

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA FARM BUREAU )  
FEDERATION, *et al.*, )  
 )  
Plaintiffs, )  
 ) No. 1:02-02328 (RCL)  
v. )  
 )  
ANNE BADGLEY, *et al.*, )  
 )  
Defendants, and )  
 )  
NATURAL RESOURCES DEFENSE )  
COUNCIL, *et al.*, )  
 )  
Proposed Intervenor-Defendants. )  
\_\_\_\_\_ )

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO INTERVENE**

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**PROPOSED INTERVENORS  
AND THEIR INTEREST IN THIS LAWSUIT**

The Bay Institute, Natural Resources Defense Council, Sacramento River Preservation Trust, and Save San Francisco Bay Association (collectively “Proposed Intervenors”) respectfully request that this Court grant them leave to intervene as Defendants in the above-titled action.

By intervening in this action, Proposed Intervenors seek to ensure the continuing viability of the Delta smelt. The Delta smelt is a two to three-inch-long fish endemic to the Sacramento-San Joaquin estuary (“the Delta”) at the mouths of the Sacramento and San Joaquin Rivers in northern California. Unlike many fish, the Delta smelt has only a one-year life cycle and is thus particularly vulnerable to extinction. Extinction of the Delta smelt could result from just a single year of spawning failure or from only a few consecutive years of high fish kills or poor spawning and/or rearing conditions.

Each of the Proposed Intervenors has a significant interest in this action. As discussed below, they brought the original lawsuits seeking to minimize the loss of the Delta smelt. As a direct result of advocacy by Proposed Intervenors in the administrative process and in court, *see* Declaration of Gary Bobker In Support of Motion to Intervene (“Bobker Dec.”) at ¶¶ 6-9; Declaration of David Lewis In Support of Motion to Intervene (“Lewis Dec.”) at ¶¶ 5-8; Declaration of John Merz In Support of Motion to Intervene (“Merz Dec.”) at ¶¶ 9-12; Declaration of Barry Nelson In Support of Motion to Intervene (“Nelson Dec.”) at ¶¶ 3-5, the Fish and Wildlife Service (“Service”) listed the Delta smelt as a threatened species, designated critical habitat for the Delta smelt, and was forced to craft a biological opinion that adequately protects the Delta smelt. It is the revocation of these hard-won protections for the Delta smelt that Plaintiffs California Farm Bureau Federation and Ted Sheely (collectively “Plaintiffs”) are seeking in this lawsuit. Proposed Intervenors seek to intervene to protect the fruits of their prior advocacy. Plaintiffs seek revocation

of these protections because that would allow the Central Valley Project (“CVP”) and the State Water Project (“SWP”) (collectively “the Projects”) to pump water from the Delta without regard for the survival of the Delta smelt species or for the health of the Delta itself. Each of the Proposed Intervenor has previously attempted to ensure that the Projects in the Delta are operated in a manner that minimizes the loss of Delta smelt. Bobker Dec., ¶¶ 6-9; Lewis Dec., ¶¶ 5-8; Merz Dec., ¶¶ 10-12; Nelson Dec., ¶¶ 4-5.

In addition to advocating for protections for the Delta smelt, members of the Proposed Intervenor organizations, all environmental organizations, are active participants in the life of the Delta. Individual members of each organization frequently visit the Delta, critical habitat for the Delta smelt, to use and appreciate the Delta ecosystem. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-4; Merz Dec., ¶¶ 3, 8; Nelson Dec., ¶¶ 6. The health and survival of the Delta smelt species is considered indicative of the health of the Delta itself. *See* U.S. Fish and Wildlife Service, Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes at 1 (Nov. 26, 1996); *see also* Bobker Dec., ¶ 11; Lewis Dec., ¶ 9; Merz Dec., ¶ 9. Proposed Intervenor’s use of the Delta for educational and recreational activities, such as hiking, boating, bird watching, swimming and fishing, would be detrimentally affected by the decline of the Delta smelt and the corresponding decline in the health of the Delta. Bobker Dec., ¶ 4; Nelson Dec., ¶¶ 6. Therefore, each of the Proposed Intervenor has a significant, particularized interest in the outcome of this case, in that their interests in the preservation of protected fish species and the ecosystems of the Delta system, upon which the quality and enjoyment of their economic, recreational, aesthetic, and other activities depends, would be injured if Plaintiffs obtain the relief they seek in this action. Bobker Dec., ¶¶ 4-5, 13-15; Lewis Dec., ¶¶ 3-4, 10; Merz Dec., ¶¶ 3-5, 15-16; Nelson Dec., ¶¶ 3, 6-7. Proposed Intervenor seek to intervene to defend the status of the Delta smelt as a threatened species and to ensure that what few

protections are in place to protect this beleaguered species remain. Although the Service instituted the protections for the Delta smelt that are now at issue, it did so only after being compelled by Proposed Intervenor's lawsuits and, therefore, it cannot be assumed that the Service will adequately protect Proposed Intervenor's interests in this litigation. For this and other reasons further stated below, the Court should grant intervention of right under F. R. Civ. P. 24(a) or, in the alternative, permissive intervention under F. R. Civ. P. 24(b).

Defendants' counsel has indicated that defendants do not oppose this motion. Plaintiffs' counsel has indicated that Plaintiffs wish to consider the moving papers before determining their position with respect to intervention.

**PLAINTIFFS' CHALLENGE TO THE STATUS OF THE DELTA SMELT AS A  
THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT**

In 1993, three of Proposed Intervenor's initiated a lawsuit to force the Service to list the Delta smelt as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et. seq.* *See Bay Institute of San Francisco, et. al v. Babbitt*, Civ. No. S-92-2132 (E.D. Cal., filed Dec. 23, 1992). They prevailed, and the Service determined that the Delta smelt was a threatened species on March 5, 1993. 58 Fed. Reg. 12,854 (Mar. 5, 1993). Subsequently, when the Department of the Interior and the Service failed timely to designate critical habitat for the Delta smelt as required under the statute, Proposed Intervenor's only recourse was to initiate an action against the Department of the Interior and the Service to compel the timely designation of critical habitat. *See Bay Institute of San Francisco, et. al v. Babbitt*, Civ. No. S-94-0265 (E.D. Cal., filed Feb. 22, 1994). The Service designated critical habitat for the Delta smelt effective January 18, 1995. 59 Fed. Reg. 65256 (Dec. 19, 1994). Three of Proposed Intervenor's also successfully challenged the adequacy of the original biological opinion covering the impacts on the smelt from the water export facilities in the Delta, resulting in the 1995 biological opinion governing today. *See Bay Institute of San*

*Francisco, et. al v. U.S. Fish and Wildlife Service, et. al*, Civ. No. C-94-2443 (N.D. Cal., filed July 12, 1994). In addition, Proposed Intervenors are currently intervenors in a lawsuit brought by the San Luis & Delta-Mendota Water Authority and Westlands Water District over the operation of the Projects in the Delta, which have been a primary factor in the decline of the Delta smelt and a major constraint on the species' future survival and recovery. *See San Luis & Delta-Mendota Water Authority, et al. v. U.S. Department of the Interior*, Civ. No. F-02-5209 (E.D. Cal., filed Feb. 25, 2002). The parties filed that lawsuit in an effort to enjoin the implementation of the biological opinions regarding Delta smelt and the winter-run chinook salmon and to stop any reduction in Delta export pumping to avoid excessive loss of these species, unless the federal agencies charged with protecting them could show that such loss would pose jeopardy to the continued existence of either species. Proposed Intervenors' actions in these lawsuits, along with concerted efforts to safeguard the Delta smelt through administrative means, led to the few protections currently in place for the species: its status as threatened under the ESA, the designation of its critical habitat, and the biological opinion protecting it.

Plaintiffs are seeking the revocation of those protections in the current action. In this case, Plaintiffs continue the attack on the protections of the Delta smelt, seeking nothing less than the complete revocation of the protections afforded the species through its listing as threatened under the ESA. The protection of the Delta smelt under the ESA has been a primary factor in slowing the decline of the species and in renewing the possibility of recovery for the species and the Delta as a whole. Bobker Dec., ¶ 12; Lewis Dec., ¶ 9. Importantly, listing the Delta smelt under the ESA compelled the water diversion projects' operators to consult with federal wildlife agencies to assess the effects of the combined projects on the survival prospects of the Delta smelt. Bobker Dec., ¶ 12. These consultations, required by § 7 of the ESA, 16 U.S.C. § 1536, resulted in the production of a

biological opinion (later challenged and replaced) evaluating and attempting to mitigate the projects' impacts on the Delta smelt. *Id.* While Proposed Intervenor do not believe that the modest mitigations offered by the biological opinion are sufficient to ensure the recovery of this species so that it no longer needs ESA protection, without the protection these mitigations offer, the smelt would undoubtedly be much closer to extinction. Bobker Dec., ¶¶ 14-15; Merz Dec., ¶ 14. *See also* 59 Fed. Reg. 65256 (Dec. 19, 1994) (stating that water quality criteria adopted as part of the critical habitat designation are “necessary to protect and recover the delta smelt.”); U.S. Fish and Wildlife Service, Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes at 25 (Nov. 26, 1996) (noting that the State agency has consistently set standards that fail to protect the Delta smelt); 58 Fed. Reg. 12854, 12857 (Mar. 5, 1993) (“[T]he precipitous decline in delta smelt abundance after 1981 coincides with a proportional increase in fresh water diversion by State and Federal water projects during the months when delta smelt are spawning.”).

The relief sought by Plaintiffs includes an injunction directing Defendants U.S. Department of the Interior, U.S. Fish and Wildlife Service, Gale Norton, Steven Williams, Steve Thompson, and Anne Badgley (collectively “Defendants”) to review the status of the Delta smelt and a judgment that the existing recovery plan for Delta smelt is arbitrary and capricious. *See* Complaint, Prayer for Relief, ¶ C. Certain of the relief sought by Plaintiffs could jeopardize the protections afforded the Delta smelt through Proposed Intervenor’s previous lawsuits to the detriment of Proposed Intervenor’s scientific, aesthetic, economic, conservation and recreational interests. Bobker Dec., ¶¶ 14-15; Lewis Dec., ¶ 10; Merz Dec., ¶¶ 15-16; Nelson Dec., ¶ 7.

## **ARGUMENT**

### **I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.**

Rule 24(a) of the Federal Rules of Civil Procedure provides in pertinent part that:

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 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.

The D.C. Circuit employs a four-part test to evaluate an applicant's eligibility to intervene under Rule 24(a): "[The] four requirements for intervention as of right under Rule 24(a)(2): (1) timeliness, (2) cognizable interest, (3) impairment, and (4) lack of adequate representation." *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (quoting *Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.*, 840 F.2d 72, 74 (D.C. Cir. 1988)).

Proposed Intervenors easily meet each of the four factors with regard to this litigation.

**A. Proposed Intervenors' Motion to Intervene Is Timely.**

The D.C. Circuit has stated that "[w]hether a motion to intervene is timely is to be determined from all the circumstances." *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977) ("*NRDC v. Costle*"). The D.C. Circuit has laid out four factors to evaluate in determining whether a motion to intervene is timely: (1) the amount of time elapsed since litigation began; (2) the purpose for which intervention is sought; (3) the necessity for intervention to preserve the rights of the applicant; and (4) the probability of prejudice to those parties already in the case. *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972).

**(1) Intervention sought at earliest stage of proceedings:**

Plaintiffs filed their complaint in this case on November 22, 2002, roughly three months ago. Defendants filed an answer on January 27, 2003. The Court has issued no substantive orders. Thus, Proposed Intervenors are seeking to intervene at the earliest stage of this litigation, before any determinations have been made regarding the issues raised by the complaint. *See, e.g., Admiral Insurance Co. v. National Casualty Co.*, 137 F.R.D. 176, 177 (D.D.C. 1991) (motion to intervene

was timely where “[t]he major substantive issues . . . have not yet been argued or resolved, and the movants filed their motions promptly.”).

**(2) Purpose for which intervention is sought:**

As stated above, Proposed Intervenors seek to intervene in this action to defend the status of the Delta smelt as a threatened species and to ensure that what few protections are in place to protect this embattled species remain.

**(3) Necessity for intervention to preserve Proposed Intervenors rights:**

Proposed Intervenors have historically been forced to demand protection for the Delta smelt. Proposed Intervenors justifiably fear that, without their strong advocacy of such protection in this case, even the limited measures currently in place for the benefit of the Delta smelt will be weakened or eliminated. Proposed Intervenors all utilize the natural resources of the Delta for aesthetic, recreational and conservation purposes such as boating, fishing, wildlife observation, photography and nature study. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-4; Merz Dec., ¶¶ 3, 8; Nelson Dec., ¶¶ 6-7. Their enjoyment of and ability to pursue these activities is directly and adversely affected by the loss of protections for the smelt that this litigation seeks and the consequent dwindling of the smelt population toward extinction. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-4; Merz Dec., ¶¶ 3, 8; Nelson Dec., ¶¶ 6-7.

**(4) No prejudice to other parties from delay in seeking leave to intervene:**

Proposed Intervenors are seeking to intervene at the earliest stage of the proceedings; thus, their intervention will not result in any delay in relief. Proposed Intervenors are willing to abide by whatever briefing and other schedules are established by the Court. In consequence, their intervention will not delay the proceedings or prejudice the existing parties in any way.

**B. Proposed Intervenors Have a Cognizable Interest In Defending the Delta Smelt**

Proposed Intervenors assert an interest — continuance of the protections for Delta smelt — that is both related to the claims in this lawsuit and squarely within the zone of interests protected by one of the statutes, the ESA, under which the litigation is brought. This case turns on the interpretation and application of the ESA. In enacting this law, Congress explicitly stated the interests people have in protection of species such as the Delta smelt when it found that “various species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction [and] these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. §§ 1531(a)(2), (3). Proposed Intervenors have a legally protected interest in defending the protections they have won for the Delta smelt and an interest in protecting the ecosystems they use and enjoy on a regular basis. Proposed Intervenors should be allowed to intervene to protect these interests.

Proposed Intervenors have a clear and legally cognizable interest in this action. As a direct result of Proposed Intervenors’ efforts, the Delta smelt gained the protections that prevented the further decline of the species. These efforts included successful litigation to force the Service to act on a petition to list the Delta smelt as threatened under the ESA. Bobker Dec., ¶ 7; Lewis Dec., ¶ 6; Merz Dec., ¶ 10. Subsequently, when the Department of the Interior and the Service failed to timely designate critical habitat for the Delta smelt as required by section 4 of the ESA, 16 U.S.C. § 1533, Proposed Intervenors initiated an action against the Department of the Interior and the Service to compel the timely designation of critical habitat. *Id.* The action led to a court ordered settlement agreement requiring the Department of the Interior and the Service to reach a final decision and, eventually, the designation of critical habitat for the Delta smelt. Even after these protections were in place, Proposed Intervenors had to return to court to challenge the adequacy of the original

biological opinion covering the Projects' impacts on the Delta smelt, a lawsuit that led directly to the 1995 biological opinion challenged in the instant litigation. *Id.* Proposed intervenors, whose primary missions include the conservation and protection of California's rivers and, in particular, the endangered fish supported by those rivers, Bobker Dec., ¶¶ 3, 6-10; Lewis Dec., ¶¶ 2, 5-8; Merz Dec., ¶¶ 7, 9-14; Nelson Dec., ¶ 2-6, have an interest in protecting the fruits of this and other<sup>1</sup> courtroom and administrative advocacy. *See Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 558 (1986) (“[p]rotection of the full scope of relief afforded by the consent decree was thus crucial to safeguard the interests asserted by Delaware Valley”); *International Union v. Scofield*, 382 U.S. 205, 216 (1965); *Synovus Financial Corp. v. Board of Governors*, 952 F.2d 426, 432 (D.C. Cir. 1991). Proposed Intervenors must be allowed to intervene to protect this interest in the instant action just as Proposed Intervenors were allowed to intervene in a case brought by the San Luis & Delta-Mendota Water Authority and Westlands Water District, who are attempting to enjoin the implementation of the biological opinions regarding Delta smelt and winter-run chinook salmon and to stop any reduction in pumping to avoid excessive loss of these species. Bobker Dec., ¶ 7; Lewis Dec., ¶ 6; Merz Dec., ¶ 10; Nelson Dec., ¶ 4.

Additionally, individual members of the Proposed Intervenor organizations are active in their use and appreciation of the Delta. In relying on the Delta for conservation, aesthetic, educational, economic, and recreational activities such as boating, swimming, photography, fishing, hiking, and

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<sup>1</sup> Proposed Intervenors have also worked successfully for the passage of the Central Valley Project Improvement Act to provide for greater attention to the survival and recovery of endangered fish species, including Delta smelt, in the operation of the Central Valley Project, Lewis Dec., ¶ 7; Merz Dec., ¶ 12; Nelson Dec., ¶ 5; participated extensively in many aspects of the CALFED program, a federal-state program intended to develop and implement a long-term comprehensive plan to restore ecological health and improve water management for beneficial uses of the Delta system, Bobker Dec., ¶¶ 8-9; Lewis Dec., ¶ 8; Nelson Dec., ¶ 5; and litigated a number of other cases related to the diversion of water from the Delta to water contractors south of the Delta, Nelson Dec., ¶ 4.

observing fish and wildlife in their native habitats, Proposed Intervenors are exercising the very interests the Endangered Species Act is intended to protect. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-4; Merz Dec., ¶¶ 3-5; Nelson Dec., ¶¶ 6-7. When passing the ESA, Congress found that “various species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction [and] these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. §§ 1531(a)(2), (3). The protection of Proposed Intervenors’ legally protected interests in these values of the Delta smelt is, in fact, the reason behind Congressional approval of the ESA. *See* 16 U.S.C. § 1351(b) (the purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved”).

Rule 24(a)(2)’s “‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969). Thus, Proposed Intervenors’ various long-standing recreational, aesthetic, economic, scientific, educational, conservation, and professional interests in the protection of Delta smelt easily provide a sufficient basis for intervention. This is especially true given the D.C. Circuit’s historically pragmatic treatment of this requirement as secondary to the other requirements under Rule 24(a). *Id.* (“The first requirement of Rule 24(a) (2), that of an ‘interest’ in the transaction, may be a less useful point of departure than the second and third requirements, that the applicant may be impeded in protecting his interest by the action and that his interest is not adequately represented by others.”)

### **C. Intervention Is Necessary to Preserve the Rights of Proposed Intervenors.**

The D.C. Circuit has stated that in order for a party to succeed on its motion to intervene, it must show that it is “so situated that the disposition of the action may as a practical matter impair or

impede [its] ability to protect [its] interest.” *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998) (quoting Fed. R. Civ. P. 24(a)). As the Advisory Committee Notes for the 1966 amendments to Rule 24(a) explain, “[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.” Fed. R. Civ. P. 24, Advisory Committee’s Note to 1966 Amendments. In light of this direction, the rule’s emphasis on “practical disadvantage” was “designed to liberalize the right to intervene in federal actions.” *Neusse v. Camp*, 385 F.2d 694, 701-02 (D.C. Cir. 1967).

If the Plaintiffs succeed in this case, all protections for the Delta smelt under the Recovery Plan and the ESA generally could ultimately be removed. Eliminating these protections is Plaintiffs’ goal in bringing this suit. *See* Complaint at 16, Prayer for Relief. In essence, Plaintiffs seek to compel the Service to delist the Delta smelt or relax the recovery criteria for the species. Complaint at 16, Prayer for Relief, ¶¶ B, C. This would deprive Proposed Intervenors of the fruit of their administrative and judicial advocacy that led to (1) listing of the Delta smelt as a threatened species, (2) designation of critical habitat for the species, and (3) the current biological opinion protecting the Delta smelt. Moreover, such an outcome would severely impact Proposed Intervenors’ members’ abilities to pursue their economic, recreational, conservation, aesthetic, and other interests in the Delta and the connected riverine ecosystems. *See, e.g.,* Lewis Dec., ¶ 10. Thus, Proposed Intervenors’ interests in protecting the Delta smelt and in protecting, using, and enjoying the Delta and the Sacramento-San Joaquin River system could be impaired by the disposition of this case.

**D. Proposed Intervenors’ Interests Lack Adequate Representation by the Existing Parties.**

An applicant for intervention “need only show that representation of his interest ‘may be’ inadequate, not that representation will in fact be inadequate.” *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1979). The D.C. Circuit has regularly held that government representation

of private individuals is inadequate in appropriate circumstances. *See, e.g., id.* (Insurance company allowed to intervene as of right on behalf of D.C. to protest invalidation of regulation because its interests are more narrow than the general public interest); *NRDC v. Costle*, 561 F.2d at 912, n.41 (“[R]epresentation may not be adequate when the parties have *different* scopes to their interest, *i.e.*, that their ‘interests may not coincide.’”); *Neusse v. Camp*, 385 F.2d 694, 702-704 (D.C. Cir. 1967) (Commissioner of Banks of Wisconsin allowed to intervene because his interest was broader than the existing parties). Potential conflict on the part of the government were it to have to represent both the interests of the general public and the more narrow interests of a proposed intervenor is sufficient to meet Proposed Intervenors’ “minimal” burden of showing that representation by existing parties may be inadequate. *Dimond*, 792 F.2d at 193; *NRDC v. Costle*, 561 F.2d at 912-13.

Here, Proposed Intervenors represent specific environmental concerns not represented by any other party. Defendants’ actions in previous litigation indicate that they are unlikely to vigorously advocate for the protections afforded to the Delta smelt. As discussed above, every protection currently in place for the species was gained only after Proposed Intervenors sought such protection through litigation and administrative advocacy. Defendants can be expected to divide their representation among the interests of Proposed Intervenors; irrigators and water agencies, whose positions are directly contrary to that of Proposed Intervenors; and other specific interest groups. Defendants’ representation of these conflicting interests, along with their previous unresponsiveness to the needs of the Delta smelt, mandates that Proposed Intervenors be allowed to intervene in order to represent the particularized concerns of the environmental community. *See Dimond*, 792 F.2d at 193; *Smuck v. Hobson*, 408 F.2d at 181 (Noting that a governing body that is “buffeted . . . by conflicting public demands” and cannot adequately represent the narrower interests of a small constituency).

Proposed Intervenor's interests will almost certainly not be adequately represented by the federal Defendants, whose perspective substantially differs from theirs. Proposed Intervenor, as is reflected in the declarations filed with this motion, have spent years litigating in an on-going effort to secure and maintain protections for Delta smelt and attempting to persuade the Projects to operate the Delta pumps in a manner that avoids take of endangered fish species to the maximum extent possible. Indeed, it is Proposed Intervenor's position that the protections currently in place are not strong enough to meet the requirements of the ESA. The substantial potential for the Interior Department's and Proposed Intervenor's interests to diverge is well illustrated by the fact that several Proposed Intervenor have in the past had to sue the Department (and its agencies) to force it to list the Delta smelt under the ESA and to take adequate measures to protect this species from the Delta pumps. Bobker Dec., ¶ 7; Lewis Dec., ¶ 6; Merz Dec., ¶ 10. Finally, Proposed Intervenor would bring a unique perspective to the litigation, one that differs significantly from those of the present parties. That Proposed Intervenor's interests may not be adequately represented by the existing parties is beyond reasonable question.

In sum, intervention as of right pursuant to Rule 24(a) is clearly appropriate in this case.

## **II. ALTERNATIVELY, THIS COURT SHOULD GRANT PROPOSED INTERVENORS PERMISSIVE INTERVENTION.**

If this Court denies them intervention as of right, Proposed Intervenor request in the alternative that the Court grant them permissive intervention under Fed. R. Civ. P. 24(b)(2). That rule provides in pertinent part that:

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.

Permissive intervention under Rule 24(b) is appropriate where there is a basis for jurisdiction over the intervenor, the intervention motion is timely, and the applicant's claim or defense has a "question of law or a question of fact in common" with the main action. *United States v. ABA*, 118 F.3d 776, 782 (D.C. Cir. 1997). Like intervention of right, permissive intervention is granted liberally. *See* 7C Wright & Miller, Federal Practice and Procedure § 1904 (1986).

Each of these prerequisites is met here. First, assuming *arguendo* that this Court has jurisdiction over the claims raised in the complaint, the Court would have supplemental jurisdiction over Proposed Intervenors pursuant to 28 U.S.C. § 1367(a), which provides such jurisdiction for "the intervention of additional parties." *See Mulligan v. Resolution Trust Corp.*, 903 F.Supp. 121, 125 n. 4 (D.D.C. 1995) (noting that a party was allowed to intervene under 28 U.S.C. § 1367(a) when there was a common nucleus of operative fact with defendant). Second, this motion is timely, as explained above. Third, Proposed Intervenors' defenses — *i.e.*, that the Delta smelt has not recovered and, in fact, more stringent protections are necessary — have an obvious and necessary legal overlap with Plaintiffs' affirmative claims to the contrary.

In deciding whether to grant permissive intervention, the Court must decide whether any delay or prejudice outweighs the advantages of such intervention: "litigative economy, reduced risks of inconsistency, and increased information (which might reduce the risk of error)" are factors the courts take into account in answering this question. *U.S. v. ABA*, 118 F.3d at 782. The benefits of Proposed Intervenors' participation here would greatly outweigh any disadvantages. If not permitted to intervene, Proposed Intervenors may be forced to bring affirmative claims — in effect, collaterally challenging any judgment in this case — through a separate action against the United States to compel regulation of the Projects while the status of the Delta smelt is reviewed, for example. Allowing Intervenors to intervene here could potentially obviate such a subsequent

challenge and thereby serve litigative economy. In addition, Proposed Intervenors will provide additional information regarding the plight of the Delta smelt.

Thus, even if this Court denies Proposed Intervenors intervention as a matter of right, it should grant their request for permissive intervention.

### **CONCLUSION**

For all of the foregoing reasons, Proposed Intervenors respectfully request that this Court grant their motion for intervention as a matter of right or, in the alternative, permissive intervention.

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Respectfully submitted,

/s/

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