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Applicant for Intervention

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOUTHEASTALASKA CONSERVATION COUNCIL, SKAGWAY MARINE ACCESS COMMISSION, LYNN CANAL CONSERVATION, INC, ALASKA PUBLIC INTEREST RESEARCH GROUP, SIERRA CLUB, and NATURAL RESOURCES DEFENSE COUNCIL,	)
Plaintiffs,	)
v.	)
FEDERAL HIGHWAY ADMINISTRATION; UNITED STATES DEPARTMENT OF TRANSPORTATION; MARIO CINO, in her official capacity as Acting Secretary of Transportation; DAVID C. MILLER, in his official capacity as Division Administrator for the Federal Highway Administration; UNITED STATES FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; MARK REY, in his official capacity as Under Secretary of Agriculture; and DENNIS E. BSCHOR, in his official capacity as Alaska Regional Forester	)CaseNo.J06-00009CV(JWS)

STATE OF ALASKA'S MOTION TO INTERVENE

Pursuant to Fed. Rule Civ. Proc. 24, the State of Alaska ("the State") hereby moves to intervene as a party defendant in all phases of the litigation in this case

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in order to protect the State's and its citizens' interests in the Juneau Access Improvements Project ("Juneau Access"). The State moves to intervene (1) *qua* the State of Alaska, (2) on behalf of its Department of Transportation and Public Facilities (DOT&PF), Department of Environmental Conservation, and Department of Natural Resources, and (3) on behalf of its citizens.

The undersigned has contacted opposing counsel, and is authorized to represent that this motion is not contested.

Juneau is currently only accessible by an approximately seventy mile boat trip, or by plane. The Juneau Access project will extend the existing Juneau road system approximately 50.8 miles north to a point north of the Katzehin River Delta. From there, shuttle ferries will provide service to Haines (7 miles) and Skagway (15 miles).

DOT&PF is charged by statute with responsibility for the state's highway system,[1] including its planning[2] and construction[3]. The planning process raises interests particular to the State of Alaska:

(1) the economic vitality of the State;

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[1] Alaska Statute (AS) 19.05.125; AS 19.10.030.

[2] AS 19.10.020 (designation of state highway system); AS 19.10.120 (research on highway development); AS 19.10.140 (long range program for highway construction and maintenance); AS 44.42.050 (state transportation plan).

[3] AS 19.10.030 (responsibility for state highway system).

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(2) the safety and security of the users of the State's transportation system;

(3) accessibility and mobility options available to people and for freight;

(4) the integration and connectivity of various modes of the State's transportation system.[4]

The State is in the best position to speak to these factors, and to explain the reasons for the alternatives considered, the research and studies performed, and the public process undertaken prior to making the decisions subject to challenge in the plaintiffs' Complaint for Declaratory and Injunctive Relief.[5]

The State has played a serious and substantial role in all aspects of project planning and design. The plaintiffs' challenge to "defendants' decisions to authorize construction of a road extension and ferry terminal north of Juneau" is, in a very real sense, a direct challenge to the State's planning and actions.

The named federal defendants either have no role in the State's highway system, or are involved only in a funding or oversight capacity. The State is in charge of implementation, and therefore has the most direct and long term involvement with nearly every aspect of the planning and decision making process for the Juneau Access project.

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[4] 17 Alaska Administrative Code (AAC) 05.125.

[5] Ex. 1, Declaration of Reuben M. Yost, October 12, 2006, at ¶ 5; Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶¶ 2, 6.

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While named federal defendant agencies have ultimate authority to make many or all of the decision approvals, the State did the lion's share of planning, research and design work leading to the decisions challenged in the Complaint.[6] Furthermore, the impact of any decision rendered in this case will be felt most directly by the State.

The State is entitled to intervene as of right under F.R.C.P 24(a)(2) on all claims except the merits phase of the NEPA claims,[7] because it is best situated to identify and discuss the relevant historical, procedural, and substantive decisions leading to the alleged violations of law identified in the Complaint.

Alternatively, the State requests permission to intervene under F.R.C.P. 24(b)(2) as to all claims, including the merits phase of the NEPA causes of action, or to be granted *amicus* status.

This motion is supported by the Points and Authorities below, and by the attached declarations of Jeffery Ottesen (Alaska DOT&PF Director of Program Development), Reuben Yost (Alaska DOT&PF Special Project Manager for Juneau Access), and Jack Beedle (Alaska DOT&PF Southeast Region Preconstruction Engineer). This motion is accompanied by a proposed order. Also accompanying this motion and lodged with the Court is the State's Answer to the plaintiffs' Complaint.

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6 Ex. 1, Declaration of Reuben M. Yost, October 12, 2006, at ¶¶ 2-5.

7 The Ninth Circuit has adopted a "federal defendant" rule which generally bars states from intervening during the merits phase of NEPA claims. *See, e.g., Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1113-14 (9th Cir. 2000).

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INTRODUCTION

The Juneau Access project is an important component of the State's long term transportation plan and statewide transportation improvement plan. The proposed road extension will result in improved overall access to Juneau, increased traffic capacity, and increased transportation flexibility.

The road will also be a part of the National Highway System, which has been described as including those roadway's "important to the nation's economy, defense and mobility."[8] Highways on the National Highway System typically connect a state's population centers with economic centers, border crossings, and intermodal facilities.

The Juneau Access project is included in the federally approved Statewide Transportation Improvement Program (STIP) for 2006-2008.[9] The STIP is required by 23 U.S.C. § 135 and 23 C.F.R. 450.216, and is implemented by state regulation.[10]

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[8] U.S. Department of Transportation website: http://www.fhwa.dot.gov/hep10/nhs/.

[9] The complete STIP may be reviewed at the Alaska Department of Transportation and Public Utilities' website: http://www.dot.state.ak.us/stwdplng/cip_stip/assets/06_08stip/06_08final/final_06-08_stip.pdf.

[10] 17 AAC 05.155-200.

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The FHWA and the Federal Transit Administration[11] approved the document on February 17, 2006.

The project is also a part of the DOT&PF 2004 Southeast Alaska Transportation Plan (SATP).[12] The SATP is an approved element of the Alaska Statewide Transportation Plan prepared in accordance with 23 C.F.R. 45.208, Alaska Statute 44.42.050, and 17 AAC 05.125 - 17 AAC 05.150.

These long term State transportation plans and transportation improvement programs are potentially adversely affected by the Complaint.

ARGUMENT

I. THE STATE IS ENTITLED TO INTERVENE AS OF RIGHT TO PROTECT THE STATE'S TRANSPORTATION INTERESTS

The Ninth Circuit Court of Appeals broadly construes Rule 24 in favor of applicants for intervention.[13]

The Ninth Circuit has adopted a four-part test for intervention as of right: (1) the motion must be timely; (2) the applicant must show an interest relating to the property or transaction that is the subject matter of the action; (3) the applicant must

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11 23 U.S.C. § 450.220(a).

12 Ex. 2, Declaration of Jeffrey C. Ottesen, October 12, 2006, at ¶ 5.

13 *See United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir.1986), *rev'd on other grounds*, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); *Blair v. Shanahan*, 919 F.Supp. 1361, 1363 (N.D. Cal. 1996); *United Bank of Arizona v. Sun Mesa Corp.*, 119 F.R.D. 430, 432 (D. Ariz. 1988) (Rule 24 is read generously in favor of intervention).

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show that without intervention, disposition of the case may as a practical matter impair its ability to protect its interest; and (4) it must be shown that the interest is not adequately represented by an existing party.[14]

The State is entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure in order to defend the State's interests with regard to the claims asserted by plaintiffs under Counts I-V, except for the merits phase of the NEPA claims. In addition, the State should be allowed to intervene as of right in the remedy phase of the NEPA claims.[15]

As applied to NEPA, the Ninth Circuit has ruled that only the federal government is a proper defendant during the merits phase (the so-called "federal defendant" rule).[16] The rationale is that NEPA requires the federal government, not other entities, to issue an environmental impact statement before taking any action

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14 *Stringfellow*, 783 F.2d at 826.

15 The State will separately move to intervene permissively on the merits of plaintiffs' NEPA claims pursuant to Rule 24(b)(2), as discussed in Section II.

16 *See, e.g., Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1113-14 (9th Cir. 2000); *but see* Stephanie D. Matheny, Who Can Defend A Federal Regulation? The Ninth Circuit Misapplied Rule 24 By Denying Intervention of Right in Kootenai Tribe of Idaho v. Veneman, 78 Wash. L. Rev. 1067, 1086 (2003) (noting several other federal courts have considered and rejected the Ninth Circuit's federal defendant rule).

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"significantly affecting the quality of the human environment."[17] Parties may still intervene as a matter of right during the remedies phase of NEPA litigation, and the State therefore moves to intervene as of right for that purpose.

States and other government entities have been allowed to intervene to defend environmental claims in this and other circuits.[18]

1. The State's Motion to Intervene is Timely.

Timeliness is dependent on the stage of the proceedings, potential prejudice to the parties, and the reason for any delay.[19] The State has moved to intervene in the earliest stage of this case, before the time set for federal defendants to file an Answer, and before any substantive rulings have been made. Thus, the State's intervention at this stage is timely and no prejudice will result to the existing parties.

2. The State Has Significantly Protectable Interests Relating to the Property or Transaction That is the Subject of the Action.

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[17] 42 U.S.C. § 4332(2)(C); *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478, 1485 (9th Cir. 1993).

[18] *See, e.g.*, *Sierra Club v. City of San Antonio*, 115 F.3d 311, 315 (5th Cir. 1997) (State of Texas allowed to intervene to defend action premised on Endangered Species Act violations); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (reversing denial of State of Texas' motion to intervene in suit against the United States Department of Agriculture for alleged failure to establish conservation programs); *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489,1499 (9th Cir. 1995) (State of Arizona allowed to intervene as of right during the remedies phase of NEPA litigation).

[19] *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 836 (9th Cir. 1996) (finding application to intervene timely when filed before any substantive rulings had been made).

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To intervene as of right at the trial level, an applicant need not establish standing, or show a particularized injury of the type used to establish standing.[20] "No specific legal or equitable interest need be established."[21] Instead,

> A prospective intervenor must establish that (1) 'the interest [asserted] is protectable under some law,' and (2) there is a 'relationship between the legally protected interest and the claims at issue.'[22]

The Ninth Circuit has also stated that:

> We ordinarily do not require that a prospective intervenor show that the interest he asserts is one that is protected by the statute under which the litigation is brought. It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.[23]

Where injunctive relief is requested and such relief will have "'direct, immediate, and harmful effects upon a third party's legally protectable interests,' that

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[20] *Didrickson v. United States Dept. of the Interior*, 982 F.2d 1332, 1340 (9th Cir. 1992).

[21] *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993); see 6 James W. Moore, *Moore's Federal Practice* § 24.03[2][a], at 24-28 (3d ed. 2003) (no authoritative definition exists for the kinds of interests satisfying Rule 24(a)(2)).

[22] *Glickman*, 82 F.3d at 837, *citing Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).

[23] *Sierra Club*, 995 F.2d at 1484; *see Kleissler v. U.S. Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998) (reviewing precedents and concluding standard was "nebulous").

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party demonstrates that is has a significant protectable interest in the action."[24]

Injunctive relief could significantly delay, or halt altogether, construction on a road out of Juneau.[25] Other obvious ramifications are decreased competition in the contracting community, increased construction costs, and disruption statewide in transportation planning and public project construction.[26]

The Juneau Access project reflects an important component of the State's overall transportation planning process, and the Complaint for Injunctive and Declaratory Relief is a direct challenge to this State transportation authority.[27] The State's broad transportation authority was recognized in Alaska Executive Order No. 39 which formed the Alaska Department of Transportation and Public Facilities to "evaluate, plan, design, construct, manage, operate and maintain all state transportation modes and systems, relying on analysis of the relative advantages of different modes and systems and considering their social, economic, and environmental consequences." These directives are specifically called out in various sections of AS 44.42.020, all of

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[24] *Sierra Nevada Forest Protection Campaign v. Tippin*, slip op., 2006 WL 1319397, at *3 (E.D. Cal. May 15, 2006) (quoting *Forest Conservation Council*, 66 F.3d at 1494).

[25] Ex. 3, Declaration of Jack D. Beedle, October 12, 2006, at ¶ 3.

[26] *Id.* at ¶¶ 3-5; Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶ 8.

[27] Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶¶ 2-8.

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which are applicable to DOT&PF's authority as reflected in the planning and decision to build the Juneau Access project:

> (a) The department shall
>
> > (1) plan, design, construct and maintain all state modes of transportation and transportation facilities and all docks, floats, breakwaters, buildings, and similar facilities;
> >
> > (2) study existing transportation modes and facilities in the state to determine how they might be improved or whether they should continue to be maintained;
> >
> > (3) study alternative means of improving transportation in the state with regard to the economic costs of each alternative and its environmental and social effects;
> >
> > (4) develop a comprehensive, long-range, intermodal transportation plan for the state;
> >
> > . . . .
> >
> > (8) study alternative means of transportation in the state, considering the economic, social, and environmental effects of each alternative;
> >
> > (9) coordinate and develop state and regional transportation systems, considering deletions, additions, and the absence of alterations.

None of the federal defendants are charged with the federally and state mandated duty of transportation planning in the State of Alaska.[28] The factors analyzed

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[28] 23 U.S.C. 135; 23 C.F.R. 450.216; AS 19.10.020; AS 19.10.120; AS 19.10.140; AS 44.42.050; 17 AAC 05.125.

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in transportation planning are, of necessity, factors particular to the State of Alaska's interests such as promotion of economic vitality,[29] improving access to the State's capital, and promotion of energy conservation.[30] The State is best situated to address these issues.

The need for improved access between Juneau and the rest of the State by and through connections to the continental highway system was recognized during the 1970's.[31] This interest is again unique to the State of Alaska. Both the current and past governor actively pursued establishing this link.[32]

The Juneau Access project as part of the State Transportation Planning process is graphically presented in the Southeast Alaska Transportation Plan (SATP), discussed in the attached Declaration of Jeffrey Ottesen, Alaska DOT&PF Director of the Division of Program Development. The Juneau Access project is called a

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[29] The Ninth Circuit has held on occasion that even a non-speculative economic interest may justify intervention as of right. *See Araki v. Cayetano,* 324 F.3d 1079, 1088 (9th Cir. 2003) (proposed intervenors had significant protectable interest in continued receipt of benefits, as required to intervene as of right); *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 821, 822 (9th Cir. 2001) (construction contractor and building trade associations had a significantly protectable interest relating to suit in which environmental groups alleged that plan and program did not comply with requirements of Endangered Species Act, in part because members had "projects that are in the pipeline for approved projects").

[30] Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶ 2.

[31] *Id.* at ¶ 4.

[32] *Id.*

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"fundamental highway element" in the Southeast Region of Alaska.[33] Juneau Access' role in Alaska's "long-term" transportation vision is specifically identified and discussed in the context of considerations specific to Alaska.[34]

The State's legal interest in the Juneau Access project is not limited to transportation planning. The State is also the federally recognized "statewide agency" charged with primary responsibility for preparation of the Environmental Impact Statement document which is the subject of this litigation.[35] In its capacity as "statewide agency," the State undertook most of the day-to-day research and coordination with respect to scoping, range of alternatives, and identification of relevant issues to be addressed.[36] Because of its extensive and direct involvement in preparation of the FEIS, the State is best situated to respond to the charges made in the Complaint for Declaratory and Injunctive Relief.

3. Absent Intervention, Disposition of This Action May Impair or Impede the State's Ability to Protect its Interests.

When an action seeks injunctive relief which, if granted, could affect an intervenor-applicant's interests, practical impairment of the ability to protect those

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33 SATP at ES-1.

34 Id. at 43, 47, 67, 69.

35 23 C.F.R. 771.109(c)(1); Ex. 1, Declaration of Reuben M. Yost, October 12, 2006, at ¶ 2.

36 Ex. 1, Declaration of Reuben M. Yost, October 12, 2006, at ¶ 3.

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interests results if intervention is not allowed.[37] The State must have the opportunity to fully participate in this case as a party in order to protect its interests against the threat of injunctive relief.

The Ninth Circuit has followed the Rule 24 advisory committee notes in determining whether or not impairment exists. Those notes provide 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.[38]

In *Southwest Center for Biological Diversity v. Berg*, the Ninth Circuit Court ruled that where the environmental litigation could negatively impact projects on a "negotiated list that are in the pipeline for design and mitigation assurances and approval," this fact alone established both a practical and legal impairment.[39]

Much in the same way, in this case the Juneau Access project has been planned and designed, and the project has been advertised for bids. The project is at a critical juncture and delay threatens the project, as well as creating financial and other impacts to the State with regards to this and other public works projects in the State.[40]

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37 *See Forest Conservation Council,* 66 F.3d at 1498.

38 *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 818, 822 (9th Cir. 2001) (quoting Rule 24 advisory committee notes).

39 *Id.*

40 Ex. 3, Declaration of Jack D. Beedle, October 12, 2006, at ¶¶ 3- 5.

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As described above, the State's ability to engage in its statutory transportation duties are also negatively impacted.[41]

The threat of injunction therefore substantially affects the State's interests in a practical sense, and this prong of the intervention analysis is met.

4. The State's Interests Are Not Adequately Represented by the Other Parties.

The requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests may be inadequate, and the burden of making that showing is minimal.[42] The applicant for intervention need only show that representation by the present parties *may* be inadequate.[43]

In evaluating the adequacy of representation a court considers three factors: (1) whether the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; (2) whether the present party is able and willing to make such arguments; and (3) whether the intervenor would offer

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41 Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶ 8.

42 *Stringfellow*, 783 F.2d at 827.

43 *Glickman*, 82 F.3d at 838; see also *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) (any doubt concerning the propriety of intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action); Daniel R. Mandelker, NEPA Law and Litigation § 4:26:2, at 4-77 (2d ed. 2005).

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any necessary element to the proceedings that the other parties would neglect.[44] The current defendants include two federal agencies (U.S. DOT and US Department of Agriculture) and various federal officials in their official capacities. The interests of the federal agencies are not identical to those of the State. The State has transportation interests which implicate statewide and regional private, political, and economic concerns simply not shared by the defendant federal governmental agencies and officials.

As applied to NEPA litigation, it has been held that "because the named defendants have different interests than [intervenors], if plaintiffs prevail, it is likely that defendants will not advance the same arguments as applicants in regards to potential remedies. Therefore, there is sufficient doubt about the adequacy of representation to warrant intervention in the remedial portion of the litigation."[45]

The Juneau Access project is sought by and is very important to the State; it is not necessarily an interest of the federal defendants -- defendants are charged only with procedural compliance with the NEPA program, for example. In *Forest Conservation Council*, the court quoted Moore's Federal Practice for the proposition that "[i]nadequate representation is most likely to be found when the applicant asserts a

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[44] *Glickman,* 82 F.3d at 838, *citing California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

[45] *Tippin*, slip op., 2006 WL 1319397, at *5.

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personal interest that does not belong to the general public."[46] The court found inadequate representation in that case because the U.S. Forest Service's interest was merely in the procedural requirements of NEPA and National Forest Management Act (NFMA), whereas the State of Arizona's interest was in the management of activities in Arizona's forests.[47] In the instant case, the State has a "personal" interest in the development of its State transportation systems, including but not limited to improvement of access to the State's capital.[48] The federal defendants' concern is primarily procedural, as opposed to the practical end result of that process. The State of Alaska, while seeking meticulously to be sure the process has been thorough and proper, is focused on the end result: the successful completion of the Juneau Access project, which this case could enjoin.

The State has a unique view and interest in another sense as well. The State of Alaska was primarily responsible for preparation and review of the studies and documentation that were reviewed by the various defendant federal agencies.[49] The State thus has intimate knowledge of, and interest in, any review or analysis of the supporting studies and documentation.

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46 66 F.3d at 1499.

47 *Id.*

48 See Ex. 2, Declaration of Jefferey C. Ottesen, October 12, 2006, at ¶¶ 2-6, 8 .

49 Ex. 1, Declaration of Reuben M. Yost, October 12, 2006, at ¶¶ 3-4.

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Finally, "[i]njunctive relief is an equitable remedy, requiring the court to engage in the traditional balance of harms analysis, even in the context of environmental litigation." [50] Therefore, even if this Court considers a potential procedural violation, the Court will yet face a decision whether to issue an injunction. The Court will have to weigh the harms. The other parties in this case will present their own take on the reasons and perspectives why an injunction should or should not be issued, but they cannot present the perspective of the State of Alaska. The State of Alaska, may suffer unique harms that cannot be considered adequately in the balancing decision of the Court without the intervention of the State.[51] Therefore, the State of Alaska satisfies the final requirement for intervention as a matter of right under Rule 24(a).

II. IN THE ALTERNATIVE TO INTERVENTION OF RIGHT, THE STATE SHOULD BE ALLOWED PERMISSIVE INTERVENTION

The State believes it is entitled as of right to intervene in this case on all claims except the merits of the NEPA claims in Counts III and IV of the Complaint. The State alternatively moves to intervene on all claims, including the NEPA merits phase, pursuant to Fed. R. Civ. P. 24(b)(2):

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50 *Forest Conservation Council*, 66 F.3d at 1496.

51 *See also Tippin*, slip op., 2006 WL 1319397, at * 5 (government entities and officials did not have same type of vested economic interest as plaintiffs, and intervention on issue of remedies in NEPA action appropriate).

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> Upon timely application anyone may be permitted to intervene in an action…when an applicant's claim or defense and the main action have a question of law or fact in common…. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

No requirement exists that a direct personal or pecuniary interest be established to establish a right to permissive intervention.[52] For example, in the case of *Kootenai Tribe of Idaho*, the court upheld the decision to allow certain environmental groups to intervene on the merits of NEPA litigation.[53] The basis provided was that the intervention would "'contribute to the equitable resolution of the case,'" and the "presence of intervenors would assist the court in its orderly procedures leading to the resolution of this case, which impacted large and varied interests."[54]

As argued above, the State's Motion to Intervene is timely. This case and the State's defense share common questions of law and fact: the State seeks to defend the federal decision being challenged and defended in the main action, but seeks to defend that decision from the perspective of transportation authority and planner in the State of Alaska. The issues of fact and law are identical and the subject of the suit is the same. As discussed above, this motion is timely.

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52 *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S.Ct. 1044, 84 L.2d. 1292 (1940).

53 *Kootenai Tribe of Idaho v. Veneman*, 313 F3d. 1094, 1111 (9th Cir. 2002).

54 *Id.*

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The State submits that its participation in this case will also "'contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.'"[55] In *Nuesse v. Camp*, the D.C. Circuit Court reversed the district court's denial of permissive intervention to the State of Wisconsin in a suit involving both federal and state banking laws.[56] In so holding, the court recognized the "intimacy of the relationship between and interdependency of the Federal and State statutes" involved.[57] The court went on to emphasize that when an intervenor-applicant is a public official, courts should apply the rule liberally:

> It is a living tenet of our society and not mere rhetoric that a public office is a public trust. While a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation.[58]

Allowing the State to intervene at this early stage of the case will not unduly delay or prejudice the adjudication of the rights of the original parties. The federal defendants have not yet answered the Complaint. The case will be able to proceed on the same schedule, with the State's participation and unique perspective.

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55 *U.S. Postal Service v. Brennan*, 579 F.2d 188, 192 (9th Cir. 1978) (citation omitted); *accord Veneman*, 313 F.3d at 1111.

56 385 F.2d 694 (D.C. Cir. 1967).

57 *Id.* at 705.

58 *Id.* at 706.

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The State's intervention will also benefit the Court in considering the public interests at stake and balancing the hardships of injunctive relief, if such relief is considered.[59]

Finally, if permissive intervention is not allowed on the merits of the NEPA claims in Counts III and IV of the Complaint, the State requests *amicus curiae* status to submit briefing to the Court.[60] Bifurcation of status into amicus and intervenor was recently allowed in *Forest Guardians v. Bureau of Land Management*, 188 F.R.D. 389, 396 (D. N.M. 1999), because the court "recognizes the [intervenor's] input on compliance may be important to the just resolution of this litigation." Similarly, in *Southwest Center for Biological Diversity v. United States Forest Service*, 82 F.Supp.2d 1070, 1074 (D. Ariz. 2000), the district court allowed participation as amicus on a compliance question and as intervenor on the question of remedy "in recognition of their expertise and interest in the subject of the dispute."

Conclusion.

For the reasons stated above, the State requests that the Court issue an order granting the State intervenor and *amicus curiae* status as follows:

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59 *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 541-546 (1987).

60 *See NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.Supp.2d 1061, 1067 (N.D. Cal. 2005) (district courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved); *see generally* 4 Am.Jur.2d *Amicus Curiae* § 3 (2006) (there are no prerequisites to the granting of amicus curiae status, but court generally will consider if the proffered information is timely, useful, or otherwise necessary to the administration of justice).

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1. The State of Alaska shall be a full party defendant intervenor with regard to Counts I-V: Count I of the Complaint (National Forest Management Act); Count II of the Complaint (Bald Eagle Protection Act, Administrative Procedures Act); Count III of the Complaint (National Environmental Policy Act); Count IV of the Complaint (Department of Transportation Act, Administrative Procedure Act, National Environmental Policy Act); and Count V of the Complaint (Endangered Species Act, Administrative Procedures Act).

2. In the alternative, the State again requests full party intervention status on Counts I-V, but if the State is not allowed to participate in the merits phase of the NEPA litigation, the State requests that it may file an amicus brief on the issue of whether the Federal Highway Administration violated NEPA as alleged in Count III (NEPA -- Failure to Consider Reasonable Alternatives) and Count IV of the Complaint (NEPA -- Misleading Traffic Demand Forecast). In addition, the State shall be an intervenor defendant on the issue of what, if any, remedy should apply in the event the Court finds a violation of NEPA as alleged in Counts III and IV of the Complaint.

3. The Answer lodged by the State shall be deemed filed.

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RESPECTFULLY SUBMITTED this 19th day of October, 2006.

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CERTIFICATE OF SERVICE

I, Angela Hobbs, certify that on October 19, 2006, a copy of the foregoing document, attached declarations of Jack D. Beedle, Jeffrey C. Ottesen, and Reuben M. Yost, and a proposed order granting intervention, were served via e-mail and regular mail to Michael C. LeVine. Courtesy copies were also sent via e-mail and regular mail to United States Attorney Nelson P. Cohen and United States Department of Justice Attorney Dean Dunsmore, and via e-mail to United States Department of Justice Attorney Coby Howell.

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