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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

18 SAN LUIS & DELTA-MENDOTA WATER) Case No. 02-CV-6461 OWW DLB
19 AUTHORITY, *et al.*,)
20)
21 Plaintiffs,) MEMORANDUM OF POINTS AND
22) AUTHORITIES IN SUPPORT OF
23 v.) MOTION TO INTERVENE
24)
25 U.S. DEPARTMENT OF THE INTERIOR, *et al.*,) Date: March 31, 2003
26) Time: 10:00 a.m.
27 Defendants, and) Judge: Hon. Oliver W. Wanger
28)
NATURAL RESOURCES DEFENSE COUNCIL,)
et al.,)
Proposed Intervenor-Defendants.)
_____)

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1 that minimizes the loss of Delta smelt. Bobker Dec., ¶¶ 6-9; Lewis Dec., ¶¶ 5-8; Merz Dec., ¶¶ 10-
2 12; Nelson Dec., ¶¶ 4-5.

3 In addition to advocating for protections for the Delta smelt, members of the Proposed
4 Intervenor organizations, all environmental organizations, are active participants in the life of the
5 Delta. Individual members of each organization frequently visit the Delta, critical habitat for the
6 Delta smelt, to use and appreciate the Delta ecosystem. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-4;
7 Merz Dec., ¶¶ 3, 8; Nelson Dec., ¶¶ 6. The health and survival of the Delta smelt species is
8 considered indicative of the health of the Delta itself. *See* U.S. Fish and Wildlife Service, Recovery
9 Plan for the Sacramento-San Joaquin Delta Native Fishes at 1 (Nov. 26, 1996); *see also* Bobker
10 Dec., ¶ 11; Lewis Dec., ¶ 9; Merz Dec., ¶ 9. Proposed Intervenors' use of the Delta for educational
11 and recreational activities, such as hiking, boating, bird watching, swimming and fishing, would be
12 detrimentally affected by the decline of the Delta smelt and the corresponding decline in the health
13 of the Delta. Bobker Dec., ¶ 4; Nelson Dec., ¶¶ 6. Therefore, each of the Proposed Intervenors has
14 a significant, particularized interest in the outcome of this case, in that their interests in the
15 preservation of protected fish species and the ecosystems of the Delta system, upon which the
16 quality and enjoyment of their economic, recreational, aesthetic, and other activities depends, would
17 be injured if Plaintiffs obtain the relief they seek in this action. Bobker Dec., ¶¶ 4-5, 13-15; Lewis
18 Dec., ¶¶ 3-4, 10; Merz Dec., ¶¶ 3-5, 15-16; Nelson Dec., ¶¶ 3, 6-7. Proposed Intervenors seek to
19 intervene to defend the status of the Delta smelt as a threatened species and to ensure that what few
20 protections are in place to protect this beleaguered species remain. Although the Service instituted
21 the protections for the Delta smelt that are now at issue, it did so only after being compelled by
22 Proposed Intervenors' lawsuits and, therefore, it cannot be assumed that the Service will adequately
23 protect Proposed Intervenors' interests in this litigation. For this and other reasons further stated
24 below, intervention as right is proper under Federal Rule of Civil Procedure 24(a) or, in the
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1 alternative, permissive intervention under Federal Rule of Civil Procedure 24(b) is proper at
2 minimum.

3 Defendants' counsel has indicated that defendants do not oppose this motion. Plaintiffs'
4 counsel has indicated that Plaintiffs wish to consider the moving papers before determining their
5 position with respect to intervention.
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7 **PLAINTIFFS' CHALLENGE TO THE STATUS OF THE DELTA SMELT AS A**
8 **THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT**

9 In 1993, three of Proposed Intervenors initiated a lawsuit to force the Service to list the Delta
10 smelt as threatened under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et. seq.* *See Bay*
11 *Institute of San Francisco, et. al v. Babbitt*, Civ. No. S-92-2132 (E.D. Cal., filed Dec. 23, 1992).
12 They prevailed, and the Service determined that the Delta smelt was a threatened species on March
13 5, 1993. 58 Fed. Reg. 12,854 (Mar. 5, 1993). Subsequently, when the Department of the Interior
14 and the Service failed timely to designate critical habitat for the Delta smelt as required under the
15 statute, Proposed Intervenors' only recourse was to initiate an action against the Department of the
16 Interior and the Service to compel the timely designation of critical habitat. *See Bay Institute of San*
17 *Francisco, et. al v. Babbitt*, Civ. No. S-94-0265 (E.D. Cal., filed Feb. 22, 1994). The Service
18 designated critical habitat for the Delta smelt effective January 18, 1995. 59 Fed. Reg. 65256 (Dec.
19 19, 1994). Three of Proposed Intervenors also successfully challenged the adequacy of the original
20 biological opinion covering the impacts on the smelt from the water export facilities in the Delta,
21 resulting in the 1995 biological opinion governing today. *See Bay Institute of San Francisco, et. al*
22 *v. U.S. Fish and Wildlife Service, et. al*, Civ. No. C-94-2443 (N.D. Cal., filed July 12, 1994). In
23 addition, Proposed Intervenors are currently intervenors in a lawsuit brought by the same Plaintiffs
24 as here, San Luis & Delta-Mendota Water Authority and Westlands Water District (collectively
25 "Plaintiffs"), over the operation of the Projects in the Delta, which have been a primary factor in the
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1 decline of the Delta smelt and a major constraint on the species' future survival and recovery. *See*
2 *San Luis & Delta-Mendota Water Authority, et. al v. U.S. Department of the Interior*, Civ. No. F-02-
3 5209 (E.D. Cal., filed Feb. 25, 2002). Plaintiffs filed that lawsuit in an effort to enjoin the
4 implementation of the biological opinions regarding Delta smelt and the winter-run chinook salmon
5 and to stop any reduction in Delta export pumping to avoid excessive loss of these species, unless
6 the federal agencies charged with protecting them could show that such loss would pose jeopardy to
7 the continued existence of either species. Proposed Intervenor's actions in these lawsuits, along
8 with concerted efforts to safeguard the Delta smelt through administrative means, led to the few
9 protections currently in place for the species: its status as threatened under the ESA, the designation
10 of its critical habitat, and the biological opinion protecting it.

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13 Plaintiffs are seeking the revocation of those protections in the instant action. In this case,
14 Plaintiffs continue their attack on the protections of the Delta smelt, seeking nothing less than the
15 complete revocation of the protections afforded the species through its listing as threatened under the
16 ESA and removal of restrictions on pumping water out of the Delta intended to benefit the smelt.
17 The protection of the Delta smelt under the ESA has been a primary factor in slowing the decline of
18 the species and in renewing the possibility of recovery for the species and the Delta as a whole.
19 Bobker Dec., ¶ 12; Lewis Dec., ¶ 9. Importantly, listing the Delta smelt under the ESA compelled
20 the water diversion projects' operators to consult with federal wildlife agencies to assess the effects
21 of the combined projects on the survival prospects of the Delta smelt. Bobker Dec., ¶ 12. These
22 consultations, required by § 7 of the ESA, 16 U.S.C. § 1536, resulted in the production of a
23 biological opinion (later challenged and replaced) evaluating and attempting to mitigate the projects'
24 impacts on the Delta smelt. *Id.* While Proposed Intervenor's do not believe that the modest
25 mitigations offered by the biological opinion are sufficient to ensure the recovery of this species so
26 that it no longer needs ESA protection, without the protection these mitigations offer, the smelt
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1 would undoubtedly be much closer to extinction. Bobker Dec., ¶¶ 14-15; Merz Dec., ¶ 14. *See* 59
2 Fed. Reg. 65256 (Dec. 19, 1994) (stating that water quality criteria adopted as part of the critical
3 habitat designation are “necessary to protect and recover the delta smelt.”); U.S. Fish and Wildlife
4 Service, Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes at 25 (Nov. 26, 1996)
5 (noting that the State agency has consistently set standards that fail to protect the Delta smelt); 58
6 Fed. Reg. 12854, 12857 (Mar. 5, 1993) (“[T]he precipitous decline in delta smelt abundance after
7 1981 coincides with a proportional increase in fresh water diversion by State and Federal water
8 projects during the months when delta smelt are spawning.”).

9
10 The relief sought by Plaintiffs includes an order directing the Defendants U.S. Department of
11 the Interior, U.S. Fish and Wildlife Service, Gale Norton, Steven Williams, Steve Thompson, and
12 Anne Badgley (collectively “Defendants”) to review the status of the Delta smelt, a declaration that
13 criteria to be met before the smelt is considered recovered are arbitrary and capricious, and an
14 injunction preventing Defendants from restricting pumping by the Projects to protect the Delta
15 smelt. *See* Complaint, Prayer for Relief, ¶¶ 1-4. Certain of the relief sought by Plaintiffs could
16 undermine the continued listing of the smelt as threatened, jeopardize all protections afforded to the
17 Delta smelt under the ESA, and allow the Projects to pump water without regard for the fact that
18 they are causing the deaths of Delta smelt in excess of the numbers permitted under the Service’s
19 biological opinion on the smelt to the detriment of Proposed Intervenor’s scientific, aesthetic,
20 economic, conservation and recreational interests. Bobker Dec., ¶¶ 14-15; Lewis Dec., ¶ 10; Merz
21 Dec., ¶¶ 15-16; Nelson Dec., ¶ 7.

22 ARGUMENT

23 I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF 24 RIGHT.

25 Rule 24(a) of the Federal Rules of Civil Procedure provides in pertinent part that:
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1 Upon timely application anyone shall be permitted to intervene in an action...when
2 the applicant claims an interest relating to the property or transaction which is the
3 subject of the action and the applicant is so situated that the disposition may as a
4 practical matter impair or impede the applicant's ability to protect that interest, unless
5 the applicant's interest is adequately represented by existing parties.

6 The Ninth Circuit employs a four-part test to evaluate an applicant's eligibility to intervene
7 under Rule 24(a):

8 The applicant must show that: (1) it has a significant protectable interest relating to
9 the property or transaction that is the subject of the action; (2) the disposition of the
10 action may, as a practical matter, impair or impede the applicant's ability to protect
11 its interest; (3) the application is timely; and (4) the existing parties may not
12 adequately represent the applicant's interest.

13 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (quoting *Donnelly v.*
14 *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). In assessing these factors, the Court should keep in
15 mind that Rule 24 has traditionally been liberally construed by the Ninth Circuit in favor of
16 applicants for intervention. *See, e.g., id.* at 397-98; *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th
17 Cir. 1993); *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983).

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

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

20 The Ninth Circuit has laid out three factors to evaluate in determining whether a motion to
21 intervene is timely: (1) the stage of the proceedings at which the applicant seeks to intervene; (2)
22 the prejudice to the other parties from any delay in applicant's seeking leave to intervene; and (3) the
23 reason for and length of delay. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297,
24 1302 (9th Cir. 1997).

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

26 Plaintiffs filed their complaint in this case on November 22, 2002, less than three months
27 ago. Defendants filed their answer on January 27, 2003. The Court has issued no substantive
28 orders. Thus, Proposed Intervenors are seeking to intervene at the earliest stage of this litigation,

1 before any substantive briefing has been done or any determinations have been made regarding the
2 issues raised by the complaint. *See, e.g., Admiral Insurance Co. v. National Casualty Co.*, 137
3 F.R.D. 176, 177 (D.D.C. 1991) (motion to intervene was timely where “[t]he major substantive
4 issues . . . have not yet been argued or resolved, and the movants filed their motions promptly”).

5
6 **(2) No prejudice to other parties from delay in seeking leave to intervene:**

7 In evaluating the potential prejudice to a party that might result from a delay in seeking
8 intervention, “courts have emphasized the seriousness of the prejudice which results when relief
9 from long-standing inequities is delayed.” *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.
10 1978), *cert. denied*, 439 U.S. 837 (1978). In the case at hand, Proposed Intervenors are seeking to
11 intervene at the earliest stage of the proceedings; thus, their intervention will not result in any delay
12 in relief. Proposed Intervenors are willing to abide by whatever briefing and other schedules are
13 established by this Court. In consequence, their intervention will not delay the proceedings or
14 prejudice the existing parties in any way.

15
16 **(3) No unreasonable delay in filing motion to intervene:**

17 As noted above, Proposed Intervenors’ motion to intervene is filed at the outset of this
18 lawsuit before the occurrence of any briefing or determinations on any matters raised by the
19 complaint. In sum, under the three factors identified by the Ninth Circuit for determining timeliness,
20 Proposed Intervenors’ motion is timely.

21
22 **B. Proposed Intervenors Have a Legally Protected Interest Relating to the Property
23 or Transaction Involved in the Pending Suit.**

24 The Ninth Circuit has held that “[a] public interest group is entitled as a matter of right to
25 intervene in an action challenging the legality of a measure it supported,” even where the public
26 interest group’s involvement was limited to participation in the administrative process leading to the
27 challenged agency decision. *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir.
28 1995). *See also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-528 (9th Cir. 1983) (Audubon

1 Society allowed to intervene as of right in suit challenging designation of a conservation area to
2 protect interest “in the preservation of birds and their habitat”); *Washington State Building and*
3 *Construction Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*,
4 461 U.S. 913 (1983) (public interest group allowed to intervene as matter of right in action
5 challenging ballot measure it supported). Here, of course, Proposed Intervenors have done much
6 more, bringing the original suits that resulted in the protections currently in place for the Delta
7 smelt. Thus, Proposed Intervenors have a significant protectable interest in defending the threatened
8 status of the Delta smelt.
9

10 Rule 24(a)(2)’s “‘interest’ test is primarily a practical guide to disposing of lawsuits by
11 involving as many apparently concerned persons as is compatible with efficiency and due process.”
12 *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). The Ninth Circuit has held that
13 intervention of right is proper where the applicant can show that it has an interest protected by some
14 law and related to the claims in the case in which intervention is sought:
15

16 We ordinarily do not require that a prospective intervenor show that the interest he
17 asserts is one that is protected by the statute under which the litigation is brought. It
18 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.

19 *Sierra Club*, 995 F.2d at 1484 (emphasis added).

20 Here, Proposed Intervenors assert an interest — continuance of the protections for Delta
21 smelt — that is both related to the claims in this lawsuit and squarely within the zone of interests
22 protected by one of the statutes, the ESA, under which the litigation is brought. This case turns on
23 the interpretation and application of the ESA. In enacting this law, Congress explicitly stated the
24 interests people have in protection of species such as the Delta smelt when it found that “various
25 species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or
26 threatened with extinction [and] these species of fish, wildlife, and plants are of esthetic, ecological,
27 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. §§
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1 1531(a)(2), (3). Proposed Intervenor have a legally protected interest in defending the protections
2 they have won for the Delta smelt and an interest in protecting the ecosystems they use and enjoy on
3 a regular basis. Proposed Intervenor should be allowed to intervene to protect these interests.

4
5 Proposed Intervenor have a clear and legally cognizable interest this action. As a direct
6 result of Proposed Intervenor's efforts, the Delta smelt gained the protections that prevented the
7 further decline of the species. These efforts included successful litigation to force the Service to act
8 on a petition to list the Delta smelt as threatened under the ESA. Bobker Dec., ¶ 7; Lewis Dec., ¶ 6;
9 Merz Dec., ¶ 10. Subsequently, when the Department of the Interior and the Service failed to timely
10 designate critical habitat for the Delta smelt as required by section 4 of the ESA, 16 U.S.C. § 1533,
11 Proposed Intervenor initiated an action against the Department of the Interior and the Service to
12 compel the timely designation of critical habitat. *Id.* The action led to a court ordered settlement
13 agreement requiring the Department of the Interior and the Service to reach a final decision and,
14 eventually, the designation of critical habitat for the Delta smelt. Even after these protections were
15 in place, Proposed Intervenor had to return to court to challenge the adequacy of the original
16 biological opinion covering the Projects' impacts on the Delta smelt, a lawsuit that led directly to the
17 1995 biological opinion challenged in the instant litigation. *Id.* Proposed intervenor, whose
18 primary missions include the conservation and protection of California's rivers and, in particular, the
19 endangered fish supported by those rivers, Bobker Dec., ¶¶ 3, 6-10; Lewis Dec., ¶¶ 2, 5-8; Merz
20 Dec., ¶¶ 7, 9-14; Nelson Dec., ¶ 2-6, have an interest in protecting the fruits of this and other¹ legal
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24 ¹ Proposed Intervenor have also worked successfully for the passage of the Central Valley Project Improvement Act to
25 provide for greater attention to the survival and recovery of endangered fish species, including Delta smelt, in the
26 operation of the Central Valley Project, Lewis Dec., ¶ 7; Merz Dec., ¶ 12; Nelson Dec., ¶ 5; participated extensively in
27 many aspects of the CALFED program, a federal-state program intended to develop and implement a long-term
28 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.

1 and administrative advocacy. *See* *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 558
2 (1986) (“[p]rotection of the full scope of relief afforded by the consent decree was thus crucial to
3 safeguard the interests asserted by Delaware Valley”). Proposed Intervenors must be allowed to
4 intervene to protect this interest in the instant action just as Proposed Intervenors were allowed to
5 intervene in another case brought by Plaintiffs, through which they attempt to enjoin the
6 implementation of the biological opinions regarding Delta smelt and winter-run chinook salmon and
7 to stop any reduction in pumping to avoid excessive loss of these species. Bobker Dec., ¶ 7; Lewis
8 Dec., ¶ 6; Merz Dec., ¶ 10; Nelson Dec., ¶ 4.

10 Additionally, individual members of the Proposed Intervenor organizations are active in their
11 use and appreciation of the Delta. In relying on the Delta for conservation, aesthetic, educational,
12 economic, and recreational activities such as boating, swimming, photography, fishing, hiking, and
13 observing fish and wildlife in their native habitats, Proposed Intervenors are exercising the very
14 interests the Endangered Species Act is intended to protect. Bobker Dec., ¶¶ 4-5; Lewis Dec., ¶¶ 3-
15 4; Merz Dec., ¶¶ 3-5; Nelson Dec., ¶¶ 6-7. When passing the ESA, Congress found that “various
16 species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or
17 threatened with extinction [and] these species of fish, wildlife, and plants are of esthetic, ecological,
18 educational, historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. §§
19 1531(a)(2), (3). The protection of Proposed Intervenors’ legally protected interests in these values
20 of the Delta smelt is, in fact, the reason behind Congressional approval of the ESA. *See* 16 U.S.C. §
21 1351(b) (the purpose of the ESA is to “provide a means whereby the ecosystems upon which
22 endangered species and threatened species depend may be conserved”).

23 Thus, Proposed Intervenors’ various long-standing recreational, aesthetic, economic,
24 scientific, educational, conservation, and professional interests in the protection of Delta smelt easily
25 provide a sufficient basis for intervention. *See, e.g., Idaho Farm Bureau Fed'n.*, 58 F.3d at 1397 (“A
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1 public interest group is entitled as a matter of right to intervene in an action challenging the legality
2 of a measure it has supported”); *Sagebrush Rebellion*, 713 F.2d at 526-28 (environmental group’s
3 “environmental, conservation and wildlife interests” sufficient for intervention as matter of right);
4 *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of the Interior*, 100
5 F.3d 837, 841-44 (10th Cir. 1996) (individual’s involvement with species through activities as
6 photographer, naturalist, and conservation advocate sufficient interest for purpose of intervention in
7 litigation concerning species’ listing under the ESA); *Humane Society of United States v. Clark*, 109
8 F.R.D. 518, 520 (D.D.C. 1985) (organizations’ recreational interests in hunting and trapping
9 sufficient to satisfy Rule 24(a)’s interest test).

11 **C. Disposition of This Matter May, as a Practical Matter, Impair or Impede**
12 **Proposed Intervenors’ Interests.**

13 Rule 24(a)’s “impairment” requirement concerns whether, as a practical matter, denial of
14 intervention *may* impede the applicant’s ability to protect its interests in the subject of the action.
15 *United States v. City of Los Angeles*, 288 F.3d at 401 (citing Fed. R. Civ. P. 24(a)(2)). As the
16 Advisory Committee Notes for the 1966 amendments to Rule 24(a) explain, “[i]f an absentee would
17 be substantially affected in a practical sense by the determination made in an action, he should, as a
18 general rule, be entitled to intervene.” Fed. R. Civ. P. 24, Advisory Committee’s Note to 1966
19 Amendments. In light of this direction, the rule’s emphasis on “practical disadvantage” was
20 “designed to liberalize the right to intervene in federal actions.” *Neusse v. Camp*, 385 F.2d 694,
21 701-02 (D.C. Cir. 1967).

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24 If Plaintiffs succeed in this case, all protections for the Delta smelt under the Recovery Plan
25 and the ESA generally could ultimately be removed and all regulation of the pumping operations
26 could be enjoined. Eliminating these protections is Plaintiffs’ explicit goal in bringing this suit. *See*
27 Complaint at 12, Prayer for Relief. In essence, Plaintiffs seek to compel the Service to delist the
28 Delta smelt, set aside the recovery criteria for the species, and forego pumping restrictions on the

1 Projects intended to protect the Delta smelt. Complaint at 12, Prayer for Relief, ¶¶ 2, 3, 4. This
2 would deprive Potential Intervenors of the fruit of their administrative and judicial advocacy that led
3 to (1) listing of the Delta smelt as a threatened species, (2) designation of critical habitat for the
4 species, and (3) the current biological opinion protecting the Delta smelt. Moreover, such an
5 outcome would severely impact Proposed Intervenors’ members’ abilities to pursue their economic,
6 recreational, conservation, aesthetic, and other interests in the Delta and the connected riverine
7 ecosystems. *See, e.g.*, Lewis Dec., ¶ 10. Thus, Proposed Intervenors’ interests in protecting the
8 Delta smelt and in protecting, using, and enjoying the Delta and the Sacramento-San Joaquin River
9 system could be impaired by the disposition of this case.
10

11 **D. Proposed Intervenors' Interests May Not Be Adequately Represented by the**
12 **Existing Parties.**

13 “[T]he requirement of inadequacy of representation is satisfied if the applicant shows that
14 representation of its interest ‘may be’ inadequate.” *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d at
15 528 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, (1972)). “[T]he burden of
16 making this showing is *minimal*.” *Id.* (emphasis added); *see also Forest Conservation Council v.*
17 *U.S. Forest Service*, 66 F.3d 1489, 1498 (9th Cir. 1995) (same). Thus, Proposed Intervenors need
18 only establish that the government’s defense of this matter “may be” inadequate with respect to their
19 interests. *See Sierra Club v. Ruckelshaus*, 602 F.Supp. 892, 896 (N.D.Cal. 1984); *U.S. v.*
20 *Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986).
21

22 In evaluating adequacy of representation, the courts consider three issues: (1) whether “the
23 interests of a present party to the suit are such that it will *undoubtedly* make all of the intervenor’s
24 arguments,” (2) whether “the present party is capable of and willing to make such arguments,” and
25 (3) whether “the intervenor would not offer any necessary element to the proceedings that the other
26 parties would neglect.” *County of Fresno*, 622 F.2d at 438-39 (emphasis added). Here, Proposed
27 Intervenors represent specific environmental concerns not represented by any other party.
28

1 Defendants' actions in previous litigation indicate that they are unlikely to advocate vigorously for
2 the protections afforded to the Delta smelt. As discussed above, every protection currently in place
3 for the species was gained only after Proposed Intervenors sought such protection through litigation
4 and administrative advocacy. Defendants can be expected to divide their representation among the
5 interests of Proposed Intervenors; irrigators and water agencies, whose positions are directly
6 contrary to that of Proposed Intervenors; and other specific interest groups. Defendants'
7 representation of these conflicting interests, along with their previous unresponsiveness to the needs
8 of the Delta smelt, mandates that Proposed Intervenors be allowed to intervene in order to represent
9 the particularized concerns of the environmental community. *See Sierra Club v. Espy*, 18 F.3d 1202,
10 1208 (5th Cir. 1994) (permitting timber industry to intervene in case brought against government by
11 environmental groups because “[t]he government must represent the broad public interest, not just
12 the economic concerns of the timber industry”); *Forest Conservation Council*, 66 F.3d at 1499.

15 In *Sagebrush Rebellion*, the Audubon Society sought to intervene in a suit against the
16 Department of the Interior challenging the creation of a conservation area in Idaho. *Sagebrush*
17 *Rebellion*, 713 F.2d at 526. The Ninth Circuit reversed the district court's ruling that the Audubon
18 Society's interest was adequately represented by the federal defendant. *Id.* at 528-29. The court
19 found that the previous positions of the Secretary of the Interior gave little assurance that he would
20 adequately represent the proposed intervenor's interests. *Id.* at 528. The court also found that, “in
21 addition to having expertise apart from that of the Secretary, the intervenor offers a perspective
22 which differs materially from that of the present parties to this litigation.” *Id.* Given that a showing
23 that representation “may be” inadequate was all that was required, the Court of Appeals found that
24 intervention should have been granted. *Id.* at 529.

27 Proposed Intervenors' interests will almost certainly not be adequately represented by the
28 federal Defendants, whose perspective substantially differs from theirs. Proposed Intervenors, as is

1 reflected in the declarations filed with this motion, have spent years litigating in an on-going effort
2 to secure and maintain protections for Delta smelt and attempting to persuade the Projects to operate
3 the Delta pumps in a manner that avoids take of endangered fish species to the maximum extent
4 possible. Indeed, it is Proposed Intervenor's position that the protections currently in place are not
5 strong enough to meet the requirements of the ESA. Further, it is unclear how committed the
6 present Administration is to defending and continuing the policies of the former Administration,
7 which made the listing decision and promulgated the Recovery criteria challenged herein. *See*
8 *Sagebrush Rebellion*, 713 F.2d at 528-29 (environmental group allowed to intervene as defendant
9 because new administration might not adequately defend action by prior administration). The
10 substantial potential for the Interior Department's and Proposed Intervenor's interests to diverge is
11 well illustrated by the fact that various of Proposed Intervenor's have in the past had to sue the
12 Department (and its agencies) to force it to list the Delta smelt under the ESA and to take adequate
13 measures to protect this species from the Delta pumps. Bobker Dec., ¶ 7; Lewis Dec., ¶ 6; Merz
14 Dec., ¶ 10. Finally, Proposed Intervenor's would bring a unique perspective to the litigation, one that
15 differs significantly from those of the present parties. That Proposed Intervenor's interests may not
16 be adequately represented by the existing parties is beyond reasonable question.

17
18
19
20 In sum, intervention as of right pursuant to Rule 24(a) is clearly appropriate in this case.

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

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

26 Upon timely application anyone may be permitted to intervene in an action. . . when
27 an applicant's claim or defense and the main action have a question of law or fact in
28 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.

1 Permissive intervention under Rule 24(b) is appropriate where there is a basis for jurisdiction
2 over the intervenor, the intervention motion is timely, and the applicant’s claim or defense has a
3 “question of law or a question of fact in common” with the main action. *Greene v. United States*,
4 996 F.2d 973, 978 (9th Cir. 1993). Like intervention of right, permissive intervention is granted
5 liberally. *See* 7C Wright & Miller, Federal Practice and Procedure § 1904 (1986).
6

7 Each of these prerequisites is met here. First, assuming arguendo that this Court has
8 jurisdiction over the claims raised in the complaint, the Court has supplemental jurisdiction over
9 Proposed Intervenors pursuant to 28 U.S.C. § 1367(a), which provides such jurisdiction for “the
10 intervention of additional parties.” Second, this motion is timely, as explained above. Third,
11 Proposed Intervenors’ defenses — *i.e.*, that the Delta smelt has not recovered and, in fact, more
12 stringent protections are necessary — have an obvious and necessary legal overlap with Plaintiffs’
13 affirmative claims to the contrary.
14

15 In deciding whether to grant permissive intervention, one important consideration is judicial
16 economy. *See Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989). Proposed Intervenors’
17 participation here would serve that goal. If not permitted to intervene, Proposed Intervenors may be
18 forced to bring affirmative claims – in effect, collaterally challenging any judgment in this case –
19 through a separate action against the United States to compel regulation of the Projects while the
20 status of the Delta smelt is reviewed, for example. Allowing Intervenors to intervene here could
21 potentially obviate such a subsequent challenge and thereby serve judicial economy.
22

23 Thus, even if this Court denies Proposed Intervenors intervention as a matter of right, it
24 should grant their request for permissive intervention.
25

26 CONCLUSION

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

1 DATED: February ___, 2003

Respectfully submitted,

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3 _____
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