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11  
12 UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
13 FRESNO DIVISION

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

15 )  
16 Plaintiffs, )

17 vs. )

18 GARY F. LOCKE, as Secretary of the United States )  
Department of Commerce, *et al.*, )

19 Defendants. )

20 PACIFIC COAST FEDERATION OF FISHERMEN'S )  
ASSOCIATIONS/INSTITUTE FOR FISHERIES )  
21 RESOURCES, THE BAY INSTITUTE, CALIFORNIA )  
TROUT, FRIENDS OF THE RIVER, NATURAL )  
22 RESOURCES DEFENSE COUNCIL, NORTHERN )  
CALIFORNIA COUNCIL OF THE FEDERATION OF )  
23 FLY FISHERS, SAN FRANCISCO BAYKEEPER, )  
and SACRAMENTO RIVER PRESERVATION )  
24 TRUST, all non-profit organizations; and the )  
WINNEMEM WINTU TRIBE, )

25 )  
26 Defendant-Intervenor Applicants. )

) Case No.: 1:09-CV-1053-OWW-DLB

) MEMORANDUM IN SUPPORT OF  
) MOTION TO INTERVENE

) Date: August 31, 2009 (Requested)

) Time: 10:00 a.m.

) Place: Courtroom 3

) Judge: Oliver W. Wanger

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1 **INTRODUCTION**

2 In this lawsuit, Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water  
3 District (“Plaintiffs”) seek to invalidate the June 2009 biological opinion (“2009 Salmon BiOp”) on  
4 the impacts of the joint operations of the Central Valley Project (“CVP”) and the State Water Project  
5 (“SWP”) (collectively “Projects”) on Sacramento River winter-run Chinook salmon, Central Valley  
6 spring-run Chinook salmon, Central Valley steelhead, southern distinct population segment of north  
7 American green sturgeon, and southern resident killer whales (“the five species”). Plaintiffs further  
8 seek to enjoin the implementation of the protective measures the 2009 Salmon BiOp requires for the  
9 five species.<sup>1</sup> The five species, which are protected under the federal Endangered Species Act, 16  
10 U.S.C. §§ 1531, *et seq.* (“ESA”), as threatened or endangered, include both fish species that migrate  
11 seasonally up the Sacramento and San Joaquin Rivers and their tributaries in northern and central  
12 California and orcas, which live in California’s coastal waters and depend on salmon, including both  
13 listed and unlisted runs, for prey. According to the National Marine Fisheries Service (“NMFS”),  
14 the expert wildlife agency with ESA jurisdiction over these species that prepared the 2009 Salmon  
15 BiOp, all of the five species are likely to go extinct if federal and state authorities continue to  
16 operate the Projects without the specific changes set forth in the 2009 Salmon BiOp.<sup>2</sup>

17 As set forth below, the relief that Plaintiffs seek through this litigation could eviscerate  
18 important protections afforded to the five species by the ESA-mandated 2009 Salmon BiOp to the  
19 detriment of the scientific, aesthetic, economic, conservation, recreational, spiritual, and cultural  
20 interests that Defendant-Intervenor Applicants Pacific Coast Federation of Fishermen’s  
21 Associations/Institute for Fisheries Research (“PCFFA”), The Bay Institute (“TBI”), Natural  
22 Resources Defense Council (“NRDC”), Sacramento River Preservation Trust (“Trust”), California  
23 Trout (“CalTrout”), Northern California Council of the Federation of Fly Fishers (“Fly Fishers”),

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiffs’ Complaint also alleges that 2009 Salmon BiOp unlawfully found that the Projects  
26 jeopardize the continued existence of Central California Coast steelhead and destroy or adversely  
27 modify that species’ critical habitat. Compl. ¶¶ 2, 5. This is not correct. In fact, the 2009 Salmon  
28 BiOp concluded that the Projects are *not* likely to jeopardize the continued existence of Central  
California Coast steelhead or adverse modify its critical habitat. 2009 Salmon BiOp at 574.

<sup>2</sup> In litigation brought by plaintiffs challenging the U.S. Fish and Wildlife Service’s 2008 biological  
opinion on the effects of Project operations on threatened delta smelt, Plaintiffs did not object to the

1 San Francisco Baykeeper, Friends of the River (“FOR”), and the Winnemem Wintu Tribe (“Tribe”)  
2 (collectively “Proposed Intervenors”) and their members have fought for years to defend and  
3 preserve. Proposed Intervenors therefore respectfully request that this Court grant them leave to  
4 intervene as Defendants in this action. By intervening, Proposed Intervenors seek to ensure the  
5 survival and recovery of the five species through the implementation of the protective measures  
6 provided by the 2009 Salmon BiOp.

7 Federal Defendants’ counsel has indicated that Federal Defendants take no position on the  
8 motion. Plaintiffs’ counsel has indicated that Plaintiffs wish to consider the moving papers before  
9 determining their position with respect to the requested intervention.

10 **I. PROPOSED INTERVENORS AND THEIR INTERESTS IN THIS LAWSUIT.**

11 Proposed Intervenors have a significant interest in this action. Proposed Intervenors are a  
12 coalition of environmental organizations, commercial and sport fishermen and women, and a Native  
13 American tribe, all of whose members are active participants in the life of the San Francisco Bay-  
14 Delta and the Sacramento and San Joaquin River systems that flow into the Delta. Individual  
15 members of these organizations frequently visit the Delta, the Sacramento and San Joaquin Rivers,  
16 and the tributaries of those rivers, which provide critical habitat for several of the five species, for a  
17 variety of recreational, commercial, educational, spiritual, and cultural activities that are dependent  
18 on a healthy river system and the continued existence of the five species. *See* Decl. of Gary Bobker  
19 in Supp. of Mot. to Intervene (“Bobker Decl.”) ¶ 6; Decl. of Sejal Choksi in Supp. of Mot. to  
20 Intervene (“Choksi Decl.”) ¶¶ 3-4; Decl. of Steve Evans in Supp. of Mot. to Intervene (“Evans  
21 Decl.”) ¶¶ 7-8; Decl. of William F. Zeke Grader, Jr., in Supp. of Mot. to Intervene (“Grader Decl.”)  
22 ¶¶ 8-9; Decl. of Curtis Knight in Supp. of Mot. to Intervene (“Knight Decl.”) ¶ 8; Decl. of Douglas  
23 W. Lovell in Supp. of Mot. to Intervene (“Lovell Decl.”) ¶¶ 4-5; Decl. of John Merz in Supp. of  
24 Mot. to Intervene (“Merz Decl.”) ¶¶ 3-7, 9; Decl. of Gary Hayward Slaughter Mulcahy in Supp. of  
25 Mot. to Intervene (“Mulcahy Decl.”) ¶¶ 4-6. Decl. of Barry Nelson in Supp. of Mot. to Intervene  
26 (“Nelson Decl.”) ¶ 6, all submitted herewith.

27 \_\_\_\_\_  
28 intervention of Proposed Intervenors NRDC and TBI.

1 For example, in addition to possessing legally protected recreational interests in the  
2 Sacramento-San Joaquin river system, Proposed Intervenors' members include commercial fisher  
3 men and women who live in this region and whose livelihood depends on the existence of healthy  
4 populations of Pacific salmon. Grader Decl. ¶ 3. Likewise, since time immemorial, members of the  
5 Winnemem Wintu Tribe have relied on native salmon that migrate up the Sacramento River for  
6 sustenance as well as for their spiritual and cultural traditions. Mulcahy Decl. ¶ 5.

7 Proposed Intervenors' use of the Sacramento River, San Joaquin River, the tributaries of  
8 these rivers, and the Delta for commercial, educational, recreational, spiritual, and cultural activities,  
9 such as hiking, boating, wildlife observation, swimming, fishing, and spiritual and cultural  
10 inspiration, would be detrimentally affected by the decline of the five species and the corresponding  
11 decline in the health of the Sacramento River, San Joaquin River, and Delta ecosystems. Bobker  
12 Dec., ¶¶ 5-6, 12-14; Choksi Decl. ¶ 9; Evans Decl. ¶ 8; Grader Decl. ¶ 11; Knight Decl. ¶¶ 8-9;  
13 Lovell Decl. ¶ 6; Merz Decl. ¶ 15; Mulcahy Decl. ¶ 8; Nelson Dec., ¶¶ 7-8, 9-10. Thus, Proposed  
14 Intervenors have significant, particularized interests in the outcome of this case, in that their interests  
15 in the preservation of the five species and their ecosystems, upon which the quality and enjoyment  
16 of their economic, recreational, aesthetic, spiritual, cultural and other activities depend, would be  
17 injured if Plaintiffs obtain the relief they seek in this action. Bobker Dec., ¶ 6, 12-14; Choksi Decl.  
18 ¶ 9; Evans Decl. ¶¶ 9-10; Grader Decl. ¶¶ 10-11; Knight Decl. ¶¶ 8-9; Lovell Decl. ¶¶ 4-6; Merz  
19 Decl. ¶¶ 15; Mulcahy Decl. ¶ 8 Nelson Dec., ¶¶ 6-10.

20 In addition, Proposed Intervenors have a long history of advocating for increased protections  
21 for several of the five species, in particular Central Valley salmon and steelhead. For example, as a  
22 direct result of advocacy of Proposed Intervenor TBI, NMFS listed the Central Valley spring-run  
23 Chinook salmon as threatened under the ESA, among numerous other populations of west coast  
24 salmon. *See* Bobker Decl. ¶ 8. Proposed Intervenors have used public education, letter writing,  
25 publishing scientific reports, participating in public hearings, and also litigation to prevent salmon  
26 and steelhead species from going extinct and to secure and to defend protections to ensure their  
27 recovery. Bobker Decl. ¶¶ 7-11; Choksi Decl. ¶ 8; Evans Decl. ¶¶ 4-6; Grader Decl. ¶¶ 4-7; Knight  
28 Decl. ¶¶ 5, 7; Lovell Decl. ¶¶ 2-3; Merz Decl. ¶¶ 11-12, 14-15; Mulcahy Decl. ¶¶ 7-8; Nelson Decl.

¶¶ 3-5. As this Court is well aware, Proposed Intervenor successfully challenged the predecessor 2004 biological opinion on the effects of Projects operations on three of the five species, which led to NMFS’s adoption of the 2009 Salmon BiOp. *See PCFFA v. Gutierrez*, 606 F. Supp. 2d 1122, 1193-94 (E.D. Cal. 2008) (holding that 2004 Salmon BiOp was unlawfully promulgated). The 2009 Salmon BiOp determined that joint CVP and SWP operations are likely to jeopardize the continued existence of the five species and adversely modify existing or proposed critical habitat of salmon, steelhead, and sturgeon, and in its Reasonable and Prudent Alternative (“RPA”) outlined ways to modify Project operations to avoid jeopardy and adverse modification.

Proposed Intervenor seek to intervene to defend the validity of the 2009 Salmon BiOp and to ensure that the protections it affords the five species remain in place. Although NMFS developed the 2009 Salmon BiOp and the protective measures for the five species challenged in this lawsuit, it did so only after being compelled to do so by Proposed Intervenor’s earlier lawsuits. Moreover, the U.S. Bureau of Reclamation (“Bureau”), which operates the CVP, is also a defendant in this action, and its interests differ significantly from those of the Proposed Intervenor. Therefore, it cannot be assumed that Federal Defendants will adequately protect Proposed Intervenor’s interests in this litigation. For these and related reasons detailed below, Proposed Intervenor satisfy the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, the requirements for permissive intervention under Rule 24(b).

## **II. PLAINTIFFS’ CHALLENGE TO THE 2009 SALMON BIOP.**

A brief overview of the history of litigation related to imperiled species in the Delta and Sacramento and San Joaquin River ecosystems illustrates Proposed Intervenor’s unique interests in intervening in this lawsuit.

Lawsuits filed by conservation organizations in the late 1980s and early 1990s, including by Proposed Intervenor TBI, succeeded in compelling NMFS to list Central Valley spring-run Chinook salmon and Central Valley steelhead as threatened species under the ESA, in addition to numerous other populations of salmon and steelhead throughout California, Oregon, and Washington. *See Oregon Natural Resources Council, et al., v. Brown, et al.*, Civ. No. C-95-3117-SI (N.D. Cal. filed Sep. 6, 1995) (suit to compel listing of west coast steelhead populations under ESA); *Puget Sound*



1 *Gillnetters Ass'n, et al., v. Daley*, Civ. No. C-97-1741-CD (W.D. Wash. filed Nov. 6, 1997) (suit to  
2 compel listing of west coast salmon populations); 64 Fed. Reg. 50394, 50394 (Sep. 16, 1999) (listing  
3 Central Valley spring-run Chinook salmon as threatened); 63 Fed. Reg. 13347, 13347 (Mar. 19,  
4 1998) (listing Central Valley steelhead as threatened).<sup>3</sup>

5 On June 16, 1993, NMFS designated critical habitat for Sacramento winter-run Chinook  
6 salmon. 58 Fed. Reg. 33212, 33212-13 (Jun. 16, 1993). On February 16, 2000, NMFS designated  
7 critical habitat for Central Valley Chinook salmon and Central Valley steelhead. 65 Fed. Reg. 7764,  
8 7778-79 (Feb. 16, 2000). In 2003, NMFS withdrew the critical habitat designations for 19  
9 populations of salmon and steelhead, including Central Valley spring-run Chinook salmon and  
10 Central Valley steelhead, as a result of a legal challenge filed by industry groups. *See* 68 Fed. Reg.  
11 55990 (Sep. 29, 2003). In response, Proposed Intervenor PCFFA and several other conservation  
12 organizations filed a lawsuit to force NMFS to agree to a court-ordered schedule for re-designating  
13 critical habitat for all 19 populations of salmon and steelhead. *See* 69 Fed. Reg. 71880, 71885 (Dec.  
14 10, 2004). On September 2, 2005, NMFS complied with the court order by publishing a final critical  
15 habitat rule for these fish, including Central Valley spring-run Chinook salmon and Central Valley  
16 steelhead. 70 Fed. Reg. 52488, 52518 (Sep. 2, 2005).

17 In 2005, all of the Proposed Intervenors initiated a lawsuit challenging the adequacy of a  
18 biological opinion released by NMFS in 2004 (“2004 Salmon BiOp”) covering the impacts of the  
19 Bureau’s Operations Criteria and Plan (“OCAP”) on several of the five species. Proposed  
20 Intervenors argued in that case that the 2004 Salmon BiOp violated the ESA. *PCFFA, et al. v.*  
21 *Gutierrez, et al.*, Civ. No. 06-0245-OWW-GSA (E.D. Cal. filed Aug. 9, 2005). This Court agreed  
22 that the 2004 Salmon BiOp was legally inadequate in a variety of respects. *Id.*, Doc. 256 (May 20,  
23 2008); *PCFFA v. Guterrez*, 606 F. Supp. 2d 1122, 1193-94 (E.D. Cal. 2008). NMFS developed the  
24 2009 Salmon BiOp as a direct result of this Court’s determination that the 2004 BiOp was not

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25  
26 <sup>3</sup> In 1990, NMFS listed Sacramento River winter-run Chinook salmon as threatened under the ESA  
27 as a result of litigation brought by the American Fisheries Society and other groups. *See American*  
28 *Fisheries Soc’y, et al. v. Verity, et al.*, Civ. No. 88-0174-RAR (E.D. Cal. filed Feb. 3, 1988); 55 Fed.  
Reg. 46515, 46515 (Nov. 5, 1990) (listing Sacramento winter-run Chinook salmon as threatened).  
In 1994, NMFS reclassified the winter-run as endangered. 59 Fed. Reg. 440, 440 (Jan. 4, 1994).

1 lawfully promulgated.

2 In this action, Plaintiffs are seeking to invalidate the 2009 Salmon BiOp and enjoin the  
3 pumping restrictions and other protective measures it requires. *See* Compl. 36-37. Proposed  
4 Intervenor believe that the measures required by the 2009 Salmon BiOp are necessary to avoid  
5 jeopardy to the existence and recovery of the species and avoid adverse modification of their critical  
6 habitat and that, if anything, the protective measures required by the 2009 Salmon BiOp must be  
7 strengthened to ensure the recovery of the five species so that they no longer need ESA protection.  
8 Bobker Decl. ¶¶ 12; Choksi Decl. ¶ 3; Evans Decl. ¶ 8; Grader Decl. ¶¶ 3, 11; Knight Decl. ¶¶ 6, 9;  
9 Lovell Decl. ¶ 6; Merz Decl. ¶ 15; Mulcahy Decl. ¶¶ 8-9; Nelson Decl. ¶¶ 9-10. The relief sought  
10 by Plaintiffs could eviscerate important protections afforded to the five species by the ESA-  
11 mandated 2009 Salmon BiOp, including carry-over storage, temperature and flow requirements in  
12 the upper Sacramento River, Stanislaus River and American River, and restrictions on pumping  
13 operations at key stages of the five species' life cycles, without which salmon, steelhead, and  
14 sturgeon could be directly killed at the pumps and indirectly harmed by degradation of their critical  
15 habitat and disruption of important stages of their life cycles, to the detriment of Proposed  
16 Intervenor's scientific, aesthetic, economic, conservation, recreational, cultural, and spiritual  
17 interests in the Sacramento River, San Joaquin River, and Delta ecosystems. Bobker Decl. ¶¶ 13-14;  
18 Choksi Decl. ¶ 9; Evans Decl. ¶ 10; Grader Decl. ¶ 11; Knight Decl. ¶¶ 6, 9; Lovell Decl. ¶ 6; Merz  
19 Decl. ¶ 15; Mulcahy Decl. ¶¶ 8-9; Nelson Decl. ¶¶ 9-11. In turn, invalidating the 2009 Salmon BiOp  
20 could also detrimentally affect orcas, which rely on Chinook salmon for prey, further harming  
21 Proposed Intervenor's interests. Nelson Dec. ¶ 6.

## 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:

26 On timely motion, the court must permit anyone to intervene who . . . claims an  
27 interest relating to the property or transaction that is the subject of the action, and is  
28 so situated that disposing of the action may as a practical matter impair or impede the  
movant's ability to protect its interest, unless existing parties adequately represent  
that interest.

Fed. R. Civ. P. 24(a). The Ninth Circuit employs a four-part test to evaluate an applicant's

1 eligibility to intervene under Rule 24(a):

2 The applicant must show that: (1) it has a significant protectable interest relating to  
3 the property or transaction that is the subject of the action; (2) the disposition of the  
4 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.

5 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002) (quoting *Donnelly v.*  
6 *Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). In assessing these factors, the Court should keep in  
7 mind that Rule 24 has traditionally been liberally construed by the Ninth Circuit in favor of  
8 applicants for intervention. *See, e.g., United States*, 288 F.3d at 397-98; *Sierra Club v. EPA*, 995  
9 F.2d 1478, 1481 (9th Cir. 1993). Proposed Intervenors easily meet each of the four factors with  
10 regard to this litigation.

11 **A. Proposed Intervenors' Motion To Intervene Is Timely.**

12 The Ninth Circuit has laid out three factors to evaluate in determining whether a motion to  
13 intervene is timely: (1) the stage of the proceedings at which the applicant seeks to intervene; (2)  
14 the prejudice to the other parties from any delay in applicant's seeking leave to intervene; and (3) the  
15 reason for and length of delay. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297,  
16 1302 (9th Cir. 1997).

17 **1. Proposed Intervenors Seek To Intervene at the Earliest Stage of the**  
18 **Proceedings.**

19 Plaintiffs filed their complaint in this case on June 15, 2009, less than 3 months ago. Federal  
20 Defendants have not filed an answer. The Court has issued no substantive orders. The very first  
21 scheduling conference is set for September 10, 2009. Thus, Proposed Intervenors motion is timely  
22 because they are seeking to intervene at the earliest stage of this litigation, before any determinations  
23 have been made regarding the issues raised by the complaint. *See, e.g., Idaho Farm Bureau Fed'n v.*  
24 *Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that intervention is timely when "filed at a very  
25 early stage, before any hearings or rulings on substantive matters").

26 **2. Granting Intervention Would Not Prejudice Other Parties.**

27 In evaluating the potential prejudice to a party that might result from a delay in seeking  
28 intervention, "courts have emphasized the seriousness of the prejudice which results when relief  
from long-standing inequities is delayed." *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.

1 1978), *cert. denied*, 439 U.S. 837 (1978). In the case at hand, Proposed Intervenors are seeking to  
2 intervene at the earliest stage of the proceedings; thus, their intervention will not result in any delay  
3 in relief. The only prejudice to the present parties that could possibly arise would be if granting  
4 intervention would somehow delay briefing of the merits of the case. However, because Proposed  
5 Intervenors are seeking to intervene in the lawsuit before the September 10, 2009 scheduling  
6 conference, there is no such possibility of prejudice to other parties.

7 **3. Granting Intervention Would Not Cause Unreasonable Delay.**

8 As noted above, Proposed Intervenors' motion to intervene is filed at the outset of this  
9 lawsuit before the occurrence of any determinations on any matters raised by the complaint.

10 In sum, under the three factors identified by the Ninth Circuit for determining timeliness,  
11 Proposed Intervenors' motion is timely.

12 **B. Proposed Intervenors Have a Legally Protected Interest Relating To the  
13 Property or Transaction Involved in the Pending Suit.**

14 Rule 24(a)(2)'s "'interest' test is primarily a practical guide to disposing of lawsuits by  
15 involving as many apparently concerned persons as is compatible with efficiency and due process."  
16 *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (citing *Nuesse v. Camp*, 385 F.2d  
17 694, 700 (D.C. Cir. 1967)). The Ninth Circuit has held that intervention of right is proper where the  
18 applicant can show that it has an interest protected by some law and related to the claims in the case  
19 in which intervention is sought:

20 We ordinarily do not require that a prospective intervenor show that the interest he  
21 asserts is one that is protected by the statute under which the litigation is brought. It  
22 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 *Sierra Club*, 995 F.2d at 1484 (emphasis added).

24 Proposed Intervenors have a legally protected interest in defending the 2009 Salmon BiOp to  
25 protect the ecosystems they use and enjoy on a regular basis. The federal law requiring the  
26 protection and recovery of the five species that are the subject of this litigation is the ESA.  
27 Plaintiffs' complaint also asserts that their claims "aris[e] under and [are] based upon the ESA."  
28 Compl. ¶ 16. In enacting the ESA, Congress explicitly recognized that preventing extinction of fish  
and wildlife species was important because these species "are of esthetic, ecological, educational,

1 historical, recreational, and scientific value to the Nation and its people.” 16 U.S.C. § 1531(a)(2),  
2 (3). Here, Proposed Intervenors seek to intervene in Plaintiffs’ lawsuit to defend the 2009 Salmon  
3 BiOp and maintain the protections it affords the five species in order to protect Proposed  
4 Intervenors’ recreational, aesthetic, educational, economic, cultural, and spiritual interests in the five  
5 species and the San Francisco Bay-Delta and the rivers and tributaries that support the San-  
6 Francisco Bay-Delta. Bobker Decl. ¶¶ 13-14; Choksi Decl. ¶¶ 3-4; Evans Decl. ¶ 7; Grader Decl. ¶¶  
7 3, 8-9; Knight Decl. ¶¶ 6, 9; Lovell Decl. ¶¶ 4-6; Merz Decl. ¶¶ 4-6, 9; Mulcahy Decl. ¶¶ 4-6, 8;  
8 Nelson Decl. ¶ 6. Proposed Intervenors’ interests are not only protected under *some* law, they are  
9 protected by the very statute that forms the basis of Plaintiffs’ claims.

10       Moreover, as a direct result of efforts of several of Proposed Intervenor organizations, the  
11 five species gained various protections intended to prevent their extinction and promote their  
12 survival and recovery. These efforts included, for example, successful litigation to force NMFS to  
13 list Central Valley spring-run Chinook salmon and Central Valley steelhead as threatened under the  
14 ESA, to operate Shasta Dam so as to maintain suitable water temperatures for both Sacramento  
15 River winter-run Chinook salmon and Central Valley spring-run Chinook salmon, and to designate  
16 critical habitat for spring-run Chinook salmon and Central Valley steelhead. Bobker Decl. ¶ 8;  
17 Grader Decl. ¶ 6; Merz Decl. ¶ 11; 69 Fed. Reg. 71880, 71885 (Dec. 10, 2004) (describing history of  
18 litigation to compel NMFS to designate critical habitat for west coast salmon and steelhead). Most  
19 directly relevant here, Proposed Intervenors brought the suit that resulted in this Court’s invalidation  
20 of the 2004 Salmon BiOp and NMFS’ subsequent adoption of the 2009 Salmon BiOp, which is the  
21 action challenged in this case.

22       Proposed Intervenors, whose primary missions and advocacy work include the conservation  
23 and protection of California’s rivers and the imperiled fish supported by those rivers, Bobker Decl.  
24 ¶ 4; Choksi Decl. ¶ 2; Evans Decl. ¶ 2; Grader Decl. ¶ 2; Knight Decl. ¶ 2; Lovell Decl. ¶ 2; Merz  
25 Decl. ¶ 8; Mulcahy Decl. ¶ 2; Nelson Decl. ¶ 2, have an interest in protecting the fruits of this and  
26 their related legal and administrative advocacy. *See Pennsylvania v. Del. Valley Citizens’ Council*,  
27 478 U.S. 546, 558 (1986) (“[p]rotection of the full scope of relief afforded by the consent decree was  
28 thus crucial to safeguard the interests asserted by Delaware Valley”). In factually similar cases, this

1 Court allowed several of Proposed Intervenors to intervene in litigation brought by Plaintiffs in  
2 which Plaintiffs attempted to weaken and remove ESA protections for delta smelt and Chinook  
3 salmon. *San Luis & Delta-Mendota Water Authority, et al. v. U.S. Dep't of Interior, et al.*, Civ. No.  
4 02-5209-OWW-DLB (E.D. Cal. filed Feb. 25, 2002), Doc. No. 26 (allowing TBI, NRDC, PCFFA,  
5 Fly Fishers, and Trust to intervene in lawsuit seeking to invalidate biological opinions restricting  
6 Project operations for the benefit of ESA-listed salmon and delta smelt); *San Luis & Delta-Mendota*  
7 *Water Authority v. U.S. Dep't of Interior, et al.*, Civ. No. 02-6461-OWW-LJO (E.D. Cal. filed Nov.  
8 22, 2002), Doc. No. 24 at 10 (allowing NRDC, TBI, and the Trust to intervene in lawsuit seeking to  
9 eliminate protections for delta smelt because their legal and political advocacy demonstrated a  
10 “legally protected interest in the Delta smelt being listed as an endangered species”); Nelson Decl.  
11 ¶ 4. This Court also recently allowed Proposed Intervenors TBI and NRDC to intervene in parallel  
12 lawsuits filed by Plaintiffs challenging the U.S. Fish and Wildlife Service’s 2008 biological opinion  
13 concerning the impacts of the Projects on endangered delta smelt. *San Luis & Delta Mendota Water*  
14 *Authority, et al. v. Salazar, et al.*, Civ. No. 09-00407-OWW-DLB (E.D. Cal. filed Mar. 3, 2009),  
15 Doc. No. 47.

16 The Ninth Circuit has held that “[a] public interest group is entitled as a matter of right to  
17 intervene in an action challenging the legality of a measure it has supported,” even when the public  
18 interest group’s involvement was limited to participation in the administrative process leading to the  
19 challenged agency decision. *Idaho Farm Bureau Fed’n*, 58 F.3d at 1397; *see also Sagebrush*  
20 *Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-528 (9th Cir. 1983) (Audubon Society allowed to  
21 intervene as of right in suit challenging designation of conservation area to protect interest “in the  
22 preservation of birds and their habitat”); *Wash. State Building and Construction Trades Council,*  
23 *AFL-CIO v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (public  
24 interest group allowed to intervene as of right in action challenging ballot measure it supported).  
25 Here, of course, Proposed Intervenors have done much more, bringing the very lawsuits that led to  
26 NMFS’ adoption of the 2009 Salmon BiOp and the protections currently in place for the five  
27 species. Thus, Proposed Intervenors have a significant protectable interest in defending the validity  
28 of the 2009 Salmon BiOp.

1           Additionally, individual members of the Proposed Intervenor organizations are active in their  
2 use and enjoyment of the Sacramento River, San Joaquin River and tributaries thereto, as well as the  
3 Delta. In relying on these rivers and the Delta for conservation, aesthetic, educational, professional,  
4 spiritual, cultural, and recreational activities such as boating, swimming, photography, fishing,  
5 kayaking, hiking, spiritual ceremonies, and observing fish and wildlife in their native habitats,  
6 Proposed Intervenors are exercising the very interests the ESA is intended to protect. Bobker Decl.  
7 ¶¶ 5-6; Choksi Decl. ¶¶ 3-4; Evans Decl. ¶¶ 7-8; Grader Decl. ¶¶ 8-9; Knight Decl. ¶¶ 2, 8; Lovell  
8 Decl. ¶¶ 4-5; Merz Decl. ¶¶ 4-6, 9; Mulcahy Decl. ¶¶ 4-6; Nelson Decl. ¶ 3. The protection of  
9 Proposed Intervenors’ legally protected interests in these values of the five species is, in fact, the  
10 reason behind the passage of the ESA. *See* 16 U.S.C. § 1531(b) (purpose of the ESA is to “provide a  
11 means whereby the ecosystems upon which endangered species and threatened species depend may  
12 be conserved”).

13           Thus, Proposed Intervenors’ various long-standing recreational, aesthetic, economic,  
14 scientific, educational, conservation, professional, spiritual, and cultural interests in the protection of  
15 the five species easily provide a sufficient basis for intervention as of right. *See, e.g., Idaho Farm*  
16 *Bureau Fed’n*, 58 F.3d at 1397 (“A public interest group is entitled as a matter of right to intervene  
17 in an action challenging the legality of a measure it has supported”); *Sagebrush Rebellion*, 713 F.2d  
18 at 526-28 (environmental group’s “environmental, conservation and wildlife interests” were  
19 sufficient interests for the purpose of intervention as a matter of right); *Coalition of Arizona/New*  
20 *Mexico Counties for Stable Economic Growth v. Dep’t of Interior*, 100 F.3d 837, 841 (10th Cir.  
21 1996) (individual’s involvement with species through activities as photographer, naturalist, and  
22 conservation advocate were sufficient interests for the purpose of intervention in litigation  
23 concerning species’ listing under the ESA); *Humane Soc’y of U.S. v. Clark*, 109 F.R.D. 518, 520  
24 (D.D.C. 1985) (organizations’ recreational interests in hunting and trapping sufficient to satisfy Rule  
25 24(a)’s interest test).

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

28           Rule 24(a)’s “impairment” requirement concerns whether, as a practical matter, denial of  
intervention *may* impede the applicant’s ability to protect its interests in the subject of the action.

1 *United States*, 288 F.3d at 401 (citing Fed. R. Civ. P. 24(a)(2)) (emphasis added). As the Advisory  
2 Committee Notes regarding Rule 24(a) explain, “[i]f an absentee would be substantially affected in a  
3 practical sense by the determination made in an action, he should, as a general rule, be entitled to  
4 intervene.” Fed. R. Civ. P. 24, Advisory Comm.’s Note to 1966 Amendments. The rule’s emphasis  
5 on “practical disadvantage” was “designed to liberalize the right to intervene in federal actions.”  
6 *Neusse*, 385 F.2d at 701-702.

7       If Plaintiffs succeed in this case, the vital protections for the five species required by the  
8 2009 Salmon BiOp could be invalidated and enjoined. Eliminating these protections is Plaintiffs’  
9 explicit objective in bringing this suit. *See* Compl. at 36-37 (requesting “temporary, preliminary and  
10 permanent injunctive relief . . . including relief from the pumping restricts and other aspects of the  
11 reasonable and prudent alternatives in the 2009 NMFS BiOp”). This would deprive Proposed  
12 Intervenors of the fruits of their many years of administrative and judicial advocacy that led to (1)  
13 listing of several of the species as endangered and threatened species, (2) designation of critical  
14 habitat for three of the five species, and (3) the 2009 Salmon BiOp itself, that avoids jeopardy to the  
15 five species and avoids adverse modification of their designated and proposed critical habitat.  
16 Further, such an outcome would severely impact Proposed Intervenors’ members’ abilities to pursue  
17 their economic, recreational, conservation, aesthetic, spiritual, cultural, and other interests in the  
18 Sacramento and San Joaquin Rivers and their tributaries, as well as the Delta. Bobker Decl. ¶¶ 6,  
19 12-14; Choksi Decl. ¶ 9; Evans Decl. ¶¶ 9-10; Grader Decl. ¶¶ 10-11; Knight Decl. ¶¶ 8-9; Lovell  
20 Decl. ¶¶ 4-6; Merz Decl. ¶ 11; Mulcahy Decl. ¶ 8; Nelson Decl. ¶ 4. Thus, Proposed Intervenors’  
21 interests in protecting the five species and in protecting, using, and enjoying the Sacramento and San  
22 Joaquin River systems and the Delta ecosystem may be impaired by the disposition of this case.

23       **D. Proposed Intervenors’ Interests May Not Be Adequately Represented By the**  
24       **Existing Parties.**

25       “[T]he requirement of inadequacy of representation is satisfied if the applicant shows that  
26 representation of its interest ‘may be’ inadequate.” *Sagebrush Rebellion*, 713 F.2d at 528 (citing  
27 *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). The burden of making this  
28 showing is “minimal.” *Id.*; *see also Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489,  
1498 (9th Cir. 1995) (same). Thus, Proposed Intervenors need only establish that the government’s



1 defense of this matter “may be” inadequate with respect to their interests. *Sierra Club v.*  
2 *Ruckelshaus*, 602 F. Supp. 892, 896 n. 6 (N.D. Cal. 1984).

3 In evaluating adequacy of representation, the courts consider three issues: (1) whether “the  
4 interests of a present party to the suit are such that it will *undoubtedly* make all of the intervenor’s  
5 arguments,” (2) whether “the present party is capable of and willing to make such arguments,” and  
6 (3) whether “the intervenor would not offer any necessary element to the proceedings that the other  
7 parties would neglect.” *County of Fresno*, 622 F.2d at 438-39 (emphasis added).

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

18 As in *Sagebrush Rebellion*, Proposed Intervenors’ unique interests are unlikely to be  
19 adequately represented by the Federal Defendants, whose perspectives differ substantially from  
20 those of Proposed Intervenors. As discussed above, Proposed Intervenors represent specific  
21 environmental, commercial, spiritual, and cultural concerns not represented by any other party. For  
22 example, PCFFA, Fly Fishers, and CalTrout represent sport and commercial fishing communities  
23 and will offer a necessary perspective on the litigation that will not be presented by either of the  
24 Federal Defendants, namely, how their ability to harvest salmon and pursue their livelihoods will be  
25 eviscerated if salmon and steelhead species become extinct because protective measures in the 2009  
26 Salmon BiOp have been enjoined. Grader Decl. ¶¶ 3, 11; Knight Decl. ¶¶ 2, 9; Lovell Decl. ¶ 6. By  
27 the same token, the Tribe contributes a voice to this dispute that is not represented by any other party  
28 – namely, how their centuries-long history of fishing salmon on the upper Sacramento River, and the

1 traditions, ceremonies, and cultural traditions the Tribe has developed to honor the salmon in this  
2 region, may be harmed if the Court were to enjoin any of the 2009 Salmon BiOp’s protective  
3 measures. Mulcahy Decl. ¶ 8. This Court has held that intervenor applicants who bring to bear  
4 unique interests such as those represented by PCFFA, Fly Fishers, CalTrout, the Tribe, and the other  
5 Proposed Intervenors are entitled to intervene in a lawsuit in which those interests are implicated.  
6 *Delta v. Carlson*, 2008 WL 2899724, \* 3 (E.D. Cal. Jul. 24, 2008) (ruling that sports fishing groups,  
7 including Fly Fishers, could intervene in lawsuit challenging regulations governing fishing of striped  
8 bass because the groups offered a “necessary perspective” that other parties would “undoubtedly  
9 neglect,” namely, that California anglers would “bear the brunt” of a decision to invalidate the  
10 striped bass regulations).

11 Moreover, the interests of the Federal Defendants can be expected to be different from those  
12 of the Proposed Intervenors. The Bureau represents a range of interests in operating the CVP,  
13 including the interests of water agencies that are directly contrary to those of Proposed Intervenors.  
14 The Bureau itself is on record as informing NMFS that it “cannot unconditionally accept the [2009  
15 Salmon BiOp’s] RPA” and that it “anticipates that it may need to reinitiate consultation” as it  
16 implements the RPA. Letter from Donald R. Glaser, Regional Director, Mid-Pacific Region,  
17 Bureau, to Rod McInnis, Regional Administrator, NMFS (Jun. 4, 2009), filed in *PCFFA, et al. v.*  
18 *Guitierrez, et al.*, Case No. 06-00245-OWW-GSA (E.D. Cal. filed Aug. 9, 2005), Doc. No. 448-2.

19 Federal Defendants’ actions in previous litigation further indicate that they may not advocate  
20 as vigorously as Proposed Intervenors for the protections afforded to the five species by the 2009  
21 Salmon BiOp. As discussed above, many protections currently in place for the five species were  
22 gained only after Proposed Intervenors or other environmental organizations sought such protection  
23 through administrative advocacy and litigation. Proposed Intervenors have spent years litigating  
24 against the same Federal Defendants in an on-going effort to secure protections afforded by the ESA  
25 to threatened and endangered fish species, and to compel them to operate the Projects in a manner  
26 that avoids take of threatened and endangered fish species to the maximum extent possible. Bobker  
27 Decl. ¶ 8; Grader Decl. ¶ 6; Lovell Decl. ¶ 3. The fact that NMFS issued the 2009 “jeopardy”  
28 biological opinion only because litigation brought by all of the Proposed Intervenors led to this

1 Court's determination that NMFS' 2004 "no jeopardy" biological opinion was arbitrary and  
2 capricious underscores the importance of Proposed Intervenors' continued participation in defending  
3 the protection afforded by the 2009 Salmon BiOp. Bobker Decl. ¶ 8; Choksi Decl. ¶ 8; Evans Decl.  
4 ¶ 5; Grader Decl. ¶ 7; Knight Decl. ¶ 5; Lovell Decl. ¶ 3; Merz Decl. ¶ 11; Mulcahy Decl. ¶ 8;  
5 Nelson Decl. ¶ 4.

6 In sum, Federal Defendants' representation of conflicting interests, their prior litigation  
7 positions, and the significant role played by Proposed Intervenors in securing protective measures  
8 for the five species mandates that Proposed Intervenors be allowed to intervene in order to represent  
9 their particularized concerns. *See Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)  
10 (permitting timber industry to intervene in case brought against government by environmental  
11 groups because "[t]he government must represent the broad public interest, not just the economic  
12 concerns of the timber industry"); *Forest Conservation Council*, 66 F.3d at 1499 ("Inadequate  
13 representation is most likely to be found when the applicant asserts a personal interest that does not  
14 belong to the general public") (quoting 3B Moore's Federal Practice, ¶ 24.07[4] (2d ed. 1995)).

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

17 If this Court denies them intervention as of right, Proposed Intervenors request in the  
18 alternative that the Court grant them permissive intervention under Federal Rule of Civil Procedure  
19 24(b). That rule provides in pertinent part that:

20 On timely motion, the court may permit anyone to intervene who . . . has a claim or  
21 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.

22 Fed. R. Civ. P. 24(b)(2), (3). Permissive intervention under Rule 24(b) is appropriate where there is  
23 a basis for jurisdiction over the intervenor, the intervention motion is timely, and the applicant's  
24 claim or defense has a "question of law or a question of fact in common" with the main action.  
25 *Greene v. United States*, 996 F.2d 973, 978 (9th Cir. 1993). Like intervention of right, permissive  
26 intervention is granted liberally. *See* 7C Wright & Miller, Fed. Prac. & Proc. § 1904.

27 Each of these prerequisites is met here. First, assuming arguendo that this Court has  
28 jurisdiction over the claims raised in the complaint, the Court has supplemental jurisdiction over

1 Proposed Intervenors pursuant to 28 U.S.C. § 1367(a), which provides such jurisdiction for “the  
2 intervention of additional parties.” In any event, the requirement to show a basis for jurisdiction  
3 does not apply to parties who seek to intervene as defendants in federal cases that are not based on  
4 diversity. *See* 7C Wright & Miller, Fed. Prac. & Proc. § 1917 (“[T]he need for independent  
5 jurisdictional grounds is almost entirely a problem of diversity litigation. In federal-question cases  
6 there should be no problem of jurisdiction with regard to an intervening defendant”). Second, this  
7 motion is timely, as explained above. Third, Proposed Intervenors’ defenses—*i.e.*, that the five  
8 species are jeopardized by joint operation of the Projects as proposed by the Bureau, that the  
9 protections required by the 2009 Salmon BiOp are soundly based on the best available science and  
10 are essential to these species’ survival, and that, if anything, more stringent protections may be  
11 necessary for the species’ survival and recovery—have an obvious and necessary factual and legal  
12 overlap with Plaintiffs’ claims to the contrary.

13 Finally, granting permissive intervention to Proposed Intervenors would promote judicial  
14 economy. If not permitted to intervene, and if the Court were to grant Plaintiffs the relief requested  
15 in this case, Proposed Intervenors could be forced to file a separate lawsuit against the United States  
16 to compel adequate interim protection of the five species until the Federal Defendants develop a new  
17 biological opinion and/or comply with the ESA, NEPA, and other laws. Allowing Proposed  
18 Intervenors to intervene in this lawsuit could potentially obviate the need for Proposed Intervenors  
19 to file further litigation related to this matter, thereby promoting judicial economy. *See Venegas v.*  
20 *Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989) (“judicial economy is a relevant consideration in deciding  
21 a motion for permissive intervention”).

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

## 24 CONCLUSION

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

1 DATED: August 24, 2009

Respectfully submitted,

2  
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