderson Columbia Envtl. v. United States*, 42 Fed. Cl. 880, 881-82 (1999). Tellingly, these decisions fail to translate their view of this court's "limited" jurisdiction into any discernible limitation on intervention. If, as has been hinted, the concern is that this court does not have jurisdiction over disputes between two private individuals (*i.e.*, the plaintiff and the intervenor), that would be universally true and render RCFC 24(a) moribund. If, instead, the concern is that this court does not have independent jurisdiction over the intervenor—that the applicant, for example, is not covered by the Tucker Act—that likely would be true of every putative intervening defendant, wiping out the most common form of intervention here. The answer to these enigmas is that, at least for intervening defendants, this court's "limited" jurisdiction is no limitation at all, for two reasons. First, it is well-accepted that defendants intervening as a matter of right need not have independent jurisdictional grounds, but instead are covered by the doctrine of ancillary jurisdiction.[7] In the

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[7] S*ee Phelps v. Oaks*, 117 U.S. 236 (1886); *Sweeney v. Athens Reg'l Med. Ctr.*, 917 F.2d 1560, 1566 (11th Cir. 1990) ("ancillary jurisdiction can support" intervenor of right); *Int'l Paper Co. v. Inhabitants of Town of Jay, Me.*, 887 F.2d 338, 346 (1st Cir. 1989) ("As a general rule, parties entitled to intervention as of right under Rule 24(a) fall within a federal court's ancillary jurisdiction; no independent basis of jurisdiction is, therefore, necessary."); *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781, 783 (8th Cir. 1985) ("intervention of right is a proper vehicle for the exercise of the court's ancillary jurisdiction"); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 540 (8th Cir. 1970) ("[w]here intervention is of right . . . the courts and authorities are in substantial agreement that there need be no independent jurisdictional grounds to support the intervenor's claim"); *Lesnik v. Pub. Indus. Corp.*, 144 F.2d 968, 973-74 (2d Cir. 1944) ("the adding of parties under the rules has been viewed in the light of

court's view, this well-established jurisdictional doctrine, which rests on "considerations of judicial economy and fairness," *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 617 n. 14 (1966), and is especially tailored for "courts of limited jurisdiction," *Morrow v. District of Columbia*, 417 F.2d 728, 738 (D.C. Cir. 1969), is as applicable here as in any Federal court, all of which, of course, are of "limited" jurisdiction.[8] Moreover, no separate waiver of sovereign immunity is required for intervening defendants, which are filing not against, but in support of the United States. *See Int'l Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 863-64 (2d Cir. 1962) (while

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the ancient and well-established principle that a federal court has 'ancillary' jurisdiction to complete adjudication of interrelated matters where its jurisdiction has once been competently invoked"); *see also Zahn v. Int'l Paper Co.*, 414 U.S. 291, 306 (1973) (Brennan, J. dissenting) (the Supreme Court has sustained the exercise of ancillary jurisdiction, "where a party's intervention was held to be a matter of right, as is now provided by Rule 24(a)").

[8] Under ancillary jurisdiction, a court acquires "jurisdiction of a case or controversy as an entirety, and it may, as an incident to the disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented." Federal Practice and Procedure § 1917, at 460; *see also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80 (1994). Because such jurisdiction springs from the necessity of effectively exercising the jurisdiction Congress actually grants, the court sees no reason why it should be distinguished from other Federal courts in this regard, at least for the limited purpose of allowing intervention by a defendant. For district courts, this ancillary jurisdiction is now subsumed under the "supplemental" jurisdiction provided by 28 U.S.C. § 1367, enacted as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

the "United States must consent to be sued," it need not "consent to be defended"); *Chalmers v. United States*, 43 F.R.D. 286, 291 (D. Kan. 1967) (same). Accordingly, like the Carrollian Jabberwock, the concerns over intervention previously expressed about this court's "limited" jurisdiction ultimately prove a fiction.

Nor can this court agree with decisions that hold that *stare decisis* can supply the practical impairment required by Rule 24(a), but conclude that such is not the case if the precedent is not binding, with the potential intervenor "free to assert its rights in a separate action." *Anderson Columbia Envtl.*, 42 Fed. Cl. at 882; *see also John R. San & Gravel Co. v. United States*, 59 Fed. Cl. 645, 655 (2004). Snatching with the right hand what they dangle with the left, these cases blur the distinction between *res judicata* and *stare decisis*, essentially defining the latter to mean the former, at least in any trial court—after all, in our Federal system, no trial court opinion is binding in a separate proceeding, except by application of *res judicata* or collateral estoppel principles. Yet, there is no indication that, in holding that *stare decisis* concerns can support intervention, courts have used that term in such a cramped fashion—to refer only to binding, rather than persuasive, authority—the narrowness of which would clash with accepted meanings of the doctrine.[9] To the contrary, several

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[9] *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in the judgment, in part, and dissenting, in part) ("*Stare decisis* is defined in Black's Law Dictionary as meaning 'to abide by, or adhere to, decided cases.' Black's Law Dictionary 1406 (6th ed. 1990)"); *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369, 374 (5th Cir. 1987) (quoting *Flowers v. United States*, 764 F.2d 759,

courts have explicitly granted intervention based upon concerns that, under the doctrine, an adverse opinion would have persuasive impact in another circuit. *See, e.g., Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) ("a decision by the District Court here, the first judicial treatment of this question, would receive great weight, whether the question arose again in this jurisdiction or in the federal court in Wisconsin"); *In re Oceana Int'l, Inc.*, 49 F.R.D. 329, 332 (S.D.N.Y. 1970). Decisions of this court that have suggested otherwise essentially construe Rule 24(a) as if it had not been amended in 1966 to delete the requirement that a putative intervenor be "bound by" a decision. *See Sam Fox Publ'g Co.*, 366 U.S. at 694 (practical impact "is not at all the equivalent of being legally bound"). That, this court will not do.[10]

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761 (11th Cir. 1985) ("*[s]tare decisis* means that like facts will receive like treatment in a court of law"). Also describing the doctrine in more general terms, Justice Cardozo once wrote:

> [I]n a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. Stare decisis is at least the every day working rule of our law.

Benjamin Cardozo, The Nature of the Judicial Process 20 (1921); *see also Gilman v. City of Philadelphia*, 70 U.S. 713, 724 (1865) (describing broadly the philosophical underpinnings of the doctrine).

[10] The court does not mean to suggest that intervention may be had in every case in which a decision might have an adverse effect as *stare decisis*. Here, there is the potential that rulings will be rendered with respect to the very water and related transactions that might be at issue in a later proceeding. The

Admittedly, this court is loath to disagree with the cited decisions, but, in the end, it is compelled to conclude that the limitations these cases impose are devoid of substance.[11] Guided by the plain language of RCFC 24(a), this court simply cannot ignore the practical reality that, whether formally under *stare decisis* or not, a succeeding court, even if not bound by precedent, will—and should—be impacted by a prior opinion dealing with the same issues and subject matter. Indeed, the Supreme Court has observed that such consistency principles "are at their acme in cases involving property and contract rights." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Where, as here, the potential of additional litigation involving the same resources looms large, a putative intervenor should

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court only holds that such a conjunction of issues and subject matter warrants intervention.

[11] Curiously, to this court's knowledge, the limitations on intervention imposed in these cases rarely, if ever, have been applied by this court in regularly granting intervention to awardees in contract bid protest actions. Indeed, this court's rules anticipate that intervention will be granted to such awardees, *see* RCFC Appendix C, para. 8, despite the fact that: (i) it is not "certain" that their interests will be adversely impacted by this court's ruling; (ii) this court would lack jurisdiction over a direct dispute between the awardee (none of which, mind you, have claims against the United States) and the protester; and (iii) this court's rulings would not be binding precedent, except where law of the case or *res judicata* considerations applied. In addition, there is no indication that this court has applied anything approaching these rigorous limitations in construing the identical requirements for joinder in RCFC 19. *See Perch Assocs. L.P. v. United States*, 20 Cl. Ct. 456, 456-57 (1990) ("Public policy would have all courts greatly liberalize joinder of parties and claims in order to provide for effective settlement of all disputes at one time, when essential portions of a dispute are already before the court.").

be allowed to prevent the development of adverse precedents that undoubtedly will be wielded against it in the future. To the extent prior decisions of this court are to the contrary, this court finds them, with all due respect—and notwithstanding *stare decisis*—to be erroneous.

Finally, under RCFC 24(a), the applicant must also show that its interest is not "adequately represented by existing parties." The burden of demonstrating inadequacy of representation is not heavy: according to the Supreme Court, this requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United States*, 404 U.S. 528, 538 n.10 (1972). As to PCFFA, the court finds that this requirement is met because the government's interest in this litigation does not coincide with the economic concerns of the Pacific fishing industry. Colloquially speaking, PCFFA cannot expect the government to "carry its water"—at least all of it. *See Sierra Club v. Espy*, 18 F.3d 1202, 1207-08 (5th Cir. 1994) (U.S. Forest Service would not adequately represent interests of timber industry in defending lawsuit brought by environmental group, because the "government must represent the broad public interest, not just economic concerns of the timber industry."). Defendant does not claim to the contrary, nor, in good faith, could it, given the tensions that arose when defendant recently settled *Tulare Lake Basin Water District, et al. v. United States*, No. 98-101L (Fed. Cl.), a case involving similar issues. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996) (applicants interests not adequately represented by government where past conduct revealed diver-

gence). The fact that this court concludes that PCFFA should be allowed to intervene, however, does obviate the necessity of determining whether the remaining applicants should be granted intervenor status because, in the court's view, PCFFA will adequately represent those applicants' interests, as reflected by the fact that, to date, they share common counsel.[12]

In sum, this court finds that PCFFA has met all the requirements of RCFC 24(a)(2)[13] and thus is entitled to intervene as a defendant in this action, as a matter of right. The court does not believe that granting this intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Though plaintiffs' counsel views with alarm the consequences of a ruling permitting this intervention, it bears emphasis that the court has adequate facility to limit the issues which may be presented in a proceeding and, in particular, to prevent extraneous issues that might prove disruptive from being injected into this already complex suit. Accordingly, the court GRANTS, IN PART, the motion filed by PCFFA, insofar as it applies to PCFFA itself and to the extent consistent with this opinion.

IT IS SO ORDERED.

/s/ Francis M. Allegra
Judge

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[12] The court thus does not decide whether these applicants meet the other requirements of RCFC 24(a)(2). Should they wish, these parties may continue to join PCFFA in making filings in this case, albeit as *amici*.

[13] Plaintiffs have not raised any serious question regarding the timeliness of the intervention application here. Given the nascent status of these proceedings, the court believes that the application most certainly was timely.

16. U.S.C. § 1536

STATUTORY PROVISIONS

16 U.S.C. § 1536—Interagency Cooperation

(a) Federal Agency Actions and Consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with

the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)

(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)

(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a sum-

mary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is

authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological Assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such

species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on Commitment of Resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing

the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an

agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)

(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of Title 5.

(5)

(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)

(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such

rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of Regulations; Form and Contents of Exemption Application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for Exemption; Report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)

(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application

shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection(d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of Exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall

grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)

(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; Violation of International Treaty or Other International Obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for National Security Reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption Decision Not Considered Major Federal Action; Environmental Impact Statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee Order Granting Exemption; Cost of Mitigation and Enhancement Measures; Report By Applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such

reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice Requirement for Citizen Suits Not Applicable

The 60-day notice requirement of section 1540(g) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial Review

Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as Providing Exception on Taking of Endangered Species

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially Declared Disaster Areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding

any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

50 C.F.R. § 402.02

REGULATORY PROVISIONS

50 C.F.R. § 402.02—Definitions

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat

that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Director refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that

have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic

consultations allow the Services to consult on the effects of programmatic actions such as:

(1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and

(2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

Proposed critical habitat means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

50 C.F.R. § 402.14

50 C.F.R. § 402.14—Formal Consultation

(a) Requirement for Formal Consultation

Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Initiation of Formal Consultation

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii)

of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in

this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

(d) Responsibility to Provide Best Scientific and Commercial Data Available

The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) Duration and Extension of Formal Consultation

Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional Data

When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a) (2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service Responsibilities

Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection

of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g) (1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45–day period in which the biological opinion must be delivered will not

be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45–day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10–day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior

to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) Biological Opinions

(1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

(2) A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

(i) Incidental Take

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service

will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv)Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause

take and are not subject to further section 7 consultation.

(j) Conservation Recommendations

The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) Incremental Steps

When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) Expedited Consultations

Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) Expedited Timelines

Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) Federal Agency Responsibilities

To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the

Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) Service Responsibilities

In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

(m) Termination of Consultation

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.