

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**SCOTT VAN VALIN, *et al.*,**

**Plaintiffs,**

**v.**

**THE HONORABLE CARLOS M.  
GUTIERREZ, in his official capacity as  
Secretary of Commerce, *et al.*,**

**Defendants.**

**Civil Action No. 08-0941 (RMC)  
Category D**

**MOTION TO INTERVENE AS DEFENDANTS**

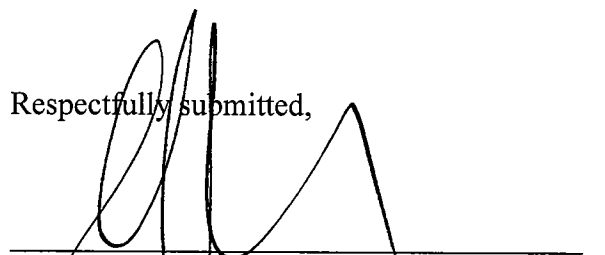
Pursuant to Fed. R. Civ. P. 24 and for the reasons set forth in their accompanying Memorandum of Points and Authorities attached hereto, Linda Behnken, David Gibson, Sherri Wohlhueter and Kurt Wohlhueter, North Pacific Seafoods, Inc., Sandy Craig, Luke Wiedel, Carolyn Heuer, Seafood Producers Cooperative, the City of Pelican, the City of Port Alexander, and the Halibut Association of North America respectfully move to intervene as defendants in the case as of right pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, permissively under Fed. R. Civ. P. 24(b). The Proposed Answer is attached hereto as Exhibit 1.

Counsel for Proposed Intervenor-Defendants has conferred with counsel for Plaintiffs and Defendants in this action. Defendants have represented that they have no position regarding the Motion to Intervene. Plaintiffs have represented that they have no opposition to this Motion as it relates to the merits of the case but oppose the Motion to Intervene to the extent it would give proposed Intervenor-Defendants the right to appeal the Preliminary Injunction. Proposed Intervenor-Defendants submit they meet the standards for intervention and should be permitted

to intervene for all purposes. Given the immediacy of the issues in this case, proposed Intervenor-Defendants respectfully request expedited consideration of this Motion to Intervene. Proposed Intervenor-Defendants have attached a proposed Order for the consideration of this Court.

Dated: June 23, 2008

Respectfully submitted,



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## CERTIFICATE OF SERVICE

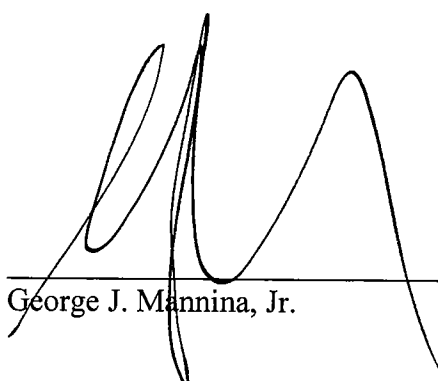
I hereby certify that on June 23, 2008, a copy of the foregoing *Motion to Intervene*, *Memorandum of Points and Authorities* in support thereof, and *Proposed Order* were served via email and first class mail, postage prepaid, upon the following counsel of record:

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Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO  
INTERVENE AS DEFENDANTS SUBMITTED BY LINDA BEHNKEN, DAVID  
GIBSON, SHERRI WOHLHUETER AND KURT WOHLHUETER, NORTH PACIFIC  
SEAFOODS, INC., SANDY CRAIG, LUKE WIEDEL, CAROLYN HEUER, SEAFOOD  
PRODUCERS COOPERATIVE, THE CITY OF PELICAN, THE CITY OF PORT  
ALEXANDER, AND THE HALIBUT ASSOCIATION OF NORTH AMERICA

I. INTRODUCTION

Plaintiffs, the charter halibut fishing industry operating in International Pacific Halibut Commission (“IPHC”) Area 2C, seek to overturn a final rule issued under the Northern Pacific Halibut Act (“Halibut Act”) – a rule specifically designed to prevent continued overfishing by Plaintiffs in Area 2C. The proposed Intervenor-Defendants (“Intervenor” or “Intervenors”), described in more detail below, will be substantially affected should this final rule be struck down by the Court.

Intervenors have three specific interests. First, they have a strong interest in the conservation of the halibut stocks. Allowing charter fishermen to continue to overfish their quota in Area 2C, as they have every year since 2003, will significantly affect halibut fishing in future years. Second, Intervenors have an interest in proper regulation of the industry. Lastly,

Intervenors wish to correct factual inaccuracies and omissions presented to the Court by the charter industry. The Court should make its final decision on accurate and complete facts.

It is significant that the charter industry has never claimed that its allotment of halibut in Area 2C is unfair or incorrect. They do not deny that the harvest amount they are allocated, called the Guideline Harvest Level (“GHL”), is a conservation-based determination. What Plaintiffs are seeking in this action is to prevent the National Marine Fisheries Service (“NMFS”) from implementing the conservation-based harvest levels set for the charter industry. Exceeding the GHL is first and foremost a conservation issue. It is not a simple allocation issue as Plaintiffs repeatedly claim. Plaintiffs have been allocated 931,000 pounds of halibut, but they do not want to be held to that level.

The Intervenors fall into five categories: (i) commercial setline halibut fishermen, (ii) halibut processors, (iii) halibut subsistence users, (iv) charter boat operators, and (v) local communities. Below is a factual description of each of the Intervenors by category. The application of the facts to the legal standards for standing can be found in Section III of this Memorandum.

A. Intervenors Who Are Commercial Setline Halibut Fishermen

1. Intervenor Linda Behnken is a commercial halibut setline fisherman fishing in International Pacific Halibut Coalition (“IPHC”) Area 2C. Affidavit of Linda Behnken (“Behnken Aff.”), ¶¶ 1, 2, attached as Exhibit 2 of Memorandum of Points and Authorities in support of Motion to Intervene as Defendants, (“Intervenors’ Memorandum”).

Ms. Behnken purchased all of the halibut quota share (“QS”) she holds. In 2008, she will be allowed to fish approximately 5,000 pounds. *Id.*, ¶ 4. Ms. Behnken depends on the halibut resource. *Id.*, ¶ 1. Approximately 50% of her family’s income is earned from halibut fishing. *Id.*, ¶ 5. The 43% reduction in the setline commercial quota over the past two years “has caused

substantial economic harm to our family” and deductions from her quota caused by the guided sport industry exceeding its guideline harvest level (“GHL”) imposes a “harmful burden....” *Id.*, ¶¶ 4, 5. If the guided sport industry fishes pursuant to the same regulatory regime as allowed in 2007, they will be harvesting approximately twice as much fish as provided for in the 2008 GHL. That will mean a further 15% reduction in Ms. Behnken’s halibut allocation since overharvests by the guided sport industry have been, and will be, deducted from the setline quota. *Id.*, ¶¶ 6, 7, 18. Thus, each day the 2008 regulations are suspended and charter boat fishermen operate under the 2007 rules results in a reallocation of commercial halibut QS from Ms. Behnken and other setline fishermen because each pound of fish harvested in 2008 by the guided sport industry above the 931,000 pound GHL will be a direct deduction from the 2009 commercial setline fisheries. *Id.*, ¶¶ 6, 7, 18. Ms. Behnken served as a member of the North Pacific Fishery Management Council (“Council”) at the time the Council helped to frame and develop the GHL program. *Id.*, ¶¶ 9, 12, 16.

2. Intervenor David Gibson owns a 40-foot commercial halibut setline fishing vessel in Area 2C. Affidavit of David Gibson (“Gibson Aff.”), ¶ 1, attached as Exhibit 3 to Intervenor’s Memorandum. Mr. Gibson borrowed money to purchase his vessel and halibut QS. *Id.*, ¶¶ 3, 4. To purchase QS, Mr. Gibson pledged his fishing vessel as collateral. *Id.*, ¶ 4. In 2006, Mr. Gibson grossed \$18,321. Subtracting his QS loan payments and expenses, Mr. Gibson netted about \$2,000. *Id.*, ¶ 4. Due to reductions in the amount of fish Mr. Gibson was allowed to harvest in 2008, his gross income of almost \$14,000 is insufficient to pay expenses and debt service on his QS loan payment. *Id.*, ¶ 5. Mr. Gibson is “entirely dependent on commercial fishing for my livelihood.... If the halibut quota is cut any further, *i.e.*, due to charter overages, I

may lose my quota share, boat, salmon permit; in other words, I would lose my whole commercial fishing business.” *Id.*, ¶ 6.

3. Intervenor Sherri Wohlhueter and Kurt Wohlhueter “are a fishing family.” Affidavit of Sherri Wohlhueter and Kurt Wohlhueter (“Wohlhueter Aff.”), ¶ 1, attached as Exhibit 4 of Intervenor’s Memorandum. The Wohlhueters received an initial halibut QS when the individual fishermen’s quota (“IFQ”) program was implemented in 1995. They have purchased additional QS. *Id.*, ¶ 3. Their halibut QS are in Area 2C and they cannot fish halibut in any other area. *Id.*, ¶ 5. Mr. and Mrs. Wohlhueter will not be able to pay their crew “if quota share reductions continue.” *Id.* Charter harvests exceeding the GHL impact the resource and reduce the amount of halibut Mr. and Mrs. Wohlhueter can harvest, economically impacting them. *Id.*, ¶ 7.

B. Intervenor Who Are Halibut Processors

1. Intervenor North Pacific Seafoods, Inc. processes halibut in Area 2C. Affidavit of North Pacific Seafoods, Inc. (“North Pacific Seafoods Aff.”), ¶ 1, attached as Exhibit 5 to Intervenor’s Memorandum. In Area 2C, North Pacific Seafoods has experienced a reduction in business due to the reduced commercial setline harvest caused in part by the charter sector exceeding its GHL. *Id.*, ¶ 3. Since 2004 when the guided sport industry began exceeding their GHL, halibut production in North Pacific Seafoods’ Area 2C processing plant has dropped 25%. *Id.*, ¶ 5. If the 2008 conservation measures are not enforced, North Pacific Seafoods expects “a further drop in processing volume, likely to be 30% of what we processed in 2004.” *Id.* If the 2008 NMFS rule is overturned, North Pacific Seafoods “will experience about a 25% loss of revenue” and will reduce its 800 employees by 10%. *Id.*, ¶¶ 1, 6.

2. Seafood Producers Cooperative founded in 1944 is the largest fishermen owned cooperative in the United States. It has a halibut processing facility in Sitka, Alaska in IPHC

Area 2C. Affidavit of Seafood Producers Cooperative (“Seafood Producers Cooperative Aff.”), ¶ 1, attached as Exhibit 6 to Intervenor’s Memorandum. Twenty-five percent of the Cooperative’s revenue is derived from halibut. The commercial halibut quota has been reduced by 43% in the past two years and the latest reduction will reduce the Cooperative’s revenue by \$2 million, also reducing incomes for 140 plant employees. *Id.*, ¶ 2. Allowing the charter GHL overages to continue will have “the immediate effect” of reducing setline fishing success, thereby impacting the Cooperative’s operations and members. *Id.*, ¶ 3. The Cooperative has participated in the Council’s deliberations on halibut management for 15 years and has representatives on both of the IPHC advisory boards. *Id.*, ¶ 5.

3. Intervenor Halibut Association of North America (“HANA”) represents 70% of the Pacific halibut processed annually, 46% of which operate processing plants in Area 2C. Affidavit of the Halibut Association of North America (“HANA Aff.”), ¶ 1, attached as Exhibit 7 to Intervenor’s Memorandum. Since 2006, halibut deliveries to HANA members Area 2C plants have dropped 10-30% depending on the plant. *Id.*, ¶ 7. Lay-offs have resulted. If the 2008 regulations are not enforced, HANA members anticipate a 25-30% drop in product availability, a 20-25% drop in revenue, and total losses of \$5-10 million. *Id.*, ¶ 8. HANA’s charter provides for representation of its members on economic and regulatory issues of concern. *Id.*, ¶ 2. HANA has been involved with efforts by the Council to manage the halibut fishery for 15 years and has actively participated in IPHC matters for nearly 50 years, including currently serving on advisory committees established by the IPHC. *Id.*, ¶¶ 2-5.

C. Intervenor Who Are Subsistence Users

1. Intervenor Carolyn Heuer is a subsistence fisherman in Area 2C. Her family depends solely on wild fish and game for the family’s protein. Affidavit of Carolyn Heuer (“Heuer Aff.”), ¶ 1, attached as Exhibit 8 to Intervenor’s Memorandum. According to Ms.

Heuer: “We can not afford to feed our family without depending on subsistence harvest. In a given year, we eat approximately 50-75 lbs of halibut. Over the past 4 years, we have noticed a significant decline in the availability of halibut due to the depletion of halibut stocks in the waters around Sitka.... We are dependent on halibut and my ability to feed my family is threatened.” *Id.*, ¶ 1. The charter fishing industry continues to concentrate its fishing efforts in and around Sitka and “our usual locations for subsistence fishing are no longer reliable....” *Id.*, ¶¶ 1, 2.

D. Intervenors Who Are Local Communities

1. Intervenor City of Pelican is a community of 106 residents, 30% of whom are Alaskan natives or American Indian in Area 2C. Affidavit of Patricia Phillips on behalf of the City of Pelican (“City of Pelican Aff.”), ¶¶ 1, 2, attached as Exhibit 9 to Intervenors’ Memorandum. Pelican has no road connections with any other town and the commercial halibut fishery is the mainstay of Pelican’s economy. *Id.*, ¶ 2. “Pelican depends heavily” on commercial fisheries’ taxes to provide essential revenue for community services and infrastructure. *Id.*, ¶ 4. Without that tax revenue, Pelican would experience a significant loss of revenue and be forced to reduce its budget by 20%. *Id.* Reductions in the setline halibut fishery reduce taxes available to Pelican. *Id.*, ¶ 6. The GHL exceedances by the charter boat sector which has contributed to the commercial setline quota reduction “has caused significant economic harm” to Pelican. *Id.*, ¶¶ 8, 9.

2. Intervenor City of Port Alexander in Area 2C is a community that “depends on viable access to healthy and abundant marine fish stocks.” Affidavit of William Luedke on behalf of the City of Port Alexander (“City of Port Alexander Aff.”), ¶¶ 1, 2, attached as Exhibit 10 to Intervenors’ Memorandum. The reallocation of halibut from the commercial setline sector to the charter sector “impact Port Alexander fishermen and our community, since the economic

survival of the community depends on the commercial halibut and salmon fleet.” *Id.*, ¶ 5. The Port also receives taxes from the fisheries’ tax on setline halibut landings. If the 2008 NMFS rule is not implemented in June, the halibut charter fleet will once again exceed its GHL and the impact on Port Alexander will be serious. *Id.*, ¶ 5. Port Alexander participated in Council deliberations for the past 15 years regarding halibut management. *Id.*, ¶ 6. “Our community depends on the halibut resource for sustenance and livelihood. The one halibut daily limit is necessary to ensure charter harvest is restricted to the sector’s GHL, the resource is not over harvested, and fishery dependent communities such as Port Alexander survive.” *Id.*, ¶ 7.

E. Intervenors Who Are Charter Boat Operators

1. Intervenor Sandy Craig is the owner and operator of a small charter fishing business. Affidavit of Sandy Craig (“Craig Aff.”), ¶ 1, attached as Exhibit 11 to Intervenors’ Memorandum. Her clients target halibut and salmon. *Id.*, ¶ 2. Ms. Craig’s business depends on a healthy halibut resource. *Id.*, ¶ 4. The number of Area 2C charter boats is increasing with mounting pressure on the resource and that is having a “negative effect on my small business...” *Id.*, ¶ 6. Ms. Craig and her family have also invested in halibut QS and, therefore, are also commercial setline fishermen. *Id.*, ¶¶ 8-9. Because of the reduction in her halibut quota amounting to 43% over the past two years, her family has suffered significant financial harm given that commercial halibut fishing accounts for approximately 25% of her family’s income. *Id.*, ¶ 9.

2. Intervenor Luke Wiedel is a charter boat captain in Area 2C. Charter fishing is his primary source of income and his clients target halibut and salmon. Affidavit of Luke Wiedel (“Wiedel Aff.”), ¶ 1, attached as Exhibit 12 to Intervenors’ Memorandum. “My business, and the business of all charter and setline fishermen, depends on a healthy resource.” *Id.*, ¶ 2. The southeast charter sector’s halibut harvest has exceeded its GHL for the past four

years and it is important to have regulations enforcing the GHL in order to protect the resource on which Mr. Wiedel depends. *Id.*, ¶¶ 2, 3.

Intervenors are entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, Intervenors respectfully request that they be permitted to intervene pursuant to Fed. R. Civ. P. 24(b).

## **II. STATEMENT OF FACTS**

Plaintiffs challenge a rule issued pursuant to authority granted under the Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773-773k. *See* 73 Fed. Reg. 30504, 30523 (May 28, 2008) (the “Rule”) (“The authority citation for 50 C.F.R. Part 300, Subpart E continues to read as follows: Authority: 16 U.S.C. 773-773k.”) The Rule limits the 2008 commercial guided sport halibut harvest to the 931,000 pound conservation limit set forth at 50 C.F.R. 300.65(c).

Part II of this Memorandum overviews the facts relevant to the interests of Intervenors and the harm to them that will occur if Plaintiffs prevail. Before doing so, it may be helpful to place the Rule in its regulatory context.

The existing regulations specifying the appropriate GHL for the halibut guided sport industry are found at 50 C.F.R. 300.65. The regulations provide that if the IPHC determines the biologically acceptable harvest of halibut is “x” then the allowable harvest by the guided sport industry, the GHL, will be “y.” There are five different GHLs based on five different halibut population sizes. 50 C.F.R. 300.65(c). No one, including Plaintiffs, has ever argued the GHL limits are not the correct harvest levels based on the health of the halibut resource. The regulations also provide a procedure for dealing with circumstances in which the guided sport industry exceeds the appropriate GHL in a given year. *Id.*

Plaintiffs argue that even though the halibut population has declined such that the appropriate GHL is now set at 931,000 pounds in accordance with 50 C.F.R. 300.65(c), NMFS

cannot require the guided sport industry to adhere to that GHIL, even though there is no dispute that this is the correct, conservation-based GHIL. Allowing the resource to be overfished by allowing the guided sport industry to exceed the conservation-based GHIL harms the resource and causes direct, immediate, and irreparable harm to Intervenor.

A. Conservation Issues

1. The Halibut Resource Is Declining

The Pacific halibut fishery is cyclical and is currently experiencing a decline in abundance. Indeed, the exploitable biomass in IPHC Area 2C has declined 55%. IPHC Eighty-fourth Annual Meeting Handout, Jan. 2008 at 83-84, which can be found at <http://www.iphc.washington.edu/HALCOM/pubs/annmeet/2008/bluebook/bluebook08.pdf>; Ex. 6, Seafood Producers Aff., ¶ 7 (“In written materials provided at the annual meeting, IPHC staff stated the halibut resource is at the lowest level in a decade”); Ex. 2, Behnken Aff., Ex., ¶ 13. When a resource is in decline, it is especially important to prevent overfishing. Commercial setline halibut fishermen such as Intervenor who have permitted halibut harvesting rights<sup>1</sup> have a direct and tangible interest in conserving the resource and preventing its overharvest, as do halibut processors. Individuals such as Intervenor who depend on the resource for their subsistence

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<sup>1</sup> In 1995, an Individual Fishermen’s Quota (“IFQ”) permit program was initiated for the commercial setline halibut fleet. Fishermen were allocated Quota Shares (“QS”) based on their past level of fishing. QS is translated annually into pounds of halibut, the amount fluctuating directly with the total setline catch limit for a management area. Without a QS setline, halibut fishing is prohibited. QS were issued for IPHC management areas. Thus, commercial fishermen with QS for management Area 2C (southeast Alaska) cannot fish in management Area 3A (central Gulf of Alaska) without a QS for that area. Pursuant to the IFQ Program, there is an excessive share cap such that the amount of QS any person may own or control is 1% of the total quota, or 599,799 QS units. Those QS units are translated into pounds of halibut based on the allowable harvest limit. Thus, if the allowable harvest based on biomass increases, the amount of pounds represented by QS units increases. If the allowable harvest number decreases, then the allocation from each unit of QS also decreases. In 2008, the maximum QS units of 599,799 translated into fixed cap of 62,100 pounds. Fishermen can buy and sell QS. Ex. 2, Behnken Aff., ¶ 3.

