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

SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY; WESTLANDS WATER  
DISTRICT,

Plaintiffs,

v.

SALLY JEWEL *et al.*,

Defendants.

PACIFIC COAST FEDERATION OF  
FISHERMENS' ASSOCIATIONS and  
INSTITUTE FOR FISHERIES RESOURCES, non-  
profit organizations,

Defendant-Intervenor Applicants.

)  
) Case No. 13-1232-LJO-GSA  
)  
)

) PACIFIC COAST FEDERATION OF  
) FISHERMENS' ASSOCIATIONS AND  
) INSTITUTE FOR FISHERIES  
) RESOURCES MEMORANDUM IN  
) SUPPORT OF MOTION TO  
) INTERVENE AS A DEFENDANT  
)  
)

) Courtroom: Courtroom 10, 6th Floor  
) Judge: Honorable Gary S. Austin  
) Hearing Date: Friday, Oct. 4, 2013  
) Time: 9:30am  
) Action Filed: August 9, 2013  
)  
)

PACIFIC COAST FEDERATION OF FISHERMENS' ASSOCIATIONS  
FOR FISHERIES RESOURCES MEMORANDUM IN SUPPORT  
OF MOTION TO INTERVENE AS A DEFENDANT

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INTRODUCTION

1  
2 In this lawsuit, Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands  
3 Water District (“Plaintiffs”) seek to declare unlawful and set aside a decision by the U.S. Bureau  
4 of Reclamation (“USBR”) to address critical flow conditions in the lower Klamath River by  
5 augmenting flows during August and September of this year on an emergency basis. Plaintiffs  
6 have stated that they intend to seek preliminary injunctive relief prohibiting USBR from  
7 implementing its emergency pulse flow proposal, which is scheduled to commence within the  
8 next few days. The Pacific Coast Federation of Fishermens’ Associations and Institute for  
9 Fisheries Resources (collectively, “Proposed Intervenors”) respectfully move for intervention as  
10 defendants in support of USBR’s decision to augment flows in the Trinity River.  
11

12 As explained more fully below, plaintiffs’ requested relief—enjoining the USBR from  
13 implementing its planned flows—could contribute to an economic and environmental  
14 catastrophe in the Klamath, specifically, a repeat of the unprecedented 2002 massive fish kill of  
15 tens of thousands of adult chinook salmon and other species, including hundreds of ESA-listed  
16 and federally protected coho salmon, before they can spawn. The disastrous 2002 fish kill event  
17 in its turn triggered nearly coast-wide and unprecedented closures of ocean commercial salmon  
18 fishing with devastating economic effects to Proposed Intervenors and their fishing industry  
19 members. Conversely, Plaintiffs’ allegations of injury rest on highly speculative leaps of  
20 causation that the relatively limited amount of water intended for flow augmentation in the lower  
21 Klamath this summer might, if USBR’s action is enjoined, theoretically be made available to  
22 them at some point in the future. This is not an adequate basis on which to seek preliminary  
23 injunctive relief. Plaintiffs and proposed intervenors share a common frustration with USBR’s  
24 failure to conduct adequate long-term water management planning and its continued practice of  
25 making last-minute water allocation decisions that affect the public. However, the solution is not  
26

1 to enjoin USBR's proposal to begin augmenting emergency flows in the Trinity in response to a  
2 clear threat to the resource, an action which is set to commence on August 13, 2012, in a  
3 commendable effort to stave off another fisheries catastrophe like the one Proposed Intervenors  
4 suffered through in 2002.

5 Proposed Intervenors therefore respectfully request that this Court grant them leave to  
6 intervene as defendants in this action. By intervening, Proposed Intervenors seek to ensure the  
7 protection of lower Klamath River salmon species through sensible water management,  
8 including late summer flow augmentation from the Trinity River. Proposed Intervenors further  
9 seek to ensure that the Court considers potential impacts to commercial fishing interests in any  
10 balancing of the equities that occurs during consideration of Plaintiffs' request for relief.  
11 Defendants' counsel has indicated that Defendants do not oppose this motion. Counsel for  
12 Plaintiffs have indicated that Plaintiffs do not oppose this motion providing that there are  
13 reasonable limits on briefing from intervenors.  
14

15 ARGUMENT

16 I. PROPOSED INTERVENORS AND THEIR INTERESTS IN THIS LAWSUIT.

17 Proposed Intervenors represent commercial salmon fishing and conservation interests.  
18 See Spain Decl. ¶ 2. Both organizations have a long history of advocacy and involvement on  
19 behalf of salmon in the Klamath River and California's Central Valley, including participation in  
20 litigation stretching back over a decade regarding the interplay between agricultural water users  
21 and the needs of salmon. *Id.* Moreover, Proposed Intervenors represent commercial fishermen  
22 whose livelihoods are profoundly and directly affected by USBR's water resource management  
23 decision in the Klamath, and, by extension, Plaintiffs' efforts in this case to challenge or enjoin a  
24 decision that will benefit salmon. *Id.* For example, as discussed more fully in the declaration of  
25 PCFFA Northwest Regional Director Glen Spain, attached herewith, the 2002 Klamath fish kill  
26

1 triggered coast-wide closures of commercial fishing with devastating impacts to Proposed  
2 Intervenor's members. *Id.* at ¶¶ 15-21. Another fish kill in the Trinity River tributary to the  
3 Klamath could well do the same. Proposed Intervenor's thus seek to intervene to defend the  
4 validity of the USBR's flow augmentation proposal and to ensure that the protections it offers to  
5 Klamath River salmon remain in place. For the reasons discussed below, Proposed Intervenor's  
6 satisfy the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)  
7 or, in the alternative, the requirements for permissive intervention under Rule 24(b).  
8

9 II. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF  
RIGHT.

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

11 On timely motion, the court must permit anyone to intervene who...claims an  
12 interest relating to the property or transaction that is the subject of the action, and  
13 is so situated that disposing of the action may as a practical matter impair or  
adequately represent that interest.

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

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

19 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (quoting  
20 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). In assessing these  
21 factors, the Court should keep in mind that Rule 24 has traditionally been liberally  
22 construed by the Ninth Circuit in favor of applicants for intervention. *See, e.g.,*  
*id.* at 397-98; *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993); *Westlands*  
*Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983). Proposed  
Intervenor's easily meet each of the four factors with regard to this litigation.

23 A. Proposed Intervenor's Motion to Intervene Is Timely.

24 The Ninth Circuit has laid out three factors to evaluate in determining whether a motion  
25 to intervene is timely: (1) the stage of the proceedings at which the applicant seeks to intervene;  
26

1 (2) the prejudice to the other parties from any delay in applicant's seeking leave to intervene; and  
2 (3) the reason for and length of delay. *League of United Latin American Citizens v. Wilson*, 131  
3 F.3d 1297, 1302 (9th Cir. 1997). All factors support a finding that intervention is timely.  
4 Plaintiffs filed their complaint in this case on August 7, 2012, just two days ago. Defendants  
5 have not filed an answer. The Court has issued no substantive orders. Thus, Proposed  
6 Intervenors are seeking to intervene at the very earliest stage of this litigation, before any  
7 determinations have been made regarding the issues raised by the complaint. *See, e.g., Idaho*  
8 *Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). Similarly, there will be no  
9 prejudice to other parties caused by a delay caused by this motion. Proposed Intervenors are  
10 willing to abide by whatever briefing and other schedules are established by this Court, and are  
11 prepared to respond to any request for preliminary or emergency relief filed by Plaintiffs.  
12 Finally, Proposed Intervenors have not delayed in their filing of this motion. In fact, undersigned  
13 counsel contacted counsel for plaintiffs regarding intervention before this case was even filed.  
14

15 B. Proposed Intervenors Have a Legally Protected Interest Relating to the Property  
16 or Transaction Involved in the Pending Suit.

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

22 We ordinarily do not require that a prospective intervenor show that the interest  
23 he asserts is one that is protected by the statute under which the litigation is  
24 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.*

25 *Sierra Club*, 995 F.2d at 1484 (emphasis added).  
26

1 Here, Proposed Intervenors assert an interest—continuance of the protections for  
2 Klamath River salmon—that is both related to the claims in this lawsuit and squarely within the  
3 zone of interests protected by the statutes, the CVPIA, NEPA and APA, under which the  
4 litigation is brought. Proposed Intervenors have a legally protected interest in defending the  
5 protections they have won for Klamath River salmon. For example, Proposed Intervenors have  
6 been involved in litigation, as both plaintiffs and defendant-intervenors, to protect Klamath River  
7 salmon, for many years. Spain Decl., ¶¶ 13-14. They have long supported flow augmentation to  
8 protect Klamath River salmon, including USBR’s plans for this year. *Id.* ¶ 22. And they and  
9 their members have paid a very high price from the catastrophic fish kill of 2002, precisely the  
10 kind of event that USBR hopes to avoid with the challenged decision. *Id.* at ¶¶ 15-21. Proposed  
11 Intervenors should be allowed to intervene to protect these interests.  
12

13 PCFFA publicly supported USBR’s proposal to augment flows that is the subject of this  
14 lawsuit. Spain Decl, ¶ 22. The Ninth Circuit has held that “[a] public interest group is entitled  
15 as a matter of right to intervene in an action challenging the legality of a measure it supported,”  
16 even where the public interest group’s involvement was limited to participation in the  
17 administrative process leading to the challenged agency decision. *Idaho Farm Bureau Fed’n*, 58  
18 F.3d at 1397. *See also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-528 (9th Cir. 1983)  
19 (Audubon Society allowed to intervene as of right in suit challenging designation of conservation  
20 area to protect interest “in the preservation of birds and their habitat”); *Washington State*  
21 *Building and Construction Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir.  
22 1982), *cert. denied*, 461 U.S. 913 (1983) (public interest group allowed to intervene as of right in  
23 action challenging ballot measure it supported).  
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1 In sum, Proposed Intervenors' commercial, economic and conservation interests in  
2 Klamath River salmon easily provide a sufficient basis for intervention. *Sagebrush Rebellion*,  
3 713 F.2d at 526-28 (environmental group's "environmental, conservation and wildlife interests"  
4 sufficient for intervention as matter of right); *Humane Society of United States v. Clark*, 109  
5 F.R.D. 518, 520 (D.D.C. 1985) (organizations' recreational interests in hunting and trapping  
6 sufficient to satisfy Rule 24(a)'s interest test).

7  
8 C. Disposition of This Matter May, as a Practical Matter, Impair or Impede Proposed Intervenors' Interests.

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

18  
19 If Plaintiffs succeed in this case, vital protections for Klamath River salmon proposed by  
20 USBR for this year could be invalidated and enjoined. Indeed, eliminating these emergency  
21 protections is Plaintiffs' explicit goal in bringing this suit. *See* Complaint, ¶ 11. In essence,  
22 Plaintiffs seek to enjoin emergency water deliveries that both Proposed Intervenors and the  
23 federal government and many others believe to be critically important to the protection and  
24 survival of Klamath River salmon, on which Proposed Intervenors' members rely for their  
25 livelihood. Proposed Intervenors satisfy this element of the test for intervention.  
26



1 D. Proposed Intervenors' Interests May Not Be Adequately Represented by the  
2 Existing Parties.

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

11 In evaluating adequacy of representation, the courts consider three issues: (1) whether  
12 “the interests of a present party to the suit are such that it will *undoubtedly* make all of the  
13 intervenor’s arguments,” (2) whether “the present party is capable of and willing to make such  
14 arguments,” and (3) whether “the intervenor would not offer any necessary element to the  
15 proceedings that the other parties would neglect.” *County of Fresno*, 622 F.2d at 438-39  
16 (emphasis added). Here, Proposed Intervenors represent specific commercial and conservation  
17 concerns not represented by any other party. Defendants’ actions in previous litigation indicate  
18 that they are unlikely to advocate as vigorously as Proposed Intervenors for the protections  
19 afforded Klamath River salmon. Indeed, Proposed Intervenors more commonly find themselves  
20 opponents of the USBR in litigation and administrative advocacy on questions related to water  
21 use in the Klamath. USBR is charged by law to represent the interests of multiple users and  
22 parties, including irrigators and water agencies, whose positions are diametrically opposed to  
23 those of Proposed Intervenors. *See Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)  
24 (permitting timber industry to intervene in case brought against government by environmental  
25  
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1 groups because “[t]he government must represent the broad public interest, not just the economic  
2 concerns of the timber industry”); *Forest Conservation Council*, 66 F.3d at 1499 (“Inadequate  
3 representation is most likely to be found when the applicant asserts a personal interest that does  
4 not belong to the general public”).

5         Additionally, Proposed Intervenors represent interests—commercial salmon fishing and  
6 salmon conservation—that other parties cannot bring. Proposed Intervenors will explain how the  
7 balance of equities supports implementation of the 2013 flow augmentation proposal, because  
8 the injunction requested by Plaintiffs would increase the likelihood of another catastrophic fish  
9 kill in the lower Klamath, with consequent devastating economic and other effects on  
10 commercial fisheries throughout the West Coast.

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

21         In sum, intervention as of right pursuant to Rule 24(a) is clearly appropriate in this case.  
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1 III. ALTERNATIVELY, THIS COURT SHOULD GRANT PROPOSED INTERVENORS  
2 PERMISSIVE INTERVENTION.

3 If this Court denies them intervention as of right, Proposed Intervenors request in the  
4 alternative that the Court grant them permissive intervention under Federal Rule of Civil  
5 Procedure 24(b). That rule provides in pertinent part that:

6 On timely motion, the court may permit anyone to intervene who...has a claim or  
7 defense that shares with the main action a common question of law or fact....In  
exercising its discretion, the court must consider whether the intervention will  
unduly delay or prejudice the adjudication of the original parties' rights.

8 Fed. R. Civ. P. 24(b). Permissive intervention under Rule 24(b) is appropriate where there is a  
9 basis for jurisdiction over the intervenor, the intervention motion is timely, and the applicant's  
10 claim or defense has a "question of law or a question of fact in common" with the main action.  
11 *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). Like intervention of right,  
12 permissive intervention is granted liberally. *See* 7C Wright & Miller, Fed. Prac. & Proc. § 1904.

13 Each of these prerequisites is met here. First, assuming arguendo that this Court has  
14 jurisdiction over the claims raised in the complaint, the Court has supplemental jurisdiction over  
15 Proposed Intervenors pursuant to 28 U.S.C. § 1367(a), which provides such jurisdiction for "the  
16 intervention of additional parties." Moreover, the requirement to show a basis for jurisdiction  
17 the does not apply to parties who seek to intervene as defendants in federal cases that are not  
18 based on diversity. *See* 7C Wright & Miller, Fed. Prac. & Proc. § 1917 ("[T]he need for  
19 independent jurisdictional grounds is almost entirely a problem of diversity litigation. In federal-  
20 question cases there should be no problem of jurisdiction with regard to an intervening  
21 defendant"). Second, this motion is timely, as explained above. Third, Proposed Intervenors'  
22 defenses—*i.e.*, that the 2013 emergency flow augmentation proposal is necessary to prevent  
23 significant harm to Klamath River salmon and Proposed Intervenors' interests—have an obvious  
24 and necessary legal overlap with Plaintiffs' claims to the contrary.  
25  
26

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

3 CONCLUSION

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

7 Respectfully submitted this 9th day of August, 2013.  
8  
9

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