

1 TRENT W. ORR, State Bar No. 77656  
2 GEORGE M. TORGUN, State Bar No. 222085  
3 Earthjustice  
4 426 17th Street, 5th Floor  
5 Oakland, CA 94612  
6 Telephone: (510) 550-6725  
7 Facsimile: (510) 550-6749  
8 torr@earthjustice.org; gtorgun@earthjustice.org

9 Attorneys for Defendant-Intervenor Applicants

10 KATHERINE POOLE, State Bar No. 195010  
11 DOUG OBEGI, State Bar. No. 246127  
12 Natural Resources Defense Council  
13 111 Sutter St., 20th Floor  
14 San Francisco, CA 94104  
15 Telephone: (415) 875-6100  
16 Facsimile: (415) 875-6161  
17 kpoole@nrdc.org; dobegi@nrdc.org

18 Attorneys for Defendant-Intervenor Applicant NRDC

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

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

Plaintiffs, )

v. )

KENNETH LEE SALAZAR, as Secretary )  
of the Department of the Interior, *et al.*, )

Defendants. )

NATURAL RESOURCES DEFENSE )  
COUNCIL and THE BAY INSTITUTE, )  
non-profit organizations, )

Proposed Defendant-Intervenors. )

Case No. 09-0407 OWW-DLB

MEMORANDUM IN SUPPORT OF  
MOTION TO INTERVENE

Date: May 22, 2009

Time: 12:30 p.m.

Place: Courtroom 3

Judge: Oliver W. Wanger

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INTRODUCTION .....1

I. PROPOSED INTERVENORS AND THEIR INTERESTS IN THIS LAWSUIT.....1

II. PLAINTIFFS’ CHALLENGE TO THE 2008 BIOP.....3

ARGUMENT .....4

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A  
MATTER OF RIGHT .....4

    A. Proposed Intervenors’ Motion to Intervene Is Timely.....5

        (1) Intervention sought at earliest stage of proceedings.....5

        (2) No prejudice to other parties from delay in seeking leave to  
            intervene.....5

        (3) No unreasonable delay in filing motion to intervene.....5

    B. Proposed Intervenors Have a Legally Protected Interest Relating to the  
        Property or Transaction Involved in the Pending Suit.....6

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

    D. Proposed Intervenors’ Interests May Not Be Adequately Represented by  
        the Existing Parties. ....9

II. ALTERNATIVELY, THIS COURT SHOULD GRANT PROPOSED  
INTERVENORS PERMISSIVE INTERVENTION.....11

CONCLUSION.....13

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978).....5

4 *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v.*  
5 *Department of Interior*, 100 F.3d 837 (10th Cir. 1996).....8

6 *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980) .....6, 10

7 *Donnelly v. Glickman*, 159 F.3d 405 (9th Cir. 1998) .....4, 5

8 *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995).....10

9 *Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) .....12

10 *Humane Society of United States v. Clark*, 109 F.R.D. 518 (D.D.C. 1985) .....8

11 *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) .....5, 7, 8

12 *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997).....5

13 *NRDC v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007) .....2, 3

14 *Neusse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) .....9

15 *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546 (1986).....7

16 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983).....7, 8, 9, 10, 11

17 *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993) .....5, 6

18 *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994).....10

19 *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) .....10

20 *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972).....9, 10

21 *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002).....4, 9

22 *U.S. v. Stringfellow*, 783 F.2d 821 (9th Cir. 1986) .....10

23 *Venegas v. Skaggs*, 867 F.2d 527 (9th Cir. 1989).....12

24 *Washington State Building and Construction Trades Council, AFL-CIO v. Spellman*,  
684 F.2d 627 (9th Cir. 1982) .....7

25 *Westlands Water District v. United States*, 700 F.2d 561 (9th Cir. 1983).....5

26 **STATUTES**

27 16 U.S.C. §§ 1531 *et seq.*.....1, 6, 7, 8

28 28 U.S.C. § 1367(a) .....12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FEDERAL REGISTER NOTICES**

58 Fed. Reg. 12,854 (Mar. 5, 1993).....3  
59 Fed. Reg. 65,256 (Dec. 19, 1994).....3

**RULES**

Federal Rule of Civil Procedure 24 .....3, 9, 12

1 **INTRODUCTION**

2 In this lawsuit, Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water  
3 District (“Plaintiffs”) seek to invalidate the December 2008 biological opinion (“2008 BiOp”) on the  
4 impacts of the joint operations of the Central Valley Project (“CVP”) and the State Water Project  
5 (“SWP”) (collectively “Projects”) on the delta smelt and enjoin the implementation of the protective  
6 measures it requires for this species. The delta smelt, which is protected under the federal  
7 Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”), as threatened with extinction, is a two-  
8 to three-inch fish endemic to the estuary of the Sacramento and San Joaquin Rivers in northern  
9 California (“the Delta”). The delta smelt typically lives for only one year and is thus particularly  
10 vulnerable to extinction, which could result from just a single year of spawning failure or from a few  
11 consecutive years of high fish kills or poor spawning or rearing conditions.

12 As set forth below, the relief that Plaintiffs seek through this litigation could eviscerate  
13 important protections afforded to the delta smelt by the ESA-mandated 2008 BiOp to the detriment  
14 of the scientific, aesthetic, economic, conservation, and recreational interests that the Bay Institute  
15 (“TBI”) and Natural Resources Defense Council (“NRDC”) (collectively “Proposed Intervenors”)  
16 and their members have fought for years to defend and preserve. Proposed Intervenors therefore  
17 respectfully request that this Court grant them leave to intervene as Defendants in this action. By  
18 intervening, Proposed Intervenors seek to ensure the survival and recovery of the delta smelt through  
19 the implementation of the protective measures provided by the 2008 BiOp.

20 Defendants’ counsel has indicated that Defendants take no position on this motion.  
21 Plaintiffs’ counsel has indicated that Plaintiffs wish to consider the moving papers before  
22 determining their position with respect to the requested intervention.

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

24 Proposed Intervenors have a significant interest in this action. Members of the Proposed  
25 Intervenors, both environmental organizations, are active participants in the life of the Delta.  
26 Individual members of each organization frequently visit the Delta, which provides critical habitat  
27 for the delta smelt, to use and enjoy the Delta ecosystem. Declaration of Gary Bobker in Support of  
28 Motion to Intervene (“Bobker Dec.”), submitted herewith, ¶¶ 5-6; Declaration of Barry Nelson in

1 Support of Motion to Intervene (“Nelson Dec.”), submitted herewith, ¶¶ 6-7. The health and  
2 survival of the delta smelt is considered indicative of the health of the Delta itself. *See* U.S. Fish &  
3 Wildlife Service (“FWS”), Recovery Plan for the Sacramento-San Joaquin Delta Native Fishes at 1  
4 (Nov. 26, 1996); *see also* Bobker Dec., ¶ 12; Nelson Dec., ¶ 8. Proposed Intervenor’s use of the  
5 Delta for educational and recreational activities, such as hiking, boating, wildlife observation,  
6 swimming, and fishing, would be detrimentally affected by the decline of the delta smelt and the  
7 corresponding decline in the health of the Delta. Bobker Dec., ¶ 12-14; Nelson Dec., ¶ 7-10. Thus,  
8 each Proposed Intervenor has a significant, particularized interest in the outcome of this case, in that  
9 its interests in the preservation of protected fish species and ecosystems of the Delta system, upon  
10 which the quality and enjoyment of their economic, recreational, aesthetic, and other activities  
11 depend, would be injured if Plaintiffs obtain the relief they seek in this action. Bobker Dec., ¶ 14;  
12 Nelson Dec., ¶¶ 7-10.

13 In addition, Proposed Intervenor has a long history of advocating for protections for the  
14 delta smelt. As discussed below, both have brought lawsuits seeking to protect the delta smelt from  
15 extinction and provide for its recovery. As a direct result of the advocacy of Proposed Intervenor  
16 TBI, *see* Bobker Dec., ¶ 8, FWS listed the delta smelt as a threatened species, designated its critical  
17 habitat, and crafted a biological opinion to protect it. Each of the Proposed Intervenor has also  
18 previously attempted to ensure that the Projects in the Delta are operated in a manner that minimizes  
19 the loss of delta smelt and promotes the species’ survival and recovery. Bobker Dec., ¶¶ 8-13;  
20 Nelson Dec., ¶¶ 4-5. As this Court is well aware, Proposed Intervenor successfully challenged a  
21 subsequent 2005 biological opinion on the effects of Projects operations on the delta smelt and  
22 secured an order that led to FWS’s issuance of a new biological opinion on those effects in  
23 December 2008 (“2008 BiOp”). *NRDC v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007). The  
24 2008 BiOp found that Projects operations posed jeopardy to the delta smelt and required a number of  
25 protective measures to be taken to avoid jeopardy.

26 Proposed Intervenor seeks to intervene to defend the validity of the 2008 BiOp and to ensure  
27 that the protections it affords the delta smelt remain. Although FWS instituted the protections for  
28 the smelt now at issue, it did so only after being compelled by Proposed Intervenor’s lawsuits and,

1 therefore, it cannot be assumed that FWS will adequately protect Proposed Intervenor's interests in  
2 this litigation. Moreover, the U.S. Bureau of Reclamation ("Bureau"), which operates the CVP, is  
3 also a defendant in this action, and its interests differ significantly from those of the Proposed  
4 Intervenor. For these and related reasons detailed below, Proposed Intervenor satisfy the  
5 requirements for intervention as of right under Federal Rule of Civil Procedure 24(a) or, in the  
6 alternative, the requirements for permissive intervention under Rule 24(b).

## 7 **II. PLAINTIFFS' CHALLENGE TO THE 2008 BIOP.**

8 In 1993, Proposed Intervenor TBI initiated a lawsuit to force FWS to list the delta smelt as  
9 threatened under the ESA. *See Bay Institute of San Francisco, et al., v. Babbitt*, Civ. No. S-92-2132  
10 (E.D. Cal., filed Dec. 23, 1992). TBI prevailed, and FWS determined that the delta smelt was a  
11 threatened species on March 5, 1993. 58 Fed. Reg. 12,854 (Mar. 5, 1993). Subsequently, when  
12 FWS failed timely to designate critical habitat for the delta smelt as required under the ESA, TBI's  
13 only recourse was to initiate an action against FWS to compel the designation of critical habitat. *See*  
14 *Bay Institute of San Francisco, et al., v. Babbitt*, Civ. No. S-94-0265 (E.D. Cal., filed Feb. 22, 1994).  
15 The Service designated critical habitat for the delta smelt effective January 18, 1995. 59 Fed. Reg.  
16 65,256 (Dec. 19, 1994). TBI also successfully challenged the adequacy of the original biological  
17 opinion covering the impacts on the smelt of the Projects' water export facilities in the Delta,  
18 resulting in a 1995 biological opinion. *See Bay Institute of San Francisco, et al., v. U.S. Fish and*  
19 *Wildlife Service, et al.*, Civ. No. C-94-2443 (N.D. Cal., filed July 12, 1994). That opinion was  
20 superseded by a 2005 biological opinion ("2005 BiOp"), which addressed the effects of a revised  
21 operations plan, the Operations Criteria and Plan ("OCAP"), formulated in 2004. Proposed  
22 Intervenor were plaintiffs in an action that challenged that opinion as legally inadequate under  
23 provisions of the ESA. *NRDC v. Kempthorne*, Civ. No. 05-CV-01207. This Court agreed that the  
24 2005 BiOp was legally inadequate in a variety of respects, set it aside, and ordered that FWS prepare  
25 a new biological opinion regarding the effects of the OCAP on the delta smelt. *Id.*, Doc. 560 (Dec.  
26 17, 2007); *NRDC v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007). The 2008 BiOp was the  
27 result of that court-ordered process.

28 In this action, Plaintiffs are seeking the invalidation of the 2008 BiOp and an injunction

1 against the Bureau's implementation of pumping restrictions and other protective measures it  
2 requires. *See* Complaint, Prayer for Relief, ¶¶ 1-3. Plaintiffs seek revocation of these protections  
3 because that would allow the Projects to pump more water from the Delta without regard to the  
4 requirements of the 2008 BiOp. While Proposed Intervenors do not believe that the protective  
5 measures offered by the 2008 BiOp are necessarily sufficient to ensure the recovery of the delta  
6 smelt so that it no longer needs ESA protection, without the protection these measures offer, the  
7 smelt would undoubtedly be closer to extinction. Bobker Dec., ¶ 13; Nelson Dec., ¶ 9. The relief  
8 sought by Plaintiffs could eviscerate important protections afforded to the delta smelt by the ESA-  
9 mandated 2008 BiOp and allow the Projects to pump water at levels that would both directly kill  
10 smelt at the pumps and indirectly harm the species by degrading its critical habitat and disrupting  
11 important stages of its life cycle, to the detriment of Proposed Intervenors' scientific, aesthetic,  
12 economic, conservation and recreational interests. Bobker Dec., ¶¶ 13-14; Nelson Dec., ¶ 7-10.

## 13 ARGUMENT

### 14 I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A MATTER OF 15 RIGHT.

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

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

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

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

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

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

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

3 The Ninth Circuit has laid out three factors to evaluate in determining whether a motion to  
4 intervene is timely: (1) the stage of the proceedings at which the applicant seeks to intervene; (2)  
5 the prejudice to the other parties from any delay in applicant's seeking leave to intervene; and (3) the  
6 reason for and length of delay. *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297,  
7 1302 (9th Cir. 1997).

8 **(1) Intervention sought at earliest stage of proceedings.**

9 Plaintiffs filed their complaint in this case on March 3, 2009, less than two months ago.  
10 Defendants have not filed an answer. The Court has issued no substantive orders. Thus, Proposed  
11 Intervenors are seeking to intervene at the earliest stage of this litigation, before any determinations  
12 have been made regarding the issues raised by the complaint. *See, e.g., Idaho Farm Bureau Fed'n v.*  
13 *Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (holding that intervention is timely when "filed at a very  
14 early stage, before any hearings or rulings on substantive matters"). Moreover, Proposed  
15 Intervenors were informed on April 22, 2009, that Plaintiffs intend to file a motion for preliminary  
16 injunction to be heard May 22, 2009, and are filing this motion to intervene promptly so as to be  
17 heard on the same date, at this earliest stage of proceedings on the substance of the complaint.

18 **(2) No prejudice to other parties from delay in seeking leave to intervene.**

19 In evaluating the potential prejudice to a party that might result from a delay in seeking  
20 intervention, "courts have emphasized the seriousness of the prejudice which results when relief  
21 from long-standing inequities is delayed." *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.  
22 1978), *cert. denied*, 439 U.S. 837 (1978). In the case at hand, Proposed Intervenors are seeking to  
23 intervene at the earliest stage of the proceedings; thus, their intervention will not result in any delay  
24 in relief. Proposed Intervenors are willing to abide by whatever briefing and other schedules are  
25 established by this Court. In consequence, their intervention will not delay the proceedings or  
26 prejudice the existing parties in any way.

27 **(3) No unreasonable delay in filing motion to intervene.**

28 As noted above, Proposed Intervenors' motion to intervene is filed at the outset of this

1 lawsuit before the occurrence of any determinations on any matters raised by the complaint. In sum,  
2 under the three factors identified by the Ninth Circuit for determining timeliness, Proposed  
3 Intervenors' motion is timely.

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

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

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

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

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

27 Proposed Intervenors have a clear and legally cognizable interest this action. As a direct  
28 result of Proposed Intervenors' efforts, the delta smelt gained various protections intended to prevent  
its extinction and promote its survival and recovery. These efforts included successful litigation to  
force the Service to list the delta smelt as threatened under the ESA. Bobker Dec., ¶ 8.

1 Subsequently, when FWS failed to timely designate critical habitat for the delta smelt as required by  
2 section 4 of the ESA, 16 U.S.C. § 1533, proposed intervenor TBI initiated an action against FWS to  
3 compel the timely designation of critical habitat. *Id.* That action led to the designation of critical  
4 habitat for the delta smelt. In 2006 and 2007, Proposed Intervenors also jointly petitioned state and  
5 federal wildlife agencies to provide greater protection for delta smelt by listing the species as  
6 “endangered” under the California and federal Endangered Species Acts. Bobker Dec., ¶ 8; Nelson  
7 Dec., ¶ 5. Most directly relevant here, Proposed Intervenors brought the suit that resulted in the  
8 2008 BiOp, whose protective measures for the delta smelt are challenged in this action.

9 Proposed Intervenors, whose primary missions include the conservation and protection of  
10 California’s rivers and the imperiled fish supported by those rivers, Bobker Dec., ¶¶ 4, 7-11; Nelson  
11 Dec., ¶¶ 1, 3-5, have an interest in protecting the fruits of this and their related legal and  
12 administrative advocacy. *See Pennsylvania v. Del. Valley Citizens’ Council*, 478 U.S. 546, 558  
13 (1986) (“[p]rotection of the full scope of relief afforded by the consent decree was thus crucial to  
14 safeguard the interests asserted by Delaware Valley”). Proposed Intervenors must be allowed to  
15 intervene to protect this interest in the instant action just as Proposed Intervenors were allowed to  
16 intervene in two earlier cases brought by Plaintiffs in this Court, by which Plaintiffs attempted to  
17 enjoin the implementation of then-operative biological opinions regarding delta smelt and winter-run  
18 chinook salmon and to compel the delisting of the delta smelt. Bobker Dec., ¶ 8; Nelson Dec., ¶ 4.

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

1 that resulted in the protections currently in place for the delta smelt, including that which resulted in  
2 the 2008 BiOp directly at issue here. Thus, Proposed Intervenor have a significant protectable  
3 interest in defending the validity of the 2008 BiOp.

4 Additionally, individual members of the Proposed Intervenor organizations are active in their  
5 use and enjoyment of the Delta. In relying on the Delta for conservation, aesthetic, educational,  
6 economic, and recreational activities such as boating, swimming, photography, fishing, hiking, and  
7 observing fish and wildlife in their native habitats, Proposed Intervenor are exercising the very  
8 interests the ESA is intended to protect. Bobker Dec., ¶¶ 5-6; Nelson Dec., ¶¶ 6-7. The protection  
9 of Proposed Intervenor’s legally protected interests in these values of the delta smelt 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 Intervenor’s various long-standing recreational, aesthetic, economic,  
14 scientific, educational, conservation, and professional interests in the protection of delta smelt easily  
15 provide a sufficient basis for intervention. *See, e.g., Idaho Farm Bureau Fed’n*, 58 F.3d at 1397 (“A  
16 public interest group is entitled as a matter of right to intervene in an action challenging the legality  
17 of a measure it has supported”); *Sagebrush Rebellion*, 713 F.2d at 526-28 (environmental group’s  
18 “environmental, conservation and wildlife interests” sufficient for intervention as matter of right);  
19 *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep’t of Interior*, 100  
20 F.3d 837, 841-44 (10th Cir. 1996) (individual’s involvement with species through activities as  
21 photographer, naturalist, and conservation advocate sufficient interest for purpose of intervention in  
22 litigation concerning species’ listing under the ESA); *Humane Society of United States v. Clark*, 109  
23 F.R.D. 518, 520 (D.D.C. 1985) (organizations’ recreational interests in hunting and trapping  
24 sufficient to satisfy Rule 24(a)’s interest test).

25 **C. Disposition of This Matter May, as a Practical Matter, Impair or Impede**  
26 **Proposed Intervenor’s Interests.**

27 Rule 24(a)’s “impairment” requirement concerns whether, as a practical matter, denial of  
28 intervention *may* impede the applicant’s ability to protect its interests in the subject of the action.  
*United States v. City of Los Angeles*, 288 F.3d at 401 (citing Fed. R. Civ. P. 24(a)(2)). As the

1 Advisory Committee Notes regarding Rule 24(a) explain, “[i]f an absentee would be substantially  
2 affected in a practical sense by the determination made in an action, he should, as a general rule, be  
3 entitled to intervene.” Fed. R. Civ. P. 24, Advisory Comm.’s Note to 1966 Amendments. In light of  
4 this direction, the rule’s emphasis on “practical disadvantage” was “designed to liberalize the right  
5 to intervene in federal actions.” *Neusse v. Camp*, 385 F.2d 694, 701-02 (D.C. Cir. 1967).

6 If Plaintiffs succeed in this case, the vital protections for the delta smelt required by the 2008  
7 BiOp could be invalidated and enjoined, including restrictions on pumping operations at key stages  
8 of the smelt’s life cycle. Eliminating these protections is Plaintiffs’ explicit goal in bringing this  
9 suit. *See* Complaint, Prayer for Relief, ¶¶ 1-3. In essence, Plaintiffs seek to invalidate the 2008  
10 BiOp and eliminate pumping restrictions on the Projects and other aspects of the BiOp’s reasonable  
11 and prudent alternative intended to protect the delta smelt. *Id.* 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 the delta smelt as a threatened species, (2) designation of critical habitat for the species,  
14 and (3) specifically the 2008 BiOp protecting the delta smelt. Further, such an outcome would  
15 severely impact Proposed Intervenors’ members’ abilities to pursue their economic, recreational,  
16 conservation, aesthetic, and other interests in the Delta and the connected riverine ecosystems.  
17 *Bobker Dec.*, ¶¶ 5, 12-14; *Nelson Dec.*, ¶¶ 7-10. Thus, Proposed Intervenors’ interests in protecting  
18 the delta smelt and in protecting, using, and enjoying the Delta and the Sacramento-San Joaquin  
19 River system may be impaired by the disposition of this case.

20 **D. Proposed Intervenors’ Interests May Not Be Adequately Represented by the**  
21 **Existing Parties.**

22 “[T]he requirement of inadequacy of representation is satisfied if the applicant shows that  
23 representation of its interest ‘may be’ inadequate.” *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d at  
24 528 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, (1972)). “[T]he burden of  
25 making this showing is *minimal*.” *Id.* (emphasis added); *see also Forest Conservation Council v.*  
26 *U.S. Forest Service*, 66 F.3d 1489, 1498 (9th Cir. 1995) (same). Thus, Proposed Intervenors need  
27 only establish that the government’s defense of this matter “may be” inadequate with respect to their  
28 interests. *See Sierra Club v. Ruckelshaus*, 602 F. Supp. 892, 896 (N.D. Cal. 1984); *U.S. v.*  
*Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986).

1 In evaluating adequacy of representation, the courts consider three issues: (1) whether “the  
2 interests of a present party to the suit are such that it will *undoubtedly* make all of the intervenor’s  
3 arguments,” (2) whether “the present party is capable of and willing to make such arguments,” and  
4 (3) whether “the intervenor would not offer any necessary element to the proceedings that the other  
5 parties would neglect.” *County of Fresno*, 622 F.2d at 438-39 (emphasis added). Here, Proposed  
6 Intervenors represent specific environmental concerns not represented by any other party.  
7 Defendants’ actions in previous litigation indicate that they are unlikely to advocate as vigorously as  
8 Proposed Intervenors for the protections afforded to the delta smelt. As discussed above, every  
9 protection currently in place for the species was gained only after Proposed Intervenors and their  
10 allies sought such protection through litigation and administrative advocacy. Defendants—  
11 particularly the Bureau, charged with operating the CVP—can be expected to divide their  
12 representation among the interests of Proposed Intervenors; irrigators and water agencies, whose  
13 positions are contrary to those of Proposed Intervenors; and other interest groups. Defendants’  
14 representation of these conflicting interests, along with their previous unresponsiveness to the needs  
15 of the delta smelt, mandates that Proposed Intervenors be allowed to intervene in order to represent  
16 the particularized concerns of the environmental community. *See Sierra Club v. Espy*, 18 F.3d 1202,  
17 1208 (5th Cir. 1994) (permitting timber industry to intervene in case brought against government by  
18 environmental groups because “[t]he government must represent the broad public interest, not just  
19 the economic concerns of the timber industry”); *Forest Conservation Council*, 66 F.3d at 1499  
20 (“Inadequate representation is most likely to be found when the applicant asserts a personal interest  
21 that does not belong to the general public”).

22 In *Sagebrush Rebellion*, the Audubon Society sought to intervene in a suit against the  
23 Department of the Interior challenging the creation of a conservation area in Idaho. *Sagebrush*  
24 *Rebellion*, 713 F.2d at 526. The Ninth Circuit reversed the district court’s ruling that the Audubon  
25 Society’s interest was adequately represented by the federal defendant. *Id.* at 528-29. The court  
26 found that the previous positions of the Secretary of the Interior gave little assurance that he would  
27 adequately represent the proposed intervenor’s interests. *Id.* at 528. The court also found that, “in  
28 addition to having expertise apart from that of the Secretary, the intervenor offers a perspective

1 which differs materially from that of the present parties to this litigation.” *Id.* Given that a showing  
2 that representation “may be” inadequate was all that was required, the Court of Appeals found that  
3 intervention should have been granted. *Id.* at 529.

4 Proposed Intervenors’ interests will almost certainly not be adequately represented by the  
5 federal Defendants, whose perspective substantially differs from theirs. Proposed Intervenors, as is  
6 reflected in the declarations filed with this motion, have spent years litigating in an on-going effort  
7 to secure and maintain protections for delta smelt and attempting to persuade the federal Defendants  
8 to operate the Delta pumps in a manner that avoids take of endangered fish species to the maximum  
9 extent possible. The substantial potential for the federal Defendants’ and Proposed Intervenors’  
10 interests to diverge is well illustrated by the fact that various of Proposed Intervenors have in the  
11 past had to sue the Department of the Interior and its agencies to force it to list the delta smelt under  
12 the ESA and to take adequate measures to protect this species from the Delta pumps, including the  
13 litigation that led to the 2008 BiOp. Bobker Dec., ¶ 8; Nelson Dec., ¶ 4. Moreover, the Bureau is on  
14 record informing FWS that, while it “provisionally accepts the Reasonable and Prudent Alternative”  
15 that provides the 2008 BiOp’s protective measures, it “will reinitiate consultation” if it “ultimately  
16 determines that ... two Components [of the RPA] are not reasonable and prudent...” Memo from  
17 Regional Director, Mid-Pacific Region, Bureau to Regional Director, Region 8, FWS (Dec. 15,  
18 2008), filed in *NRDC v. Kempthorne*, 1:05-cv-1027-OWW, Doc. 767-2. Clearly, the Bureau may  
19 not vigorously defend the 2008 BiOp. Finally, Proposed Intervenors would bring a unique  
20 perspective to the litigation that differs significantly from those of the present parties. That  
21 Proposed Intervenors’ interests may not be adequately represented by the existing parties is beyond  
22 question.

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

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

26 If this Court denies them intervention as of right, Proposed Intervenors request in the  
27 alternative that the Court grant them permissive intervention under Federal Rule of Civil Procedure  
28 24(b). That rule provides in pertinent part that:

1 On timely motion, the court may permit anyone to intervene who...has a claim or  
2 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  
3 delay or prejudice the adjudication of the original parties' rights.

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

8 Each of these prerequisites is met here. First, assuming *arguendo* that this Court has  
9 jurisdiction over the claims raised in the complaint, the Court has supplemental jurisdiction over  
10 Proposed Intervenors pursuant to 28 U.S.C. § 1367(a), which provides such jurisdiction for "the  
11 intervention of additional parties." Moreover, the requirement to show a basis for jurisdiction the  
12 does not apply to parties who seek to intervene as defendants in federal cases that are not based on  
13 diversity. *See* 7C Wright & Miller, Fed. Prac. & Proc. § 1917 ("[T]he need for independent  
14 jurisdictional grounds is almost entirely a problem of diversity litigation. In federal-question cases  
15 there should be no problem of jurisdiction with regard to an intervening defendant"). Second, this  
16 motion is timely, as explained above. Third, Proposed Intervenors' defenses—*i.e.*, that the delta  
17 smelt is jeopardized by Projects operations, that the protections required by the 2008 BiOp are  
18 soundly based and essential to its survival, and that, in fact, more stringent protections may be  
19 necessary for its survival and recovery—have an obvious and necessary legal overlap with  
20 Plaintiffs' affirmative claims to the contrary.

21 In deciding whether to grant permissive intervention, one important consideration is judicial  
22 economy. *See Venegas v. Skaggs*, 867 F.2d 527, 531 (9th Cir. 1989). Proposed Intervenors'  
23 participation here would serve that goal. If not permitted to intervene, Proposed Intervenors may be  
24 forced to bring affirmative claims—in effect, collaterally challenging any judgment in this case—  
25 through a separate action against the United States to compel adequate protection of the delta smelt  
26 from Projects operations while new consultation occurs, for example. Allowing Proposed  
27 Intervenors to intervene here could potentially obviate such an independent subsequent challenge  
28 and thereby serve judicial economy.

